Exploration and Development within the EEZ – offshore oil and gas

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SOUNDING OUT RICHES AND RISK: APPROACHING ENVIRONMENTAL REGULATION OF OIL AND GAS WITHIN NEW ZEALAND’S EEZ

The sea has never been friendly to man. At most it has been the accomplice of human restlessness.
— The Mirror of the Sea, Joseph Conrad

Introduction

Improved technology and increases in raw commodity prices have resulted in increased investment in the exploration for – and development of – deep-sea mineral resources. In the last twenty years, there has been a veritable explosion of deep-sea exploration, with no sector spending more time exploring the deep-sea environment than the oil industry. The present government, with a view to New Zealand’s long-term economic performance has encouraged the growth of this industry in our continental waters. Oil is New Zealand’s fourth largest export earner. Ministry of Business Innovation and Employment (MBIE) figures suggest that the resource potential (both on land and offshore) could see New Zealand become a net exporter of oil by 2030. Presently, offshore oil and gas production is primarily concentrated in the Taranaki Basin, but New Zealand’s offshore potential outside Taranaki is under-explored by international standards (eg Great Southern Basin). However, it is calculated a large offshore gas field could be worth $8.1 billion to the economy of any region hosting the industry, and $3.1 billion in regional GDP. A Crown press release concerning the commencement of seismic surveys in unexplored basins in late 2009 stated that:

[c]urrently petroleum accounts for around $3 billion per annum of New Zealand’s export revenue. Should the estimated resources in our unexplored basins be developed, this could increase to $30 billion per annum in export revenue by 2025.

If correct, this would clearly be a game changer for the New Zealand economy.

2 “Game changing gas boom worth billions”, The New Zealand Herald, 10 January 2014.
3 Reported in Greenpeace v Minister of Energy and Resources [2012] NZHC 1422 (HC) at [55].
That said, our scientific understanding of the deep-sea environment remains very limited. It is often remarked in oceanographic circles that we have been to the moon more times than to the beds of our deepest oceans. New Zealand’s Exclusive Economic Zone (EEZ) is the fifth largest in the world, with an area of about 15 times that of its land mass (or 5.7 per cent of the world’s EEZ).\(^4\) With the legal continental shelf extensions, New Zealand’s current ocean area jurisdiction spans more than 20 times the area of its land – 1.2 per cent of the earth’s surface area. In practical terms, scientific knowledge of New Zealand’s EEZ marine environment is sparse. We know that drilling and production of oil at sea involves greater risk than terrestrial activities. We are aware that a blow-out of a well could have significant adverse effects on our coastline. We are less certain, however, as to the potential impacts of discharges on deeper-water ecosystems. Undertaking exploration and development in this environment requires a cautious approach, where risks are planned for and managed in a manner that allows operations to be adapted as real-time information comes to hand. Until recently, our lack of knowledge was compounded, by legislative silence on these and other forms of environmental management within New Zealand’s EEZ.

However, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act), and fresh amendments to the Maritime Transport Act 1994 (MTA), now provides a code for the environmental regulation of exploration and development within our EEZ and continental shelf. The purpose of this paper is to provide an overview of this code, as it relates to oil and gas, under six main headings. These address: (1) the role international law plays in New Zealand’s administration of the EEZ and continental shelf; (2) the legislative regime that existed prior to the EEZ Act and its focus on allocation; (3) the new EEZ Act and recent amendments in relation to non-notified discretionary activities (i.e. exploratory drilling); (4) the EEZ Regulations and their provision for oil and gas activity classification; (5) the control of discharges under both Acts, and oil spill planning under the

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MTA; and (6) the criminal and civil liability regime that applies in the case of discharges and oil pollution in breach of the EEZ Act and MTA. As will become quickly apparent, the regime for environmental regulation of oil and gas within the New Zealand’s EEZ is rich with legislative change and fresh acronyms. To simplify this paper I have abbreviated the names of legislation (etc) where appropriate in order to maintain some degree of readability.
1. RIGHTS AND OBLIGATIONS UNDER INTERNATIONAL LAW

It is important, when considering the EEZ Act, to appreciate that the EEZ and continental shelf are not part of New Zealand’s sovereign territory. Rather, New Zealand exercises “sovereign rights” over the EEZ and continental shelf pursuant to the United Nations Law of the Sea Convention 1982 (LOSC). Those sovereign rights are subject to a number of obligations set out under the LOSC, various international agreements and customary international law. In terms of spatial jurisdiction, the EEZ extends from the outer limit of the territorial sea (12 nautical miles (nm)) to 200 nm from the territorial sea baseline (LOSC, arts 55 and 57). The continental shelf comprises the seabed and subsoil which is “the natural prolongation” of a coastal State’s land territory and may extend beyond the EEZ (LOSC, art 76(1)). As apparent from the introduction (and figure 1), New Zealand’s continental shelf does extend beyond its EEZ.

Figure 1: Extent of New Zealand’s territorial sea, EEZ and continental shelf

New Zealand has “sovereign rights” within the EEZ for “exploring and exploiting, conserving and managing” the living and non-living natural resources of the waters, seabed and subsoil (LOSC, art 56(1)(a)). The EEZ provisions under the LOSC also establish

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jurisdiction over artificial islands, installations and structures, marine scientific research, and prescribe obligations to protect and preserve the marine environment (LOSC, art 56(1)(b) and (c)). New Zealand’s rights and jurisdiction are subject to freedoms enjoyed by other States including; navigation, over-flight and the laying of submarine cables and pipelines (LOSC, art 58), as well as the general obligations under the LOSC (eg Parts XII and XIII) and those set out under other international agreements and customary international law.

New Zealand’s rights are narrower in respect of the continental shelf where it extends beyond the EEZ. These comprise of exclusive “sovereign rights” to explore and exploit natural resources within the continental shelf (ie mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species (LOSC, art 77)). There are no special rights in respect of the water column or airspace (LOSC, art 78). Exclusive rights are exercised over artificial islands, installations and structures (LOSC, art 80), and for the authorisation and regulation of drilling (LOSC, art 81). These rights are subject, however, to the freedom of foreign States to lay submarine cables and pipelines (LOSC, art 79(1)), and the requirement to pay royalties to the International Seabed Authority for resources exploited from the continental shelf.

Clause 11 of the EEZ Bill, as introduced to parliament, provided that it “must be interpreted, and all persons performing functions and duties under it must act, consistently with New Zealand’s obligations under the [LOSC]”. However, it became apparent during public submissions and the Select Committee phase of the Bill that the law of the sea is no longer confined to the LOSC. Rather, New Zealand is subject to international obligations under a number of international and regional instruments with respect to its EEZ and activities taking place therein. The Select Committee in turn recommended that cl 11 be amended to require the EEZ Bill to be “interpreted, under various international conventions”, expressly including the “Convention on Biological Diversity”. However, the Government members of the Select Committee raised concerns that this wording was too strong and would constitute an interpretation clause giving the LOSC independent operating effect, which they believed could cause cl 11 to become subject to international obligations not considered by Parliament. As a result, the provision as finally enacted is rather opaque, simply noting that the EEZ Act continues or enables the implementation of New Zealand’s obligations under various international conventions relating to the marine environment including the LOSC and Convention on Biological Diversity (s 11, EEZ Act).

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6 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (321-2) (Select Committee Report) at 2 to 3 and 20.
2. LEGISLATIVE REGIME PRIOR TO EEZ ACT AND ALLOCATION

Parliament passed the EEZ Act in order to fill the gaps that existed in New Zealand’s environmental management regime at the time, and to give effect to our obligations under the LOSC to manage and protect the natural resources of the EEZ (Bill, explanatory note). Prior to the enactment of the EEZ Act a legislative lacuna existed in New Zealand with regard to managing the effects of exploration and development within the EEZ. This lacuna was demonstrated in the decision of the High Court in *Greenpeace v Minister of Energy and Resources*, where Greenpeace brought judicial review proceedings against the Minister for failing to undertake an environmental impact assessment prior to granting exploration rights to Petrobras over an area of the EEZ (the Ruakumara Basin) under the Crown Minerals Act 1991 (CMA). The Court observed that overshadowing individual submissions was the proposition that the minister was required to take into account international obligations concerning environmental impact assessment, and in failing to do so he erred in law (at [64]). The High Court found on this point that:

[105] The Resource Management Act does not apply to activities outside the territorial waters. If questions arise as to the extent to which New Zealand – as a State – met its international obligations that must be a matter upon which Parliament might choose to legislate. It is not a matter upon which the Court can direct Parliament. Nor could it be for the Minister to “plug any gap” because, in the end, the regulatory and statutory functions designed to deal with risks of harm, general to the environment, have by deliberate policy been entrusted to fall within the ambit of powers vested in other authorities.

Prof. Palmer notes that the High Court’s decision highlights the inadequacy of the environmental assessment and consent procedures for ocean mining activities, prior to the enactment of the EEZ Act.

The RMA 1991 (RMA) provided for comprehensive assessment of environmental matters regarding land-based applications and those within the 12-mile coastal marine area. By contrast, the legislative framework applying to the EEZ was less developed and conferred a broad discretion on the Minister of Energy to approve or not approve the exploration or mining activity.

This is correct, but it is also important to note that the decision highlights an important distinction between the regime under the CMA and environmental legislation. The purpose of the CMA is to promote prospecting, exploration and mining (s 1A(1)). To this end, the Act provides for “the efficient allocation” of rights to prospect, explore and mine for Crown owned minerals (eg petroleum) and a fair financial return to the Crown (s 1A(2)(a) and (d)). In short, the regime is principally concerned with allocation and Crown revenue. Although good industry practice is required, the CMA is not specifically concerned with the regulation of environmental impacts.

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7 [2012] NZHC 1422 (HC).
8 Section 4(1) of the Continental Shelf Act 1964 provides that the CMA “and any regulations made under that Act, as far as they are applicable and with any necessary modifications, shall apply with respect to petroleum (as defined in that Act) in the seabed and subsoil of the continental shelf.”
10 Section 10 of the CMA provides that all petroleum existing in its natural state shall be property of the Crown.
This distinction was an important part of the High Court’s decision. The Court noted that it was emphasised from an early stage, during the passage of the Resource Management Bill, “that there was a need for separation of regulatory and allocation functions”. This was because there was perceived to be a conflict between the Crown’s commercial interest in obtaining a fair financial return for its mineral estate, and the sustainable management of minerals. The responsibility for safeguarding the sustainable management of minerals would be compromised because of the preoccupation with obtaining financial results, while the sustainable management objective would provide an excuse for providing poor financial results (at [101]). In essence, the concern was that the fox could not guard the hen house. Accordingly, the sections relating to Crown Minerals Legislation were removed from the Resource Management Bill and proposed as separate legislation (at [102]). The High Court went on to find for this reason that the CMA:

as a whole … cannot require the Minister to call for an environmental impact assessment … or to undertake inquiry into and give consideration to international environmental obligations. They are dealt with elsewhere, and fall outside his powers. Indeed, if he chose to do so and made a decision adverse to, for example, a competitive bidder, he might well be challenged on the basis of acting outside his powers (at [116]).

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Before moving on to the next heading it is worth mentioning *Greenpeace v Environmental Protection Authority*, which acts as a footnote to the regime prior to the EEZ Act insofar as it concerns environmental impact assessment under the transitional provisions of the new Act. Anadarko held a petroleum exploration permit for the Taranaki Basin granted under the CMA. Because Anadarko’s permit had been granted prior to the EEZ Act coming into force, but drilling had not yet started, the transitional provisions of the Act applied, which required submission of an impact assessment to the Environmental Protection Authority (EPA) under s 166 of the Act. Anadarko appended a discharge management plan to the impact assessment prepared for approval by Maritime New Zealand (MNZ) under Part 200 of the marine protection rules of the MTA (discussed under fourth heading). The discharge management plan included oil spill modelling, which provided trajectory information in the case that well control was lost. The powers of the EPA in relation to transitional impact assessments are limited to determining whether the impact assessment is complete or not (s 166(4), EEZ Act).

The essence of Greenpeace’s case was that the EPA was wrong in accepting the impact assessment as complete because the discharge management plan did not include trajectory information for the effects of a spill seawards. The High Court found that the EPA’s role under s 41 does not involve any assessment of the merits of the content of the impact assessment (at [28]). The “decision which is ‘wholly administrative in nature’ and ‘essentially mechanical’ is not readily susceptible to the sort of error which may justify judicial review” (at [33]). The Court was careful to point out that its decision was based on the transitional provisions, and that if the exploration permit had been sought after the commencement of the Act a marine consent would have been required (at [7] and [8]). However, because the case was within the transitional provisions and would not proceed to a marine consent application, there was no need to consider whether a separate assessment of the discharge management plan (prepared as it is under a separate legislative code) was required by the EPA (at [43]).
3. THE EEZ ACT’S REGIME – OIL AND GAS

The purpose of the EEZ Act

International law: sustainable development

The preamble to the LOSC states that its objectives include establishing a legal order for the seas and oceans which promotes “the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.” The LOSC thus attempted for the first time to provide a global framework for the rational exploitation and conservation of the sea’s resources and the protection of the environment. The LOSC provision for development and protection is consistent with the concept of sustainable development recognised by the World Commission on Sustainable Development in its report Our Common Future. The report defines sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. Many definitions of sustainable development, if not most, include explicit or implied reference to “future generations”. Although, it is worth noting, that there are variety of different ways in which the term has been implemented in practice. The LOSC does not expressly endorse sustainable development except in relation to EEZ fisheries (LOSC, art 61(3)) and the conservation of the living resources of the high seas (LOSC, Art. 119(1)(a)). Nevertheless, there is no doubt that the development rights and environmental obligations under the LOSC can be used to give effect to sustainable development. Support for this can be found in decisions of the International Tribunal for Law of the Sea, and the United Nations General Assembly resolutions and reports of the consultative process on oceans and law of the sea.

Clause 10 of EEZ Bill: sustainable development

The EEZ Bill was introduced to Parliament on 24 August 2011 in order to give effect to New Zealand’s obligations under the LOSC to manage and protect the natural resources of its EEZ and continental shelf. Initially scheduled to come into effect on 1 July 2012, the Bill was eventually enacted on 3 September 2012. Clause 10, as originally proposed, provided that the Bill sought “to achieve a balance between the protection of the environment and economic development in relation to activities in the [EEZ] and on the continental shelf”. Irrespective of whether one accepts that the LOSC endorses sustainable development, it is important to recognise that the balancing approach as proposed under cl 10 was interpreted under international law as sustainable development. For example, the International Court of Justice (ICJ) found in the Gabčíkovo-Nagymaros case that “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of

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12 This heading borrows extensively from an article by the author in the following journal: Makgill, R., Dawson, K. and de Wit, N., “The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill”, (2012) April Resource Management Journal 1, at 3 to 5.
15 Ibid at Chapter 2: Towards Sustainable Development, para 1.
sustainable development”. Likewise, the ICJ observed in the *Pulp Mills* case that it is “the balance between economic development and environmental protection that is the essence of sustainable development”.

Clause 10 of the EEZ Bill contained a number of similarities to the “sustainable management” purpose of the Resource Management Act 1991 (RMA) and the “utilisation” “sustainability” purpose of the Fisheries Act 1996. Both of these Acts form part of the marine management regime under s 7 of the EEZ Act, and include decision-making provisions that will interface with decision-making under the EEZ Act. A key departure under cl 10, however, was the omission of any requirement to consider the needs of future generations. This was also a departure from sustainable development as defined under international law. The New Zealand Law Society (Law Society) submitted during the Select Committee process that, while it was important to acknowledge that natural resources are finite, the lack of reference to future generations under cl 10 narrowed the ability of decision-makers to consider whether resources might be better exploited at a future point in time (eg as technology improves the efficiency of exploitation methods). This was remedied when the purpose of the Act was amended to sustainable management, which is defined as including the reasonably foreseeable needs of future generations.

### Section 10 of EEZ Act: sustainable management

Another issue addressed by the Law Society during the Select Committee phase of the Bill, was the lack of a clear definition as to the Bill’s purpose. The Law Society warned that failure to define the balancing approach under the Bill introduced an unnecessary level of uncertainty that was likely to complicate integrated management of the EEZ, continental shelf and territorial sea. There is an extensive body of international literature extolling the administrative virtues of integrating legislative regimes that govern the marine and coastal environment. It should not be overlooked, in this respect, that the RMA is generally extolled amongst that body of literature as a legislative model for the implementation of “integrated management”. Implementation of integrated management, in cases where there is more than one legislative regime, requires that policy considerations, decision-making processes and administrative entities are harmonised and made consistent.

Accordingly, the Law Society suggested that the definition of cl 10 under the Bill should be made consistent with the definition of sustainable management under the RMA. This was considered a prerequisite to achieving an appropriate level of integration and compatibility between existing legislative regimes and the Bill.

The Law Society further suggested that defining the purpose of cl 10 as “sustainable management” would be preferable to defining it as “sustainable development” or “sustainable use”. This is because sustainable management is the test that is applied under the RMA to those parts of cross-boundary applications located in the territorial sea. Consequently, adoption of a sustainable management approach would promote integrated

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20 *Ibid* at 140.
management of the marine environment.\textsuperscript{22} Significantly, the Law Society contended, such an approach would be more certain, easier to administer and ultimately less costly for decision-makers and applicants.\textsuperscript{23} The Select Committee Report records that concerns were expressed by non-government members that failure to align the Bill and the RMA’s purpose would result in nonalignment of the two regimes.\textsuperscript{24} In any event, the Select Committee report did not recommend clarifying the meaning of cl 10 of the Bill.

Nevertheless, between the Select Committee Report and the final reading of the Bill, cl 10 was amended to confirm that the purpose of the Bill was sustainable management. It is quite possible during this time, that aside from poor integration, the Government became aware of other implications of employing sustainable development language under the purpose of the Act. By way of background, the treatment of sustainable development under \textit{Our Common Future} was drawn on to shape the purpose of the RMA.\textsuperscript{25} However, it became apparent that the approach to sustainable development under that document sat uncomfortably alongside New Zealand’s preferred approach to allocation (discussed under second heading), and neo-liberal effects based approach to environmental management. This is because the concept of “needs” under the report gives overriding priority to the needs of the poor. To this extent, sustainable development “implies a concern for social equity”, and can be said to seek to redress imbalances in resource allocation.\textsuperscript{26} Accordingly, the sustainable purpose of the RMA under s 5 was deliberately worded to emphasise management rather development. Sustainable management does not seek to regulate social equity. It does not seek to redistribute wealth, and it does not seek to equitably allocate rights to development. It is effectively a form of development control and regulation.\textsuperscript{27}

Whatever the case, the resulting language under s 10 of the EEZ Act closely resembles that of s 5 of the RMA, with a major exception. There is no provision for social or cultural wellbeing. Likewise, the definition of environment does not include people and communities, or social, aesthetic and cultural conditions. If the policy behind this approach conforms to law developed under other jurisdictions, it is because social and cultural values are not considered to be relevant beyond territorial waters. Rather, the Act applies to the natural values within the EEZ and continental shelf (s 4). Accordingly, s 10 states:

\textbf{10 Purpose}

\begin{enumerate}
\item The purpose of this Act is to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.
\item In this Act, \textit{sustainable management} means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
\begin{enumerate}
\item sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
\end{enumerate}
\end{enumerate}

\textsuperscript{22} \textit{Ibid} at 4 to 5.
\textsuperscript{23} \textit{Ibid} at 4.
\textsuperscript{24} Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (321-2) (select committee report) at 9.
\textsuperscript{26} Brundtland, G., \textit{Our Common Future} (Oxford: Oxford University Press, 1987), Chapter 2: Towards Sustainable Development, para 3: “… sustainability cannot be secured unless development policies pay attention to such considerations as changes in access to resources and in the distribution of costs and benefits. Even the narrow notion of physical sustainability \textit{implies a concern for social equity} between generations, a concern that must logically be extended to \textit{equity within each generation.}” [Emphasis added]
(b) safeguarding the life-supporting capacity of the environment; and
(c) avoiding, remediying, or mitigating any adverse effects of activities on the environment.

**Classification of activities within the EEZ**

The EEZ Act currently empowers the Minister for the Environment by way of regulations to classify activities carried out in the EEZ or continental shelf as permitted, discretionary or prohibited (s 27 and 29). Permitted activities may be undertaken as of right provided the operator meets conditions specified in regulations (s 35). Discretionary activities may be expressly classified under regulation, but also include any activity that is not otherwise classified under the regulations as permitted or prohibited. Discretionary activities may only be undertaken if the proponent of the activity obtains a marine consent from the EPA (s 36). Discretionary consent applications will be publicly notified, submissions will be invited, and hearings will be held if requested by any party including submitters. The EPA has 130 working days after the application is determined as being complete in which to notify, hear and issue a decision in respect of the application. Prohibited activities may not be carried out under any circumstances. Regulations for permitted activities came into force on 28 June 2013.  

Both the permitted and proposed regulations are discussed under the fourth heading.

A further non-notified discretionary classification is now provided for under the EEZ Amendment Act 2013. Although requiring a marine consent, such activities do no need to be publicly notified (s 29D(1)). The Minister may make regulations classifying activities as non-notified discretionary if of the opinion that:

(a) the activity has a low probability of significant adverse effects on the environment or existing interests; and
(b) the activity is—
   (i) routine or exploratory in nature; or
   (ii) an activity of brief duration; …

This amendment caused much public controversy at the time it was made. This is because it was proposed by way of a Supplementary Order Paper (SOP) late in the passage of the Marine Legislation Bill, therefore avoiding the select committee process and public submissions. This was seen as particularly disturbing by a number of non-governmental organisations due to the fact that one of the principal reasons for introducing the amendment was to enable exploratory drilling to take place on a non-notified basis under the newly proposed regulations discussed above. These groups consider that exploratory drilling for oil and gas poses significant risk to the environment and ought to be notified as a matter of

28 Exclusive Economic Zone and Continental Shelf (Environmental Effects – Permitted Activities) Regulations 2013.
public interest. However, the MfE Regulatory Impact Statement (RIS) for the SOP\textsuperscript{30} contended that the scale of such activities did not warrant the full public process associated with discretionary activities (RIS at 4). The discretionary process will take up 6 months, excluding possible appeals, and has been estimated to potentially cost between $NZ250,000 and $NZ1.5 million depending on the complexity of the application (RIS at 5). It was considered the amendment would reduce costs to businesses and improve incentives to invest in New Zealand’s natural resources in the EEZ and continental shelf. The EPA estimates, as it is, that the costs of processing a non-notified discretionary application will be between $NZ100,000 and $NZ450,000 (RIS, at 9).

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure.png}
\caption{Reproduced with the kind permission of Malcolm Evans - www.evanscartoons.com}
\end{figure}

### Marine consents and environmental impact assessment

All oil and gas activities in EEZ will need to be permitted or authorised by marine consent (s 20(1)). Marine consent applications must be supported by an impact assessment (s 38). The information in the impact assessment should include such detail as corresponds to the scale and significance of effects that the proposed activity may have on the environment or existing interests, and sufficient detail to enable the EPA and potentially affected persons to understand the nature of the activity and its effects on the environment (s 39(2)(a) and (b)). Public notice must be given in respect of discretionary activities (s 45), and any person may make a submission to the EPA on the application (s 46). The EPA may conduct a hearing if it considers one desirable, or one is requested by the applicant or a submitter (s 50). The EPA must establish a procedure that is fair and reasonable (eg accords with the principles of

natural justice). The hearing must avoid unnecessary formality, and to these ends cross-examination is not allowed unless the EPA gives permission (s 53).

In assessing an application the EPA must consider a comprehensive list of matters principally concerned with effects on the environment. As discussed, the definition of environment constrains consideration to natural values. Nevertheless, the economic benefit to New Zealand must also be taken into account, and no special weight is given to environmental matters under the list. As with the RMA, the EPA must not have regard to trade competition or the effects of trade competition (s 59). Matters that must be regarded when considering the extent of adverse effects on existing interests include: (a) the area in common; (b) the degree to which both activities must be carried out to the exclusion of others; and (c) whether the existing interest can only be exercised in the area to which the application relates (s 60). The Act’s information principles require the EPA to make full use of its powers to request information and obtain advice, base decisions on the best available information, and take into account any uncertainty or inadequacy in the information available (s 61). Having considered the application in light of these matters the EPA may either grant the application subject to conditions, or refuse the application (s 62 and 63).

**Caution and adaptive management**

The Act’s information principles require the Minister exercising regulatory power, and the EPA exercising consenting power, to base all decisions on the best available information and to take into account uncertainty and inadequacy of information (s 34(1) and 61(1)). Best available information means the best information available without unreasonable cost, effort or time (s 34(4) and s 61(5)). Reasonableness in this context is likely to be assessed in relation to the nature of the risk and scale of potential adverse effect. The Act requires decision-makers to “favour caution and environmental protection” where the information available is uncertain or inadequate (s 34(2) and 61(2)). This approach is a reasonable reflection of the precautionary principle under international law, which states that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.  

This view is supported by the findings of the International Tribunal for the Law of the Sea, in the deep-sea mining Advisory Opinion, where it states that the precautionary approach should be applied “in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks”.

If favouring caution and environmental protection means that an activity is likely to be prohibited, the decision maker must first consider whether an adaptive management approach would allow the activity to be undertaken (s 34(3) and 61(3)). For example, the EPA may include adaptive management approaches in the conditions of a marine consent. An adaptive management approach includes (s 64(2)): (a) commencing on a small scale, or for a short period so that effects can be monitored; or (b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects. Environmental lawyers

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are familiar with the use of adaptive management as a tool for managing risk and change under the RMA. Adaptive management approaches may be applied through environmental management plans, staging, monitoring and contingency plans, environmental audits, best practicable option analysis and the review mechanisms under conditions of consent. The Environment Court has held that key features of an adaptive management approach include:\textsuperscript{33}

- that stages of development are set out;
- the existing environment is established by robust baseline monitoring;
- there are clear and strong monitoring, reporting and checking mechanisms so that steps can be taken before significant adverse effects eventuate;
- these mechanisms must be supported by enforceable resource consent conditions which require certain criteria to be met before the next stage can proceed; and
- there is real ability to remove all or some of the development that has occurred at that time if the monitoring results warrant it.

4. EEZ REGULATIONS AND OIL AND GAS

The Minister may make regulations for the purposes of classifying activities within the EEZ and continental shelf. Matters that must be taken into account when preparing regulations include things such as any effects on the environment or existing interests of allowing an activity, the importance of protecting biological diversity, international obligations and the economic benefit to New Zealand of an activity (s 33). The Minister must, as discussed, favour caution and environmental protection, and consider adaptive management if an activity would otherwise be classified as prohibited (s 34). The Permitted Regulations 2013 seek to address those industries currently operational within the EEZ, or likely to be within the next five years. The purpose of the Regulations is to prescribe those activities which are permitted, and which can be undertaken as of right subject to prescribed conditions (cl 4). Exploration and seismic surveying are both permitted activities (cl 5 and 7). Exploration means any drilling reasonably necessary to determine the nature and size of a mineral deposit or occurrence. However, the definition of exploration expressly excludes drilling for petroleum (cl 3). MfE stated in the RIS for the Regulations that no options had been assessed in relation to petroleum drilling, aside from routine activities that do not carry the risk of oil spill. Routine activities effectively meant seismic surveying, which is carried out in the prospecting stages of petroleum exploration. Accordingly, the default position for petroleum exploration is discretionary and public notice applies, unless or until such time as the proposed activity regulations come into force.

MfE anticipated at the time the permitted activities were under consideration that “[a]s technology advances and other activities in the EEZ develop, further regulations may be developed”. Furthermore, although petroleum was not addressed in the RIS for Permitted Regulations, MfE signalled that Cabinet would be considering proposals about that activity at a later date (RIS at 3). Subsequently, as discussed, MfE released a discussion document around the same time as the SOP to the Marine Legislation Bill concerning non-notified discretionary activities. That document identified three broad phases for oil and gas activities together with MfE’s preferred activity classifications. These are:

- prospecting for oil and gas in the EEZ and continental shelf (a permitted activity primarily involving seismic surveying);
- exploration, which involves drilling exploratory and discovery appraisal wells (currently discretionary and proposed to be non-notified discretionary in the discussion document); and
- production (a discretionary activity requiring a notified application for marine consent under the EEZ Act).

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The discussion document states the permitted activities associated with oil and gas exploration (i.e. seismic surveying) have very minimal impacts on the environment (at 11). However, the effects of drilling a well require greater regulatory oversight because of the potential impacts of an oil spill due to loss of well control. Although such events have low probability, they have a high potential impact on the environment and existing interests. That said, as a mature industry, the routine effects of exploratory drilling are generally well understood. The document also points to the fact that exploratory drilling requires a discharge management plan under the MTA, and drilling activities generally only last 30 to 40 days. This is posited against the fact that the limited supply of drill ships and supply vessels worldwide, and the importance of having investment decisions and contacts in place months in advance, make investment certainty important. These considerations together with multiple approval regulations require a streamlined (yet robust) regulatory process (at 11). For oil and gas exploratory drilling, the costs to applicants of the current discretionary classification are described as disproportionate when considered against the scale of the activity and the impacts on the environment and existing interests. However, a permitted activity classification provides insufficient regulatory oversight (at vi). Overall the discussion document states that the government considers a non-notified process strikes an appropriate balance between the management of environmental effects and investment certainty (at 14). Accordingly, a draft regulation for non-notified activities\textsuperscript{38} suggests the following cl 5:

\textsuperscript{38} Exclusive Economic Zone and Continental Shelf (Environmental Effects—Non-Notified Activities) Regulations 2013
5 Non-notified activity

(1) Exploration drilling for petroleum in the exclusive economic zone or in or on the continental shelf is classified as a non-notified activity and an application for a marine consent for the activity is not to be publicly notified.

(2) For the purposes of this regulation, activity includes any activities described in section 20(2) or (4) of the Act that are involved in exploration drilling for petroleum, such as—

(a) placing a rig:

(b) taking seabed samples to test for site stability:

(c) placing anchors and moorings:

(d) placing monitoring equipment:

(e) seismic surveying down a well:

(f) capping a well.

Submissions on the discussion document closed on 25 September 2013. A summary of submissions prepared by MfE shows significant public opposition to the proposed regulations. This opposition is based on concerns that oil spills can still occur during exploration. Deepwater Horizon is cited as an example of an oil spill during exploration. Consultation on the draft proposed exploratory oil and gas drilling regulations closed on 31 January 2014. The proposed regulation is presently under consideration by the Minister.

5. DISCHARGES AND OIL SPILL PLANNING

Discharges under the EEZ Act

The recent amendments to discharges under the EEZ Act are perhaps one of the more complicated areas of the EEZ legislative regime. This is because both the EEZ Act and MTA control discharges within the EEZ. In its simplest form MNZ retains jurisdiction over discharges from maritime shipping, while the EPA assumes jurisdiction for discharges from exploration and development activities. These can include discharges from offshore installations or ships engaged in drilling or production. Cabinet approved policy proposals to transfer the regulation of non-shipping discharges from MNZ (under the MTA) to the EPA (under the EEZ Bill) on 3 October 2011. However, the proposals did not end up being reflected in the EEZ Bill. Instead, all discharges remained under the purview of the MNZ at the time that the EEZ Bill was enacted. The Marine Legislation Bill was subsequently introduced on 30 August 2012, a few days prior to the enactment of the EEZ Act. The Marine Legislation Bill sought, amongst other things, to transfer the regulation of drilling and production discharges from the MTA to the EEZ Act.

The Marine Legislation Bill was divided by the house into two Bills on 24 September 2013. Those parts of the old Bill pertaining to discharges within the EEZ were included in the EEZ Amendment Bill, which was subsequently enacted on 22 October 2013. The EEZ Amendment Act provides that:

- no person may discharge harmful substances into or onto the continental shelf beyond the outer limits of the EEZ, or into the sea above that part of the shelf from a structure involved inter alia in mining activity (s 20B);
- no person may discharge a harmful substance (if the discharge is a mining discharge) from a ship into the sea of the EEZ or above the continental shelf beyond the outer limits of the EEZ into or onto the continental shelf (s 20C);
- harmful substances mean any substance specified as a harmful substance by regulations made under the EEZ Act (s 5);
- mining activity means an activity carried out for identification, taking or extraction of minerals from the sea or seabed (s 5);
- mineral means any naturally occurring inorganic substance beneath or at the surface of the earth, whether under or not under water, including fuel minerals such as petroleum (s 5, referring to s 2 CMA).

However, the discharge amendments to the EEZ Act do not come into force until a date appointed by the Governor-General by Order in Council (s 2). This is because the discharge provisions “only come into effect once regulations are promulgated to classify discharges …

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41 The EEZ Bill passed its third reading on 28 August 2012 and was enacted on 3 September 2012.
43 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013.
under the EEZ Act. Until then, the existing MTA regime remains in place.\textsuperscript{44} The proposed regulations under the EEZ Act suggest a range of classifications for discharges from offshore installations. This means that some activities might be undertaken as of right, while others will require marine consent or simply be prohibited. For example, it is proposed that:

- discharges of offshore processing drainage and displacement water up to 50 ppm\textsuperscript{45} of oil waste from machinery are permitted;
- discharges exceeding that threshold required for geological, technical or safety reasons, and drilling fluid discharges during oil and gas exploration, are non-notified discretionary; and
- drilling fluid discharges during oil and gas production are discretionary; and
- discharges of oil waste from machinery over 15 ppm is prohibited.\textsuperscript{46}

In the meantime, the MTA provides that harmful substances are not to be discharged in the sea within the EEZ or seabed of the continental shelf from any ship or offshore installation other than in accordance with the marine protection rules (s 226). The marine protection rules enable the Minister of Transport to implement any rules necessary, from time to time, to comply with New Zealand’s international obligations to protect the marine environment. Part 200 of the marine protection rules address discharges from offshore installations.\textsuperscript{47} These rules provide that offshore installations must not be operated without written approval of a discharge management plan from the Director of MNZ (r 200.4). The Director’s written approval of a discharge management plan is a marine protection document for the purposes of part 18 of the Act (r 200.7(2)). Marine protection documents are defined inter alia as meaning permits, certificates or licences issued under the marine protection rules. Part 200 might therefore be thought of as including effectively a permitting regime for oil discharges (s 222 MTA).

The owner of an offshore installation must ensure that harmful substances are only discharged in accordance with the discharge management plan (r 200.13). The rules also establish inter alia standards for permitted discharges of production water, displacement water and offshore processing drainage (r 200.14). However, the discharge management plan does not only address discharges. The director must also be satisfied that an operator has assessed the impact of operations on the environment and prepared a contingency plan to respond to emergencies (eg oil spills) (sch 1 part 200). As discussed, the EEZ Act’s transitional provisions concerning discharge management plans were considered by the High Court in \textit{Greenpeace of New Zealand Inc v Environmental Protection Authority}. The High Court’s decision does not offer much assistance in respect of the content of discharge management plans, as the decision under judicial review was procedural as opposed to substantive.

\textsuperscript{44} Ministry for the Environment, \textit{Activity classifications under the EEZ Act: A discussion document on the regulation of exploratory drilling, discharges of harmful substances and dumping waste in the Exclusive Economic Zone and continental shelf}, (Wellington: MfE August 2013) at 8.

\textsuperscript{45} One ppm is 1 part in 1 million. An easier way to think of ppm is to visualize putting four drops of ink in a 55-gallon barrel of water (208 litres) and mixing it thoroughly.

\textsuperscript{46} Ministry for the Environment, \textit{Activity classifications under the EEZ Act: A discussion document on the regulation of exploratory drilling, discharges of harmful substances and dumping waste in the Exclusive Economic Zone and continental shelf}, (Wellington: MfE August 2013) at 17 to 20.

Protection of the marine environment from oil spills under the MTA

The MTA will continue to regulate, and MNZ continue to be responsible for, marine oil spill contingency planning, preparedness and response (and discharges from ships). There are two types of marine spill contingency plans for the EEZ (site and national). Site plans are prepared by operators, as part of their discharge management plan, under the marine protection rules for offshore installations. They must set out the emergency response measures to be taken in the case of a spill from an offshore installation (s 281 and 287 MTA, r 204 and sch 1 of Part 200). National plans are prepared by MNZ to promote a nationally co-ordinated response to any marine oil spill that is within the EEZ, and which the Director of MNZ considers to require a national response (s 296 and 297 MTA). In practice the Director is likely to exercise this discretion in any circumstances where the oil spill cannot be handled by the onsite operator of the installation.

Operators of offshore oil installations are also required to hold a minimum amount of public liability insurance to cover any clean-up or damage costs in the event of an oil spill (s 385H MTA and part 102 of the marine protection rules). Part 102 requires owners of offshore installations to carry certificates of insurance which are recognised by the Director of MNZ (r 102.7). The Director has to be satisfied as to the financial status of the party providing the insurance. The rules state that the minimum level of insurance required is approximately NZ$30 million (r 102.8(2) and objective). However, it has been 10 years since the rules were last updated, and more a recent MfE document puts the insurance figure at around $NZ25 million. The rules do not presently reflect the changes introduced under the MTA Amendment Act 2013, and it may well be that the minimum level of insurance is revisited at the time the rules are updated. Claims in respect of liability for pollution damage may be brought directly against the insurer of the offshore installation (s 385J MTA). Civil liability for oil spills caused by offshore oil installations is addressed in more detail below (sixth heading).

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6. CRIMINAL AND CIVIL LIABILITY FOR OIL SPILLS

The Deepwater Horizon and MV Rena incidents provide stark reminders that large oil spills cause significant environmental, economic and social damage. There is a marked difference between the damage caused by Deepwater Horizon and MV Rena. The final cost to British Petroleum from the Macondo blowout is estimated to be somewhere in the vicinity of $US41 billion.50 The cost for the Bay of Plenty clean-up was around $NZ46 million.51 Although, this figure does not take account of the economic impact to the region or the shipping company’s salvage costs.52 As discussed, the EEZ Act and MTA establish a robust legislative regime for managing the risks associated with offshore exploration and development. Nevertheless, Deepwater Horizon demonstrates that things can go catastrophically wrong. Although the chances of occurrence are low, a major blow-out could clearly have significant environmental and economic repercussions for a small economy like New Zealand. It is hoped that criminal and civil liability will provide deterrence against allowing the genie out of the bottle. However, if deterrence does not work, liability should serve to ensure that the polluter bears the costs of remedying and mitigating any damage and not somebody else.53 Against this backdrop it might be considered whether the minimum insurance requirement of circa $NZ25 to 30 million under the marine protection rules needs to be revised. In any case, this part of the paper is intended to provide an overview of the provision for criminal and civil liability under the EEZ Act and MTA.

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51 http://www.treasury.govt.nz/publications/information/releases/renacosts
52 Maritime New Zealand v Daina Shipping Company CRI-2012-070-1872 (DC). The shipping company claimed that its insurers had spent $NZ235 million on clean-up and salvage during sentencing for the oil spill.
53 Machinery Movers Ltd v Auckland Regional Council (1993) 1A ELRNZ 411 (HC). See High Court’s discussion concerning who should bear the costs of pollution at 416, education and deterrence at 417 to 418.
Criminal liability under EEZ Act and MTA

Presently, failure to obtain a marine consent for a discretionary activity, contravention of a consent, non-compliance with regulations regarding permitted or prohibited activities, or breach of an enforcement order are all offences under the EEZ Act (s 132). Strict liability applies and the defences are the same for each kind of offence. However, the EEZ Amendment Act has separated offences into separate categories with different types of defences (s 132 to 134G, not in force). The amendments provide that the owner of a structure involved in a breach of the restrictions other than discharges and the person who carried out the activity commit an offence under the Act (s 20 and 132, not in force). The term owner, in relation to an offshore structure, is very broadly interpreted as including (s 132(3)(b)):

- the person holding the right to explore or exploit minerals (eg oil and gas) in connection with the use of the installation;
- the manager, lessee, licensee, or operator of the installation; and
- any agent or employee of the owner, manager, lessee, licensee, or operator, or the person in charge of the operations connected with the installation.

Offences against the restrictions on discharges are subject to strict liability. This means it is not necessary to prove that the defendant intended to commit the offence. Proof of the act involved in the breach is sufficient for a conviction and the imposition of a fine. The strict liability nature of the offence means that the aforementioned types of person can be held vicariously liable for the acts of another person. Although such a regime is harsh, especially on a vicarious basis, parliament justifies it in the public interest.\(^{54}\) However, the strict liability regime for non-discharge offences is ameliorated to some extent by the following no-fault defences:

- the action was to protect life, property or serious adverse effects on the environment, the conduct was reasonable in the circumstances and the effects were adequately mitigated or remedied by the defendant; or
- the action resulted from an event beyond the control of the defendant (including natural disaster, mechanical failure, or sabotage), could not reasonably have been foreseen and the effects were adequately mitigated or remedied by the defendant.

Significantly, it appears that the new amendments to the EEZ Act adopt a less rigorous approach when it comes to offences for breaches in relation to the discharge of harmful substances (s 134 and 134A – not in force), or those offences involving oil pollution. The owner of an offshore installation, or the persons carrying out the mining activity, commit an offence if a harmful substance such as oil is discharged in breach of s 20B (not in force). Although these offences are likely to pose much greater risk to the environment and economy, they are not expressed as strict liability offences under the amendments. The defences also appear less onerous, including: (a) the harmful substance was discharged for the purpose of securing the safety of an offshore installation or for the purpose of saving life, and the discharge was a reasonable step to take to effect that purpose; or (b) the harmful substance escaped as a consequence of damage to an offshore installation, without the negligence or deliberate act of the defendant and as soon as practicable after the damage occurred, all reasonable steps were taken to prevent or minimise the escape of the harmful substance (s 134A).

The maximum pecuniary penalty for an offence committed by a natural person is a fine of NZ$300,000, whereas corporate entities are liable to a fine of up to NZ$10 million (s 134H(1)). All persons (including corporates) are further liable to an additional maximum fine of NZ$10,000 per day for a continuing offence (134H(2)). In addition, a person who commits an oil discharge offence is liable on conviction to pay the costs incurred cleaning up any harmful substances or other waste to which the offence relates (s 134I). The Court may in turn order any fine imposed to be paid to another person, provided the money is applied to meet the costs incurred cleaning-up or repairing the damage caused any harmful substances or other waste (s 134M). The phrase “repairing the damage” is significant; as it is possible that it could be relied on to resolve certain private claims in respect of damage caused by an oil spill. As highlighted during the MV Rena incident, much of focus was placed on compensating central and local government for the costs of the clean-up. However, the process for remedying damage to private property has proved to be less straightforward. It may well be that the breadth of offence and penalty provisions for illegal discharges under the amendments justify the presence of a wider range of defences than would otherwise be available under a strict liability regime. Additional penalties may be imposed if the offence was committed in the course of producing commercial gain. However, unlike offences under the RMA, there is no provision for a prison sentence under the EEZ Act. Although there is more limited jurisdiction over the EEZ than the territorial sea, a different approach is taken under the MTA.

As discussed, s 226 of the MTA provides that harmful substances from an offshore installation are not to be discharged within the EEZ or continental shelf other than in accordance with the marine protection rules (ie a discharge management plan). It is an offence for the owner of an offshore installation, and the person in charge of the operation, to discharge a harmful substance into the sea or onto the seabed in breach of s 226 (s 237). The defence provisions for such offences mirror the defence provisions for offences under s 134A (not in force) of the EEZ Act (s 243 MTA). Pecuniary penalties for an offence include a fine not exceeding $NZ200,000 plus $NZ10,000 a day for a continuing offence, such amount necessary to clean-up damage resulting from the discharge and any addition fine that might be imposed as the result of commercial gain (s 244).

Distinct from the EEZ Act is the provision for a term of imprisonment of up to two years for a breach of s 226. While this provision does not apply to the masters of foreign vessels outside the territorial sea (s 244(2)(a)), it presumably does apply to the owners and persons in charge of offshore installations within the EEZ. However, an imprisonment sentence may only be imposed where it can be shown that the person intended to commit the offence, or the offence occurred as the result of recklessness in the knowledge that serious damage to the environment would likely result (s 244(2)(b)). As in the case of the EEZ Act, the principal will be liable for offences committed by agents or employees as if the principal had personally committed the offence (s 410, MTA). Natural persons have a good defence where they could not reasonably been expected to have known that the offence was being committed, or took reasonable steps to stop the commission of the offence (s 410(a)). However, in the case of a corporate entity it must be shown that neither the directors or management could have been reasonably been expected to know of the offence, and took all reasonable steps to prevent the commission of same (s 410(b)).

56 Art 56, LOSC.
Civil liability under EEZ Act: enforcement orders

The EEZ Act, like the RMA, makes provision for abatement notices and enforcement orders. EPA enforcement officers are empowered to issue abatement notices for non-compliance with the Act, regulations or a marine consent (s 125 EEZ Act). A person served with an abatement notice may appeal against the notice to the Environment Court (s 129 EEZ Act). Any person may apply to the Environment Court for an enforcement to ensure compliance with the Act, or to remedy adverse effects on the environment resulting from a breach of the Act (s 116(1)). An enforcement order may require a person to pay money or reimburse another person for the actual and reasonable costs incurred in taking measures to avoid, remedy or mitigate an adverse effect on the environment (s 115(1)(c)). This means the Court’s jurisdiction could be exercised to require the payment of compensation for costs incurred in cleaning-up environmental damage resulting from an offshore installation oil spill in breach of s 20B (not yet in force).57 The possibility that a person may have a remedy against a party in another forum (ie general courts) should not preclude the Environment Court granting an application for an enforcement order for payment to that person.58

Civil liability under MTA: Parts 7 and 26A

One of the more controversial aspects of the MV Rena oil spill from a public policy perspective is the ability of ship owners (and their insurers) to protect themselves from full liability for damages under the Convention on Limitation of Liability for Maritime Claims (part 7, MTA). This issue was compounded in New Zealand by the failure of successive governments to amend the MTA to give effect to increases to the minimum limitation available under the Convention.59 “Limitation is in practical terms unbreakable.”60 This resulted in the owner’s liability for the MV Rena incident being limited to $NZ11 million, which is significantly less than the Crown’s clean-up costs for the oil spill without accounting for other damages (as discussed). While the policy behind limitation remains debatable, the legislative short-comings as to quantum under the Convention were addressed under the MTA Amended Act 2013. The MTA no longer requires an Act of Parliament to implement changes to limitation, so implementation should happen promptly. New limits under the Convention are expected to take effect in mid-2015. “At current exchange rates, the limitation amount for a ship with the tonnage of the Rena under those rules would be just under $40 million, so the increase will be significant.”61

While the general limitation of liability provisions under the MTA will continue to apply to oil pollution claims arising from discharges from ships, there is no limitation available where claims are made for pollution damage caused by a discharge from an offshore installation.62

58 Auckland City Council v Sulenta A066/94 (PT).
60 Beadle, N., The Rena’s Cautionary Tale: Limitation of Liability in Marine Claims in New Zealand, New Zealand Shipping Gazette, Volume 17, Number 65, June 2013. Beadle points out that “[i]n recognition of the high burden of proof to be met, Rena’s owners’ right to limitation was recently confirmed and an attempt by Bay of Plenty business owners to obtain documents to explore a challenge to limitation was denied: Daina Shipping Company v Te Runanga O Ngati Awa [2013] NZHC 500.” For a more extensive discussion of MV Rena see Beadle, N., and Reid N., “Recovering From Rena”, New Zealand Insurance Law Association Conference, 4 - 6 September 2013, Queenstown.
61 Ibid.
62 David, P., “The Search For Oil in New Zealand Waters: Work to be Done?”, [2011] 25 Australian & New Zealand...
There is presently no international liability regime for offshore structures – limitation of liability is all about maritime shipping. Therefore, liability is theoretically unlimited. Part 26A of the MTA, as inserted under the MTA Amendment Act, provides for civil liability for pollution of marine structures. Marine structures include offshore installations, which is any installation within New Zealand continental waters (i.e. the territorial sea and EEZ). The person in charge of the marine operation, or the owner of an installation, must pay the Crown the costs incurred by the Crown in dealing with oil discharges or the imminent threat of oil being discharged (s 385B). Furthermore, the operator or owner are also liable in damages for all pollution damage caused by an oil discharge (s 385C). Pollution damage is defined under s 385A as “damage or loss of any kind and”:

(a) includes the cost of any reasonable preventative measures taken to prevent or reduce pollution damage and any damage or loss occurring as a result of those measures;
(b) includes the costs of reasonable measures of reinstatement of the environment that are undertaken or to be undertaken; and
(c) includes losses of profit from impairment of the environment; but
(d) does not include any costs in relation to the impairment of the environment other than the costs referred in (b) and (c).”

Civil liability to the Crown, and for private damages, is subject to part 7 of the MTA and the defences against liability (s 385E). As discussed, part 7 only applies to ships and not installations. The reference to part 7 is probably intended to make it clear that limitation applies to vessels involved in oil spills connected to exploration or development. This may mean that oil spills connected to exploratory drilling from ship based platforms are covered by part 7. It is a defence for an operator or owner if they can prove that the discharge (or threat of discharge): (a) resulted from an act of war or a natural phenomenon; or (b) was wholly caused by a third person, other than the employee or agent, with intent to cause damage; or (c) was wholly caused by the negligence or other wrongful act of any government or other authority (s 385E(1)). The actions of the claimant can also be employed as either a defence, or mitigation in the amount of damages awarded (s 385E(2) and 385F). Furthermore, as discussed, operators of offshore oil installations are also required to hold a minimum amount of public liability insurance to cover any clean-up or damage costs in the event of an oil spill ($NZ25 million).

The MTA bars claims for pollution damage from ships at common law (s 352). However, there is no such bar on common law claims for pollution damage caused by offshore installations. As a consequence, a range of possible claims will be available at common law in addition to the statutory claims under part 26A of the MTA. Oil spills in other jurisdictions have, in the past, seen a range of claims based on negligence and nuisance. The range of possible claims are broad and recoverability would likely be decided by the level of causal nexus required between the discharge and the pollution damage. In practical terms, recovery for claims in a major incident will be governed by the financial resources (including insurance) available to those liable. Insurance cover for clean-up costs and claims up to $US1.25 billion appears to be available in the market.63 “Beyond that, the payment of claims will become a question of whether the operator has the financial capacity to self-insure, as was the case with BP in the Deepwater Horizon situation.”64
Unlocking potential offshore oil and gas resources could lead to significant increases in New Zealand’s export revenue. The returns to the economy would likely lead to lower unemployment, better incomes, improved infrastructure, and higher quality education and medical care. One need only look to Norway to see evidence of these benefits. However, offshore exploration and development is inherently more difficult to manage than similar types of terrestrial activities, given the remoteness and highly dynamic nature of the offshore environment. Furthermore, the vast size of New Zealand’s EEZ and continental shelf is only matched by our lack of scientific knowledge as to the nature and importance of their benthic environments and ecosystems. The risks (albeit of low probability) have the potential to cause significant environmental and economic damage. It is quite difficult imagining New Zealand being able to cope with an oil spill on the scale of Deepwater Horizon ($US41 billion). Therefore, any decisions concerning exploration and development must be based on the best available information and favour caution and environmental protection.

This paper has examined the international framework under which New Zealand exercises rights and obligations in respect of the EEZ, the regulatory gap that existed prior to the EEZ Act, the changes that have been brought about by that legislation, requirements for oil spill planning and the liability regime if an oil spill occurs. In terms of the key points that have been made, firstly, it is important to appreciate that the EEZ and continental shelf are not sovereign territory. New Zealand’s right to exploit the natural resources within its EEZ are subject to environmental obligations designed to protect the interests of other State Parties to the LOSC. Although s 11 does not require compliance with international law, it would do well for decision-makers under the Act to bear in mind that New Zealand can be held liable by other States for damage to those interests. Second, as demonstrated by the High Court’s decision in Greenpeace v Minister of Energy and Resources, the regime that preceded the EEZ Act was principally concerned with allocation and not environmental regulation. The MTA continues to be the instrument of allocation for mineral resources (i.e. petroleum) within the EEZ and continental shelf. The distinction between allocation and regulation must be kept in mind when appraising any application for consent to undertake oil exploration or development.

Third, The EEZ Act was enacted in order to fill the regulatory gap that existed in relation to the environmental regulation of activities within the EEZ. Like the RMA, the Act is a purpose based piece of legislation. The decision-making provisions of the Act are not peppered with references to “achieving the purpose of the Act” in the same way as the RMA. Nevertheless, decision-makers are directed to achieve the purpose under s 10 itself. Accordingly, decisions will need to promote the sustainable management of the natural resources within of the EEZ and continental shelf. In contrast to the RMA, the Act is not concerned with social or cultural values. Accordingly, integrated decision-making between the territorial sea and EEZ will focus on the natural environment. Discretionary activities will require publicly notified applications for marine consent. Non-notified activities will not require public notification. This classification was added to the Act at the end of 2013 in order to facilitate exploratory drilling. However, non-notification of exploratory drilling is dependent on the Minister for the Environment’s decision on whether it is included as such in the proposed activity classification regulations. Non-notified discretionary activities will still require approval of a marine consent. In either case, decision-makers are required to
favour caution and environmental protection, but must consider adaptive management if that means an application for consent might be refused.

Fourth, the Permitted Regulations seek to address industries currently active within the EEZ (eg the oil and gas industry). The only oil and gas activity that is permitted is seismic surveying. All other oil and gas activities require an application for marine consent, which must presently be publicly notified. The recently proposed activity classifications indicate the government’s preference for exploration to be non-notified and production to be publically notified. The rational for non-notification of exploration is the short duration of the activity and need for investment certainty. The proposal has encountered strong public opposition from those concerned that well control might still be lost during exploration. Deepwater Horizon is cited as an example of loss of control during exploration.

Fifth, the regulation of discharges and oil spills is provided for under both the MTA and the EEZ Act. The MTA retains jurisdiction over discharges from ships, while the EEZ Act assumes jurisdiction for discharges associated with exploration and development (i.e. installations or ships). The EEZ provisions on discharges will not come into effect until such time as regulations are made to classify discharges. In the meantime, exploration or production discharge approval will continue to be regulated under MTA’s marine protection rules. Irrespective, the MTA will continue to regulate marine spill contingency planning, preparedness and response. This includes a requirement that the owners of offshore installations hold public liability insurance to cover the clean-up of any oil spill (circa $NZ25 to 30 million).

Sixth, adherence of an owner and/or operator of an offshore installation (or drilling ship) to the any regulations or consent conditions should serve to minimise the risk of a major spill. Furthermore, the criminal and civil liability regime under the EEZ Act and MTA are intended to provide deterrence against the kinds of short-cuts that led to the Deepwater Horizon oil spill. Distinct from the RMA, the EEZ Act does not adopt a strict liability regime for oil pollution offences. Nevertheless, financial penalties for a conviction can include orders to meet the costs of clean-up or repairing any damage caused by an oil spill. It is possible that such orders could be made to resolve certain private claims, and avert the need for communities to become involved in costly civil litigation. Penalties may also be imposed under the MTA for breaching the conditions of a discharge management plan. Although the fines are smaller, penalties similar to those under the EEZ Act may be imposed in respect of clean-up costs. The Environment Court may also make enforcement orders under the EEZ Act requiring the reimbursement of costs incurred in cleaning up environmental damage.

One of the more controversial aspects of the MV Rena oil spill was the ability of the ship’s owners (and their insurers) to limit their liability in respect of the clean-up costs of the spill and resulting damages. There is no international limitation regime in respect of pollution damage caused by oil spills from offshore installations. Liability, at least in theory, is unlimited. However, insurance available for clean-up costs is only about $US1.25 billion. Beyond that, the payment of claims is likely to rely on the ability of the operator to self-insure. Clearly, oil spill insurance may not even touch the sides in the case of a major oil spill as demonstrated by Deepwater Horizon. This serves to emphasise the importance of good decision-making in respect of oil and gas exploration under the new legislative regime for the EEZ and continental shelf.