

LAW OF THE SEA AND FISHERIES

I. INTRODUCTION

2014 saw a number of matters reach conclusion after several years in development. These included the ratification of three marine pollution conventions, the formal establishment of the Headquarters to the South Pacific Regional Fisheries Management Organisation in Wellington and the passing of legislation for the reflagging of foreign charter fishing vessels. New Zealand's intervention in the ICJ *Whaling in the Antarctic* case bore fruit, with the Court ordering Japan to stop issuing permits under the existing research programme. In addition, New Zealand continued to put diplomatic effort into fisheries and oceans issues in the Pacific region.

II. ENVIRONMENTAL PROTECTION

A. Ratification of IMO Conventions

New Zealand has ratified three treaties, under the auspices of the International Maritime Organisation, focused on oil pollution and liability. In April 2014, the government ratified:

- The Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil 1973;
- The 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC Protocol); and
- The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

A gap in New Zealand's ratification of conventions related to marine pollution was highlighted by the *Rena* incident in 2011.¹ These conventions had been examined by the Transport and Industrial Relations Committee in 2008, which found few, if any, disadvantages to ratifying them.² However, pressure of the Parliamentary legislative programme meant that, when the *Rena* ran aground, no formal action had been taken to implement the treaties into New Zealand law or ratify them. In 2013, amendments to the Maritime Transport Act 1994 paved the way for ratification of the 1996 LLMC Protocol, by providing that the LLMC Convention as amended by the LLMC Protocol would have force of law in New Zealand.³ Those amendments also allowed the three conventions to be incorporated into New Zealand law.⁴

1 See Joanna Mossop "Law of the Sea and Fisheries" (2011) 9 NZYIL 329 at 333.

2 The treaty examination reports can be found at <www.parliament.nz>.

3 Maritime Transport Act 1994, s 84A.

4 Maritime Transport Act 1994, s 445A.

B. Marine Pollution

The Resource Management (Marine Pollution) Regulations were amended in 2014 to prohibit all forms of garbage from being discharged into the marine coastal area.⁵ Some exceptions apply: for example, food waste discharged more than three nautical miles from shore is permitted if it is ground to a small size. These changes to the regulations are in line with changes to Annex V of MARPOL.⁶

C. Exclusive Economic Zone and Continental Shelf (Environmental Effects – Non-notified Activities) Regulations 2014

Under the Exclusive Economic Zone and Continental Shelf Act 2012, activities in the EEZ or on the continental shelf are classified as permitted, non-notified, discretionary or prohibited. The classification determines the level of scrutiny the activity receives before it is approved. Regulations promulgated in 2014 establish that drilling for oil and gas at the exploratory and production stages are non-notified activities. As long as the applicant has an existing right preserved by the Crown Minerals Act 1991 and the geographical area is covered by a permit, the application will not be publicly notified. These regulations implement a proposal initially made in 2013 to classify drilling activities as non-notified on the basis that they require some oversight but with a less cumbersome process than regular discretionary activities.⁷

III. FISHING

A. Foreign Charter Fishing Vessels

In 2012, a Ministerial Inquiry into the use of Foreign Charter Vessels examined allegations that crews aboard foreign charter vessels operating in New Zealand waters were being exploited, that safety standards were being ignored and that breaches of fisheries legislation were occurring.⁸ As a result of the Inquiry, Parliament passed the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014, amending the Fisheries Act 1996. The amendments require all vessels operating in the New Zealand exclusive economic zone to be flagged to New Zealand and be registered as a fishing vessel by May 2016.⁹ This means that all vessels and their crews will be covered by New Zealand legislation in relation to minimum wages and other employment conditions. It is possible for an exemption to be granted

5 Resource Management (Marine Pollution) Regulations 1998, r 13 and 13A.

6 International Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 (MARPOL 73/78) 1340 UNTS 62 (opened for signature 2 November 1973 and 17 February 1978, entered into force 2 October 1983).

7 See Joanna Mossop “Law of the Sea and Fisheries” (2013) NZYIL 262 at 263.

8 *Report of the Ministerial Inquiry into the Use and Operation of Foreign Charter Vessels* (February 2012).

9 Fisheries Act 1996, s 103(1).

for the purposes of fisheries-related research where no New Zealand ship is available.¹⁰ In such a case, the foreign charter vessel must comply with New Zealand employment law including the payment of minimum wages.

The Primary Production Select Committee, which considered the Bill, had recommended additional exemptions for vessels targeting migratory tuna species, for Māori operators of quota derived from the Treaty of Waitangi settlement process and for other exceptional circumstances.¹¹ The Government rejected these last three proposed exemptions on the basis that they could undermine the purpose of the legislation.

B. Ban on Shark Finning in New Zealand Waters

From October 2014, the Fisheries (Commercial Fishing) Regulations 2001 made it illegal for a commercial fisher in New Zealand waters to remove the fins from any shark and discard the body of the shark at sea.¹² Rules applying to different species of shark set out when and how the fin can be removed at sea – however in no case may the body be discarded. Whole sharks may be returned to the sea but must be reported and counted against the total allowable catch. These rules result from the development of a National Plan of Action for the conservation and management of sharks, which was released in 2013.¹³ In that report the problems arising from shark finning were acknowledged and the New Zealand government committed to ensuring the long term viability of shark populations.

C. Port State Measures Agreement

In February 2014, New Zealand ratified the Port State Measures Agreement.¹⁴ The Port State Measures Agreement establishes measures that port states can apply to foreign fishing vessels visiting their ports. These measures include inspections to ensure that the vessel is complying with international rules and the ability to deny services to any vessel suspected of engaging in illegal fishing. New Zealand has a policy of working towards the strengthening of international fisheries governance and reducing the occurrence of illegal, unreported and unregulated fishing and played a significant role in the development of the Agreement.¹⁵ New Zealand has existing legislation in place for port inspections which will allow it to easily implement the Agreement's obligations.

10 Fisheries Act 1996, s 103A.

11 Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill (75-2) (select committee report).

12 Ministry for Primary Industries "Eliminating Shark Finning in New Zealand" (11 February 2015) <<http://www.fish.govt.nz>>.

13 Ministry of Primary Industries *National Plan of Action for the Conservation and Management of Sharks* (2013).

14 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (opened for signature 22 November 2009, not yet in force) text available at <<http://www.fao.org>>. New Zealand signed the treaty on 15 December 2009.

15 Foreign Affairs, Defence and Trade Select Committee *International Treaty Examination of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (13 December 2013), Annex B.

D. Niue Treaty Subsidiary Agreement on Fisheries Surveillance and Enforcement in the South Pacific

At the Pacific Islands Forum in Palau in July 2014, New Zealand signed the Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region.¹⁶ This is the first broad regional subsidiary agreement to the Niue Treaty¹⁷ and establishes procedures to facilitate the exchange of information on fisheries surveillance and enforcement information to improve coordination of surveillance and enforcement in the region. The Agreement provides for cooperative activities, including the exercise of surveillance and enforcement by one country in the waters of another. New Zealand undertakes regular naval and air surveillance in the Pacific. The signature of New Zealand reinforces its commitment to working with Pacific Island states for reducing illegal, unreported and unregulated fishing in the region.

E. South Pacific Regional Fisheries Management Organisation

New Zealand has acted as the depository and host for the interim secretariat to the South Pacific Regional Fisheries Management Organisation (SPRFMO) since it was signed in 2010. In April 2014, New Zealand entered into a Headquarters Agreement with SPRFMO that outlines the legal personality, privileges and immunities of the Organisation in New Zealand.¹⁸ The Agreement was immediately brought into effect by the Diplomatic Privileges (SPRFMO) Order 2014. Dr Johanne Fischer was appointed as Executive Secretary of SPRFMO.

At the second annual meeting of SPRMO in January 2014, the parties concluded a range of conservation and management measures. The efforts to achieve consensus on allocation for jack mackerel failed, and a vote was held for the first time. This was disappointing given the strong emphasis on consensus decision making that underpins the organisation.¹⁹ Other measures were adopted by consensus, including those relating to seabird bycatch,²⁰ a vessel monitoring system²¹ and port inspections.²²

16 The text of the Agreement is available at <www.ffa.int>.

17 Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region NZTS 2005 No 12 (opened for signature 9 July 1992, entered into force 20 May 1993).

18 Headquarters Agreement between the South Pacific Regional Fisheries Management Organisation and the Government of New Zealand (entered into force 15 April 2014).

19 Chairperson's Report to the Second Meeting of the Commission of the South Pacific Regional Fisheries Management Organisation (Manta, 27-31 January 2014).

20 Conservation and Management Measure on Minimising Bycatch of Seabirds in the SPRFMO Convention Area CMM 2.04 (4 May 2014).

21 Conservation and Management Measure on the Establishment of the Vessel Monitoring System in the SPRFMO Convention Area CMM 2.06 (4 May 2014).

22 Conservation and Management Measure on Minimum Standards of Inspection in Port CMM 2.07 (1 January 2015).

Of particular interest is Conservation and Management Measure 2.03, dealing with bottom fishing. In 2007, during the negotiations for SPRFMO, the participant states implemented voluntary interim measures that would apply until the convention was finalised. One measure was directed at implementing General Assembly resolutions in relation to bottom fishing and required states not to expand bottom fishing unless appropriate conservation and management measures were in place as well as creating “move on” rules when evidence of vulnerable marine ecosystems is discovered during fishing.²³ CMM 2.03 formalises measures under the new Convention. States are required to prepare a “bottom fishing footprint” and in most circumstances to limit fishing to within that area.²⁴ If a state wishes to expand its fishing area, it must make an application to SPRFMO which includes an assessment of the impact of the fishing activity. The CMM references the FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas 2009 as the standards to apply for assessments and encounters with vulnerable marine ecosystems until SPRFMO has developed its own. This measure reflects best practice for RFMOs in implementing the resolutions of the General Assembly to protect vulnerable marine ecosystems²⁵ and also article 206 of the Law of the Sea Convention 1982 which requires states to assess the potential environmental impact of activities.

F. Convention on the Conservation of Southern Bluefin Tuna

This Convention is another important RFMO in which New Zealand participates. New Zealand hosted the 21st meeting of the Commission in October 2014. One of the more notable decisions of the meeting was the decision to define the “attributable catch” which will ensure that each Member accounts for its allocation on the basis of the same effort. In the past, there was concern that some activities that resulted in significant mortality, especially discards and recreational fishing, were not counted towards each state’s allocation of tuna. Practices differed between states in relation to the extent to which tuna mortality was counted towards the states’ allocations under the Convention. The new definition of attributable catch covers fishing activities within a Member’s jurisdiction or control and includes commercial fishing (including those not targeting Southern Bluefin Tuna), releases and discards, recreational fishing, customary or traditional fishing and artisanal fishing.²⁶ The Members agreed on action plans to implement the new definition.

23 Interim Measures Adopted by Participants in Negotiations to Establish South Pacific Regional Fisheries Management Organisation (3rd Meeting, Renaca, 2007).

24 Conservation and Management Measure for the Management of Bottom Fishing in the SPRFMO Convention Area CMM 2.03 (4 May 2014), at [8(a)] and [8(d)].

25 *General Assembly Resolution 61/105* GA Res A/Res/61/105 (2006); *General Assembly 71st Plenary Meeting A/61/PV.71* (2006); *General Assembly Resolution 64/72* GA Res A/Res/64/72 (2009); *General Assembly 57th Plenary Meeting A/64/PV.57* (2009); *General Assembly Resolution 66/68* GA Res A/Res/66/68 (2011); *General Assembly 76th Plenary Meeting A/66/PV.76* (2011).

26 *Report of the Extended Commission of the Twenty First Annual Meeting of the Commission* (13-16 October). Available at: <www.ccsbt.org>.

G. Pacific Forum: Palau Declaration on “The Ocean: Life and Future”

New Zealand participated in the 45th Pacific Islands Forum held in Palau in July 2014. One of the outcomes of that meeting was the Palau Declaration on “The Ocean: Life and Future, Charting a Course to Sustainability”.²⁷ This declaration reiterated the fundamental role that the ocean plays in Pacific economies and societies. The states called for: regional and global partners to work with members and the Forum Fisheries Agencies to reduce IUU fishing; the use of environmental impact assessment and the precautionary principle; strengthened efforts to determine maritime boundaries; and for improved coordination in seeking sustainable development in the region.

IV. WHALING

New Zealand successfully applied to intervene in the International Court of Justice (ICJ) case between Australia and Japan in relation to whaling in the Antarctic, in 2013. New Zealand made written and oral submissions to the Court. The ICJ released its decision on 31 March 2014.²⁸ In the decision, the ICJ found that JARPA II, the Japanese scientific permit whaling programme, was not consistent with article VIII of the International Convention for the Regulation of Whaling. The Court considered whether JARPA II involved scientific research and, second, whether the killing of whales was for the purposes of scientific research by asking whether, in the use of lethal methods, the programme’s design and implementation were reasonable in relation to its stated objectives.²⁹ A number of factors led the Court to determine that JARPA II’s design was not reasonable, including: the failure to consider the use of non-lethal research methods; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame of the project; the paucity of scientific outputs and the failure to coordinate with other research programmes. The Court ordered Japan to revoke extant permits under JARPA II and refrain from granting any further permits for that scientific programme under art VIII.

The New Zealand Government welcomed the ICJ’s decision.³⁰ At the subsequent meeting of the International Whaling Commission, New Zealand initiated Resolution 2014-5 which instructed the Scientific Committee to undertake a review of Japan’s new proposed scientific research programme to determine whether it meets the ICJ’s requirements. States were requested not to issue further research permits until the Scientific Committee has reviewed the programme and the Commission has considered the Scientific Committee’s report.

27 *Palau Declaration on “The Ocean: Life and Future”: Charting a course to Sustainability*, adopted at the 45th Pacific Islands Forum (Palau, July 2014).

28 *Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Merits)* [2014] ICJ Rep 226.

29 At [67].

30 Murray McCully “ICJ Decision Harpoons ‘Scientific’ Whaling” (press release, 31 March 2014).

V. OTHER MATTERS

In previous Year in Review reports, the case of *Police v Teddy* has been discussed.³¹ This case arose when the New Zealand Police arrested Mr Teddy for breaching an “exclusion zone” around a vessel conducting a seismic survey for the oil company Petrobras. In the District Court the judge found that the prosecution failed because the Maritime Transport Act could not be used in relation to offences committed outside the territorial sea.³² On appeal to the High Court, this decision was quashed on the basis that extraterritorial application of the Act could be implied, in part due to New Zealand’s international obligations.³³ Mr Teddy appealed to the Court of Appeal, which rejected his case in August 2014.³⁴

The Court of Appeal found that the offences in the Maritime Transport Act 1994 could be applied outside the territorial sea. It relied on the case of *R v Hinde* which established jurisdiction over a seaman “wherever found”.³⁵ Alternatively, the extraterritorial effect of the Act “flows as a matter of inevitable logic from its text read in light of the public safety purposes of the MTA and the practicalities of New Zealand’s geography”.³⁶ The Court of Appeal found that this decision was supported by international obligations contained in the Law of the Sea Convention. It would be contrary to New Zealand’s obligations to exercise jurisdiction over its vessels on the high seas if it could not take measures to ensure safety at sea, wherever the vessel is operating.³⁷ The case was returned to the District Court for the hearing on the original charges.

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31 See Joanna Mossop “Law of the Sea and Fisheries” (2012) 10 NZYIL 232 at 235 and (2013) 11 NZYIL 262 at 267.

32 *Police v Elvis Heremia Teddy* DC Tauranga CRI-2011-070-002669, 26 July 2012.

33 *New Zealand Police v Teddy* [2013] NZHC 432.

34 *Teddy v New Zealand Police* [2014] NZCA 422.

35 *R v Hinde* (1902) 22 NZLR 436, 441 (CA).

36 *Teddy v New Zealand Police* [2014] NZCA 422 at [58].

37 At [63].

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