

OIL AND WATER – CAN THE OFFSHORE MINERALS INDUSTRY AND ENVIRONMENTAL PROTECTION EVER MIX?

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1 Introduction¹

Take an emerging global energy crisis, mix it with some convenient United Nations rules that allow a small country to claim fifteen times its land area in ocean space, and then add a splash of cutting-edge extraction technology. With these factors in place, New Zealand's potential to develop a significant offshore minerals industry increases dramatically. All that is needed is an effective legal regime to attempt to balance the ensuing raft of economic, environmental and social concerns that arise from mineral extraction in the exclusive economic zone (the 'EEZ') and on the continental shelf.

New Zealand now largely regulates offshore mineral activities under the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* (NZ) (the 'EEZ Act'). This Act came into force on 28 June 2013² and has become a fast moving area of law. To date, the Environmental Protection Authority (the 'EPA') has received four notified marine consent applications under the new framework.³ The EPA declined seabed mining proposals from Trans-Tasman Resources Limited ('TTR') and Chatham Rock Phosphate Limited ('CRP') (the 'TTR decision' and 'CRP decision').⁴ TTR lodged, then withdrew, an appeal to the High Court,⁵ while CRP opted not to appeal at all.⁶

On the other hand, the EPA has approved notified applications for oil drilling activities, from OMV New Zealand Limited ('OMV') and Shell Todd Oil Services Limited ('Shell Todd') (the 'OMV notified decision' and 'Shell Todd notified decision').⁷ It also granted marine consents to those companies on a non-notified basis in late 2014 (the 'OMV non-notified decision' and the 'Shell Todd non-notified decision').⁸

In this paper, I have considered the prior regime for accessing resources in the EEZ. I have attempted to analyse the EEZ Act in the context of the first marine consent decisions under the new framework. I have supplemented this analysis with reference to the Australian regime for accessing petroleum and minerals. The EEZ Act has provided a much-needed response to a gap in the environmental management of New Zealand's offshore resources. Despite this, cracks are already starting to appear in the regime. The overall regulatory structure for offshore activities remains fragmented, with many agencies involved at different stages of the process. As a result, New Zealand still lacks a comprehensive, integrated management regime for offshore resource developments. Given the high levels of reward and risk associated with developing the offshore minerals industry, such a regime is a necessary and desirable step if New Zealand is to benefit from its offshore resources in a responsible and environmentally sound way.

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¹ This article considered the EEZ Act as passed. The New Zealand government has proposed a number of changes to the EEZ Act under the Resource Legislation Amendment Bill 2015. That Bill is currently before a select committee, which is due to issue its report in September 2016.

² *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act Commencement Order 2013* (NZ) cl 2.

³ I have excluded applications for marine consents under the transitional provisions of the EEZ Act. The notified application process requires public input. Non-notified applications are not open to public submissions.

⁴ Environmental Protection Authority, *Trans-Tasman Resources Limited Marine Consent Decision* (17 June 2014) ('TTR decision'); Environmental Protection Authority, *Decision on Marine Consent Application by Chatham Rock Phosphate Limited to mine phosphorite nodules on the Chatham Rise* (10 February 2015) ('CRP decision').

⁵ Environmental Protection Authority, *Trans-Tasman Resources Ltd: Application for marine consent* (2014) <http://www.epa.govt.nz/EEZ/previous-applications/trans_tasman/Pages/default.aspx>.

⁶ Environmental Protection Authority, *Chatham Rock Phosphate Ltd: Application for marine consent* (2015) <http://www.epa.govt.nz/EEZ/chatham_rock_phosphate/Pages/default.aspx>.

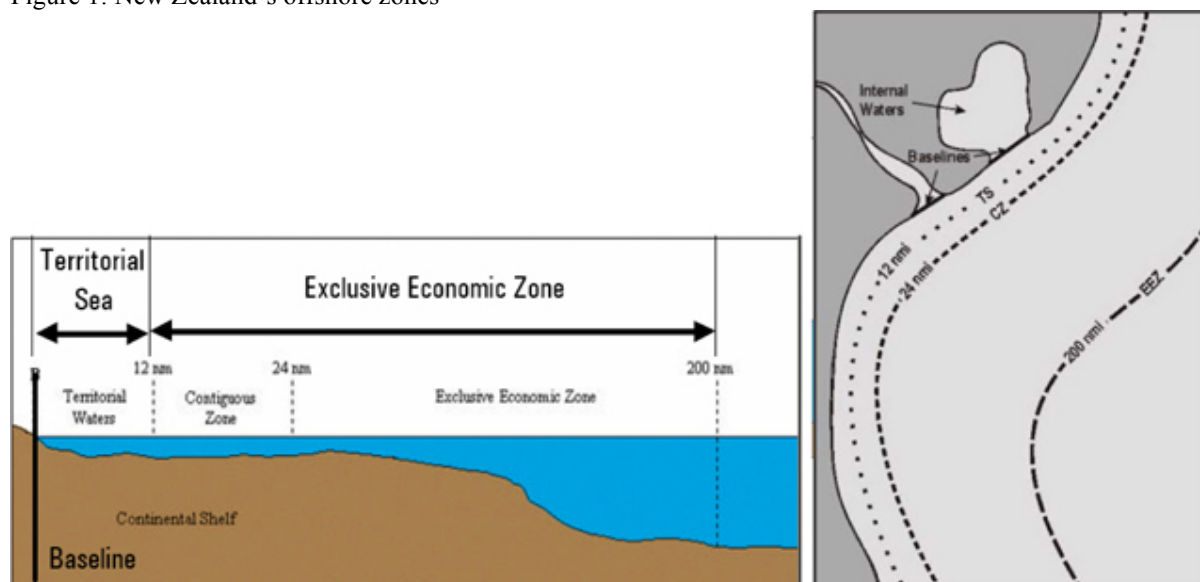
⁷ Environmental Protection Authority, *Decision on Marine Consent Application OMV New Zealand Limited Development drilling at the Maari Field at the Taranaki Bight* (15 December 2014) ('OMV notified decision'); Environmental Protection Authority, *Māui Offshore Facilities – Shell Todd Oil Services Limited Reasons for Decision on Application for Marine Consent* (4 June 2015) ('Shell Todd notified decision').

⁸ Environmental Protection Authority, *OMV New Zealand Limited Whio-1 – located within the South Taranaki Bight Environmental Protection Authority* (26 August 2014) ('OMV non-notified decision'); Environmental Protection Authority, *Shell Todd Oil Services New Zealand Limited Ruru-2 and Māui-8 – Located within the South Taranaki Bight* (14 October 2014) ('Shell Todd non-notified decision').

2 New Zealand's Claim to the Exclusive Economic Zone and Continental Shelf

Administratively, New Zealand's offshore area is divided into the territorial sea, the contiguous zone, the EEZ and the continental shelf, as detailed below:

Figure 1: New Zealand's offshore zones⁹



The 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS') regulates New Zealand's authority in each of these zones. The territorial sea extends from baselines to a line 12 nautical miles away.¹⁰ This forms part of the sovereign territory of New Zealand.¹¹ The contiguous zone extends a further 12 nautical miles from the limits of the territorial sea.¹² In the contiguous zone, New Zealand can exercise the level of control necessary to enforce customs, fiscal, immigration or sanitary laws.¹³

The EEZ extends from the 12 nautical mile limit of the territorial sea to a line 200 nautical miles from the territorial sea baseline.¹⁴ At approximately four million square kilometres, New Zealand's EEZ is one of the largest in the world.¹⁵ In the EEZ, New Zealand has 'sovereign rights' to explore, exploit, conserve and manage all living and non-living natural resources on and under the seabed and in the waters above it.¹⁶ The use of the term 'sovereign rights' over some aspects of the EEZ suggests that the State's powers are more than jurisdictional, yet fall short of full sovereignty.¹⁷ New Zealand then has mere 'jurisdiction' under the Convention with regard to offshore installations and structures, marine scientific research and protection of the marine environment.¹⁸

This raises an interesting point of international law about the extent to which the New Zealand Parliament can make and enforce law to protect and preserve the marine environment – an area over which New Zealand only has 'jurisdiction'. Under UNCLOS Article 211(5), States can make laws and regulations in the EEZ, provided that these laws and regulations conform to accepted international rules and standards.¹⁹ This provision could validate the EEZ Act, assuming that it is actually legislation designed to protect and preserve the marine environment. An alternative may be to justify the EEZ Act as an exercise of New Zealand's sovereign right to explore, exploit, conserve and manage resources in the EEZ. A more detailed analysis of this topic is beyond the

⁹ Land Information New Zealand, *Maritime Boundary Definitions* (13 October 2015) <<http://www.linz.govt.nz/sea/nautical-information/maritime-boundaries/maritime-boundary-definitions>>.

¹⁰ *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977* (NZ) s 3.

¹¹ *United Nations Convention on the Law of the Sea (UNCLOS)*, 1982, 1833 UNTS 3 art 2(1).

¹² *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act* (NZ) s 8A(2).

¹³ UNCLOS art 33.

¹⁴ *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act* (NZ) s 9(1).

¹⁵ Land Information New Zealand, *Map of the Continental Shelf Boundary* (13 October 2015) <<http://www.linz.govt.nz/about-linz/what-were-doing/projects/new-zealand-continental-shelf-project/map-continental-shelf>>.

¹⁶ UNCLOS, art 56(1)(a).

¹⁷ Ivan Shearer 'The Limits of Maritime Jurisdiction' in Clive Schofield et al (eds) *The Limits of Maritime Jurisdiction* (Martinus Nijhoff, 2014) 51, 58.

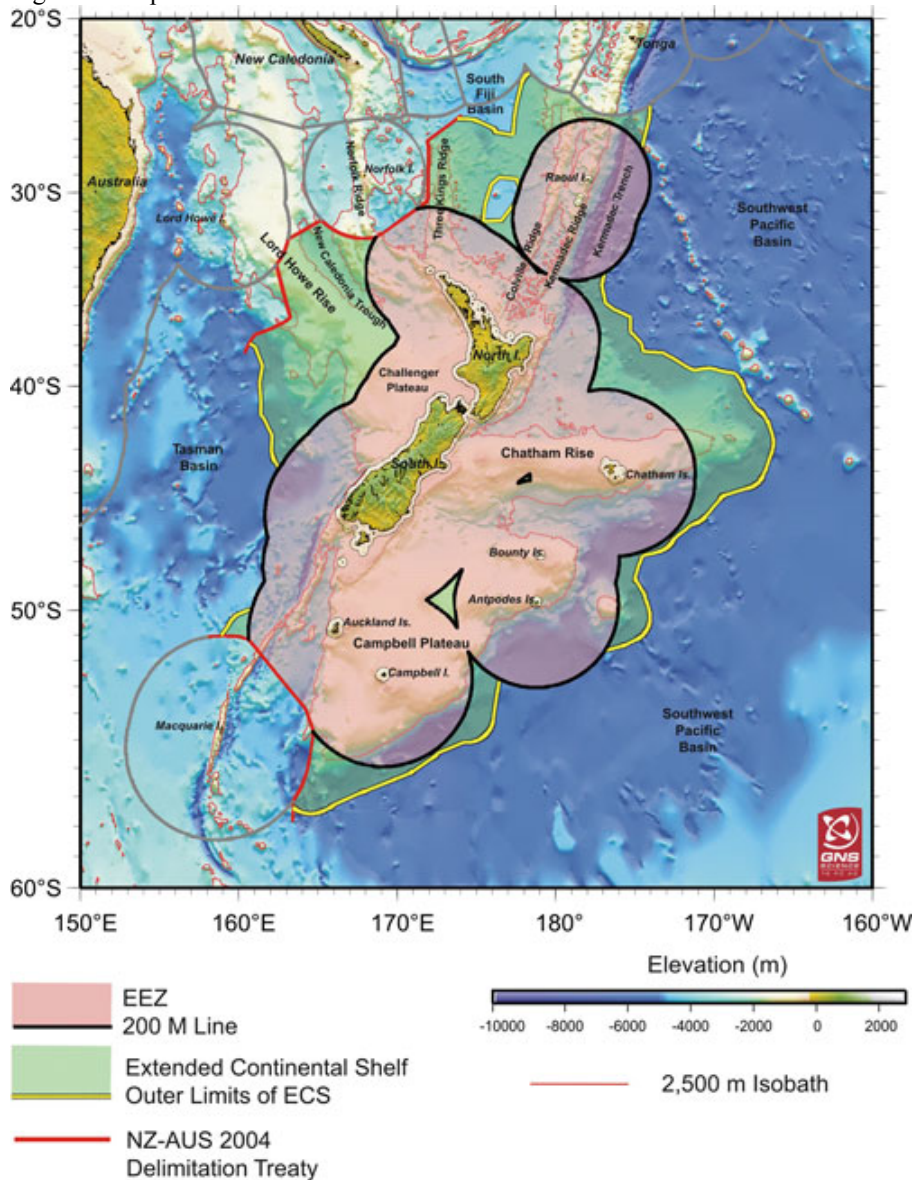
¹⁸ UNCLOS art 56(1)(b).

¹⁹ See also Shearer, above n 16, 62.

scope of this paper, but New Zealand's exercise of legislative control over the EEZ does raise pertinent questions about the interface between state sovereignty and the freedom of the high seas.

The continental shelf is the 'natural prolongation' of New Zealand's submerged landmass.²⁰ The continental shelf extends beyond the EEZ in places, adding a further 1.7 million square kilometres to New Zealand's submarine resource hoard.²¹ New Zealand has fewer entitlements under UNCLOS to resources on the continental shelf, as the state's rights are limited to resources on or under the seabed.²² This opens the continental shelf to oil drilling and seabed mining proposals.

Figure 2: Map of the exclusive economic zone and continental shelf²³



The outer limits of the New Zealand ECS north of New Zealand are subject to the delimitation of boundaries with Fiji, Tonga and France in respect of New Caledonia

²⁰ UNCLOS art 76.

²¹ Land Information New Zealand, above n 14.

²² UNCLOS art 77(4).

²³ Land Information New Zealand, above n 14.

3 The Previous Regime

A key issue with the pre-2013 regime was the absence of any effective environmental protection requirements for activities in the EEZ and on the continental shelf.²⁴ A regulatory gap arose from the fact that the environmental management regime under the *Resource Management Act 1991* (NZ) (the ‘RMA’) ended abruptly at the 12 nautical mile limit of the territorial sea.²⁵ The *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977* (NZ) defines the various zones, but it does not set standards for activities within each zone. Beyond the territorial sea, the *Crown Minerals Act 1991* (NZ) (the ‘CMA’) and *Maritime Transport Act 1994* (NZ) (the ‘MTA’) governed access to minerals.

The CMA deals with the acquisition of property rights in Crown owned minerals.²⁶ It applies²⁷ to the EEZ by virtue of the *Continental Shelf Act 1964* (NZ), which imposes the rights allocation system of the CMA to petroleum on the continental shelf.²⁸ The Continental Shelf Act initially applied its own requirements to other minerals on the continental shelf, but this has since been replaced with the CMA regime.²⁹ The rights to all natural resources on the entire continental shelf are vested in the Crown.³⁰ This includes areas of the continental shelf within and outside the EEZ.³¹

Operators must obtain a permit before they are able to access minerals on the continental shelf.³² Before 2013, the CMA essentially did not require decision makers to take environmental factors into account when issuing permits. Instead, the key factors were efficient allocation of resources and a fair financial return to the Crown.³³ As a result, activities in the EEZ authorised by the CMA were not subject to any principles of sustainability or environmental management.³⁴ On land and in the territorial sea, activities would need to comply with the environmental protection requirements of the RMA, even if that activity were authorised by the CMA.³⁵ A similar comprehensive environmental management regime did not apply to mineral exploitation in the EEZ.

Instead, environmental protection came under the safety framework of the MTA. Offshore resource extraction activities fall under Part 200 of the Marine Protection Rules, issued under the MTA.³⁶ The Rules apply to New Zealand’s territorial and continental waters.³⁷ Operators of offshore installations must prepare a Discharge Management Plan (‘DMP’), to be approved by the Director of Maritime New Zealand (‘MNZ’).³⁸ Operators must maintain the level of training and equipment necessary to deal with an oil spill.³⁹ The DMP must contain the appropriate measures to identify, assess and prevent the risk of a discharge.⁴⁰ It must also set out emergency response procedures in the event of a spill.⁴¹

The MTA framework does not comprehensively ensure environmental protection. The oversight of offshore drilling and mining is at best a peripheral activity that does not really fit with the main purpose of MNZ, which is essentially the regulation of marine transport systems.⁴² Secondly, the Marine Protection Rules are reactionary in nature: the required DMP focuses more on dealing with the consequences of a blowout as opposed to providing

²⁴ For convenience, subsequent references to the EEZ will include the continental shelf, unless otherwise specified.

²⁵ Kenneth Palmer, ‘Environmental Management of Oil and Gas Activities in the Exclusive Economic Zone and Continental Shelf of New Zealand’ (2013) 31 *Journal of Energy and Natural Resources* 123, 129.

²⁶ GW Hinde et al, *Principles of Real Property Law* (LexisNexis, 2nd ed, 2014) 114.

²⁷ The permitting regime under the CMA is still in force.

²⁸ *Continental Shelf Act 1964* (NZ) s 4.

²⁹ *Continental Shelf Act 1964* (NZ) ss 5, 5AA; see also *Continental Shelf Amendment Act 2013 Commencement Order 2013* (NZ) cl 2.

³⁰ *Continental Shelf Act* (NZ) s 3.

³¹ See definition of ‘continental shelf’ in *Continental Shelf Act* (NZ) s 2(1).

³² *Crown Minerals Act 1991* (NZ) s 8.

³³ See *Crown Minerals Act 1991* (NZ) (6 April 2012 Reprint) ss 12 and 22. Section 12 has been repealed. Section 22 has been amended.

³⁴ David Grinlinton, ‘Integrating Sustainability into Environmental Law and Policy in New Zealand’ in Klaus Bosselmann and others (eds) *Environmental Law for a Sustainable Society* (University of Auckland, 2nd ed, 2013) 21, 33-34.

³⁵ *Crown Minerals Act 1991* (NZ) s 9. See also *Gebbie v Banks Peninsula District Council* [2000] NZRMA 553 (10 August 2000). The High Court held that extraction of privately owned minerals was still subject to the RMA. As an observation, the Court extended this to CMA permit holders.

³⁶ These rules are still in force.

³⁷ *Marine Protection Rules 2013 Consolidation* (NZ) r 200.3(1).

³⁸ *Ibid* r 200.4.

³⁹ *Ibid* r 200.11.

⁴⁰ *Ibid* sch 1, cl 1.

⁴¹ *Ibid* sch 1, cl 2.

⁴² *Maritime Transport Act 1994* (NZ) s 430 (‘MTA’). See also Kate Mulcahy, Raewyn Peart and Abbie Bull, *Governing Our Oceans: Environmental Reform for the Exclusive Economic Zone*, Environmental Defence Society (2012) <http://www.eds.org.nz/assets/Publications/Safeguarding%20Our%20Oceans/Safeguarding%20Our%20Oceans_Ch0.pdf>, 29.

stringent requirements to prevent such an accident from occurring in the first place.⁴³ The discharge management provisions of the Marine Protection Rules appear to focus predominantly on discharges of oil, with less emphasis on the effects of other offshore activities such as seabed mining.

Greenpeace of New Zealand Incorporated v Minister of Energy and Resources highlights this regulatory gap.⁴⁴ Greenpeace applied for judicial review of a decision by the Minister to grant an exploration permit to Petrobras International Braspetro BV over an area of seabed in the Raukumara Basin. Under the CMA as it stood, the Minister only had to consider the relevant Minerals Programme.⁴⁵ The *Minerals Programme for Petroleum 2005* (NZ) (the ‘MPP 2005’) required the Minister to promote the responsible discovery and development of petroleum resources.⁴⁶ It deliberately omitted any environmental considerations, on the basis that these would be adequately dealt with under the RMA – but this had no effect beyond the 12 nautical mile limit.⁴⁷

Greenpeace contended that the Minister had not correctly exercised his power under the CMA and MPP 2005, as he did not take into account environmental factors or international environmental obligations.⁴⁸ The judge reviewed the legislative regime as a whole and held that the Minister was entitled to conclude that these considerations were outside his discretion:⁴⁹

The Minister would have known of the possibility that offshore oil exploration and drilling might have an impact on the environment. He was entitled to conclude that those were not matters for him to consider in the exercise of his mandated function and powers. He knew they fell within the province of others. [...] [The MPP], read in the context of the Crown Minerals Regime as a whole, and other regulatory provisions, cannot require the Minister to either call for an environmental impact assessment ... or to undertake inquiry into and give consideration to international environmental obligations. They are dealt with elsewhere, and fall outside his powers.

This case demonstrates the lack of comprehensive environmental management under the former regime. Environmental concerns could not be adequately addressed through the CMA permit process. MNZ was arguably not well-equipped to handle complex applications for offshore activities. A (probably apocryphal) story has circulated about an unnamed oil company that prepared an environmental impact assessment for proposed activities, then was unable to find an agency in New Zealand that wanted to review it.⁵⁰ In any event, the regulatory gap surrounding activities in the EEZ had become obvious.

4 The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

4.1 Overview

The EEZ Act has now been in force for over two years. The *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill* (NZ) (the ‘EEZ Bill’) was introduced in 2011 in order to address the regulatory gap for activities in the EEZ.⁵¹ Parliament eventually passed the bill by 72 votes to 49.⁵² Opponents to the Bill acknowledged the need for legislation, but maintained that the Bill in its final form did not adequately protect the environment.⁵³

The Act’s purpose is as follows:

10 Purpose

- (1) The purpose of this Act is to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.
- (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—

⁴³ Josh Blue, ‘Offshore Drilling, Environmental Protection and Emergency Response: Is New Zealand ready for a *Deepwater Horizon* scenario?’ in Karol Helmink (ed) *Resource Management Theory and Practice* (Resource Management Law Association of New Zealand, 2013) 139, 158.

⁴⁴ *Greenpeace of New Zealand Incorporated v Minister of Energy and Resources* [2012] NZHC 1422 (22 June 2012) (‘Greenpeace’)

⁴⁵ *Crown Minerals Act 1991*(NZ) (6 April 2012 Reprint) s 22.

⁴⁶ *Minerals Programme for Petroleum 2005* (NZ) policy 2.2.

⁴⁷ *Minerals Programme for Petroleum 2005* (NZ) preamble at [11].

⁴⁸ *Greenpeace* [2012] NZHC 1422 (22 June 2012) [58].

⁴⁹ *Ibid* [115]-[116].

⁵⁰ Barry Barton, ‘Offshore Petroleum and Minerals’ [2011] *New Zealand Law Journal* 211, 212.

⁵¹ New Zealand, *Parliamentary Debates*, 13 September 2011, 21215.

⁵² New Zealand, *Parliamentary Debates*, 28 August 2012, 4803.

⁵³ *Ibid* [4799]-[4800].

- (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
 - (b) safeguarding the life-supporting capacity of the environment; and
 - (c) avoiding, remedying, or mitigating any adverse effects on the environment.
- (3) In order to achieve the purpose, decision makers must—
- (a) take into account decision-making criteria specified in relation to particular decisions; and
 - (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

The purpose of the EEZ Bill as introduced was to ‘achieve a balance between the protection of the environment and economic development’.⁵⁴ Opponents criticised this initial purpose as ‘effectively putting a price on environmental degradation’.⁵⁵ The initial purpose section prompted much of the opposition to the EEZ Bill in Parliament and meant that the Select Committee was unable to recommend that the Bill be passed.⁵⁶ In separate submissions, the New Zealand Law Society and Parliamentary Commissioner for the Environment noted that the ‘balance’ purpose would be inconsistent with New Zealand’s international obligations, and recommended a shift to a ‘sustainable management’ purpose.⁵⁷ Eventually, a Supplementary Order Paper (‘SOP’) substituted the ‘sustainable management’ standard.⁵⁸ The Minister for the Environment acknowledged the ‘considerable benefit’ of incorporating sustainable management into the Bill’s purpose section.⁵⁹

The Act classifies activities as: permitted, meaning they can be carried out as of right;⁶⁰ discretionary, meaning they require a marine consent;⁶¹ and prohibited.⁶² Discretionary activities may in turn be classified as non-notified or notified.⁶³ The default position is for activities to be classified as discretionary.⁶⁴ Regulations prescribing non-notified activities and permitted activities are currently in force.⁶⁵

The EPA is the primary body responsible for managing activities in the EEZ under the EEZ Act.⁶⁶ Operators must apply to the EPA for a marine consent to carry out discretionary activities.⁶⁷ Applications must ‘fully describe the proposal’ and include an Environmental Impact Assessment (‘EIA’).⁶⁸ The EIA must describe factors such as the current state of the environment and the effect of the proposed activity on the environment and existing interests.⁶⁹ The EPA may delegate its decision making function to a Decision Making Committee (‘DMC’) appointed under the *Crown Entities Act 2004* (NZ).⁷⁰ In May 2013, the EPA delegated all of its functions and powers to every DMC appointed under the *Crown Entities Act 2004* (NZ).⁷¹ The DMC process has become standard, with all past consent applications referred to DMCs.

Despite the new legislation, the EPA is not the only entity responsible for activities in the EEZ. The permitting regime under the CMA remains in force, with New Zealand Petroleum and Minerals responsible for issuing permits. WorkSafe New Zealand maintains health and safety standards. Interestingly, MNZ is still in charge of overseeing DMPs and managing oil spill responses.⁷² This seems anomalous and highlights a point of tension in the regime between the EPA’s authority to seek enough information to make an informed decision, and the role

⁵⁴ *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011* (NZ) cl 10(1).

⁵⁵ Chris Simmons. ‘The RMA at Sea?’ [2012] *New Zealand Law Journal* 385, 385.

⁵⁶ See, eg. New Zealand, Parliamentary Debates, 13 September 2011, 21217. See also New Zealand Local Government and Environment Committee, *Report on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill* (15 May 2012), in particular the minority views at 8, 10, 16.

⁵⁷ New Zealand Law Society, Submission to New Zealand Local Government and Environment Committee, *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill*, 1 February 2012, [10], [18]; Parliamentary Commissioner for the Environment, Submission to New Zealand Local Government and Environment Committee, *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill*, 13 December 2011, 5.

⁵⁸ Supplementary Order Paper (2012) *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011* (321–3) (NZ).

⁵⁹ New Zealand, Parliamentary Debates, 16 August 2012. [4492].

⁶⁰ *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* (NZ) s 35 (‘EEZ Act’).

⁶¹ *Ibid* s 36.

⁶² *Ibid* s 37.

⁶³ *Ibid* ss 29D, 44C, 45(1).

⁶⁴ *Ibid* s 36(1).

⁶⁵ *Exclusive Economic Zone and Continental Shelf (Environmental Effects—Non-notified Activities) Regulations 2014* (NZ) and *Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013* (NZ).

⁶⁶ EEZ Act s 13.

⁶⁷ *Ibid* ss 13(1)(a), 36(2).

⁶⁸ *Ibid* ss 38(2)(b), 39(2)(c).

⁶⁹ *Ibid* s 39(1).

⁷⁰ *Ibid* s16(a) and *Crown Entities Act 2004* (NZ) sch 5 cl 14.

⁷¹ *OMV* non-notified decision [5].

⁷² For a more detailed overview of different authorities in the EEZ, see Environmental Protection Authority, *Who Does What in New Zealand’s Offshore Waters?* (13 October 2015) <http://www.epa.govt.nz/EEZ/who_does_what/Pages/default.aspx>.

of other agencies in administering their own particular patch in the EEZ. I will address this issue in more detail later in this paper.

4.2 Comparison with the Resource Management Act 1991

The EEZ Act applies a regime with broadly similar principles and processes to the RMA. Both Acts share a ‘sustainable management’ purpose, with some minor variations.⁷³ The RMA enables people to provide for their ‘social, economic and cultural wellbeing’.⁷⁴ The EEZ Act refers only to ‘economic’ well-being.⁷⁵ The RMA then goes on to provide a range of matters of national importance and other matters that decision makers must take into account.⁷⁶ A similar overarching list is not present in the EEZ Act. The RMA is entirely subject to the principles of the Treaty of Waitangi.⁷⁷ The EEZ Act does not generally apply the principles of the Treaty, but has some requirements for Māori input into the decision making process.⁷⁸

Some commentators suggested that extending the RMA would have been the simplest and most cost-effective means of implementing an environmental management regime for the EEZ.⁷⁹ The establishment of a separate regime could have caused unnecessary fragmentation and confusion, especially for projects straddling the boundary between the territorial sea and EEZ.⁸⁰ Applying the RMA would also have avoided the need for unnecessary litigation, as any cases would have followed the same principles set out in previous resource management decisions.⁸¹

Nevertheless, the nature of resource management in the EEZ is such that a wholesale application of the RMA would have been difficult. In passing the Bill, the Government emphasised that the RMA framework could be ‘overkill’ given the relative lack of competing interests offshore.⁸² The EEZ Act centralises decision making functions with the EPA. As a specialist environmentally-focused agency, the EPA has the necessary expertise in environmental analysis and processes to be able to handle the technically complex nature of marine consent applications.⁸³ Regional authorities under the RMA may not necessarily be equipped to handle these applications. The EEZ Act regime also allows for uniform and nationally consistent standards to be applied across the entire EEZ. Commercially, this is desirable because operators are able to work with a consistent and predictable set of requirements. On balance, the potential strategic and economic importance of resources in the EEZ justifies a more centralised and uniform approach than the framework available under the RMA.

5 Implementing the Legislation: The Environmental Protection Authority’s Processes and Decisions

5.1 Transitional provisions

The EEZ Act’s transitional provisions gave operators a grace period (now expired) to continue existing and planned petroleum activities without a marine consent.⁸⁴ The extent of the EPA’s control over operators under the transitional provisions was controversial.

In *Greenpeace of New Zealand Incorporated v Environmental Protection Authority*,⁸⁵ Anadarko NZ Taranaki Company (‘Anadarko’) applied for permission to continue with a planned petroleum activity. Section 166 of the Act outlined that activities already authorised under the former regime could proceed without a marine consent.⁸⁶ The only requirement was for the operator to submit an EIA to the EPA.⁸⁷ Section 41 of the EEZ Act applied to

⁷³ Compare EEZ Act s 10 with *Resource Management Act 1991* (NZ) s 5 (‘RMA’).

⁷⁴ RMA s 5(2).

⁷⁵ EEZ Act s 10(2).

⁷⁶ RMA ss 6, 7.

⁷⁷ RMA s 8.

⁷⁸ EEZ Act s 12.

⁷⁹ Mulcahy, above n 41, 43.

⁸⁰ Barton, above n 49, 212.

⁸¹ *Ibid* 212.

⁸² New Zealand, Parliamentary Debates, 30 May 2012, 2735.

⁸³ Barton, above n 49, 212.

⁸⁴ EEZ Act ss 161, 166.

⁸⁵ *Greenpeace of New Zealand Incorporated v Environmental Protection Authority* [2013] NZHC 3482 (19 December 2013) (‘*Greenpeace 2*’).

⁸⁶ EEZ Act ss 166(1), (2), (8).

⁸⁷ *Ibid* s 166(3).

applications under the transitional provisions.⁸⁸ This section says that the EPA may decide that an application is incomplete because it does not meet all of the requirements for an EIA under section 39. The EPA must return an incomplete application.⁸⁹

Anadarko's EIA contained parts of the DMP that it had provided to MNZ under the previous regime. Anadarko omitted some appendices to the original DMP that contained information such as oil spill modelling. In particular, Greenpeace contended that Anadarko's EIA did not contain information about an oil spill travelling away from New Zealand towards the open ocean.⁹⁰ The EPA's external consultants recommended that the EPA exercise its discretion under section 41 to return the EIA as incomplete. EPA staff disagreed and advised Anadarko that the EPA would accept its EIA.⁹¹

Greenpeace applied for a judicial review of the EPA's decision. Greenpeace submitted that the EIA was incomplete and that the EPA had erred in law by not exercising its discretion to return it to Anadarko.⁹² The judge held that section 41 did not give the EPA the authority to consider the merits of the content of the EIA. The only purpose of the initial consideration under section 41 was to ensure that the public and the EPA would have enough information to be able to submit on the application when it reached the actual decision making stage.⁹³ Any evaluative function would be carried out under other provisions such as sections 59 and 61, which outline factors for the EPA to consider when the application reaches the substantive decision making stage. As a result, the EPA's role under section 41 is "essentially administrative".⁹⁴

This decision understates the extent of the EPA's discretion to consider the merits of the EIA under section 41. The transitional provisions gave the EPA discretion to return an incomplete application under section 41, if the EIA did not meet the requirements of section 39. Section 39(2) states that the EIA must (a) give a level of detail proportionate to the scale and significance of the potential effects of the activity and (b) *sufficient detail to enable the EPA to understand the nature of the activity* (emphasis added).

Section 39 appears to give the EPA an evaluative role in determining whether the EIA actually contains enough information, with the level of detail necessary to allow the EPA to come to an informed conclusion as to the effects of the activity. The decision seems inconsistent with the fact that the EEZ Act explicitly provides for the EPA to seek independent advice as to whether the EIA complies with section 39.⁹⁵ This provision would seem to be irrelevant if the question is simply whether all the necessary information is present. Reducing this discretion to a "box-ticking exercise" does not give full effect to the power granted to the EPA under section 41.

This issue has remained live in marine consent decisions issued under the new legislation. It raises two problems. The first is that if the EPA's completeness check is simply administrative, the EPA cannot assess if the applicant's information is sufficient to decide the application until the substantive decision making stage. This means that the relevant DMC must seek further information under pressing time constraints – a problem noted by the DMC in the *OMV* non-notified decision.⁹⁶ The EPA's completeness check also reveals a more fundamental problem about the extent of the EPA's authority to seek information that is relevant, but governed by other marine management regimes. There appears to be some tension between the EPA's function in processing marine consent applications and MNZ's role in administering DMPs. In the *OMV* and *Shell Todd* non-notified decisions, the DMCs requested complete copies of each applicant's DMP. In both cases, neither the applicant nor MNZ complied (*OMV* provided a partial copy).⁹⁷ I will discuss this issue in more detail in part 66 of this paper.

⁸⁸ Ibid s 166(4).

⁸⁹ Ibid s 41(3).

⁹⁰ *Greenpeace 2* [2013] NZHC 3482 (19 December 2013) [20].

⁹¹ Ibid [14].

⁹² Ibid [21].

⁹³ Ibid [28].

⁹⁴ Ibid [29].

⁹⁵ EEZ Act s 41(2).

⁹⁶ See the DMC's recommendations in the *OMV* non-notified decision, appendix 2 at 61-62.

⁹⁷ See *OMV* non-notified decision [80] and *Shell Todd* non-notified decision [29].

5.2 The Current Process

Briefly, a marine consent application for a proposed activity wholly within the EEZ undergoes the following process:

- The applicant lodges its application with the EPA.⁹⁸ The application must contain an EIA with the information required by section 39.⁹⁹
- The EPA reviews the EIA and decides if it meets the requirements of section 39.¹⁰⁰ The EPA may seek independent advice or commission an independent review on this matter.¹⁰¹ The EPA may also request further information before a hearing (or before it makes its decision if there is no hearing).¹⁰² The applicant can challenge these decisions under section 101. If the EIA is incomplete, the EPA must return the application.¹⁰³
- If the activity is non-notified, the EPA may conduct a hearing if it decides that a hearing is necessary, or if the applicant requests it.¹⁰⁴ A hearing is not essential. The EPA must issue its decision on non-notified applications within 50 days of the completion of the application.¹⁰⁵
- If the activity is notified, the EPA must give public notice.¹⁰⁶ Any person may make a submission on a notified application.¹⁰⁷
- A notified application will proceed to a hearing if the EPA decides that one is necessary, or if the applicant or a submitter requests a hearing.¹⁰⁸ Hearings must be completed within 40 days.¹⁰⁹
- The EPA will consider the application in accordance with sections 59 to 61. Section 59 outlines the factors that the EPA must take into account. Section 60 outlines mandatory considerations in respect of existing interests. Section 61 imposes a set of 'information principles' that the EPA must apply in its decision.
- The EPA may then grant or refuse the application.¹¹⁰ It must do so within 20 working days from the end of the hearing.¹¹¹ The EPA may apply conditions to the marine consent.¹¹²
- If favouring caution and environmental protection means that the consent is likely to be declined, the EPA must consider whether it could approve the activity subject to an adaptive management approach.¹¹³ This means that the activity can go ahead on a smaller scale to allow its effects to be monitored.¹¹⁴ The EPA may order the operator to stop the activity if the adverse effects are unacceptable.¹¹⁵
- Applicants and submitters may appeal to the High Court against the EPA's decision, but only on questions of law.¹¹⁶

⁹⁸ EEZ Act s 38.

⁹⁹ Ibid s 38(2)(c).

¹⁰⁰ Ibid s 41(1).

¹⁰¹ Ibid s 44(1).

¹⁰² Ibid s 42.

¹⁰³ Ibid s 41(3).

¹⁰⁴ Ibid s 44B.

¹⁰⁵ Ibid s 68(2).

¹⁰⁶ Ibid s 45.

¹⁰⁷ Ibid s 46(1).

¹⁰⁸ Ibid s 50.

¹⁰⁹ Ibid s 52.

¹¹⁰ Ibid s 62.

¹¹¹ Ibid s 68(1).

¹¹² Ibid s 61.

¹¹³ Ibid s 61(3).

¹¹⁴ Ibid s 64(2)(a).

¹¹⁵ Ibid s 64(2)(b).

¹¹⁶ Ibid s 105.

5.3 Information Principles

An important feature of the marine consent process is section 61, which outlines the Act's information principles. The EPA must apply these principles when it considers marine consent applications. This includes making full use of its powers to seek additional information.¹¹⁷ The EPA can request additional information from the applicant itself, call for an independent review of the applicant's EIA and commission reports or seek advice on any aspect of the marine consent application.¹¹⁸ The EPA must base its decisions on the best available information and take into account any uncertainty or inadequacy in the information it receives.¹¹⁹ Crucially, if the information available to the EPA is uncertain or inadequate, the EPA *must favour caution and environmental protection*.¹²⁰ This creates a presumption that if there is uncertainty about any aspect of a marine consent application, the EPA will decline the application, although it appears to fall short of making it mandatory for the EPA to refuse to give consent (a point that I will discuss in more detail in part 6 below).

5.4 Case Studies: Trans-Tasman Resources and Chatham Rock Phosphate

5.4.1 Trans-Tasman Resources

TTR submitted the first notified application for a marine consent, to be decided entirely under the new regime. TTR sought consent to excavate up to 50 million tonnes of seabed material annually, in a 65.76 square kilometre zone just beyond the territorial sea in the South Taranaki Basin. TTR proposed sending a 'Floating Processing Storage and Offloading Vessel' ('FSPO' or 'ship') into the project area. The ship would tow an extraction machine called a 'crawler', which would excavate ten metre wide trenches in the seabed across a 300 square metre block. A tube would shift material from the crawler to the ship, where it would be processed to extract iron ore. At the same time, the ship would deposit processed material back onto the seabed in another block, through a deposition pipe positioned four metres above the ocean floor.¹²¹

The responsible DMC declined TTR's application in June 2014. In a 200-page decision, the DMC comprehensively evaluated all aspects of TTR's application and considered the wide range of environmental impacts that would flow from TTR's proposed activities. In particular, the DMC was concerned with the sediment plume that would be created by the initial excavation of material and by the subsequent discharge of material from the ship onto the seabed.¹²² This would have flow on effects on primary productivity – the energy entering the food chain at the bottom level from small flora – and subsequently further up the food chain.¹²³ The DMC also considered the effects that the proposal could have on existing interests, including iwi,¹²⁴ various fishing interests,¹²⁵ recreation and tourism,¹²⁶ existing petroleum mining licence holders¹²⁷ and marine traffic.¹²⁸ On the other side of the ledger, the DMC then considered the economic benefits of the proposal. The royalty payments alone to the New Zealand Government were assessed at approximately NZD 50 million per year.¹²⁹ The DMC noted some uncertainty in terms of quantifying the economic benefit. Experts disagreed firstly over whether to use a computable general equilibrium model or a cost-benefit analysis to establish the economic outcomes of the project.¹³⁰ The likely increase in Gross Domestic Product from the project and the number of jobs that would be created as a result were also uncertain. The DMC ultimately found that the project would return a positive net economic benefit.¹³¹ However, the economic case in TTR does not appear to have been particularly strong. This meant that TTR was unable to fully capitalise on section 59(2)(f), which makes economic benefits a mandatory consideration for the DMC. This could have been a major factor in favour of the application. As a result, the decision is perhaps of limited value in determining how the EPA will balance adverse environmental effects with economic benefits.

¹¹⁷ Ibid s 61(1)(a).

¹¹⁸ Ibid ss 42, 44(1).

¹¹⁹ Ibid ss 61(1)(b), (c).

¹²⁰ Ibid s 61(2) (emphasis added).

¹²¹ Trans-Tasman Resources Limited, *South Taranaki Bight Iron Sands Project: Impact Assessment Summary* (21 October 2013).

¹²² *TTR decision* [147]-[189].

¹²³ Ibid [190]-[233].

¹²⁴ Ibid [591]-[642].

¹²⁵ Ibid [643]-[700].

¹²⁶ Ibid [701]-[711].

¹²⁷ Ibid [712]-[720].

¹²⁸ Ibid [721]-[726].

¹²⁹ Ibid [753].

¹³⁰ Ibid [728], [731].

¹³¹ Ibid [753].

A key factor in declining the application was the level of scientific uncertainty about the effects of TTR's proposal. The DMC stated that:¹³²

Put simply, we do not know enough about the existing environment ... and how that environment may be affected by the proposed mining [...] We were surprised at the applicant's inability to clearly articulate from the outset how it was going to mine and operate to ensure that it achieved the environmental results – and especially the plume characteristics – that its experts had modelled. [...] We find that there is considerable uncertainty in the information provided as to both the nature of the environment and the way the mining operation might affect it.”

Scientific uncertainty in the *TTR* decision stemmed largely from difficulties in modelling the effects of TTR's proposed activities. This modelling would have to accurately assess the impact on one particular aspect of the environment in the project area, and then show the ramifications elsewhere. For example, TTR's primary productivity impact assessment was based on the probable reaction of primary producers (such as plankton) to a change in light levels. Information about the change in light levels was drawn from another model, which predicted the movements of suspended sediment plumes. The DMC stated that this 'layering of model predictions' had the effect of compounding the level of scientific uncertainty.¹³³ The DMC decided that, on the basis of incomplete and uncertain information, it would apply caution and environmental protection and decline the consent – as required by the EEZ Act's information principles.¹³⁴

The DMC then had to consider whether it could grant consent subject to TTR proceeding according to an adaptive management approach. Generally, this relates to allowing the activity to commence on a smaller scale, to allow its effects to be monitored.¹³⁵ TTR took a novel approach to adaptive management. TTR submitted that it could not operate a standard adaptive management plan: if it were forced to carry out the project in stages with no certainty of being allowed to continue, the project would collapse as TTR would not be able to find the necessary (and substantial) capital investment to continue.¹³⁶ Instead, TTR set out a number of environmental performance objectives, baseline monitoring proposals, quantitative measures and operational monitoring proposals as a substitute.¹³⁷ The DMC agreed in principle that a similar framework could meet the criteria for an adaptive management approach, but ultimately found that TTR's proposal was not clear or robust enough to meet these requirements.¹³⁸ On this basis, the DMC rejected TTR's adaptive management framework and declined the marine consent application. The DMC considered overall that the application was 'premature' and that TTR should have taken more time to comprehend the environment, the operation and the likely impact of the operation on the environment.¹³⁹

5.4.2 Chatham Rock Phosphate

A similar narrative unfolded in the *CRP* decision, where the responsible DMC rejected CRP's application to mine phosphorite nodules on the Chatham Rise. CRP applied to mine up to 30 square kilometres of seabed annually. Similarly to TTR, it intended to extract material from the sea floor (although using a conventional "drag head" as opposed to a crawler machine) and pump this material to a mining vessel for on-board processing. The processed material would then be returned to the sea floor through a deposition hose.¹⁴⁰

CRP's project faced a rocky consent process from the outset. The EPA released its initial staff report in August 2014.¹⁴¹ This report stated that the EPA could not recommend the application. A key factor in this conclusion was the level of uncertainty surrounding CRP's proposal. The EPA acknowledged that CRP could provide additional information, but that some uncertainty would remain.¹⁴²

CRP's application was further hindered by the fact that the company intended for most of its mining to occur within a 'Benthic Protection Area' ('BPA'), established under the *Fisheries (Benthic Protection Areas) Regulations 2007* (NZ). The purpose of these regulations is to establish "Benthic Protection Areas", regulate

¹³² Ibid [133], [136], [138].

¹³³ Ibid [230].

¹³⁴ Ibid [773].

¹³⁵ EEZ Act s 64(2).

¹³⁶ *TTR* decision [794]-[795].

¹³⁷ Ibid [796].

¹³⁸ Ibid [850].

¹³⁹ Ibid [853].

¹⁴⁰ *CRP* decision [15], [17].

¹⁴¹ The EPA may commission Staff Reports under EEZ Act s 44.

¹⁴² Environmental Protection Authority, *EPA Staff Report: Chatham Rock Phosphate Limited Marine Consent Application* (EPA, August 2014) [588], [597].

activities within those areas (including prohibiting the use of dredges) and create offences and penalties for breaches.¹⁴³

Ninety-two percent of CRP's consent area sat within the Mid Chatham Rise BPA. The company submitted that seabed mining was not specifically prohibited within the BPA – meaning the area was not closed to such an activity.¹⁴⁴ The DMC did not accept this argument. It noted that:¹⁴⁵

[...] mining the seafloor in an area in which a comparable activity is prohibited would be, at the very least, contradictory. [...] The net effect, being the destruction of a sizeable benthic area that is protected from an activity similar to mining, is clearly contrary to purpose (a) of the BPA, which is not just to prohibit the specific activities of trawling and dredging, but also to protect the benthos.

As with TTR's application, however, it was the level of uncertainty surrounding CRP's proposal that ultimately led the DMC to decline consent. Despite CRP's efforts to address the issues that the EPA raised in its staff report, uncertainty remained a key theme in the DMC's final decision. The DMC stated:

[...] it is incontestably the case that there remained significant gaps in the data and information provided about the consent area's marine environment as well as uncertainty about the impact of the proposal on existing interests and the environment.¹⁴⁶ [...] a complete understanding of the environment and absolute certainty about the risks posed by the proposal are not a prerequisite to the granting of a consent. On the other hand, scientific knowledge of the Chatham Rise ecosystem is manifestly incomplete and the DMC does need to have sufficient, and sufficiently certain, information to identify and evaluate the risks involved in a proposal such as this.¹⁴⁷

Accordingly, the DMC concluded:

The DMC's overall conclusion is that the information available to it on the application, while it met the EEZ Act's definition of best available, was uncertain and in some areas inadequate.¹⁴⁸ [...] To favour caution and environment protection [sic] would in this case mean that the proposal would be likely to be refused consent.¹⁴⁹

Having reached this conclusion, the DMC proceeded to consider adaptive management. In parallel with the TTR decision, the DMC and the applicant were not able to agree on a viable adaptive management approach. The DMC considered a three stage programme – with the first stage being limited to information gathering only.¹⁵⁰ CRP responded that such an approach would present unacceptable commercial risk, given the level of upfront investment needed to conduct even a trial period.¹⁵¹ As a consequence, the DMC declined the application.¹⁵²

6 Issues with the Current System

The EEZ Act as a whole represents a positive first step towards an effective management regime for New Zealand's offshore resources. In this section, I will highlight areas of the regime that are contentious, or where some reform could better serve the Act's sustainable management purpose. Where appropriate, I have supplemented this analysis with reference to the Australian regime for offshore minerals. Due to space constraints, I have not comprehensively analysed the Australian system. Instead, in assessing certain areas of the New Zealand framework, I have referred to relevant areas of Australian law that highlight either strengths or inadequacies in the New Zealand system.¹⁵³ I have limited my comparative analysis to Australia, because its recent overhaul of its offshore minerals legislation makes it a useful counterpoint to the New Zealand regime.

¹⁴³ *Fisheries (Benthic Protection Areas) Regulations 2007* (NZ) reg 3.

¹⁴⁴ CRP decision [717].

¹⁴⁵ *Ibid* [731].

¹⁴⁶ *Ibid* [823].

¹⁴⁷ *Ibid* [824].

¹⁴⁸ *Ibid* [826].

¹⁴⁹ *Ibid* [827].

¹⁵⁰ *Ibid* [847].

¹⁵¹ *Ibid* [850].

¹⁵² *Ibid* [930].

¹⁵³ For a more detailed overview of the Australian system, see Tina Hunter, 'Offshore Petroleum Facility Incidents Post Varanus Island, Montara and Macondo: Have we really addressed the root cause?' (2013-2014) 38 *William and Mary Law and Policy Review* 585; Alexandra Wawryk, 'Recent Changes to the Commonwealth Offshore Petroleum Legislation: Strengthening environmental liability, compliance and enforcement provisions' (2013) 27 *Australian and New Zealand Maritime Law Journal* 49.

Australia regulates activities in ‘Commonwealth waters’¹⁵⁴ under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (the ‘OPGGSA’). The OPGGSA and subsidiary instruments regulate the allocation of property rights and the environmental management and health and safety aspects of offshore activities.¹⁵⁵ The key regulatory agency is the National Offshore Petroleum Safety and Environmental Management Authority (‘NOPSEMA’). NOPSEMA has responsibility for health and safety, structural integrity, environmental management and day-to-day operations associated with offshore petroleum activities.¹⁵⁶ The Australian framework has recently undergone substantial reform in response to the 2008 Varanus Island pipeline explosion and Montara oil spill in 2009.¹⁵⁷ These incidents highlight valuable lessons for New Zealand’s own development.

6.1 Composition of Decision Making Committees

The EPA to date has delegated all decisions to DMCs. There are no guidelines for the necessary qualifications and experience of the committee in the legislation. There is also no standing panel of decision makers for EEZ activities.¹⁵⁸ Instead, the EPA appoints DMCs on an ad hoc basis, raising the concern that DMC members will not have an appropriate range of expertise.¹⁵⁹ Some commentators have suggested replacing the current ad hoc approach with a standing board of inquiry dedicated to processing applications in the EEZ.¹⁶⁰ The benefit of this would be to ensure that the body responsible for processing applications would have the necessary experience within its own ranks to assess information and impact assessments. On the other hand, the desirability of a full-time committee would need to be tempered by financial considerations. Given the comparatively low volume of applications, a standing committee could be an unnecessary expense. An appropriate compromise could be to adjust the EEZ Act to allow regulations as to the composition of the decision making body appointed by the EPA. This would ensure adequate expertise in areas such as geology, marine biology, Māori concerns, law, and planning and resource management.

6.2 Non-notified Applications

The original EEZ Bill did not contain provisions for non-notified applications. The non-notified consenting process came in through a supplementary order paper attached to the *Marine Legislation Bill 2012* (NZ).¹⁶¹ The SOP was introduced after the Select Committee process, leading to criticism that there had not been enough of an opportunity for public comment.¹⁶² Section 29D of the EEZ Act now allows for regulations to classify discretionary activities as non-notified. The activity must have a low probability of significant adverse effects and must be routine or exploratory, or of brief duration, or a dumping activity.¹⁶³ Regulations have classified activities related to exploratory petroleum drilling as non-notified.¹⁶⁴ In 2014, DMCs appointed by the EPA approved applications by OMV and Shell Todd for marine consents to drill exploratory wells off Taranaki. The DMCs considered the environmental effects and potential economic benefits of the proposal and concluded that both proposals would achieve the purpose of the EEZ Act.¹⁶⁵

Unsurprisingly, the non-notified application process has raised objections. A key concern is that there is now no scope for public input into marine consent decisions for non-notified activities.¹⁶⁶ This is not just restrictive in the sense of preventing the public at large from having its say about an application. The notification process also allows submitters to adduce technical and expert evidence on the application – which may challenge the evidence provided by the applicant.¹⁶⁷ This runs the risk that the EPA will have to make the decision solely based on information submitted by the applicant, with no ‘second opinion’ in the form of evidence from submitters. The EPA does have the power to request additional information or commission an independent review of the

¹⁵⁴ Under Australia’s Offshore Constitutional Settlement 1980, the Commonwealth has authority over the area of ocean from three nautical miles to the outer limits of the continental shelf: see *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), ss 4, 5 (‘OPGGSA’).

¹⁵⁵ Wawryk, above n 155, 54.

¹⁵⁶ *Ibid* 53.

¹⁵⁷ Hunter, above n 155, 604.

¹⁵⁸ Catherine Somerville and Kylie Paine, ‘Non-Notified Exploratory Drilling in the EEZ: Shutting out the public or a reasonable response?’ April 2014 *Resource Management Journal* 1, 5.

¹⁵⁹ Palmer, above n 24, 143.

¹⁶⁰ Peart, above n 41, 51.

¹⁶¹ Supplementary Order Paper 2013 (347) *Marine Legislation Bill 2012* (58–2) (NZ).

¹⁶² Somerville, above n 157, 2.

¹⁶³ EEZ Act s 29D(2).

¹⁶⁴ *Exclusive Economic Zone and Continental Shelf (Environmental Effects—Non-notified Activities) Regulations* (NZ) reg 5. This regulation states that applications activities described in EEZ Act s 20(2), (4) that are related to exploratory drilling may proceed on a non-notified basis.

¹⁶⁵ See *OMV* non-notified decision, Executive Summary, 2-3; *Shell Todd* non-notified decision, Executive Summary, 2-3.

¹⁶⁶ Somerville, above n 160, 4.

¹⁶⁷ *Ibid* 4.

applicant's EIA,¹⁶⁸ but this relies on the EPA being vigilant in exercising this power. In the *OMV* non-notified decision, the DMC considered that the information principles outlined in Section 61 empowered it to seek further information, as the applicant's evidence alone may not have been sufficient.¹⁶⁹ In both the *OMV* and *Shell Todd* non-notified decisions, the EPA requested further information from a variety of sources. Future DMCs should follow this example.

In favour of non-notified consents, the EEZ context is such that the same principles that underlie the RMA's public participation element are not all present. Public participation under the RMA ensures that neighbouring persons who will be directly affected by a project can have an input. This direct neighbourhood or community interest does not arise in the EEZ context.¹⁷⁰ The opposing interest falls more into the category of a wider overall environmental concern, which is perhaps best addressed through the EPA's ability to call expert and technical evidence, rather than through a broad base of (potentially non-technical) individual submissions.

This is a fine line: the EPA cannot afford complacency in terms of uncritically accepting the information provided by applicants, particularly as the avenues for providing alternative evidence are so restricted. The *Deepwater Horizon* incident should be a sobering reminder of the catastrophic impact that can result, in the worst case scenario, from even exploratory activities.¹⁷¹ Removing the opportunity for public submissions reduces the scope for rigorous testing of applications. This in turn increases the onus on DMCs to use their information gathering powers to the fullest extent possible. Provided they uphold this obligation, the non-notified consent process may prove an acceptable compromise.

6.3 The Decision Making and Hearings Process

When deciding applications for activities in the EEZ, it is important that the decision making process is as comprehensive and transparent as possible. The stakes in the EEZ are high, with substantial potential economic benefits jostling with significant environmental risks. A sound process at the EPA level is of paramount importance because the application stage is the only point where parties can establish the substantive facts of the application: appeals to the High Court are only on questions of law.¹⁷² This means that applicants and submitters only have one opportunity to present and critique factual evidence.

The timeframe for hearings and decisions has emerged as a key barrier to an effective process. Hearings on notified applications are limited to 40 days.¹⁷³ Decisions on notified applications must then be issued within 20 days of the hearing.¹⁷⁴ The EPA must decide on non-notified applications within 50 days of the application being completed.¹⁷⁵ Given the amount of material that must be processed, the complexity of the subject matter and the range of interests that must be represented, this is not an adequate timeframe. Writing on the similar Board of Inquiry process under the RMA, Michael Pickford notes that compressed time periods raise a number of problems. Submitters may not have enough time to read applications and evidence and formulate an adequate response. There will generally be time limits on the presentation of expert evidence and subsequent cross-examination, which may prevent submitters from exposing deficiencies in the evidence. Shifting timetables may mean that experts are required to prepare material at short notice.¹⁷⁶ As a result, strict timeframes run the risk that crucial information will be omitted or that certain evidence will not be adequately tested.

The DMC in the *TTR* decision was particularly critical of the EEZ Act's timeframes, stating that they were 'a source of considerable challenge for all parties and for this Decision-making Committee'.¹⁷⁷ The DMC also noted that the problems arising under the restrictive timeframes were exacerbated by the fact that the facts and opinions can only be tested at the DMC stage.¹⁷⁸ The DMCs in the *CRP* decision and the *OMV* and *Shell Todd* non-notified decisions also referred to the time limits on decisions as a source of considerable "challenge" to those Committees.¹⁷⁹

¹⁶⁸ EEZ Act ss 41(2), 42(1), 44.

¹⁶⁹ *OMV* non-notified decision [76].

¹⁷⁰ Somerville, above n 160, 5.

¹⁷¹ New Zealand, Parliamentary Debates, 15 October 2013, 13869.

¹⁷² EEZ Act s 105.

¹⁷³ *Ibid* s 52.

¹⁷⁴ *Ibid* s 68(1)(a).

¹⁷⁵ *Ibid* s 68(2).

¹⁷⁶ Michael Pickford, 'Board of Inquiry process under the RMA' [2014] *New Zealand Law Journal* 35, 36.

¹⁷⁷ *TTR* decision [34].

¹⁷⁸ *Ibid* [39].

¹⁷⁹ See *CRP* decision [32]; *OMV* non-notified decision [32] and *Shell Todd* non-notified decision [40].

Strict timeframes could also inadvertently lengthen the entire consent process, by leading to appeals on grounds that could be avoided with a less restrictive timetable. In the TTR hearing, for example, counsel for the fisheries interests tried to introduce expert evidence in the late stages of the hearing process. The DMC declined to hear this evidence, citing procedural fairness.¹⁸⁰ Counsel reserved their right to appeal on this particular point.¹⁸¹ This means that the EEZ Act's interest in an efficient procedure could potentially create a minefield in terms of grounds for appeal on issues such as procedural fairness and natural justice. These grounds may arise where the DMC takes action such as excluding a witness or cutting short submissions in order to meet time constraints.

In the same vein, such strict timeframes may inadvertently increase the likelihood that the EPA will decline applications. Section 61 of the EEZ Act requires the EPA to favour caution and environmental protection in the event of uncertainty. If an applicant does not have adequate time to present its case, increased levels of uncertainty could be inevitable – meaning that the EPA will be more likely to decline the application. Referring to the *TTR* decision, industry commentators noted that the DMC and TTR could have agreed on conditions to allow the project to go ahead, if there had been more time to negotiate.¹⁸² Ironically then, the EEZ Act's time limits appear to have impeded, rather than hastened, offshore mineral developments. These time limits have the rare, if dubious, achievement of raising the ire of environmental protection groups, industry lobbyists and the DMCs responsible for considering applications. A prompt revision of the EEZ Act's timeframes would be in the interests of all concerned and lead to a higher quality process.

6.4 Standards of Evaluation

The overarching purpose of the EEZ Act is clear. The Act seeks to enable economic development, subject to a certain level of environmental protection. The key question under this heading is whether the standards applied by the EEZ Act are sufficient to achieve the Act's purpose and to balance the complex factors at play in the EEZ. Developing offshore resources requires a nuanced approach to assessing risks and rewards. Activities in the EEZ give rise to multiple categories of risk. There is complexity in terms of linking causes and effects in offshore environments, scientific uncertainty in predicting the outcomes of offshore activities, and socio-political ambiguity as reflected in the range of viewpoints on whether New Zealand should continue to develop offshore minerals industries.¹⁸³ These issues will undoubtedly become more pressing as offshore minerals become an increasingly lucrative economic prospect as a result of higher demand and improved technology.

Section 59 of the EEZ Act imposes a 'shopping list' of factors for the EPA to take into account. Broadly, these factors are environmental,¹⁸⁴ social (including the impact on human health and other non-regulated activities in the area),¹⁸⁵ economic (including the economic benefit to New Zealand and potential economic detriment to other interests)¹⁸⁶ and legal (including other legal regimes, conditions of consent and best practice standards).¹⁸⁷ There is also a catch-all category of any other relevant matter.¹⁸⁸

The list is fairly exhaustive and applies to a range of different interests that may be affected by activities in the EEZ. However, there is a potential risk that companies will tailor their applications to 'tick the boxes' listed in section 59.¹⁸⁹ This could lead to applications that resemble information silos, with detailed technical material on specific issues, and less emphasis placed on a coherent and holistic assessment of the effects of the project as a whole. As a counterpoint, the International Seabed Authority's 2013 Mining Code sets out a series of standards for the exploitation of seabed minerals. The Code appears to have a more unitary standard, which is 'to ensure effective protection for the marine environment from harmful effects which may arise from the contractors' activities in the Area'.¹⁹⁰

¹⁸⁰ *TTR* decision [125]-[126].

¹⁸¹ Transcript of Proceedings, *Trans-Tasman Resources Limited Marine Consent Application* (Environmental Protection Authority Hearing, 1 May 2014) 2431.

¹⁸² 'Mining Sector in Shock Over Seabed Mining Decision' *The New Zealand Herald* (online), 19 June 2014. <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11277331>.

¹⁸³ These categories are outlined in Bruce Glavovic, 'Disasters and the Continental Shelf: Exploring new frontiers of risk' in Myron Nordquist and others (eds) *The Regulation of Continental Shelf Development* (2013) 225, 237-238.

¹⁸⁴ EEZ Act ss 59(2)(a), (b), (d), (e), (g).

¹⁸⁵ *Ibid* ss 59(2)(b), (c).

¹⁸⁶ *Ibid* ss 59(2)(a), (b), (f),

¹⁸⁷ *Ibid* ss 59(2)(h), (i), (j), (k), (l).

¹⁸⁸ *Ibid* s 59(2)(m).

¹⁸⁹ Palmer, above n 24, 145.

¹⁹⁰ *Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area* ISBA/19/LTC/8 (2013) [9(a)].

This ties in to a further potential weakness of the EEZ Act, in that it leaves the EPA with substantial discretion to approve or decline applications. The Act says simply that the EPA may grant or refuse the application.¹⁹¹ The EPA is permitted, but not obliged, to refuse consent if it considers that it does not have enough information.¹⁹² In the event of any uncertainty, the EPA must ‘favour caution and environmental protection’.¹⁹³ Admittedly, on this point, the DMC in the *TTR* decision considered that this was an absolute obligation that could not be “traded off” against potential economic wellbeing.¹⁹⁴ However, even the information principles as they stand fall short of actually imposing a fixed threshold of environmental acceptability, because the EPA is not under an explicit obligation to decline consent if the applicant cannot meet a certain environmental standard.

The DMC’s discussion in the *CRP* decision highlights this issue. During the hearing, counsel for the Environmental Defence Society submitted that the definition of ‘sustainable management’ in the Purpose section of the EEZ Act¹⁹⁵ should be read as setting out environmental ‘bottom lines’ that must be observed.¹⁹⁶ *CRP*, by contrast argued that the EEZ Act was intended as a “resource and economic development statute” as opposed to an environmental protection statute. The DMC (having reviewed the Minister for the Environment’s speech during the EEZ Bill’s Third Reading) ultimately disagreed with both propositions:¹⁹⁷

From the above, the DMC concludes that the Minister was reflecting a position somewhere between the approaches of Mr Winchester and Mr Enright. As the words of the Minister imply, the intention was that the EEZ’s economic resource be unlocked *in an environmentally responsible way that supports our clean, green reputation.*

The Australian legislation offers guidance in this area. Under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (the ‘OPGGGS Environment Regulations’), operators must submit an environment plan in order to carry out activities in Commonwealth waters.¹⁹⁸ Regulators¹⁹⁹ must accept the environmental plan if there are reasonable grounds for believing that, among other things, the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable and of an acceptable level.²⁰⁰ If the regulator is not satisfied that the applicant has met these standards, and the applicant cannot amend its environmental plan, the regulator must not accept the plan.²⁰¹ The lack of residual discretion to decline the plan even if it does meet an acceptable level of environmental protection could be concerning. However, the Australian approach is valuable in that it mandates a certain standard of environmental protection that operators must reach, or have their applications declined. This exposes an interesting omission in the EEZ Act. Although the EPA must favour caution and environmental protection in the event of uncertainty, nothing in the Act obliges the EPA to decline consent if the applicant cannot meet certain standard of environmental acceptability. Such a standard could better serve the Act’s sustainable management purpose.

6.5 Do Economic Benefits Have a Place?

In stark contrast to the environmental protection standard proposed above, clause 61 of the original Bill provided that the EPA would have to accept the application if the economic benefits to New Zealand outweighed the adverse effects.²⁰² The Select Committee deleted this pure cost-benefit approach.²⁰³ Despite this, the obligation to consider economic benefits under section 61(2)(f) may still implicitly condone a ‘sliding scale’ of environmental acceptability. Under the legislation as it stands, the EPA could potentially grant consent for an activity with a high risk of environmental harm, if the economic benefits were clear and substantial enough to tilt the balance (despite the DMC’s assertion to the contrary in the *TTR* decision).

To an extent, the inclusion of section 61(2)(f) seems incongruous. The EEZ Act exists to assess environmental effects – not economic benefits. The RMA focuses on environmental management, and leaves economic

¹⁹¹ EEZ Act s 62(1).

¹⁹² *Ibid* s 62(2).

¹⁹³ *Ibid* s 61(2).

¹⁹⁴ *TTR* Decision [139].

¹⁹⁵ EEZ Act s 10.

¹⁹⁶ *CRP* Decision [44].

¹⁹⁷ *Ibid* [48] (emphasis added).

¹⁹⁸ *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) reg 6 (‘OPGGGS Environment Regulations’).

¹⁹⁹ The ‘regulator’ for petroleum activities is the ‘Designated Authority’. This appears to be the responsible State or Territory Minister, not NOPSEMA. See definitions of ‘Regulator’ in OPGGS Environment Regulations reg 4 and of ‘Designated Authority’ in OPGGSA s7. For an outline of the role of the Designated Authority, see Wawryk, above n 155, 52.

²⁰⁰ OPGGS Environment Regulations 11(1)(b), (c).

²⁰¹ *Ibid* reg 11(3).

²⁰² *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011* (321—1) (NZ) cl 61(2)(a).

²⁰³ *Ibid* cl 61(2).

considerations to the market.²⁰⁴ From a commercial point of view, allowing the EPA to assess economic factors runs the risk of the EPA acting as financial controller and declining applications on the basis that the project is not economically feasible. The EPA is a specialist entity whose function is to ‘contribute to the efficient, effective, and transparent management of New Zealand’s environment and natural and physical resources’.²⁰⁵ The result is the potential for the EPA to have conflicting roles in terms of enforcing environmental standards, but at the same time needing to consider economic benefits.²⁰⁶ The legislation could be more effective if the EPA were required to focus solely on assessing the environmental elements of an application.

Despite this, leaving economic considerations entirely out of the equation may be too extreme. A potential compromise could be a two-tiered system. At first instance, applicants would have to demonstrate that their project would meet a fixed standard of environmental protection, as proposed above. This would give the EPA a more concrete means of ensuring that the proposed activity would meet the Act’s purpose of sustainable management. There would be scope at this point for clear bottom lines in terms of levels of risk and the ability of applicants to respond if any aspect of the project were to go wrong.

Beyond this standard, economic benefits would still have a role in determining whether the application should still proceed, even if the applicant could demonstrably meet a minimum standard of environmental acceptability. Most mineral extraction activities in the EEZ will carry a level of risk. The EPA should still be able to consider economic and other benefits, to ensure that the potential rewards of the proposed project justify any actual or potential adverse effects on the environment. If the EPA were not able to consider these benefits, it would be forced to regard projects as environmental degradation with no upside. This proposed solution is not a major shift from the current system. The EPA’s discretion should be tempered, however, by a mandatory, non-negotiable standard of environmental protection.

6.6 The Information Principles and Adaptive Management

The EPA has declined the first two seabed mining applications under the new legislation. Uncertainty was a key factor in both the *TTR* and *CRP* decisions. In these decisions, at least, the EPA appears to have taken a relatively strong approach to the information principles outlined in section 61. This uncertainty about seabed mining contrasts with the first notified oil drilling applications. In the *Shell Todd* notified decision, for example, the responsible DMC confirmed that:²⁰⁷

We are satisfied that we have sufficient information regarding the risks of a hydrocarbon spill event. [...] The overall environmental effects from a hydrocarbon spill on fish, zooplankton, marine mammals, seabirds and coastal ecosystems within close proximity to the spill, taking into account the nature and scale of those effects discussed above, and the low probability of such an event occurring, are likely to be negligible to minor.

For seabed mining at least, *TTR* and *CRP*’s experience with the new regulatory framework could dissuade companies from investing significant amounts of money in preparing EIAs. There seems to be a perception that the EPA’s standard has been set at a level that will impede the Government’s offshore resources programme.²⁰⁸ The EPA’s relatively narrow view on adaptive management could also be a cause for concern. Applicants may be left in a position where they must reduce the scale of their operations to a level that is not commercially viable in order to obtain consent. This could also be a barrier to investment in relatively new offshore industries such as seabed mining. The offshore petroleum industry, by contrast, has not faced the same issues to date.

²⁰⁴ Barton, above n 49, 212.

²⁰⁵ *Environmental Protection Authority Act 2011* (NZ) s 12(1)(a).

²⁰⁶ Blue, above n 42, 166.

²⁰⁷ *Shell Todd* notified decision [341]. See also *OMV* notified decision [258].

²⁰⁸ ‘Seabed Mining Sets Very High Bar’ *The New Zealand Herald* (online), (23 June 2014).

6.7 Enforcement – What Happens When It Goes Wrong?

The spectre of a major offshore disaster looms large when evaluating the merits of offshore mineral extraction, especially oil. With oil drilling, an ‘uncontrolled blowout’ remains the worst case scenario. In the *OMV* and *Shell Todd* non-notified decisions, the responsible DMCs stated that the likelihood of such a blowout was ‘remote’, but the consequences would be ‘massive’ or ‘catastrophic’. This led to overall findings that the environmental risks would be ‘low’ and ‘medium’ respectively.²⁰⁹ The DMCs in the later, notified, applications by OMV and Shell Todd came to similar conclusions.²¹⁰

Despite the low probability of an uncontrolled blowout, such an incident is still possible. New Zealand’s response framework at present is fragmented, which reduces the capacity of agencies to effectively manage offshore incidents. At the root of the problem is the fact that the EEZ Act does not in itself contain a comprehensive disaster response framework.

6.7.1 The Environmental Protection Authority’s Enforcement Role

The EEZ Act gives the EPA some enforcement powers. The EPA may review the duration or conditions of a marine consent.²¹¹ The EPA can cancel a marine consent in extreme circumstances where new information comes to light and the activity has significant adverse effects.²¹² To ensure that operators comply with their obligations under the Act, regulations under the Act and their marine consents, the EPA may appoint enforcement officers.²¹³ The EEZ Act empowers enforcement officers to inspect ships and installations involved in offshore activities.²¹⁴ In the event of a breach, an enforcement officer may serve an abatement notice on the operator. This notice can prohibit an activity or threatened activity that contravenes the operator’s obligations.²¹⁵ Alternatively, the abatement notice can require an operator to take some positive action to comply with its obligations or avoid, remedy or mitigate adverse environmental effects.²¹⁶ At a higher level, the EPA or an enforcement officer or any other person can apply to the Environment Court for an enforcement order that requires the operator to comply with its obligations.²¹⁷ The scope of the actions able to be ordered by abatement notices and enforcement orders appears broad. This suggests that there is considerable overlap with the more detailed emergency response powers available under the MTA.

Under the EEZ Act, it is an offence to carry out any activity that is not permitted or authorised by a marine consent. It is also an offence to breach an abatement notice or enforcement order.²¹⁸ A company that commits one of these offences is liable to the \$10 million maximum penalty under the Act, with additional fines for ongoing breaches.²¹⁹ However, the Act does not have its own “polluter pays” sections to oblige operators to meet the costs of an environmental disaster.

6.7.2 The Maritime Transport Act 1994 Response and Enforcement Framework

The MTA contains detailed provisions for protecting the marine environment and responding to offshore accidents. The MTA is responsible for preparing New Zealand’s Marine Oil Spill Response Strategy.²²⁰ In the event of a spill in the EEZ, MNZ manages the response.²²¹ MNZ appoints a National On-Scene Commander, with extensive powers to direct clean-up operations.²²² A crucial aspect of the MTA framework is the ‘polluter pays’ principle.²²³ This essentially means that operators whose activities result in discharge of harmful substances will be liable to the Crown for all reasonable clean-up costs.²²⁴ In addition, operators will be liable in damages for any pollution damage they cause.²²⁵ The MTA has clear sections to ensure a strong response to an environmental

²⁰⁹ See *OMV* non-notified decision [153]; *Shell Todd* non-notified decision [209].

²¹⁰ See *OMV* notified decision [258]; *Shell Todd* notified decision [341].

²¹¹ EEZ Act s 76.

²¹² *Ibid* s 81(3).

²¹³ *Ibid* s 138(1).

²¹⁴ *Ibid* ss 140, 141.

²¹⁵ *Ibid* s 125(1)(a).

²¹⁶ *Ibid* s 125(1)(b).

²¹⁷ *Ibid* s 115.

²¹⁸ *Ibid* s 132(1).

²¹⁹ *Ibid* s 133(1)(b), (2).

²²⁰ MTA s 283.

²²¹ Maritime New Zealand, *NZ Marine Oil Spill Response Strategy* (July 2006) 13.

²²² MTA ss 305, 319.

²²³ Maritime New Zealand, above n 26, 21-22.

²²⁴ MTA s 385B.

²²⁵ *Ibid* s 385C.

disaster and to ensure that operators will be liable for any clean-up costs. The polluter pays principle is an important element of the framework, provided it can actually be enforced against operators whose activities cause large-scale damage.

In this area, New Zealand and Australia have developed similar provisions. The OPGGSA obliges title holders to control petroleum releases and remedy any resulting damage to the environment.²²⁶ If the title holder does not meet this obligation, NOPSEMA or the responsible Commonwealth Minister can take remedial action and pursue the title holder for the costs.²²⁷ NOPSEMA can also give directions to title holders in the event of ‘significant offshore petroleum incidents’.²²⁸ An interesting point of difference with the OPGGSA is that it appears to place a stronger initial obligation on the operator to remedy the situation before Government agencies step in. It also has a more explicit requirement to ‘remediate’ any environmental damage, where the MTA refers in more general terms to ‘dealing with’ discharges and liability for ‘pollution damage’.²²⁹ A more specific obligation to remedy the environment could be a valuable addition to New Zealand’s oil spill response provisions.

6.8 A Fragmented Regime?

During the exploration and production phases of an offshore minerals project, five organisations are involved in overseeing various parts of the process. New Zealand Petroleum and Minerals regulates prospecting and mining permits. The EPA issues marine consents. MNZ administers DMPs and essentially takes full responsibility for any clean-up operations. WorkSafe New Zealand evaluates health and safety processes. In the exploration phase, the Department of Conservation ensures that seismic surveying does not affect marine mammals.²³⁰ This is a key structural weakness in the current regime. The EEZ Act may have plugged an environmental gap, but it falls well short of creating the unitary, integrated system that is arguably needed for effective resource management in the EEZ. The drafters of the Act never intended to create such a system: at the EEZ Bill’s second reading, the Minister for the Environment noted that ‘[t]he bill is not about oil response, mineral allocation, marine reserves, fishing or shipping. These are all addressed under other legislation’.²³¹

Despite this, the Act’s sustainable management purpose would be better served if the EPA took on a more multi-level role in overseeing offshore activities. The most obvious issue is the fragmentation between the EPA and MNZ in terms of assessing DMPs and in acting in response to a major oil spill. On three occasions, the EPA has effectively had to decide applications without full information, because it was not able to fully assess the relevant DMP.²³² Admittedly, there appears to have been some progress in this area. In both the notified *OMV* and *Shell Todd* decisions, the EPA requested, and received, copies of the DMP.²³³

Although there appears to have been more co-operation between the EPA and MNZ on this issue, the fact that MNZ is not obliged to provide the EPA with the DMP is troubling. An uncontrolled blowout in the EEZ remains a significant, if improbable, environmental risk. For the EPA to grant consent without ascertaining whether an applicant is actually capable of responding to such an occurrence deeply contradicts the purposes of the Act, to say nothing of its information principles. It would be a logical step to put the EPA in charge of evaluating DMPs. As a dedicated environmental management agency, the EPA would have the necessary expertise to handle these plans, in addition to the other environmental assessment documents that are already under the auspices of the EPA.

This paper proposes extending the EEZ Act to create a single entity that handles the full process for extracting offshore resources. Permits should continue to be handled under the CMA regime, because this addresses the separate concern of allocation of property rights. Due to space constraints, I have not evaluated the current health and safety regime. A transfer of these functions from WorkSafe New Zealand to the EPA could also potentially be a desirable step.

Such measures would see the EPA taking on a role similar to that of NOPSEMA in Australia. It would be responsible for deciding marine consent applications, as it is now. In addition, it would also take on MNZ’s current functions in terms of assessing DMPs, creating emergency response frameworks and actually responding to

²²⁶ OPGGSA s 572C(2).

²²⁷ *Ibid* ss 572D, 572E.

²²⁸ *Ibid* s 576B.

²²⁹ Compare OPGGSA s 572C(2)(b) with MTA ss 385B(3), 385C(1).

²³⁰ Environmental Protection Authority, above n 72.

²³¹ New Zealand, Parliamentary Debates, 30 May 2012, 2733.

²³² Anadarko’s application as reviewed in *Greenpeace v Environmental Protection Authority*, the OMV non-notified application and the *Shell Todd* non-notified application.

²³³ See *OMV* notified decision [118]; *Shell Todd* notified decision [150].

offshore disasters. The MTA's oil spill response and liability sections should be transferred to the EEZ Act, with authority for implementing those sections vested in the EPA.

The Australian framework provides a useful model in this regard. Australia has increasingly harmonised its regulatory approach to offshore activities, particularly in response to the Varanus Island and Montara incidents. These incidents highlighted the problem that a system with multiple regulators relies on each agency carrying out its functions in a competent way. Such a system can lead to inconsistencies of regulatory approaches and procedures.²³⁴ A more unified approach would not only address environmental concerns, but could also lead to benefits for the industry. Prior to the establishment of NOPSEMA, the Australian Petroleum Production and Exploration Association ('APPEA') argued strongly in favour of a single regulatory authority that would bring 'a number of practical and administrative benefits'.²³⁵ APPEA also noted the 'strong synergies' between health and safety and environmental issues.²³⁶ The Australian framework as it stands represents a much more unified and comprehensive system for managing offshore resources. New Zealand should learn from Australia's past incidents and consider adopting Australia's more unitary approach in any future reform of the EEZ Act and other marine management regimes.

7 Conclusion

The recent changes to New Zealand's offshore resource regime have called for a thoughtful and nuanced evaluation of complex questions of risk and reward. At the heart of this question is the interplay between economic, social and environmental concerns in a world of increasingly scarce resources. The EEZ Act has been a credible first step in addressing concerns surrounding the management of resources in the EEZ. The Act has largely succeeded in its purpose of filling an obvious void in New Zealand's offshore regulatory regime. The marine consent process under the Act appears to have struck a sensible balance in terms of assessing risk and ensuring that offshore activities can proceed, but in a way that minimises their actual and potential impact on the environment. Guided by the Act, decision makers have been sensitive to the range of factors involved in evaluating proposals for economic activities in the EEZ. Despite this, the first decisions under the new system have exposed weaknesses in the regime.

The strict timeframes for decisions remain a point of contention and warrant prompt review. They appear unworkable from a commercial and environmental standpoint, as they do not allow decision makers the time to properly assess the effects of a proposal. A further omission in the Act is the lack of an explicit obligation on the EPA to decline marine consents if an applicant cannot meet a minimum standard of environmental protection. This obligation is implied in the Act's information principles, but clarification on this point would be desirable in order to better ensure environmental protection. Such a standard could ease public anxiety about offshore projects, which continues to be a barrier to development.

The final issue is the very structure of New Zealand's entire offshore management regime. As it stands, the EEZ Act only regulates part of the complex process for extracting resources and dealing with the aftermath if something goes wrong. There is fragmentation between the EPA and the various other bodies responsible for managing different facets of offshore activities. Recent consent decisions have revealed this tension. This fragmentation increases the risk that important elements of proposed activities will not be adequately considered, if the various agencies seek not to encroach on each other's sphere of interest.

The creation of a single regulatory body responsible for all aspects of offshore activities would be a significant step towards making the EEZ Act a comprehensive and robust instrument to govern the development of offshore resources. This would have multiple commercial and environmental benefits. It would reduce the potential for regulatory overlap and ensure that uniform, predictable standards could be applied across the entire EEZ. Such a system would also avoid regulatory gaps. New Zealand should learn from Australia's experience, which reveals the dangers inherent in a system with multiple regulatory bodies. It increases the risk that some aspect of an offshore project will slip through the cracks, leading to a preventable incident with large-scale environmental impacts. The scope of the EEZ Act and the EPA's powers should be progressively extended so that the Act ultimately provides an effective resource management regime for all aspects of activities in the EEZ. Only then will the economic potential of this precious resource be realised in a manner that truly recognises the environmental value of our oceans.

²³⁴ Hunter, above n 155, 598.

²³⁵ Ibid 608.

²³⁶ Ibid 608.