PART 3

The Law of the Sea and Ocean Governance

Does Aotearoa New Zealand Need an Oceans Policy for Modern Ocean Governance?

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Introduction*

In 2000, New Zealand initiated a process for the creation of a National Oceans Policy. This initiative followed similar developments in Canada, Australia and elsewhere, and was intended to respond to a recommendation of the Parliamentary Commissioner for the Environment in 1999 that New Zealand should develop an oceans strategy.¹ Despite significant investment in the process and extensive public consultation, the initiative was suspended in 2003 and, although re-started in 2005, was effectively abandoned in 2008 following a change of government.² This article will explore whether, twenty years on, New Zealand still needs a national oceans policy.

New Zealand's maritime zone is 5.7 million km² (almost 1.7 percent of the world's oceans),³ and is 21 times the size of terrestrial New Zealand.⁴ More than 30 percent of New Zealand's biodiversity is located in its marine environment⁵ and the marine economy added around NZ\$7 billion to New Zealand's economy

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1 Parliamentary Commissioner for the Environment, *Setting Course for a Sustainable Future. The Management of New Zealand's Marine Environment* (Wellington, 1999), p. 99, available online: <https://www.pce.parliament.nz/media/pdfs/Sustainable_Future_report.pdf>.

2 P. Taylor, "Toward a national ocean policy in New Zealand," in *Routledge Handbook of National and Regional Ocean Policies*, eds., B. Cicin-Sain, D.L. VanderZwaag and M.C. Balgos (Abingdon: Routledge, 2015), pp. 361–392, p. 361.

3 A.B. MacDiarmid et al., "New Zealand marine ecosystem services," in *Ecosystem Services in New Zealand: Conditions and Trends*, ed., J.R. Dymond (Lincoln: Manaaki Whenua Press, 2014), pp. 238–253, p. 238.

4 Land Information New Zealand, "Map of the Continental Shelf Boundary," available online: <<https://www.linz.govt.nz/about-linz/what-were-doing/projects/new-zealand-continental-shelf-project/map-continental-shelf>>.

5 Ministry for the Environment and Stats NZ, *New Zealand's Environmental Reporting Series: Our Marine Environment 2019* (Wellington: Ministry for the Environment, 2019),

in 2017.⁶ More fundamentally, New Zealand's environment, society and economy are underpinned by significant marine ecosystem services which are harder to put a dollar figure on. MacDiarmid et al. distinguish between regulatory, provisioning and amenity services. They describe regulatory services as representing

the capacity of ecological systems to provide favourable conditions for humans by processing material (e.g., climate regulation). Provisioning services represent the tangible resources that humans can extract and utilise (e.g., food and raw materials); these resources are often labelled ecosystem goods. Finally, non-consumptive services represent the capacity of ecological systems to provide humans with intrinsic benefits ranging from recreational opportunities to visual amenity values like landscape and seascape. New Zealand marine ecosystems provide at least 12 regulatory services, 5 provisioning services and 9 non-consumptive services.⁷

Despite the intrinsic value of the oceans and their fundamental importance to New Zealand and New Zealanders, oceans policy and governance have been relatively neglected by successive governments.

Although there have been a number of governance initiatives over the last twenty years, in particular, relating to regulating the environmental effects of activities in its exclusive economic zone (EEZ),⁸ oceans governance in New Zealand is fragmented across 25 statutes, 14 government agencies across seven spatial jurisdictions, and numerous regional, local and community-based authorities.⁹ Excluding benthic protection zones, New Zealand currently protects about 0.4 percent of its maritime zone, largely in areas with sparse or no populations, and there are no protected areas beyond its territorial sea.¹⁰

p. 5, available online: <<https://www.mfe.govt.nz/publications/environmental-reporting/our-marine-environment-2019>> [*Our Marine Environment 2019*].

6 Id.

7 See MacDiarmid et al., n. 3 above, p. 241.

8 See the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012*, discussed *infra*.

9 J. Hewitt et al., "Proposed ecosystem-based management principles for New Zealand," *Resource Management Journal* (November 2018): 10–13, p. 12.

10 Approximately 615 km² of New Zealand's territorial sea is subject to area protection. See Controller and Auditor-General Tumuaki o te Mana Arotake, *Using Different Processes to Protect Marine Environments* (June 2019) (Presented to the House of Representatives under section 20 of the *Public Audit Act 2001*), p. 17. Available online: <<https://oag.parliament.nz/2019/marine-environment/docs/marine-environments.pdf>>. There is no one globally accepted definition of an MPA, but most broadly refer to an area subject to a

Attempts to reform New Zealand's outdated marine protected area (MPA) legislation have thus far failed,¹¹ and New Zealand has acknowledged that it is unlikely to meet global targets to protect 10 percent of its marine environment by 2020¹² in its most recent national report under the 1992 Biodiversity Convention.¹³ Although there is a degree of integrated coastal management at the regional level under the *Resource Management Act 1991* (RMA),¹⁴ which operates within the parameters of the 2010 New Zealand Coastal Policy Statement (NZCPS),¹⁵ there is little integration of governance across the territorial sea and EEZ. Moreover, the first attempt to develop marine spatial planning (MSP) in the Hauraki Gulf appears to have stalled, with insufficient resources or capacity being made available to implement the marine spatial plan that was released in December 2016.¹⁶ The process of recognizing the rights of Māori to the oceans, its resources and their governance under Te Tiriti o Waitangi (the Treaty of Waitangi) continues to be fraught. It was the dispute over the foreshore and seabed between Māori and the Crown¹⁷ that derailed

higher level of protection than the surrounding area with respect to one or more activities. The law and policy relating to MPAs in New Zealand is discussed *infra*.

11 See the discussion, *infra*.

12 See Convention on Biological Diversity (CBD) Decision X/2 (2010) *The Strategic plan for biodiversity 2011–2020 and the Aichi Biodiversity Targets*, Target 11. This target was also reiterated in the 2015 UN Sustainable Development Goals (Goal 14.5). See United Nations General Assembly (UNGA) Resolution 70/1, *Transforming our world: The 2030 Agenda for Sustainable Development*, adopted 15 September 2015.

13 See Department of Conservation Te Papa Atawhai (DOC), *New Zealand's Sixth National Report to the United Nations Convention on Biological Diversity (Reporting Period 2014–2018)* (Wellington: DOC, 2019), p. 78. Available online: <<https://www.doc.govt.nz/globalassets/documents/about-doc/role/international/nz-6th-national-report-convention-biological-diversity.pdf>>.

14 See generally, R.A. Makgill and H.G. Rennie, "A model for integrated coastal management legislation: A principled analysis of New Zealand's Resource Management Act 1991," *International Journal of Marine and Coastal Law* 27 (2012): 135–165.

15 The 2010 New Zealand Coastal Policy Statement (NZCPS) was prepared by the Minister for Conservation under s. 28 of the 1991 RMA and is discussed further, *infra*. The NZCPS is available online: <<https://www.doc.govt.nz/Documents/conservation/marine-and-coastal/coastal-management/nz-coastal-policy-statement-2010.pdf>>.

16 See Sea Change Tai Timu Tai Pari Hauraki Gulf Marine Spatial Plan (May 2017), available online: <<https://www.seachange.org.nz>>. In July 2019, the New Zealand government appointed a nine-member Ministerial Advisor Committee in order to respond to the plan. See K. Serjeant and R. Peart, *Healthy Seas. Implementing Marine Spatial Planning in New Zealand* (Environmental Defence Society, 2019), p. vi, available online: <http://www.eds.org.nz/assets/Publications/Healthy%20Seas_FINAL.pdf>.

17 On the foreshore and seabed debate see D. Grinlinton, "Private property rights versus public access: The foreshore and seabed debate," *New Zealand Journal of Environmental Law* 7 (2003): 313–341; J. Ruru, "The political and juridical battle in the salt-sand environment,"

the National Oceans Policy process in 2003, and the government's failure to consult with Māori over the designation of the Kermadec/Rangitāhua Ocean Sanctuary in 2015 suggests that lessons have yet to be learned.¹⁸ Legislation for the sanctuary,¹⁹ which would protect 15 percent of New Zealand's maritime zone, remains stalled in Parliament.

New Zealand currently ranks a credible 43rd out of 221 in terms of EEZ ocean health according to the Ocean Health Index,²⁰ and 84 percent of routinely assessed stocks are fished within sustainable limits within New Zealand waters.²¹ However, there is no basis for complacency in relation to the state of New Zealand's marine environment. In a 2016 report on the marine environment, the Ministry for the Environment identified climate change and ocean acidification, the threatened extinction of native marine birds and mammals and the degradation of coastal marine habitats and ecosystems as the most serious environmental issues threatening New Zealand's oceans.²² It is estimated that 90 percent of seabirds, 80 percent of shorebirds²³ and 22 percent of marine mammals in New Zealand are threatened with or at risk of extinction.²⁴ Although New Zealand comprises only 0.2 percent of global land area, 1.5 percent of global sediment loss (approximately 192 million tonnes of soil) occurs off New Zealand's coast annually.²⁵ It is estimated that there are

in *Making our Place: Exploring Land-use Tensions in Aotearoa New Zealand*, eds., J. Ruru, J. Stephenson and M. Abbott (Dunedin: Otago University Press, 2011), p. 23.

- 18 See further B. France-Hudson, "The Kermadec/Rangitāhua Ocean Sanctuary: Expropriation-free but a breach of good faith," *Resource Management in Theory and Practice* 12 (2016): 55–81.
- 19 For information and progress on the Kermadec Ocean Sanctuary Bill see online: <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DB_HOH_BILL68514_1/kermadec-ocean-sanctuary-bill>.
- 20 See Ocean Health Index, "New Zealand," available online: <<http://www.oceanhealthindex.org/region-scores/scores/new-zealand>>.
- 21 Ministry for the Environment and Stats NZ, *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019*, (Wellington: Ministry for the Environment, April 2019), p. 84, available online: <<https://www.mfe.govt.nz/publications/environmental-reporting/environment-aotearoa-2019>>.
- 22 Ministry for the Environment and Statistics New Zealand (2016), *New Zealand's Environmental Reporting Series: Our Marine Environment 2016* (Wellington: Ministry for the Environment, 2016), p. 7, available online: <<https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/our-marine-environment.pdf>> [*Our Marine Environment 2016*].
- 23 See *Our Marine Environment 2019*, n. 5 above, p. 5.
- 24 Id., p. 7.
- 25 Ministry for the Environment and Statistics New Zealand, *New Zealand's Environmental Reporting Series: Environment Aotearoa 2015* (Wellington: Ministry for the Environment, 2015), p. 99, available online: <<https://www.mfe.govt.nz/sites/default/files/media/>

214 non-native species established in New Zealand waters and this number is rising.²⁶ In New Zealand, 99.5 percent of imports and exports move by sea,²⁷ although the 6,200 vessels that commercially trade in New Zealand waters on an annual basis represent a fraction of those that ply the waters of the Northern Hemisphere.²⁸ The grounding of the *Rena*, a 37,209 tonne Liberian-registered container ship off Tauranga in October 2011, and the loss of 350 tonnes of oil and 86 containers, represents New Zealand's most serious modern maritime disaster.²⁹ New Zealand is also at risk of natural disasters, and the magnitude 7.8 Kaikōura earthquake in 2016 caused significant modification of seafloor topography resulting from uplift of 1–3 meters off the Kaikōura coast,³⁰ in addition to severe sediment loss, the destruction of intertidal habitats and key species of algae and invertebrates.³¹ It is estimated that sea level around New Zealand has risen 2.44 mm per year over the last 60 years, double the rate of the previous 60 years (1.22 mm per year).³² Seas around New Zealand have warmed by around 0.2 °C per decade since 1981,³³ and an unprecedented marine heatwave occurred in the Tasman Sea and near the Chatham Islands over the spring and summer of 2017.³⁴ It is estimated that sea surface temperatures will increase by 0.8 to 2.5 °C by 2100.³⁵ Research off the Otago coast demonstrated a 7.1 percent increase in ocean acidity in the last 20 years.³⁶ The impacts of climate change more generally have yet to be fully assessed but are predicted to be “complex.”³⁷

Environmental%20reporting/Environment-Aotearoa-2015.pdf>. See further, H. Bostock et al., “Distribution of surficial sediments in the ocean around New Zealand/Aotearoa. Part A: continental shelf and deep ocean,” *New Zealand Journal of Geology and Geophysics* 62, no. 1 (2019): 1–23, p. 14.

26 See *Our Marine Environment* 2019, n. 5 above, p. 5.

27 Id., p. 6.

28 See Maritime New Zealand, *New Zealand Coastal Navigation Safety Review* (2015), p. 42.

29 Id., p. 37. See further, Maritime Transport Investigation Commission, Inquiry 11–204: Container ship MV *Rena* grounding, on Astrolabe Reef, 5 October 2011, available online: <<https://taic.org.nz/inquiry/mo-2011-204>>.

30 C.L. Stevens et al., “Physical oceanography of New Zealand/Aotearoa shelf seas: A review,” *New Zealand Journal of Marine and Freshwater Research* (2019): p. 25. doi: 10.1080/00288330.2019.1588746.

31 D.R. Schiel et al., “The Kaikōura earthquake in southern New Zealand: Loss of connectivity of marine communities and the necessity of a cross-ecosystem perspective,” *Aquatic Conservation: Marine and Freshwater Ecosystems* 29 (2019): 1520–1534.

32 See *Our Marine Environment* 2019, n. 5 above, p. 6.

33 Id.

34 Id.

35 Id., p. 45.

36 Id.

37 See Stevens et al., n. 30 above, p. 29.

One of the principal challenges to ocean governance in New Zealand is the paucity of information about the marine environment, outside coastal and harbor areas, in contrast to other developed States,³⁸ with the Hauraki coast, Chatham Rise, Kaikōura and the west coast of the South Island being the most surveyed regions.³⁹ It is estimated that only about 15 percent of New Zealand's sea floor has been mapped to the standard necessary to map benthic habitats.⁴⁰ New Zealand does not have an ocean observing system for the collection of baseline environmental data⁴¹ and cannot quantify the state of marine habitats at the national level nor the full impact of fishing on coastal and open ecosystems.⁴² Moreover, even though its quota management system (QMS) for managing fisheries has been acclaimed internationally,⁴³ the total allowable catch (TAC) for 89 percent of stocks has been changed only two or fewer times since the introduction of the system, with 57 percent of stocks never having had the TAC altered, primarily as a consequence of data deficiency as well as procedural issues associated with the management of the QMS.⁴⁴

The question posed in this article is whether the governance and management of ocean resources as well as ocean health could be improved with the adoption of a New Zealand national oceans policy. Although this question is clearly speculative, the answer in this article (also speculative) is a qualified yes. Currently, as will be explored in this article, New Zealand's ocean governance regime is fragmented and insufficiently robust to respond to new threats and challenges and to provide for proactive and anticipatory management of activities. The legislative framework that draws a stark jurisdictional line between the territorial sea and the EEZ, and that depends on a significant level of regional control also largely confined within political boundaries, is ill-suited to support the development of ecosystem-based management approaches. The plethora of initiatives at all levels, from community to national, and the failure or, at best, limited success of many of these

38 For an overview of New Zealand's oceanographic conditions, see Stevens et al., n. 30 above and S.M. Chiswell et al., "Physical oceanography of the deep seas around New Zealand: A review," *Journal of Marine and Freshwater Research* 49 (2015): 286–317.

39 See Stevens et al., n. 30 above, p. 25.

40 See MacDiarmid et al., n. 3 above, p. 241.

41 J. O'Callaghan et al., "Developing an integrated ocean observing system for New Zealand," *Frontiers in Marine Science* 6 (March 2019): Article 143, p. 1.

42 See *Our Marine Environment* 2016, n. 22 above, p. 8.

43 New Zealand fisheries have been twice ranked as the most sustainable in the world. See F. McCormack, "Sustainability in New Zealand's quota management system: A convenient story," *Marine Policy* 80 (2017): 35–46, p. 35.

44 B. Hersoug, "'After all these years'—New Zealand's quota management system at the crossroads," *Marine Policy* 92 (2018): 101–110, p. 102.

initiatives, not least in relation to MPAs and MSP, illustrates the challenges of developing policy outside of a national framework based on agreed values and principles. Moreover, a national oceans policy may provide an opportunity to develop a genuine process of co-management of oceans resources between Māori and the New Zealand government on behalf of New Zealanders more generally. A national oceans policy could also raise the profile and importance of the oceans for policy and other decision-makers and help make it a priority issue for governments in the way that the Biodiversity Strategy⁴⁵ has shaped and focused government initiatives relating to conservation. Finally, a national oceans policy could provide a framework within which to better implement New Zealand's international commitments and to demonstrate leadership at the both the regional and the international level.

However, international experience of developing an oceans policy illustrates the challenges of implementing that policy. The cautionary experiences of Canada and Australia will be highlighted in this article, and lessons learned from their experiences will be identified. Canada adopted an *Oceans Act* in 1996, an Oceans Strategy in 2002 and an Oceans Action Plan in 2005.⁴⁶ Although the designation of the Tuvaijuittuq MPA in the Canadian High Arctic on 1 August 2019 means that 13.81 percent of Canada's marine environment is now subject to higher protection than surrounding areas, and that Sustainable Development Goal (SDG) Target 14.5/Aichi Target 11 has been surpassed (in area-based terms),⁴⁷ the general view is that the implementation of the *Oceans Act* has not lived up to its goals.⁴⁸ The Australian experience is similarly mixed. While the 1998 Oceans Policy began with an ambitious multi-sector approach to oceans governance, it has largely reverted to a single sector environmental

45 *Te Mana o Te Taiao—Aotearoa New Zealand Biodiversity Strategy 2020*, available online: <<https://www.doc.govt.nz/globalassets/documents/conservation/biodiversity/anzbs-2020.pdf>>; *The New Zealand Biodiversity Strategy 2000–2020* (February 2000), available online: <<https://www.doc.govt.nz/globalassets/documents/conservation/new-zealand-biodiversity-strategy-2000.pdf>>. See also DOC, *Te Kōiira O Te Kōiira—Our Shared Vision for Living with Nature. A Discussion Document on Proposals for a Biodiversity Strategy for Aotearoa New Zealand* (Wellington: DOC, August 2019), available online: <<https://www.doc.govt.nz/globalassets/documents/conservation/protecting-and-restoring/biodiversity-discussion-document.pdf>>.

46 For background on Canada's oceans policy, see C. Mageau et al., "Oceans Policy: A Canadian case study," in Cicin-Sain et al., n. 2 above, pp. 87–131.

47 See Fisheries and Oceans Canada, "Achievements," available online: <<http://www.dfo-mpo.gc.ca/oceans/conservation/achievement-realizations/index-eng.html>>.

48 M.S. Watson and S.M. Hewson, "Securing protection standards for Canada's marine protected areas," *Marine Policy* 95 (2018): 117–122, p. 121.

approach primarily focused on MPA designation.⁴⁹ Although marine bioregional plans have been adopted for most areas,⁵⁰ Australia's Oceans Policy has been described as being "in abeyance."⁵¹ Recent experience in the United States also demonstrates the vulnerability of an oceans policy to the vacillations of political fortune, with the transition from President Obama to President Trump leading to a shift in the U.S. oceans policy "from an evolving effort to develop and implement ecosystem-informed stewardship back to an approach that prioritizes accelerated economic development and resource extraction."⁵² International experience can therefore provide some valuable lessons for New Zealand in developing a National Oceans Policy, in particular, around ambition and partnership.

In the penultimate section of this article, building on New Zealand's previous experience in developing an early stillborn National Oceans Policy, a proposal for a new oceans policy will be outlined. It is suggested that the policy build on and develop values and principles that already underpin oceans governance in New Zealand, but which, in particular, emphasize and facilitate ecosystem and co-governance approaches to oceans management. Options for associated infrastructure such as an *Oceans Act* will also be briefly explored. The article will conclude with final observations.

Ocean Governance in New Zealand

New Zealand ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁵³ in 1996. In accordance with the Convention, New Zealand exercises sovereignty over its territorial sea,⁵⁴ sovereign rights over its continental shelf⁵⁵ and, within its EEZ, sovereign rights for the purposes of exploitation of living and non-living resources as well as jurisdiction over the establishment and use of artificial islands, installations and structures, marine

49 D.C. Smith et al., "Implementing marine ecosystem-based management: Lessons from Australia," *ICES Journal of Marine Science* 74 (2017): 1990–2003, p. 1992.

50 G. Treloar et al., "The National Science Plan: Informing Australia's future ocean policy," *Australian Journal of Maritime & Ocean Affairs* 8 (2016): 43–51, p. 43.

51 J. Vince et al., "Australia's Oceans Policy: Past, present and future," *Marine Policy* 57 (2015): 1–8, p. 1.

52 J.A. Duff, "U.S. ocean priorities shift with a new administration," *Ocean Yearbook* 33 (2018): 45–57, p. 45.

53 United Nations Convention on the Law of the Sea, adopted 10 December 1982, 1833 *United Nations Treaty Series* 397.

54 Id., Article 2.

55 Id., Article 77.

scientific research and environmental protection.⁵⁶ New Zealand's EEZ is the fifth largest in the world, and the outer limits of its continental shelf beyond 200 nautical miles (M) were confirmed by the UN Commission on the Limits of the Continental Shelf in 2008,⁵⁷ and were implemented under domestic law by virtue of an Order in Council in 2018.⁵⁸ New Zealand's maritime zones are illustrated in Figure 1.

New Zealand has a unicameral political system but there is nevertheless a tradition of strong regional autonomy, which means that marine and coastal planning within New Zealand's territorial sea is divided between central, regional and local government under the RMA, the overarching purpose of which is the "sustainable management of natural and physical resources."⁵⁹ The RMA seeks to manage the effects of activities rather than activities themselves, and this approach was largely adopted in respect of the EEZ in 2012 under the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act* (EEZ & CS Act). Beyond these two Acts, activities are largely managed on a sectoral basis with specific legislative regimes regulating fishing,⁶⁰ shipping,⁶¹ and oil and gas exploration.⁶² Legislation also protects marine species,⁶³ as well as addressing threats such as invasive species.⁶⁴ MPAs are primarily designated within New Zealand's territorial sea under the *Marine Reserves Act 1971*, although other forms of area-based protection can be implemented under legislation relating to fishing, the protection of wildlife and shipping. In an effort to meet its international commitments under the 1992

⁵⁶ Id., Article 56. The *Continental Shelf Act 1964* (as amended) and the *New Zealand Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977* (as amended) establish New Zealand's maritime zones in accordance with international law.

⁵⁷ *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission* (Twenty-second Session, New York, 11 August–12 September 2008) CL*CS/60 [8]–[11].

⁵⁸ Continental Shelf Order 2018/135.

⁵⁹ *Resource Management Act 1991*, s. 5 [RMA Act].

⁶⁰ Fishing is primarily although not exclusively regulated under the *Fisheries Act 1996*.

⁶¹ Shipping is primarily although not exclusively regulated under the *Maritime Transport Act 1994*.

⁶² Oil and gas exploration is primarily although not exclusively regulated under the *Crown Minerals Act 1991*. The environmental effects of oil and gas exploration are regulated by the RMA 1991 and the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* (EEZ & CS Act 2012).

⁶³ Legislation includes but is not limited to the *Marine Mammals Protection Act 1978*, *Wildlife Act 1953* and the *Trade in Endangered Species Act 1989*.

⁶⁴ See the *Biosecurity Act 1993*.

FIGURE 1 New Zealand's maritime zones

Biodiversity Convention,⁶⁵ New Zealand adopted the *Marine Protected Areas Policy and Implementation Plan* (the MPA Policy)⁶⁶ in 2005 in order to facilitate

65 Convention on Biological Diversity, adopted 5 June 1992, *United Nations Treaty Series* 1760 [1992 CBD].

66 Department of Conservation and Ministry of Fisheries, *Marine Protected Areas Policy and Implementation Plan* (2005), available online: <<https://www.doc.govt.nz/globalassets/>

the development of a network of representative MPAs. Although progress has been slow, in addition to reserves established under the *Marine Reserves Act*, MPAs have also been designated under separate legislation in the Hauraki Gulf,⁶⁷ Fiordland,⁶⁸ Kaikōura,⁶⁹ the sub-Antarctic islands,⁷⁰ and the Sugar Loaf Islands.⁷¹

Māori consider the ocean to be taonga (treasures) and their right to undisturbed possession of fisheries is guaranteed by Article 2 of Te Tiriti o Waitangi (the Treaty of Waitangi). As Treaty partners, Māori demand a co-governance role over marine resources, and their relationship with the oceans is based on tikanga Māori (Māori customary law) founded in whakapapa (genealogy), mana (authority) and kaitiakitanga (guardianship).⁷² In 1975, the Waitangi Tribunal was established in order to hear grievances against the Crown⁷³ and, in 1995, the Office of Treaty Settlements was established. This formalized the process of negotiation with iwi (an extended kinship group) to agree and implement settlement of historical Treaty of Waitangi claims that had begun in 1989.

documents/conservation/marine-and-coastal/marine-protected-areas/mpa-policy-and-implementation-plan.pdf>.

67 The *Hauraki Gulf Marine Park Act 2000* established the Tawharanui Marine Park as well as the Hauraki Gulf Forum.

68 The *Fiordland (Te Moana o Atawhenua) Marine Management Act 2005* established the Fiordland (Te Moana o Atawhenua) Marine Area. The eight marine reserves established under the Act are deemed to be marine reserves under section 4(1) of the *Marine Reserves Act 1971* and the terms of the *Marine Reserves Act* apply to those reserves (section 8 of the 2005 Act).

69 The *Kaikōura (Te Tai o Marokura) Marine Management Act 2014* established the Te Whata Kai o Rākihōia I Te Tai o Marokura/ Kaikōura Marine Area. Within the marine area a number of zones have been designated, including a marine reserve, a fur seal sanctuary, a whale sanctuary, mātaītai (customary fishing areas) and taiāpure (locally managed fishing areas).

70 *Subantarctic Islands Marine Reserves Act 2014*.

71 The Ngā Motu/ Sugar Loaf Islands MPA was established by *The Sugar Loaf Islands Marine Protected Area Act 1991*, which provides for restrictions on fishing and prohibits mining within the MPA.

72 A. Suszko, *Māori Perspectives on Ocean Governance* (2014, report on file with author), p. 2. See generally, A. Erueti, "New Zealand/ Aotearoa and the Rights of Māori to Natural Resources in Marine Areas," in *The Rights of Indigenous Peoples in Marine Areas*, eds., S. Allen, N. Banks and Ø. Ravna (Oxford: Hart Publishing, 2019), pp. 237–249; A. Jackson, N. Mita and H. Hakopa, *Hui-te-ana-nui: Understanding Kaitiakitanga in Our Marine Environment* (National Science Challenges. Sustainable Seas, 2017); R. Joseph et al., *The Treaty, Tikanga Māori Ecosystem-based Management, Mainstream Law and Power Sharing for Environmental Integrity in Aotearoa New Zealand—Possible Ways Forward* (National Science Challenges, Sustainable Seas, 2019).

73 *Treaty of Waitangi Act 1975*. See M. Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008).

In relation to fisheries, Māori have benefited significantly under this process; in 2016 Māori, who make up around 15 percent of New Zealand's population,⁷⁴ own almost 50 percent of New Zealand's fishing quota under the QMS.⁷⁵

By contrast, in respect of rights to the foreshore and seabed, Māori rights were much harder won. In 2003, one of the most challenging periods in modern Māori/Crown relationship history was precipitated by the decision of the New Zealand Court of Appeal⁷⁶ to overturn historic legal precedent⁷⁷ and determine that Māori customary title to the foreshore and seabed had not been extinguished by legislation adopted after 1840. Responding to concerns over public access of New Zealanders to the foreshore, the Labour government, in 2004, reversed this decision under the 2004 *Foreshore and Seabed Act*, which vested ownership of the foreshore and seabed in the Crown, effectively extinguishing Māori customary rights therein.⁷⁸ The 2004 Act was subsequently repealed in 2011 by the *Marine and Coastal Area (Takutai Moana) Act*, which declared that the foreshore and seabed (referred to as the "common marine and coastal area") could not be owned by the Crown or by any other person.⁷⁹ The 2011 Act restored any customary interest in the common marine and coastal area that had been purportedly extinguished by the 2004 Act⁸⁰ and created three new statutory rights to the marine environment: participation in conservation processes; a protected customary use right; and customary title.⁸¹ More generally, obligations to consider the principles of Te Tiriti o Waitangi (the Treaty of Waitangi) as well as principles of tikanga Māori, such as the protection of taonga and kaitiakitanga, are embedded within the RMA⁸² and the EEZ & CS Act.⁸³

74 Stats NZ, "2013 Census ethnic group profiles: Māori," available online: <http://archive.stats.govt.nz/Census/2013-census/profile-and-summary-reports/ethnic-profiles.aspx?request_value=24705&parent_id=24704&tabname=#24705>.

75 H. Bodwitch, "Challenges for New Zealand's individual transferable quota system: Processor consolidation, fisher exclusion, and Maori quota rights," *Marine Policy* 80 (2017): 88–95, p. 88. See *infra*, text at footnotes 188–191.

76 *Attorney General v. Ngati Apa* [2003] 3 *New Zealand Law Reports* 643 (CA).

77 *Wi Parata v. Bishop of Wellington* (1877) 3 NZ Jur (NS) (SC). See also *Re Ninety Mile Beach* [1963] *New Zealand Law Reports* 461 (CA).

78 On the foreshore and seabed debate, see Grinlinton, n. 17 above, and Ruru et al., n. 17 above.

79 *Marine and Coastal Area (Takutai Moana) Act 2011*, s. 11(2).

80 *Id.*, s. 6.

81 *Id.*, ss. 47–50, 51, 58–62. See generally, A. Suszko, "The Marine and Coastal Area (Takutai Moana) Act 2011: A just and durable solution to the foreshore and seabed debate?," *New Zealand Universities Law Review* 25 (2012): 148–179.

82 RMA 1991, ss. 6–8.

83 EEZ & CS Act 2012, s. 12.

In addition to national partnerships with iwi there are also a number of community-based initiatives that form part of ocean governance in New Zealand. These include the Hauraki Gulf Forum, which was established under the *Hauraki Gulf Marine Park Act 2000* and includes representation from central, regional and local government authorities across Auckland, Waikato and Thames-Coromandel regions, as well as representatives of the tangata whenua (Māori with authority over the land) of the Hauraki Gulf and its islands.⁸⁴ The Forum has, most recently, through a multi-stakeholder group, developed a marine spatial plan for the Hauraki Gulf.⁸⁵ On the west coast of the North Island, the Kaipara Harbour Management Group was established in 2005, and its purpose is to promote integrated management and inter-agency coordination and kaitiakitanga of the Kaipara Harbour and its catchment.⁸⁶ Kaipara Harbour is New Zealand's largest estuarine ecosystem, extending across Auckland, New Zealand's largest city, and Northland. On the west coast of the South Island, the Fiordland Marine Guardians are officially recognized under the *Fiordland (Te Moana o Atawhenua) Marine Management Act 2005*, and represent commercial and recreational fishers, tourism, recreational users, science, conservation and the local community. They make recommendations to government on marine management issues in the Fiordland Marine Area, which extends from Awarua Point on the West Coast of New Zealand to Sandhill Point, Te Waewae Bay out to 12 M offshore.⁸⁷

On the east coast, the South East Marine Protection Forum (Roopu Manaaki Ki Te Toka), was appointed in 2014 by the Ministers for Conservation and Primary Industries to recommend sites for area-based protection in accordance with the 2005 MPA Policy.⁸⁸ The Forum covers the coastal marine area, out to 12 M, from Timaru in South Canterbury to Waipapa Point in Southland and represents mana whenua, local government, commercial and recreational

84 See Auckland Council, "What is the Hauraki Gulf Forum?," available online: <<https://www.aucklandcouncil.govt.nz/about-auckland-council/how-auckland-council-works/harbour-forums/Pages/hauraki-gulf-forum.aspx>>.

85 The plan and further information on the Sea Change Tai Timo Tai Pari process can be found online: <<https://www.seachange.org.nz>>.

86 See Integrated Kaipara Harbour Management Group, "Who We Are," available online: <<https://www.kaiparaharbour.net.nz/about>>.

87 See Ministry for the Environment, "Role of the Fiordland Marine Guardians," available online: <<https://www.mfe.govt.nz/marine/we-all-have-role-play/fiordland-marine-guardians>>.

88 Recommendations were made in 2018. See South East Marine Protection Forum Roopu Manaaki Ki Te Toka, *Recommendations to the Minister of Conservation and the Ministry of Fisheries* (February 2018), available online: <<http://www.rmla.org.nz/wp-content/uploads/2018/03/South-East-Marine-Protection-Forum-Report.pdf>>.

fishers and representatives from science, the environment and tourism.⁸⁹ Also in 2014, the Kaikōura Marine Guardians were established under the *Kaikōura (Te Tai o Marokura) Marine Management Act* in order to advise central government ministers and any person or organization on matters that affect the Kaikōura marine area.⁹⁰ The Guardians comprise representatives from Te Rūnanga o Ngāi Tahu, the Kaikōura community, and industries or interests including biosecurity, conservation, education, the environment, marine science and tourism.⁹¹

As this brief overview demonstrates, although New Zealand has a unicameral as opposed to a federal political structure, ocean governance is fragmented across a large number of instruments and organizations with strong regional and, in some but not all locations, community engagement. Governance is complex and, in places disconnected, and there are significant gaps, particularly in respect of area-based protection. For the purposes of this article, the principal legislative instruments that provide the foundation for ocean governance in New Zealand will be briefly outlined below. It is not possible to provide a comprehensive overview⁹² of each statute, but central values, principles and processes will be highlighted in order to demonstrate that the core of an oceans policy has arguably already been developed in New Zealand.

Resource Management Act 1991

The scope of the RMA extends to activities taking place on land and in the ocean out to the 12-M limit. The overarching purpose of the RMA is the “sustainable management of natural and physical resources”⁹³ in New Zealand, and the RMA seeks to manage the effects of activities on the environment rather than the activities themselves.⁹⁴ Seventeen bodies perform the

89 See DOC, “South eastern South Island marine protection,” available online: <<http://south-eastmarine.org.nz/about/the-process/>>.

90 See DOC, “Kaikōura Marine Guardians,” available online: <<https://www.doc.govt.nz/about-us/statutory-and-advisory-bodies/kaikoura-marine-guardians/>>.

91 *Kaikōura Marine Guardians Annual Report 2018/2019* (July 2019), p. 3, available online: <<https://www.doc.govt.nz/globalassets/documents/about-doc/statutory-bodies/kaikoura-marine-guardians-annual-report-2018-2019.pdf>>.

92 For a detailed introduction to the oceans governance legislative framework see T. Daya-Winterbottom, “Protection of the coastal and marine environment,” in *Environmental Law in New Zealand*, eds., Hon. P. Salmon QC and D. Grinlinton (Wellington: Thomson Reuters, 2018), 2d ed., pp. 753–835.

93 RMA 1991, s. 5.

94 *Id.*, s. 3.

functions of regional councils,⁹⁵ and are tasked with managing the coastal and marine environment. They must also adopt a regional coastal plan, subject to approval by the Minister of Conservation, setting out the principles guiding management of the coastal marine area and the rules relating to individual activities taking place therein.⁹⁶ Fishing and oil and gas exploration is managed at the national level, but its environmental effects may be regulated by regional authorities under the RMA.⁹⁷ Regional coastal plans must recognize and provide for the matters of national importance set out in section 6 of the RMA as well as have regard to the principles set out in sections 7 and 8 of the Act, in addition to the overarching principles and objectives set out in the New Zealand Coastal Policy Statement (NZCPS).⁹⁸ Matters of national importance (section 6 of the RMA) have greater weight than regional or district goals and must be meaningfully provided for in national, regional and local plans, and it is not sufficient for decision-makers simply to have regard for these factors.⁹⁹ Moreover, the Supreme Court has recently concluded that the NZCPS may provide greater direction than what is set out in sections 6, 7 and 8 of the RMA and, where the wording of the NZCPS is specific, there is no need to have recourse to the relevant sections of the RMA. In particular, the Supreme Court characterized NZCPS Policies 13(1)(a) and 15(a) (requiring activities and development to avoid adverse effects on the outstanding national character of the coastal environment and on outstanding natural features and landscapes of the coastal environment respectively) as “environmental bottom lines,” which

95 Sixteen councils exercise the functions of a regional council in managing the coastal marine areas (CMAs) offshore New Zealand and the Chatham Islands Council manages the CMA offshore the Chatham Islands. See online: <http://www.localcouncils.govt.nz/lcip.nsf/wpg_url/Profiles-Councils-by-Region-index>. The Department of Conservation performs the functions of regional councils in respect of New Zealand's islands in the sub-Antarctic and the Pacific.

96 RMA 1991, ss. 57, 58, 64 and Schedule 1.

97 The powers of regional councils in relation to managing the environmental impacts of fishing have been recently confirmed by the New Zealand Court of Appeal in *Attorney-General v. Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532. See also *Trustees of the Motiti Rohe Moana Trust v. Bay of Plenty Regional Council* [2018] NZEnvC 67.

98 RMA 1991, ss. 57–58. The New Zealand Coastal Policy Statement 2010 (NZCPS 2010) is adopted by the Minister of Conservation. The current version was adopted in 2010 and can be found online: <<https://www.doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/new-zealand-coastal-policy-statement/new-zealand-coastal-policy-statement-2010/>>.

99 *Environmental Defence Society v. Mangonui County Council* [1989] 3 NZLR 257, applied in *Trio Holdings v. Marlborough District Council* [1997] NZRMA 97.

must be given effect to by regional authorities in their plans and coastal consent decision-making.¹⁰⁰

Section 6 of the RMA identifies matters of national importance that must be provided for in plans, policies and decisions and these include the preservation of the natural character of the coastal environment, the protection of outstanding natural features and landscapes from inappropriate use and development, the protection of indigenous flora and fauna, the maintenance of public access to the coastal marine area, and the protection of protected customary rights. Additional principles and other matters that decision-makers must consider are set out in Section 7 of the RMA and these include the concepts of stewardship and *kaitiakitanga*,¹⁰¹ the efficient use and development of natural resources, the intrinsic value of ecosystems and the maintenance and enhancement of the natural environment, and the effects of climate change. In terms of hierarchy, matters identified under section 7 of the RMA are given less weight than the matters of national importance listed under section 6, but they nevertheless comprise an important part of the planning and decision-making context. Finally, under section 8 of the RMA, decision-makers must take into account the principles of *Te Tiriti o Waitangi* (the Treaty of Waitangi) in relation to management and protection of resources. The NZCPS, the latest version of which was adopted in 2010 by the Minister of Conservation, places a strong emphasis on precautionary, strategic and integrated management of activities taking place in the coastal marine area,¹⁰² and sets out seven objectives and 29 policies, which, in amalgamation, attempt to balance the need for protection and preservation of the coastal and marine environment with economic development in light of New Zealand's obligations to its indigenous population and under international law.

The principal sections of the RMA governing activities in the coastal marine area are 12 and 15. Section 12 of the RMA establishes a general presumption against development of the coastal and marine area except where the development or activity is expressly authorized in a regional coastal plan or by a coastal permit. Activities are designated one of six categories ranging from permitted to prohibited.¹⁰³ Activities classed as permitted do not require a coastal permit provided they comply with any conditions set out in the regional coastal plan. Controlled activities by contrast, must be authorized by a coastal permit, but

100 *Environment Defence Soc Inc. v. The New Zealand King Salmon Co Ltd. & Ors* [2014] NZSC 38.

101 *Kaitiakitanga* is defined for the purposes of the RMA as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship" (s. 2).

102 2010 NZCPS, n. 98 above, Policies 3, 4 and 7.

103 RMA 1991, s. 87A.

that permit *must* be issued where the activity complies with any conditions relating to matters over which the control is reserved. Restricted discretionary activities are similarly subject to authorization via a coastal permit, and the power to decline or grant a conditional permit is limited to matters over which the discretion is restricted (as set out in the coastal plan). By contrast, discretionary and non-complying activities must be authorized by a coastal permit and that permit may be declined or subject to any conditions the consent authority deems appropriate. Finally, activities classed as prohibited cannot be authorized by a coastal permit under any conditions. The activities listed in section 12 of the RMA focus on the development of the coastal marine area and include activities such as resource extraction, seabed disturbance and modification, the erection of structures within the coastal marine area and the introduction of species to the coastal marine area.¹⁰⁴ The discharge of contaminants into the coastal marine area is governed by section 15 of the RMA and is subject to a similar consent authorization process. The Act sets out detailed provisions relating to the process for obtaining consent, public participation and review.

The RMA is therefore notable in establishing a highly integrated approach to coastal marine management across an entire catchment area. The principled framework established by the RMA and the 2010 NZCPS, as well as the requirement that plans are approved by the Minister of Conservation, ensures a level of national consistency, although there is some variation in how activities are designated between authorities with respect to the type of permit they need. As noted above, in some regions such as the Hauraki Gulf and Kaipara Harbour, there is a level of cooperation and coordination between regional councils. Furthermore, where an activity is deemed to be of national significance it may be called in by the Minister of Conservation and referred to a Board of Enquiry or the Environment Court for consideration and this provides for a level of national oversight.¹⁰⁵ The RMA also provides for selected cooperation between interested agencies in certain cases, such as aquaculture, where coastal permits must also be assessed by the Chief Executive of the Ministry of Fisheries¹⁰⁶ in order to determine whether the application will have an undue adverse effect on fishing.¹⁰⁷ Nevertheless, there are significant limitations on integrated management under the RMA. Both fishing and oil and gas activities (other than their environmental effects) are authorized under separate, national regimes

104 Id., ss. 12(1)–(6).

105 Id., s. 142.

106 Id., s. 107.

107 *Fisheries Act 1996*, s. 186E.

and, unusually—in contrast to other jurisdictions that endorse an integrated approach to ocean coastal management—MPA designation is also largely managed by separate legislation and processes. Finally, there is insufficient integration or interaction in respect of the territorial sea and EEZ interface within the RMA.

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

The environmental impacts of activities (other than fishing) in New Zealand's EEZ were subjected to a regulatory regime in 2012 with the adoption of the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act*.¹⁰⁸ The purpose of the Act is designed to be complementary to the RMA, and comprises the “sustainable management of the natural resources of the exclusive economic zone and the continental shelf” as well as the protection of the marine environment from pollution.¹⁰⁹ Nevertheless, the scope of the EEZ & CS Act is narrower than that of the RMA, and this is relevant to the interpretation of “sustainable management” under the Act.¹¹⁰ A number of overarching principles are set out under the EEZ & CS Act in order to guide decision-makers, in particular, the Environmental Protection Authority (EPA), when determining marine consent applications. These include the importance of protecting rare or vulnerable ecosystems or species, the economic benefit to New Zealand of the proposed activity, as well as the more general principle of efficient use and development of natural resources.¹¹¹ In contrast to the RMA, the EEZ & CS Act explicitly endorses the precautionary principle.¹¹² The Act

¹⁰⁸ Section 27 of the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977* provided for the adoption of measures for the protection of the environment (as well as other matters) by Order in Council but could not be said to establish a comprehensive regime for protecting the EEZ environment.

¹⁰⁹ EEZ & CS Act 2012, s. 10(1).

¹¹⁰ The Environmental Protection Authority (EPA) has counseled against transferring case law and interpretations uncritically from the RMA to the EEZ Act when dealing with applications under the latter. See *Trans-Tasman Resources Ltd. Marine Consent Decision*, June 2014, para. 78, available online: <<https://www.epa.govt.nz/assets/FileAPI/proposal/EEZ000004/Boards-Decision/ff4e630f5d/EEZ000004-Trans-Tasman-Resources-decision-17June2014.pdf>>.

¹¹¹ EEZ & CS Act 2012, s. 59.

¹¹² *Id.*, s. 34. In the relatively few marine consent applications considered thus far the EPA has robustly applied the precautionary principle, rejecting applications on the basis that adequate information had been supplied as to the likely impacts of the operations. See *Trans-Tasman Resources Ltd. Marine Consent Decision*, n. 110 above, and *Chatham Rock Phosphate Ltd. Marine Consent Decision*, February 2015, paras. 816–827, available online: <<https://www.epa.govt.nz/assets/Uploads/Documents/Marine-Activities-EEZ/>

expressly acknowledges New Zealand's obligations under key international instruments,¹¹³ as well as the Crown's obligations under Te Tiriti o Waitangi (the Treaty of Waitangi).¹¹⁴ Specifically, the Act requires decision-makers to notify iwi of potential applications that may affect their interests¹¹⁵ and consider the impact of applications on existing iwi interests when making decisions on marine consents.¹¹⁶ The Minister must establish and use a process that allows iwi adequate time and opportunity to comment on proposed regulations under the Act,¹¹⁷ and a Māori Advisory Committee is established in order to ensure that marine consent decisions are informed by a Māori perspective.¹¹⁸ As yet there is no equivalent of the 2010 NZCPS for the EEZ, but amendments adopted to the EEZ & CS Act in 2017 now provide for the issue of an EEZ policy statement (or statements) by the Minister in order to set out overarching objectives and policies to support decision-making on applications for marine consents in the EEZ.¹¹⁹ To date however, no EEZ policy statement has been issued.

The EEZ & CS Act was designed to complement existing legislation and to fill gaps rather than to provide an overarching comprehensive regulatory regime for the EEZ. Instead of integrating existing legislation, the Act attempts to coordinate instruments regulating marine activities through clarification of jurisdictional scope.¹²⁰ Low-level integration is achieved by the requirement that the EPA consider the nature and effect of the RMA and other applicable management regimes when deciding on consent applications.¹²¹ This provision has been used by the EPA in order to consider the implications of an

Activities/990a6509eb/CRP-Decision-EEZ000006.pdf>. See also D.K. Anton and R.E. Kim, "Current legal developments in New Zealand. The application of the precautionary and adaptive management approaches in the seabed mining context: Trans-Tasman Resources Ltd. Marine Consent Decision under New Zealand's Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012," *International Journal of Marine and Coastal Law* 30 (2015): 175–188.

113 EEZ & CS Act 2012, s. 11. The instruments comprise the 1982 UNCLOS, the 1992 CBD, the International Convention for the Prevention of Pollution from Ships (1973/79 MARPOL) and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, (London Convention).

114 EEZ & CS Act 2012, s. 12.

115 *Id.*, s. 46.

116 *Id.*, ss. 33, 59.

117 *Id.*, s. 32.

118 *Id.*, s. 18.

119 *Id.*, ss. 37A, 37G.

120 For example, section 20A of the EEZ & CS Act clarifies that the EEZ Act governs discharges and dumping from structures and the 1994 *Maritime Transport Act* regulates discharges and dumping from ships.

121 EEZ & CS Act 2012, ss. 59(2) (h) and (k) to (m).

activity for the 2010 NZCPS and regional coastal plans, although the EPA has acknowledged that neither the NZCPS nor regional coastal plans have direct application in the EEZ.¹²² In order to achieve a level of consistency in decision-making across a range of activities, the Act provides a mandate for one agency, the EPA, to decide on marine consent applications within the EEZ, to enforce the Act and to promote awareness of the Act.¹²³

Reflecting the approach of the RMA, the EEZ Act establishes a presumption that activities covered by the Act are prohibited unless expressly permitted or authorized by a permit on a case-by-case basis. The activities covered by the Act include, but are not limited to, the construction or placement of structures on or under or activities otherwise disturbing the seabed, discharges from structures or vessels involved in mining operations, dumping, incineration and burial at sea.¹²⁴ Regulations adopted in 2013, 2014 and 2015 set out activities which are deemed to be permitted, discretionary or prohibited. Permitted activities do not require a permit provided they comply with the terms of any regulations, and, if required by regulations, are notified to the EPA.¹²⁵ Discretionary activities, including any activity which disturbs the seabed, involves resource extraction, construction or the introduction of species¹²⁶ or the discharge of harmful substances or waste from structures at sea,¹²⁷ must be authorized under a marine consent and may be either notified or non-notified.¹²⁸ Prohibited activities cannot be authorized by a permit.¹²⁹

The Act sets out detailed procedures relating to environmental impact assessment, public participation and the factors that must be taken into account by the EPA, as noted above. In addition, with a nod to the ecosystem approach, the EPA must also consider the impacts of EEZ activities on the territorial sea

122 *Trans-Tasman Resources Ltd Marine Consent Decision*, n. 110 above, para. 754.

123 EEZ & CS Act, s. 13.

124 *Id.*, ss. 20–20J.

125 *Id.*, s. 35. Permitted activities are set out in the EEZ (Environmental Effects—Permitted Activities) Regulations 2013 and include marine scientific research, activities affecting already permitted marine structures, seismic surveys and activities relating to submarine cables.

126 EEZ & CS Act, s. 20.

127 *Id.*, ss. 20A–20I.

128 *Id.*, s. 38. See the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 (SR 2013/283); Exclusive Economic Zone and Continental Shelf (Environmental Effects—Non-notified Activities) Regulations 2014 (SR 2014/43); Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015 (SR 2015/228); Exclusive Economic Zone and Continental Shelf (Environmental Effects—Burial at Sea) Regulations 2015 (SR 2015/229).

129 EEZ & CS Act, s. 37.

and coastal environment.¹³⁰ As noted above, the Act endorses a precautionary approach. In addition, however, the Act also permits the application of an adaptive management approach in respect of activities (other than marine dumping and discharges)¹³¹ that are likely to be prohibited by applying a precautionary approach, in order to classify those activities as discretionary.¹³² The purpose of endorsing adaptive management, defined as allowing an activity to take place on a small scale, for a short period, with appropriate monitoring¹³³ under the Act, is to reflect “Parliament’s desire to ensure that the precautionary approach does not have a burdensome, chilling effect on economic development” and to provide an alternative to outright refusal.¹³⁴ Finally, the EEZ & CS Act provides for review and appeal in respect of consent applications as well as detailed enforcement provisions.

The EEZ & CS Act filled several significant gaps in the regulation of (or rather, the failure to regulate) the environmental impacts of activities taking place in the EEZ. It is not equivalent to the RMA, but it does, in practical terms, provide for broadly comparable principles in the EEZ as the RMA does in the territorial sea and coastal area. The Act is evolving, and has already undergone multiple substantive amendments in addition to the adoption of several sets of regulations in its short seven-year history.¹³⁵ The most controversial applications to date, both of which have been rejected, concern seabed mining in the EEZ,¹³⁶ but the Act has yet to be tested by an application in respect of a novel activity such as marine geoengineering.¹³⁷ The Act develops a principally reactive framework for responding to marine consent applications. It does permit the adoption of regulations identifying and closing areas to activities, on account

¹³⁰ Id., s. 33(3)(a)(ii).

¹³¹ Id., s. 64 (1AA).

¹³² Id., ss. 34(3), 59, 61, 64.

¹³³ Id., s. 64.

¹³⁴ C. Iorns and T. Stuart, “Murky waters. Adaptive management, uncertainty and seabed mining in the exclusive economic zone,” *Policy Quarterly* 13, no. 2 (2017): 10–16, p. 12.

¹³⁵ For an overview of recent amendments and the risks associated with the mode and nature of the amendments, see M. Watkins, “Under new management: Marine consents in the exclusive economic zone,” *Policy Quarterly* 13, no. 2 (2017): 23–28.

¹³⁶ Applications have been made by Chatham Rock Phosphate Ltd. and Trans-Tasman Resources and details on these applications and the EPA decisions can be found online: <<https://www.epa.govt.nz/industry-areas/eez-marine-activities/previous-applications-and-activities/seabed-mining/>>. See generally, J.I. Ellis et al., “Environmental management frameworks for offshore mining: the New Zealand approach,” *Marine Policy* 84 (2017): 178–192.

¹³⁷ A full list of activities in the EEZ subject to permits can be found on the EPA webpage online: <<https://www.epa.govt.nz/industry-areas/eez-marine-activities/ongoing-activity-or-activity-about-to-commence-in-the-eez/>>.

of those areas' vulnerability owing to biophysical characteristics or environmental pressures or where they are the location for conflicting activities.¹³⁸ However, this is far from providing a mandate to establish a network of representative MPAs and there is little coordination with other MPA processes. Moreover, the Act does not provide for bio regional planning or indeed any form of proactive planning in the EEZ in contrast to the processes provided for under the RMA in respect of the territorial sea and coastal environment. More fundamentally, although the EEZ Act does set out some basic principles to guide decision-makers, and highlights the importance of New Zealand's obligations to both the international community and to Māori, it lacks a clear and detailed articulation of values and principles underpinning the regulation of EEZ activities. The EEZ policy statements, inserted into the Act via amendment as an afterthought, have the capacity in principle to address this, but in practice have yet to be operationalized. Finally, the level of integration and ecosystem-based management is light at best, with the most significant activity taking place in the EEZ, fishing, being entirely excluded from the application of the Act.

Area-based Protection and MPAs

The *Marine Protected Areas Policy and Implementation Plan* was adopted in 2005 to create a comprehensive network of MPAs covering representative marine ecosystems within New Zealand's territorial sea and EEZ.¹³⁹ The Ministry for Primary Industries (which has responsibilities for fisheries) and the Department of Conservation are jointly responsible for implementing the Policy. For the purposes of the Policy an MPA is defined as "[a]n area of the marine environment especially dedicated to, or achieving, through adequate protection, the maintenance and/ or recovery of biological diversity at the habitat and ecosystem level in a healthy functioning state."¹⁴⁰ The Policy was intended to provide a means of coordinating the implementation of existing legislative and administrative tools, as well as setting out overarching

¹³⁸ EEZ & CS Act 2012, s. 28.

¹³⁹ Department of Conservation and Ministry of Fisheries (2005), n. 66 above, paras. 13, 18. Guidelines, adopted in 2008, clarified that because 17 benthic protection areas were established in 2007, primarily in New Zealand's EEZ, the MPA Policy would apply only to the territorial sea until 2013. See Department of Conservation and Ministry of Fisheries, *Marine Protected Areas. Classification, Protection Standard and Implementation Guidelines* (2008), s. 2.7, available online: <<https://www.doc.govt.nz/about-us/science-publications/conservation-publications/marine-and-coastal/marine-protected-areas/marine-protected-areas-classification-protection-standard-and-implementation-guidelines/>>. Since 2013 however, there has been no action on implementing the MPA Policy in the EEZ.

¹⁴⁰ Department of Conservation and Ministry of Fisheries (2005), n. 66 above, para. 14.

principles relating to implementation and planning.¹⁴¹ The articulated principles include precaution, consistency, best scientific information, recognition of the special relationship between the Crown and Māori, transparent and participatory processes, as well as monitoring, adaptive management and effective enforcement.¹⁴²

In 2008 it was decided¹⁴³ that the Policy would be implemented on a regional basis through community-based Marine Protection Planning Forums (MPPFs)¹⁴⁴ within fourteen biogeographic regions.¹⁴⁵ The biogeographic regions are not entirely coterminous with regional authorities, which under the RMA are more generally responsible for coastal planning. The MPPFs are tasked with developing recommendations for MPAs within their region,¹⁴⁶ and comprise 14 members, including representatives from industry and local interest groups with representatives from the Department of Conservation and Ministry of Primary Industries as ex officio members.¹⁴⁷ Since 2005 only three MPPFs have been established. The West Coast Marine Protection Forum, established in 2005 (prior to the adoption of the MPA policy), proposed a package of MPAs in 2011 with five marine reserves being established in 2014.¹⁴⁸ The Sub-Antarctic Regional Marine Protection Planning Forum was established in 2008 and, following recommendations made in 2010, three marine reserves were designated under the *Subantarctic Islands Marine Reserves Act 2014*.¹⁴⁹ The South East Marine Protection Forum (Roopu Manaaki Ki Te Toka), noted above, was established in 2014 and made two sets of recommendations (not being able to agree on a single set) in 2018.¹⁵⁰ A new public consultation was announced in June 2020.¹⁵¹ In a recent assessment of MPA processes it was noted that with the exception of Dunedin, MPPFs have not been established in populous areas, and it is unlikely that any MPPF will be established in the

¹⁴¹ Id., paras. 17 and 62–99.

¹⁴² Id., paras. 62–99.

¹⁴³ Department of Conservation and Ministry of Fisheries (2008), n. 139 above.

¹⁴⁴ Id., s. 3.1.

¹⁴⁵ Id., s. 3.2 and Appendix.

¹⁴⁶ Id., s. 3.2.

¹⁴⁷ Id.

¹⁴⁸ See DOC, “Establishing Marine Protected Areas,” available online: <<https://www.doc.govt.nz/nature/habitats/marine/establishing/>>.

¹⁴⁹ Id.

¹⁵⁰ See DOC, “South eastern South Island marine protection,” n. 89 above.

¹⁵¹ See DOC, “Consultation on south-eastern South Island marine protected areas,” available online: <<https://www.doc.govt.nz/get-involved/have-your-say/all-consultations/2020-consultations/consultation-on-south-eastern-south-island-marine-protected-areas/>>.

North Island owing to the “complexity of existing and perceived rights and uses of the marine environment.”¹⁵²

The MPA Policy was intended to coordinate MPA designation under existing instruments and the 2008 Guidelines divide MPAs into two categories: Type 1 MPAs comprise marine reserves so designated under the *Marine Reserves Act 1971* and Type 2 MPAs are designated under any other legislative instrument.¹⁵³ The *Marine Reserves Act 1971* is the primary instrument for MPA designation within the current legal framework but, at over 40 years old, unsurprisingly, it does not reflect modern MPA values. Its objective is to preserve areas for the purpose of scientific study¹⁵⁴ and its scope is restricted to New Zealand's internal and territorial waters.¹⁵⁵ Areas suitable for reserve status comprise those that “contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest.”¹⁵⁶ The objectives of reserve designation are to preserve the areas as far as possible in their natural state, protect and preserve the marine life and their habitats therein and, as far as possible, to preserve public freedom of access to the reserves for the purpose of studying, observing, and recording marine life in its natural habitat.¹⁵⁷ Marine reserves provide for the highest level of protection in New Zealand's waters and prohibit fishing¹⁵⁸ as well as mining.¹⁵⁹ Marine reserves under the Act are declared by an Order in Council on the application of a limited number of entities including universities, bodies administering land under the Reserves Act located on the coast, bodies engaged in the scientific study of marine life or natural history, Māori iwi or hapu [tribe] who have tangata whenua status over the area, and the Director-General of Conservation. All marine reserves are subject to a conservation management plan.¹⁶⁰ The management of activities including diving, anchoring, navigation and the exclusion of the public from areas closed for scientific study is addressed in the Marine Reserves Regulations 1993 (SR 1993/230).

Type 2 MPAs can be adopted by a range of other legislative instruments and are designed to preserve values other than the importance of scientific

152 Controller and Auditor-General Tumuaki o te Mana Arotake, n. 10 above, p. 17.

153 Department of Conservation and Ministry of Fisheries(2008), n. 139 above, p. 13.

154 *Marine Reserves Act 1971*, s. 3(1).

155 *Id.*, s. 2.

156 *Id.*, s. 3(1).

157 *Id.*, s. 3(2).

158 *Id.*, s. 3(3). Fishing activities can be authorized by the Minister of Conservation (s. 3(3)(a)–(c)) but this permission has been rarely exercised.

159 *Crown Minerals Act 1977*, s. 61 and Schedule 4.

160 *Marine Reserves Act 1971*, ss. 7–8.

research. These include the designation of marine mammal sanctuaries under the *Marine Mammals Protection Act 1978*¹⁶¹ and the temporary or permanent closure of areas to fisheries by the Minister for Primary Industries under the *Fisheries Act 1996*.¹⁶² Both Acts apply to New Zealand's territorial sea and EEZ. Fisheries can also be managed through temporary closure under customary law using the concepts of *rāhui*, *mātaimai* and *taiāpure*.¹⁶³ In theory, sanctuaries established under the *Wildlife Act 1953* can extend into the marine area,¹⁶⁴ although this option has yet to be utilized. The protection of vulnerable areas from the impacts of shipping within New Zealand's entire maritime zone is addressed through the declaration of "areas to be avoided" by the Ministry of Transport under the *Maritime Transport Act 1994*.¹⁶⁵ Management of a wider range of activities for the purpose of environmental protection within the territorial sea is governed by the *Resource Management Act 1991*, which permits regional councils to identify areas in need of protection within their regional coastal plans and to specify activities (excluding fishing and mining) that are prohibited or subject to restriction.¹⁶⁶

As noted above, limited powers also are provided for under the EEZ & CS Act to close areas to activities on account of their vulnerability or the intensity of multiple activities taking place within an area.¹⁶⁷ Protected areas can be designated to protect submarine cables and pipelines from the risk of fishing activities.¹⁶⁸ Finally, special legislation can be adopted in order to designate MPAs and such legislation has been adopted to support MPA proposals developed through MPA Policy and MPFF processes (such as in the sub-Antarctic), as well as initiatives developed separately from these processes (in the case of Hauraki Gulf,¹⁶⁹ Fiordland,¹⁷⁰ Kaikōura,¹⁷¹ and the

¹⁶¹ *Marine Mammals Act 1978*, s. 22.

¹⁶² *Fisheries Act 1996*, ss. 186A, 311.

¹⁶³ See further, Salmon and Grinlinton, n. 92 above, at 8.6.1.

¹⁶⁴ *Wildlife Act 1953*, s. 9.

¹⁶⁵ *Maritime Transport Act 1994*, s. 36.

¹⁶⁶ RMA 1991, ss. 64, 67 and Schedule 1.

¹⁶⁷ EEZ & CS Act 2012, s. 28.

¹⁶⁸ *Submarine Cables and Pipelines Protection Act 1996*, s. 12.

¹⁶⁹ The *Hauraki Gulf Marine Park Act 2000* established the Tawharanui Marine Park as well as the Hauraki Gulf Forum.

¹⁷⁰ The *Fiordland (Te Moana o Atawhenua) Marine Management Act 2005* established the Fiordland (Te Moana o Atawhenua) Marine Area and established eight marine reserves, which are deemed to be marine reserves under section 4(1) of the *Marine Reserves Act 1971* and subject to the terms of the *Marine Reserves Act* (s. 8 of the 2005 Act).

¹⁷¹ The *Kaikōura (Te Tai o Marokura) Marine Management Act 2014* established the Te Whata Kai o Rākihouia I Te Tai o Marokura/Kaikōura Marine Area. Within the marine area a number of zones have been designated, including a marine reserve, a fur seal sanctuary, a whale sanctuary, *mātaimai* and *taiāpure*.

Sugar Loaf Islands¹⁷²). The level of protection varies within MPAs established under special legislation, but typically mining is prohibited, fishing is prohibited or restricted and, in some cases, recreational activities are subject to strict management.

Excluding Benthic Protection Areas,¹⁷³ only about 0.4 percent of New Zealand's maritime zone is subject to area protection and "many of New Zealand's coastal regions have little or no marine protected areas."¹⁷⁴ There are no MPAs within New Zealand's EEZ (beyond 12 M). This is despite the fact that the New Zealand public thinks that about 30 percent of New Zealand waters are protected.¹⁷⁵ The New Zealand government has long recognized that its MPA legislation is not fit for purpose. The first set of MPA reform proposals were released in 2002 in the form of a Marine Reserves Bill, which was intended to provide a legislative basis for designating MPAs throughout New Zealand's entire maritime zone in order to protect marine ecosystems and to support the implementation of the 2000 New Zealand Biodiversity Strategy.¹⁷⁶ The Bill foundered on the rocks of the foreshore and seabed dispute and was replaced, in part, by the 2005 MPA Policy. Fourteen years later, in 2016, the Ministry of the Environment released a consultation document proposing a new Marine Protected Areas Act¹⁷⁷ that would have created a representative and adaptable network of MPAs within New Zealand's territorial sea in order to enhance, protect and restore marine biodiversity¹⁷⁸ and to contribute to a marine management system designed "to achieve an appropriate balance between protecting [the] marine environment and maximising commercial, recreational and cultural opportunities now and in the future."¹⁷⁹ This process

172 The Ngā Motu/Sugar Loaf Islands MPA was established by *The Sugar Loaf Islands Marine Protected Area Act 1991*, which provides for restrictions on fishing and prohibits mining within the MPA.

173 Seventeen benthic protection areas were designated in 2007 and cover about 32 percent of New Zealand's EEZ. While constituting area-based protection as they restrict bottom trawling and dredging, they do not constitute MPAs. For further information on these areas, see Ministry for Primary Industries, "Benthic Protection Areas," online: <<https://www.mpi.govt.nz/protection-and-response/sustainable-fisheries/protected-areas/benthic-protection-areas/>>.

174 Controller and Auditor-General Tumuaki o te Mana Arotake, n. 10 above, p. 3.

175 T.D. Eddy, "One hundred-fold difference between perceived and actual levels of marine protection in New Zealand," *Marine Policy* 46 (2014): 61–67, p. 64.

176 See further online: <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL4754_1/marine-reserves-bill>.

177 Ministry for the Environment, *A New Marine Protected Areas Act: Consultation Document* (2016), p. 12, available online: <<https://www.mfe.govt.nz/node/21496>>.

178 Id., pp. 15–16.

179 Id., p. 10.

has also stalled.¹⁸⁰ Moreover, the Kermadec/ Rangitāua Ocean Sanctuary, which was announced with such fanfare in 2015 and would, if adopted, have covered 15 percent of New Zealand's EEZ, has also run into the legislative equivalent of the doldrums. The Bill, introduced in 2016,¹⁸¹ was challenged by Te Ohu Kaimoana (Māori Fisheries Trust) and the commercial fishing industry as being contrary to rights under both the QMS and Te Tiriti o Waitangi (the Treaty of Waitangi).¹⁸² However, although both proceedings have been stayed, pending passage of the Bill,¹⁸³ a change in government has meant that the Kermadec Sanctuary no longer appears to be a priority, notwithstanding that its designation would permit New Zealand to meet its international commitment to protect 10 percent of its marine environment by 2020.

New Zealand's failure to make progress on MPA designation is both surprising and lamentable, particularly given that globally it is estimated that about 18 percent of waters under the jurisdiction of States are subject to some form of area-based protection.¹⁸⁴ The reasons for this lack of progress are not dissimilar to challenges identified elsewhere in the world. Tensions between stakeholders, in particular, representatives from the fishing industry, environmental groups and tangata whenua can lead to processes that "are fraught with tension and have historically taken a long time."¹⁸⁵ The MPA Policy relies on a bottom-up, stakeholder driven process that sits outside the broader marine management framework (the RMA) and, on experience over the last fifteen

180 For an overview of the 2016 proposal and an assessment of its contribution to MPA policy in New Zealand see K.N. Scott, "Evolving MPA management in New Zealand: Between principle and pragmatism," *Ocean Development and International Law* 47 (2016): 289–307.

181 See New Zealand Parliament, "Kermadec Ocean Sanctuary Bill," available online: <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL68514_1/kermadec-ocean-sanctuary-bill>.

182 *E Ohu Kai Moana Trustee v. Her Majesty's Attorney General* [2016] NZHC 1768; *Ngāti Mutunga o Wharekauri Asset Holding Compan; TWA Holding Company Ltd v. the Attorney General* [2017] NZHC 2481.

183 Id. For an assessment of the legal implications of the Bill for Māori rights and interests see B. France-Hudson, n. 18 above.

184 Protected Planet, "Explore the World's Marine Protected Areas," available online: <<https://www.protectedplanet.net/marine>>. It should be noted that there are significant differences in estimates of MPA coverage, depending in part on the definition of an MPA or area-based protection more generally. Whereas Protected Planet estimates that as of October 2019, 7.78 percent of the oceans is subject to area-based protection (with 18.11 percent protected under national jurisdiction and 1.18 percent of the high seas protected), the Atlas of Marine Protection, available online: <<http://www.mpatlas.org>>, estimates a much more conservative 4.8 percent is protected, using the criteria of whether the MPA is implemented and actively managed.

185 Controller and Auditor-General Tumuaki o te Mana Arotake, n. 10 above, p. 3.

years, would appear to be primarily suited to areas with no or few inhabitants. It relies on an outdated legislative framework, which largely fails to provide for modern values, including basic ecosystem protection. Outside of this Policy a small number of other MPA processes have been initiated on a regional basis, and the extent to which these can be considered successful in terms of both substance and process is highly variable. There is no active process for the designation of MPAs in New Zealand's EEZ.

An important issue in New Zealand is that MPAs are not particularly consistent with tikanga Māori, and have been described as “non-indigenous management frameworks that may sever cultural-ecological interactions that have been accumulated and held across generations,” which is detrimental because “cultural-ecological knowledge shapes local and tribal identity, well-being and environmental ethos.”¹⁸⁶ Although consultation and, more recently, collaboration with Māori over the last forty years has improved significantly, the outcry over the Kermadec/ Rangitāua Ocean Sanctuary demonstrates that there is still room for improvement, with the Kermadec Bill being described as illustrating “the inherent problems within pluralistic societies where we have opposing world views, such that one—often Māori's world view—is subordinated to the other.”¹⁸⁷ More fundamentally, area-based protection has simply not been a priority for the government. This is demonstrated not only by the legislative and policy malaise that characterizes both MPA designation and oceans governance more generally, but also the reluctance to invest nationally in the necessary scientific research that must underpin the creation of a network of ecologically coherent and representative MPAs.

Fisheries Management

New Zealand manages its fisheries through a quota management system originally introduced in 1986. By a Deed of Settlement, adopted in 1992, Māori were granted a 10 percent quota in respect of the 26 species already part of the QMS and a 20 percent quota of all new species added, as well as a financial settlement in order to purchase a 50 percent stake in New Zealand's largest fishing company, Sealord. The quota shares were allocated to a Trust and, in 2004, divided among 57 iwi.¹⁸⁸ The remaining 80 percent of the quota was assigned

186 K. Davies et al., “The evolution of marine protected area planning in Aotearoa New Zealand: Reflections on participation and process,” *Marine Policy* 93 (2018): 113–127, p. 113.

187 T. Love, “The Kermadecs conundrum. Marine protected areas and democratic process,” *Policy Quarterly* 13 (2017): 17–22, p. 21.

188 See Bodwitch, n. 75 above, p. 88.

to the Crown and made available to operators on the basis of historic catch.¹⁸⁹ A key feature of the QMS system is that quota may be transferred between operators under the system of individual transferrable quota (ITQ). Quota thus constitutes an asset. Today, the QMS forms the basis of the *Fisheries Act*, the purpose of which is to provide for the utilization of fisheries resources while ensuring sustainability.¹⁹⁰ There are currently 98 species (or species groups) divided into 642 separate fish stocks under the QMS across up to 10 Quota Management Areas.¹⁹¹

The Minister must set an annual total allowable catch (TAC)¹⁹² for each fish stock and, after an allowance is made for recreational and customary fishing and other causes of mortality, the total allowable commercial catch (TACC) is divided among commercial fishers on the basis of the amount of quota held. In setting the TAC, the Minister must consider the principles of maximum sustainable yield, environmental matters, as well as social, cultural and economic issues.¹⁹³ There is no specific reference to an ecosystem approach although section 9 of the Act refers to habitat protection, the importance of maintaining biological diversity and the need to ensure the viability of dependent or associated species. Similarly, the precautionary principle is not explicitly articulated, but decision-makers are required to be cautious when information is inadequate and must not use absence or uncertainty of information as a reason to postpone or fail to take measures under the Act.¹⁹⁴

Commercial fishers are allocated an annual catch entitlement (ACE), which is also transferable, on the basis of the TACC, and the ACE must cover fish actually caught under the QMS or fishers are required to pay a “deemed value” in respect of catch not so-covered.¹⁹⁵ Around 2,200 individuals and companies

189 B. Torkington, “New Zealand’s quota management system: Incoherent and conflicted,” *Marine Policy* 63 (2016): 180–183, p. 180.

190 *Fisheries Act 1996*, s. 8. “Sustainability” is defined as “maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; avoiding, remedying or mitigating any adverse effects of fishing on the environment; and developing fishery resources to enable people to provide for their social, economic and cultural well-being.”

191 See Ministry for Primary Industries, “Fish Quota Management System,” available online: <<https://www.mpi.govt.nz/law-and-policy/legal-overviews/fisheries/quota-management-system/>>.

192 *Fisheries Act 1996*, ss. 13, 24.

193 *Id.*, ss. 9–11, 15.

194 *Id.*, s. 10.

195 *Id.*, s. 76.

own quota, but it is estimated that eight companies own approximately 75 percent of quota.¹⁹⁶

The *Fisheries Act* requires all commercial fishing in New Zealand waters to be authorized by a permit.¹⁹⁷ From May 2016, only fishing vessels registered in New Zealand may be granted a permit to fish in New Zealand's EEZ.¹⁹⁸ This initiative was designed to respond to the issue of poor labor conditions which were found to exist on a number of foreign-registered vessels operating in New Zealand's waters over the previous decade.¹⁹⁹ New Zealand fishing vessels operating on the high seas must also obtain a permit under New Zealand law.²⁰⁰

New Zealand fisheries have been twice ranked as the most sustainable in the world,²⁰¹ and when the QMS system was adopted in 1986 New Zealand was rightly regarded as a world leader in fisheries management. New Zealand asserts that 84 percent of routinely assessed stocks are fished within safe limits.²⁰² However, only about 350 stocks are actually managed, and the TAC for 57 percent of stocks has never been altered.²⁰³ The principal reason for this is lack of data (which is largely produced by the fishing industry) and a loss of policy and operational capacity within the Ministry of Primary Industries.²⁰⁴ Moreover, data is not routinely collected in respect of recreational and customary fishing, neither of which are regulated. Furthermore, in a recent study it was asserted that between 1950 and 2010 discards have been consistently under-reported and, including discards, catch was on average 2.7 times higher than officially reported.²⁰⁵ Notwithstanding the basic reference to an ecosystem approach—largely in the context of principles relating to the protection of habitat and

196 L.Z. Hale and J. Rude, eds., *Learning from New Zealand's 30 Years of Experience Managing Fisheries Under a Quota Management System* (Virginia, USA: The Nature Conservancy, 2017), p. 20.

197 *Fisheries Act 1996*, s. 89. No permit is required for recreational or customary fishing.

198 *Id.*, s. 103.

199 See G. Simmons and C. Stringer, "New Zealand's fisheries management system: Forced labour an ignored or overlooked dimension?," *Marine Policy* 50 (2014): 74–80.

200 *Fisheries Act 1996*, s. 113D.

201 See McCormack, n. 43 above, p. 35.

202 *Environment Aotearoa 2019*, n. 21 above, p. 84.

203 B. Hersoug, "After all these years'—New Zealand's quota management system at the crossroads," *Marine Policy* 92 (2018): 101–110, p. 102.

204 *Id.*, pp. 102, 105.

205 G. Simmons et al., *Reconstruction of Marine Fisheries Catches for New Zealand 1950–2010*. Working Paper 2015/87 (Institute for the Oceans and Fisheries, The University of British Columbia, 2016), available online: <<http://www.seaaroundus.org/doc/PageContent/OtherWPContent/Simmons+et+al+2016++NZ+Catch+Reconstruction++May+11.pdf>>. It is worth noting that both MPI and the industry disputed the conclusions in this paper.

dependent and associated species²⁰⁶—management is based on single stock analysis with relatively little consideration for interaction between stocks²⁰⁷ or for the environment more generally.²⁰⁸ Although the rationale underpinning the QMS was the creation of a quasi-property right designed to promote a stewardship approach on the part of operators, there is little evidence that this has occurred.²⁰⁹ More generally, the *Fisheries Act* does little to integrate fisheries management with planning for other activities²¹⁰ and it has been argued that the inconsistent legislative obligations and disparate processes have led to spatial conflicts and a race for the allocation of space in New Zealand's marine environment.²¹¹ This is perhaps most acutely felt in relation to area-based protection where holders of ITQ have resisted the creation of MPAs,²¹² as recently demonstrated by the failure to move forward on establishing the Kermadec/Rangitāua Ocean Sanctuary.

Shipping Management

New Zealand's regulatory framework for managing shipping and navigation in New Zealand waters comprises at least 16 Acts of Parliament, subsidiary regulation, as well as national and regional coastal plans.²¹³ Maritime New Zealand has the principal role in managing navigation in New Zealand waters, and monitoring maritime safety through systems of inspection and audit, but other relevant authorities include regional and local councils, port operators

206 *Fisheries Act 1996*, s. 9.

207 P. Marchal et al., "A comparative review of the fisheries resource management systems in New Zealand and in the European Union," *Aquatic Living Resources* 22 (2009): 463–481, p. 470. See also R. Le Heron et al., "Improving fisheries management in New Zealand: Developing dialogue between fisheries science and management (FSM) and ecosystem science and management," *Geoforum* 39 (2008): 48–61.

208 But see M. Cryer, P.M. Mace and K.J. Sullivan, "New Zealand's ecosystem approach to fisheries management," *Fisheries Oceanography* 25 Suppl. 1 (2016): 57–70.

209 See Torkington, n. 189 above, p. 182.

210 Section 11 of the *Fisheries Act 1996* requires the Minister to have "regard" to regional coastal plans adopted under the RMA, management plans under the 1987 Conservation Act, sections 7 and 8 of the *Hauraki Gulf Marine Park Act 2000*, regulations adopted under the EEZ & CS Act 2012 and any planning document lodged with the Minister of Fisheries by a customary marine title group under section 91 of the *Marine and Coastal Area (Takutai Moana) Act 2011*.

211 See R. Bess and R. Rallapudi, "Spatial conflicts in New Zealand's fisheries: The rights of fishers and protection of the marine environment," *Marine Policy* 31 (2007): 719–729.

212 See M.T. Gibbs, "Lesser-known consequences of managing marine fisheries using individual transferable quotas," *Marine Policy* 31 (2007): 112–116.

213 See generally B. Marten, *Maritime Law in New Zealand* (Wellington: Thompson Reuters, 2016).

and harbor masters. The Ministry of Transport has overall responsibility for maritime policy, and the Ministry of Primary Industries exercises responsibilities in respect of fishing vessels.

The *Maritime Transport Act 1994* is the primary legislation under which vessel standards are set and navigation controlled. New Zealand largely applies international standards relating to design and construction, equipment, manning and operation to any vessel within its EEZ and to New Zealand vessels wherever they are located. Under the Act, the discharge of harmful substances from vessels within New Zealand's EEZ is prohibited,²¹⁴ as is the transfer of oil or noxious substances unless notice is given by the Master or shipowner to the Director of Maritime New Zealand or the relevant regional council, and the transfer accords with relevant maritime rules.²¹⁵ New Zealand takes a strict approach to biosecurity, and ballast water may only be discharged into New Zealand's waters where it has been exchanged with mid-ocean seawater en route to New Zealand at least 200 M from land, or where it is fresh water or where it has been treated.²¹⁶ Moreover, from 2018, vessels arriving in New Zealand (defined as anchoring, berthing or entering a port) must have a "clean hull" as defined in the Craft Risk Management Standard: Biofouling on Vessels Arriving to New Zealand.²¹⁷

The *Customs and Excise Act 1996* sets out the information requirements in respect of vessels en route to New Zealand ports.²¹⁸ Additional security information is required by the *Maritime Security Act 2004*.²¹⁹ Vessels "arriving" in

214 *Maritime Transport Act 1994*, s. 226. Details are set out in the Marine Protection Rules, available online: <<https://www.maritimenz.govt.nz/rules/>>.

215 *Maritime Transport Act 1994*, s. 230.

216 Ministry for Primary Industries, Import Health Standard, *Ballast Water from all Countries* (issued 17 May 2016), available online: <<https://www.mpi.govt.nz/dmsdocument/1167-Ballast-Water-from-all-Countries-Import-Health-Standard->>>. The Import Health Standard was issued pursuant to section 24 of the *Biosecurity Act 1993*.

217 Issued on 15 May 2014, see Biosecurity New Zealand, "Biofouling Management," available online: <<http://www.mpi.govt.nz/importing/border-clearance/vessels/biofouling-management/>>.

218 Section 21 of the *Customs and Excise Act 1996* requires vessels, 48 hours prior to arrival, to provide information relating to their intended port of entry, crew and passengers, cargo and ballast water designation.

219 This includes information on whether a vessel is carrying an approved international ship security certificate, information on the security level at which the vessel is operating and the security level at which the vessel operated at during its last port of call (s. 30 of the *Maritime Security Act 2004*).

New Zealand's EEZ²²⁰ must give notice prior to arrival and information on their approximate intended location under the *Biosecurity Act 1993*.²²¹

New Zealand imposes relatively few controls on navigation in waters under its jurisdiction. It recommends that oil and chemical tankers navigate at least five nautical miles from land, islands and hazards except when entering port²²² and has designated two areas to be avoided and one precautionary area within its maritime zone.²²³ Safety zones of up to 500 meters around installations or devices on its continental shelf may be declared under the *Continental Shelf Act 1964*.²²⁴ Further, in response to public disquiet over oil exploration activities and protest action interfering with survey activities at sea,²²⁵ new offences under the *Crown Minerals Act 1991* were created in 2013 relating to intentional damage or interference with a structure or a vessel involved in minerals operations²²⁶ or entering, without reasonable excuse, a non-interference zone surrounding a structure or a vessel involved in mining operations.²²⁷ The most well-known restriction on navigation in New Zealand's waters is its prohibition on nuclear-powered ships entering internal waters (including ports).²²⁸

220 "Arrival" in this context means "to anchor in, berth in, or operate in the EEZ for the purpose of exploring or exploiting resources in the EEZ, or in preparation or support for such a purpose, after a voyage originating beyond the outer limits of the EEZ" under s. 162AA of the *Biosecurity Act 1993*.

221 *Biosecurity Act 1993*, ss. 17, 162AF, 162AG.

222 1993 Voluntary Code for Vessels Carrying Oil and Other Harmful Liquid Substances in Bulk. The Code was revised in 1996 and 2001. See Maritime New Zealand, "Ship Routeing," online: <http://www.maritimenz.govt.nz/commercial/environment/operators/ship-routeing.asp#ship_routeing>.

223 The Three Kings Island (1995) and Poor Knights Islands (2005) were designated as areas to be avoided by New Zealand and the International Maritime Organization. The Taranaki Precautionary Area was declared in 2007 in order to protect oil production activities taking place therein.

224 *Continental Shelf Act 1964*, s. 8. Six safety zones have been established to date. See the Continental Shelf (Maui A Safety Zone) Regulations 1975; Continental Shelf (Maui B Safety Zone) Regulations 1991; Continental Shelf (Pohokura B Safety Zone) Regulations 2006; Continental Shelf (Kupe Safety Zone) Regulations 2006; Continental Shelf (Umuroa Installation Safety Zone) Regulations 2008; Continental Shelf (Maari Development Safety Zones) Regulations 2008.

225 One protest at sea resulted in legal action taken against protestors under the *Maritime Transport Act 1994*, wherein the New Zealand Court of Appeal confirmed that the 1994 Act had extraterritorial effect and was applicable to activities beyond 12 M. See *Teddy v. Police* [2014] NZCA 422. The *Maritime Transport Act* was subsequently amended to clearly reflect its extraterritorial impact with respect to New Zealand registered vessels.

226 *Crown Minerals Act 1991*, s. 101B(1).

227 *Id.*, s. 101B(2).

228 *New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987*, s. 11. Internal waters are defined as "any areas of the sea that are on the landward side of the baseline

Warships may only be approved to enter internal waters if the Prime Minister of New Zealand is satisfied that it is not carrying any nuclear explosive device upon entry into internal waters.²²⁹

Enforcement jurisdiction compatible with New Zealand's international obligations under the law of the sea is provided for under all of the instruments noted above, which generally permit New Zealand to inspect and detain vessels, expel them from port and initiate enforcement proceedings in respect of violations of domestic law. Under the *Maritime Security Act 2004* an exclusion zone around a vessel may be declared which may include restrictions on access or exit.²³⁰ Enforcement obligations associated with maritime crimes, including those created under the 1988/2005 Convention for the Suppression of Unlawful Acts Against the Safety of Navigation,²³¹ are provided for under the *Maritime Crimes Act 1999*, the *Maritime Security Act 2004* and the *Crimes Act 1961*. Most recently, New Zealand has adopted legislation creating additional offences and expanding enforcement powers in international waters in respect of the smuggling of narcotics into and out of New Zealand.²³²

Given that shipping is subject to detailed regulation at the international level and coastal States are limited by the principles of freedom of navigation and innocent passage when restricting the operations of foreign vessels in their waters, it is unsurprising that shipping regulation in New Zealand is almost entirely shaped by international rather than domestic priorities. This is inevitable where overarching domestic values, priorities and principles have yet to be articulated for New Zealand's entire maritime zone. Although this approach has not proven particularly problematic in practice, current decision-making relating to shipping and navigation is nevertheless largely isolated from broader oceans governance in New Zealand.

of the territorial sea of New Zealand" by s. 4 of the *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977*.

229 *New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987*, s. 9(2).

230 *Maritime Security Act 2004*, ss. 59 and 61.

231 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Navigation, adopted 10 March 1988, *United Nations Treaty Series* 1678; Protocol to the convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted 14 October 2005, *United Nations Treaty Series* 1678.

232 *Misuse of Drugs Act 1975*, ss. 12E and F; *Customs and Excise Act 2018*, s. 267A and Schedule 5.

Birth and Demise of New Zealand's Oceans Policy

In 1999, the Parliamentary Commissioner for the Environment recommended to New Zealand's Prime Minister that she "establish a Coastal and Oceans Task Force for the purpose of developing a strategy comprising firstly, goals and principles, and secondly, actions and policies for the future sustainable management of New Zealand's marine environment."²³³ At the time, politicians, policy-makers and commentators critiqued the lack of any overriding and consistent goals for New Zealand's entire maritime zones with (then) minimal controls on activities taking place within New Zealand's EEZ. There was significant risk of spatial conflict between incompatible ocean-based activities, and an ecosystem-based management approach was inconsistently applied in the territorial sea and not at all in the EEZ.²³⁴ Moreover, both Canada and Australia were relatively advanced in their development of an oceans policy. The process for developing a National Oceans Policy was initiated in 2000, and was intended to answer the question: how should we govern our oceans?²³⁵

Development of the Oceans Policy²³⁶ was to take place in three stages: (1) developing a national vision through extensive consultation; (2) identifying policy options designed to achieve the vision; and (3) implementation of the vision.²³⁷ The process was intended to be a whole-of-government, Cabinet-led exercise with a six-member *ad hoc* ministerial committee leading policy development. The process was hosted by the Ministry of the Environment but led

²³³ See Parliamentary Commissioner for the Environment, n. 1 above, p. 99.

²³⁴ See the various rationales summarized in the speech given by Pete Hodgson, then Minister for Fisheries and Aquaculture on 27 November 2002 entitled "Oceans Policy: What Happens Now?," available online: <<https://www.beehive.govt.nz/speech/oceans-policy-what-happens-now>>. See also *Healthy Sea: Healthy Society. Towards an Oceans Policy for New Zealand* (Report on consultation undertaken by the Ministerial Advisory Committee on Oceans Policy) (30 September 2001), p. 10, available online: <<https://www.mfe.govt.nz/sites/default/files/healthy-sea-healthy-society-sep01.pdf>>.

²³⁵ See Taylor, n. 2 above, p. 375.

²³⁶ For a comprehensive overview of the development of New Zealand's Ocean Policy development see Taylor, n. 2 above, and J. Vince and M. Haward, "New Zealand oceans governance: Calming turbulent waters?," *Marine Policy* 33 (2009): 412–418. See also P. Cozens, "Commentary: Some reflections on recent oceans policy and oceans governance issues in New Zealand," *Australian Journal of Maritime and Ocean Affairs* 6 (2014): 41–48; A. Foster, "New Zealand's Oceans Policy," *Victoria University of Wellington Law Review* 34 (2003): 469–496; J. Mansell, "The voyage towards national oceans policy in New Zealand—Encountering rocks and shoals," *Maritime Studies* (July–August 2004), 1–12; M. Patrick, "All at Sea: Do we need an oceans policy for New Zealand?," *Resource Management Journal* 1X (2001): 1–5.

²³⁷ Vince and Haward, n. 236 above, p. 415.

by the Hon. Pete Hodgson, Minister of Fisheries (2002–2004). The Ministry of Economic Development, Department of Conservation, Ministry of Foreign Affairs and Trade and Te Puni Kokiri (Ministry of Māori Affairs) all made substantial policy contributions to the process.²³⁸ The committee established a Ministerial Advisory Committee on Oceans Policy (MACOP) with the particular responsibility for undertaking stage one consultation, and an Oceans Policy Secretariat was created to support the work of the ministerial committee and MACOP.²³⁹

Stage one was completed in 2001. Forty-seven meetings and 24 hui were held throughout New Zealand and attended by about 2,000 individuals. A further 1,160 written submissions were received.²⁴⁰ The report summarizing and synthesizing the consultation concluded that any vision for New Zealand's oceans must recognize the importance of ocean health in order to preserve it as a source of food and for recreational purposes for current and future generations; that the ecological and intrinsic value of the ocean must be protected from environmental threats and that all New Zealanders have responsibility for its well-being; that the ocean provides important economic benefits; that access to the ocean and coast must be preserved; and that human interaction with the ocean must reflect New Zealand perspectives, in particular, the Māori world view.²⁴¹ Nine values were identified, with New Zealanders demanding an Oceans Policy that would

- set clear goals;
- integrate separate management processes;
- provide open and transparent decision-making that allows for informed participation;
- provide fair and equitable means to balance competing aspirations;
- reflect the range of values held in relation to the marine environment;
- strike a balance between the need for adaptability and consistency;
- provide for the optimal realization of economic benefits without compromising the quality of the environment;
- ensure that management decisions are informed by adequate knowledge and due caution is exercised; and
- promote a collective sense of responsibility.²⁴²

²³⁸ See Taylor, n. 2 above, p. 384.

²³⁹ Id., p. 381.

²⁴⁰ See *Healthy Sea: Healthy Society*, n. 234 above, p. 3.

²⁴¹ Id., pp. 7–8.

²⁴² Id., p. 8.

On the basis of this report, Cabinet approved the following vision statement for the National Oceans Policy: “Healthy oceans: New Zealanders understand marine life and marine processes, and accordingly take responsibility for wisely managing the health of the ocean and its contribution to the present and future social, cultural, environmental and economic wellbeing of New Zealand.”²⁴³ This was subsequently shortened to “healthy oceans wisely managed for the greatest benefit to New Zealand, now and in the future.”²⁴⁴

Over the next two years progress was made in drafting the National Oceans Policy and developing policy options for its implementation (stage two). It was intended that the Oceans Policy “be a practical exercise in sustainable development” and would cover commercial and recreational fishing, shipping, mineral and petroleum exploitation, aquaculture, invasive species, recreational activities, employment and economic opportunities, and conservation.²⁴⁵ In setting out the envisaged process for developing an Oceans Policy, the Hon. Pete Hodgson identified three core values: ready public access to the oceans; environmental sustainability; and appropriate recognition of Treaty issues without revisiting rights that have already been settled.²⁴⁶ He went on to say that for the Policy to be successful it needed to be ecosystem-based, holistic, and must incorporate the precautionary approach but also use best information to support decision-making.²⁴⁷ He emphasized the need to “put in place a cohesive and integrated management framework for the oceans” providing “clear direction on what ‘best value’ means across the full range of cultural, economic, environmental and social interests” for current and future generations.²⁴⁸ Moreover, the Policy must facilitate participation in decision-making at all levels, in particular, Māori participation.²⁴⁹ Last but not least, Hon. Pete Hodgson stated that “the Oceans Policy needs to set out clear rights and responsibilities for people involved in all aspects of oceans management. We need to be clear about who can do what in different parts of the ocean, and recognise the corresponding duties that arise from those entitlements.”²⁵⁰ In 2003 however, despite a plan to put a draft discussion document on the Oceans Policy before

²⁴³ Hodgson, n. 234 above.

²⁴⁴ See Vince and Haward, n. 236 above, p. 415.

²⁴⁵ See Hodgson, n. 234 above.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

Cabinet in July that year,²⁵¹ the process was paused owing to the foreshore and seabed dispute.

Although the Oceans Policy process was restarted in 2005,²⁵² it had lost its initial momentum and, apparently, its ambition. The process began to focus on regulatory reform in the EEZ rather than oceans policy reform more generally. Following workshops organized by the Ministry of the Environment, two papers were published in 2005, relating to the role of information and setting priorities for managing New Zealand's marine environment²⁵³ and managing environmental effects in New Zealand's EEZ.²⁵⁴ The latter paper identified four wide-ranging options for EEZ management: a voluntary approach; an act filling the gaps in current legislation; a single act to manage all resources in the EEZ; and an umbrella act requiring an environmental impact assessment to be carried out in respect of all activities likely to impact the EEZ environment.²⁵⁵ A paper published in 2007 narrowed the options to two, comprising a new comprehensive act and legislation limited to filling gaps in existing regimes.²⁵⁶ Its recommendation that the narrower, gap filling legislation be developed was endorsed in 2008 by Cabinet and, in the speech announcing the decision by Environment Minister Trevor Mallard, there was no reference to the oceans policy process.²⁵⁷ In effect, the oceans policy process was abandoned in 2008 and, as described above, the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act* was ultimately adopted in 2012.

251 Chris Carter, Minister for Conservation, "Progress on Marine Protection" (30 June 2003), available online: <<https://www.beehive.govt.nz/speech/progress-marine-protection>>.

252 See David Benson-Pope, Minister for the Environment, "Seachange 05—Oceans Policy Recommenced" (22 November 2005), available online: <<https://www.beehive.govt.nz/speech/seachange-05-oceans-policy-recommenced>>.

253 Ministry for the Environment, *Getting Our Priorities Right. The Role of Information in Setting Priorities for Management of New Zealand's Ocean* (2005), available online: <<https://www.mfe.govt.nz/sites/default/files/getting-priorities-right-jun05.pdf>>.

254 Ministry for the Environment, *Offshore Options. Managing Environmental Effects in New Zealand's Exclusive Economic Zone* (2005), available online: <<https://www.mfe.govt.nz/sites/default/files/offshore-options-jun05.pdf>>.

255 Id.

256 Ministry for the Environment, *Improving Regulation of Environmental Effects in New Zealand's Exclusive Economic Zone* (2007), available online: <<https://www.mfe.govt.nz/publications/marine/improving-regulation-environmental-effects-new-zealand's-exclusive-economic-z-13>>.

257 Trevor Mallard, Minister for the Environment, "Legislation to Safeguard Ocean Ecosystems" (27 June 2008), available online: <<https://www.beehive.govt.nz/release/legislation-safeguard-ocean-ecosystems>>.

Why Does New Zealand Need an Oceans Policy?

Twenty years on from New Zealand's first attempt to develop a national oceans policy, is a policy still needed? Given that there have been significant legislative and policy developments over this period, not least in relation to the EEZ, could an oceans policy add value to or otherwise improve oceans governance in New Zealand? The answer to this question is a qualified, albeit speculative, yes. Moreover, the reasons why an oceans policy could improve oceans governance in New Zealand in 2020 are largely the same as the reasons identified in 2000.²⁵⁸ While legislative developments and initiatives have undoubtedly improved oceans governance over the last 20 years, they have not successfully addressed all or indeed most of the governance failures identified in 2000 as justifying the oceans policy initiative. Seven reasons why New Zealand needs an oceans policy in 2020, in the opinion of this author, are briefly outlined below.

The Articulation of Goals and Values across New Zealand's Entire Maritime Zone

New Zealand is an archetypal maritime State: its maritime zone is 21 times the area of its territory, and over 30 percent of its biodiversity is located offshore. Despite this, New Zealand has yet to identify overarching values, goals and principles that apply to its *entire* maritime zone. As described above, a relatively comprehensive set of values have been developed in respect of the territorial sea under the RMA and, more particularly, the 2010 NZCPS. In 2000, there were in effect no values, goals or principles applicable to New Zealand's EEZ, and although this has been partially addressed by the EEZ & CS Act, the principles set out under this Act are few, and are expressed at a relatively high level of abstraction. This may in the future be ameliorated if an EEZ policy statement is adopted under the Act,²⁵⁹ but thus far no statement has been promulgated. Moreover, statements of principles and values articulated separately under both Acts do not equate to an overarching set of values designed to apply to New Zealand's *entire* maritime zone in a holistic manner. In particular, principles and values relating to key sectors, including fishing and shipping, fall largely outside instruments promulgated under either the RMA

²⁵⁸ This is unsurprising as these reasons have been broadly identified in studies on oceans governance between 2000 and today. See in particular, M.V. McGinnis, *Ocean Governance: The New Zealand Dimension A Full Report* (Emerging Issues Programme, School of Government, Victoria, University of Wellington, August 2012), available online: <https://cbe.miiis.edu/cgi/viewcontent.cgi?article=1000&context=cbe_working_papers>.

²⁵⁹ EEZ & CS Act 2012, s. 37A.

or the EEZ & CS Act. Furthermore, there are now several local and community-based initiatives, several of which cut across or are otherwise not coterminous with regional authority boundaries, which have also identified values and principles of application to activities and measures. Finally, no act or instrument adequately permits proactive (as opposed to reactive) oceans governance in the form of setting targets, goals and priorities across all activities taking place throughout New Zealand's entire maritime zone, including those relating to economic development as well as conservation.

Implementation of Ecosystem-Based Management across New Zealand's Maritime Zone

In 2000, ecosystem-based management was a driving imperative for the development of an oceans policy. This remains the case today. The RMA provides for a high degree of integrated coastal zone management, and thus supports in good part an ecosystem approach. However, one of the most significant impacts on the ecosystem, fishing, is largely excluded from the RMA framework. Moreover, regional coastal plans are ecosystem-based only insofar as the political boundaries of the regional authority coincide with the ecosystem. Furthermore, regional coastal planning extends out to 12 M offshore irrespective of actual ecosystem boundaries. Ecosystem-based management and planning is not implemented within New Zealand's EEZ outside of its limited application to fishing,²⁶⁰ notwithstanding the enactment of the EEZ & CS Act.

Facilitating Integrated Management across New Zealand's Maritime Zone

Outside of regional coastal planning in the territorial sea, New Zealand's approach to oceans governance is primarily sectoral with individual regimes managing fishing, shipping, and MPAs etc. Even within the territorial sea, regional planning does not encompass fishing (beyond its environmental effects) or, more surprisingly, MPAs. One attempt at marine spatial planning has been initiated to date, in the Hauraki Gulf, but the spatial plan, finalized in 2016, has yet to be implemented, and its status will be advisory rather than mandatory. Tools for managing spatial conflicts within the maritime domain and, more generally, conflicts between different types of activities are inadequate, and this has been demonstrated most evidently in the context of MPA designation (or lack thereof). Integrated management can only be implemented across New Zealand with strong central government support. As Morgan has stated, "poor integrated management of the ocean estate is not

²⁶⁰ See Cryer et al., n. 208 above.

purely a political, organisational or legislative problem but rather a failure to approach the issues from a central government perspective or strategic point of view.”²⁶¹

Providing a Framework for Ecologically Coherent Area-Based Protection Measures

The most egregious failure of oceans governance over the last twenty years has been the consistent inability to update legislation providing for the designation of MPAs and other forms of area-based protection, and to effectively implement the 2005 MPA Policy. A derisory 0.4 percent of New Zealand's maritime zone is protected, well below the international average and far off the 2020 global target of 10 percent. Moreover, MPAs that have been established are largely in areas with low population densities, and the Department of Conservation has conceded that the process of developing the MPA network through Marine Protection Planning Forums is unlikely to be successful in the North Island, which is where three-quarters of New Zealand's population is located.

Framework for Co-Governance of Ocean Resources with Māori

Ultimately, it was the dispute between the Crown and Māori over rights to the foreshore and seabed that derailed the first oceans policy process. Since then, foreshore and seabed rights have largely been settled under legislation adopted in 2011,²⁶² and several community-based initiatives, such as those developed in Kaikōura, the Hauraki Gulf and Kaipara Harbour, are co-partnered with Māori. Māori are also engaged in local fisheries management through the declaration of taiāpure and mātaimai reserves. Developing an oceans policy in 2020 may provide an opportunity to engage with Māori as partners rather than stakeholders in the future governance of New Zealand's oceans and its resources. Partnership obviously includes implementation of Crown responsibilities under Te Tiriti o Waitangi (the Treaty of Waitangi), but goes beyond this, to reflect a pluralist approach to oceans governance that

261 A.D. Morgan, “Perspectives on effects-based management of New Zealand exclusive economic zone resources,” *Ocean & Coastal Management* 54 (2011): 652–657, p. 652.

262 Nevertheless, it should be noted that the Waitangi Tribunal released, in 2020, an Inquiry Stage 1 Report criticizing some of the procedural and funding arrangements associated with the *Marine and Coastal Area (Takutai Moana) Act 2011*. Available online: <https://forms.justice.govt.nz/search/Documents/WT/WT_DOC_161085699/MACA%20PPW.pdf>.

encompasses mātauranga Māori²⁶³ and tikanga Māori, including the principle of kaitiakitanga.²⁶⁴

Raising the Profile of Oceans as Environmental and Economic Priorities in New Zealand

Oceans governance generally has a low profile in New Zealand and has not been a priority for successive governments or, indeed, regional authorities. Although individual issues have received national attention, such as plastics pollution and bycatch, in general New Zealand is much more concerned about its “clean green” image at the expense of a “clean blue” image. The oceans lack profile in comparison with issues such as freshwater quality, protection of endemic bird species from invasive pests, forest management and climate change. Developing a national oceans policy that is overarching and integrated in approach should raise the profile of the oceans as a priority for environmental governance. It is notable that the National Biodiversity Strategy, adopted in 2000 and currently in the process of being renewed, has been instrumental in guiding policy and decision-making in relation to activities impacting biodiversity.

A similar criticism, relating to lack of profile of the oceans, might also be made in relation to the failure to prioritize ocean-based economic opportunities beyond fishing and oil and gas exploration. In respect of the latter, it should be noted that in 2018, the Labour government announced that considering its climate change aspirations, no new oil and gas exploration permits will be offered outside of the Taranaki region and new Taranaki permits will not be offered after 2021. Existing permits are unaffected.²⁶⁵ An oceans policy could highlight other economic opportunities such as renewable energy, carbon dioxide (CO₂) sequestration (in seaweed, for example) and biological prospecting, as well as provide a framework to support the development of those opportunities. Nevertheless, care must be taken to ensure that the

263 Mātauranga Māori is defined as “the body of knowledge originating from Māori ancestors, including the Māori world view and perspectives, Māori creativity and cultural practices.” See Māori Dictionary, available online: <<https://maoridictionary.co.nz/>>.

264 See further, R. Joseph et al., n. 72 above; C.J.I. Magallanes, “Maori cultural rights in Aotearoa New Zealand: Protecting the cosmology that protects the environment,” *Widener Law Review* 21 (2015): 273–327.

265 These changes were implemented in the *Crown Minerals (Petroleum) Amendment Act 2018*.

development of an oceans policy is not used as a means to capture marine resources for corporate gain.²⁶⁶

*Implementing New Zealand's International Commitments and
Demonstrating International Leadership*

Finally, an oceans policy would likely facilitate New Zealand in complying with its international obligations under the UNCLOS and numerous other instruments relating to environmental protection and ocean governance more generally. New Zealand's failure to protect 10 percent of its marine environment by 2020 (assuming that the Kermadec/Rangitāhua Ocean Sanctuary is not established by the end of 2020) is the most high-profile example of failing to meet international commitments. But New Zealand has made other oceans-related commitments, for example, in respect of climate change, ocean acidification and marine pollution (including plastics) under other instruments, including the 2015 UN SDG 14, as well as associated voluntary commitments in 2017 as part of the Oceans Conference.²⁶⁷ An oceans policy may provide a vehicle through which to identify goals and targets as well as the key actions needed to achieve those goals and targets. In the past, New Zealand was regarded as a leader in oceans governance on the international stage and it clearly continues to aspire to this status.²⁶⁸ It is questionable however, whether domestic policy over the last 20 years allows it to legitimately claim an international oceans governance leadership role in 2020. Such leadership could however, be demonstrated by the development of a comprehensive, integrated oceans policy that is successfully implemented.

266 See, for example, S. Bond, G. Diprose and A.C. Thomas, "Contesting deep sea oil: Politicisation-repoliticisation," *Environment and Planning C: Politics and Space* 37 (2019): 519–538.

267 The New Zealand government has made 22 voluntary commitments as part of the 2017 Oceans Conference Process, including protected area research (ecological integrity and sentinel site programmes) (Ocean Action 18295) and the introduction of modern MPA legislation (Ocean Action 18274). As of November 2020, 1,632 voluntary commitments have been made by States and a large range of other public and private entities. See online: <<https://oceanconference.un.org/commitments/>>.

268 It has been suggested that New Zealand's announcement of the Kermadec/Rangitāhua Ocean Sanctuary at the 2015 UN Oceans Conference with minimal domestic consultation was motivated by a desire "to be lauded as a pioneer in marine conservation." See Love, n. 187 above, p. 21.

Cautionary Tales: Oceans Policy Development in Other Jurisdictions

International experience of developing an oceans policy and national frameworks for integrated oceans governance or marine spatial planning demonstrates emphatically that achieving integrated, value-based ocean governance is challenging. Arguably no State has fully achieved comprehensive, integrated oceans governance within its national waters. It is beyond the scope of this article to provide a complete overview of practice to date,²⁶⁹ but the experiences of two States in developing an oceans policy will be drawn on to illustrate both the opportunities and limitations of an oceans policy for national oceans governance. These States are Canada and Australia. They have been chosen because they developed their oceans policies just before New Zealand began its abortive process, and they provided an important source of inspiration for New Zealand's own initiative. The vision statements for both oceans policies are similar not only to one another but also to the vision statement developed by New Zealand in 2001. The principles and values that underpin both policies are compatible with those identified by New Zealand in its ocean policy documentation, as well as being consistent with New Zealand's current legislative framework for managing ocean-based activities. Nevertheless, notwithstanding the significant resources available to both States (compared with New Zealand), the challenges that they have encountered in developing and, more particularly, implementing their oceans policies, mean that the Canadian and Australian experiences can provide valuable if cautionary lessons for New Zealand if it were to restart its own oceans policy process.

Canadian Oceans Policy

In 1996, Canada adopted the *Oceans Act*,²⁷⁰ which largely implemented its rights and obligations under UNCLOS,²⁷¹ including the establishment of Canada's EEZ,²⁷² as well as providing a basis for the development of an oceans policy.²⁷³ The 1996 Act was the first example of comprehensive oceans legislation

²⁶⁹ But see Cicin-Sain et al. eds., n. 2 above which provides an overview of policies adopted in Canada, Australia, Russia, United Kingdom, Brazil, Jamaica, Japan, Mexico, United States, Portugal, New Zealand, Norway, Philippines, Vietnam, and India, as well as regional case studies on the European Union, the Pacific, East Asia and Sub-Saharan Africa.

²⁷⁰ *Oceans Act* S.C. 1996, c. 31.

²⁷¹ Canada ratified UNCLOS in 2003.

²⁷² *Oceans Act*, ss. 13–16.

²⁷³ *Id.*, Part III. For literature providing an overview, assessment and evaluation of the development and implementation of Canada's oceans policy see A. Chircop and L. Hildebrand,

anywhere in the world.²⁷⁴ The Act and subsequent policy development were designed to respond to failing oceans health, including declining fish stocks and marine biodiversity more generally; growing ocean user conflicts and administrative, jurisdictional and regulatory complexities; and an oceans industry sector that was perceived as significantly weaker than its potential.²⁷⁵ Following extensive consultation, an Oceans Strategy was adopted in 2002,²⁷⁶ which was followed by an Oceans Action Plan in 2005.²⁷⁷ A Strategy and Framework for establishing an MPA network were adopted in 2005²⁷⁸ and 2011²⁷⁹ respectively, with further protection standards being adopted in 2019.²⁸⁰

The 1996 Act mandates the Minister of Fisheries and Oceans, in collaboration with other ministers, boards and agencies, as well as provincial and territorial governments and aboriginal organizations, to “lead and facilitate the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems in waters that form part of Canada.”²⁸¹ The Act identifies three principles that underpin the national strategy: sustainable development; integrated management; and the precautionary

“Beyond the buzzwords: A perspective on integrated coastal and ocean management in Canada,” in *Toward Principled Oceans Governance. Australian and Canadian Approaches and Challenges*, eds., D.R. Rothwell and D.L. VanderZwagg (Abingdon: Routledge, 2006), pp. 19–71; S. Jessen, “A review of Canada’s implementation of the Oceans Act since 1997: From leader to follower?,” *Coastal Management* 39 (2011): 20–56; Mageau et al., n. 46 above, pp. 87–131; T.L. McDorman and A. Chircop, “Canada’s oceans policy framework: An overview,” *Coastal Management* 40 (2012): 133–144; P.J. Ricketts and L. Hildebrand, “Coastal and ocean management in Canada: Progress or paralysis?,” *Coastal Management* 39 (2011): 1–19.

274 P. Ricketts and P. Harrison, “Coastal and ocean management in Canada: Moving into the 21st century,” *Coastal Management* 35 (2007): 5–22, p. 9.

275 *Canada’s Oceans Action Plan for Present and Future Generations* (Ottawa: Fisheries and Oceans Canada, 2005), p. 4, available online: <<https://waves-vagues.dfo-mpo.gc.ca/Library/315255e.pdf>> [Canada’s Oceans Action Plan].

276 *Canada’s Oceans Strategy. Our Oceans, Our Future* (Ottawa: Fisheries and Oceans Canada, 2002), available online: <<https://waves-vagues.dfo-mpo.gc.ca/Library/264675.pdf>> [Canada’s Oceans Strategy].

277 See Canada’s Oceans Action Plan, n. 275 above.

278 *Canada’s Federal Marine Protected Areas Strategy* (Ottawa: Fisheries and Oceans Canada, 2005), available online: <<https://waves-vagues.dfo-mpo.gc.ca/Library/315822e.pdf>>.

279 *National Framework for Canada’s Network of Marine Protected Areas* (Ottawa: Fisheries and Oceans Canada, 2011), available online: <<https://waves-vagues.dfo-mpo.gc.ca/Library/345207.pdf>>.

280 See Fisheries and Oceans Canada, “Protection Standards to Better Conserve Our Oceans,” available online: <<http://www.dfo-mpo.gc.ca/oceans/mpa-zpm/standards-normes-eng.html>> [DFO Protection Standards].

281 *Oceans Act* 1996, s. 29.

approach.²⁸² These principles are reiterated in the Preamble to the Act, which also refers to the ecosystem approach as well as economic diversification. All these principles provide the basis for the Oceans Strategy.²⁸³ The Act requires the collaborative development of integrated management plans covering all activities or measures in or affecting estuaries, coastal and marine waters,²⁸⁴ and provides a mandate for extensive institutional cooperation, including the establishment of new advisory or management bodies.²⁸⁵ In addition, the Act also requires the Minister to lead and coordinate the development and implementation of a network of MPAs²⁸⁶ for the purpose of conservation of species, habitats, areas of high biological productivity and ecological integrity, as well as the conservation and protection of commercial and non-commercial fishery resources.²⁸⁷

Within the framework of the *Oceans Act*, Canada's Oceans Strategy was adopted in 2002, with the overarching goal "to ensure healthy, safe and prosperous oceans for the benefit of current and future generations of Canadians."²⁸⁸ The *Oceans Act's* principles of sustainable development, integrated management and precaution provide the basis of the Strategy,²⁸⁹ and the identified strategy objectives comprise understanding and protecting the marine environment, supporting sustainable economic opportunities, and providing international leadership.²⁹⁰ The Strategy is intended to advance oceans governance in three areas: (1) developing and supporting the establishment of institutional governance mechanisms to enhance coordinated, collaborative oceans management across federal and other levels of government; (2) implementation of a program of integrated planning to engage partners in the planning and management of ocean activities; and (3) promoting stewardship and public awareness.²⁹¹ It sets out a series of short- to long-term goals designed to meet these objectives,²⁹² including support for the planning

282 *Id.*, s. 30.

283 See Canada's Oceans Strategy, n. 276 above, pp. 6–7.

284 *Oceans Act* 1996, s. 31.

285 *Id.*, ss. 32–33.

286 *Id.*, s. 35(2).

287 *Id.*, s. 35(1). An MPA is defined by the Act as "an area of the sea that forms part of the internal waters of Canada or the exclusive economic zone of Canada and has been designated under this section or section 35.1 for special protection."

288 See Canada's Oceans Strategy, n. 276 above, p. 10.

289 *Id.*, p. 11.

290 *Id.*, pp. 12–18.

291 *Id.*, pp. 18–20.

292 *Id.*, pp. 22–26.

processes for large ocean management areas (LOMAS).²⁹³ The Strategy confirms that its purpose is one of coordination and that “all levels of government retain respective legislative and jurisdictional responsibilities and authorities.”²⁹⁴

The Strategy was developed and expanded on Canada’s Oceans Action Plan, adopted in 2005.²⁹⁵ The Action Plan was based on four interconnected pillars: international leadership, sovereignty and security; integrated oceans management for sustainable development; health of the oceans; and oceans science and technology.²⁹⁶ The Action Plan advocated a phased implementation approach, beginning with new oceans governance arrangements for the purposes of integrated management and ecosystem science to improve the management of the marine environment.²⁹⁷ It identified five priority areas (or LOMAs) for the implementation of integrated management: Placentia Bay and the Grand Banks, the Gulf of St. Lawrence, the Scotian Shelf, the Beaufort Sea, and the Pacific North Coast.²⁹⁸ Integrated management initiatives were in fact already under way in the latter three areas.²⁹⁹ The Action Plan also set out key ocean management tools including the procurement of ecosystem overview and assessment reports, seabed mapping, the identification of ecologically significant areas and the identification of ecosystem objectives to be applied in each priority area.³⁰⁰ With respect to the third pillar, the Action Plan set out strategies and goals associated with area-based protection, invasive species and pollution.³⁰¹

Simultaneously but separately, Canada’s Federal Marine Protected Areas Strategy was also released in 2005. The goal of the MPA Strategy was “[t]he establishment of a network of marine protected areas, established and managed within an integrated oceans management framework, that contributes to the health of Canada’s oceans and marine environments.”³⁰² In support of this goal the Strategy aimed to establish a more systematic approach to MPA planning and designation; enhance collaboration for oceans management,

293 *Id.*, p. 26.

294 *Id.*, p. 11.

295 See Canada’s Oceans Action Plan, n. 275 above.

296 *Id.*, p. 5.

297 *Id.*

298 *Id.*, pp. 13–15.

299 The Beaufort Sea Integrated Management Planning Initiative (BSIMPI), the Atlantic Ocean (Eastern Scotian Shelf Integrated Management Initiative (ESSIM)) and the Pacific Ocean (Central Coast of British Columbia). See Canada’s Oceans Strategy, n. 276 above, pp. 28–30.

300 See Canada’s Oceans Action Plan, n. 275 above, pp. 15–16.

301 *Id.*, pp. 17–18.

302 See Canada’s Federal Marine Protected Areas Strategy, n. 278 above, p. 3.

including clarification of the roles and responsibilities of federal, provincial and other agencies with area protection mandates; increase awareness, understanding and participation of Canadians in the MPA network; and link the national network to continental and global MPA networks.³⁰³ For the purposes of implementing the Strategy nine principles were identified: integrated management; ecosystem approach; precaution; respect for aboriginal peoples; use of scientific and traditional ecological knowledge; consultation and collaboration; public awareness, education and stewardship; monitoring and assessment of management effectiveness; and adaptive management.³⁰⁴

In 2011, Canada adopted the National Framework for Canada's Network of Marine Protected Areas,³⁰⁵ which set out the vision for Canada's MPA network as "[a]n ecologically comprehensive resilient and representative national network of marine protected areas that protects the biological diversity and health of the marine environment for present and future generations."³⁰⁶ The National Framework endorsed 13 ecologically defined bioregions as the spatial planning framework for Canada's national MPA network,³⁰⁷ and determined that the vision, goals, principles, eligibility criteria, design and management approach set out in the Framework would apply across all bioregions.³⁰⁸

In a recent development, in 2019, Canada adopted new protection standards for marine conservation,³⁰⁹ based on recommendations from the National Advisory Panel on Marine Protected Area Standards.³¹⁰ Under these new standards, networks will comprise MPAs and other effective area-based conservation measures, adopting the language used in global targets, including the SDG 14.5. Within MPAs, oil and gas exploitation, mining, dumping and bottom trawling will be prohibited. Within areas covered by other effective area-based measures, activities will be assessed on a case-by-case basis.³¹¹ These standards will apply to MPAs established under the *Oceans Act* as well as in respect of measures adopted under other instruments.

Finally, also in 2019, amendments were made to the *Oceans Act* in order to permit interim protection of an area, whereby the boundary of an MPA

³⁰³ Id.

³⁰⁴ Id., pp. 10–11.

³⁰⁵ National Framework for Canada's Network of MPAs, n. 279 above.

³⁰⁶ Id., p. 6.

³⁰⁷ Id., pp. 8–9.

³⁰⁸ Id., p. 10.

³⁰⁹ See DFO Protection Standards, n. 280 above.

³¹⁰ *Final Report of the National Advisory Panel on Marine Protected Area Standards* (Ottawa: Fisheries and Oceans Canada, 26 September 2018), available online: <<http://www.dfo-mpo.gc.ca/oceans/conservation/advisorypanel-comiteconseil/index-eng.html>>.

³¹¹ See DFO Protection Standards, n. 280 above.

is designated and the “footprint” of ongoing activities is “frozen” so that they are not increased, and no new activities are permitted.³¹² A permanent MPA must be designated within five years of the interim order.³¹³ The first MPA to be designated for interim protection is the Tuvalujuittuq MPA, established in August 2019. It covers 5.5 percent of Canadian waters, bringing total protection—through the 14 MPAs established under the *Oceans Act*—to 13.89 percent.³¹⁴ This initiative, which is implicitly precautionary, is complemented by a further amendment to the Act, which explicitly strengthens the application of the precautionary principle to MPA designation.³¹⁵

Much has been achieved within the framework of Canada’s oceans policy in terms of both concrete actions, including the designation of MPAs, and in process, particularly, enhanced coordination and cooperation.³¹⁶ However, most commentators agree that progress has been slow and that ultimately, the *Oceans Act* has yet to live up to its ambitious goals.³¹⁷ The designation of MPAs under the Act has been slow, taking, on average, seven years for each MPA, and the level of protection across MPAs has been variable.³¹⁸ Canada has only met its global target to protect at least 10 percent of its marine environment by 2020 with the designation of a large interim MPA in the Arctic, the Tuvalujuittuq MPA, in 2019.³¹⁹ More fundamentally, most of the LOMA integrated management initiatives have been delayed or abandoned, including the Eastern Scotian Shelf Integrated Management Initiative (ESSIM), which was relatively advanced.³²⁰

312 *Oceans Act* 1996, s. 35.1 (2).

313 *Id.*, ss. 35, 3(1).

314 See Fisheries and Oceans Canada, “Marine Protected Areas across Canada,” available online: <<http://www.dfo-mpo.gc.ca/oceans/mpa-zpm/index-eng.html>>.

315 *Oceans Act* 1996, s. 35.2.

316 See McDorman and Chircop, n. 273 above, p. 143.

317 See, for example, Jessen, n. 273 above; McDorman and Chircop, n. 273 above, p. 143; Ricketts and Hildebrand, n. 273 above, p. 7; M.S. Watson and S.M. Hewson, “Securing protection standards for Canada’s marine protected areas,” *Marine Policy* 95 (2018): 117–122, p. 121.

318 Watson and Hewson, n. 317 above, p. 118.

319 The 2019 reforms noted above, in particular addressing environmental standards across MPAs, will hopefully improve the situation going forward.

320 M. Bailey et al., “Canada at a crossroad: The imperative for realigning ocean policy with ocean science,” *Marine Policy* 63 (2016): 53–60, p. 54. The ESSIM initiative was abandoned in 2012. For a detailed history of integrated planning in the Eastern Scotian Shelf area prior to 2012 see T. Hall et al., “Advancing objectives-based, integrated ocean management through marine spatial planning: Current and future directions on the Scotian Shelf off Nova Scotia, Canada,” *Journal of Coastal Conservation* 15 (2011): 247–255; E. Foster, M. Haward and S. Coffen-Smout, “Implementing integrated oceans management: Australia’s South East Regional Marine Plan (SERMP) and Canada’s Eastern Scotian Shelf Integrated Management (ESSIM) initiative,” *Marine Policy* 29 (2015): 391–405;

There are a number of reasons for this mediocre progress. First, the Department of Fisheries and Oceans (DFO), while leading the oceans policy process and charged with coordinating institutions at all levels, cannot compel cooperation. At the federal level alone, there are 27 departments and agencies and 25 major federal statutes with responsibility for marine activities,³²¹ operating on a largely sectoral basis. At times it has been challenging to find willing partners at the federal level³²² and to harmonize sectoral regulations.³²³ Moreover, the implementation of initiatives depends on authority divided between federal, provincial and indigenous entities,³²⁴ and Canada's experience reflects more generally the challenges of implementing oceans policies within federal States. A 2005 auditors report highlighted a number of failings, including lack of leadership,³²⁵ and institutional challenges within DFO are demonstrated by the number of groups, committees and councils it has established over the last couple of decades, most of which have been abandoned.³²⁶ Inadequate funding and resources have also been a consistent challenge,³²⁷ and the auditors further noted the absence of an accountability framework with performance measures.³²⁸ The strength of commitment to public participation and community-based management has varied over time³²⁹ and there has been some criticism of engagement (or lack thereof) with indigenous communities.³³⁰ The challenges that can be found in almost every attempt to develop an oceans policy—deficient ecological and other data³³¹ and conflicts

R.J. Rutherford, G.J. Herbert and S.S. Coffen-Smout, "Integrated ocean management and the collaborative planning process: The Eastern Scotian Shelf Integrated Mangement (ESSIM) initiative," *Marine Policy* 29 (2005): 75–83.

321 See McDorman and Chircop, n. 273 above, p. 139.

322 See Mageau et al., n. 46 above, p. 95.

323 S. Guénette and J. Alder, "Lessons from marine protected areas and integrated ocean management initiatives in Canada," *Coastal Management* 35 (2007): 51–78, p. 71.

324 See Mageau et al., n. 46 above, p. 106.

325 See Bailey et al., n. 320 above, p. 54.

326 For an overview of the institutions associated with the oceans policy process, see Mageau et al., n. 46 above, pp. 94–95.

327 See Bailey et al., n. 320 above, p. 54. See also J. Alder, "Canada's ocean policy: Where are the funds? Where are the protected areas," *Biodiversity* 4 (2003): 42.

328 See Bailey et al., n. 320 above, p. 54.

329 See Mageau et al., n. 46 above, p. 105. See also J. Kearney et al., "The role of participatory governance and community-based management in integrated coastal and ocean management in Canada," *Coastal Management* 35 (2007): 79–104.

330 See N.J. Bennett et al., "Coastal and Indigenous community access to marine resources and the ocean: A policy imperative for Canada," *Marine Policy* 87 (2018): 186–193.

331 See Guénette and Alder, n. 323 above, p. 72.

over access to fisheries³³²—have also impeded progress in Canada. Finally, Canada's experience over almost 25 years demonstrates that adopting “bare bones integrated ocean planning legislation” creates implementation risks, with significant reliance on decision-making by officials and bureaucrats in respect of substantive matters such as areas of application and timelines.³³³

Australian Oceans Policy

Like Canada, Australia has long been a pioneer in oceans governance. In the 1970s, it became one of the first States to develop integrated coastal management,³³⁴ as well as nascent marine spatial planning, in respect of the Great Barrier Reef.³³⁵ Serious discussion on the need for a national oceans policy began in the 1980s,³³⁶ and Australia's Oceans Policy was formally adopted in 1998.³³⁷ In contrast to Canada, Australia's Oceans Policy lacks a legislative basis and, as a Commonwealth policy, excludes the coastal zone from its application; the coastal zone being subject to the jurisdiction of the states and the Northern Territory.³³⁸ The Policy proposed that the Australian and New Zealand Environment and Conservation Council (ANZECC) operate as the forum for integration of planning across state and Commonwealth waters.³³⁹

The 1998 Oceans Policy³⁴⁰ sets out the following vision for Australia's oceans: “[h]ealthy oceans; cared for; understood and used wisely for the

332 Id.

333 See Mageau et al., n. 46 above, p. 122

334 G. Wescott, “Stimulating vertical integration in coastal management in a federated nation: The case of Australian policy reform,” *Coastal Management* 37 (2009): 501–513, p. 501.

335 *Great Barrier Reef Marine Park Act* No. 85, 1975 was innovative for the era, and provides a framework for the conservation and ecological sustainable use of the entire park as an integrated whole, proactively managing activities taking place therein through a system of multiple use zoning. See J.C. Day, “Zoning—lessons from the Great Barrier Reef Marine Park,” *Ocean and Coastal Management* 45 (2002): 139–156.

336 See A. Bergin, “Australian ocean policy: The need for a comprehensive review,” *Maritime Studies* 24 (1985): 7–9.

337 Australia's Oceans Policy 1998 is available online: <<http://www.environment.gov.au/archive/coasts/oceans-policy/publications/pubs/policyvi.pdf>>.

338 See Vince et al., n. 51 above, p. 3. The 1979 Offshore Constitutional Settlement provides for shared responsibility of the marine environment between states/Northern Territory and the Commonwealth. States and the Northern Territory exercise jurisdiction out to 3 M with the Commonwealth having responsibility from 3 M to the outer limit of Australia's jurisdiction.

339 See Australia's Oceans Policy 1998, n. 337 above, p. 17.

340 For an overview of and assessment of Australia's Oceans Policy, see Vince et al., n. 51 above. See also D. Petrachenko and B. Addison, “Australia's Oceans Policy,” in Cicin-Sain et al., n. 2 above, pp. 132–161; D.R. Rothwell, “Environmental integration and coastal and marine law,” in *Australian Coastal and Marine Law*, eds., R. Baird and D.R. Rothwell (Sydney: The

benefit of all, now and in the future.”³⁴¹ The Policy articulates nine broad policy goals designed to achieve this vision: (1) to exercise and protect Australia's rights and jurisdiction over offshore areas and resources; (2) to meet Australia's international law obligations under UNCLOS and other instruments; (3) to understand, protect and sustainably use Australia's biodiversity; (4) to promote ecologically sustainable economic development and job creation; (5) to establish integrated oceans planning and management arrangements; (6) to accommodate community needs and aspirations; (7) to improve scientific and technological expertise in ocean-related management; (8) to identify and protect natural and cultural marine heritage; and (9) to promote public awareness and understanding of the oceans.³⁴² Fundamental principles for ecologically sustainable ocean use are also identified, including ecosystem-based and integrated management, use of best available scientific and other information, precaution, and various process-related principles.³⁴³ The Policy highlighted some key initial actions supporting its implementation, including funding of AU\$50 million over three years, the implementation of regional marine planning for the southeastern region of Australia's EEZ, funding to support national marine resource surveys, sustainability indicators and monitoring, acceleration of the development of a National Representative System of Marine Protected Areas (NRSMPA) and the adoption of additional measures to support the Great Barrier Reef Marine Park.³⁴⁴ The Policy also noted initiatives being developed with respect to protection of species, fisheries and aquaculture, environmental impact assessment, minerals exploitation, shipping, marine pollution, tourism and community engagement.³⁴⁵ In the final section of the Policy, the issue of sustainable economic development and job creation are addressed with the Marine Industry Development Strategy (1997) and the Marine Science and Technology Plan (released in 1999) identified as providing key elements of the Oceans Policy.³⁴⁶

The Policy was intended to be a whole of Commonwealth government approach, and a sophisticated suite of institutions was established to support

Federation Press, 2011), pp. 348–372; M. Tsamenyi and R. Kenchington, “Australian Oceans Policymaking,” *Coastal Management* 40 (2012): 119–132; J. Vince, “Ten years of implementing *Australia's Oceans Policy*: From an integrated approach to an environmental policy focus,” *Maritime Studies* 159 (2008): 1–10.

341 See Australia's Oceans Policy 1998, n. 337 above, p. 4.

342 *Id.*

343 *Id.*, p. 19.

344 *Id.*, pp. 21–23.

345 *Id.*, pp. 24–32.

346 *Id.*, pp. 33–34.

its implementation. These included a National Oceans Ministerial Board (NOMB) comprising Commonwealth Ministers from departments of industry, resources, fisheries, science and tourism; a National Oceans Advisory Group (NOAG) formed from non-government representatives drawn from industry, science and conservation; a National Oceans Office (NOO) to support the work of the other bodies and reporting to the National Oceans Ministerial Board; and Regional Marine Plan Steering Committees.³⁴⁷ Following a major review in 2002, two further organizations were established: the Oceans Board of Management (OBOM) and the Oceans Policy Science Advisory Group (OPSAG).³⁴⁸ By 2008, however, all but one of these institutions had been abolished. The remaining institution being the OPSAG, which changed its name in 2014 to the National Marine Science Committee and supports collaboration and cooperation with respect to marine research.³⁴⁹ The NOO, which was subsequently designated an Executive Agency in order to increase sector integration (but was based in Tasmania rather than in Canberra, Australia's capital),³⁵⁰ was ultimately integrated into the Department of Environment and Heritage in 2004.

The most significant initiative in the Oceans Policy was the introduction of a regional marine planning process in order to implement the Policy's commitment to integrated and ecosystem-based planning and management. The Policy required the Commonwealth to collaborate with states and territories to develop regional marine plans (RMPs) based on large marine ecosystems, and were designed to integrate sectoral commercial interests and conservation.³⁵¹ The objectives of the RMPs were to ensure continuing marine ecosystem health, safeguard marine biological diversity, promote diverse, strong and sustainable marine industries, provide increased certainty and long-term security for all marine users and ensure the establishment of a representative system of MPAs.³⁵² In respect of the latter objective, the government committed to accelerating the development of the NRSMPA.³⁵³ The Policy set out the essential steps in the planning and management process and a broad outline of the content of plans.³⁵⁴ The only RMP adopted was in respect of South East

347 *Id.*, pp. 15–17.

348 See Vince et al., n. 51 above, p. 4.

349 *Id.*, p. 4.

350 *Id.*

351 See Australia's Oceans Policy 1998, n. 337 above, p. 11.

352 *Id.*, p. 12.

353 *Id.*

354 *Id.*, pp. 12–13.

Australia, the planning in respect of which was already underway at the time of the adoption of Australia's Oceans Policy.³⁵⁵

Following a review initiated in 2002, which was critical of the regional planning process,³⁵⁶ RMPs were discontinued and replaced with marine bio-region plans (MBPs) pursuant to section 176 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Each bioregional plan must set out the components of biodiversity located with the region, specify economic and social values and establish objectives and priorities for biodiversity conservation as well as mechanisms for involving the community in the implementation of the plan and for monitoring and reviewing the plan.³⁵⁷ Six marine bioregions have been identified for planning purposes,³⁵⁸ and MBPs have been developed for four of these regions (i.e., North, Temperate East, South-west and North-west)³⁵⁹ setting out relatively high-level goals and priorities designed to assist and inform decision-makers.³⁶⁰ None of the plans have legislative effect, however.³⁶¹ Notably, the plans apply to waters under Commonwealth jurisdiction only and, consequently, are not entirely ecosystem-based.³⁶² The replacement of RMPs with MBPs has had significant consequences for the continued endurance of the Oceans Policy. While MBPs under the EPBC Act are largely ecosystem-based, planning is conservation-focused rather than integrated, and "conservation ... overshadowed the multisectoral consideration of regional objectives that was provided for in the Oceans Policy"³⁶³ with little attention being paid to social and economic objectives.³⁶⁴ This change has been described as "signifying the 'beginning of the end' of the holistic approach to Australian oceans governance."³⁶⁵ A practical implication of this change was that funding for planning was reduced from AU\$50 million over

355 See further J. Vince, "The South East Regional Marine Plan: Implementing Australia's Oceans Policy," *Marine Policy* 30 (2006): 420–430; Foster et al., n. 320 above.

356 See Tsamenyi and Kenchington, n. 340 above, pp. 128–129.

357 *Environment Protection and Biodiversity Conservation Act* (EPBC) 1999, s. 176(4).

358 North, Coral Sea, Temperate East, South-east, South-west and North-West. See Australia State of the Environment, "Marine Regions" (2016), available online: <<https://soe.environment.gov.au/theme/marine-environment/topic/2016/marine-regions>>.

359 Id. A marine regional profile has been developed for the South-east marine region.

360 For the four plans and one profile, see Department of Agriculture, Water and the Environment, "Marine Bioregional Plans," available online: <<http://www.environment.gov.au/marine/marine-bioregional-plans>>.

361 EPBC Act 1999, s. 176(4A).

362 See Tsamenyi and Kenchington, n. 340 above, p. 126.

363 Id., p. 129.

364 See Vince et al., n. 51 above, p. 5.

365 J. Vince, "Marine bioregional plans and implementation issues: Australia's oceans policy process," *Marine Policy* 38 (2013): 325–329, p. 328.

three years to AU\$37.7 million over four years, including the NRSMPA, which had previously been funded separately.³⁶⁶

Like Canada, Australia also announced a simultaneous but parallel process to develop a National Representative System of Marine Protected Areas (NRSMPA) in federal waters.³⁶⁷ Initially this process was distinct from regional marine planning processes, but from 2005 it was decided that the MBPs would form the basis of the NRSMPA,³⁶⁸ although MPAs were adopted separately under state legislation and, in the case of Commonwealth Marine Reserves, under section 344 of the EPBC Act. The NRSMPA was proclaimed in 2012 and covers about 36 percent of Australia's EEZ.³⁶⁹ The management plan for the South-east marine parks network was adopted in 2013³⁷⁰ and, after a hiatus where plans were temporarily set aside in 2014, management plans were formally adopted for the remaining marine park networks and the Coral Sea in 2018.³⁷¹

The legacy of Australia's Oceans Policy is decidedly mixed. On the one hand, bioregional plans have been adopted for most areas and the NRSMPA has significantly exceeded global MPA targets. One assessment suggests that progress has also been made in strengthening Australia's marine science and technology base.³⁷² Moreover, the Oceans Policy has indirectly impacted on policy development, particularly by increasing focus on the marine environment in other areas of government policy. In a comprehensive assessment of the Oceans Policy, Vince et al. conclude that "[i]t is clear that the policy has failed to deliver all that was hoped of it but it did have a profound impact on the way the marine environment was regarded across multiple sectors."³⁷³ On the other hand, the goals of ecosystem and integrated management have not been met.³⁷⁴ Australia's federal structure ultimately prevented any serious integration of ocean and coastal management,³⁷⁵ and the process was ultimately undermined by the Commonwealth's failure to obtain support and acceptance

³⁶⁶ See Vince et al., n. 51 above, p. 5.

³⁶⁷ Id., p. 3.

³⁶⁸ Id., p. 5.

³⁶⁹ See Parks Australia, "Australian Marine Parks," available online: <<https://parksaustralia.gov.au/marine/parks/>>.

³⁷⁰ See Australian Marine Parks, "South-east Marine Parks Network," available online: <<https://parksaustralia.gov.au/marine/parks/south-east/>>.

³⁷¹ See Parks Australia, n. 369 above.

³⁷² See Treloar et al., n. 50 above, pp. 43–44.

³⁷³ See Vince et al., n. 51 above, p. 6.

³⁷⁴ Id., p. 1.

³⁷⁵ N. Harvey, "The combination-lock effect blocking integrated coastal zone management in Australia: The role of governance and politics," *Ocean Yearbook* 30 (2016): 1–31, p. 13.

from states and the Northern Territory. Without a legislative basis, even persuading sectoral engagement at the Commonwealth level was challenging,³⁷⁶ and this was compounded by the decision to locate the NOO in Tasmania, far from the center of government in Canberra. As noted above, the replacement of regional marine planning with marine bioregional plans under the EPBC Act sounded the death knell for genuine integrated cross-sector management. Finally, mirroring the Canadian experience, a lack of scientific data,³⁷⁷ inadequate funding³⁷⁸ and conflicts over access to fisheries³⁷⁹ all served to undermine the Ocean Policy processes. It has been asserted that “[t]he Oceans Policy is now in abeyance and, although MBPs are formally in place, the sectoral approach to oceans management remains the dominant paradigm”³⁸⁰ in Australia.

Concluding Observations

Canada and Australia’s experience of developing an oceans policy over more than twenty years provides many salutary lessons for New Zealand. The fact that both States are well resourced, motivated and were experienced in developing innovative oceans governance mechanisms, and yet struggled to develop a successful oceans policy suggests that New Zealand should move down this path with caution. There are five lessons in particular, that are valuable in the New Zealand context.

First, the importance of developing partnerships and ensuring, in New Zealand’s case, government, Māori, community and stakeholder acceptance to an oceans policy at all stages of its development and implementation. Meaningful partnership and engagement have been a challenge for both Canada and Australia and, in the case of Australia, failure to engage with other parties, most notably states, ultimately derailed implementation of the Australian Oceans Policy. New Zealand’s constitutional framework is more straightforward in that it is not a federal State, but it does have strong regional governance that is enshrined in the RMA. Moreover, success in New Zealand can only be achieved in partnership with Māori.

Second, an oceans policy should be enshrined in enabling oceans management legislation. While legislation alone is not sufficient, and the risks of a minimal statutory framework is demonstrated by the Canadian experience,

³⁷⁶ See Vince et al., n. 51 above, p. 2.

³⁷⁷ Id., p. 6.

³⁷⁸ Id., p. 2.

³⁷⁹ Id., p. 3.

³⁸⁰ Id., p. 1.

the absence of a legislative basis imperils the durability of ocean policy values and principles and even the policy itself. In Australia, the policy shift from regional marine planning to marine bioregional plans under the EPBC Act effectively undermined the Australian Ocean Policy goal of integrated holistic management, and this goal has been all but abandoned. The fact that the Australian Oceans Policy was not enshrined in legislation, and was effectively not enforceable, permitted this to happen.

Third, area-based protection should be fully integrated into an oceans policy rather than being implemented through separate albeit complementary processes. In both Canada and Australia, MPA designation processes began separately from the Oceans Policy and both States struggled to develop networks in the first decade or so of implementation. Canada has only, in 2019, reached the global target (bearing in mind that the original global target was the protection of 10 percent of the marine environment by 2012). Australia has now far exceeded the target, but only after largely merging the processes of establishing MPA networks and marine bioregional planning from 2005 onwards. Area-based protection is a fundamental part of any regional planning process and cuts across multiple sectors, including fishing and shipping. As such, it should be core to and not separate from a New Zealand oceans policy.

Fourth, the Canadian and Australian experience demonstrates that there are significant practical and policy constraints that limit ambition. Governments, stakeholders and commentators alike have been surprised by many of the challenges associated with full regional planning exercises and the obstacles to integrated oceans management. Developing spatial plans takes both time and significant resources and this needs to be recognized and acknowledged. A New Zealand oceans policy will need to achieve a balance between aspiration and being realistic as to what can be achieved given available resources. A short-, medium- and long-term plan setting out how the policy will be implemented, and the resources associated with each of those stages should be developed.

Finally, an oceans policy that is designed to operate for the long-term must provide for means to adapt in terms of its processes and its institutions. In Australia, without a legislative base there is no clear mechanism to adapt and alter the Oceans Policy itself, so external mechanisms, such as the EPBC Act were used—in the case of replacing RMP with MBP—and consequently, key values underpinning the Oceans Policy were simply abandoned. By contrast, the *Oceans Act* in Canada can be amended, and this provides an opportunity to adapt principles and substantive rights and obligations within the framework of the policy. Canada has recently amended the Act in order to provide for interim MPAs and to strengthen the application of the precautionary principle

in relation to MPA decision-making. Learning the lessons from these international experiences, New Zealand will need to develop an oceans policy that is sufficiently robust that its values and principles provide a framework for decision-making and cannot simply be abandoned, but which provides for appropriate processes allowing the policy to adapt and respond to future environmental conditions and industry and stakeholder demands.

A New Zealand Oceans Policy: An Outline

What would a New Zealand oceans policy in 2021 look like? It is not possible to set out a detailed outline of a proposed oceans policy in this article, and a key feature of the process begun in 2000 was that it was designed to be intensely collaborative. Nevertheless, drawing on New Zealand's existing legislative and policy framework, the values and principles identified in the previous abortive attempt to develop an Oceans policy and selected international experience, this article provides a skeletal overview of the core features that this author recommends for inclusion in an oceans policy. The proposal does not recommend a full-scale reform of all existing legislation and institutions, but rather, is designed to develop a pragmatic oceans policy that builds on New Zealand's current legislative framework and introduces key legal, institutional and policy reforms designed to achieve ecosystem-based, integrated and proactive management of activities in or affecting New Zealand's oceans.

Values and Goals

A principal function of any oceans policy is the articulation of overarching values and goals that are designed to guide decision-makers at all levels, as well as the development of legislation, policy and initiatives that may impact directly or indirectly on New Zealand's oceans. New Zealand's existing governance framework already endorses several key values that provide an eminently suitable foundation for an oceans policy. Moreover, the extensive consultation process that took place in 2000 also identified what New Zealanders value about their oceans and how they want to see them managed. It is suggested that the following overarching values and goals be articulated in a New Zealand oceans policy, although owing to space constraints, a detailed exposition of each value and goal is not possible here.

- Ecologically healthy and resilient oceans (with appropriate attention to promoting resilience in order to adapt to the impacts of increasing ocean temperature and sea level rise)
- Sustainable fisheries management

- Ecosystem-based integrated management of all ocean-based activities and activities that impact the oceans
- Protection of at least 30 percent of New Zealand's EEZ by 2025
- Sustainable realization of the economic benefits derived from the oceans and oceans-based activities
- That New Zealanders owe collective responsibility for the oceans and, are all entitled to benefit from the oceans, including (but not limited to) access, kai (food), recreation, cultural and economic benefits
- That the oceans are managed in partnership with tangata whenua in accordance with tikanga Māori and Te Tiriti o Waitangi (the Treaty of Waitangi)
- That through successful domestic oceans governance, New Zealand becomes a leader in oceans governance internationally

Principles

A second function of an oceans policy is to articulate key principles that are designed to support the values and goals identified by the policy. The principles identified here are again largely drawn from existing legislation, policies and practice in New Zealand, but articulated as a collective, provide a clear framework for decision and policy-makers at all levels. Space constraints similarly permit only a brief reference to each principle.

The first principle, which underpins the RMA, the EEZ & CS Act and the *Fisheries Act*, is *sustainability*, which broadly refers to using resources in such a way as to allow for current generations to provide for their social, economic and cultural well-being, while sustaining the potential of natural resources to meet the reasonably foreseeable needs of future generations. This includes safeguarding the life-supporting capacity of ocean ecosystems and avoiding, remedying and mitigating environmental harm.³⁸¹ *Intergenerational equity* comprises the second principle and is obviously integral to sustainable management. As a separate principle, however, it requires decision-makers to expressly consider the needs of future generations when authorizing marine consents or when developing policy, such as response to sea level rise. The third principle is *kaitiakitanga*, which broadly equates to guardianship in accordance with tikanga Māori, and is considered roughly equivalent to the Western concept of stewardship. Kaitiakitanga does not of itself exclude “use”

³⁸¹ This definition is broadly based on section 5 of the RMA 1991. See also the EEZ & CS Act 2012, section 5 and the *Fisheries Act* 1996, section 8.

from the concept of protection,³⁸² and is thus also supportive of sustainable management.

Ecosystem-based management comprises a fourth and fundamental principle and requires management of measures and activities in the context of an ecosystem rather than on a sectoral basis or in accordance with arbitrary political or administrative boundaries. The fifth principle is *resilience*, and this principle is perhaps more implicit than explicit in terms of New Zealand's current legislative framework. The concept of ecosystem resilience is, however, increasingly regarded as a fundamental component of ecosystem-based management.³⁸³ Resilience is typically discussed in the context of climate change, but more broadly, refers to measures taken to strengthen the capacity of ecosystems to resist or adapt to threats or changing environmental conditions. *Integrated management* comprises the sixth principle and complements ecosystem-based management in that it is designed to support a holistic approach to oceans governance. Integrated management requires that activities are considered holistically with consideration of their impact on one another and cumulative impacts as well as the implications of systemic threats such as climate change.

The seventh principle requires that decisions are taken and policies developed on the basis of *best available scientific information*. This also implies that policy and resources must support research in order to provide the necessary information. Where information is not available or is inadequate, decision-makers should be cautious in authorizing activities that may damage the environment and should be subject to an obligation not to authorize them altogether in cases of significant or irreversible risk. The *precautionary principle* (principle number eight) also requires policy-makers to take pre-emptive protective action where information is uncertain. However, scientific information must be complemented by *matāuranga Māori* (principle number nine) that must be appropriately reflected in policies and in the frameworks guiding decision-makers.³⁸⁴ The *polluter pays principle* (number 10) is also insufficiently reflected in New Zealand's current legislative framework, and requires

382 J. Ruru et al., "Reversing the decline in New Zealand's biodiversity. Empowering Māori within reformed conservation law," *Policy Quarterly* 13 (2017): 65–71, p. 67.

383 For example, Sustainable Development Goal 14.2 demands that "By 2020, [states] sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, *including by strengthening their resilience*, and take action for their restoration in order to achieve healthy and productive oceans" [emphasis added]. See United Nations, "SDG 14," available online: <<https://sustainabledevelopment.un.org/sdg14>>.

384 For an in depth assessment of the application of *matāuranga Māori* and *tikanga Māori* to the marine environment see Jackson et al., n. 72 above; Joseph et al., n. 72 above.

polluters and other perpetrators of environmental harm (such as fishers) to compensate for that harm.

These ten overarching principles should be complemented by four additional operational principles. First, *environmental impact assessment*, which is already well established in New Zealand domestic frameworks, apart from fisheries, and requires an assessment of the potential environmental effects of an activity prior to its authorization. Second, *area-based protection*, which comprises MPAs and other measures, and which obviously complements ecosystem, integrated and precautionary management. However, there is a tension between Western scientific approaches to no-take MPAs, which are regarded as highly beneficial for environmental protection³⁸⁵ and Māori concerns whereby national parks are sometimes regarded as “gated areas where we are obstructed from our customary practices locked out from decision making, and held back from continuing our relationship with sites of deep spiritual or cultural significance.”³⁸⁶ Designing MPA policy through a co-governance approach will be vital to achieving an environmental and culturally appropriate accommodation. Third, *monitoring and adaptive management*, which has been developed under both the RMA and the EEZ & CS Act provide useful principles balancing risk and reward with respect to the exploitation of oceans resources. Finally, at all levels, decision- and policy-making processes must be *open, transparent and participatory*. They must enable community, local, industry and conservation engagement, as well as relevant local government and iwi or hapū participation.

Bioregional Spatial Planning

The third component of the proposed oceans policy is the development of processes supporting bioregional and/or spatial planning in order to support ecosystem-based and integrated oceans management throughout New Zealand's maritime zone. This component will have considerable cost implications and will require significant new investment. However, without a process of bioregional planning it will be impossible to truly achieve meaningful ecosystem-based and integrated management in New Zealand's oceans. An important question for policy-makers will be whether the bioregional planning system builds on the existing boundaries between regional authorities

385 See, for example, S.D. Gaines et al., “Designing marine reserve networks for both conservation and fisheries management,” *Proceedings of the National Academy of Sciences* 107, no. 43 (2010): 18287; C.M. Roberts et al., “Marine reserves can mitigate and promote adaptation to climate change,” *Proceedings of the National Academy of Sciences* 114, no. 24 (13 June 2017): 6167–6175.

386 See Ruru et al., n. 382 above, p. 67.

or whether the process is developed from scratch using primarily ecosystem and ecological criteria to determine bioregions. It is estimated that there are at least 60 distinct ecosystems within New Zealand's marine environment.³⁸⁷ While the latter approach is likely to facilitate the implementation of a more authentic version of ecosystem-based management, it would nevertheless require extensive legislative and administrative reform. The former approach, though imperfect, represents a more pragmatic alternative, whereby an ecosystem approach can be developed from existing regional coastal plans. It may be appropriate to look at the boundaries of some plans where they clearly do not coincide with ecosystem considerations and processes will have to be developed for better coordination and cooperation across ecosystem boundaries. The Sea Change—Tai Timu Tai Pari marine spatial planning process in the Hauraki Gulf is an excellent example of a planning process across several local and regional administrative boundaries.

It is suggested that bioregional plans would extend from New Zealand's coastal environment, including, where appropriate, the catchment area, out to the maximum extent of New Zealand's EEZ or outer continental shelf. Australia's approach to the Great Barrier Reef whereby the park is zoned for different activities and measures provides a helpful model that could be adapted by New Zealand, allowing it to build on planning initiatives that are already in place in New Zealand waters. The coastal zone and territorial sea could comprise one zone subject to the regional coastal plan, with the EEZ being divided into further zones as appropriate. The process should be sufficiently flexible to permit zones to reflect local and community initiatives such as those in Kaikōura and the Hauraki Gulf. It would be sensible to consider whether the 12-M limit is broadly appropriate within the context of ecosystem-based management and to adjust this where the ecosystem and the legislative boundaries diverge.

Bioregional planning should be comprehensive and cover all measures and all activities taking place within or impacting the oceans. This includes fishing, aquaculture, oil and gas, mineral extraction, shipping, coastal and other infrastructure, dredging, marine scientific research, bioprospecting, renewable energy projects, cables and pipelines. Area-based protection should also be implemented as part of the planning process and systemic issues such as climate change and ocean acidification must underpin all decision-making.

Some form of bioregional planning committee will need to be established to implement the planning process and the committee should be co-led by the Crown and Māori. This is not necessarily an easy arrangement to establish as

³⁸⁷ See MacDiarmid et al., n. 3 above, p. 240.

there may be multiple iwi with mana whenua (rights to manage land) over a region. The committee will need to provide for appropriate government, community, environmental and industry representation as well as representatives of commercial and recreational fishing. Getting the balance of interests right will inevitably be challenging with national and international experience demonstrating that fishing interests frequently dominate. Moreover, the structure of the plan should ideally balance the need for a level of top-down, overarching goals, principles and priorities with sufficient flexibility to allow for bottom-up community-based initiatives.

Ocean Policy Institutions

An oceans policy must be supported with a level of institutional infrastructure. This is an issue that both Australia and Canada have struggled with. Both States established multiple institutions as part of their oceans policies with the vast majority being disbanded at some stage or another. Canada mandated an existing institution (the Department of Fisheries and Oceans) to lead its oceans policy but limited its role to institutional coordination, which has had variable levels of success over the years. The common experience can be summed up as too many institutions with insufficient power or mandate to actually lead or facilitate change. The lesson New Zealand should take from this is that it should establish as few as possible supporting institutions, but provide those institutions with a clear mandate to lead change and exercise meaningful oversight. This article proposes the creation of an *Oceans Council* and a new *Ministry for Ocean Affairs* in addition to the *bioregional planning committees* noted above.

The proposed Oceans Council would have overall responsibility for developing, reporting on and providing advice in relation to the New Zealand oceans policy. It would be co-governed by the Crown and Māori. An important function would be to take steps to ensure that the oceans policy is part of decision-making by all government departments where activities or measures affect the oceans. It would provide advice to the government on actions needed to implement the policy as well as recommendations on future policy development. The Council would play an important role in ensuring the policy is maintained as a living and indeed evolving instrument. The Council would report annually to the government on implementation of the policy. Membership of the Council should be drawn from relevant government departments and agencies, tangata whenua, representatives from industry, fishing, and conservation-focused organizations.

The Ministry of Ocean Affairs would have the mandate for the operational implementation of the oceans policy as well as all other things 'oceans' in

New Zealand. It is proposed that existing agencies and government departments with an oceans mandate be amalgamated into the Ministry of Oceans Affairs. These would include, for example, Maritime New Zealand, fisheries (currently within Ministry for Primary Industries) and relevant departments within the Department of Conservation, Ministry for the Environment and Ministry of Business, Innovation and Employment. The advantage of physically co-locating these key government departments is that this will support the development of integrated management approaches, whereby officials setting catch limits under the QMS are working alongside officials who are managing MPAs or developing climate change response strategies. No solution is perfect, but this proposal potentially avoids the pitfalls of establishing a new and potentially competing institution, as trialed in Australia, and providing a mandate to an existing institution with insufficient new powers, as is the case in Canada.

Currently, marine consents are issued by regional authorities (in respect of the territorial sea) or the Environmental Protection Authority (in the case of the EEZ). The oceans policy proposal, as outlined above, does not necessarily preclude this arrangement from continuing albeit with much greater guidance being given to all institutions issuing consent. An alternative option, which would require a more radical reform to existing legislative and administrative arrangements, is the creation of one organization with responsibility for all marine consents, in the manner of the Marine Management Organisation established in 2010 in the United Kingdom under the 2009 *Marine and Coastal Access Act*.³⁸⁸ While this may be an option for the future in New Zealand, it is arguably not necessary at this stage to support the implementation of an oceans policy.

An Oceans Act

Finally, it is proposed that an oceans policy and bioregional planning throughout New Zealand's entire maritime zone including area-based protection and supporting institutions have formal recognition in a New Zealand *Oceans Act*. It is not absolutely necessary to adopt legislation for the implementation of an oceans policy; New Zealand's Biodiversity Strategy does not have a formal legislative base, for example. However, the Australian experience demonstrates that without a legislative foundation, it is easy for an oceans policy to be sidelined or even abandoned as a consequence of subsequent policy development. It is not suggested at this stage that an *Oceans Act* be all encompassing,

388 For information on the Marine Management Organisation, see online: <<https://www.gov.uk/government/organisations/marine-management-organisation#content>>.

effectively forcing far-reaching reform of other statutes that apply to oceans issues (such as the RMA 1991, EEZ & CS Act 2012, Fisheries Act 1996 and *Maritime Transport Act 1994*),³⁸⁹ but rather, provide a framework for the oceans policy and associated planning to support coordination between and integration of existing processes.

Conclusion: The Future of Oceans Policy Development in New Zealand

Twenty years ago, New Zealand was arguably an international leader in oceans management. It had begun an ambitious process to develop an integrated and comprehensive oceans policy, building on almost a decade of experience of semi-integrated ocean and coastal management within its territorial sea under the RMA and an innovative approach to fisheries management under the *Fisheries Act*. By contrast, the last two decades have witnessed a stagnation in policy and governance initiatives. Whereas States such as Australia, Canada, the United Kingdom and many others have started to develop and implement systems and processes of bioregional or marine spatial planning, New Zealand has taken no steps towards developing a national framework to facilitate this.³⁹⁰ It has successfully addressed significant governance gaps with respect to activities taking place within its EEZ, but attempts to develop a representative network of MPAs through legislative and policy reform have largely failed. While there are notional references to ecosystem-based management across several key oceans governance instruments, ocean management in New Zealand is still largely sectoral-based and divided between legislative acts and institutions on the basis of political and administrative boundaries. Fundamentally, state of the oceans reports that have been released over this

389 Subsequent to the completion of this article a report from a New Zealand-based NGO, The Environmental Defence Society (EDS), proposed an Oceans Act and an Oceans Agency as part of RMA reform proposals. The proposal envisages the Act applying from 3 M from the coast, and does not therefore propose fully integrated coastal and marine management. See G. Severinsen, *Reform of the Resource Management System. A Pathway to Reform. Working Paper 2: A Model for the Future* (Environmental Defence Society, 2019), available online: <<https://www.eds.org.nz/our-work/rm-reform-project/>>.

390 On MSP in New Zealand more generally see K.N. Scott, "The evolution of marine spatial planning in New Zealand: Past, present and possible future," *International Journal of Marine and Coastal Law* 31 (2016): 652–689.

period reveal a largely steady decline or, at best, stasis in the health of New Zealand's ocean ecosystems and biodiversity.³⁹¹

This article has argued that New Zealand needs an oceans policy. It acknowledges the challenges of developing such a policy considering domestic and international experience, but suggests that those experiences can be used positively to inform and guide future policy development in New Zealand. In light of the relative neglect of "clean blue" in contrast to "clean green," the latter being fundamental to New Zealand's domestic and international image, an oceans policy could provide a point of focus from which to develop new governance approaches and to increase the profile of the oceans domestically. For example, climate change and the role of forests in mitigating New Zealand's emissions has dominated the policy agenda for the last few years and yet it is estimated that New Zealand's oceans will in fact absorb more CO₂ than New Zealand's forests.³⁹² There is, however, no overall framework supporting and protecting New Zealand's oceans as a sink for CO₂. An oceans policy could also provide the necessary overarching framework coordinating policy development at national, regional, local and community levels. New Zealand has acknowledged the importance of an ecosystem-based approach and, in 2014, launched 'Sustainable Seas' as part of its National Science Challenge with funding of up to NZ\$71.1 million over 10 years.³⁹³ The aim of this Challenge is to "transform Aotearoa New Zealand's ability to enhance our marine economy, and to improve decision-making and the health of our seas through ecosystem-based management."³⁹⁴ It is argued that an oceans policy is the most appropriate instrument to achieve this in conjunction with appropriate legislative and administrative reform as outlined earlier in this article. Without a national overarching instrument setting out goals and principles of application to all ocean sectors it is unlikely that meaningful ecosystem-based and integrated management will actually be achieved. The New Zealand experience has demonstrated that piecemeal, and consequently, unambitious legislative and policy reform is ultimately unlikely to achieve its desired goals.

391 The most recent report was released in October 2019. See *Our Marine Environment 2019*, n. 5 above.

392 *Id.*, p. 50.

393 See Ministry of Business, Innovation and Employment, "Sustainable Seas/ Ko ngā moana whakauka," available online: <<https://www.mbie.govt.nz/science-and-technology/science-and-innovation/funding-information-and-opportunities/investment-funds/national-science-challenges/the-11-challenges/sustainable-seas/>>. Phase II was announced in July 2019, and NZ\$39.8 million has been allocated for the 2019–2024 period.

394 See National Science Challenges: Sustainable Seas, "About Us," available online: <<https://sustainableseaschallenge.co.nz/challenge>>.

Finally, a national oceans policy could provide an important opportunity to develop a genuine process of co-governance with tangata whenua, incorporating mātauranga Māori and tikanga Māori alongside Western science and environmental concepts and principles as well as goals relating to economic opportunities. “In te ao Māori (the Māori world and worldview) the mauri, or life force, of a healthy moana [ocean] enhances the mauri of those who interact with it.”³⁹⁵ This philosophy holds not just for Māori but for all New Zealanders.

395 See *Our Marine Environment 2019*, n. 5 above, p. 5.