
Enabling Marine Ecosystem-based Management: Is Aotearoa New Zealand's Legal Framework up to the Task?

Raewyn Peart,* Alison Greenaway† and Lara Taylor‡

Ecosystem-based management (EBM) has been proposed as a more effective way of addressing complex environmental challenges in the marine environment. The Sustainable Seas National Science Challenge has recently proposed seven principles to underpin marine ecosystem-based management in New Zealand reflecting international experience and the essential role of Māori in New Zealand society. This article reviews the extent to which the current legal framework supports the application of the principles in the New Zealand context. It concludes that there is an uneven approach across New Zealand's legislative landscape with some important areas requiring rationalisation, modernisation and strengthening. In the absence of fundamental legislative reform, a national statutory framework for marine spatial planning could provide a stronger framework for the application of the proposed "EBM Principles".

1. INTRODUCTION

The legal framework applying to the management of New Zealand's marine estate is both complex and fragmented. Numerous pieces of legislation apply to the marine area, administered by multiple agencies at both central and regional government levels. Some of the legislation, such as the Wildlife Act 1953 and Marine Reserves Act 1971, is quite dated. Māori customary rights

*Policy Director, Environmental Defence Society. Email: raewyn@eds.org.nz.

†Senior Researcher Social Science, Manaaki Whenua — Landcare Research.

‡Kairangahau Māori, Manaaki Whenua — Landcare Research.

The authors would like to acknowledge the Sustainable Seas National Science Challenge for supporting the preparation of this article.

and those under Te Tiriti o Waitangi — The Treaty of Waitangi (Treaty) in the marine area have yet to be fully resolved, complicating broader-scale legislative reform. In more recent times, there has been a proliferation of bespoke regional legislation, indicative of problems with the general applicability of the national legal framework.¹

At the same time, pressures on the marine space continue to increase. The 2016 state of the marine environment stocktake highlighted as the top three issues of concern, the degradation of coastal marine habitats and ecosystems, the perilous state of marine bird species (with most threatened or at risk of extinction), and the growing threat of ocean acidification and warming.²

Ecosystem-based management (EBM) has been proposed as a more effective way to address complex environmental challenges through shifting the focus from sector-specific management to a wider range of interrelated ecological, environmental and human factors.³ Its importance has recently been acknowledged by the New Zealand Government in its proposals for an updated biodiversity strategy.⁴

Recognising these factors, and the essential role of Māori in New Zealand society and law, the science leadership team of the Sustainable Seas National Science Challenge suggested that the following seven major principles should underpin marine EBM in the New Zealand context:⁵

1. Governance structures provide for Treaty of Waitangi partnerships, tikanga and mātauranga Māori.
2. Place and time-specific ecological complexities and connectedness and present cumulative and multiple stressors, as well as those that might occur with new uses, are considered.
3. Humans, along with their multiple uses and values for the marine environment, are considered as part of the ecosystem.
4. Healthy marine environments, and their values and uses, are safeguarded for future generations.
5. Collaborative, co-designed and participatory decision-making processes are used, involving all interested parties from agencies, iwi, industries, whānau, hapū, and local communities.

1 Such as the Hauraki Gulf Marine Park Act 2000, Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 and Kaikōura (Te Tai o Marokura) Marine Management Act 2014.

2 Ministry for the Environment and Statistics New Zealand *Our Marine Environment 2016* (October 2016).

3 Richard Curtin and Raúl Prellezo “Understanding marine ecosystem based management: A literature review” (2010) 34 *Marine Policy* 821 at 821.

4 New Zealand Government *Te Koiora o Te Koiora: Our shared vision for living with nature* (August 2019) at 58.

5 Judi Hewitt, Linda Faulkner, Alison Greenaway and Carolyn Lundquist “Proposed ecosystem-based management principles for New Zealand” (November 2018) RMJ 10.

6. Decisions are based on science and mātauranga Māori and are informed by community values and priorities.
7. Flexible, adaptive management, appropriate monitoring and acknowledgement of uncertainty are promoted.

With the exception of the first principle, which provides specifically for the Treaty partnership, the set of seven principles encompasses most of the “EBM Principles” used around the world. This article investigates the extent to which the principles are provided for within the current legislative context and highlights areas where future legislative reform could more fully support the application of marine EBM in New Zealand.

2. EBM PRINCIPLES AND CURRENT MARINE LEGAL FRAMEWORK

Three pieces of legislation jointly provide the main underlying framework for marine management in New Zealand: the Resource Management Act 1991 (RMA), Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) and Fisheries Act 1996 (see Figure 1). Supplementary to that, the Crown’s marine obligations to Māori are more specifically delivered under Treaty legislation and there is also a body of conservation legislation that applies to the marine space.

Land	Territorial sea (seawards 12 nm)	Exclusive economic zone (seawards 200 nm)
Resource Management Act 1991		
		Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
Fisheries Act 1996		
	Marine and Coastal Area (Takutai Moana) Act 2011	
Conservation Act 1987		
	Marine Reserves Act 1971	
Marine Mammals Protection Act 1978		
Wildlife Act 1953		
	Hauraki Gulf Marine Park Act 2000 (Hauraki Gulf)	

Figure 1: Spatial coverage of the main pieces of New Zealand marine legislation.

The RMA applies to the management of New Zealand's territorial sea⁶ (apart from fisheries) as well as freshwater, land and air. The Act was considered world-leading when it came into force in 1991 and is still being drawn on as a useful model for natural resource law reform in other countries, with Wales being a recent example.⁷ It has been heavily amended, with some 18 amendment Acts over the past 27 years, and is currently the focus of a comprehensive governmental review.⁸

Decision-making under the RMA is largely decentralised to regional councils and territorial authorities, with regional councils preparing regional coastal plans and making permitting decisions within the territorial sea (termed "coastal marine area").⁹ Their decisions are taken within the framework of pt 2 (which sets out the purpose and principles of the Act) and national policy statements, with the most pertinent to the marine environment being the New Zealand Coastal Policy Statement 2010 (NZCPS). The NZCPS provides more specificity on how the purpose and principles of the RMA are to be applied to the coastal environment which includes the territorial sea, islands and land significantly impacted by coastal processes.¹⁰

The RMA was developed at a time when sustainable development, rather than EBM, was a strong theme in international environmental debates, popularised by the Brundtland Report.¹¹ The purpose of the legislation reflects this and is to "promote the sustainable management of natural and physical resources".¹² The Act does not specifically refer to EBM, but being in many respects ahead of its time in 1991, it does substantively provide for many (but not all) of the EBM Principles as explained below.

In contrast, the EEZ Act is a relatively recent piece of marine legislation being promulgated in 2012. It was designed to fill the gap in environmental provisions applying to the exclusive economic zone (EEZ)¹³ and continental shelf as identified by an earlier oceans policy process.¹⁴ Similar to the scope of the RMA, it excludes the management of fisheries, but addresses most other offshore marine activities. Decision-making is centralised, with a government Minister in charge of policy- and rule-making, and consenting undertaken either

6 Which extends seawards 12 nautical miles.

7 Victoria Jenkins "Sustainable Management of Natural Resources: Lessons from Wales" (2018) 30(3) JEL 399.

8 Cabinet Environment, Energy and Climate Committee "Comprehensive review of the resource management system: scope and process" (July 2019).

9 Extending seawards 12 nautical miles.

10 New Zealand Coastal Policy Statement 2010 [NZCPS], policy 1.

11 Brundtland Commission *Our Common Future* (Oxford University Press, Oxford, 1987).

12 Resource Management Act 1991 [RMA], s 5(1).

13 Which extends 200 nautical miles from shore.

14 Raewyn Peart *Governing our oceans: Environmental reform for the exclusive economic zone* (Environmental Defence Society, Auckland, 2011) at 1.

by a Ministerially appointed Board of Inquiry or the Environmental Protection Authority (EPA), a quasi-independent Crown agency.

Despite its recency, the overall framing of the EEZ Act is similar to that for the RMA, and it does not explicitly acknowledge EBM. It features a “sustainable management” purpose in order to draw on the RMA jurisprudence established around the concept over the preceding two decades.¹⁵ In 2015, a second purpose was added to the EEZ Act as a result of the transfer of marine discharge and dumping provisions from the Maritime Transport Act 1994, being to “protect the environment from pollution”.¹⁶ This reflects New Zealand’s obligations under the London Convention.¹⁷

The Fisheries Act 1996 applies to fishing “resources” (widely defined to include all species of marine life including fish, seaweed and seabirds) within New Zealand’s marine realm including the territorial sea and EEZ. It does not address other impacts on the marine space, on fishers or on the health of fish stocks. It is therefore spatially expansive but sectorally focused legislation. The Act establishes a quota management system underpinned by the allocation of individual transferable quota. This creates a right to harvest a proportionate share of the total allowable commercial catch of a “stock” (defined in the Act as “any fish, aquatic life, or seaweed ... that are treated as a unit for the purposes of fisheries management”). Decision-making is highly centralised, with most decisions made by the Minister of Fisheries.

Similar to the RMA and EEZ Act, this legislation does not specifically refer to EBM, although the matter was explicitly canvassed at the time it was formulated. A Fisheries Task Force commissioned by the Minister of Fisheries in 1991 to make recommendations on the future development of fisheries legislation proposed that it contain a purpose of “sustainable management” that included as part of its definition “adopting an ecosystem based approach to the management of the marine environment”.¹⁸ When the legislation was passed in 1996, references to EBM were omitted and the purpose placed a greater emphasis on utilisation being “to provide for the utilisation of fisheries resources while ensuring sustainability” albeit with utilisation being widely defined as “conserving, using, enhancing, and developing fisheries resources”.¹⁹

15 (28 August 2012) 683 NZPD 4779.

16 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013.

17 Convention on the Prevention of Marine Pollution and Dumping of Wastes and Other Matter 1972.

18 Fisheries Task Force *Sustainable Fisheries — Tiakina Nga Taonga a Tangaroa: Report of the Fisheries Task Force to the Minister of Fisheries on the Review of Fisheries Legislation* (1992) at 13.

19 Fisheries Act 1996, s 8.

The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Māori Fisheries Act 2004 and Māori Commercial Aquaculture Claims Settlement Act 2004 collectively address Treaty claims to fisheries and aquaculture primarily through the provision of cash, fisheries quota and aquaculture space. The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act) establishes most of the territorial sea as a common marine and coastal area which is incapable of ownership, protects public rights of access, and provides for iwi and hapū groups to establish and exercise customary rights in the area.

Relevant conservation legislation includes the Conservation Act 1987, Marine Reserves Act 1971, Marine Mammals Protection Act 1978 and Wildlife Act 1953. The Conservation Act 1987 provides a broader policy and planning framework which overlays those Acts more narrowly concerned with marine habitat (Marine Reserves Act 1971) and species (Marine Mammals Protection Act 1978 and Wildlife Act 1953) protection. There is no reference to EBM in any of this legislation which has a strong focus on “conservation” rather than sustainability or utilisation.

There is much other legislation which could be discussed,²⁰ but in the interest of brevity we also refer only to the Hauraki Gulf Marine Park Act 2000 in relevant places. This is an example of bespoke legislation which applies to a defined area of the north-east coast of New Zealand including the territorial sea, the islands within it and its catchments. The Act establishes the Hauraki Gulf Marine Park, a co-governance structure — the Hauraki Gulf Forum, and management objectives that apply to other statutory regimes operating within the marine park area. There is no specific reference to EBM in this Act, although it embraces many relevant features.

The following sections analyse the extent to which this body of legislation enables the application of each respective EBM principle described above.

2.1 EBM Principle 1 — Governance Structures and Treaty of Waitangi

Aotearoa New Zealand is unique in comparison to other countries due to the Treaty consensus between the state and indigenous peoples as partners. The exchange of rights and obligations encompassed by the Treaty, and its provision for both *kāwanatanga* (Crown government) and *tino rangatiratanga*

20 For example, the Maritime Transport Act 1994 and Biosecurity Act 1993 also have relevance to marine management.

(chieftainship), has been characterised by Parliament,²¹ the courts²² and the Waitangi Tribunal as a partnership.²³

In regards to governing and managing the marine estate, the Treaty allows the Crown to develop policy and legislation to control the sustainable use and development of the environment. However, in doing so the Crown must, to the greatest extent practicable, protect the authority of iwi and hapū in relation to taonga (such as coastal lands, fresh and coastal waters, flora and fauna and the ecosystems that support them, wahi tapu, pā and other important sites), so that they can fulfil their obligations as kaitiaki (guardians).²⁴ Thus, EBM Principle 1 acknowledges and upholds the right of iwi and hapū to exercise rangatiratanga in the governance and management of their natural resources or taonga.

The RMA is cognisant of these Crown obligations to Māori and in s 8 specifically requires decision-makers to “take into account” the principles of the Treaty. “[T]he relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” is a matter of national importance to which decision-makers must “recognise and provide for” and kaitiakitanga is a matter to be paid “particular regard to”.²⁵ These general obligations flow into all decision-making under the Act. The Waitangi Tribunal has been critical of this architecture as the provisions protecting Māori rights and interests “are weighed in a process that requires a balancing of those rights and interests against the purpose of the RMA and its principles outlined in sections 5, 6 and 7 of the Act”.²⁶ They therefore do not take primacy and can be traded off against other matters. In addition, the Tribunal has made it clear that the Crown cannot avoid its Treaty obligations by delegating responsibilities for the control of natural resources to other bodies and: “If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.”²⁷

There are many references to the role of iwi authorities in plan-making processes under the RMA although there is no direct obligation to consult iwi (or any other parties) on resource consent applications.²⁸ The NZCPS highlights the need for such consultation to be “early, meaningful, and as far

21 See, for example, Treaty of Waitangi Act 1975, s 4(2A)(a).

22 See, for example, *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) at 35.

23 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 17.

24 Waitangi Tribunal, above n 23.

25 RMA, ss 6 and 7.

26 Waitangi Tribunal *He Maunga Rongo — Report on Central North Island Claims* (Wai 1200, 2008) at 1457–1458.

27 Waitangi Tribunal *The Ngawha Geothermal Resource Report* (WAI 304, 1993) at 100–101.

28 RMA, s 36A.

as possible in accordance with tikanga Māori”.²⁹ In addition, councils must “take into account” relevant iwi and hapū planning documents recognised by an iwi authority or customary marine title group if lodged with the relevant local authority.³⁰ Joseph notes that these provisions have “not empowered iwi” in practice and that a “major challenge has been the weak impact of iwi management plans” which have not generally influenced RMA planning documents.³¹

More recently, provisions introduced through the Resource Legislation Amendment Act 2017 enable iwi to initiate the negotiation of Mana Whakahono a Rohe (iwi participation agreements) with council. These can set out how an iwi authority may participate in plan-making processes, be consulted on resource consent matters, and work with councils to develop and agree on monitoring methods, amongst other things.³² Theoretically, they provide a more proactive role for all iwi and hapū in establishing bespoke arrangements, which can be tailored to the particular needs and aspirations of the parties concerned. The Waitangi Tribunal recently observed that Mana Whakahono a Rohe “is an important improvement over other RMA mechanisms” and that “[a]lthough it is too early to be sure how the Mana Whakahono a Rohe mechanism will be taken up, it appears to us that the new participation agreement is a useful starting point for iwi–council engagement”. However, the compulsory matters to be agreed are very limited and there are weaknesses in the dispute resolution provisions.³³

The above provisions fall short of a Treaty-based partnership model encapsulated in EBM Principle 1. Joseph describes them as representing a “right to culture” model which focuses on stewardship, the relationship of Māori with their environment and participation in decision-making but not “authentic partnership with political authority”.³⁴ In contrast, the Treaty envisages rangatira to rangatira (chief to chief) and mana to mana (power to power) partnership at all levels of participation and decision-making.³⁵

29 NZCPS, policy 2(b).

30 RMA, ss 61(2A), 66(2A) and 74(2A).

31 Robert Joseph “The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental prosperity in Aotearoa New Zealand — possible ways forward” in Greg Severinsen and Raewyn Peart (eds) *Reform of the Resource Management System: The Next Generation — Working Paper 3* (Environmental Defence Society, Auckland, 2018) at 34.

32 RMA, pt 5, sub-pt 2.

33 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Pre-publication Version* (WAI 2358, 2019) at 313.

34 Joseph, above n 31, at 30.

35 Lara Taylor, Tania Te Whenua and Bonny Hatami *Discussion Paper: How current legislative frameworks enable customary management & ecosystem-based management in*

A partnership that empowers two equal cultures and the relevant knowledge, institutions and processes is what Awatere and others describe as the He Waka Taurua model (see Figure 2).³⁶ Others use similar ideology based on “a waka with two hulls bound by a common kaupapa”.³⁷

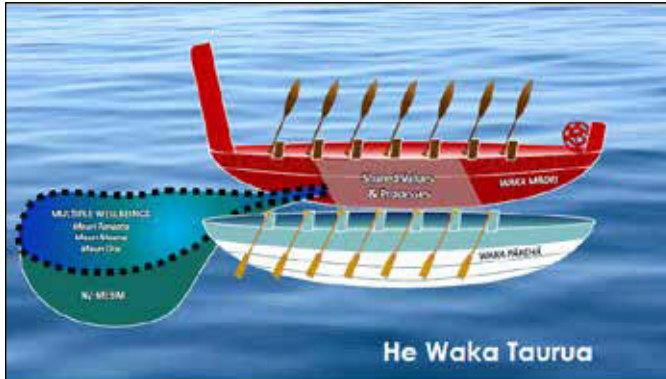


Figure 2: He Waka Taurua model of Treaty-based partnership.³⁸

There are provisions in the RMA that facilitate the envisaged power sharing with Māori. Section 33 enables a local authority to transfer functions, powers and duties to an iwi authority, but this has not generally been utilised. In 2005, s 36B was inserted to enable councils to enter a joint management agreement with an iwi or hapū whereby the parties jointly exercise a function or power. This provision may “restore to Māori a degree of *mana* (prestige) and also *tinorangatiratanga* (self-determination)”.³⁹ Many joint management agreements have been put in place,⁴⁰ but we have been unable to identify any which apply to the marine area.

Aotearoa New Zealand — the contemporary practice of rāhui (Sustainable Seas National Science Challenge, April 2018) at 7–8.

36 K Maxwell, K Ratana, K Davies, C Taiapa and S Awatere “Mauri Moana, Mauri Tangata, Mauri Ora — Documenting social values of New Zealand’s marine environment” (Presentation to the International Society for Ecological Economics Conference, Puebla, Mexico, 10–12 September 2018).

37 Lara Taylor “He waka hourua, he waka eke noa: evolving management and governance for Kaipara Moana” (Master of Science Dissertation, University of Auckland, 2015) at 127.

38 Maxwell and others, above n 36.

39 Natalie Coates “Joint-management Agreements in New Zealand: Simply Empty Promises?” (2009) 31(1) JSPL at 33.

40 See, for example, the Taupō District Council and Tūwharetoa Māori Trust Board Joint Management Agreement; Raukawa Settlement Trust and Waikato Regional Council Joint Management Agreement; and Gisborne District Council and Te Runanganui o Ngāti Porou Trustee Limited Joint Management Agreement.

Compared to the RMA, the EEZ Act has a paucity of Treaty provisions. It does establish a Māori Advisory Committee (Ngā Kaihautū Tikanga Taiao) so that decisions “may be informed by a Māori perspective” with the consent authority required to “have regard to” any advice received from it.⁴¹ This provides a mechanism through which tikanga and mātauranga Māori can potentially be applied to decision-making under the Act, but falls short of the partnership approach envisaged by EBM Principle 1.

The EEZ Act also contains several requirements regarding Māori consultation including the right to comment on draft regulations and to be served with notified consent applications.⁴² In addition, decision-makers must take into account the effects of activities on “existing interests” which include Treaty settlements.⁴³ Although these provisions recognise Māori rights and interests to some extent, they can be outweighed by other matters.

Despite these ostensibly weak provisions, the Act has been applied to protect Māori interests. Ralston and Ruru explain the detailed consideration that the Decision-Making Committee gave to such matters when considering an application by Trans-Tasman Resources to undertake seabed mining of iron sands off the South Taranaki Bight.⁴⁴ It concluded that the applicant had failed “to consider effects on Māori customary and commercial fishing, wāhi tapu, social and economic implications and exercising of kaitiakitanga”. The application was declined.⁴⁵

The Fisheries Act 1996 has imbedded within it Treaty redress measures. Under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, all Treaty claims by Māori in respect of commercial fishing were settled through a range of measures including transfer of quota in commercial fisheries.⁴⁶ Ongoing claims in respect of non-commercial customary fishing have been recognised through statutory provision for taiāpure-local fisheries, mātaimai reserves, temporary closures and devolved permitting.

Taiāpure-local fisheries are created by Order in Council for areas that have customarily been of special significance to iwi or hapū as a source of food or for spiritual or cultural reasons. A Ministerially appointed management committee makes recommendations on fishing regulations.⁴⁷ Mātaimai reserves are created by a less formal process with the Minister declaring them through a *Gazette*

41 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 [EEZ Act], ss 12(a) and 59(3)(c).

42 Section 32(2)(b).

43 Sections 2, 33, 46 and 59.

44 Benjamin Ralston and Jacinta Ruru “Landmark EPA decision” [2014] NZLJ 284.

45 Environmental Protection Authority [EPA] *Trans-Tasman Resources Limited Marine Consent Decision* (Wellington, June 2014).

46 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9.

47 Fisheries Act 1996, pt 9.

notice. A Ministerially appointed tangata kaitiaki/tiaki manages the area and is empowered to make bylaws restricting fishing activity, although they must be approved by the Minister before coming into effect. Commercial fishing is not normally permitted.⁴⁸

The Minister can also temporarily close or restrict fisheries for up to two years to “recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights”.⁴⁹ Such closures, often referred to as “rāhui”, can be rolled over for further periods and several have been in place for some time. For example, Ngāti Kuta and Patukeha of Te Rawhiti initiated a closure at Maunganui Bay in December 2010 and it is currently in force until December 2020. Regulations under the Fisheries Act 1996 also provide for tangata whenua to nominate kaitiaki who are then responsible for issuing customary fishing authorisations within their rohe moana (marine domain).⁵⁰

The Act also requires the Minister to provide for the input and participation of tangata whenua who have a non-commercial interest in the stock concerned, or an interest in the effects of fishing on the aquatic environment, and to have particular regard to kaitiakitanga when setting sustainability measures.⁵¹

Taylor and others note that these legal provisions, which are designed to empower Māori, have some promise for the implementation of EBM. “Rather than a one-size-fits all national or regional approach, they are locally-based tools, founded on local knowledge, albeit enabled by national legislation.”⁵² However, all these mechanisms need the approval of the Crown and it can be cumbersome and time-consuming for management committees to obtain such approval in practice.⁵³ Many iwi and hapū also continue to practise traditional rāhui outside of the Fisheries Act, using tikanga Māori and relying on local enforcement with no recognised legal backing.

The Conservation Act 1987 includes the strongest Treaty obligation of all the legislation reviewed, with a requirement in s 4 to interpret and administer the Act “to give effect to the principles of the Treaty of Waitangi”. This provision was recently considered by the Supreme Court in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* where the Trust challenged the Minister of Conservation’s decision to grant concessions for tourism operations on Motutapu and Rangitoto Islands. The Court noted that s 4 requires more than

48 Fisheries (Kaimoana Customary Fishing) Regulations 1998, ss 18–32.

49 Fisheries Act, s 186A(2).

50 Fisheries (Kaimoana Customary Fishing) Regulations 1998 and Fisheries (South Island Customary Fishing) Regulations 1998.

51 Fisheries Act, s 12(1).

52 Taylor, *Te Whenua and Hatami*, above n 35, at 12.

53 Anne-Marie Jackson “Erosion of Māori fishing rights in customary fisheries management” (2013) 21 Wai L Rev 59.

procedural steps and that “[s]ubstantive outcomes for iwi may be necessary including, in some instances, requiring that concession applications by others be declined”. In addition, “[e]nabling iwi or hapū to reconnect to their ancestral lands by taking up opportunities on the conservation estate (whether through concessions or otherwise) is one way that the Crown can give practical effect to Treaty principles”.⁵⁴ The case related to land, but similar principles would apply to concessions in the marine space.

The other pieces of conservation legislation reviewed pay scant direct regard to Treaty issues. However, there is a reference in the Conservation Act 1987 to a broad range of conservation-related legislation, which has the effect of bringing the Treaty of Waitangi s 4 provision into play. This was successfully used to challenge a decision by the Department of Conservation to issue whale-watching permits in Kaikōura (in addition to those held by Ngāi Tahu) under the Marine Mammals Protection Act 1978.⁵⁵ In addition, iwi and hapū are empowered as one of the limited parties who can apply for marine reserves,⁵⁶ despite the concept of locking up marine resources in perpetuity not resonating with Māori management approaches.

The MACA Act recognises and provides for the intrinsic, inherited rights of whānau, hapū and iwi in the foreshore and seabed. It does so by creating three new types of statutory rights:

- (1) customary marine title — which gives title holders the right to say “no” to resource consents, marine reserves, conservation areas and Department of Conservation concessions (with some exceptions); ownership of minerals (except petroleum, gold, silver and uranium); interim custody of newly found taonga tūturu; and consultation on some government and council decisions including the ability to create a planning document which influences RMA plans as described above;
- (2) wāhi tapu protection — which creates legally binding prohibitions or restrictions on access to a specified site or area; and
- (3) protected customary rights — where the rights-holding group does not need to obtain consent for the activity, or pay charges or royalties, and councils must not approve a resource consent that adversely affects the right.

A high statutory bar has been applied to establishing such rights. Protected customary rights must have been exercised since 1840 and be continuing. A customary marine title requires exclusive use and occupation from 1840

⁵⁴ *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 at [52].

⁵⁵ *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

⁵⁶ Marine Reserves Act 1971, s 5(1)(a)(iv).

to the present day without substantial interruption.⁵⁷ Many MACA Act negotiations are under way, with Ngāti Porou being the first iwi to secure an agreement for customary title, which will extend over significant parts of the East Cape coastline.⁵⁸ The process can be slow and drawn out. For example, in 2017 following five years of negotiation, Ngāti Pāhauwera were the first iwi to be offered partial redress. The tribe's application had no customary overlaps, no marine structures, and minimal opposition — making it a very straightforward case. The Crown's offer was limited to a very small proportion of the coastal marine title area applied for and lacked any of the wāhi tapu or protected customary rights sought. The tribe ratified the limited offer (which has yet to be further progressed by government) and is pursuing the remainder of the claim in the High Court.

Taylor and others suggest that the MACA Act has the potential to enable Māori engagement in EBM by addressing iwi and hapū grievances and re-establishing ownership and interest rights. If iwi receive full redress, this would facilitate Māori involvement and agency in EBM, by addressing power dynamics and jurisdiction. Timely redress would better enable iwi and hapū, the Crown and wider communities to progress into a more transformative engagement space that meets EBM Principle 1 — co-governance.⁵⁹

The Hauraki Gulf Marine Park Act 2000 acknowledges “the historic, traditional, cultural, and spiritual relationship of the tangata whenua with the Hauraki Gulf and its islands”.⁶⁰ The Act goes some way towards a Treaty partnership through the establishment of the Hauraki Gulf Forum which has members drawn from tangata whenua (six representatives) and management agencies (15 representatives). The Waitangi Tribunal considered the legislation shortly after it came into force and concluded that it provided a framework for all parties, including Hauraki iwi who had lodged the claim, to work together towards the common goal of protecting the Hauraki Gulf environment for future generations.⁶¹ More recently, the Act provided the context for, and the Forum was the main instigator of, the Sea Change Tai Timu Tai Pari project which commenced in 2013 and adopted a co-governance approach to oversee the development of a marine spatial plan for the Hauraki Gulf.⁶²

Overall, the marine legislative framework goes a considerable way towards enabling the application of EBM Principle 1. Conservation legislation contains a direct obligation to give effect to the principles of the Treaty. The RMA and

57 Marine and Coastal Area (Takutai Moana) Act 2011, ss 51, 58.

58 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

59 Taylor, *Te Whenua and Hatami*, above n 35, at 18.

60 Hauraki Gulf Marine Park Act, s 3(d).

61 Waitangi Tribunal *The Hauraki Gulf Marine Park Report* (Wai 728, 2001) at 44.

62 Sea Change Tai Timu Tai Pari *Hauraki Gulf Marine Spatial Plan* (Waikato Regional Council, Hamilton, 2016).

Fisheries Act 1996 provide opportunities for transfer of power, partnerships, and the direct application of tikanga and mātauranga Māori. The Hauraki Gulf Marine Park Act 2000 also adopts a partnership model with tangata whenua and has helped facilitate co-governance planning. The MACA Act has the potential to significantly empower iwi and hapū groups although implementation has been slow. The EEZ Act is not so strong in this respect, but the Māori Advisory Committee has proved effective in ensuring that Māori perspectives are incorporated into decision-making.

2.2 EBM Principle 2 — Place- and Time-Specific Ecological Complexities, Connectedness and Cumulative Stressors

The RMA acknowledges the need to address ecological complexity and connectedness, as well as cumulative and multiple stressors, as highlighted in EBM Principle 2. Some of this complexity is recognised in the definition of “biological diversity” in s 2 which is “the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems”. The NZCPS further elaborates on this issue, with objective 1 emphasising the importance of “maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature”.

There is a strong focus on integration within the RMA which recognises the connectedness between different environments. This is supported by the NZCPS which emphasises the importance of integrated management of activities across administrative boundaries, between activities on land and the coastal marine area, and “where significant adverse cumulative effects are occurring, or can be anticipated”.⁶³

The RMA’s spatial application encompasses water catchments and the territorial sea (termed coastal marine area), thereby providing a catchment-to-the-sea management interface. Regional council jurisdictional boundaries are largely based around water catchments with the adjacent coastal marine area included. In practice, their boundaries are more aligned with terrestrial and freshwater systems than marine with, for example, boundaries cutting across two of New Zealand’s largest coastal embayments — the Hauraki Gulf and the Kaipara Harbour. Some marine jurisdictions are even more fragmented, in cases where regional council functions have been allocated to smaller “unitary” councils.⁶⁴

⁶³ NZCPS, policy 4.

⁶⁴ For example, the top of the South Island has three unitary councils — Marlborough District Council, Nelson District Council and Tasman District Council.

Regional councils have as a statutory function “to achieve integrated management of natural and physical resources of the region”⁶⁵ and the preparation of regional policy statements is one mechanism to achieve this. These have the potential to be integrative, forward-looking strategic planning documents, although this has often not been realised in practice.⁶⁶ Regional councils also prepare regional plans (generally for catchments) and regional coastal plans (which apply to the coastal marine area), with a recent trend towards amalgamating these into integrated catchment-to-the-sea documents, which the legislation makes provision for.⁶⁷

Joint plans can also be developed by two or more councils. This means that it is possible to develop statutory joint harbour plans for places where marine jurisdictions are shared (for example, the Hauraki Gulf and Kaipara Harbour) to establish integrated, catchment-based management. In fact, a report written over 10 years ago for the former Auckland Regional Council recommended such catchment-based EBM for the Kaipara Harbour.⁶⁸ Potentially, iwi and hapū authorities could be incorporated into this arrangement through delegation of power, or a transfer of powers to a statutory committee using s 33 of the RMA (as described above).

Cumulative effects are to be explicitly considered in planning and consenting decisions due to the inclusion of a definition of “effect” in the Act that includes “any cumulative effect which arises over time or in combination with other effects”.⁶⁹ The NZCPS requires councils in regional policy statements and plans to identify “coastal processes, resources or values that are under threat or at significant risk from adverse cumulative effects” and to include provisions to manage such effects.⁷⁰ Consent applications are required to include an assessment of environmental effects of the proposed activity (including cumulative effects) on the neighbourhood, wider community and ecosystems, providing for different scales of analysis.⁷¹

The EEZ Act also specifically acknowledges the need to consider cumulative effects, adopting the same definition of “effect” as the RMA.⁷² Cumulative

65 RMA, s 30(1)(a).

66 Raewyn Peart and Peter Reaburn *Strengthening Second Generation Regional Policy Statements* (Environmental Defence Society, Auckland, 2011).

67 RMA, s 80. See, for example, the Proposed Marlborough Environment Plan which creates a single document incorporating the regional policy statement, regional plan, regional coastal plan and district plan.

68 A Kirschberg *Kaipara Harbour Coastal Environment Policy Review* (Auckland Regional Council Technical Publication No 345, 2007).

69 RMA, s 3.

70 NZCPS, policy 7(2).

71 RMA, sch 4 cl 7.

72 EEZ Act, s 6.

effects are to be considered when promulgating regulations, preparing an impact assessment and considering consent applications.⁷³

Although lacking the well-developed policy and planning framework of the RMA, the EEZ Act potentially provides for spatial planning through the ability to promulgate regulations that identify and provide for specific areas of the EEZ or continental shelf due to their vulnerability, importance for specific uses, need for coordinated management with other regimes, competition or conflict, or because they “are experiencing, or likely to experience, cumulative adverse environmental effects”. No such regulations have yet been made.⁷⁴

The Fisheries Act acknowledges the cumulative effects of fishing through the definition of “effect” which is also similar to that in the RMA. The interactions between fishing activity and the wider marine environment are recognised in the environmental principles which refer to the maintenance of “associated or dependent species” and “biological diversity” and the protection of “habitat of particular significance for fisheries management”.⁷⁵

However, within these broader provisions, the legislative focus for management under the Act turns to individual fish “stocks”. Each stock is typically defined as a single species located within a spatially defined quota management area. These spatial delineations are not always aligned with biological stocks.⁷⁶ Current management is primarily concerned with setting the total allowable catch (maximum harvest amount) and total allowable commercial catch (maximum amount permitted to be harvested by commercial fishers) for each particular stock. Under s 13(2), the Minister is required to set a total allowable catch that “maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks”. The specific reference to the “interdependence” of stocks recognises the connectedness of marine species as referenced in EBM Principle 2.

Maximum sustainable yield (MSY) is not a concept that acknowledges the complexity of the marine environment. It very much focuses on managing harvest from individual fish stocks, rather than on interactions with other species in the food web or with the marine environment more generally. In its simplistic application, MSY assumes that ocean systems are static, and that fish productivity is unaffected by external factors in the marine environment other than harvest.⁷⁷ The Fisheries Act contemplates total allowable catches being set

73 Sections 28(1)(e), 33(3)(a)(i), 39(1)(d) and 59(2)(a)(i).

74 Section 28.

75 Fisheries Act, s 9.

76 Raewyn Peart *Voices from the Sea: Managing New Zealand's Fisheries* (Environmental Defence Society, Auckland, 2018) at 14.

77 See, for example, C Finley “The social construction of fishing, 1949” (2009) 14(1) *Ecology and Society* 6 and WS Patrick and JS Link “Hidden in plain sight: Using optimum yield

above MSY, with wider impacts and interdependencies being considered, which enables a broader approach to be taken to the application of MSY in practice.

Marine conservation legislation is particularly patchy and fragmented. The purpose of marine reserves is focused on the “scientific study of marine life” rather than broader conservation or ecosystem purposes.⁷⁸ The Act only applies to the territorial sea with there being no similar legislation applying within the EEZ. As well as protecting marine life within their boundaries, marine reserves can act as a trigger for better management under the RMA, with the NZCPS requiring councils to “avoid adverse effects of activities” on areas protected under other legislation, which include such reserves.⁷⁹

The Conservation Act 1987 provides mechanisms to overlay conservation management strategies (and plans) on the management of marine reserves, marine mammal sanctuaries and the like once they are created to help create some coherence. The purpose of such strategies is to “establish objectives for the integrated management of natural and historic resources, including any species, managed by the Department”.⁸⁰ For example, the Auckland Conservation Management Strategy provides a set of outcomes, policies and milestones-outputs for marine reserves in the region (amongst many other things).⁸¹

The Hauraki Gulf Marine Park Act 2000 has a particularly strong integrative focus, with its set of common management objectives and the establishment of the Hauraki Gulf Forum which has as one of its functions to “promote and advocate the integrated management and, where appropriate, the sustainable management of the Hauraki Gulf, its islands, and catchments”.⁸² The Sea Change Tai Timu Tai Pari marine spatial plan also promotes integrated management with its focus on addressing multiple and cumulative stressors on the Hauraki Gulf. The plan is non-statutory, but the Ministers of Conservation and Fisheries have established a Ministerial Advisory Committee to progress implementation.⁸³

Much legislation operates within the same marine space creating the potential for overlaps and conflicts. In some cases, explicit legislative linkages

as a policy framework to operationalize ecosystem-based fisheries management” (2015) 62 Marine Policy 74.

78 Marine Reserves Act, s 3(1).

79 NZCPS, policy 11(a)(vi).

80 Conservation Act 1987, s 17D.

81 *Auckland Conservation Management Strategy* (Department of Conservation, November 2014).

82 Hauraki Gulf Marine Park Act, s 17(1)(i).

83 Ministers of Conservation and Fisheries “New Ministerial Committee established to progress Hauraki Gulf marine plan” (press release, 2 July 2019) [Beehive.govt.nz <https://www.beehive.govt.nz/release/new-ministerial-committee-established-progress-hauraki-gulf-marine-plan>](https://www.beehive.govt.nz/release/new-ministerial-committee-established-progress-hauraki-gulf-marine-plan).

have been created between decision-making processes, such as the requirement for the Minister of Fisheries to consider RMA planning documents when making fisheries sustainability decisions and the requirement that regional councils consider plans and strategies prepared under other Acts and fisheries regulations when developing regional policy statements. These provisions have not proved effective in practice, and there has been little interaction between the RMA and fisheries regimes.⁸⁴

The Court of Appeal in *Attorney-General v Motiti Rohe Moana Trust and Ors* has recently considered the interaction of the Fisheries Act 1996 and the RMA.⁸⁵ The case focused on whether it was possible for a regional council to spatially protect parts of the marine environment from the impacts of fishing activity through provisions in its regional coastal plan. The Environment Court had concluded that the council was able to provide such protections, so long as the sole or dominant purpose was related to those set out under the RMA, such as having particular regard to the intrinsic values of ecosystems or the relationship of Māori with ancestral waters and taonga.

The Court referenced the Primary Production Select Committee's report on the Fisheries Bill, and noted the Committee's opposition to including a wider range of matters in the environmental principles clause of the Fisheries Act, stating: "The current interface reflects acceptance that fishing, like other activities, can be curtailed under the RMA and other statutes on the basis of effects on matters such as intrinsic and amenity values."⁸⁶

The Court of Appeal reached a similar conclusion, holding that councils may control fisheries resources provided they do not manage them for Fisheries Act purposes. It noted that government had assigned regional councils the primary governance role for biodiversity in giving effect to New Zealand's international obligations under the Convention on Biological Diversity.⁸⁷ The Court also identified five indicia: necessity, type, scope, scale and location to provide some objective guidance as to whether any particular control was lawful.⁸⁸

In a separate case, the Environment Court confirmed that "damage, destruction, removal of flora and fauna" including by fishing activity should be prohibited in the Bay of Plenty Regional Coastal Environment Plan within three marine areas, thereby creating (in effect) marine protected areas via the RMA. The Court directed the regional council to draft appropriate plan provisions for circulation to parties for comment.⁸⁹

84 Peart, above n 76.

85 *Attorney-General v Motiti Rohe Moana Trust and Ors* [2019] NZCA 532.

86 *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 240 at [13].

87 *Attorney-General v Motiti Rohe Moana Trust and Ors*, above n 85, at [53] and [54].

88 At [64] and [65].

89 *Motiti Rohe Moana Trust v Bay of Plenty Regional Council*, above n 86, at [203].

Overall, the RMA provides a strong framework for the application of EBM Principle 2, reflecting the complexity and connectiveness of the marine environment and need to manage cumulative stressors. Recent court decisions have confirmed its applicability to the management of broader ecosystem impacts of fishing activity. The Hauraki Gulf Marine Park Act 2000 further strengthens the ability to apply this EBM Principle in the Hauraki Gulf and has facilitated the development of an integrated marine spatial plan.

Although recognising cumulative effects, the EEZ Act is poorly configured to proactively address them, due to a weak policy and planning framework and focus on case-by-case decision-making. Conservation legislation remains fragmented and narrowly focused. The Fisheries Act 1996 has an inbuilt tension with an emphasis on single-stock MSY-based management in some parts of the legislation which does not mesh well with the broader environmental principles that help frame the Act.

2.3 EBM Principle 3 — Humans as Part of the Ecosystem

This principle envisages that humans are considered as an integral part of the ecosystem. This recognises elements of Te Ao Māori where:⁹⁰

... all of the myriad elements of creation — the living and the dead, the animate and inanimate — are seen as alive and inter-related. All are infused with mauri (that is, a living essence or spirit) and all are related through whakapapapa [descent].

The approach is partially recognised in the definition of “environment” in s 2 of the RMA which includes “ecosystems and their constituent parts, including people and communities”. However, the human element has been excised from similar definitions in the EEZ Act and Fisheries Act.

The RMA (and associated NZCPS) also recognise the importance of people and communities being able to provide for their “social, economic, and cultural well-being” through use and development whilst protecting important environmental values.⁹¹ The MACA Act seeks to recognise the relationship of iwi, hapū, whānau and the general public with the foreshore and seabed. The Hauraki Gulf Marine Park Act adopts a holistic approach in protecting the associations of tangata whenua and other people and communities with the Gulf. The EEZ Act narrows such considerations down to only “economic” well-being. The Fisheries Act refers to social, economic, and cultural well-being, but these are linked to the “utilisation” of fisheries resources and therefore

⁹⁰ Waitangi Tribunal, above n 23, at 23.

⁹¹ RMA, s 5(2); NZCPS, obj 6.

potentially do not recognise the value people place on *in situ* marine life to the same extent. In direct contrast, the Conservation Act recognises the importance of natural and historic resources for the “appreciation and recreational enjoyment by the public” amongst other things.⁹²

Overall, only the RMA, MACA Act and Hauraki Gulf Marine Park Act can be said to provide for the implementation of EBM Principle 3, with other legislation separating humans from the natural environment and emphasising some human values ahead of others.

2.4 EBM Principle 4 — Healthy Environments Safeguarded for Future Generations

The importance of safeguarding healthy environments for future generations, as highlighted in EBM Principle 4, is specifically acknowledged in the broader purpose statement of the RMA which refers to “sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations”.⁹³ References to future generations are also included in the EEZ Act, Fisheries Act and Conservation Act.⁹⁴ The last takes a more proactive approach by establishing the Department of Conservation as an agency tasked with advocating for the “conservation of natural and historic resources generally”.⁹⁵

One way of ensuring healthy environments into the future is to establish strong environment bottom lines. The NZCPS, as interpreted by the Supreme Court in *Environmental Defence Society v New Zealand King Salmon*, provides for these in the coastal environment.⁹⁶ The case related to the proposed location of a salmon farm in remote Port Gore in the outer Marlborough Sounds. The Court concluded that the definition of “sustainable management” in s 5(2) of the RMA “contemplates protection as well as use and development” and that policies 13 and 15 of the NZCPS, which use the word “avoid” in respect of outstanding natural landscapes and outstanding natural character, “provide something in the nature of a bottom line”.⁹⁷ The Court went on to reason that “[i]f there is no bottom line and development is possible in any coastal area no matter how outstanding, there is no certainty of outcome ...” and there is the potential “to undermine the strategic, region-wide approach that the

92 See definition of “conservation” in Conservation Act, s 2.

93 RMA, s 5(2)(a).

94 EEZ Act, s 10(2)(a); Fisheries Act, s 8(2)(a); Conservation Act, s 2 definition of “conservation”.

95 Conservation Act, s 6(b).

96 *Environmental Defence Society v New Zealand King Salmon Company Limited* [2014] NZSC 38.

97 At [132].

NZCPS requires regional councils to take to planning”.⁹⁸ Prior to this, court jurisprudence had supported an “overall judgement” approach which potentially enabled short-term economic considerations to take precedence over long-term environmental protection.

The Court’s decision would almost certainly also apply to the use of the word “avoid” in policy 11 of the NZCPS which refers to avoiding “adverse effects” on indigenous ecosystems in the coastal environment that are threatened or naturally rare, and avoiding “significant adverse effects” on indigenous ecosystems found only in the coastal environment and which are particularly vulnerable to modification including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh. The effect of the decision is that marine ecosystems should receive greater protection for future generations under the RMA than has been the case to date. There is also the opportunity for central government to set additional environmental bottom lines under the RMA through amendments to the NZCPS or the production of additional national policy statements.

There are few firm environmental safeguards under the EEZ Act with decision-makers tasked with assessing a long list of considerations when determining consent applications which include environmental, economic and existing interests. Of relevance to the natural environment, they include “the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes” and “the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species”. But these are given no particular priority and are to be weighed up against other matters including “the economic benefit to New Zealand of allowing the application”.⁹⁹

Since 2017 there has been provision for the promulgation of EEZ policy statements which the decision-maker must “have regard to” when determining marine consents.¹⁰⁰ The parameters for such policy statements are broad, having as a purpose “to state objectives and policies to support decision-making on applications for marine consents in this Act”.¹⁰¹ They could potentially be used to establish environmental bottom lines, although the requirement to only “have regard to” them is relatively weak and means that they could be overridden by other considerations. No such policy statements have as yet emerged.

Despite these relatively weak provisions, some decisions have been protective of the marine environment including the first decision on the Trans-Tasman Resources application referred to above. This was a proposal to excavate iron sand from the seabed over an area of around 0.66 square kilometres, with residual material deposited back on the seabed once the iron

98 At [137] and [139].

99 EEZ Act, s 59(2).

100 Section 59(3)(aa).

101 Section 37A(1).

ore had been extracted. The first application was turned down due to uncertainty around the scale of effects including those related to “primary productivity and benthic effects and consequent ecosystem effects ...” as well as impacts on iwi and fishing interests.¹⁰²

A second application for the same activity was approved by the Decision-Making Committee chair’s casting vote. Approval was on the basis that the impact of most effects would be felt at a localised scale, the benthos which would be destroyed by the mining activity would recover to perform a similar ecological function, and that the other effects could be adequately controlled by conditions. The minority decision opposed consent on the basis that the localised adverse effects were unacceptable, given that they would affect an ecologically sensitive area with valued ecosystem components (the Patea Shoals), failed to protect the potential of these resources to “meet the foreseeable needs of this generation or future generations” and were “contrary to New Zealand’s aspirations for protection of our marine environment”.¹⁰³ The decision has since been overturned by the High Court on appeal.¹⁰⁴

The Chatham Rock Phosphate application also involved in-depth consideration of environmental matters. This sought to mine phosphorite nodules on the Chatham Rise in depths of 250 to 450 metres over 10,000 square kilometres of seabed. The Decision-Making Committee considered a wide range of environmental issues including “the significant and permanent adverse effects on the benthic environment”; “the effects of the return of waste material to the seabed”; “effects on the trophic web (including primary production, microbes and zooplankton), fish and other pelagic fauna, rock lobsters, paua, water quality and seabirds; effects of mining-related noise, including on marine mammals; and the risks to biosecurity and human health”.¹⁰⁵ It was clearly a very wide-ranging enquiry which considered ecosystem-level effects. However, the decision did not explicitly consider future generations.

The application was ultimately declined, primarily due to the irreversible impacts on potentially unique protected stony coral communities, coupled with a lack of certainty about the receiving environment and adverse effects on it, as well as on existing interests which included Treaty settlement rights and the fishing industry. The fact that the area was already protected in a benthic protection area was also a contributing factor in the decision.

102 EPA, above n 45.

103 EPA *Decision on marine consents and marine discharge consents application, Trans-Tasman Resources Limited, Extracting and processing iron sand within the South Taranaki Bight* (Wellington, August 2017) at 228 and 233.

104 *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217.

105 EPA *Decision on marine consent application, Chatham Rock Phosphate Limited to mine phosphorite nodules on the Chatham Rise* (Wellington, February 2015).

These cases indicate that mining applications within the EEZ have undergone a rigorous assessment of environmental effects, including consideration of broader ecosystem effects of the proposals. The needs of future generations have sometimes been considered, but not always. For both applications, the uncertainty of effects was a significant issue. The split in the Trans-Tasman Resources Decision-Making Committee for the second application was indicative of members applying different approaches to dealing with risk. The majority considered the level of uncertainty and risk to be acceptable and able to be managed through conditions. In contrast, the minority considered the level of uncertainty and risk to be higher and meriting the adoption of a precautionary approach in favour of the environment and future generations. Both cases highlight the difficulties of fully assessing effects in the context of a case-by-case consenting regime.

While the Fisheries Act does not specifically provide for environmental bottom lines, it does contain a set of environmental principles, as described in part 2.2 above. As already noted, the interests of future generations are referred to in the Act's purpose, and are also ostensibly considered in the application of MSY to fish stocks, as this seeks to maintain the productive capacity of fisheries into the future. In addition, fisheries plans could potentially be used as a mechanism to articulate environmental bottom lines and to protect the interests of future generations. However, these are all matters that decision-makers are only required to "take into account" which means that they must be paid attention to but can be outweighed by other considerations.¹⁰⁶ There is no provision in the Act for the development of policy statements with legal effect similar to those under the RMA and EEZ Act which could set firm environmental and future generation protections. This does not, of course, preclude the development of non-statutory documents such as threat management plans and national plans of action which have been developed for protected species such as seabirds, sharks, dolphins and sea lions.¹⁰⁷

Conservation legislation provides the tools to protect healthy environments for future generations, such as through the creation of marine reserves, but these have the narrow purpose of "scientific study of marine life" and are confined to the territorial sea.¹⁰⁸ There is no statutory trigger for their creation and they have been sparsely used.

Although much marine legislation references the needs of future generations, only the RMA has established firm environmental bottom lines to help ensure a healthy environment for them to benefit from.

106 Fisheries Act, s 9 and s 11(2A)(b).

107 See, for example, Ministry for Primary Industries *National Plan of Action — 2013 to reduce the incidental catch of seabirds in New Zealand Fisheries* (April 2013).

108 Marine Reserves Act, s 3(1).

2.5 EBM Principle 5 — Collaborative, Co-designed and Participatory Decision-making

Public participation was a strong feature of the RMA from its inception, with very broad submission and appeal rights for all plan-making processes and for those resource consent applications where adverse effects are “more than minor”. These help give effect to the participatory decision-making processes referred to in EBM Principle 5. In recent times, there has been a substantial narrowing of these rights. In particular, provision for public participation has been pared back as part of a government agenda to “simplify and streamline” the RMA and associated planning and consenting processes.¹⁰⁹ Currently, there is no obligation on the council or applicant to consult with any party about a resource consent application,¹¹⁰ and only 2 per cent of such applications are publicly notified.¹¹¹ Therefore, resource consent decision-making under the RMA cannot be regarded as participatory.

There is much greater opportunity for participation in RMA plan-making processes. In the most common (sch 1) plan-making process councils must notify proposed plans and anyone can lodge a submission on them. Submitters have a right to be heard at a subsequent council hearing and can appeal council decisions to an independent Environment Court which will rehear the substantive matters. Decisions of the Environment Court can be appealed further up the court hierarchy on matters of law only. A consequence of such extensive public participation provisions is cost and delay with a 2008 review documenting an average of 5.6 years to finalise an RMA plan.¹¹²

In the 2017 amendments to the RMA, alternative planning tracks were provided for. One termed a “streamlined planning process” reduces public participation opportunities in order to speed up the process. As a minimum, affected parties must be consulted and the proposed plan must be publicly notified and submissions sought. There is no requirement to hold a public hearing and no appeal rights.¹¹³ This considerably constrains the ability of parties to influence the plan-making process. The amendments also provided for an alternative “collaborative track” for plan-making which involves a somewhat

109 Christine Cheyne “Changing urban governance in New Zealand: Public participation and democratic legitimacy in local authority planning and decision-making 1989–2014” (2015) 33(4) *Urban Policy and Research* 416.

110 RMA, s 36A.

111 Reported for the 2014/15 and 2015/16 year in the Ministry for the Environment’s National Monitoring System <<http://www.mfe.govt.nz/rma/national-monitoring-system/reporting-201415-and-201516/resource-consents/resource-consents>>.

112 Blair Devlin *Analysis of timeframes for the development of policy statements and plans under the Resource Management Act 1991* (Brown & Pemberton, December 2008).

113 RMA, sch 1 cl 78.

complex legal process,¹¹⁴ has yet to be used, and is proposed to be removed from the Act in another round of amendments.¹¹⁵

Under the EEZ Act, decisions on non-notified consent applications are made by the EPA. The EPA also initially made decisions on all publicly notified consent applications, but since amendments to the Act in 2017 following the decline of the two initial seabed mining applications, most of these are now made by a Ministerially appointed Board of Inquiry creating the potential for the politicisation of decision-making on consents.¹¹⁶ For notified applications, any party is able to make submissions and be heard at a public hearing. However, unlike under the RMA, there is only a one-stage hearing process, the Environment Court has no role, and appeal rights are restricted to points of law. There are no collaborative or co-designed processes provided for.

The Fisheries Act does not prescribe the same level of public participation as in the RMA or even the EEZ Act. There is no legislative provision for public submissions, hearings or appeal rights. There is also no statutory provision for the development of fisheries policies or standards (although some non-statutory standards have been developed) and a poorly developed framework for fisheries plans.

Most fisheries decision-making is undertaken by the Minister of Fisheries and takes the form of “sustainability measures” which can set fisheries harvest limits as well as other restrictions on fishing activity. When approving a fisheries plan or making a sustainability measure the Minister of Fisheries is required to consult with representatives of interested parties including Māori, environmental, commercial, and recreational interests.¹¹⁷ There is no legal right for the general public to have input into any decisions under the Act although such input is also not excluded and, in practice, public written submissions are sought on many proposals before finalisation.

The Conservation Act takes a participatory approach with all conservation strategies and plans going through a statutory public submission and hearings process. There is less formality than under the RMA and no right of appeal. The documents themselves are approved by the New Zealand Conservation Authority, a body of 13 Ministerial appointees including tangata whenua and a range of other parties (currently including several farmers and tourism operators, trampers, hunters and a scientist)¹¹⁸ thereby providing for more collaborative decision-making. The statutory process for marine reserve creation only provides the public an opportunity to make written “objections”

114 Schedule 1 pt 4.

115 See Resource Management Amendment Bill 2019, cl 72(2).

116 EEZ Act, s 52 as amended by the Resource Legislation Amendment Act 2017.

117 Fisheries Act, s 12(1)(a).

118 Conservation Act, s 6D(1); <<https://www.doc.govt.nz/about-us/statutory-and-advisory-bodies/nz-conservation-authority/membership/current-members/>>.

to a proposal and for marine mammal sanctuaries the ability to make written submissions after the sanctuary has been created.¹¹⁹

Greater progress has been made in applying a collaborative approach to marine management through non-statutory processes. The *Marine Protected Areas Policy and Implementation Plan*, released in 2005,¹²⁰ provides a framework for the establishment of collaborative community-based planning fora to develop proposals for networks of marine protected areas within bio-regional areas. These have had some success — for example, in the creation of additional marine reserves around the Sub-Antarctic Islands and along the west coast of the South Island. But the most recent effort focused on the South Island’s south-east coast was unable to reach consensus after three years of deliberations.¹²¹ In a recent review, the Controller and Auditor-General concluded that the implementation guidelines were too restrictive in limiting the marine protection tools and issues that fora members could consider.¹²²

There have been other successful marine collaborative initiatives around the country, primarily initiated by the local communities, including the Guardians of Fiordland and the Te Korowai process in Kaikōura. Both resulted in bespoke regional legislation which established marine protected areas (and in Kaikōura mātaimai and taiāpure) as well as collaborative groupings — the Fiordland Marine Guardians and the Kaikōura Marine Guardians — which have a largely advisory and public educational role. The more recent Sea Change Tai Timu Tai Pari project successfully developed a marine spatial plan for the Hauraki Gulf Marine Park through an iwi and stakeholder-led collaborative process which took three years. The plan addresses a wide range of matters including better management of the impacts of catchment and fishing activities and provision of additional marine space for marine protection and aquaculture. The plan proposed a new tool called “ahu moana” which are mana whenua and community coastal co-management areas. This novel approach may require new statutory provision in order to be brought to fruition.¹²³ Such approaches can better empower people and communities, thereby reflecting the intent of EBM Principle 5.

Despite recent amendments to restrict public participation rights, the RMA still provides the most extensive participatory provisions that apply to statutory decision-making in the marine space including merits appeals in many

119 Marine Reserves Act, s 5; Marine Mammals Protection Act 1978, s 22(1).

120 Department of Conservation and Ministry of Fisheries *Marine Protected Areas Policy and Implementation Plan* (December 2005).

121 South-East Marine Protection Forum *Recommendations to the Minister of Conservation and the Minister of Fisheries* (February 2018).

122 Controller and Auditor-General *Using different processes to protect marine environments* (June 2019) at 4.

123 Sea Change Tai Timu Tai Pari, above n 62.

cases. The Act now also provides for an optional collaborative approach to plan-making although this may be removed through proposed amendments. It goes a considerable way in enabling the implementation of EBM Principle 5. The Conservation Act 1987 also provides for broad public engagement and some key decision-making is undertaken by a Ministerially appointed iwi and stakeholder grouping. Public participatory rights are more restricted under the EEZ Act and are minimal under the Fisheries Act 1996. Statutory provisions can be augmented by non-statutory consultation and collaborative processes and these appear to provide the greatest opportunity to apply EBM Principle 5 to the marine environment in absence of legal reforms.

2.6 EBM Principle 6 — Decisions Based on Science, Mātauranga Māori and Community Values and Priorities

The RMA provides for evidence-based decision-making. When preparing or changing plans, councils are required to prepare an evaluation report (known as a “section 32 report”) which includes, amongst other things, identification and assessment of “the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions”.¹²⁴ The NZCPS highlights the importance of “incorporating mātauranga Māori into sustainable management practices” and into regional policy statements, plans, and consideration of resource consent applications.¹²⁵ The open public submission process for plans enables community values to be expressed.

When preparing a resource consent application, applicants must normally include “an assessment of the activity’s effects on the environment”.¹²⁶ The ambit of such effects is broad including effects on landscape, visual amenity and ecosystems, and “any effect on natural resources having aesthetic, recreational, scientific, historical, spiritual, or cultural value, or other special value, for present or future generations”.¹²⁷

Unlike the RMA, the EEZ Act includes a set of information principles that apply to decision-making. These are modelled on those in the Fisheries Act described below and include basing decisions on the “best available information” and taking into account any “uncertainty or inadequacy in the information available”. In addition, there is a positive obligation on the consent authority to seek out information through making “full use of its powers” to request information from applicants, obtain advice, and commission reviews or reports. Where information is uncertain or inadequate the decision-maker must

124 RMA, s 32(2)(a).

125 NZCPS, obj 3 and policy 2(e).

126 RMA, s 88(2)(c).

127 Schedule 4 cl 7(1)(d).

favour caution and environmental protection.¹²⁸ The matters to be considered do not explicitly refer to mātauranga Māori, but this can be incorporated through the work of the Māori Advisory Committee. Community values are not directly referenced, but rather the focus is on effects on existing legal interests and human health.

The Fisheries Act includes a set of information principles set out in s 10 which require that decision-makers take into account “the best available information”, that decision-makers should be cautious when information is “uncertain, unreliable, or inadequate”, and that “the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure” to achieve the purpose of the Act. The High Court, in a case relating to the protection of Hector’s and Māui’s dolphins,¹²⁹ found that s 8 of the Act required the Minister to balance between two competing policies — utilisation and protection. Where information was uncertain, the Minister “was entitled to take a risk averse approach, favouring conservation objectives over utilisation of the fisheries”.¹³⁰

The MACA Act and the customary non-commercial fisheries management provisions under fisheries legislation (such as mātaimai and taiāpure) also potentially creates space for iwi and hapū to apply mātauranga Māori in marine management decision-making.

A major constraint on science-based decisions in the marine area is not statutory but a lack of investment in science. As noted in the *Our Marine Environment 2016* report: “Many human-related pressures on our marine environment are not routinely monitored.”¹³¹ Similarly, a major constraint on mātauranga Māori-based decisions is a lack of investment in enabling Māori to utilise and apply mātauranga Māori. Lack of investment is likely a result of poorly configured funding mechanisms. Regional councils are primarily funded through a land-based rating system with there being no similar system of coastal occupation or user charges in the marine environment. Fisheries research is mainly funded through a cost-recovery system which incentivises some quota owners to minimise research costs.¹³²

The Sea Change Tai Timu Tai Pari process in the Hauraki Gulf has probably made the most progress in integrating science and mātaurangi Māori, as well as

128 EEZ Act, s 61(1).

129 *New Zealand Federation of Commercial Fishermen v Minister of Fisheries* HC Wellington CIV-2008-485-2016.

130 At [281].

131 Ministry for the Environment and Statistics New Zealand, above n 2, at 19.

132 Peart, above n 76, at 17–18.

community values, into an integrated marine plan thereby implementing EBM Principle 5.¹³³

2.7 EBM Principle 7 — Flexible, Adaptive Management and Monitoring and Acknowledgement of Uncertainty

The RMA places obligations on councils to monitor the state of the environment in their area and “the efficiency and effectiveness” of policies, rules and processes deployed by them.¹³⁴ Provisions in policy statements and plans are to be reviewed every 10 years.¹³⁵ The EPA has a statutory duty to monitor compliance with the Act but not the state of the marine environment.¹³⁶ Similarly, monitoring is referenced in the Fisheries Act regarding compliance activities, but there is no explicit obligation to monitor the state of fish stocks or the environment.

The Fisheries Act potentially enables timely and flexible management decision-making, due to the scanty provisions for public consultation, but this has not necessarily proved to be the case. Many stocks have not been reviewed for decades, due to the lack of investment in science on which to found decisions, as described above.¹³⁷ Conservation legislation does not reference any monitoring that applies to the marine environment.

Regular national state of the environment monitoring has now been provided for under the Environmental Reporting Act 2015 and this requires a report on the marine domain every three years.¹³⁸ However, there is no direct statutory link between the findings of the report and management action, which could institutionalise an adaptive management approach. In addition, the Parliamentary Commissioner for the Environment recently identified “huge gaps” in the information base for environmental reporting.¹³⁹ Information gaps in the marine environment include poor understanding of marine biodiversity and too little information to reliably assess the state of about half of New Zealand’s fish stocks.¹⁴⁰ The Hauraki Gulf Marine Park Act 2000 requires the Hauraki Gulf Forum to produce a three-yearly report on the state of the environment of the Hauraki Gulf with five reports produced to date.¹⁴¹ Despite

133 Raewyn Peart *Turning the Tide: Integrated marine planning in New Zealand* (Environmental Defence Society, Auckland, 2018) at 6 and 28.

134 RMA, s 35(2).

135 Section 79(1).

136 EEZ Act, s 13(1)(b).

137 Peart, above n 76, at 51–54.

138 Environmental Reporting Act 2015, ss 10(1)(e) and 12(4).

139 Parliamentary Commissioner for the Environment *Focusing Aotearoa New Zealand’s environmental reporting system* (November 2014) at 4.

140 At 29.

141 Hauraki Gulf Marine Park Act, s 17(1)(g).

these positive developments, a recent review of council and agency monitoring concluded that “what monitoring is undertaken, due to patchiness and poor utility, is likely to underestimate the gravity of environmental problems”.¹⁴²

Monitoring does not need a statutory basis to be undertaken and much more could be achieved in this area. For example, the Hauraki Gulf marine spatial plan proposes the establishment of a monitoring committee to facilitate and coordinate the development of a research and monitoring plan for the Hauraki Gulf Marine Park including the use of cultural indicators.¹⁴³ Such a coordinated approach to monitoring and reporting, and responding to the learnings it provides, is an important element of an “adaptive management” approach.

Adaptive management has been more typically considered in relation to individual consented activities where the impacts of an activity are uncertain. The Supreme Court has considered its application in the case of salmon farms and it set out the following criteria which need to be met before adaptive management can be applied under the RMA as follows:¹⁴⁴

- (a) there will be good baseline information about the receiving environment;
- (b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;
- (c) thresholds are set to trigger remedial action before the effects become overly damaging; and
- (d) effects that might arise can be remedied before they become irreversible.

The EEZ Act explicitly provides for the application of adaptive management which is described as including “allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored” and “any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects”.¹⁴⁵ Before refusing an application due to uncertainty of information the consent authority must first consider whether “taking an adaptive management approach would allow the activity to be undertaken”.¹⁴⁶ An adaptive management approach is

142 Marie Brown “Compliance, monitoring, enforcement, and evaluation” in Greg Severinsen and Raewyn Peart (eds) *Reform of the Resource Management System: The Next Generation — Working Paper 3* (Environmental Defence Society, Auckland, 2018) at 193.

143 Sea Change Tai Timu Tai Pari, above n 62, at 181.

144 *Save Our Sounds v New Zealand King Salmon Company* [2014] NZSC 40 at [133].

145 EEZ Act, s 64(2).

146 Section 61(3).

not available for marine dumping and discharge consent applications reflecting the higher degree of risk associated with these activities.¹⁴⁷

These provisions were considered by the High Court in *Taranaki-Whanganui Conservation Board v Environmental Protection Authority*. In that case the discharge of seabed mining residue back into the sea was categorised as requiring a marine discharge consent and therefore an adaptive management approach was not available. The case turned on whether the conditions imposed amounted to adaptive management. In finding that they did so, Churchman J observed that adaptive management is a “tool for managing uncertainty” and that “monitoring to establish what the environmental baselines are, because of uncertainty or inadequate information coupled with a potential modification or cessation of activity, depending on the circumstances revealed by information” amounted to adaptive management.¹⁴⁸ The decision was overturned.

The Fisheries Act makes no direct reference to adaptive management. However, such an approach has been applied to the fishing down of stocks about which little is known. For example, between 1992 and 2009, all bluenose stocks in New Zealand were included in an adaptive management programme which had the goal “to increase commercial utilisation in low knowledge stocks while providing a cost-effective way of obtaining more information on stock size”.¹⁴⁹ Hulme-Moir contrasted this approach to that taken under the RMA and EEZ Act which both require sufficient baseline information to be established prior, so that the risks involved can be identified and evaluated, before an activity is permitted to commence.¹⁵⁰

Ahu moana areas proposed for the Hauraki Gulf are designed to facilitate adaptive management of coastal and mainly near-shore environments. In accordance with Māori practices, these are not permanently closed-off areas, but allow for dynamic management. While their starting point is that commercial and recreational fishing is allowed, ahu moana enable the prohibition of fishing or particular harvest methods, or the temporary closure of areas to allow species or habitat restoration. This is designed to enable more responsive management than currently provided by fisheries legislation, where responses such as closing local tuangi/cockle beds require a Ministerial decision and a notice published in the *Gazette*.¹⁵¹

147 Catherine Iorns and Thomas Stuart “Murky waters: adaptive management, uncertainty and seabed mining in the exclusive economic zone” 13(2) (2017) Policy Quarterly 10 at 13.

148 *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217 at [401].

149 Ministry for Primary Industries *Review of sustainability and other management controls for bluenose (BNS 1, 2, 3, 7 and 8)* (MPI Discussion Paper No 2013/21, July 2013) at 8.

150 William Hulme-Moir “Risk and Uncertainty in New Zealand’s Fisheries Management: Adaptive Management under the Fisheries Act 1996” (2017) NZJEL 229 at 245.

151 Fisheries Act, s 186A.

Another example of adaptive management in a non-statutory setting is the effort to restore historical mussel beds in the Hauraki Gulf. The restoration programme is underpinned by an adaptive management strategy that amalgamates mātauranga Māori and science to inform and develop restoration initiatives, and importantly, creates vocational and educational pathways for hapū members.

The principle also makes reference to uncertainty. This is acknowledged in the definition of “effect” in the RMA, EEZ Act and Fisheries Act which includes “any potential effect of low probability” but which has a “high potential impact”.¹⁵² The use of a precautionary approach in the context of uncertainty has already been discussed above.

Overall, although the subject matter of EBM Principle 7 receives little legislative recognition, there would appear to be few statutory impediments to applying a more flexible and adaptive management approach to the marine area.

3. CONCLUSIONS AND PROSPECTS FOR FUTURE REFORM

In the previous part, we reviewed the extent to which marine legislation in New Zealand enabled the implementation of EBM, as articulated in the seven principles described in part 1. From the review, it is evident that some parts of the marine legislative framework are more well developed in this respect than others. In particular, the RMA places well on most of the criteria, providing for partnerships with Māori (although still to a limited extent), recognising connectedness, cumulative effects and a wide range of human values, providing for the establishment of environmental bottom lines, and drawing on a wide range of knowledge. It also places positive obligations on agencies to undertake monitoring.

The EEZ Act is a simplified version of the RMA and lacks its sophistication. It falls short on enabling EBM in a number of areas. This raises the question as to whether it should be replaced by an extension of the RMA to the EEZ.

The Fisheries Act 1996, as it is currently configured, creates greater challenges for the implementation of EBM. Although the Act references broader marine environmental considerations, the heart of the legislation focuses on implementing a single “stock” management framework based on MSY. This is a narrow concept which is hard to reconcile with ecological complexity, connectedness or cumulative stressors. That said, the Act provides considerable scope to broaden fisheries management decision-making. Several valuable customary management tools have been provided to enable (again to a limited extent) the application of tikanga and mātauranga Māori in defined marine

¹⁵² RMA, s3(f); EEZ Act, s6(1)(f); Fisheries Act, s 2(1).

areas. But there are no statutory public participation processes and this element is well out of step with other environmental legislation in New Zealand. Recent court decisions have confirmed that the impacts of fishing activity on the broader marine environment can be managed under the RMA, and this must be a positive step for EBM. The fisheries reform process foreshadowed by the Minister of Fisheries could enable the creation of a stronger legal framework to support the application of EBM to the fisheries management regime.¹⁵³

Statutory provisions for customary non-commercial fisheries management show promise, but fall short due to the requirement for most decision-making to be approved by the Crown. A more empowered iwi/hapū co-governance arrangement with local communities, such as the ahu moana proposed for the Hauraki Gulf, could help to overcome such shortcomings.

Marine conservation legislation is fragmented and largely outdated. It does not provide an adequate framework for EBM. This has been recognised for many years, with the most recent attempt to improve matters being *A New Marine Protected Areas Act*, a consultation document issued by the Ministry for the Environment in January 2016. This had an objective (amongst others) that “a representative and adaptable network of MPAs is created over time to enhance, protect and restore marine biodiversity in New Zealand’s territorial sea”. Proposed categories of protection included marine reserves, species-specific sanctuaries, seabed reserves and (rather strangely) recreational fishing parks. The proposal excluded the EEZ, which was the subject of considerable contention. It also failed to embrace a Treaty partnership model as envisaged in EBM Principle 1, instead only referring to “meaningful involvement” and “representation” by iwi/Māori.¹⁵⁴ Innovative models such as ahu moana and marae-based marine protection do not appear to have been considered. The reform has yet to proceed.

Another potentially fruitful area for the progression of marine EBM in New Zealand is the implementation of marine spatial planning. The Sea Change Tai Timu Tai Pari project provided a valuable testing ground for the application of EBM to New Zealand’s marine space. Much can be learned from this innovative process, with a lesson learned study recently completed,¹⁵⁵ and there is considerable potential to experiment further in this area.

Forthcoming Treaty settlements over marine space are also likely to have significant potential for the implementation of EBM, although in a spatially uneven manner. Settlements have established co-governance arrangements for

153 Hon Stuart Nash, Minister of Fisheries “The Government’s fisheries reform agenda” (Environmental Defence Society Conference presentation, Grand Millennium Hotel, Auckland, 1 August 2018).

154 Ministry for the Environment *A New Marine Protected Areas Act: Consultation Document* (2016) at 26.

155 Peart, above n 133.

freshwater and terrestrial areas and similar arrangements for marine space may well evolve in the future.

Despite these positive developments, there still remains an uneven approach to applying EBM throughout New Zealand's marine domain. No legislation fully reflects the seven EBM Principles suggested above. There is little sectoral or national consistency. There is a growing body of bespoke legislation. Treaty rights and interests remain unevenly recognised and provided for, with a partnership approach still nascent. The lack of a robust legal framework to support EBM means that progress is largely reliant on agency interest and political will.

Overall, legislation and policy for the marine environment would benefit from rationalisation, modernisation and strengthening. EBM Principles could then be properly recognised and appropriate tools provided for their application. This could be achieved through fundamental legislative and institutional reform (such as a new Oceans Act as proposed by the Environmental Defence Society),¹⁵⁶ although there has been little political appetite for this in recent years. Perhaps, more achievably, a consistent national statutory framework for marine spatial planning could be provided, building on lessons from the Sea Change Tai Timu Tai Pari project as well as relevant overseas experience.¹⁵⁷ This could play an integrating role across the entire marine management system as well as bed in the proposed EBM Principles.

As pressures on New Zealand's marine space intensify, the application of an EBM management approach is likely to become increasingly important if we are to avoid crises and tipping points. There is considerable potential to improve management approaches under current legislation, but future legislative reform will likely be required if Aotearoa New Zealand is to reliably apply a fully developed EBM management system across its whole marine domain.

156 Greg Severinsen *Reform of the Resource Management System: A Pathway to Reform — Working Paper 2: A model for the future* (Environmental Defence Society, Auckland, October 2019).

157 Kelsey Serjeant and Raewyn Peart *Healthy Seas: Implementing Marine Spatial Planning in New Zealand* (Environmental Defence Society, Auckland, 2019).