Legislative design considerations

This chapter addresses the key factors that should be considered in the design of new marine protected areas legislation for New Zealand. These include the scope of the legislation, what its purpose should be, whether a classification system should be used, how the establishment process should be undertaken and linkages with broader marine management. In the concluding section, we have located the various approaches taken in New Zealand and the comparator countries, in respect of each factor, along a continuum of adopting a narrower or broader approach.

Scope

The scope of the legislation could be either narrow with a focus on no-take marine reserves or broader in accommodating different levels of protection.

Narrow scope

This is the approach taken in the Marine Reserves Act and also proposed in the Marine Reserves Bill, which retains the narrow focus on the establishment of no-take marine reserves.

In this arrangement, the MPA Policy would continue to be the instrument empowering the establishment of a representative network of marine protected areas, of which marine reserves under the new legislation would form one element. Tools under the various other legislative instruments would continue to be used in the establishment of marine protected area networks.

The strength of this approach is that it reinforces the important role that no-take marine reserves play in a representative network, and ensures that protection of the marine environment remains the core focus of protection measures.

However, the difficulty with this approach is that it does not address the absence of properly targeted legislative instruments that allow for the establishment of a full range of marine protection measures as part of an integrated network. Marine protected areas where some extractive activities are permitted would need to continue to be created under other legislation such as the Fisheries Act, which are not specifically designed for that purpose and have different priorities. Further, Māori perspectives on an integrated approach to marine management consistent with kaitiakitanga are not provided for.

In addition, this approach does not reflect the developments in international best practice that have occurred in recent years. A system which is inflexible and unable to provide for a range of interests is likely to alienate stakeholders and encourage the adversarial politics that have hampered marine reserve establishment in the past. Successful marine protected areas legislation provides for flexible measures, that can take account of the needs of stakeholders, whilst recognising that a healthy marine environment is beneficial to everyone.

Broader scope

This is the approach taken by all the jurisdictions included in the international case studies (England, California, Australian Commonwealth and New South Wales). In this case, the legislation would provide for the full range of flexible measures required to implement a representative network of marine protected areas. This could recognise and provide for a wide range of values (recreational, cultural, heritage and sustainable use) underpinned by a central goal of protecting the marine environment.

This approach would require the replacement of the Marine Reserves Act 1971 with new legislation and the replacement of, or significant amendments to, the MPA Policy. The 'Protection Standard' set out in the MPA Policy would need to be overhauled – all marine protected areas would have as their primary purpose the protection of marine biodiversity. As a result, areas where marine biodiversity protection is incidental to their primary purpose, such as cable protection zones, would not necessarily form part of the network.

The strength of this approach is that it enables the establishment of a coherent system of marine protected areas that can be managed as a whole for a common primary purpose. It also enables a tailor-made system of marine protection categories to be developed, which can provide for a range of activities, where consistent with the secondary objective of each category (see below).

Potential problems with applying this approach in the New Zealand situation include the risk that the focus on no-take marine reserves may be lost. If marine protection mechanisms are available which provide for lower levels of protection, decision-makers may opt for these because it is easier to achieve support for them. This could be addressed by requiring a minimum level of no-take protection, for example, by requiring that a comprehensive range of species and habitats must be protected in at least one no-take zone.

If a broader approach was adopted, transitional provisions could be included in new legislation to bring existing marine protected areas, such as benthic protection areas and seamount closures, within the new marine protected area network under the new legislative regime. Each existing spatial protection area could be allocated a category based on the values protected and management response.

Purpose

The purpose of marine protected areas within the legislation could narrowly focus on biodiversity protection or could more broadly recognise the wide range of potential benefits that can be achieved through the establishment of marine protected areas. Individual marine protected areas can be designed to generate recreational, cultural, scientific, and aspirational benefits for society. Marine protected area networks can safeguard ecosystem processes and contribute to the resilience of the marine environment.

Narrow purpose

The Marine Reserves Act has a narrow focus aimed solely at the protection of the marine environment for the purpose of scientific study. The Marine Reserves Bill proposes alterations to this narrow focus to reflect international thinking that suggests that indigenous marine biodiversity should be preserved as an end in itself, but the purpose remains narrow.

The purpose of the MPA Policy is directed towards the formation of a network of marine protected areas that is comprehensive and representative of New Zealand's marine habitats and ecosystems, but the Policy does not provide for a wider range of objectives to be incorporated into the network.

The benefit of a narrow purpose is that the simpler the legislation is, the easier it is for the public to understand what it seeks to achieve. Having one clear purpose emphasises the importance of marine protection and ensures that it is not obscured by multiple and potentially competing purposes.

The limitations of this approach are evident in New Zealand's current system of marine protection. A focus that does not recognise the value that marine protected areas can provide to society is more likely to alienate people and encourage a 'conservationists versus users' culture. This approach fails to recognise that

marine protected areas can provide a range of benefits, including the promotion of cultural and recreational values.

Broader purpose

In this case, the protection of biodiversity could be the main purpose, but a range of secondary purposes could also be adopted. These could include scientific study, habitat protection, protection of special features, cultural use, sustainable use, ocean health, recreation, tourism, resilience, and risk management.

The strength of this approach is that it provides the framework for a flexible system which recognises the needs of society, and the values that marine protected areas can provide, whilst underpinning all management measures with the need to protect the marine environment.

Potential problems with this approach include the difficulty of taking into account multiple purposes and the possibility that multiple purposes could obscure the primary objective of protection of the marine biodiversity.

Regardless of the option chosen, the stated purpose of the legislation should reflect New Zealand's intention to establish a representative network of marine protected areas.

Management measures

A system of classification can be applied to marine protected areas, which sets out a standard framework of marine protected area types reflecting a range of secondary purposes and appropriate management measures.

Management measures may be strictly defined for each category – with some or all activities expressly prohibited. Alternatively, one type of marine protected area can be provided for in which management measures are flexible, decided on a case-by-case basis dependent on the needs of the area in question.

No classification system

The Marine Reserves Act 1971 provides for only one type of marine protected area to be established – where all activities that are not consistent with the preservation of the marine environment are prohibited. In practice this means that all extractive activities are excluded.

The Marine Reserves Bill similarly provides for only one type of marine protected area – a marine reserve – but explicitly prohibits fishing whilst providing for the potential for mining activities to occur at some sites.

The English marine conservation zones system does not incorporate a classification system but does provide for a range of management measures to be implemented. Management measures are to be established on a case-by-case basis, dependent on the measures necessary to protect the particular features that have been identified for protection.

If only one type of marine protected area is to be established, which provides for a strict set of management measures, it should be easy for most users to understand the rules. However, the establishment of a representative network would likely require the additional use of a range of management measures, as set out in the MPA Policy. If management measures are defined on a case-by-case basis, they can be targeted towards the particular needs of the area concerned. However, this approach is likely to be confusing for users and makes it more difficult to ensure that management measures are meaningful and effective.

Classification system

The IUCN has developed a set of seven categories which reflect the different management measures that can be applied to marine protected areas to achieve different goals (providing that the primary goal is marine biodiversity protection). The Australian Commonwealth and states have adopted this system into domestic legislation, so that every marine protected area established is assigned one of these categories.

The MPA Policy classifies marine management measures into three groups (Type 1, Type 2 and 'other marine protection tools'). These categories bear no relationship to any internationally recognised classification system.

The Reserves Act 1977 provides for a system of classification for terrestrial reserves. Section 16 of the Act provides that reserves must be classified into one of seven principal categories: Recreation, Historic, Scenic, Nature, Scientific, Government Purpose and Local Purpose. The category into which a reserve is placed reflects the present values of the reserve, the future potential values and the possible future uses of the area. This classification system aims to ensure that the control, management, development, use and preservation of reserves is appropriate.

These categories are not directly applicable to the marine environment, but demonstrate a useful approach. An analogous classification system more closely based on the IUCN categories could be developed.

The main benefit of a classification system is that it provides a coherent, purpose-designed system which enables each area to be assigned a specific management objective which recognises and provides for all desirable uses and values. This results in certainty for stakeholders, together with flexibility, which makes the creation of marine protected areas easier. On the other hand, it could possibly make the development of tailor-made objectives for a particular area more difficult.

Linkages with wider ecosystem-based marine management

Initiatives overseas indicate that ecosystem-based marine management of entire marine jurisdictions, using tools such as marine spatial planning, is becoming a well-established objective. This raises the issue of the extent to which marine protected area design initiatives should be folded into wider management measures.

Identification undertaken independently

This approach is essentially business as usual, in which marine protected areas are established in parts of the marine area whilst activities in the rest of the marine environment are managed separately. The Marine Reserves Act, the Marine Reserves Bill and the MPA Policy operate on the basis of this approach.

The Californian system has not moved beyond the establishment of a network of marine protected areas, partly because the marine protected area identification process was so resource intensive that there is no political appetite to embark on further work. Similarly, the New South Wales system does not include wider management of the marine area, although a recent review commissioned by the government recommends that the system should be overhauled to enable a broader planning process to occur.

The benefit of this approach is that it avoids complicating the process, focusing effort on the core goal of creating marine protected areas. In addition, there is currently no statutory provision for integrated management in New Zealand's marine environment, or for tools which might provide a means to achieve it

such as marine spatial planning.[1] However, ecosystems-based management is becoming widely accepted around the world as an effective way to manage competing pressures on the marine environment. It seems likely to be adopted in New Zealand in the future. Therefore marine protection legislation which is not flexible enough to provide for a linkage with future integrated management processes may become quickly outdated.

Identification undertaken as part of marine spatial planning

There are a number of options for undertaking a marine spatial planning process which incorporates marine protected areas. First, marine protected areas could be identified as part of the planning process itself. This is the approach adopted by the Australian Commonwealth government in its bioregional planning process, although the bioregional plans only partially deal with other ocean uses.

The benefit of this approach is that it enables all activities and pressures to be considered at the same time, providing more certainty for ocean users, communities and the environment. On the other hand, it may result in the dilution of marine protected area proposals, as the focus may move from biodiversity protection to provision for other oceans uses and activities.

The second approach is to incorporate marine protected areas that have already been identified into marine spatial planning, so that broader oceans management can address impacts on marine protected areas from outside their boundaries. This is the approach being undertaken in England, where the enabling legislation provides for both the establishment of marine protected area networks and marine spatial planning which are to be undertaken in separate processes.

The benefit of this second approach is that it helps to ensure that the process for the establishment of marine protected areas remains focused on marine protection, and does not result in excessive emphasis being placed on user interests. However, this may prove confusing for stakeholders, who may not appreciate the difference between the processes. It would also utilise extra resources through the undertaking of two different projects.

Given that marine spatial planning is very likely to become more widely adopted, as pressures on the marine area increase, it would appear sensible for new marine protected areas legislation to recognise and provide for the establishment of marine protected areas within a wider marine spatial planning programme. For example, the legislation could make provision for the subsequent adoption of marine protected areas identified as part of a marine spatial planning

process, avoiding the need go through a separate public process. It could also provide for subsequent planning processes to recognise and incorporate existing marine protected areas into wider marine spatial planning.

Stakeholder involvement in marine protected area planning

The Marine Reserves Act provides for both certain interested parties and the Director General of Conservation to propose individual new marine reserves. A key benefit of this approach is that it provides for a mechanism by which interested parties can establish marine protected areas which they support, and over which local communities feel a sense of ownership. However, reliance on community proposals for new marine protected areas is clearly inadequate if the establishment of a representative network of marine protected areas is the goal: reserves proposed by the public are established on an *ad hoc* rather than strategic basis and are very likely to be established only in coastal areas. Accordingly, in addition to this arrangement, a government-led initiative to 'fill in the gaps' is required.

If an initiative to complete the establishment of a representative network of marine protected areas is undertaken, a key consideration is the extent to which stakeholders should be involved. Whilst conventional environmental management expects that management decisions will be undertaken by government entities, in recent times the benefits of involving stakeholders more fully have been recognised. In the context of the marine environment, stakeholders hold useful information that can inform management decisions, and the challenges of enforcement in the marine area make stakeholder support extremely valuable. Stakeholder involvement can be achieved in a number of different ways. At opposite ends of the spectrum, government may consult with stakeholders bilaterally, or alternatively establish a collaborative decision-making process in which stakeholders make all the key recommendations which are then adopted by government.

Government-led approach

This approach would follow the conventional model in which government leads the process for the identification, design and implementation of marine protected

areas, guided by government policy and advice from experts. Bilateral consultation with tangata whenua and key stakeholders could be undertaken in order that their needs are taken into account. The government would work up a draft proposal upon which public submissions would be sought.

This is the approach adopted for the Australian Commonwealth government marine bioregional planning programme, for the design and establishment of the Great Barrier Reef marine park, and in the establishment of the New South Wales marine parks. The Marine Reserves Act provides for a similar system, although a small number of stakeholders are permitted to put forward marine reserve proposals themselves.

The principal benefit of a government-led system is that it is much easier for the government to control the process and provide strong leadership, and to ensure that final recommendations are consistent with government policy. In addition, it is easier to ensure that the final product is more firmly rooted in the scientific information available, as experts who understand the detail of the issues are involved directly in decision-making.

In Australia this has been successful, as evidenced by the 2004 rezoning of the Great Barrier Reef Marine Park (where the level of protection in no-take zones was increased from 5 per cent to 33 per cent) and the progress made in the marine bioregional planning process. The Australian government's willingness to allocate 'structural adjustment packages' to affected stakeholders has assisted in the implementation of this approach.

Nevertheless, this approach can fail to address, and even encourage opposition to, marine protected area establishment. Stakeholders may feel that their interests and concerns are not being addressed by government decision-makers. This problem was experienced in New South Wales, where the public objected to the 'politicisation' of the marine park establishment process, ultimately resulting in a moratorium on the establishment of marine parks and an independent audit of their effectiveness.

Another risk is that without an established and transparent process for stakeholder engagement, government will be influenced during the political process by the most powerful stakeholders to the detriment of others. This issue has been observed in the Australian bioregional planning process where protection measures in some areas have been diluted to appease particular interests.

Collaborative approach

Collaborative decision-making delegates the task of identifying and designing new marine protected areas to stakeholder groups that are specially established for the purpose. The stakeholder groups can function in accordance with government guidance and aim to meet detailed ecological requirements. This is the approach taken in California and England and in the New Zealand MPA Policy.

Such an approach can be beneficial in a number of ways. It can provide a transparent and effective forum for stakeholder involvement and allow for consideration of all interests. The knowledge and experience of users of the marine area can make a useful contribution to design decisions. The approach may help to build support for marine protected area proposals, because the process helps stakeholders to understand the issues and the proposals, and to feel they have a stake in them.

The approach also provides a venue for diverse stakeholder groups which do not normally work together to build relationships, potentially breaking with the adversarial approach that usually characterises marine management issues. Collaborative processes can result in the establishment of a group which can continue to play a positive role in ongoing management of the area. A good example is the ongoing role adopted by the Guardians of Fiordland.

In recent times collaborative approaches have become more popular in New Zealand, with the establishment of succesful initiatives such as the Land and Water Forum and the Upper Waitaki Shared Vision Forum. A similar approach is proposed for the Hauraki Gulf Marine spatial planning initiative and may also be introduced to plan-making processes under the Resource Management Act in the near future.

The collaborative approach carries some risks. Consensus may not be reached, as happened with the West Coast Marine Protection Forum and the Sub-Antarctic Marine Protection Planning Forum. Theoretically the approach would provide for scientific guidance to set out parameters within which lay stakeholders make their decisions. This would help to ensure that the resulting recommendations are scientifically robust, and meet minimum protection requirements, as well as reflecting socio-economic concerns. However, the marine environment is complex, with gaps in the available information. As a result, decision-making about marine protection is not simple. Thus, providing for stakeholders to do it means that there is significant potential for scientific integrity to be sacrificed in favour of socio-economic concerns.

Collaborative approaches are time consuming and resource intensive. Stakeholders need time to establish working relationships and understand the issues. Government must commit significant resources to ensure that the necessary information on the marine environment is available, and that the groups are well supported with guidance and expert advice. New Zealand has only limited resources for such projects, so the achievability of a collaborative approach for all New Zealand's marine areas should be carefully considered.

If a collaborative process is undertaken, careful consideration needs to be given to the process for implementation of the group's recommendations. Often, a conventional statutory process involving public consultation is undertaken. These processes may not combine easily with collaborative decision-making. For example, if public consultation is held *following* a collaborative process, this can destroy carefully achieved consensus, pitching different interests against each other again. In addition, the knowledge that a further consultation will be undertaken may have the effect of discouraging complete cooperation with the collaborative process, as participants are aware that they will have an opportunity to state their views again later.

Experiences of collaborative processes both in New Zealand and overseas also indicate that problems can arise where there is a disjunct between the expectations of participants, and the government's intentions, in terms of whether the group's recommendations will be taken forward by the government. Where Ministers must retain ultimate discretion, this should be made clear to participants, and the limits of their decision-making authority clearly communicated to them at an early stage.

The issue of compensation

The establishment of marine protected areas in Australia is often accompanied by financial support for those adversely affected, particularly fishers. Such compensation has not been paid in New Zealand on the creation of marine reserves. The issue of compensation was raised by the West Coast Marine Protection Forum, on the basis that if compensation was available, it would make reaching consensus between fishing and conservation interests more achievable. However, government made it very clear that it was not willing to offer any compensation to fishers.

On the positive side, the availability of compensation could help to reduce opposition to marine protected areas by those who may be adversely affected.

However, on the negative side, if such compensation is expected or required, it could make the establishment of a comprehensive and representative network of marine protected areas unaffordable and therefore unachievable.

Who decides on new marine protected areas?

The final decision about whether to establish a marine protected area could be undertaken jointly by a number of parties, to reflect the range of interests relevant to the issue, or could be undertaken by one decision-maker. To ensure objectivity, a single decision-maker could be selected on the basis of the lack of vested interest and thus an ability to consider the competing interests objectively.

Joint decision-making

This approach envisages that the consent of two or more Ministers will be required to establish a marine protected area. Under the Marine Reserves Act, the Department of Conservation has responsibility for granting marine reserve applications, but both the Minister for Primary Industries and the Minister of Transport must concur with the proposal. This has considerably slowed down the process of marine reserve creation and has led to a situation where a large amount of work has gone into developing a proposal, only for a Minister to veto it. The MPA Policy also relies on a joint approach. The Department of Conservation and the Ministry for Primary Industries were jointly tasked with implementing the policy, but they have different priorities, and implementation has now been put on hold.

The approach does have benefits, however. It helps to ensure that both conservation and other interests (such as fisheries and transport) are properly considered and taken into account when a decision is made to create a marine protected area.

Sole decision-maker

The alternative is to provide for one Minister or other entity to make the final decision. The Marine Reserves Bill provides for the Minister of Conservation to have sole decision-making power, following consultation with any relevant ministers. This is possibly one of the reasons why the passage of the Bill has

not been achieved, as it was thought by some parties to give too much power to conservation interests.

The main benefit of using a sole decision-maker is that it helps ensure a streamlined process and the efficient use of resources.

A potential problem is that it may fail to give sufficient weight to all of the relevant interests. This problem can be mitigated by ensuring that an appropriate Minister or entity has decision-making power, one that is not aligned to a particular sector. Concerns about vesting too much power in conservation interests could be alleviated by adopting an independent review process, for example along the lines of the board of inquiry process used in the preparation of national policy statements under the Resource Management Act. Key features of this process are the review of the draft plan by an independent body and a public hearing where submitters are heard and can present evidence in support of their submissions. The independent body should be made up of expert members, with a judicial chair. Further appeals could be made on points of law only.

In this process, the Minister of Conservation could make a final decision without requiring concurrence from the Minister for Primary Industries. The independent board of inquiry process provides an alternative means through which any concerns of the Ministry for Primary Industries can be fully taken into account externally to the Department of Conservation.

Providing for sole decision-making power should considerably speed up the process and is consistent with the principle that the power to make a decision should be aligned with the person who has accountability for the outcome of that decision.

Conclusion

Figure 9.1 locates the various approaches taken in New Zealand and in comparator countries along a continuum from a narrower to a broader approach. From this analysis, it is evident that the Marine Reserves Act and Bill take a narrow approach to marine protection, and as such are out of step with the international comparator countries. The MPA Policy takes a broader approach, but is still out of step with comparator countries in terms of failing to adopt a classification system. It also does not provide linkages with broader marine spatial planning which is something that is being undertaken in the United Kingdom and partially in Australia.

Figure 9.1: Summary of legislative design considerations and existing legislative systems

	Narrow ← → Broad		
Scope	Marine Reserves Act Marine Reserves Bill	MPA Policy	New South Wales Marine Parks Act Australian Commonwealth MPA Program English Marine and Coastal Access Act California Marine Life Protection Act
Purpose	Marine Reserves Act Marine Reserves Bill		MPA Policy New South Wales Marine Parks Act Australian Commonwealth MPA Program UK Marine and Coastal Access Act California Marine Life Protection Act
Classification System	Marine Reserves Act	Marine Reserves Bill UK Marine and Coastal Access Act MPA Policy	New South Wales Marine Parks Act Australian Commonwealth MPA Program California Marine Life Protection Act
Linkages with Marine Spatial planning	Marine Reserves Act Marine Reserves Bill MPA Policy California Marine Life Protection Act New South Wales Marine Parks Act	Australian Commonwealth MPA Program	UK Marine and Coastal Access Act
Stakeholder involvement	Marine Reserves Act Marine Reserves Bill	Australian Commonwealth MPA Program New South Wales Marine Parks Act	MPA Policy UK Marine and Coastal Access Act California Marine Life Protection Act

Endnotes

1 Although there has been some movement toward a more ecosystem-based approach to *fisheries* management through the Ministry for Primary Industries' *Strategy for Managing the Environmental Effects of Fishing*