

LAW OF THE SEA AND FISHERIES

I. ENVIRONMENTAL PROTECTION

A. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

This Act was passed in August 2012. It establishes an environmental management regime for the New Zealand exclusive economic zone and continental shelf. The Act does not replace existing legislation dealing with the environmental impact of certain activities, such as fishing, which are covered by specific legislation. However, the Act does cover activities such as seabed mining, energy generation, carbon capture and storage and marine farming, which are not currently covered by appropriate regulation. The goal of the Act is to provide principles for making decisions about activities beyond the territorial sea, and to establish a process for considering applications.¹

Changes to the Act from the original Bill included a new purpose provision. The main environmental protection and planning legislation for territorial areas including the territorial sea is the Resource Management Act 1991, which has as its primary purpose to “promote the sustainable management of natural and physical resources”.² The purpose in the original Bill was stated as being “to achieve a balance between the protection of the environment and economic development in relation to activities in the exclusive economic zone and on the continental shelf”. However, in the final Act, the purpose reads “to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.”³ Sustainable management is defined in the same way in both Acts, to ensure consistency of interpretation across all terrestrial and marine planning areas.⁴ A second important change was the inclusion of significant penalties where there is non-compliance with the provisions of the Act.

Opponents of the Act criticised the Government for not including language reflecting the obligation in article 192 of the Law of the Sea Convention 1982 to preserve and protect the marine environment. They also argued that the regime in the new Act was more permissive of harmful activities than the Resource Management Act.

The Ministry for the Environment undertook consultation in 2012 on the appropriate content of the regulations, which will contain the details about which activities are considered permitted, discretionary or prohibited. It is expected that these regulations will be promulgated in 2013.

1 The Bill was discussed in Joanna Mossop “Law of the Sea and Fisheries” (2011) 9 NZYIL 329.

2 Resource Management Act 1991, s 5.

3 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 10.

4 Hon Amy Adams *Speech Moving the Third Reading of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill* (28 August 2012) 683 NZPD 4779.

B. Marine Legislation Bill 2012

This Bill was introduced into Parliament in August 2012 and is intended to address issues in New Zealand's marine legislation. One aspect of the Bill is to transfer the regulation of dumping and certain discharges from Maritime New Zealand to the Environmental Protection Authority. This required amendments to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. A second important aspect of the Bill is that it provides a legislative basis to allow New Zealand to become party to three international conventions. These are: the 1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims 1976; the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001; and the Protocol Relating to the Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973. Some criticism had been directed at the government for failing to implement the first of these conventions earlier in light of the significant bunker oil spill by the *Rena* in the Bay of Plenty in 2011.⁵ The Bill underwent its first reading and was sent to the Transport and Industrial Relations Select Committee in September 2012.

II. FISHERIES

A. Foreign Charter Fishing Vessels

In August 2011, the Minister of Fisheries and Aquaculture and the Minister of Labour convened a Ministerial Inquiry into the use of foreign charter vessels (FCVs) to fish in New Zealand's exclusive economic zone. The Inquiry was prompted by concerns about the employment conditions for foreign crew, vessel safety standards and breaches of fisheries and environmental legislation. The Inquiry report was issued in February 2012.⁶

FCVs have been used by New Zealand operators from the late 1970s when the New Zealand industry was expanding to respond to the declaration of an exclusive economic zone. Today, more than half of the volume of fish caught in the exclusive economic zone is caught by foreign vessels chartered to New Zealand companies. Currently, there is an industry Code of Practice for Foreign Fishing Crew which is intended to impose minimum employment conditions for foreign crews on FCVs. However, reports of poor wages and abuse of foreign crews has led to calls for change.

The Ministerial Inquiry made a number of recommendations that were immediately accepted by the government.⁷ These included strengthening the monitoring and compliance efforts of the Ministry of Agriculture and

5 See Joanna Mossop "Law of the Sea and Fisheries" (2011) 9 NZYIL 329 at 333.

6 *Report of the Ministerial Inquiry into the use and operation of Foreign Charter Vessels* (February 2012) <www.fish.govt.nz>.

7 David Carter and Kate Wilkinson "Foreign Charter Vessels Inquiry Report Released" (press release, 1 March 2012).

Forestry, the Department of Labour and Maritime New Zealand. The Inquiry also recommended changes to legislation to allow greater control over FCVs including the power to suspend or revoke the registration of an FCV, to expand the Health and Safety in Employment Act 1992 to crews of FCVs, and to amend the Fisheries Act 1996 to allow the reflagging to New Zealand of some or all FCVs.

The Government later announced that it would require reflagging of FCVs to New Zealand under demise charters after four years.⁸ This would ensure that the New Zealand operators chartering the vessel are responsible for health and safety, environmental impacts, employment conditions, ship safety and adherence with fisheries laws. During the transition period, stronger monitoring and enforcement would protect foreign crews on FCVs. In December 2012, Immigration Instructions replaced the Code of Conduct for Foreign Fishing Crew, which increased controls on the employment of foreign crews.

B. Fisheries Cooperation in the Pacific

In November 2012, the parties to the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region 1992 concluded an Agreement aimed at strengthening implementation of that treaty.⁹ The Agreement establishes a Niue Treaty Information System to manage exchanges of information, and provides for national authorities to be contact points responsible for ensuring that reporting requirements are fulfilled and information is managed correctly. The Agreement also establishes mechanisms for cooperation in fisheries surveillance and enforcement. In support of this Agreement, the governments of New Zealand, Australia, France and the United States issued a Pacific Maritime Surveillance Partnership Statement agreeing to strengthen and coordinate maritime surveillance activities in the Pacific region, and to improve the exchange and utilisation of information between their countries and Pacific Island countries.¹⁰

III. WHALING

New Zealand has formally sought to intervene in the case between Australia and Japan in the International Court of Justice regarding whaling in the Antarctic. In November 2012, New Zealand filed a declaration of intervention pursuant to article 63 of the Statute of the Court.¹¹ New Zealand

8 David Carter and Kate Wilkinson "Foreign Charter Vessels to be Reflagged" (press release, 22 May 2012).

9 Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (November 2012) <www.ffa.int>.

10 Murray McCully "Pacific Maritime Surveillance Partnership Statement" (press release, 1 September 2012).

11 Declaration of Intervention Pursuant to Article 63 of the Statute of the Court by the Government of New Zealand (20 November 2012) <www.icj-cij.org>.

relies on its status as a party to the International Convention for the Regulation of Whaling 1946 (ICRW) for the right to intervene. The particular question on which New Zealand wished to intervene was the proper construction of article VIII of the ICRW, which sets out the right to undertake whaling for scientific research purposes. New Zealand's declaration argued that article VIII permits the killing of whales under special permit only if: the killing is for the purposes of scientific research; the killing is necessary for, and proportionate to, the objectives of the research; and the government issuing the permit has discharged its duty of meaningful cooperation with the Scientific Committee and the International Whaling Commission.

The New Zealand Government formally protested against the South Korean announcement that it would commence a scientific whaling programme in the North West Pacific. In July 2012, the New Zealand Ambassador in Seoul was instructed to convey New Zealand's "serious concerns" about the proposal.¹²

In December 2012, New Zealand joined the governments of Australia, the Netherlands and the United States in issuing a statement calling for responsible behaviour at sea during the 2012-2013 whaling season in the Southern Ocean.¹³ In particular, the governments emphasised the need to ensure the safety of navigation and compliance with international regulations aimed at preventing collisions.

IV. OTHER

The issue of deep sea oil exploitation became a high profile public issue in 2011 and 2012. In April 2011, Petrobras began an underwater survey of the sea floor in New Zealand's exclusive economic zone, but its activities were interrupted by several vessels protesting the prospect of oil development in the Raukumara Basin. The vessels attempted to get in the path of the survey vessel to disrupt the collection of data. As a consequence, Police declared an exclusion zone around the primary survey vessel for the purposes of safety. The exclusion zone stated that no vessel was to approach closer than one nautical mile to the left or right of the survey vessels or the tow cable, no closer than half a nautical mile from the bow of the survey vessel and no closer than six nautical miles behind the vessel – the latter distance set to take into account sonar cables being towed behind it. One of the protest vessels subsequently navigated into the path of the survey vessel and deployed buoys into the water. The skipper of the New Zealand flagged fishing vessel, Mr Elvis Teddy, was arrested for operating a ship in a manner which caused unnecessary risk to the survey vessel and for resisting arrest.

12 Murray McCully "NZ opposes South Korean whaling proposal" (press release, 5 July 2012).

13 Murray McCully "Joint Statement on Whaling and Safety at Sea" (press release, 21 December 2012).

Mr Teddy's prosecution was heard in the District Court in 2012.¹⁴ The defence argued that the Police did not have jurisdiction to arrest the defendant on the basis that the Maritime Transport Act 1994 and the Summary Offences Act 1981 did not apply outside the 12 mile territorial sea. The Maritime Transport Act (MTA) is one of the primary mechanisms through which New Zealand has implemented international obligations in the Law of the Sea Convention 1982 relating to the safety of shipping as well as International Maritime Organisation regulations. The issue related to the extraterritorial effect of the Part of the MTA under which Mr Teddy was charged. The MTA does not expressly state that Part 6 applies outside New Zealand (which is defined as including the territorial sea). The District Court accepted the principle that New Zealand's statutes are not presumed to apply extraterritorially and any extension of jurisdiction beyond the territorial sea requires an express statement to that effect. Although some parts of the MTA do expressly apply extraterritorially, the particular section relied on by the prosecution was not one of those. Therefore, the Judge found that the charges were nullities and the prosecution was dismissed.

The prosecution noted in the District Court that a finding that the Police did not have jurisdiction in this matter could cause difficulties for ships subject to protest action outside the territorial sea in the future. The case certainly raised important questions about the appropriate extent of the powers of the Police and other authorities under the MTA and their applicability in the exclusive economic zone. However, the decision has been appealed to the High Court and is expected to be considered in 2013.

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¹⁴ *Police v Elvis Heremia Teddy* DC Tauranga CRI-2011-070-002669, 26 July 2012.