LEGISLATION NOTES

The Crown Minerals Amendment Act 2013 and Marine Protest

ANNA DEVATHASAN*

I INTRODUCTION

In 2010, Brazilian energy giant Petrobras was awarded a five year licence to explore a suspected gas field in the Raukumara Basin.[1] This caused significant concern among local kaitiaki and civil society groups, who collaborated in marine protest activities against deep sea oil exploration.[2] This culminated with Opotiki fisherman Elvis Teddy steering his boat into the vicinity of a prospecting ship on 23 April 2011 and putting out fishing lines.[3] He was arrested and charged under s 65(1)(a) of the Maritime Transport Act 1994 (MTA).

The Auckland District Court dismissed the charges against Teddy on the basis that the MTA did not extend past New Zealand's territorial sea unless this was specifically provided for under the MTA.[4] The High Court overturned this decision on the basis that by necessary implication, the MTA must have extraterritorial effect as it was enacted to allow New Zealand to regulate the actions of its nationals on the high seas.[5] Nevertheless, the government responded to this perceived gap in legislation by enacting new offences in the Crown Minerals Amendment Act 2013 (the Act) that relate to protesting against prospecting ships. This legislative note will focus on the implications of these new offences in respect of the international law of the sea and international human rights law.

II THE NEW OFFENCES

The provisions that have disturbed the waters are the new ss 101A–101C in the Crown Minerals Act 1991. These provisions create two new offences that relate to protest at sea.[6] The first penalises conduct that causes damage or interferes with any structure or ship related to mining operations. The

* BA/LLB(Hons) student.

1 Gerry Brownlee "Petrobras awarded big exploration permit" (press release, 1 June 2010).

2 Thomas O'Brien "Fires and Flotillas: Opposition to Offshore Oil Exploration in New Zealand" (2013) 12 Social Movement Studies 221 at 223–224.

3 O'Brien, above n 2, at 223–224.

4 *R v Teddy* DC Tauranga CRI-2011-070-2669, 26 July 2012.

5 *Police v Teddy* [2013] NZHC 432, [2013] NZAR 299 at [23]–[24]. At the time of publishing, this decision was subject to appeal: see *Teddy v Police* [2013] NZHC 756.

6 Crown Minerals Amendment Act, s 55.

penalty for this offence is a term of imprisonment not exceeding 12 months or a fine not exceeding $50,000.[7] The second offence involves the creation of a "non-interference zone" around designated prospecting, exploration or mining activities.[8] A person commits an offence as the master of a ship entering the zone or for leaving a ship and entering the zone.[9] This is a strict liability offence, albeit one with a reasonable excuse defence and carries a penalty of a fine not exceeding $10,000.[10] This new securitised regime also grants the following powers to an enforcement officer (constables or members of the New Zealand Defence Force) who has reasonable cause to suspect that a person is committing, has committed, or is attempting to commit an offence: to stop a ship within the zone; to remove a person from the zone, to prevent a person or ship from entering the zone; to board a ship; and to arrest a person without a warrant.[11]

A Joint Statement in opposition to the Act called the provisions a "sledgehammer designed to attack peaceful protest at sea" which "breach[es] international law, and attack[s] our democratic freedoms".[12] These offences were a disconcertingly late addition to the Act. They were introduced through Supplementary Order Paper 205, which bypassed the Select Committee process. Accordingly, there was little opportunity for submissions in relation to the Act's compliance with the New Zealand Bill of Rights Act 1990 (NZBORA) and the international law of the sea.[13]

III THE LAW OF THE SEA

One of the curiosities in the history of the Act is the Crown Minerals Amendment Act 2013 Amendment Bill 2013 (Amendment Bill), which was enacted in order to correct a number of errors and omissions that were contained in the Act.[14] One such error was the omission of the word "or" in the definition of "offshore area" in creating the jurisdictional force field for these new offences.

Compare the following provisions:[15]

> **offshore area** means any area within the territorial sea or exclusive economic zone that is on or above the continental shelf

7 Crown Minerals Act, s 101B.

8 Section 101B(6).

9 Section 101B(2).

10 Section 101B(5).

11 Section 101C(1).

12 "Join [sic] Statement on Crown Minerals Bill Amendment 2013" (press release, 9 April 2013), available at <www.greenpeace.org> at 1. Signed by Greenpeace, the Rt. Hon. Geoffrey Palmer QC, Peter Williams QC, Dame Anne Salmond, WWF-New Zealand, Forest and Bird, Rikirangi Gage (a representative from Te Whānauā Apanui), the NZ Council of Trade Unions and others,

13 Supplementary Order Paper 2012 (205) Crown Minerals (Permitting and Crown Land) Bill (70-2).

14 Crown Minerals Amendment Act 2013 Amendment Bill 2013 (115-1) (explanatory note).

15 Crown Minerals Amendment Bill 2013 (70-3A), cl 46A.

And:[16]

> **offshore area** means any area that is—
> (a) within the territorial sea; or
> (b) within the exclusive economic zone; or
> (c) on or above the continental shelf"

The Act now attempts to extend its jurisdiction well into the high seas. It is uncontroversial that sovereignty and territorial jurisdiction do not extend automatically from New Zealand's coastline to as far as New Zealand can extend its control. Nevertheless, the Act seems to disregard much of the law of the sea regime as represented in the United Nations Convention on the Law of the Sea (UNCLOS).[17]

Territorial Waters and Contiguous Zone

According to UNCLOS, New Zealand is only sovereign in its territorial waters which comprise a notional line 12 nautical miles from New Zealand shores.[18] New Zealand's territorial sovereignty does not extend to the contiguous zone (the space between the notional 12 nautical mile boundary and a notional 24 nautical mile boundary).[19] However, in accordance with art 33 of UNCLOS, New Zealand may exercise the control necessary (in a very specific form of jurisdiction) to prevent or punish infringements of its customs, fiscal, immigration or sanitary laws and regulations.[20] On a plain reading, regulating protests around prospecting ships does not come under this category.

Exclusive Economic Zone

New Zealand's exclusive economic zone (EEZ) extends to 200 nautical miles from the coast.[21] Nevertheless, New Zealand is not sovereign in its economic zone. Instead, it has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the zone.[22] Further, it has jurisdiction in the zone in limited instances. Crucially, there is no jurisdiction over the waters surrounding prospecting ships.

Minister of Energy and Resources Simon Bridges has noted that other jurisdictions, such as Australia, have enacted similar anti-protest provisions.[23] However, the Australian counterpart, in s 616 of the Offshore Petroleum and

16 Crown Minerals Amendment Act 2013 Amendment Bill 2013 (115-1), cl 14.

17 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

18 Article 2.

19 Article 33(2).

20 Article 33(1).

21 Article 57.

22 Article 56(1)(a).

23 "Labour doubts Govt can regulate continental shelf" (20 May 2013) Radio New Zealand News <www.radionz.co.nz>.

Greenhouse Gas Storage Act 2006 (Cth) accords with UNCLOS by only permitting such safety areas to be created around stationary structures and petroleum wells.[24] Further, s 616 only prohibits vessels and not individuals from entering the zone.[25] In comparison, the Crown Minerals Amendment legislation creates a peculiar legal situation where a moving foreign-flagged ship, which is under the jurisdiction of another State, is surrounded by a prophylactic 500 metre bubble of New Zealand's purported jurisdiction.

The Continental Shelf and the High Seas

The continental shelf is the seabed and subsoil of the submarine areas that comprise the natural prolongation of a state's land territory to a minimum of 200 nautical miles.[26] A state has sovereign rights over its continental shelf for the purpose of exploring and exploiting the mineral and sedentary species of the continental shelf.[27] Nevertheless, "[t]he rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters".[28]

While the EEZ and the continental shelf overlap, a state's continental shelf may often extend significantly further than the 200 nautical mile limit to the outer edge of the continental margin. In 2006, New Zealand applied to the United Nations Commission for the Limits of the Continental Shelf and officially recognise the outer limits of its continental shelf.[29] The "or" of the Amendment Bill, noted above, assumes relevance at the intersection of the continental shelf and the EEZ. This word "of" extends the definition of "offshore area", and consequently New Zealand's extraterritorial jurisdiction, a spectacular 1.7 million square kilometres of seabed *outside* the EEZ.[30]

Article 89 of UNCLOS provides that, "[n]o State may validly purport to subject any part of the high seas to its sovereignty".[31] The high seas freedom of navigation applies to all of the zones listed above, save the territorial sea.[32] Nevertheless, a state cannot purport to claim jurisdiction in the waters above the continental shelf outside the EEZ as this area is incontrovertibly entitled to high seas freedom of navigation. Since the beginning of the 17th century, the principle of the freedom of navigation on the open sea has formed the backbone of the international law of the sea.[33] This freedom is not just for commercial ships of other states, but it is a freedom that inheres

24 Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), s 616.

25 Section 616.

26 UNCLOS, above n 17, art 76(1).

27 Article 77.

28 Article 78(1).

29 "Commission on the Limits of the Continental Shelf (CLCS): Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by New Zealand" (20 August 2009) United Nations Oceans & Law of the Sea <www.un.org>.

30 Helen Clark "UN recognises NZ's extended seabed rights" (press release, 22 September 2008) available at <www.beehive.govt.nz>.

31 UNCLOS, above n 17, art 89.

32 Articles 58, 86 and 87. To clarify, the freedom of navigation of the high seas applies to the waters in the contiguous zone, the EEZ and outside the EEZ.

33 See for example, Glen Plant "Civilian protest vessels and the law of the sea" (1983) 14 NYIL 133 at 138.

in civilian protest ships and boats as well.[34] The Act presumes incredible powers to legislate on the high seas against such protests. Ironically, the Act anticipated its international dysfunction by including the new s 101B(9), which indicates it is highly unlikely that this section will be used against non-New Zealanders.[35] The effect of this provision against a Greenpeace ship, which will often fly its own flag and ensure that it has individuals of many different nationalities on board,[36] may well expose the legislative impotence of this provision.[37]

IV INTERFERENCE WITH INTERFERENCE: THE RIGHT TO PROTEST AND "OVERKILL"

There is no "right to protest", as such, in either international human rights law or domestic legislation. Instead, the right to protest is the necessary corollary to the rights to freedom of expression, freedom of association and freedom of peaceful assembly.[38] As with any encroachment on a NZBORA right, the fundamental question concerns whether these provisions represent demonstrably justified limits on fundamental freedoms. As such, for interference with human rights to be justified, it must be proportional — it must be rationally connected to a legitimate objective and interfere with rights and freedoms as little as possible.[39] Further, in accordance with s 6 of the NZBORA, any reasonable interpretation which is consistent with preserving the rights and freedoms concerned should be preferred.[40]

The offences created in the Act are an excessive response to the objective of encouraging oil prospecting in New Zealand as well as ensuring the safety of those involved in (and those protesting) deep sea oil drilling. Any rational connection between this objective and these provisions is illusory. Dangerous or violent protest activity that could present a legitimate threat to the safety of those involved in either the protest or the exploration

34 And arguably in civilian bodies as well.

35 Crown Minerals Act, s 101B(9).

36 Plant, above n 33, at 141.

37 For the sake of completeness, the author notes that the New Zealand Continental Shelf Act 1964 s 7(1) has a deeming provision that situates every act that takes place on or under or above any installation or device used in, above, or on the continental shelf in connection with the exploration of the continental shelf shall be deemed to take place within New Zealand, and grants civil and criminal jurisdiction to New Zealand courts in respect to such acts. This is in accordance with art 81 of UNCLOS, which states that "the coastal State has exclusive right to authorize and regulate drilling on the continental shelf for all purposes". It should be noted, however, that there is a very tight geographic proximity between the installation and device on the continental shelf. It is a considerable legislative jump to extend this proscribed meaning to encompass the 500 metre zones that are being imposed around ships, notwithstanding that a ship is neither an installation nor a device. Secondly, UNCLOS grants a state penal jurisdiction over its flag ships and nationals concerning collisions and other incidents of navigation in the high seas. However, this is also a narrowly construed jurisdiction concerning masters or ships and those in service of ships. It is clear that this jurisdiction was not intended to extend to boats, dinghies, kayaks and swimmers in the high seas as these provisions purport to do.

38 John Ip "What a Difference a Bill of Rights Makes? The Case of the Right to Protest in New Zealand" (2010) 24 NZULR 239 at 239.

39 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [70].

40 At [149].

is already prohibited.[41] The provisions in the Act go a step further by also seriously limiting the scope of non-violent direct action, thereby attempting to ensure that non-violent protest cannot be used as an effective means of opposition in the sea where mining is concerned.

V CONCLUSION

New Zealand has a long history of protest by sea, especially where the environment is concerned. New Zealand protest ships have participated in direct action against nuclear testing, anti-dumping campaigns and anti-whaling. It is unfortunate that the Government has seen it fit to subordinate both the law of the sea and citizens' rights to protest to the overriding interests of the mining industry. The issues the Act gives rise to are perhaps unsurprising given the Government's view that a failure to limit the right to effective protest as a gap in the legislation. The Government has currently issued 70 permits for deep sea oil exploration with 23 pending.[42] If other New Zealand citizens seek to protect their coasts as vehemently as the Raukumara kaitiaki, it is likely that issues with this legislation will resurface in our courts.

41 See for example Maritime Transport Act 1994, s 65 and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1678 UNTS 221 (opened for signature 10 March 1988, entered into force on 1 March 1992).

42 "Permits" (24 May 2013) NZ Petroleum and Minerals <www.nzpam.govt.nz>.

Criminal Procedure Act 2011

LUKE SIZER*

I INTRODUCTION

When the Criminal Procedure (Reform and Modernisation) Bill was introduced to Parliament in 2010, it was heralded as the "biggest reform and modernisation of criminal justice procedure in nearly two generations".[1] The major vehicle of that reform was the Criminal Procedure Act 2011 (the CPA).[2] The Act was implemented in two stages: the minor provisions coming into force on 5 March 2012 with the remaining provisions coming into force on 1 July 2013.

The CPA undeniably represents striking reform. The question is the extent to which that reform satisfies the objectives of justice and fairness on the one hand and efficiency on the other. The manner in which the CPA seeks to satisfy such objectives signals a marked change in the criminal justice system.

II PROGRESS AND POLICY AIMS

The Act emerged in response to a consensus that the criminal justice system had major deficiencies.[3] As Mr Power outlined, the median time to dispose of a jury trial in a District Court case was 52 weeks, while in the High Court it was 69 weeks.[4] Moreover, officials considered around 43,000 court appearances per year were unnecessary.[5] The status quo was clearly untenable.

Accordingly, the parent Bill aimed to "ensure that the criminal justice system [would become] more transparent, understandable, and efficient".[6] It promised to reduce the time required to dispose of a case to between five and 13 weeks, free up some 16,000 court hours per year and save $24 million of government spending over the next five years.[7]

The Bill sought to achieve these goals through a range of means. Many of them were common sense; others, however, proved controversial. The Bill would permit trial in the absence of the accused.[8] It would also

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* BA/LLB(Hons) student.

1 (24 November 2010) 669 NZPD 15754.

2 The CPA passed by a majority of 110 to 10 and was presented for royal assent on 17 October 2011.

3 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2) (select committee report) at 12.

4 (24 November 2010) 669 NZPD 15754.

5 (24 November 2010) 669 NZPD 15754.

6 (24 November 2010) 669 NZPD 15754.

7 (24 November 2010) 669 NZPD 15754.

8 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Procedure (Reform and Modernisation Bill)* (15 November 2010) at 2–7.

allow adverse inferences to be drawn from a silent defendant and require the defendant to identify in advance the issues in dispute.[9]

The Law Society issued a strong critique of many aspects of the Bill, describing it as "piecemeal" and questioning its proportionality.[10] The significance of those criticisms was highlighted when Chief Justice Sian Elias took the unusual step of making a submission to the Select Committee. She raised concerns about the proposed pre-trial management regime, the defendant's obligation to disclose issues in dispute, and the attendant sanctions for a non-compliant defendant or their counsel or both.[11]

Parliament withdrew its support for the Bill and it was only through a number of amendments that it gained support. The Bill's provisions were divided between 15 different Acts, including the CPA.[12] The result is legislation that promises efficiency without the more extreme measures that were initially proposed.

III MECHANICS

The CPA is impressively comprehensive and a full review is beyond the scope of this note. However, the salient features of the CPA are set out below. The Act is broad in scope, covering the commencement of proceedings and preliminary steps (Part 2), procedure before trial (Part 3), trial procedure (Part 4), general matters (Part 5), appeals (Part 6) and miscellaneous and transitional provisions (Part 7).

Four Categories of Offences, Forum and Jury Election

The CPA replaces the summary/indictable distinction under the Summary Proceedings Act 1957 and the Crimes Act 1961 with four new categories of offences, set out in s 6(1).

Category 1 offences are punishable by fine only. Category 2 offences are punishable by community-based sentences or imprisonment of less than two years. These first two categories are to be tried by judge-alone and are therefore non-electable categories.[13] Category 3 offences are those punishable by two or more years' imprisonment and category 4 offences are set out in sch 1 of the CPA.[14] These last two categories may proceed by

9 At 24–28.

10 "Debate needed on criminal justice system goals" (10 March 2011) New Zealand Law Society <www.lawsociety.org.nz>.

11 Sian Elias "Submission to the Justice and Law Reform Select Committee on the Criminal Procedure (Reform and Modernisation) Bill 2010".

12 (4 October 2011) 676 NZPD 21638.

13 Criminal Procedure Act 2011, ss 71 and 72.

14 Sections 73 and 74.

jury trial, unless a judge orders otherwise.[15] They are therefore known as the "electable categories".

The categories determine how the case will proceed. Offences under categories 1–3 may be tried in the District Court unless an order is made otherwise.[16]

Case Management

The CPA provides for case management through ss 54–59. Offences under category 2–4 will be subject to this procedure where the defendant pleads not guilty, unless the court directs otherwise.[17]

The purpose of the case management procedure is to "ascertain whether the proceeding will proceed to trial and, if so, make any arrangements necessary for its fair and expeditious resolution".[18] It requires the prosecutor and defendant to complete a case management memorandum (CMM) in accordance with s 56.[19] Under s 56, a CMM must include the following information: whether there is to be any change in plea, the charges to be added, amended or withdrawn, whether a sentence indication is requested, whether judicial assistance is needed and whether the prosecutor considers it a protocol offence.[20]

Where the trial is by judge alone, the CMM must include the following further information: notice of pre-trial applications, any admissions to be made by the defendant under s 9 of the Evidence Act 2006, the number of witnesses to be called, the estimated length of the trial and other information as required by the rules of the court.[21] Furthermore, the defendant may provide notification of issues and facts in dispute under s 56(2)(c).

Compliance or derogation from procedural requirements may expose a defendant to a mitigated or aggravated sentence under the new ss 9(2)(fa) and (1)(k) of the Sentencing Act 2002.

Sentencing Indications

The Act provides a new statutory framework for sentencing indications.[22] A

15 Sections 102 and 103. Section 102(4) provides for judge-alone orders in respect of trials exceeding 20 sitting days, where the defendant's right to a fair trial is outweighed by the risk that the potential jurors will not be able to perform their duties effectively. However, such an order may not be made where the defendant is charged with an offence for which the maximum penalty would be life imprisonment or imprisonment exceeding 14 years. Section 103 permits judge-alone orders in circumstances of actual or possible juror intimidation.

16 Sections 68 and 70.

17 Sections 54(1) and 58(1). Note that category 1 offences can be made subject to case management where an order is made under s 59.

18 Section 55(1)(a).

19 Section 55(1)(b). Note this only applies where the defendant is represented by a lawyer. Where the defendant is self-represented, he or she may inform the court orally of the matters the memorandum would otherwise contain at a case review hearing per s 57(2).

20 Section 56(1).

21 Section 56(2).

22 Sections 60–65.

sentence indication is a statement by the court that, if the defendant pleads guilty to the offence alleged in the charge, at the time, the court would or would not be likely to impose on the defendant.[23] The court is not obliged to give an indication.[24]

The new provisions go further than the practice previously adopted in the District Court. They allow for indications as to length/quantum (s 60) that may be given on an offence (s 60), and the court may hear from the parties (s 62(1)). The indication will expire after five days or at a date otherwise set (s 64) and a defendant may not withdraw a guilty plea where the sentence received on appeal is more severe than that initially indicated (s 252).

Any requests for a sentence indication are inadmissible in evidence.[25]

Codification of Name Suppression and Absentee Proceedings

The CPA codifies various court practices, including the granting of name suppression and absentee proceedings. The criteria for granting an order of name suppression are set out under s 200(2). Under s 200(3), that an offender is "well known" does not, in itself, entail that publication of his or her name will result in extreme hardship. In the latter, ss 119–124 exhaustively set out when a court may proceed. This will largely turn upon the category of the offence.

Under s 125, a defendant may apply to the court for a retrial where the defendant is found guilty in his or her absence.[26]

IV WHAT DOES THE ACT MEAN FOR THE FUTURE OF CRIMINAL JUSTICE?

The CPA will undoubtedly reduce the burden on the courts. The CMM imposes a greater administrative burden onto the parties. Jury trials will now be available less frequently, the numerous statutory deadlines will encourage timely disposal and courts will have an expanded power to proceed in absentee matters. Regardless of differing views, these measures free up court time and resources.

However, the CPA signals a sea change in the criminal justice system. Parties are expected to progress matters independently, largely through the CMM. As a result, the merits of a particular case may fall to be determined by the bargaining strength of the parties.

There is real concern too that these measures produce efficiency at the cost of justice. The CMM requirements, taken together with sentencing

23 Section 60.
24 Section 61(1).
25 Section 65.
26 Section 125.

indications and amendments to the Sentencing Act 2002, punish procedural delay and reward expedience. These are carrots and sticks that may wrongfully incentivise the defendant. An innocent defendant may elect the certainty of plea bargaining and an early guilty plea, deciding to run with the flow of efficiency rather than against it. In such cases, the emphasis upon rapid disposal may outflank the merits of their defence. A defendant should not hastily be deprived of a trial, nor should the gravity of a conviction be underestimated or eroded.

V CONCLUSION

The CPA is comprehensive and seeks to strike a balance between the needs of justice and efficiency. Nevertheless, the Act has implications for the principles of open justice and the right to a fair trial. The value of open resolution of justice should not be so readily eroded.

Moreover, however beneficial this procedural reform can be, the contradictory principles that underlie our system, reflected in the tension here between efficiency and justice, are in desperate need of reflection. The requires an examination of the objectives of the criminal justice system, and how to address the drivers of crime. Procedural reform, in itself, cannot be expected to resolve what are much larger criminal justice issues.