Developing our underwater continent

Darise Bennington finds out more about the legislation that has been designed to govern our Exclusive Economic Zone and continental shelf

It's difficult to imagine anyone more well versed in the law of ocean governance than North South Environmental Law director Robert Makgill. So when I wanted to understand what the issues were with the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (Bill), I knew exactly who I should talk to.

First things first, what are these 'places', geographically speaking, over which the Bill has been designed to govern environmental effects?

According to a Ministry for the Environment discussion paper, *Improving regulation of environmental effects in New Zealand's Exclusive Economic Zone*, released in August 2007, "New Zealand's Exclusive Economic Zone (EEZ) is the area of sea and seabed that extends from 12 to 200 nautical miles offshore. It is the fifth largest EEZ (approximately 430 million hectares) in the world, about 15 times the size of our land mass."

Makgill, in an article in the April edition of the *Resource Management Journal*, explains that the continental shelf "comprises the seabed and subsoil which is 'the natural prolongation' of a coastal State's land territory and may extend beyond the EEZ". New Zealand's continental shelf, says Makgill, does extend beyond the EEZ in certain locations, with the combined area of the two being approximately 20 times New Zealand's land area (Robert Makgill, Kellie Dawson, and Nicola de Wit, "The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011", at 2).

A question of purpose

One of the main issues with the Bill, says Makgill, is that it fails to articulate clearly its purpose of sustainable development. Clause 10(1)(b), the purpose provision, provides:

> "This Act seeks to achieve a balance between the protection of the environment and economic development in relation to activities in the exclusive economic zone and on the continental shelf by-
> (b) requiring them to take a cautious approach in decision-making if information available is uncertain or inadequate."

In its submissions to the Select Committee in respect of the Bill, which were presented by Makgill, the New Zealand Law Society (Law Society) noted that it was concerned that in failing to define the purpose of the Bill, it left it open to forms of interpretation that might be inconsistent with the sustainable management regime for the territorial sea under the *Resource Management Act* 1991 (RMA). It also submitted that the clause was "narrower" than the concept of sustainable development as it has evolved in international law. "As generally understood, that concept includes meeting the needs of the present, without compromising the ability of future generations to meet their own needs" (Law Society submissions at [10]).

Makgill says, however, "that the requirement to balance between the protection of the environment and economic development has been defined by the International Court of Justice as meaning sustainable development. One example of this definition is found in the recent *Pulp Mills* decision." Furthermore, "it is consistent with the *Law of the Sea Convention* 1982 to interpret the bundle of rights to development and duties to protect provided for under the Convention as being consistent with the principle of sustainable development".

Although he also suggests that the purpose of the Bill might be better defined as "sustainable management", as that is the terminology used in the RMA, which regulates the environmental effects of activities in New Zealand's territorial seas.

Marine consents

The other issue concerning environmental lawyers is the fact that clause 61(2) of the Bill is inconsistent with the Bill's purpose. It authorises marine consent "if the activity's contribution to New Zealand's economic development outweighs the activity's adverse effects on the environment".

Makgill considers that "every decision under the Bill, as with the *RMA,* should be assessed to ascertain whether it achieves the Bill's purpose or not". He questions what happens when the consenting exercise sits outside the purpose of the Bill. "Does it become a threshold that you need to achieve before you make your final evaluative decision pursuant to the Bill's purpose, or is it supposed to tip the scales of decision making away from sustainable development?"

"If the latter is intended, the Bill is inconsistent with the principle of sustainable development under international law (eg *Pulp Mills*).

Sustainable development is not about weighing environmental effects against economic outcomes and finding which one comes out on top. It is a much more complicated exercise, relying on science and other assessments to achieve a balance or equilibrium between environment and development," says Makgill. "Of course, that does not mean that economic development will not outweigh environmental effects in certain situations. Often this comes down to a question of the scale of adverse environmental effect and the ability to mitigate."

Makgill says the Bill is tinkering with long-established approaches to sustainable development (or management) developed under existing legislation. We have 20 years' experience in sustainable management in decision making, and attributing weight to matters of national importance, under the RMA. His suggestion, and that of the Law Society's, is that the Bill should introduce a second tier into its decision-making process. "List the matters that policymakers wish to attribute more weight as matters of national importance similar to section 6 of the RMA," he says.

In addition, by eschewing consistency with the purpose of the RMA, the Bill creates the potential for different results to occur on either side of the jurisdictional boundary that runs between New Zealand's territorial sea and EEZ. "It's a jurisdictional boundary," says Makgill. "It's not driven by science. Activities on one side of the boundary will invariably have effects on the other. We already know this is likely to be the case with certain iron ore mining proposals." It is virtually impossible to achieve a desirable level of integrated management where different evaluative purposes apply either side of the jurisdictional boundary.

Integrated management

But why is it important that the laws governing the EEZ and the continental shelf be consistent with those governing our territorial waters? "Because," says Makgill, "a fundamental tenet of international environmental law, environmental law, and environmental management is integrated management."

Having two different tests either side of that jurisdictional boundary creates ambiguity and a lack of clarity – which, says Makgill, will in turn lead to procedural delays and costly litigation.

"New Zealand is a world leader in terms of environmental management and integrated management. The problem with the legislation covering our territorial waters, and that proposed for our EEZ, is it's becoming increasingly complicated which makes integrated decision making harder," he says. "The most fundamental starting point is that the balancing exercise that you undertake must be the same either side of the jurisdictional boundaries. Irrespective of the values that you're considering, and the weight attributed to those values, you need to have the same test."

Makgill says that the problems that exist in New Zealand in respect of environmental decision making relate to procedural delay. "We have a pretty robust system for deciding whether the merits of a proposal are sound or not, and, by and large, nationally significant projects under the RMA will receive approval." Makgill considers that nationally significant projects with important returns for the national economy would still be approved in the majority of cases under the Bill if a sustainable management purpose was applied. "Under the RMA, such projects are generally approved subject to conditions requiring mitigation and/or adaptive management."

Makgill's point is that we need to look at the procedure, and ensure that the ways in which the decisions are being made is integrated. We should be making the decision-making criteria in respect of supporting scientific information as simple as possible. "Decision making is going to be science-driven," he says. "We know so little about our territorial waters, let alone our EEZ. Our EEZ is 20 times New Zealand's land area. It's a continent under water. So it needs to be science-driven."

We can't have policy and legislation that complicates the decision making in this area, he says. That will lead to uncertainty. "Businesses want certainty. Decision makers want certainty. The public wants certainty."

And that was the fundamental point of the submissions made by the Law Society to the Select Committee – it's not that the Bill doesn't provide for sustainable development, it's just that there's scope as the Bill is currently drafted for it to be interpreted as something else. Something that will create a clash, affecting the ability of the various regimes that govern New Zealand's seas to integrate, thereby potentially causing more procedural delays that so frustrate those with plans to develop New Zealand's deep sea resources.

Without clear regulatory integration between the RMA, the *Marine and Coastal Area (Takutai Moana) Act* 2011, the Bill, fisheries legislation, and the *Maritime Transport Act* 1994, then, says Makgill, you either end up with statutory lacunas, or with legislation that is trying to achieve different things. Legislation with overlapping, but different purposes, does not work, as it creates uncertainty. "What we've got to understand is that we're talking about natural resource development and environmental management in the deep sea, which is all driven by science. There's not a lot of existing scientific information at the moment. So if the legislation is confused about what it's trying to achieve, then it makes it very difficult for scientists to be able to come up with the information necessary to support decisions under that legislation."

Adaptive management – a cautious approach

When there is a gap in knowledge, a lack of information, then there is a need to turn to "adaptive management". It enables you to respond in a situation where there is imperfect knowledge, says Makgill. "So you can proceed in an environment of imperfect information, and you adapt as you go along if certain triggers indicate that the activity in question is having an effect which could end up being significant."

It's about being cautious – about adopting principle 15 of the 1992 *Rio Declaration on Environment and Development* – the "precautionary principle", which provides:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

This does not mean that you do not do something until the information you have is complete, or that you proceed irrespective of the information you have, says Makgill. "What it means is that you may move forward provided measures are taken to prevent environmental degradation. This generally requires establishing an environmental baseline of knowledge and monitoring for adverse change." However, he says, if, during the course of monitoring the activity, it becomes apparent that serious or irreversible damage is likely to occur, then measures must be implemented to prevent that occurrence, or the activity must be stopped.

Effectively, it's about managing risk, and managing it to a best practice standard. When it comes to the EEZ, Makgill says international law requires the implementation of both best practice and a precautionary approach. And while he acknowledges that the Bill sets out quite a solid precautionary approach through the language it uses, its cautious approach, and its adaptive management principles, his concern is still that clause 61(2) seems to sit outside of this. "Do you end up in a position where you override adaptive management principles in favour of national economic development?" he asks.

For Makgill, fundamentally, the key issue with the Bill is that it seems to try and reinvent the wheel. It sets out new approaches to decision making that have already been comprehensively tested via the RMA. And while he is not saying that the RMA should extend its reach into the seas of the EEZ, he is saying that the RMA should be considered and used to inform the Bill that will soon be governing these seas.

Ultimately, Makgill would like to see a regionally integrated approach for development and protection of natural resources within territorial waters, EEZs, and the High Seas of the Pacific Ocean. The integrated approach he talks of is one that should extend beyond New Zealand's waters, and into the seas and EEZs that surround our nearest neighbours. It's about creating regional consistency as well domestic integration. "All our EEZs, they all touch. We share our continental shelf with Australia, and our EEZ with Australia, Tonga and Fiji. So it makes sense," he says.

It's about creating certainty within this watery continent – between proposed development and environmental management that straddles our jurisdictional waters, and those that straddle other State jurisdictions. And, in the end, isn't that what the Government intends – a regime that will encourage development and not create additional procedural issues or costly litigation? NZL

The Bill was introduced to the House on 24 August 2011, and passed its first reading on 13 September 2011. The Select Committee report on the Bill is due to be released this week.