COMMENT ON MINING AND ENVIRONMENTAL LEGISLATION RELEVANT TO MINING VENTURES IN NEW ZEALAND

By J. M. D. Willis*

Quid non mortalia pectoria cogis
Auri sacra fames![1]

Messrs. Curry and Holm have presented a comprehensive paper covering all of the matters likely to be confronted by would be mining operators in New Zealand. The sheer breadth of the topic has however prevented the undoubted ability of both Curry and Holm to examine in more detail some issues.

The focus of this commentary is on some of the commercial aspects of mining operations in New Zealand. The rationale behind this focus is that from the perspective of the mining operator the quest for capital is all important. The mechanisms by which this capital can be introduced into an appropriate corporate structure in New Zealand, the obtaining of a market for securities and the taxation of any gains achieved are generally similar to equivalent Australian legislation or regulation but in various areas there are important practical distinctions.

Australian mining companies and entrepreneurs have had a substantial influence on the development of mining ventures in New Zealand in the past decade. They continue to be at the forefront of the establishment of new ventures in New Zealand. It is hoped that this commentary will demonstrate that despite the difficulties all mining operators must contend with in obtaining New Zealand mining rights (as compared with the position in most Australian States) access to the share market and the obtaining of listing for mining company shares is comparatively easier in New Zealand.

MINING COMPANIES IN NEW ZEALAND

> Sir, I have two cogent reasons for not printing any list of subscribers — one, that I have lost all the names, — the other, that I have spent all the money[2]

Any person wishing to establish a mineral exploration or mining company in New Zealand can incorporate a company pursuant to the New Zealand Companies Act 1955 ('the Act'). Such a company may, but is not required, to state objects for the company.[3] Any company registered after 1 January 1984 is deemed to have the powers of a natural person.[4] Thus a

* LL.M. (V.U.W.) Dip. Acc. (V.U.W.) Barrister and Solicitor, High Court N.Z. and Supreme Court of Victoria.

1 Virgil, *Aeneid* II
2 Dr. Samuel Johnson — Boswell's Life of Johnson
3 The Companies Act 1955 s. 14A
4 *Ibid.* ss. 15A(1) and 15A(4)

company incorporated after 1 January 1984 for the purposes of pursuing a mining venture need not include any objects clauses relating to mining operations.

Part XIV of the Act contains a special code for mining companies. For the purposes of this part of the Act a mining company means a company formed for mining purposes or having mining purposes among its objects.[5] This can be compared with the relevant provision in the Australian Companies Code ('the Code') to the effect that a mining company must have as its sole object mining purposes. The definition of mining purposes in the Act is also different from the definition in the Code. Mining purposes means:

> ... the purpose of obtaining any precious metal or precious stone of any kind by any method whereby the soil or earth, or any rock or stone, may be disturbed, removed, carted, carried, washed, sifted, smelted, refined, crushed, or otherwise dealt with, whether the metal or stone is the property of the Crown, or of any company, or of any person whomsoever; and includes the purchase, construction, erection, and maintenance of machinery of any kind, and letting the same for hire, for all or any such purposes as aforesaid; and also includes the purchase, construction, erection, and maintenance of races, sluices, and watercourses, and the letting or selling of the water or power therefrom or thereof for all or any such purposes as aforesaid.[6]

The key words are 'precious metal or precious stone'. The pursuit of gold, silver, platinum, diamonds, emeralds and other jewel stones would qualify in this instance but it is doubtful that a company formed for the purposes of mining copper, lead, zinc, iron ore or other base metals would qualify. Certainly the definition does not contemplate a company established for oil exploration as being a company having mining purposes among its objects. The draftsman must therefore be careful when preparing documentation for a mining company intended to be formed pursuant to this part of the Act to ensure that the memorandum uses the key words 'precious metal or precious stone' or alternatively states that the purposes for which the company has been formed includes the pursuit of some substance that is undoubtedly either a precious metal or precious stone.

By virtue of the provisions of section 14A and section 15A of the Act, the distinction between a mining company and an ordinary company will not generally be important, but it is important if it is desired to establish a no liability company. A mining company (as defined in the Act) may be registered as a company limited by shares[7] or as a no liability company. A no liability company is a company:

> ... formed on the principle that there is no contract between the company and its members that the members will pay or be liable in respect of their shares for any calls, or any contribution towards the debts and liabilities of the company, in which case the words 'No Liability' shall form the last words of the name of the company.[8]

No liability companies in New Zealand are comparatively rare and as at the date of this commentary eight only were listed on the New Zealand Stock Exchange. However, given that there were only 17 companies in total

5 *Ibid.* s. 424
6 *Ibid.* s. 424
7 *Ibid.* s. 428(1)(a)
8 *Ibid.* s. 428(1)(b)

listed on the Mining Board of the New Zealand Stock Exchange they do represent a fair proportion.

There are a number of machinery provisions relating to incorporation of no liability companies that are relevant.

> Subject to the provisions of this part of the Act, a mining company shall be registered in the same manner, and with the same consequences in all things, as a company limited by shares.[9]
>
> Subject as aforesaid, all the provisions of this Act relating to companies limited by shares shall, so far as applicable and with the necessary modifications, extend and apply to mining companies.[10]

In short all of the provisions of the Act relating to companies limited by shares apply to no liability companies.

This gives rise to some benefits and advantages.

Unlike the Code which states that the provisions relating to public companies apply to no liability companies, in New Zealand a no liability company can be formed as a private company.

Part VIII of the Act applies to private companies and at section 353 it is provided:

> Notwithstanding anything in this Act, it shall be lawful for any number of persons not exceeding 25 associated for any lawful purpose, by subscribing their names to a memorandum of association as hereinafter specified, and otherwise complying with the requirements of this Act in respect of registration, to form a private company having its capital divided into shares, and having the liability of its members limited by shares, or by shares and by guarantee, or unlimited.

As this is a provision relating to a company limited by shares it is a provision that by virtue of section 426 of the Act extends and applies to no liability companies.

The incorporation of a private no liability company gives rise to a number of advantages, including:

(1) Resolutions can be passed by entry in the minute book without the need for a formal meeting.
(2) No auditor need be appointed.
(3) There is no need to comply with the provisions of section 117 of the Act relating to the time after which a company can commence business.
(4) The Company can be formed with two shareholders only (public companies requiring seven shareholders).
(5) There is no need to comply with the requirement found in section 134 for the company, within three months of commencing business, to hold a statutory meeting.

From a practical perspective these are significant advantages. A no liability company can be formed as a private company, can immediately commence business, can proceed to acquire assets (including mining rights) and, when the time is opportune, re-register as a public company[11], increase its authorised capital and proceed with a public offering if that is what is desired. By forming as a public company *ab initio* the company will

9 *Ibid.* s. 425
10 *Ibid.* s. 426
11 Pursuant to s. 366 (*Ibid.*)

be required to meet the various provisions referred to above which can create some practical difficulties and be an administrative burden.

Once incorporated attention needs to be paid to the unusual provisions found at section 430 of the Act. There appears to be no equivalent provision in the Code. The effect of this provision is to impose certain particular requirements relating to transfers of shares in mining companies including:

(i) The transferor of a share must at the time of executing the transfer attach to his signature the true date of signing.[12]

(ii) The transferee is required to present the transfer for registration within 42 days from the date of transfer (with certain extended limits if the transfer is executed in Australia, Fiji or any other places outside New Zealand).[13]

(iii) On receipt of the transfer the secretary of the company is required to endorse thereon the true date the transfer is received.[14]

(iv) A transfer that is presented for registration at any time within 120 days may be registered within that period of 120 days but no transfer can be registered after 120 days without a court order.[15]

The rationale behind this provision is not clear and neither are there any authorities to assist. Suffice to say that with the lengthy delays experienced with respect to the registration of shares throughout New Zealand last year, section 430 presented its own peculiar problems for share registrars. Frequently share transfers have been returned to transferors with the request that they be re-executed.

The principal advantage of a no liability company is that it can issue partly paid shares without shareholders having any continuing liability to meet any further calls on their shares. The legislation probably had in mind the protection of shareholders. However, a company that can be floated with partly paid shares has an easy and convenient mechanism to engage in order to raise additional capital without there being any dilution of the company's capital. When a call is made shareholders must either meet the call or forfeit the shares; in practice a powerful incentive to shareholders meeting the call.

The requirements on no liability companies in relation to the making of a call are usually set out in the Articles of Association of the Company. There are no provisions in the Act directly relating to the procedure for the making of calls in a no liability company. The New Zealand Stock Exchange Listing Requirements do however contain a number of relevant provisions. The notice sent by a no liability company to its shareholders when a call is made must include at least the following information:[16]

— the total amount expended on exploration and administration since the date of the last audited accounts;

12 *Ibid.* s. 430(2)
13 *Ibid.* s. 430(3)
14 *Ibid.* s. 430(4)
15 *Ibid.* s. 430(5)
16 New Zealand Stock Exchange Listing Requirement — (Regulation 262)

- full details of the use to which the funds raised will be put including geological data available on proposed exploration and/or mining areas;
- exploration activity completed in those areas to date and results;
- the identity and qualifications of the person recommending the exploration and/or mining programme to the directors;
- an estimate of the amount of funds necessary to complete such a programme;
- details of how the funds will be utilised pending implementation of the programme;
- advice as to whether the company's directors intend to pay the call in respect of all or any of the shares in which they have a beneficial interest and the number of shares involved.

There is no requirement to state the history of the company's share market performance in the period immediately prior to the call.

The provisions relating to forfeiture of shares and auctioning of shares are similar to the provisions found in the Code. The articles of a company should specify the number of days notice to be given of a call. If a call is not paid within 28 days after the due date of payment the share can be forfeited.[17] No special procedure is necessary in relation to the forfeiture itself. If the share is forfeited the secretary of the company must, within 14 days, send a notice of forfeiture by registered post to the relevant shareholder advising of the time and place of the intended sale of the shares.[18] All forfeited shares are to be offered for sale by auction not less than 28 nor more than 60 days after forfeiture.[19] The auction must be advertised[20] but the directors can withdraw the shares from sale if there is no bid equal to the amount of the unpaid call.[21] At any time up to the day preceding the auction of the shares the shareholder may redeem the forfeited share on payment of the outstanding call amount and all expenses associated with the forfeiture.[22] The company is obliged to keep its office open on the day preceding the auction.[23] There is no provision in the Act authorising a postponement of a forfeited share sale auction.

Some practical problems need to be considered when advising in relation to the proper call and forfeiture procedure,

- Depending on the relevant provisions in the articles, the process from the time of announcing a call to completion of the auction of the forfeited shares can take up to three months. A shareholder fully aware of this procedure therefore has a lengthy period in which to assess whether or not it is worth his while to meet the call. For this reason no liability companies may (if funds are needed quickly) need to consider offering shareholders inducements as an encouragement to pay on time.

17 The Companies Act 1955 s. 433
18 *Ibid.* s. 435
19 *Ibid.* s. 436
20 *Ibid.* s. 436(2)
21 *Ibid.* s. 436(3)
22 *Ibid.* s. 439
23 *Ibid.* s. 440

— The legislation has no provision relating to the conditions of sale that may apply at an auction. It would appear that the conditions of sale can be set by the directors of the company on such terms as they think fit. Certainly such conditions of sale should include provisions requiring payment by the successful bidder immediately or virtually immediatly after the auction.

— The Act does not specifically require all the shares to be auctioned at once. Inevitably at an auction a certain percentage of the relevant company is available in potentially one parcel and (depending on the success or otherwise of the call) it is possible for control of a company to change at an auction as a result of a purchase of that parcel. Two steps can be taken to minimise the chances of this happening, namely:
  (i) The shares available for sale should be sold in several lots commencing with small parcels and increasing thereafter so that as the auction proceeds scrutiny can be given to the purchaser of those parcels.
  (ii) It is possible (although to the writer's knowledge never been done in New Zealand) for several auctions to be held over several days there being no requirement that there be one auction only, merely that forfeited shares '... be offered for sale by public auction'[24]

— The day of the auction should never be specified on a Monday because of the provision that the office of the company be opened on the preceding day. This practical aspect should not be overlooked as opening an office on a Sunday can be difficult.

If after the auction the shares are not sold then the forfeited shares are registered in the name of the company and until reissued are the property of the company and deemed to be held in trust for the company.[25] Before any of those shares can be re-issued they must first be offered *pro rata* to every member of the company such offer to remain open for 14 days.[26]

The bulk of the above described provisions are very similar to the provisions relating to calls on shares found in the Code. The main differences between no liability companies in New Zealand and in Australia are, therefore:

— A no liability company can be formed as a private company in New Zealand;

— There is no provision in the Act that permits a New Zealand no liability company to as of right issue its shares at a discount. Any no liability company wishing to issue shares at a discount must obtain shareholder and Court approval, exactly as if it were a company limited by shares;

This latter distinction is a significant difference and has deterred a number of people from incorporating mining companies as no liability companies. When a no liability company has exhausted part or all of its

24 *Ibid.* s. 436(1)
25 *Ibid.* s. 438(1)
26 *Ibid.* ss. 438(2), 438(3)

capital in pursuit of an unsuccessful mining venture, then the raising of additional funds can only be achieved by either a further call, or alternatively obtaining Court approval for the issue of shares at a discount. The ability to issue shares at a discount has clearly kept many Australian no liability companies going through troubled times, but no such relief is available for New Zealand companies.

STOCK EXCHANGE LISTING REQUIREMENTS FOR MINING COMPANIES

In this section of this commentary it is intended to comment briefly on the New Zealand Stock Exchange Listing Requirements (the 'Listing Requirements') to the extent that they specifically apply to mining companies.

The starting point is the definition of a Mining Company and Mining Exploration Company for the purposes of the Listing Requirements namely:

> Mining company — one which is principally engaged in the exploration for or the extraction of any mineral, oil or natural gas, and includes a company which through either itself or a subsidiary, holds an interest in any mining tenement where that interest or interests is or are the principal part of the company's business or accounts.[27]
>
> Mining exploration company — a mining company which in the opinion of the Exchange is wholly or principally engaged in exploration for oil or minerals.[28]

These definitions are quite different from the definition of a mining company found in the Act. The result is that a company that is a mining company pursuant to the Act is not necessarily a mining company within the Listing Requirements. There are therefore anomalous situations that exist in New Zealand where listed companies that commenced their existence as mining companies in both senses of the word now have their securities quoted not on the Mining Board but on the Industrial Board. However, where they continue to be no liability companies they continue to be mining companies within the definition of the Act.

The bulk of the Listing Requirements in relation to mining companies were taken from provisions found in the Australian Stock Exchange Listing Requirements. However while the Australian Requirements have been updated and expanded from time to time, the New Zealand Listing Requirements have not been significantly amended since 1985. The principal provisions and restrictions applicable to mining companies are summarised as follows:

- Shares in a mining company issued to vendors for a consideration other than cash are to be held in escrow for 12 months with the relevant share certificates to be held by a bank or other recognised trustee company.[29]
- In the case of options granted to any person on terms other than those granted to the public then those options will not be listed at all.[30] Any options so granted and referred to in a prospectus cannot

27 New Zealand Stock Exchange Listing Requirements Regulation 255
28 *Ibid.* R. 255
29 *Ibid.* R. 256(1)
30 *Ibid.* R. 256(2)

be exerciseable on a date later than one month prior to the expiry of any options offered to the public under that prospectus. Options subscribed for in terms of a public issue in the same way and under the same terms and conditions as those applying to members of the public will not be classified as vendor options unless the cash used to subscribe for them comprises all or part of the proceeds of any consideration paid by the company to a vendor for the purchase of any of his assets.[31]

The above provisions will be familiar to most Australian securities practitioners. However in a recent instance in New Zealand certain shares in a mining company were subscribed for cash. The company then acquired a large range of mineral tenements both in New Zealand and in Australia. Prior to the company obtaining listing the mining tenements were all revalued (upwards of course) and from the revaluation reserve thus created a bonus issue was made. The result was to dramatically increase the number of shares held by the original subscribers. This transaction has been considered by the New Zealand Stock Exchange and they have not classified the bonus shares as vendor shares for the purposes of the Listing Requirements.

- There is a general provision that in the event of a takeover announcement or takeover offer the Exchange has a discretion to release vendor securities from the escrow requirements.[32]
- Where a listed company becomes a party to a joint venture agreement the listed company is required to have incorporated in the contract a provision to the effect that any significant discovery of mineralisation or hydrocarbons is to be immediately conveyed to the Exchange in order to avoid a false market in the listed company's securities.[33]
- A listed mining company is required to notify the Exchange immediately following the expiry date of vendor options as to the number of options exercised and the number of options which will have lapsed.[34]

A mining company seeking to have its shares listed will not qualify for admission unless:

- The company has at least $400,000 in working capital.
- The vendors or the company have commenced exploration work and the application for listing is accompanied by a report verified by both an independent qualified accountant and a geologist on the expenditure on such work and on the results obtained. Prior work carried out by some other party is also to be included.
- The application for listing is required to be accompanied by a report by an independent qualified engineer as to the description, state, and suitability of the equipment which the company uses or proposes to acquire for the purposes of its operations.

31 *Ibid.* R. 256(2)
32 *Ibid.* R. 256(5)
33 *Ibid.* R. 256(4)
34 *Ibid.* R. 256(6)

— Where the company has vendor shares, the terms of issue of those shares are to provide that share capital issued to members of the public shall rank in priority to vendor shares in the event of a winding up.[35]

These provisions are in addition to the extensive requirements in respect of a prospectus proposed to be issued by a mining company. Such a prospectus must contain (in addition to the requirements contained in the Companies Act, Securities Act or elsewhere in the Listing Requirements) the following information:

— A map of and a report on the mining licences by a qualified geologist or mining engineer. Such a map must be drafted so as to leave no doubt as to the extent and location of the boundaries and must be prepared either for the purposes of the prospectus or by a government authority.[36]

— In the case of an oil exploration venture, appropriate geological maps or cross-sections relating to the relevant licence area are to be supplied together with a report by a person who is a qualified geologist.[37]

— Where appropriate, a report by a qualified engineer as to the description, state, and suitability of the equipment which the company uses or proposes to acquire or lease for use in the carrying out of exploration operations.[38] Any engineer including his report is required to state his qualifications.[39]

— Until recently there was a requirement that every director of a company seeking listing and who holds an interest exceeding 5 percent of the voting capital in any other mining or mining exploration company (held personally through nominees or otherwise) was required to state the nature and extent of those interests. This provision has, however, since been dropped because of the enormous additional detail this would apparently have created in the case of some one or more prospectuses submitted for approval.

— The mining interests of the company are to be clearly described in a schedule stating the areas, nature of title and where that title has not been formally approved or reported a solicitor's report on the status of the application. The schedule is also required to state the name of the person or corporation in whose name the title is, and if it is not the company, then the solicitor's report must specify the steps taken to protect the interests of the company. The schedule should also indicate whether the company knows of any reason why the Minister might withhold his consent to an application and the details of work and expenditure obligations relating to the tenement.[40]

35 *Ibid.* R. 257
36 *Ibid.* R. 258(2)
37 *Ibid.* R. 258(3)
38 *Ibid.* R. 258(4)
39 *Ibid.* R. 258(5)
40 *Ibid.* R. 258(7)

- Where a mining company has acquired an interest or entered into an agreement to acquire an interest in a mining tenement from any person then the name of the vendor is required to be included and if the vendor is a company then a statement as to the beneficial owners of the shares in that company.[41] Details about the vendor including the manner in which the vendor acquired the mining licence, the purchase price paid and any amount outstanding on that purchase price is to be included together with details of any work done by the vendor on developing the mining licence, including money spent.[42]
- The date of acquisition of the interest in the mining licence by the company and the purchase price paid is required to be stated and it should be noted that consideration includes the right to subscribe for or nominate persons to subscribe for the shares offered by the prospectus.[43]
- The mining company must provide a detailed analysis of the purchase price paid by the company for the interest in the mining tenement showing how it was arrived at and whether or not the company had recourse to expert reports on the mining tenement before the purchase and if so a summary of each of those reports should be set out.[44]
- The mining company should issue a statement by the directors as to whether the mining licence has previously been prospected or developed and if so a summary of those results.[45]
- The mining company must include a financial statement by the directors setting out a programme of expenditure for exploration of each mining tenement and explain how any excess funds raised pursuant to the new issue are to be expended by the directors.[46]
- Any reference to a valuation should state the basis of valuation. Copies of the valuation are to be made available.[47]
- Particulars of royalties are to be included together with details of any agreements or contracts entered into between the company and any of its directors.[48]
- If the Exchange is not satisfied as to the qualifications or independence of any person providing an expert statement the authority of the relevant broker to act can be withheld until such time as the Exchange has been provided with an acceptable statement.[49]

These are the formal requirements in relation to a new issue. It should be noted that all of the New Zealand Stock Exchange Listing Requirements are currently being reviewed together with those provisions

41 *Ibid.* R. 258(8)(a)
42 *Ibid.* R. 258(8)(b) & (c)
43 *Ibid.* R. 258(8)(d)
44 *Ibid.* R. 258(8)(a)
45 *Ibid.* R. 258(8)(f)
46 *Ibid.* R. 258(8)(g)
47 *Ibid.* R. 258(9)
48 *Ibid.* R. 258(10) & (11)
49 *Ibid.* R. 259

particularly applicable to mining companies. It is unlikely that this revision will be completed before the end of July 1987.

What is perhaps of equal interest are the internal steps taken by the Stock Exchange Association in relation to their perusal of prospectuses.

The Stock Exchange, before giving approval, requires to see a version of the prospectus as near as possible in its final form, that is to say typeset and with photos and colours included as appropriate. However, for the purposes of reviewing a mining company prospectus the Stock Exchange prefers to receive a copy generated from a word processor at least two to three weeks before any approval is expected to be given. The Stock Exchange considers that the examination of prospectuses is an interactive process as between the relevant broker supporting the application, the company and the Exchange. Because of the experience of the Exchange in recent times relating to some recent mining floats the rigour with which the Exchange is examining prospectuses is being increased.

Essentially the Exchange looks for basic compliance with the precise provisions of the Regulations as they are applicable to mining companies. While this is relatively flexible the point should be made that it would appear that the approach taken by the Exchange is somewhat less vigilant than appears to be the case in Australia.

Upon receipt of a draft prospectus the Exchange will then forward it to one of a panel of independent geologists (which includes Australian geologists) for comment. The purpose of this report is to obtain an independent perspective on the merits of the proposal. The Exchange has found that the biggest problem is inevitably associated with the valuations that are attributable to mining licences because of the highly subjective nature of such valuations. The Stock Exchange does not consider that it is in a position to make value judgments except in extreme cases. Where the Exchange has doubts it usually deals with those doubts by requiring more disclosure of information.

In addition to having the proposed prospectus checked by an independent geologist the Stock Exchange also independently checks the status of relevant mining licence tenements at the Mines Division of the Ministry of Energy where licences are registered and recorded.

Final approval of a prospectus will only be given when the Stock Exchange is happy with the content of the document and is satisfied that all the disclosure requirements are met. This final approval will usually be granted before the prospectus is committed to print.

The approach taken by the Companies Office to mining company prospectuses is no different to its approach to any other prospectus. Draft copies of the prospectus should be lodged with the Companies office seven working days before it is hoped to have the prospectus registered. The Companies office examines prospectuses to ensure compliance with the provisions of the Securities Act and Securities Regulations. It sees its role as facilitating commercial transactions and, for this reason, processes the approval of prospectuses as expeditiously as is prudent. There are no requirements in the Securities Regulations particular to mining companies and a commentary on those Regulations is not appropriate in this paper. There are no special internal procedures at the Companies Office for

mining company prospectuses except ensuring that the consents of experts to the inclusion of their reports are obtained. The lengthy and time consuming requisitions that can be expected when prospectuses are lodged with the Australian Corporate Affairs Commission are seldom duplicated in New Zealand.

The New Zealand Securities Commission undertakes no examination of proposed prospectuses prior to registration.

The result is that the responsibility for the content of prospectuses in New Zealand is largely left to the directors of the company and its advisers. The further result is that the process for preparation, examination and registration of prospectuses in New Zealand is very much shorter than the equivalent process in Australia.

On-Going Requirements

Mining companies have a number of on-going disclosure and reporting requirements additional to those required by other listed companies. One such on-going requirement is the obligation to provide a quarterly report to the Exchange providing details of production, development and exploration activities, expenditure incurred thereon including a 'balanced interpretation' of any exploration results.[50] The quarterly report is also required to state:

(a) The location of mining tenements still held by the company.
(b) Location of mining licences relinquished by the company.
(c) Current activities of the company.
(d) The so-called 'ML Report'.[51]

The ML Report is a relatively onerous requirement which amounts to a disclosure of a mining company's cash flow during the relevant quarter. The report is required to state details of all liquid funds held at the beginning of the quarter (liquid funds being deemed to include listed securities held by the company), to summarise funds received during the quarter (including details as to the source of those funds) and details as to the expenditure of those funds. The final requirement of the ML report is a statement as to liquid funds at the end of the quarter.

It will be appreciated that mining companies that cease to be mining companies within the terms of the Listing Requirements have an understandable desire not to have to continue to produce ML Reports.

Any statement in such a quarterly report purporting to give details as to the reserves of a company must be signed by a person who is a member of the Australian Institute of Mining and Metallurgy or some other professional organisation acceptable to the Exchange, such as the American Association of Petroleum Geologists, and with a minimum of five years experience in the field of activity upon which he is reporting.[52]

The reporting obligations of a mining company include the obligations for oil exploration companies to provide the following mini-

50 *Ibid.* R. 260
51 *Ibid.* R. 260(2)(d)
52 *Ibid.* R. 260(3)

mum information on a daily basis as to current drilling operations namely:

(a) The time of the report
(b) The current depth of the well.
(c) The depth drilled since the last report.
(d) The current operational status of the rig.

In addition to the foregoing, on every seventh day, the relevant company is required to report any hydrocarbon indications observed while drilling and to list the participating companies and their percentage beneficial interests in the well. Any significant find of hydrocarbons is required to be communicated immediately to the Exchange as is any curtailment of a drilling programme. However, where a company is participating in a well being drilled outside New Zealand and where the majority of listed participants are companies whose home exchange is not the New Zealand Stock Exchange, the New Zealand listed participants will fulfil the New Zealand reporting obligations by reporting according to the requirements of the overseas exchange.[53]

TAXATION OF MINING – PROGNOSIS FOR THE NEW REGIME

Messrs. Curry and Holm have outlined the general principles affecting taxation of mining in New Zealand. As the taxation regime is presently being reviewed, no attempt will be made in this commentary to further examine the existing regime. Instead some additional comment is made on the objectives of the proposed reforms.

As was mentioned in the primary paper the taxation of mining companies in New Zealand is presently subject to comprehensive review. The review is zero based. As a result of several public statements, it has been made plain to the mining industry at large that the Government's thinking on the subject can in large part be deduced from the Consultative Document on Petroleum Mining Taxation ('the Consultative Document') produced by the Government early in 1987.

The reasons for reform are stated in a preface by the Minister of Finance.

> The proposed new regime represents the latest in a series of moves towards a more neutral taxation of different business activities. This is for two reasons. The first is that wide-ranging tax incentives and special treatments given to specific industries have distorted investment patterns in New Zealand. Capital has been directed into certain areas of activity to exploit concessionary tax arrangements, rather than because such investment represented the best return on capital.... The new regime will bring taxation of petroleum mining closer to the normal accounting practices adopted for financial reporting purposes.

The objective of the changes is '... to move to a more neutral tax treatment' and to bring that tax treatment '... closer to the normal accounting practices adopted for financial reporting purposes.'[54]

The first result of such an approach is that the more obvious and direct incentives applying to many industries in New Zealand have been

53 *Ibid.* R. 261
54 The Consultative Document on Petroleum Mining Taxation 5

removed. In the petroleum and mining sectors, deductions made available to persons subscribing for shares in mining or petroleum companies have been removed. The concessional tax rates for petroleum companies have been removed and it is clearly only a question of time before equivalent concessions for mining companies are also removed.

The approach of the Consultative Document is that many of the special tax provisions for petroleum mining companies are simply incentives and for that reason should be removed. Thus it is proposed that exploration expenditure which has hitherto been deductible in the year incurred be subject to a modified regime whereby:

(i) general exploration work (*e.g.* seismic data acquisition, geological and geophysical work and the costs of licence acquisition) can be deducted only when the relevant licence is abandoned.
(ii) costs incurred prior to acquisition of a licence can only be deducted against any income produced as a result of that expenditure.
(iii) expenditure on a well which proves to be dry and abandoned can be written off when incurred.

In the petroleum mining context development expenditure was permitted to be amortised over five years. In the mining context all development expenditure can be allowed as a deduction in the year the expenditure is incurred[55] and in some circumstances, can be claimed as a deduction before the expenditure is incurred.[56]

In the Consultative Document the treatment of development expenditure for petroleum mining is proposed to be changed so that development expenditure be amortised over the expected life of the field with the costs of land acquisition and contouring not deductible at any stage.

From the foregoing it can be surmised that any new regime for the taxation of mining companies will include proposals providing that:

(i) Development expenditure for a mine be amortised over the expected life of the mine with land acquisition costs not deductible at any stage.
(ii) Exploration expenditure relating to a specific licence to be deductible only when the licence is surrendered or expires.
(iii) Exploration expenditure not directly related to a specific licence to be deductible only against any income arising from that expenditure.

Changes such as these would have far reaching effects on the New Zealand mining industry which is presently enjoying something of a renascence.

The Consultative Document produced a large number of submissions from the petroleum industry. Perhaps because of the volume of those submissions, and the nature of the issues raised in them the position at the time of writing this commentary was that the review of taxation of petroleum mining has been delayed. Since the discussion document on the taxation of mining was to await the petroleum mining review that discussion document may not appear for some time.

55 The Income Act 1976 s. 216(8)
56 *Ibid.* s. 216(9)

The original intention was to have a new tax regime for both mining and petroleum in place by 1 April 1988. There must be some doubt as to whether this can be achieved. However, it is also clear that many of the existing provisions will be amended in some form or other and that it would be unwise to make long term plans based on the continuance of the existing regime.