# Operation Minotaur – Options for Legislative Reform

The present system in New Zealand of regulatory approvals for mining activities has been described as a legislative and administrative labyrinth. This paper overviews some options for reforming the system. Dubbed 'project 'Minotaur', the drive for improving the efficiency and cost effectiveness of the system while retaining strict environmental controls is gathering momentum.

In Greek mythology, the Minotaur was a creature with the head of a bull on the body of a man. The creature resided in the twisting maze of the labyrinth, where he was offered a regular sacrifice of youths and maids to satisfy his cannibalistic hunger.

The task of reforming the mining regulatory system is to achieve positive outcomes without unnecessary sacrifices.

**Introduction**

The mining industry currently faces compliance with at least five separate pieces of legislation covering environmental and heritage issues in order to access and operate on public conservation land. This situation is onerous, contains unnecessary duplication and confusion, and leads to increased costs and delays for developers, stakeholders, and regulatory agencies. From an industry perspective it is a legislative and administrative labyrinth.

There are a range of options for legislative reform to streamline consenting requirements for mining (and other) activities on public conservation land, ranging from major reforms involving Environmental Protection Agency (EPA) or Board of Inquiry (BOI) involvement, to a low key streamlining of the Crown Minerals Act (CMA) and Conservation Act (CA) to introduce more efficient processing of applications. This paper identifies the primary reform options and their associated benefits and disadvantages.

**Option One – streamlining existing processes**

Option one is suitable if there is no appetite for more significant legislative reform. It simply streamlines processing timeframes in the CA and CMA, similar to the stricter timeframes provided for in the RMA, for instance, by requiring the Minister(s) to make a decision on access arrangement or concession applications within 20 working days of receiving a recommendation. There would be no change to the legislative tests.

The processes for obtaining resource consent, access arrangements and concessions would remain separate. The existing legal tests under each Act (the CA legal tests are different from the CMA legal tests) would also be retained.

A refined version of this option could provide for an appeal to the Environment Court for concessions under the CA and possibly for access arrangements under the CMA. The appeal could either be by way of a rehearing (where the evidence provided at the first hearing is reconsidered on appeal) or 'de novo' (where there is completely new evidence considered completely afresh in a new hearing). The Environment Court would be empowered to make decisions on concession applications, and perhaps for access arrangement applications, or alternatively, to make recommendations to the relevant Minister(s).

**Option Two – Crown Minerals Act rather than Conservation Act for mining related activities**

Option two involves amending the CMA to provide a 'one stop shop' for mining and mining related activities, so that there is no need for concessions under the CA for mining activities.

Activities which are ancillary to mining (e.g. formation, use and maintenance of roads, stockpiles, processing plants, power, water treatment plants, bridges, plant nurseries, explosives storage, workshops/machinery storage and such like) often occur outside mining permit areas because space within a MP area is at a premium, or the area does not have suitable topography for infrastructure, or the activities would overlie the mineral and sterilise the resource. Currently, it is the Department of Conservation's position that any mineral related activities on DOC land which are outside a mining permit area require a concession rather than an access arrangement.

The reform would amend the CMA to return to the pre-CMA concept of ancillary mining activities or 'mining operations', so that all mining related activities which are part of a project require an access arrangement, not a concession.

There need be no changes made to the legislative tests or the relevant decision makers.

**Option Three – basic amendments to Crown Minerals Act and the RMA**
This option involves:

a. Making mining related activities subject to the CMA and not the CA as per option two;

b. Amending s61 CMA to remove reference to environmental/conservation effects so that an access arrangement becomes a simple mechanism to provide for rental; and

c. Amending s104 RMA so that where applications were made for resource consents for mining activities on Crown land additional matters would be taken into account. This could be done by transferring the matters from s61(2)(a), (b), (c) and (da) CMA. The benefit of this is that the overall test remains sustainable management under the RMA, a concept that is well understood.

d. For access arrangements in relation to private land it would delete s60(1)(e) CMA - which states an access arrangement may make provision for the things a permit holder must do in order to protect the environment. The proposed change in the RMA that requires property rights to be taken into account will address concerns about taking the matter out of the hands of landowners.

e. Extending the compulsory arbitration process under ss 63-75 CMA to all 'significant' mining proposals.

**Option Four – combined consent, concession and access arrangement processes**
This option requires a substantial legislative reform and involves a new class of environmental approval for activities on public conservation land that would combine resource consent, concession and access arrangement requirements into one aligned process (reform of the Historic Places Act and Wildlife Act processes could also be included). The reform is premised on the fact that there is potential for more businesses to operate sustainably on public conservation land, but this growth potential needs a fit-for-purpose, legislative and regulatory framework. Under this reform option businesses would manage, as an integrated package, the effects of their activities on the environment and on conservation values.

A new Part would be introduced into the RMA, providing for a new class of regulatory approval, say a “conservation permit”, for all commercial activities on public conservation land. "Conservation permit" applications would be assessed against sustainable management criteria, as for resource consents, and relevant conservation-related tests, e.g. consistency with statutory land management plans under the CA, and the purpose for which the land is held.

The EPA would receive all applications above a specified threshold. Setting the threshold would require careful consideration. For the purpose of this paper we have simply proposed that the threshold would be 'significant' minerals exploration and mining, electricity generation and transmission, and tourism and other infrastructure. However we recognise that there are often medium to large projects that are low impact activities and are not 'significant', and smaller projects that are 'significant', so further thought regarding an appropriate threshold is required. An appropriate test may be set out in the recently amended s 61(1AAB) CMA about 'significant'.

'Significant' projects would be referred directly to a BOI or hearings panel serviced by the EPA. The Department of Conservation would nominate one person onto that BOI or panel, which otherwise would be configured and managed like other BOIs or panels, with appeals available on points of law to the High Court. Under the recently amended CMA the Minister(s) deciding on access arrangements on Crown land must have regard to *"the direct net economic and other benefits of the proposed activity in relation to which the access arrangement is sought"* (s61(2)(da)). This makes the decision more akin to the sustainable management test in the RMA, so it seems appropriate for a specially appointed BOI to make a decision, or a recommendation to the Minister(s), on an access arrangement.

Projects below the threshold would be processed by local authorities.

The concessions provisions (Part 3B of the CA) would be repealed.

The functions of DOC are set out in section 6 of the CA. Section 6(e), which currently states:
"To the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism", could be amended to replace “allow their use for tourism”, with “enable their commercial use and development”.

The "conservation permit" provisions would also provide for landowner approval, i.e., from the Minister of Conservation, in the form of rent related to the value of the land. Guidance for assessing the value of the land could be set out in a schedule to the RMA, or a regulation. This would provide transparency and certainty for developers and the Minister.

Section 61 of the CMA and associated provisions relating to access to public conservation land would be repealed.

| Option | Advantages | Disadvantages |
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| **Option 1 – streamlining existing processes** | | |
| Amend CA and CMA to include stricter timeframes.<br><br>No change to legislative tests.<br><br>Provide for appeal to Environment Court by way of rehearing (or de novo). Retain existing statutory tests. Environment Court can either make decisions or recommendations to the relevant Minister(s). | Requires some, but not extensive, legislative reform.<br><br>Accords with the government's streamlining approach to the RMA.<br><br>Provides for appeal to an independent decision maker, reducing the current tension between DOC's conservation advocacy and decision making roles. | Does not eliminate duplication and delay associated with obtaining approvals under two separate regulatory regimes.<br><br>Retaining existing legal tests does not resolve complications arising from two different legal tests for concessions and access arrangements being applied to the same project. |
| **Option 2 – Crown Minerals Act rather than Conservation Act for mining related activities** | | |
| Amend the CMA so all mineral related activities or mining operations require an access arrangement, not a concession.<br><br>No additional change to legislative tests or decision makers. | No substantive amendment of the CA required.<br><br>Reduces the statutory tests from 3 to 2. | |
| **Option 3 – Basic amendments to Crown Minerals Act and the RMA** | | |
| Amend CMA as per option 2.<br><br>Amend s61 CMA to remove references to environmental/conservation effects so that an access arrangement becomes a simple mechanism to provide for rental.<br><br>Amend s104 RMA so that where applications are made for consents for mining activities on Crown land additional matters (from the CMA s 61) are | Changes to the CMA and RMA are not extensive.<br><br>Retains the well understood legal test of 'sustainable management'. | Requires more substantive amendment than options 1and 2<br><br>Could be seen as reducing landowners' rights |

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| taken into account.<br><br>For private land access arrangements, delete provisions enabling consideration of environmental issue.<br><br>Extend compulsory arbitration process to 'significant' mining proposals. | | |
| **Option 4 –'conservation permits', combined resource consent, concession and access arrangement processes** | | |
| 'Significant projects' – direct referral to BOI to consider 'conservation permits' (resource consent, concession and access arrangement applications). Single decision made by BOI under an amended s104 RMA which includes additional criteria for activities on Crown land. Retains existing legislative tests reframed into RMA.<br><br>EPA to consider 'conservation permits' above an identified threshold.<br><br>Councils to process 'conservation permits' below the threshold. | Improves timeframes for processing.<br><br>Removes uncertainty about different statutory tests.<br><br>Independent decision maker rather than DOC.<br><br>Provides for a single process and decision under the RMA having regard to conservation issues within the broader sustainable management framework.<br><br>Provides appeal rights that are not available under the current concession and access arrangement regimes, which only provide for judicial review of Ministerial decisions. | Only applies if 'significant' (determining 'significance' will be critical).<br><br>Requires substantial level of legislative reform. |

## Appendix

***Crown Minerals Act 1991 – s60 – grant of access***

**Section 60 Grant of right of access by access arrangement**

(1) An access arrangement in relation to land may make provision for or with respect to the following matters: …

(e) The things which the permit holder needs to do in order to protect the environment while having access to the land and prospecting, exploring, or mining on or in the land

***Crown Minerals Act 1991 – s61C – assessment of 'significance'***

**Section 61C Public notification of certain access arrangements**

(2) The Minister of Conservation must determine whether or not activities are significant exploration or mining activities for the purposes of this section and, in doing so, must have regard to—

(a) the effects the activities are likely to have on conservation values for the land concerned; and

(b) the effects the activities are likely to have on other activities on the land; and

(c) the activities' net impact on the land, either while the activities are taking place or after their completion; and

(d) any other matters that the Minister of Conservation considers relevant to achieving the purpose of this Act.

***Crown Minerals Act 1991 – s61 – access arrangements***

**Section 61 Access arrangements in respect of Crown land and land in common marine and coastal area**

(1) The appropriate Minister may, by agreement with the permit holder concerned, enter into the following arrangements in respect of Crown land.

(1AAB) The appropriate Minister must determine whether or not activities are significant exploration or mining activities for the purposes of this section and, in doing so, must have regard to:

(a) the effects the activities are likely to have on conservation values for the land concerned; and

(b) the effects the activities are likely to have on other activities on the land; and

(c) the activities' net impact on the land, either while the activities are taking place or after their completion; and

(d) any other matters that the appropriate Minister considers relevant to achieving the purpose of this Act.

(1A) The Minister of Conservation or the Minister and the Minister of Conservation, as the case may be, must not accept any application for an access arrangement, or variation to an access arrangement, or enter into any access arrangement, or variation to an access arrangement, relating to any Crown owned mineral in any Crown owned land or internal waters or land of the common marine and coastal area described in Schedule 4, except in relation to any activities as follows:

(a) that are necessary for the construction, use, maintenance, or rehabilitation, of an emergency exit or service shaft for an underground mining operation, where these cannot safely be located elsewhere, provided that it does not result in:

(i) any complete stripping of vegetation over an area exceeding 100 square metres; or

(ii) any permanent adverse impact on the profile or surface of the land which is not a necessary part of any such activity:

(b) that do not result in:

(i) any complete stripping of vegetation over an area exceeding 16 square metres; or

(ii) any permanent adverse impact on the profile or surface of the land that is not a necessary part of any activity specified in paragraph (a):

(c) a minimum impact activity:

(d) gold fossicking carried out in an area designated as a gold fossicking area under section 98 or 98A:

(e) any special purpose mining activity carried out in accordance with a mining permit.

(2) In considering whether to agree to an access arrangement, or variation to an access arrangement, in respect of Crown land, the appropriate Minister, or the Minister and the appropriate Minister, as the case may be, shall have regard to:

(a) the objectives of any Act under which the land is administered; and

(b) any purpose for which the land is held by the Crown; and

(c) any policy statement or management plan of the Crown in relation to the land; and

(d) the safeguards against any potential adverse effects of carrying out the proposed programme of work; and

(da) the direct net economic and other benefits of the proposed activity in relation to which the access arrangement is sought; and

(db) if section 61C(3) applies, the recommendation of the Director-General of Conservation and summary referred to in that subsection; and

(e) such other matters as the appropriate Minister considers, or the Minister and the appropriate Minister, as the case may be, consider relevant.

***Conservation Act 1987 – Part 3B – concessions (extracts)***

**17U - Matters to be considered by Minister**

(1) In considering any application for a concession, the Minister shall have regard to the following matters:

(a) the nature of the activity and the type of structure or facility (if any) proposed to be constructed:

(b) the effects of the activity, structure, or facility:

(c) any measures that can reasonably and practicably be undertaken to avoid, remedy, or mitigate any adverse effects of the activity:

(d) any information received by the Minister under section 17S or section 17T:

(e) any relevant environmental impact assessment, including any audit or review:

(f) any relevant oral or written submissions received as a result of any relevant public notice issued under section 49:

(g) any relevant information which may be withheld from any person in accordance with the Official Information Act 1982 or the Privacy Act 1993.

(2) The Minister may decline any application if the Minister considers that:

(a) the information available is insufficient or inadequate to enable him or her to assess the effects (including the effects of any proposed methods to avoid, remedy, or mitigate the adverse effects) of any activity, structure, or facility; or

(b) there are no adequate methods or no reasonable methods for remedying, avoiding, or mitigating the adverse effects of the activity, structure, or facility.

(3) The Minister shall not grant an application for a concession if the proposed activity is contrary to the provisions of this Act or the purposes for which the land concerned is held.

(4) The Minister shall not grant any application for a concession to build a structure or facility, or to extend or add to an existing structure or facility, where he or she is satisfied that the activity:

(a) could reasonably be undertaken in another location that:

(i) is outside the conservation area to which the application relates; or

(ii) is in another conservation area or in another part of the conservation area to which the application relates, where the potential adverse effects would be significantly less; or

(b) could reasonably use an existing structure or facility or the existing structure or facility without the addition.