
**A GAPING ABYSS:
ENVIRONMENTAL REGULATION OF
NEW ZEALAND'S OCEANS**

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INTRODUCTION

This paper will explore the issue of environmental regulation of New Zealand's oceans. It will identify a gap in the environmental regulation of our oceans and assess two options for addressing this abyss. This paper aims to identify a solution that will ensure New Zealand's marine environment is protected for present and future generations to enjoy.

New Zealand's oceans currently generate \$NZ3.3 billion of revenue. Fishing and petroleum extraction are the main revenue generating activities.¹ There is an increasing interest in offshore petroleum² and minerals.³ This enthusiasm will continue to grow as the era of easy oil comes to an end.⁴ New Zealand's marine environment also contains a diverse range of ecosystems which support up to 80 percent of New Zealand's plant and animal species.⁵ New Zealand's oceans provide recreational opportunities and deliver services which are crucial for our survival, including the regulation of atmospheric gases (including carbon dioxide), acting as a source and sink for heat, and involvement in waste treatment and nutrient cycling.⁶

Given the value of our oceans it is crucial that adequate environmental regulation is in place to protect the marine environment for present and future generations. Within the territorial sea the Resource Management Act 1991 (‘RMA’) fulfils this role. Beyond the 12 nautical mile (‘nm’) limit the environmental regulation is fragmented and piecemeal⁷ (see appendix one for an outline of the maritime zones). This paper will analyse two proposed options for filling this gap; extending the RMA and enacting the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (‘the Bill’). It will assess whether either

¹ Rod Oram ‘The sea bed and the sea flaw’ *Sunday Star Times* (New Zealand, 19 June 2011).

² Four years ago there was just one multinational exploring offshore New Zealand. At the end of the 2009/2010 year there were four corporations exploring offshore New Zealand: Crown Minerals *Annual Report 2009/2010* (Crown Minerals, Wellington, 2010) at 10.

³ *Ibid*, at 18-19.

⁴ Easy oil is oil which is easy to drill (technically and financially) and high quality: Ben Casselman ‘Facing Up to End of ‘Easy Oil’ *The Wall Street Journal* (United States of America, 24 May 2011) <<http://online.wsj.com>>.

⁵ Ministry for the Environment *Environment NZ 2007 – Summary* (Ministry for the Environment, Wellington, December 2007) at 57.

⁶ Parliamentary Commissioner for the Environment *Setting Course for a Sustainable Future: The Management of New Zealand’s Marine Environment* (December 1999) at 8-9 and Rod Oram, above n 1.

⁷ M Stirling ‘New Zealand’s Offshore Mining Regime – Rights and Responsibilities beyond the 12-Mile Limit’ (2002) 6 NZJEL 139 at 176.

of these options can provide an adequate long term solution for the governance of New Zealand's oceans.

Chapter one will outline the gaping hole in the environmental regulation of New Zealand's exclusive economic zone (EEZ) and extended continental shelf (ECS). The decade of policy work leading up to the proposed legislation illustrates the complexity of filling this gap. This chapter will discuss one of the challenges facing policy makers, ensuring that any regulation is consistent with New Zealand's rights and obligations under international law.

Chapter two will set out three benchmarks of good regulation; effectiveness, efficiency and equity and will also outline the theory of integrated environmental management.

Chapter three will discuss the oceans governance regimes in Canada, Australia, and the United Kingdom and highlight the lessons learnt from the implementation of integrated environmental management in these countries.

Chapter four will describe the background to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill. It will analyse the two proposed options for regulation of New Zealand's oceans utilising the benchmarks set out in chapter two and the lessons learnt in chapter three.

This paper concludes by suggesting that the Bill or an extended RMA could only provide a short term solution for filling the regulatory gap. It suggests that only a complete overhaul of our existing regulatory regime and replacement with new integrated oceans legislation will provide an adequate long term solution for oceans governance in New Zealand.

CHAPTER ONE: BEYOND THE TERRITORIAL SEA

1.1 Introduction

This chapter outlines a gaping hole in New Zealand's environmental law. It highlights that it took over a decade of policy work to propose a solution to this problem. The environmental regulatory scheme within 12 nm is compared with that beyond the 12 nm line in order to demonstrate the regulatory gap. Finally, this chapter will address New Zealand's rights and obligations under international law which increase the complexity of solving this problem.

1.2 The Regulatory Gap

There is a gaping hole in the regulation of New Zealand's oceans. The RMA extends to the edge of the territorial sea, but beyond the 12 nm limit New Zealand's environmental law is fragmented and piecemeal (see figure 1).⁸ Some limited regulation of the environmental effects of petroleum and minerals activities is provided by the Maritime Transport Act 1994 and further controls could be imposed through permits issued under the Crown Minerals Act 1991. There is some limited conservation legislation which applies beyond the 12 nm limit.⁹

The inadequacy of New Zealand's environmental management regime beyond 12 nm was first brought to attention in 1996 by the Parliamentary Commissioner for the Environment's report 'Environmental Management of Petroleum and Mineral Mining Activities beyond the 12-mile Limit'.¹⁰ A further paper entitled 'Setting Course for a Sustainable Future: the Management of New Zealand's Marine Environment' followed from the Commissioner in 1999.¹¹ In 2000 the Ministry for the Environment began policy work on this issue, producing a report entitled 'Offshore Options' in 2005¹² and a discussion document 'Improving

⁸ Stirling, above n 7, at 176.

⁹ The Marine Mammals Protection Act 1978 and the Wildlife Act 1953 provide species-specific protection but there is no legislation providing for area wide protection.

¹⁰ Parliamentary Commissioner for the Environment *Environmental Management of Petroleum and Mineral Mining Activities Beyond the 12-mile Limit* (November 1996).

¹¹ Parliamentary Commissioner for the Environment, above n 6.

¹² Ministry for the Environment *Offshore Options: Managing Environmental Effects in New Zealand's Exclusive Economic Zone* (June 2005).

Regulation of Environmental Effects in New Zealand’s Exclusive Economic Zone in 2007.¹³ The result of this policy work was a cabinet paper.¹⁴ The Labour government of the time approved work to begin on drafting a bill.¹⁵ The change of government after the 2008 election resulted in this issue being placed on the backburner for almost 3 years. The current National government announced an intention to introduce new legislation in July 2011.¹⁶ At the time of writing the Bill had been referred to select committee.

The fact that policy work on this regulatory gap has continued for over a decade without tangible results demonstrates the considerable complexity of identifying and implementing an appropriate solution. The following sections will examine the regulatory gap in detail by comparing the environmental management scheme within 12 nm with the current scheme beyond 12 nm.

	Fisheries	Transport & Marine Pollution	Conservation	Petroleum & Minerals	Aqua culture	New Activities
Territorial Sea	Fisheries Act	Maritime Transport Act	Marine Reserves Act	Resource Management Act	Resource Management Act	Resource Management Act
Beyond 12 nm	Fisheries Act	Maritime Transport Act		Maritime Transport Act (limited) Crown Minerals Act (limited, little used)		

Figure 1: The existing environmental regulation scheme, highlighting the regulatory gap beyond the territorial sea (in yellow)

¹³ Ministry for the Environment ‘Improving Regulation of Environmental Effects in New Zealand’s Exclusive Economic Zone: Discussion Paper’ (August 2007).

¹⁴ Cabinet Paper ‘Proposal of Exclusive Economic Zone Environmental Effects Legislation’ (10 July 2008) CAB 07-C-0751.

¹⁵ Trevor Mallard ‘Legislation to safeguard ocean ecosystems’ (press release, 27 June 2008).

¹⁶ Nick Smith ‘Environmental protection law for oceans announced’ (press release, 2 June 2011).

1.2.1 Environmental Regulation within the Territorial Sea

The RMA is the principal environmental statute applying within the territorial sea.¹⁷ The purpose of the RMA is to promote the sustainable management of natural and physical resources.¹⁸ It achieves this by placing restrictions on certain effects¹⁹ and allowing those effects only if a planning document expressly permits them or if a resource consent is granted.²⁰ Local authorities are tasked with producing planning documents and deciding resource consent applications. The RMA's resource consent regime allows for the evaluation of a proposal prior to its commencement. A resource consent application must include an assessment of environmental effects.²¹ The application may be publicly notified (if the adverse effects of the activity are likely to be "more than minor"²²) before the consent authority decides whether to allow the application, allow it with conditions, or disallow it.²³

The RMA regulates oil and gas activities within the territorial sea. For example, in order to develop the Pohokura offshore gas field (located approximately 8 km off the coast of Taranaki) Shell Exploration NZ Limited was required to obtain four resource consents for; the occupation of the coastal marine area, taking and using water, erecting offshore platforms, structures and pipelines and disturbing the seabed and foreshore.²⁴ These consents include 43 conditions requiring the consent holder, *inter alia*, to adopt the best practicable option to minimise effects on the environment, to adequately maintain the structures, to relocate kaimoana (seafood) from the disturbed area, to prepare a contingency plan and a wildlife management plan.²⁵

¹⁷ The RMA governs the coastal marine area. The seaward boundary of the coastal marine area is the 12 nm line dividing the territorial sea and the exclusive economic zone: Resource Management Act 1991, s 2.

¹⁸ Resource Management Act 1991, s 5.

¹⁹ Including the erection of a structure, the disturbance of the seabed, the deposition of any substance, the occupation of the common marine and coastal area, the removal of natural material from the area, the dumping or incineration of any waste, and the discharge of a harmful substance or contaminant into water. See the Resource Management Act 1991, part 3.

²⁰ The Act prohibits *absolutely* the dumping or storage of radioactive matter or waste: Resource Management Act 1991, s 15C.

²¹ Resource Management Act 1991, s 15C.

²² Resource Management Act 1991, s 95

²³ Resource Management Act 1991, s 104A & 104D.

²⁴ Taranaki Regional Council *Shell Exploration NZ Limited Pohokura Offshore Monitoring Programme 2007-2009 Technical Report 2009-23* (September 2009), executive summary.

²⁵ Taranaki Regional Council, above n 24, at 5-8.

1.2.2 Environmental Regulation beyond the Territorial Sea

The difference between the two regimes can be highlighted by considering the example of Petrobras International Braspetro B.V. Petrobras undertook seismic exploration of the Raukumara Basin in 2011. A large portion of the exploration area is beyond the 12 nm limit and thus Petrobras' activities are not regulated by the RMA. Environmental regulation is provided by permit conditions, voluntary guidelines, and the Maritime Transport Act.

The Crown Minerals Act allows the Minister to grant a permit on such conditions as the Minister thinks fit.²⁶ Petrobras is required to comply with the conditions of its exploration permit. However, permit conditions relating to environmental protection are generally limited to a condition requiring the permit holder to 'make all reasonable efforts to mine in accordance with good exploration and mining practice.'²⁷ Petrobras may also be guided by the voluntary Environmental Best Practice Guidelines for the Offshore Petroleum Industry. The guidelines require operators to conduct all activities to the standard of a 'reasonable and prudent operator'²⁸ and to apply 'best practicable options' to minimise or prevent adverse effects on the environment.²⁹

The permit condition and guidelines provide little environmental protection. Both the permit condition and the guidelines are qualified by the term 'reasonable'. This sets the bar low by merely requiring operators to meet industry standards and effectively requires self regulation by the industry. In addition, the term 'good exploration and mining practice' is not focused on environmental protection, it is a wider term which also requires practice that is economic, efficient, and safe. Finally, the guidelines are voluntary and have no legal force or penalties.³⁰

The Maritime Transport Act³¹ and the Marine Protection Rules 2011 provide limited environmental regulation of oil and gas activities. The Act does not impose an impact assessment or consenting process. It creates offences for discharging harmful substances and

²⁶ Crown Minerals Act 1991, s 25(1).

²⁷ For example: NZ Petroleum & Minerals *Petroleum Mining Permit 50509* (November 2009) and NZ Petroleum & Minerals *Petroleum Exploration Permit 52707* (June 2010)

²⁸ Maritime New Zealand and Ministry for the Environment *Environmental Best Practice Guidelines for the Offshore Petroleum Industry* (March 2006), paragraph 3.2.

²⁹ *Ibid*, paragraph 3.4.

³⁰ *Ibid*, paragraph 2.2.

³¹ The Act applies within New Zealand's 'continental waters' including the territorial sea, exclusive economic zone and the high seas overlying the extended continental shelf: Maritime Transport Act 1994, s 222. Although New Zealand has no jurisdiction over the high seas this recognizes that New Zealand would be liable at international law for any pollution of the high seas caused by exploration of its extended continental shelf: Stirling, above n 7, at 166.

dumping of waste where the discharge or dumping is not in accordance with the Marine Protection Rules.³² The Act also requires offshore installations to have a marine oil spill contingency plan³³ which outlines the measures to be taken in respect of an oil spill from the offshore installation.³⁴ The Marine Protection Rules require operators of an offshore installation to develop a discharge management plan³⁵ establishing procedures and practices aimed at reducing the environmental impacts from discharges of harmful substances from offshore activities³⁶ through risk identification, assessment and prevention.³⁷

The long title of the Marine Transport Act states that one of its functions is to protect the marine environment,³⁸ however its effectiveness in doing so is limited in two ways. First, because the Act implements New Zealand's international marine commitments,³⁹ it focuses on discharges and dumping. It does not address effects such as the taking and use of water, erection of structures and pipelines or disturbance of the seabed, which may be managed through resource consent conditions within the territorial sea. Second, the mechanisms the Act and Rules provide are limited to the management of effects, there is no basis on which an activity can be barred from occurring.

1.2.3 Other regulation in the marine environment

The fisheries industry and marine conservation are managed separately under the Fisheries Act 1996 and the Marine Reserves Act 1971.

The Fisheries Act regulates commercial, recreational and customary fishing within New Zealand fisheries waters, including the waters of the territorial sea and the exclusive economic zone.⁴⁰ The purpose of the Fisheries Act is to provide for the utilisation of fisheries resources while ensuring sustainability.⁴¹ This is primarily achieved through the setting of a total allowable catch, a total allowable commercial catch and the quota

³² Maritime Transport Act 1994, ss 226 and 261.

³³ Maritime Transport Act 1994, s 287.

³⁴ Maritime Transport Act 1994, s 281.

³⁵ Maritime Protection Rules 2011, r 200.4.

³⁶ Maritime New Zealand 'Discharge management plans' <www.maritimenz.govt.nz>.

³⁷ Maritime Protection Rules 2011, schedule 1.

³⁸ Maritime Transport Act 1994, long title.

³⁹ New Zealand also has obligations in relation to marine pollution under the London Dumping Convention 1972 and the International Convention for the Prevention of Pollution from Ships 1973.

⁴⁰ Fisheries Act 1996, s 2.

⁴¹ Fisheries Act 1996, s 8.

management system. The Fisheries Act also allows the Minister of Fisheries to set sustainability measures relating to, *inter alia*, catch limits, size or sex limits, areas, methods, and seasons.

The Marine Reserves Act allows for the establishment of marine reserves for the scientific study of marine life.⁴² These can be created in areas of territorial sea⁴³ that "contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful or unique, that their continued preservation is in the national interest."⁴⁴ Despite this statute, New Zealand has a small number of marine reserves which are confined to small coastal areas.⁴⁵ Just 0.3% of New Zealand's total marine environment is protected in marine reserves.⁴⁶ The Act is limited as it only allows for reserves to be created within the territorial sea. A Marine Reserves Bill, which would allow marine reserves to be established within the exclusive economic zone, was introduced to Parliament in June 2002. The select committee is due to report on the 20th of October 2011.

1.2.4 Conclusion:

The current environmental management system beyond 12 nm is inadequate. There is a lack of environmental effects assessment. There is limited opportunity to set environmental conditions on developments, no opportunity for the public to comment during the planning stages of offshore developments and no provision for conservation areas. The regime beyond the 12 nm limit is also inconsistent with the system inside the 12 nm limit.⁴⁷

1.3 Legal Challenges facing Policy Makers

1.3.1 Introduction

The previous section demonstrated the deficiencies in New Zealand's environmental regulatory scheme beyond 12 nm. That policy work on this issue continued for over a decade before legislation was introduced demonstrates the considerable challenges which faced

⁴² Marine Reserves Act 1971, s 3(1).

⁴³ Marine Reserves Act 1971, s 2.

⁴⁴ Marine Reserves Act 1971, s 3(1).

⁴⁵ Parliamentary Commissioner for the Environment, above n 6, at 21.

⁴⁶ Department of Conservation "Marine reserves A-Z" <www.doc.govt.nz>.

⁴⁷ Parliamentary Commissioner for the Environment, above n 10, at 4.2.

policy makers. These challenges include pressure from industry and environmental groups, the existing institutional structures and legislative schemes, and legal issues. This section will examine the legal rights and obligations under international law which add complexity to this problem.

1.3.2 Jurisdictional Rights

New Zealand's rights and obligations in the maritime zones are contained in the United Nations Convention on the Law of the Sea⁴⁸ (UNCLOS) which New Zealand ratified in 1996.⁴⁹ UNCLOS has been accepted by the international community as the basis for all law of the sea.⁵⁰ Under UNCLOS coastal States have diminishing competence the further the maritime zone is from the coast (figure 2). Therefore any legislation addressing the regulatory gap beyond 12 nm must allow for New Zealand's reduced jurisdiction in the exclusive economic and extended continental shelf zones.

New Zealand has full sovereignty in its territorial sea, including the airspace, seabed and subsoil,⁵¹ subject only to the right of innocent passage enjoyed by foreign vessels.⁵² Beyond the territorial sea New Zealand's rights are more limited. In the exclusive economic zone New Zealand has sovereign rights for exploring and exploiting, conserving and managing the living and non-living natural resources of the waters, seabed and subsoil.⁵³ New Zealand also has jurisdiction with regard to artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment,⁵⁴ along with other rights and duties provided for in UNCLOS.⁵⁵ These rights are subject to three freedoms enjoyed by other States, these are navigation, overflight and the laying of submarine cables and pipelines.⁵⁶

⁴⁸ United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994).

⁴⁹ Stirling, above n 7, at 150.

⁵⁰ Stirling, above n 7, at 142.

⁵¹ United Nations Convention on the Law of the Sea, above n 48, art 2.

⁵² United Nations Convention on the Law of the Sea, above n 48, art 17.

⁵³ United Nations Convention on the Law of the Sea, above n 48, art 56(1)(a).

⁵⁴ United Nations Convention on the Law of the Sea, above n 48, art 56(1)(b).

⁵⁵ United Nations Convention on the Law of the Sea, above n 48, art 56(1)(c).

⁵⁶ They are also subject to other internationally lawful uses of the sea related to these freedoms: United Nations Convention on the Law of the Sea, above n 48, art 58(1). The rules relating to the high seas and other rules of international law also apply in the exclusive economic zone where it is not incompatible with these rights: United Nations Convention on the Law of the Sea, above n 48, art 58(2).

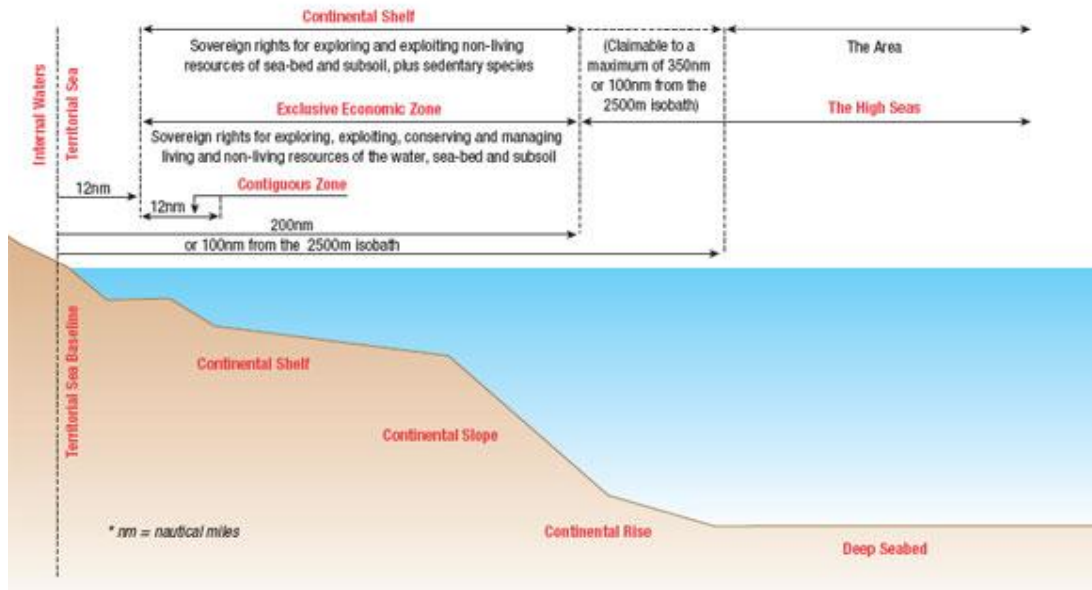


Figure 2: The Maritime Zones and Coastal States Rights⁵⁷

Within the continental shelf (which may extend beyond the exclusive economic zone) New Zealand's rights are further limited. New Zealand has "sovereign rights" for exploring and exploiting its natural resources⁵⁸ but not for managing and conserving its natural resources as it does within the exclusive economic zone. New Zealand does have exclusive jurisdiction over artificial islands, installations and structures⁵⁹ and the exclusive right to authorize and regulate drilling for all purposes.⁶⁰ These rights are also subject to the freedom of foreign States to lay submarine cables and pipelines on the continental shelf,⁶¹ although New Zealand can direct the course of a foreign cable or pipeline.⁶² These rights are also limited by the requirement for New Zealand to pay royalties to the International Seabed Authority⁶³ for resources exploited from the extended continental shelf (the continental shelf which extends

⁵⁷ Fisheries and Oceans Canada "Canada's Ocean Estate: A Description of Canada's Maritime Zones" (2010) <www.dfo-mpo.gc.ca>.

⁵⁸ United Nations Convention on the Law of the Sea, above n 48, art 77(1). These are limited to non-living resources of the seabed and subsoil and living organisms which are sedentary species: United Nations Convention on the Law of the Sea, above n 48, art 77(4).

⁵⁹ United Nations Convention on the Law of the Sea, above n 48, art 80.

⁶⁰ United Nations Convention on the Law of the Sea, above n 48, art 81.

⁶¹ United Nations Convention on the Law of the Sea, above n 48, art 79(1).

⁶² Stirling, above n 7, at 148

⁶³ Increasing by 1% annually from 1% of the value or volume of production during the sixth year until the 12th year after which it remains static at 7% of the value or volume of production.

beyond the 200 nm boundary).⁶⁴ It should be noted that within the extended continental shelf New Zealand has no special rights in respect of the waters and airspace⁶⁵ and the waters form part of the high seas.⁶⁶

1.3.3 International Law Obligations

UNCLOS contains obligations regarding the conservation of the marine environment. It imposes a general obligation on States to "protect and preserve the marine environment."⁶⁷ It places a duty on coastal States to adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction.⁶⁸ It also requires States to take "all measures" that "are necessary to prevent, reduce and control pollution of the marine environment from any source" using "the best practicable means at their disposal and in accordance with their capabilities."⁶⁹ It seems clear that New Zealand is currently not meeting these international obligations and any legislation addressing the regulatory gap should ensure that these obligations are fulfilled.

Agenda 21 is a piece of soft law which requires States to "prevent, reduce and control degradation of the marine environment" by, *inter alia*, "prior assessment of activities which may have significant adverse impacts on the marine environment."⁷⁰ While not obligatory any new legislation should take guidance from Agenda 21.

1.3.4 Conclusion

New Zealand's rights and obligations in the maritime zones are contained in UNCLOS. Under UNCLOS New Zealand's rights diminish with distance from the coastline. Thus any legislation addressing the deficiencies in New Zealand's environmental regulatory scheme beyond 12 nm must allow for New Zealand's different rights in the exclusive economic zone and continental shelf as compared to the territorial sea. Any new legislation must also ensure

⁶⁴ United Nations Convention on the Law of the Sea, above n 48, art 82.

⁶⁵ United Nations Convention on the Law of the Sea, above n 48, art 78(1).

⁶⁶ Stirling, above n 7, at 149.

⁶⁷ United Nations Convention on the Law of the Sea, above n 48, art 192.

⁶⁸ United Nations Convention on the Law of the Sea, above n 48, art 208.

⁶⁹ United Nations Convention on the Law of the Sea, above n 48, art 194(1).

⁷⁰ Agenda 21 United Nations Conference on Environment and Development (1992), at 17.22.

that New Zealand is meeting its international obligations regarding protection of the marine environment.

CHAPTER TWO: GOOD ENVIRONMENTAL REGULATION

2.1 Introduction

This chapter sets out three characteristic features of good regulation; effectiveness, efficiency and equity. These will be utilised later in this paper to assess the proposals for filling the regulatory gap beyond the territorial sea. This chapter will also outline the theory of integrated environmental management (IEM) and highlight New Zealand's experience with IEM.

2.2 Characteristics of Good Regulation

In order to assess the proposals for environmental regulation beyond the territorial sea later in this paper it is necessary to set clear benchmarks relevant to such an evaluation.⁷¹ Three benchmarks will be used; effectiveness, efficiency, and equity. These will be used to assess the proposals in a manner which is independent of political debate and personal opinion.

An effective regulatory regime makes significant substantive contributions to achieving the desired outcome.⁷² In the context of environmental regulation, this requires a substantive contribution to protecting the environment.⁷³ An efficient regulatory regime is one which achieves the intended outcome with the lowest possible inputs or costs.⁷⁴ Administrative efficiency is particularly important as complex administrative structures invariably lead to high costs and time delays. As the effectiveness and efficiency of a proposal cannot be quantitatively predicted this paper will focus on the institutional and legal mechanisms that may contribute to or detract from these benchmarks as informed by the theory of IEM and the experiences of Canada, the United Kingdom and Australia.

⁷¹ R Baldwin and M Cave *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, Oxford, 1999) at 76.

⁷² *Ibid.*, at 81.

⁷³ N Gunningham and PN Grabosky *Smart Regulation: Designing Environmental Policy* (Oxford University Press, Oxford, 1998) at 16.

⁷⁴ R Baldwin and M Cave, above n 71, at 81.

Effectiveness and efficiency are the preeminent criteria for good environmental regulation as they are of primary concern to policy makers.⁷⁵ However, it is also recognised that a regulatory regime should be equitable.⁷⁶ A regime may be described as equitable if; the regulator has sufficient expertise, the regime is transparent, the regulator is accountable to an acceptable body, the public has an opportunity to participate in the process, and the regime treats all parties consistently.⁷⁷ In the New Zealand context an equitable regulatory regime will give proper weight to the Treaty of Waitangi.

Regulatory decision making is often placed in the hands of a nondemocratic expert body. It cannot be assumed that experts are neutral and they may be subject to industry capture⁷⁸ thus without democratic controls over such a body it is important that the decision making process is transparent and the body provides full reasons for their decisions. It is also essential that the expert body is accountable to an appropriate institution on appropriate grounds.⁷⁹ Public participation will also increase the legitimacy of such a regime. A regime which involves the public in decision making recognises that environmental issues are best handled with the participation of all concerned citizens.⁸⁰ Public participation has an equitable element in that it protects the rights and interests of persons affected, as well as an effectiveness element as it enhances the quality of decision making.⁸¹

There is often a tug-of-war between the three characteristic features of good regulation. For example, public participation is crucial to the legitimacy and success of environmental regulation but may be at odds with efficiency.⁸² Participation may also conflict with effectiveness if it leads to stagnation of the process or prevents the exercise of expertise.⁸³ Thus the goal is an appropriate balance between the three benchmarks. The weight that an individual places on each of these will reflect that person's political philosophies. Despite this, persons of different political persuasions should be able to assess regulatory options

⁷⁵ N Gunningham and D Sinclair *Leaders and laggards: next-generation environmental regulation* (Greenleaf Publishing, Sheffield, United Kingdom, 2002) at 10.

⁷⁶ See R Baldwin and M Cave, above n 71, at 287 and N Gunningham and PN Grabosky, above n 73, at 26.

⁷⁷ R Baldwin and M Cave, above n 71, at 78-81.

⁷⁸ *Ibid*, at 78-9 and 85.

⁷⁹ *Ibid*, at 78-9.

⁸⁰ Declaration of the UN Conference on Environment and Development 1992 UN Doc A/CONF.151/26/Rev.1 (Rio Declaration), principle 10.

⁸¹ *Discount Brands v Westfield (New Zealand) Ltd* [2005] NZRMA 337 at [46].

⁸² N Gunningham and PN Grabosky, above n 73, at 26.

⁸³ R Baldwin and M Cave, above n 71, at 79.

according to these criteria and ask whether performance in one area can be improved without material loss in another.⁸⁴

2.3 Integrated Environmental Management (IEM)

As western bureaucracies grew in size they became fragmented and compartmentalised with separate laws and institutions for each sector of society.⁸⁵ IEM is an approach which attempts to address this fragmentation. IEM is "widely extolled"⁸⁶ and seen as an approach that "can deliver both better environmental outcomes and greater economic efficiency".⁸⁷ It also contributes to ensuring a regime is equitable. Thus IEM is an approach that can assist in developing a regulatory regime that meets the three benchmarks of effectiveness, efficiency and equity discussed above.

IEM has been defined by the Ministry for the Environment as an approach to environmental management "which requires recognition of the linkages between different parts of the environment, and adopts a range of tools to identify and manage environmental effects across these different parts, and to ensure co-ordination across institutional barriers".⁸⁸ One writer suggests that IEM encompasses two aspects; *what* should be integrated and *how* should it be integrated. The "what" has been termed substantive integration while the "how" has been termed process integration.⁸⁹

Substantive integration involves integration across environmental assets, sectors and time.⁹⁰ Integration across environmental assets recognises the holistic nature of ecosystems. Integration across sectors incorporates environmental considerations into socio-economic decision making thus enabling environmental effects to be related to their socio-economic causes. Integration across time requires long-term planning and monitoring and respect for the interests of future generations.⁹¹

⁸⁴ Ibid, at 83.

⁸⁵ J Frieder "Approaching Sustainability: Integrated Environmental Management and NZ's Resource Management Act" (December 1997) Ian Axford (New Zealand) Fellowships in Public Policy at 20.

⁸⁶ SM Born and WC Sonzogni, above n 97, at 167.

⁸⁷ J Frieder, above n 85, at 6.

⁸⁸ Ibid, at 20.

⁸⁹ U Klein, "Integrated Resource Management in New Zealand - A Juridical Analysis of Policy, Plan and Rule Making under the RMA" (2001) 5 NZJEL 1 at 11.

⁹⁰ Ibid, at 12.

⁹¹ Ibid, at 12.

Process integration provides the mechanisms for achieving substantive integration. Integration is required between legal, political, economic and administrative areas and between levels, such as national, regional and territorial bodies.⁹² The key mechanisms for achieving this are interaction and coordination.⁹³ Interaction involves the general public and stakeholders and provides decision makers with a comprehensive view of problems and identifies society's goals and priorities.⁹⁴ There are a number of methods for achieving interaction ranging from notification to consultation to shared decision making.⁹⁵ Coordination refers to the process of communication and conflict resolution among planning agencies. This may be horizontal, for example between Ministries, or vertical, for example between city councils and regional councils.⁹⁶

Other writers highlight four central characteristics of IEM. They suggest that IEM is; comprehensive, interconnective, interactive and strategic.⁹⁷ A scheme is comprehensive if it embraces all of the physical, chemical and biological components of the ecological system, all uses of the system and all the entities that affect its management.⁹⁸ An interconnective regime recognises the relationships between all parts of the ecosystem and between resource users and the other entities that have an interest in a resource.⁹⁹ An interactive system recognises that information must be gathered from various agencies and stakeholders and that there is a degree of conflict between participants.¹⁰⁰ The final element, the strategic dimension is an important part of IEM. It addresses the complexity and wealth of information generated by a comprehensive, interconnective and interactive approach. The strategic element involves narrowing down the range of interest and can be likened to a filtering process.¹⁰¹

Integrated environmental management is regarded internationally as best practice in environmental management. The recognition of the need for integration stems from the

⁹² Ibid, at 13.

⁹³ Ibid, at 14.

⁹⁴ Ibid, at 14.

⁹⁵ Ibid, at 15.

⁹⁶ Ibid, at 15.

⁹⁷ SM Born and WC Sonzogni 'Integrated Environmental Management: Strengthening the Conceptualization' (1995) 19(2) *Environmental Management* 167 at 169. See similarly RD Margerum 'Integrated Environmental Management: Moving from Theory to Practice' (1995) 38(3) *Journal of Environmental Planning and Management* 371 at 376 who states that there are 'four central themes' for defining IEM; inclusive, interconnective, strategic and goal focused.

⁹⁸ SM Born and WC Sonzogni, above n 97, at 170.

⁹⁹ SM Born and WC Sonzogni, above n 97, at 170.

¹⁰⁰ SM Born and WC Sonzogni, above n 97, at 171.

¹⁰¹ SM Born and WC Sonzogni, above n 97, at 171.

failures and weaknesses of non-integrated environmental management¹⁰² and the fact that this approach reflects the interconnectedness of the environment.¹⁰³

Writers have identified numerous weaknesses of non-integrated environmental management. Fragmented environmental management tends to be narrowly focused and ignore the holistic nature of ecosystems because it attempts to manage environmental assets in isolation.¹⁰⁴ Non-integrated environmental management also tends to be reactive rather than proactive as it ignores the socioeconomic causes of environmental damage and focuses on cleaning up the mess.¹⁰⁵ Finally, fragmentation will often result in a complex administrative structure and a highly regulatory burden with a multitude of rules, procedures and agencies which are a major obstacle to greater efficiency and effectiveness.¹⁰⁶

Despite the failures of non-integrated management it has been argued that IEM is neither well understood nor systematically practiced¹⁰⁷ and too difficult to apply and merely a theoretical concept.¹⁰⁸ Critics claim that integration ignores the modern nature of expertise, which is narrow, specialised and disciplinary and would overload the planning process and require intellectual capabilities and sources of information that are not always available in practice.¹⁰⁹ Such criticisms fail on two accounts. First, they ignore the strategic or filtering dimension of IEM which addresses the complexity and wealth of information generated by the earlier stages. Second, many countries, including New Zealand, have utilised IEM within their environmental regulatory schemes to varying degrees. Thus policy makers now have considerable experience to draw on when attempting to apply IEM.

2.4 Integrated Management in New Zealand

Prior to 1991 New Zealand's environmental laws were fragmented, narrowly focused and inconsistent.¹¹⁰ There was a hotchpotch of different rules, procedures and institutional arrangements¹¹¹ which did not achieve good environmental outcomes.¹¹² This resulted

¹⁰² U Klein, above n 89, at 5.

¹⁰³ Ibid, at 5. See also RD Margerum, above n 97, at 375.

¹⁰⁴ Ibid, at 8.

¹⁰⁵ Ibid, at 6 and 8.

¹⁰⁶ Ibid, at 8.

¹⁰⁷ J Frieder, above n 85, at 6.

¹⁰⁸ U Klein, above n 89, at 14.

¹⁰⁹ Ibid, at 14.

¹¹⁰ Ibid, at 2.

¹¹¹ Ibid, at 2.

because environmental laws were developed on a reactive basis, resulting in legislation focusing on one medium and agencies designed to implement individual laws.¹¹³

The Resource Management Act 1991 integrated the management of land, air and water and resulted in the repeal of 63 statutes and 19 regulations.¹¹⁴ Integrated management is at the very core of the Resource Management Act.¹¹⁵ The purpose states that it applies across all natural and physical resources¹¹⁶ and the Act explicitly requires local authorities to achieve integrated management of natural and physical resources.¹¹⁷

However, the RMA does not achieve integration across all environmental sectors. The environmental effects of minerals activities are regulated by the RMA but are excluded from the requirement to sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.¹¹⁸ The Hazardous Substances and New Organisms Act 1996 has some overlap with the RMA¹¹⁹, and the Fisheries Act excludes fish stocks from the purpose of sustainable management.¹²⁰ Furthermore, some of the mechanisms the Act includes to assist with integration, such as national policy statements, have not been fully utilised¹²¹ due to a lack of political will. Despite this, the Resource Management Act provides a good framework and could be utilised as a basis for future integrated environmental regulation in New Zealand.

2.5 Conclusion

This chapter has set out three characteristics of good regulation; effectiveness, efficiency and equity. These will be utilised to evaluate the proposals for filling the regulatory gap beyond the territorial sea. This chapter also outlined the current best practice in environmental management, integrated environmental management. Finally, this chapter highlighted New Zealand's experience with IEM under the RMA.

¹¹² BH Davis 'New Planning and Environment Law in New Zealand; Preliminary Assessment of the Resource Management Act 1991' (1996-1997) 5 Asia Pac L Rev 102 at 107 quoting from the Introductory Explanatory Note to the Resource Management Bill 1989.

¹¹³ RD Margerum, above n 97, at 373.

¹¹⁴ Resource Management Act 1991, schedules 6 and 7.

¹¹⁵ J Frieder, above n 85, at 22.

¹¹⁶ U Klein, above n 89, at 18 and Resource Management Act, s 5.

¹¹⁷ Resource Management Act 1991, ss 30(1)(a) and 31(a).

¹¹⁸ Resource Management Act 1991, s 5(2)(a). See also U Klein, above n 89, at 22.

¹¹⁹ MWD White *Australasian Marine Pollution Laws* (2nd ed, The Federation Press, New South Wales, 2007) at 195.

¹²⁰ Fisheries Act 1996, s 8. See also U Klein, above n 89, at 19.

¹²¹ U Klein, above n 89, at 35.

CHAPTER THREE: OVERSEAS EXPERIENCE

3.1 Introduction

This chapter outlines oceans regulation in Canada, the United Kingdom and Australia. These countries have recognised the benefits of IEM and have attempted to utilise the theory in their oceans governance regimes. This chapter highlights key themes which arise from the experiences in these countries. These themes will be utilised later in this paper to assess the proposals for oceans regulation in New Zealand.

3.2 Canada

3.2.1 Constitutional Structure

Canada has a federal system of government. Jurisdictional responsibilities in the marine environment are shared by the federal, provincial and territorial governments.¹²² There is no nationwide boundary between federal, provincial and territorial responsibilities.¹²³ Canada's constitutional structure makes it more difficult to apply IEM compared to a unitary State such as New Zealand.

3.2.2 Legislation

Almost fifteen years ago Canada enacted a "ground-breaking"¹²⁴ and "extraordinary"¹²⁵ piece of legislation; the Oceans Act 1997. This made Canada the first country in the world to

¹²² See Oceans Directorate "The Role of the Provincial and Territorial Governments in the Oceans Sector" (2009) Fisheries and Oceans Canada <www.dfo-mpo.gc.ca> for a detailed catalogue of oceans-related responsibilities and activities carried out by the provincial and territorial governments of Canada.

¹²³ An example of the separation of responsibilities is provided by British Columbia. The federal government is responsible for all organisms in the water column and all offshore areas. The province has jurisdiction over the foreshore below the high-tide mark and coastal waters "within the jaws of the land": J Alley and K Topelko "Oceans Governance Arrangements in British Columbia" (paper presented at the Maritime Awards Society of Canada Oceans Governance on Canada's West Coast Workshop, Victoria, British Columbia, 2007).

¹²⁴ A Chircop and BA Marchand "Oceans Act: Uncharted Seas For Offshore Development in Atlantic Canada?" (2001) 24 Dalhousie L.J. 23 at 24.

¹²⁵ M Haward and others "Fisheries and Oceans Governance in Australia and Canada: from Sectoral Management to Integration?" (2003) 26 Dalhousie L.J. 5 at 17.

boast an integrated policy and planning framework for its ocean area.¹²⁶ The Act defines Canada's maritime zones.¹²⁷ It requires the development of a national strategy for the management of oceans based on sustainable development, integrated management, and the precautionary principle. It necessitates regional plans to achieve the integrated management of all activities affecting oceans.¹²⁸ Finally, the Act provides for the development of a national system of marine protected areas.¹²⁹

3.2.3 Planning Instruments

The national strategy, Canada's Oceans Management Strategy, was promulgated in 2002 and provides the policy framework for oceans management.¹³⁰ It was followed by an Ocean Action Plan in 2005 which identified a series of actions to be completed.¹³¹ In 2007 the Action Plan was replaced with five initiatives grouped under the title of Health of the Oceans.¹³² The development of three documents within a short period suggests that Canada has had difficulty identifying a national policy vision for its oceans. This instability detracts from role policy statements may play in achieving integration.

Development of integrated management plans has proceeded at a glacial pace. Canada has identified five regions, or large ocean management areas, for which to develop integrated management plans.¹³³ These five regions cover only a proportion of Canada's oceans (see figure 3) and only one plan has entered into force since 1997. A number of challenges have affected development of integrated management plans. There are no national guidelines on which to base the development process thus requiring a "learning by doing" approach.¹³⁴ There is a lack of any incentives encouraging or requiring the timely development of plans. The jurisdictional challenges discussed above (3.2.1) have resulted in the stagnation of the Eastern Scotian Shelf and the Gulf of St Lawrence plan processes. Finally, integrated oceans

¹²⁶ R Peart, K Serjeant, and K Mulcahy *Governing our Oceans: Environmental Reform for the Exclusive Economic Zone* (Environmental Defence Society, Auckland, 2011) at 15.

¹²⁷ Oceans Act SC 1996 c 31, part I.

¹²⁸ Oceans Act SC 1996 c 31, part II, ss 29-34.

¹²⁹ Oceans Act SC 1996 c 31, s 35.

¹³⁰ S Jessen "A Review of Canada's Implementation of the Oceans Act since 1997: From Leader to Follower" (2011) 39(1) *Coastal Management* 20 at 23.

¹³¹ Jessen, above n 130, at 23.

¹³² PJ Ricketts and L Hildebrand "Coastal and Ocean Management in Canada: Progress or Paralysis?" (2011) 39 *Coastal Management* 4 at 10.

¹³³ Fisheries and Oceans Canada "Large Ocean Management Areas" (2010) <www.dfo-mpo.gc.ca>.

¹³⁴ Jessen, above n 130, at 37

management has been effectively demoted, it was the central pillar under the Oceans Action Plan but it is just one of five initiatives under the Health of the Oceans 2007.¹³⁵

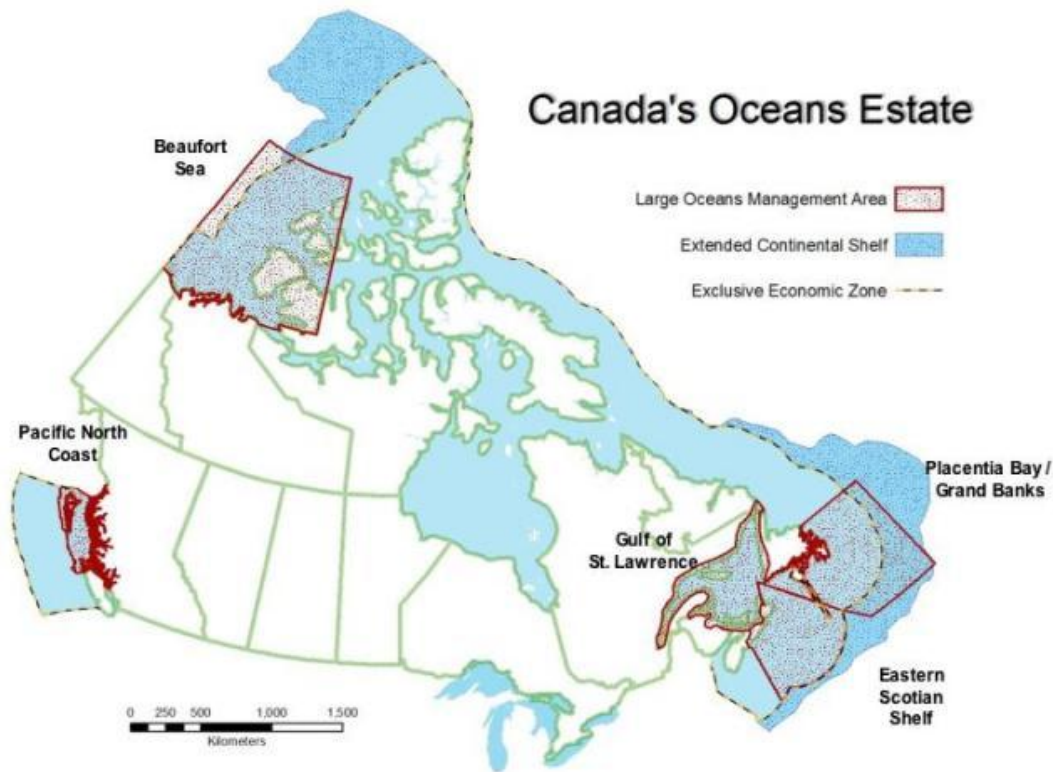


Figure 3: Canada's Large Oceans Management Areas¹³⁶

3.2.4 Marine Conservation

Although the Act provides for the development of a national system of marine protected areas¹³⁷, the development of marine protected areas is a challenging and exceptionally slow process.¹³⁸ In the 10 year period after passage of the Oceans Act Canada's total marine protected area only increased from 0.43% to 0.51%.¹³⁹ As with the integrated management plans there are no incentives or requirements encouraging the timely development of a national system of marine protected areas.

¹³⁵ Ricketts and Hildebrand, above n 132, at 11.

¹³⁶ UNESCO Marine Spatial Planning Initiative "Canada (LOMA's)" (2010) <www.unesco-ioc-marinesp.be/>.

¹³⁷ Oceans Act SC 1996 c 31, s 35.

¹³⁸ Jessen, above n 130, at 31.

¹³⁹ Jessen, above n 130, at 29.

3.2.5 Criticisms

Only five years after the Act was passed there were mounting concerns over the Act and its implementation.¹⁴⁰ Thirteen years later it is clear that Canada's oceans continue to be managed using the piecemeal, sector-by-sector approach that the Oceans Act was meant to replace.¹⁴¹

There are a number of factors which have affected Canada's ability to effectively implement an integrated oceans regulatory scheme. The Department of Fisheries and Oceans manages both fisheries and oceans and it has allowed fisheries management issues to consistently override its broader oceans management responsibilities.¹⁴² Second, the Act commits to an integrated approach but to implement this relies on the cooperation of over 20 federal departments and agencies using their existing powers and resources.¹⁴³ It does not provide the coordination mechanisms necessary to achieve integration.¹⁴⁴ This problem is amplified by division of jurisdictional responsibilities between federal, provincial and territorial governments which creates an extra level of complexity and requires a higher level of cooperation.¹⁴⁵ Canada lacks the 'whole-of-government approach' fundamental to IEM.¹⁴⁶ Third, the Act contains no incentives or requirements for departments to accomplish the aims of the legislation in a timely manner¹⁴⁷ resulting in the exceptionally slow development of plans and marine protected areas. Finally, the implementation of the Act was compromised by a lack of adequate funding. During the eight years after it was enacted the Department of Fisheries and Oceans had to redirect existing funding to finance implementation of the Act. The lack of funding signalled a lack of political priority for oceans management and affected the Department of Fisheries and Oceans' ability to gain the cooperation of other departments.¹⁴⁸

¹⁴⁰ Chircop and Marchand, above n 124, at 25.

¹⁴¹ Jessen, above n 130, at 20.

¹⁴² Jessen, above n 130, at 26.

¹⁴³ Jessen, above n 130, at 25.

¹⁴⁴ Compare to Australia at 3.4.4

¹⁴⁵ Ricketts and Hildebrand, above n 132, at 7.

¹⁴⁶ Jessen, above n 130, at 25.

¹⁴⁷ Jessen, above n 130, at 25.

¹⁴⁸ Jessen, above n 130, at 26.

3.2.6 Conclusion

Canada was once considered a world leader in oceans management. However this section demonstrates the challenges Canada has faced putting theory into practice. It highlights the need for a national policy vision, an effective lead agency, adequate funding, mechanisms for process integration, and requirements for timely instrument development. These lessons should be utilised in the development of environmental regulation for New Zealand's ocean area.

3.3 United Kingdom (UK)

3.3.1 Constitutional Structure

The UK system of government includes devolved responsibilities; some administrative, executive and/or legislative powers are delegated from the UK Parliament to the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly.¹⁴⁹ The UK Parliament retains the right to create legislation applying in all four countries as it has done with the Marine and Coastal Access Act 2009. As in Canada, the devolution of responsibilities adds complexity to the implementation of IEM.

3.3.2 Legislation, Planning Documents and Institutional Bodies

The UK has recently enacted the Marine and Coastal Access Act 2009. This legislation creates a new system for marine planning, marine licensing and marine conservation zones.

The Act provides for the creation of a marine policy statement applying across the UK. The UK's marine policy statement¹⁵⁰ was published on the 18th of March 2011.¹⁵¹ It provides the high level policy context for preparing marine plans and making decisions affecting the marine environment.¹⁵² It outlines a vision for the UK marine area, general principles for

¹⁴⁹ M Leeke, C Sear and O Gay 'An introduction to devolution in the UK' (17 November 2003) Parliament and Constitution Centre, House of Commons Library, Research Paper 03/84 at 7.

¹⁵⁰ Adopted by the UK Government, the Scottish Government, the Welsh Assembly Government and the Northern Ireland Executive: Department for Environment, Food and Rural Affairs 'UK marine policy statement published' (2011) <www.defra.gov.uk>

¹⁵¹ Ibid.

¹⁵² UK Marine Policy Statement, at 3.

decision making, and policy objectives for the key activities that take place in the marine environment.¹⁵³

The Act also provides for the making of marine plans for the inshore and offshore regions of England, Scotland, Wales and Northern Ireland. England's marine planning process officially began on the 1st of April 2011.¹⁵⁴ England has identified 10 marine planning regions (see figure 4). A new agency called the Marine Management Organisation (MMO) has been created to administer marine planning in England.¹⁵⁵ The MMO has recognised the importance of delivering planning instruments in a timely manner and, despite no time requirements in the Act, has set a goal of delivering two plans every two years.¹⁵⁶ In Wales marine planning will be undertaken by the Welsh Assembly Government. In Northern Ireland the Department of the Environment will carry out marine planning¹⁵⁷ and Marine Scotland will be responsible for marine planning in Scotland.¹⁵⁸ The devolution of these responsibilities creates challenges for integration, however, the UK marine policy statement has been adopted by all four UK administrations and is intended to 'enable an appropriate and consistent approach to marine planning across UK waters.'¹⁵⁹ The Act ensures this by requiring that marine plans conform with the marine policy statement, unless relevant considerations indicate otherwise.¹⁶⁰

¹⁵³ UK Marine Policy Statement, at 6.

¹⁵⁴ Marine Management Organisation 'Marine plan areas' <www.marinemanagement.org.uk>.

¹⁵⁵ R Peart, K Serjeant, and K Mulcahy, above n 126, at 14.

¹⁵⁶ Marine Management Organisation 'Marine plan areas' <www.marinemanagement.org.uk>.

¹⁵⁷ Department for Environment, Food and Rural Affairs, above n 150.

¹⁵⁸ The Scottish Government 'Marine Planning & Legislation' (2011) <www.scotland.gov.uk>.

¹⁵⁹ Department for Environment, Food and Rural Affairs, above n 150.

¹⁶⁰ Marine and Coastal Access Act 2009 (UK), s 51(6).



Figure 4: England's marine planning areas¹⁶¹

3.3.3 Marine Licensing

The Act provides the framework for a new marine licensing system. Marine licensing will be carried out by the MMO in all waters adjacent to England and all offshore UK waters, except those adjacent to Scotland.¹⁶² The Act requires anyone undertaking a licensable marine activity to obtain a marine license.¹⁶³ Licensable marine activities include; depositing any substance, scuttling a vessel, constructing or altering works, removing any substance from the seabed, carrying out any form of dredging, use of any explosive substance, or incinerating any substance, within the UK marine licensing area.¹⁶⁴ Exemptions are provided for

¹⁶¹ Marine Management Organisation, above n 154.

¹⁶² Department for Environment, Food and Rural Affairs 'Marine licensing' (2011) <www.defra.gov.uk>

¹⁶³ Marine and Coastal Access Act 2009 (UK), s 65.

¹⁶⁴ Marine and Coastal Access Act 2009 (UK), s 66(1). The UK marine area consists of the area of sea within the limits of the territorial sea, exclusive economic zone, and the UK sector of the continental shelf (where such treatment does not contravene any international obligation binding on the UK): Marine and Coastal Access Act 2009 (UK), s 42. The UK marine licensing area is the UK marine area other than the Scottish inshore area: Marine and Coastal Access Act 2009 (UK), s 66(4).

dredging by a harbour authority¹⁶⁵ and oil and gas activities and carbon dioxide storage,¹⁶⁶ which continue to be regulated under sectoral legislation.¹⁶⁷ The exclusion of oil and gas activities from the licensing system reduces the integrated nature of this scheme.

3.3.4 Marine Conservation

The Act enables an appropriate authority¹⁶⁸ to designate marine conservation zones within the UK territorial sea, exclusive economic zone or extended continental shelf.¹⁶⁹ It requires those authorities to designate marine protected areas in order to form a network of protected areas. However, the Act gives no indication as to the size of the network or the time within which it must be established.¹⁷⁰ England has already protected 24% of its inshore waters as marine protected areas under prior legislation.¹⁷¹ Marine conservation zones will exist alongside these existing sites.¹⁷²

3.3.5 Criticisms

The Marine and Coastal Access Act has only been in force for a short period. However a key weakness is the features of the Act which allow public authorities to ignore marine planning documents. First, where developments are nationally significant infrastructure projects¹⁷³ and require consent under the Planning Act 2008¹⁷⁴, the decision maker need only 'have regard' to marine planning documents. In these situations there is little legal basis to compel public

¹⁶⁵ Marine and Coastal Access Act 2009 (UK), s 75.

¹⁶⁶ Where a license is required to search for and get petroleum or constructing or maintaining a pipeline, establishing or maintaining an offshore installation, or gas unloading, storage and recovery and carbon dioxide storage: Marine and Coastal Access Act 2009 (UK), s 77.

¹⁶⁷ The Petroleum Act 1990, Petroleum (Production) Act 1934, and the Energy Act 2008.

¹⁶⁸ In relation to an area in Wales, the Welsh Minister, in relation to an area in the Scottish offshore region, the Scottish Ministers (with the agreement of the Secretary of State), and the Secretary of State in any other case: Marine and Coastal Access Act 2009 (UK), s 116.

¹⁶⁹ Except for the Scottish or Northern Ireland inshore regions: Marine and Coastal Access Act 2009 (UK), s 116. Marine nature conservation in the inshore waters of Scotland and Northern Ireland is a matter for the Scottish Minister and Northern Ireland Departments to determine through their own legislation: Marine and Coastal Access Act 2009, explanatory notes.

¹⁷⁰ T Appleby and PJS Jones 'The marine and coastal access act' (2012) 36 *Marine Policy* 73, at 76.

¹⁷¹ Department for Environment, Food and Rural Affairs 'Marine Protected Areas' (2011) <www.defra.gov.uk>.

¹⁷² Department for Environment, Food and Rural Affairs 'Marine Conservation Zones' (2011) <www.defra.gov.uk>.

¹⁷³ Including energy, transport, water, waste water and hazardous waste facilities that exceed certain capacities: Planning Act 2008 (UK), pt 3.

¹⁷⁴ Planning Act 2008 (UK), s 31.

authorities to comply with marine planning.¹⁷⁵ Secondly, a public authority making an authorisation or enforcement decision¹⁷⁶ must do so in accordance with marine planning documents, “unless relevant considerations indicate otherwise”. Public authorities taking any decision which is not related to authorisation or enforcement are only required to “have regard” to the appropriate marine planning documents when carrying out their functions.¹⁷⁷ Similarly, a marine plan must conform to the marine policy statement, unless relevant considerations indicate otherwise.¹⁷⁸ The use of the term “unless relevant considerations indicate otherwise” gives public authorities the chance to evade marine planning simply by stating why they chose to ignore planning documents.¹⁷⁹ This allows “recalcitrant sectoral authorities” to focus on their sectoral priorities and may undermine the potential for “a strategic, integrated, ecosystem-based approach to marine spatial planning”.¹⁸⁰

3.3.6 Conclusion

The UK is the most recent of the three countries examined to adopt an integrated approach to oceans governance. The Marine and Coastal Access Act avoids some of the pitfalls of Canada’s Oceans Act however it still appears to have two significant weaknesses, the exclusion of oil and gas activities from the marine licensing system and the features which allow public authorities to evade marine planning documents. The UK regime also goes further than Australia and Canada have by integrating fisheries management and licensing into the Marine and Coastal Access Act. The UK example provides valuable experience and should guide the development of regulation for New Zealand’s oceans.

¹⁷⁵ Appleby, above n 170, at 75-6.

¹⁷⁶ An “authorisation or enforcement decision” is the determination of any application for authorisation of an act which affects the UK marine area, a decision relating to conditions of an authorisation, extension, replacement, variation, revocation of an authorisation or conditions, a decision relating the enforcement of an authorisation or conditions and any decision relating to the enforcement of any prohibition or restriction on the going of any act: Marine and Coastal Access Act 2009 (UK), s 58(4).

¹⁷⁷ Marine and Coastal Access Act 2009 (UK), s 58(1).

¹⁷⁸ Marine and Coastal Access Act 2009 (UK), s 51(6).

¹⁷⁹ Appleby, above n 170, at 75-6.

¹⁸⁰ Appleby, above n 170, at 76.

3.4 Australia

3.4.1. Constitutional Structure

Australia has a federal system of government and has divided responsibility for its marine area. States and territories have primary responsibility for coastal waters within three nm of the territorial sea baseline.¹⁸¹ The Commonwealth Government manages the marine area from the State or Territory limit to the edge of the exclusive economic zone.¹⁸²

3.4.2 Legislation

Australia's Environmental Protection and Biodiversity Conservation Act 1999 (EPBCA) is overlay legislation, it provides a Commonwealth-level environmental management framework while activities remain subject to sectoral and State legislation. It is unique in that it applies onshore and offshore, including the exclusive economic zone and continental shelf.¹⁸³ The overlay structure reflects Australia's federal constitutional structure¹⁸⁴ and as such may not be an appropriate model for New Zealand.

The EPBCA is triggered by any activity which may have a 'significant impact' on a matter of national environmental significance.¹⁸⁵ This includes any activity that has or is likely to have a significant impact on the environment of the Commonwealth marine area.¹⁸⁶ When a proposal triggers the EPBCA the application will be transferred to the Environment Minister to decide whether approval is needed¹⁸⁷ and how to assess the impacts of the application.¹⁸⁸

¹⁸¹ A Bergin and M Haward 'Australia's New Oceans Policy' (1999) 14 *Int'l J. Marine & Coastal L.* 387 at 388.

¹⁸² Australian Government Department of Sustainability, Environment, Water, Population and Communities 'Marine Protected Areas' (2010) <www.environment.gov.au>.

¹⁸³ Environmental Protection and Biodiversity Conservation Act 1999 (Cth), s 5.

¹⁸⁴ R Peart, K Serjeant, and K Mulcahy, above n 126, at 15.

¹⁸⁵ Environmental Protection and Biodiversity Conservation Act 1999 (Cth), pt 3.

¹⁸⁶ Environmental Protection and Biodiversity Conservation Act 1999 (Cth), s 23. The Commonwealth marine area is: the waters, seabed, and airspace in the exclusive economic zone and continental shelf, except those which have been vested in States: Environmental Protection and Biodiversity Conservation Act 1999 (Cth), s 24.

¹⁸⁷ If the Act is triggered Ministerial approval is required under part 9 of the Act. The exception is where part 4 allows the action without approval because it is covered by bilateral agreements or ministerial declarations: Environmental Protection and Biodiversity Conservation Act 1999 (Cth), s 23(4).

¹⁸⁸ A proposal may be assessed using: a process laid down by a bilateral agreement, a process specified or accredited by the Minister, information included in the referral, preliminary documentation provided by the proponent, a public environmental report, an environmental impact statement, or a public inquiry.

Based on that assessment the Minister decides whether or not to approve the action and what conditions to attach.¹⁸⁹

3.4.3 Oceans Policy

Australia's Oceans Policy was launched in 1998 with the goal of developing a comprehensive national plan to protect and manage Australia's oceans.¹⁹⁰ It has no statutory basis but continues to guide the Australian Government's marine programmes following the enactment of the EPBCA.¹⁹¹

3.4.4 Institutional Bodies

Australia has a number of institutional bodies involved in oceans governance. The Minister for the Environment and Heritage has lead responsibility for Australia's Oceans Policy.¹⁹² The Marine Division of the Department of the Environment, Water, Heritage and the Arts puts the policy into action, develops regional marine plans and co-ordinates across government and between governments.¹⁹³ The Minister for the Environment and Heritage and the Department of the Environment, Water, Heritage and the Arts are also responsible for the application of the EPBCA which should assist with integration between the legislation and the policy.

An Oceans Board of Management comprises representatives from seven Australian Government departments and agencies¹⁹⁴ and is tasked with providing high-level, whole-of-government advice on Australia's Oceans Policy and regional marine planning.¹⁹⁵ This is a coordination mechanism that assists in achieving integration between legal, political, economic and other areas. A National Oceans Advisory Group provides a key consultative

¹⁸⁹ Environmental Protection and Biodiversity Conservation Act 1999 (Cth), s 66.

¹⁹⁰ Bergin and Haward, above n 181, at 387.

¹⁹¹ Australian Government Department of Sustainability, Environment, Water, Population and Communities 'Australia's Oceans Policy' (2010) <www.environment.gov.au>.

¹⁹² Ibid.

¹⁹³ Bergin and Haward, above n 181, at 387.

¹⁹⁴ Department of Environment and Heritage, Department of Industry, Tourism and Resources, Department of Agriculture, Fisheries and Forestry, Department of Education, Science and Training, Department of Transport and Regional Services, Department of Defence, Department of Finance and Administration, Department of Prime Minister and Cabinet, Australian Fisheries Management Authority.

¹⁹⁵ Australian Government Department of Sustainability, Environment, Water, Population and Communities, above n 191.

mechanism.¹⁹⁶ It is comprised of non-government groups representing industry, community, science, conservation and other stakeholders.¹⁹⁷ The final institutional body is the Oceans Policy Science Advisory Group which was formed to promote coordination between marine science agencies and across the broader Australia marine science community. It consists of Government, State and non-government marine science groups.¹⁹⁸

Australia has established a number of institutional bodies to ensure its oceans policy is successfully implemented. This approach can be contrasted to that of Canada who relied on existing institutional bodies with few mechanisms to implement the new regime.

3.4.5 Planning Instruments

The EPBCA provides for the making of marine bioregional plans. These set out key conservation issues and priorities for each marine region.¹⁹⁹ If a bioregional plan is in place the Minister must have regard to it when making a decision under this Act.²⁰⁰ Marine bioregional plans are currently being prepared in all five of Australia's marine regions (see figure five).²⁰¹

¹⁹⁶ Bergin and Haward, above n 181, at 388.

¹⁹⁷ The sectors currently represented include: marine science, conservation, ports, indigenous people, recreation, minerals, tourism, shipping, commercial fishing, recreational fishing, oil and gas, maritime policy and law, Bureau of Meteorology, and community.

¹⁹⁸ Australian Government Department of Sustainability, Environment, Water, Population and Communities, above n 191.

¹⁹⁹ R Peart, K Serjeant, and K Mulcahy, above n 126, at 13.

²⁰⁰ Environmental Protection and Biodiversity Conservation Act 1999 (Cth), s 176(5).

²⁰¹ Australian Government Department of Sustainability, Environment, Water, Population and Communities "About marine bioregional planning" (2011) <www.environment.gov.au>.

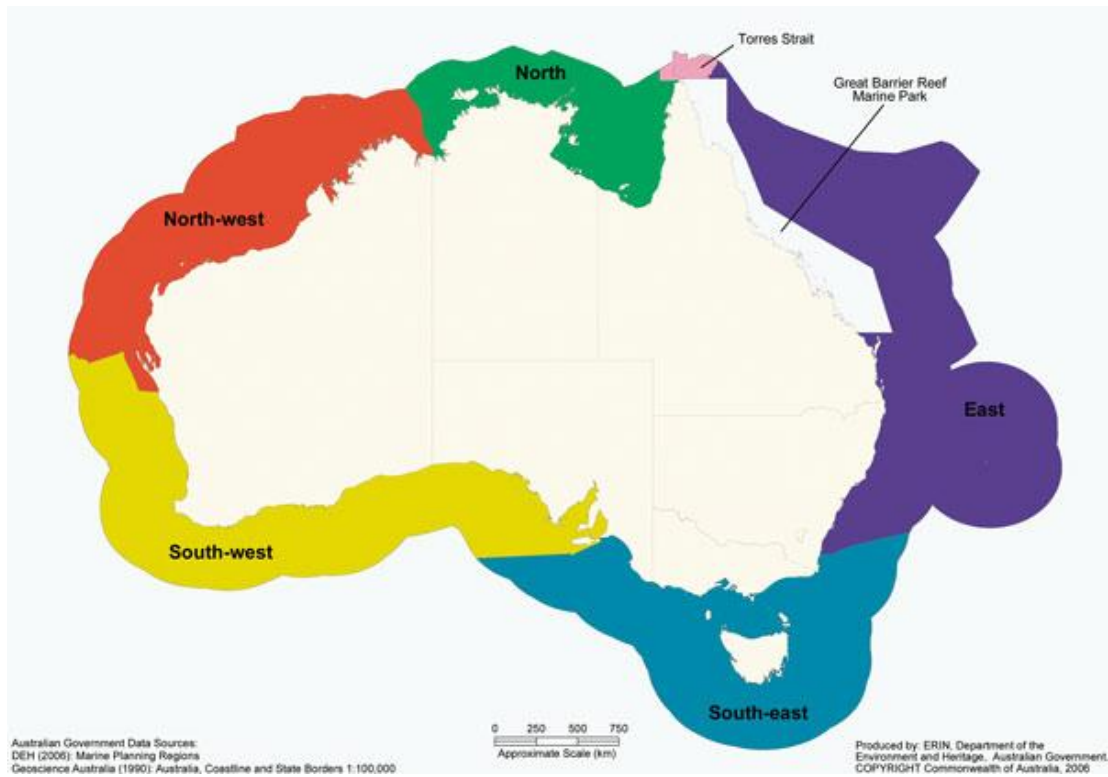


Figure 5: Australia’s marine regions²⁰²

3.4.6 Marine Conservation

The EPBCA provides for Commonwealth reserves to be created on land or at sea, including the exclusive economic zone.²⁰³ The primary objective of the marine protected areas is to protect biodiversity. Australia currently has over 200 marine protected areas equating to 10% of Australia’s exclusive economic zone (see figure 6) and is working toward establishing a national representative system of marine protected areas.²⁰⁴

²⁰² Australian Government Department of Sustainability, Environment, Water, Population and Communities “Marine Bioregional Planning – North-west Marine Region” (2010) <www.environment.gov.au>.

²⁰³ Environmental Protection and Biodiversity Conservation Act 1999 (Cth), s 344.

²⁰⁴ Australian Government Department of Sustainability, Environment, Water, Population and Communities “National Representative System of Marine Protected Areas” (2010) <www.environment.gov.au>.

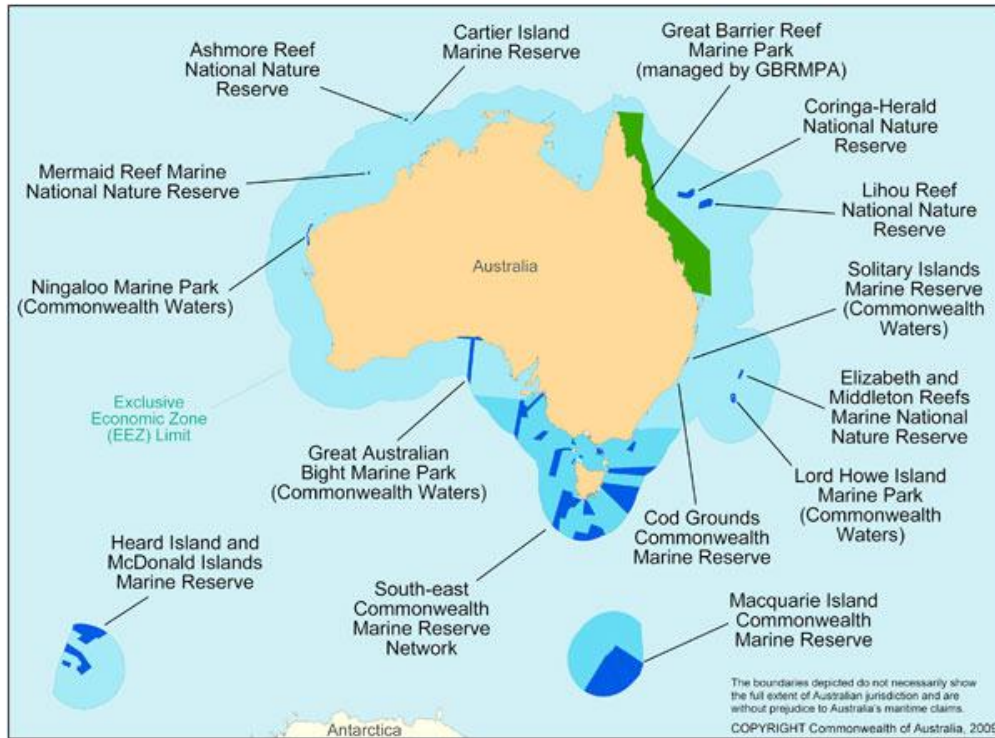


Figure 6: Australia's Commonwealth marine reserves²⁰⁵

3.4.7 Criticisms

Rather than introduce dedicated oceans legislation, Australia has created new institutional arrangement to develop a policy framework and implement it²⁰⁶ along with overarching environmental legislation (the EPBCA) that applies on and offshore. Australia has maintained existing sectoral regimes for managing ocean resources. Fisheries are managed under the Fisheries Management Act 1991 and Fisheries Administration Act 1991 and petroleum is managed under the Petroleum (Submerged Lands) Act 1967. Due to Australia's federal constitution State regimes also remain in place. This is a major challenge to integrated oceans management in Australia.

²⁰⁵ Australian Government Department of Sustainability, Environment, Water, Population and Communities "Marine Protected Areas" (2010) <www.environment.gov.au>.

²⁰⁶ Bergin and Haward, above n 181, at 395-6.

3.5 Lessons for New Zealand

The experiences of Canada, the UK and Australia provide valuable lessons which should assist in developing a solution for oceans governance in New Zealand. A number of themes emerge from this chapter. First, all three countries have recognised the importance of integrated environmental management and have attempted to make this an integral part of their legislation. As all three countries have devolved responsibilities this task should prove easier in New Zealand.²⁰⁷ Second, each country has developed a lead agency for oceans management in order to enable an integrated whole-of-government approach. Thirdly, all three countries recognise the need for marine spatial planning and have begun developing regional marine plans. Fourthly, each country has accepted the necessity of a national policy vision and a policy statement is in effect in all three countries. Fifthly, Canada, Australia and the UK have all integrated conservation into their management schemes by providing for the establishment of marine conservation areas. Finally, the UK has recently gone further than Canada and Australia and has developed a scheme which integrates policy, plans, licensing (including fisheries), and conservation. Although the Marine and Coastal Access Act is only new it may prove to be a model for future best practice in oceans governance. The lessons learnt in this chapter and the preceding chapter will be utilised to analyse the proposals for filling New Zealand's regulatory gap beyond the territorial sea.

²⁰⁷ R Peart, K Serjeant, and K Mulcahy, above n 126, at 16.

CHAPTER FOUR: THE OPTIONS FOR ADDRESSING THE REGULATORY GAP

4.1 Introduction

The previous Labour government²⁰⁸ began drafting environmental legislation for the exclusive economic zone in June 2008. However, as a result of the change in government after the 2008 general election, this legislation was never introduced to Parliament.²⁰⁹ The current National government²¹⁰ introduced the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill to Parliament on 24 August 2011.²¹¹ This chapter analyses some provisions of the Bill in detail, by comparing and contrasting the provisions with the 2008 proposal and existing environmental legislation. It then assesses the Bill in accordance with the principles and themes identified in chapters two and three. Throughout this discussion the alternative option of extending the RMA is also analysed. This chapter concludes that the option of extending the RMA has significant advantages over the Bill. Despite this, it suggests that neither the Bill nor the RMA can provide an adequate long term regime for oceans governance in New Zealand.

4.2 An overview of the Bill

The Bill is intended to come into effect on 1 July 2012.²¹² It is closely based on the 2008 proposal but reflects the current government's greater emphasis on economic development and minimising compliance costs.²¹³ It fills the gap in the management of the exclusive economic zone and extended continental shelf without noteworthy amendments to existing regimes.

The Bill provides that the purpose of the legislation is to achieve a balance between the protection of the environment and economic development.²¹⁴ It also lists matters for decision

²⁰⁸ The 5th Labour government's term ran from 1999-2008.

²⁰⁹ Trevor Mallard 'Legislation to safeguard ocean ecosystems' (press release, 27 June 2008).

²¹⁰ The current National government came into power after the 2008 general election.

²¹¹ Nick Smith 'Environmental protection laws for oceans introduced' (press release, 24 August 2011).

²¹² *Ibid.*

²¹³ Cabinet Paper 'Proposal for Exclusive Economic Zone Environmental Effects Legislation' (4 May 2011) <www.mfe.govt.nz> at [4].

²¹⁴ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-1), cl 10.

makers to take into account and information principles.²¹⁵ The Bill prohibits certain activities²¹⁶ unless they are classified as permitted or authorised by a marine consent.²¹⁷ Regulations will provide the operational detail for the legislation, including the classification of activities into permitted, discretionary and prohibited classes.²¹⁸ The Bill states that a person must have a marine consent before undertaking a discretionary activity.²¹⁹ Applications for marine consent will be publicly notified²²⁰ and decided by the Environmental Protection Agency (ōEPAō).²²¹ The Bill states that the EPA may grant an application for a marine consent if the activityōs contribution to New Zealandōs economic development outweighs the activities adverse effects on the environment.²²² Decisions regarding marine consents will be appealable to the High Court on questions of law.²²³

4.3 Analysis of the Options

4.3.1 Commencement and Transition

The Bill will come into force on a date appointed by the Governor-General by Order in Council with any provisions not in force by 1 July 2013 coming into force on that date.²²⁴ The purpose for the delay in commencement is to allow regulations to be developed. It is anticipated that regulations will be made and the Bill brought into force by the end of 2012.²²⁵ This timetable is based on an assumption that National will remain in government following the 2011 general election.

²¹⁵ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 12 and 13.

²¹⁶ The activities are ō (a) the construction, placement, alteration, extension, removal, or demolition of a structure on or under the seabed; or (b) the construction, placement, alteration, extension, or removal of a submarine pipeline on or under the seabed; or (c) the placement, alteration, or removal of a submarine cable on or from the seabed; or (d) the removal of non-living natural material from the seabed or subsoil; or (e) the disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on the seabed or subsoil; or (f) the deposit of any thing or organism in, on, or under the seabed; or (g) the destruction, damage, or disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on marine life or its habitat.

²¹⁷ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 15.

²¹⁸ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 29.

²¹⁹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 37.

²²⁰ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 46.

²²¹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 39.

²²² Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 61(2).

²²³ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 103.

²²⁴ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 2.

²²⁵ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, explanatory note.

Considering the substantial interest in New Zealand's offshore resources this delay is of concern. The government has put in place interim measures for the drilling of new exploration wells for petroleum applying from 24 August 2011.²²⁶ These measures request operators to submit environmental impact assessments to the EPA for review and comply with the latest drilling safety rules developed in the United States.²²⁷ Industry is asked to comply with these interim measures voluntarily.²²⁸

Although the interim measures are voluntary and do not allow the EPA to refuse marine consent for an activity or impose conditions the transitory provisions mean this is not of concern. The Bill provides that where an activity becomes discretionary as a result of the Bill coming into force the operator will need to apply for a marine consent within 6 months. Activities which become prohibited as a result of the Bill coming into force will be required to cease after a period indicated in the regulations. This means that all activities which commence between 1 July 2011 and the Bill coming into force will come under the control of the legislation. An exception is mining activities which were authorised under the Crown Minerals Act 1991 or Continental Shelf Act 1964 before 1 July 2011. These are allowed to continue in contravention of the legislation for the length of the term stated in the permit or license.²²⁹ This recognises that these operators have invested heavily in their operations prior to the legislation being announced.

These provisions contrast with the 2008 proposal. That proposal intended that the legislation would come into force before the development of regulations during which period all new activities would be deemed to be discretionary.²³⁰ The cabinet paper also suggested that where an existing activity has been approved under other legislation (presumably a mining activity approved under the Crown Minerals Act) that would not be subject to the legislation until the existing approval expires, or, if the conditions of the existing approval were deemed

²²⁶ The Cabinet Paper estimates that two to four new wells are likely to be drilled in the interim period out of the 18 petroleum exploration permits in the EEZ under which drilling could potentially take place based on the progress of operators through their work programme: Cabinet Paper 'Exclusive Economic Zone and Extended Continental Shelf Environmental Effects Legislation Interim Measures and Other Improvements to the Regulatory Regime for Offshore Petroleum' (27 July 2011) CAB 11-C-00952 at [15].

²²⁷ Nick Smith, above n 211.

²²⁸ Cabinet Paper, above n 226, at [1].

²²⁹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 16.

²³⁰ It also provided for minor applications to go through a non-notified process: Cabinet Paper 'Proposal of Exclusive Economic Zone Environmental Effects Legislation' (10 July 2008) CAB 07-C-0751 [263]-[264].

to be inconsistent with the legislation a transitional EEZ consent requiring the operator to align the activity with the legislation within 5 years would be required.²³¹

The interim measures and transitional provisions contained in the Bill will prevent a rush to commence activities prior to the legislation coming into force. They may encourage operators to delay commencing an activity until the legislation comes into force so that they can receive a marine permit and have certainty regarding their investment. However, the exclusion of existing minerals activities from the regime may overvalue existing interests at the expense of environmental protection. A process requiring gradual alignment with the legislation, such as that proposed in 2008, may be more appropriate given the environmental risks associated with mining activities.

4.3.2 Jurisdictional Issues

This paper outlined New Zealand's rights beyond the territorial sea above and concluded that any legislation applying beyond the territorial sea would need to recognise New Zealand's reduced jurisdiction and the rights of other States beyond the territorial sea.

The Minister for the Environment claimed that the Bill has been "carefully designed" to ensure it is consistent with New Zealand's international obligations.²³² Clause 11 directs that the Bill "must be interpreted, and all persons performing functions and duties or exercising powers under it must act, consistently with New Zealand's international obligations under [UNCLOS]." An equivalent provision, referring to international obligations relating to fishing, is contained in the Fisheries Act which, like the Bill, applies beyond the territorial sea.²³³ These provisions reflect the willingness of the Courts to interpret legislation in a way that is consistent with the principles of international law.²³⁴ This is a tidy way to ensure that the legislation does not conflict with New Zealand's international obligations. However this provision may not be effective in practice because it is unlikely every person applying the legislation will have a working knowledge of the rights and obligations contained in UNCLOS. Departmental manuals may provide guidance to decision makers, however this does not align with the claim that the Bill was carefully designed to ensure consistency with

²³¹ *Ibid*, at [263]-[268].

²³² (13 September 2011) 675 NZPD 21214

²³³ Fisheries Act 1996, s 5.

²³⁴ *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 at 59.

New Zealand's international obligations. Furthermore the Bill makes no provision for the rights of other States beyond the territorial sea. The 2008 cabinet paper proposed that the legislation should reflect the permissive regime for international navigation, cables and pipelines and marine scientific research.²³⁵ This is not achieved in the Bill, suggesting an intention to deal with these matters through regulations classifying activities.

The previous and current government used international law as a justification for not considering extension of the RMA as a viable option for addressing the regulatory gap.²³⁶ However, if the inclusion of clause 11 is sufficient to ensure New Zealand's international obligations are met by the Bill, it may be asked why such a provision could not achieve the equivalent in an extended RMA. This suggests that international law considerations are not an adequate justification for preferring new legislation over an extended RMA.

4.3.3 Purpose and Matters to be taken into account

Clause 10 provides that:²³⁷

“The Act seeks to achieve a balance between the protection of the environment and economic development in relation to activities in the exclusive economic zone and on the continental shelf by

(a) requiring decision-makers to take the matters in section 12 into account in making decisions [to make regulations or grant or refuse an application for marine consent]; and

(b) requiring them to take a cautious approach in decision-making if information available is uncertain or inadequate; and

(c) requiring the adverse effects of activities on the environment to be avoided, remedied, or mitigated.”

²³⁵ Cabinet Paper, above n 230, at [84].

²³⁶ For example the Regulatory Impact Statement for the Bill stated the “RMA was designed for application in areas over which New Zealand had full sovereignty” and that “unmodified application” to the EEZ “would not be consistent with New Zealand’s obligations under international law”: Ministry for the Environment *Regulatory Impact Statement – Exclusive Economic Zone and Extended Continental Shelf Environmental Effects Legislation* (20 April 2011) at 12.

²³⁷ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 10.

This must be read together with clause 12 which states that:²³⁸

ō[i]n making decisions for the purposes of this Act, all persons performing functions and duties or exercising powers under it that may affect the environment or existing interests must take into account the following matters:

- (a) the adverse effects on the environment of all activities undertaken in an area of the exclusive economic zone or the continental shelf, including the effects of activities not regulated under this Act:
- (b) the economic well-being of New Zealand:
- (c) the efficient use and development of natural resources:
- (d) the effects of activities on existing interests:
- (e) the effects on human health that may arise from adverse effects on the environment:
- (f) the nature and effect of other marine management regimes:
- (g) the protection of the biological diversity and integrity of marine species, ecosystems, and processes:
- (h) the protection of rare and vulnerable ecosystems and the habitats of threatened species.ö

The Bill seeks to achieve a balance between two components, protection of the environment and economic development. This may be contrasted to the 2008 proposal which was to primarily focus on protection of the environment.²³⁹ The 2008 cabinet paper does not give the exact wording of a proposed purpose but it suggested that ōthe legislation will provide for uses of the natural and physical resources of the EEZ, and manage the effects of such uses in order to protect the environment and ensure that any uses are environmentally sustainableö.²⁴⁰ This can be contrasted to the 2011 cabinet paper which suggested that the legislation ōwill provide for the development of natural resources in the EEZ and ECS while protecting the environment from the adverse effects of activities í by balancing the adverse effects of the

²³⁸ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 12.

²³⁹ Cabinet Paper, above n 230, at [115].

²⁴⁰ Cabinet Paper, above n 230, at [77].

activities with the benefits activities provide.²⁴¹ The purpose clearly reflects the current government's greater emphasis on economic development.²⁴²

Protection of the marine environment and economic development are often irreconcilable values. Section 5 of the RMA provides that the purpose of the RMA is to promote the sustainable management of natural and physical resources. This also requires decision makers to balance environmental preservation²⁴³ and development of resources.²⁴⁴ Similarly, the purpose of the Fisheries Act is to provide for the utilisation of fisheries resources while ensuring sustainability.²⁴⁵ It is clearly not unusual for environmental regulation to have foci other than protection of the environment. Despite this, the development components of the RMA and the Fisheries Act refer to social, economic and cultural wellbeing while the Bill focuses solely on economic development. This narrower focus may reflect a belief that social and cultural considerations are not as paramount where activities occur a considerable distance from the coastline. The lack of day-to-day contact with activities occurring beyond the territorial sea may reduce social and cultural concerns. However, it is possible that the adverse effects of those activities will affect the territorial sea and coastline (for example; an oil spill could damage an area of cultural significance such as Cape Reinga, recreational fishing areas and coastal aesthetics). Thus it is the author's opinion that, if the Bill is to include a balancing test, social and cultural factors should not have been excluded from clauses 10 and 12.

Where legislation contains irreconcilable values the decision makers must prefer one value over the other based on the particular factual scenario. Which value the decision maker will prefer will depend significantly on the culture of the organisation making the decision and the persuasiveness of the evidence presented. The advantage of this is flexibility. The disadvantage is the lack of an environmental bottom line. The Hazardous Substances and New Organisms Act 1996 is a piece of legislation which moved toward an environmental bottom line. When the Hazardous Substances and New Organisms Bill was introduced its purpose was to manage or prevent the harmful effects of hazardous substances and new

²⁴¹ Cabinet Paper, above n 213, at [42].

²⁴² Cabinet Paper, above n 213, at [4].

²⁴³ It requires that the potential of resources are sustained to meet the reasonably foreseeable needs of future generations, that the life-supporting capacity of resources is safeguarded, and that adverse effects on the environment are avoided, remedied or mitigated: Resource Management Act 1991, s 5(2).

²⁴⁴ It requires management of the *use, development*, and protection of resources to enable people and communities to provide for their social, economic and cultural wellbeing: Resource Management Act 1991, s 5(2).

²⁴⁵ Fisheries Act 1996, s 8.

organisms in order to protect the environment, and the health and safety, and the economic, social and cultural well being, of people and communities so as to enable the maximum net national benefit to be achieved. The maximum net national benefit was to be achieved by weighing up all the costs and benefits of any kind, monetary and non-monetary. It was argued that this purpose would give a very wide discretion to the Environmental Risk Management Authority to determine what weight it would place on environmental and economic factors and thus the personal philosophies of the Authority members would be the primary influence on decisions.²⁴⁶ The concern about the purpose of the Hazardous Substances and New Organisms Bill as introduced led the select committee to substitute a purpose of 'protection of the environment and the health and safety of peoples and communities by preventing or managing the adverse effects of hazardous substances and new organisms'.²⁴⁷ This purpose significantly tipped the scales in favour of environmental protection at the expense of economic and social development.

The balancing test contained in the EEZ Bill, like the purpose of the Hazardous Substances and New Organisms Bill as introduced, will give a wide discretion to the EPA and allow personal philosophies significant influence. It may be argued that this is also the case under the RMA. However, the local authorities who make decisions under the RMA are democratically accountable and guided by planning documents. In contrast, EPA board members are appointed by the Minister for the Environment and the EEZ Bill (like the Hazardous Substances and New Organisms Act) contains no provision for the making of policy or planning documents. The 2008 cabinet paper for the EEZ Bill considered a purpose which would have tipped the scales in favour of environmental protection. The purpose, based on 'protecting and preserving the environment by regulating the environmental effects of activities, and providing for environmentally sustainable uses', was rejected as it was felt the term 'protect and preserve' pushed the legislation too much towards conservation rather than sustainable use.²⁴⁸ The purpose of the EEZ Bill thus reflects a clear political intention that the scales *not* be tipped in favour of environmental protection.

It is worth mentioning that the conflicting values within the purpose mean that a decision could not be challenged on the basis that it is not in accordance with the purpose of the legislation, leaving the decision maker with considerable discretion. The purposes of the Bill,

²⁴⁶ (16 April 1996) 60 NZPD 11900

²⁴⁷ Hazardous Substances and New Organisms Act 1996, s 4.

²⁴⁸ Cabinet Paper, above n 230, at [80].

the RMA and the Fisheries Act merely create an illusion of the rule of law, they do not guide decision makers or allow persons to hold decision makers accountable.

The Bill does not define the terms protection of the marine environment or economic development. However, the reference to clause 12 suggests that the matters it lists are to give guidance to the meaning of clause 10. Clause 12 contains a mixture of environmental, social and economic matters. It contrasts with the 2008 proposal which suggested a clause containing environmental objectives based on a biophysical definition of the environment²⁴⁹ and a separate provision listing economic, social and cultural matters. This hierarchy was intended to reflect a primary focus on managing the environmental effects of activities.²⁵⁰ However, this is not the primary focus of the Bill and placing these considerations within one provision with no internal hierarchy does reflect the purpose of balancing protection of the environment and economic development.

Finally, it may be questioned whether a piece of environmental legislation should have the role of providing balance between economic development and environmental values. NZ Petroleum and Minerals is tasked with promoting investment in the minerals estate²⁵¹ and thus economic development of our offshore resources. Therefore, within the minerals industry at least, the purpose of the Bill creates a double allowance for economic development.

4.3.4 Information Principles

Clause 13 provides that:²⁵²

(1) In achieving the purpose of this Act, a person performing functions and duties or exercising powers under it that affect the environment mustô

(a) make full use of the information and other resources available to it and of its powers to obtain information and expert advice and commission research;
and

²⁴⁹ Cabinet Paper, above n 230, at [110].

²⁵⁰ Cabinet Paper, above n 230, at [115].

²⁵¹ NZ Petroleum and Minerals öBusiness Unitö (2011) <<http://www.nzpam.govt.nz>>.

²⁵² Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 13.

- (b) base decisions on the best available information; and
- (c) take into account any uncertainty or inadequacy in the information available.

(2) If, in relation to the making of a decision under this Act that affects the environment, the information available is uncertain or inadequate, the person must favour caution and environmental protection.

(3) If favouring caution and environmental protection means that an activity is likely to be a prohibited activity or a marine consent is likely to be refused, the person must first consider whether taking an adaptive management approach would allow the activity to be undertaken.

(4) In this section, *best available information* means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

This provision is intended to manage that lack of information about the marine environment, and the risks associated with new technologies which may be implemented there.²⁵³ It appears to be based on section 10 of the Fisheries Act, therefore this section will contrast clause 13 with that provision.

Subclause 1(a) has no equivalent in the Fisheries Act. It requires a person acting under the Act to "make full use" of its powers to obtain information and expert advice and commission research. The EPA has powers to request further information from an application²⁵⁴ and to obtain independent advice.²⁵⁵ This provision could open up decisions of the EPA to appeal on the ground that the EPA did not obtain independent advice, even if, for example, the EPA already had considerable amounts of information and there was no indication any of it was out of date. This does not align with the goal of efficient legislation. This could be addressed by adding, for example, "when reasonable" to the end of clause 13(1)(a).

²⁵³ Cabinet Paper, above n 213213, at [57].

²⁵⁴ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 43.

²⁵⁵ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 45.

Subclause 2 is a form of the precautionary principle. The principle is generally described as 'lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.²⁵⁶ Subclause 2 compares favourably to the equivalent provision contained in the Fisheries Act which 'extends beyond the scope of the precautionary principle' by stating that uncertainty should not be used as a reason for postponing measure to achieve *utilisation*, as well as sustainability.²⁵⁷ Despite this, subclauses 1(b) and (3) undermine the precautionary statement in subclause 2.

Subclauses (1)(b) and (c) closely reflect sections 10(a) and (b) of the Fisheries Act. However, subclause (1)(b) *requires* decisions to be based on the best available information whereas section 10(a) of the Fisheries Act merely requires decision makers to *take into account* the principle that decisions should be based on the best available information. Although Fisheries Act decision makers technically retain discretion, the courts have interpreted section 10(a) of the Fisheries Act as creating a duty for decision makers to be base their decisions on the best available information.²⁵⁸ This duty has overshadowed the precautionary principle under the Fisheries Act. It reduces the ability of decision makers to make precautionary decisions because, for example, a precautionary decision to close a fishery due to concern about bycatch, cannot be made until all presently available relevant scientific information is considered and correctly understood.²⁵⁹ Similarly, it is likely the precautionary principle contained in clause 13(2) of the Bill will be undermined by the requirement for decisions to be based on the best available information.

Subclause 3 requires a decision maker to consider the use of an adaptive management approach. It has no equivalent in the Fisheries Act. This approach is defined in the Bill as allowing an activity to commence; on a small scale or for a short period so that its effects can be monitored, on the basis that consent can be revoked if the effects are more than minor, or on the basis that its effects will be assessed and the activity discontinued on the basis of those effects.²⁶⁰ Use of an adaptive management approach is likely to allow the gathering of information regarding the effects of activities on the marine environment and thus will

²⁵⁶ Rio Declaration on Environment and Development 1992, principle 15.

²⁵⁷ Nicola Wheen 'How the Law lets down the 'Down-Under Dolphin' Fishing-Related Mortality of Marine Animals and the Law in New Zealand', forthcoming article, at 16.

²⁵⁸ *Squid Fishery Management Company v Minister of Fisheries* CA39/04, 13 July 2004 at [103].

²⁵⁹ W Gullet 'The Threshold Test of the precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review' in E Fisher, J Jones and R von Schomberg (ed) *Implementing the Precautionary Principle – Perspectives and prospects* (Edward Elger, Gloucestershire, 2006).

²⁶⁰ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 4.

decrease uncertainty regarding the marine environment. Nevertheless, in some cases, such as where a species is nearing extinction, an adaptive management approach would not be suitable. As such the discretionary nature of this provision, requiring a decision maker only to *consider* an adaptive management approach, is crucial.

The RMA does not contain a provision which is similar to clause 13. The RMA does contain precautionary features, such the requirement for an evaluation, taking into account the risk of acting or not acting if there is uncertain or insufficient information, before a proposed plan or policy statement is publicly notified. Although the Bill specifically refers to the precautionary principle this is severely weakened by the other provisions in clause 13 meaning it is unlikely there is a stronger emphasis on precaution in the Bill compared with the RMA.

4.3.5 Treaty of Waitangi

The Bill recognises the Treaty of Waitangi through specific practical provisions providing for Maori engagement rather than a general Treaty principles provision.²⁶¹ The Bill lists four provisions in the Bill which recognise the Crown's responsibility to take appropriate account of the Treaty of Waitangi: a Maori Advisory Committee to advise the EPA, a process to allow iwi an opportunity to comment on proposed standards and regulations, requiring all persons acting under the Act to have regard to existing interests, and requiring the EPA to notify iwi authorities of consent applications which may affect them.²⁶² This provision has been described as 'more of a declaration of the Crown's view that the bill complies with its Treaty obligations, rather than a provision that places a[n] obligation on decision makers in terms of the Treaty and Treaty principles.'²⁶³

In contrast, the RMA contains a general Treaty of Waitangi provision requiring all persons exercising functions and powers under the Act to take into account the principles of the Treaty of Waitangi,²⁶⁴ along with specific mechanisms for engagement with Maori.²⁶⁵ Without a general treaty provision in the Bill the possibility of Maori challenging decision making under the legislation is reduced. For example, in a case under the RMA Maori

²⁶¹ Cabinet Paper, above n 213213, at [54]

²⁶² Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 14.

²⁶³ (13 September 2011) 675 NZPD 21214

²⁶⁴ Resource Management Act 1991, s 8.

²⁶⁵ For example a local authority preparing a proposed policy statement or plan must consult with the tangata whenua of the area who may be so affected: Resource Management Act 1991, sch 1 pt 1 cl 3(1)(d).

appealed a council decision to grant a discharge consent. The Court held that the council had complied with the principle of consultation but not with the principle of active protection of Maori interests, which required the council to adequately investigate alternative options.²⁶⁶ The four provisions listed above provide for consultation with Maori but do not provide for full gamut of Treaty principles, including active protection. The intention of this may be to streamline processes however the government has obligations to fulfil under the Treaty of Waitangi and the Bill does not give full effect to these obligations.

4.3.6 Classification of Activities

The Bill provides for three classes of activities; permitted, discretionary and prohibited. Permitted activities may be undertaken without a marine consent provided the activity complies with any terms and conditions specified in the regulations and the person undertaking the activity notifies the EPA if required by the regulations.²⁶⁷ Discretionary activities can be undertaken if a marine consent is granted.²⁶⁸ Prohibited activities may not be undertaken by any person.²⁶⁹ The three classes have been streamlined from the six contained in the RMA; permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited.²⁷⁰ Under the Bill activities will be classified into the three classes by regulations²⁷¹ but where there are no regulations in place an activity will be deemed to be discretionary and require a marine consent.²⁷² In contrast, activities regulated by the RMA may be classified by regulations (including any national environmental standard) or in a regional or district plan.²⁷³

The Bill provides that an activity must not be classified as permitted if, in the Minister's opinion, the activity is likely to have adverse effects on the environment or an existing interest that are 'significant in the circumstances' and it is more appropriate for the adverse effects to be considered during a consent process.²⁷⁴ The Bill gives no further guidance as to the meaning of these terms. The word significant is defined by the Shorter Oxford English

²⁶⁶ *Te Runanga v Northland Regional Council* [1996] NZRMA 77.

²⁶⁷ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 36.

²⁶⁸ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 37.

²⁶⁹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 38.

²⁷⁰ Resource Management Act 1991, s 87A.

²⁷¹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 29.

²⁷² Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 37.

²⁷³ Resource Management Act 1991, s 87A.

²⁷⁴ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 29(4).

Dictionary as meaning important or large.²⁷⁵ It is a much higher standard than 'more than minor' contained in the notification test in the RMA.²⁷⁶ The meaning of 'in the circumstances' is likely a reflection of the fact that effects may be greater or smaller depending on the vulnerability of the area in question. The term 'more appropriate' may be interpreted with regard to what the consent process involves. A consent process involves an impact assessment, compulsory notification, and may involve a hearing. These are significant requirements that may raise the standard of this provision. How this test is applied is extremely important because the legislation will be wholly ineffective if the majority of activities are classified as permitted.

Regulations will be publicly notified unless the regulations will have no more than a minor effect, or the regulations correct errors or make minor technical changes.²⁷⁷ Thus it is likely that the public will have the opportunity to make submissions regarding the classification of activities. The notification process is more streamlined than that required for planning instruments under the RMA²⁷⁸ but considering public notification is not generally required for the making of regulations this is to be expected. Despite this, regulations are more difficult to challenge than planning documents. Regulations can only be challenged if they are ultra vires or other grounds of judicial review are relevant, whereas planning documents made under the RMA can be appealed to the Environment Court by any person who submitted on the proposal in respect of any provision in the document.²⁷⁹ The reduction in accountability mechanisms is efficient, but, considering the entire effectiveness of the legislation rests on the classification of activities it is questionable whether it is appropriate to exclude appeals on the merits.

4.3.7 Notification

The Bill provides for compulsory public notification of all complete applications for a marine consent thus allowing any person to make a submission to the EPA regarding an application for consent.²⁸⁰ It also requires Ministers with responsibilities that may be affected, Maritime New Zealand, Maori interests, existing interests and regional councils that may be affected to

²⁷⁵ *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007)

²⁷⁶ Resource Management Act 1991, s 95A.

²⁷⁷ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 32.

²⁷⁸ Resource Management Act 1991, sch 1 part 1, cl 1.

²⁷⁹ Resource Management Act 1991, sch 1 part 1, cl 14.

²⁸⁰ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 47.

be notified.²⁸¹ This contrasts with the RMA scheme which contains a test for when public notification, limited notification or no notification is required. The RMA requires public notification only if the consent authority decides the activity is likely to have adverse effects on the environment that are more than minor or the applicant requests public notification.²⁸² However a rule or national environmental standard can require public notification²⁸³ thus compulsory notification for marine activities could also be achieved under the RMA.

The 2011 Cabinet Paper indicates that the reasoning for requiring compulsory notification is that the exclusive economic zone and extended continental shelf will be managed at a national scale and thus it is appropriate that the opportunity to participate in the consideration of a consent is available nationally.²⁸⁴ The decision to require compulsory notification may also reflect an anticipation that the majority of activities classed as discretionary would meet a test, such as the notification test in the RMA, if it was included in the Bill and thus it is more efficient to remove the step of considering whether notification is required.

4.3.8 Decision Making

The Bill specifies matters the EPA must consider when deciding a marine consent application and on which grounds they may grant or decline a marine consent. The matters the EPA must consider include the purpose and principles, relevant regulations, submissions, advice, effects on the environment or existing interests of allowing the activity, best practice in relation to an industry or activity, and any other matter the EPA considers relevant and reasonably necessary to determine the application. These considerations closely resemble those a consent authority must consider under the RMA.²⁸⁵ The Bill also directs that the EPA must not have regard to trade competition, the effects on climate change of discharging greenhouse gases, or effects on existing interests where written approval has been given.²⁸⁶ This also aligns with the RMA.

²⁸¹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 46.

²⁸² Resource Management Act 1991, cl 95A.

²⁸³ Resource Management Act 1991, cl 95A.

²⁸⁴ Cabinet Paper, above n 213, at [106].

²⁸⁵ Resource Management Act 1991, s 104.

²⁸⁶ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 59.

The Bill gives further guidance to the EPA. It requires the EPA to consider whether imposing conditions may avoid, remedy or mitigate the adverse effects of the activity.²⁸⁷ It *allows* the EPA to grant a marine consent if the activity's contribution to New Zealand's economic development outweighs the activity's adverse effects on the environment. It *allows* the EPA to refuse the application if the adverse effects of the activity on the environment outweigh the activity's contribution to New Zealand's economic development. This test reflects the purpose of balancing protection of the marine environment and economic development. Because these values are irreconcilable this requires the decision maker to prefer one value over the other in the particular factual scenario.

The reference to adverse effects in this provision means that the definition of effects is important. The definition of effects includes any potential effect of low probability that has a high potential impact.²⁸⁸ The RMA contains an identical definition of effects and the associated body of case law suggests that any real effect (as opposed to an unproven effect) must be taken into account by the decision maker.²⁸⁹ This definition of effect would require a decision maker to consider the effect of a low probability but high impact catastrophic oil spill. How can this be 'balanced' with the transient economic benefits of drilling an individual well? It must be intended that such adverse effects will be 'outweighed' by the economic benefits of a petroleum discovery as it is inevitable that consents will be granted for at least some drilling applications. A reason suggested for not extending the RMA was that importing the large volume of case law behind the RMA could result in unintended consequences when applied to the exclusive economic zone.²⁹⁰ Thus it is possible that the definition of effect under the Bill could be interpreted differently to that under the RMA based on the different purpose of the legislation.

4.3.9 Conditions

If the EPA grants a marine consent they may issue the consent subject to conditions.²⁹¹ Conditions may require, but are not limited to, a bond, public liability insurance, monitoring,

²⁸⁷ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 61(1).

²⁸⁸ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 6(1).

²⁸⁹ See *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66.

²⁹⁰ Ministry for the Environment, above n 236, at 13.

²⁹¹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 61(5).

observers, or making records available for audit.²⁹² The Bill allows for the EPA to review the duration of a consent or the conditions on a consent.²⁹³ The grounds for review of conditions are similar to those contained in the RMA but a unique feature of the Bill is the provision for review of the duration of a marine consent.²⁹⁴ The justification for this is unlikely to be streamlining, as the provisions regarding notification and hearings apply to review of conditions as if it were an application for consent, with the necessary modifications.²⁹⁵

Another unique feature of the Bill is its requirement for the EPA, when reviewing conditions of a marine consent, to have regard to whether the activity allowed by the consent will continue to be viable after the proposed change of conditions.²⁹⁶ This is the converse to the RMA as in *New Zealand Rail Ltd v Marlborough District Council* the court stated that considerations of financial viability which involve the consideration of the profitability of a venture and the means by which it is to be accomplished are not relevant under the RMA.²⁹⁷

4.3.10 Accountability

The EPA is an administrative non-democratic non-judicial body. Despite this the Bill contains few accountability mechanisms. The RMA provides for de novo appeals against a decision of a consent authority regarding an application for a resource consent by the applicant or any submitter to the Environment Court on the merits.²⁹⁸ In comparison the Bill only allows an applicant or any submitter to appeal to the High Court only on a question of law in respect of an EPA decision to grant or decline a consent or impose any conditions.²⁹⁹ The lack of appeal on the merits suggests that EPA is considered more qualified to deal with significant applications than consent authorities. However the EPA is merely an administrative body, its board members are not democratically elected and it has no judicial component. Thus the lack of accountability measures, especially the lack of appeal rights on the merits, appears to be based on efficiency and streamlining. Judicial review is available for decisions however the grounds are more limited than that of a de novo appeal on the merits.

²⁹² Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 62(2).

²⁹³ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 74(1).

²⁹⁴ Section 127 of the RMA prohibits a consent holder from applying for a change in duration of a consent.

²⁹⁵ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 77.

²⁹⁶ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 78(a)(ii).

²⁹⁷ *New Zealand Rail Ltd v Marlborough District Council* PT Wellington C36/93, 11 June 1993 at 22.

²⁹⁸ Resource Management Act 1991, s 120.

²⁹⁹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 103.

4.3.11 Cross boundary activities

The Bill makes provision for activities which are to be carried out partly in the exclusive economic zone or extended continental shelf and partly in New Zealand territory and both a resource consent and marine consent are required.³⁰⁰ This may include a number of oil and gas activities as some drilling rigs beyond the 12 nm line will pipe the product through pipelines running through the territorial sea to a processing station on land. The Bill allows an applicant to prepare a joint application which complies with the requirements of both regimes, or apply for separate consents.³⁰¹ It also provides for the EPA to require a joint application or separate applications.³⁰² The EPA will be the lead agency for a joint application process as it is responsible for ensuring the efficient and coordinated processing of the application.³⁰³ Although the application will be joint the Bill still requires the EPA and consent authority to make separate decisions on the granting or refusing of a marine consent and resource consent under the different regimes.³⁰⁴

The Bill makes no provision for a situation where either the resource consent or marine consent is granted and the other is not, thus an applicant will have to decide whether or not to proceed with the activities that were granted consent. Because of the purpose of the Bill a likely scenario is the awarding of a marine consent accompanied by the declining of a resource consent. This will have the unintended effect of effectively requiring a marine consent application for a cross boundary activity to meet the RMA standard. This is inefficient and could be addressed by applying the same standard throughout the oceans. If the RMA was extended to apply beyond the territorial sea, joint hearings could be held for cross boundary activities³⁰⁵ and as the consent authorities would be applying the same legislation they would be able to make a joint decision.³⁰⁶

4.3.12 Conservation

The EEZ Bill is not intended to provide a dedicated and comprehensive marine protection tool. Like the RMA, it focuses on effects management. The 2011 cabinet paper suggests that

³⁰⁰ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 86.

³⁰¹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 88.

³⁰² Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cls 91 and 92.

³⁰³ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 94.

³⁰⁴ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 96.

³⁰⁵ Resource Management Act 1991, s 102(1).

³⁰⁶ Resource Management Act 1991, s 102(2) and (3)

the appropriate way to address the lack of marine protection beyond the territorial sea is through the Marine Reserves Bill.³⁰⁷ The Marine Reserves Bill has been languishing with select committee for almost a decade so it is questionable when or if this will come into effect. It seems that its existence is being used by policy makers as a justification for ignoring the option of integrating conservation and effects management.

The EEZ Bill contains one provision which could be used as a conservation measure. It allows for regulations identifying and providing for an area which; is important or vulnerable, must be managed in coordination with other regimes, is the subject of competition or conflict, or, is experiencing cumulative adverse effects. The regulations may close the area to all or any activities.³⁰⁸ This provision could allow, for example, the Minister for the Environment to close areas of the oceans to fishing activities through a regulation. This could be an important tool especially for the management of vulnerable areas subject to cumulative adverse effects. However, its value will depend on whether it is utilised.

4.3.13 Integrated Environmental Management and the Two Options

In chapter two it was argued that the theory of integrated environmental management can assist in the creation of legislation which is effective, efficient and equitable. The Bill merely attempts to fill gaps and makes no attempt to integrate the management of all activities occurring in New Zealand's oceans. The Bill will not address the fragmentation between the regulation of fisheries and other marine activities (nor will an extended RMA). Many stakeholders have concerns about the exclusion of fisheries management, noting that fishing is the most significant environmental effect in the exclusive economic zone and that the environmental effects of fishing are being poorly managed. Without integration there is a risk that fishing and other activities will be managed to different environmental standards.³⁰⁹ The Bill's provisions for consideration of cumulative effects and alignment of decision making are unlikely to abate these concerns.

In order to manage cumulative effects the Bill requires impact assessments to identify the actual and potential cumulative effects of the activity on the environment and existing

³⁰⁷ Cabinet Paper, above n 213, at [45].

³⁰⁸ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 28.

³⁰⁹ Cabinet Paper, above n 230, at [57]-[58].

interests³¹⁰ and requires the EPA to have regard to any cumulative effects on the environment or existing interests when considering an application for a marine consent.³¹¹ It also requires the Minister, when developing regulations, to have regard to the cumulative adverse effects on the environment of all activities undertaken in the exclusive economic zone or continental shelf (including the effects of activities not regulated under the Act).³¹² The RMA also provides for the consideration of cumulative effects through the definition of effect³¹³ and the requirement for decision makers on consent applications to have regard to any actual and potential effects on the environment.³¹⁴

In order to align decision making across the statutes applying in the exclusive economic zone the Cabinet Paper suggested that regulations will be developed in consultation with other relevant agencies and after consideration of the environmental controls under other regulations, in order to promote consistency in the environmental standards under different pieces of legislation.³¹⁵ However, the Bill does not require the Minister for the Environment or the EPA to consider documents made under other legislation when developing regulations or deciding a resource consent application, as was suggested in the Cabinet Paper. The Bill does require the Minister of Fisheries to have regard to regulations made under the Act before setting or varying any fisheries sustainability measure³¹⁶ and regional councils preparing or changing a regional policy statement or plan to have regard to the extent to which it needs to be consistent with regulations made under the Bill.³¹⁷ Thus the Bill appears to create a one-way street for aligning decision making with the Bill, creating a bottom line that documents produced under other pieces of legislation must align with. This may be a more efficient mechanism than the two way alignment suggested in the cabinet paper but it may be questioned whether it is appropriate for this Bill to be setting that bottom line. Aligning of decision making within the oceans could be achieved instead by extending the RMA so that the same standard and consideration apply and planning instruments can be used.

³¹⁰ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 40.

³¹¹ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 59.

³¹² Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 33.

³¹³ Resource Management Act 1991, s 3.

³¹⁴ Resource Management Act 1991, s 104.

³¹⁵ Cabinet Paper, above n 213, at [72].

³¹⁶ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 156.

³¹⁷ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011, cl 157.

4.4 Assessment against the benchmarks

4.4.1 Effectiveness

In chapter two effective environmental regulation was defined as regulation which makes a significant substantive contribution to protection of the environment. The purpose and matters to be taken into account by decision makers reflect the fact the strong emphasis in the Bill on balancing the environmental effects of activities with the benefits they provide, rather than solely focusing on preventing adverse effects.³¹⁸ The Bill clearly reflects the political priority given to economic development by placing economic development on the same level as protection of the environment in a piece of environmental legislation. This is not unusual for environmental legislation in New Zealand as both the RMA and Fisheries Act contain a protection and a development component.

In chapter two it was suggested that integrated environmental management is international best practice and may contribute to the development of a regulatory regime that is effective, efficient and equitable. This Bill is only intended to fill gaps in the regulation of environmental effects in New Zealand's oceans and as such it makes little attempt to integrate the management and conservation of marine environmental assets. It does provide for decision makers to consider cumulative effects. It also contains a few mechanisms for aligning plans made under the RMA and sustainability measures made under the Fisheries Act with regulations made under the Bill. This 'one-way street' for aligning decision making with the regulations made under the Bill creates a bottom line. However, this is limited in application³¹⁹ and is likely to have a minimal effect on ensuring integrated management of environmental assets. Although it effectively places the EPA in the position of 'lead agency' for oceans management it does not create any associated mechanisms for integration between agencies. This can be compared to Australia's National Oceans Board of Management which comprises representatives from seven Australian Government departments and agencies³²⁰ and provides high-level, whole-of-government advice on Australia's Oceans Policy and regional marine planning.³²¹ A similar institution could bring together the EPA, regional

³¹⁸ Cabinet Paper, above n 213, at [4].

³¹⁹ For example sustainability measures are just a small part of the Fisheries Act regime.

³²⁰ Department of Environment and Heritage, Department of Industry, Tourism and Resources, Department of Agriculture, Fisheries and Forestry, Department of Education, Science and Training, Department of Transport and Regional Services, Department of Defence, Department of Finance and Administration, Department of Prime Minister and Cabinet, Australian Fisheries Management Authority.

³²¹ Australian Government Department of Sustainability, Environment, Water, Population and Communities, above n 191.

councils, the Ministry of Fisheries, Maritime New Zealand, the Department of Conservation and other institutions. However, such a body would require considerable financial and time input and as long as each body is acting under a different legislative mandate it is difficult to see such a body to achieving a great deal.

It could be argued that the Bill provides for integration across sectors with its heavy emphasis on economic development. However, the intention of this seems to be to allow economic factors to outweigh environmental effects rather than to enable environmental effects to be related to their socio-economic causes in order to address those causes. The Bill also makes no provision for long term planning and monitoring or for consideration of future generations that would signal integration across time. The Bill does not allow for the creation of a national policy statement or regional plans that may be used to strategically manage our oceans for future generations. In contrast, an extended RMA would contain provisions for marine spatial planning and national policy development. The Bill also omits any reference to future generations such as those contained in the RMA³²² and Fisheries Act.³²³

There are also some particular features of the Bill which could limit its effectiveness. The standard at which an activity cannot be permitted is important. If this allows the majority of activities to be classified as permitted the Bill could change little from the status quo. The delay in the Act coming into force in order to produce regulations is not necessary and it would be more in line with precaution to bring the Act into force immediately and deem any activity discretionary in the interim.

4.4.2 Efficiency

In chapter two an efficient regulatory regime was described as a regime which achieves the intended outcome with the least possible level of inputs or costs.³²⁴ The focus of this inquiry is administrative efficiency. The Bill minimises administrative requirements by using regulations rather than planning instruments to provide the layer of detail beneath the legislation. This option lowers cost and time delays as the regulations will focus on operative details and will not contain policy direction. Furthermore, although the Bill provides for the

³²² Section 5(2)(a) of the Resource Management Act 1991 refers to 'sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations'.

³²³ Section 8(2) of the Fisheries Act 1996 refers to 'maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations'.

³²⁴ R Baldwin and M Cave, above n 71, at 81.

public to be notified and given an opportunity to comment on proposed regulations, this is a less involved process than that under the RMA.³²⁵ The current Environment Minister Nick Smith has justified the use of regulations over planning instruments by stating that “there is less need for the costly and detailed planning that exists under the RMA” because “in the EEZ there is less competition for space and resources, limited local interest in activities and the number of activities needing consent will be a handful each year.”³²⁶ This statement demonstrates that the approach of the government has been to “plug the gaps” rather than develop a long term effective solution. If the Bill is to be in place for the long term it should provide for policy and planning documents to be created in the future. A lack of policy direction could increase inefficiencies as the number of activities in the oceans rises. This could be achieved by making alterations to the Bill or adopting the alternative option of an extended RMA.

The Bill does not address administrative complexity in the oceans as it increases the number of regulatory bodies involved in oceans governance. The EPA is added to consent authorities, Ministry of Fisheries, Maritime New Zealand, and the Department of Conservation among others. The Bill contains inadequate provision for coordination between these agencies to ensure that there is some integration and consistency.

Industry certainty is also an aspect of an efficient regime as it allows industry to make investment decisions in the most efficient manner. The replacement of voluntary guidelines in the case of petroleum with legislation will decrease certainty for that industry as there is a possibility of activities not receiving consent or being prohibited. However, limiting the legislation to filling gaps and avoiding amendment of the existing fisheries and maritime transport laws does avoid the creation of unnecessary uncertainty for those industries.³²⁷

4.4.3 Equity

In chapter two a number of characteristics of an equitable regulatory regime were set out. These included: expertise, accountability, transparency, public participation, consistent treatment, and the Treaty of Waitangi. The Bill identifies the EPA as the expert decision making body. The EPA is a new institution, and although it will likely employ experts in this

³²⁵ Resource Management Act 1991, sch 1 part 1.

³²⁶ Nick Smith “EDS National Conference - The Bluegreen Agenda” (press release, 2 June 2011) at 5.

³²⁷ Cabinet Paper, above n 213, at [8]

area, it will be applying new legislation with no case law or national policy to guide its decision making. As a result it is highly important that the EPA is transparent in its operations. Furthermore, the EPA is an administrative body, it is not democratically accountable or a judicial body. Despite this the Bill provides for few accountability mechanisms and there is no de novo appeal on the merits available. The use of regulations rather than planning instruments affects the transparency and the provision for public participation under the Bill. A positive for public participation is the requirement for notification of all discretionary applications and proposed regulations. However, regulations are more difficult to challenge in the courts than planning instruments.

This Bill does not address inconsistencies in oceans governance, different activities and different areas remain regulated under different regimes with different purposes. This Bill creates significant differences between oceans regulation either side of a human drawn line that has no ecological significance. Finally, the Bill makes inadequate provision for the Treaty of Waitangi. It contains no general provision requiring decision makers to consider the principles of the Treaty preferring instead to limit the rights of Maori to specific mechanisms for involvement.

4.5 Conclusion

The Bill will fill gaps in New Zealand's environmental regulatory scheme. It will classify activities with significant effects as discretionary. Those activities will require an impact assessment and must gain a marine consent which may impose conditions. This is preferable to the current situation where only harmful discharges are actively managed. Despite this many criticisms can be made of the effectiveness, efficiency and equity of the regime the Bill will put into place. The focus on economic development is likely to hinder effectiveness. Inconsistency across the maritime zones will reduce efficiency. Minimising accountability procedures will reduce the equitable character of the Bill, and the lack of integration is disappointing.

Despite the problems associated with the Bill, the ever increasing interest in New Zealand's offshore resources means that environmental legislation must be put in place immediately. The question therefore is whether the Bill or an extended RMA is the best short term option for oceans governance in New Zealand. The great majority of the operational provisions

within the Bill closely resemble equivalent provisions in the RMA.³²⁸ The RMA has significant advantages over the Bill in that it will create a more integrated and consistent scheme, it will allow for the creation of planning instruments, it allows *de novo* appeals to the Environment Court, and it would allow decision makers to draw on their existing knowledge of the law.³²⁹

The reason for the government's preference of the Bill, over an extended RMA, appears to be a preference for legislation that allows a focus on economic development and minimises regulation. This approach does not align with international trends and the experiences of Canada, Australia and the UK. It is narrow minded and does not look to the future. Thus it is the author's opinion that extending the RMA would be the best short term option for oceans governance in New Zealand.

³²⁸ For example, clauses 70, 77, 79 and 126 of the Bill closely resemble ss 122, 130, 132 and 341 of the RMA.

³²⁹ B Barton 'Offshore petroleum and minerals' [2011] NZLJ 211 at 213.

CONCLUSION

This paper has outlined a gaping hole in New Zealand's environmental law. The RMA effectively manages effects within the territorial sea but beyond the 12 nm limit there is little environmental regulation. The boundaries within ocean ecosystems are based on physical and chemical characteristics thus it is not ecologically sound to have different procedures based on a "magic line" called the 12 nm limit.³³⁰ This human drawn boundary is based on New Zealand's rights under UNCLOS, however, UNCLOS does not prevent the introduction of a consistent governance regime across our oceans. It is inadequate that New Zealand has "no overarching environmentally-oriented legislation governing the entire marine area."³³¹ New Zealand has fallen far behind international best practice in oceans management and is failing to meet its international obligations.³³²

This paper has analysed two proposed options for environmental regulation of New Zealand's oceans beyond the territorial sea; the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill and extending the RMA and assessed whether either of these options can provide an adequate long term solution for the governance of New Zealand's oceans. Chapter 5 concluded that the option of extending the RMA has significant advantages over the Bill. It will be more effective, as it provides for greater integration, more efficient, by applying a single standard to the entire oceans, and more equitable, with greater appeal rights. Despite this, the option of extending the RMA still does not fully align with international trends, for example its exclusion of conservation, and thus it will not provide an adequate long term solution for the governance of New Zealand's oceans.

The Parliamentary Commissioner for the Environment recommended in 1999 "a major revision of New Zealand's thinking, policies and legislation í to ensure the sustainable future of the oceans and seas around New Zealand."³³³ To achieve this, the Commissioner recommended a taskforce "aimed at putting in place a long-term strategy for the sustainable management of New Zealand's marine environment."³³⁴ Instead, concurrent governments

³³⁰ Parliamentary Commissioner for the Environment, 10, at 3.1.

³³¹ Stirling, above n 7, at 170

³³² R Peart, K Serjeant, and K Mulcahy, above n 126, at 53.

³³³ Stirling, above n 7, at 172

³³⁴ Parliamentary Commissioner for the Environment, above n 6, at 98

have preferred the option of 'continuous iteration of the complex and disjointed systems we have evolved to date' which is unlikely to achieve the necessary progress.³³⁵

The inadequacies of extending the RMA or new legislation as options for oceans governance led the Environmental Defence Society in its paper *Governing Our Oceans* to propose fundamental oceans reform similar to that undertaken in the late 1980s resulting in the enactment of the RMA.³³⁶ This would be based on the international best practice discussed in chapters two and three. The Environmental Defence Society recommended a Royal Commission on Oceans Governance could be appointed to develop recommendations for new legislation and institutional arrangements.³³⁷

This paper supports the implementation of short term legislation to fill gaps in New Zealand's oceans regulation, preferably through extension of the RMA. The need for legislation in this area is urgent because of the increasing interest in New Zealand's offshore resources and the complete inadequacy of the current regime. However, it is important that any short term option is not considered permanent and that a long term solution for oceans governance in New Zealand is the focus. International best practice suggests that this will require a complete overhaul of our existing regimes and replacement with new integrated oceans legislation. New Zealand is blessed with a valuable marine area with its intrinsic and economic values. It is important that it is managed effectively, efficiently and equitably so it can be enjoyed by current and future generations.

³³⁵ Parliamentary Commissioner for the Environment, above n 6, at 98.

³³⁶ R Peart, K Serjeant, and K Mulcahy, above n 126, at 48.

³³⁷ R Peart, K Serjeant, and K Mulcahy, above n 126, at 49.

APPENDIX 1: MARITIME ZONES

The world's oceans can be divided into eight maritime zones as outlined in the United Nations Convention on the Law of the Sea (UNCLOS). These zones are the; internal waters, archipelagic waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, high seas and the Area.

These zones are determined with respect to the territorial sea baseline which is the coastal low-water line³³⁸ or the archipelagic baseline which is a line joining the outermost point of the outmost island in the case of an archipelago.³³⁹ The waters inland from the territorial sea baseline are internal waters³⁴⁰ and those inland from the archipelagic baseline are archipelagic waters.³⁴¹ The territorial sea extends out to sea for 12 nm from the territorial sea baseline.³⁴² Adjacent to the territorial sea is the contiguous zone, which may not extend more than 24 nm beyond the territorial sea baseline.³⁴³

The exclusive economic zone extends from the outer limit of the territorial sea to 200 nm from the territorial sea baseline.³⁴⁴ The continental shelf comprises the seabed and subsoil which is "the natural prolongation of [a coastal State's] land territory".³⁴⁵ This may extend beyond 200 nm, with its boundary being determined under one of the formulae set out in UNCLOS³⁴⁶ and set on the basis of the recommendations of the Commission on the Limits of the Continental Shelf.³⁴⁷ That part of the continental shelf which extends beyond the 200 nm boundary is commonly referred to as the extended continental shelf. The high seas are all parts of the sea which are not internal waters, territorial sea or exclusive economic zone.³⁴⁸ Where the continental shelf extends beyond the exclusive economic zone, the superjacent

³³⁸ United Nations Convention on the Law of the Sea , above n 48, art 5.

³³⁹ United Nations Convention on the Law of the Sea , above n 48, art 47(1).

³⁴⁰ United Nations Convention on the Law of the Sea , above n 48, art 8(1).

³⁴¹ United Nations Convention on the Law of the Sea , above n 48, art 49(1).

³⁴² United Nations Convention on the Law of the Sea , above n 48, art 3.

³⁴³ United Nations Convention on the Law of the Sea , above n 48, art 33(2).

³⁴⁴ United Nations Convention on the Law of the Sea , above n 48, arts 55 and 57.

³⁴⁵ United Nations Convention on the Law of the Sea , above n 48, art 76(1).

³⁴⁶ United Nations Convention on the Law of the Sea , above n 48, art 76(5).

³⁴⁷ United Nations Convention on the Law of the Sea , above n 48, art 76(8)

³⁴⁸ United Nations Convention on the Law of the Sea , above n 48, art 86

waters will be high seas. The Area is the seabed and subsoil beyond the limits of national jurisdiction³⁴⁹ which underlies the high seas and is the "common heritage of mankind".³⁵⁰

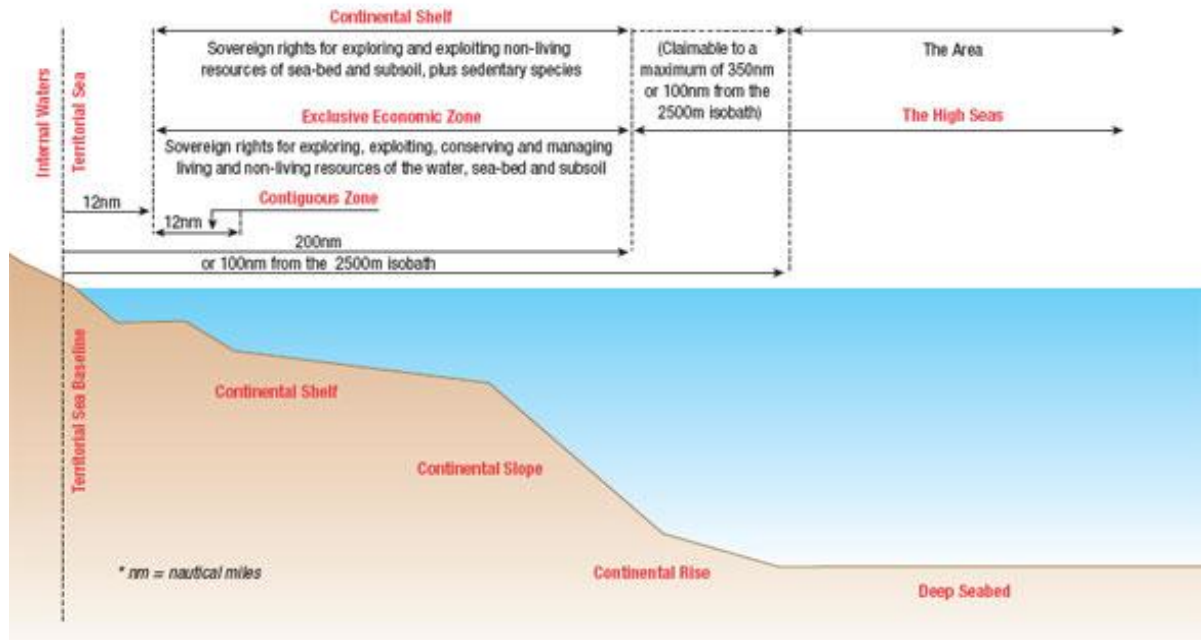


Figure 7: The Maritime Zones³⁵¹

³⁴⁹ United Nations Convention on the Law of the Sea, art 1(1)(1)

³⁵⁰ M Stirling, above n 7, at 150.

³⁵¹ Fisheries and Oceans Canada "Canada's Ocean Estate A Description of Canada's Maritime Zones" (2010) <www.dfo-mpo.gc.ca>.

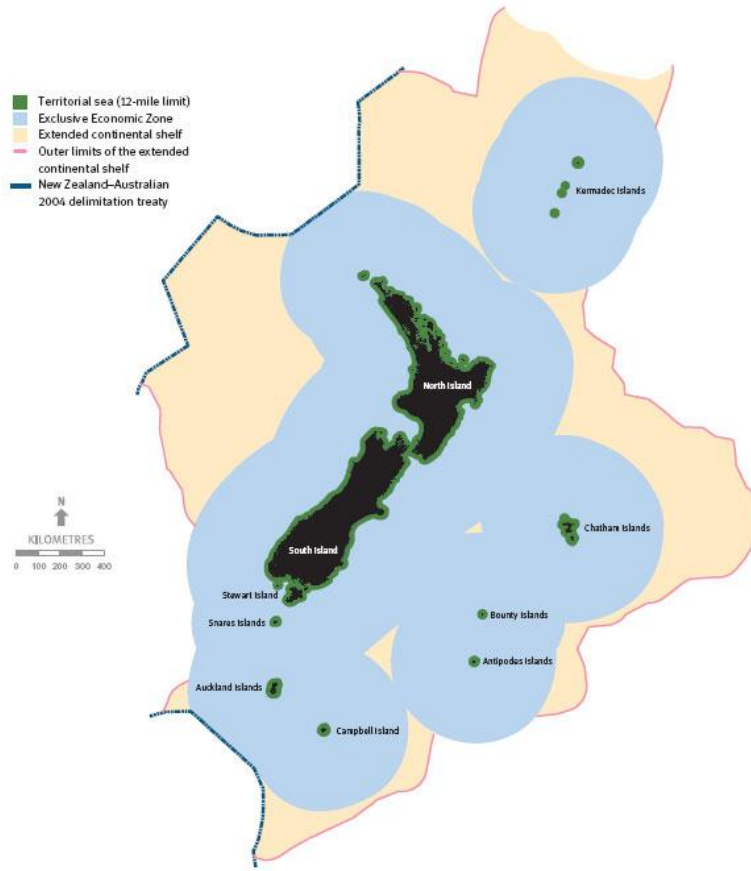


Figure 8: Map denoting New Zealand’s territorial sea (green), exclusive economic zone (blue) and extended continental shelf (pink)³⁵²

³⁵² Ministry for the Environment “New Zealand’s marine area” (2008) <www.mfe.govt.nz>.

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