

New Zealand requisition of ships in time of war or other like emergency

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I. INTRODUCTION

Almost exactly one year after the British war against Argentina came to an end the Wellington newspaper the "Dominion" published on the 3 August 1983 a short article encaptioned: "Ship Requisitioning Law Change Favoured".

The article said that the Ministry of Defence, in response to a Ministry of Transport shipping policy paper, was ready to seek a law change to allow requisitioning of merchant ships in time of national emergency.

Pointing to the use made by the Royal Navy of "Ships Taken Up From Trade" during the Falklands war the Ministry of Defence said that a healthy and thriving shipping industry in New Zealand could yield more than economic benefits; such an industry would be a valuable strategic asset as it would give New Zealand a capacity for independent action in time of war or emergency. The Ministry went on to say that New Zealand-owned shipping should be on a New Zealand register and that it would seek legislation to this effect.

Attention was called to the fact that the use by the military, of national assets which were commercially productive in peacetime, was in tune with a defence policy appropriate to a small country like New Zealand with its necessarily small defence financial vote.

In August 1983 New Zealand was still a year away from the snap election and the Ministry of Defence was engaged in fitful and sporadic attempts to implement the wishes of the then National Government's Defence Review of 1983. That review had called for a modernization of mobilization procedures within a general context of greater self reliance. It had been foreseen, following the so-called Nixon doctrine, that allies of the United States would have to increase their own contribution to the Western defence

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alliance if they wanted the United States to guarantee their national security. It would no longer be sufficient for small countries to live in luxury and not even pay a green fee to play on the golf course.

I describe the Ministry of Defence's efforts to comply with its own government's policy as sporadic and fitful because such efforts were continually beset by defence expenditure cuts of the irrational haircutting type. A haircut is the type of reduction in expenditure when you say "I don't care what long term financial programmes we approved last month, this month the social welfare vote has to increase, and you will cut the defence expenditure programme 22% across the board. Pay? No, not pay you idiots!"

So here in this defence proposal to promote a legal basis for the emergency requisitioning of merchant ships was a no-cost opportunity to show the United States of America and the world that New Zealand was making a greater contribution and was not the bludger which has become part of our national psychological profile.

What happened? Was the ability to requisition ships truly a requirement in 1983? Is it a requirement today? Was the legislation sought? Where is the shipping legislation? Does it deal with the situation? Is there indeed a situation? Let us examine this one small molecule of a national security plan which affects us as maritime lawyers. Let us determine whether New Zealand has provided itself with the capacity to get STUFT (Ships Taken Up From Trade) or whether we, as New Zealanders, have chosen to take our chances on being stuffed should a national maritime emergency ever arise.

II. DOES NEW ZEALAND NEED A SHIP REQUISITIONING REGIME?

Before raising a hue and cry on this topic, and before the Association passes a unanimous resolution to press for immediate Government action, it is as well to consider carefully whether New Zealand even needs such a regime. After all, surely the position here is totally different from that of the United Kingdom with all their involvement in NATO, their remaining colonial defence commitments, and their despicable propensity to use nuclear fission to turn the propellers of some of their warships. Did not the United Kingdom Defence Committee say, in their Report to the House of Commons in May 1985, that the reasons Britain must have requisitioning are:

- (a) the reinforcement of Europe with both forces and United States equipment; and
- (b) direct support of the Royal Navy?

Of what relevance are those considerations to New Zealand? The short answer is, of course, none. But it could be said that there are other equally important reasons why New Zealand should have a requisitioning capability

of its own. Peggy Lee says in the song all of us middle-aged men know and remember “Fever’s not a new thing; Fever started long ago”. So too with requisition. That started long ago and has been used for many purposes. The Royal Navy itself was, of course, before King Henry VII’s time, nothing more than fleets constituted from merchant ships requisitioned, usually from the Cinque Ports.¹ These ships were navigated by merchant seamen and fought by soldiers; hence the Naval ranks which survive today of “captain” and “lieutenant”. The Charter of Edward I for example, directed to the barons of the Cinque Ports, declares:²

“... that at each time that the King passeth over the sea, the ports ought to rig up fifty and seven ships whereof every one to have twenty armed soldiers and to maintain them at their own costs by the space of fifteen days together — if kept at sea longer the charges to fall on the King.”

Indeed the whole of the subsequent history of England, the United Kingdom, and its sea-faring Dominions has been concerned with the subject. Even a tiny dominion like New Zealand, as it was during World War I, used section 2 of the War Regulations Act 1914 to requisition civilian craft. Some time after that legislation had been repealed, we find in 1928 the Solicitor-General informing an inquiring Naval Secretary 19 days after his request for a Crown Law opinion, (Crown Law opinions seemed to be a little more prompt then than now) that no statutory provision then remained for the naval requisition of merchant ships and that royal prerogative power would have to be relied upon. There were dark hints at the practical and legal difficulties and uncertainties involved in reliance on the prerogative.

In the event, such difficulties did not arise when next New Zealand was called upon to consider the question by reason of the Public Safety Conservation Act 1932. This Act was passed not for the purpose of requisition, but in order to provide for the use of military force to put down riots. This new radical Act empowered the Government of 1939 to bring down, within one day, thirty-three sets of regulations, hundreds of pages thick, for all the purposes of running a nation at War; including the power to requisition merchant ships. How did all this happen in one day? No miracle; just good legal planning. Most of the regulations had already been drafted under the supervision of the Organisation for National Security which had been set up in 1937 in the Prime Minister’s department. And so, little New Zealand was again able to respond, at a speed appropriate to naval warfare of the time, to requisition civilian owned ships and smaller craft. On that occasion these ranged from large blue water ships like the *Breeze* and the Union Line’s *Monowai* to dozens of smaller brown water craft, and the functions for which they were used extended beyond transport to actual warfighting.

1 The Cinque Ports consist of Hastings, Romney, Hythe, Dover and Sandwich.

2 Hakluyt i 21, 22.

So, is this relevant today? Today people fight wars by pushing buttons. Though many buttons were pushed during the Falklands war, if the British had not had the fifty-four ships taken up from thirty-three companies in trade they never could have prevailed.

That war was about the illegal seizure of British sovereign territory lying at a great distance from the homeland. The seizure was accomplished by a relatively small force equipped with conventional weapons at the second or third level of available technology, all of which are quickly and readily available on the world arms market. You might have to wait a few weeks for the French to supply you with Exocet but the rest was not a problem.

New Zealand has sovereign territory at a distance from our shores. Not only do we claim sovereignty over a large slice of Antarctica but also New Zealand is responsible under the Defence Act 1971 for the defence of the Cook Islands, Tokelau and Niue.³ These territories are included in the definition of the Queen's Realm of New Zealand in the Letters Patent to the Governor-General of 1983.⁴ It would take no military genius to calculate that even our fledgling forces of four frigates, one battalion and two dozen Skyhawks would require considerable logistic support from merchant naval resources just to neutralize a small organized armed force which might lodge itself in one of those island territories. The Navy, for example, does not even have a single oil tanker let alone a troop carrier, stores ship or hospital ship.

One should not forget either that New Zealand has a treaty-like obligation under the Five Power Defence Arrangements of 1971 to co-operate in defence matters with the United Kingdom, Australia, Malaysia and Singapore in the South East Asian area. We still maintain a large, for New Zealand, joint force in Singapore.

So who will say that the requisition of ships is a subject which can be filed in the history of New Zealand defence policy and safely forgotten for the future?

Just say a need were to arise for New Zealand to fulfil its defence obligations in the Pacific territories which might require the sustenance of military operations by the so-called ready-reaction force of the Army with Naval and Air support for a period of only a few months. Where would the heavy sea lift capability, the maritime logistic support for the supply of men, of fuel, ammunition, food and stores come from? The United States? I think not. Even the New Zealand Law Journals of August 1985 and March 1986 contain articles by lawyers acknowledging that the ANZUS treaty has now joined the SEATO Treaty in the defunct paper tiger bin as far as New Zealand is concerned. Australia? Not according to Paul Dibb who was recently interviewed for a Bulletin article which previewed the forthcoming

3 Section 4.

4 New Zealand Statutory Regulations 1983/225.

review of Australian defence policy.⁵ That country is on the verge of mounting a Fortress Australia policy which will openly dismantle any power projection capability it now has. The longest striking range envisaged apart from the range of small corvettes will be F-18 fighter aircraft refuelled in the air. This Fortress Australia policy rests on a new strategy, that Australia will not maintain forces for intervention in Asia or the Pacific Islands; their force structure will be designed only to defend Australia itself. Of course unlike New Zealand, Australia has no commitment to defend territory in the Pacific Islands. Ironically Australia has less need than New Zealand for the power to requisition merchant ships. It will surprise no one to learn that Australia is not going to make provision to do so, on behalf of New Zealand.

With the Royal Navy (politically, and soon it seems legally), banned from entering New Zealand harbours it may be assumed that we can now forget the British as a source of support and the only other Western maritime power in the Pacific, the French, are not seen by this commentator as a likely supporter of New Zealand Pacific policy. Besides they are currently short of limpet mines.

No, New Zealand has announced to the world that it will go it alone, increase its defence expenditure and provide for its own defence requirements. In the maritime field this has so far consisted of the purchase of one Orion long range maritime anti-submarine aeroplane and a proposal to purchase one small tanker. A more extensive shopping list presented by the Ministry of Defence has so shocked the Government that it has diverted the matter by establishing a travelling commission of persons who know little about maritime defence to travel around the country collecting ideas from members of the public and pressure groups.

If the cost of adopting a self-reliant defence posture is frighteningly high, one substantial measure which would cost little more than pen and ink and a bit of parliamentary counsel time would be the creation of a legislative base for the use of available civil assets for warfighting purposes. Some measures, for example the requisition of civil aircraft and aerodromes under the Civil Aviation Act 1964, are already in place.⁶ Ships, however, remain in an area of legal enigma.

III. THE PRESENT NEW ZEALAND LEGAL POSITION

I have so far tried to paint for you a strategic picture in order to establish that New Zealand more than ever before in its history, needs to have a sound legal basis for the requisition of civilian ships in time of national maritime emergency.

⁵ John Stockhome "The Secret Report: We'll go it alone with fast hit hard forces", *The Bulletin*, 8 April 1986, p24.

⁶ Section 22.

Let us now look at the existing law, assess the changes which are imminent and try to assess whether the country's new stand-alone defence posture will be backed up by such a sound legal foundation for ship requisition.

We can begin by examining the components of a desirable legal structure for a unicameral, democratic, semi-Westminster type state like New Zealand.

In the first place I suggest we need a broad statutory empowering provision which plainly states that the Governor-General, in the name of the Queen, may, in time of threat of war, or other like emergency, requisition merchant ships required for defence purposes. The legislation would also authorize the necessary compulsory drafting of crews in order to man the ships and it would deal plainly with the question of financial compensation. I would recommend, for several reasons, the use of statute in preference to simply relying on the possible exercise of the Royal Prerogative. The first is that the speed of modern warfare dictates that the State should have its detailed requisition management scheme already in place, in statutory regulation form, in advance of the advent of hostilities, and such regulations should be continually and actively updated by the Ministries of Transport and Defence so that if the necessity arises they can be instantly invoked. The medium of warfare is no longer geography but time, as the Americans and the Libyans will tell you today, and here I depart from Paul Dibb who says that Australia will always have 10 years notice of serious armed conflict.⁷ Whereas before World War II it was possible to see the likelihood of hostilities years ahead, that situation does not apply today. The British, for example, had a few days notice of the Falklands invasion. A solid and clear statutory authority would enable planners in both the defence and merchant shipping worlds to put detailed plans in place with the clear backing of the New Zealand Parliament and people. The Royal Prerogative is to New Zealanders I think a shadowy and little understood base for dramatic government action affecting peoples' civil and private rights. Even Solicitor-General Fair, eminent lawyer though he was, in his 1928 opinion to the Naval Secretary seems, with respect, to imply in one passage that the Royal Prerogative power to requisition could be exercised in New Zealand by the Governor-General without reference to the Queen herself. I believe that many people in military authority in this country and, dare I say it, many learned brethren, and even some learned sisters, would suggest that if New Zealand had to declare war on another nation then it is the Governor-General alone who issues the declaration, acting of course, on the advice of the Government. All of us here, on the other hand, know that it is well-settled constitutional law that the Governor-General may only exercise those prerogative powers on behalf of the Queen which are granted

⁷ *Supra* n5.

to him in his Letters Patent and the power to declare war is not granted by the 1983 Letters Patent.⁸ Nor incidentally was that power granted in the 1917 Letters Patent and that is why the 1939 New Zealand declaration of war on Germany recites that the then Governor-General had on command from the King, to sign the declaration. Similarly, the Letters Patent to the Governor-General contain no power to requisition merchant ships without the authority of Buckingham Palace.

So, one can see the unsatisfactory features in relying in New Zealand, (it may well be otherwise in the United Kingdom) on the Prerogative power as the legal foundation for a requisitioning system. It is not the New Zealand way of doing things and has not been in both World Wars. It is greatly misunderstood and suspiciously regarded, and it is out of tune with what I feel is the current state of consitutional relationships with Britain today.

The Statutory Regulations which I suggest be put in place would deal, of necessity in great length and considerable detail, with the working management level of the task. Some such topics would be the maintenance of what might be termed the Defence Register of New Zealand ships, the requirement for certain ships to comply with structural and technical standards stipulated by the Crown to make them readily adaptable to a military environment, the necessity to take part in Naval control of shipping exercises, the establishment of the appropriate bureaucracy, and of course all the detailed administrative machinery for the transition of a merchant ship into a quasi-Naval ship should the need actually arise.

It would be no good attempting, as I am sure is the current thinking of politicians in New Zealand today, to legislate on the day. Before World War II, New Zealand, as I have indicated, at the urging of the British government, spent 2 years preparing a set of Statutory Regulations for the management of a country at war, and these included broad ship requisitioning powers, which came into force under the authority of the Public Safety Conservation Act 1932. So much for the broad powers. The detailed transition into the conduct of hostilities was less well planned and has been characterized in the 1983 Defence Review along with other war planning measures, as “. . . frantic ingenious, improvisation . . .” and not recommended for the future.⁹ The cost of that approach is measured in human lives at the beginning of operations as it was for New Zealand in the early phases of the war.

The second broad legislative requirement for the basis of a sound requisitioning regime is of course a suitable shipping registration code which deals squarely and openly with the need any maritime country has to recognize that its merchant ships are a precious military resource as well as

8 J. F. Northey “*Declarations of War and Peace*” (1951) 27 NZLJ 239.

9 *New Zealand Government’s Defence Review* Government Printer, Wellington, 1983 ch 6 para 6.6.

an economic asset. The registration code needs to address the sort of legal problems the British are confronting and which are discussed in the 1985 Defence Committee Report to the House of Commons entitled *The Use of Merchant Shipping for Defence Purposes*.¹⁰ These legal problems are to do with the legal availability of merchant ships. That availability depends on the category of ownership and registration in which ships may lie. As maritime commercial lawyers know, better than anyone, various permutations and combinations of nationality of registration, ownership, and beneficial ownership are possible. All shipping does not necessarily fall into neat categories like New Zealand owned and registered, or registered under foreign flag but New Zealand beneficially owned. The legal requirements for the maintenance of a Defence Register which cannot be vitiated by the skills of the commercial lawyers of Featherston Street need to be faced and met. Only legislation can achieve this. I shall not attempt in this forum to offer detailed solutions to problems which can arise here. Part XII of the present Shipping and Seaman Act 1952 does now contain what may be called a defence provision purporting to restrict the ability to transfer ships on the New Zealand register to foreign flags. We shall all no doubt await with interest the unveiling of any changes to the existing provisions in the forthcoming Shipping Registration Bill. My latest information is that the Bill which has now been in gestation for some years has not yet reached the stage where its contents may be opened to public scrutiny. Assuming however that it will preserve the existing Shipping and Seamen Act's defence clause the country can look forward to retaining at least the desire for some measure of control on any Defence Register.

One cannot be so optimistic however about the future of the requisition empowering legislation. Presently, this is the Public Safety Conservation Act 1932 which I have previously alluded to. Though the Navy has always been closely associated with both the genesis and the actual use of the Act (the Navy played a major role in quelling the riots which caused its creation), the Act does not specifically deal with requisition. It empowers the Governor-General to proclaim a state of emergency across a broad spectrum of threat to public safety and to make immediate regulations to deal with the threat. Such regulations could include requisitioning regulations should the need arise and these would have to be endorsed by subsequent Act of Parliament within 14 days of their being made. No requisitioning regulations exist any longer. The old World War II ones have long since been revoked¹¹ and all we now have is the broad power to declare a state of emergency and to start from there. That hardly meets the tests for preparedness for modern armed conflict to which I have referred earlier. The broad emergency legislation could be said to be the absolute minimum

10 First Report from Defence Committee. Session 1984-85 printed 21 May 1985.

11 New Zealand Statutory Regulations 1947/185.

a country could have; the sort of lax approach which could be taken by a country which did not like to face up politically to hard defence questions but which could in the end probably rely on a large, powerful and well-prepared ally to step in and do the job for it.

It was accordingly, with some amazement, that this observer heard the present Government announce shortly before it took office in 1984 that it would repeal the Public Safety Conservation Act 1932 which it styled, unnecessarily, repressive legislation. No mention was made of providing a substitute legal means of requisitioning merchant ships. Now that a Public Safety Conservation (Repeal) Bill has indeed been introduced into the House and the Government has announced that it intends to proceed with it during the current session, one is indeed curious, to say the least, to see what the outcome will be. Now that it seems clear that by other legislation¹² we are going to ban from visiting our country the very large allied Navy upon which we might have relied to provide for us, it would seem to be the antithesis of a self-reliant defence policy to remove from the statute book the last vestige of legal power to act in this area.

If indeed we do produce this legal outcome one can only presume that we shall revert to the old Royal Prerogative power which for the reasons I have discussed would appear to be an unsatisfactory basis for such matters.

By contrast one notes with interest tiny Singapore's Defence Requisition Bill which will provide for ship requisition, compensation and compulsory personnel drafting.

A mischievous one-liner ran round Wellington last week. It was said that Frank O'Flynn thought that the Dalkon shield was a new type of defence weapons system. I trust that such a scurrilous assertion in no way reflects the level of legal and political thought being devoted to the question of requisition of ships.

As a former naval person I am hoping that in the end New Zealand gets S.T.U.F.T and not stuffed.

¹² New Zealand Nuclear Free Zone, Disarmament, and Arms Control Bill No. 172-1 (introduced 10 December 1985).