Regulatory Impact Statement

Protection of offshore petroleum and mineral activity from unlawful interference

Agency Disclosure Statement

1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment (MBIE).

2 It provides an analysis of options to protect offshore petroleum and minerals activities granted permits under the Crown Minerals Act (CMA) from unlawful interference by an individual or vessel.

3 Analysis has been undertaken by MBIE, in consultation with the Ministry of Transport (MoT), Ministry of Foreign Affairs and Trade (MFAT), Land Information New Zealand (LINZ), Maritime New Zealand (MNZ), New Zealand Defence Force (NZDF), the Ministry of Justice (MoJ), New Zealand Police Legal Services (NZPLS) and Crown Law Office (CLO). This consultation has sought to ascertain what legislative framework is best suited to introduce an enforcement power applicable to interference with lawful activities in New Zealand waters, including the territorial sea, the Exclusive Economic Zone (EEZ) and above the continental shelf. There has been no public consultation which limits the information available to feed into the analysis.

4 Recent events have demonstrated gaps in New Zealand's legal framework which these changes seek to address. Providing legislative certainty that lawful activities can be carried out without interference will avoid unnecessary risks and ensure a predictable investment climate for industry. No additional costs will be imposed on businesses, or override common law principles. Nor will the changes override or conflict with international law.

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Status Quo and Problem Definition

5 There are no clear enforcement powers in New Zealand's legal framework to effectively protect offshore[1] petroleum and minerals activities, permitted under the Crown Minerals Act (CMA) regime, from intentional interference by an individual or vessel, that occurs beyond the 12 nautical mile (nm) limits of the territorial sea and within our Exclusive Economic Zone (EEZ) and above the continental shelf.

6 Offshore mining and exploration activities for petroleum and minerals are carried out under permits issued through the CMA regime. Intentional interference with activities permitted under the CMA can impose unnecessary costs to companies by disrupting their operations, and can also pose health, safety and environmental risks.

7 There have been attempts to disrupt such activities with the aims of generating publicity through protest and of preventing the exploration and drilling phases of development. Protests at sea are more difficult to address and monitor than on-shore, given the nature of the environment as well as the distance from response and emergency infrastructure.

Interference with offshore petroleum and mineral activities

8 Interference with offshore petroleum and mineral activities permitted under the CMA recently occurred off the East Coast of New Zealand, in April 2011. A flotilla protesting against an underwater survey being conducted by oil company Petrobras in the Raukumara Basin, in the EEZ, managed to disrupt the company's activities. The company called-off their survey for 1 - 2 days.

9 The actions of the flotilla included several individuals in survival suits entering the water approximately 200 metres in front of the seismic vessel's path, and to the port side. The vessel had to veer starboard in order to avoid the individuals. The individuals were then collected by their boat and the action repeated.

10 Elvis Teddy was part of the flotilla, and was arrested by Police on 23 April for operating his fishing vessel in an unsafe manner. He was charged with an offence under section 65(1)(a) of the Maritime Transport Act 1994 (MTA), in that he had operated a ship in a manner that caused unnecessary risk, both to his own vessel and the Petrobras survey vessel.

11 In July 2012, the Tauranga District Court dismissed the charge. The Court found that the provisions of section 65(1)(a) of the Maritime Transport Act do not apply in the EEZ, as there is nothing in legislation that confers jurisdiction of that particular section outside the territorial sea.[2] This decision is under appeal. The Raukumara protest also emphasised the practical benefit of establishing clearer policing and other enforcement powers.

12 New Zealand's reputation for having a predictable and stable regulatory and investment environment may be damaged by this type of interference, particularly if it continues in the context of the legal uncertainty discussed above. This situation can discourage petroleum and mineral exploration companies to invest and explore in New Zealand waters. It also poses an unnecessary risk to the Government's objectives to attract overseas investment (in what is a competitive market for international capital) and encourage the responsible development of our petroleum resources.

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[1] Offshore includes the territorial sea, the EEZ and the continental shelf.
[2] *Police v Teddy* CRI-2012-470-31

Cost of interference

13 There are costs to a company from intentional and unlawful interference with their operations. Such impacts are not the focus of legislation that pertains to maritime health, safety and environmental risks.

14 Costs of survey acquisition, as an example, will vary depending on whether it is 2D or 3D seismic lines being acquired (3D is more expensive than 2D) and what the size of the ship and technical equipment on board are. Seismic streamers for instance, that are pulled behind the ship, can be up to 10 km long. The operational cost is calculated per km of seismic line acquired and can range upwards from USD1200 per km for a 2D seismic survey, to USD7000 for a 3D seismic survey.

15 Companies would incur costs if:

i. Interference causes them to veer off course;

ii. the company postpones their operations;

iii. the vessel or its technical equipment is damaged.

16 A seismic vessel cannot immediately stop if something is in its path - due to the seismic streamers - and will have to veer off-course in order to avoid the individual or vessel. If it veers too far it has to continue to arc and loop back around onto its seismic acquisition trajectory. This can take up to 4 hours and delay activity, which incurs a stand-by cost. Stand-by rates can vary between 20 – 50% of the cost per km of seismic line.

17 If the company decides to postpone its operations due to repeated interference the costs will be greater, depending on how many days the vessel is inactive. Stand-by rates will apply.

18 Seismic streamers cost up to USD3 million per streamer. Damage to the streamers can occur naturally at sea, for instance from a shark bite, which will have a 6 – 12 hour down time to repair. Stand-by rates apply for this operation. If any damage is caused to the streamers by an act of intentional interference the same costs will apply.

19 Drilling rigs are major operations and could be a target of protest action future. A deep-water semi-submersible rig (likely to be used for mining activities in the EEZ) can cost up to USD1 million per day. A shallow water rig will cost up to USD500,000 per day. Protest action that directly interferes with the rig will require the company to render the well safe and stop operations. For example, in the Netherlands a jack-up rig operated by Shell was boarded by protesters. Operations stopped for one day in order for police to arrive and the protestors safely retrieved. This incurred stand-by costs: one-day of stand-by will be approximately half the cost of the rig per day i.e. USD500,000 stand-by per day for a deep-water rig at USD1 million. Additional stand-by costs will incur for the supply boats, personnel and contract staff. These stand-by rates are generally higher for deep-water, and for personnel can be full-rates or 90%.

20 Protest action on drilling rigs (as well as survey vessels) may not only risk the safety of the protesting individuals, but also the safety of workers on-board the seismic vessel or rig.

21 The deployment of enforcement personnel i.e. the police and NZDF, to an incident of interference with offshore petroleum and minerals activities in the EEZ has significant costs. As an example, the estimated costs to police during the Elvis Teddy are given below in Table 1. The operation lasted 40-60 days, including 12 staff at sea for continuous duty for 42 days.

Table 1: Estimated police costs for the Teddy case[3]

Operation	Staff/duration/cost per hr	Total (NZD)
Operations Group	18hrs x $45.20	813
Intelligence Group	2 staff @ 4hrs per day x 8 weeks	2,892
	1 staff @ 8hrs per day x 6 weeks	10,448
District Intel and liaising	1 staff @ 8hrs per day x 5 days	1,808
Operation Tauranga and Wellington	20 staff x 8hrs	14,464
Operation Deep Sea	12 staff @ 24hrs per day x 42 days x $45.20	546,739
Accommodation	12 staff x $120 per night x 6 occasions	8,640
		$585,804

22 NZDF were also involved in the Elvis Teddy case, deploying two Inshore Patrol Vessels (IPVs) for 'Operation Deep Sea.' Costs are given below in Table 2. NZDF personnel crew would be paid regardless of the operation, so additional costs as a result of the Teddy case is the IPV operating cost.

Table 2: Estimated NZDF costs for Operation Deep Sea

Inshore Patrol Vessel (IPV) x 2	Duration/cost per day	Total
IPV operating cost	40 sea days x $8,000 per sea day in ship expenditure x 2	640,000
IPV personnel cost	40 sea days x $5,500 per sea day in personnel crew cost x 2	440,000
		$1,080,000

Existing legislation and regulations

23 There is a lack of clarity around the ability authorities have to ensure the safety of persons and to protect property and the environment in the EEZ. There are two gaps in New Zealand's existing legislation and regulations:

i. A clear legal framework applicable to vessels or individuals who interfere with lawful activities in the EEZ;

ii. The MTA safety related offences in the EEZ/on the continental shelf do not apply to foreign flagged vessels.

24 Ordinary New Zealand law and powers of enforcement do extend to actions taken within New Zealand's territorial sea. They do not apply to activities or incidents that take place in the EEZ.

[3] The costs estimated here are restricted to those costs directly involved in the operation and do not consider the cost in terms of having staff deployed at sea and unavailable for normal duties.

25 The Maritime Transport Act 1994 (MTA) applies to New Zealand registered vessels, and contains specific criminal jurisdiction with respect to maritime safety and the marine environment. The MTA can apply to offences where dangerous activity involving ships or maritime products takes place, or where there is unnecessary danger caused by holder of a maritime document.

26 It is not clear whether the MTA applies to incidents in the EEZ. The offences under the MTA focus on safety in the context of navigation, or are environmentally focussed, and are not necessarily applicable to all incidents of intentional interference with lawful activities. Ascertaining liability for intentional interference is also difficult in terms of maritime legislation, which must be consistent with the "rules of the sea". This includes the requirement that a ship under power (e.g. a survey ship) give way to a ship under sail (e.g. a 'protest' ship) or a fishing vessel.

27 There is no 'easy fit' option under the MTA to address (with legal certainty) the actions of individuals who are not immediately associated to a vessel, and who do not clearly endanger another vessel or individual. The provisions in the MTA have an overriding safety purpose and are not designed for situation where an individual enters the water or ascends a rig as an act of intentional interference, in which they first and foremost endanger themselves rather than others.

28 There are no provisions to establish exclusion zones for vessels undertaking seismic surveys and other petroleum exploration and development activities that do not involve fixed installations. For offshore installations, the United Nations Convention on the Law of the Sea (UNCLOS) Article 60 provides for coastal states to establish exclusion zones extending to a distance not exceeding 500 m from each point of the outer edge of the installation. Under New Zealand's Continental Shelf Act 1964 (CSA) New Zealand can establish safety zones around fixed installations and associated mobile facilities. Entry into safety zones prohibited to all but authorised vessels, with a fine of up to $1000.

29 In the Teddy case, police had set an exclusion zone around the survey vessel for the safety of the survey and protesters. This had no effect in deterring the defendant from entering this zone. There are no clear penalties (as there would be for an exclusion zone around a fixed installation) or enforcement powers by police. As noted before, the incident took place in the EEZ, where the police do not have ordinary criminal jurisdiction.

Objectives

30 The objectives are to provide an effective, clear deterrent and readily workable operational powers, to act against unlawful interference with lawful offshore petroleum and mineral activities in our EEZ from individuals and from vessels, whether New Zealand- or foreign-flagged. It would be consistent with international law and it would cover both temporarily fixed installations and moving vessels. Furthermore, any compliance costs that arise would be minimised.

Regulatory Impact Analysis

31 The Regulatory Impact Analysis identified three options. The options have been assessed against the objectives above, in consultation with MoT, MFAT, LINZ, MNZ, NZDF, MoJ. New Zealand Police Legal Services and CLO.

Option 1: Continuing to use existing safety provisions in the Maritime Transport Act

32 The first option is to use the safety provisions already in the Maritime Transport Act (MTA). This option is the status quo.

33 The MTA only applies to New Zealand registered vessels, not individuals, and is concerned with health, safety and environmental risks. The MTA would not apply to foreign vessels. This would mean that a foreign vessel interfering in a lawful activity in the EEZ would be exempt from offences set in the MTA.

34 There is uncertainty in this option on whether authorities have the ability to ensure the safety of persons and to protect property and the environment in the EEZ. Addressing this may require changes to the MTA through the Maritime Legislation Bill. It is uncertain whether changes could be made that would encompass all types of intentional interference, as the provisions in the MTA have an overriding safety purpose and are not designed for situation where an individual enters the water.

Cost and benefits

35 As the option is the status quo, costs to permit holders and enforcement agencies set out in paragraphs 13 to 22 could re-occur and be as prolonged.

Risks

36 There is a risk that ambiguity in the legal framework persists under this option. The penalties under the MTA would not necessarily or clearly apply to intentional interference with lawful offshore petroleum and mineral activities. Penalties under the MTA can apply to an individual, operating a New Zealand registered vessel, who commits an offence of a dangerous activity that involves ships or maritime products. This means also, that the act of interference would have to be deemed a health and safety risk.

37 The option does not include foreign vessels, and there is a risk that this would provide little deterrence for continued interference. An individual can use a foreign vessel to disrupt lawful activities and not be subject any liability under criminal jurisdiction.

Option 2: Creating exclusion zones around vessels and structures

38 The second option is to create exclusion zones around survey vessels and structures not fixed to the sea-bed. Safety zones already exist for fixed structures through the CSA (for the area beyond the outer limit of the territorial sea to the outer limit of the continental shelf and the EEZ).

39 Existing provisions in the CSA apply to fixed installations and vessels connected with the "device." These provisions would be extended to apply to moving vessels that are not associated with a fixed installation, and clarified in regards to temporary structures not fixed to the sea-bed.

40 The existing provisions are primarily for navigational purposes and designed to ensure the safety of the structure and other vessels. These zones are clearly demarcated on navigational charts. The fine for entering these zones is low and set at $1000.

41 From a practical perspective it would be difficult for a moving safety zone to meet the requirements of legal specificity for an offence to be created, or to meet the requirements of the Continental Shelf Act and UNCLOS that the safety zone "shall not exceed a distance of 500 metres around them, measured from each point of their outer edge." A seismic vessel is particularly problematic, given it includes the long seismic streamers towed behind it and is constantly moving. Temporary structures will also be problematic.

Cost and benefits

42 Even if the technical and practical difficulties were surmountable, there would likely be additional administrative burden on companies and government. Companies would have to apply for an exclusion zone to be established and this could be unnecessarily cumbersome and costly. The application process is lengthy and is set in place on a case-by-case by way of regulation. The timeframe is at least 6 months.

Risks

43 The legislation focuses on navigational risks and would not be suitable for incidents of intentional interference. For instance, if a vessel or individual interferes with a vessel with an exclusion zone, there is a risk that the zone would be largely ineffective as a deterrent. It could be argued that the interfering vessel could not reasonably avoid entering the exclusion zone. Or that the boundaries of the exclusion zone could not be reasonably discerned by either party.

44 There is a risk that an exclusion zone would be perceived as interfering with navigation and other rights and freedoms of other States as provided for by UNCLOS. This could occur through accidental breaches, due to the practical difficulties in specifying where an exclusion zone would exist.

45 Under the UNCLOS, fines for entering an exclusion zone are too low to act as deterrence for interference. Entry into safety zones is prohibited to all but authorised vessels, with a fine of $1,000.

Option 3: Creating a new offence

46 This option would create two new offences. The first offence relates to intentional interference with offshore petroleum and minerals activities and damage to structures or vessels used in such activities. This offence is similar to a current Australian offence provision in s 603 of the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Commonwealth).

47 A person will commit this offence if they intentionally:

a. damage or interfere with, any structure or vessel that is in an offshore area and that is, or is to be, used in exploring for, recovering, processing, storing, preparing for transport, or transporting, petroleum or minerals; or

b. damage or interfere with, any equipment on, or attached to, such a structure or vessel; or

c. interfere with any operations or activities being carried out, or any works being executed, on, by means of, or in connection with, such a structure or vessel.

48 The proposed penalty is imprisonment of up to 12 months or a fine not exceeding $50,000, or in the case of a body corporate, a fine not exceeding $100,000.

49 The second offence is a strict liability offence of ships interfering with petroleum and mineral activities through coming too close to activities.

50 Once New Zealand Petroleum & Minerals (NZP&M) have ensured that the activity is notified in the “Notice to Mariners”, setting out:

a. the time period of the activity (of up to 3 months)

b. which area covered by the activity, and

c. a minimum non-interference distance (up to 500 metres), determined by NZP&M, from the structure or vessel and any attachment to it;

then:

a. any master of a ship which comes within the minimum distance, without lawful excuse, will commit an offence.

b. any person that leaves a ship and then comes within the minimum distance, without reasonable excuse, will commit an offence.

51 Fortnightly notices (New Zealand Notices to Mariners) advise mariners of important matters affecting navigational safety and are the authority for correcting New Zealand nautical charts. The New Zealand Hydrographic Authority is authorised to produce the NZ Notices to Mariners under Maritime Rules Part 25.

52 Licensed mariners and other parties covered by Maritime Rule 25 are required to keep their nautical publications corrected using Notices to Mariners.

53 The penalty for the strict liability offence will be a fine of up to $10,000.

54 The CMA is a suitable legislative vehicle to create the new offences. It does not have predefined legal parameters that make it difficult to incorporate ‘interference’ that may not involve health, safety or environmental risks. The offences would only apply to offshore mining and exploration activities for petroleum and minerals that are carried out under permits issued through the CMA regime.

55 The penalties are consistent with relevant offences in the MTA. Under the MTA, an individual who commits an offence of a dangerous activity that involves ships or maritime products is liable to imprisonment for a term not exceeding 12 months or a fine not exceeding $10,000, or in the case of a body corporate, to a fine not exceeding $100,000.

56 This option would establish legal clarity on enforcement officers and their powers, and allow designated enforcement officers in the EEZ to operate effectively. The MBIE Chief Executive can appoint enforcement officers. Appointed enforcement officers do not have powers to arrest.

57 In relation to these two offences, the CMA will expressly provide that a police officer or officer in command of a New Zealand defence force vessel (and any person under his or her command):

a. shall be deemed to be an enforcement officer; and

b. such deemed enforcement officer can board ships without a warrant, detain and arrest a person, and detain a vessel. [Note: cf s196 (2) and (3) of the Fisheries Act 1996.]

c. any prosecution of a foreign flagged vessel could occur only with the consent of the Attorney-General (as required under the Submarine Cables and Pipeline Protection Act 1996).

58 These offence provisions have been discussed with the relevant Ministries and agencies. This consultation is elaborated on in the cost, benefits and risk analysis below.

Cost and benefits

59 The option introduces clear legal certainty and a penalty regime that may help deter individuals from disrupting offshore petroleum and mineral activities permitted under the CMA. This is desirable as it would reduce the likelihood of interference, or reduce the duration of interference through clear enforcement powers, thereby reducing costs of delay on companies (paragraphs 13 – 22).

60 Police face significant costs in deploying officers at sea for a long period of time (paragraph 21, table 1). The status quo does not guarantee that the same disruptive interference, with similar costs, will not reoccur. While the option to create a new offence will not guarantee disruptive interference will not reoccur either, it may act as a deterrent and reduce the number of incidences that would have occurred under the status quo and allow enforcement powers to more efficiently address disruptive interference and reduce the amount of time spent at sea.

Risks

61 This option is based on the Australian model which is viewed as UNLCOS-compliant. There would not be a risk of challenge under international law.

62 The proposal includes search and seizure provisions. The provisions should align with the Search and Surveillance Act. This would mitigate the risk that provisions of search and seizure under the CMA are inconsistent with the right to be free from unreasonable search and seizure affirmed in s 21 of NZBORA.

63 In regards to enforcement action against foreign flagged vessels, the threshold would have to be high and should not be exercised lightly (because it involves the interests of other States). This requires clear operational safeguards to be established and adhered to. Operational guidelines should require, if circumstances allow, communication with the relevant flag State in advance of boarding. This kind of pre-emptive engagement with a flag State would reduce the chance of bilateral or diplomatic “fall out” from New Zealand boarding a foreign vessel. Enforcing this offence against foreign flagged vessels is consistent with our rights under UNCLOS. There is a real benefit (particularly diplomatically) in NZ being able to show due diligence in communicating with the other State concerned.

64 The above political and legal risk is addressed by requiring consent of the Attorney General (provided for in the CSA as a standard check to ensure compliance with international obligations in any particular case) before any legal proceedings are carried out against foreign flagged vessels subsequent to any offence. This is an appropriate safeguard against the rights of innocent passage under the UNCLOS risk being unnecessarily impinged upon under a criminal offence.

65 There may be a risk that domestic vessels accidentally interfere with a vessel by crossing the minimum non-interference distance. The risk that this would escalate to a strict liability offence is low, as they would have to be deemed as intentionally interfering. The "Notice to Mariners" (paragraph 50) advise mariners of the activity taking place. Should a domestic vessel enter the minimum non-interference zone regardless, then standard maritime practice would deem it appropriate for the Master of the Ship to communicate with the domestic vessel that they are too close and should correct their vessel's path. Should the vessel have a mechanical break-down then it is likely they would have lawful excuse for their interference (paragraph 50).

66 There is a risk that creating new offences, specifically for a vessel operating under a mining or exploration permit, will have implications on human rights. The primary concern from a human rights perspective would be that the proposal could limit the right to freedom of expression affirmed in s 14 of NZBORA. A new offence could create apprehension (real or imagined) on the part of the individual, seeking to exercise their right to protest, that they will be prosecuted. This risk would be mitigated if a minimum distance in the definition of 'interference' is included. Protesters may exercise their right to freedom of expression beyond the minimum distance while not interfering in the vessel's right to conduct lawful activities in the EEZ, and avoid endangering themselves by operating their vessel in an unsafe manner or entering the water in the path of the on-coming vessel.

Consultation

67 Analysis has been undertaken by the Ministry of Business, Innovation and Employment (MBIE), in consultation with the Ministry of Transport (MoT), Ministry of Foreign Affairs and Trade (MFAT), Land Information New Zealand (LINZ), Maritime New Zealand (MNZ), New Zealand Defence Force (NZDF), the Ministry of Justice, New Zealand Police Legal Services and Crown Law Office.

68 The upstream oil and gas industry has sought a more robust government response to threats of, and actual, direct protest actions, but has not been consulted about these proposals. It is not anticipated that industry will have an adverse reaction to the proposed changes.

69 There has been no public consultation.

Conclusions and Recommendations

70 Analysis and inter-agency consultation has concluded that *Option 3: creating a new offence* will meet the objectives to provide an effective, clear deterrent and readily workable operational powers, to act against unlawful interference with lawful offshore petroleum and mineral activities in our EEZ from individuals and from vessels, whether New Zealand- or foreign-flagged. It is also consistent with international law and would cover both fixed installations and moving vessels. Furthermore, any compliance costs that arise would be minimised.

71 The recommendation is to implement *Option 3: Create a new offence.*

Implementation

72 The Crown Minerals (Permitting and Crown Land) Bill is currently before the Commerce Committee.

73 If the changes are accepted they would take effect as soon as the Bill is enacted.

Monitoring, Evaluation and Review

74 Evaluating the effectiveness of the new changes will not come to pass until an incident has occurred and the provisions of the new offence are applied. It will also be difficult to ascertain the extent to which the new offence has acted as a deterrent.

75 Monitoring and evaluation of the changes will be on-going between the relevant departments and agencies.