

# New Zealand Law Society

## SUBMISSION ON EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF (ENVIRONMENTAL EFFECTS) BILL

### Introduction

- 1 The New Zealand Law Society (Law Society) appreciates the opportunity to submit on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (Bill).
- 2 This submission comments on:
  - (a) The legal implications of the Bill if enacted in its present form.
  - (b) The Bill's consistency with New Zealand's international obligations.
  - (c) The Bill's drafting.

### Legal implications if Bill enacted in its present form

- 3 The legal implications of the Bill need to be seen in both international and domestic contexts.

### International context

- 4 The Exclusive Economic Zone (EEZ) and Continental Shelf are not part of New Zealand's sovereign territory. New Zealand exercises rights over the EEZ and Continental Shelf pursuant to the Law of Sea Convention 1982 (LOSC), ratified by New Zealand in 1996.
- 5 The exercise of New Zealand's sovereign rights in the EEZ and Continental Shelf is subject to the obligations set out in the LOSC, other international agreements and customary international law. While New Zealand may enact legislation over the EEZ and Continental Shelf, such legislation must be consistent with New Zealand's rights and obligations, and their interpretation, under international law.
- 6 The right to develop resources within the EEZ and on the Continental Shelf (conferred under the LOSC and customary international law) is subject to obligations to protect and preserve the marine environment, under the preamble and article 193 of the LOSC.
- 7 While the LOSC does not expressly use the terms "sustainable development" or "sustainable management", decisions of the International Tribunal of the Law of the Sea, United Nations General Assembly Resolutions and reports of the consultative process on oceans and the law of the sea demonstrate that the LOSC rights and obligations are encapsulated in the phrase.

Decisions of the International Court of Justice likewise support “sustainable development” as a cornerstone of international law.

- 8 Customary international law and the LOSC regulations governing seabed mining adopt “the precautionary approach” to environmental management.
- 9 The international jurisprudence is summarised in the Appendix to this submission.
- 10 In three respects, the Bill does not reflect international jurisprudence:
  - (a) Clause 10 states that the purpose of the Bill is to “achieve a balance between the protection of the environment and economic development in relation to activities”. This purpose statement is 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.
  - (b) Clause 11 requires the Bill to be interpreted, and all persons performing functions and duties or exercising powers under it to act, consistently with New Zealand’s obligations under the LOSC. New Zealand’s obligations are wider than those expressed in the LOSC. They include its associated jurisprudence, and relevant customary international law. There are also other international agreements and conventions relating to the EEZ and the continental shelf. Other agreements include the Convention on Biological Diversity 1992, ratified by New Zealand in 1993.
- 11 Clauses 10(1)(b) and (13) do not adopt the phrase “precautionary approach”.

### **Domestic context**

- 12 Use, development and protection of natural and physical resources within the territorial sea and land mass of New Zealand is managed (principally) by the Resource Management Act 1991 (RMA). The RMA has an overarching purpose of “sustainable management”, as defined in s 5. Further, Part 2 of the RMA sets out matters of national importance which must be recognised and provided for (s 6). There are other matters to which particular regard must be given (s 7). There is some 20 years of jurisprudence developed around these provisions of the RMA.
- 13 In addition, the RMA establishes specialist decision-makers: consent authorities and the Environment Court.

- 14 The Bill is intended to manage specific activities in the EEZ and on the Continental Shelf. It applies seaward of the boundaries of the territorial sea. The 12 nautical mile line which differentiates the coastal marine area, managed under the RMA, and the EEZ and Continental Shelf, to be managed under the Bill, is an artificial construct reflecting administrative and jurisdictional purposes. It is not a line drawn for environmental purposes or because the activities specified in clause 15 of the Bill are different in nature, benefit or effect from activities within the territorial sea.
- 15 Despite these considerations, the proposed Bill:
- (a) Has a different purpose from the RMA.
  - (b) Does not include any matters of national importance.
  - (c) Provides a different mechanism of planning control (regulation) rather than through rules and plans.
  - (d) States different criteria for consenting.
  - (e) Uses a different decision-maker (the Environmental Protection Authority).
  - (f) Defines terms used in the RMA, differently for the purpose of this Bill; principally “environment”.

**Summary of consequences if Bill drafted in its present form**

- 16 The consequences of drafting the Bill in its present form are:
- (a) The Bill does not adequately reflect international law and associated jurisprudence or New Zealand’s obligations under it.
  - (b) Different management regimes apply either side of the outer limit of the territorial sea.
  - (c) There is a risk of inconsistent planning regimes.
  - (d) There is consequential difficulty in achieving integrated management, which is a touchstone of modern environmental law.
  - (e) There is complexity, and there would be costs for the Crown, applicants, submitters (whether supporters, opponents or neutral) and decision-makers whenever there are applications for activities which straddle the jurisdictional line of the territorial sea or when an application involves associated activities both within and beyond the limits of the territorial sea.
  - (f) The purpose and principles in subpart 2, part 1 are novel, not mirrored in the RMA or other relevant domestic legislation. Time will need to be taken to explore their meaning and application through avoidable litigation.

### ***Recommendations***

17 Against this background the Law Society makes the following recommendations.

#### **Clause 10: Purpose**

- 18 Replace clause 10 with a redrafted clause that indicates that the purpose of the Act is “sustainable management”, as defined in s 5 of the RMA.
- 19 If clause 10 is retained, substitute “precautionary approach” for “cautious approach” in clause 10(1)(b).

#### **Clause 11: International obligations**

- 20 Expand to include New Zealand’s other international obligations. This could be achieved by removing the words “under the convention”.

#### **Clause 12: Matters to be taken into account to achieve purpose**

- 21 Consider which matters might be stated to be of national importance in decision-making to achieve the purpose of the Bill.

#### **Clause 13: Information principles**

- 22 Replace “favouring caution” with “precautionary approach”.

#### **Clause 61: Decisions on applications for marine consents**

- 23 See paragraphs 39 to 42 below.

### **Further submissions**

#### **Clause 17: Certain existing activities to continue**

- 24 This clause provides for existing activities that have been lawfully established to continue without a marine consent for six months after the relevant regulations come into force.
- 25 If the person undertaking the activity applies for a marine consent within the first six months, the activity may continue until the application is finally decided.
- 26 It is a tight timeframe for any existing activities that may have been in place for a number of years. It could also create difficulties of an administrative nature for the Environmental Protection Authority (EPA) in the first six months after the regime’s commencement.
- 27 A more realistic timeframe should be allowed.

***Recommendation***

28 That clause 17 be amended to provide for a 12 month, rather than a six month, transitional period. Consequential amendment is required to the transitional provisions in clause 150.

**Clause 18: Certain prohibited activities to continue**

29 Clause 18 provides a regime for lawfully established activities that become prohibited as a result of regulations coming into force.

30 Clause 18(3)(c) provides that a person undertaking such an activity must, among other things, comply with any instructions of the EPA in relation to a structure associated with the facility.

31 It is unclear, however, what happens if a person does not comply. Non-compliance is not an offence. Nor is it clear that the enforcement order jurisdiction can apply.

***Recommendation***

32 That the Bill be amended to include an enforcement mechanism.

**Clause 35: Relationship between regulations and consents**

33 Clause 35(1) and (2) deal with the relationship between marine consents and regulations under the Bill. Subclause 1 provides a marine consent containing conditions that are more stringent than a regulation prevails over the regulation. Clause 35(2) provides that a marine consent must not be more lenient than a regulation.

34 Section 43B(2) and (4) of the RMA explain “stringent” and “lenient” for the purposes of defining the relationship between national environmental standards and rules or consents.

35 Section 43B(2) provides that a consent is more stringent than a standard if it imposes conditions on an activity that the standard does not impose or authorise. Section 43B(4) provides a consent is more lenient than a standard if it permits or authorises an activity that the standard prohibits or restricts.

36 These explanations might, with any necessary modifications, be included in clause 35.

***Recommendation***

37 Consider adopting the explanations of “stringent” and “lenient” from s 43B of the RMA to clause 35.

**Clause 61: decisions on applications for marine consents**

- 38 Clause 61(2) authorises the EPA to grant a marine consent “if the activity’s contribution to New Zealand’s economic development outweighs the activity’s adverse effects on the environment”. Conversely, the authority may refuse an application “if the adverse effects on the environment outweigh the activity’s contribution to New Zealand’s economic development”.
- 39 A number of points should be made:
- (a) The test for consenting is quite different from under the RMA.
  - (b) The evaluation required is complex and problematic both for the parties involved (whether applicants or submitters) and the Authority.
  - (c) “Contribution to New Zealand’s economic development”, in particular poses significant practical and evidential problems.
  - (d) It is not clear if, in the opinion of the EPA, the contribution to New Zealand’s economic development outweighs adverse effects on the environment, the Authority must grant a consent or whether it still has a discretion to refuse.
  - (e) The test for granting a marine consent is different from the purpose of the Bill in clause 10. The purpose requires balancing between protection of the environment and economic development. Clause 61(2) enables a consent to be granted if economic development outweighs environmental effect. Perceived economic benefit trumps environmental effect. There is, therefore, an internal inconsistency in the Bill between clause 10 and clause 61.
  - (f) The test for granting marine consent as set out in clause 61(2) is inconsistent with New Zealand’s obligations under international jurisprudence (as discussed in paragraphs 4 to 10 above and the Appendix). Consequently, there is a further internal contradiction in the Bill between clauses 11 and 61.
  - (g) The test for granting a marine consent in clause 61(2) also is difficult to reconcile with clauses 13(2) and (3) which articulate the precautionary principle.
  - (h) Because of the different tests under the RMA and the Bill, the possibility of associated applications under the Bill and the RMA being decided differently arises, which is not satisfactory.

***Recommendations***

- 40 Amend clause 61(2) to read:

“After complying with subsection (1) and ss 59 and 60 the EPA may grant an application, in whole or in part, or may refuse the application”.

41 The consenting power should be exercised for the purpose of the Bill. The test in clause 61(2) should be removed.

**Clause 79: Decisions on review of resource consents**

42 This clause enables the cancellation of consent. If cancelled, clause 79(5) authorises the EPA to set a timetable for cessation of the activity and direct the consent holder to take any other action in relation to structures used for the activity.

43 As cancellation can be based upon adverse effects on the environment resulting from the exercise of the consent, the EPA might also be authorised to direct the consent holder to do anything else necessary to remedy or mitigate effects of the activity on the environment.

***Recommendation***

44 Add to clause 79(5) power to require a consent holder to do anything else specified by the EPA to remedy or mitigate adverse effects on the environment.

**Subpart 3: Marine consents for cross-boundary activities**

45 Different statutory considerations will apply to marine consent applications and resource consent applications. This difference entails a significant risk that similar applications will be decided differently. The risk arises principally from the different statutory tests to be applied.

46 This risk can be ameliorated by aligning the purpose of the Bill with the purpose of the RMA.

***Recommendation***

47 The Law Society repeats the recommendation at paragraph 18 above.

**Part 3: Objections, appeals, and enforcement**

48 The decision of the EPA can, under the Bill, be appealed to the High Court on a question of law only. Decisions of a relevant consent authority can be appealed on the merits to the Environment Court. When an undertaking involves applications for a marine consent and a resource consent, there are different appeal paths. This is unsatisfactory.

***Recommendation***

49 That decisions of the EPA be subject to appeal to the Environment Court, at least where proposals require both resource and marine consents.

**Minor drafting errors**

50 The Law Society wishes to draw attention to the following apparent drafting errors in this Bill:

- (a) Clause 4: “structure”, page 14 – the word “offshore” has been omitted before “installation” in paragraph (b)(ii).
- (b) Clauses 28 and 29 appear to be independent regulation making powers. The regulation making power in clause 27 is confined to regulations that prescribe technical standards, methods or requirements. The subject matter of clause 28, classifying areas and clause 29, classifying activities is much broader. As they are independent regulation-making powers, it seems the introductory words “the Governor-General may, by Order in Council, made on the recommendation of the Minister make regulations that ...” should be repeated in both clauses 28 and 29.
- (c) Clause 32(3): the word “technical” in the final line seems unnecessary and unduly limiting. The effective control is the word “minor”. Technical would seem to confine the changes to matters relating to standards, methods or requirements, which may not be intended.
- (d) Clause 74(1)(a): the words “for that purpose” seem redundant.
- (e) Clause 78(c): “the” has been omitted before activity in the first line.
- (f) Clause 104(1): it would be helpful to state that the notice of appeal must be filed with the High Court Registrar at Wellington.
- (g) Clause 121(2): the cross-reference appears to be clause 119(2), not 120(2).
- (h) Clause 125(1)(a): these provisions appear to be based on the RMA but do not repeat the maximum of two years imprisonment.

**Conclusion**

51 The Law Society wishes to appear in support of this submission.



Jonathan Temm  
**President**  
27 January 2012

## Appendix: International jurisprudence

### Relating to “sustainable development”

- 1 The Law of the Sea (LOSC) provision for development and protection is consistent with the concept of sustainable development recognised by the World Commission on Sustainable Development in its report, *Our Common Future*,<sup>1</sup> and commonly applied as a guide for international action. The report defines sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>2</sup> Many definitions of sustainable development, if not most, include explicit or implied reference to “future generations”. Although, it is worth noting that there are variety of different ways in which the term has been implemented in practice.
  
- 2 The LOSC does not expressly endorse sustainable development except in relation to EEZ fisheries<sup>3</sup> and the conservation of the living resources of the high seas.<sup>4</sup> Nevertheless, there is no doubt that sustainable development can be used to give effect to development rights and environmental obligations under the LOSC. Support for this can be found in decisions of the International Tribunal for Law of the Sea and the United Nations, General Assembly, resolutions and reports of the consultative process on oceans and law of the sea.<sup>5</sup>
  
- 3 The concept of sustainable development calls for a balancing of development with environmental protection, as recognised by the International Court of Justice (ICJ) in the *Gabčíkovo-Nagymaros* case.<sup>6</sup> Most recently the ICJ observed in the *Pulp Mills* case that it is “the balance between economic development and environmental protection that is the essence of sustainable development.”<sup>7</sup>
  
- 4 The concept of sustainable development is relatively new in terms of international law. The precise term is unlikely to have been at the forefront of the minds of the architects of the LOSC

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<sup>1</sup> U.N. Doc. A/42/47 (1987), reprinted in World Commission on Environment and Development, *Our Common Future*, (Oxford: Oxford University Press, 1987).

<sup>2</sup> *Ibid.*, p. 43.

<sup>3</sup> LOSC, Art. 61(3)

<sup>4</sup> *Ibid.*, Art. 119(1)(a).

<sup>5</sup> Report of the Secretary-General, “*Oceans and the law of the sea*” - *Topic of focus of the 12th meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law Sea*. U.N. Doc., General Assembly, A/66/70/Add.1 (11 April 2011).

<sup>6</sup> *Case Concerning Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Merits, 1997 I.C.J. Reports 7, at p.77 and 78, para 140. “Through the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects on the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind –for present and future generations- new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing activities begun in the past. *This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.*” [Emphasis added]

<sup>7</sup> *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) Merits, Judgment, I.C.J. Reports 2010, at p.54, para 177.

when they drafted Parts V or VI (i.e. the EEZ and Continental Shelf parts of the LOSC). Nevertheless, it is appropriate to interpret the LOSC in light of sustainable development insofar as both development and environmental protection are required under the LOSC preamble and the Convention's subsequent parts. This was indeed the approach of the ICJ when faced with similarly worded provisions under another international agreement in the *Pulp Mills* case.<sup>8</sup>

### **Relating to the “precautionary approach”**

- 5 There has been some suggestion in the past that “precautionary principle” is somehow more restrictive than the “precautionary approach”. This is incorrect. There is no substantive distinction between the precautionary principle and the precautionary approach under international law. Rather, the content of the obligation and the way it is enforced is defined by the context within which it is implemented.<sup>9</sup>
- 6 The Seabed Disputes Chamber of the International Tribunal for Law of the Sea (Chamber) observed in its recent Advisory Opinion on deep seabed mining<sup>10</sup> “that the precautionary approach has been incorporated into a growing number of international treaties and instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration”. In the Chamber's view this has initiated “a trend towards making this approach part of customary international law”.<sup>11</sup>
- 7 The Chamber cited the LOSC regulations and the ICJ's invocation of the precautionary approach in the *Pulp Mills* case as support for its applicability in respect of deep seabed mining.<sup>12</sup> The mining regulations, governing prospecting and exploration for polymetallic nodules and sulphides, explicitly require States and the ISA to apply Rio Declaration Principle 15. That formulation requires that “where there are threats of serious or irreversible damage,

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<sup>8</sup> Ibid., p.53 to 54, paras 175 and 177. “The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other .... Consequently, it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.” [Emphasis added] It is worth noting that the *Pulp Mills* case concerned trans-boundary harm in relation to a river. The requirement to balance the interests of the riparian states (including environmental interests) goes back over 100 years and is a principle of particular application to water courses and other bodies of shared freshwater.

<sup>9</sup> Ibid., p 21; A. Trouwborst, *Precautionary Rights and Duties of States* (Martinus Nijhoff Publishers, Leiden, 2006) p. 11; S. Marr, *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law* (Martinus Nijhoff Publishers, Leiden, 2003) pp. 17 to 21.

<sup>10</sup> Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, (Feb. 1, 2011).

<sup>11</sup> Ibid., para. 135.

<sup>12</sup> Ibid., para 135.

lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>13</sup>

- 8 The Chamber concluded that States must apply a precautionary approach as an integral part of their due diligence obligations “in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks.” Disregarding such risks would constitute a failure to comply with the precautionary approach, and accordingly a failure to meet the State’s due diligence obligation.<sup>14</sup>

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<sup>13</sup> Ibid., para 161. See C. Payne, Chamber advises caution in seabed mining, IntLawGrrls, March 8 2011, <http://intlwgrrls.blogspot.com>.

<sup>14</sup> D. Anton, R. Makgill, and C. Payne, ‘Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber’, *Environmental Policy and Law*, 41/2 (2011), p 63.