

EXTERNAL REVIEW INTO HOW THE NON-INTERFERENCE PROVISIONS OF THE CROWN MINERALS ACT ARE EFFECTED

Simon Murdoch
18 April 2019

18 April 2019

Ms Carolyn Tremain
Chief Executive
Ministry of Business, Innovation and Employment
Wellington

Dear Carolyn

I have completed the review you commissioned in late January on how the Non- Interference provisions of the Crown Minerals Act are to be given effect going forward, and the appropriate enforcement roles of agencies identified in the National Plan. My full report is attached.

I believe that with various adaptations I have suggested to the settings of the Plan, and taking into account new practices already in place or proposed to be adopted by MBIE and Police for managing Plan -related information, there are now sufficient layers of assurance for you to have confidence that if Operation Exploration is required to mobilise again, it will be fit for purpose and compliant with public service standards and expectations.

I must thank those who agreed to be interviewed-past and present MBIE staff, and other agencies. They were fully cooperative. Because of pressing commitments arising from the Christchurch Mosque response and aftermath, NZ Police were not able to give me as much interview time as had been planned- but consultation did occur through the Steering Group for the review and I received their views on my draft report. I have been able to test my report with several of your senior officers, and to respond to their questions, but of course, I am available to meet you at your convenience.

May I also thank Melleny Black for her guidance of the project. The support and advice provided by Privacy of [redacted] and Privacy of natural natural persons [redacted] was thoroughly professional, very helpful and very much appreciated by me.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Simon Murdoch', with a stylized flourish at the end.

Simon Murdoch

External Review - How the non-interference provisions of the Crown Minerals Act are effected

Simon Murdoch

Executive Summary

This review was commissioned by the Ministry of Business, Innovation, and Employment (MBIE) to provide assurance that the National Plan to Implement the Non-Interference Provisions of the Crown Minerals Act 1991 (the Plan), with its proposed amendments, and any other adaptations arising from the review is fit for purpose. This includes assurance that the Plan can be carried out by MBIE, and other agencies, in compliance with the letter and the spirit of the State Services Commission (SSC) model standards on information gathering and public trust (Model Standards (SSC 2018)).

The review examines the development and early performance of “Operation Exploration” (OpEx) the code name given to the activities undertaken by agencies to address interference risks to the on water activities of permitted exploration companies under the 2013 amendments to Crown Minerals Act 1991 (CMA).

The review then considers OpEx in its established stable state from 2014 (when it became the Plan) up to the time of the 2017 deployment and subsequent Inquiries by SSC and Police. It looks closely at various aspects of risk management by the designated interagency leadership and governance for OpEx, with a particular focus on knowledge management as a previously unrecognised risk.

Structured decision making by MBIE and Police as joint lead agencies, with supervisory responsibilities under the Plan, is important for the future. It is also important that those responsible for the implementation of OpEx, particularly the interagency Steering Group (SG), has access to senior level oversight which can focus on risk more broadly and can connect to systems level Officials Committee for Domestic and External Security Coordination (ODESC) governance. Knowledge management protocols specific to OpEx are necessary and can be developed by Police and MBIE through work each has already undertaken and by reference to best practice elsewhere in the public service.

Approach and methodology

1. As foreshadowed in the Terms of Reference (TOR) for my review I have considered the Plan as it was in 2018 prior to the events described in the report of the SSC inquiry into the use of external security consultants by government agencies (SSC Inquiry report (Martin & Mount QC, 2018)). I have also looked at the changes which MBIE, as Lead Agency, has proposed to the Plan in light of the SSC Inquiry report and related findings, both specific to MBIE and the wider public service.
2. I have spoken with past and present MBIE managers in order to understand how they interpreted their statutory powers under the CMA, and how they interacted with the other

agencies which were allocated co-lead or support responsibilities under the Plan. I was given a first redraft of the Plan at quite an early stage of its in-house iteration in MBIE.

3. I was able to meet with the review Steering Group¹. They were aware of MBIE's intended revision of the Plan, but had not been formally consulted about the re-draft. This meant their views and responses to propositions I put to them were necessarily personal to a degree and not fully-formed "departmental positions".
4. I met with past members of the interagency Steering Group (SG) (including the former MBIE chair and the Police representative).
5. ODESC agreed that the Plan be developed under the aegis of the Maritime Security Oversight Committee (MSOC). As such I spoke about the Plan with the Department of the Prime Minister and Cabinet (DPMC) because of its system oversight responsibilities for all national security risk, including planning, and its secretariat role as the hub for the higher level governance arrangements relating to plans which have been taken through the ODESC machinery and approved by Cabinet.
6. I did not engage with the exploration permit holders (operators), or their safety and security consultants.
7. I also met the authors of the SSC Inquiry report (Martin & Mount QC).
8. The name given to the implementation of the non-interference provisions of the CMA was "Operation Exploration" (OpEx). My approach has been to look at the "regime" of OpEx as it was in its design phase in 2013/14 before its incorporation into the Plan, and then, in its implementation phase until the SSC Inquiry in late October 2018. I aimed to see how it was intended to be operationalised, and how, in practice, it was operationalised - the machinery put in place to give effect to the amended Act at MBIE and by collaborating agencies through the Plan itself - the actual "regime"².
9. This requires some context about the origins of the regime for which I have drawn on some MBIE documents, Ministerial submissions and Cabinet papers of the time. Some of this ground has been well covered in the SSC Inquiry report, so I have compressed my observations and findings to a considerable degree. They are presented, with the advantage of hindsight, as common themes which emerged from interviews about the regime, particularly as they relate to the MBIE and Police roles as lead agencies under the Plan. Also there are views relating to the roles of the designated support agencies and advice entities under the Plan. Together these created for me a picture of the regime and the functioning of the Plan including its knowledge management (knowledge fusion), as distinct from the particular methods of information gathering practiced by the joint intelligence cell (MEJIG).

¹ See Annex One – Terms of Reference - this included agencies which are the core members of the current OpEx SG.

² Unfortunately for the second part of this, whilst MBIE's internal documentary record was accessible, there appear to be very few records of the proceedings of the interagency machinery-MSOC; SG; OPG (Operational Planning Group) and MEJIG.

10. You identified the governance arrangements over the Plan as a significant area for assurance. I addressed it at two levels - internal within MBIE and interagency, and the oversight exercised by both the lead agencies.
11. There is a third governance element in the Plan- the role assigned by ODESC to MSOC - to oversee the initial development of the Plan and, subsequently, its implementation. MSOC is a standing committee, at Deputy-CEO level, which reported to the Hazard Risk Board (previously called the Readiness and Response Board (RRB)). This body is accountable through DPMC to the designated Cabinet Committee for setting national response system standards and operational doctrine, as well as investment priorities, in regard to “civil contingencies” – risks such as transport; infrastructure or hazardous substances, and capabilities such as maritime or terrestrial search-and-rescue.
12. You also specified the issue of information management in the Plan, and in particular the role of the Minerals Exploration Joint Intelligence Group (MEJIG), in light of the requirements for agencies (other than Police) to carry out their statutory and regulatory duties in accord with the new SSC Model Standards. I have considered the Police’s own findings on the operation of MEJIG as they appeared in the redacted version of the Police internal investigation into its use of external security consultants (Police Engagement of External Security Consultants: Investigation Report 5 December 2018) (Police internal review).

Overview

13. The Plan provided the framework for a rather complex set of agency powers and activities to be integrated so that a risk management purpose could be achieved through harmonised operational activities. In the broadest sense the risks arising from “interference” might have materialised in incidents at sea which caused human casualties or technological damage with major environmental and fiscal impacts, which (as with the Rena grounding) might have stretched or overcome our national capacity to contain or limit the costs. Fortunately, that has not been the case, and the Plan has performed satisfactorily in the sense of proving fit for purpose in the circumstances it has encountered to date-with the one major exception exposed in the SSC Inquiry, and several other weaknesses or revealed shortcomings of design.
14. Since the Plan was adopted in late 2014 there has been considerable progress within the national security system in how maritime risk management is conceptualised and organised, notably with the articulation of a whole-of-government maritime security framework (National Maritime Coordination Centre, 2018)³. Leaving aside any political decision as to the future of the non-interference provisions in the CMA, the future of the Plan needs to be evaluated in this context, where interference risk is related to a wider set of national maritime concerns and interests against a wider background of rising global economic and security focus in the South Pacific and the Southern Ocean.
15. The four principal areas in which changes to the Plan have already been proposed are:
 1. Risk settings

³ 2018 “Future Maritime Security Strategy” - officials report to ODESC.

Differentiated levels of readiness and of response are appropriate depending on the probability and severity of the impacts of different kinds of breaches of the non-interference provisions of the CMA. For example some breaches could directly threaten national security, but lower level protest action may not, and threatened interference with oil platforms may require a different response to interference with seismic surveying. The Plan is not clear about risk assessment and calibration as a threshold function. It needs to establish and assign to the SG a process of calibration which distinguishes between an overall residual risk level for interferences (onshore/offshore) and an assessed threat level for a particular event. From this step, the process of testing for proportionateness between the threat and countermeasures (a key finding of the SSC Inquiry) should follow. The Plan also lacks a risk register as a process tool to guide judgement. These matters need correction.

2. The “Reduction” Function

Steps taken to reduce risk latency (to prevent a threat materialising) ought to be proportionate to the risk itself. The Plan (prior to revision) addressed reduction exclusively in terms of “social license” conceived as government and operator information programmes aimed at community understanding and implied consent to exploration activity. The Plan revision questions where the responsibility for such activity should lie - with MBIE (which has a promotion duty but also other, primary, regulatory/enforcement functions) as OpEx lead agency, or outside OpEx under different leadership. I agree with this, and suggest also rethinking the scope of the activity itself, exploring the possibility of mitigatory engagement with organised protest entities. The revision proposes not to term such groups generically as “Issue Motivated Groups” (IMGs) or treat them all as national security threat actors.

3. Governance

The governance arrangements of the Plan were rarely engaged. They might therefore appear redundant. I see a distinction between OpEx governance which needs to be close enough to exercise meaningful oversight of the regime in action, and Plan governance, which is more an overwatch, conducted at a systemic level with wider national maritime security strategy and doctrine, in mind. This means retaining but resetting governance expectations for the OpEx joint lead agencies, and for MSOC in the Plan.

4. Knowledge Management

In the Plan (prior to revision), and in the OpEx regime itself, there is a focus on “intelligence” and arrangements - particularly a cross-agency fusion centre (MEJIG) - to produce actionable information for all Plan functions and activities from public and industry sources. The achievement of non-interference outcomes was especially reliant on the delivery of advance knowledge, but the manner in which this knowledge was obtained was not recognised as a specific risk. The revised Plan should address this gap.

It must also be adapted to comply with the public sector information management practices specified in the Model Standards. In this regard both the SSC Inquiry findings

and those of the separate Police internal review into how security consultants' knowledge should, in future, be handled by OpEx (or other similar multi-agency operational collaborations) have already determined some revisions to existing OpEx arrangements. These seem sound to me, but I suggest setting them in the Plan as an explicit OpEx function with a framework of risks and mitigations to be constructed around best practice for knowledge fusion. Specific protocols to guide MEJIG should also be developed.

PART ONE: Establishment phase 2013-14

Context

16. The non-interference provisions deriving from amendments to the CMA came into effect on 24 May 2013. The processes which created the amendments, the policy advice and the legislative drafting, are outside my TOR, but were the subject of some critical comment during my interviews.
17. In preparation for the upcoming exploration season (the summer of 2013/14) officials and Ministers began meeting to explore “interagency preparations” to implement the non-interference provisions. At this time there was a high level of Ministerial attention; they regarded the development of mineral and energy resources as a key element of the Business Growth Agenda, itself central to the Government’s policy settings for the aftermath of the Global Financial Crisis.
18. At a meeting with officials on 1 August 2013 Ministers⁴ were told that two vessels were arriving soon and five more over the season and that to coordinate interagency roles and functions OpEx had been established under an Inter-agency Non-Interference Steering Group (SG) which MBIE was leading to devise and/or refine interference response plans being prepared in a subsidiary operational planning group (OPG) of the same five agencies but led by Police.
19. Three SG/OPG member agencies (MBIE, Police and the New Zealand Defence Force (NZDF)) were responsible for designing the OpEx regime; it was to be based on ODESC best practice - the then ruling templates for risk management (the “5 Rs”) and organisational/structural cohesion in emergency or crisis response in civil or security emergencies (“CIMS”).
20. It was decided to bring OpEx under the wider purview of the national security machinery of government (led by DPMC/ODESC). The procedures of OpEx were to be encompassed in a formal National Security Plan which would be developed by the SG but overseen by a senior officials committee (MSOC) with a national security system mandate for maritime strategic risk management and doctrine. This two-tier arrangement was taken to the relevant Cabinet Committee (DES) on 26 September 2013, and was treated as a work-in-progress.
21. The non-interference provision in the CMA include a discretionary power for the CEO of MBIE to specify a “non-interference zone” (NIZ) around permitted activity. A person who enters a NIZ without reasonable excuse commits an offence under the CMA (section 101B(2) of the CMA).
22. Accordingly, during this time officials in MBIE were considering the circumstances in which the CEO of MBIE should exercise the discretionary power to specify a NIZ and the best means of doing so. Rather than specifying NIZs in response to individual operator requests, officials considered that NIZs should be specified by default, and on the basis of information provided to MBIE by operators in the course of the permitting process (their Safety Plans) and amalgamated

⁴ MBIE’s OpEx reports went to “Joint Ministers” -i.e. through its own Minister, as well as the Ministers of Defence and Police.

into a comprehensive “forward activity forecast” (FAF) which, because of requirements that NIZs be activity-specific and time-limited, as well as inherent variabilities in the operating environment, would be constantly updated.

23. In parallel, thought was given by the then SG to issues of proportionateness between interference threats and possible response measures⁵. Senior legal advisors provided input by developing a legal framework to assist the SG with understanding the relevant legal provisions and powers and how they should be effected (through the interagency Legal Group discussed below).
24. In November 2013 an MBIE submission discussed interference risk and risk actors in terms of IMGs and environmental concern groups, noting that “although it is possible legitimate and lawful protest action may occur, IMGs have in the past undertaken high-profile NVDA (nonviolent direct action) to disrupt operational activity and to cause economic loss as well as to create “bearing witness” events to raise public awareness”. Concern was expressed about possible multiple interference events.
25. This report explained OpEx as “the response plan in place”. As a multiagency regime, it was supervised (overseen) by the SG chaired by MBIE, but managed operationally through the OPG which was “coordinated by Police and a collaboration of the same agencies” (as those in the SG). OPG’s main task was to consult with exploration operators “about their security plans for their proposed activities”, and use that information to develop contingency response plans.
26. In regard to the subsidiary elements of the structure - MEJIG - the joint intelligence group whose leadership lay with Police - was to monitor open source information and highlight activities that might potentially lead to interference, as well as to receive and process information provided by third parties. Its products would come to the SG “as appropriate” via Police. Two other designated interagency groups, Legal and Communications, were to “work alongside” SG and OPG.
27. In terms of decision rights, MBIE and Police shared lead agency status. The MBIE decision maker would “deem” that “IMG actions” required a response, but Police alone would decide, case-by-case, what form the response might take. Police Operations would mobilise and deploy that response through Orders to the relevant District containing specific tactical instructions which would come into effect for all responders including agencies providing enforcement assistance to Police. The overall interagency organisational arrangements of the plan can be depicted graphically below:

⁵ This was eventually found its way through to the Police Operational Orders – refer to Paragraph 27 - “Any response will be proportional to the level of interference; risk to personal safety and the balance between lawful activity and the right to protest”.



Figure one: Incident Contact Tree from MBIE's 2016/17 Season NIZ INFO PACK.
Names and contact details redacted.

28. A further report to Ministers early in 2014 advised of the first reality-testing of OpEx and the non-interference powers⁶, expressing confidence that the cross-government arrangements for responses to interference were effective. This report noted that “while onshore and harbour-based protest action is occurring, the risk of unlawful interference offshore is low”. It explained the information gathering task as monitor[ing] activities relating to Operation Exploration, including any intentions of issue motivated groups (IMGs) to engage in unlawful activity. This monitoring can escalate as required, e.g. using daily situational reports and close channels of communication to ensure responses can intensify or abate as a situation develops”.

⁶ This involved the drill ship “Noble Bob Douglas”. For a summary of incidents 2013-18 see Annex Two.

29. By September 2014 the National Security Plan had been finalised and “endorsed” by MSOC to the RRB which noted it, and directed MSOC to provide continuing oversight. This appears to be the moment that the Plan came formally into effect, and OpEx received formal approval.

30. The essence of the Plan is best captured in the following graphic:

5 The “Five R’s” Approach

5.1 Overview

Unlawful interference and disruption to offshore petroleum and minerals activity is a risk to permit operators, enforcement agency staff, IMGs, and individuals.

The Plan uses a “Five R’s” approach to managing actual or potential unlawful interference to permitted activity.

1	Reduction	Inform and socialise
2	Readiness	Plan for potential unlawful interference activity
3	Response	Respond to unlawful interference activities
4	Recovery	Recovery planning and response outcomes
5	Review	Review and capture improvements

Table 2: the Five R’s Approach

Figure Two: Section 5.1 Overview from the Plan (prior to amendment).

Observations

31. MBIE, in 2013, was a relatively newly-merged and complex state agency, coming to grips with new regulatory roles and activities it had assumed by merger. MBIE, unlike Police (or NZDF or Customs) had no real institutional experience of national security risk management, or of the intelligence function, and no established practices for exercising community engagement or law enforcement functions in relation to the minerals and petroleum sector.

32. The creation of the regime (OpEx) took place under time, event, and stakeholder pressures. Its design was driven less by policy than by operational necessities and (on the job) fine-tuning. It was the kind of incident management that Police or NZDF were well-practised at planning for their own operations or for civil defence emergency management (CDEM) response mobilisation purposes.

33. It was based on the view that offshore petroleum and minerals activities such as surveying, exploratory drilling and sampling, taking place on moving vessels not fixed production facilities, required more flexible, responsive and speedier “mechanisms” to prevent interference, than those available under the safety zone provisions of the Continental Shelf Act 1964 (or other relevant legislation).

34. There were many factors about OpEx which made it hard to be categorical about risk level. It could shift quickly from low to higher. The overall risk settings for the regime were precautionary from the very start and carried over into the Plan. All water-based protest was seen as inherently disruptive, with uniformly serious impacts on national security (i.e. safety and the economy) and therefore best treated as imminent threats. Some interviewees thought that from its inception OpEx had been “overblown” in terms of an inflated view of risk carrying over to mitigations such as the need for precautionary “monitoring” of potential risk actors to enable scenario and operational plans to be readied⁷.
35. The OpEx regime needed to operate by organised collaborations; its leadership described as “joint” in the Plan was in fact more split or shared. Both Police and MBIE were concerned about being drawn into role creep. MBIE had lead role overall but with “supporting” responsibilities and Police were the lead enforcement agency with full accountability, as well as a supporting enforcement agency for certain enforcement actions using agency-specific statutory or regulatory powers. Some of the assets that might be earmarked as readiness-critical and mobilised for a response were not under either MBIE or Police command and control (for example Navy ships). The regime also had dependencies on the operators at several critical points, notably for information.
36. In regard to the risk “Reduction” phase of the Plan which was focussed on the concept of “social licence to operate” and community stakeholder consent, it was explicitly stated that MBIE was to lead a wider cast of public sector bodies, each with stakeholder engagement and consultation practices and obligations relevant to environmental and other interests. Awareness of need to maintain proportionality and to recognise the right of peaceful protest is evident in this aspect of the early OpEx design and development documents.
37. Governance of a Plan like this would normally focus on high level outcomes and risks. Oversight of regime performance would normally focus on end-to-end effectiveness, and obstacles to delivery. Risk management would normally be specified at both levels, and a register created. The Plan assigned overwatch and oversight roles to MSOC and the SG without much specification of what either should do or how they were to interact. There were no subsidiary understandings such as between the two lead agencies as to how each would interact with each other.

⁷ I learnt as result of discussions with the review steering group that current best planning practice to managing the inflation risk involves the planners developing two plans in order to test high risk and low risk assumptions.

PART TWO: Implementation of the National Plan and the OpEx regime 2015-18

Observations about MBIE

38. In September 2014 when the Plan took effect, OpEx -the “regime” of planned response -was well-established and already a going concern. MBIE, as the holder of the CMA/non-interference statutory powers, had regulatory and enforcement functions to perform on its own accountability. It also held authorisation to perform leadership functions under the Plan (jointly with Police) from Cabinet, as well as under the OpEx regime which had Ministerial endorsement. It was to steer the conduct of the operational programme of interagency actions to manage the risks of breaches of the non-interference provisions and participate in certain response actions. It had membership of the OPG and MEJIG. It was also to lead on risk reduction (“social license”). This constitutes a “performance envelope” of some substance.
39. Standardising and codifying the decision-making processes around the non-interference provisions had advanced. MBIE had, by June 2015, created an internal manual (the “info pack”) explaining the OpEx regime and the Plan to induct and guide its staff regarding their departmental and interagency duties. It was shared with Police and other OpEx support agencies. The development of scenario-based contingency plans through OPG and interactions with operators and security consultants was proceeding. There had been a number of OpEx mobilisations but (prior to the incidents of April 2017 involving the seismic survey vessel Amazon Warrior and Greenpeace vessels) only one response action which did not end in a prosecution.
40. The risk which had most preoccupied MBIE senior management during the establishment phase was the potential conflict of interests between the statutory purpose of marketing and promotion of petroleum and minerals investment opportunities in New Zealand, and that of regulating the actions of the operators, and monitoring their compliance, in a more clearly disinterested “arms-length”⁸ way than the promotion mandate implied. Corrective action to separate the compliance and enforcement function organisationally by creating a new unit began promptly and was completed with the appointment of a new senior manager in March 2014.
41. Thereafter, MBIE’s internal authorising environment for OpEx also began to be changed by moving the delegations of statutory powers, and Plan/regime leadership functions from the CEO downwards and into third to fifth tiers (see Annex Three). It was at this level that the substantive administration and supervision of the regime, from pre-season to post-season, took place, and where most of the statutory decision-making was exercised. The Deputy-CEO became the point of escalation, and provided advice on an as-needs basis. Communication with Ministers was a third tier responsibility. There appears to have been no programmatic consideration of the OpEx “performance envelope” at the senior management team level.

⁸ Maintaining “arms length” as a resource regulator, as well as independence in exercising non-interference enforcement powers and prosecution duties appears to create a further conflict for MBIE to also lead the “social license” element of risk reduction for OpEx e.g. dialogue with potential protest actors .

42. None of this is necessarily good or bad in agencies as big as MBIE which had wider-ranging regulatory responsibilities under the CMA, on shore and offshore, with the Pike River disaster inquiry findings, and the creation of Worksafe NZ increasingly claiming senior management attention.
43. A common theme in my interviews was that by the 2015-16 season the implementation of OpEx had achieved “steady state”; and, with no significant incidents over a 3 year period, became normalised in the organisation. It went onto “autopilot”. OpEx looked like business as usual, and from certain vantage points it was. But not all.
44. The officials who had designed the OpEx machinery had all moved on. Those in MBIE who inherited the day-to-day running of the regime from them shared common perceptions about ends, means and capabilities, and methods that conditioned their decision-making and influenced the way the regime worked:

Ends

- They were conscious that Parliament had spoken very directly about interference as an offence and the law was to be upheld; that expectation was uppermost. At the same time the regime itself was attempting to manage a risk-scape with many “known unknowns” and a political sensitivity which was becoming more apparent as the 2017 election approached.
- The overall strategic posture for the regime was not straightforward; it had to straddle more than one public good across a hierarchy of values (which it is the prerogative of Ministers to define) and to strike, independently, an appropriate balance, in setting the administrative gears for best practice regulation.
- The creation of the non-interference provisions in law was not a deterrent to interference, but a motivator for some organised protest entities, increasing the likelihood of on-the-water protest actions against (non-stationary) vessels with limited evasive manoeuvrability. Well-equipped and skilled organised protest entities using sizeable protest vessels and/or trained individuals could carry out hazardous activities that could, in the worst case, create maritime safety risks with significant economic/environmental impacts and would be high threat by definition. The original overall sense of precaution remained.
- But the New Zealand context suggested nonviolent (NVDA) intent, an aversion to environmental damage, and restrained means, aimed largely at public awareness by staging “bearing witness” moments, not by confrontation or attack on the vessels such as by pirates or paramilitary actors which international operators faced elsewhere in the world.
- The industry itself had factored into its costs of business globally the need to manage environmental protest sensitively, and in New Zealand, to be pro-active in explaining itself to communities, such as iwi Māori, with concerns about how operations affected their legitimate interests. But the very tangible commercial risks of interference, and the dynamic nature of the offshore risk environment were more dominant planning considerations than “social licence”.

Means and Capabilities

- The legal environment for non-stationary permitted activities at sea was complex, crossing three distinct maritime jurisdictions, and a wide spread of coastal state regulatory powers.
- MBIE's stance as regulator still held ambiguities. Under the CMA, it was to be at a distance from the industry sufficient to ensure that the exploration activity could be judged to be in New Zealand's interests based on agreed plans. But to lead the OpEx regime, it also had to get close enough to operators to ensure that knowledge sufficient to enable readiness planning and to generate situational awareness for responses was being created.
- The ability of the statutory decision-maker to be consistently well-informed about each decision to notify a NIZ was constrained. The information which operators had to supply to MBIE about their plans for permitting was subject to situational variation (e.g. weather fluctuations) and short notice. An updated FAF was MBIE's principal contribution to this decision-making and to OpEx knowledge management and readiness.
- Whilst the legislation envisages activity-specific, and time-bound NIZ notifications, in reality the regime could not work without assuming that drill and survey vessels on water would always have a valid NIZ; the process, after the first decision, became one of renewals and "automated".
- MBIE's post-event duties to support the police in enforcement involved locating suspects and offenders, identifying them, and identifying witnesses, laying charges and serving a summons. These were not competencies for which the CMA regulatory officers (often geologists) had been recruited, or in which they had formal training.

Methods

- The vessel safety plan became the basis for OPG (Police) to explore security planning proactively with the operator. In New Zealand, operators generally outsourced security arrangements to local private providers, such as Thompson & Clark Investigations Ltd (TCIL).
- Achieving readiness and mobilising a response to an unfolding act of interference required situational awareness which, in practice, could only come from the permitted vessel.
- Nor was the mounting of a response straightforward. The costs and other material constraints on maintaining any deterrent through presence patrolling on the water (as could be done on shore in the port or at the shoreline) were prohibitive. Even assembling the assets to "intervene" in an interference or NIZ breach in progress beyond the 12 mile limit, let alone deploying them on the day was problematic. In a worst case scenario, for example, an accidental disablement of a protest support vessel, the rescue task might well fall to the exploration vessel's captain. At yet another level of complexity lay the risk of environmental damage from spills caused by the interactions of vessels and platforms.

Observations about SG/OPG

45. A theme of interviews was that the coordinating structures were “over-engineered” and tended to suffer from attrition. Attendance by agencies other than leads was by the same person or, affected by rotational churn, sometimes by a new person unfamiliar with the Plan.
46. The membership of SG, other than the designated joint Plan leads, is NZDF; Maritime New Zealand (MNZ) and Customs. Other than the general comment above, I received no comments from them about their views on their participation.
47. The Plan allocated to the SG administrative and supervisory responsibilities for the regime; preparation and maintenance of the Plan; upwards coordination (to ODESC/Ministers) and downwards (to all OpEx subordinate groups), guidance and support.
48. It also allocated “strategy” but gave no guidance on what that might entail. It is a reasonably common understanding that because risk can shift, risk management begins with the threshold step of maintaining risk awareness - through analysis (horizon-scanning); assessment of probability and latency and calibration, leading to a formal scoring or rating of levels of risk. From the assessed risk level the appropriate mitigation (reduction) options can be generated and the appropriate settings for readiness. Risk awareness is neither a stated governance expectation of the Plan, nor did the Plan mandate it explicitly of the SG or of MSOC.
49. MBIE’s reports to Ministers during the establishment phase suggest that the then OpEx leadership did undertake such threshold discussions and did set a risk level. Although in internal MBIE reports after 2014 there is reference to risk shifts (e.g. changes in the intensity of organised protest entities public rhetoric and assumed intent) no risk overview or level seems to have been attempted. As previously noted, the default was a security situation description which had a precautionary bias.
50. Whereas overwatch of the Plan (on behalf of the national security system) was intended to lie with MSOC “as required”, the SG was clearly intended as the main point of oversight of the regime. But in fact SG administered and supervised, rather than oversaw, regime activities. Their most active engagement was with the planning and delivery of operational outputs.
51. What could have better focussed and enabled both oversight and overwatch was a risk register which SG would establish and maintain. The Plan did not contain a specific chapter on risks, nor mandate a register, but in 2016, one was created by the then National Manager and SG convenor (see Annex Four). Of its kind, this seems well-constructed and comprehensive. However it was never circulated to or used by the SG but was added to the MBIE induction “info-pack”. More use could have been - and, with adaptation, still can be - made of it, not least in light of the need arising from the SSC and Police Inquiry findings to oversee OpEx information gathering and to overwatch knowledge management.
52. In the functional allocation (under the 5Rs) for regime risk management, MBIE, as SG lead, was responsible in four domains:

1. Reduction

This is discussed in some detail in the Plan, but from one particular perspective- “social licence”- which is explained as “informing and socialising” by means of communicating and engaging with local communities and other stakeholders directly or indirectly interested in or affected by the (exploration) activity. This was depicted as a task for government agencies beyond the OpEx regime membership, local government and the exploration companies.

My interviews established that for a period, a programme of meetings to exchange information with Regional Councils and local iwi was in place, involving a group of agencies, not core OpEx members (except for MNZ). They were coordinated by MBIE. They were separate from the community consultation which operators undertook as part of their permit requirements and were related to petroleum operations, not non-interference/OpEx matters. After 2015, when petroleum activities began to taper off, the meetings ceased.

Police and some OpEx core members did participate in meetings of the Taranaki Oil and Gas Security group (TOGS), referred to in the SSC Inquiry report, and described in the Police review as “set up to manage threats to the oil and gas industry from IMGs”. TOGS appears to have been an initiative of the security consultants, not MBIE or the OpEx leadership and concerned exclusively with security-response tactical readiness, not social license.

There is no record of any thought having been given by the SG, as a component of Reduction, to the merits of seeking a dialogue with organised protest entities to test their understanding of risk; their contingency arrangements or their preparedness to voluntarily self-restrain tactically. In other spheres of protest, I understand such dialogue is often conducted by Police, consistent with their community-based and prevention-first strategic posture; by agencies with wider environmental networks than MBIE (and less identified with industry regulation or compliance) or by a valid intermediary.

2. Readiness

Very much a multi-agency function for the regime, it is well explained in the Plan, as it deserves because of the inherent environmental complexities and constraints referred to in paragraph 44. SG’s role had two parts; firstly to assemble information through review of upcoming exploration activities; captured in the FAFs and then to facilitate planning which would require operator security and safety plans to be harmonised with the contingency response planning done principally by the OPG collaboratively under Police leadership.

The members of OPG other than the two lead agencies were NZDF; MNZ; Customs and the National Maritime Coordination Centre (NMCC).

3. Response

This function was led by Police through the plans created in OPG, with strong connectivity to the “common operating picture” and situational awareness briefings

provided by MEJIG. I was told of a high level of underlying institutional knowledge and familiarity supporting this function. NZDF has set procedures for supporting Police-led responses in many other areas of civil defence and emergency management. Customs has the same. MNZ commented on well-developed and practised arrangements between Police and the Rescue Coordination Centre for responses in coastal waters and beyond.

4. Review

It was the SG's task to organise and conduct a review of the season's operational activity (based on individual operational debriefs and other continuous improvement findings) and produce an annual report. There is evidence of debriefing taking place as outcomes from debriefs are referred to in internal MBIE briefing documents for senior managers. But it appears to be a less formal and structured process than the Plan envisaged. The annual report appears to have become subsumed into MBIE's pre-season overview.

5. Recovery

This phase appears to have been well articulated in MBIE's internal documents (it was tested in desk top exercises) and well performed on the whole through OPG's inputs to Police Orders. The quality of interaction on the ground at the front-line between District Police and MBIE incident staff required preparatory liaison at senior levels.

Observations about MSOC

- 53. MSOC's role in regard to Review (as with "strategy") was not explained in the Plan (other than that reports of "regular" SG meetings were to be referred to MSOC). It is not clear that SG reports were generated or transmitted or that MSOC ever sought them.
- 54. With no active Plan testing or review (overwatch) from MSOC, and with MBIE's delegations affecting senior participation in SG, regime oversight was not exercised by the lead agencies at the level required by some of its inherent complexities. SG may not have been the right body for it from the start. A better arrangement for regime governance and oversight would be to position it as a shared MBIE/Police task to be planned for and carried out at a second-tier level by a risk review based on a register maintained by SG.
- 55. As proposed above the Plan as a whole should be reviewed by MSOC in the context of developments in maritime sector policy and practice settings since 2014.

Observations about other Plan groups and other agencies

- 56. The Plan designated two other interagency groups (Legal and Communications) as part of core OpEx, both under MBIE lead, and it identified four agencies whose interests or capabilities meant they should expect to be consulted or informed by OpEx.

The Legal Group

- 57. The Legal Group was tasked with establishing the regime legal framework and monitoring and updating it. There is ample evidence that the first task was properly carried out during 2013. And it seems that, subsequently, legal advice was drawn upon properly by SG/OPG when

mobilisation of a response and enforcement actions were being contemplated. In assessing possible prosecutions MBIE legal advisers considered information and witness statements provided by the security consultants and had access to MEJIGs finished product “Information Report”. External legal advice about the risk of evidential deficiencies was also commissioned. MBIE legal advisors however were not involved in MEJIG’s information gathering processes including any assessment of the risks that these processes might present (before the evidential assessment stage).

58. MBIE’s “info-pack” contains detailed guidance to staff attending a response about how the recovery function would be managed and how to conduct their enforcement support activities lawfully.
59. It is not clear whether the Legal Group was ever asked to convene for review (update) of the 2013 framework as part of Plan governance. Legal risk should be part of an OpEx risk register (see Annex Four), and legal advice about it from this Group should be part of governance oversight.

The Communications Group

60. I received no comments about the Communications Group or the way it performed in my interviews except about the original allocation of lead agency to MBIE rather than to Police. From MBIE’s internal induction and other documents it appears MBIE saw the role as best carried out with distributed responsibilities, and coordination only as required, rather than by central control. The subsidiary Communications and Media plan envisaged in the 2014 Plan was established; in it a strategic posture was defined and responsibilities for media responses were allocated across five agencies (related to their applicable legislation) and the operator.
61. Whilst it is clear that the Plan is based on some risk appreciation related to a response operation, there would be advantage in seeing “Communications and Engagement” as a wider risk, not limited to formal media response post-incident, but related to the Reduction function as well, in terms of civil society and community interests. Other national security plans may provide benchmarks.

Other Agencies

62. Of the four interagency group members, Customs was a SG and OPG member. I received no comments on Customs involvement. I also received no comments about the other agencies involvement listed under the reduction phase in the Plan.

PART THREE: Information gathering and management by MEJIG for OpEx

Joint Intelligence Groups (JIG)

63. JIGs – interagency information fusion cells – have become a standard feature of national law enforcement and national security architecture for cross-cutting risks. They allow knowledge (built by integrating and analysing data from all sources) to be created and shared in order to better manage risk. MEJIG, one of several similar law enforcement fusion arrangements, was located in Police in the National Intelligence Centre; chaired by Police and, as such, subject to Police Instructions for the handling of sources and the techniques of analysis, as well as all-of-government Protective Security rules. In the Plan it was stated that the OpEx fusion process would draw upon “open source information”, meaning public statements, press releases or social media posts, and other “intelligence”, not further specified.
64. The regime was built around a planning sequence moving from advanced information and analysis to initial contingency plans based on likely scenarios that might be encountered in a drilling season. These would be refined into Response Plans, and finally tactical plans (Police Operational Orders). This required an aggregation of regime knowledge to ensure coherence through a “common picture” formed from information gathered from three principal sources:
1. MBIE’s seasonal Forward Activity Forecasts (FAFs) (and updates) based on technical data of commercial sensitivity to operators;
 2. Operator Security Plans created by security consultants in a process which involved Police; and
 3. Indicators, information about intent to interfere and to target the particular activity of an operator, which were analysed by MEJIG.
65. MEJIG then issued a blended situational awareness product (Police Information Report, classified “Sensitive”) to OpEx member agencies in preparation for a possible deployment.

Model Standards for information gathering

66. As the SSC Inquiry report (and the Police internal review) makes clear, the interaction of these three sources all involved the security consultant firm TCIL, as provider of advance technical data about operator safety and security; participant in scenario-based planning discussions; creator of target and threat intelligence, with membership of MEJIG (as well as of another group, TOGS-Taranaki Oil and Gas Security - not designated in the Plan and set up before it was approved); and tactical planner and deliverer of response and recovery inputs. Of all these interlocked roles contributing to regime knowledge, it is the degree of security consultant interlock with MEJIG that has been most faulted.
67. Following its broader inquiry, but partially as a result of the OpEx findings, the SSC issued new Model Standards for information gathering associated with regulatory compliance, law

enforcement and security functions. They apply to Chief Executives in the state sector and their agencies and are intended to supplement the overarching Code of Conduct.

68. The Model Standards must be applied in future by all the OpEx agencies (other than Police⁹) involved in the Plan. Giving effect to them is of particular concern to MBIE because of its (joint) lead agency role in OpEx.
69. SSC has quite clearly prescribed what agencies individually must do to codify the responsibilities laid out in the Model Standards. Policies and practices which reflect transparently any legislative or policy frameworks which set boundaries for their information-gathering, and which define what safeguards are in place to prevent compliance failures must be in place.
70. The Model Standards directly address the requirement for agencies to test information which is the outcome of surveillance or monitoring conducted by private interests for its legality and appropriateness before accepting it.
71. In regard to how the Model Standards might apply collectively, to future multiagency national security operations and to those under joint leadership involving Police, the Model Standards are less prescriptive, but the section entitled “WORKING TOGETHER” is the most directly relevant.
72. It notes that where agencies with different legislative authorities come together for common purposes, such as managing a security threat, formal agreements among them about the use of powers, information-sharing and decision-making are needed to give the public confidence that they are being protected from inappropriate uses of state power. It specifies that ahead of delivery there should be “effective arrangements under joint governance” including clearly assigned lead accountability for ensuring alignment with the Model Standards.
73. The Plan therefore requires amendment, to incorporate a new knowledge management function. This means defining what knowledge OpEx needs to generate internally or with external inputs; from which sources for which regime purposes; and on what terms OpEx knowledge is to be shared for what purposes. Risks arising from the activity should be identified and placed on the risk register to enable both regime leadership and oversight. Expectations about professional conduct should be established in protocols for the three activities described above which can be based on departmental conduct rules adapted for the Model Standards or other best practice.
74. MBIE has already commenced an organisational wide adaptation project and should lead the work in consultation with the OpEx Legal Group and Police which besides its specialised tasks has a shared management and supervisory responsibility, as well as a governance role, for the knowledge management as a whole.

⁹ The Police Commissioner is not appointed by the State Services Commissioner and has differently managed accountabilities. Police conduct is subject to other forms of oversight.

Overview

75. Police, with a similar intent to other agencies, have already proposed changes to existing rules and practices for engaging with external security consultants. These will go a considerable distance towards creating “effective arrangements” for OpEx knowledge management particularly in regard to the assembling and treatment of Indicator information about interference threats; its analysis and assessment and its integration into OpEx advice about response planning or to provide situational awareness for actual responses.
76. Elsewhere in this review there are recommendations about risk management, regime oversight and system overwatch which are all intended to create more effective OpEx governance, and, in combination these should help to give effect to the Model Standards.
77. The necessity of an OpEx information/intelligence fusion function is unquestionable, but whether a multiagency group (MEJIG) remains the organisational form best suited to the function is open to question.

Observations

78. The capability to fuse information and reliable means to share it continue to be necessary for OpEx. There cannot be effective management of the full spectrum of risks relating to permitted non-stationary seismic survey or drilling exploration activities taking place in the New Zealand maritime jurisdiction without advance knowledge. It is what enables risk management. It needs to be shared between the coastal state and the operators; to be integrated and assessed and then applied appropriately by the operational decision-makers of the OpEx regime.
79. Operators may engage local contractors for safety and security liaison. They are critical information providers also representing the rights of their principals to be consulted and informed about interference risk and its management as it impacts their permitted business activities. This has to be balanced by the need for officials to carry out all duties related to OpEx mindful of the need to avoid capture or bias by maintaining appropriate “professional distance” from interested parties and/or their contracted representatives.
80. In the case of exploration operators, the reality is MBIE and Police will need to engage, closely at times, to receive and share operator information. Other agencies who are SG or OPG participants contributing to planning will be party to assessments based on external consultant and operator information, including security information.
81. Whilst the onus to ensure professional distance, and comply with new conduct expectations lies with government agencies, it may at least be worth exploring whether the proposed standards for knowledge generation and information sharing applying to OpEx agencies can be reflected in the generic agreement between Police and the security industry association or possibly in contracts between the operators and their local consultants.
82. My understanding from the findings of the Police internal review is that overall Police engagement with external security consultants is “appropriate and professional”, well governed and well managed, but it remains an area of situational risk. Nonetheless changes are to be

made to processes and behaviour rules for knowledge management to improve aspects of internal Police practice. Some of these changes will affect all multiagency groups involving Police and external non-government parties, including the OpEx Information-sharing parties.

83. The most germane of the Police proposed changes for OpEx are:

1. the exclusion of external security consultants from formal membership of “groups set up to coordinate a government response to an issue” and
2. the introduction of a requirement to establish knowledge management protocols (“clear TOR and information sharing agreements between the parties involved”).

84. The knowledge management function for OpEx can be described using the existing framework of the Plan beginning with procedures for risk recognition and moving through all points of the risk continuum, explicitly defining OpEx knowledge needs and vulnerabilities requiring mitigations. Failure to comply with the Model Standards is a risk. The protocols are the means of mitigation.

85. The protocols can be found from a combination of the existing MBIE and refined Police doctrine as well as other best practice such as the ACC manual which the SSC Inquiry cited, or possibly more recent Police examples such as the Gang Intelligence Centre (GIC).

86. Supervisory and management responsibilities for the protocols can be assigned between the SG and the OPG chairs who will be accountable under the altered regime governance (oversight) arrangement I have proposed. The OpEx Legal Group should also be tasked with providing support and advice to the Chairs, particularly when and if issues about the appropriateness of how information is gathered are deemed a matter of sufficient complexity and risk to be escalated.

87. There does not appear to me to be any need to change the knowledge-sharing arrangements by which MBIE creates its FAF, or contributes technical data about safety supplied by operators for scenario purposes to build OpEx contingency response plans. MBIE as a regulatory agency has organisational settings, as well as doctrine, to ensure “professional distance” in the quality of its administrative practice.

88. The main focus of the protocols should be the interaction with operators on security planning; how OpEx obtains, integrates and shares knowledge about interference threats or threat actors from any information or intelligence source and how MEJIG treats information or intelligence of this kind provided by industry or private security consultants.

89. To provide assurance for MBIE and for other member agencies that threat-related information and intelligence provided to them by Police (through MEJIG) for OpEx purposes is properly and lawfully obtained, the protocols should take into account the following:

1. Police review findings are explicit that Police can receive information from and can engage with an external security consultant for the purpose of obtaining information about suspected criminal offending, or with the aim of preventing offending if it is thought useful information may be obtained. There are also explicit constraints in law

and rules of practice in the Police Instructions about tasking external security consultants and about Police powers relating to surveillance or covert investigative activities to gather intelligence. The requirements of evidentiary integrity - to seek or obtain information lawfully - are a constant.

2. Police are part of the national intelligence community and its “culture” with standards, and professional competencies for objective assessment and impartial analysis. There are also generic standards for information fusion integrating both open source and other kinds of “intelligence” related to threat intent or threat actors. The Police National Intelligence Centre is therefore the right “professional home” for the OpEx fusion function.
 3. As with the SSC Inquiry and the Model Standards, the Police review describes interaction with security consultants in terms of risks to integrity and, acknowledges the importance of retaining trust and confidence in its dealings with the public, including “issue motivated” individuals and groups. “Appropriateness” is a values test to be applied as much by Police as by SSC-controlled agencies.
90. Police therefore should be able to provide assurance to MBIE¹⁰ and to other agencies that a framework of rules and standard procedures broadly consistent with SSC Model Standards is in place for its interactions with security consultants in regard to threat indicator information.
91. These factors seem to me, in aggregate, sufficient to be assured that MEJIG can continue to perform the function of knowledge fusion assigned to it in the Plan and conduct its activities in accordance with expectations about legality and appropriateness.
92. However, if further layers of assurance are thought necessary it may be worth considering making MEJIG a Police-only entity. Alternatively, the threat-indicator information gathering process could be assigned to Police as a separate knowledge input, to be assessed and analysed by Police unilaterally. Should other OpEx member agency involvement in this be required by circumstances, Police could apply the “need-to-know” rule and co-opt. Open source and technical information could still be gathered by other OpEx members and supplied to Police in order to be fused into situational awareness and common operating picture briefing documents. OPG would continue to be the main user of fused information for planning, readiness, response and recovery outputs. There may be coherence and efficiency costs to any of these “compartmentalisation” options and other OpEx member agencies may have particular reasons for maintaining their participation in MEJIG.

¹⁰ Although the Plan is reasonably clear about respective responsibilities, as noted in paragraphs 35-37 there is no subsidiary understanding between Police and MBIE about joint leadership. An assurance about consistency with Model Standards could form part of any such subsidiary agreement.

PART FOUR: Summary of recommendations

(a) GOVERNANCE¹¹

- 1 National Plan governance meaning system overwatch should remain with MSOC as point of escalation to the ODESC system for matters arising from the oversight body and for strategic policy guidance about exploration risk management and OpEx resourcing needs in the broader maritime national security context.
- 2 OpEx governance, meaning regime oversight, should be assigned formally to a new body comprising the two lead agency senior managers (Deputy Chief Executive of MBIE and Deputy Commissioner of Police) and, on a rotational basis, one other senior manager of an OpEx member agency with maritime safety capabilities.
- 3 Police and MBIE should conclude a formal agreement about their leadership and governance roles in OpEx and mutual performance expectations. This may require a review of the present division of lead responsibilities in the National Plan, both in terms both of risk management domains (5Rs) and regime (CIMS) functions for OpEx.
- 4 There should be a record kept of proceedings between the SG and both governance entities.

(b) NATIONAL PLAN

- 5 MBIE should refine the existing (internal) OpEx risk register, and lead a process to embed it in the National Plan. A process for risk assessment and threat level setting should be specified in the National Plan and assigned to the SG. This process should incorporate the step of testing proposed risk mitigation or threat reductions for proportionateness.
- 6 MBIE in its SG lead role should take responsibility for maintaining the register and supervising risk mitigation. The register should become the core tool for governance, at both entity and system levels.
- 7 The “social licence” section of the National Plan should be reviewed and a wider engagement about interference risks with environmental or other civil society groups should be considered, including the possibility of negotiated protest parameters.
- 8 Any changes resulting from review and carried into the National Plan should also be captured in subsidiary OpEx and agency instructions.

(c) KNOWLEDGE MANAGEMENT

- 9 Knowledge management should be defined as a specific function in the National Plan with a descriptive framework for OpEx knowledge generation and information-sharing which incorporates key deliverables to enable fusion and key relationships.
- 10 Supervisory and oversight responsibilities should be assigned.
- 11 Risks to effective knowledge management and mitigations should be included in the new risk register.

¹¹ Refer to Annex Five for graphical representation of proposed governance structure.

- 12 Expectations about professional conduct should be addressed explicitly in knowledge generation and information-sharing protocols based on departmental best practice and the adaptations to codes of conduct made by MBIE, in light of the Model Standards and Police, in light of the Police internal review.
- 13 Options for the fusion of open source and other information, including treatment of indicator information about interference threat should be discussed by MBIE and Police as relating to the present role and structure of MEJIG.

Works cited

Martin, D., & Mount QC, S. (2018). *Inquiry into the use of external security consultants by government agencies*. State Services Commission.

MBIE. (2019). *Terms of Reference for review of how the non-interference provisions of the Crown Minerals Act 1991 are effected*.

National Maritime Coordination Centre. (2018). *Future Maritime Security Strategy - Officials report to ODESC*.

NZ Police. (2018). *Police Engagement of External Security Consultants Investigation Report*.

State Services Commission. (2018). *Information gathering and public trust*. SSC.

Annex One: Terms of Reference

Terms of Reference for review of how the non-interference provisions of the Crown Minerals Act are effected

As at 27 February 2019

PURPOSE

1. This document sets out the parameters for a Review of how the non-interference provisions set out in section 101B of the Crown Minerals Act (the Act) are effected, including the appropriate roles of various agencies for the enforcement of those provisions.
2. The purpose of the review is to recommend an approach as to how MBIE and other agencies might utilise those provisions, and if necessary and relevant, support their enforcement, so that:
 - the provisions of the Act are properly given effect and
 - State Sector entities operate in a manner that is consistent with good regulatory practice, including the guidelines recently released by the SSC on Information Gathering and Public Trust.
3. In particular, the review will focus on recommending an appropriate governance arrangement (including membership) for overseeing the work of MBIE and other agencies related to operationalising and enforcing the non-interference provisions.

BACKGROUND

Reason for the review

4. In December 2018, SSC released the report of the *Inquiry into the use of external security consultants by government agencies*. This found that interactions between MBIE (specifically New Zealand Petroleum and Minerals – NZP&M) and Thompson and Clark lacked the necessary objectivity and professional distance. Of relevance to this review, the inquiry noted that:

“...MBIE’s leadership of ‘Operation Exploration’, a key interagency governance mechanism, did not sufficiently ensure that Thompson and Clark, who were acting on behalf of the oil and gas industry, were kept at an appropriate arm’s length from the operational and planning processes of the government’s enforcement of the Crown Minerals Act 1991. MBIE uncritically adopted the construct of ‘issue motivated groups’ to guide the design of its enforcement function, and this was problematic... This mechanism enabled Thompson and Clark to embed itself as a crucial participant within the regulatory and enforcement function, despite the fact they represented private economic interests. This risked creating at least a perception of conflict of interest and was poor regulatory practice.”

5. The CE of MBIE has undertaken to review the way in which MBIE is planning and operationalising its responsibilities in relation to the non-interference provisions in the Crown Minerals Act. The review is to include consideration of the governance and membership of “Operation Exploration” (more formally known as the *National Plan for Implementation of the Non-Interference Provisions in the Crown Minerals Act 1991*) and the Mineral Exploration Joint Intelligence Group, which is part of that.

Non-interference provisions

6. The non-interference provisions (sections 101A-101C) were introduced into the Crown Minerals Act by legislative amendment in May 2013. The provisions allow the CE of MBIE to specify a zone of up to 500m around a ship, equipment it is towing, or a structure, related to offshore petroleum activity, known as a non-interference zone. It is a potential offence for any ship or person to enter into a non-interference zone. Enforcement officers under the provisions are able to take action both when an offence occurs, and to prevent an offence from occurring if they have reasonable cause to suspect that a person is attempting an offence.
7. At the same time, the purpose of the Act was changed, to be “...to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand.” The purpose of the Act states that other provisions (including non-interference provisions) are provided for “to that end”.
8. The changes to the Act in 2013 were made after protests by those opposed to oil and gas mining activities, including off the East Cape in 2011 and in the deep water Taranaki Basin in 2013. Offshore petroleum operations carry significant health and safety risks due to the nature of petroleum, the use of heavy equipment and the complexity of operating in the marine environment. MBIE understood that the non-interference provisions were introduced to balance the rights of individuals to protest lawfully while protecting the ability of petroleum permit holders to operate. This included allowing the permit holders to complete the work programme obligations required of them under the Crown Minerals Act.
9. While MBIE is responsible for administering the Crown Minerals Act, it is not the sole agency with a statutory role related to the non-interference provisions. For instance, an enforcement officer for the purposes of the non-interference provisions is a constable, or the person in charge of a NZ Defence Force ship (or acting under that person’s command).

Operation Exploration

10. Following introduction of the non-interference provisions, a national plan for the implementation of the provisions was developed. This was intended to ensure MBIE and other agencies were well placed to utilise and enforce the new legislative provisions ahead of the 2013/14 summer prospecting period. The actions required to implement the plan were referred to as “Operation Exploration”. This has become a standing term used amongst agencies for preparing for upcoming offshore petroleum activities (including some activities not directly related to the non-interference provisions).

SCOPE

11. The review report is expected to be primarily forward looking, focused on recommending how relevant agencies including MBIE should organise in the future to operationalise and enforce the non-interference provisions. For clarity, the following matters are out of scope of the review:
 - Other aspects of the Crown Minerals Act, for instance the block offer process

- The appropriateness of the decision to establish Operation Exploration, or undertake any of its previous activities
- Any impact of Operation Exploration on Ministerial decision making.

INTERDEPENDENCIES

12. In undertaking the review, the reviewer will be cognisant of the following interdependencies:
 - Work underway within MBIE to ensure the SSC Model Standards for Information Gathering are adhered to
 - Policy work underway to review the Crown Minerals Act
 - Other regulatory initiatives belonging to the Regulatory Governance Board
 - The need for arrangements to support staff acting in a manner that is consistent, at all times, with MBIE's internal policies, and the Code of Conduct for the State Services (as issued by SSC).

ROLES & RESPONSIBILITIES

13. The Review will be carried out by Simon Murdoch reporting to Carolyn Tremain, Chief Executive of MBIE.
14. A steering group for the review will be established, consisting of: Chris Bunny, (Deputy Chief Executive for Building, Resources and Markets, MBIE; Melleny Black, Head of the Office of the CE, MBIE; Superintendent John Rivers, Police; Lieutenant Colonel Anthony Blythen, Deputy Director Strategic Commitments – Domestic, NZ Defence Force; and Nigel Clifford, Deputy Director Safety & Response Systems, Maritime NZ. Additional members may be added as required.
15. The reviewer will keep the Steering Group informed of progress, and consult with them on the draft review report and findings. The steering group will support the reviewer accessing information from within MBIE, and other relevant agencies, as required.

Review process and reporting

16. The reviewer will determine how they wish to take to undertake the review, and consult with the Steering Group on the proposed approach.
17. MBIE will provide the reviewer at the outset with key documents relevant to the review, including the *National Plan for Implementation of the Non-Interference Provisions in the Crown Minerals Act 1991 (the National Plan)* and the SSC guidelines on *Information Gathering and Public Trust*.
18. Agencies involved in the review are expected to make all documents, and staff required for interview, available to the reviewer.
19. It is expected that the reviewer will enquire into why the choice of governance arrangements contained in the National Plan were put in place, how they operated in practice, and why Thompson and Clarke Ltd was able to embed itself within the structure in the manner outlined in the Inquiry.

20. The reviewers report will focus on the changes that need to be made to the National Plan in order to ensure that an appropriate governance, and if necessary other, arrangements are put in place such that similar issues should not arise again in the future. All recommendations must be consistent with the SSC guidelines on *Information Gathering and Public Trust*, and accepted good regulatory practice.
21. A draft report will be provided by mid-March 2019. A final report will be provided by late March 2019.

Confidentiality and public comment

22. All material provided to the reviewer is to be treated as, and remain, confidential.
23. Given the public interest in ensuring that MBIE is addressing the issues raised by the Inquiry into use of external security consultants, the expectation is that the report will be made public after it has been received and considered by the CE of MBIE. The CE of MBIE will be the spokesperson in regards to the review process and findings and any requests for public comment should be directed to her office.

Annex Two: Summary of incidents 2013-18

Extract from 2017/18 Seismic Survey Activity Communications Plan

- While there was a range of protest activity in the previous summers, there has been a breach of the non-interference provisions in late 2013 and early 2017
- MBIE issued formal warnings to four crew members of the SV Vega, after they breached a non-interference zone around the Noble Bob Douglas drill ship in November 2013.
- The warnings may be provided to the courts if the individuals were to face prosecution for breach of a non-interference zone, or any other relevant Crown Minerals Act (CMA) provisions, in the future.
- While MBIE believed there was sufficient evidence to prosecute the vessel's crew under the CMA non-interference provisions, it did not consider that the public interest would be served by taking prosecutions in that instance.
- MBIE took a number of factors into account in reaching this decision, including: that the delay to the drill ship's work was minimal; there was no serious harm caused; and the SV Vega crew left the scene of their own accord.
- The Noble Bob Douglas had only just arrived on site and was preparing to undertake exploratory activity for Anadarko, approximately 170 km off the New Plymouth coast when the SV Vega entered the non-interference zone.
- Had the circumstances been different, a prosecution may well have been warranted. If exploration drilling had actually commenced, or the sea conditions worsened, for example, the observance of the non-interference zone would have been a critical safety requirement.

Note: The Vega shadowed TGS seismic vessel when surveying off the Northland coast in the summer of 2014/15. However, no interference occurred.

- In April 2017, Greenpeace protesters Dr Russell Norman, Sara Howell and Gavin Mulvay, along with Greenpeace NZ, were charged after entering the water off the Wairarapa coast under the CMA non-interference provisions. Mr Mulvay completed diversion while Dr Norman, Ms Howell and Greenpeace pleaded not guilty and a trial is set down to begin in Napier on April 30 2018. [Dr Norman and Ms Howell subsequently pleaded guilty and were discharged without conviction on 21 September 2018. Charges against Greenpeace were dropped].

Annex Three: MBIE delegation chart

Delegation levels for issuing Non-Interference Zones under the Crown Minerals Act

	2013	2014	2015	2016	2017	2018
Chief Executive	CE delegated to DCE	CE delegated to DCE	CE delegated to DCE	CE delegated to DCE	CE delegated to DCE	CE delegated to DCE
Deputy Chief Executive, Building, Resources and Markets Formally Infrastructure and Resource Markets	18 Sept 2013	22 April 2014 27 Nov 2014 Kept with DCE. Consider sub-delegation to GM in future	1 July 2015 31 Aug 2015 10 Dec 2015 DCE delated to - General Manager Energy and Resource Markets - National Manager Petroleum - National Manager Minerals - Manager Permitting and Compliance - Manager Minerals Strategy	8 April 2016 DCE delated to - General Manager Energy and Resource Markets - National Manager Petroleum - National Manager Minerals - Manager Permitting and Compliance - Manager Minerals Strategy	10 Feb 2017 3 July 2017 4 Sept 2017 DCE delated to - General Manager Energy and Resource Markets - National Manager Petroleum - National Manager Minerals	17 Sept 2018 DCE delated to - General Manager Energy and Resource Markets - National Manager Petroleum - National Manager Minerals - National Manager Compliance - Manager Minerals Operations
General Manager Energy and Resource Markets			15 July 2015 3 Sept 2015 14 Dec 2015	12 April 2016	10 Feb 2017 3 July 2017 4 Sept 2017	18 Sept 2018
National Manager Petroleum			15 July 2015 3 Sept 2015 14 Dec 2015	12 April 2016	10 Feb 2017 3 July 2017 4 Sept 2017	18 Sept 2018
National Manager Minerals			15 July 2015 3 Sept 2015 14 Dec 2015	12 April 2016	10 Feb 2017 3 July 2017 4 Sept 2017	18 Sept 2018
Manager Permitting and Compliance			15 July 2015 3 Sept 2015 14 Dec 2015	12 April 2016		
Manager Minerals Strategy			15 July 2015 3 Sept 2015 14 Dec 2015	12 April 2016		
National Manager Compliance						18 Sept 2018
National Manager Operations						18 Sept 2018

Annex Four: National Plan – Risk, MBIE internal document, 2017

Risks/issues and mitigation

Risk	Mitigation
Lack of clarity between agencies and their respective Ministers about the various legislative measures and how/when they apply	Inter-agency steering group and joint-Ministers meetings aim to manage these risks.
Lack of clarity between government agencies, external agencies (ie territorial authorities), and operators about the various legislative measures and how/when they apply	On-going discussions with operators and agencies represented on the steering group.
Uncertainty over who the decision-makers are in range of different settings	Table-top scenario planning has occurred to identify who makes what decisions and ensure communication channels are in place. Lead decision-makers for key areas identified. Legal advice developed to aid this process.
Uncertainty over threat management and incident response – ie acceptable use of force by the operator and/or Police	Table-top scenario planning has occurred to map out potential responses and what equipment may be required – eg helicopters. Legal advice developed to aid this process.
Government response to protest not seen as proportionate	The Government, including its enforcement agencies, are committed to ensuring any response is proportionate and people's right to legitimate protest is respected.
Health and safety risks emerge/people are injured during a protest or as the result of enforcement action	The health and safety risks surrounding a seismic vessel or rig and related operations are clearly communicated. Operations closed down in the event of a potential health and safety threat.
Enforcement action is subject to legal challenge	Legal advice prepared to ensure enforcement action is lawful.
Concern / criticism over potential environmental impacts in wake of Deepwater Horizon, Rena etc	Appropriate agencies working together to ensure response plans in place; operators required to meet stringent maritime safety and environmental protection standards.
Concern about the impact of seismic surveying on marine mammals	General messaging prepared. DoC aware detailed responses may need to come from them. Operators encouraged to outline the precautions they are taking, including the work of MMOs.

Annex Five: Graphical representation of proposed governance structure

