Appendix 1: A description of the current oceans management system

The Resource Management Act

Arguably at the core of the current system is the RMA. It establishes the framework for the management of "natural and physical resources" in Aotearoa New Zealand to the outer limits of the territorial sea. It therefore has a big marine component. In our resource management project, we described it as:[1]

> a product of its time (the late 1980s and early 1990s), and reflects a desire for integrated management, effects-based rather than prescriptive decision-making, open and transparent government, Māori values, devolution, public input, and a degree of faith in the market as to how resources are used.

The Act has a broad purpose of "sustainable management".[2] Despite a chequered history and ongoing debate about what this purpose does and means (culminating in the *EDS v New Zealand King Salmon* decision and subsequent case law),[3] its intention has always been to ensure that firm environmental limits are imposed across all domains, including the marine environment. Many of these are expressed within the principles of the Act in section 6 (matters of national importance, which decision makers must recognise and provide for) and section 7 (other matters, to which they must have particular regard). Matters of national importance include the preservation of the natural character of the coastal environment (which includes the marine environment), protection of areas of significant indigenous vegetation and habitat (including in the marine environment), the relationship of Māori with marine sites and taonga, and public access to the sea. The latter two things are also addressed in the Marine and Coastal Area (Takutai Moana) Act (MACA Act) (see further below). Section 8 of the RMA provides that decision-makers must take into account the principles of te Tiriti o Waitangi.

The RMA applies to a wide variety of "domains", including land, freshwater, the coastal and marine environment, soil, air, and impacts on the "environment" more broadly (which is defined to include the condition of communities as well as more tangible resources). The Act as a whole is therefore "integrated" in a spatial sense – the important links between land-based activities and impacts on the oceans are recognised, at least in theory. We don't have one statute for marine management and another for land management. This is reflected in jurisdictional responsibilities; regional councils have responsibility for regulating impacts on catchments (including through controls on land use) as well as activities in the marine environment.

While the purpose of the Act is extremely broad on its face (and has been interpreted in an even broader way), the things that the RMA actually does in practice are largely limited by Part 3 of the

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[1] Greg Severinsen *Reform of the Resource Management System: A model for the future Synthesis report* (Environmental Defence Society, Auckland, December 2019) at 57.

[2] Resource Management Act 1991, s 5.

[3] See Greg Severinsen and Raewyn Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 97; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593. See also *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group* (2012).

Act. This, essentially, outlines what people are not allowed to do.[4] People are free to use private land how they wish,[5] unless its use is expressly restricted (although in practice, most land uses are restricted in some way).[6] Control of land use has significant implications for the marine environment (eg nutrients from agricultural activities, sediment and other contaminants from urban development). Discharges to freshwater, which can end up in the coastal environment, are also regulated. But the Act also directly restricts activities occurring in the marine area (express authorisation is required to do these things). These are found in sections 12 to 15B of the Act, and require authorisation to:

- reclaim or drain any foreshore or seabed
- erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed
- disturb any foreshore or seabed (including by excavating, drilling, or tunnelling) in a manner that has or is likely to have an adverse effect on it (other than for the purpose of lawfully harvesting any plant or animal – a significant exception)[7]
- deposit in, on, or under any foreshore or seabed any substance in a manner that has or is likely to have an adverse effect on it
- destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on plants or animals or their habitat
- introduce or plant any exotic or introduced plant in, on, or under the foreshore or seabed
- destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on historic heritage
- occupy any part of the common marine and coastal area
- remove any sand, shingle, shell, or other natural material from the common marine and coastal area
- dump any waste or other matter from any ship, aircraft, or offshore installation[8]
- incinerate any waste or other matter in any marine incineration facility[9]
- discharge a harmful substance or contaminant, from a ship or offshore installation into water, onto or into land,[10] or into air[11]
- discharge water into water from any ship or offshore installation.[12]

The RMA also goes further by preventing *any* other activities in the coastal marine area if they would contravene a planning instrument.[13] Such instruments do not, however, have limitless jurisdiction to

[4] Sections 9, 11, 12, 13, 14, 15, 15A and 15B of the RMA impose restrictions on the use of land, subdivision, the use of the coastal marine area, the use of lake and river beds, the use of water, and the discharge of contaminants into the environment.
[5] In accordance with their property rights, of course.
[6] Resource Management Act 1991, s 9.
[7] As discussed later, this captures the removal of fish, which is managed under other frameworks, notably the Fisheries Act 1996.
[8] This cannot be permitted in a plan, and must have a resource consent.
[9] This cannot be permitted in a plan, and must have a resource consent.
[10] Which is defined as including the seabed, hence its inclusion in the coastal marine area.
[11] Express authorisation is not needed in some circumstances (essentially where the Act deems effects as not being significant).
[12] Express authorisation is not needed in some circumstances (essentially where the Act deems effects as not being significant for aquatic life).
[13] Unless a consent can be, and is, obtained. There is also a deemed prohibited activity for the dumping or storage of radioactive waste and the storage of toxic waste.

do so. Notably, there is no jurisdiction to set harvest limits for the taking of fish, which is instead done under the Fisheries Act.[14] But regional councils under the RMA are responsible for planning and managing marine aquaculture.[15]

The RMA operates in practice through the development of a hierarchy of subordinate instruments. Central government can, if it wishes, promulgate national direction in the form of national policy statements (NPSs) and national environmental standards (NESs). The latter operate as regulations. Significantly, the New Zealand Coastal Policy Statement (NZCPS) is the only mandatory form of national direction, and includes a range of policies outlining (among many other things) the need for a precautionary approach, integrated management, the avoidance of effects on things like threatened species and protected areas and recognition of the benefits of some activities.[16]

A number of other NESs and NPSs have been created, most within in the last decade. Many of these have implications for the marine environment, notably the NES on Plantation Forestry (which imposes consistent standards for afforestation, reforestation and harvesting), the NPS for Freshwater Management (which sets limits for water quality and requires timeframes for implementation), and the NPS on Urban Development (which drives the release of development capacity to facilitate urban growth). There is also now an NES for marine aquaculture, which is primarily concerned with reconsenting existing marine farms.[17]

NPSs must be given effect to in a cascade of lower level instruments: regional policy statements, regional plans and district plans. That is a strong direction, and can mean that instruments like the NZCPS in effect contain "bottom lines" that cannot be infringed, although much depends on the actual wording of the instrument (a strong obligation to "give effect" to a weakly phrased policy is not a true bottom line).[18] Regional policy statements are developed by regional councils, and outline objectives and policies (but not regulatory rules) that apply the principles of the Act and national direction to the particular region. Regional plans are also developed by regional councils according to their functions (which include control of activities in and impacting on the coastal marine area), and must give effect to the regional policy statement.[19] Both these instruments cover catchments and the territorial sea, so provide an opportunity for a "mountains to sea" approach.

District plans are developed by territorial authorities, and are primarily concerned with land use (in the traditional sense of town and country planning), although regional councils can also control land use to achieve their "environmental" functions.[20] The control of land use by territorial authorities can have important implications for the marine environment – including how urban growth, density and subdivision are provided for and the clearance of vegetation near the coast. District plans must also give effect to the regional policy statement. Combined plans can also be created, which are effectively a combination of a regional policy statement, regional plans and district plans. It is becoming more common for a regional council to have a single plan with closely linked chapters, rather than multiple regional plans (eg for the coastal environment, freshwater, and land). The

[14] This is also expressly not a function of regional councils under the Act. Curiously, s 12(3), which says that no one can do anything *if* it contravenes a planning instrument, is phrased widely enough to encompass fish, but the planning instruments themselves do not have jurisdiction to deal with fish.
[15] Resource Management Act 1991, s 30(2).
[16] New Zealand Coastal Policy Statement 2010. Some sections in bespoke legislation for the Hauraki Gulf are deemed to be an NZCPS, but the NZCPS prevails in the event of conflict.
[17] Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020.
[18] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
[19] Resource Management Act 1991, s 30.
[20] Section 31.

"coastal" components of regional plans often cover coastal land as well as the marine area, although most rules apply only to the latter (with the former being created through district plans).

RMA plans contain objectives and policies that expand on the purpose and principles of the Act, and through rules and standards determine what people are and are not allowed to do in relation to the marine environment, land, water, air, soil, and so forth (with more specificity than in Part 3 of the Act). In creating and changing plans there is opportunity for public participation and, usually, appeal rights on the merits of a plan for submitters to the Environment Court for final determination. More bespoke, and quite different, planning processes have also been introduced for the creation of the Auckland Unitary Plan (following council amalgamations), including components relating to Auckland's coastal marine area (which includes a substantial portion of the Hauraki Gulf).[21] National Planning Standards – designed to provide consistency between different council plans – are now another measure that central government can use.[22]

Rules in plans, and NESs at a national level, can either prohibit or allow an activity. They can also require a person to obtain different categories of resource consent before undertaking an activity.[23] Different rules can apply in different areas, and often the coastal marine area has some "zones". However, compared to the relatively advanced and detailed system of zones and overlays on land, spatial delineation at sea is undeveloped and often takes the form of relatively few zones targeted as much at enabling and protecting specific activities (eg ports, infrastructure protection, aquaculture) as at the protection of the marine environment (in the sense of marine protected areas). Often the framework is quite general, with many activities provided with a discretionary consenting pathway.

However, it is worth noting that regional plans are certainly capable of imposing strong spatial protections for a variety of reasons, and therefore "marine protected areas" – including prohibited activity status. They are also more capable than other marine protected area frameworks (see further below) of addressing the root causes of marine degradation coming from land, including through planning controls on soil (and therefore sedimentation) and catchments (discharges that reach the sea). It is a point that is important when considering how the toolkit could be used better (see Chapter 8), in that the RMA is an opportunity that often seems to be overlooked when it comes to discussions about marine protected areas.

Consent decisions under the RMA, once an application is triggered by a rule in a plan, are usually decided by councils or commissioners. Most applications are not publicly notified,[24] and the RMA provides for restrictions on what can be considered for some kinds of things.[25] If an application is notified (or "limited" notified), submitters generally have appeal rights to the Environment Court, and there is the ability for some consents to be "called in" and referred directly to the Court (or to a specially appointed Board of Inquiry) for decision.[26] There are no appeal rights in relation to notification decisions, although judicial review is possible.

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[21] Local Government (Auckland Transitional Provisions) Act 2010. See Section 152(3) and pt 1.
[22] Resource Management Act 1991, ss 58B-58J.
[23] The Act classifies activities into six primary categories: permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited.
[24] Greg Severinsen and Raewyn Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 10.
[25] For example, councils are heavily restricted from considering impacts of activities on climate change. Controlled or restricted discretionary activity status can also constrain the matters that can be considered by a consent authority.
[26] Resource Management Act 1991, pt 6AA.

It is also worth noting that, while a resource consent under the RMA is primarily a formal recognition that an activity meets the purpose of the Act (essentially, that it does not have unacceptable impacts on the environment), in some cases it effectively doubles as an exclusive allocation of rights to one person over another in the nature of a licence (eg to occupy coastal space). While the Act does allow for more structured approaches to allocating resources (including coastal space, where councils can essentially tender the right to apply for a coastal permit to occupy),[27] for the most part the first person to apply for permission gets the right to use what may be a scarce resource.[28]

The RMA also provides for other project or site-specific mechanisms: designations (where an approved requiring authority is able to make decisions on land use instead of the relevant council),[29] heritage orders (a similar concept where decision-making power rests with an approved heritage protection authority, not the council),[30] and water conservation orders (a more protective tool that can be imposed, upon application, to safeguard the values of a specific freshwater body).[31] These have incidental relevance to the marine environment. It also contains enforcement provisions, including abatement notices, enforcement orders, and prosecutions.[32]

There is the ability under the RMA for councils to transfer powers to iwi authorities, or for joint management agreements to provide for the shared exercise of powers with Māori.[33] However, uptake has been patchy. Some Treaty settlement legislation requires joint management agreements to be entered into.[34]

The RMA has been subject to many amendments over its lifetime, and has become significantly larger and more complex than it used to be. Another amendment – to reverse some recent changes (such as strengthening public participation and removing the collaborative planning track) as well as provide for another planning process (for freshwater) and strengthen the enforcement role of the EPA – has been recently made.[35] Overall, the RMA provides a framework within which a substantial amount of discretion is exercised in relation to the protection and use of natural and physical resources, including in the marine environment and with respect to activities on land that can impact the sea.

However, while it is significant, the RMA does not do everything. Perhaps most importantly, the RMA does not manage fisheries resources. That said, as explained later, there is a complex, overlapping and uncertain interface between the RMA and the Fisheries Act. Both can manage the impacts of fishing on the environment, although there are limits to the extent to which the RMA can do so. The RMA also does not manage the rate at which minerals are depleted, or allocate rights to explore for or mine minerals. As such, the Act interfaces with the Crown Minerals Act, which does those things. Furthermore, the RMA does not apply to activities undertaken beyond the coastal

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[27] Parts 7 and 7A; s 31(1)(fa).
[28] *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257 (CA).
[29] Often for significant infrastructure having public importance (eg networks like transmission lines, prisons, schools etc).
[30] Resource Management Act 1991, pt 8.
[31] Part 9.
[32] Part 12.
[33] For example, that established between Taupō District Council and the Tūwharetoa Māori Trust Board on 17 January 2009. This agreement provides for publicly notified resource consents and private plan change applications, in relation to multiply owned Māori land within the rohe of Ngāti Tūwharetoa and within the Taupō district, to be decided by a panel of decision makers comprising two commissioners chosen by each party and a jointly appointed fifth commissioner and chairman.
[34] See Greg Severinsen and Raewyn Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 9.
[35] Resource Management Amendment Act 2019.

marine area. The EEZ Act performs a similar role here. The RMA also does not manage some aspects of shipping (including some of their impacts or risks for the environment), which are roles performed under the Maritime Transport Act 1994.

Finally, the RMA does not contain all the tools needed to achieve environmental outcomes in the marine environment, even if its purpose encompasses them (it is primarily an effects-based framework reliant on regulatory tools like plans and consents). Additional layers of tools therefore exist to complement the RMA, delivered through separate frameworks (eg the emissions trading scheme under the Climate Change Response Act 2002, various marine protected area tools under multiple "conservation" statutes, and product stewardship schemes under the Waste Minimisation Act). The separate Biosecurity Act 1993 can also be thought of in this way – biosecurity arguably falls within the scope of sustainable management, but the RMA does not provide the targeted tools and institutional architecture necessary to achieve it (eg pathway management plans).

As already noted, the RMA is also set for a significant overhaul (although the exact nature of that remains unclear). This has significant implications for marine management as well as the broader resource management system. Key aspects of this are explored at the end of this chapter.

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

The RMA is complemented by a similar, but much simpler, framework for managing natural[36] resources in the EEZ and continental shelf.[37] Decision-making here is much more centralised, with roles performed by central government and the EPA through regulations, national policy, and the issuing of permits.[38] The Act has a generally comparable purpose to the RMA based on sustainability, but a number of novel features (including a much more directive purpose relating to marine pollution, and a firm statutory precautionary principle).[39] This framework (particularly interpretation of its precautionary principle) has proved controversial, especially in the wake of high-profile applications for seabed mining being declined.[40] This is still playing out, with a decision concerning iron sands mining awaited from the Supreme Court at the time of writing.[41] It has also proved controversial because of its approach to te Tiriti o Waitangi, in that its Treaty clause essentially "deems" the Act to comply rather than requiring decisions to have regard to or give effect to the principles of the Treaty/te Tiriti.

Essentially, the EEZ Act was designed as a gap filling piece of legislation. Some activities were already regulated in the EEZ under other regimes, including shipping, the allocation of mineral rights (including oil and gas), fishing and oil spill incidents, and for the most part these remain separate (although there has been some transfer of environmental jurisdiction from the Maritime Transport Act for marine pollution). There was also already a skeleton framework for other activities under the Continental Shelf Act 1964, but this was regarded quite rightly as being grossly inadequate other than for the allocation of minerals, and its role has been largely usurped by the more developed EEZ Act and Crown Minerals Act.

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[36] Not *physical* resources, as under the RMA. This is because of the influence of international law and limits on jurisdiction.
[37] Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
[38] Parts 3 and 3A.
[39] Partly to implement strong international agreements on dumping under the London Protocol.
[40] See generally Catherine Iorns Magallanes and Greg Severinsen "Diving in the deep end: Precaution and seabed mining in New Zealand's exclusive economic zone" (2015) 13 NZJPIL 201.
[41] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZSC 67 granted leave to appeal to the Supreme Court.

Essentially, no general environmental legislation existed in the EEZ for twenty years prior to the enactment of the EEZ Act, which meant that many activities, including, oil and gas operations (with the associated risk of large volume oil spills) had no proper environmental scrutiny.[42]

Fisheries legislation

The RMA encompasses the management of most natural and physical resources within New Zealand's coastal marine area. But fisheries are managed separately to the RMA, partly for historical reasons and partly in recognition that allocative issues, and proactive stock management of fish as a renewable resource, require more targeted attention than under a laissez-faire environmental effects regime.[43]

The management of fishing[44] at sea[45] occurs under targeted legislation specifically carved out from the RMA and EEZ Act, despite falling squarely within the purpose of those statutes. That is unique among marine sectors.[46] The core statute is the Fisheries Act 1996, which is supported by and intersects with more specific statutes.[47] A plethora of regulations have been made under the Act, as this is one of the key mechanisms by which the Act is implemented.

The Act applies to, and manages, fisheries resources both in the territorial sea and the EEZ. That is a key difference with the spatially constrained RMA (and conservation legislation like the Marine Reserves Act), which apply only in the coastal marine area. Its purpose (section 8) is "to provide for the utilisation of fisheries resources while ensuring sustainability", where sustainability means "maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment."[48] This take on sustainability – one in which utilisation is specifically sought – is quite different to the broader, more passive and arguably more protective formulation in the RMA and EEZ Act.[49]

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[42] Barry Barton "Offshore Petroleum and Minerals: Plugging the Gaps in the Present Framework" (paper presented to Coastlines: Spatial Planning for Land and Sea Conference, Auckland, 1-2 June 2011).

[43] See Greg Severinsen and Raewyn Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 150, where we noted that protections for fish (to be able to continue to consume them) are imposed for quite different reasons to the protection of, say, kiwi.

[44] "Fish" includes some other surprising marine living resources like seaweed.

[45] However, the Act applies to all fish, including freshwater species.

[46] For example, the environmental impacts of removing minerals from the seabed are still managed under the RMA and EEZ Act, despite additional authorisation being required to explore and mine minerals under the Crown Minerals Act and Continental Shelf Act.

[47] For example, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

[48] "Utilisation" under section 8(2)(b) of the Act means "conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being." "*Aquatic environment" under section 2* means "the natural and biological resources comprising any aquatic ecosystem; and (b) includes all aquatic life and the oceans, seas, coastal areas, inter-tidal areas, estuaries, rivers, lakes, and other places where aquatic life exists". "Aquatic life" under section 2 means "*a*ny species of plant or animal life that, at any stage in its life history, must inhabit water, whether living or dead" and includes "seabirds (whether or not in the aquatic environment)".

[49] See Resource Management Act 1991, s 5; and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 10.

Fisheries management in Aotearoa New Zealand is complex, has a rich history,[50] and has developed a framework quite different to the planning and consenting architecture of the RMA and the reliance (largely) on consenting under EEZ Act. This is because it is focused first and foremost on the proactive management of a particular resource for social and economic benefit, not on the reactive management (prevention and mitigation) of environmental effects. In other words, fisheries legislation seeks to maximise the benefits of using a shared resource, while the RMA seeks to address the impacts of activities that people may wish to do (it does not really care if people do an activity or not).

As well as addressing the adverse effects of fishing more broadly, the Fisheries Act framework is, in short, based on the delineation of specific fish "stocks". A stock may include a single species such as snapper, or occasionally several species (as with the flatfish stock, which includes eight different species). A stock comprises the population of such a species or species group within a defined spatial area called a quota management area, which are broadly based on 10 fisheries management areas. A single species – like snapper, gurnard or tarakihi – may therefore be managed as a number of distinct stocks. There are generally between one and 10 quota management areas per species (for example, there are six spatially separate snapper stocks – SNA1 through to SNA6). Overall, New Zealand has 98 species (or species groups) that are managed, which are divided into 642 spatially separate fish stocks.[51] Fish "stocks" can consist of "fish" (which includes finfish and shellfish like mussels and oysters), "aquatic life" (a very broad category of marine and freshwater animal and plant life which for example includes harvestable crustaceans such as crayfish and scampi) and seaweed.

This complexity is exacerbated because there are three quite different "purposes" for which fish are caught. The harvest of fish from each stock is managed as commercial, customary and recreational fishing, and each has a different management regime applied to it.

Commercial rights to fish stocks are managed through the QMS, which operates through the creation of individual transferable quotas (ITQ). ITQ systems define rights to catch a specified number of fish in a specified location during a specified time period. In Aotearoa New Zealand, ITQ are expressed as "quota shares"[52] and provide a right in perpetuity to harvest a proportional share of the TACC for a fish stock. Each quota share generates ACE, which is the right to harvest that share of the TACC during one fishing year.[53] Both ITQ and ACE are tradeable. ACE is often leased to fishers who do not own quota, to enable them to harvest particular species. As well as ACE, commercial fishers require a fishing permit before they are able to commercially harvest fish and they can only sell their catch to a licensed fish receiver. Those receivers must report monthly on the types and amounts of fish received and who supplied them, and information is used to inform subsequent management decisions.[54] Fishers can also sell small amounts through "wharf sales".[55]

A system of "deemed values" encourages commercial fishers to have sufficient ACEs to cover the species and amount of fish caught. When fishers have insufficient ACEs to cover their catch, they are

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[50] See, for example, Waitangi Tribunal "Muriwhenua Fishing Report" (1998) (Wai. No. 22), Parts II and III.
[51] Ministry for Primary Industries "Fish Quota Management System" <www.mpi.govt.nz/legal/legislation-standards-and-reviews/fisheries-legislation/quota-management-system/>.
[52] The total number of quota shares for a fish stock is always 100,000,000: Ministry for Primary Industries "Commercial fishing annual catch entitlement (ACE)" (16 November 2020) <www.mpi.govt.nz/fishing-aquaculture/commercial-fishing/operating-as-a-commercial-fisher/commercial-fishing-annual-catch-entitlement/>
[53] For most species, the fishing year starts in October.
[54] Eg TAC, TACC, and deemed values.
[55] See Fisheries Act 1996, s 192(2)(b).

required to pay the "deemed value" of the excess fish. The level at which deemed values are set is important. If they are too high, they will encourage fishers to (illegally) discard excess fish. However, if they are too low, they will fail to provide an incentive for fishers to acquire sufficient ACEs, or to keep their catch within their allocation, and therefore their combined catch within the TACC.

Bycatch (of non-target commercial fish species, often where two or more species often co-exist in the same waters) is not always unwanted and is often landed, resulting in the requirement to purchase ACE retrospectively or to make deemed value payments. A portion can be legally discarded[56] although, under proposed fisheries reforms, almost all catch will need to be landed in the future.[57]

Commercial fishing vessels must also be licensed. Operators must provide catch, effort and landing information, and that is cross-checked against reporting by fish receivers. Recently, Fisheries NZ has rolled out a new real time monitoring system.

There are other restrictions that can be placed on fishing. Hundreds of specific regulatory restrictions exist depending on the location, species and other factors.[58] For example, 19 QMS species have a minimum legal size.

The issue of Māori fishing rights was brought to a head during the late 1980s, when the QMS was first introduced, with Māori being concerned that their rights to fisheries guaranteed under te Tiriti o Waitangi were being alienated by the Crown. In other words, the creation of perpetual property rights (rather than time bound permits) made the resolution of Māori rights and interests urgent.

An interim settlement of Māori rights was enshrined in the Māori Fisheries Act 1989 which provided for 10 per cent of all existing quota to be given to Māori as well as a cash settlement. Further negotiations culminated in the full and final settlement of Māori commercial claims to fisheries in 1992, which was enshrined in new legislation, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[59] This granted Māori a 50 per cent share in Sealord Products which at that time was New Zealand's largest fishing company. In addition, 20 per cent of any new quota brought into the QMS was to be allocated to Māori. Alongside the Fisheries Act is the Māori Fisheries Act 2004, which puts into effect the settlement with the Crown. As a result of these settlements, Māori commercial customary fishing rights have been managed under the QMS in the same way as other commercial fishing interests.[60]

As a result of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Māori non-commercial customary fishing is managed under a different regulatory system which attempts to provide for the rights of Māori to obtain fish directly for consumption and cultural purposes. Tangata whenua nominate kaitiaki who are responsible for issuing customary fishing authorisations within their

[56] Fisheries Act, s 72 and sch 6. These provisions contain a list of stocks which may be returned to the sea or other waters and the stated requirements for the return to be legal.
[57] Minister for Ocean and Fisheries *Fisheries Amendment Bill: Strengthening fishing rules and policies: landings and discards* (2 July 2021) at [27].
[58] See V A Froude and R Smith *Area-based restrictions in the New Zealand marine environment* (Department of Conservation, 2004).
[59] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
[60] Paul Meredith "Te hī ika – Māori fishing - fisheries management and practice" (12 June 2006) *Te Ara - the Encyclopedia of New Zealand* <www.TeAra.govt.nz/en/te-hi-ika-maori-fishing/page-6>.

rohe[61] In addition, there is provision for spatial management through the creation of taiapure-local fisheries and mātaitai[62] and Tangata[63] respectively.[64]

- Mātaitai reserves – recognise and provide for traditional fishing through local management. They allow customary and recreational fishing but usually don't allow commercial fishing.
- Taiāpure (local fisheries) – estuarine or coastal areas that are significant for food, spiritual, or cultural reasons. They allow all types of fishing and are managed by local communities.
- Temporary closures and restrictions on fishing methods (Sections 186A and 186B closures) – areas that are temporarily closed to fishing or certain fishing methods.

No authorisation is required to undertake recreational fishing. Recreational harvest is managed under the Fishing (Amateur Fishing) Regulations 2013, with the prime tools used being daily bag limits, species size limits, gear restrictions and some spatial exclusions. There is no overall harvest cap for recreational take or an obligation on recreational fishers to report their catch. Many Māori still fish under the recreational regulations rather than under customary fishing authorisations as they don't require any prior permission. Thus "Māori" fisheries is by no means the same thing as customary fisheries – Māori are active in commercial, customary and recreational fishing.

The upshot is that there are three quite different frameworks for fishing the same stocks in Aotearoa New Zealand, and that can cause tension. These operate within the joint framework of the TAC set for each stock by the Minister of Fisheries. The TAC sets the maximum amount of fish which can be taken by the combined commercial, customary and recreational fishing effort each year from a specific stock, as well as making an allowance for other sources of fishing-related mortality including illegal fishing.

Under section 13 of the Fisheries Act, the Minister is required to set a TAC that maintains each stock at or above a level that can produce the "maximum sustainable yield" (B_{MSY}). Where a fish stock is below its estimated B_{MSY}, the Minister is required to set a TAC which will enable the stock to increase to a level at or above it. Before setting a TAC, the Minister must consider best available information and conservation needs.

The Minister is also required to set the TACC which specifies how much of the TAC can be harvested by commercial fishers. The TACC must not exceed the TAC and the Minister must "allow for" Māori customary non-commercial fishing interests and recreational interests (as well as estimating other causes of fish mortality) before setting or adjusting the TACC. Where fish stocks are shared between commercial, recreational and/or customary fishers, the Act provides no guidance as to what proportion of the TAC should be allocated to each sector. This is a matter which is left up to the discretion of the Minister.[65] The Fisheries Act is therefore not just about ensuring that stocks are sustainable and impacts of fishing on the marine environment are managed, but it also performs an allocative function by determining who can take what amounts of fish.

To prevent monopolisation of any stock, regulations are in place to help ensure no quota owner holds more than a certain percentage of quota in any particular stock or species. These are generally

[61] Fisheries (Kaimoana Customary Fishing) Regulations 1998 and Fisheries (South Island Customary Fishing) Regulations 1999.
[62] Fisheries Act 1996, Part 9.
[63] Fisheries (Kaimoana Customary Fishing) Regulations 1998, regs 18–32.
[64] Ministry of Primary Industries "Managing customary fisheries" (16 November 2020) <www.mpi.govt.nz/fishing-aquaculture/maori-customary-fishing/managing-customary-fisheries/>
[65] See *New Zealand Recreational Fishing Council Inc and other* v *Sanford Limited and others* [2009] NZSC 54.

35 or 45 per cent of the quota of any species, with a 20 per cent limit for bluenose, a 10 per cent limit for crayfish stocks and a 20 per cent limit for pāua stocks.[66]

The TAC and TACC are the primary sustainability measures for a stock, but the Minister may also establish other sustainability measures to control the effects of commercial and other fishing on a fish stock, on protected species or on the marine environment more generally. These measures may include restrictions on fishing methods, the size of fish taken, and where and when fishing may be undertaken. The Act provides for a conservation services levy, which seeks to address the effects of fishing on protected species.[67] The QMS is therefore not synonymous with the wider Fisheries Act, because the latter also includes sustainability measures and management of recreational and customary fishing.

The Marine and Coastal Area (Takutai Moana) Act

Rights to Aotearoa New Zealand's fisheries resources raised significant issues under te Tiriti o Waitangi, resulting in the complex settlement arrangements described above. Another significant flashpoint in Crown-Māori relations arose over control or "ownership" of the foreshore and seabed itself. This debate was much broader than one about sound environmental management (so did not focus on the RMA) and sought to resolve the issue of whether Māori could claim proprietary rights, exercise customary activities with fewer restraints, and have a stronger role in environmental management. There is a complex history behind the foreshore and seabed debate, but the matter has (for now) been addressed through the MACA Act. This is a cross-cutting statute, in that it links into various others.

In short, the MACA Act restored a right for Māori to claim customary rights and title over parts of the common marine and coastal area, which had previously been unavailable under the controversial Foreshore and Seabed Act.[68] The "marine and coastal area" is the area between the line of mean high-water springs and the outer limits of the territorial sea (12 nautical miles from shore), and includes the air space and water space above the land, and the subsoil, bedrock and other matters below.[69] In more practical terms, the marine and coastal area can be considered as the "wet" part of the beach covered by the ebb and flow of the tide, together with the seabed.[70]

Subject to existing private rights and the establishment of Māori interests (described below), the Act makes it clear that no one can own the foreshore and seabed (including the Crown).[71] This remains a relatively novel approach within a largely Western resource management framework that is elsewhere enthusiastic about parcelling up resources and conferring ownership.

One might see the legislation as a political compromise – recognising the mana tuku iho[72] exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua, while ensuring the protection of the legitimate interests of all New Zealanders in the marine and coastal area. As such, while not conferring ownership on the Crown, the Act safeguards access rights for all New

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[66] Fishserve "Quota Shares" <www.fishserve.co.nz/information/quota-shares>.
[67] Fisheries Act 1996, pt 14.
[68] Foreshore and Seabed Act 2004 (repealed).
[69] Marine and Coastal Area (Takutai Moana) Act 2011, s 9(1).
[70] P Majurey and C Whata "Maori and Environmental Law" in *Environmental and Resource Management Law* (LexisNexis, online ed, 2021) at [14.60].
[71] Marine and Coastal Area (Takutai Moana) Act 2011, s 11.
[72] *Mana tuku iho* means inherited right or authority derived in accordance with tikanga; see Marine and Coastal Area Act 2011, s 9(1).

Zealanders as well as fishing and navigation rights.[73] The Act also recognises and protects the exercise of existing lawful rights and uses in the marine and coastal area.

However, the Act establishes ongoing *processes* by which tangata whenua can claim various rights, although few are conferred automatically. There are three key mechanisms under the Act.[74] First, affected iwi, hapū and whānau have the right to participate in conservation processes in the common marine and coastal area.[75] Secondly, there is a process to apply for recognition of a protected customary right, or customary marine title, whether by direct negotiation with the responsible Minister on behalf of the Crown; or by an order of the High Court.[76] A protected customary right is a right that has been exercised since 1840, and continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant.[77] Recognition means that consent under the RMA is not required[78] and that rights holders are not liable to pay coastal occupation charges.[79] Councils must also consider whether regional plans need to be changed to recognise and provide for plans concerning customary rights, providing a link to the RMA.

Thirdly, the Act establishes a process for claiming customary marine title. Essentially, title can be recognised if an applicant holds the area in accordance with tikanga, and has used it without substantial interruption since 1840.[80] A proprietary interest need not be established. Relevant factors also include whether customary fishing rights have been exercised without interruption.[81] The courts have confirmed that it is assumed, in the absence of proof to the contrary, that customary interests have not been extinguished.[82] Once recognised, customary marine title provides an interest in land, but is not exempt from controls under the RMA or other acts.[83] However, title holders have broad rights to decline permission for many activities to occur within the title area where a consent is required under the RMA,[84] or where a conservation activity is proposed (eg a concession or a marine reserve application), with no rights of appeal available.[85] A large number of applications (190) have been received by the High Court, but only two have been resolved so far. Other claims are progressing through the alternative process of direct negotiation with the Crown.

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[73] Sections 26-28.
[74] Sections 7(a)–(c).
[75] Section 47(2). Affected iwi, hapū and whanau means "iwi, hapū, or whānau that exercise kaitiakitanga in a part of the common marine and coastal area where a conservation process is being considered", s 47(1).
[76] Section 94(1).
[77] Sections 51(1)(a)–(b). Section 51(1)(c) also states that a protected customary right cannot exist if it has been extinguished as a matter of law. An "applicant group" is defined at s 9(1) to include (a), "[one] or more iwi, hapū, or whānau groups that seek recognition […] of their protected customary rights or customary marine title by a recognition order or an agreement […]".
[78] Section 52(1).
[79] Sections 52(2) and 52(3). See also ss 56 and 57.
[80] Sections 58(1)(a)–(b). Subsections (2) and (3) explain subs (1). Subsection (4) notes, without limitation to subs (2), that customary marine title does not exist if that title is extinguished as a matter of law.
[81] Section 59(1). Subsections (2) to (4) clarify various aspects of subs (1).
[82] See *Re Edwards (Te Whakatohea (No 2))* [2021] NZHC 1025 at [99]; *Re Tipene* [2016] NZHC 3199.
[83] Marine and Coastal Area (Takutai Moana) Act 2011, s 60(2)(a).
[84] There are exceptions for "accommodated activities" – essential things like infrastructure.
[85] Marine and Coastal Area (Takutai Moana) Act 2011, s 68.

The Maritime Transport Act

The Maritime Transport Act is, like the Fisheries Act, a sector-specific framework, dealing with shipping.[86] However, unlike the Fisheries Act, it goes well beyond what is commonly understood as "resource management", incorporating topics like health and safety at sea, liability for goods, and salvage operations alongside "environmental" elements designed to deal with pollution from ships and prevent oil spills. In other words, the statute spans multiple systems – the oceans management system (as we have defined it) and what we might call the "property" system and the "health and safety" system or, even more broadly, the "transport" system.

This diversity of content in a single sector-focused statute is partly because much of it is a vehicle for translating what has become extremely detailed aspects of international shipping law developed under the auspices of the International Maritime Organization.[87] The idea is that if it can all be done through a single statute, and related schedules and regulations ("maritime rules"), that makes any updates easier to implement.[88] This is an important consideration when thinking about legislative and institutional design. Its diversity of content is also reflected in its lack of clear purpose – instead, it has a long title that refers to aims as diverse as "to ensure that participants in the maritime transport system are responsible for their actions" and **"**to regulate maritime activities and the marine environment in the exclusive economic zone and on the continental shelf as permitted under international law".[89] Guiding principles emerge from some key provisions[90]: promoting maritime safety[91]; protecting the environment (in relation to maritime activity)[92]; implementing international obligations[93]; and protection of seafarers[94]. The Act is divided into Parts dealing with the regulation of maritime activity[95] and those concerned with marine pollution.[96]

A core aim of the Act, and the one most directly relevant to the oceans management system as we have defined it, is to protect the marine environment.[97] Most notable are restrictions on discharges from ships and design and construction requirements (eg double hulling) to prevent pollution events. Oil spill preparedness and response is also a focus of the Act, and is funded by the imposition of a levy on the industry. Maritime New Zealand has primary responsibility for this.

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[86] Bevan Marten "Limitation of Liability in Maritime Law and Vessel Source Pollution: A New Zealand Perspective" (2013) 2 NZ Law Rev 199 at 205.

[87] The United Nations specialised agency with responsibility for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships.

[88] It is a common feature of maritime legislation in many jurisdictions that it either enacts, or is based on, international conventions entered into by sovereign states with the aim of regulating shipping and trading activities and maritime matters worldwide. As a consolidating statute, the Maritime Transport Act 1994 replaced the Shipping and Seamen Act 1952 which was modelled on the United Kingdom Merchant Shipping Acts. See Paul David and Felicity Monterio "Maritime Law and Admiralty Law" in *Laws of New Zealand* (LexisNexis, online ed, 2020) at [2] and [4].

[89] Maritime Transport Act 1994, long title.

[90] Bevan Marten *Maritime Law in New Zealand* (Thomson Reuters, 2016) at 68.

[91] See Maritime Transport Act 1994, ss 5(a), 5A(a), 17(3), 19(1), 21(1), 32, 33, 39, 392(a)(ii), 430 and 431(1).

[92] See long title (f) and (g), ss 5(a), 5A(b) and (d), 392(a)(i), 430 and 431(1).

[93] See long title (b), (g) and (i), ss 5(b), 5A(c), 39(1), 392(b) and 431(1).

[94] Sections 22-29, 39, 54, and 415.

[95] Parts 1-17 and 28-31.

[96] Parts 18-27.

[97] Long title (f).

Designed as part of a suite of transport statutes (land transport, aviation, and shipping), the Minister of Transport is responsible for the Maritime Transport Act's overall implementation.[98] Maritime New Zealand carries out day-to-day operations under the Act, particularly for maritime safety and marine pollution risks, but liaises closely with the EPA.[99] The Act applies to New Zealand waters, defined as the territorial sea, internal waters, and all rivers and inland waters of New Zealand as well as New Zealand ships anywhere in the world.[100]

"Conservation" legislation

The phrase "conservation" does not have a definitive meaning, especially in relation to related concepts like "resource management" and "oceans management".[101] For example, to some the term might conjure up images of indigenous species, particularly those that are threatened. To others, it might be about biodiversity more broadly, or the management of game species.[102] And to still others, it might be about ensuring that "wild" or "untouched" places still exist. Then there is the conservation of built and historic heritage, which is something quite different again. It is common overseas to think about *resource* conservation, which is really about making efficient use of finite mineral deposits.[103] And when we protect submarine cables and pipelines through marine protected areas, is that also "conservation"?

It is possible for statutes as diverse in their purpose and subject matter as the RMA, EEZ Act, Heritage New Zealand Pouhere Taonga Act 2014, Marine Reserves Act and many others to be regarded as "conservation" legislation. How we define conservation, and whether it is truly a separate system to others in the marine space, is relevant when it comes to legislative design (see Chapter 11).[104]

Here, our task is simply to describe the statutes we have at the moment. A convenient way of grouping conservation legislation is the statutes currently administered by the *Department* of Conservation.[105] From an oceans perspective, the most relevant ones are the Conservation Act, the Marine Reserves Act, the Marine Mammals Protection Act, the Wildlife Act and the Hauraki Gulf Marine Park Act. The RMA and EEZ Act apply across the whole of our marine area, but conservation

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[98] Maritime Transport Act 1994, ss 5 and 5A. The Transport Law Bill introduced in 1993 was later divided into separate land, air and sea components, with the MTA 1994 modelled on the Civil Aviation Act 1990; see Bevan Marten *Maritime Law in New Zealand* (Thomson Reuters, 2016) at 12.

[99] Maritime Transport Act 1994, pt 29.

[100] Section 2(1). There are eight maritime zones referred to in the MTA, and New Zealand is notable from other countries in that "maritime" does not refer to the sea alone. See Bevan Marten *Maritime Law in New Zealand* (Thomson Reuters, 2016) at 74.

[101] It can range from conservation of natural heritage or built heritage, the preservation of wilderness values, the safeguarding of biodiversity, the protection and management of public lands for various purposes, the safeguarding of threatened species and so on.

[102] The conservation act deals with the management of sport and game fisheries, whereas fisheries at sea are not treated as a "conservation" issue.

[103] Such as Alberta's Oil and Gas Conservation Act.

[104] Conservation is a fuzzy term, and is often used to denote more active management and stricter protection of species, areas and historic or built features from weaker "sustainability", which also applies to activities that can threaten species, heritage and protected areas. But other "forms" of conservation exist: for example, soil "conservation" is about making sure that soils do not disappear through erosion or degradation, while resource "conservation" more generally is about making sure we do not "waste" natural resources.

[105] That is not to presuppose that such statutes, and the tools under them, should necessarily *continue* to be the responsibility of the Department, or that other tools not currently administered by the Department should remain that way. See Conservation Act 1987, schedule 1, for enactments administered by the Department of Conservation.

legislation provides an additional layer of restrictions and obligations in relation to particular areas or species.

The current system's approach to conservation issues has been fairly fragmented, with a number of protective statutes addressing different conservation concerns. Some are species-centric, as in the case of the Wildlife Act or Marine Mammals Protection Act, whilst others are location-specific, like the Marine Reserves Act.[106] Some are highly location specific – these are bespoke statutes that create various forms of one-off marine protected areas such as those around Kaikōura, the Hauraki Gulf, Fiordland and the Sugar Loaf Islands off the coast of Ngāmotu New Plymouth.

Conservation Act

The Conservation Act is not just about marine conservation, but forms something of an overarching framework. It was designed as a way to provide some structure and coherence to the diverse range of older legislation[107] (as was the contemporaneous creation of the Department itself), although existing legislation remained in force alongside it. Extensive cross-references are made to the Conservation Act in more targeted statutes.

In short, the Act creates and empowers the Department of Conservation to protect natural and historic resources,[108] and provides for the establishment and categorisation of various protected areas. These are managed through hierarchies of general policy instruments, management strategies, and conservation plans. There are many categories of protected areas on land, but few apply to the marine area beyond the foreshore (essentially, the inter-tidal zone).

For example, conservation parks are about protecting natural and historic resources and providing for recreation, while amenity areas are about protecting indigenous natural and historic resources and fostering their recreational attributes. Other categories include wilderness areas, ecological areas, sanctuary areas, watercourse areas, and wildlife management areas. Areas listed in Schedule 4 of the Act may not be mined. The Act also establishes institutions such as Conservation Boards and the Conservation Authority. Various advisory committees and "guardians", including for the marine area under separate legislation, may also be appointed jointly by the Ministers for Conservation and Fisheries. [109]

Marine Reserves Act

The Marine Reserves Act is, as the name suggests, about the establishment and management of marine reserves. Essentially, they are defined areas, managed by the Department of Conservation to maintain their natural state, in which fishing and other extractive or harmful activities are prohibited. Their surprisingly narrow purpose is "to provide for the setting up and management of

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[106] That is not to say species legislation cannot impose restrictions in particular places, only that the focus of management is the value of a species rather than the value of a particular place. For example, marine mammal sanctuaries can be imposed under the Marine Mammals Protection Act, but these are focused on the value of marine mammals who rely on the area, rather than the value of the area itself.

[107] For example, through a common architecture comprised of general statements of policy, conservation management strategies, conservation management plans and concessions.

[108] Historic heritage functions apply within public conservation land.

[109] See for example, the Kaikoura Marine Guardians created under the Kaikoura (Te Tai o Marokura) Marine Management Act 2014, s 6. See also (below) the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005.

areas of the sea and foreshore as marine reserves for the purpose of preserving them in their natural state as the habitat of marine life for scientific study".[110]

Currently, there are 44 marine reserves in Aotearoa New Zealand, with ten of those in Fiordland.[111] Marine reserves are often referred to as "type 1" marine protected areas (strong protections), as opposed to "type 2" areas where narrower restrictions apply (eg restrictions on fishing methods, protection of just the seabed etc). Thus marine reserves are only one type of marine protected area. Subject to the provisions of the Act, and any conditions or restrictions, the public has freedom of access and entry to marine reserves. While the Reserves Act 1977 also has a strong focus on public access, use and enjoyment, and has broader objectives, this does not extend beyond the foreshore or coastal land.

Wildlife Act

The Wildlife Act 1953 is New Zealand's most spatially broad species-oriented legislation, and applies to both land and sea (including the territorial sea and EEZ). The Act predates modern biodiversity management concerns, and does not distinguish between introduced and indigenous species protection, or common or rare species.[112] There is a presumption that all wildlife is absolutely protected under the Act unless it is specifically listed.[113] No one is allowed to kill or capture any animal that is absolutely protected unless a permit is obtained or an exception is provided for. Some exceptions (eg for seabirds) are made for customary harvest.

The term "wildlife" means any animal living in a wild state, but "animal" has a relatively narrow definition and does not include marine mammals or invertebrates.[114] However, some marine species and invertebrates have been added for protection by amendment via schedules to the Act. The upshot of the Act's definitions and inclusions via schedules is that there are relatively few marine species (other than seabirds and reptiles) subject to the protection of the Wildlife Act. Protected marine species include various corals, sharks and rays listed in Schedule 7A.[115]

Very few fish are listed, presumably because most fish are seen as "stocks" to be managed for consumption under fisheries legislation (even if a stock is collapsed), rather than a species to be managed or protected for conservation reasons. Furthermore, the accidental killing or injury of protected species is legally defensible (there is a defence to any prosecution) where it occurs as part of a fishing operation, as long as it is reported to authorities.

Various types of protected areas can also be recognised under the Act: wildlife refuges, sanctuaries (which may prohibit entry of the public), management reserves and districts. With respect to wildlife areas, the Act provides for general policies, management strategies and plans to be developed in a way that generally reflects the Conservation Act. Population management plans can be created by

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[110] Marine Reserves Act 1971, long title.

[111] Department of Conservation "Marine Reserves A-Z" <www.doc.govt.nz/marinereserves>. On Fiordland marine reserves, see the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 and discussion below.

[112] For a recent overview of conservation law in New Zealand, including the Wildlife Act 1953, see Deidre Koolen-Bourke and Raewyn Peart *Conserving Nature: Conservation Reform Issues Paper* (Environmental Defence Society, July 2021), ch seven.

[113] Wildlife Act 1953, s 3. Exceptions to this rule are provided in ss 4 and 5 and schedules 1-5.

[114] *An animal* means "any mammal (not being a domestic animal or a rabbit or a hare or a seal or other marine mammal), any bird (not being a domestic bird), any reptile, or any amphibian" (Wildlife Act 1953, s 2).

[115] Marine fish and invertebrates must be specifically listed in schedules to be classified as "wildlife".

the Minister for particular species of marine wildlife (including the setting of maximum levels of fishing related mortality in specific areas or overall). However, these require the "concurrence" of the Minister of Fisheries before they can take effect.

Marine Mammals Protection Act

The Marine Mammals Protection Act is conceptually similar to the Wildlife Act, but is focused on particular species – marine mammals.[116] Many of these are threatened, and that is part of the reason for the Act's existence. However, it also recognises that marine mammals that may not be threatened, like whales and dolphins, are special and should not be hunted or killed.

There are three key things that the Act does. First, it imposes restrictions on direct interactions with marine mammals. For example, a permit is required to "take" an animal, which includes where people harm, harass, move, injure or attract it. Accidental injury or mortality does not attract liability as long as it is reported. This is to encourage people to provide information, which would not otherwise be easy to obtain, and to recognise that fishing and shipping can unintentionally cause harm to marine mammals (especially if they follow boats in the pursuit of food). Purse seine nets are required to have escape panels to allow marine mammals to escape (but not trawl nets which can also trap the animals).

Secondly, the legislation allows for the creation of marine mammal sanctuaries. These provide havens for where species commonly live and move, and are general enough in purpose to allow for many different restrictions (eg fishing methods such as set netting and trawling, mining, the creation of noise such as from seismic surveying). There is currently a proposal for a new sanctuary in the Bay of Islands.[117]

Thirdly, since 1996 the Act has provided for the creation of population management plans. A big part of this is to ensure the recovery of *threatened* species to non-threatened status, or to prevent populations declining, but they can be created for non-threatened species as well. Plans can, for example, specify a maximum amount of fishing-related mortality for a species, mirroring the approach in the more general Wildlife Act. As under the Wildlife Act, plans require the joint sign off of the Minister of Conservation and Minister of Fisheries, and thus requires consideration of the impact of the plan on commercial fishing.

Bespoke "conservation" legislation

To add further complexity to the conservation regime, we have a range of bespoke statutes that set up distinct management and institutional frameworks for particular areas. Most of these are in the sea rather than land, reflecting the inadequacies of the area-based protection frameworks available under more general legislation.[118] They tend to impose an additional layer of management rather than carving out management from broader frameworks like the RMA or Fisheries Act, and to cross-reference to the mechanisms within those statutes rather than creating their own.

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[116] Marine mammals are excluded from the definition of "animal" under the Wildlife Act.
[117] Department of Conservation "Te Pēwhairangi (Bay of Islands) marine mammal sanctuary proposal" <www.doc.govt.nz/get-involved/have-your-say/all-consultations/2021-consultations/te-pewhairangi-bay-of-islands-marine-mammal-sanctuary-proposal/#summary>.
[118] For example, the Marine Reserves Act.

The Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 applies to a specific area around Fiordland.[119] It has regulatory impact, in that it directly creates eight marine reserves within the wider management area (but which are managed under the Marine Reserves Act).[120] In that sense, it can be seen as legislation creating marine protected areas. It also creates an institution – the Fiordland Marine Guardians – to advise the government on various matters (including fishing, biosecurity, sustainability and conservation), and directly amended the Southland Regional Coastal Plan developed under the RMA (including recognition of high value areas outside marine reserves, called "China shops", and provisions relating to biosecurity).

The legislation was a mechanism by which a wide ranging and non-statutory strategy, developed by a consortium of various stakeholders (the Fiordland Marine Conservation Strategy) was implemented. In short, it recognises that various legislative and institutional silos (including the RMA, Marine Reserves Act, Biosecurity Act and Fisheries Act) are intimately connected, and that integrated place-based management is important in areas of high conservation value like Fiordland.

Te Korowai ō Te Tai-o-Marokura Strategy is another non-statutory marine protection initiative that has resulted in bespoke legislation for implementation: the Kaikōura (Te Tai ō Marokura) Marine Management Act 2014. The purpose of the Act is to recognise the unique coastal and marine environment and distinctive biological diversity and cultural heritage of the marine environment around Kaikōura.[121] It has a strong conservation flavour. As with the Fiordland legislation, it directly creates a number of protected and other areas that could have been created under more general legislation (a marine reserve, two marine mammal sanctuaries, and mataitai and taiāpure area management tools for customary fishing), and amends fisheries regulations relating to recreational fishing.[122] It also established the Kaikōura Marine Guardians, which are appointed by the Ministers of Conservation and Fisheries to represent the interests of Ngāi Tahu, the Kaikōura community, conservation, environment, biosecurity, education, fishing, science and tourism.[123] The Guardians provide advice that must be taken into account by a variety of Ministers and those exercising functions under multiple marine statutes.

Like the Fiordland legislation, the Act is another place-based mechanism through which tools under multiple more general frameworks are implemented in a coordinated way, together with another layer of institutional arrangements to oversee it.

Another place-based statute administered by the Department of Conservation, the Hauraki Gulf Marine Park Act 2000, establishes the Hauraki Gulf Marine Park.[124] The Park itself extends from the northernmost boundary of Auckland Council down to the southernmost boundary of the Hauraki District, and includes the islands in the Gulf. The catchment area feeding into the Marine Park extends as far south as the South Waikato district.

However, despite its name and the establishment of a new management area, the Act is not really about establishing a "marine protected area" and should not be regarded as a purely "conservation" statute. It does not itself create regulatory restrictions. Instead, it can be regarded as an effort to manage a particular spatial area (one that is among the most heavily used and congested in the country) in a more integrated way by connecting up *other* regimes and tapping into their machinery.

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[119] See Kate Mulcahy, Raewyn Peart and Abbie Bull *Safeguarding Our Oceans: Strengthening marine protection in New Zealand* (Environmental Defence Society, 2012), ch 16.
[120] See Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, pt 3 and sch 12.
[121] Kaikōura (Te Tai o Marokura) Marine Management Act 2014, s 3.
[122] Part 2.
[123] Section 6.
[124] Hauraki Gulf Marine Park Act 2000, s 33.

This spatial legislative overlay is one way in which better connections can be made across the system in a way that responds to the unique circumstances and pressures of a particular place. To this end, the Act:

- Establishes the Hauraki Gulf Forum, which is a "hybrid" entity comprised of the members of other institutions, including representatives of the Ministers of Conservation, Primary Industries and Māori Affairs, tangata whenua, Auckland Council, and other local authorities. The Forum does not have regulatory powers, but instead is charged with coordinating its members' functions, identifying strategic issues and priorities for action, and preparing a three yearly report on the state of the Gulf. This has showcased an alarming amount of degradation.[125]

- Provides for matters of national significance and objectives, which are deemed to form an NPS for the purposes of the RMA. They therefore act alongside the NZCPS when councils are creating and changing plans and when consent applications are considered.

- These matters must also be "had regard to" when the Minister is setting sustainability measures under the Fisheries Act. Those with functions under a lengthy list of other legislation must also have particular regard to these matters, including under the Heritage New Zealand Pouhere Taonga Act, the Local Government Act, the Biosecurity Act and the various conservation statutes described above.

In short, the Act creates a more nuanced, place-based layer of objectives to be considered under multiple other frameworks and an institutional and reporting framework for better integrating the roles of existing entities. What it does not do directly is create a framework for marine spatial planning. However, the Forum and its agencies are a key player in a non-statutory spatial planning initiative for the Gulf that was recently conducted: Sea Change Tai Timu Tai Pari. This is discussed further below.

The Sugar Loaf Islands Marine Protected Area Act is an older piece of legislation, enacted in the same year as the RMA.[126] As such, it is much more narrowly focused on establishing a single protected area than (as in Fiordland and the Hauraki Gulf) making more integrated use of different bits of legislation. The Act is designed "to provide for the setting up and management of the Sugar Loaf Islands Marine Protected Area for the purpose of protecting that area of the sea and foreshore in its natural state as the habitat of marine life, and to provide for the enhancement of recreational activities", and its purpose is "to ensure that the scenery, natural features, and ecosystems of the Protected Area that should be protected and conserved by reason of their distinctive quality, beauty, typicality, or uniqueness are conserved".[127] This is much broader than the purpose of the Marine Reserves Act (scientific research), but its restrictions are less strict; mining and non-recreational anchoring is prohibited, but fishing is not.[128] The Act is not just about the marine area, in that it also establishes sanctuary areas on the islands themselves; the surrounding water is deemed to be a "conservation park" under the Conservation Act. This marine protected area is now bordered by a more recent marine reserve (Tapuae) created in the conventional manner,[129] so the overall area is effectively covered by two separate protected areas under quite different rules.

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[125] See Hauraki Gulf Forum *State of our Gulf 2020* (State of the Environment Report 2020, February 2020).
[126] Sugar Loaf Islands Marine Protected Area Act 1991.
[127] Section 3.
[128] Marine Reserves Act 1971, long title; Sugar Loaf Islands Marine Protected Area Act 1991, ss 5 and 6.
[129] See Marine Reserve (Tapuae) Order 2008.

Further marine reserves were created under the Subantarctic Islands Marine Reserves Act 2014, which protects the territorial sea surrounding certain subantarctic islands.[130] The subantarctic islands themselves are classified as Nature Reserves.[131]

The Biosecurity Act

The Biosecurity Act is about dealing with pests and unwanted organisms, for both economic and environmental reasons. It is a framework for border controls aimed at preventing unwanted organisms from entering the country, including on ships, for establishing surveillance to detect organisms once they have arrived, and for the control and eradication of pests once they have become established. It applies out to the limits of the EEZ and spans freshwater terrestrial and marine environments (including ports).

Functions under the Biosecurity Act are split between the Ministry for Primary Industries, other government departments, and regional councils. The Ministry for Primary Industries oversees the implementation of the legislation, undertakes border control, manages national surveillance programmes, carries out responses to incursions and manages national control programmes. Regional councils monitor established pests and prepare regional pest management plans[132] and pathway management plans.[133] These cannot be inconsistent with regional policy statements and regional plans made under the RMA.

Regional councils are also required, under a National Pest Management Plan of Action, to provide leadership by promoting coordination of pest management between regions. A National Policy Direction for Pest Management[134] was developed in 2015 to improve the alignment and consistency of pest management plans and programmes across the country.

Mining legislation

The Continental Shelf Act, which previously formed the much less robust framework under which some of the EEZ Act's decisions are now made,[135] remains in existence. However, it is now primarily a vehicle for making decisions about mining, and piggybacks on and extensively cross-references the more evolved framework of the Crown Minerals Act. Essentially, much of the Continental Shelf Act has become a shell statute for extending most of the provisions of the Crown Minerals Act to the EEZ and extended continental shelf, and does not itself allow for new permits to be granted under it.[136]

The Crown Minerals Act is about "promoting" the exploitation of Crown-owned minerals for the benefit of New Zealanders,[137] and is primarily used as a means for the Crown to allocate rights (often through competitive processes like block offers) to explore for and mine its property (as well as access arrangements so miners can get to them).[138] That includes oil and gas.[139]

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[130] See Subantarctic Islands Marine Reserves Act 2014, ss 5-8 and schedules 1-3.
[131] See Department of Conservation, Subantarctic Islands, at <www.doc.govt.nz>.
[132] Biosecurity Act 1993, ss 68-78.
[133] Sections 88-89.
[134] National Policy Direction for Pest Management 2015; Biosecurity Act 1993, ss 56-58.
[135] Much of what is now in the EEZ Act framework was also contained within regulations made under the Maritime Transport Act 1994, in recognising that many environmental risks and human activities have traditionally been associated with ships.
[136] That said, there are several provisions in the Continental Shelf Act that go beyond just mineral exploitation.
[137] Crown Minerals Act 1991, s 1A.
[138] Crown minerals will often exist under private land.
[139] See New Zealand Petroleum & Minerals <nzpam.govt.nz>.

The minerals regime is highly discretionary (and involves the development of minerals programmes and the issuing of permits largely in isolation of other regimes like the RMA).[140] The current government has signalled that it will not be allowing new offshore oil and gas exploration (largely for climate change reasons).[141] Authorisation to explore for or mine minerals does not, however, remove the need to obtain other permissions, for example under the RMA or EEZ Act.[142] It is primarily an allocative and access framework, not an environmental one. To complement that separation, the RMA is explicit that sustainable management does not include the rate of depletion of mineral resources.

The Minister of Conservation and the Minister of Energy and Resources have also created a *Code of conduct for minimising acoustic disturbance to marine mammals from seismic surveys operations*.[143] This Code was more protective than the existing marine mammal sanctuary restrictions (imposed under the Marine Mammals Protection Act), and mitigation measures have been required across the entire historic range of the Māui dolphin out to the 100m water depth contour.

Climate change legislation

Climate change mitigation and adaptation are becoming increasingly central issues within the context of resource management, and that includes marine management. To date, climate change has primarily been addressed through the Climate Change Response Act, which has established an emissions trading scheme designed to allow greenhouse gas emissions to be traded and offset, and to meet New Zealand's international obligations.[144]

The Climate Change Response (Zero Carbon) Amendment Act was also enacted in 2020.[145] This has strengthened the Climate Change Response Act considerably beyond being a framework for emissions trading. It endows the Act with a stronger purpose, a legislated set of targets, a carbon budgeting framework, and roles for a new and independent Climate Change Commission. There are to be national level plans for emissions reductions (expected imminently at the time of writing) and adaptation, and an initial risk assessment has been produced to inform a national adaptation plan. The Climate Change Commission has recently provided its advice to the government in an extensive report – *Ināia tonu nei: A low emissions future for Aotearoa* – which must be considered.[146] This made reference to the importance of "blue carbon" (carbon stored in marine environments), but concluded that more scientific information is required before it can be included in accounting or reporting.[147]

In contrast, the RMA does not address climate change mitigation in a meaningful way (except to promote renewable energy generation in a very general sense). Until recently councils were expressly prohibited from considering the climate impacts of greenhouse gas discharges, and central

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[140] Crown Minerals Act 1991, pts 1A, 1B.
[141] See Crown Minerals Amendment Act 2019.
[142] Access arrangements include access to conservation land, and relevant decision-making criteria are in the Crown Minerals Act rather than the Conservation Act (unlike all other activities on conservation land). See Crown Minerals Act 1991, s 61.
[143] Department of Conservation *2013 Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals from Seismic Surveys Operations* (November 2013).
[144] Climate Change Response Act 2002, s 3.
[145] Climate Change Response (Zero Carbon) Amendment Act 2019.
[146] Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa* (31 May 2021).
[147] At 53.

government has not chosen to exercise its powers to fill that gap through national direction.[148] That restriction has now been removed, but it is still unclear what role councils are expected to play under the RMA, including in their management of the coastal marine area (eg through exercising powers to control fishing activities like bottom trawling to reduce the release of greenhouse gases from the seabed).[149]

Heritage New Zealand Pouhere Taonga Act

Historic heritage is partly protected under the RMA. Section 6(f) of the Act requires all decision-makers to recognise and provide for the protection historic heritage from inappropriate use and development as a matter of national importance. Regional plans can impose restrictions to protect marine heritage (eg shipwrecks) in the coastal marine area, but few do so. On land, historic heritage can be more specifically addressed through a heritage order, which ensures that protected features or places are identified in the relevant district plan.[150] But heritage orders are not applicable to the marine environment, because they are implemented through scheduling in *district* plans.

Alongside the RMA is a statute dedicated solely to heritage: the Heritage New Zealand Pouhere Taonga Act. Its purpose is to promote the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage. Heritage New Zealand (an autonomous Crown entity) is tasked with maintaining the New Zealand Heritage List/Rārangi Kōrero (previously the Historic Places Register) and is informed by the Māori Heritage Council. The purposes of the List are to inform the public about historic heritage, to notify the owners of historic heritage, and to be a source of information for the purpose of more formal protections through the RMA. The List identifies historic places, historic areas, wāhi tūpuna, and wāhi tapu areas. Those can include marine sites, such as submerged structures, sites of cultural significance, and shipwrecks.[151] However, the List does not have direct regulatory consequences – protections need to be progressed through tools under the RMA. Furthermore, many marine heritage sites have yet to be identified, let alone listed – for example, only around 150 shipwrecks have been located despite over 2,000 being known.[152]

That said, Heritage New Zealand Pouhere Taonga also has statutory responsibility for the identification and protection of archaeological sites (where linked to human activity predating 1900). It is charged with issuing archaeological authorities where activities may modify or destroy part or all of an archaeological site. In contrast to the Heritage List, this is a tool that has regulatory effect.[153] This means that early shipwrecks are automatically protected, without being listed or identified in a regional plan.

Submarine Cables and Pipelines Protection Act

[148] Resource Management Act 1991, ss 70A, 70B, 104E, 104F.
[149] On the climate implications of trawling, see Steve Urlich "Doing nothing in our oceans is a major way to do something about climate change" (16 August 2021) <www.stuff.co.nz/environment/climate-news/126086460/doing-nothing-in-our-oceans-is-a-major-way-to-do-something-about-climate-change>
[150] Resource Management Act 1991, pt 8.
[151] Historic places are divided into Category 1 (places of special or outstanding historical or cultural heritage significance or value) and Category 2 (places of historical or cultural heritage significance or value).
[152] Gerard Hutching "Shipwrecks" (12 June 2006) Te Ara - the Encyclopedia of New Zealand, <http://www.TeAra.govt.nz/en/shipwrecks>.
[153] Heritage New Zealand Pouhere Taonga Act 2014, ss 42-64.

The Submarine Cables and Pipelines Protection Act is, as its name suggests, designed to protect cables and pipelines on the seafloor from activities that could impact them. The main way in which it does so is through the creation of protected areas through orders in council. These areas prohibit fishing[154] and anchoring activities which impact the seabed. It is an offence to cause damage, whether wilfully or negligently. It is also concerned with liability for any harm caused. The Act applies in the coastal marine area and the EEZ. Penalties for damage can be severe, reflecting the importance of underwater cables and pipelines (eg for connecting the North and South Islands and Aotearoa New Zealand to the rest of the world). There are currently 10 protected areas established under the legislation, including those protecting the Cook Strait electricity and communications cables, infrastructure in the Hauraki Gulf, and the Maui gas field pipelines. Some of these areas are recognised as "type 2" marine protected areas under the current marine protected areas policy.[155]

There are cross-references between the Act and the Maritime Transport Act – in particular, it is deemed to be a "maritime act" and therefore rules can be made under the Maritime Transport Act for the purposes of the Submarine Cables and Pipelines Protection Act. This is a way that the complex machinery of decision-making under the Maritime Transport Act can be deployed in the service of statutes that have a more specific purpose (not dissimilar to the way in which the Continental Shelf Act makes use of the tools under the Crown Minerals Act).

Other substantive legislation

Some statutes do not address the management of marine activities directly, but regulate or guide human activities that can have consequential impacts on the oceans. Notable are the Waste Minimisation Act, Litter Act, Hazardous Substances and New Organisms Act, Land Transport Management Act, Urban Development Act and Building Act.

Waste Minimisation Act

Waste management (in the sense of the disposal of unwanted material)[156] is the concern of a number of statutes and institutions in the current system. The RMA and EEZ Act, for example, deal with pollution by prohibiting discharges of contaminants (including into the coastal marine area and EEZ) unless expressly allowed. With few exceptions, marine dumping is prohibited – reflecting the requirements of international law under the London Dumping Protocol. The Maritime Transport Act restricts discharges from ships.[157]

However, we also have a more targeted framework for waste *minimisation*. The Waste Minimisation Act seeks to protect the environment from harm and to provide environmental, social, economic and cultural benefits.[158] It is a more proactive regime than the RMA, in that it tries to prevent waste issues from arising in the first place, rather than just requiring consent for their disposal or dealing with the effects of things that can become waste when discarded. To do that, it allows for harmful "priority products" to be declared, and mandatory product stewardship schemes created (cradle to

[154] With one minor exception in relation to the Cook Strait protected area.
[155] A marine protected area is defined as being an "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". A type 2 protected area is generally where there are varying degrees of regulation, such as activities impacting on seabed habitats, whereas a type 1 protected area is one where all potentially harmful activities are excluded.
[156] As opposed to "wasting" a valuable resource or inefficient use.
[157] Marine Transport Act, pts 19 and 19A.
[158] Waste Minimisation Act 2008.

the grave management of the product).[159] Businesses can also be accredited in relation to voluntary schemes.[160] Some products can be banned altogether (we have recently seen a ban on single-use plastic bags, and the government has recently announced an intention to phase out other plastic products like plates, cotton buds, straws and fruit labels).[161] Prohibitions have been imposed on personal products containing microbeads (such as health and beauty products), which can cause harm to aquatic life.[162]

The framework also allows for the development of incentives for waste reduction. For example, the government has recently signalled the introduction of measures like a deposit refund scheme.[163] Funding is another component of the framework; a waste disposal levy is imposed on disposal facilities (and is set to expand).[164] Half of this is received by territorial authorities and the other half made available to projects aiming to reduce waste through the Waste Minimisation Fund. The Act also creates a Waste Advisory Board to advise the Minister.[165] The legislation specifically outlines its relationship with the Local Government Act, given that waste management needs to be planned for under the latter's long-term and annual plans.

Plastic waste is particularly problematic in the marine environment (see Chapter 2), and can have significant impacts on marine wildlife (including seabirds, fish and marine mammals). A lot of this comes from land, where it is discarded and finds its way to sea, while other plastic waste comes from boats (eg fishing gear) and marine farms (eg ropes and buoys). Microplastics are also increasingly prevalent, finding their way into the marine food chain. Thus while the Waste Minimisation Act is not a "marine" focused statute, it is an important component of the oceans management system. It is currently under review by the Ministry for the Environment.

Litter Act

Alongside the Waste Minimisation Act is the narrower Litter Act, which deals with one particular problem of waste disposal: littering. This is significant, because much of the waste that ends up in the marine environment comes, not from large scale activities that require consent under the RMA or EEZ Act, but rather from casual and small-scale non-compliance from individuals who throw away things like cigarette butts, cans and straws. While the Waste Minimisation Act is partly designed to reduce the amount of material having to go to landfill, the Litter Act is focused on making sure the stuff that (unfortunately) *does* need to go to landfill does not end up in other places – like the oceans.

Among other things, the Act provides for enforcement officers and litter wardens who may issue fines and abatement notices for littering offences, allows councils to require the removal of litter, and provides for the making of bylaws.[166] The Ministry for the Environment is in the process of reviewing the Litter Act alongside the Waste Minimisation Act.

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[159] Part 2.
[160] Section 11.
[161] Waste Minimisation (Plastic Shopping Bags) Regulations 2018; Ministry for the Environment "Phasing out hard-to-recycle and single-use plastics" (June 2021) <www.environment.govt.nz>.
[162] Waste Minimisation (Microbeads) Regulations 2017.
[163] Ministry for the Environment "Container return scheme: An option for reducing litter and waste to landfill" (April 2020) <www.environment.govt.nz>.
[164] Waste Minimisation Act 2008, pt 3; Ministry for the Environment "Waste disposal levy expansion" <www.environmnent.govt.nz>.
[165] Part 7.
[166] Litter Act 1979, ss 5-8, 9-12.

Hazardous Substances and New Organisms Act

New Zealand has a more targeted framework for the management of hazardous substances and genetically modified organisms, under the Hazardous Substances and New Organisms Act. While there is some tension and overlap between what the RMA and this Act are concerned with, the latter controls some actions or activities that the RMA does not (eg the import, manufacture and use of manufactured chemicals that have hazardous properties – not just their release to a receiving environment).[167] Import or manufacture requires approval, which places controls on matters such as storage, identification, emergency management and disposal. The Act is also the place in which the control, testing and release of genetically modified organisms is regulated.[168] While it is not a "marine" statute as such, and to some extent is concerned with health and safety rather than environmental health, the Act confers powers in relation to the transport, importation, packaging and labelling of hazardous substances at sea (eg during shipping). The EPA plays the primary role under the Act.

Legislation for land-based development

Various other legislation can be mentioned briefly. The Local Government Act is concerned with the purpose, structure and activities of regional councils, territorial authorities and unitary authorities. Under the Act, councils are charged with producing long-term plans (describing the activities and community outcomes to be pursued over the coming 10 years, and including both a financial and infrastructure strategy) and annual plans (including budgets), which support the achievement of the long-term plan.[48] In other words, among other things, the Act is a framework for how councils spend money.

Funding has implications for the ways in which councils conduct functions (including marine-focused functions) under other legislation like the RMA. Councils are also in charge of local roads and are obliged to assess the need for, and provide, water services (with some exceptions),[49] and some other public services.[50] This is particularly significant for marine outcomes, because investments in waste water and stormwater infrastructure, as well as the location and design of roads, can have impacts on the discharge of contaminants into the sea. We have seen underfunding in three waters infrastructure contribute to regular marine pollution in urban areas.[169] This also means that the Land Transport Management Act – a framework for councils and Waka Kotahi/New Zealand Transport Agency to plan, fund and deliver infrastructure like roads – and the Land Transport Act (which, among other things, allows the setting of emissions standards for vehicles) also have relevance to the health of our oceans. When it comes to runoff from roads and other infrastructure, the RMA is really the ambulance at the bottom of the cliff. Standards for motor vehicles, design and materials requirements for infrastructure and buildings, and the money to upgrade and fix broken pipes are where many problems are created in the first place.

The Urban Development Act is also potentially significant from a marine perspective, in the same way that the RMA and infrastructure legislation is. Urban development can create a variety of pressures on the oceans, such as sediment from construction, ongoing runoff from impermeable surfaces, contaminants from products used by more people living in higher concentrations, wastewater pressures, and generally more human activities on beaches and out on boats. The particular significance of the Urban Development Act is its ability to empower and drive large scale

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[167] Hazardous Substances and New Organisms Act 1996, pt 5.
[168] Section 34-45B.
[169] See Michael Neilson "Why Auckland's beaches are unswimmable every time it rains, and what's being done to turn it around" www.nzherald.co.nz> (9 January 2021).

urban development (suburb scale) that – arguably – has weaker environmental safeguards than the RMA (including with respect to the coastal marine environment). We investigated this in our previous work on resource management reform in the urban context.[170]

The Building Act is, as its name suggests, focused on land. We tend not to build much at sea.[171] The environmental impacts and occupation aspects of marine construction are covered by the RMA and EEZ Act, but the actual design requirements for offshore installations (and ships) are regulated instead under the Maritime Transport Act. However, the Building Act has incidental relevance in that the design of buildings on land, once in place, can have implications for the marine environment. For example, "green" buildings can reduce contributions to greenhouse gas emissions that impact the sea, material choices can eliminate the leaching of some contaminants (eg heavy metals) into stormwater systems (which end up in the sea), while systems for onsite stormwater and rainwater management and green roofs can reduce the contamination that reaches the marine environment.

Legislation establishing the system's architecture

We also have a number of statutes that are concerned with establishing what might be called the architecture of the system. That includes creating institutions with multiple roles under other statutes, producing cross-cutting strategies, establishing jurisdiction, and outlining general processes that feed into other acts.

Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act

In practice, this Act has a limited function.[172] Essentially, it formalises the country's EEZ in domestic law, and delineates the boundaries of the territorial sea and contiguous zone in accordance with the United Nations Convention on the Law of the Sea. Curiously, the Act also clarifies that the Marine Mammals Protection Act applies in the EEZ.[173] It is administered by the Ministry of Foreign Affairs and Trade.

There is also an interesting regulation power in the Act, which provides (among other things) that "Where no other provision is for the time being made by any other enactment for any such purposes, [regulations can be made] for all or any of the following purposes [including] prescribing measures for the protection and preservation of the marine environment … [and] regulating the exploration and exploitation of the … sea for the production of energy from the water, currents, and winds, and for any other economic purposes".[174] We are not aware of the existence of any such regulations, which would find a more comfortable home in more targeted and developed legislation.

Environment Act

The Environment Act establishes important aspects of the system's institutional architecture.[175] While some cross-cutting institutions (like the Environment Court, Department of Conservation and Conservation Authority) are established/continued under legislation where they have their primary

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[170] Greg Severinsen *Reform of the Resource Management System: The Urban Context* (Environmental Defence Society, July 2020).
[171] Unless the sea becomes land by virtue of reclamation.
[172] Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977.
[173] Section 10.
[174] Section 8.
[175] Environment Act 1986.

or initial role (eg the RMA and Conservation Act),[176] both the Parliamentary Commissioner for the Environment and the Ministry for the Environment are established under the Environment Act.[177] This act of creation (and associated mandate) is the Act's primary purpose.[178] The Ministry for the Environment has a broad statutory mandate, including policy in the marine environment alongside the Department of Conservation. It is fairly unusual for a ministry to be established formally in legislation.

The Parliamentary Commissioner for the Environment is a particularly significant framework feature of the system. This officer of Parliament has a wide but firmly protective mandate, and is charged with conducting investigations and reviews on environmental issues.[179] It is strongly independent, and reports directly to Parliament. The Commissioner has produced a number of reports concerning the marine environment, including a recent one on the management of estuaries.[180]

Environmental Protection Authority Act

The Environmental Protection Authority Act establishes the EPA as a Crown entity, although it is given particular roles mainly under other acts (eg the RMA, EEZ Act, Climate Change Response Act and hazardous substances legislation).[181] The Act is significant, however, because it sets out the institutional structure (including with respect to its independence from government) and mandate of the EPA, which has important roles under marine legislation (eg the EEZ Act) as well as more general functions in the marine environment (eg enforcement under the RMA).

Environmental Reporting Act

We also have a dedicated Environmental Reporting Act, which requires the government (the Ministry for the Environment and Statistics New Zealand) to issue information on the state of the environment at a national level, including a rolling cycle of reporting on particular domains (eg the atmosphere and climate, air, freshwater, land, and marine).[182] The marine domain report was last released in 2019, and marine reporting is rolled into synthesis reporting every three years.

Finally, it is worth noting other statutes that exist well away from the core of the oceans management system, but which are not entirely disconnected from marine outcomes. For example, the Public Finance Act is concerned with the central government budgeting process (and is linked to the Treasury's wellbeing framework against which public investment decisions are measured); the Education Act is concerned with the school curriculum, and therefore has implications for how a future generation of oceans leaders and politicians are educated; and the Companies Act outlines corporate obligations and responsibilities in relation to shareholders and society. There may be many other relevant frameworks like these that are not currently concerned with the marine environment, but which nevertheless provide opportunities to improve marine outcomes.

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[176] Conservation Act 1987, s 5; Resource Management Act 1991, pt 11.
[177] Environment Act 1986, ss 4 and 28.
[178] Environment Act 1986, long title.
[179] Section 16.
[180] Parliamentary Commissioner for the Environment *Managing our estuaries* (August 2020).
[181] For example, see Resource Management Act 1991, s 42C.
[182] Environmental Reporting Act 2015, pt 2.

Appendix 2: Aotearoa New Zealand's international legal obligations under the law of the sea

The United Nations Convention on the Law of the Sea

Under UNCLOS, coastal states[183] are accorded jurisdictional and sovereign rights over resources in each zone and are expected to comply with associated environmental responsibilities and requirements. UNCLOS was ratified by Aotearoa New Zealand on 19 July 1996 and entered into force on 18 August 1996.[184]

UNCLOS provides for the determination of maritime zones by establishing a fixed reference point – the "territorial sea baseline". This baseline is generally the coastal low-water mark,[185] unless a coastline has distinct geomorphic characteristics (e.g. the coast is interrupted by bays; is otherwise deeply indented or unstable; or there are reefs)[186] or the state is an archipelago.[187] Waters located inland of the baseline are identified as internal waters.[188] The territorial sea comprises the marine area that extends seaward of the baseline to an outer limit of 12 nautical miles.[189] The contiguous zone lies adjacent to the territorial sea and extends seaward by a maximum distance of 24 nautical miles.[190] It overlaps with the inner part of the EEZ, which extends from the outer limit of the territorial sea to a maximum offshore distance of 200 nautical miles from the baseline.[191]

The continental shelf comprises the seabed and subsoil extending beyond the territorial sea to the outer edge of the continental margin.[192] It underlies the EEZ and therefore has a minimum breadth of 200 nm from the baseline. Article 76 of UNCLOS defines the *continental margin* as the submerged prolongation of a coastal state's land mass, including the continental shelf, slope and rise. The continental shelf can naturally extend seaward of the EEZ, where it is described as "the extended continental shelf". Where the outer limits of the continental shelf extend beyond the EEZ, they must be delineated in accordance with the formal processes of UNCLOS; based on recommendations of the Commission on the Limits of the Continental Shelf.[193] UNCLOS sets a maximum seaward limit of 350 nm from the baseline or 100 nm from the 2,500m isobath.[194] The waters beyond the outer limits of the EEZ are the *high seas*;[195] while the seabed and subsoil located beyond the limits of national jurisdiction comprise *the Area*.[196]

The government may exercise sovereignty over the territorial sea, subject to the requirements of UNCLOS and international law.[197] In terms of UNCLOS, state sovereignty includes the jurisdiction to enact regulations for the conservation or exploitation of natural resources; and the protection or

[183] The reference to "*states*" is used herein to mean "*States Parties*" to UNCLOS unless otherwise specified. There are currently 168 States Parties to UNCLOS.
[184] United Nations Convention on the Law of the Sea 1982 (1982) 21 ILM 1261 (opened for signature 10 December 1982, entered into force 16 November 1994), art 5.
[185] For non-archipelagic states. Refer to the "normal baseline" set by UNCLOS, art 5.
[186] UNCLOS, arts 6-10
[187] UNCLOS, art 47, which sets "archipelagic baselines".
[188] UNCLOS, art 8.
[189] UNCLOS, art 3.
[190] UNCLOS, art 33(2).
[191] UNCLOS, art 57.
[192] UNCLOS, art 76.
[193] UNCLOS, art 76.
[194] UNCLOS, art 76(5).
[195] UNCLOS, art 86.
[196] UNCLOS, art 1(1).
[197] UNCLOS, art 2(1).

preservation of the marine environment.[198] States must respect the right of foreign vessels to undertake innocent passage through the territorial sea.[199] Innocent passage is defined as the "*continuous*" or "*expeditious*" transit of a foreign vessel through the territorial sea of another state, where it is "*not prejudicial to the peace good order or security of the coastal State*";[200] and includes the incidental or urgent stopping and anchoring of vessels.[201] The government can regulate innocent passage for specified purposes including: the protection of facilities, cables and pipelines; safety; the conservation of living resources; preservation of the environment; to prevent, reduce and control marine pollution; marine scientific research; and for the prevention of infringements of fisheries, customs, fiscal, immigration or sanitary laws and regulations.[202] Further, the government has jurisdiction to confine the passage of vessels carrying "*inherently dangerous or noxious substances or materials*".[203] In accordance with article 25(1) of UNCLOS the government has rights of protection, including the right to take "*necessary steps*" to prevent passage that is not innocent; and to temporarily suspend passage in specified areas if essential for the protection of security.[204] In essence, this means that the extent of the government's sovereign rights over the territorial sea are relatively unfettered in respect of key resource and environmental interests.
There are limits on the extent to which the government can enforce criminal and civil laws on foreign flagged vessels within the territorial sea.[205] The criminal jurisdiction is restricted to circumstances where:[206]

- the consequences of crime extend to the coastal state;
- the crime disturbs the peace the country or good order of the territorial sea;
- assistance has been requested from the responsible agencies; or
- measures are necessary to suppress illicit traffic in narcotics.

Article 28 of UNCLOS limits the civil jurisdiction of the coastal state to circumstances where a vessel causes damage while in the territorial sea or internal waters.

In the contiguous zone, the government has sovereign rights over natural resources in accordance with the underlying EEZ regime. In addition, the government can exercise "*the control necessary*" to prevent and punish infringements of its customs, immigration, tax and sanitary laws that were committed within its territory (including the territorial sea).[207] These additional rights enable the government to take precautionary or responsive action in respect of incoming or outgoing vessels that have or are likely to infringe domestic regulations.

In the EEZ, the government has sovereign rights for the purpose of exploring, exploiting, conserving, and managing all living and non-living natural resources.[208] Article 56(1) of UNCLOS explicitly accords sovereign rights for "*other activities for the economic exploitation and exploration of the zone*" and identifies the production of energy from water, currents and wind as one such activity.

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[198] The extent of jurisdiction is interpreted from the scope of jurisdictional rights accorded to states over resources in the EEZ and Continental Shelf regime. It is also informed by Art 21(1) which explicitly provides for the regulation of innocent passage through the territorial sea; Art 192 which imposes a general obligation on State Parties to protect and preserve the marine environment; and Art 194(1) which requires that State Parties take all measures necessary to prevent, reduce and control pollution of the marine environment from any source.
[199] UNCLOS, art 17.
[200] UNCLOS, art 18 and Art 19.
[201] UNCLOS, art 18(2).
[202] UNCLOS, art 21(1).
[203] UNCLOS, art 22.
[204] UNCLOS, art 25(3).
[205] UNCLOS, art 27 and Art 28.
[206] UNCLOS, art 27(1)(a) to (d).
[207] UNCLOS, art 33(1).
[208] Including the waters, seabed and subsoil. Refer UNCLOS, art 56(1)(a).

The continental shelf regime overlaps in entirety with the EEZ, but also includes the parts of the shelf that extend beyond the 200 nm limit and underlie the waters of the high seas. Article 77 of UNCLOS accords the government with sovereign rights to explore and exploit the natural resources of the continental shelf; comprising the seabed, subsoil and sedentary species in constant physical contact with the shelf.[209] Further, the government has an exclusive right to drill the shelf for any purpose.[210] Payments or contributions "in kind" must be made to the International Seabed Authority for the exploitation of non-living resources on the extended continental shelf.[211]

The government is required to have "due regard" for the rights of other states in the EEZ.[212] Pursuant to article 58(1) of UNCLOS, these rights include the high seas freedoms relating to overflight, navigation, and the laying of submarine cables and pipelines. In the EEZ, the government may stop and search fishing vessels to ensure compliance with domestic fisheries laws;[213] and enact regulations to control vessel pollution. In practice, states have imposed restrictions on navigational freedoms on the grounds of environmental security and maritime security.

Jurisdictional rights in the EEZ extend beyond the conservation and exploitation of natural resources to include artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment.[214]

Substantive requirements under UNCLOS

Alongside its jurisdictional matters, UNCLOS contains substantive environmental obligations, although most are high level. Article 192 of UNCLOS requires state parties to protect and preserve the marine environment. In accordance with article 194(1) states must take, individually or jointly as appropriate, all measures necessary to prevent, reduce and control pollution of the marine environment from any source. Further, article 194(2) provides that states must ensure activities within their jurisdiction or control do not cause damage to other states or their environment, or that pollution spreads beyond any areas they exercise sovereign rights. Article 194(3) specifies the need for measures to address all sources of pollution to minimise the release of toxic substances, pollution from vessels, and pollution from installations; while article 194(4) recognises the need to protect and preserve rare or fragile ecosystems and critical habitats. Part XII of UNCLOS requires that States cooperate to formulate international rules, standards, and practices to prevent marine pollution.[215]

UNCLOS also provides more specific direction. It requires the adoption of laws and regulations to "*prevent, reduce and control pollution*" arising from:

- land-based sources;[216]
- seabed activities occurring within national jurisdiction;[217]
- artificial islands, installations, and structures under national jurisdiction;[218]
- dumping practices, which are prohibited without the prior approval of the coastal state;[219]

[209] UNCLOS, Art 77.
[210] UNCLOS, Art 81.
[211] UNCLOS, Art 82.
[212] UNCLOS, Art 56(2).
[213] UNCLOS, Art 73(1).
[214] UNCLOS, Art 56(1).
[215] UNCLOS, Art 197; as affirmed by the *MOX Plant (Ireland v United Kingdom) (provisional measures)* (2002) 41 ILM 405.
[216] UNCLOS, Art 207.
[217] UNCLOS, Art 208.
[218] UNCLOS, Art 208.
[219] UNCLOS, Art 210.

- domestic[220] or foreign flagged[221] vessels; and
- the atmosphere.[222]

In the territorial sea, the government can adopt laws to regulate pollution from foreign vessels, including those exercising the right to innocent passage.[223] The jurisdiction is narrower in respect of the EEZ, where regulations to manage pollution from foreign vessels must be consistent with generally accepted international laws and standards (ie those approved by the International Maritime Organisation).[224]

From a system design perspective this is interesting, as it creates detailed regulations effectively directly translated from international law. That goes some way to explaining the highly focused and detailed legislative and institutional silos of the Maritime Transport Act and Maritime New Zealand, which are focused largely on shipping and (at least in the EEZ) largely translate international law to domestic regulation.

In exercising sovereign rights over living resources in the EEZ, the government has associated duties. Key requirements include setting the allowable catch for fisheries in the EEZ[225] and implementing conservation and management measures to ensure living resources in the EEZ are not endangered by over-exploitation.[226] Management measures must be informed by the best scientific evidence,[227] and have the core focus of maintaining or restoring populations of harvested species at levels which can produce the maximum sustainable yield.[228] They must also consider cumulative effects on non-target species with a view to maintaining or restoring populations of such species to levels at which their reproduction is not seriously threatened.[229]

States are required to promote the objective of "optimum utilisation" in the EEZ.[230] Optimum utilization requires the government to grant surplus catch to other states if they cannot harvest the total allowable catch set in any given year.[231] If the government grants catch to other states under this mechanism, they have the jurisdiction to regulate all aspects of the fishing rights granted.[232] The EEZ provisions provide for the establishment of regional or sub-regional organisations to enable the coordination of conservation and development approaches between states with an interest in a common stock or stocks of associated species, including straddling stocks,[233] highly migratory species,[234] and marine mammals[235] that occur across multiple EEZ's. Additional detail on fisheries management requirements deriving from UNCLOS and associated international agreements is provided further below.

Fisheries New Zealand, a business unit within the Ministry for Primary Industries, represents Aotearoa New Zealand in international fisheries management issues. International fisheries include

[220] UNCLOS, art 211(2).
[221] UNCLOS, art 211(3).
[222] UNCLOS, art 212(1). As applicable to the airspace under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry.
[223] UNCLOS, art 211(4).
[224] UNCLOS, art 211(5).
[225] UNCLOS, art 61(1).
[226] UNCLOS, art 61(2).
[227] UNCLOS, art 61(1).
[228] UNCLOS, art 61(3).
[229] UNCLOS, art 61(4).
[230] UNCLOS, art 62(1).
[231] UNCLOS, art 62(2).
[232] UNCLOS, art 62(4).
[233] Pursuant to article 63(1), the term "straddling stocks" applies "where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States…".
[234] Listed in Annex 1 to the Convention; pursuant to art 64(1).
[235] UNCLOS, art 65.

fisheries on the high seas, fisheries located within another state's waters, and fisheries involving highly migratory species located within our EEZ.[236] For the purposes of this report, the most relevant requirements are those that apply to highly migratory species that occur between the high seas and the EEZ. Aotearoa New Zealand has ratified a number of international agreements deriving from the UNCLOS framework that include requirements for the management of highly migratory species and these are addressed below.

The United Nations Fish Stocks Agreement and related instruments

Article 64 of UNCLOS imposes a requirement on states engaged in fishing for highly migratory species within a region to cooperate either directly or through an appropriate international organisation to ensure and promote the objective of optimum utilization. The requirement applies to highly migratory species listed in Annex I to UNCLOS, which includes tuna, marlin and sail-fish, oceanic sharks, and some cetaceans.[237] The United Nations Fish Stocks Agreement[238] was developed to facilitate implementation of requirements relating to straddling stocks and highly migratory species under UNCLOS. It was ratified by New Zealand in 2001.

Part II of the Fish Stocks Agreement sets out a series of fundamental principles including the precautionary approach; assessing impacts on an ecosystem-basis; minimising pollution, waste, discards and bycatch, and protecting biodiversity; and implementing and enforcing conservation measures. Measures adopted in the EEZ must be compatible with measures adopted for the high seas;[239] and measures adopted for the high seas must not undermine the effectiveness of measures adopted for the EEZ.[240] The Fish Stocks Agreement promotes cooperation via state participation in RFMOs.

There are several regional fisheries management organisations (RFMOs) mandated to address high seas fisheries and Aotearoa New Zealand is a member of:

- The Commission for the Conservation of Antarctic Marine Living Resources[241]
- The South Pacific Regional Fisheries Management Organisation
- The Commission for the Conservation of Southern Bluefin Tuna
- The Western and Central Pacific Fisheries Commission.

Members of RFMOs cooperate to establish conservation measures aimed at preventing the over-exploitation of fish stocks (and associated non-target species) on the high seas. They also provide a mechanism for implementing measures that have achieved consensus amongst the international community. In 2006 the United Nations General Assembly called on RFMOs to implement measures to regulate bottom trawling by closing vulnerable marine ecosystems such as seamounts, hydrothermal vents, and cold-water coral gardens.[242] This led to the establishment of new RFMOs for the management of demersal fisheries with a preference for seabed habitats; and the development of conservation measures aimed at identifying and protecting vulnerable marine ecosystems.[243]

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[236] Ministry for Primary Industries (2020) "International Fisheries". Available at: https://www.mpi.govt.nz/fishing-aquaculture/fisheries-management/international-fisheries/

[237] UNCLOS, Annex I sets out 17 categories of highly migratory species.

[238] The United Nations Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (Fish Stocks Agreement).

[239] FSA, art 7.

[240] FSA, art 7(2)(a).

[241] Established by the 1980 Convention on the Conservation of Antarctic Marine Living Resources.

[242] UNGA Resolution 61/105 of 8 December 2006, at [80].

[243] For a review of developments in this space, refer: Caddell, R. (2020) Deep-Sea Bottom Fisheries and the Protection of Seabed Ecosystems: Problems, Progress and Prospects in Banet, C. (Ed) *The Law of the Seabed*: Access, Uses, and Protection of Seabed Resources.

Another important development is the Code of Conduct for Responsible Fisheries 1995 adopted by the Food and Agriculture Organization of the United States (FAO). The Code contains recommendations and best practice fisheries management guidelines that apply to all maritime zones including those within coastal state jurisdiction. The Code is voluntary and is to be interpreted and applied in conformity with international law. It sets out how fisheries should be managed responsibly and includes requirements to minimise negative environmental impacts, reduce waste, and preserve the quality of the fish caught; understand the effects on the environment before using new fishing gear; and protect important fish habitats from destruction and pollution. Guidance is provided on how to manage fisheries in the face of scientific uncertainty;[244] a cautious approach is recommended for states in the developing new or exploratory fisheries;[245] and emergency measures are recommended for the management of fish stocks that have experienced significant adverse effects due to a natural phenomenon.[246]

The FAO has issued a number of instruments, guidelines, and technical guidelines to facilitate implementation of the Code. Key developments include the adoption of four International Plans of Action to guide management of impacts on seabirds;[247] sharks;[248] fishing capacity[249] and Illegal, Unreported and Unregulated fishing.[250]

Shipping

Fishing deals with highly mobile animals that cross jurisdictional boundaries and in which the whole world has an interest. Similarly, international law has paid a great deal of attention to another activity that spans borders: shipping. While a lot of it is environmental in nature (eg to prevent pollution), a large driver of international shipping regulation is to ensure that states (through their flag ships) do not harm each other. Arguably it is less about ensuring that states parties look after their own environment. New Zealand is a party to several International Maritime Organization conventions and associated protocols that aim to prevent the degradation of the marine environment by regulating shipping operations.

The 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol (MARPOL) is the main international convention addressing the prevention of marine pollution by ships from operational or accidental causes. It entered into force in New Zealand on 25 September 1998. It contains six annexes that address pollution from ships by oil (Annex I); by noxious liquid substances carried in bulk (Annex II); harmful substances carried by sea in packaged form (Annex III); sewage (Annex IV), garbage (Annex V); and the prevention of air pollution from ships (Annex VI). New Zealand is a party to Annexes I, II, III, and V; and at the time of writing is anticipated to become a party to Annex VI shortly.

Publications on Ocean Development, Volume 90. Brill|Nijhoff. 615 pp. https://doi.org/10.1163/9789004391567_014 (Open access, available at: https://brill.com/view/title/54208).

[244] FAO Code, page 12, at [7.5.2].

[245] FAO Code, page 13, at [7.5.4].

[246] FAO Code, page 13, at [7.5.5].

[247] FAO International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds).

[248] FAO International Plan of Action for the Conservation and Management of Sharks (IPOA-Sharks).

[249] FAO International Plan of Action for the Management of Fishing Capacity (IPOA – Capacity).

[250] International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA-IUU). There are a variety of other international agreements aimed at strengthening port state controls (but these seek to reduce IUU fishing on the high seas predominately / or include conservation measures aimed at high seas fishing activities). E.g. The FAO Compliance Agreement (which only applies to the high seas) and the 1989 Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (obliges members to prevent the use of long drift-nets by their nationals and to restrict access to ports by vessels which use drift-nets).

Annex I contains technical requirements for machinery spaces and operational requirements aimed at preventing or minimising discharges of oil from machinery and cargo spaces. It also establishes a prohibition on the discharge of oil or oily mixtures to sea from ship cargo areas unless strict conditions are met.[251] Further, oily waste must be retained for subsequent disposal at land-based facilities.

New construction standards were imposed by amendments to Annex I in 1993. The standards were developed to address concerns about the seaworthiness of aging single-hull oil tankers and a string of maritime incidents involving single-hull tankers.[252] As a result of the amendments, all new tankers constructed from 1996, and most existing vessels were required to be fitted with double-hulls.[253] The government has jurisdiction to undertake inspections of vessels and carry out seaworthiness assessments to ensure any single-hulled oil tankers do not posed unnecessary risk to the marine environment.

Annex II contains regulations for the control of pollution by bulk chemicals. It establishes a four-category system[254] with the most hazardous substances ("category X") subject to a complete prohibition on discharge, while less hazardous substances ("categories Y and Z") may be discharged in limited quantities in certain circumstances, and a final category ("other substances") of harmless substances that may be discharged when cleaning tanks or releasing bilge and ballast water. Chemical tankers must be certified in accordance with the design, construction, equipment and operations standards specified in Annex II.

Annex III contains regulations for the prevention of pollution by harmful substances in packaged form. It includes standards concerning packaging, marking, labelling, documentation, stowage, and quantity limits.

Annex V establishes regulations aimed at the prevention of pollution by garbage disposal at sea. It establishes a *prima facie* prohibition on the disposal of all garbage into the sea from ships and fixed or floating platforms. Garbage is defined broadly to include all kinds of food wastes, domestic wastes and operational wastes, all plastics, cargo residues, incinerator ashes, cooking oil, and animal carcasses generated during normal ship operations. The prohibition is strict in respect of plastics including synthetic rope, fishing nets, and plastic bags. However, the disposal of less harmful garbage types including food wastes, cargo residues, cleaning agents or additives, and animal carcasses may be permissible in certain circumstances if conditions are met (eg minimum offshore distances are complied with). Annex V requires that ships[255] carry a Garbage Management Plan; Garbage Record Book; and information placards.

In meeting its requirements under Annex I, II, III, and V, the government must ensure there are adequate reception facilities to receive pollutant residues and enable vessel operators to comply with the requirements of MARPOL. The government must ensure domestic flagged vessels comply with the design and technical requirements of each Annex. It is entitled to enforce the same requirements on foreign flagged vessels by conducting ship inspections, monitoring compliance with discharge standards, and punishing vessels that are found to have violated the standards.

Annex VI of MARPOL addresses shipping emissions. It contains regulations to prevent and minimise impacts on human health and environments in port communities; and reduce contributions to climate change and ozone layer depletion. It sets limits on air pollutants from ship emissions that are

[251] Annex I, Regulation 34.
[252] For example the European Union moved to enact a ban on single-hulled tankers following the sinking of an oil tanker "the Prestige" off Spain's coast in 2002.
[253] Refer Regulations listed under Chapter 4: Requirements for the cargo areas of oil tankers.
[254] Annex II, Regulation 6.
[255] The requirements apply to ships of certain sizes. [none of this applies to NZ inshore fishing vessels?]

harmful to humans (including sulphur oxide and nitrogen oxide); regulates greenhouse gases and ozone depleting substances; and sets out requirements for reception facilities, Port State Control, and Party States to enable their ships to demonstrate compliance with energy efficiency regulations when entering the ports of other Party States.[256] The regulations also provide for coastal state inspections of foreign flagged vessels to assess compliance with the regulations.

The requirements of MARPOL are addressed in domestic legislation by the Resource Management (Marine Pollution) Regulations 1998; the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and extensive regulations (maritime rules and marine protection rules) made under the Maritime Transport Act 1994.

In 2004, the IMO adopted the *International Convention for the Control and Management of Ships' Ballast Water and Sediments*, which entered into force on September 8 2017. The purpose of the Convention is "*to prevent, minimise and ultimately eliminate the risks to the environment, human health, property and resources arising from the transfer of harmful marine organisms and pathogens through the control and management of ships' ballast and sediment*". The Convention imposes mandatory requirements on international vessels including:

- implementation of a Ballast Water Management Plan;
- maintenance of a ballast record book;
- vessel certification ('International Ballast Water Management Certificate') or approval in accordance with IMO guidelines; and
- installation and use of ballast water treatment systems (to be installed by 2024 on ships carrying ballast water).

New Zealand acceded to the Convention on 13 June 2018, and amendments were made to the Maritime Transport Act 1994 and Marine Protection Rules Part 300 – Ballast Water Management to implement the Convention. Strict requirements apply in respect of mid-ocean exchange (as a transition measure only) and ballast treatment.[257] Vessel certification or approval documentation is issued under s 269 of the Maritime Transport Act 1994 and may be subject to conditions, suspensions or revocation on the grounds provided under the Act.

New Zealand had already given effect to some provisions of the Convention by issuing the *Import Health Standard for Ships' Ballast Water from all Countries* (IHS) under s 24A of the Biosecurity Act 1993. The IHS came into force on 17 May 2016. The regulations of the IHS apply to ballast loaded within the territorial waters of another country that is intended for discharge within New Zealand waters.[258] No ballast may be discharged into New Zealand waters without the prior approval of MPI,[259] and vessels wishing to discharge ballast under the IHS must submit a Vessel Ballast Water Declaration Form to MPI prior to arrival in New Zealand waters. To satisfy the requirements of the Standard, ships must:[260]

- demonstrate that ballast water has been exchanged mid ocean (preferably 200nm from the nearest land in water over 200m deep);
- demonstrate that the ballast is comprised of fresh water;
- treat ballast using a treatment system that has been approved by MPI; or

[256] Refer https://apo.org.au/sites/default/files/resource-files/2018-11/apo-nid203281.pdf
[257] Refer https://www.maritimenz.govt.nz/commercial/environment/operators/documents/Ballast-water-management-guidelines.pdf
[258] Refer to clause 1.1 of the HIS.
[259] With the exception of emergencies (safety reasons only).
[260] Refer to Clause 1.6 of the HIS – requirements for ballast water and sediments.

- discharge ballast water at an onshore treatment facility approved by MPI (to date no such facilities have been approved in New Zealand).

The IHS also prohibits the discharge of sediment to New Zealand waters from ballast tanks, anchor lockers, sea chests or other sources.

In 2011, the MEPC adopted *Guidelines for the Control and Management of Ships' Biofouling to Minimise the Transfer of Invasive Aquatic Species* for commercial vessels[261] and extended the application of the guidelines to recreational craft in 2012.[262] The guidelines recommend measures that vessel operators can take to minimise the risks of transporting biofouling, including maintenance of a Biofouling Management Plan and record book (detailing inspections, surveys, maintenance and repair). The guidelines are voluntary and do not import mandatory obligations on international vessels.

MPI was a strong advocate for the development of international biofouling management guidelines; pushing for their inclusion on the IMO Agenda and leading an IMO correspondence group on biofouling in 2008.[263] MPI undertook public consultation on options for implementing the Guidelines, which culminated in the development of a mandatory standard – *the Craft Risk Management Standard: Biofouling on Vessels Arriving to New Zealand*. The Standard was issued by MPI under s 24G of the Biosecurity Act 1993 and came into force on 15 November 2018.

The Standard imposes mandatory requirements on the operator of a vessel that seeks to enter New Zealand waters after voyaging through another country's territorial sea. A vessel must arrive in New Zealand with a 'clean hull' (in accordance with measures specified in the CRMS) or comply with an approved Craft Risk Management Plan.

Of note, the IMO adopted the International Convention on the Control of Harmful Anti-fouling Systems on Ships in 2001, and it entered into force in 2008. The Convention prohibits the use of harmful compounds (*organotins*) in anti-fouling paints used on ships and provides for the establishment of a technical group to review proposals for other antifouling substances to be prohibited or restricted.

Key agreements under the auspices of the IMO are summarised below.

Convention	Date of entry into force in Aotearoa New Zealand	General purpose(s)
Key IMO Conventions		
International Convention for the Safety of Life at Sea 1974, as amended (SOLAS)	23 May 1990	The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment, and operation of ships, compatible with their safety. Flag States are responsible for ensuring that ships under their flag comply with its requirements, and a number of certificates are prescribed in the Convention as proof that this has been done. Control provisions

[261] Resolution MEPC.207(62).
[262] Resolution MEPC.1/Circ.792.
[263] Refer to Georgiades et al. (2020) at page 4.

		also allow Contracting Governments to inspect ships of other Contracting States if there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention - known as port State control.
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 and the Seafarers' Training, Certification and Watchkeeping (STCW) Code. Manila Amendments (2010)	30 October 1986. 1 January 2013.	The 1978 STCW Convention was the first to establish basic requirements on training, certification and watchkeeping for seafarers on an international level. It prescribes minimum standards relating to training, certification and watchkeeping for seafarers which countries are obliged to meet or exceed. Parties are required to provide detailed information to IMO concerning administrative measures taken to ensure compliance with the Convention, education and training courses, certification procedures and other factors relevant to implementation. The information is reviewed by panels of competent persons, nominated by Parties to the STCW Convention, who report on their findings to the IMO Secretary-General, who, in turn, reports to the Maritime Safety Committee (MSC) on the Parties which fully comply. The Manila amendments to the STCW Convention and Code were aimed at updating the agreements.
Convention on the International Regulations for Preventing Collisions at Sea (COLREG), 1972, as amended.	15 July 1977.	To maintain a high level of safety at sea. Applies to all vessels upon the high seas and "*all waters connected therewith navigable by seagoing vessels*".[264] The regulations impose safety requirements on vessels and their operation (e.g., look-out; safe speeds; measures required to avoid collisions; and technical guidelines for lights / sirens).
Convention on Facilitation of International Maritime Traffic (FAL), 1965, as amended.	25 September 1973.	To facilitate maritime transport by simplifying and minimising the formalities, documentary requirements and procedures associated with the arrival, stay and departure of ships engaged on international voyages.

[264] International Regulations for Preventing Collisions at Sea, 1972, Part A, Rule 1(a).

International Convention on Load Lines, 1966, and 1988 Protocol.	5 May 1970 / 6 June 2002.	To provide technical guidance to ensure the watertight integrity of ship hulls below freeboard.
International Convention on Maritime Search and Rescue, 1979.	22 June 1985.	To develop an international search and rescue plan, and to enable coordination and cooperation between neighbouring search and rescue organisations. Parties are required to ensure that arrangements are made for the provision of adequate search and rescue services in their coastal waters.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), 1988 and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (and the 2005 Protocols).	8 September 1999 (with the 2005 Protocols entering into force in 2018).	The main purpose of the Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it. The scope of offences was expanded by the 2005 Protocol. The Convention requires Contracting Governments to either extradite or prosecute alleged offenders.
International Convention for Safe Containers (CSC), 1972.	6 September 1977.	To maintain a high level of safety of human life in the transport and handling of containers by providing generally acceptable test procedures and related strength requirements; and to facilitate the international transport of containers by providing uniform international safety regulations, equally applicable to all modes of surface transport. In this way, proliferation of divergent national safety regulations can be avoided. The requirements of the Convention apply to the majority of freight containers used internationally.
International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995 (STCW-F).	4 December 2017.	This Convention aims to ensure that all seagoing fishing vessel personnel are qualified and fit for their duties in relation to the safety of life and property at sea and the protection of the marine environment.
International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (INTERVENTION).	6 May 1975.	The Convention affirms the right of a coastal State to take measures on the high seas as necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following a maritime casualty (which the Convention defines as including a collision, stranding or other incident of navigation, or other occurrence resulting in material

		damage or imminent threat to a ship or cargo). The Convention applies to all seagoing vessels except warships or other vessels owned or operated by a State and used on Government non-commercial service.
International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990.	2 October 1999.	Parties to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) are required to establish measures for dealing with pollution incidents, either nationally or in co-operation with other countries. Requirements include: • ships are required to carry a shipboard oil pollution emergency plan; • operators of offshore units under the jurisdiction of Parties are required to have oil pollution emergency plans or similar arrangements which must be co-ordinated with national systems for responding promptly and effectively to oil pollution incidents; • ships are required to report incidents of pollution to coastal authorities and the convention details the actions that are then to be taken; and • Parties are required to provide assistance to others in the event of a pollution emergency. The Convention provides for the IMO to play an important co-ordinating role.
Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND).	25 June 1999.	Established the 1992 International Oil Pollution Compensation Fund (IOPC) to provide state parties and persons with compensation for oil pollution damage. It applies in the territorial sea and EEZ of a Contracting State. It ensures compensation is available for damage caused by pollution from oil cargoes carried in bulk at sea.
International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.	4 July 2014.	Establishes a liability regime for damage from bunker oil spills. The regime consists of strict but limited liability for ship owners and requirements for compulsory insurance to cover liability.

The London Convention and marine dumping

The *London Convention*[265] and the *London Protocol*[266] establish a framework for regulating the dumping of waste at sea. Aotearoa New Zealand is a party to both instruments, though the Protocol essentially supersedes the Convention.

The government signed the *London Protocol* in 1997 and it entered into force in 2006. In contrast to the London Convention, the Protocol establishes a *prima facie* prohibition on the dumping of waste at sea;[267] and prohibits the deliberate disposal of waste by incineration at sea.[268] The Protocol establishes a framework that enables permits to be granted by the government to enable the dumping of dredged material; sewage sludge; fish waste; organic material of natural origin; specified bulky metal items; and carbon dioxide for sub-seabed sequestration purposes.[269] A permit may only be granted in accordance with the assessment framework established under Annex 2 of the Protocol. The government must consider:

- opportunities for waste prevention at the source and the inclusion of waste reduction and prevention requirements in any permit issued;
- opportunities for waste management options including re-use, off-site recycling, the destruction or treatment of hazardous constituents, and alternative disposal mechanisms (i.e. to land, air or water);
- the characterisation of waste based on various chemical, physical and biological properties;
- dump-site selection;
- an assessment of the potential effects on human health, living resources, amenities, and other legitimate uses of the sea (for each potential disposal option); and
- compliance monitoring and permit conditions.

A permit to dump wastes must be refused if it is determined that appropriate opportunities exist to re-use, recycle or treat the waste without undue risks to human health or the environment or disproportionate costs.[270] Further, if the comparative assessment of different options demonstrates that the dumping option is less preferable, a permit should not be granted.[271] The responsibility for issuing permits for dumping lies with the state party in which the waste is loaded, except where the loading occurs in a state which is not a party, in which case the flag state is to issue permits.[272]

In 2008, parties to the London Convention and London Protocol adopted a Resolution in response to concerns over the potential adverse effects of large-scale ocean fertilisation on marine biodiversity. The Resolution defines ocean fertilisation as "*any activity undertaken by humans with the principal intention of stimulating primary productivity by the oceans*".[273] Ocean fertilisation has been promoted as a possible solution to the problem of increasing atmospheric carbon dioxide levels. It involves the dumping of iron compounds in the water column to stimulate phytoplankton growth in the surface layer of the oceans. Phytoplankton produces organic matter that absorbs carbon dioxide from the water column, establishing a gradient between the air and sea that promotes uptake of atmospheric carbon dioxide by the ocean. The Resolution confirms that state parties agree that ocean fertilisation activities fall within the scope of the London Convention and Protocol.[274] Further,

[265] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Convention).
[266] 1996 Protocol to the convention on the prevention of marine pollution by dumping of wastes and other matter, 1972.
[267] London Protocol, Article 4.1.1.
[268] London Protocol, Article 5.
[269] London Protocol, Annex 1.
[270] London Protocol, Annex 2.6.
[271] London Protocol, Annex 2.15.
[272] London Protocol, Article 9(2).
[273] Resolution LC-LP.1 (2008) on the Regulation of Ocean Fertilization at [2].
[274] Resolution LC-LP.1 (2008) on the Regulation of Ocean Fertilization at [1].

the Resolution agrees that, given the present state of knowledge, ocean fertilisation should not be allowed other than for legitimate scientific research purposes.[275]

The Bonn Convention and migratory species

The 1979 Convention on the Conservation of Migratory Species of Wild Animals (widely referred to as the Bonn Convention) provides a framework for enhancing the conservation status of migratory species through the co-operative efforts of "range states" of those species. Under the Bonn Convention, the term "range states" is used to describe nations that support or are visited by migratory species, as well as nations whose vessels interact with such species on the high seas.

The Bonn Convention includes two appendices. Appendix I contains a list of critically endangered migratory species, while Appendix II contains a list of migratory species that have an unfavourable conservation status, and which require or might significantly benefit from international agreements for their conservation and management. A species can be listed on both appendices.

The Bonn Convention obliges state parties to establish a *prima facie* prohibition on the taking of Appendix I species, with limited exceptions relating to scientific purposes, enhancement of the survival of the species, and traditional subsistence uses.[276] The provisions of the Convention otherwise encourage (as opposed to requiring) range states to take various actions to conserve the species listed under Appendix I.[277]

States parties that are a range state for migratory species listed under Appendix II must seek to establish agreements to protect populations of such species that enter areas within their jurisdiction.[278] Seven agreements have been developed under the framework established by the Bonn Convention, but Aotearoa New Zealand is a range state for only one of the subject species. Aotearoa New Zealand became a party to the Bonn Convention in 2000 and subsequently ratified the Agreement on the Conservation of Albatrosses and Petrels (ACAP) in 2001. ACAP entered into force in 2004.

ACAP provides a mechanism through which states can coordinate efforts to address significant declines in the world's albatross and petrel populations.[279] One of the most significant threats facing albatrosses and petrels is mortality resulting from interactions with fishing gear during long-line and trawl operations. The birds also face various land-based threats including predation by non-indigenous species at breeding sites; diseases; habitat loss; and human disturbance (including tourism and impacts from plastic pollution).[280] ACAP provides a framework for the development and implementation of effective conservation measures for threatened seabirds, both on land and at sea.

The primary objective of Agreement on the Conservation of Albatrosses and Petrels is to achieve and maintain a favourable conservation status for albatrosses and petrels.[281] It applies to 22 species of

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[275] Resolution, at [8].
[276] CMS, Art III(5).
[277] Refer to CMS, Art III(4) "*shall endeavour*" means state parties must attempt to conserve, but not conserve the species. Further, refer to Art III(6) "*the Conference of the Parties may recommend to the Parties that are Range States of a migratory species listed in Appendix I that they take further measures considered appropriate to benefit the species*".
[278] CMS, Art IV.
[279] For a review of the history and development of ACAP, refer Cooper, J., Baker, G.B., Double, M.C., Gales, R., Papworth, W, Tasker, M.L. & Waugh, S.M. 2006. The Agreement on the Conservation of Albatrosses and Petrels: rationale, history, progress and the way forward. *Marine Ornithology* 34: 1-5. Available at: http://www.marineornithology.org/PDF/34_1/34_1_1-5.pdf
[280] Refer: https://www.acap.aq/resources/about-acap
[281] ACAP, Art II(1).

albatrosses and 9 species of petrels.[282] Pursuant to Article III of ACAP, parties must comply with general conservation measures to:

a) conserve and, where feasible and appropriate, restore those habitats which are of importance to albatrosses and petrels;
b) eliminate or control non-native species detrimental to albatrosses and petrels;
c) develop and implement measures to prevent, remove, minimize or mitigate the adverse effects of activities that may influence the conservation status of albatrosses and petrels;
d) initiate or support research into the effective conservation of albatrosses and petrels;
e) ensure the existence and appropriateness of training for, inter alia, the implementation of conservation measures;
f) develop and maintain programmes to raise awareness and understanding of albatross and petrel conservation issues;
g) exchange information and results from albatross and petrel, and other relevant, conservation programmes; and
h) support the implementation of the actions elaborated in the FAO International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries which complement the objectives of this Agreement.

In accordance with ACAP, parties are required to implement a *prima facie* prohibition on the deliberate taking of, or harmful interference with, albatrosses and petrels, their eggs, or their breeding sites.[283] Parties may only grant an exemption for specified purposes (eg scientific or subsistence harvest) if "*there is no other satisfactory course of action*".[284]

An Action Plan for the achievement and maintenance of a favourable conservation status for albatrosses and petrels is included in Annex 2 of ACAP (Action Plan). The Action Plan describes conservation measures that are required to be implemented by Parties. The aim of the measures is to reduce fishery-induced mortality; eradicate non-indigenous predators from albatross and petrel breeding sites; reduce human disturbance, habitat loss and marine pollution.[285] The measures are somewhat aspirational, in that they require parties to "*take all feasible action*" or require action "*where feasible*". This language provides an opportunity for parties to argue that the measures are not feasible in certain circumstances. In accordance with the Action Plan, parties to ACAP are required to, *inter alia*:

- prohibit the use of, and trade in, albatrosses and petrels or their eggs;[286]
- adopt a precautionary approach when re-establishing albatrosses and petrels into part of their traditional breeding range;[287]
- take all feasible action to prevent the introduction of non-indigenous species, or to adopt measures for the control and eradication of non-indigenous species, that are or may be detrimental to populations of albatrosses or petrels;[288]

[282] The species within the scope of ACAP are listed in Annex 1.
[283] Art III(2).
[284] ACAP, Art III(3).
[285] Cooper, J., Baker, G.B., Double, M.C., Gales, R., Papworth, W, Tasker, M.L. & Waugh, S.M. 2006. The Agreement on the Conservation of Albatrosses and Petrels: rationale, history, progress and the way forward. *Marine Ornithology* 34: 1-5. Available at: http://www.marineornithology.org/PDF/34_1/34_1_1-5.pdf
[286] ACAP, Annex 2, at 1.1.1.
[287] ACAP, Annex 2, at 1.3.
[288] ACAP, Annex 2, at 1.4.

- protect the breeding sites of albatrosses and petrels (where feasible);[289]
- endeavour to manage marine habitats to ensure the sustainability of marine living resources that are an important food source for albatrosses and petrels; and avoid pollution that may harm albatrosses and petrels;[290]
- adopt special measures to conserve marine areas that they consider critical to the survival or restoration of albatrosses and petrels with an unfavourable conservation status;[291]
- assess the potential impact of policies, plans, programmes, and projects which they consider likely to affect the conservation of albatrosses and petrels before any decision is made in relation to their adoption;[292]
- take appropriate measures to reduce or eliminate the mortality of albatrosses and petrels resulting incidentally from fishing activities;[293] and to minimise the discharge of pollutants from land-based sources and vessels, which may have an adverse effect on albatrosses and petrels either on land or at sea;[294] and
- seek to minimise disturbance of albatrosses and petrels in both marine and terrestrial habitats, and to establish and maintain some areas that are kept free from disturbance.[295]

The Meeting of the Parties (MoP) is the decision-making body of ACAP.[296] An Advisory Committee provides expert advice to the MoP and makes recommendations concerning the Action Plan, and implementation of the Agreement.[297] The Advisory Committee is supported by three working groups: the population and conservation status working group, which addresses land based threats and the conservation status of Annex 1 species; the seabird bycatch working group addresses at-sea threats; and the taxonomy working group.[298]

The seabird bycatch working group has been working with Regional Fishery Management Organisations (RFMOs) to encourage the adoption of best-practice mitigation measures (a combination of night setting, line weighting, and deployment of bird-scaring lines) to reduce seabird mortality in longline fisheries on the high seas. The working group has also been working to reduce seabird mortality in trawl and other fisheries where seabird bycatch occurs. This work is proposed to be extended to include purse seine, artisanal and small-scale fisheries.

The recent Advisory Group Report to the sixth Meeting of the Parties recognised that effective mitigation measures have been identified for reducing bycatch mortalities associated with longline and trawl fisheries. To date, implementation and monitoring activities have been constrained by the lack of fisheries data available.[299] In 2019, ACAP's Advisory Committee declared a conservation crisis in respect of its 31 listed species, with thousands of albatrosses, petrels and shearwaters dying as bycatch.[300] The future focus of the seabird bycatch working group is to ensure efforts are made to implement the mitigation measures effectively.

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[289] "For all such protected areas, the Parties shall endeavour to develop and implement management plans and take other actions which maintain and enhance the conservation status of the species, including inter alia the prevention of habitat degradation, the reduction of disturbance to habitats and the minimisation or elimination of damage by introduced non-native animals, plants, hybrids or disease-causing organisms." Refer to ACAP, Annex 2, at 2.2.1.
[290] ACAP, Annex 2, Art 2.3.
[291] ACAP, Annex 2, Art 2.3.4.
[292] ACAP, Annex 2, Art 3.
[293] ACAP, Annex 2, Art 3.2.
[294] ACAP, Annex 2, Art 3.3.
[295] ACAP, Annex 2, Art 3.4.
[296] Pursuant to Article IV of ACAP.
[297] Refer to ACAP, Art IX.
[298] The Working Groups address: seabird bycatch; population and conservation status; and taxonomy. Refer to: https://www.acap.aq/working-groups
[299] Refer https://www.acap.aq/resources/about-acap
[300] https://www.acap.aq/latest-news/3324-acap-s-advisory-committee-declares-a-conservation-crisis-for-albatrosses-and-petrels

Trade in endangered species

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regulates and provides for the monitoring of international trade in species and specimens of terrestrial and aquatic animals and plants. CITES aims to protect species at risk of overexploitation from trade by establishing a certification and permit system for the import and export of such species. It categorises species into one of three groups (listed in appendices to the convention) with differing levels of protection afforded depending on their conservation status and trade demands. Appendix I includes species threatened with extinction in which trade is strictly restricted and authorised only for scientific or educational purposes. Appendix II includes species that are at risk of becoming threatened by extinction in the future if trade is not regulated appropriately. Species listed on Appendix II may be traded subject to compliance with import and export requirements. Appendix III lists species and specimens that are protected by domestic legislation. The aim of appendix III is to ensure a coordinated approach is adopted by parties to the convention to manage trade in these species.

Roughly 5,950 species of animals and 32,800 species of plants are protected by CITES, including a number of marine species. Appendix I includes *inter alia* all species of beaked whales, most species of "*great whales*",[301] marine turtles, fur seals, several dolphin and porpoise species, and all sawfish species.[302] In addition, Appendix II lists the remainder of the world's dolphin species, several shark species (including the great white shark, oceanic white tip, porbeagle shark, and hammerhead shark), and stony corals.[303]

CITES regulations apply to the harvest of listed marine species from the Exclusive Economic Zone if species are exported to international markets for sale.[304] They also apply to listed marine species that are taken from the high seas. If a species is landed by a vessel in the high seas and then transported to that vessel's flag state it is referred to as "*an introduction from the sea*" and specific certification requirements apply.[305] If a species is transported to another state from the high seas, CITES import, export, or re-export regulations will apply. Required permits are issued by a state party's designated Management Authority on the advice of the designated Scientific Authority.[306] All parties are required to regulate trade in listed species and to take appropriate enforcement measures, including the imposition of penalties and/or confiscation of subject specimens.[307]

Two conditions must be satisfied before an export or introduction from the sea permit can be issued by a designated Management Authority for a species or specimen listed on Appendix I or II of CITES. First, a state's Scientific Authority must confirm that the proposed export or landing will not be

[301] Being those falling under the responsibility of the International Whaling Commission and including: blue, fin, sei, Bryde's, minke, right, pygmy right, humpback, bowhead, gray and sperm whales.
[302] CITES, Appendix I. This list is not comprehensive.
[303] CITES, Appendix II. Note this list is not comprehensive and additional marine species are protected by Appendix II.
[304] Note that a state which is a party to both CITES and a bilateral fisheries ("Article XIV") agreement is exempt from trade obligations under Article IV of CITES for specimens of an Appendix II marine species that are taken (a) by the registered ships of that State and (b) in accordance with the 'Article XIV agreement'. Refer to the Fifteenth meeting of the Conference of the Parties (CoP15) Inf. 45 relating to the interpretation and implementation of Article XIV, paragraphs 4 and 5 of CITES. Available at: https://cites.org/sites/default/files/eng/cop/15/inf/E15i-45.pdf
[305] Introduction from the sea is one of the four types of trade regulated under CITES (with the others being import, export, and re-export). Introduction from the sea is defined in Article 1 of the Convention as "the transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State". Introduction from the sea of specimens of species is included in Appendix I and II is regulated by the Convention, but not Appendix III listed species. The Conference of the Parties has adopted additional guidance regarding the practical implementation of these provisions (refer to Resolution Conf. 14.6; Rev. CoP16 '*Introduction from the* sea'). Available at: https://cites.org/eng/res/14/14-06R16.php
[306] CITES, Art IX.
[307] CITES, Art VIII.

detrimental to the survival of the subject species ('non-detriment finding').[308] Second, the Management Authority must certify that the subject species or specimen was not obtained in contravention of national laws ('legal acquisition finding).[309] The regulatory framework established for Appendix I and II species therefore provides an opportunity for states to take enforcement action in respect of species caught by illegal, unregulated or unreported fisheries activities.

There has been a trend toward the increased protection of commercially exploited marine species in CITES Appendices I and II.[310] At CoP16 and CoP17 held in 2013 and 2016 respectively, several shark and ray species including the oceanic whitetip shark, thresher shark, three hammerhead species, and all devil ray and manta ray species were included in Appendix II.[311] At the most recent Conference of the Parties in 2019 (CoP18) a further 18 shark species were added to Appendix II, including shortfin and longfin mako species which frequent Aotearoa New Zealand waters.[312] Although the majority of internationally traded fish species and specimens are not covered by CITES, the listing of certain commercially relevant species in Appendix II makes it necessary for CITES agencies and fisheries sectors to coordinate management efforts. To this end, agreements have been established between the Food and Agriculture Organization of the United Nations (FAO) and the CITES Secretariat to facilitate cooperation in respect of the management of fisheries;[313] and the FAO recently issued guidelines for the implementation of CITES through national fisheries legal frameworks.[314]

In light of the evolving lists of species contained in the CITES appendices, and growing pressures facing fish stocks (either by direct or incidental capture), the Preface to the Guidelines identifies a need for States to carry out legal analysis to ensure national legal frameworks providing for the implementation of CITES complement national fisheries legal frameworks.[315]

In Aotearoa New Zealand, the Department of Conservation (DOC) is responsible for administering and enforcing CITES through the Trade in Endangered Species Act 1989 (TIES). TIES establishes a *prima facie* prohibition on the import or export of endangered, threatened, and exploited species without an appropriate permit or certificate.[316] The requirements for permits to authorise trade in CITES listed species are set out in Part 2 of TIES. Additional requirements may apply to the import or export of specimens containing parts of birds or marine mammals under the Wildlife Act 1953 and Marine Mammals Protection Act 1978, respectively.

The Convention on Biological Diversity

The 1992 Convention on Biological Diversity (CBD) is the main international instrument for addressing broader biodiversity issues. Unlike a lot of fishing and shipping frameworks, this is a substantive piece of international law that is not just about addressing states' direct impacts on each other (eg common fish stocks and pollution from other counties' ships). Instead, it sees biodiversity within a states's sovereign territory as being of international concern and as something that requires international oversight to prevent states from causing environmental degradation in their own

[308] This requirement is reflected in Article III(2)(a) for specimens of species listed in Appendix I; and Article IV(2)(a) for specimens of species listed in Appendix II.
[309] This requirement is reflected in Article III(2)(b) for specimens of species listed in Appendix I; and Article IV(2)(b) for specimens of species listed in Appendix II.
[310] Nakamura, J.N. and Kuemlangan, B. Implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) through national fisheries legal frameworks: a study and a guide. Legal Guide No. 4. Rome, FAO. Available at: http://www.fao.org/3/cb1906en/cb1906en.pdf at page 11.
[311] Ibid.
[312] Ibid.
[313] For example, in 2006 a formal Memorandum of Understanding was signed by the FAO and CITES Secretariat to facilitate coordination of efforts in managing trade in listed CITES fish species.
[314] Nakamura, J.N. and Kuemlangan, B. Above n 57.
[315] Nakamura, J.N. and Kuemlangan, B. Above n 57, at page v.
[316] TIES, section 9.

territory. It is not marine focused, but includes marine species. New Zealand ratified the convention on 12 June 1992, and it entered into force on 29 December 1993.

The CBD defines biological diversity (biodiversity) as "*variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems*".

The CBD urges states to take action to address the causes of significant biodiversity loss; and to minimise the threat of future losses.[317] It contains three core objectives: (1) to conserve biodiversity; (2) to provide for the sustainable use of its components; and (3) to provide for the fair and equitable sharing of the benefits arising from the utilisation of genetic resources and relevant technologies.[318]

The provisions of the CBD apply to biodiversity located within a state's national jurisdiction and to any processes and activities carried out under a state's jurisdiction or control, including activities that are located beyond the limits of national jurisdiction.[319] The CBD affirms that a state has sovereign rights over its resources subject to the duty to cause no environmental harm to areas beyond national jurisdiction.

As a state party to the CBD, the New Zealand government is required to:

- Develop national strategies, plans or programmes that contain measures for the conservation and sustainable use of biodiversity.[320]
- Identify and monitor important components of biodiversity and the key threats facing biodiversity.[321]
- Establish a system of protected areas or areas where special measures are needed to conserve biodiversity.[322]
- Regulate or manage biological resources important for the conservation of biodiversity, with a view to ensuring their conservation and sustainable use.[323]
- Promote the protection of ecosystems, natural habitats, and the maintenance of viable populations of species in natural surroundings.[324]
- Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species.[325]
- Regulate, manage, or control the risks associated with the use and release of living modified organisms from biotechnology.[326]
- Prevent the introduction of, control or eradicate alien species that pose a threat to ecosystems, habitats, or species.[327]
- Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biodiversity and the sustainable use of its components.[328]

[317] CBD, preamble.
[318] CBD, Art 1.
[319] CBD, Art 4.
[320] CBD, Art 6.
[321] CBD, Art 7.
[322] CBD, Art 8(a).
[323] CBD, Art 8(c).
[324] CBD, Art 8(d).
[325] CBD, Art 8(f).
[326] CBD, Art 8(g).
[327] CBD, Art 8(h).
[328] CBD, Art 8(i).

- Respect, preserve and maintain indigenous and local community knowledge and promote the application to innovations and practices.[329]
- Develop or maintain necessary legislation and / or regulatory provisions for the protection of threatened species and populations.[330]
- Where a significant adverse effect on biodiversity has been determined, regulate, or manage the relevant processes and categories of activities.[331]

Specific obligations apply in respect of the sustainable use of biological resources. Under the CBD, the government is required to:

- integrate consideration of the conservation and sustainable use of biological resources into national decision-making frameworks;[332]
- adopt measures to avoid or minimise adverse impacts on biodiversity;[333]
- protect and encourage customary use of biological resources in accordance with traditional cultural practices;[334] and
- support local populations to develop and implement remedial action in degraded areas.[335]

The CBD also directs state parties to establish procedures for environmental impact assessments where projects are likely to have significant adverse effects on biodiversity, with a view to avoiding or minimizing such effects and enabling public participation.[336]

The CBD is governed by a Conference of the Parties (COP) which meets every two years.[337] The COP is responsible for advancing implementation of the CBD and establishing subsidiary bodies to provide scientific and technical advice, as necessary.[338] The Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) reports to the COP on an annual basis;[339] and is responsible for making recommendations to the COP on technical aspects of the Convention.

At the second COP meeting in 1995, member parties adopted the Jakarta Mandate on Marine and Coastal Biodiversity (Jakarta Mandate).[340] The Jakarta Mandate affirmed global consensus on the importance of marine and coastal biodiversity and provided momentum for the subsequent adoption of a multi-year programme of work for the conservation and sustainable use of marine and coastal biodiversity.[341] The work programme comprises five key themes:

- Integrated Marine and Coastal Area Management (IMCAM);
- Sustainable use of marine and coastal living resources;
- Marine and coastal protected areas;

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[329] CBD, Art 8(j).
[330] CBD, Art 8(k).
[331] CBD, Art 8(l).
[332] CBD, Art 10(a).
[333] CBD, Art 10(b).
[334] CBD, Art 10(c).
[335] CBD, Art 10(d).
[336] CBD, Art 14(1)(a).
[337] The CoP is established by Article 23 of the CBD.
[338] To date, there have been 14 ordinary meetings and one extraordinary meeting (to adopt the Biosafety Protocol). The next meeting is scheduled to occur in Kunming, China in October 2021.
[339] CBD, Art 25.
[340] Second Meeting of the Conference to the Parties to the Convention on Biological Diversity, Decision II/10, available at: https://www.cbd.int/decision/cop/?id=7083
[341] The programme of work was adopted in 1998 at the fourth meeting of the COP (decision IV/5); and further priorities were adopted in 2000 by the fifth meeting of the COP to incorporate priorities relating to coral reefs and Small Island Developing States (decision V/3). The programme of work on marine and coastal biological diversity is annexed to decision IV/5.

- Mariculture[342]; and
- Non-indigenous marine species.

The aim of the work programme is to assist with the implementation of the Jakarta Mandate at national, regional and global levels. It identifies key operational objectives and priority activities within the five elements.[343] It is underpinned by six "basic principles" - the ecosystem approach; the precautionary approach; the importance of science and expertise; local and indigenous communities, and multiple levels of implementation (local, regional and global).[344] The work programme directs member states to promote the ecosystem approach, particularly to ensure marine protected areas are integrated into wider strategies for preventing adverse effects to marine and coastal ecosystems; and to adopt the precautionary approach to guide all activities affecting marine and coastal biological diversity.

The COP has encouraged members states to use IMCAM to address the impact of human activities on marine and coastal biological diversity and to promote conservation and sustainable use of these resources.[345] In this regard, member states are recommended to establish and/or strengthen institutions, administrations, and legislation for the development of integrated management of marine and coastal ecosystems. The COP and SBSTTA have repeatedly emphasised that the ecosystem approach should be adopted as the guiding principle for achieving the conservation and sustainable use of marine and coastal living resources.[346]

The COP has described marine and coastal protected areas as "an essential tool" for the conservation and sustainable use of marine biodiversity; and repeatedly urged member states to make efforts to adopt, as a matter of high priority, a national framework of marine and coastal protected areas.[347] In 2000, the COP urged member states to address threats arising from the land (eg water quality and sedimentation) to maximise the effectiveness of marine and coastal protected areas. [348] The COP has also adopted scientific criteria to assist member states with identification of ecologically or biologically significant marine areas in need of protection.[349] More recently, the impacts of ocean acidification on marine biodiversity and habitats, and the impact of ocean noise on marine protected areas were included for consideration under the work programme.[350]

In 2010, the COP adopted the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets.[351] Several of the targets seek to protect marine and coastal biodiversity, including:

- **Target 6:** "*By 2020 all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably, legally and applying ecosystem based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits*."

[342] This is the term used throughout the CBD relating to coastal and marine biodiversity. It is reproduced here for consistency, though it is read to mean aquaculture more broadly in the Aotearoa New Zealand context.
[343] COP4, Decision IV/5, Annex (Programme of Work on Marine and Coastal Biological Diversity).
[344] Ibid.
[345] COP2, Decision II/10 (the Jakarta Mandate), at 2 and 3.
[346] Refer in particular, COP5, Decision V/6 where COP adopted a decision calling upon parties, other governments and international organisations to apply, as appropriate, the ecosystem approach; and to develop practical expressions of the approach for national policies and legislation.
[347] COP7, Decision VII/5, at [20] to [28].
[348] Ibid.
[349] COP9, Decision IX/20, at [14].
[350] COP10, Decision X/13. These issues were identified as "existing" rather than "new and emerging" and the SBSTTA was asked to consider these issues under the existing work programme.
[351] COP10, Decision X/2, Annex "Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets".

- **Target 7:** "*By 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity*."

- **Target 8:** "*By 2020, pollution, including from excess nutrients, has been brought to levels that are not detrimental to ecosystem function and biodiversity."*

- **Target 9:** "*By 2020, invasive alien species and pathways are identified and prioritized, priority species are controlled or eradicated, and measures are in place to manage pathways to prevent their introduction and establishment*."

- **Target 10:** "*By 2015, the multiple anthropogenic pressures on coral reefs, and other vulnerable ecosystems impacted by climate change or ocean acidification are minimized, so as to maintain their integrity and functioning*."

- **Target 11:** "*By 2020, at least 17 per cent of terrestrial and inland water areas, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes*."

In 2010, when the Aichi Targets were established, 13% of terrestrial areas and 5% of coastal areas were subject to some form of regulatory protection.[352] The requirement to conserve at least 10% of marine environments by 2020 was established to reduce the imbalance between protection of important terrestrial and marine ecosystems. The target of 10% marine protection was also adopted by the UN as a Sustainable Development Goal for the oceans.[353] There are concerns that the target lacks a scientific basis; and is inadequate for protecting marine and coastal biodiversity. [354]

In 2014, the marine Cross-cutting Theme at the IUCN World Parks Congress adopted a recommendation to "*urgently increase the ocean area that is effectively and equitably managed in ecologically representative and well-connected systems of MPAs or other effective conservation measures".*[355] A target of 30% of each marine habitat was recommended for marine protection purposes.[356] The recommendation was endorsed by the IUCN World Conservation Congress in 2016, with the Congress issuing a resolution encouraging governments to designate and implement at least 30% of their national waters as MPAs and other effective area-based conservation measures by 2030.[357] In 2021, the High Ambition Coalition for Nature and People, an intergovernmental group of more than 57 countries was established to advance a global deal for nature and people at the COP to the CBD to be held at the end of 2021, with the central goal of protecting at least 30% of the world's

[352] Ibid.
[353] UN Sustainable Development Goal 14: Conserve and sustainable use the oceans, seas and marine resources.
[354] Refer to the review by O'Leary, B.C., Winther-Janson, M., Bainbridge, J.M., Aitken, J., Hawkins, J.P., Roberts, C.M. (2016) Effective Coverage Targets for Ocean Protection. Conservation Letters. https://doi.org/10.1111/conl.12247 Available at: https://conbio.onlinelibrary.wiley.com/doi/10.1111/conl.12247
[355] World Parks Congress. (2014). A strategy of innovative approaches and recommendations to enhance implementation of marine conservation in the next decade. Available at: http://worldparkscongress.org/downloads/approaches/ThemeM.pdf.
[356] Ibid.
[357] IUCN (2016). WCC-2016-Res-050-EN Increasing marine protected area coverage for effective marine biodiversity conservation https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_050_EN.pdf

land and ocean by 2030 ('the 30x30 target').[358] The target has gained widespread support and is included in the zero draft for CBD COP 15, to be held in October 2021.[359]

The draft Post-2020 Global Biodiversity Framework sets action targets for 2030, including:

- **Target 1**. "*Retain and restore freshwater, marine and terrestrial ecosystems, increasing by at least [50%] the land and sea area under comprehensive spatial planning addressing land/sea use change, achieving by 2030 a net increase in area, connectivity and integrity and retaining existing intact areas and wilderness*".

- **Target 2.** "*Protect sites of particular importance for biodiversity through protected areas and other effective area-based conservation measures, by 2030 covering at least [60%] of such sites and at least [30%] of land and sea areas with at least [10%] under strict protection.*"

- **Target 3.** "*Control all pathways for the introduction of invasive alien species, achieving by 2030 a [50%] reduction in the rate of new introductions, and eradicate or control invasive alien species to eliminate or reduce their impacts by 2030 in at least [50%] of priority sites.*"

- **Target 4.** *Reduce by 2030 pollution from excess nutrients, biocides, plastic waste and other sources by at least [50%].*

- **Target 5.** *Ensure by 2030 that the harvesting, trade and use of wild species, is legal and at sustainable levels.*

In 2005, Aotearoa New Zealand ratified the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, which aims to address the potential risk to biodiversity from the import and export of living modified organisms. A main objective of the protocol is to provide information to importing countries to assist their decision on whether or not to accept such organisms. To help achieve this, an internationally centralised web-based biosafety clearing-house mechanism has been established. Parties to the Cartagena Protocol, including Aotearoa New Zealand, have negotiated a Supplementary Protocol[360] that sets out rules and procedures on liability and redress for damage resulting from the import and export of genetically modified organisms. The Supplementary Protocol entered into force in 2018 and Aotearoa New Zealand has not yet signed or ratified the agreement, but is working towards that goal.

The RAMSAR Convention

The Convention on Wetlands of International Importance especially as Waterfowl Habitat (known as the Ramsar Convention) aims to halt the progressive loss of wetlands and their associated flora and fauna by promoting the international coordination of conservation actions.[361] The Ramsar

[358] The High Ambition Coalition for Nature and People (HAC) was launched by France and Costa Rica at the One Planet Summit on Biodiversity in 2021. One of the key aims of the HAC is to advocate for the adoption of a new target for the protection of 30% of terrestrial and marine spaces by 2030 at the Conference of the Parties to the CBD to be held in 2021. Refer https://www.oneplanetsummit.fr/en/news-17#node-anchor-157 and https://www.hacfornatureandpeople.org/

[359] Second meeting of the Open-ended working group on the post-2020 Global Biodiversity Framework (February 2020) *Zero Draft of the Post-2020 Global Biodiversity Framework* Available at: https://www.cbd.int/doc/c/efb0/1f84/a892b98d2982a829962b6371/wg2020-02-03-en.pdf

[360] The Nagoya / Kuala Lumpur Supplementary Protocol on Liability and Redress Damage to the Cartagena Protocol on Biosafety.

[361] Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971, Preamble.

Convention defines wetlands as areas of marsh, fen, peatland, or water, and includes shallow marine areas such as estuaries, deltas and tidal flats.[362]

Aotearoa New Zealand ratified the Ramsar Convention in 1976. Contracting parties are required to designate suitable wetlands for inclusion on the List of Wetlands of International Importance (the List);[363] promote the significance of listed wetlands; monitor and advise of any changes in their ecological character; and promote the "*wise use*" of wetlands by formulating and implementing national policy on wetland conservation management.[364] The government has advocated for the inclusion of seven wetlands on the Ramsar list,[365] and these sites are managed by the Department of Conservation.

The Whaling Convention

The International Convention for the Regulation of Whaling (ICRW) entered into force in 1946 and was amended by Protocol in 1956. The ICRW (with Protocol) was ratified by Aotearoa New Zealand in 1976. The ICRW creates an international framework for the regulation of whaling and the conservation of global whale stocks.[366] It establishes an International Whaling Commission (IWC) with one voting member from each of the signatories to the Convention;[367] and accords the IWC with powers to adopt binding regulations for the conservation and utilisation of whales.[368] The regulations are included in the Schedule to the ICRW and specify:[369]

- protected and unprotected species;
- whaling seasons, including temporal and geographical limits;
- the locations of designated whale sanctuaries;
- permissible capture methods;
- classification of whale stocks;
- maximum catch limits (which are set to zero for commercial whaling)[370];
- size limits and methods of measurement; and
- information and data reporting requirements.

The regulations can be amended by the IWC in accordance with Article V of the ICRW.[371] Amendments are subject to a formal objection procedure which provides signatories with an opportunity to withdraw from a specific amendment prior to it taking effect.[372] Parties are required to enforce the regulations in relation to persons or vessels under their jurisdiction.[373]

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[362] RAMSAR, Art 1(1).
[363] RAMSAR, Art 2(1).
[364] RAMSAR, Art 3.
[365] The listed sites are: Awarua Waituna Lagoon, Farewell Spit, Kopuatai, Manawatu Estuary, Wairarapa-Moana, and Whangamarino.
[366] 1946 International Convention for the Regulation of Whaling and 1956 Protocol to the International Convention for the Regulation of Whaling (referred to collectively in this chapter as the "ICRW").
[367] ICRW, Art III.
[368] ICRW, Art V(1).
[369] International Convention for the Regulation of Whaling, 1946, Schedule, As amended by the Commission at the 67th Meeting Florianópolis, Brazil, September 2018. The latest amendments to the Schedule took effect from 29 December 2018.
[370] Refer to the ICRW Schedule, at 10(e) which sets a moratorium on commercial whaling from 1985/86.
[371] In accordance with Art V, amendments to the Schedule must be necessary to carry out the objectives and purposes of the ICRW; be based on scientific findings; must not impose restrictions on the number or nationality of factory ships or land stations, nor allocate quota to any factory ship or land station and must take into consideration the interests of consumers of whale products and the whaling industry.
[372] ICRW, Art V(3).
[373] ICRW, Art IX(4).

The scope of the ICW's jurisdiction is contested.[374] Some member states have argued that the ICW's jurisdiction is restricted to the twelve whale species annexed to the original Schedule, while other member states have argued that the ICW's jurisdiction applies to all cetaceans, including whales, dolphins and porpoises.[375] This jurisdictional issue has never been formally resolved. To date, conservation measures implemented by the IWC have focused on the "great whales" including *inter alia* the blue, bowhead, Bryde's, fin, gray, humpback, minke, right, sei, and sperm whale and have not addressed small cetaceans.[376] The Aotearoa New Zealand Government has publicly affirmed that it considers the IWC is the appropriate lead agency for coordinating the protection of small cetaceans, but it is not yet clear whether regulations will be developed for the protection of dolphins and non-listed whales under the ICRW framework in the future.[377]

There are a number of conservation measures implemented by the IWC under the IWRC framework. In 1982, the IWC voted to implement a ban on commercial whaling, which came into effect in 1986. The moratorium applies to all great whales,[378] with strict exceptions to enable indigenous subsistence whaling[379] and the issuing of special permits by state parties for scientific research purposes.[380] The IWC has also established two whale sanctuaries; the Indian Ocean Sanctuary,[381] and the Southern Ocean Sanctuary.[382] In these sanctuaries, commercial whaling is prohibited to enable the rehabilitation of marine ecosystems that were previously damaged by the overexploitation of whales; and to restore whale populations.[383] In the past, Japan has led a number of scientific whaling programs in the Southern Ocean Sanctuary, justifying the taking and killing of whales for scientific research under Article VIII of the ICRW.[384] This has generated condemnation from other member states, and in December 2018, Japan announced its withdrawal from the ICRW and the cessation of its special permit whaling programme.[385] The Japanese government has signalled its intent to continue whaling within Japan's territorial sea and EEZ.[386] Additional sanctuaries have been proposed in the South Pacific Ocean and the South Atlantic Ocean, but have not yet achieved the majority required under the ICRW for their adoption.[387]

IWC deliberations are informed by reports of the Scientific Committee on matters including: the population status and trends of great whales; environmental threats to whales and other cetaceans; issues affecting small cetaceans; tourism impacts; subsistence whaling practices; and scientific whaling programs.[388] At the most recent IWC meeting in 2018 ('IWC67'),[389] the Scientific Committee raised "*grave concerns*" about the conservation status of Māui dolphins in Aotearoa New Zealand;

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[374] For a review, refer to Gillespie, A. (2001) "Small Cetaceans, International Law and the International Whaling Commission", Melbourne Journal of International Law, 2. Available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1680216/Gillespie.pdf

[375] Ibid.

[376] Refer to information on the work undertaken by the IWC in relation to small cetaceans at https://iwc.int/smallcetacean.

[377] Department of Conservation, (2004), "The Conservation of Whales in the 21st Century" https://www.doc.govt.nz/documents/conservation/native-animals/marine-mammals/conservationwhales-c21.pdf at page 19.

[378] Noting the unresolved jurisdictional issue.

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[380] IWRC, Art VIII.

[381] IWRC, Schedule 2018, Art III(7)(a).

[382] IWRC, Schedule 2018, Art III(7)(b).

[383] IWRC, Schedule 2018, Art III(7)(a) and (7)(b). Refer also: IWC (2018) Draft Southern Ocean Sanctuary Management Plan available at: https://iwc.int/private/downloads/_EHjNmRrIvvzFK3IzJoAfQ/southern_ocean_management_plan.pdf

[384] For a summary of developments on this subject refer: IWC "Special Permit Whaling" at https://iwc.int/permits

[385] Ibid.

[386] As reported in RNZ (2018) "*Japan to resume commercial whaling within its territory"* Available at: https://www.rnz.co.nz/news/world/379019/japan-to-resume-commercial-whaling-within-its-territory

[387] In 2000, at the 52nd IWC meeting, Australia and New Zealand proposed the establishment of a South Pacific Whale Sanctuary, to protect the breeding grounds of most of the species of migratory great whales that are found in the region. The proposal did not achieve the majority required to be adopted. Similarly, a proposal to establish a whale sanctuary in the South Atlantic was rejected at the 66th IWC meeting in 2016.

[388] The matters on which the Scientific Committee must provide advice are set out in the Schedule to the IWRC.

[389] The 67th Meeting of the IWC (IWC67) was held in Florianopolis, Brazil, 10-14 September 2018.

and a member state expressed concerns that the government had permitted mineral exploration activities within an established Marine Mammal Sanctuary.[390]

The ICRW applies to whales, rather than maritime zones, in recognition that whales are highly migratory species that transit through the jurisdiction of multiple states. In Aotearoa New Zealand, the ICRW is implemented by regulations contained in the Marine Mammals Protection Act 1978 (MMPA). The MMPA provides for the conservation, protection, and management of marine mammals, including all species of seal, whale, dolphin, porpoise, dugong, and manatee in the territorial sea and EEZ of Aotearoa New Zealand.[391] It prohibits any person from holding captive or taking a marine mammal without first obtaining a permit from the Department of Conservation (DOC).[392]

Other international conventions of relevance to the marine space include:

- The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (which provides for World Heritage listings). The Convention has a range of requirements for achieving a successful listing, and a state must show the site(s) are subject to strong environmental and cultural protection. New Zealand has three listed sites, including its sub-Antarctic islands (1998).
- The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (which entered into force in 2009). Article 10 of the Convention addresses the protection of underwater cultural heritage in the EEZ and on the Continental Shelf and has the effect of making coastal states 'Co-ordinating States' for the purposes of protecting underwater cultural heritage 'on behalf of the States Parties as a whole and not in their own interest' (Article 10(6)).

[390] Ibid, at page 19.
[391] MMPA, section 2.
[392] MMPA, section 4.

Appendix 3: The potential for the proposed Strategic Planning Act to be used as a vehicle for marine spatial planning

In Chapter 10 we mentioned the possibility of using the proposed Strategic Planning Act (designed for spatial planning on land) as a vehicle to conduct marine spatial planning as well. This legislation has been signalled by the government, but no indicative drafting has been released. Below, we look at what the Randerson Panel proposed for this statute, and consider its appropriateness in the marine context in more depth.

The proposed Strategic Planning Act

The Randerson Panel recommended a new Strategic Planning Act as part of reforms to the resource management system. That is now being progressed through more detailed policy development by the government, with a draft bill expected by the end of 2021. Although it was recommended that this only interface with the RMA, Local Government Act, Land Transport Management Act and Climate Change Response Act (due to the limitations of the Panel's terms of reference), there would be opportunity through further oceans reform to extend its ambit to additional marine legislation including the Fisheries Act, EEZ Act and conservation legislation (including potential marine protected areas legislation).

The Randerson Panel proposed a new Strategic Planning Act "as the key mechanism for improving strategic integration across the resource management system". It is to be designed to help improve strategic integration at a regional level across multiple statutes, functions, outcomes and agencies.[393]

The Strategic Planning Act would require spatial strategies to be developed for each region, and they would encompass land, freshwater and the coastal marine area, but not the EEZ. They are to provide a long-term view, setting a strategic direction for at least the next 30 years and cover a wide range of matters including:[394]

> long-term objectives to improve the quality of the natural and built environments, provide sufficient development capacity, promote Māori interests and values, promote the sustainable use of rural land, protect historic heritage, address natural hazards and climate change.

The regional spatial strategies are to be developed jointly by central government, local government and mana whenua through consensus decision-making. This, importantly, enables mana whenua to participate in spatial planning as partners and "to better reflect Te Tiriti partnerships and incorporate mātauranga Māori knowledge".[395] It should enable Māori values associated with the coastal marine area to be more fully reflected in the planning documents.

The Panel proposes that regional spatial strategies would include a range of environmental matters (alongside identifying the location of future development capacity and infrastructure) such as "regionally significant ecological areas, landscapes and recreational space that should be protected or enhanced", "areas of historic heritage values and areas of significance to mana whenua that should be protected and enhanced", "areas where significant change in land use is required to reduce impacts of land use and development in lakes, rivers, wetlands and the marine

[393] Resource Management Review Panel *New Directions for Resource Management in New Zealand* (Ministry for the Environment, June 2020), at 129.
[394] At 142.
[395] At 146-147.

environment", "areas for enhancement and restoration, such as wetlands and green corridors" and "areas that may be affected by climate change or other natural hazards, and measures that might be necessary to address such issues".[396]

Regional spatial strategies under the proposed Strategic Planning Act would have the ability to address a range of environmental matters at the regional level, including land-based impacts on the marine area (eg where urban expansion can go) and use of the coastal marine area itself (where different marine activities are appropriate). However, it is clear the framing has been driven primarily by a terrestrial focus, particularly as one of the driving issues for the proposal to develop the new Act is the better management of urban issues and housing supply and affordability.

The Panel also recommended that central government should have the ability to develop a 'national priorities statement' under the Strategic Planning Act which would "signal its intention to address specific nationally significant issues through regional processes".[397] This would be used to set out "particular nationally significant issues central government wishes to resolve at a regional level" amongst other things.[398] This national priorities statement could be a mechanism through which central government sets out its long-term national priorities for the coastal marine area (beyond the effects-based and largely reactive focus of the NZCPS), and this could form an important part of a national oceans policy.[399] It could serve to set out priorities for spatially planning the marine area in a similar manner to the United Kingdom, where provision is made in the legislation for the preparation of a marine policy statement, and in Victoria which has a Marine and Coastal Policy.

It could even be framed more broadly as a formal vision for the future of Aotearoa New Zealand, combing te ao Māori and Western perspectives, addressing big picture elements of the Treaty relationship, and form something of a resource management constitution. We have, for example, previously suggested that a broader national Futures Strategy would be a better framing for such a tool.[400]

Regional spatial strategies, according to the Panel, would be accompanied by "implementation agreements" which include more detailed planning for "certain infrastructure or environmental remediation projects" and apportion funding responsibility between central and local government. These could then be linked to the budgeting process for each government body, thereby helping to ensure that funding is made available to implement the regional spatial strategies for non-regulatory actions. Such implementation agreements would serve as a useful implementation tool for proactive actions identified for the marine area, such as coastal restoration initiatives.

The Panel's recommendations also address the potential linkage between regional spatial strategies and other resource management legislation through which the provisions of the spatial strategies would primarily be implemented. The Panel proposed that regional spatial strategies should be "consistent with" the purposes of the new NBA, Local Government Act 2002 and Land Transport Management Act. It also proposed that they be consistent with national direction including NPSs, NESs, the national adaption plan under the Climate Change Response Act and government policy statements on land transport and housing and urban development. This means that the NZCPS will

[396] At 142-143.
[397] At 138.
[398] At 138.
[399] At 138.
[400] Greg Severinsen *Reform of the Resource Management System: A Pathway to Reform. Working Paper 2: A model for the future* (EDS, Auckland, 2019) at 111 and following; Greg Severinsen *Reform of the Resource Management System: A model for the future. Synthesis report* (EDS, Auckland, 2019) at 168 and following.

play an enlarged, and very important, role within the system, in that big picture spatial planning will need to be consistent with it.

In turn, plans developed under the NBA, the Local Government Act and the Land Transport Management Act would need to be consistent with a regional spatial strategy.[401] This should help ensure that alignment runs both ways. Such plans include long-term plans and annual plans which incorporate local government budgets, and this could help to ensure that local government expenditure is aligned with the regional spatial strategy's provisions on the coastal marine area.

On the face of it, the proposed Strategic Planning Act presents an intriguing opportunity to progress a framework for formal marine spatial planning. That is particularly the case because it allows integrated consideration of how catchments, towns and land impact on the marine area over time, and can make a plan for how to change land use, fund restoration initiatives, and potentially create coastal protected areas under conservation legislation (eg reserves and covenants) with that end in mind. As we have emphasised in our conservation system reform work:[402]

> Private land uses, pollutants and downstream effects have a significant impact on the country's biodiversity. In recent years, agricultural intensification (especially conversion from sheep to dairy farming), subdivision and urban sprawl have all contributed to increasing pressures on already at risk and highly vulnerable species… we need to connect the dots between the management of private land and the broader conservation management system.

That is true of marine species, too. However, the proposals for the new Act have not been driven by marine concerns, and therefore have some drawbacks. For one, while the Act's aim of integrated management is compatible with that for marine spatial planning (which is primarily to integrate management across a particular marine area), if it was to provide a framework for an oceans policy, the Act's scope would need to be much broader. For a start it would need to apply to the EEZ (as well as the coastal marine area), given that is where the bulk of the country's marine jurisdiction is located. And while a general purpose is compatible, the focus of integration on land (connecting land use and infrastructure) is quite different to the needs of the marine space, which are much more focused on ecosystem-based management. The context of property rights is quite different too, as is the conservation context; on land, area-based conservation is largely focused on managing the conservation estate and its connections to private land, whereas in the sea the imperative is to create *new* protected areas beyond private ownership.[403]

The new Strategic Planning Act envisaged by the Randerson Panel provides one option for progressing marine spatial planning. However, spatial plans under the proposed Act would not extend out to the EEZ, which comprises the bulk of the country's marine area. This is a significant shortcoming.

The Strategic Planning Act would also need to interface with a much broader suite of legislation including the EEZ Act, the Fisheries Act, the Maritime Transport Act and the Biosecurity Act, as well as conservation legislation like the Marine Reserves Act (or new marine protected areas legislation), Marine Mammals Protection Act and Wildlife Act. If it did not, the risk is that it will further fragment

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[401] Resource Management Review Panel *New Directions for Resource Management in New Zealand* (Ministry for the Environment, June 2020), at 139-140.
[402] Deidre Koolen-Bourke and Raewyn Peart *Conserving Nature: Conservation System Reform Issues Paper* (EDS, Auckland, 2021) at 125.
[403] For example, "30 by 30": the goal of 30 per cent of our oceans being spatially protected by 2030.

and complicate the system in the coastal marine area, because it would essentially only apply to one regime – the new NBA.

A spotlight on the potential relationship between marine spatial plans and the EEZ Act

The Strategic Planning Act could be expanded so that spatial plans created under it could extend into the EEZ. This would necessitate some kind of relationship between the Strategic Planning Act and the EEZ Act. For example, provisions of the marine spatial plan could be given direct effect through a number of mechanisms:

- The relevant part of the plan could become an EEZ policy statement (under subpart 2 of the EEZ Act) or amend or be added to an existing EEZ policy statement in the event that one is prepared. This in turn would affect decision-making on consents through a requirement for decision-makers to "have regard to" it.[404] However, this is quite a weak relationship because it means that the EEZ policy statement can be overridden by other considerations in consenting.

- The marine spatial plan could be prescribed more directly as a matter to be taken into account in decisions on marine consents under section 59(2) of the EEZ Act.

- The marine spatial plan could recommend to the Minister the making of regulations, particularly under section 28 of the EEZ Act which enables the identification of specific areas and the closure of them to specific activities, and/or under section 29 which enables activities to be prescribed as permitted, discretionary or prohibited.

- A spatial plan could have the ability to directly insert or create regulatory provisions under the EEZ Act. However, this begs the question as to why such things would not be done under the EEZ Act itself (eg if setting limits became mandatory under that Act), or whether we should dispense with an additional layer of strategic planning and simply cut to the chase through a single, more integrated, Oceans Act that subsumed existing legislation.

The scope of the Strategic Planning Act could be expanded so that it had legal influence over decisions made under the EEZ Act as well as the RMA. That could happen in a variety of ways. However, that would create further complexity in a system arguably requiring simplification and rationalisation.

Creating such relationships across many marine statutes is probably a big ask for legislation like the Strategic Planning Act, which is primarily designed to interface with the terrestrial resource management system and associated freshwater and marine systems. This indicates that a different piece of legislation – or at least a version of the Strategic Planning Act that is thoroughly reworked – may be needed to house something like a national oceans policy alongside land-focused instruments. Moreover,[405] a different process for marine spatial planning may be needed to that proposed under the Act, not least because of the presence of a different range of stakeholders (including within government, such as Fisheries NZ).[406]

The need to interface with a broader range of marine legislation raises some difficult questions about an expanded Strategic Planning Act. In particular, what should the direction of influence be?

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[404] Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s59(3)(aa).
[405] This would not be the *only* process possible for marine spatial planning, however.
[406] Exactly what that process looks like in drafting form remains to be seen.

The Panel has envisaged that national direction – a National Planning Framework – will effectively drive decision making under spatial plans. The direction of influence is bottom-up. Where would that leave, for example, centralised decision making under the Fisheries Act? Should marine spatial plans have to be consistent with decisions taken under that Act (including where decisions have consciously been taken *not* to do things), or should the Fisheries Act instead be seen as a toolkit to be deployed in the service of a spatial plan that is more strategic or ambitious? Would that be different if there were a requirement (see Chapter 8) to deploy a fisheries strategy and area-based fisheries plans?

The Sea Change – Tai Timu Tai Pari spatial planning process essentially conceived of the direction of influence as being top-down (it would influence how other frameworks were used), and this is the way it is being implemented in practice.[407] However, the risk of this direction of influence is that a more collaborative or even negotiated style of planning under the Strategic Planning Act, together with a broader purpose, might enable more specific measures under other marine legislation (including conservation laws or new strategic marine protected area legislation) to be undermined. That is one of the concerns on land, where the relationship between environmental limits set under the NBA and broader spatial plans under the Strategic Planning Act needs careful attention.

The scope of the Strategic Planning Act could also be expanded so it had legal influence over decisions made under the Fisheries Act. However, it is not clear what the direction of influence should be here.

Spatial plans under the Strategic Planning Act may also become so broad, and the issues they need to deal with (on land and sea, urban and rural etc) so extensive that they become too complex and too difficult to develop within any meaningful timeframe. The danger is that they then become so high level that their usefulness is diminished. For example, would decision-makers contemplate delaying the production of a regional spatial strategy on land, crucial for coordinating the deployment of infrastructure with the release of land for urban growth, because more time was needed to map habitats out at sea?

The normative basis of marine and land management is also arguably quite different. A prime function of marine spatial planning is to assist with implementing an ecosystem-based management for our marine environment. The goal of ecosystem-based management is to maintain ecosystems in a healthy, productive and resilient condition so they can provide the goods and services humans want and need.[408] In addition, key functions that a framework for marine spatial planning needs to perform are the protection and restoration of the marine environment and providing for the setting of environmental bottom lines (or at least translating those into spatial terms, such as protected areas). In contrast, terrestrial spatial planning, as proposed in the Strategic Planning Act, is more focused on the need to align decision-making under legislation that has spatial components, such as land use planning and infrastructure funding decisions. In this sense, the role of spatial planning on land may be weighted more towards its integrative role than towards its role in achieving healthy and productive ecosystems and other environmental outcomes (although this will still be a relevant role).

The complex and interconnected nature of the marine environment also requires consideration in designing spatial planning legislation. In terrestrial spatial planning we have a better understanding of where the boundaries of activities start and stop, and of the scale at which their impacts may occur. Marine environments do not react to development pressures based on the traditional notions

[407] See Sea Change Tai Timu Tai Pari *Hauraki Gulf marine spatial plan* (May 2017).
[408] Charles Ehler and Fanny Douvere *Marine spatial planning: A step-by-step approach toward ecosystem-based management* (UNESCO, Paris, 2009).

of ‘sites’ and ‘boundaries’. Understanding impacts in marine environments requires spatial planning approaches that consider chains of causation and an understanding of the complexity and fluidity of marine environments.[409] These differences are likely to require different approaches to the design of spatial planning processes on land and in the ocean. This does not necessarily mean that the two approaches could not be accommodated within one piece of legislation (it could contain two parts), or that they could not progress in tandem. Separate processes could also be connected better by having a strong role for an Oceans Agency or Commission in inputting into land based spatial plans.

The Randerson Panel does propose that regional spatial strategies would include a range of environmental matters (alongside identifying the location of future development capacity and infrastructure), as described in the spotlight above.[410] Many of these matters are relevant to the marine area but such a list could be expanded to include things such as areas suitable for marine uses (such as fishing and aquaculture) and marine areas suitable for restoration (including shellfish beds and kelp forests).

The proposed approach of a joint government-Māori planning body would help ensure that relationships between mana whenua and the marine environment were better acknowledged and supported, that important values were protected, and also that there is cross-government consistency in approach. However, it may not enable stakeholders to have a hands-on role in the collaborative planning process which can help build trust and reduce conflicts within the marine environment.

The purpose of spatial planning on land and at sea is arguably quite different. Marine spatial planning is more firmly rooted in the concept of ecosystems-based management, whereas terrestrial spatial planning is (at least partly) driven by the need to coordinate land use and public infrastructure funding and supply. That calls into question the appropriateness of undertaking these processes under the same legislative framework, although dual purposes and processes could be provided for.

[409] Paolo Gazzola, Maggie Roe and Paul Cowie "Marine spatial planning and terrestrial spatial planning: Reflecting on new agendas” (2015) 33(5) Environment and Planning C: Government and Policy 1156.
[410] Resource Management Review Panel *New Directions for Resource Management in New Zealand* (Ministry for the Environment, June 2020) at 142-143.

Appendix 4: The oceans policy process of the 2000s

The early impetus for the attempt to develop an oceans policy for Aotearoa New Zealand stemmed back to the early 1990s, when a report following the decommissioning of the research vessel *Rapuhia,* drew attention to the potential wealth in Aotearoa New Zealand's relatively unexplored oceans. A group of officials were directed by Cabinet to investigate the matter further and several work streams were pursued during the mid-1990s to investigate a range of matters such as UNCLOS, marine research and hydrography, but not environmental governance or management.[411]

While that narrow scope should have sounded warning bells, this early work did help raise the profile of oceans matters within government. The 1990s was also the decade when the QMS was bedding in, the aquaculture industry was rapidly expanding,[412] Māori claims to commercial fisheries were finally settled (1992),[413] New Zealand ratified UNCLOS (1996), and marine mammal tourism was becoming established around the country.[414] The United Nations Year of the Ocean was held in 1998 and during that year the Environment and Conservation Organisations of New Zealand hosted a conference focused on oceans management. This "brought together a group of New Zealand's leading marine scientists, policy and resource managers to address future directions for management of human impacts at sea".[415]

In March 1999, a group of Ministers (Environment, Conservation and Biosecurity) directed officials to investigate current arrangements for the management of New Zealand's marine environment. It was recognised that oceans management required a whole-of-government approach, and so the Department of the Prime Minister and Cabinet was given the responsibility for managing the ongoing project.[416]

Shortly thereafter, in December 1999, the Parliamentary Commissioner for the Environment (Dr Morgan Williams) released his report *Setting course for a sustainable future: the management of New Zealand's marine environment*. This identified a number of problems with the current ocean management system and recommended the establishment of a Coastal and Oceans Task Force to develop a long-term strategy for the marine environment comprising goals and principles and then actions and policies "for the future sustainable management of New Zealand's marine environment". It was to look out until at least 2043 and consider the pressures, opportunities and potential state of the environment. Dr Williams recommended that the Task Force be administered by an agency independent of any particular government department or minister, be representative of all key stakeholders, and report directly to the Prime Minister.[417]

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[411] Patrick Helm "New Zealand's ocean future opportunities and responsibilities" in Catherine Wallace, Barry Weeber and Sam Buchanan (eds) *Seaviews marine ecosystem management: obligations and opportunities*, (Environment and Conservation Organisations of New Zealand, Wellington, 1998) at 251.

[412] Raewyn Peart *Farming the sea* (Environmental Defence Society, Auckland, 2019) at 6.

[413] Raewyn Peart *Voices from the Sea: Managing New Zealand's Fisheries* (Environmental Defence Society, Auckland, 2018) at 19-21.

[414] Raewyn Peart *Dolphins of Aotearoa: Living with New Zealand dolphins* (Craig Potton Publishing, Nelson, 2013) at 159-160.

[415] Parliamentary Commissioner for the Environment *Setting course for a sustainable future: The management of New Zealand's marine environment* (1999) at 1.

[416] Carolyn Risk "An oceans policy for New Zealand: Why, what, how?" (Office of the Hon Pete Hodgson, Wellington, 2002) at 2.

[417] Parliamentary Commissioner for the Environment *Setting course for a sustainable future: The management of New Zealand's marine environment*, (1999) at 99-100.

On reading the Parliamentary Commissioner's report, the then Prime Minister Hon Helen Clark was reportedly moved to take action to prepare an oceans policy.[418] In March 2000 she appointed Hon Pete Hodgson, the then Minister of Fisheries and Energy as well as Research, Science and Technology, to take over responsibility for the development of an oceans policy for New Zealand.

The development of the oceans policy was officially initiated in July 2000, when cabinet established an ad hoc group of six Ministers (Fisheries, Foreign Affairs and Trade, Conservation, Māori Affairs, Commerce and Environment) to oversee the policy development process. Cabinet directed that the project was to focus on managing the marine environment within New Zealand's jurisdiction and on the interaction between land management and the status and quality of the marine environment and the intertidal zone. It was to identify "clear goals and principles" and provide an "integrated framework" for managing the oceans.[419]

The policy development process was to have three stages. The first stage involved developing a vision. Stage two focused on designing policies to achieve this vision. Stage three was to deliver the policies, processes and tools necessary to achieve the vision.[420]

A Ministerial Advisory Committee, chaired by Hon Dame Cath Tizard, was appointed by Cabinet in March 2001 and tasked with undertaking wide public consultation in order to assist in defining a vision for oceans policy.[421] Between June and August 2001 the committee undertook an extensive consultation process throughout Aotearoa New Zealand, including 47 public meetings and 24 hui attended by around 2,000 people. The committee also received 1,160 written submissions.[422] In September 2001, the committee produced a report titled *Healthy sea: healthy society: towards an oceans policy for New Zealand*. This identified many problems. For the most part these still exist today.

Once the Advisory Committee report had been delivered, a cross-departmental officials group was established, initially led out of the Minister Hodgson's office. The group immediately focused on developing a vision and establishing process goals, values and principles for the development of the oceans policy.[423] To give the initiative more momentum, a small dedicated Oceans Policy Secretariat was subsequently established within the Ministry for the Environment. The work of the Secretariat was overseen by an Ocean Policy Steering Group of officials (chaired by the Deputy Chief Executive of the Ministry for the Environment), a Chief Executives Group comprising the heads of key agencies and, in turn, the ad hoc Ministerial Group which was tasked with providing overall leadership and direction for the project.[424]

The Oceans Secretariat was given the directive to deliver a draft policy within nine months and was given a modest budget of around NZ$1 million.[425] The tight time frame resulted from Ministerial frustration at the slow pace of policy development during the previous two years and the wish to "get something done". As well as focusing on delivering the policy within the stipulated time frame,

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[418] Pete Hodgson, Minister of Fisheries and Forestry 2000 "The oceans policy: Managing NZ's marine environment" (Energy and Natural Resources Law Association, 12 October 2000) at 6.
[419] Carolyn Risk "An oceans policy for New Zealand: Why, what, how?" (Office of the Hon Pete Hodgson, Wellington, 2002), at 2.
[420] Raewyn Peart *Looking out to sea: New Zealand as a model for oceans governance* (Environmental Defence Society, Auckland, 2005) at 184.
[421] Ministerial Advisory Committee on Oceans Policy *Healthy sea: Healthy society: Towards an oceans policy for New Zealand* (Oceans Policy Secretariat, 30 September 2001) at 53-54.
[422] At 3.
[423] Carolyn Risk "Oceans policy project: Structure and methodology for stage two" (Ad Hoc Ministerial Group on Oceans Policy, 2002) at 7.
[424] Oceans Policy Secretariat, "The team" (2003) *Oceans Blueprint* 1 at 7.
[425] Carolyn Risk *Oceans policy: Stage two work programme* (Ad Hoc Ministerial Group on Oceans Policy, 2002) at 9.

the Secretariat also aimed to obtain the support of key stakeholders for the policy and to deliver a policy which was tangible and practical, so that people could clearly understand what impact it would have.

After commissioning various pieces of work, the Secretariat prepared a discussion document for approval by cabinet, which outlined the policy options and proposed solutions. It planned to carry out broad public consultation on the preferred policy options during September and October 2003. However, before the paper could go to cabinet, the policy process came to an abrupt halt due to controversy over Māori customary rights to the foreshore and seabed. The discussion document was never made public.

As the political storm around foreshore and seabed matters intensified, the cross-governmental Oceans Policy Secretariat was disbanded and oceans issues handed back to the Ministry for the Environment. However, two projects stemming from the initiative did continue. The first was the development of an information-based framework for setting priorities for oceans management and research. The second was an investigation into the environmental regulation of activities beyond the territorial sea.[426] Both projects produced reports in June 2005.

The furore over the subsequent foreshore and seabed legislation passed by the Labour-led government created a chilling effect over any development of marine policy for many years. In November 2005 the then Minister for the Environment announced that work on the country's oceans policy had recommenced.[427] However, this was more a political statement than actuality. There was no attempt to reconstitute the Oceans Policy Secretariat. But work did continue within government on one matter, the development of a legal framework for the EEZ. A paper was published in 2007 proposing two options for reform and gap-filling legislation was endorsed by Cabinet in 2008.[428] However, it was not until the National Government repealed the foreshore and seabed legislation in 2011 (with the MACA Act) that the new legislation could proceed.

[426] Ministry for the Environment *Offshore options: Managing environmental effects in New Zealand's exclusive economic zone* (Ministry for the Environment, 2005).
[427] Michael Vincent McGinnis *Ocean governance: The New Zealand dimension* (Victoria University of Wellington, 2012) at 34.
[428] Karen Scott "Does Aotearoa New Zealand need an oceans policy for modern oceans governance?" (2021) 35 *Ocean Yearbook* at 25-26.