MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Simeon Brown	**Portfolio**	Energy
Title of Cabinet paper	Offshore Renewable Energy Regulatory Regime Offshore Renewable Energy Bill: Approval for Introduction	**Date to be published**	20 December 2024

List of documents that have been proactively released		
Date	**Title**	**Author**
November 2024	Offshore Renewable Energy Bill: Approval for Introduction	Office of the Minister for Energy
November 2024	Offshore Renewable Energy Bill: Approval for Introduction LEG-24-MIN-0235	Cabinet Office
13 June 2024	2324-3049 Offshore renewable energy regime – offences, penalties, powers and appeals	MBIE
20 June 2024	2324-3446 Offshore Renewable Energy regulatory regime – permit variations	MBIE
25 July 2024	2324-4013 Offshore renewable energy - update on progress and establishment of a developer working group	MBIE
8 August 2024	2425-0577 Accelerated timing for Offshore Renewable Energy Bill and Hydrogen Action Plan	MBIE
19 August 2024	2425-0725 Engagement with iwi on the offshore renewable energy regulatory regime	MBIE
23 August 2024	2425-0230 Offshore renewable energy regulatory regime – decommissioning obligations	MBIE
23 August 2024	2324-3448 Offshore renewable energy regulatory regime – transmission infrastructure	MBIE
18 October 2024	BRIEFING-REQ-0004369 Offshore Renewable Energy Bill – draft Cabinet paper seeking approval for introduction and agreement to related policies	MBIE
7 November 2024	BRIEFING-REQ-0005576 Offshore Renewable Energy Bill – updated Cabinet paper seeking approval for introduction	MBIE
June 2024	Offshore Renewable Energy Regulatory Regime: Policy Decisions	Office of the Minister for Energy
June 2024	Offshore Renewable Energy Regulatory Regime: Policy Decisions Minute of Decision CBC-24-MIN-0041	Cabinet Office

May 2024	Offshore Renewable Energy Regulatory Regime	Office of the Minister for Energy
May 2024	Offshore Renewable Energy Regulatory Regime Minute of Decision ECO-24-MIN-0062	Cabinet Office

Information redacted **YES**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

a. Privacy of natural persons
b. Confidential advice to Government

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Offshore renewable energy regime – offences, penalties, powers and appeals

Date:	13 June 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-3049

Action sought		
	Action sought	**Deadline**
Hon Simeon Brown **Minister for Energy**	**Agree** to the proposed offences, penalties, powers and appeals for the Offshore Renewable Energy regime to inform drafting instructions to the Parliamentary Counsel Office.	20 June 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Melanee Beatson	Manager, Offshore Renewable Energy and Hydrogen	04 896 5789	Privacy of natural persons	✓
Stacey Campbell	Senior Policy Advisor	04 901 4139		

The following departments/agencies have been consulted
Ministry of Justice, Ministry of Transport

Minister's office to complete:

☐ Approved ☐ Declined
☐ Noted ☐ Needs change
☐ Seen ☐ Overtaken by Events
☐ See Minister's Notes ☐ Withdrawn

Comments

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Offshore renewable energy regime – offences, penalties, powers and appeals

Date:	13 June 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-3049

Purpose

To seek decisions on:

a. the offences, defences and penalties for the Offshore Renewable Energy (ORE) regime, including the proposed enforcement approach for safety zones

b. power to revoke a permit

c. limitations to appeal rights

d. the proposed information-sharing provisions.

This briefing is part of the package of briefings being provided to you to take further decisions, in line with the delegated authority obtained from Cabinet, to inform the instructions to Parliamentary Counsel Office (PCO) for the drafting of the Offshore Renewable Energy Bill.

Executive summary

On 10 June 2024, Cabinet confirmed the detailed design of the Offshore Renewable Energy (ORE) regime agreed to by the Cabinet Business Committee (CBC-24-MIN-0041). Cabinet delegated authority to you to make decisions on the issues covered by this briefing.

Offences, penalties and enforcement

We propose aligning the offence and penalty levels to the equivalent provisions in the ***Crown Minerals Act 1991*** (CMA) in almost all instances (see **Annex 1**). Unlike the CMA, we are not proposing there be infringement fees, accruing penalties or a strict liability offence for failing to comply with the Act, regulations and permit conditions. This is based on advice received from the Ministry of Justice (MOJ) and the Legislation Design and Advisory Committee (LDAC) guidance, which recommends against these types of penalties for the ORE context.

We advise adopting Australia's approach to safety zone offences, with the penalty levels set at an equivalent level to the non-interference zone offences in the CMA and relevant provisions of the Maritime Transport Act 1994 (MTA). Consistent with the CMA, we have recommended establishing safety zone enforcement officers (either constables or the Defence Force) to enforce the safety zone provisions. We are not proposing to have a bespoke damage or interference penalty for ORE infrastructure, as this would largely duplicate existing provisions under the MTA.

We consulted the MOJ, and its advice is reflected in this paper.

Power to revoke a permit

We have recommended including a broad power to revoke a permit in the Bill if a permit holder breaches the legislation or conditions of their permit. We also recommend a power to revoke if there is a significant change to the circumstances of the permit holder which affects its suitability to hold a permit e.g., if a significant national security concern arose.

Appeals

We recommend that there should not be an appeal right in relation to conditions imposed on a permit or in relation to safety zone notices. This is consistent with the approach in Australia and the CMA.

Information-sharing provisions

We have recommended the agencies that the regulator can provide information to and receive information from.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Agree,** in line with Cabinet delegations, to consult with the Minister of Justice on the recommendations in this paper

Agree / Disagree

b **Agree** to the list of offences, defences and their corresponding penalties, set out in **Annex 1**

Agree / Disagree

c **Agree** that the Bill will have safety zone enforcement officers to enforce the safety zone provisions in the Bill who are either a constable, or a person in command of a New Zealand Defence Force ship (or a person under that person's command)

Agree / Disagree

d **Agree** that safety zone enforcement officers are empowered to:

i. require that a master of a ship that is in a safety zone unlawfully (where that ship or activity is prohibited or where that ship does not have consent from the regulator) to take the vessel outside the safety zone

ii. require the master of a disabled ship to permit the ship to be towed away from the safety zone or accept any other assistance that the safety zone enforcement officer deems necessary

Agree / Disagree

e **Note** the recommendations in (c) and (d) above are subject to further consultation with the relevant agencies on the safety zone enforcement proposals

Noted

f **Agree** that the Bill will include a power for the Minister for Energy to revoke a permit if:

i. there has been a breach of permit conditions or the legislation, or

ii. the regulator or Minister has become aware of a change to the circumstances of the permit holder which affects its suitability to hold a permit (e.g., if significant risks to national security or public order became a concern)

Agree / Disagree

g **Agree** that a permit holder will not be able to appeal conditions imposed on the permit

Agree / Disagree

h **Agree** that safety zone notices will not be subject to appeal

Agree / Disagree

i **Agree** that the regulator may provide information to and receive information from WorkSafe NZ, the Environmental Protection Authority and any consent authority under the Resource

Management Act, Maritime New Zealand, the Department of Conservation, the Ministry for the Environment, Government Communications Security Bureau, New Zealand Security Intelligence Service and safety zone enforcement officers, where the information:

i. is held for the performance or exercise of either the regulator's or the specified entity's functions, duties or powers, and

ii. would assist the regulator or the specified agencies in the performance or exercise of their functions, duties or powers – including the assessment of permit applications.

Agree / Disagree

Melanee Beatson **Manager, Offshore Renewable Energy and Hydrogen Policy** Energy Markets, MBIE	Hon Simeon Brown **Minister for Energy**
13 / 06 / 2024	..... / ..... / .....

Background

2. On 10 June 2024, Cabinet confirmed the detailed design of the Offshore Renewable Energy (ORE) regime agreed to by the Cabinet Business Committee (CBC-24-MIN-0041).

3. Cabinet agreed to the broad compliance and enforcement framework, including the powers and enforcement tools the regulator will have, which largely aligns with the existing enforcement regime in the ***Crown Minerals Act 1991*** (CMA). Cabinet also agreed the maximum penalties for the most significant offences and penalties in the ORE system.

4. Cabinet also agreed to delegate to you the detailed design of:

    a. the offences, defences and penalties introduced by the regime, ***in consultation with the Minister of Justice***, including whether permits can be revoked as a penalty beyond the proposed 'use it or lose it' provisions (recommendation 13.6)

    b. any other functions, powers or duties needed for the regulator to ensure compliance with permit conditions, the Act, and/or regulations (recommendation 13.7)

    c. which decisions can be appealed and whether there are other limitations on appeal rights beyond the ability to appeal on points of law only (recommendation 13.5)

    d. entities the regulator requires information from or needs to provide information to including what that information may be and how it is handled (recommendation 13.8).

5. This briefing provides advice on these matters. MBIE will provide drafting instructions to PCO based on your decisions.

Offences, penalties and enforcement

We have proposed an offence and penalty regime that is largely modelled off the CMA

6. As set out in the Cabinet paper, we have looked to align the enforcement approach with the CMA and Australia's ***Offshore Electricity Infrastructure Act 2021*** (OEIA/the Australian regime).

7. There are close parallels between the obligations in the CMA and the ORE regime for permit holders, which mean the behaviour should be regulated in a consistent manner (e.g., meeting permit conditions, paying annual fees, reporting and decommissioning obligations). It is also intended that the newly created regulator would leverage off the existing compliance and enforcement skillset and resources from New Zealand Petroleum & Minerals (NZPM) as the regulator for the CMA.

8. Both regimes operate within broader legislative settings that have enforcement and compliance offences and penalties.[1] We have considered this wider framework to ensure we are not duplicating offences for the same behaviour, where there are already sufficient offences and enforcement mechanisms in place.

We have recommended an offence and penalty regime that largely aligns with the CMA, except where there are good reasons to depart

9. When identifying the type of behaviour that could be subject to an offence, and the level of

[1] This includes the consents framework (the Resource Management Act 1991 and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012), intersections with marine uses and safety (including the MTA, the Continental Shelf Act 1964 and the Submarine Cables and Pipelines Protection Act 1996) and relevant health and safety provisions (under the Health and Safety at Work Act 2015).

penalty or sanction, we have applied the following principles:

a. Where the behaviour would amount to an offence under the CMA, the ORE regime should align with that offence and penalty, unless there is a good reason to depart.

b. If the behaviour amounts to an offence under the Australian system, we should include it in the ORE regime, unless it would duplicate an existing penalty (covered by other legislation) or where there is a good reason not to include it.[2] We do not recommend consistency with the penalty levels or sanctions from the Australian system, as the penalties and enforcement landscape is specific to its legislative context.

10. **Annex 1** sets out our recommendations on when an offence should apply, the corresponding fines, penalties or sanctions, and our rationale. We have also recommended defences that should be available where an offence has been committed. In summary:

a. We recommend aligning the offence and penalty levels to the CMA in almost all instances.

b. We have not replicated the offence and penalty under the CMA for failing to comply with the Act, regulations and permit conditions. The Ministry of Justice (MOJ) and the Legislation Design and Advisory Committee (LDAC) have advised against these types of broad offences, especially where other levers are available (like warnings, compliance notices etc).

c. We have not recommended carrying over the prohibition on directors seeking indemnity insurance in relation to decommissioning offences from the CMA. We do not think there is a strong public justice reason in this case, because:

- the possibility of imprisonment for up to two years is a sufficient deterrent for directors to ensure that they comply with the requirements of the Act
- the Crown can recoup the cost (either directly from the director or insurance).

d. We have recommended following Australia's approach to safety zone offences, while setting the penalty levels equivalent to the non-interference zone offences in the CMA and relevant provisions of the Maritime Transport Act 1994 (MTA). We are not proposing to have a bespoke damage or interference penalty for ORE infrastructure, as we consider this would largely duplicate existing provisions under the MTA.

e. We have not recommended the ORE regime contain accruing penalties. Advice from MOJ, LDAC and the Law Commission is that accruing penalties can lead to large financial sanctions with no maximum, which can undermine the principle of the certainty of law. Compliance tools, such as a compliance notice, are likely to be more effective to incentivise behaviour because maintaining a good compliance record is important for developers, as their record can impact their likelihood of being awarded a permit in the future (not just in New Zealand, but in other jurisdictions).

Safety zone enforcement officers, with specific powers, will be required to enforce safety zones

11. Cabinet agreed that the regulator will be able to establish safety zones of up to 500 metres around ORE infrastructure to protect it from accidental or intentional harm and ensure public and navigational safety (recommendation 4 and Appendix One, paragraph 38). This is

[2] For example, the Australian legislation includes offences for a permit holder interfering with the lawful activities of other marine users.

consistent with the approach taken by the UK and Australia.[3]

12. The effect of a safety zone is to prohibit some or all activities or vessels in a declared safety zone. We have recommended offences for safety zones (set out in **Annex 1**), which make it an offence to be in a safety zone when doing so is prohibited, or for failing to act on a direction to leave a safety zone (or accept assistance to leave a safety zone) from a safety zone enforcement officer.

13. We recommend creating safety zone enforcement officers who are either a constable, or a person in command of a New Zealand Defence Force ship or a person under their command, who are empowered to take action where there has been a breach of the safety zone rules. This is needed because the ORE regulator would not have the necessary ship or resources needed to enforce safety zones. The CMA uses the same enforcement officers to enforce the non-interference zone provisions (section 101A–101C).

14. In line with the approach in Australia, we recommend that safety zone enforcement officers are empowered to:

    a. require a master of a ship that is in a safety zone unlawfully to take the vessel outside the safety zone

    b. require the master of a disabled ship to permit the ship to be towed from the safety zone or accept assistance that the safety zone enforcement officer deems necessary.

15. There are no safety zone provisions in the CMA, because safety zones already apply to mining activity in the territorial sea under the Continental Shelf Act 1964. However, the CMA does contain non-interference zones, which were put in place specifically to address protest behaviour relating to ships or equipment that were being used for mining operations. These provisions provide broad powers, including for enforcement officers to remove any person and arrest a person without a warrant. We do not consider these provisions are necessary for the ORE regime, because the nature of the risk of protest activity is lower and the provisions would be out of step with similar ORE systems overseas.

16. We are consulting on these proposals and working through the detail with the relevant agencies (New Zealand Police and Ministry of Defence). We are seeking your agreement, subject to any feedback we receive.

Power to revoke permits

17. Cabinet agreed that the Minister for Energy has the power to revoke a feasibility permit where the permit holder does not begin feasibility activities within 12 months of gaining the permit, or where they do not make effective use of the permit (recommendation 4 and Appendix One, paragraph 14.6). Cabinet also delegated authority to you to make decisions about whether there are other circumstances in which either the feasibility or commercial permit can be revoked (see recommendation 13.6).

We recommend including a power to revoke a permit in the Bill

18. The CMA and Australian legislation provide the ability for the relevant Minister to revoke licences or permits on broad grounds (i.e., any breach of the Act, regulations or conditions of the permit or licence). Revocation under the CMA has been used in relation to Tier 2 permit holders (lower return industrial, small business, and hobby mineral operations), typically where they have not paid the relevant fees or where there is persistent non-compliance with

[3] The intention is that the Submarine Cables and Pipelines Protection Act 1996 would cover protection of transmission and array cables connecting to ORE infrastructure. This allows for a protection area to be established around cables and pipelines where it is an offence to undertake certain activities (e.g., no fishing or anchoring in a protection area).

the Act. Revocation has never been used in relation to a Tier 1 permit (those that are complex, high risk and return mineral operations).

19. Revoking a permit where the infrastructure has already been built is an extreme action that would only be taken, in practice, where the situation warranted such a response. There are flow-on consequences, including in relation to decommissioning or, if the infrastructure is still within its useful life, transferring the permit (subject to the relevant consents being gained). Submissions from developers opposed a broad revocation power.

20. We recommend aligning with the CMA and the Australian legislation to include a power to revoke a permit in the Bill, if:

    a. there has been a breach of permit conditions or the legislation, or

    b. the regulator or Minister become aware of a change to the circumstances of the permit holder, which affect its suitability to hold a permit (e.g., if significant risks to national security or public order became a concern).

21. Note, we propose the Bill set out, in addition to the broad power to revoke a permit based on a breach of the legislation or conditions, the specific provisions which could lead to the permit being revoked (for example, if a change of control happened without the approval of the Minster for Energy). Both the CMA and the Australian legislation take this approach.

22. Before revoking a permit, the regulator or Minister may notify the permit holder of their intention to revoke the permit and their proposed reasons for doing so. The permit holder would then have an opportunity to respond before any final decision was made. The final decision to revoke the permit would include when the revocation is to take effect and direct the permit holder to comply with any obligations under the Act (e.g., to decommission the infrastructure) within the prescribed timeframe before the permit is revoked.

23. In practice, we anticipate that the permit holder could make use of the transfer or change of control provisions, where appropriate, prior to the Minister making the direction to revoke the permit. For example, if the infrastructure was relatively young the permit holder may seek to sell its interest, which may affect the decision about whether to revoke the permit (i.e. avoid the need to revoke the permit, where the new permit holder is able to meet the permit conditions or requirements of the legislation).

Appeals

24. Cabinet agreed to the following appeal rights in the ORE system:

    - The decision to decline a feasibility permit application would not be able to be appealed.

    - There are limited rights of appeal to the High Court for key permitting decisions (such as a decline of a commercial permit application or the revocation of a permit), and those appeals would be limited to points of law only, and only available to the person who has applied for, or holds, the permit to which the contested decision relates (see recommendation 4 and Appendix One, paragraph 29).

25. Cabinet also agreed to delegate decision-making to you about whether there are other limitations on appeal rights beyond the ability to appeal on points of law only, including which decisions can be appealed (see recommendation 13.5).

26. We have reviewed the decision points in the ORE system and recommend that two further decisions should not be subject to appeals:

    a. **The conditions imposed on a permit.** Permits are granted, ***subject to*** the applicant agreeing to the conditions of the permit. We do not have appeal rights for the ***granting***

of the permit and consider that allowing appeals on the conditions of a permit could mean the basis on which the permit is granted is changed. Therefore, we do not recommend appeals be available on the conditions of the permit. The applicant can either accept the conditions and be granted the permit or decline and not be granted a permit. Once the permit is accepted, the permit holder can seek a variation to the conditions through a written application, or the Minister can vary the conditions with the consent of the permit holder (see briefing 2324-3446 which describes this process). We consider this provides a suitable process to vary the conditions of the permit.

b. **The issuing of a safety zone notice.** This is an administrative decision that is important for the safety of users in the area of ORE infrastructure and to protect the infrastructure from damage. Judicial review remains available to impacted parties. This is consistent with the approach under the CMA and Australian system.

Information-sharing provisions

27. Cabinet agreed to delegate decision-making to you about the scope of the information-sharing provisions (see recommendation 13.9). This is modelled on the information-sharing provisions in the CMA. It is intended that the regulator may provide information to, and may receive information from, other government agencies where that information:

    a. is held for the performance or exercise of either the regulator or the specified entity's functions, duties or powers, and

    b. would assist the regulator or the specified agencies in the performance or exercise of their functions, duties or powers – including the assessment of permit applications.

28. We recommend the agencies that the regulator can provide information to and receive information from include WorkSafe NZ, the Environmental Protection Authority and any consent authority, Maritime New Zealand, the Department of Conservation, the Ministry for the Environment, Government Communications Security Bureau, New Zealand Security Intelligence Service and safety zone enforcement officers.

Next steps

29. MBIE will develop drafting instructions based on your decisions on these matters. The drafting instructions will be provided to PCO shortly.

Annexes

Annex 1 – Table of offences with corresponding penalty levels

Annex 1 - Table of offences with corresponding penalty levels

Offences we <u>are</u> proposing to replicate from the CMA (or Australian legislation where appropriate)		
Offence & any available defence (if applicable)	**Penalty**	**Rationale**
Enforcement and compliance related offences		
Wilfully obstructs, hinders, resists or deceives any person in the execution of any powers conferred on that person by or under the Act.	Every person who commits an offence is liable on conviction to a fine not exceeding $3,000.	• Deters a person from obstructing the regulator from investigating breaches with the legislation. • Offence and penalty level align with the CMA (as updated in 2013). The RMA and the EEZ Act have the same offence and a similar level of fine ($1500).
Failure to comply with a compliance notice. There will be a defence where there is a reasonable excuse for failing to comply with the compliance notice within the required time period.	Every person who commits an offence is liable on conviction to a fine not exceeding $200,000.	• Important enforcement tools for the regulator where parties are not compliant with a compliance notice or enforceable undertaking. • Offence and penalty level align with CMA (the penalty levels for compliance notices and enforceable undertakings in the CMA were updated in 2021).
Contravening an enforceable undertaking. Where an enforceable undertaking has been given, criminal proceedings may be taken for an offence within 6 months after: • the enforceable undertaking is contravened; or • it comes to the notice of the enforcement officer that the enforceable undertaking has been contravened; or • the enforcement officer agreed to the withdrawal of the enforceable undertaking.		
Failure to provide information within the time and manner specified	Every person who commits an offence is liable on conviction to a fine not exceeding $20,000.	• Incentivises a person to provide the necessary information for the regulator to be able to enforce compliance with the legislation. • Offence and penalty level align with CMA. The RMA and EEZ Act have the same offence and a similar level of fine ($10,000 and $15,000 respectively).
Knowingly providing false, altered, incomplete or misleading information.	Every person who commits an offence is liable on conviction to	• Important to ensure information provided to the regulator is not intentionally false or misleading.

	a fine not exceeding $800,000.	• Offence and penalty level align with CMA. The fine is already sufficiently high for deterrence.
Offences related to decommissioning		
A civil pecuniary penalty for • failing to decommission, • failing to establish and maintain appropriate financial securities for the performance of decommissioning obligations. We also recommend replicating the CMA offences for attempting to contravene the above or being involved in the contravention in some way (89ZZV(1)(b)-(f))). There will be a defence if the breach was: • due to a reasonable mistake or due to events outside of the person's control; and • remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the person or brought to the person's notice; and • the person has compensated or offered to compensate any person who has suffered loss or damage by that breach.	The amount of any pecuniary penalty must not exceed: For an individual, $500,000 In any other case, a pecuniary penalty that is the greater of either $10 million or, if the Court is satisfied that the contravention resulted in a cost to the Crown or another person to remedy the effects of the contravention, 3 times the commercial gain or if the commercial gain cannot be readily ascertained, 10% of the turnover of the person and all its interconnected body corporates (if any) in each accounting period during which the contravention occurred.	• Important as the impact on the Crown can be significant if a permit holder fails to decommission the infrastructure. • Offence and penalty level align with the CMA.
Criminal liability for doing an act, failing to act, or engaging in a course of conduct knowing that the act, failure to act, or course of conduct will result in that person not being able to meet their decommissioning obligations (failing to decommission or meet the costs of decommissioning). Where the person is a body corporate, any person who is a director of that body corporate at the time the body corporate commits the offence, also commits an offence. In the case of proceedings against a director, it is a defence if the director proves that: • the person liable for fulfilling decommissioning obligations took all reasonable steps to ensure they would meet their decommissioning obligations, or	For an individual (including directors at the time the offence is committed), a fine not exceeding $1 million and up to 2 years imprisonment. In any other case, a fine that is the greater of either $10 million or three times the costs of decommissioning.	• Important as the impact on the Crown can be significant if a permit holder fails to decommission the infrastructure. • Offence and penalty level align with the CMA. However, we do not recommend carrying over the prohibition on directors being able to seek indemnity insurance (as per the explanation below). We considered if it would be appropriate to permit directors to seek liability insurance where the permit holder has failed to decommission, and the person was a director at that time, as in the CMA. We do not think there is a strong public justice reason for limiting liability insurance in this case, because: • the possibility of imprisonment for up to two years is a sufficient deterrent for directors to ensure that they comply with the requirements of the Act

• the director took all reasonable steps to ensure the decommissioning obligations were met; or • in the circumstances, the director could not reasonably have been expected to take steps to ensure the decommissioning obligations were met.		• the Crown can recoup the cost (either directly from the director or insurance).
Offences relating to taking action without having a commercial permit		
It is an offence if a person exercises a consent authorising activities related to the construction, operation and decommissioning of ORE-related infrastructure without first obtaining a commercial permit.	A person is liable on conviction to a term not exceeding 2 years or a fine not exceeding $400,000.	• Important to ensure a commercial permit is obtained before ORE infrastructure is constructed. • This replicates the equivalent penalty under the CMA for operating without a permit (section 101(1)). Note, it would not apply if a person constructs ORE infrastructure without the applicable consent, because that behaviour is already an offence under either the RMA or EEZ Act and already carries significant penalties (up to $600,000 under the RMA and up to $10,000,000 under the EEZ Act).
Offences relating to change of control without approval		
It is an offence if a person begins to control the permit holder or ceases to control the permit holder either without approval of the Minister or if the approved change took affect outside an approval period for change in control. It will be a defence if the person did not know, and could not reasonably be expected to have known, that a change of control has occurred. It will also be a defence if an application has been made, but the application is still being considered by the Minister when the change of control takes effect: • there will be no contravention while the application is being considered by the Minister, and • if the Minister gives approval, there will be no contravention, but If the Minister declines to give approval, this must be treated as a contravention from the date of the Minister's decision. (The defence is modelled on section 41AC(3) of the CMA.)	Every person who commits an offence is liable on conviction to a fine not exceeding $800,000.	• Important because it incentivises change of control of a permit to only occur with the approval of the Minister during the approval period. • The offence is modelled on the Australian legislation (section 95). • The penalty level aligns with the CMA for Tier 1 permit holders that have failed to obtain consent for a change of control of a permit operator.

Where the decision maker has approved a change in control of a permit holder, and that change takes effect within the approval period, it is an offence if a person who is given notice of the approval of a change in control does not notify the regulator within a prescribed time after the end of the approval period. It is also an offence if a person begins to control the permit holder or ceases to control the permit holder either without approval of the Minister or if the approved change took affect outside an approval period for change in control and the person does not notify the regulator of the change of control within a prescribed time of the change taking effect. It will be a defence if the person did not know, and could not reasonably be expected to have known, that the person has begun to control or ceased to control, the permit holder.	Every person who commits an offence is liable on conviction to a fine not exceeding $200,000.	• Important to ensure the regulator is notified when a change of control takes effect. • Offence is modelled off section 93 and 96 of the Australian legislation. • The penalty level aligns with the similar offence and penalty level in the CMA for failing to notify the regulator of that change of control within a set time period of the change of control taking effect (section 101(2A)(b)).
Offences relating to substantive changes to an application that could impact on decision being sought		
It is an offence if a person has applied for approval of a permit or a variation of a permit and before a decision has been made (or during the approval period for a change of control) there is a change in circumstances that would materially affect the matters the decision maker must have regard to, and that person fails to notify the regulator.	Every person who commits an offence is liable on conviction to a fine not exceeding $200,000. In relation to change of control, as a consequence, the Minister may revoke any approval of a change in control that was given during the approval period.	• Important to incentivise accurate information about an impending decision is provided to the regulator in a timely way. • Offence only applies to an application for change of control in the Australian legislation (section 91 OEIA) but given how a substantive change in circumstances could materially alter how a permit is awarded, we recommend this penalty apply more broadly to any decision to grant or vary a permit. • The penalty level aligns with a similar offence in the CMA (section 101(2A)(b)) for failing to notify a change of control within the specified time period.
Offences relating to officers not having a personal interest		
No person holding any office under, or employed by, the Crown in any capacity in the administration of this Act shall hold, directly or indirectly, any pecuniary interest whatever in any permit (unless provided for in the Act or regulations).	Every person who commits an offence is liable on conviction to a fine not exceeding $20,000.	• Offence and penalty level is replicated from the CMA. • Important that those enforcing or making decisions about the regime do not have an interest that could impact on their decision-making or actions under the system.

Offences relating to safety zones		
A master of a ship enters into a safety zone, without reasonable excuse, where that vessel or activity is prohibited. A person enters into or remains in a safety zone, without reasonable excuse, where that activity is prohibited.	A person is liable on conviction to a fine not exceeding $10,000.	• Important to incentivise behaviour to not enter a safety zone. • The offence is based on the equivalent provisions in the Australian legislation (section 139 and 148) and penalty level is based on non-interference zones under the CMA (section 101B(2) and (5)).
Breaching a requirement from a safety zone enforcement officer to: • remove the vessel outside the safety zone • permit the vessel to be towed away from the safety zone or accept any other assistance that the enforcement officer considers necessary.	A person is liable on conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding $15,000, for any other case a fine not exceeding $150,000.	• Important to incentivise people to comply with directions from safety zone enforcement officers. • This offence is modelled off the Australian equivalent (section 141 of the OEIA). • The level of the penalty is equal to a similar offence in the Maritime Transport Act for failing to comply with a direction or requirement imposed on them (section 33F(6)), but adjusted for inflation.
Offences we are <u>not</u> proposing to carry over from the CMA		
Offence	**Rationale for not bringing over to the ORE Regime**	
Failure to comply with the act or regulations or permit conditions. Every person who commits an offence is liable on conviction to a fine not exceeding $20,000.	• We are not proposing to replicate this offence. • Instead, the regulator could use a compliance notice to remedy any breaches and when the breach is sustained have access to the maximum penalty of $200,000, which would have a similar effect. • MOJ and LDAC guidance advises against including broad offences like ‘every breach of the act is an offence’ in new legislation, especially where other levers are available (like compliance notices).	
Damaging or interference with ships, operations, activities or infrastructure relating to mining operations (section 101B of the CMA).	• We do not recommend creating a separate offence under the ORE regime to address damage with ORE infrastructure. • The MTA already contains offences where a person takes any action in respect of a ship if that action causes unnecessary danger or risk to any person or to any property (even if injury or damage does not occur). Creating a new offence in relation to ORE infrastructure would be largely duplicative.	
We are not proposing an infringement fee scheme.	• As proposed in the Cabinet paper, the ORE regime will not contain infringement offences. MOJ advises infringement offences are used where there is a low-level offence occurring at volume and on a regular basis, and where identifying the actual offender isn’t practicable e.g., parking fines. The maximum fee advised is $1000.	

	• The ORE regime would only apply to a small number of participants who are expected to be large multi-national companies, meaning an infringement regime would not be an effective tool to use for lower-level offences. This is a different approach to the CMA, which has a high volume of Tier 2 permit holders.
We are not proposing accruing penalties in the ORE regime.	• We do not recommend the ORE regime contains accruing penalties. • The CMA has accruing penalties which apply to a broad range of offences, including any breach of permit conditions, the Act or regulations. • Advice from MOJ and LDAC is that accruing penalties can lead to large financial sanctions with no maximum, which can undermine the principle of the certainty of law. • In the past eight years, New Zealand Petroleum & Minerals said it had sought accruing penalties twice. It agreed it would be comfortable not having an accruing penalty, because of the risk that the amount of the sanction can escalate significantly, especially where the offence has been continuing for some time before being detected.