

Natural Resources and the Environment in Fiji - A review of existing and proposed legislation

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This report will hopefully contribute to discussion on the future sustainable use of Fiji's natural resources and corresponding expectations to protect the environment. Its particular purpose is to stimulate debate on how legislation and legislative policy can be deployed in this pursuit.

The legislation reviewed in this project is examined for its policy principles, legislative schemes and the specific tools that are available for managing, protecting and conserving resources and the environment in Fiji. This report therefore does not purport to be definitive nor exhaustive, and is certainly not a legal opinion. All legislation of some direct relevance to natural resources and the environment has been reviewed. Other statutes of marginal application have been excluded from the review. This report reflects the status of legislation as of June 2004.

1.1 BACKGROUND TO THE REPORT

This report compiles and reviews the primary legislation in Fiji governing protection of the environment and the use of natural resources, both terrestrial and marine. The study was commissioned as part of the Department of Environment's efforts to improve the capacity of legislation to support the sustainable development of Fiji's resources. The review was undertaken during the first half of 2004.

The primary resources for this project were the statutes of Fiji. Several dozen enacted laws govern the allocation and disposition of resources, or access to and use of the environment. Together, this legislation provides the framework for natural resources and environmental decision making. Three other relevant statutes exist in draft form. Much of the effort of this project was devoted to reviewing this legislation, to identify both its policy intention and substantive provisions. Governmental administrators were also approached to clarify certain aspects of the legislation. The report was previewed by Fiji government officials before being finalised.

The report serves as a snapshot of the prevailing legislative policy towards the environment and natural resources in Fiji. In this context, this report is both a ready reference of the current situation, as well as being a platform for exploring possible changes to the legislation. Amendments to legislation do occur, and so some of the particular prescriptions identified in this report may become superseded or replaced. Notwithstanding this fact, such amendments are likely to be uncommon, and the framework described herein will therefore continue to provide the basis for government policy towards the environment for the foreseeable future.

Findings of the review are presented in this report in three thematic parts. Part Two following identifies and reviews extant legislation with an environmental or natural resource flavour. Both parent and subsidiary legislation is considered; legislation recently repealed or replaced is also reviewed to provide a useful point of reference for comparing

changes. The legislation is reviewed in terms of the cognition given to the environment within statutory provisions, such as the existing of enabling provisions, powers and duties of government functionaries, private rights and responsibilities, as well as the general orientation of the statutes. Emphasis is also given to the nature and extent of good governance principles within the legislation. This is important not only in absolute terms, but also because transparency and participation are integral features of environmental decision making.

The third part of the report reviews second generation legislation, mainly existing as Bills as well as two more recent enactments. This legislation is distinguished by its more contemporary formulation as contrasted to the older statutes reviewed in the first part of the report. A summarisation and general comment as to a way forward with respect to implementing legislation are made in the fourth part. No wholesale changes to legislation are suggested, but enactment of the draft legislation should proceed with priority. It may then be timely to revisit some of the existing anachronistic laws to update these to reflect contemporary approaches towards environmental decision making.

1.2 CONSTITUTIONAL SETTING

Fiji has experienced a rather turbulent recent history in terms of its status as a nation and powers associated therewith. The Deed of Cession, under which Fiji became a member of the British Commonwealth, was signed in 1874. That instrument gave to the British Crown possession of and dominion over the group of islands constituting Fiji. Unalienated lands not needed by a chief or tribe were vested in Her Majesty, while sovereignty over adjacent waters bounded by reefs were ceded to the British Crown. The rights and interests of ceding chiefs were recognised to the extent of consistency with British sovereignty, however.

Tenure over terrestrial and marine areas differs. Indigenous Fijians own more than 80% of land, with the remainder being held either freehold or by the State. Offshore, a dual tenure system was created at cession whereby fishing rights for the relevant tribal group were preserved while the underlying seabed accrued to the State. Communal ownership of land vests in the mataqali (or the smaller unit of tokatoka), whereas fishing rights accrue to

larger groupings, such as vanua. This approach to jurisdiction allows smaller tribal units which do not normally fish because of their traditional duties, and highland tribes distant from the sea, to participate in fishing.

The 1970 constitution relied on the provisions of the Deed of Cession. The situation regarding jurisdiction was thus largely maintained after independence. Following coups in 1987, a replacement constitution adopted in 1990 provides for royalties in respect of gas or oil extracted from any land or customary fishing rights area (qoliqoli) to be payable to the relevant tribal grouping. The 1990 constitution also incorporates into the laws of Fiji any customary law that is not inconsistent with other statutes or the constitution itself.

It was perhaps misunderstood at the time of cession that tenure over the offshore would revert back to chiefs. This reversion has not happened, though, and the fact that jurisdiction over the adjacent inshore waters remains incomplete is a source of frustration for some indigenous Fijians. The salient point is that although the constitution is the source of ultimate legal authority, it is not the only basis for law in Fiji. Custom is still very influential as a source of law. Increasingly in this globalised world, so too is international law.

1.3 THE ROLE OF INTERNATIONAL LAW

Most of the legislation examined in Part Two of this report is purely domestic in nature, without any international dimension. Some of the more recent laws discussed in Part Three derive from conventions, however, and so the relationship between international and national law needs to be explained.

Over the past three decades, there has been an impressive growth in the number and coverage of treaties and other instruments governing environmental issues. This proliferation of treaty making has arisen from a global recognition that many environmental problems are trans-boundary in nature, and are beyond the capability of countries to address acting alone. Nations have successfully negotiated treaties to address species' loss and climate change, for example, wherein global standards and measures are agreed which parties then adopt and apply domestically.

Typically, domestic adoption involves action by governments to emplace controls in respect of national behaviour, very often through the enactment of legislation expressed in the terms of the particular international instrument. Such domestic controls might involve prohibitions or creating a permissions system. It is through the collective action of countries within their own jurisdiction that the goals and standards announced in an international instrument will be attained. Importantly, the relevant treaty or convention enables the government to undertake actions that it would otherwise possibly not be able to do.

As mentioned, in the case of the environment it has been recognised that many issues require international cooperation if these problems are to be solved. This same rationale applies to an extent with respect to maritime law; because shipping and navigation are global in nature it is therefore logical that the industries are regulated on a globally common basis. An important addition to this basic tenet is that the maritime area is actually extra-territorial to nations and therefore beyond the jurisdiction of countries. Over historical times, stretching as far back as the Roman Empire, a body of international law has developed granting to States certain powers and rights in respect of offshore areas.

Originally, this law took the form of custom (customary international law) and was applicable to all countries. Increasingly, as in the case of environmental policy, this international maritime law has been codified as treaty text negotiated by countries. Unlike custom, law of this nature is not applicable to all States, but generally only applies to those which have become party to the particular instrument.

As with international environmental law, States must adopt maritime law domestically through legislation. Some aspects of international maritime law have assumed the status of custom, however, and probably exist even without specific domestic adoption. The concept of extended maritime zones, such as the 12-mile territorial sea, exemplify such a customary existence. With these few exceptions, it is questionable whether a country can avail itself of provisions originating in international law without being party to an international instrument.

Part Two EXISTING LEGISLATION

Most legislation governing natural resources in Fiji is very old and outdated. In consequence, there is very little attention given to environmental issues in these extant statutes. The absence of a legislative environmental policy is observed in two ways: no statutes exist with an express or implied environmental mandate; the laws governing resources development fail to recognise the environmental bases of natural resources. Little support is therefore provided by legislation in terms of capacity to protect the environment from the impacts of development activities. There is certainly no mandate nor legislative capacity to pursue the goal of sustainable development.

A second theme to emerge is the absence of good governance provisions in the extant resources legislation. Few opportunities are available for public input to decision making, for example. The protection of private rights is also seen to be wanting.

For logic and analysis, this Part categorises legislation around five policy areas as outlined below. Under each category, the relevant legislation is described in terms of its substantive provisions followed by a commentary thereof. The features of all the legislation reviewed are summarised at the end of this Part of the report, with some thematic development. Five categories of legislation are identified, viz –

- Tenure and jurisdiction over land and sea areas
- Major infrastructure and land use planning laws
- Legislation designed to protect the environment
- Resources development legislation
- Law relevant to biodiversity conservation

2.1 TENURE AND JURISDICTION

This section describes the legislation governing tenurial and jurisdictional issues in Fiji. Legislation of this nature relates to the status or ownership of land—both marine and terrestrial—rather than access to or allocation of resources (which is covered in section 2.3).

Broadly, the statutes described here establish the basis of State and native lands, and extend Fijian jurisdiction offshore.

2.1.1 State Lands (Cap 132)

The model of the State Lands Act is fairly typical of Commonwealth countries. Certain land belongs to the State which is able to be disposed of by the government, permanently or most often temporarily through a leasing arrangement. Parts III and IV of the State Lands Act deals with the sale and leasing of state land, respectively. In terms of the former, the sale of any state land does not confer on the purchaser the right to minerals found therein, - on or -under; moreover, the State retains mineral exploitation rights on any land it has sold.

Leases under the State Lands Act are generally unexceptional. Special conditions apply to the leasing of foreshore land or “soil under the waters of Fiji” to protect public access to the coast. Before awarding a lease over coastal areas, the application must be advertised and any objections considered by the Minister (s21). A lease, once awarded, releases the lessee from preserving any public rights and privileges which may have existed in respect of the area. The lessee is liable to compensate adjacent landowners for infringing any rights as a consequence of leasing the foreshore land (s22).

Regulations under section 41 of the State Lands Act create nine categories of leases: agricultural, residential, commercial, grazing, industrial, dairying, tramway, quarry, and special purposes (r7). Leases for farming and quarrying may be up to 30 years in length while the other categories can extend to 99 years. Farming leases impose minimum conditions designed to conserve soil and vegetation (rr14,17). Annual licences can be issued to graze livestock, extract basic building materials, cultivate crops and reside. Conditions attached thereto recognise soil erosion and vegetation, but this is not reflected in the other types of licences (rr35–39).

The State Lands Act also provides for the compulsorily acquisition of land for public purposes pursuant to the State Acquisition of Lands Act. Public purposes include defence, town and country planning, and general public benefit.

Comment

The State lands regime is not unusual. Providing access to public land for productive purposes—mainly agriculture—is a fairly common element in many jurisdictions. Little cognition is given to environmental issues in leasing decisions, however, which is to be expected in such legislation. Also, an inconsistency would seem to exist in relation to land that has been acquired compulsorily. Under the enabling legislation, land can only be so acquired for public good purposes, and not for a commercial end such as agriculture, grazing or industry, as provided for by the State Lands Act.

2.1.2 Native Lands (Cap 133)

The Native Lands Act is one of the statutes governing land in the interests of native Fijians. The purpose of this Act is to identify native lands, whereafter which these are administered under the terms of the Native Lands Trust Act.

Native owners are the mataqali or other division of natives having the customary right to occupy and use any native lands (s2). Fundamental to this definition is that the community—not an individual—owns native land. As well, the nature of the ownership is circumscribed to occupation and use; selling the land or charging for its use are not within the scope of ownership contemplated under the Native Lands Act.

A Native Land Commission appointed by the Minister is charged with ascertaining which land is the property of native owners (s4). State lands and those the subject of a state grant cannot be native lands (s2). The Commission enquires into the status of all lands claimed by mataqali, and is empowered to summon witness to give evidence in this regard (s6).

Following commission of any proceedings, the decision as to native ownership is announced by the Commission (s7). The Act contains appeal and dispute mechanisms. Vacant lands are also anticipated, and shall be treated as State land following declaration by the Minister (s19).

Comment

The intention of the Native Lands Act would seem quite apparent. The definition of native lands does create some uncertainty, however: “lands which are neither state lands nor the

subject of a State grant'. The meaning of the second part is unclear. The creation of a fee simple tenure—where a unit of land is sold or disposed of by the State—is actually a grant. Under the definition of native land even such a parcel held freehold would become available as native land.

Conversely, excluding State land from a native land claim would seem an artifice. Native land was clearly held in possession by natives at the time of occupation and its assumption by the State upon settlement is not necessarily automatic.

The Act has been amended recently to further clarify some aspects of native land administration. The definition of native lands has been updated to make clear that all vacant land is now native land, in addition to that previously defined (s2). As well, a formula for deriving income from the use of vacant land has been included, whereby such money is for the exclusive use of native Fijians. The Native Lands Trust Board (discussed below) has also now become the lessor, rather than the Director of Lands (s19).

2.1.3 Native Lands Trust (Cap 134)

This legislation is to be read in conjunction with the Native Lands Act. That other statute provides for the existence of native land while the Native Lands Trust Act (NLT Act) administers its use. Much as the Native Lands Commission is integral in determining the ownership of native land, the Native Lands Trust Board (NLTB) is the key body governing actual use. The NLTB is a representative body in which the control of all native land is vested (ss3-4).

Basic to the system is the inalienable nature of native land. Other than to the State, native land cannot be alienated nor encumbered (s5). The pre-eminent resources legislation does prevail, though (the Forest, Petroleum and Mining Acts) as does the State Acquisition of Lands Act (s7).

The Board is authorised to grant leases or licences for accessing native land (s8). The test to be applied is that of beneficiation: the Board must be satisfied that the land under question is not beneficially occupied, nor likely to become so over the duration of the lease (ss8-9).

Regulations provide detail as to the specifications applying to each type of land use. Most of the regulatory detail relates to processes for leasing native land and the disbursement of rent from its use. The main uses anticipated under the NLT Act and regulations are forestry, agriculture, grazing, dairying, and residential and commercial activities. Regulation is very much concerned with applying and recovering rent. As well, the leasing requirements are oriented towards the productive use of the land; minimal attention is given to soil and water conservation (eg ss25,28,29,30).

Under the NLT Act, native land can be further classified as native reserve (s15). The prevailing provisions of the paramount resources legislation still apply in respect of native reserves. Two additional constraints do flow from reservation, though: leases or licenses need to be consented to by native owners; such concessions are only available to native Fijians or the Land Development Authority as if it were of such personage (s16).

Comment

The native lands system is an interesting mixture of institutions. Whilst native land is owned by mataqalis it is in fact the Board that determines use. This use, furthermore, has a clear development orientation. It is therefore wrong to assume that the communal ownership of land equates necessarily to a sustainability or stewardship ethic. The mere existence of native land does not suggest that this is being used any more sustainably than other land and should be treated outside of any reforms of an environmental flavour.

2.1.4 Marine Spaces (Cap 158A)

The Marine Spaces Act is a curiosity in that it establishes the nature and extent of Fiji's offshore jurisdiction but is also an instrument for regulating fishing. The latter aspect will be dealt with later under the discussion of resources development legislation.

With respect to the former, the Marine Spaces Act is cast in terms very consistent with the Law of the Sea Convention. In particular, Fiji's offshore zones—internal and archipelagic waters, territorial sea, exclusive economic zone—are established relying very faithfully upon the enabling provisions of the LOSC (ss3-6,8). The legal character of these marine areas derives directly from LOSC, both in terms of Fiji's jurisdiction and that of other States in Fiji's waters (ss9-11).

Comment

The Marine Spaces Act is a solid framework for administering Fiji's adjacent maritime zones, especially insofar as foreign fishing is concerned. Importantly, the Minister is the responsible decision maker for many of the roles under the legislation.

The Marine Spaces Act does contemplate a range of ocean uses, consistent with LOSC, in respect of which regulations can be made. These uses include marine scientific research and protecting and preserving the marine environment, for example. No such regulations have been made, though, leaving the government without legislative coverage of such uses. Moreover, LOSC provides considerable capacity to elaborate a statutory regime to address the entire range of issues associated with these maritime activities. Enacting legislation cast in these terms is preferable to the promulgation of regulations. That is, because LOSC provides a complete regime for governing various uses, any domestic adoption of these provisions should be achieved through implementing legislation, rather than left to regulation.

2.1.5 Continental Shelf Act (Cap 149)

The purpose of the Continental Shelf Act is to extend offshore the application of other legislation. Such an approach is necessary to ensure that development of the continental shelf does not occur in a legal vacuum. Rights over the continental shelf flow from international convention (Convention on the Continental Shelf [CCS], United Nations Convention on the Law of the Sea [LOSC]). The Continental Shelf Act enables all other laws to apply to the superjacent waters as if these were part of Fiji in connection with exploring and exploiting the continental shelf (s4). The Minister may also exercise control over vessels in terms of interfering with continental shelf activities, and assuring the safety of navigation (ss6,7). These provisions are adopted very directly from the CCS.

Comment

The Continental Shelf Act departs from the parent convention in one main respect: by applying only to designated areas rather than to the continental shelf in entirety. The Convention on the Continental Shelf has unqualified application, so the approach of the Fiji legislation is unnecessary. Moreover, the Law of the Sea Convention enables the Continental Shelf Act to be updated, for example by redefining the continental shelf

consistent with its more contemporary formulation. The Marine Spaces Act deems that the seabed and subsoil of Fiji's exclusive economic zone under LOSC form part of the continental shelf, negating the need to separately designate these areas as such under the Continental Shelf Act. The reasons for extending Fiji jurisdiction offshore through this method are not apparent.

2.2 PLANNING AND INFRASTRUCTURE

A fundamental role of government is to plan for and provide services for the populace. In the context of environmental services, these activities include the supply of water, provision of linear infrastructure, and major industrial facilities. Legislation governing this type of major infrastructure is reviewed here, as are laws relating to the planning of land for development.

2.2.1 Town Planning (Cap 139)

Planning for the physical development of land, especially in built-up areas, represents an early approach to developing land on an environmental basis. The physical separation of incompatible activities, and preservation of green space for public recreation, was designed to serve health and amenity needs in growing dense communities. However, town planning did not recognise environmental services as such, because of which tensions exist between planning and environmental impact assessment in particular.

The general approach adopted under the Town Planning Act in Fiji is fairly typical of land use planning as practised elsewhere. A scheme defining land uses is prepared for an area of land with which all subsequent developments must be consistent. In the case of Fiji, the system is driven by town planning areas constituted by ministerial order upon application by the Director of Town and Country Planning or a local authority (s7).

The Town Planning Act anticipates some delay in finalising Town Planning schemes for each Town Planning Area. Pending such schemes, development activities are controlled under a permissions regime of each local authority (s7). Regulations prepared under section 7 specify the details of a development permission, as well as the types of land uses and activities that are permissible without the need for local authority approval. The Director

retains power to abnegate the blanket permission provided by regulation either generally or by reference to a particular development (r8).

Any permissions to develop granted by local authorities must first be approved by the Director (s7). Permission to develop can be refused, or granted conditionally. Compensation is payable in the event of land being rendered “incapable of reasonably beneficial use” by the development permission (s8).

Local authorities may revoke or modify permissions with the confirmation of the Director following a 28-day comment period (r9). The basis for altering permission is where it appears to a local authority expedient to revoke or modify development permission (s9). Buildings or works can be altered or removed by the local authority following concurrence of the Director (s10).

During the period before a town planning scheme has been approved, the Minister can compulsorily acquire land under the State Acquisition of Lands Act. The test to be applied is “where a town council is satisfied that the acquisition of any land under this section is expedient for my purpose which appears to it to be necessary in the interests of the proper planning of that area” (s12).

Town planning schemes are the preferred instruments for controlling land use within town planning areas (rather than development permissions). The object of a scheme is expressed quite broadly to cover the provision of land for transportation, residential and commercial use, amenities and the like (s16). A scheme consists of a plan and provisions to regulate land development in the terms of the objects (s17). A schedule identifies matters which may be covered in a scheme.

The Act requires local authorities to prepare schemes for the Director’s provisional approval. If a local authority does not produce a scheme within the time prescribed by the Director the latter may produce same at the expense of the local authority (s18).

Following provisional approval—changed or otherwise by the Director—a scheme is announced by the responsible local authority for public interest (s19). Owners or occupiers of land within the scheme area may object to the local authority within three months (s20).

The Director of Town and Country Planning considers all objections. Local authorities provide objections and their response therefore to the Director (s21,22). Objections may be upheld in whole or part or dismissed entirely (s23). After disposing of objections, the Director shall approve the scheme, which is then publicly notified by the local authority (ss23,24). Modifications and suspensions of an approved scheme follow the same process (s26).

The Town and Country Planning Act includes rather detailed circumstances relating to compensation for loss of land value as a result of a scheme. Also, once a scheme has been approved by the Director, a town council may petition the Minister to acquire any land by compulsion under the provisions of the Local Government Act (s37).

Comment

The approach to planning for land use is generally sound. However, the Town Planning Act is beset with problems related to both its policy intent and actual construction.

Probably the most disturbing aspect is the lack of explication regarding the basis for making decisions under the Act. The only commonly employed guidance is expediency, where either the local authority or Director considers it expedient to decide upon something. The very use of expediency as the test for decision making is alarming. Moreover, the construction of the relevant provisions almost precludes other matters from being considered in the making of a decision.

Another major defect with the legislation is the exclusion of broad public input to planning. Town Planning areas are constituted by the Minister without fetter. These areas are fundamental to the operation of the Act, and provisions relating to their constitution need to allow for greater community input. Town Planning schemes are not prepared through a public consultation process; indeed schemes are not even prepared as drafts for public comment. Rather, schemes are approved provisionally whereafter which residents may

lodge objection. This very presumption is antithetical to public engagement as it presumes that the public does not have anything meaningful to contribute to the design of a town planning scheme.

It is emphasized that only owners or occupiers may even object to a scheme. Similarly, no standing is provided to the wider interested community to appeal against decisions of the Director. The Act fails to provide any substance with respect to the basis for considering an objection. An advisory committee does exist for the purpose of appeals but again the Act is silent as to the matters it may consider and its relationship to the Minister.

Town Planning Schemes are central to the Town Planning Act. In addition to the absence of public input, no timeframes are provided regarding the preparation or operation of schemes. Consequently, the interim development provisions would tend to be relied upon, undermining the integrity of the whole planning philosophy.

Construction errors also occur in the legislation. Section 10 empowers the local authority to discontinue the use of buildings; where residents are 'displaced' therefore they must be found satisfactory accommodation. Under the terms of s10(3), the local authority could evict people and raze buildings where it is 'expedient'. The only corresponding obligation is to find other accommodation before the eviction. Such a power is simply reckless; regardless of the intention it represents an affront to good governance.

Another construction discrepancy relates to the compulsory acquisition of land before a scheme is finalized. The applicable legislation—State Acquisition of Lands Act—enables the compulsory acquiring of land for public good purposes. The provision within the Town Planning Act makes no such qualification in referring to using the State Acquisition of Lands Act to compel acquisition. The relevant section purports to apply that other Act on the basis that the acquisition of any land thereunder is expedient for any purpose which appears to it to be necessary in the interest of the proper planning of that area s12 (1). The scope of the State Acquisition of Lands Act would seem not to support the acquisition of land as purported by the Town Planning Act.

Section 17 (4) also is of questionable validity. This provision of the Act attempts to elevate a town planning scheme above the operation of any inconsistent Act, regulation or by-law. That an instrument prepared by a public official can prevail over a superior legislative tool is ridiculous.

Finally, a number of other drafting errors also occur. For example, regulation 9(1) refers to permissions issued under section 6 of the Act. A cursory review of that section shows that it is in fact not at all concerned with issuing permissions.

2.2.2 Subdivision of Land (Cap 140)

Controls over planning and development outside of towns are found in the Subdivision of Land Act. The Act applies to areas as gazetted by the Minister, but excludes unleased State land, urban areas under the Local Government Act, and native reserves under the Native Trust Land Act (s2). Under ministerial order, the Subdivision of Land Act applies to all lands within three miles of any public road of the islands of Viti Levu, Vanua Levu, Taveuni and Ovalau. Land located more than three miles from a town may be subdivided without approval if the lots are at least five acres in size (s4).

For subdivisions which require approval, application is made to the Director of Town and Country Planning, providing basic descriptive details of the land the subject of the application (s5-6). Regulations promulgated under section 19 list additional descriptive information required in the application such as watercourses, important natural or historical features, land availability, and drainage features.

The relevant local authority is also given a month to comment on a proposed subdivision (s7). The Director has wide power to approve applications subject to conditions or in part, or to reject these (s8). In the case of conditional or partial approval, or rejection, the applicant has 28 days to appeal to the Minister (s14).

Comment

The Subdivision of Land Act enforces a basic process for subdividing non-urban land. The exceptions from the application of the Act are expressed ambiguously, though; townships are excepted, as is land within three miles proximate. In practice this uneven approach may

not present difficulty but the drafting does nonetheless remain clumsy. A more pressing criticism relates to the absence of details for processing applications. The Act does not stipulate timeframes for either applying for approval to subdivide nor for the treatment of such applications. Similarly, no detail is given in terms of the considerations for approving or refusing an application. The only guidance is the Director's opinion that development is "undesirable" or "unsuitable".

Minimally, considerable elaboration of these provisions is needed. A much more profound rethinking of how land release and development relates to environmental assessment would be a more satisfying way forward.

2.2.3 Local Government (Cap 125)

Very little capacity to plan for and manage the environment is found in the Local Government Act. Essentially, the purpose of the Act is to create units around which communities can be organized which are then given limited powers to exercise to this end. These powers relate generally to maintaining order in terms of traffic, buildings, and other local facilities. Included within local council remit are powers to ensure that the area remains clean and inhabitable, exercised as by-laws covering the frequency of garbage collection, for example.

Comment

The Local Government Act is an administrative tool, not one for actively planning the use of an area (this is the purpose of the Town and Country Planning Act). Additionally, the Act is not at all engaged with environmental issues. The existence of by-laws protecting against excessive noise or accessing public parks, for example, are concerned only with human amenity value. By-laws are intended to facilitate the peace, good order and government of local areas.

2.2.4 Roads (Cap 175)

The Roads Act enables the construction of public roads, and provides the government with fairly abrasive powers to this end. The rights of adjoining land users clearly yield to the State, as a few examples illustrate. For example, the permanent secretary may possess land for both opening and widening roads, on a compensable basis (s4). Similarly, material may

be forcibly extracted from any land proximate to a public road for the purpose of roadworks (ss7,8). Excavated material and roadwork debris may be dumped on lands adjacent to roadworks (s10). In terms of both governance and environmental issues, the Roads Act is anachronistic and should be replaced.

2.2.5 Water Supply (Cap 144)

The legislation governing the supply of water in Fiji is similar to the Drainage Act (discussed later). Much of the Water Supply Act relates to the infrastructure for delivering water to consumers, and powers to intervene associated therewith. The Commissioner of Water Supply is widely empowered to lay, repair and alter main pipelines to ensure continuity of supply (ss5,9). By-laws specify the details relating to technical specifications of pipes, meters, cisterns, valves and the like (Subsidiary Legislation, s1, s-11). Charges for supplying water occupy a considerable part of the Water Supply Act.

Very little content is concerned with the environmental aspects of water supply. Catchment areas can be declared by the Minister following a two-month notice period. An owner, lessee or licensee in respect of such an area may object to a proposed declaration. Following consideration of such an objection, the Minister may declare the catchment area in whole or in part. It then becomes prohibited to pollute the water contained therein (s4). It is also an offence to pollute water in the waterworks (ie, the water supply system) (s24). Catchment areas are therefore purposed to protect water quality from pollution.

Comment

Catchment areas are a basic concept in the supply of water. As occurs with the Drainage Act, however, no elaboration of the concept is provided: 'catchment area means any area of land or water declared by the Minister to be a catchment area under the provisions of this Act' (s2). The absence of any more substance is difficult to comprehend and again leaves the application of the concept unfettered.

Other problems exist with the legislation. Again, no detail is contained for objecting to the declaration of a catchment area, and the presumption is that such objections will be dismissed. Transparency of process is minimal. The definition of pollution—which only becomes relevant in respect of catchment areas—is deficient and cumbersome: "Pollute

with its grammatical variations and cognate expressions” (s2) has no meaning in either practical or legal terms. Moreover, the definition has a limited anthropogenic application: adding to water a substance which affects its taste, smell or purity, or is harmful to humans (s2). Pollution under the Water Supply Act therefore does not recognize despoilation of water for environmental purposes. Additional to their function as reservoirs of water supply, catchment areas are widely recognized as fulfilling broad environmental services, and indeed are the basis of contemporary management approaches.

Finally, there does not seem an obvious connection between catchment areas and dams. Reservoirs, drains, and weirs are included under the definition of waterworks, but no powers to construct or maintain are apparent. Moreover, there is no elaboration of catchment areas in terms of their purpose and relationship to the water supply system.

2.2.6 Sewerage (Cap 128)

The Sewerage Act provides for the construction and maintenance of infrastructure for the treatment of sewage. Powers to this end are shared between local councils and the Government. The expectation of the Sewerage Act is that councils are responsible for sewerage, with the government being able to intervene in situations where the former is remiss in its responsibilities (s16). The construction of the legislation is somewhat imperfect, but any government involvement in sewerage is intended not to be derogatory with respect to council powers (s3).

The Sewerage Act applies to all towns, and to other sewerage works or systems as specified (s2). Several plants have been brought within the scope of the Act through this mechanism. All proposed new works or alterations to existing sewerage systems by a council need ministerial approval, with the exception of Suva (and other specified towns) (s4). Councils are empowered to enter ‘any lands whatsoever’ and undertake work necessary to service sewerage infrastructure eg., cutting, drilling, digging, removing earth (the removal of material from private properties is not allowed). The only constraint is that ‘the council shall do as little damage as may be necessary’ in undertaking such construction and maintenance work. Damage caused by sewerage system work is compensable by the council (s7).

The Sewerage Act enables areas within a town to be declared as sewerage areas (s3). Once declared, the council formulates and implements a scheme for disposing of 'sewerage' (*sic*, 'sewage') within that area. Several towns have made by-laws specifying the technical requirements of sewerage systems. Such details are the size of pipes, thickness or weight of materials, and general design of system elements. Property owners can be compelled to connect septic works or private drains to sewerage systems.

Comment

The Sewerage Act does not evidence an awareness of environmental considerations. Neither the construction nor operation of sewerage facilities is subjected to any constraints or controls to protect the environment, or to attain an environmental goal. The Act is a product of its time. Even the advent of a new environmental protection regime would likely do little to this end, except if a licence to pollute was introduced and this coerced an improvement in effluent discharge in terms of volume or quality parameters, or both.

The power to declare sewerage areas is a curious one. On the one hand, this would seem to allow for an undesirable land use to be planned for and consolidated into a suitable area. However, there is no linkage between this provision and those provisions exerting regulatory control over actual sewerage works. It would seem sensible to link the two provisions whereby construction of new (or alterations to existing) sewerage systems occurs according to a strategic planning approach as provided for through the sewerage area mechanism. Any work of this type should require assessment of its environmental impacts or another planning approval, with the expectation of agency concurrence and public comment.

2.2.7 Factories (Cap 99)

The Factories Act is to ensure the health, safety and welfare of employees working in innately hazardous factories. As such, the Factories Act is not concerned with establishing or ensuring the environmental performance of factories in terms of the generation of waste, emission of pollution, or energy efficiencies. The Act certainly doesn't apply to the siting, design and construction of factories. It has been repealed and replaced by new occupational safety legislation.

2.3 ENVIRONMENTAL PROTECTION

Legislation to protect the environment has only existed for several decades. In the case of Fiji, no legislation with an explicit environmental protection purpose —such as air quality or impact assessment—has been enacted over this time. A very few other provisions with a protective mandate are found in Fijian law.

2.3.1 Traffic Regulations 1974

Air pollution is not considered at law except for a regulation outlawing the use of a motor vehicle that emits visibly polluting exhaust causing a nuisance or property damage. The application of the regulation is non-existent, as evidenced by current practice. Moreover, this approach lacks any meaningful basis such as identifying emissions and attempting to meet environmental goals. Airshed management is completely neglected and a framework for ensuring air quality is sorely needed.

2.3.2 Public Health (Cap 111)

The Public Health Act is of slight relevance to environmental protection through the concept of nuisance. A common law principle, nuisance has been codified and given a statutory basis to protect public health. Polluted waterbodies (harbours, ponds, rivers, foreshores) are deemed to be a public nuisance (ss57-59). The local authority has powers to compel an owner or occupier to abate the nuisance and to seek a court order in the event of non-compliance.

Comment

The Public Health Act has very limited utility in terms of environmental protection. The Act provides a few remedies for compelling the abatement of nuisance events that may impinge human health (pollution of internal waterways, particulate smoke emissions). Clearly, the Act is not an instrument for regulating and controlling pollution or waste, although it may provide a means for intervening in limited situations, in the absence of other means.

2.3.3 Ports Authority of Fiji (Cap 181)

Port services are maintained by a statutory authority on behalf of the government under this legislation. Regulations thereunder establish some controls over pollution (pursuant to

s63). The discharge of oil, waste, sewage and contaminated ballast into the waters of a port is prohibited unless authorised by the Authority. To assist in implementing these regulations, the Authority in 1998 produced 'Standards for Effluent Discharge to Ports' wherein allowable concentrations of heavy metals, organic chemicals and other pollution parameters are specified. In order to obtain a discharge permit the effluent must conform to these standards. As well, the disposal of solid matter is regulated, although primarily from the perspective of shipping obstructions.

Comment

The 1990 Regulations provide some framework for marine pollution control within the limits of ports and in terms of effluent and direct discharge. The Standards are a practical means of giving effect to these Regulations. However, permission to discharge would need to reflect these standards, perhaps incorporated as a permit condition to ensure enforceability.

2.4 RESOURCES CONSERVATION AND DEVELOPMENT

The overwhelming bulk of extant legislative capacity to govern the environment and natural resources relates to development. Broadly, this law covers access to and the allocation of resources, and their utilisation by developers. Most natural resources occurring in Fiji are subject to some legislative coverage. Generally, though, the provisions are heavily predisposed towards the interests of the government rather than the greater public good or private investors.

2.4.1 Agricultural Land and Tenant (Cap 270)

The relationship between the tenant farmer and the owner of the holding is governed under the Agricultural Land and Tenant Act. Very little other than the roles of the two parties and how they relate is covered. In this context, the only reference as to how the land is to be used is found in provisions relating to extensions of tenant contracts.

Under section 13, the notion of good husbandry is defined in terms of traditional farming practices; for example, constructing terraces, hedges and drains, maintaining soil fertility, controlling pests. The legislation conspicuously does not appreciate limits to the use of

farmland. Issues such as retaining remnant vegetation, preserving groundwater quality, soil compaction, enrichment of surface water, are all neglected in the Act. Whilst the purpose of making land available for farming is fundamental to any leasing system, this must be promoted on the basis of an appreciation of environmental sustainability.

2.4.2 Irrigation (Cap 144A)

The Irrigation Act is concerned with improving agricultural productivity through the optimal use of impounded water. The application of measures to this end under the Irrigation Act revolves around irrigation areas. A Commissioner, appointed by the Minister for specified areas, may declare irrigation areas by notification in the Gazette (ss3-5). Within a gazetted irrigation area, broad powers to promote—and in fact compel—irrigated agriculture accrue to the Commissioner. These include constructing bridges, canals, pumps, sluices and other irrigation works at any time on land within an irrigation area (s7).

An area Commissioner is empowered to adjust agricultural holdings to form fields of suitable size and shape for irrigation. This apparent power of Commissioners to assume land for irrigation areas is reinforced by section 30, wherein a formula for the deprivation of and compensation for property so assumed is described. Essentially, the Commissioner must petition the Supreme Court for the exercise of such powers, providing the landholder with some protection against the forced loss of land. The same provision has a degree of retrospective application: where the Commissioner exercises such powers before applying for authorisation, such application must be made within the following 30 days. If the Supreme Court denies this authority, the Commissioner shall compensate for damages incurred as a result of the possession or compulsory acquisition of land.

Once an irrigation area is created, considerable powers accrue to the relevant area Commissioner. As mentioned, foremost among these are those powers to enter land and construct irrigation works. Irrigation rates may be imposed upon land in an irrigation area (s9). The Commissioner can also specify programmes, practices and standards that must be adopted (s14); irrigation works (s16); and even determine the types of crops which may be cultivated (s12). Offences are created for wasting or wrongfully using water (s21), or polluting irrigation works (s26).

Comment

The Irrigation Act is an instrument designed to optimise agricultural production; environmental needs are unsurprisingly non-existent. Indeed, under the legislation farmers can be compelled to remove vegetation from their land, a policy which has contributed to massive environmental degradation in many countries. No support for protecting the environment is found in the legislation. Even the single provision to protect against pollution is miscast: it is an offence to pollute irrigation works rather than the water.

In terms of governance, the Irrigation Act is coercive and clumsily drafted in parts. Commissioners' power to adjust agricultural holdings, *and* with owner or occupier approval, creates an uncertainty. Combining an assumptive power of the Commissioner with the need for land holder's approval is awkward and ambiguous (s8).

The policy intention is unambiguous though, with the Commissioner having almost invasive powers to direct landholders in the use of those farms included in an irrigation area. In this regard, the capacity of the Commissioner to exercise powers and then retrospectively seek approval is an illogical statutory provision. From both environmental and public policy perspectives, the Irrigation Act needs to be replaced with more contemporary legislation.

2.4.3 Drainage (Cap 143)

The Drainage Act works by first establishing drainage areas under the jurisdiction of a local Drainage Board, which in turn is enabled to carry out particular works in respect of that drainage area. Drainage works are designed to prevent or mitigate flooding or erosion by: physically altering watercourses; installing pumps and associated machinery; and constructing or reinforcing defensive barriers. Watercourses include most natural and artificial bodies of water.

The Controlling Authority (CA) is a peak body under the Drainage Act (being the Land Conservation Board under the Land Conservation and Improvement Act—discussed later). If the CA considers that a parcel of land should become a drainage area, with ministerial consent it must publicise its intention to declare same and receive objections for at least two

months. During this period, any disaffected landowner may object to the CA for consideration and decision thereupon; objectors dissatisfied with the CA's decision may appeal to the Minister within 30 days, whose decision is final. The boundaries and status of a drainage area may be varied by the CA (with approval of the Minister) provided that new areas do not become included (s3). The CA has wide powers to enter onto and assess the status of land for declaring drainage areas.

Drainage Boards are appointed by the minister for each area, comprising at least seven members, two of whom are landowners (s4). The Board is responsible for draining land within the drainage area, being broadly empowered to undertake works to this end.

Much of the Drainage Act is devoted to levying rates for drainage. In extreme situations the Board may sue for the sale of land to recover defaulted payment of drainage rates. Boards may also compulsorily acquire land within their drainage area pursuant to the State Acquisition of Lands Act (s18). A number of drainage areas have been declared under the Drainage Act.

Comment

Considerable capacity for the government to intervene in the use of private land exists under the Drainage Act. The provisions relating to process attempt to emplace a transparent regime, but are very understated with respect to issues such as the appointment of the Controlling Authority, the role of the Minister, and appeal provisions. A major problem is that only landowners within a proposed drainage area may object thereto. Other agencies or interested parties do not have any basis to express views or offer comment on proposals.

The hydrological cycle is a vital ecosystem component. Historical practices such as drainage are being revisited in many places in favour of land use more sensitive to environmental needs. In this context, it is necessary to introduce an environmental basis to drainage; this could be achieved by updating the Drainage Act or subjecting decisions thereunder to some kind of environmental approval.

The Act is silent in terms of the grounds upon which an objection may be made and decided. Nor is there any requirement for the objector to be informed by the controlling Authority or Minister regarding the fate of their objection.

A major deficiency with the Drainage Act is the lack of attention applied to defining drainage area: “means any portion of land declared a drainage area under the provisions of this Act”. No other guidance is given and the potential application or even abuse of the tool is vast. Given the centrality of drainage areas to the operation of the Act, the concept needs defining by reference to environmental and geographical factors, thereby injecting some discipline to the scheme.

2.4.4 Land Conservation and Improvement (Cap 141)

Environmental problems such as erosion, eutrophication, soil compaction, and localised pollution are caused by livestock husbandary and the cultivation of crops. The Land Conservation and Improvement Act provides the statutory basis for the government to act in anticipation of these types of farming-related impacts.

A Land Conservation Board is established by the Minister to generally promote land and water resources conservation (ss3,4). The Board exercises particular capacities to issue orders designed to improve the status of resources at risk. These orders are termed conservation, closing and work orders (ss7-9).

Where the Board deems it expedient for the conservation or improvement of land or water resources, conservation orders may be issued to prohibit, regulate or control most agricultural practices (eg, land clearing, grazing, burning). The orders may be of general application or particular to identified land parcels (s7).

The Board can also order the closure of land that has become despoiled. Once closed, the occupation or cultivation of land, depasturing of cattle, and cutting or destroying of vegetation is prohibited (s8). A third type of order is a work order. Under a work order an owner or occupier can be required to construct or maintain works to conserve land or water resources (s9).

The landowner or occupier can appeal to the Minister against an order. Such appeals must be made within 30 days – the time when orders become operative. The Minister may reject or uphold the appeal, or modify the order (s10). Conservation or closing orders may be altered by the Board at any time (s12).

It is an offence not to comply with any order issued under the Act (s15). Conservation officers are able to enter land to ascertain whether measures are needed for the conservation and improvement of land, and whether conservation and works orders are being adhered to (s14).

Comment

The Land Conservation and Improvement Act is one of the more enlightened statutes relevant to protecting the environment in Fiji. Its purpose is to ensure the integrity of land and water resources which sustain agricultural productivity. As such, the basic scheme of the legislation is sound and in need of only minimal refinement.

The Board is quite pivotal to the legislative scheme and its composition does reflect the main stakeholder agencies (agriculture, works, land, and forests) (s3). The other five positions should be cast so as to fully represent the wider public interests in land and water conservation, in particular the head of the Environment Department, a peak conservation NGO, and leaders of the farming community or lobby.

Conservation orders are a key tool for addressing land degradation. However, the empowerment of the Board to issue these orders lacks precision: ‘where it deems expedient for the conservation and improvement of land or water resources’ (s7(1)). The potential scope or reach of this expression is sorely in need of clarification and circumscription.

The terms of closing orders similarly needs refining. A range of ordinary farming activities is prohibited from areas that are closed due to despoliation. This provision should be recast to demand restoration of despoiled areas. Whilst prohibiting destructive activities will ensure that no further degradation occurs, in some situations the loss of resources will be of such severity that land and water resources will need to be actively restored.

Finally, the Board's ability to amend or resolve orders should be better cast. As is, no assurance is provided to either the land user or the wider public as to the operational life of a conservation or closing order. An expiration period should become obligatory for each order, with an automatic review triggered by the imminent expiration of orders. This approach would add a degree of clarity to the scheme, and also compel land users to strive to improve the condition of their land so that orders may be lifted.

2.4.5 Animals Importation (Cap 159)

The Animal Importation Act controls the importation of animals into the country through a prohibition and permission scheme operating at the barrier. There are two key elements of the scheme: the importation of animals and derivatives requires permission (s4); a standing ban exists in respect of certain listed species (s5). The specific requirements of importation are detailed in regulations, such as quarantine, transportation, standards, and fees.

Comment

The Animals Importation Act is designed to protect the animal husbandry sector from the potential exotic diseases and pest hazards that may emanate from introducing livestock and poultry to Fiji. These hazards represent a threat to agricultural productivity rather than to the environment or resources, so the scheme is of marginal utility in terms of environmental protection.

The introduction of diseases or pests such as ticks represents a negligible environmental threat as these tend to associate with or are particular to the host and unlikely to become established on populations of native species. The depauperate resident animal assemblage further militates any likely impacts of this nature.

An environmental issue not anticipated under legislation is land degradation caused by feral animals. The legislation doesn't provide for intervention to remove or destroy livestock that has escaped or been released, multiplied in the wild and now impacts upon water and soil resources through erosion, compaction, and pollution. Even some capacity to control stocking relative to carrying capacity would be a useful mechanism at the disposal of government.

2.4.6 Plant Quarantine (Cap 156)

The Plant Quarantine Act is designed to anticipate and enable action in response to plants that are pestiferous or injurious. These actions may be exercised both at the border and in relation to plants already in Fiji. A regime of restricting the importation of plants subject to ministerial permission is established with commensurate inspection and related powers (ss5–28).

Under the Plant Quarantine Act, inspectors have a very crude power to instruct the owner or possessor of infected or infested plants to eradicate or control the pests and destroy or treat the plant (s29). Subsidiary legislation exists elaborating the Plant Quarantine Act. This detail relates to the inspection and movement of vessels, eradication of noxious weeds, quarantine areas, and prohibited weeds.

Comment

The Plant Quarantine Act is very much oriented towards protecting primary industries from infestation by noxious plants. In this regard it does offer a basic set of provisions in so far as border control is concerned. Domestic control is elaborated under regulations but more could be done to clarify such issues as control measures, landowner and occupier duties, and inspectorial powers to determine infections or infestations. The Act has no relevance as a tool to assist in biodiversity conservation.

Equally, it is worth emphasising that the legislation is concerned only with plant pests, not pest plants. Non-native plants that are pests to either the environment or agriculture are not controlled under the Plant Quarantine Act, unless these are noxious or infected with a pest. Many countries are labouring to eradicate or remove pest species that have crossed their borders illegally, or because no controls apply to the translocation of exotic species. The absence of such controls portends as a similar potential problem for Fiji.

2.4.7 Pesticides (Cap 157)

Control over pesticides is achieved through a registration scheme under the Pesticides Act which requires pesticides to be registered before being made available for sale. Regulations specify the type of information needed for registration and labelling (ss3,4,5,10).

Registration is a common method for controlling pesticides and other hazardous chemicals. In Fiji, this control relates only to the availability of pesticides but not to their use, although regulations may be made under the Pesticides Act in respect of the latter.

Whether government should become involved in controlling actual use or this should remain the prerogative of the farmer is an interesting consideration. The current approach is premised on the user being responsible; that is, once government has approved a pesticide for sale and without other controls existing, the pesticide is safe to use under normal applications.

It is now well recognised that a number of environmental issues emanate from the use of pesticides. These include: runoff or diffusion of pesticides through the atmosphere; chronic toxicity loads in non-target species; bioaccumulation through ecosystem processes; and chemical transformation over time.

Almost certainly, few farmers are familiar with these types of issues, and it may be timely for government to consider measures to control the actual use of pesticides.

2.4.8 Forest (Cap 150)

Up until fairly recently, forestry in Fiji was governed under the Forest Act. Different types of forestry areas were defined under the Forest Act, with corresponding requirements for the licensing of forest-related activities described. Little definition of forest types was provided in the Act, though, with the Minister essentially defining these through declaration. The categories of forest were –

- reserved forest (unalienated State land and land leased to the State)
- silvicultural area (reserved forest not being a nature reserve)
- native reserve (reserved forest not being a silvicultural area)
- protected forest (native land not being reserved forest)

With the exception of protected forests, the Minister had unfettered discretion to declare land as any of the forest categories. In that lattermost case, the consent of the NLTB was also required (ss6,7,8).

The Forest Act made clear that a grant or contract is the vehicle through which rights in respect of forests are acquired, and identified a number of activities the undertaking of which were offensive in reserved forests without such authorities. These activities included cutting, collecting or removing forest produce, setting fire, digging up land, erecting buildings, interfering with boundary markers, and other actions associated with forestry (s12). A hierarchy of offences was established according to other forest categories: in a protected forest it was illegal to cut, fell, lop, burn, and remove any forest produce; and to cultivate or dig up land. By contrast, on alienated land it was an offence only to remove any forest produce (s12).

The rest of the legislation was concerned with the enforcement of offences and the application of fees and royalties. Licences to practice forestry were issued by the Conservator of Forests, in concurrence with other decision matters as per: licences for native land required NLTB prior approval; licensing in respect of State land needed the Director of Lands' consent; a licence to remove forest produce from alienated land required consent of the owners or lessees (s33). Lengthy subsidiary legislation provided the administrative details of the forestry system.

Comment

The Forest Act is very outdated, revolving around prohibitions and offences rather than the active management of forest resources. A more enlightened statute would detail how the various forest types are defined and created, and provide for legislature oversight of these processes. In particular, forests should be managed according to explicit and publicised principles, preferably under an instrument such as a management plan. This approach would ensure that the resource is being managed transparently in an agreed manner, over a prescribed period.

In this context, forests could be managed for multiple purposes, such as conserving wildlife and achieving a sustained level of harvesting. Tools such as permits, closures, and harvest strategies would be detailed in a management plan, including how these would be deployed in pursuit of forestry goals.

Environmental conditions could be attached to approvals to harvest or to the management regime—such as to minimise the spread of forest disease, for example, or revegetate a certain portion of land—to ensure the sustainable use of forests in succession.

2.4.9 Forest Decree 1992 (No. 31 of 1992)

The extant Forests Act was repealed and replaced by Presidential Decree in 1992. The general scheme remains similar to that under the Forests Act but some attempts to clarify and broaden the forestry agenda have been added.

A Forestry Board is constituted to advise the Minister with respect to forestry policy. Membership of the Forestry Board reflects key stakeholders' interests in forestry, including government officials, forest owners, industry and the public (s4).

Forests and nature reserves are maintained under the new law, but with some substantial changes. Unalienated State land, unalienated native land already reserved for a public purpose, and land leased to the State, may be declared by the Minister to be a forest or a nature reserve. A recommendation from the Forestry Board must precede this declaration. Similarly, upon Forestry Board recommendation, the Minister may compulsorily acquire alienated land for reservation (s6). Forestry can only occur within a forest or nature reserve, so the reservation of land is precursory to any activity (s28).

Once established, forest reserves are managed to permanently provide “the optimum combination of benefits of protection and production of which they are capable”. On the other hand, the management of nature reserves is for the “permanent preservation of their environment, including flora, fauna, soil and water” (s7). A hierarchy of uses is then described whereby extractive activities—such as felling timber, removing earthen materials, fishing and trapping—are allowed only under licence, dependent upon the tenure of the land unit. Most such uses within forest and nature reserves require licensing; on State or native land “not being alienated” the felling of timber, extraction of forest products and clearing of land needs to be licensed; on alienated land only felling or extracting timber requires a licence (s8).

Licences are issued by a licensing officer subject to conditions. The prior consent of various statutory and other bodies is required, depending upon the tenure of the land; these consenting parties include the Native Land Trust Board, Director of Lands, lessees and owners (s10). Licences are valid for up to ten years, or the Conservator can licence for up to thirty years in respect of processing facilities (ss11,13).

An important addition to the forestry system is the development of logging plans. The issuance of a licence is now contingent upon a logging plan being prepared, wherein are specified the annual harvest quota, minimum tree size and retention rates, and any reforestation requirements. The Forest Decree anticipates annual revisions of the logging plan. Compliance with a logging plan is a condition attached to licences (s14).

Provisions regarding offences and the enforcement thereof have been strengthened. The maximum penalty for an offence is \$10,000 or a year's imprisonment (s29).

Comment

The Forest Decree provides a more elaborate framework for undertaking forestry than existed under the previous legislation. The approach remains very much based upon an offence regime, though, notwithstanding the addition of some management-related provisions. A very useful inclusion in the Forest Decree is the concept of a national forestry plan. Unfortunately, though, no elaboration of the Plan is provided; indeed, the only reference to the National Forestry Plan is as a task for the Forestry Board.

Developing a National Forestry Plan should be a mandated obligation of the Forest Decree, wherein should be stipulated the Plan's purpose, its contents, consultation and timing, and operational life. Licences to forest should be linked explicitly to the Plan to ensure that aggregated production and conservation targets are pursued on a licensee basis. Individual logging plans would then flow from this linkage. Notwithstanding this absent link, the fact that licences are now linked to individual logging plans is welcomed.

The Forest Decree has attempted to define different land tenures. However, the definitions of alienated and native lands and their use within the legislation are somewhat ambiguous. For example, alienated land is defined whereas the scheme itself revolves around

unalienated land; ditto with respect to native land. The definitions are such that it is neither intuitively obvious nor clear at law exactly what constitutes unalienated land, despite this concept being pivotal to the system.

Another concern with the Forest Decree is that licences to undertake forestry activities are issued by a licensing officer, as appointed under Regulations. The issuance of licences is the paramount decision with respect to forestry, as it is in many natural resources arenas. This being so, such a peak function should be reserved to the Minister or an executive decision maker; the Conservator of Forests is an obvious functionary. The Conservator has very few functions to undertake, the only significant policy role being to suspend or revoke licences for violating a licence condition or the Forest Decree. That this revocation power reposes with the Conservator is perfectly appropriate. It is illogical, however, that the complementary power to originally issue licences does not repose with the Conservator, but rather with a licensing officer.

2.4.10 Mining (Cap 146)

All land in Fiji is essentially open for mining under the Mining Act, with some qualifications. Minerals are the property of the State regardless of the status of the land on which they are located (s3). The government may also declare any parcel of land up to 250ha to be a government protection area, allowing the Director of Mines to exercise tighter control over the minerals found therein by tendering for access (s7). The Minister may variously prohibit or restrict access to minerals by order, or otherwise grant these rights exclusively to a preferred developer (s4).

Some types of land are closed to mining. For instance, farmland and residential properties can only be accessed consensually with the owner or occupier. Reserved forests and water supply areas require the consent of the responsible public executive official. With ministerial approval however, the Director may issue tenements in respect of closed lands (s11).

Prospecting and mining occurs pursuant to eight types of tenements. The schemes are conceived to generally be progressive from exploration through to development. The

duration of tenements and their scope varies according to the type of tenement and the needs of the minerals developer. Prospectors have fairly broad rights to enter upon land, being compelled to only provide advance notice. Rights to prospect give primacy to the holder of the tenement: prospectors can devegetate land, extract water and dig shafts with few constraints (s24).

Following prospective exploration, tenement holders may proceed to seek permission to mine. Permits are designed for short-term mining ventures whereas mining leases provide for mines with a productive life of decades (ss 31,32). Rights granted under mining tenements are expansive; landowners or occupiers merely need to be informed of intended mining activities.

The Mining Act does contain provisions relating to damages and compensation. Tenement holders are required to compensate for surficial damage as a result of prospecting or mining. If the parties cannot agree as to the level of compensation the Director determines the amount (s40). There is a requirement to restore land by filling extraction damage and removing marking posts (s43). Lengthy regulations specify the technical and administrative details of mining operations.

Comment

The Mining Act is fairly typical of legislation in other Commonwealth jurisdictions. The regimes established by and under the Mining Act are purposed to expedite the prospecting of minerals. The clear legislative intention is to ensure that land is available for mining, with the rights of the landowner tending to yield to those of the miner. That much said, the legislation anticipates rather more development scenarios than exist in Fiji, and the range of tenement types could be reduced.

In this context, the Mining Act does seek to afford some protection to parties impacted by mining related activities. Some uncertainty pervades in terms of the timing for compensation payments; in particular, whether compensable damage is payable prior to or following operations.

The principal decision maker under the legislation is the Director rather than the Minister. This approach is unusual insofar as decisions about accessing minerals would tend to repose with elected ministers rather than officials. In practice, these powers may often be delegated to agency heads but the Mining Act doesn't give the Minister this option, as the Director is the responsible person.

The Minister does possess some quite extraordinary powers, though. One of these relates to the definition of minerals, which is expressed in detail in the statute. Notwithstanding this definitional detail, the Minister is able to include or exclude substances by gazettal. The rationale for this approach is not obvious; that the legislature should so carefully elaborate the definition of minerals but then allow the Minister to alter this.

More worrying is the convention adopted within the legislation of setting aside the enacted provisions thereof by ministerial discretion. For example '... the Director may, subject to the approval of the Minister, grant a mining tenement to any person on such terms and conditions ... whether in accordance with the provisions of this Act or not, as the Minister may think fit...' (s 11(3)). The effect of this provision is to allow the statute to be set aside for the purpose of setting conditions at the whim of the Minister (in this example). The existence of such provisions is reckless and in need of reform.

2.4.11 Quarries (Cap 147)

The Quarries Act is a complement to the Mining Act in that it applies with respect to the extraction of minerals not covered by that other statute. The orientation of the Quarries Act is very much towards safety in the quarry workplace. It is an extremely brief statute, comprising only four sections. In fact, the Quarries Act simply enables the making of regulations, and this is where the substance of the legislation is found.

The regulations under the Quarries Act are considerable, being concerned with maintaining a safe working quarry site. Some specifications address health and sanitation but the environmental impacts of quarrying are not anticipated at all.

2.4.12 Petroleum (Exploration and Exploitation) (Cap 148)

The legislation governing petroleum development borrows heavily from the comparable Australian legislation. Indeed, many provisions of the P(EE)Act are direct extracts from that other legislation. It is therefore unsurprising that the petroleum regime evidences a clear and mature structure and drafting precision, given its origins.

The P(EE)Act does depart slightly from the Australian model insofar that whilst petroleum is the property of the State, this only applies to designated areas in Fiji's case (s3). The Minister may designate areas of the continental shelf under the Continental Shelf Act. The P(EE)Act then applies in respect of those designated areas, rather than the continental shelf entirely. Within designated areas, the State is empowered to explore for or recover petroleum with 'full liberty' (s4).

The regime revolves around the Minister declaring blocks (graticulated sections of the earth) open for development (ss5-6). Exploration licenses are granted by the Minister following application: "Subject to the provisions of this Act and to any terms and conditions not inconsistent therewith that he may think fit" (ss 15,16).

Renewals of exploration licences can be made in respect of half the area of the initial licence. Provided that conditions have been observed the renewal will be granted (ss19,20). This practice of relinquishing half the area under tenement is to ensure that land is actively explored, and not left idle.

Following the discovery of petroleum, explorers may apply to the Minister for a production licence over half the prospective area. Again, if the holder of the exploration licence has discharged the requirements of that tenement, a production licence will be granted (ss25-27). Similarly, first renewals of licences to produce will be granted by the Minister (s30).

There is attached to production licences a requirement to carry out a level of work specified by the Minister (s32). If dissatisfied with the recovery of petroleum, the Minister may further direct the operator to increase the recovery rate, or decrease it as well, to achieve production targets (s33).

Pipeline licences may also be issued to production licence holders or their partners. The legislation is again constructed to assure the holder of the precedent tenement of priority in being granted subsequent tenements, including pipeline licences (ss37,38). The P(EE)Act does require the Minister to have regard to the public interest and interference with flora and fauna, amongst other matters, when issuing licences (s38).

Environmental issues are given explicit currency under other provisions of the legislation. Licences are compelled to employ good oilfield practices, which are designed to protect the environment from pollution by oil (s62). Regulations require all applications—both original and renewals—for production and pipeline licences to be accompanied by an environmental impact statement (EIS) (rr7-11).

Comment

The legislation for developing petroleum resources is distinguished from other Fiji statutes for its clarity, logic and precision. The P(EE)Act is very faithful to the Australian statute from which it is extracted so the construction and drafting exaction is easily understood, given the importance of offshore oil and gas to Australia. Unlike the case with many other natural resources statutes in Fiji, the P(EE)Act designates the Minister as the decision maker rather than the Director, a more appropriate approach for public policy towards natural resources.

Some problems with the P(EE)Act are to be found, however, inherited from other development legislation. A particular offending provision is the ability of the Minister to reserve blocks for preferential allocation ‘to any person on such terms and conditions, whether in accordance with the provisions of this Act or not, as the Minister may think fit...’ (s6(2)). This purported setting aside of the Act for the issuing of a tenement is borrowed from the Mining Act.

The P(EE)Act excludes from the licensing regime thereunder pipelines constructed by the State. As custodian and protector of the public’s interest the State should apply to itself the same rigours as it applies to other operators.

Applying the P(EE)Act only to designated areas—rather than throughout the country—is odd. This approach leaves unclear in whose property or possession petroleum resources of the continental shelf are before they become the State's within discrete parcels of 'designated areas'.

The regulations refreshingly demand that applicants furnish an EIS with applications to access or develop resources. The regulations are short on details, and the EIS cannot be considered as a true assessment in terms of public comment, timing, monitoring, and alternatives. Nonetheless, the P(EE)Act does emerge as a statute worthy of emulation, possibly as a model for some resource sectors.

The P(EE)Act was amended in 1995 to modify some aspects of the permissions regime. The offensive section 6 discussed above was modified slightly to qualify the ability of the Minister to essentially set aside the Act. The new provision now reads: "The Minister may ... grant an exploration licence, where fully justified by technical or economic circumstances, under terms and conditions which in respect to specific time frames or economic circumstances or quantitative items are different from this Act, provided that the licence shall generally follow the provisions of the Act."

The provisions relating to the renewal of exploration licences were amended, and a new concept of an appraisal area introduced. The purpose of appraisal areas is to enable the discoverer to undertake further evaluation work with a guaranteed continuity of tenure (s22). The provisions relating to the award of production licences have also been strengthened in favour of the licensee, although the renewal provisions are now somewhat obfuscated: "The renewal of a production licence may be granted under terms and conditions as are prevailing in Fiji at the time of renewal upon such conditions as may be negotiated".

The main policy additional amendments to the P(EE)Act are the inclusion of petroleum agreements. The minister is now empowered to enter into a petroleum agreement with licence holders "embodying terms and conditions on which petroleum exploration, development, production and transportation are to be carried out by such person." Subsequent provisions relating to the award of licences are read in light of the petroleum

agreement. The intention of this new instrument is to enable development to occur under a more strategic framework agreed between the government and developers.

This new approach is laudable, but the nature of the legislative construction has given rise to two problems. Firstly, the existence of a petroleum agreement should abnegate the need for subsequent approvals and licensing as these should be captured in the head agreement. As cast, licences for the various phases of development need to still be obtained by prospectors. This observation relates to the second problem with the new provisions; the drafting does not satisfactorily address the situation where developers have not entered into a petroleum agreement. That is, the award of licences assumes that applicants will have a petroleum agreement in place, without this being a requirement. As drafted, the P(EE)Act is unworkable in those circumstances. Either all applicants must be required to enter into petroleum agreements, or licensing needs to be decoupled from petroleum agreements.

Despite the relative sophistication of the P(EE)Act, to a large extent the legislation is irrelevant. Fiji is not a petroleum producing nation, having to rely upon imports to meet its energy needs. There is also no prospect of petroleum reserves being discovered. So although the P(EE)Act is very well framed to regulate the sector, it will remain unused on the statute books.

2.4.13 Petroleum (Cap 190)

The Petroleum Act is concerned with the laying of pipelines (development is administered under the Petroleum (Exploration and Exploitation) Act). Under the Petroleum Act, the Minister has largely unfettered power to permit the construction of pipelines for conveying petroleum in, on or under any public or private land, and imposing conditions thereupon (s9). Under regulations, the release of oil from vessels and associated infrastructure into the sea is prohibited (r6). In terms of onshore oil pollution, a \$100 fine applies in respect of the escape of petroleum which may percolate to the sea, stream or river (r 50).

Comment

The ministerial power to lay pipelines is worrying, as the statute provides no framework for decision making, especially in terms of avenues for redress or other recourse by landowners or occupiers. A logical approach would be to specify the expectations of pipeline laying in

an MOU with the Department of Environment. On the other hand, the impact of pipelines is very localised and there is no potential for further expansion of this infrastructure in Fiji, so the matter is not pressing.

The prohibition on the release of oil from vessels also lacks any considered detail. For example, the regulation doesn't distinguish between accidental or deliberate discharges, nor anticipates the emergency release of oil. Polluting non-tidal waters through the release of oil is not prohibited; indeed, tidal waters are not even defined. Similarly, in terms of onshore storage no offence exists for polluting the terrestrial environment through oil pollution.

2.4.14 Fisheries (Cap 158)

The regulation of domestic fisheries in Fiji is based upon an offence and permissions scheme maintained under the Fisheries Act. A licensing officer may grant licenses to commercial fisheries on an annual basis. Recreational fishing is not covered by the Fisheries Act, nor is fishing from the shore for trade or business with a line or with a spear (s5). Licensed fishers must register their vessels, which again requires annual renewal (s6).

Taking fish or attempting to take fish without a licence where one is required is an offence. Contravening licence conditions or regulations is also offensive to the Fisheries Act. Dynamite fishing is prominent as an offence, although the Minister may permit the use of dynamite to any person on a discretionary basis (ss10,11).

Customary fishing rights are important under the Fisheries Act. A Native Fisheries Commission is established to inquire into and decide upon the existence of customary fishing rights (ss14-16). Once determined, the details of qoliqolis are formally registered and preserved in perpetuity (s19). Rules of procedures for determining native fishing have been prepared under subsidiary legislation.

It is an offence to fish in a registered native fishing area, with a few exceptions (s13). Members of the mataqali do not require a licence to fish in their area. Recreational fishing with hook and line, spear and portable fish trap is excused from the additional regulatory

requirements associated with a qoliqoli. For other situations—commercial fishing particularly—a permit to access the qoliqoli is needed. Native Fisheries Commissioners grant permission at their discretion, after consulting with the customary fishing rights holders who may be disaffected thereby (s13). Normal licensing aspects still apply in addition to these permitting rules.

Regulations under the Fisheries Act specify technical details such as fees, mesh, dimensions, minimum fish sizes, and prohibitions (such as against the taking of dolphins). Amendments to these regulations have considerably elaborated the commercial fishing of oceanic species. An offshore licence is now required to fish for listed tuna species and deepwater snappers is now regulated; separate offshore licences are required for each category (r4(A)). These regulations allow the Minister to determine a total allowable catch for these identified species and award catch quotas to the holders of offshore licences (r4(B)). The capacity to determine a fishery TAC already existed under the Marine Spaces Act, for the purpose of making the surplus available for foreign fishing. No such TAC had been set for tuna or indeed other species, until very recently.

The amendment regulations have also expanded the enforcement aspects of tuna fishing. The fishing of species under either category by area or vessels can be prohibited while the use of set nets for fishing these species is banned. Monthly fisher records by weight and location of catch are required. The regulations also enable the deployment of observers on board fishing vessels holding offshore licences. Infringing any of these licence conditions may lead to loss of the licence or quota.

Turtles are treated as fish under the Fisheries Act; regulations have imposed a minimum carapace length and prohibit disturbance with eggs and nests (r20). Separate regulations have been promulgated more recently to improve the status of turtles. Under these 1997 regulations, it became an offence until the end of December 2000 to molest, take or kill any turtle, or sell any shell or meat. The regulations enable this prohibition to be extended thereafter by gazettal (r20A).

Regulations also extend protection to other species at risk of over exploitation. Beche-de-mer are subject to export restrictions, and giant clam and live fish exports are prohibited (rr25A,B). Prohibitions on using underwater breathing apparatus are also in place under regulation. Penalty levels were increased greatly in 1991, by up to ten times in terms of monetary fines and a doubling in gaol sentence.

Comment

The Fisheries Act is similar to the Forest Act is merely providing for the creation of offences under a minimal licensing regime. There is little capacity under the legislation to actively manage fisheries resources for a societal objective. Indeed, the long title is ‘An Act to make provision for the regulation of fishing’.

More contemporary legislation should compel the determination of fisheries and the preparation of fishery-specific management plans. The process of management planning should follow prescribed timelines and consultation requirements. Management plans would in turn be disallowable instruments, ensuring parliamentary oversight of natural resources management.

The role of the Minister in fisheries regulation is peculiar. Licenses to fish—the peak decision under legislation—are granted by a licensing officer rather than by the Minister. Whilst it may be argued that officials should exercise this power under delegation (itself a difficult argument to maintain) in Fiji’s case the Minister doesn’t even possess this power, let alone the corresponding power to delegate licensing. The Fisheries Act therefore precludes the elected government from assuming responsibility for custodianship of the public’s interest in fish resources.

An additional flaw with licensing is that licenses to fish cannot be revoked by officials or even the Minister. Licenses can only be cancelled by a court following conviction for an offence against the legislation or for contravening licence conditions. As cast, this provision may be conceived to protect licences from arbitrary or injudicious actions by fisheries officials. However, it does mean that the government cannot intervene to halt fishing in the event of observed misbehaviour or abuse of licensing terms.

The validity period of licences is inappropriate to resource stewardship and formal planning. Licences are valid for only one year, encouraging operators to maximise extractions during this time and mitigating against long-term resource sustainability. Nor are commercial fishers able to plan for fishing operations on the expectation of continued access to stocks on pre-defined terms, given the lack of succession in the system. Even then, the Fisheries Act doesn't expressly provide for licence renewals (although forms exist for this purpose under subsidiary legislation).

A final licensing point relates to native fishing. The requirement to hold a licence to fish as well as a permit to access a qoliqoli seems excessive. The reason for having another system for qoliqoli fishing is appreciated. However, this system should operate as separate regime rather than as additive, as is the case.

Another very real shortcoming with the Fisheries Act is that it assumes non-commercial fishing ('by way of trade or business') is less in need of control than fishing for profit. The catch and effort capacity of non-commercial operations clearly is much less than for a fitted trawler or longliner. However, subsistence and artisanal fishing can employ motorised and mechanised techniques, not necessarily relying upon low technologies. And especially in countries with demography like Fiji's, the non-commercial sectors are manyfold more numerate than the licenced commercial sector. The catching capacity therefore may well exceed the resource sustainability but be outside of regulation.

The move towards quotas reflected in the 1990 regulations is to be welcomed. Three apparent limitations arise with this approach, though. Firstly, no such quotas have been allocated following the setting of a TAC in 2002; the scientific basis of this TAC has even been the subject of severe questioning. Moreover, this TAC only applies to the tuna longlining fishery. Linking quotas to a total allowable catch or effort is almost necessary.

The second problem with the quota regulation is whether it is supportable by the parent legislation. The regulation making power does not specifically refer to quotas nor does the generality of the construction of this head of power appear immediately to enable such a

regulation. Quota is ideally transferable between participants in a fishery; the Fisheries Act licensing provisions would prevent any such transfers being made.

Thirdly, under the Fisheries Act, the Minister has been required for decades to establish a TC in the context of foreign fishing under LOSC. No such TAC has been established so the commitment to manage fisheries on a sustainable basis is questionable.

A final observation on the anachronistic Fisheries Act relates to destructive fishing with explosives. The legislation very explicitly bans this type of fishing and the sale of fish so taken. The Minister may, however, permit fishing with explosives and the transporting and sale thereof by fisheries officers. Quite simply the Fisheries Act contains two policies in complete contradiction which further erodes the integrity of the legislation.

2.4.15 Marine Spaces (Cap 158A)

As discussed earlier, jurisdiction over offshore areas derives from the Marine Spaces Act. This statute also regulates foreign fishing in the EEZ (s12). There is again a high degree of fidelity to the LOSC in terms of access to Fiji waters and the conditions which may be applied to foreign fishing vessels. These include: fishing times and areas; fishing gear; entry into port; catch and effort statistics; observer and research programmes; and transfer of technology (ss13-14). Regulation making provisions similarly purport to cover a wide range of administrative and operational matters for controlling foreign fishing (s22).

Detailed regulations (miscast as being prescribed under section 20 of the Act) have been promulgated. Under these regulations, distant water fishing nations (DWFNs) should prepare a fishery plan preliminary to actually being awarded licences to fishing vessels. Vessels so licensed must satisfy reporting demands and be willing to accept fisheries officers and observers on board (s34).

Most profoundly, the Minister is required to determine “the total allowable catch in respect of every fishery within the exclusive economic zone” (s13(1)(a)). The portion that Fiji cannot harvest itself may be available for foreign fishing, as required under LOSC.

Comment

The regulations addressing foreign fishing pertain to the administration of licensing rather than to the management of fisheries. Moreover, the provisions supporting a DWFN fishing plan are essentially voluntary. Therefore, whilst the structure and general flavour of the foreign fishing requirements appears adequate, considerable more active management on the part of government is needed.

The TAC for only one fishery—tuna longlining—was determined for the first time in 2002, decades after the statutory obligation on the Minister. As well, the scientific veracity of that much delayed determination is highly questionable. Another problem is that only tuna fisheries are determined under a TAC. The government is therefore disregarding requirements under both the Marine Spaces Act and LOS to determine TACs for all fisheries.

Finally, the inclusion of fisheries controls in legislation that is ostensibly designed to establish offshore zones is less than convincing. There is some logical connection between the two subjects. However, the approach taken does frame the existence of offshore jurisdiction as having a singular fisheries nexus to the preclusion of other maritime users. Attention to this situation is warranted.

To this end, the government has recognised the inherent awkwardness of regulating foreign and domestic fishing under different legislation (refer ‘Tuna Development and Management Plan’. The draft Fisheries Management Bill (described later) attempts to remedy this situation in the context of improving the management of fisheries generally.

2.5 CONSERVATION OF BIODIVERSITY

The policy area of conservation is very neglected in Fiji. No statutes expressly address the protection of wildlife or the reservation of areas for preserving habitat or species. A very few Acts contain provisions which might be used for a conservation purpose. As will be seen, these do not amount to an awareness of the conservation needs of biodiversity.

2.5.1 Forest (Cap 150)

No comprehensive legislation exists enabling the establishment and maintenance of protected areas. Capacity to this end is therefore found in provisions of other statutes.

As described earlier, the Forest Act previously regulated forestry activities. This regime does also provide for the non-extractive use of forests reserves. Once designated as a forest reserve, and thus within the forestry regime, the Minister may declare in whole or part any such area as nature reserves. Nature reserves are therefore nested within reserved forests (s7). The 1992 Forest Decree maintains nature reserves, so the Forest Act system needs to be described.

A small portion of the reserved forest estate has been declared nature reserves, as specified in subsidiary legislation (s26). The general restrictions applicable to reserved forest apply in respect of nature reserves, revolving around the need for approval to undertake any extensive or destructive work (s12). Additional limitations are imposed in respect of nature reserves; a licence to cut, graze or reserve forest produce will only be issued where this is purposed to conserve the flora and fauna; hunting and fishing licences are issuable only where it is “necessary or desirable” to kill any species. Regulations may also be made to control entry into nature reserves, although none have been promulgated.

Comment

The Forests Act enabled reserves to be set aside for the ostensible purpose of nature conservation, although this is not explicit and must be construed. Herein is one major deficiency with the legislation: the conservation of nature is not an object or purpose. It is therefore not obvious as to how the Forests Act should be administered in this regard. Problems may also be encountered if the validity of a ministerial declaration is challenged without the intention of the statutory provisions at all evident.

A second deficiency arises from the discretion afforded to the Minister to establish or disestablish nature reserves (as in the case with reserved forest more generally). The Minister is unfettered in this regard, providing neither comfort to forestry operators in

terms of continued access to a forest coup nor security for the conservation status of a nature reserve. A remedy would be to compel parliamentary approval or to subject declarations to disallowance.

The lack of active management is a substantial shortcoming with the creation of nature reserves. The legislation does not enable, let alone demand, the preparation of a management plan or other similar instrument. Without such capacity, the values for which the nature reserve was created cannot be assured over time—if indeed it is possible to ascertain the original purpose for creating the nature reserve.

A fourth, and equally major, constraint to creating conservation reserves under the Forest Act is that only forested areas can be so conserved. Land worthy of being reserved for conservation purposes outside of a natural forest therefore needs constituting under other legislation. This creates a potentially disjointed reserve system with reserves existing under separate statutes for different purposes. However, other legislative capacity to reserve areas is very limited and it is simply not possible to conserve a diversity of ecosystems. Mangroves, foreshores, bushland and coastal waters may all warrant conservation, but cannot be reserved under legislation.

One of the few other statutes of passing relevance is the National Trust for Fiji Act (Cap 265). This Act establishes the Trust with several purposes relating to the preservation of land, buildings, and other artefacts. Its functions are mainly concerned with promotion, with an emphasis on historical and palaeontological interest (s3). As such, this statute offers very little support for conserving biodiversity.

As stated above, nature reserves are maintained under the 1992 Forest Decree. The management of nature reserves is now for the “permanent preservation of their environment, including flora, fauna, soil and water” (s7). The Forest Decree still does not demand any active management of nature reserves, though, nor are tools for management available. So whilst the clear conservation mandate in respect of nature reserves is welcomed, the legislation provides no assistance in terms of preserving biodiversity. In fact, forestry and other extractive activities are allowable uses of nature reserves.

2.5.2 Rivers and Streams (Cap 136)

The Rivers and Streams Act is a brief statute enshrining the rights of the public to have access to riparian waterbodies. An easement exists along all riverbanks for public access, except where controls under the Town Planning Act have altered the status to another use (s3).

Residents living adjacent to rivers and streams may apply for additional rights to extract water for consumptive purposes (s7). Similarly, these classes of people may seek to build on riverbanks and encroach upon or impede public access thereto (s10).

The Director of Lands is the responsible decision maker on these matters. Under the Act, any person opposing an application may object within 30 days of the application and objectors may appeal to the Minister if dissatisfied with the Director's decision (s11).

Comment

The Rivers and Streams Act is noteworthy for its advocacy of the public interest and the standing it gives to the community. Comparable provisions are uncommon in other legislation in Fiji.

The Act could be broadened to capture other aspects of riverine management, such as preserving water quality and better controlling extraction by adjacent land users. Additions of this nature would shape the Act as much more of a management tool than it currently is.

2.5.3 Birds and Game Protection (Cap 170)

Birds are protected from injury or take by the Birds and Game Protection Act, except for those species specified under schedules as not protected or treated as game (ss2,3). The former category includes non-native species such as the Malay turtle dove and mynahs. The Fijian wood and fruit pigeons are defined as game under the second schedule. In fact, these two species are the only defined game in Fiji. To take any game listed in the second schedule requires a licence issued under the Act (ss7,4). Closed seasons can be declared in the third schedule; the open season for the two game species is one month beginning 15th May. The Minister may alter schedules without constraint.

Comment

Wildlife is virtually unprotected in Fiji. The Birds and Game Protection Act is purported to facilitate hunting rather than to protect wildlife from intentional or accidental harm. Because of Fiji's very poor wildlife complement, the Act may be adequate in this regard. However, the situation is rather different offshore where Fiji waters sustains an abundance of marine species. It therefore may be worth contemplating bringing marine species such as turtles and corals within the cloak of conservation rather than fisheries laws.

The legislation should be repealed and replaced with a statute replete with tools appropriate to contemporary understanding of wildlife needs and containing an unambiguous statement of government policy. A threshold consideration relates to the approach: whether all wildlife is protected and then levels of protection reduced through various statutory tools; alternatively, individual species can be identified as needing protection and then brought within the cloak of the law.

Conservation tools and issues such as management planning, critical habitat, and access to biological resources must be contemplated in new legislation. As discussed in the following Part, threatened species are now the subject of very recently law, and this is to be commended. However, that new regime only applies to species under threat from international trade and thus has no relevance to the conservation of species in a purely domestic context.

2.6 SUMMARY OF EXISTING LEGISLATION

Fiji's legislation governing the environment and natural resources is the product of its time. Very little legislative cognition is given to environmental sustainability, and support in terms of instruments and general capacity to manage resources is therefore negligible. Particular limitations relate to the absence of resource or environmental management capacity, poor governance provisions, and some questionable policy concerns within the statutes.

With respect to managing resources and the environment, a common deficiency is the lack of any active management tools and approaches. None of these first generation statutes displays an awareness of the necessity of managing resources or protecting environmental values from degradation. Objectives or goals are not required and management tools or instruments are not available. Almost all the statutes simply establish a permissions and offence regime, with few enabling provisions—let alone correspondent or complementary requirements—to manage resources.

In terms of wider issues relating to governance, most statutes worryingly marginalise the place of stakeholders and the wider public interest in the environment. The legislation is generally without avenues for public involvement in decision making; even those directly affected by decisions have few rights of redress. Commonly, owner and occupier interests are diminished at the whim of the State. Avenues of appeal or objection are non-existent, and a clear presumption against plaintiffs prevails in those few cases where such statutory avenues may exist. Many statutes also purport to empower the Minister to compulsorily acquire land for a range of uses that appear to be *ultra vires* to the State Acquisition of Lands Act.

The third set of limitations relates to policy or logic aspects of the legislation. For example, the exercise of State powers is very uneven with respect to the responsible decision maker. Most commonly, a statutory figure such as a Director or Commissioner is vested with decision making powers. In other cases, only a line officer within an agency exercises significant powers, such as the issuing of an authority to exploit resources. Under only a few statutes does the Minister actually make decisions. It is not possible from the statutes to establish any clear governmental position as to where the responsibility for making resources decisions resides, particularly with respect to the trivial role given to Ministers.

Another absurd feature of some of the natural resources legislation in Fiji is the ability of the Minister to set aside the relevant Act at his or her discretion. Enactment by Parliament of laws which enable the Minister to rule that those laws do not apply is quite astounding. Another similar example is the power of the Minister to redefine enacted terminology by changing the statutory definitions in some laws.

Some statutes also excuse the State from their actual application. Provisions of this type dominate Fiji's natural resources laws, and need to be removed.

Two Acts do present a more enlightened and inclusive process for protecting both public and private interests in respect of natural resources. The Land Conservation and Improvement and the Drainage Acts emerge as better conceived and constructed, notwithstanding other limitations within this legislation. These statutes are a rarity, though, and do not reflect a wider policy approach to environmental and resources management.

Part Three SECOND GENERATION LEGISLATION

A raft of important new legislation to update natural resources policy and improve environmental protection in Fiji exists in both enacted and draft form. Much of this law derives from international treaties. A high degree of fidelity to the parent conventions is reflected in the Fiji legislation.

Ozone depletion and threatened species are the subject of statutes passed within the last five years, directly implementing international laws. In terms of the draft legislation, three Bills cover the fields of pollution of the sea, fisheries management and sustainable development. Again, there is an international dimension to each of these bills, although except for marine pollution the nexus is much less direct than in the case of the enacted ozone and threatened species laws. The fisheries and sustainable development legislation addresses a wide range of issues of a domestic character and therefore perhaps serves as a barometer of shifting government policy toward the environment and natural resources in Fiji.

This part of the report discusses second generation legislation in Fiji and considers its contribution towards improving the government's role as environmental regulator. The two enacted laws are considered first, adopting the same style as used previously (a description of the statute followed by some comments). The review of the three Bills follows a slightly different style. Given that this legislation is still in draft form, and therefore amenable to changes, a more discussive approach is taken. It is hoped that in this spirit remarks will be of some use in finalising the Bills before their eventual enactment by Parliament.

3.1 ENACTED LEGISLATION

3.1.1 Ozone Depleting Substances Act (No. 26 of 1998)

One of the two recently enacted statutes relating to the environment is the Ozone Depleting Substances Act (Ozone Act). The purpose of the Ozone Act is to control the sale and use of substances that deplete the ozone layer pursuant to the two principal international instruments, the Vienna Convention for the Protection of the Ozone Layer, and the subsidiary Montreal Protocol on Substances that Deplete the Ozone Layer.

Under the Ozone Act, the Minister must establish an Ozone Depleting Substances Unit within the Environment Department to support the Director (s8). The Director is charged broadly with formulating and implementing the plan to phase out controlled (ozone depleting) substances, including analysing the demand for and consumption of such substances (s9). To this end, the Director must monitor and audit controlled substance use, permit the handling of controlled substances, promote awareness and training, and implement the programme and action plan formulated under the two international instruments (s10). With approval of the Minister, the Director may appoint staff, establish standards and procedures, and provide a Central Storage Facility for the deposition of halons (s11).

An Ozone Layer Protection Fund is created under the Act. The purpose of the Fund is to support programmes to protect the ozone layer, including the action plan and other initiatives in pursuit of the Vienna Convention and Montreal Protocol. Funding comes from parliamentary appropriations and fees levied under the Ozone Act (s12).

The Act requires the Minister to prepare a National Policy for the Protection of the Ozone Layer “through the widest possible consultation and participation” (s13(1)). The Policy must account for ecological, economic, social and cultural “realities” and contain –

- (a) an analysis of future demand for any controlled substance;
- (b) an evaluation of options concerning the phasing-out of any controlled substance;
- (c) an estimation of incremental costs for the phase-out of any controlled substance;
- (d) the target year for phasing out of the consumption of any controlled substance;
- (e) a strategy containing mechanisms, programmes and initiatives that are to be implemented to give effect to the National Policy;
- (f) a review of and mechanisms to manage or mitigate the social, environmental, human health and economic impacts of the National Policy;
- (g) mechanisms to monitor the implementation of the National Policy and implementation programme, and to ensure its periodic review.

Some delivery mechanisms identified under the strategy include economic incentives, public awareness, and recycling and reduction training programmes (s13(2)).

Actual regulation of controlled substances is addressed through two approaches: phasing out substances over certain time frames—especially in terms of trade across the border—and managing their allowable use in the country. With respect to the former, the Schedule lists numerous ozone depleting substances over which control needs to be effected. Bulk controlled substances may not be imported, exported, stored, disposed or manufactured as of 2000 or 2031, depending upon the Schedule. Phase out periods are also applied to the trade in or common use of controlled substances, including fire extinguishers, air conditioners and refrigeration devices. Defying the legislated phase out periods is an offence (s14).

Management of controlled substances involves authorising people and places with respect to their use. The importation of a controlled substance, or of equipment containing same, requires permission of the Director. Similarly, a premises or facility needs to be permitted to sale, store or purchase controlled substances. Non-compliance with permit conditions or provisions of the Ozone Act can trigger a direction to halt the sale, storage or processing of a controlled substance, or result in forfeiture of the permit. Inspection and reporting are applied to permittees—including spot checks and audits—to ascertain compliance with any applicable provisions (s16).

Another aspect to managing ozone depleting substances is the licensing of people to handle controlled substances (ie, to recycle, recharge, capture substance) (s17). There are also general obligations not to release controlled substances (s18). It is an offence to violate any of the provisions that manage controlled substances. Offences are also created for mis- or non-reporting, and hindering or obstructing inspectors and auditors. Penalties are severe, ranging to \$10,000 or 12 months' imprisonment (s20). Repeated offenders are liable for fines or gaol terms up to ten times heavier.

Regulations may be prescribed to promote the National Policy and programmes thereunder, including standards, guidelines, and codes of practice. The Minister for Finance

is compelled to prohibit any controlled substance (or equipment) being imported without a permit issued by the Director, on the advice of the Minister responsible for the Ozone Act. Variable import duties may also be levied to encourage the importation of ozone friendly equipment (s25).

Comment

The Ozone Depleting Substances Act is the product of both more enlightened drafting and a clear environmental policy. Provisions are workable and well conceived to control the use of ozone depleting substances. Embracing market approaches to this end is a very useful addition to the legislative scheme. A few idiosyncrasies do appear, though.

Establishing the Ozone Depleting Substances Unit does evidence a commitment by the government to the policy contained in the legislation; it does also assure that the Unit will be established. On the other hand, enshrining a purely administrative body in legislation does remove any organisational flexibility. A decision-making entity with independence and power should be protected by statute, but this is not the role of the Unit. It is quite nonsensical that simple departmental restructuring in response to emerging issues would require amendment legislation.

Another curiosity with the Ozone Act is its very lazy definition of the environment: “means the components of the earth”. Despite the potential for causing problems, this curiosity is largely inconsequential because the scheme employed under the Ozone Act does not depend upon defining the environment. The only real application of the term is in a very limited offence context. Nonetheless, it is illogical to define environment so differently in two contemporary laws (the other being the Environmental Management Bill, discussed later).

More awkward is the casting of the Director’s powers relative to those of the Minister. Under the Act, the Director needs ministerial approval to appoint inspectors and auditors, a possibly unworkable situation. Ministers should not be distracted with the appointment of core staff to an agency, a duty which should be left to respective agency head. More generally, the apportionment of ministerial powers relative to those of the agency is an issue encountered frequently in the three pieces of draft legislation.

Two worthy features of the Ozone Act are the National Policy for the Protection of the Ozone Layer and the Ozone Layer Protection Fund. The National Policy compels the government to contemplate and express, in an inclusive manner, its actions to protect the ozone layer. Unfortunately though, no process for preparing the National Policy is articulated in the Ozone Act. Other than a requirement for wide consultation and participation, no details are provided regarding such considerations as timing, review, and appeal. Moreover, there is no attention at all given to implementation; that is, no corresponding requirement exists to implement the Policy. And whilst the Fund complements the Policy by providing the means for delivering on many of the activities and mechanisms therein, ultimate efficacy may be undermined by the absent detail identified here.

3.1.2 Endangered and Protected Species Act (No. 29 of 2002)

As outlined earlier, wildlife is not afforded any general protected status at law; indeed, the extent to which legislation did exist was to treat wildlife as an exploitable resource. With passage of the Endangered and Protected Species Act (EPSA) the government's ability to conserve threatened species was materially enhanced. The EPSA operates primarily to adopt in Fiji international controls under CITES, an international treaty which works to protect wildlife at risk of extinction from the demand stimulated by international trade.¹ As well, the legislation also controls the trade of some indigenous wildlife as a matter of national policy outside of CITES controls. In both cases, the protection of wildlife exists only in a trade context. Put another way, the EPSA does not have any relevance to protecting species (whether endangered or otherwise) in a purely domestic setting where the wildlife is threatened not by trade but from some other activities, such as habitat loss or bycatch.

The regimes under EPSA work by requiring permission to import or export any listed species (or specimen therefrom) (ss9,10). Broadly, the five lists established by EPSA correspond to the three appendices maintained under CITES and two relating to Fijian wildlife not listed by CITES (s3). The lists reflect the threatened status of the species –

Appendix I lists species threatened with extinction from commercial trade

Appendix II lists species which may become threatened if trade remains unregulated

Appendix III lists species needing protection within a particular country which can be assisted by trade controls

Schedule 1 lists Fijian wildlife not listed in the CITES Appendices but which may be threatened with extinction

Schedule 2 lists all other indigenous Fijian wildlife.

Trade in listed wildlife can be permitted subject to the conditions corresponding with and applicable to the particular CITES listing. The tests to be applied primarily revolve around non-detriment; whether harvesting for trade will detrimentally affect the survival of the species. Other considerations include: whether the trade is for commercial purposes, that the specimen has been obtained lawfully, approvals from the trading country have been issued, and that live specimens are transported and housed adequately. In respect of the Scheduled species (ie, specimens from Fiji) conditions of trade are simply as determined (s13). It is an offence to import or export a listed specimen without the required permissions, attracting hefty penalties (ss9–11).

As required by CITES, two decision making bodies exist under EPSA. The Management Authority (the Authority) comprises relevant agency heads and several non-government members (ss4-6). The main role of the Authority is to issue (or refuse) import and export permissions for the movement of wildlife across Fiji's border (s13). Technical advice to the Authority regarding the status of species and the impact of trade thereon is provided by a Scientific Council (the Council). In particular, the Council advises the Authority on whether trade will be detrimental to the status of the species (s7).

Comment

Because the EPSA is linked directly to CITES, its provisions are very precise and faithful to the international law. Few definitional problems therefore arise. One comment relates to "endangered"; the use of survival in this definition would benefit from a temporal context.

¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora

In other words, to define the period over which survival of the species is to be assessed. Without this dimension, reproductive survival lacks a robust measure.

The main imperfection in terms of definitions is that employed for "introduction from the sea". This term is intended to refer to marine species taken from the high seas (ie, fishing beyond EEZs), as reflected in the CITES definition. The translation into Fiji legislation does not adhere to the precise CITES language, and misrepresents this intention in two ways. Firstly, the Fiji definition treats a marine species taken from the EEZ of another country and transported to Fiji as an introduction rather than an export from that country. And, under the EPSA terminology a marine species introduced to another country from the high seas but subsequently exported to Fiji would become an introduction from the sea rather than an export. This inaccuracy has obvious implications relating to import and export approvals as well as distorting statistics in global wildlife trade.

Before discussing mistakes in the EPSA approvals regime, it is first necessary to understand the corresponding CITES regime that EPSA is implementing in Fiji. Under CITES, commercial trade of species listed in Appendix I is prohibited while Appendix II species may be traded commercially subject to a non-detriment finding. Appendix I species can be traded between zoological parks and like organisations, subject to approval and with the accompanying CITES documentation from both the exporting and importing country.

The approvals required under EPSA depart from CITES significantly in a number of ways. Firstly, under EPSA the test to be applied for the exportation of both Appendix I and II species is that the trade will not be detrimental to the species concerned (s13(3)(a)). Whilst this non-detriment finding is the correct test to apply to species listed in Appendix II, EPSA does not reflect the ban in commercial trade of Appendix I species. Similarly with respect to the importation of Appendix I-listed species; EPSA includes only the non-detriment test but not the ban on commercial trade (s 13(3)(b)). The implication is that wildlife prohibited from trade in commerce under CITES could be imported to or exported from Fiji for commercial purposes. Unclear, though, is whether this is a drafting mistake or reflects a government position.

Another notable mistake relates to the Council. One function of the Council is to determine if the importation of live Appendix I specimens will be detrimental to the species and whether the recipient is able to care for the specimens upon arrival (s7(4)(a)(ii)). The errors manifest with this drafting are many, including: non-detriment findings apply equally to both living and dead specimens under CITES; species listed in both Appendices are subjected to the non-detriment test; adequate reception facilities must be provided for Appendix I and II species alike. Again, it is not clear if these mistakes are deliberate or unintentional.

A third error with EPSA relative to CITES is how it treats introductions from the sea (aside from the definitional problems discussed above). The Fiji legislation refers to the issuance of an import permit for specimens introduced from the sea (s13(3)(g)). Because marine species taken on the high seas have not actually been exported from one country to another, it is therefore not possible to issue an import permit. CITES instead provides for certificates to be issued by the Management Authority as an alternative means of control. Although this drafting inaccuracy is less pressing than the few identified already, it nonetheless does warrant correction, especially as Fiji is now fishing on the adjacent high seas.

3.2 DRAFT LEGISLATION

3.2.1 Marine Pollution Prevention Bill

Overview

Control over vessel-sourced pollution is the subject of the Marine Pollution Prevention (MPP) Bill. Broadly, the MPP Bill establishes controls over pollution from vessels and the dumping of wastes at sea, as well as establishing insurance and liability arrangements. The definitions contained in the draft legislation evidence this lattermost aspect in particular. The MPP Bill generally relies upon and proposes to implement many of the pollution conventions falling under the rubric of the International Maritime Organisation (IMO).²

² International Convention on Civil Liability for Oil Pollution Damage, 1992; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992; International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (and the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil, 1973)

It is because of this international nexus that the MPP Bill is both comprehensive in its scope, as well as displays a high degree of maturity in its expression and proposed operation.

Notwithstanding this general comment, the linkage between Fiji law and the IMO and other conventions is not well made in the draft legislation. Clause 5 simply lists a number of international instruments which “are incorporated into and have the force of law in the Fiji Islands”. Amongst these are the familiar IMO family of treaties covering pollution control and liability, and the SPREP convention and protocols. In practical terms, though, without specific corresponding provisions in domestic legislation the tools and powers under these instruments may not be available to regulators. The implications of accepting particular international undertakings needs to be more carefully translated into national actions, including the enactment of corresponding legislative provisions. Whilst this most obviously refers to IMO instruments, the same consideration also needs to be made in respect of Law of the Sea Convention and its relevance to marine pollution generally.

It is also important to note that Fiji is not actually party to most global pollution control instruments. Legislative assertions based upon international instruments which the country has not accepted—and which certainly haven’t assumed the status of customary international law—are questionable as a matter of law and from a policy perspective. In particular, the exercise of powers thereunder may not be sustained in the event of a legal challenge against or in furtherance of a decision.

Intervention Convention”; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (as amended by the Protocol of 1996 relating thereto) “London Convention”; International Convention for the Prevention of Pollution from Ships (as modified by the Protocol of 1978 relating thereto) “MARPOL”; International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990; Protocol on the Prevention of Pollution of the South Pacific by Dumping (a protocol of the SPREP Convention); Protocol concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region (SPREP Pollution Emergencies Protocol); International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2002.

Information regarding Fiji’s status in terms of IMO treaties is current as of 1st July 2004.

To make the Government's intentions apparent and to put the validity of legislation beyond doubt, Fiji should ascend to the IMO instruments underpinning the MPP Bill as a matter of haste. Such a move will also enjoin Fiji into the community of maritime nations committed to the rule of global standards.

Pollution prevention

With respect to vessel-sourced pollution, the general approach of the MPP Bill is to exercise control over ship design and operation, and to prohibit all discharges of pollutants and harmful substances. The approach is conceptually sound, but a number of legal and administrative problems arise, due largely to the IMO nexus and its crude domestic adoption in the draft legislation.

One immediate inconsistency between the MPP Bill and the international convention (MARPOL) is that under the latter it is not offensive for a vessel to discharge pollutants within EEZ waters. MARPOL controls the discharge of pollutants but does not impose a complete prohibition thereon; for example, minimum distances from shore and vessel speeds are prescribed under which oil may be released. The MPP Bill, however, prohibits any pollution discharges into Fiji waters, or from a Fiji vessel into any waters, and imposes extremely heavy penalties for such offences (clause 9). As cast, the MPP Bill therefore purports to exceed the enabling international law, both the IMO convention and wider law of the sea. Whilst some matters regulated under parent conventions may be subject to stricter domestic control than specified in the international instrument, this is not true of these pollution provisions.

Clauses 7 and 8 exemplify another problem with the relationship between national and international law. These clauses are expressed to compel "all vessels to which MARPOL 73/78 applies" to comply with the design and operation details specified therein. Problems with this approach are several. Firstly, the different sizes and classes of vessels plying the seas are recognised by variability in the applicable MARPOL requirements. The coverage purported by the MPP Bill lacks this differentiation.

Similarly, the legislation can only apply in this context to vessels flagged to Fiji, not to “all vessels” as currently cast, given that vessel design and construction is exclusive to the flag State. Thirdly, MARPOL places obligations upon States’ Parties, ship owners or operators rather than upon vessels, as wrongly conceived by the MPP.

When read more broadly, it would seem from the MPP Bill that it intends to apply only to Fiji vessels and to Fiji waters, notwithstanding the wording employed. So whilst the policy intention is reasonably intelligible, these provisions suffer from imperfections in drafting.

Intervention

The intervention provisions of the MPP Bill suffer from similar imperfections. Clause 38 stems from the Intervention Convention which enables coastal States to take preventative action in respect of maritime casualties on the high seas. Where such an incident is likely to damage a coastline, that State may intervene on the high seas to prevent, mitigate or eliminate the threat, such as taking control of a vessel. The Intervention Convention is thus carefully constructed to not affront two of the pillars of international sea law (flag State responsibility and freedom of navigation).

The Fiji legislation is drafted to be quite faithful to the parent treaty. One provision, however, does potentially allow interventions to be made within the waters of another country. The MPP Bill enables powers to be exercised or measures to be taken “as a result of a pollution incident occurring onboard a vessel or a platform” (cl 38(1)(b) without circumscribing this to be applicable to Fiji waters or the high seas. This text could be another drafting oversight but seems unlikely: subclause (a) does specifically apply to marine casualties within those two zones. Read in context, the construction does therefore imply its intention to empower Fiji to intervene into other national waters.

The oceanic geography of the Pacific islands region is characterised by the virtual absence of high seas space and the existence of shared maritime boundaries. It is certainly possible that a vessel might become distressed within the EEZ of a neighbouring country and threaten to pollute Fiji waters. If enacted in its current form, the MPP Bill would authorise Fiji to intervene into adjacent national waters—such as Tonga or Solomon Islands—in this

event. A power of this nature exceeds those supported by international customary or treaty law, and would therefore represent a unilateral act of intervention.

Pollution offences and costs

A range of offences for violating the MPP Bill are proposed. The corresponding penalties are very severe, commonly a fine of around \$250 000 or 10 years' imprisonment. Both the vessel owner and master are criminally responsible for ship-borne pollution (cl 9(2)). Similarly, both parties incur clean up and restoration costs associated with a pollution event (cl 9(3)). Only the owner is liable for paying compensation, though, a distinction for which the reason is not apparent, especially given that a pollution casualty may have resulted from the master's negligence (cl 43). This basic concept of master is lost from some of the liability provisions; it is therefore assumed that the master is to be treated for these purposes as one of the crew, although whether this is the intention is very unclear from the MPP Bill.

The National Marine Pollution Fund (POLFUND) is a very progressive and commendable element of the pollution regime. As with many contemporary schemes, POLFUND is premised on users paying for access to a resource or contributing towards the cost of any environmental remediation. Industry operators are members of the POLFUND Board of Trustees to provide users (payees) with the opportunity to shape how their fees will be spent. Funds are to be applied for specified pollution preparedness and clean-up work (cl 25,26).

Despite its broad membership, governance of the POLFUND seems almost random in effort to be transparent. The Board of Trustees governs and administers the fund, while the Director "applies" money for pollution preparedness activities (training, the purchase of equipment). A third body, the On Scene Commander, prepares an annual budget for the POLFUND for the Board's approval, not the Director. This Commander also has discretion to spend money as is reasonable in responding to a pollution incident (cl 27,28). Ensuring accountability in the collection and expenditure of funds is welcomed, although the logic of the structure adopted in the case of the POLFUND needs to be clarified.

The MPP Bill does make clear that the costs of pollution from an industry facility are not to be met from POLFUND. The owner or operator of such a facility must incur these costs (cl 28(3)). However, despite the simplicity of the approach, at least two shortcomings appear: the term “industry facility” is not defined in the legislation; nor is there guidance provided as to whether the owner or the operator of said facility is responsible. In a pollution event, these two provisions will become pivotal as industry may seek to avoid paying remediation costs. It is therefore necessary to add some precision to the evident intention of the clauses.

Introduced marine pests

The MPP Bill attempts to address the problem of marine pests introduced to coastal waters through the mechanism of ships’ ballast water. Clause 10 is the operative provision whereinunder it will become illegal to discharge into the Fiji EEZ ballast water containing non-indigenous organisms and pathogens. There are two problems with this approach as taken by the draft legislation, due to its departure from the applicable international law.

The first problem is that the relevant IMO convention does not prohibit the discharge of ballast water within national waters, but encourages this to be done beyond 200 miles from shore. The prohibition on discharges within the EEZ proposed by the MPP Bill therefore exceeds the authority provided by the IMO ballast water convention. Secondly, the convention establishes management controls over the discharge of ballast water from ships. The Fiji legislation, however, attempts to *control the release of ballast water that contains particular species* rather than adhering to the simpler IMO regime of *controlling ballast water releases*. In consequence, the MPP Bill presupposes that the operator has full knowledge of the composition of the vessel’s ballast water. There is also an awkward reference to complying with voluntary IMO requirements that are “in force”. A more efficacious approach would be to simply adopt and apply in Fiji the IMO marine pest regime as it exists.

Dumping of wastes

Another policy area of the MPP Bill is that of sea dumping. The dumping of wastes at sea is regulated under a 1972 treaty—the London Convention—which establishes an international permissions regime revolving around broad categories of waste material. Parties in turn

have legislated mechanisms to fulfil these internationally agreed practices. Generally this involves a permit system to exert control over the dumping of allowable wastes, such as by determining the location and method of disposal.

A fundamental change to the rationale and approach of the sea dumping regime was adopted in a 1996 Protocol to the London Convention. Under this Protocol, the philosophy of using the sea as a repository for waste has been greatly modernised with a more contemporary approach based upon the principles of precaution and polluter pays, and the practice of not transferring waste to another part of the environment. The Protocol is yet to enter into force but will effectively replace the original regime.

The MPP Bill will adopt in Fiji the updated London Convention regime; the original 1972 treaty is effectively bypassed. The 1996 Protocol is reproduced very faithfully in the draft legislation, ensuring a high degree of fidelity to the international law. Some discretion could be employed in this regard, though, as it is unnecessary to reproduce literally some of the Protocol text. Clause 56 (2)(g) of the MPP Bill exempts from the prohibition on sea dumping those substances as identified in the 1996 Protocol as per –

“bulky items primarily comprising iron, steel, concrete and similarly unarmful materials for which the concern is physical impact, and limited to those circumstances where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping.”

It would be sufficient to limit the description to the substances concerned (ie, iron, etc) as being exempt substances. The verbatim reference to the circumstances is superfluous, given that Fiji is clearly a small island with limited disposal options, as specifically contemplated by the 1996 Protocol and the LOS Convention. In fact, one legal difficulty may be experienced through reproducing the 1996 Protocol text in full. As written, the MPP Bill literally means that the exemption against dumping applies only to small islands within the cluster of 332 islands that comprise Fiji, rather than to the country as a whole, which is clearly not the policy intention. Fiji is a small island country in the context of the 1996 Protocol (and indeed many other international instruments); its own legislation should therefore not refer to small islands in a third party tense.

The balance of the Part is expressed in identical terms to the international law, detailing the requirements for a sea dumping application that the Minister must consider. These include a detailed characterisation of the waste and dump site, alternative disposal options, and waste reduction strategies. The MPP Bill again stipulates the environmental parameters to be considered as outlined under the 1996 Protocol, such as persistence, accumulation and transformation of the waste, and amenity and other values of the area. There is no compulsion on the Minister to permit dumping, as this is granted discretionarily and conditionally (cl 57).

In terms of construction, many of the provisions (for example, clause 57) are overly long and could be recast for a more workable structure. The penalties for violating the sea dumping provisions are again severe. In fact, the penalty for dumping either a prohibited waste or an exempted waste without permission is double those imposed for violating a provision governing pollution (cl 56(5)). Presumably this fact reflects a prevailing policy that the dumping of waste at sea is more offensive to the government than is pollution caused either deliberately or by misadventure.

Miscellany

A minor definitional matter relates to the meanings of garbage and sewage. The former includes “operational waste” but this term itself is not clear, especially given that sewage is defined separately. It also seems that wastewater from personal washing has been excluded from sewage. One very odd definition is found: “‘wastes or other matter’ means material and substances of any kind, form or description” (cl 5(1)). As cast, this definition is simply without meaning.

A number of misdescriptions occur in the MPP Bill. Most obviously, Part 3 is littered with incorrect internal cross-references. Some particular examples are that clause 23(3) refers mistakenly to section 21 instead of s25; similarly, cl 25(1) misrefers to s22; clause 56(3) makes reference to subsection 1 instead of 2 of that same section. In this same context, clause 35 establishes offences against Part 3 of the Act, but refers to “this section” rather than “this Part”.

3.2.2 Fisheries Management Bill

Overview

The whole framework for fisheries is to be replaced and updated by the Fisheries Management Bill (Fish Bill). Indeed, there are few areas of fisheries policy not covered under the Fish Bill, which will repeal the Fisheries Act (Cap 158) upon enactment. Not only are existing approaches to fisheries management to be renewed, but issues currently outside of control will now be given legislative coverage.

Definitions as adopted in clause 2 of the Fish Bill are generally workable, although a couple of imperfections are found. Artisanal and customary fishing are defined almost identically, notwithstanding obvious distinctions between the two in terms of the end use of the fish. In consequence, the one fishing event can simultaneously be treated as both artisanal and customary under the Fish Bill.

Neither of these fishing activities will actually be regulated by the legislation once it is enacted, though. Artisanal and customary fishing are defined only so as to be excluded from the Fish Bill. The fact that the two types of fishing are so similar at law therefore is not pressing. However, regulations to set aside this exemption can be promulgated (cl 83(2)). It seems that questions will eventually arise as to whether an action is artisanal or customary fishing, most likely for the purposes of enforcement and prosecution.

Another definitional problem relates to “fish”. The definition adopted by the Fish Bill is too broad and will cause problems in practice. Three immediate inconsistencies with the definition are: plants are an animal under the legislation; turtles and dolphins are treated as fish; fish also includes seabirds. More thought needs to be given to the management purpose of defining fish in such a loose fashion. Indeed, given the high conservation value of these taxa, they may be better managed under conservation rather than fisheries laws.

“Fishing master” is defined to be the person in charge of the fishing activities of a vessel. The wider maritime function of commanding a vessel is assigned to the “master”. There seems no obvious reason for separating these functions; indeed, the effect is destined to

cause confusion as to where control of a vessel lies, and where culpability might reside in the event of an incident.

This lack of clarity is further obscured by the definition of “operator”. As expressed, there will be multiple operators of a vessel under the law. The language seems to be employed deliberately to this end—to ensure that at least somebody is a legal operator of the vessel. Almost certainly, though, administration of the statutory tools will become awkward if not ineffectual because of this definition, again particularly in a compliance context.

The term “resource owners” is not defined under the draft legislation. Nor does it have a common sense meaning given that fish resources are public goods and not liable to private appropriation. Its use in the Fish Bill may be taken to imply indigenous Fijians; if so this should be made clear, as should the conceptual bases of resource ownership.

These definitional matters need to be clarified in advance, to minimise identified or anticipated problems following enactment.

Administration

One of the important suites of changes to be introduced by the Fish Bill relates to governance of the fisheries sector. A National Fisheries Authority (the Authority) will be established to manage Fiji fisheries on behalf of the government (cl 4,5). The Authority will be governed by a Board of Directors (the Board) comprising senior officials, fishing industry, resource owners, and a non-governmental organisation (cl 8). In establishing the Board, clause 4 is redundant in two respects: the Board will be established under clause 8 and not that other provision, as expressed; and under that same clause it is not the “National Fisheries Board” but a Board of Directors of the Authority (cl 8(1)). The intention is nonetheless quite evident in spite of these minor errors.

A more substantial observation relating to governance is the poor articulation of the respective roles assumed by the several bodies that constitute the fisheries bureaucracy. In addition to the Authority and its Board, other key functionaries are the Director, Chief Executive Officer (CEO) and Minister. The distribution of decision making is a means of

ensuring that power does not concentrate in a single organ. The problem in this case is the lack of any evident policy or logic as to how the Fish Bill has shared responsibilities amongst these functionaries.

For example, in some situations the power to make decisions reposes with the Minister, often following advice from the Director. However, in other cases—such as aquaculture operations—it is the Director rather than the Minister who is the approving agent (cl 31). Crucial catch and effort limits are set by the Director in consultation with the CEO, the role of the Minister being only to prescribe the procedures for participating in a fishery once the limits have been established (cl 25). And whilst the Minister, Director and Authority are bound to have regard to objectives in exercising their respective powers (cl 23), no such obligation applies to the CEO. Quite simply, the governance roles appear to be randomly assigned without any design or purpose.

Fisheries management

A substantial part of the Fish Bill is devoted to the management, conservation and development of fisheries. The objectives and principles reflect contemporary views of fisheries management as well as its increasingly international dimensions. If pursued with appropriately matched tools, the objectives and principles provide a very sound framework for management (cl 23).

As outlined above, one new management approach is the ability to limit fishing by catch and effort, with reference to familiar management tools including area control, vessel numbers, and fishing permissions. Such limits are established by the Director in consultation with the CEO. Designated fisheries can also be declared where the circumstances necessitate special consideration. In this regard, the designation is done by the Minister on advice from the Director (cl 25).

The Director, consulting with the CEO, may prepare Fishery Management Plans (Plans) in respect of any fishery. Plans must be prepared for any designated fishery or as required by the Minister. Plans need to broadly describe the status of the fishery, objectives for its management, identify likely environmental impacts, and the existence of customary fishing

practices. Fishery Management Plans “shall be kept under review” and are endorsed by the Board before ministerial approval (cl 26).

Whilst an enabling capacity to pursue fishery management planning is welcomed, the regime proposed by the Fish Bill is short on both process and substance. The more obvious deficiencies are that:

- no management tools or measures are included in Plans;
- review of Plans is “as necessary” rather than being automatic;
- no public exposure or input to Plan development is provided for;
- the development of Plans is discretionary to the Director.

The Fish Bill, again demonstrating contemporariness in concepts, contemplates many other management issues. These emerging issues include: prohibitions on certain fishing; the declaration of marine reserves; controls over aquaculture, sport fishing, and live fish movements; prohibiting fishing with poisons and explosives; and maintaining the ban on driftnet fishing.

The responsible decision maker varies as between these different issues. The Minister is largely unfettered in being empowered to declare marine reserves (cl 30). The Minister can prohibit certain fishing by method, area, size, time, and equipment on recommendation from the Director (cl 28). For most of the other matters the Director is the controlling body (cl 31-36). The ban on destructive fishing is effected by the statute itself rather than by decision (cl 37-39).

The proposed controls over the movement of live fish and fisheries products are worth examining in more detail. A regime to grant export permissions will be established wherein the Director confers with agency staff and grants a 5-year permit if the application is in order (cl 35). Whilst clauses 33 and 34 are well intentioned, they are also completely superfluous. One superfluity is the requirement to consult internally, something the Director would do as a matter of course. The greater superfluity is the regime more generally. An original approval to fish in the fishery is based upon sustainability considerations, a matter completely unrelated to the end use or destination of the product.

Requiring another permission—especially where this is automatic as proposed by the legislation—will not alter the management of the fishery, which needs to be done through management instruments. Indeed, the long validity period of export approval (five years) confirms that these permissions are not considered as tools for managing the fishery.

Currently, barrier controls over the exportation of live fish products are applied under customs instruments; these other controls will continue additional to the new fisheries export permits. The intention of the Fish Bill may be to replace the need for a separate fishing licence with the single proposed approval to catch and export live fish. Even if this is intended, the legislation as drafted doesn't achieve this because the permittee would still need to obtain a licence to fish. From both customs and fisheries perspectives, the draft regime seems to be burdensome and redundant.

Foreign fishing

A policy area addressed competently under the Fish Bill is that of foreign fishing access. It will become necessary for countries to negotiate and conclude an agreement with Fiji precursory to vessels being granted a foreign fishing licence. The Minister is the responsible decision maker for entering into access agreements. As well, the Fish Bill allows access agreements to be made with fishing associations and companies (cl 40). This latter provision would benefit from further consideration, particularly in terms of how this might affect flag State duties.

Provision is also made for Fiji to enter into regional fishery management agreements. This enabling clause identifies management tools available under those agreements such as authorities to fish, observer programmes, and monitoring, control and surveillance. In contrast to access agreements, for no apparent reason the Authority rather than the Minister is the party (cl 44). A logic error is found in this clause where such agreements “at the Authority's discretion” may include certain fishery management provisions. The mistake with this construction is that agreements reflect what was negotiated between countries, not what the Authority determined.

On balance, it is not necessary to legislate to enter into fishery agreements. This authority inheres to nations as a matter of sovereignty. Nonetheless, the effect of these new legislative provisions is to elevate through legislative policy the importance to Fiji of foreign fishing.

Licences

Licensing to fish is handled under Part IV of the Fish Bill. The Board of the Authority is the granter of licences, based upon the Director's recommendation. The CEO issues licences following a Board decision (cl 48). Fishing terms and conditions common to all licences are listed under clause 50.

Rights of appeal in respect of refused applications will be enabled under the Fish Bill. The Minister, CEO and a Licence Appeals Committee all feature in the appeal process. However, the construction of the provisions is very cluttered and the actual decision maker is unclear. The Minister is explicitly empowered to determine an appeal, yet "The decision of the Appeals Committee is final" (cl 51). A fundamental internal inconsistency thus exists.

A basic deficiency with the licensing regime is that no criteria or other guidance is contained as to how the award of licences is to be determined. Serious questions of objectivity and probity will therefore arise. Equally disconcerting is the absence of any linkage between licences and fishery management plans. Despite both these instruments being tools for managing fisheries, there is no connection between the two, such as a Plan setting the number of licences or serving as the framework for their issuance. A mechanism linking the two is sorely needed.

The Fish Bill contains considerable detail regarding what can broadly be categorised as compliance matters. Intervention and observation functions are generally well conceived and expressed (cl 56-62). If operationalised, these functions will materially contribute to improved fisheries management. By contrast, the provisions pertaining to health inspection are very poorly drafted and display an ignorance of the entire hazard analysis and critical control point system (HACCP) (cl 64). The appointment of a Competent Authority as envisaged by the draft legislation will not satisfy the standards of seafood production codified by HACCP.

The elaboration of offences by the Fish Bill is especially noteworthy. Not only are offences expansive, but the applicable penalties are appropriate in terms of both deterrent and punishment (cl 67). Seizure, forfeiture and disposition of assets and illegally obtained catch are also cast well (cl 74-80), as are the evidentiary provisions, which are aligned with the other compliance-related legislative text. Finally, the regulation making power is wide while not being excessive (cl 83). Much of the efficacy of the Fish Bill will turn on how these supportive provisions are utilised to ensure compliance with management prescriptions, notwithstanding the deficiencies with some of those other provisions.

3.2.3 Environmental Management Bill

Overview

The Environmental Management Bill (EMB) represents an overdue updating of the environmental credentials of the government and an upgrading of its ability to protect the environment. The purpose of EMB frames this ambitious new legislation perfectly – *to apply the principles of sustainable development to the use and development of natural and physical resources; and to identify matters of national importance for the Fiji Islands*

If enacted substantially as drafted, the legislation will radically alter the basis of environmental and natural resource policy in Fiji. The EMB will introduce new statutory processes and impose upon decision makers new obligations designed to protect the environment and sustain the use of natural resources. The most profound of these is the introduction of environmental impact assessment. Also to be introduced are requirements to plan for natural resources use and report upon the status of the environment. Before reviewing these instruments in detail, some definitional issues as found in clause four of the draft legislation are first considered.

The definition of coastal zone in the EMB expressly excludes water and includes only land. Whilst coastal lacks a universally agreed definition, conceptually the zone is taken to include adjacent marine waters out to a certain linear distance. Curiously, land is defined as including the seabed underlying the superjacent waters. Fishing is specifically excluded as a development activity.

A noteworthy aspect of the EMB is its attempt to define significance. The concept of significance is pivotal in many environmental impact assessment systems, which tend to leave the term undefined and which evolves through administrative practice, such as guidelines. There are attractions with defining significance, but also traps with definitional constraints. The definition of significance as proposed in the EMB is a worthy attempt to express the concept in terms of its elements, rather than in strictly articulated terms. In doing this, however, the legislation may be read narrowly, thereby precluding other dimensions from subsequent administrative practice or judicial interpretations.

The definition of significance in the EMB is also internally inconsistent. On the one hand, the draft legislation correctly recognises that environmental impacts have a cumulative dimension. However, within the same definition the intensity of impact is a stated determinant of significance, which read in entirety would limit any temporal dimension to the accumulation of impacts. In other words, because some impacts accumulate over time or through time-delayed pathways—which necessarily are not intense—these cumulative impacts would be precluded as significant under the current definition.

Governance

Many organisational and institutional changes are contemplated by the EMB. One of these is the creation of the National Council for Sustainable Development (the Council) as a peak decision maker (cl 8(12)). The proposed composition of the Council will include both government and non-government members, with its role being one of high level oversight, advice and even partial watchdog. Particular functions of the Council are to coordinate policy development and delivery, devise environmental strategy, prioritise programs and procedures, advise on institutional structure, and review the general operation of the legislation.

The development of sustainable development policies is a main function of the Council. Unclear from the draft legislation, though, is whether the Council develops policy or if it oversees and ensures the development of policies by agencies. This ambiguity is amplified by the requirement that agencies with an environmental or natural resources mandate must

formulate a sustainable development policy for that sector. Quite simply, the relationship between Council and agency policy development is confused. There is also an absence of a corresponding requirement regarding policy implementation. Whilst the Council and agencies are clearly required to formulate sustainable development policies, there is no requirement to subsequently implement these. The intention and effect of the provision, and particularly the role of the Council, needs to be clarified.

Notwithstanding this lack of clarity over policy responsibilities, the process as outlined in the EMB is well conceived, especially in terms of being consultative (cl 12). Public input at the preliminary stage is commendable, including the stipulation of a time period in this respect (30 days) and obligation to circulate the subsequent draft policy for public review. By contrast, however, no details are provided in terms of timing for this review and the fate of comments.

A quirk of the EMB is that policies are approved by the Council rather than the Minister, a very substantial divestiture of a core government function to a statutory body. The Council must review sustainable development policies within five years; the purpose of such reviews is specified, further strengthening the value of this mechanism. However, a period of this duration is simply unrealistic, and would be better extended to a period of 7 to 10 years.

Clause 12(13) provides for the obligations of Fiji under an international treaty to be effected through regulation. The intention of this provision is very apparent and laudable but is very overstated in purporting to “give effect to any obligations” through the promulgation of a regulation. The scope and complexity of many international obligations necessitates a much more robust and complete framework than can be achieved under a narrow, specific regulation. Furthermore, it may be worth considering whether the Constitution can even sustain this approach to implementing international laws.

The EMB proposes to establish a Department to discharge many new and existing environmental functions (cl 13). This proposition is worth exploring further. Certainly, it is not necessary to legislate to create a government department, which can be done

administratively under general public service provisions. And the approach does constrain the Government by removing any flexibility to restructure the bureaucratic machinery or to redefine the Department's role as to do so would require another Act of Parliament to amend the EMB. This burden may become a liability, especially if an emerging environmental issue meant that an urgent organisational response was needed.

On the other hand, this proposal does evidence a governmental commitment toward the environment by enshrining an agency and its role in legislation. The Department is thus assured of continuity, and insured against arbitrary dissolution. Legislating to establish an agency is normally done to give that agency an unusual or special role in the government apparatus, such as protecting public interests. The legislated agency—a statutory authority—is usually given a unique character and vested with correspondent powers to this end. The relationship between the agency and the Minister is usually well defined, commonly to minimise the role of the latter and assure the independence of the statutory authority.

None of these extra dimensions are apparent in the EMB, and little seems to flow from the approach of creating the Department under legislation. Given that the Department as envisaged by the EMB is no different from other line agencies in terms of its powers and functions, it may be worth considering the rationale behind giving the agency a legislated status.

The EMB also compels every government agency to establish an Environmental Management Unit (cl 20). This proposal is quite unusual as it deals with the internal organisational structure of agencies other than the one charged with administration of the legislation. Over time, agencies should evolve and organise themselves as needed as a result of external drivers for change, such as major new laws. By legislating for this type of change, the process of internal learning within other agencies is being expedited. The proposed model may not fit within the internal structures of some agencies, at least not immediately. The effect of compelling the establishment of agency Environmental Management Units right across government needs to be considered in light of the desired outcome.

On balance, wholesale reform of decision making for the environment and natural resources is being instituted by the new legislation, and there may be some advantage in compelling other agencies to engage through this manner.

This same general observation is made in respect of clause 21 of the EMB, which compels commercial and industrial facilities to create Environmental Management Committees. In this case, though, an important difference is that companies are not agents of and funded by the government. Companies will mature over time to organise themselves so as to be able to comply with new expectations relating to the environment. Whether it is the role of government to dictate how a business structures itself is questionable, given that this could interfere with its financial profitability, and is contrary to the very notion of free enterprise. A persuasive case exists for businesses to adapt as they best see fit to satisfy any new legislative requirements, environmental or indeed of any other discipline.

Finally, an Environmental Trust Fund will be established pursuant to clause 14 of the EMB. Trusts of this nature are increasingly common in natural resources policy. Fees and fines payable and parliamentary appropriations are deposited to this Fund which the Department expends in furtherance of the legislation. The Fund is timely and eminently supportable.

Environmental impact assessment

Perhaps the most important contribution of the EMB is found in Part 3, which elaborates an environmental impact assessment (EIA) system for Fiji. The system hinges on development not being allowed until approval has been granted following an EIA. The system revolves around different types of land uses and activities, and the role of the approving authority.

The EMB identifies a range of activities that are subject to EIA; in fact, very few land uses or developments are not explicitly contemplated (cl 37,38). Most classes of activities which impact key environmental components, such as erosion of land, degradation of waters or the loss of species, for example, are to be assessed by the EIA Administrator. Proposals of a certain type, including heavy industry and major construction, are treated similarly (cl

37(2)). Residual proposals of a far more restricted character will be assessed by the agency approving the development (the 'approving authority'); these include small residential subdivisions, commercial and urban land use developments, and activities which may impact on general health and culture (cl 37(3)). A third category of activities is exempt from EIA. These exempted activities are the building of single residences and customary structures located 30m from a waterbody (cl 38).

Pivotal to the EIA system is the determination by the approving authority at the screening stage as to whether a proposal will cause a significant impact. If the approving authority determines that the impacts are insignificant, no EIA is required (cl 25(4)). If this determination by the approving authority identifies significant impacts, then the proposal becomes subject to EIA. In the case of major activities as outlined above, the assessment is undertaken by the EIA administrator. Proposals in the second category are assessed by the approving authority itself.

The integrity of the system therefore turns principally on the initial determination of significance by the approving authority. In other words, it is the agency responsible for the development approval that determines whether an EIA is required by its screening of likely significant impacts. If the responsible agency makes a determination of no significance, the proposal is excused from subsequent assessment. The impartiality and technical competencies of the agency with carriage of the development proposal are therefore crucial to the integrity of the system. An improvement would be to give the EIA Administrator a role in the initial determination of significance. A secondary threshold issue relating to integrity also arises in respect of the development agency assessing the environmental impacts of a proposal in the second category of activities described above.

Another critical decision point is the review of assessment reports. This review is done by a committee of the Administrator or of the approving authority, as the case may be. In this regard, the role of the public is again important. The EMB requires that an EIA report be available for inspection by the public for at least a month after it is submitted. As part of the review, proponents may be required to "invite public comments on the report". Public review should be automatic and mandatory, not discretionary to the agency. Nor is a

decision maker required to consider or take into account public comments, even if these are invited. Read together, public input to an EIA becomes essentially optional to the Administrator or approving authority (cl 28).

Another imperfection relates to timing. The draft legislation does compel a decision on the assessment report within two weeks of public inspection (cl 28). Deadlines of this type are common in EIA systems, being designed to militate against excessive delays in the making of decisions. In reviewing assessment reports, the respective decision makers (Administrator or approving authority) can call for further research, study or technical advice. A discord therefore exists between the statutory timing period and any further assessment work. The remedy would be to put the decision into abeyance during this time, easily achieved through an amendment to clause 28 (5). Although this may be the intention it is not accurately represented in the EMB.

The draft legislation also links the trigger point to satisfactory compliance measures. Commencing a development without EIA approval is an offence, as is departing from the terms of an approval. The Inspector (a statutory position, described further in relation to pollution control) can intervene to stop work commenced illegally. The Inspector can order the restoration of any such land so developed, and seek an injunction in the event of a stop work order been ignored. These type of provisions are vital to the efficacy of an EIA system, and in general have been cast appropriately (cl 34).

Notwithstanding this logically sound approach, a substantial problem with this regime occurs. Even where a proposal has commenced without EIA approval, a conviction must be recorded before the Inspector can order a stop to work. That is, the Department must prosecute an offence before it can force work on such an unlawful development to stop. Any work that has been commenced without approval should be subject to an immediate halt, with any prosecutorial action coming later, that is if the Department does in fact even decide to prosecute. The situation created by the EMB allows a particular unlawful development to continue operations until such time as a successful prosecution has been undertaken, a period of at least several months, which is clearly ridiculous and untenable. Decisions relating to criminal prosecution are quite separate to the immediacy of stopping

work, and are influenced by many factors relating to priorities, staffing, court schedules, likelihood of success. The nexus between criminal conviction and a stop work order therefore needs to be broken.

Another problem with the draft legislation relates to the listed EIA activities. The list of activities subject to EIA may be altered by ministerial order in the Gazette (cl 37(6)). By contrast, the addition of exempted activities can only be done through regulation (cl 38(1)(e)). Presumably this approach was taken so as to afford a greater oversight of any proposal to redefine an activity as exempt (regulation making is a lengthy process, including being subject to parliamentary disallowance, unlike gazettals). In this regard, it is worth considering that activities which are assessed by the approving authority amount to a self-assessment by the development agency. Developers will almost certainly prefer their proposals to be assessed by the agency responsible for development, rather than by the Administrator and Environment Department. The power to relist activities is therefore of some importance. By altering the listed activities those developments that would otherwise have been subject to EIA by the Administrator would be assessed by the development agency.

A drafting problem is found in clause 35(2) pursuant to which the EIA Unit “must examine and process every development proposal which is referred to the Administrator by an approving authority under section 37(1); or comes to its attention as likely to have a significant environmental or resource management impact as defined in section 2; or causes, or in the opinion of the Minister is likely to cause, public concern”.

Assessing proposals referred by the Administrator is self-evident. However, as described, the EMB quite explicitly leaves the assessments of certain impact-generating activities to the approving authority. An apparent legislative conflict therefore arises in respect of the other obligations in the clause. It is unclear if this provision is designed to serve as an override or call-in power for the Administrator. If so, this needs to be better reflected in the text, including an elaboration of the precise mechanics as to how this power would prevail.

Finally, a major misdescription in the EMB needs to be corrected. Clause 25(4) links the assessing body—that is, the approving authority or Administrator—to the development activities listed in clauses 37 (2) and (3). However, that earlier clause mistakenly cross-refers to subclauses 1 and 2 of clause 37 (rendering the whole system nonsensical).

Pollution control

Pollution and waste is covered primarily under Part 4 of the EMB. By contrast to the EIA provisions, this Part of the draft legislation is brief and lacking in detail. The controls are focused on the generation of waste and pollution from factories, which is prohibited unless permitted by the Director. This kind of command-and-control approach is fairly common in pollution control (cl 41).

The enabling provisions are uneven and inconsistent, though. For example, the Director may enter any factory to ascertain the status of waste management and pollution control facilities. However, a court order is needed to enter into and inspect for any breaches of permit conditions (cl 44,48). The very opposite approach would seem more appropriate. Similarly, in cases of severe breaches the Director petitions a court to order a stop to work, yet the Director can reinstate the permit and allow work to recommence (cl 47). It is not apparent, either, given the statutory position of Chief Environmental Inspector (see below), why this functionary doesn't exercise inspectorate duties with respect to these matters.

There is an attempt to accommodate a transition to the new permitting system (cl 43). Because this provision lacks any particular detail many factories are not well absorbed into the new system. One example is the circumstance of an existing commercial or industrial facility being compelled to apply for a permit to discharge wastes or pollution, but not receiving such permission. The EMB does not anticipate such a situation arising.

Most fundamentally wrong with the system is that it is not an offence to either construct or operate a commercial or industrial facility without a permit. So although a factory may not generate, store or discharge waste or pollution, it is nonetheless not offensive under the EMB to act contrary to this obligation (cl 41). Given that the permissions regime is the very

basis of the approach towards waste and pollution, it is essential that offences be linked to such departures from the legislation.

The inspection of pollution and waste-related matters receives considerable attention under the EMB. A Chief Environmental Inspector (the Inspector) is to be appointed by the Public Service Commission to undertake inspectorate functions, such as entering commercial/industrial premises, interviewing personnel, sampling and copying documents, and impoundment. Some of the more expansive powers in this regard are the ability to enter sites at any time, rather than during business hours, and directing that the use of certain operations be discontinued (cl 16(2)(a),(h)).

The EMB provides for the issuance of improvement notices (IN) by the Inspector (cl 17). Such tools are now very familiar in terms of exercising discrete control over waste and pollution generating activities, and the conception of INs seems suitable for the Fiji situation. A worrying allowance is that INs may be served at private residences; the worry is that INs relate solely to the operation of an industrial or commercial facility (cl 17(9)). If enacted, this provision would amount to an encroachment upon the non-work dimension of a purely workplace activity where no such need arises. Clearly, there are scenarios when it would be expedient to intervene at a residential address, but this is limited to criminal acts of pollution where the operator of the facility may be a flight risk. INs are not instruments related to criminal offences but rather regulate the operation of a factory or plant, and should only be served at the said facility.

The relationship between the Inspector and Director of the Department is not specified. In fact, the only role of the Director regarding inspections is to concur with and approve the issuance of prohibition notices by the Inspector in cases of immediate environmental threat or risk (cl 17(4)). These relational issues stem largely from the Inspector being a creature of the Public Service Commission rather than a functionary of the Department. Given that the inspectorate service will repose within and essentially operate as part of the Department, yet execute its own specified functions, there will almost definitely arise a need to detail the relationship between the Director and Inspector.

Logically, the Inspector should be an employee of the Department and subject to ordinary direction. This preferred arrangement has been set aside in favour of statutorily segregating the Inspector from the support agency. It is worth revisiting the reasons for embracing this model. In the absence of obvious reasoning, it would be sensible to abandon this proposal and simply provide for the appointment of departmental officers as inspectors.

Finally, a drafting mistake is found in clause 17(3) wherein cross-reference is made to appeals under subclause 1; this should read cl 17(11).

Natural resources management

Another broad area of policy that the EMB addresses is natural resources management (NRM) (Part 5). The main tools in this regard are to be a Natural Resources Inventory, database and management plan. In combination, these tools are designed to be mutually reinforcing in shifting the use of resources to a managed basis. For instance, the Inventory, as its name implies, is a stocktake of the status of resources in Fiji. The Inventory must be prepared with wide input and maintained in a publicly accessible manner (cl 53). These tools will in turn underpin the National Resources Management Plan (the Plan).

The Plan is the substantial element to natural resources management as envisaged under the EMB. Essentially, the Plan is purposed to ensure that natural resources are planned and managed for longterm sustainability. In particular, the Plan must “identify the most appropriate uses for the natural resources of the Fiji Islands” and the respective areas for use. The Plan must contain mechanisms for implementation; amongst these, it must also evaluate the sustainable development policies prepared by agencies (described earlier).

The same process as employed for developing sustainable development policies is followed in respect of the Plan (cl 54). Process-related remarks made in respect of clause 12 therefore are relevant here. The National Council for Sustainable Development approves the final Plan. Once finalised, every agency “must observe the plan and enforce its observance” (cl 55). A raft of requirements to this end flow from approval. For example, all agencies are required to review their sustainable

development policies within two years to ensure compatibility with the Plan. The Plan also “provides the basis” for the EIA of development proposals (cl 57). Clause 58 requires that the development of all natural resources—with the exception of fishing—to be undertaken “in accordance with the provisions of” the Plan. Regulations may also be prepared to “establish a system of approvals and permits required for natural resources” as described by the Plan (cl 59).

Notwithstanding the laudable intentions of these provisions governing natural resources planning and management, the system it proposes to create will be unworkable for at least two reasons. Firstly, the interaction of the Plan with other instruments is not elaborated in a practicable manner from a legal sense. And secondly, the sheer scope of the system is unwieldy and will almost certainly overwhelm the agencies charged with its administration.

In terms of the former, the legislative construction leaves completely unclear how the Plan will operate vis-à-vis other statutory instruments, such as licences to mine for minerals. Whether the new system is intended to displace existing sectoral approvals or prevail over licences issued under other legislation for the extraction of resources is unclear. The potential for uncertainty and conflict is considerable.

The second fundamental fault with the Plan is how unwieldy the system will be in practice. A lot of repetition and structural redundancy is obvious within the system; for example, having to align agency sustainable development policies with the National Resources Management Plan. The fact that the same approving body—the National Council for Sustainable Development—approves both sets of instruments and adjudicates in the event of disputation between the two instruments becomes circular.

The concept of planning for resource use needs to be retained within the draft legislation. Rather than one National Resources Management Plan being prepared for the nation, however, a better approach would be to prepare plans for particular resource uses or geographic regions in the context of the sustainable development policy. In other words, the one policy provides the framework within which plans for specific natural resources are nested, thereby operationalising the sustainable development policy. The precise question of how these plans relate to development approvals issued under resources legislation would still need to be resolved. Regardless of that outstanding matter, organisationally an approach such as this is simpler and more achievable than that proposed in the EMB.

Miscellaneous

Once enacted, the EMB will give statutory status to three instruments – State of the Environment reporting, the National Environment Strategy, and environmental auditing. As with some of the other new inventions of the EMB, these instruments are now widely used elsewhere and serve a valuable purpose in emplacing environmental issues firmly on the government agenda, and in a highly public manner. One difference here again is that these instruments will become law rather than policy or practice.

In the case of Fiji, there is likely gain in legislating for reporting and strategising of this type. Without legislative insistence, reticent agencies may avoid participating in these types of initiatives. Legislation will at least ensure that an awareness of environmental issues will become inculcated and maintained.

The EMB is quite progressive in terms of enforcement. Offences against the EMB and corresponding penalties are carefully expressed. Similarly, civil remedies are available and integrated well into the enforcement regime. Clause 64 relates to continuing offences, an issue of some relevance to environmental protection. One limitation with the current provision is that separate prosecutions would have to be initiated in respect of each daily continuation of the offence. Whilst this approach may amount to more convictions being recorded against the offender, in practice the effort and expense of mounting subsequent court actions may militate against the intended effect of the provision. A small refinement of the clause would allow offences for continued breaches to be more automatic.

As a closing comment on the EMB, it is apparent that the Minister's role in environmental protection is very marginalised. Few ministerial powers exist, and those that do relate mainly to appointments and the promulgation of regulations. In this regard, the EMB seems to epitomise much of the other second generation of natural resources legislation. The existence of three key statutory positions—Director, Administrator and Inspector—also needs to be rethought. Although there is real value in giving key roles a statutory status, the interaction with the Director in particular may prove to be problematic. The Department will service those other two roles, and it is the Director who heads up this service agency. Precisely how the Administer and Inspector interact with the Director and Department should be clarified and ideally codified.

3.3 SUMMARY OF SECOND GENERATION LEGISLATION

A distinguishing aspect of this new legislation, both enacted and draft, is its contemporariness and sophistication, in terms of institutions, provisions, and general purpose. The head of power provided by the relevant international instrument largely accounts for much of this legislative maturity, as the Fiji law generally and substantially reflects the terms of the former. Controls over pollution and fishing are to be greatly updated, while the legislation relating to the trade in endangered species and to sustainable development represent a committed broadening of the legislative policy base.

A few points need to be restated by way of summary. The framework emplaced by the Ozone Depleting Substances Act is robust for controlling substances that deplete the ozone layer. Controls govern both the sale and use of such substances. The efficacy of the regime will very much depend upon its implementation by government as the coverage of the Act is appropriate to its purpose.

The other new legislation, the Endangered and Protected Species Act, is also a very useful control where a policy vacuum existed previously. The main limitation with this statute is its field of application, affording protection to wildlife only in a trade setting. Wildlife species, whether threatened or otherwise, does not enjoy a general protected status in Fiji. Now that the more insistent threat of trade has been brought under some controls, attention

should be applied to the protection of wildlife more generally. In this respect, species such as corals and turtles should be afforded a conservation status, given the increasingly disturbing condition of marine wildlife as a result of over exploitation.

In terms of draft legislation, control over the major sources of at-sea pollution will be greatly enhanced if the Marine Pollution Prevention Bill is enacted substantially as drafted. The legislation represents a welcome contemporising and expansion of the government's control over marine pollution. As well, it represents a credible accession by Fiji to globally accepted standards and approaches, which are very much reliant upon flag and coastal State diligence. There are imperfections with the MPP Bill—mainly simple drafting mistakes as outlined above, but also some policy issues which need to be resolved.

An important fact to restate is that Fiji is not party to many of the IMO instruments reflected in the MPP Bill. The only instrument to which Fiji is party is the Intervention Convention. It is therefore curious that the draft legislation clearly evidences Fiji's support for the global principles and approaches agreed through the IMO instruments but without becoming party thereto. As a matter of practice, Fiji should take the positive step of joining those instruments and thereby show its commitment to the IMO community. Very real problems may also inhere through applying domestically measures sourced in international law without actually being bound to the enabling treaty or convention.

The capacity of the government to better manage natural resources is also pending. Once enacted, the Fisheries and Environmental Management Bills will provide updated tools and empower entry into issues currently outside of government control. Whilst the construction and content of these Bills is ambitious, the legislation is appropriate—and indeed essential—if the use of resources is to be sustained into the future.

Although the scope and coverage of the Fisheries Management Bill is sound, many latent difficulties become apparent upon closer inspection, and it is unclear whether these are genuine drafting mistakes or reflect government intention. In terms of the Environmental Management Bill, its obvious enthusiastic mandate could be tempered with respect to the number of instruments it proposes to introduce. More attentiveness needs to also be paid to

the future administration of certain provisions. Establishing a legislative basis for environmental impact assessment and sustainable development policy are the potent tools most urgently needed in Fiji. Some other tools are also welcome, such as statutory plans for managing natural resources, but the desired outcome of such planning could be achieved through the judicious implementation of assessments and policies.

Finally, the role of the Minister continues to be inconsistent under the second generation legislation. Many new functionaries are proposed or enacted, all designed to improve the government's capacity to protect the environment and manage natural resources. The relationship between some of these key roles often lacks appreciation in terms of how they might function in practice. As well, the new legislation differs greatly with respect to the responsibilities of the Minister proposed thereunder. It would be timely in considering draft legislation to adopt a more consistent position as to ministerial roles and responsibilities across the much expanded policy areas of resources and the environment.

Part Four CONCLUDING COMMENTS

Two obvious characteristics emerge from this review of legislation governing natural resources and the environment in Fiji. The first is the clear distinction between the older statutes existing as Chapters in the Laws of Fiji and the legislation recently enacted or under consideration by the government. This second generation legislation is distinguished by its cognition of environmental issues and the necessity of managing natural resources for sustainability.

A second obvious defect with the legislative framework is the marginal right of the public to contribute to decision making. Public involvement is basic in any environment-related regime, but Fiji's laws are seen to be grossly inadequate in this regard. Refreshingly, the marginalisation of stakeholders evident in those older statutes is being rectified in the new laws in various stages of development.

Limitations and likely future problems with Fiji's legislation have been described at length in this report, and are not repeated here. Those problems can be redressed on a sector-specific basis as part of an agenda to improve performance within resources development sectors. It behoves sectoral regulators to be vigilant that resources within their remit are being managed under the most enlightened policy regime.

Enactment of the draft fisheries, marine pollution and environmental management laws in particular will go a long way towards correcting the most obvious gaps and deficiencies with the use of resources in Fiji. It would be preferable to enact the best laws possible by addressing some of the flaws with the Bills identified here, although this is not fatal to the legislation.

Introducing environmental impact assessment requirements, articulating policies for sustainable development, actively managing natural resources, and empowering the public in these processes will profoundly alter the basis of government decision making. Efforts should now turn to implementing these initiatives and ensuring that the appropriate institutional arrangements are in place for successful delivery of the new laws.

Government agencies, industry, and civil society will all be affected by the draft laws, and need to be engaged as soon as possible.

Some natural resources users will continue to operate without being materially changed by the new laws. Farming practices are one such area of operations that will not be captured by the tools soon to become available, for example, due largely to the characteristics of the sector. As experience with the new system grows, it will be possible to address environmental issues that fall outside the immediacy of the expanded legislative framework.

The draft legislation should be debated and enacted by Parliament without undue delay. In parallel, efforts could be usefully applied to correcting identified problems within the individual sectoral legislation. This convergence of actions will shift the use of resources to a sustainable basis and better protect the environment from the impacts of development.