

Getting into deepwater? – Marine Reserves in the EEZ

In a major departure from the current law, 'no take' marine reserves will be able to be established throughout New Zealand's 200 mile Exclusive Economic Zone when the new Marine Reserves Bill 2002 becomes law. What implications does this have for New Zealand's obligations under UNCLOS and other international agreements? We sought the opinion of Colin Keating – now with Chen Palmer & Partners and formerly New Zealand Ambassador on the United Nations Security Council, Director of the Legal Division of the Ministry of Foreign Affairs, principal adviser to the government on international law and UNCLOS negotiator. Here's what we found out.

When then Conservation Minister Sandra Lee announced on 10 June this year that the Marine Reserves Bill 2002 had been introduced to Parliament, she said, "the current legislation provides for the protection of marine areas for scientific study. The new purpose in the Bill is to conserve indigenous marine biodiversity for current and future generations. It will also allow reserves to be created in the exclusive economic zone whereas they can currently only be declared within New Zealand's 12 mile territorial sea".

For the seafood industry, and for other extractive users of marine resources, the prospect of marine reserves in the exclusive economic zone (EEZ) immediately raised some significant concerns. Industry submissions on the Review of the Marine

Reserves Act questioned -

- Are marine reserves necessary in the EEZ? Can any risks to biodiversity be managed effectively under existing legislation such as the Fisheries Act?
- Is the establishment of marine reserves in the EEZ consistent with New Zealand's international obligations under UNCLOS (the United Nations Convention on the Law of the Sea)?
- How would marine reserves in the EEZ be enforced? Would New Zealand vessels still have a level playing field with respect to the activities of other countries in our EEZ?

Papers received under the Official Information Act show that scant regard was given to these questions in the drafting of the new Marine Reserves Bill. So a consortium of users of the EEZ sought some additional advice as a general contribution to the debate¹.

The EEZ – a historic compromise

The difference in international law, between the territorial sea – a narrow band of ocean adjacent to the coast over which a coastal state has very wide power (sovereignty) – and the high seas, over which a coastal state has virtually no power. Until the UNCLOS negotiations, the concept of an EEZ was not known in international law. The development of the EEZ regime was the result of a historic compromise reached between countries negotiating the 1982 UNCLOS Convention.

¹As Colin recalls “at the most extreme end of the spectrum certain coastal states were arguing in favour of extending the territorial sea with its full sovereignty implications, out to 200 miles. The Latin American countries were the primary advocates of this position. At the other end of the spectrum there was absolute opposition on the part of the major powers and the distant water fishing countries - primarily the USA, the UK, and Japan - to any extension of the territorial sea beyond its then three miles”. In developing the EEZ regime a balance would be struck which ensured that the economic interests of both sides were accommodated to some extent.

Does existing law protect biodiversity in the EEZ?

There are rules in the Fisheries Act 1996, the Maritime Transport Act 1994 and the Continental Shelf Act 1964 which would enable limitations to be placed on fishing, mining activities and maritime transport that would allow protection of biodiversity. But these laws were not designed with biodiversity protection as their primary purpose, and Colin notes that “there is possible litigation risk for the Crown attached to the use of provisions in these Acts for long-term biodiversity protection”. However, he points out that while some new provisions for biodiversity protection in the EEZ may be appropriate, it does not follow that simply extending the Marine Reserves Act into the EEZ would be consistent with international law.

Protecting 10% of the EEZ

If the Government decided to use ‘no take’ marine reserves in the EEZ to implement its stated policy of protecting 10% of the marine environment, would this be consistent with New Zealand’s obligations under international law? Advice is that such an approach would be open to challenge. “There may be scope in international law for a permanent ‘no take’ area, but it would be at the very outer limits of legitimacy”. This conclusion rests on an analysis of the Articles of UNCLOS in its entirety. There different types of rights, jurisdictions and duties of coastal states in their EEZs. A coastal state has a *sovereign right* to explore and exploit, conserve and manage the natural resources, whether living or non-living, of the EEZ. It has *jurisdiction* with regard to the protection and preservation of the marine environment. It does not have sovereignty in the EEZ.

The distinction between these concepts is deliberate and important in the context of marine reserves because it reflects the overall balance of interests accommodated in UNCLOS – “the right given with respect to protection and preservation of the marine environment is a much more limited right. It is a right of jurisdiction, not a sovereign right. This means that a state is authorised to regulate activities in order to protect and preserve the marine environment. However, it can’t use its regulatory jurisdiction to expropriate resources or to exclude activities”.

What’s more, the international community has a clear right that any ‘no take’ permanently closed area should not impact unreasonably on the ‘optimum utilisation’ rule. Colin explains “this means that a marine reserve which closed off a whole stock or a significant portion of a stock that could not be fished elsewhere, and as a result was not able to be utilised to optimum levels, would be unlawful”. Matters such as

¹ Colin Keating’s opinion was commissioned jointly by the New Zealand Seafood Industry Council, Te Ohu Kai Moana, the Petroleum Exploration Association of New Zealand and the New Zealand Minerals Industry Association.

the size of the area, the fish populations in the area and their relationships with populations outside the area become very important determinants of lawfulness. "Locking up a large area of ocean simply on the basis of it being a 'representative sample' would clearly not meet this test." The 'surplus allocation' rule, which requires a coastal state to make available to other states access to the surplus of the allowable catch of all living resources over and above its domestic harvesting capacity might also be infringed by a large no take marine reserve. By way of contrast, Colin considers that a small, permanently closed no take zone, established for genuine biodiversity protection purposes consistent with best scientific advice could be consistent with UNCLOS. He notes however, the critical importance in international law of scientific evidence and concludes that "applying a scientific perspective sets the barrier for the establishment of a marine reserve relatively high".

International biodiversity agreements favour multiple use and a range of tools

Colin also examined other relevant international agreements including the IUCN Guidelines on Marine Protected Areas and the 1992 Convention on Biological Diversity. New Zealand's obligations under the Convention were given effect in part through the production in 2000 of the "New Zealand Biodiversity Strategy" (NZBS). The NZBS recommended extending the scope of the Marine Reserves Act to enable protection of biodiversity in the EEZ. But, as Colin notes, the NZBS – like the IUCN Guidelines – clearly contemplated the protection of biodiversity through a range of different types of protection mechanisms, rather than purely through the 'no take' reserves contemplated in the Bill. Colin concludes, "clearly the strategy does not envisage marine reserves to be the only – or even the predominant – components of a network of representative marine protected areas".

What about Australia?

Australia already has a number of marine reserves in its EEZ, including an extremely large no take reserve proposed in the EEZ around the Heard and McDonald Islands (HIMI). "It needs to be appreciated", says Colin, "that the HIMI Reserve can be distinguished in terms of international law because of its special "sub-Antarctic" status". The HIMI EEZ is within the jurisdiction of the Convention for Conservation of Antarctic Marine Living Resources (CCAMLR), which differs from the UNCLOS regime in very significant respects. For one thing, it specifically contemplates the designation of areas for the purpose of scientific study or conservation.

Enforcement

Colin's advice on enforcement of marine reserves in the EEZ is reassuring – "as drafted, the Marine Reserves Bill will apply equally to all fishers, domestic and foreign". That is not to say that there won't be practical problems in enforcing marine reserves in the EEZ.

Amending the Bill

Colin recommends amending the Marine Reserves Bill to properly reflect the international law perspective and to follow UNCLOS obligations.