DENTONS

The wind is rising on offshore renewable energy

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The release of Cabinet Decisions for a prospective offshore renewable energy regulatory framework takes us a significant step forward.

Cabinet has recently announced key decisions on a proposed regulatory regime for offshore renewable energy development in New Zealand.[1] This represents a significant opportunity for offshore wind developers and investors, and the country as a whole.

In broad terms, the announced regime is consistent with consultation undertaken under the previous Labour government, with some tweaks to the application criteria and further details announced. In terms of timing, the plan is for new legislation to be introduced later this year and passed in mid-2025. That will pave the way for a first 'application round' for feasibility permits to begin in late 2025, with permits issued in 2026.

Cabinet confirmed a two-tiered permitting approach to the regime:

- Developers can apply for a **Feasibility permit**, which will cover a designated area and allow developers to conduct feasibility studies, secure necessary approvals, and prepare for the commercial phase. It may be issued for up to a term of 7 years (with limited scope for extensions to be granted), and operates under a "use it or lose it" principle, where failure to make progress towards commercial development (and hit project plan milestones) could result in the permit being revoked. A new 'quid pro quo' of the exclusive[2] permit will be a requirement for developers to share the results of their feasibility studies at the end of the feasibility period.
- Feasibility permit holders will have the exclusive right to apply for a **Commercial permit** in respect of the same (or reduced) area, which grants them the rights to construct, operate, and maintain offshore renewable energy projects within the permitted area for a period of up to 40 years, with the ability to seek extensions up to a further 40 years (with decommissioning obligations kicking in at the end of the project life).
  The permit area both the feasibility and commercial stages will cover an area that is "reasonable for the proposed development." Cabinet has indicated that 250km^2 is likely to be needed for 1GW developments, but there will be no maximum area in the legislation.

In parallel to the permits obtained through this regulatory regime, developers will also be required to secure various environmental and other approvals as mandated by existing legislation, such as the Resource Management Act (RMA), the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act (EEZ Act), and the Marine Mammals Protection Act, among others. However, it will be necessary to first secure a feasibility permit before applying for such approvals.

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[1] Cabinet papers and summary of the proposed new regime are available at: https://www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-generation-and-markets/offshore-renewable-energy

[2] 'Exclusive' as against other renewable energy developers – the feasibility permit does not appear to prevent anyone else from seeking to undertake other activities (e.g. aquaculture, seabed mining) in the same area, although the Cabinet Paper includes a proposal for 'safety zones' around renewable energy infrastructure.

The MBIE website provides a useful summary of the design of the proposed regime, available here. In this article we take a closer look at the application criteria and what they will likely require in practice, environmental approvals and the need for a supportive policy regime, competition for space (including with other activities), route to market issues (particularly the Government's current stance on CfDs), and comparisons with other regimes overseas.

Securing permits – application process and criteria

The issue of feasibility permits will be a comparative process (meaning that competing or overlapping applications will be compared on their merits). The application criteria confirmed by Cabinet cover essentially the same ground as the list of criteria included in earlier MBIE consultation. However, the criteria have been rationalised[3] and split into 'primary' and 'additional' considerations, as follows:

Primary Considerations

- Energy system benefits; and
- Technical and financial capability of the applicant

Additional considerations

- Wider economic benefits;
- Decommissioning arrangements;
- Compliance record;
- Existing rights, interests and limitations;
- Iwi and Hapū engagement; and
- National security or public order risks

Exactly what is required under each of these headings will presumably be confirmed through the legislation, detailed regulations, and/or accompanying guidance material. We provide further analysis of the matters that are likely to be relevant to each of these criteria in the **Annexure** to this article.

Applications for feasibility permits will be determined by the Minister for Energy (who can delegate this decision to MBIE). MBIE will notify applications and undertake public consultation as part of this process. However, only applicants and permit holders will have the ability to appeal permitting decisions (such as the decline of a commercial permit, or the revocation of a permit, though not the decline of a feasibility permit).

Applications for commercial permits will be assessed on a 'pass/fail' (rather than comparative) basis, with a focus on 'final checks before construction begins'. The applicable criteria at this stage will be:

- Technical and financial readiness;
- Decommissioning arrangements;
- Iwi engagement; and
- National security and public order risks

[3] For example, the new criterion "technical and financial capability" was previously described as "financial, technical, and commercial capability'; "energy system *benefits*" was previously "energy system *impacts*"; "wider economic benefits" was previously "indicative economic development opportunities"; "decommissioning arrangements" was previously "indicative decommissioning capability"; "compliance record" appears to replace the health and safety capability criterion (or expands it to capture environmental compliance as well); iwi and hapū "engagement" was previously "involvement prior to and during feasibility" (and the Cabinet Paper indicates a slightly narrower focus on treaty settlements); "existing rights, interests and limitations" is brand new (we discuss the possible implications of this below); and "national security or public order risks" was previously "national interest considerations".

Environmental Approvals

The Cabinet Paper notes that work on developing 'national direction' for offshore wind and infrastructure (in relation to environmental approvals under the RMA and EEZ Act) will occur in parallel with the proposed permitting regime. While it will be some time before developers are in a position for environmental approvals (and will need feasibility permits first in any case), getting the settings right here will be important.

Within New Zealand's territorial sea, resource consents will need to be obtained under RMA, and beyond that marine consents will be required under the EEZ Act. The intention is to keep the regulatory overlap as small as possible, so that environmental considerations are primarily addressed in the context of seeking environmental approvals (and do not feature in the feasibility permit criteria, aside from in terms of the applicant's track record).

The Government has also indicated that a 'one-stop shop' approach for environmental approvals and commercial permits will be considered.

Currently, offshore wind energy is not specifically provided for in the regulations under the EEZ Act, meaning that any applications would be treated as 'discretionary' activities by default. Unlike the RMA, the EEZ Act does not have complementary planning and policy regime in place. This means that attempting to progress applications in the absence of environmental 'national direction' would be likely to result in uncertainties and challenges. This has been the experience for seabed mining applications, which have been particularly difficult and uncertain, with ongoing litigation and somewhat conservative approaches taken by the courts. Key issues have included relatively onerous 'information principles,' a lack of clarity around the level of information, monitoring, or certainty required, and a lack of policy guidance or support.

It is important to learn from that experience in developing a more comprehensive regulatory and policy framework for offshore wind. The proposed 'national direction' could include greater use of:

1. EEZ Regulations, which can prescribe specific requirements, methods, and technical standards for offshore renewable energy projects. For example, regulations could prescribe requirements for baseline monitoring and the certainty of information needed to secure an approval (while these matters are often addressed in guidance material, this tends to lack formal status so does not assist greatly in providing certainty to applicants).
2. EEZ Policy Statements, which are historically under-used but functionally similar to policy statements under the RMA. An EEZ policy statement on offshore wind could establish clear objectives and policies to guide decision-making, potentially focusing on the benefits of offshore renewable energy.

In public statements Ministers have touted the proposed "Fast-track" consenting process as a solution to the challenge of securing environmental approvals, and the Cabinet Paper confirms this process will be made available.[4] However, that may not be a complete answer.

A number of offshore wind developers (as well as actors in other sectors) have expressed reluctance to make use of the fast-track process, at least as initially proposed (the recent decision to remove final decision-making power for Ministers may address some of those concerns). Regardless of the consenting pathway used, building and maintaining social license with affected communities and iwi over the relatively long lifetime of these projects will remain critical.

The Fast-track approvals process would simplify the consenting process (by eliminating public submissions and tipping the scales in favour of granting consent). However, it is unlikely to reduce the technical work required to support an application, or provide any certainty as to the standards of information required or the mitigation of effects. There is also a sense that given the numerous other challenges at play (including international supply chains, port infrastructure, transmission line upgrades, and grid connections), the time required for environmental consenting may not necessarily be the 'rate limiting step'.

[4] The Fast-track Approvals Bill currently excludes offshore renewables until the permitting legislation comes into force.

Overall, developing a robust and comprehensive environmental approvals framework, aligned with the new offshore renewable energy regulatory regime, will be crucial to providing certainty, streamlining the process, and ensuring the sustainable development of this sector.

Competition for Space

Competition for space and the use of finite marine resources requires careful navigation, both in resolving overlaps between feasibility applications for offshore renewable energy projects, and in resolving activities with other mutually exclusive activities.

Competing renewable energy permit applications

As noted above, feasibility permit applications will be assessed against each other on a comparative basis (insofar as they compete for the same space, and/or the use of the same infrastructure). Having application 'rounds' will enable competing applications to be considered side by side and avoid a "first in first served" approach.

Previous consultation had suggested that where feasibility permit applications overlap, applicants would be given the opportunity to resolve the overlap between themselves. However, the Cabinet Paper states that after further analysis that is no longer considered appropriate due to risks of anti-competitive behaviour.

Instead, the current proposal is that where proposed permit areas overlap, "the regulator may invite applicants to nominate another area."[5] Given there are a few critical sites identified as the most desirable (e.g. in South Taranaki and Waikato), strategic site selection may be important. We expect further detail to be released setting out how the "invitation" process will work when overlaps occur.

Competition with other activities

The Cabinet Paper also notes the potential for conflict between proposed offshore wind developments and other mutually exclusive activities.[6] In this regard it highlights the contest for space in the South Taranaki Bight, and the anticipated overlap with Trans-Tasman Resources' application for seabed mining. Notably, since the Cabinet Paper was prepared in June, Trans-Tasman Resources has been successful in expanding the area of its mining permit under the Crown Minerals Act.[7]

In this regard the Cabinet Paper notes that there may be an opportunity to resolve such overlaps through "a level of strategic planning in the marine environment". We note that in the absence of such strategic or spatial planning, the default setting between competing kinds of activity (as opposed to competing offshore wind developments) is a "first in first served" regime – but one in which offshore wind developers do not yet have a regime to apply under, so cannot be "in" until the first feasibility permit application round, at the earliest, meaning they are inherently at a disadvantage.

This situation arises because:

- The feasibility permit criteria will now include "existing interests," which will presumably include any environmental approvals (and potentially mining permits) already granted; and
- In determining applications for marine consent to authorise an offshore wind development under the EEZ Act, activities that are already authorised by marine consent, such as seabed mining, must be considered as "existing interests".

Further, as the Cabinet Paper notes, "other users could gain a consent, including through the fast-track approvals process, which prevents an offshore renewable energy project from going ahead." The fast-track regime will not provide for merit appeals (although anyone with an interest greater than the general public can appeal on points of law).

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[5] This can be contrasted to the approach in Australia where applicants are invited to resolve overlapping applications between themselves (and if overlaps are not resolved, applicants are invited to submit financial bids).

[6] Offshore wind permits in Australia do not stop other existing activities (i.e. mining) from occurring. Offshore wind permit holders could be committing an offence in certain circumstances if they interfere with existing activities.

[7] See: https://newsroom.co.nz/2024/09/03/seabed-mining-permit-area-nearly-quadruples/

Addressing these issues related to competition for space, overlapping legal interests, and potential limitations in the public participation and appeal processes will be crucial for ensuring a fair, transparent, and sustainable development of the offshore renewable energy sector. Strategic or spatial planning could well be an important part of that.

Decommissioning and Security

The Cabinet Paper also includes further details on the intended decommissioning obligations under the new regime. To provide reassurance that developers will decommission renewable assets at the end of their working lives (rather than potentially leaving this to the Crown), permit holders will be required to:

- Provide a decommissioning plan, a cost estimate for decommissioning (based on fully removing the infrastructure; and
- Obtain and maintain one or more financial securities to enable the Crown to recover decommissioning costs in the event of default by the permit holder.

Details are still to come in terms of exactly what will be required – which will be set out in regulations and guidance. The Cabinet Paper simply notes that the form of financial security to be obtained, and the amount to be secured, are to be determined by the Minister "based on the cost estimate and will be required to reach certain proportion of overall decommissioning cost at particular milestones, reflecting points of particular risk in the lifetime of the project."

In the event of a commercial permit being transferred to a new party, the transferee will be required to put in place adequate financial securities for decommissioning – and the transfer itself will also need to be approved by the Minister. By default, the original permit holder will be subject to "trailing liability" (i.e. will themselves remain liable even after the permit is transferred), although the Minister will have a discretion to decide to remove that requirement on a case-by-case basis at the time of approving a transfer. This flexibility is welcome, although practically, exercise of that Ministerial discretion may become a condition precedent to most permit transfer transactions.

Overall, it appears the regime will end up fairly well aligned with the Crown Minerals Act (following its review). No doubt prospective developers will be awaiting further detail with interest. In particular, the level of cash (or cash equivalent) security that will be required – as the financing costs will directly impact on development cost and whether projects meet FID.

Viability – Route to Market

As part of these announcements, the Minister for Energy has signalled that the current Government is not intending to offer revenue stabilizing mechanisms such as a 'contract for difference' (or CFD) to support the development of the offshore wind industry. That is consistent with previous communications up until now.

As the Cabinet Paper itself acknowledges, internationally 'most offshore wind projects have been supported by some form of government-backed price support mechanism, e.g. contract for difference, to provide certainty over the future electricity price, which enables access to the significant project finance required at a cheaper rate'.

An offshore wind farm requires a significant amount of capital to build due to its size (with a single turbine being not much smaller than the Auckland Sky Tower). Securing a "route to market" and confirmed "offtake" (i.e. confirmation that the project has long-term committed revenue) is a prerequisite for a project to be "bankable." Lenders and other investors need that confirmation in order to provide funding.

In this context, the Government's stance will be disappointing to developers, and also seems at odds with the stated intention in designing the regime to "borrow the best" from "more mature regimes in the United Kingdom, Netherlands, Denmark and Australia" (all of which administer some form of CFD mechanism[8]).

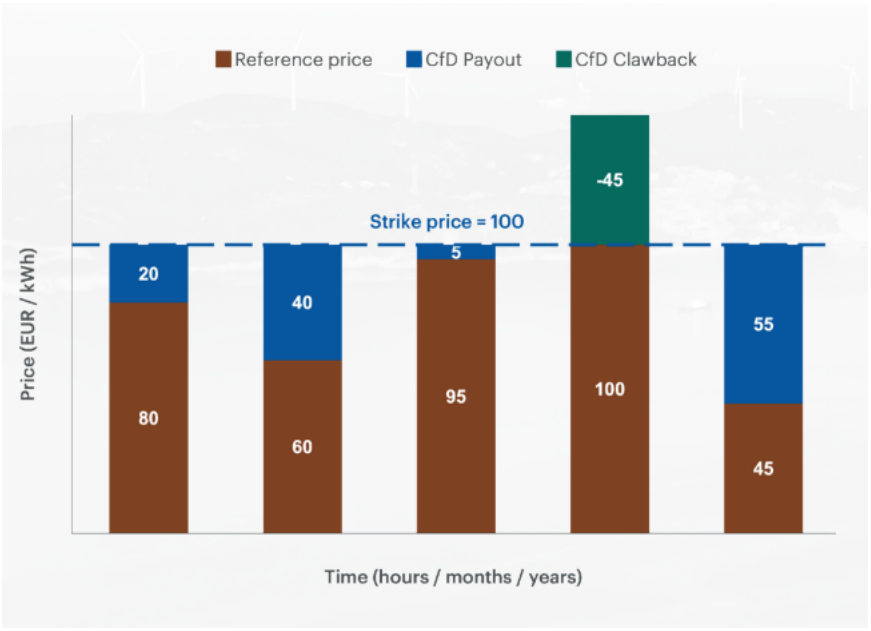
[8] A two-way CFD was recently confirmed as the most appropriate and effective mechanism to encourage investment in large scale projects in Northern Ireland, as well: Design Considerations for a Renewable Electricity Support Scheme for Northern Ireland, Department for the Economy, April 2024. Page 5.

Accordingly, we suggest this warrants a second look. A CFD solution does not need to be built into the regime on day one, instead such arrangements could be entered into further down the track (and under a separate framework outside of the permitting legislation).

A CFD solution

In terms of the potential features of a CFD solution:

- CFDs act as price stabilizers, guaranteeing a fixed "strike price" for the electricity generated, with developers receiving a top-up payment if market prices fall below the strike price, or paying back the difference if market prices exceed the strike price.



- It is typically a long-term arrangement of 10-15 years (or longer).
- In the UK, the rapid decline in strike prices over successive CFD auctions has vindicated the model, demonstrating that while not cost-neutral initially, a CFD solution can drive cost reductions and make clean energy more competitive in the long run.
- A CFD might soften market wholesale pricing – meaning that the cost to fund the CFD solution can be offset by the savings to consumers experienced through a lower wholesale market price for electricity. In a market like New Zealand where we are experiencing high levels of price volatility, this could be a clear benefit.
- The CFD is not a silver bullet. As it only generates difference payments it is still up to the generator to capture the market price – i.e. the developer still carries the risk of finding customer(s) / offtaker(s). In the UK, the CFD scheme also includes an “offtaker of last resort provision” which further mitigates this risk – albeit with added cost if activated.
- The CFD payments can be funded centrally or through a levy on electricity users.

Adding levers to the Government’s Infrastructure tool kit

In addition to increasing the bankability of projects, a CFD solution could provide the Government with a number of opportunities, to add to its tool kit, to fund and manage critical infrastructure, outside of purely acting as a regulatory enforcer.

Other positive features of a CFD solution to enable infrastructure, based on examples overseas, include the following:

- The CFD contract itself can be a highly effective vehicle for Government to obtain contractually enforceable undertakings from developers. This can be used to support not only the offshore wind infrastructure but other large-scale developments which are in the public interest. For example, the Government could negotiate with a developer that in return of x% change in the strike price, the developer would build infrastructure in the local community such as roads, ports, factories, and so on.
- In an environment where the Government is looking at activating PPP models, utilising CFDs to enable the private sector to build much needed infrastructure seems to us to be a genuine opportunity.
- Infrastructure and public good projects can be undertaken by the private sector but with a high degree of oversight by government and remedies for non-delivery under the CFD contract.
- The CFD contract can give the Government a commercial lever which it can utilise and enforce contractually against developers. This can be much more effective than resorting to regulatory enforcement action against permit holders (which can be costly and punitive rather than solutions-focused).
- By its nature, the CFD payments do not start until the generation is built and then are spread over the life of the contract. This enables upfront capital to be built with the cost to Government deferred, spread out over the term, and with the option to keep it off Government balance sheet (via a levy).

CFDs could also be used in conjunction with other mechanisms to support the bankability of off-shore wind projects, for example Power Purchasing Agreements could be entered into with major electricity users, including potentially the Government, to provide security of offtake.

Offshore Transmission Infrastructure

The Cabinet Papers confirms that the funding and delivery approach to new transmission infrastructure will be a ‘hybrid model’, whereby:

- Commercial permit holders are generally responsible for planning, building, and funding new offshore transmission infrastructure. They may also choose to contract with Transpower to plan and build offshore transmission; and
- Transpower will become responsible for owning, operating, and decommissioning the infrastructure.

Further policy work is required in terms of the details of how offshore transmission infrastructure will be regulated. The Cabinet Paper refers to further consultation to be undertaken by MBIE in consultation with, Transpower, the Electricity Authority and the Commerce Commission. It appears Cabinet are favouring an approach similar to that in the United Kingdom, where the developer typically builds the offshore transmission infrastructure with a third party then acting as operator (i.e. Transpower in the New Zealand context).

Key issues to be worked through in this space will include arrangements for cost sharing, who takes the price risk to build transmission assets, the asset transfer price, and the timing of construction and lining this up with offshore generation assets and onshore transmission assets.

Conclusion

New Zealand continues to take exciting steps forward to bring offshore renewable energy to our shores. There remain a few problems to solve as the legal framework takes shape, and further policy work required in some areas. Nonetheless we take a lot of confidence from steps taken to date and the sector building activities being undertaken by Government, MBIE, offshore wind developers and advocates in this emerging market. Please get in touch with our experts should you wish to discuss.

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Annexure: Feasibility application criteria

The proposed assessment considerations are:

Primary Considerations;

- Energy system benefits; and
- Technical and financial capability of the applicant

Additional considerations;

- Wider economic benefits;
- Decommissioning arrangements;
- Compliance record;
- Existing rights, interests and limitations;
- Iwi and Hapū engagement; and
- National security or public order risks.

The scope of each of these criteria and the level of information required may only become clear once the new legislative regime and associated regulations or guidance material are in place. In the meantime, we have summarised what we expect to be relevant (based on the Cabinet Paper and earlier consultation material) in the table below.

Feasibility application criteria	
Primary considerations	**Likely requirements or relevant matters**

Energy system benefits	• Indicative information on:
	  ○ The volume and location of electricity generation
	  ○ Transmission plans
	  ○ System resilience measures
	  ○ Intermittent or firming solutions
	• Anticipated energy system benefits associated with the above

Technical and financial capability of the applicant	*Technical* • The applicant's experience and track record in developing and operating similar projects. • Access to the necessary technical expertise to successfully execute the project. • Ability to carry out the project plan while adhering to all legal obligations. *Financial* • Evidence of a strong financial position, demonstrating the applicant's ability to fund the project. • Initial financing in place to commence the feasibility stage of the project. The following matters may also be relevant (focussing on the project at hand, rather than the applicant's capability in the abstract): • A clear project plan outlining critical milestones. • Details on how they will manage project complexity and risks. • Indicative business plans for construction, operation, and decommissioning phases • The intended route to market for the generated electricity. • Estimated commercial return and conditions for a positive Final Investment Decision (FID)

Feasibility application criteria	
Additional considerations	Likely requirements
Existing rights, interests, and limitations	This is a new criterion, summarised in the Cabinet Paper as “management of existing rights, interests or limitations (i.e. so a project is not selected where it’s clear it could not go ahead, e.g. because of other permitted activities or a marine reserve in the area)”. In principle, the intention seems to be to bar feasibility permits from being granted over areas where it is ultimately not feasible or appropriate for a renewable energy project to go ahead. As noted above, it remains to be seen what role strategic/spatial planning could play in managing potential conflicts, and to what extent permissions already granted to third parties could act as a “veto” at the feasibility stage.

Compliance record	• The applicant’s track record and capability in meeting environmental standards and requirements. As part of this, it may also be helpful to confirm that there are no obvious environmental concerns associated with the permit area, and to note the environmental studies or assessments proposed during the feasibility period.
	• The applicant’s track record and capability in meeting health and safety standards and requirements. As part of this, it will likely be useful to demonstrate a comprehensive understanding of legal health and safety requirements, and potentially also provide a health and safety plan, noting that:
	  ○ The Health and Safety at Work Act 2015 will be the primary legislation governing health and safety requirements; and
	  ○ There is potential for enhanced requirements, such as those found in the Health and Safety at Work (Petroleum Exploration and Extraction Regulations) 2016, including WorkSafe approval conditions.

Iwi and hapū engagement	• Engagement with affected iwi and hapū throughout the process • Provision of an iwi engagement report • Ongoing iwi and hapū engagement, annual reporting, and agreed project involvement. • Implications of the project for existing legally recognised rights and interests of iwi and hapū, including treaty settlement interests

Wider economic benefits	• Indicative information on:
	  ○ Job creation potential
	  ○ Community impact
	  ○ Training and skills development opportunities
	  ○ Local investment prospects
	• Where relevant, potential to include economic development commitments into permit conditions

Decommissioning arrangements	• Financial and technical ability to successfully decommission projects. • Adequacy of decommissioning plan and financial arrangements
National security or public order risks	• Alignment with national security, public order, and international relations objectives • The economic impact of the project will be assessed. • The project must be consistent with New Zealand's values and interests. • A reassessment of national interest considerations will be conducted. • The assessment will be aligned with the Overseas Investment Act (OIA) • There will be a high bar for mitigations, with a presumption that overseas investment is in New Zealand's interests. • Cross-referral with the OIA regime will be necessary to ensure compliance