

Proposed Amendments to Crown Minerals (Permitting and Crown Land) Bill Under International Law

Executive Summary

The Government has proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill, including proposed new offences applicable in the exclusive economic zone. This opinion finds that the proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill would breach international law in a number of respects.

1. They would wrongly interfere with the freedom of navigation in that they would apply a 500 metre exclusion zone around vessels, whereas UNCLOS only provides for such zones around installations, and expressly preserves rights of navigation.
2. In providing for criminal penalties for mere interference, including in structure and operations, without requiring violence, acts of violence, damage endangering safe navigation of a ship, or serious interference with the operation of maritime navigational facilities likely to endanger the safe navigation of a ship, they go much further than the SUA Convention provides.
3. They would breach international human rights, in purporting to prohibit legitimate and peaceful forms of demonstration, protest, or confrontation, which has expressly been recognized by the International Maritime Organization (IMO), and breach the rights to freedom of expression, peaceful assembly and free association, enshrined in the International Covenant on Civil and Political Rights.
4. A consequence of this finding is that the Attorney-General should examine the Bill and indicate to the House when it appears to him that it is inconsistent with the NZ Bill of Rights Act 1990, according to s7 of the Act. According to the Cabinet Guidelines, "[s]ufficient time needs to be built into the government bill preparation process for adequate consideration of Bill of Rights issues by officials, the Attorney-General, and other Ministers where appropriate."

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Introduction

The Government has proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill. The proposals follow the Select Committee consideration of the Bill so it is envisaged that they will not be considered by a Select Committee. This opinion does not address the procedural aspects of this proposed amendment, but focuses on its consistency or otherwise with applicable international law.

According to the Supplementary Order Paper No. 205 (9 April 2013), two new offences are proposed:

"101B Interfering with structure or operation in offshore area

- "(1) A person commits an offence if the person intentionally engages in conduct that results in—
- "(a) damage to, or interference with, any structure or ship that is in an offshore area and that is, or is to be, used in mining operations or for the processing, storing, preparing for transporting, or transporting of minerals; or
 - "(b) damage to, or interference with, any equipment on, or attached to, such a structure or ship; or
 - "(c) interference with any operations or activities being carried out, or any works being executed, on, by means of, or in connection with such a structure or ship.
- "(2) A person commits an offence if—
- "(a) the person is the master of a ship that, without reasonable excuse, enters a specified non-interference zone for a permitted prospecting, exploration, or mining activity; or
 - "(b) the person leaves a ship and, without reasonable excuse, enters a specified non-interference zone for a permitted prospecting, exploration, or mining activity.
- "(3) In prosecuting an offence against **subsection (2)**, it is not necessary for the prosecution to prove that the person intended to commit the offence.
- "(4) A person who commits an offence against **subsection (1)** is liable on summary conviction,—
- "(a) in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$50,000:

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"(b) in the case of a body corporate, to a fine not exceeding \$100,000.

"(5) A person who commits an offence against **subsection (2)** is liable on summary conviction to a fine not exceeding \$10,000.

"(6) For the purposes of **subsection (2)**, the chief executive may specify a non-interference zone by notice published in a fortnightly edition of the *New Zealand Notices to Mariners* (under Part 25 of the Maritime Rules).

"(7) A notice must specify—

"(a) the permitted prospecting, mining, or exploration activity to which the non-interference zone relates; and

"(b) the locality of the activity; and

"(c) the area of the non-interference zone to which the activity relates (which may be up to 500 metres from any point on the outer edge of the structure or ship to which the activity relates or, if there is any equipment attached to the structure or ship, 500 metres from any point on the outer edge of the equipment); and

"(d) the period (which may be up to 3 months) for which the notice has effect.

"(8) The chief executive, when determining the area of a non-interference zone for the purposes of a notice, must take into account the nature of the activity, including the size of any structure or ship to which the activity relates and any equipment attached to the structure or ship necessary for the carrying out of the activity.

"(9) No proceedings for an offence against this section may be brought in a New Zealand court in respect of a contravention of this section on board, or by a person leaving, a foreign ship without the consent of the Attorney-General.

New Zealand's Rights Over the Continental Shelf and in the Exclusive Economic Zone

Under the 1982 United Nations Convention on the Law of the Sea,¹ to which New Zealand is party,² New Zealand has sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.³ New Zealand also has jurisdiction⁴ as provided for in the relevant provisions of the Convention with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.

Article 78.2 provides that in exercising its rights and performing its duties under this Convention in the exclusive economic zone (EEZ), New Zealand as the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention.⁵ In addition, crucially, the exercise of the rights of New Zealand as the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in the Convention.

¹ United Nations Convention on the Law of the Sea. Signed at Montego Bay, Jamaica, 10 December 1982, entered into force 16 November 1994 ("UNCLOS"). At http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

² UNCLOS entered into force on 16 November 1994. New Zealand ratified UNCLOS on 19 July 1996. See status at http://www.un.org/Depts/los/reference_files/status2010.pdf.

³ UNCLOS article 77.1.

⁴ UNCLOS article 56.1(b).

⁵ UNCLOS article 56.2.

Installations and Structures in the EEZ and Safety Zones

Article 60 addresses artificial islands, installations and structures in the EEZ.⁶ It grants, in the EEZ, to New Zealand as the coastal State the exclusive right to construct and to authorize and regulate the construction, operation and use of installations and structures for the purposes provided for in article 56 and other economic purposes. New Zealand, as the coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.⁷

The breadth of the safety zones shall be determined by New Zealand as the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.⁸ All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.⁹ Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.¹⁰

Rights in the EEZ

In the EEZ, all States enjoy, subject to the relevant provisions of the Convention, the freedoms (referred to in article 87) of navigation and overflight, and other internationally lawful uses of the sea related to these freedoms, and compatible with the other provisions of the Convention.¹¹

Under article 58.2, articles 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with Part V (relating to the EEZ). These include rights of navigation.¹²

In exercising their rights and performing their duties under the Convention in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with this Part.¹³

⁶ UNCLOS article 60.

⁷ UNCLOS article 60.4.

⁸ UNCLOS article 60.5.

⁹ UNCLOS article 60.6.

¹⁰ UNCLOS article 60.7.

¹¹ UNCLOS article 58.1.

¹² UNCLOS article 90.

¹³ UNCLOS article 58.2

Conflicts in the EEZ

Article 59 provides the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone (EEZ). It provides that "[i]n cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

Implications for this Bill

The comparable Australian legislation, the Offshore Petroleum and Greenhouse Gas Storage Act 2006, provides in section 616 for a 500 metre petroleum safety zone for the purpose of protecting a petroleum well, a structure, or any equipment, in an offshore area. There is no provision for a safety zone around a vessel.

This is important. UNCLOS, as has been seen, provides for a 500 metre safety zone around an installation such as an oil rig. It does not provide for such a safety zone around a ship. Such a safety zone would constitute an interference with navigation, which is specifically preserved in article 58.1. There is a good reason that UNCLOS does not allow safety zones around vessels. In contrast to installations such as oil rigs, which are subject to the exclusive jurisdiction of the coastal State, ships are principally subject to their flag State laws while sailing in the EEZ or on the high seas. Safety zones around vessels would create confusing zones of coastal state jurisdiction around foreign flagged vessels - a very confusing state of affairs which is not contemplated by UNCLOS or the law of the sea.

Other Relevant International Legal Provisions

There are already numerous international instruments in place to address the safety of navigation of vessels. The 1972 Collision Regulations¹⁴ are aimed at avoiding collisions at sea, and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the "SUA Convention")¹⁵ and its related protocols are aimed at preventing violent acts against vessels and installations.

Some years after the September 2001 World Trade Centre bombing, member States of the International Maritime Organization, including New Zealand, agreed amendments to the 1988 SUA Convention. That Convention specifically provided that nothing in the SUA Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the UN Charter and international human rights law.¹⁶ That is important, as it shows that Parties when negotiating the SUA Convention specifically had in

¹⁴ Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs). Adopted on 20 October 1972; entered into force 15 July 1977. Copy at <http://www.collisionregs.com/MSN1781.pdf>.

¹⁵ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, concluded at Rome on 10 March 1988, and Protocol for the Suppression of unlawful acts against the safety of fixed platforms located on the continental shelf. Concluded at Rome on 10 March 1988. At <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf/>

Protocol adopted in London, UK on 14 October 2005, entered into force 28 July 2010. At <https://www.unodc.org/tldb/pdf/Convention&Protocol%20Maritime%20Navigation%20EN.pdf>.

¹⁶ SUA Convention article 2bis.

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mind the balance between protecting human rights and protection against acts of terrorism. Article 3 of the SUA Convention provides for various offences, including that:

"1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which that person knows to be false, thereby endangering the safe navigation of a ship."

In other word, article 3 requires elements of acts of violence, damage endangering safe navigation of a ship, and serious interference with the operation of maritime navigational facilities likely to endanger the safe navigation of a ship. This is clearly a much higher threshold than 'interference' with a structure, a ship, or even operations or activities, as proposed in the SOP. The SUA Convention, after much negotiation, struck a balance between protection of vessels from violent acts and human rights.

Even more recently, New Zealand supported rights of protest in opposing attempts by Japan at the IMO to adopt an international 'Code of Conduct during Demonstrations/Campaigns against Ships at High Seas'¹⁷ on the grounds that existing international laws strike the right balance.

Freedom of Expression and Protest at Sea

The New Zealand Bill of Rights enshrines in section 14 "the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form," and provides in section 16 for the freedom of peaceful assembly and in section 17 for the right to freedom of association. These sections reflect similar provisions in the International Covenant on Civil and Political Rights,¹⁸ which provides for freedom of expression,¹⁹ freedom of peaceful assembly²⁰ and freedom of association.²¹

There is no doubt that international law supports the right of legitimate and peaceful demonstration, protest and confrontation at sea. The IMO has expressly recognised the right of protest at sea, in a

¹⁷ IMO document NAV 54-10-1, (15 April 2008). At <http://www.sjofartsverket.se/pages/14913/54-10-1.pdf>. See Greenpeace comments on the Japanese proposal in NAV 54/10/2 (9 May 2008) at <http://www.sjofartsverket.se/pages/14913/54-10-2.pdf>.

¹⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171,

¹⁹ ICCPR article 19.

²⁰ ICCPR article 21.

²¹ ICCPR article 22. See also similar provisions in the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, articles 19 and 20.

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resolution "[a]ffirming the rights and obligations relating to legitimate and peaceful forms of demonstration, protest or confrontation and noting that there are international instruments that may be relevant to these rights and obligations."²²

The International Whaling Commission has repeatedly in resolutions expressly upheld the right to legitimate and peaceful forms of protest and demonstration at sea.²³ The writer was present at the meetings, where New Zealand took an important and active role in preserving the right to peaceful protest in the resolutions. It is worth noting that many important environmental protection initiatives arose from protests at sea, including the moratorium on commercial whaling, the ban on the dumping of nuclear waste at sea and the ban on the use of driftnets. Perhaps most importantly to New Zealanders, a cessation of atmospheric nuclear tests came after the New Zealand government itself sent two naval vessels protest - HMNZS *Canterbury* and HMNZS *Otago* - to protest at Moruroa in 1973, and again in 1995 to protest underground nuclear testing.²⁴ Australia also participated in the 1973 waterborne protest, sending the HMAS *Supply*.

Case Law

The European Court of Human Rights has upheld a waterborne protest, finding in *Women on Waves v Portugal*²⁵ that forbidding a protest vessel to enter Portuguese territorial waters prevented the plaintiffs from conveying their information and holding meetings and manifestations – that were scheduled to take place on board – in a way they deemed most effective.

The European Court of Human Rights in *Steel and others v United Kingdom*,²⁶ observed that “[i]t is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the Court considers nonetheless that they constituted expressions of opinion within the meaning of Article 10. The measures taken against the applicants were, therefore, interferences with their right to freedom of expression.” The Court has stated that: “... any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.”²⁷ National courts have interpreted this

²² IMO Resolution MSC.303(87) , at <http://www.maritimenz.govt.nz/AdyGil/IMO-resolution.pdf>,

²³ IWC Resolution 2006/2, Resolution on the Safety of Vessels Engaged in Whaling and Whale Research-Related Activities (at <http://archive.iwcoffice.org/meetings/resolutions/resolution2006.htm#2>) (“Whereas the Commission and Contracting Governments support the right to legitimate and peaceful forms of protest and demonstration”) and IWC Resolution 2007/2 Resolution on Safety at Sea and Protection of the Environment (same wording). At <http://archive.iwcoffice.org/meetings/resolutions/resolution2007.htm#res2>.

²⁴ See Hansard at <http://www.vdig.net/hansard/archive.jsp?y=1995&m=07&d=18&o=27&p=41>. See account of the voyage at <http://mururoavet.8k.com/Rumours.htm>.

²⁵ *Women on Waves v Portugal* Requête no 31276/05 (ECHR 2009). At [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["women on waves"\],"documentcollectionid":\["COMMITTEE","DECISIONS","COMMUNICATEDCASES","CLIN","ADVISOR YOPINIONS","REPORTS","RESOLUTIONS"\],"itemid":\["001-91046"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{).

²⁶ *Steel and others v United Kingdom* 67/1997/851/1058 (ECHR 1998). At [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58240#{"itemid":\["001-58240"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58240#{). Para. 92.

²⁷ See, for example, *Sergey Kuznetsov v. Russia*, 23 October 2008, Application no. 10877/04, §44.

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to mean that direct action that obstructs business needs to be tolerated if it raises a matter of general importance and requirements of proportionality, subsidiarity and safety are met.²⁸

In Australia, the District Court of New South Wales has held that "[t]he right to protest and the right to express publicly one's political views, albeit by direct action, is one which is to be valued and protected in the context of a modern democracy."²⁹

Conclusion

The proposed amendments to the Crown Minerals (Permitting and Crown Land) Bill would breach international law in a number of respects.

1. They would wrongly interfere with the freedom of navigation in that they would apply a 500 metre exclusion zone around vessels, whereas UNCLOS only provides for such zones around installations, and expressly preserves rights of navigation.
2. In providing for criminal penalties for mere interference, including in structure and operations, without requiring violence, acts of violence, damage endangering safe navigation of a ship, or serious interference with the operation of maritime navigational facilities likely to endanger the safe navigation of a ship, they go much further than the SUA Convention provides.
3. They would breach international human rights, in purporting to prohibit legitimate and peaceful forms of demonstration, protest, or confrontation, which has expressly been recognized by the IMO, and breach the rights to freedom of expression, peaceful assembly and free association, enshrined in the International Covenant on Civil and Political Rights.
4. The Attorney-General should examine the Bill and indicate to the House when it appears to him that it is inconsistent with the NZ Bill of Rights Act 1990,³⁰ according to s7 of that Act.³¹

²⁸ See *Shell Nederland Verkoopmaatschappij B.V. and others v. Stichting Greenpeace Nederland and Stichting Greenpeace Council (Greenpeace International)* District Court of Amsterdam, 5 October 2010, LJN BX9310.

Translation available at <http://www.greenpeace.org/international/Global/international/publications/climate/2012/Arctic/finaltranslation%20of%20judgment.pdf>. See also <http://www.greenpeace.org/international/en/press/releases/Dutch-court-grants-Greenpeace-right-to-stage-peaceful-protests-against-Shell/>.

²⁹ *R. v Kirkwood* NSW District Court 15 May 2002, DCZ 2293 EF-C (unpublished).

³⁰ 262 New Zealand Bill of Rights

"(1) Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the Attorney-General must indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.

(2) An indication by the Attorney-General to the House concerning the New Zealand Bill of Rights Act 1990 is made by the presentation of a paper,—

(a) in the case of a Government bill, on the introduction of that bill, or

(b) in any other case, as soon as practicable after the introduction of the bill.

(3) Where the House has accorded urgency to the introduction of a bill, the Attorney-General may, on the bill's introduction, present a paper under this Standing Order in the House.

(4) A paper presented under this Standing Order is published under the authority of the House."

At <http://www.parliament.nz/en-NZ/PB/Rules/StOrders/b/a/e/00HOHPBReferenceStOrders3-Standing-Orders-of-the-House-of-Representatives.htm>. Standing Order 262 at <http://www.parliament.nz/en->

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According to the Cabinet Guidelines, "Sufficient time needs to be built into the government bill preparation process for adequate consideration of Bill of Rights issues by officials, the Attorney-General, and other Ministers where appropriate."³² As was observed by the 2011 Report of the Standing Orders Committee,³³ "Cabinet guidelines require officials to report on Bill of Rights and other constitutional matters in the documentation supporting proposals for bills, although this analysis is not always reflected in explanatory notes or regulatory impact statements when bills are introduced. We consider that this material should be included and given prominence in regulatory impact statements to assist submitters and committees in their consideration of these issues in bills. The Government should also amend Cabinet guidelines to require Bill of Rights reporting on substantive Supplementary Order Papers."³⁴



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[NZ/PB/Rules/StOrders/Chapter5/8/1/5/00HOHPBReferenceStOrdersChapter5CGeneral1-General-provisions.htm#SO262](http://www.parliament.nz/en-NZ/PB/Rules/StOrders/Chapter5/8/1/5/00HOHPBReferenceStOrdersChapter5CGeneral1-General-provisions.htm#SO262)

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³² See Cabinet Guidelines, Checking human rights issues, at <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/checking-human-rights-issues>.

³³ Review of Standing Orders: Report of the Standing Orders Committee. September 2011. At http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/4/a/8/49DBSCH_SCR5302_1-Review-of-the-Standing-Orders-I-18B.htm, page 37.

³⁴ See Cabinet Guidelines, Checking human rights issues, at <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/checking-human-rights-issues>.