Forbidden Treasure: Adaptive Management & Marine Taonga

Taranaki-Whanganui Conservation Board v Environmental Protection Authority [2018] NZHC 2217 (28 August 2018)

Churchman J decided to start his lengthy judgment on a lyrical note:

> *"The large south-westerly swells that roll into the South Taranaki Bight start far away in the Southern Ocean and the waves encountered are driven by winds blowing unhindered across the Tasman Sea. These powerful forces shape a marine environment that is both turbulent and dynamic. Despite the appearance of vast emptiness, many taonga lie beneath the surface of the waters off the South Taranaki Coast"*

However, despite the poetic image and with decidedly practical results he quashed the decision of 3 August 2017 by the Environmental Protection Authority (EPA) to grant Trans-Tasman Resources Limited (TTR) consents to extract and process seabed material, 90% of which would then have been discharged back onto the seabed.

In reaching this decision the Judge subjected the legislative power under which the EPA had the power to grant permission - the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ) - to close scrutiny. The judgment provides valuable guidance on the process to be adopted by the EPA when considering applications due to the number of parties and wide-ranging objections taken to the granting of consent.

Significantly, the legislative wish to comply with international agreement for the need for cautious management of sensitive ecosystems and avoiding a 'learn as you go' approach, influenced the judge's decision to take a broad approach in construing the restrictions on the marine discharges.

Background

TTR's application concerned a 66 square kilometre area off the South Taranaki Bight, some 22 to 36 kilometres offshore. It is abutting but outside of the Coastal Marine Area governed by the Resource Management Act 1991 (RMA).

Granting consent to extract and process seabed material to extract iron ore meant that up to 45 million tonnes of the extracted seabed material would be legally discharged from an Integrated Mining Vessel back onto the seabed. The consent granted imposed 109 separate conditions. They provided for gathering of baseline information, monitoring of the effects of the activities on the environment, with further formal decisions being made in three stages. The applicable law was that which applied in August 2016.

TTR's application was the sequel to an earlier application made in November 2013. This had been declined by a differently constituted Decision Making Committee (DMC) in June 2014.

The EEZ

As made clear by s. 11, the EEZ had been enacted to give force to New Zealand's status as a signatory of a number of important international conventions relating to the marine environment. These included:

- the United Nations Convention on the Law of the Sea 1982;
- the Convention on Biological Diversity 1992;
- the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL); and
- the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 1972 (the London Convention).

Reflecting New Zealand's international commitments, and in recognition of the potentially harmful effect of extraction on marine ecology, section 10 states that the EEZ's purpose is (in part) "to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances." Harmful substances are expressly defined to include

sediments from seabed mining. Discharge is defined widely by s. 44 EEZ to mean "any release, disposal, spilling, leaking, pumping, emitting, or emptying".

As the Judge observed at [103] this means that it was envisaged that carefully regulated discharges may be allowed where appropriate in a way that avoids, remedies or mitigates any adverse effects of such activities on the environment.

Knowledge

The EEZ recognises that it can be hard to be aware of potentially adverse effects to marine environments well away from the coastline which may not be closely mapped or monitored. As a result DMC's are required to take an inquisitorial approach. Under the EEZ a DMC must make full use of its powers to request information, obtain advice, and commission a review or a report and base decisions on the information available without unreasonable cost, delay or effort in the circumstances.

The Judge held that a DMC can even seek to fill gaps it identifies in information from the experts instructed by parties to object the application. In this case the DMC ordered objecting parties' experts to prepare joint reports to provide information missing in TTR's application. This was then used by the DMC to support granting of consent. Churchman J, holding there was no error of law in this regard, observed that "consenting decisions are not *inter-parties* disputes".

Nonetheless, a DMC must to take into account uncertainty or inadequacy in the information available. Where the information available remains uncertain or inadequate, the DMC must favour caution and environmental protection. If this approach means refusal is likely, the DMC must first consider whether taking an adaptive management approach would allow the activity to be undertaken. However, importantly for the outcome in this case, that requirement does not apply in the case of discharges in this area. Churchman J held at [347]:

> "There can be no doubt that the DMC was not permitted to use an adaptive management approach, notwithstanding that such an approach is available in

relation to marine consents applying to activities undertaken within the territorial waters, and therefore governed by the RMA and [New Zealand Coastal Policy Statement], and that an adaptive management approach would seem to be ideally suited in cases where there was uncertainty as to the effects on the environment of a marine discharge consent."

As the Judge noted in its report to the Select Committee, the Ministry of Transport and Ministry for the Environment took the view that this prohibition against adaptive management was required to "... ensure New Zealand continues to act consistently" with MARPOL and the London Protocol.

Adaptive Management and Marine Discharges

The EEZ does not lay down a definition of what adaptive management is. Rather s. 64(2) says that adaptive management includes the following:

- allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored;
- any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

The Judge accepted the submission that:

"... the key to adaptive management is that it involves allowing an activity to be carried out so that its effects can be monitored and assessed and the activity modified or discontinued accordingly".

Churchman J also referred to the use of guidelines from the International Union for Conservation of Nature *Sustain Our Sounds Inc v The New Zealand King Salmon Co* Ltd [2014] NZSC 40, [2014] 1 NZLR 673 by the Supreme Court. The Supreme Court has also referred to *Pendina Institute for Appropriate Development v Canada (Attorney General),*

where the Canadian Court had said that adaptive management allows projects to proceed, despite uncertainty and potentially adverse environmental impacts, based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts, where sufficient information regarding those impacts and potential mitigation measures already exists.

The DMC on advice took a relatively narrow approach that an adaptive management approach was one which could result in a permanent cessation of consented activities as a result of the obtaining of new information about effects. As noted, this ignored the full wording of s. 64. The prohibition was against any approach which allow

> "an activity to be undertaken so that its effects can be assessed and the activity continued with or without amendment on the basis of those effects"

not just those where information may result in discontinuance.

Churchman J held a broad reading of the EEZ's restrictions on adaptive management was justified because it is consistent with the purpose of environmental protection and the statutory obligation to favour caution. The extensive conditions imposed by DMC had impermissibly been "used as a tool for managing uncertainty":

> "Although such an approach is permitted, and indeed very sensible, in relation to activities taking place in the marine environment covered by the RMA and NZCPS, it is simply not available (in relation to the discharge consent) in an area governed by the EEZ Act.

The Judge went further and doubted whether, due to the level of uncertainty, the prerequisites for 'adaptive management' even existed:

> "Even if the activities were to take place in an area governed by the RMA, there is doubt as to whether the adaptive management approach in this case would be valid because one of the prerequisites for using an adaptive management approach is to have sufficient baseline information so that appropriate conditions can be drafted. There must be real doubt that this is the case here."

Conclusion

TTR's application was accompanied by a 320-page impact assessment, 520 pages of appendices and 42 technical reports from third parties. An independent witness for the EPA asserted that:

> [T]he scale and extent of preparation for the particular environmental impacts of this TTR mining process ... far exceeds anything I have seen in relation to comparable environmental assessments of the effects of bottom trawl fishing in the NZTerritorial Seas and Exclusive Economic Zone in the last 45 years

The application was followed by an inquisitorial process designed to produce further information at huge expense. Even expert witnesses called by other parties were asked to do joint reports to fill information gaps.

Despite all this the DMC still needed to put in place 109 conditions. In doing so, they demonstrated that the effects of the discharge was still an unknown in many respects. As such, the DMC impermissibly in the judgement of the court had used adaptive management to cope with this level of uncertainty. The Judge even doubted the baseline information was sufficient for adaptive management to be used.

The decision shows that the level of knowledge and certainty required before marine discharge consents can be granted under the EEZ, and thus international obligations, is truly formidable. Perhaps in many locations where harm to New Zealand's taonga may occur, it will prove insurmountable.