

THE SEARCH FOR OIL IN NEW ZEALAND WATERS: WORK TO BE DONE?

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1 Plans for development

New Zealand is currently committed to unlocking the petroleum potential within its waters. The government introduced the Petroleum Action Plan ('Plan') in November 2009 which aims to lift the value of petroleum exports from NZ\$3 billion (as at November 2009) to NZ\$30 billion by 2025.¹ Currently, some new permits for exploration have been granted. The work under the five year exploration permit granted to the Brazilian oil and gas company, Petrobras, in June 2010 to explore a 12 333 square kilometre block of sea bed in the Raukumara Basin off the East Cape of the North Island, has recently become headline news as a result of protest actions by environmentalists and iwi which have sought to disrupt the work of the Petrobras seismic survey ship.²

New Zealand has a large exclusive economic zone ('EEZ') and extended continental shelf which, as a state party to UNCLOS, it has the right to explore and exploit.³ Although several onshore and offshore oil and gas fields have started production in the Taranaki Basin since 1970, to date, the exploration and exploitation of seabed resources has been carried out at a fairly modest level. The scientific data suggests that there is a further significant opportunity to develop New Zealand's resources.⁴ Given the national and global economic situation and the central role of oil and gas in developed economies, the New Zealand government's desire to increase oil exploration in the near future is understandable.

2 Areas of exploration

Currently, most of New Zealand's producing oil and gas fields are located in the Taranaki Basin. The Maui field now only produces natural gas, although its gas reserves are dwindling. Previously, for about 10 years, it produced oil. The Kupe field produces natural gas and some light condensate, as does the smaller Pohukura field. The largest oil field is the Maari field. Tui is a smaller oil field.

Prospecting or exploration permits have recently been issued to several major international companies. While most exploration currently occurs in the Taranaki Basin, the Great South Basin and the New Zealand Orogenic Belt Basin are seen as having potential for development. The activity in the Taranaki Basin takes place at water depths of approximately 200 metres to 300 metres. Some current exploration is taking place in much deeper environments.⁵

The 'blow-out' at the Macondo well in the Gulf of Mexico in April 2010 which caused the death of 11 workers and gave rise to the largest ever oil spill in US waters, has highlighted the risks in offshore exploration, particularly where deepwater drilling is involved. The spill underlined the importance of ensuring that exploration within New Zealand waters is carried out within an appropriate regulatory

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¹ See Ministry of Economic Development website <<http://www.med.govt.nz>>.

² In March/April 2011 a flotilla of vessels operated by environmental groups such as Greenpeace and Te Whanau A Apanui, the East Coast of the North Island iwi, has sought to disrupt the work of the Ocean Explorer, the Petrobras seismic survey ship. Protesters were served with notices under the *Maritime Transport Act 1994* (NZ) ordering them to stay at least 200 metres away from the survey ship and its support vessel. On 23 April 2011 the skipper of a fishing vessel owned by the local iwi was arrested by police for allegedly operating his vessel in an unsafe manner in the vicinity of the survey ship and its support vessel. See, 'Skipper charged over safety concerns', *The Sunday Star Times* (online), 24 April 2011. <<http://www.stuff.co.nz/national/4922307/Skipper-charged-over-safety-concerns>>. At the time of writing the protest and actions by the relevant authorities in relation to it are ongoing.

³ UNCLOS arts 56(1) and 77(1).

⁴ A recent survey, the Fraser Institute Global Petroleum Survey, which is referred to in the Comparative Review of Health and Safety and Environmental Legislation for Offshore Petroleum Operations ('Review'), concludes that New Zealand was the 18th most favourable country for potential oil exploration of 133 countries surveyed: Fraser Institute, *Global Petroleum Survey 2010* (June 2010) 12 <<http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/global-petroleum-survey-2010.pdf>>. As part of its Petroleum Action Plan, the Government has made a sizeable investment in publishing existing seismic data and acquiring further data to provide better information concerning the possible resources for the industry.

⁵ By way of example, the US deepwater exploration company Anadarko Petroleum has interests in three exploration permits in the Taranaki and Canterbury Basins.

regime and that New Zealand has the necessary technical expertise to monitor offshore exploration and respond appropriately, should accidents occur.

3 New Zealand Review

As part of the Plan, the government commissioned an initial comparative review of the New Zealand legislative regime relating to offshore petroleum operations ('Review').⁶ After the Review was published in September 2010, the Report to the President of the National Commission on the *Deepwater Horizon* Oil Spill and Offshore Drilling was produced in January 2011.⁷ Both documents provide a good background to the issues arising in relation to offshore oil exploration which all those with an interest in the area should consider.

At this time in the proposed process of further exploration in New Zealand waters it seems appropriate that the legislative regime relating to the permission process for offshore exploration, the operational control of such exploration and the capacity to respond to a spill or other accident, and the technical resources available to ensure compliance should be reviewed.

4 Outline of paper

This paper seeks to outline the legislative regime which applies to offshore exploration in New Zealand waters,⁸ to discuss how that regime might respond to a major pollution incident involving an escape of oil from an offshore installation, and to suggest the areas where amendment to the regime might be considered, particularly in the light of the findings of the Review and the Report into the *Deepwater Horizon* oil spill.

5 Current legislative regime

As noted, New Zealand's rights to explore and exploit the sea and seabed are derived from the *United Nations Law of the Sea Convention* 1982 ('UNCLOS').⁹ New Zealand legislation has established an EEZ and New Zealand's rights over its EEZ and extended continental shelf.¹⁰ Generally, the New Zealand legislative regulation of matters such as pollution from ships, dumping, civil liability for oil pollution damage, oil pollution preparedness and response and intervention on the high seas in case of oil pollution casualties is based on the relevant international conventions. The conventions are implemented, for the most part, by provisions of the *Maritime Transport Act 1993* (NZ) ('MTA') and maritime or marine protection rules made under the MTA.

There is no specific legislative enactment solely concerned with the regulation of offshore exploration - this mirrors the international position where there is no specific convention directed at this activity. The regulation of offshore exploration and offshore installations even in relation to specific areas such as the control of discharges into the environment is to be found in a range of legislative provisions.

The grant of permits for prospecting, exploration and mining of oil and other minerals is regulated by the *Crown Minerals Act 1991* (NZ) ('*Crown Minerals Act*'). The health and safety of employees on offshore installations is governed by the *Health and Safety in Employment Act 1992* (NZ) ('HSEA') and industry-specific regulations made under s 21 of the Act. Provisions of the *Resource Management Act 1991* (NZ) ('RMA') and the MTA (and delegated legislation under both Acts) regulate the operation of offshore installations from the environmental perspective and provide for civil and criminal liability for discharges from offshore installations. While these are the principal legislative provisions applicable in

⁶ New Zealand Ministry of Economic Development, *Comparative Review of Health and Safety and Environmental Legislation for Offshore Petroleum Operations* (September 2010) <<http://www.med.govt.nz/upload/Offshore%20Petroleum%20-%20Final%20Report%20and%20Annexures.pdf>>.

⁷ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deepwater: the Gulf Oil Disaster and the Future of Offshore Drilling – Report to the President* (January 2011) <http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf>.

⁸ For more detail on the regime as at 2008, insofar as it relates to marine pollution, see Paul David, 'Marine Pollution' in D Nolan (ed), *Environmental and Resource Management Law* (LexisNexis Butterworths, 3rd ed, 2005) ch 9.

⁹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 14 November 1994) ('UNCLOS').

¹⁰ See, *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977* (NZ), and *Continental Shelf Act 1964* (NZ) ss 3-5A.

the context of oil and gas exploration, other legislative provisions will have potential application in various situations.¹¹

6 Prospecting, exploration and mining of petroleum

6.1 *Crown Minerals Act 1991*

The prospecting, exploration and mining of offshore oil and petroleum and the grant of licenses is governed by the *Crown Minerals Act*. This Act provides for the management and administration of Crown-owned minerals (by the Minister of Energy), aspects of Crown mineral ownership, the allocation of Crown-owned minerals by way of minerals programmes and mineral permits, and access to land to undertake prospecting, exploration, or mining. Under the Act, the Crown seeks to provide for the efficient allocation of Crown-owned minerals and for a fair financial return for the mining of those minerals.¹² The regime focuses on the process of allocation and revenue return to the Crown. While permits granted will require that work is carried out using good exploration and mining practice, the Act is not specifically concerned with the regulation of the environmental impact of activities. This is dealt with under other legislation such as the *RMA* and *MTA*.

Section 10 of the *Crown Minerals Act* declares that all petroleum existing in its natural condition in land ('land' includes New Zealand's territorial sea) is the property of the Crown.¹³ Section 10 does not apply to petroleum in the seabed of New Zealand's EEZ and continental shelf. As noted above, the Crown has rights to explore and exploit the EEZ and continental shelf under UNCLOS. While the Crown does not assert ownership over petroleum and other minerals in the seabed beyond the territorial sea, all rights of exploration are exclusively vested in the Crown and the provisions of the *Crown Minerals Act* are applicable to the exercise of the rights to petroleum in the seabed and subsoil in the EEZ and/or over the continental shelf.¹⁴ This is a form of limited sovereignty over the area arising and exercised in accordance with international law.

In granting licences to explore, the Minister of Energy has to impose in every such licence the condition that the licensee pay to the Crown royalties at a rate specified in the licence. In specifying the rate of royalties, the Minister of Energy has to regard New Zealand's rights and obligations under Article 82 of UNCLOS. The Crown has to make all payments or contributions in kind required to be made to the International Sea-Bed Authority from time to time under the terms of Article 82 of UNCLOS.

6.2 Licensing regime for prospecting, exploration and mining

The Minister of Energy is responsible for granting licences for petroleum exploration and production, as well as preparing minerals programmes which provide the management framework for central government decisions on the allocation of Crown-owned minerals and take the form of delegated legislation. There must be an approved work programme before a mining permit can be granted.¹⁵ The Minister may require a scheme of unit development if the mineral deposit is under land to which two or more permits have been granted.¹⁶

¹¹ By way of example only, in an extreme situation involving a large scale spill, it is possible that a state of national emergency could be declared under the *Civil Defence Emergency Management Act 2002* (NZ). In a major spill, a fairly wide range of statutory bodies and legislative provisions may be engaged.

¹² See *Crown Minerals Act 1991* (NZ) s 12 ('*Crown Minerals Act*') for a more detailed consideration of the legislative regime under the *Crown Minerals Act*. See also Rob Fisher and Michelle van Kampen, 'Mining and Petroleum' in D Nolan (ed), *Environmental and Resource Management Law* (LexisNexis Butterworths, 3rd ed, 2005) ch 7, 418.

¹³ The recently enacted *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ) restored the right to claim customary title in the foreshore and seabed in the common marine or coastal area (the territorial sea). The legislation also removed the ownership of the seabed in this area from the Crown but this did not affect the ownership of petroleum and minerals in the coastal area, which remain the property of the Crown. Section 16 of the *Marine and Coastal Area (Takutai Moana) Act* expressly preserves the Crown ownership of petroleum, gold silver and uranium in their natural condition in land under the *Crown Minerals Act* and reserves those minerals to the Crown. The *Marine and Coastal Area (Takutai Moana) Act* has no application to the situation beyond the territorial sea in the EEZ and over the continental shelf.

¹⁴ See, *Continental Shelf Act 1964* (NZ) ss 3-5A. It would seem possible for claims asserting some form of customary right to the mineral resources of the EEZ and continental shelf to be advanced.

¹⁵ *Crown Minerals Act* s 43.

¹⁶ *Crown Minerals Act* s 46.

6.3 Permits for phases of mining operations

There are three types of permits which reflect the different phases of operations leading to the mining of petroleum.¹⁷ Petroleum prospecting permits are granted for the purpose of conducting reconnaissance surveys and general investigations with the purpose of providing information for further petroleum exploration.¹⁸ Petroleum exploration permits are granted for the purpose of undertaking work to identify petroleum deposits, and evaluating the feasibility of mining the petroleum deposits discovered.¹⁹ Staged work programme bidding is the primary form of allocation for exploration permits. The permit is exclusive and also carries with it the exclusive right to a mining permit over any discovery made within the area of the exploration permit.²⁰ Mining permits are granted to enable the development of a petroleum field with the purpose of extracting and producing petroleum.²¹ An application for a mining permit is usually made after an exploration permit holder has discovered a petroleum field within the exploration permit area.²²

6.4 Health and Safety

The health and safety aspects of prospecting, exploration and mining offshore oil and petroleum, are governed by HSEA and the *Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999* (NZ) (*'Petroleum Regulations 1999'*).

The HSEA and the *Petroleum Regulations 1999* establish health and safety standards for petroleum exploration and extraction, both onshore and offshore.

This legislative regime is administered by the Department of Labour in relation to fixed installations and permanently moored structures (including Floating Petroleum Storage and Offloading ('FPSO') facilities). Where ships are involved in offshore exploration, Maritime New Zealand ('MNZ') is responsible for administering the regime in relation to employees working on ships, as well as monitoring compliance with relevant maritime legislation.

The *Petroleum Regulations 1999* adopt a 'safety case' approach under which an employer has to take all practical steps to ensure that a safety case for the particular installation containing designated particulars is in place. Breaches of specified regulations will give rise to criminal liability under the HSEA.²³ The Department of Labour is responsible for inspecting the various installations.

6.5 RMA requirements in Coastal Marine Area

Notwithstanding the grant of a minerals permit by s 9 of the *Crown Minerals Act*, a party with a minerals permit will still need to comply with the provisions of the *RMA* relating to the environmental effects of prospecting, exploring, and mining of minerals (in addition to the requirements imposed under the *Crown Minerals Act*).

Under the *RMA*, petroleum exploration and production activities in the coastal marine area (territorial sea) ('CMA') will require approval from the regional council with responsibility for the particular CMA. An application for resource consent for an offshore installation in the CMA must include an assessment of environmental effects (EIA) in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

¹⁷ *Crown Minerals Act* s 30.

¹⁸ *Crown Minerals Act* s 2.

¹⁹ By way of example the five year permit granted to Petrobras to carry out exploration in the Raukumara Basin provides in its Schedule for the work under the permit to cover the staged processing and interpretation of seismic data leading to the drilling of one exploratory well (if that stage is reached).

²⁰ *Crown Minerals Act* s 30(2).

²¹ *Crown Minerals Act* s 30(3).

²² *Crown Minerals Act* s 32, which gives right of permit holder to subsequent permits.

²³ See *Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999* (NZ) reg 35 (*'Petroleum Regulations 1999'*) and *Health and Safety in Employment Act 1992* (NZ) s 50 (*'HSEA'*).

6.6 EIA requirements

Schedule 4 of the *RMA* provides for the matters which are to be included in an assessment of effects on the environment. This will include a description of the proposal and, where it is likely an activity will result in any significant adverse effect on the environment, an assessment of the actual or potential effect on the environment of the proposed activity, a description of the mitigation measures (safeguards and contingency plans where relevant), identification of the persons affected by the proposal, and, where the scale or significance of the activity's effect are such that monitoring is required, a description of how effects will be monitored and by whom. The application should also consider any effect on those in the neighbourhood and the wider community, any physical effect on the locality, any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations, any discharge of contaminants into the environment, and any risk to the neighbourhood, the wider community, or the environment through natural hazards or the use of hazardous substances or hazardous installations.

6.7 Outside CMA in EEZ and over continental shelf

The requirements of the permitting regime under the *RMA* are not applicable to exploration activities in the EEZ and over the continental shelf. This area is covered by the *MTA* and Part 200 of the Marine Protection Rules made under the *MTA*. This regime is administered by MNZ on behalf of the Minister of Transport. Under Part 200 of the Rules (which were amended in 2010), operators are required to hold a discharge management plan approved by the Director of MNZ, setting out the measures to be used to manage discharges of harmful substances including oil.²⁴ In approving a plan, the Director of MNZ must be satisfied that the operator has the systems, procedures and equipment in place to meet prescribed standards for harmful substance discharge, measure the impact of operations on the environment, and contingency planning for response to emergencies, such as oil spills.²⁵ MNZ carries out regular inspections and audits of installations to ensure compliance with Part 200 requirements.

6.8 Regime under *MTA* and *RMA* relating to discharges from offshore installations

The *RMA* and *Resource Management (Marine Pollution) Regulations 1998* (NZ) ('*Marine Pollution Regulations*') impose duties and requirements relating to dumping and discharges within New Zealand's CMA.²⁶ The *MTA* covers dumping and discharges outside the CMA, but within the EEZ and over the continental shelf. Both pieces of legislation recognise the importance of the marine environment and the need to protect the environment from pollution.²⁷

Regional Councils administer coastal plans under the *RMA*. Coastal plans regulate environmental effects within the territorial sea. Regional Councils are also responsible for administering the regime relating to criminal liability and enforcement orders under the *RMA*. The Ministry for the Environment administers the *Marine Pollution Regulations*.

6.9 *RMA* regime – dumping and discharges from offshore installations

The *RMA* prohibits the discharge and dumping of pollutants in the CMA. Section 15A provides for restrictions on dumping²⁸ and the incineration of waste²⁹ and other matter in the CMA. Section 15A(1) provides that no person may dump any waste or other matter from any ship, aircraft, or offshore

²⁴ For the detailed requirements for such a plan, see Marine Protection Rules, pt 200 sch 1.

²⁵ For more detail on the legislative regime relating to spill response, see paras 14 – 14.2 below.

²⁶ Under the *Resource Management Act 1991* (NZ) ('*RMA*'), the coastal marine area is the foreshore, seabed and coastal water between the mean high water springs and the outer limits of the territorial sea – see *RMA* s 2(1) for the full definition.

²⁷ *Maritime Transport Act 1993* (NZ) s 5(1)(a)-(d) ('*MTA*') and s 5(2); *RMA* ss 5(1) and 6(a).

²⁸ *RMA* s 2(1) defines dumping as '(a) in relation to waste or other matter, its deliberate disposal; and (b) in relation to a ship, an aircraft, or an offshore installation, its deliberate disposal or abandonment;— but does not include the disposal of waste or other matter incidental to, or derived from, the normal operations of a ship, aircraft, or offshore installation, if those operations are prescribed as the normal operations of a ship, aircraft, or offshore installation, or if the purpose of those operations does not include the disposal, or the treatment or transportation for disposal, of that waste or other matter; and to dump and dumped have corresponding meanings.'

²⁹ Waste or other matter means materials and substances of any kind, form, or description: under *RMA* s 2(1).

installation or incinerate any waste or other matter in any marine incineration facility in the CMA, unless expressly allowed by a resource consent.

Section 15B is the central provision relating to the discharge of oil or other harmful substances in the CMA.³⁰ Section 15B prohibits the discharge of harmful substances from ships or offshore installations and provides that no person may, in the CMA, discharge a harmful substance or contaminant, from a ship or offshore installation into water, onto or into land, or into air, unless the discharge is permitted or controlled by regulations made under the Act, by the *Marine Pollution Regulations*, by a rule in a regional coastal plan, by proposed regional coastal plan, by regional plan, by proposed regional plan or by a resource consent. Regulation 2 of the *Marine Pollution Regulations* contains a list of harmful substances for the purposes of the RMA.³¹ This includes petroleum in any form, including crude oil, fuel oil, sludge, oil refuse, and refined petroleum products and includes the various substances specified as oil under Schedule 2 of the Regulations. Schedule 1 of the Regulations contains a list of other substances which are harmful substances under the RMA which is derived from MARPOL. Permitted discharges under the *Marine Pollution Regulations* are generally those which are permitted by MARPOL.³²

Section 15B(1)(b) provides that the discharge of a harmful substance or contaminant will not be prohibited if after reasonable mixing, the harmful substance or contaminant discharged (either by itself or in combination with any other discharge) is not likely to give rise to all or any of the following effects in the receiving waters:

- (a) the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials;
- (b) any conspicuous change of colour or visual clarity;
- (c) any emission of objectionable odour;
- (d) any significant adverse effects on aquatic life.

The discharge will not be prohibited if the harmful substance or contaminant, when discharged into air, is not likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have a significant adverse effect on the environment.³³

The dumping and/or discharge of radioactive or toxic or hazardous waste from offshore installations in the CMA is prohibited under s 15C. Part 2 of the *Marine Pollution Regulations* provides for the detail of the prohibition of the dumping of waste in the CMA and for the situations in which the dumping of particular items of waste will be a discretionary activity subject to a coastal permit regime. While the dumping of waste from an offshore installation will generally be a prohibited activity, and the dumping of a man-made platform or ship at sea from any ship, aircraft or offshore installation will be a discretionary activity under a regional coastal plan, the dumping or storage of waste arising from the exploitation of seabed mineral resources is not covered by the regulations relating to dumping.³⁴ These matters are covered by Part 200 of the Marine Protection Rules.

Part 3 of the *Marine Pollution Regulations* provides for the control of discharges from offshore installations in the CMA. There are a range of permitted discharges. A discharge of oil from an offshore installation may be made if the oil content of the discharge does not exceed 15 parts per million. A contaminant may be discharged from an offshore installation where the discharge is incidental to the normal operation of the installation as specified in Schedule 4.³⁵

³⁰ Harmful substances are defined in terms of the provisions of MARPOL by the *Resource Management (Marine Pollution) Regulations 1998 (NZ)* ('*Marine Pollution Regulations*').

³¹ This schedule is based on the substances specified in MARPOL.

³² See pt 3 of the *Marine Pollution Regulations*.

³³ RMA s 15B(1)(c).

³⁴ *Marine Pollution Regulations* reg 4(3).

³⁵ See, further, *Marine Pollution Regulations* pt 3 regs 8-15.

7 Criminal Liability for discharges under the RMA

7.1 Offences under the RMA

A person who contravenes s 15 *RMA* commits an offence under s 338 *RMA*. Section 338 provides that the owner of an offshore installation commits an offence against the *RMA* if it contravenes s 15B.³⁶ Generally the offences under the *RMA* are strict liability offences and it is not necessary to prove that the defendant intended to commit the offence. The Act contains specific statutory defences.³⁷

7.2 Penalties

Section 339 *RMA* provides for the penalties which apply on conviction under s 338. In the case of a natural person, the penalty is imprisonment for a term not exceeding two years or a fine not exceeding \$300 000. In the case of a person other than a natural person, a fine not exceeding \$600 000 may be imposed. If the offence is a continuing one, the person is also liable to a fine not exceeding \$10 000 for every day or part of a day during which the offence continues. Fines imposed are to be paid to the local authority instituting the prosecution, with 10 percent of the sum paid in favour of the Crown.³⁸

If a person is convicted of an offence under s 338, the court may, instead of or in addition to imposing a fine or a term of imprisonment, make the enforcement orders specified in the *RMA*³⁹ or an order requiring a consent authority to serve notice, under s 128(2), of the review of a resource consent held by the person (where the offence involves an act or omission that contravenes the consent). An enforcement order made under s 314 can include the power to require a person to remedy or mitigate the adverse effect on the environment caused by that person. Further, a Court may sentence any person who commits an offence against the *RMA* to a sentence of community work, and the provisions of 2 of the *Sentencing Act 2002* (NZ), with all necessary modifications, apply accordingly.⁴⁰

An additional penalty can be imposed where offences are committed for commercial gain. Section 339 provides that where a person is convicted of an offence for breach of s 15B, the Court may, in addition to any penalty which the court may impose under s 339, order that person to pay an amount not exceeding three times the value of any commercial gain resulting from the commission of the offence if the court is satisfied that the offence was committed in the course of producing a commercial gain.

7.3 Liability of directors and principals and statutory defences

Principals will be liable for offences committed by an agent (including any contractor) or employee of another person, in the same manner and to the same extent as if the principal had personally committed the offence.⁴¹ This liability is subject to statutory defences. The principal of a servant or agent has a good defence if the principal proves that in the case of a natural person (including a partner in a firm), that he or she did not know, and could not reasonably be expected to have known, that the offence was to be or was being committed, or that he or she took all reasonable steps to prevent the commission of the offence. In the case of a person other than a natural person (e.g. body corporate), the principal will need to prove that neither the directors (if any) nor any person involved in the management of the defendant knew, or could reasonably be expected to have known, that the offence was to be or was being committed, or that the defendant took all reasonable steps to prevent the commission of the offence, and the defendant proves that the defendant took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.

³⁶ Section 338(1B) – the definition of offshore installation and owner in the context of an offshore installation in the *RMA* is the same as the definition in the *MTA* s 222(2), see paras 8.1.1 – 8.1.2 below.

³⁷ *RMA* ss 340-341B.

³⁸ *RMA* s 342.

³⁹ *RMA* s 314.

⁴⁰ *RMA* s 339(4). This means that the process of sentencing in matters will be carried out under the same general process as is applicable to other criminal offending. For further on sentencing for marine pollution offences, see David, above n 8, [9.93], and for a recent sentencing decision concerning a discharge from an offshore installation off the coast of Taranaki, see *MNZ v Prosafe Production Services Pte Limited and Australian Worldwide Exploration Limited*, (Unreported, New Plymouth District Court, Thorburn DCJ, 7 July 2009) where both companies involved in the operation of an FPSO were fined for a discharge into the EEZ. The fine of \$105 000 was apportioned equally.

⁴¹ *RMA* s 340. As noted, this is subject to the specific statutory defences.

7.4 Directors of body corporate

Section 340(3) provides that, if a person other than a natural person is convicted of an offence against the *RMA*, a director of the defendant (if any), or a person involved in the management of the defendant, is guilty of the same offence if it is proved— (a) that the act or omission that constituted the offence took place with his or her authority, permission, or consent; and (b) that he or she knew, or could reasonably be expected to have known, that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

7.5 Statutory defences

There will be a defence to the s 15B offence of discharging of harmful substances, if the defendant proves that the harmful substance or contaminant or water was discharged for the purpose of securing the safety of a ship or an offshore installation, or for the purpose of saving life and that the discharge was a reasonable step to effect that purpose.⁴² There is also a defence if the defendant proves that the harmful substance or contaminant or water escaped as a consequence of damage to a ship or its equipment or to an offshore installation or its equipment, and such damage occurred without the negligence or deliberate act of the defendant and as soon as practicable after that damage occurred, all reasonable steps were taken to prevent the escape of the harmful substance or contaminant or water or, if any such escape could not be prevented, to minimise any escape.⁴³ There are specific notice and time limit provisions governing the availability of these defences.⁴⁴ There is a similar statutory defence in respect of dumping in breach of s 15A.⁴⁵

7.6 Enforcement powers

The *RMA* gives various powers relating to the investigation of alleged pollution incidents to persons authorised by the local authority responsible for the CMA. These include power of entry for inspection, survey and the taking of samples. Applications may also be made for warrants to enter and search property.⁴⁶ There are various criminal offences where an individual or a body corporate fails to comply with the inspection or audit requirements of the Director of MNZ.

7.7 The *MTA* regime in the EEZ and over the continental shelf

The *MTA* and Marine Protection Rules and regulations made under the *MTA* regulate the operation of offshore installations outside the territorial sea within the EEZ and over the continental shelf. The *MTA* is wide-ranging in its scope but one of its main purposes (as with the *RMA*) is to regulate the discharge and dumping of harmful substances at sea and to protect the marine environment.

The provisions in the *MTA* and in the Marine Protection Rules made under the *MTA* are based on several international conventions that have all been declared to be marine protection conventions for the purposes of the *MTA*.⁴⁷ The *MTA* and the Marine Protection Rules will be interpreted with that background and purpose in mind.⁴⁸

⁴² *RMA* s 341B(2)(a).

⁴³ *RMA* s 341B(2)(b).

⁴⁴ *RMA* s 341(3).

⁴⁵ *RMA* s 341A.

⁴⁶ *RMA* ss 332, 333.

⁴⁷ In *Maritime Transport (Marine Protection Conventions) Order 1999* (NZ): *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, opened for signature 29 November 1969; *International Convention for the Prevention of Pollution from Ships 1973 as amended by the Protocol of 1978*, opened for signature 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983) (MARPOL 73/78); the *International Convention on Civil Liability for Oil Pollution Damage*, opened for signature on 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975), as amended by the *Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage*, opened for signature on 27 November 1992, 1956 UNTS 255 (entered into force 30 May 1996) (CLC 92); the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, opened for signature on 18 December 1971, 1110 UNTS 57 (entered into force 15 July 1975), as amended by the *1992 Protocol to Amend the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, opened for signature on 27 November 1992, 1953 UNTS 330 (entered into force 30 May 1996).

⁴⁸ The Marine Protection Rules relating to marine pollution are pts 101A-200 of the Maritime and Marine Protection Rules.

Under the *MTA* maritime rules can be made in respect of many aspects of ship operation and maritime activity (for the areas where maritime rules can be made see *MTA* ss 34-37.) Marine Protection Rules are also made under the *MTA* for the purposes set out in para 7.8.

MNZ is responsible for administering the *MTA* and the Marine Protection Rules and is also responsible for the process by which the Rules are developed, implemented and administered.

7.8 Marine Protection Rules

Marine Protection Rules can be introduced to implement New Zealand's obligations under any marine protection convention, to set out the process and requirements to obtain marine protection documents for various maritime activities, to specify harmful substances under the *MTA* and to prohibit the discharge or storage of harmful substances in relation to offshore installations, to specify types of waste under the *MTA*, to specify matters to be contained in oil spill contingency plans. In all the above areas, Marine Protection Rules have relevance for the operation of offshore installations and operations.⁴⁹

As has been noted above, Part 200 of the Marine Protection Rules provides specific rules for offshore installations to prevent pollution of the marine environment by harmful substances associated with the operation of offshore installations used in mineral exploration and exploitation.⁵⁰ The Part is concerned with discharges of oil, other harmful substances and garbage and requires operators to develop a discharge management plan (a form of environmental management plan) which must be approved for all offshore installations and promotes the application of 'best practicable option' to prevent or minimise adverse effects on the environment arising from discharges. The requirement to have a plan will apply in both the CMA and EEZ and over the continental shelf but offshore installations in the CMA will also need to meet any requirements under the *RMA*. Part 200 provides, where appropriate, for different requirements for installations in the territorial sea (which are subject to the *RMA*) from the requirements for offshore installations in the EEZ or beyond the EEZ but above the continental shelf of New Zealand.

8 Application of *MTA* provisions – criminal and civil liability

8.1 Part 18 – Interpretation

8.1.1 Definition of 'offshore installation'

Under Part 18 of the *MTA*, an offshore installation is defined to include:

any artificial structure (including a floating structure other than a ship) used or intended to be used in or on or anchored or attached to the seabed for the purposes of exploration for, or the exploitation or associated processing of any mineral; but does not include a pipeline.

An offshore terminal is 'any place in the sea where cargo is loaded or unloaded'. A pipeline is 'a pipeline constructed or used to convey any matter or substance and includes all machinery and tanks and fittings connected to the pipeline'.⁵¹ As noted above, the definitions are also adopted by the *RMA*.

8.1.2 The owner of an offshore installation

For the purposes of the provisions in Parts 19 to 27 of the *MTA*, which include the provisions relating to criminal and civil liability, the owner in relation to an offshore installation includes:⁵²

- (a) The person having any right, privilege or licence to explore for or exploit minerals in connection with which the installation is being, has been or being used;
- (b) The manager, lessee, licensee or operator of the installation; and

⁴⁹ For the full powers of the Minister to make marine protection rules and regulations to protect the marine environment, see, ss 386-393 pt 27 of the *MTA*.

⁵⁰ Part 200 gives effect to applicable provisions of the 1973 *International Convention for the Prevention of Pollution from Ships as amended by the Protocol of 1978*, opened for signature 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983) ('MARPOL') and the *International Convention on Oil Pollution Preparedness, Response and Cooperation*, opened for signature 30 November 1990, 1891 UNTS 51 (entered into force 13 May 1995) ('OPRC').

⁵¹ See *MTA* s 222(1) for the definitions. This definition is also used in the *RMA*.

⁵² *MTA* s 222(2).

- (c) Any agent or employee of the owner, manager, lessee or licensee or operator of the installation, or the person in charge of any operations connected with the installation.

In relation to a pipeline, 'owner' includes 'any manager, lessee, licensee or operator of the pipeline or the person in charge of the pipeline'. In relation to an oil transfer site, owner includes 'any manager, lessee, licensee or operator of the transfer site or the person in charge of the site'.⁵³ These definitions mean that a wide range of persons may be defendants in criminal proceedings or face civil claims arising from a discharge from an offshore installation.⁵⁴

Criminal proceedings against a natural person in relation to a contravention of Parts 19 to 28 of the *MTA*, where the offence is alleged to have occurred outside the territorial sea of New Zealand, can only be commenced against a person, who is a citizen of New Zealand, a person ordinarily resident in New Zealand, or any other person with the consent of the Attorney General.⁵⁵ If any person alleges that he or she is not a New Zealand citizen, nor ordinarily resident in New Zealand, the onus of establishing this lies on the person who so alleges.

9 Part 19 *MTA* – Protection of marine environment from harmful substances

9.1 Discharges

Section 226 *MTA* contains the central provision (which is equivalent to s 15B *RMA* in the *CMA*) forbidding the discharge of harmful substances into the sea or onto or into the seabed below the EEZ or continental shelf of New Zealand. Section 226 provides that harmful substances cannot be discharged or escape from any ship, offshore installation, or pipeline into the sea or the seabed of New Zealand's EEZ or continental shelf. Harmful substances are those specified as harmful substances under the Marine Protection Rules and the designation of harmful substances in the Rules (which adopts the defined substances in MARPOL) would, if it is submitted, be applied for the purposes of this section. A discharge is defined as including any 'release, disposal, spilling, leaking, pumping, emitting, or emptying' but does not include 'dumping in accordance with a permit issued by the Director under s 262 of this Act; or release of harmful substances for the purpose of legitimate scientific research into pollution abatement and control.'⁵⁶

Similarly, the discharge or escape of harmful substances as a result of any marine operations into the sea within the EEZ or beyond the outer limits of the EEZ but over the continental shelf of New Zealand or onto or into the seabed below that sea is prohibited. Marine operations are defined as 'operations or operation for, or connected with, the exploration for or the exploitation or associated processing of, any mineral in the sea or the seabed.'

9.2 Duty to report discharges or escapes

Section 227 *MTA* provides that, where a discharge occurs in breach of s 226 (or in breach of s 15B of the *RMA*), notice must immediately be given as required by the Marine Protection Rules to the Director of MNZ or, where the discharge has occurred within the internal waters or territorial sea of New Zealand, to the Director or the regional council within whose region the discharge has occurred. If the discharge was from a ship, the duty to notify lies with the owner or master of the ship. In relation to an offshore installation or pipeline, the duty lies with the owner of the offshore installation or pipeline. If the discharge or escape was the result of any marine operations, the duty lies with the person in charge and the persons carrying on such operations. There are similar requirements to notify a pollution incident, which means an incident involving the probable discharge or escape into the sea or seabed of a harmful substance in contravention of the *MTA* or the *RMA*.⁵⁷ This broadens the obligation to give notice to cover situations where an incident may lead to discharge or escape of harmful substances. The

⁵³ *MTA* s 222(2).

⁵⁴ In *MNZ v Prosafe Production Services*, above n 40, both companies which operated the FPSO were within the definition and were convicted of the offences under the *MTA*.

⁵⁵ *MTA* s 224.

⁵⁶ For a summary of the legislative position under the *MTA* see David, above n 8, [9.63]-[9.93].

⁵⁷ *MTA* s 228.

Director of MNZ and the relevant regional council are obliged to share information concerning notices of discharge or probable discharge of harmful substances. The failure to meet the above reporting duties without reasonable excuse will constitute an offence under the *MTA*.

9.3 Powers of Director where harmful substance discharged

The Director has various powers relating to the protection of marine environment from harmful substances. These include a power for the Director to require the owner of the ship, offshore installation or pipeline to take all necessary steps to rectify any conditions on a ship, offshore installation or pipeline that the Director believes, on reasonable grounds, have been or are likely to be responsible for a discharge or escape of a harmful substance in breach of the *MTA* or *RMA* or pose an unreasonable threat of harm to the marine environment.⁵⁸ There will be a right of appeal to the District Court where the Director of MNZ imposes such a requirement. Every person who fails to comply with a requirement of the Director of MNZ, commits an offence.

9.4 Not Complying with Director's instructions

A person who fails to comply with any instructions issued by the Director, wilfully obstructs a person acting in compliance with instructions given by the Director, or who wilfully obstructs the Director in carrying out any of the powers conferred on the Director will commit an offence.⁵⁹ It is a defence if the person proves that the action, or failure, which is alleged to constitute the offence, resulted from the need to save life at sea or if the person charged complied as promptly as possible with the instructions. The penalty on conviction is a term of imprisonment not exceeding two years or a fine not exceeding \$200 000 and, if the offence is a continuing one, a fine not exceeding \$10 000 for every day or part of the day which the offence is continued. Again, imprisonment will only be available where a person intended to commit the offence or the offence occurred as a consequence of any reckless act or omission by the person with the knowledge that that act or omission would be likely to cause serious damage to the marine environment and the commission of the offence caused or is likely to cause serious damage to the marine environment.

Where the Director's instructions conflict with instructions given by a harbourmaster or any other person under the Local Government Act or navigation bylaws, the Director's instructions will prevail.⁶⁰ However, the Director is not entitled to issue instructions that conflict with the powers exercised by certain civil defence authorities where emergencies are declared. If the Director becomes aware of a conflict in instructions which are being given, the Director must advise the person making the conflicting instructions and that person has to withdraw the instructions. The Director or any person complying with the Director's instructions will be protected from criminal or civil liability in relation to the instructions under s 256.

9.5 Powers of investigation

The Director has wide-ranging general powers to investigate any discharge or escape of a harmful substance in breach of the *MTA* or *RMA* under s 235. The powers can be exercised to make inquiries where the Director has reason to believe that a person is in possession of information that may lead to discovery of the cause of the discharge or escape of pollution incident. The Director may issue a summons requiring a person to attend a place and give evidence and produce documents. The Director may take possession and remove such documents from the place where they are kept for such period as time as is reasonable in the circumstances. The Director may require a person to reproduce or allow the Director (or an authorised person) to reproduce in a usable form, any information recorded or stored on a document electronically or by other means. A person who is subject to the exercise of these powers has the same general right and privilege as a person giving evidence before a Commission of Inquiry under s 6 of the *Commissions of Inquiry Act 1908* (NZ). The Director has further powers to limit access to the site of the discharge, escape or pollution incident if the Director believes, on reasonable grounds, that such orders are necessary to preserve or record evidence or prevent evidence being tampered with, to collect oil samples and to seize, detain, remove, preserve, protect or test anything the Director believes will, on reasonable grounds, assist in establishing the causing of the discharge.

⁵⁸ *MTA* s 233.

⁵⁹ *MTA* s 253.

⁶⁰ *MTA* s 254.

10 Part 20 MTA - Protection of marine environment from hazardous ships, structures, and offshore operations

10.1 Powers in relation to hazardous offshore installations

The Director of MNZ also has powers in relation to hazardous offshore installations or pipelines to prevent extensive pollution damage. If the Director considers an offshore installation or pipeline to be hazardous (i.e. it is discharging, or is likely to discharge, a harmful substance into internal waters or continental waters of New Zealand) the Director has the power to issue instructions to the owner of the offshore installation or pipeline or take any measures in respect of the ship or pipeline.

The Director is only entitled to issue instructions or take measures if these steps are necessary to avoid, reduce, or remedy pollution or a significant risk of pollution by a harmful substance.⁶¹ Where a person has incurred expenses as a result of the Director's instructions, the person may recover compensation from the Crown if the action or measure was not reasonably necessary to protect the marine environment or marine interest from a harmful substance or to prevent or reduce the risk of a harmful substance being discharged into the sea or was such that the good done by the action or measure or the good likely to be done was disproportionately less than the expenses incurred or the loss or damage suffered as a result of that action or that measure.⁶²

11 Part 22 – Obligations and powers in relation to marine protection documents

Marine protection documents are permits issued by the Director under s 262 of the *MTA* in relation to dumping, certificates of insurance issued, recognised or accepted by the Director (under ss 363 and 364), and any permit, certificate, licence or other document issued or recognised by the Director under s 270, or any permit, certificate, licence, or other document issued by any other person and accepted by the Director under s 271. Marine protection documents are issued in relation to 'marine protection products', which comprise any part of the ship, offshore installation or pipeline which has the purpose of preventing, limit or controlling the discharge or escape of a harmful substance. The requirement to hold marine protection documents provides a system of formal approval by which standards are maintained in relation to the equipment and processes which prevent pollution. Marine Protection Rules provide that marine protection documents have to be in place in various areas of activity. This will include many aspects of the operation of offshore installations.

Where a marine protection document is required, every person has a responsibility to hold the appropriate document and meet the requirements of the document. The holders of marine protection documents have to establish and follow management systems, provide training and supervision and provide sufficient resources to comply with the standards and conditions attached to the marine protection document.

The Director has the power to suspend marine protection documents or impose conditions in respect of the recognition of such documents if he or she considers such action necessary in the interests of protecting the marine environment, provided the Director is satisfied of certain matters set out under the *MTA*. The Director also has the power to revoke marine protection documents. If the Director believes, after investigation, that the marine protection document should be revoked, the Director may revoke the document. A person may appeal against the revocation to the District Court under s 424 of the *MTA*.

12 Criminal liability under MTA

12.1 Part 19 – protection of marine environment from harmful substances

Under *MTA* s 244 the penalty on conviction for discharge or escape of a harmful substance contrary to s 237 *MTA* is a term of imprisonment not exceeding two years, or a fine not exceeding \$200 000 and, if the offence is a continuing one, to a further fine not exceeding \$10 000 for every day or part of the day

⁶¹ *MTA* s 250.

⁶² *MTA* s 251.

during which the offence continues, and orders to pay such amount as the court may assess in respect of costs incurred in cleaning up the consequences of the discharge, together with any additional penalty under s 409 *MTA*. The maximum fine is different from the maximum fine under the *RMA*.⁶³ As noted, the persons potentially liable where there is a discharge from an offshore installation, from marine operations or from a pipeline, will be the owner of the offshore installation or pipeline or the person in charge of the marine operation. The Crown may recover as a debt from the agent of the ship such amount of that fine or monetary penalty as remains unpaid.

The power to impose a sentence of imprisonment for an offence under s 244(1) *MTA* is limited by the provisions of s 244(2) in a manner which is consistent with the provisions of UNCLOS (as is the case under the *RMA*). Imprisonment will only be available where a person intended to commit the offence or the offence occurred as a consequence of any reckless act or omission by the person with the knowledge that that act or omission would be likely to cause serious damage to the marine environment and the commission of the offence caused or is likely to cause serious damage to the marine environment.

For offences involving failure to report discharge of harmful substance into sea or seabed, failure to notify pollution incidents, or failure to comply with requirement of Director, the penalty on conviction is a fine not exceeding \$10 000 (\$100 000 for a body corporate) and, if the offence is a continuing one, to a further fine not exceeding \$2 000 (\$20 000 for body corporate) for every day or part of a day during which the offence is continued.

Dumping of waste from an offshore installation is governed by Part 21 *MTA* and Part 180 of the Marine Protection Rules. The broad purpose of the statutory regime is to prohibit the dumping of radioactive and other waste in the EEZ and over the continental shelf. If waste is dumped without a permit from the Director, an offence will be committed. Dumping permits are assessed by reference to the criteria in the London Dumping Convention.⁶⁴ The criminal offences and defences are at *MTA* ss 263-267.

12.2 Principals liable

As with the *RMA*, where an offence is committed against the *MTA*, the principal will be liable for offences committed by an agent (including any contractor) or employee of another person, in the same manner and to the same extent as if the principal had personally committed the offence.⁶⁵ The principal has a good defence if the principal proves that in the case of a natural person (including a partner in a firm), that he or she did not know, and could not reasonably be expected to have known, that the offence was to be or was being committed, or that he or she took all reasonable steps to prevent the commission of the offence. In the case of a body corporate, the principal will need to prove that, neither the directors nor any person involved in the management of the defendant knew, or could reasonably be expected to have known, that the offence was to be or was being committed, or that the defendant took all reasonable steps to prevent the commission of the offence, and the defendant proves that the defendant took all reasonable steps to remedy any effects of the act or omission giving rise to the offence. The principal must also prove (whether in relation to an individual or body corporate) that the defendant took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.

12.3 Offences where there is a breach of a marine protection rule

The *Marine Protection (Offences) Regulations 1998* (NZ) set out the offences which can be committed by breaching provisions of Marine Protection Rules. The Rules impose a range of obligations in relation to many aspects of maritime activity. The regulations provide for a range of summary offences punishable by the imposition of fines and infringement notices punishable by payment of infringement fees where specified breaches of provisions of the Marine Protection Rules have been committed. Under Part 200 of the Marine Protection Rules which regulate the operation of offshore installations, there are some 40 specified offences which might be committed by the owner of an offshore

⁶³ See para 7.2 above. This appears to be a legislative anomaly which should be corrected.

⁶⁴ *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, opened for signature 29 November 1972, 1046 UNTS 120 (entered into force 30 August 1975) ('London Convention').

⁶⁵ *MTA* s 410.

installation. By way of example, if the owner of an offshore installation does not hold a valid international oil pollution prevention certificate in respect of the installation, it would be subject to a maximum penalty on summary conviction of \$2 500 (or \$15 000 for person other than individual) and an infringement fee of \$1 000 (\$6 000 for person other than individual).

In general terms, the level of fines imposed for marine pollution offences under the *RMA* or *MTA* have been relatively modest.⁶⁶

13 Civil liability for pollution damage from offshore installations

13.1 Part 25 *MTA*

Part 25 of the *MTA* provides for civil liability for pollution of the marine environment. The statutory regime applies to civil liability for pollution in both the CMA and EEZ and over the continental shelf. Liability for pollution from ships is governed by ss 343-354 *MTA*. Liability for pollution from marine structures and operations is governed by ss 355-360 *MTA*. The regime relating to civil liability for pollution from ships covers liability for clean-up carried out by the Crown and marine agencies and claims for pollution damage. While limits under Part 25, based on the CLC Convention,⁶⁷ will apply where a CLC ship causes pollution damage and the general limitation of liability provisions under Part 7 of the *MTA* will apply to other pollution claims arising from discharges from ships,⁶⁸ there is no limitation available where claims are made for pollution damage caused by a discharge from an offshore installation.

Sections 355-360 *MTA* provide for liability for pollution damage caused by discharges from marine structures and operations (which include offshore installations or pipelines). The person in charge of an offshore installation or pipeline⁶⁹ must pay the Crown the cost, including GST (if any), reasonably incurred by or on behalf of the Crown in dealing with a harmful substance (which includes oil) discharged or poses a grave and imminent threat of being discharged into New Zealand waters. Section 356 *MTA* provides that the person in charge of a marine structure is liable in damages, including GST (if any), for all pollution damage in New Zealand or New Zealand waters caused by a harmful substance (which includes oil) or any waste or other matter dumped, and the cost of reasonable preventative measures taken by the Crown (or marine agency) to eliminate or reduce a grave and imminent threat that a harmful substance may be discharged or escape from that operation or structure.

'Pollution damage' is broadly defined under the *MTA*, and means '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).

13.2 Common law claims not excluded

While the *MTA* regime for claims for pollution damage from ships expressly bars claims at common law,⁷⁰ there is no such bar on common law claims for pollution damage caused by offshore installations or pipelines. As a consequence, a range of possible claims will be available at common law in addition

⁶⁶ See David, above n 8, [9.93]. For a recent decision in relation to an oil spill from an FPSO, see *MNZ v Prosafe Production Services*, above n 40.

⁶⁷ *International Convention on Civil Liability for Oil Pollution Damage*, opened for signature 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975) ('CLC Convention') and any subsequent protocol or amendment to or revision of the convention that New Zealand has accepted or ratified: s 342 *MTA*.

⁶⁸ *MTA* s 347 - rights to limit will be lost where the pollution damage is the result of intentional or reckless acts or omissions, *MTA* ss 347(1)(b), 352(c) and 85(2).

⁶⁹ *MTA* s 355 - there is no definition of 'in charge' and the question whether a person is in charge of an offshore installation will be a matter of fact.

⁷⁰ *MTA* s 352.

to the statutory claim under s 356 *MTA*. Oil spills in other jurisdictions have, in the past, seen a range of claims based on negligence, nuisance, and, in the US, strict liability for defective goods.⁷¹

Claims for pollution damage under the *MTA* provisions haven't been considered by the New Zealand courts but the range of possible claims is broad and recoverability is likely to be decided by the level of causal nexus required between the discharge and the pollution damage. As noted, unlike liability for pollution damage from ships, for which the statutory limits apply, there is no limitation of financial liability in relation to pollution damage caused by offshore installations and pipelines. In practical terms, recovery for claims in a major incident will be governed by the financial resources (including insurance) available to the companies subject to the potential liability of an owner of an installation or of a person in charge of a marine operation.

The capacity in the highly specialised international insurance market and extent of cover available was the subject of discussion after the *Deepwater Horizon* spill, but in general terms, insurance cover for clean-up costs and claims up to \$1.25 billion appears to be available in the market. 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.

13.3 Defences to civil claims

The *MTA* provides for statutory defences to a claim for liability for pollution damage. The owner of an offshore installation or pipeline or the person in charge of marine operations will not be liable for pollution damage if he or she proves that the discharge or dumping resulted from an act of war or a natural phenomenon of an exceptional, inevitable, and irresistible character, or was wholly caused by the act or omission of a third person (other than an employee or agent of the owner or person in charge) with intent to cause damage, or was wholly caused by the negligence or other wrongful act of any government or other authority, or of any person, responsible for the maintenance of lights or other navigational aids in the exercise of its functions in relation to those lights or aids.⁷² The owner will not be liable if it is proved that the discharge was wholly caused by the act or omission of the claimant, or the employee or agent of that claimant, with intent to cause damage, or was wholly caused by the negligence of that claimant or the employee or agent of that claimant.⁷³

The Court has the power to reduce liability of the owner if it is proved that the pollution damage suffered by the claimant was partly caused either by the act or omission of that claimant with intent to cause damage or by the negligence of that claimant.⁷⁴ The Court's power is discretionary, as it may reduce the liability of the owner to such extent as it thinks just and equitable.

If the owner of an offshore installation or pipeline proves the defences which relate to a specified third party, then proceedings may be brought against the person who has caused the discharge of the harmful substance.

14 Parts 23-24 – plans, response, and financial response to protect marine environment from marine oil spills

Parts 23 and 24 of the *MTA* are concerned with the making and operation of plans and responses to protect New Zealand waters in the event of an oil spill and for the funding of such plans and responses. These provisions are founded on the obligations owed by New Zealand as a party to the 1969 *International Convention on Oil Pollution Preparedness, Response and Cooperation* ('OPRC').⁷⁵

Section 282 establishes the Oil Pollution Advisory Committee ('OPAC'), which gives advice to MNZ on the New Zealand Marine Oil Spill Response Strategy, the fixing and levying of oil pollution levies imposed under Part 24 of the *MTA*, the use of the New Zealand Oil Pollution Fund, and any other

⁷¹ See, for some examples of decisions in other jurisdictions considering liability at common law and under statutory provisions, David, above n 8, [9.41] – [9.42].

⁷² *MTA* s 358(1).

⁷³ *MTA* s 358(2).

⁷⁴ *MTA* s 359.

⁷⁵ *International Convention on Oil Pollution Preparedness, Response and Cooperation*, opened for signature 30 November 1990, 1891 UNTS 51 (entered into force 13 May 1995) ('OPRC').

matter related to marine oil spills that the Minister or the Director of MNZ from time to time specifies by notice to the Committee.⁷⁶

14.1 Spill response

The Director of MNZ is responsible for the New Zealand marine oil spill strategy response strategy.⁷⁷ The purpose and content of a response strategy is to describe the actions to be taken, and by whom the action is to be undertaken, in response to a marine oil spill in New Zealand marine waters, provide a standard response to marine oil spills in New Zealand, and promote the co-ordination of marine oil spill contingency plans and the action taken in response to marine oil spills under such plans.

Part 23 provides for a three-tiered marine oil spill contingency plan regime. The three tiers of the response strategy are ship and site containment, regional council and national levels.⁷⁸

At the first level, operators of an oil transfer site shall have an approved oil transfer site marine oil spill contingency plan prepared, reviewed, and kept in accordance with Part 130B of the Marine Protection Rules. Schedule to Part 130B sets out the required contents for a site marine oil spill contingency plan. This must include risk identification, assessment and prevention information (such as up-to-date drawings, plans or general arrangement of the site) and information on responding to a marine oil spill (such as procedures for personnel for preventing the escalation of the oil spill). Oil transfer site marine oil spill plans do not cover offshore installations.⁷⁹ Discharges of pollutants from offshore installations are dealt with under Part 200 of the Marine Protection Rules which requires that an offshore installation cannot operate without the Director's written approval of a discharge management plan. A discharge management plan has to contain matters similar to the matters prescribed for by oil transfer site marine oil spill contingency plans.⁸⁰

Regional marine oil spill contingency plans deal with oil spills that are beyond the resources of the persons on site and are the responsibility of regional councils. A regional marine oil spill contingency plan is prepared by the regional council and submitted to the Director of MNZ for approval no less than every three years.⁸¹ A regional marine oil spill contingency plan must be consistent with the New Zealand marine oil strategy and the national marine oil spill contingency plan, as well as complying with Part 130C of the Marine Protection Rules.

The purpose of the national contingency plan is to coordinate a response to an oil spill that is beyond the resources of the regional council within whose region the oil spill is located or is outside the region of any regional council but within the EEZ. Any spill from an offshore installation which is outside the CMA which cannot be handled by the onsite operator of the installation will be dealt with under the national plan at tier three. The national contingency plan is prepared by the Director of MNZ and has to be reviewed at least once every three years.⁸²

The person responsible for the offshore installation or oil transfer site has a duty to notify the relevant regional council or the Director of MNZ if he or she is unable to contain and clean up the marine oil spill.⁸³ If a regional on-scene commander is notified, he or she has to decide whether or not it is appropriate for any action to be taken in response to that marine oil spill, including the taking of any measures under the regional marine oil spill contingency plan or the exercise of any powers under the *MTA*.⁸⁴ If the regional on-scene commander believes the containing or cleaning up of the oil spill is beyond the resources of the regional council, he or she must notify the Director. If a national on-scene commander is notified, he or she has to decide whether or not it is appropriate for any action to be

⁷⁶ Note that the way in which the Oil Pollution Levy is assessed to fund the New Zealand Oil Pollution Fund has been the subject of a recent review. Consultation on the proposals to change the way in which funding is levied closed on 31 January 2011. See review of the Oil Pollution Levy Industry Consultation Document December 2010 <<http://www.maritimenz.govt.nz/Consultation/OPL/Oil-pollution-levy-proposal.pdf>>

⁷⁷ *MTA* s 283.

⁷⁸ The New Zealand Marine Oil Spill Response Strategy is available on the Maritime New Zealand website <<http://www.maritimenz.govt.nz/Publications-and-forms/Environmental-protection/Oil-spill-response-strategy.pdf>>.

⁷⁹ Marine Protection Rules, pt 130B 3(2).

⁸⁰ Contents to be contained in a discharge management are set out in Marine Protection Rules, pt 200 sch 1.

⁸¹ *MTA* ss 289-290.

⁸² *MTA* s 297. The plan is currently due for review in accordance with the obligations under the section.

⁸³ *MTA* s 299.

⁸⁴ *MTA* s 300.

taken in response to that marine oil spill, including the taking of any measures under the national marine oil spill contingency plan or the exercise of any powers under the *MTA*.

14.2 On-scene commanders

An on-scene commander has the primary aim of preventing further pollution from the marine oil spill and containing and cleaning up the oil spill in accordance with the relevant regional marine oil spill contingency plan or the national oil spill contingency plan.⁸⁵ An on-scene commander has wide powers,⁸⁶ including directing the owner of any offshore installation or oil transfer site to do anything or refrain from doing anything that the on-scene commander considers necessary or desirable to control or clean up the oil spill. An on-scene commander can also remove any person obstructing oil spill response from the area where the marine oil spill response is being carried out, require the evacuation of the area where the marine oil spill response is being carried out, totally or partially prohibit or restrict access to the area or any part of the area where the marine oil spill response is being carried out. He or she can also remove any New Zealand ship or other thing impeding the response from the area where the marine oil spill response is being carried out, carry out such inspections as he or she thinks appropriate in respect of any New Zealand ship, vehicle or other thing in the area where the marine oil spill is being carried out, and require the owner or person for the time being in control of any New Zealand ship, vehicle, or other real or personal property to place that property under his or her control. The power to requisition property is subject to the requirement to give the person in charge the property a written notice.⁸⁷ The on-scene commander also has additional powers which include disseminating information and advice to the public relating to the marine oil spill, carrying out such works as will control the clean up the oil spill, and providing any item, equipment, or facility to assist with the control and clean up of the marine oil spill.⁸⁸

It is an offence for the owner of an offshore installation or oil transfer site to fail to comply with directions of the on-scene commander. It is also an offence for the person responsible for the contingency plan at an oil transfer site or for the person responsible for the discharge management plan on an offshore installation, if he or she fails to notify in respect of inability to contain and clean up the marine oil spill as required by s 299 *MTA*. Penalties for both offences are a fine not exceeding \$10 000 for individuals or \$100 000 in other cases.⁸⁹

14.3 Insurance

Under the *MTA*⁹⁰ and Part 102 of the Marine Protection Rules, the owners of regulated offshore installations have to carry certificates of insurance which have to be recognised by the Director of MNZ.⁹¹ The level of insurance required by Part 102 is about NZ\$30 million. Under Part 102, the Director has to be satisfied as to the financial status of the party providing the insurance. Section 366 *MTA* provides for direct action against the insurer which provides the certificate of insurance for the offshore installation.

14.4 A major spill

Incidents can take many forms – blow-outs, pipeline or other leaks, system failures in FPSO operations. Each situation will, have its own unique circumstances and challenges and will require particular responses. In the event of a major spill, the immediate response would be governed by the New Zealand Response Strategy which has been outlined above. Under that strategy, the owner of the installation/the operator would have the initial responsibility to contain any discharge and to give notice to the relevant authorities, but, in the circumstances of a major spill, the response would necessarily reach Tier 3 and be co-ordinated by the Director of MNZ with the regional on-scene commanders. Assistance would be sought internationally by calling upon the arrangements which MNZ has in place to assist with spill response and in reliance on the obligations of state parties to the

⁸⁵ *MTA* s 303.

⁸⁶ *MTA* s 305.

⁸⁷ *MTA* s 306.

⁸⁸ *MTA* s 311.

⁸⁹ *MTA* s 317.

⁹⁰ *MTA* s 363-367.

⁹¹ See Marine Protection Rules, pt 102.8.

OPRC.⁹² The effectiveness of the response at a technical level will depend on how well the system works and the availability of the necessary physical and technical resources.

The investigation of the causes of the incident would be carried out by the various statutory bodies exercising relevant statutory powers. The civil and criminal liability regime outlined above would be applicable and criminal liability would be strict with the limited defences which have been outlined.

In addition to the statutory liability for clean-up costs, claims would, no doubt, be advanced by those whose economic interests have been directly or indirectly damaged. While claims at common law are not barred under the *MTA*, where pollution damage is caused by a discharge from an offshore installation, a statutory claim under the *MTA* is likely to offer a more straightforward claim given the strict liability basis for claims and the broad definition of 'pollution damage'. In a significant incident, it is to be anticipated that the volume of possible claims would prove a significant challenge to the New Zealand court system where there is no framework for the resolution of claims against a fixed limited fund (as there is if the CLC and Fund Convention apply) and, where, from a procedural perspective, New Zealand has limited procedural rules regulating class actions.

While liability for claims under the *MTA* has no fixed limit, in practical terms, the financial status and insurance protection of those owning the offshore installation and those involved in its operation would be the 'cap' on claims. The level of insurance required means that there is a real risk that the value of claims brought would surpass the amount of the insurance which the operator is obliged to have in place.

The possible scale of a pollution incident from deep water drilling for petroleum has been dramatically emphasised by the *Deepwater Horizon* incident. While a commitment to unlock the potential in our waters is to be welcomed, the proposed increase in oil exploration should be seen as an opportunity to review the current legislative regime and the capacity to react to a significant incident. There is much to learn from the US experience and the Report to the President contains a good deal of material which requires careful consideration.

15 Recent review of Health and Safety and Environmental ('HSE') legislation for offshore petroleum operations

As has been noted above, the review of New Zealand's HSE regime was part of the Government's Petroleum Action Plan. The purpose of the Review was to assess whether New Zealand's existing legislative framework requires improvement or modification to meet the proposed expansion of petroleum exploration, and that it would ensure that the proposed expansion would not compromise or jeopardise the New Zealand marine and coastal environment. The approach taken was to compare the regime at a high general level with the regime in four other countries - United Kingdom, Australia, Ireland and Norway. The review makes a series of recommendations for strengthening and improving the New Zealand regulatory framework in both the short and long term.

The Review identifies a number of potential issues with the current regime:

- (a) A lack of clarity in the respective responsibilities under the relevant legislation for health and safety, with no formal understanding between the Department of Labour and MNZ as to their specific roles;
- (b) The absence of express environmental assessment requirements or other environmental approval processes for exploration within EEZ and over the continental shelf. The *Resource Management (Marine Pollution) Regulations 1998* (NZ) do not apply to the EEZ or continental shelf. Part 200 of the Marine Protection Rules only concerns preventing pollution by requiring operators to hold a discharge management plan approved by the Director of MNZ. (In comparison, the Report suggests that there is over-regulation in relation to activities in the territorial sea under the *RMA* when compared to the other countries);
- (c) The Department of Labour is not able to directly on-charge the costs of its health and safety regulatory role to offshore petroleum operators. This is a concern in an area that requires highly technical expertise if regulation is to be effective; and

⁹² For the power of the Director to call upon assistance outside New Zealand, see *MTA* s 301(2).

- (d) The level of compulsory insurance cover required to be held by the operators of offshore installations is set too low.

The Review makes eight different recommendations (in order of priority), which seek to strike a balance between encouraging new investment in New Zealand's offshore petroleum sector, and ensuring New Zealand has a comprehensive, robust and well-resourced HSE regulatory regime. In summary it recommends:

- (a) Government should investigate cost recovery options to ensure appropriate expertise and funding is available to the Department of Labour and MNZ to fulfil HSE functions relating to approval, monitoring and compliance.
- (b) HSE including strategic environmental assessment should be considered at stage of the grant of the petroleum permit. (This process should be kept separate from fiscal aspect of permit regime).
- (c) The Department of Labour should continue to be primarily responsible for health and safety approval, monitoring and enforcement, but there should be urgent inter-agency consultation to improve co-ordination.
- (d) An enhanced 'safety case' approach should be adopted, with third party verification and improved co-ordination with other agencies during review of 'safety cases' to bring about improvement in operator compliance and performance.
- (e) There should be a specific environmental regulatory framework for environmental assessment and approval of petroleum activities in EEZ and over the extended continental shelf with a simplified process in the CMA.
- (f) An agency with responsibility for environmental assessment, monitoring and enforcement within EEZ and extended continental shelf should be established.
- (g) The Government should investigate whether current minimum standards for insurance levels for offshore installations are adequate.
- (h) Consideration should be given to the consolidation of offshore environmental jurisdiction within one statutory jurisdiction in one agency.

It should be emphasised that this was essentially a structural review of the regulatory conduct by lawyers that did not audit technical compliance or, indeed, the detail of the legislative regime. The conclusions and recommendations can, perhaps, be summarised as saying that the system needs a more unified, focused approach to the regulation of offshore installations, if it is to function effectively, in an environment where petroleum exploration in New Zealand waters is significantly expanded.

15.1 The current challenge

It seems clear that the effectiveness of the New Zealand legislative regime at both a the general and detailed level and the resources available to ensure compliance should be reviewed before New Zealand embarks upon the proposed significant further exploitation of its resources in collaboration with the international companies which will be licensed to operate in New Zealand waters. If there is to be a significant increase in seabed mining, there is a good case for specific legislation dealing with the approval and operation of offshore installations and for the establishment of a specific agency to oversee the area (while keeping the fiscal side of permit allocation separate). Such changes could see the relevant legislation gathered in one place in a coherent whole, and, at a technical level, would allow the development of expertise in relation to the specific issues which may arise in the offshore exploration industry to be developed in a one agency.

A review of the current New Zealand regime suggests that:

- (a) There should be greater co-ordination and consistency in the regulation of offshore exploration, whether in the CMA or in the EEZ or over the continental shelf, in particular at the time when permits are granted. While the economic aspects of the exploration regime and granting of licences should be separate from operational matters, there is considerable merit in implementing a more streamlined regulatory system with, perhaps, a single principal piece of legislation and a single regulator responsible for the conditions of operation in offshore exploration. This would (with the appropriate level of funding) allow the development of appropriate technical resource and expertise.

- (b) The legislative regime should require one form of environmental impact assessment to be carried out before any permit for exploration is granted whether in the CMA, the EEZ or over the continental shelf. There is no logical justification for the different approaches for controlling environmental effects in the CMA and in the EEZ and over the continental shelf. The process for the approval of exploration in all New Zealand waters (and the control of off-shore exploration and mining operations) should be consistent.
- (c) Revised legislation should remove the inconsistencies between the *RMA* and *MTA* (e.g. the differences in penalties for discharges in breach of the legislation). Consideration might also be given to increasing the maximum fines for the main environmental offences.
- (d) The mandatory insurance requirements for offshore operators should be increased, although the level of cover to be required should be carefully considered by reference to the levels available in the international insurance market and usually carried by operators engaged in the activities for which permits are sought.

Accidents, such as the *Deepwater Horizon* spill, should not be allowed to prevent or paralyse development where it is appropriate, and will provide significant national benefit, but, a review of the report to the President into the *Deepwater Horizon* spill should give some pause for thought. The essential point identified in the report is that the ‘blowout’ at the Macondo well was the product of missteps or oversights by the international operators responsible for the rig, which government regulators lacked the authority, necessary resources and technical expertise to prevent. The report charts the development of the offshore oil industry in particular in relation to the expansion into deep water operations. It describes an industry where reaching towards the frontiers of oil exploration and ever deeper waters, using extraordinary technology, took place without the required safety culture and regulatory expertise keeping pace. The report also finds that response planning for a catastrophic spill and the response itself was inadequate.⁹³

16 Concluding comment

It is important that a country of New Zealand’s size makes the most of the resources which it can exploit. However, the challenge is to ensure that, before we move to the next phase of greater exploitation of those resources, we understand the lessons from recent history and audit our legislative and technical supervisory system accordingly.

The decision to encourage a significant increase in offshore exploration activities in New Zealand waters by international companies with the necessary expertise and resources should be treated as an opportunity to review and, where necessary, reform the regulatory regime applicable to offshore exploration and to carry out a rigorous audit of the performance of the private sector and of our regulators in relation to the operation of offshore installations and their readiness to respond effectively if an incident occurs.

⁹³ For a summary of the findings of the Commission, see National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, above n 7, vi – xii (Foreword).