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New Zealand Oceans Governance: A Safe Harbour or a Lee Shore?

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ABSTRACT

In March 2000, New Zealand began the development of a national Oceans Policy which aimed to introduce a new policy framework aimed at ecosystem based, integrated oceans management. Integration across sectors (such as fishing, aquaculture, indigenous affairs) has proved difficult. The Oceans Policy was to be released in late 2003 but in July 2003 the policy development process ceased until an ongoing dispute between Maori and the Crown over title to coastal land and water was resolved. In November 2005 New Zealand's Environment Minister announced that work on the oceans policy process had recommenced. This paper analyses developments in New Zealand oceans governance identifying the interaction between state, community and market as important influences that can help explain complexities of policy development, lack of sectoral integration and a change in policy direction.

Introduction

New Zealand's jurisdiction spans over 3 million kms^2 of ocean (Mansell 2004, 3), following its declaration of an Exclusive Economic Zone (EEZ) in 1978. New Zealand ratified the United Nations Convention on the Law of the Sea (LOS Convention) in July 1996, with this ratification taking effect on 18 August 1996. New Zealand has an extensive coastline, in excess of 15,000 km in length, with this maritime domain encompassing a 'coastal environment ... of rich diversity within relatively low-productivity seas' (Rennie 1993, 151).

This domain is the source of significant cultural and historical value, as well as a resource for Maori (New Zealand's indigenous people) and Pakeha (non-indigenous, Europeans). The proximity of the coast to New Zealanders, '[w]ith no town further than 120 kilometres from the coast it is natural that it should hold many ... special places; places of particular significance culturally, the whai tapu of the Maori, and similar windows to the Pakeha's much shorter past' (Rennie 1993, 151). This attachment to the oceans and coasts has helped shape New Zealand's response to ocean governance.

New Zealand has undertaken a relatively stormy 'voyage' in relation to creating a national oceans policy (Mansell 2004). A policy development process was established with Cabinet imprimatur that recognised, explicitly, Maori interests and relationships with the ocean as an important policy consideration. This process was noteworthy for its bottom-up focus on stakeholder and community engagement, overseen by an advisory committee chaired by a former New Zealand Governor-General. New

Zealand's Oceans Policy was to be released in late 2003, however, in July of that year before the target date the process stalled. Issues regarding the ownership of the foreshore and seabed that had emerged in ongoing disputes between Maori and the Crown needed to be resolved. This matter was re-ignited following a Court of Appeal decision 'which ruled that Maori are entitled to seek exclusive title over the foreshore and seabed in the Maori Land Court' (Mansell 2004, 7). A government decision to legislate to overcome the consequences of this decision with the *Foreshore and Seabed Act* 2004 stalled the oceans policy process. It was not until November 2005 that the Minister for the environment announced that work on New Zealand's oceans policy had recommenced (Ministry for the Environment 2007).

New Zealand faces similar challenges in oceans management to other states yet it has a very different constitutional framework and has used different policy tools to address these challenges (see Vince 2005, 2008). New Zealand has a unitary political system, but with a strong focus on regionalism. A uni-cameral parliamentary representative democracy based on the Westminster system, New Zealand has no formal written constitution, being one of three countries in the world in this situation (Parliamentary Library 2005). New Zealand's governance framework is also distinguished by the influence of the Treaty of Waitangi, negotiated between the British and Maori in 1840. While there has been ongoing debate over the translations of the Treaty, and over the interpretation of its key articles it nonetheless has 'acquired some permeating influence in New Zealand law' (Parliamentary Library 2003, 18). Of particular importance to Maori is the link to sea and resources found in Article Two of the Treaty of Waitangi. This article has been subject to differing interpretations, but the 'orthodox position is that the Treaty guarantees in Article II to protect the exclusive possession and rangatiratanga over lands, forests, fisheries and taoanga are not enforceable in New Zealand law unless provided for in statute' (Parliamentary Library 2003, 18). At the same time, however, New Zealand Courts 'will not ascribe to parliament an intention to permit conduct inconsistent with the Treaty of Waitangi' (Parliamentary Library 2005, 2). The Treaty of Waitangi and Maori interests in coastal and marine environments and resources have been a significant factor in contemporary ocean governance in New Zealand.

The New Zealand system of government has resulted in an oceans regime that is free from provincial or state jurisdictional conflicts that are prevalent in Canada and Australia (Vince 2005, 2008), yet differences between ocean resource sectors and primacy placed on indigenous peoples interests in coastal and marine environments and resources issues have been a source of contention in development of New Zealand oceans governance. This paper analyses the developments in New Zealand ocean governance by first examining fisheries management and then the development of a national oceans policy. It identifies the interaction between state, community and market as important influences in policy development and begins by examining these modes of governance.

Governance: Government, Market and Community

Governance is more than government and involves a number of instruments and actors, 'encompassing norms, institutional arrangements and substantive policies' (Miles 1999, 1). Rhodes commented in seminal article in 1996 that the 'search for new tools' is a key element of the new governance (Rhodes 1996, 666), as indicated by use of market-based instruments in addressing public policy problems. In oceans

governance, as in other policy areas, these market-based tools are diverse and include transferable quotas in fisheries, user fees and charges for resource users, and the external certification of products and processes. Co-management arrangements – or more broadly based community forms of governance – are also important and have been promoted as alternative means to address regulatory failure.

It is important to note that neither market nor community governance, while promoted as means to efficiently overcome regulatory failure, are a complete replacement for regulation, the most common form of government action. Regulation, market and community are not mutually exclusive approaches. Indeed effective market or community approaches are based on appropriate legislative and regulatory instruments.

Market instruments are those that introduce pricing, as well as dynamics of supply and demand, as a means of allocating access to resources. The use of tradeable rights and the creation of quasi-market approaches by such 'trades' in fisheries management, for example, have provided an alternative paradigm for both fishers and fisheries managers. In the 1990s the New Zealand government increased the use of economic instruments, chiefly through the introduction of individual transferable quotas, fishing rights and focus on resource rent recovery. Other market instruments include user fees and charges, increasingly used in areas such as marine parks (Haward and Wilson 2000). It also includes use of certification and labelling of fisheries through non-state market-based instruments such as eco-labels (Gale and Haward 2004, Potts and Haward 2007).

Supporters of market approaches to governance argue that if left alone markets will indeed get to an equilibrium point, while critics argue that conditions can arise in which markets fail and lead to sub-optimal outcomes (Larmour 1997, see also Dietz, Ostrom and Stern 2003). While the models of governance provide useful insights into aspects of public policy development and implementation, there are also limitations of single models. While the concept of model failure provides a way in which to appreciate the dynamics of governance it is also important to recognise that real world policy making may well involve mixing of the models, legislation is enacted to establish user pays arrangements which have the effect increasing the interest of those users of the goods or services or resources and increases their sense of community and encourages cooperative or self management (see, generally, McCay and Acheson 1987, Pretty 2003).

This invites a reassessment of the tragedy of the commons thesis that has had significant influence on oceans management. The tragedy of the commons first identified the negative consequences of individual action, and second, focused on regulatory and/or market regimes as solutions to the tragedy caused by individual self-interest (see Hardin 1968). Concerns over exploitation of stocks increasingly led to fisheries management 'solutions' which cast regulatory arrangements and government control as the only means of protecting fish stocks and controlling fishers. Underpinning this view of fishery management was 'a polarised view of the world, in line with Hardin's "Tragedy of the Commons": fishers were seen as selfish profit maximisers, versus regulators as protectors of the resources. This perspective, although flawed, actually became self-fulfilling' (Charles 1997, 108). As a result fishers, excluded from decision-making processes, had few incentives to moderate

catches. Simply speaking they were seen as rapacious maulers of the commons unable or unwilling to reduce their desire for short-term profit over the need for long-term sustainability of stocks in the fishery. As a consequence government regulation was needed to control fishing. This approach dominated fisheries management arrangements but in what is a classic case of regulatory failure was less successful in restricting effort and catch levels in fisheries.

The possibility of an alternative solution to those proposed by Hardin has already been suggested. Increased support for co-management derives, first, from a reappraisal of view of the inevitability of a tragedy of the commons and second from the recognition of the limits of government action. A number of writers have re-appraised Hardin's pessimistic prognosis for the commons. Berkes, Feeney, McCay and Acheson used a number of brief examples to show 'that success [in managing the commons] can be achieved in ways other that privatisation or government control' (Berkes et al 1989, 91), and point out that '[c]ommunities dependent on common-property resources have adopted various institutional arrangements to manage those resources, with varying degrees of success in achieving sustainable use' (Berkes et al 1989, 91). These arrangements can in fact be quite complex, as shown in studies of community rights-based fishing arrangements in different parts of the world (see Ostrom 1990, Ostrom 1997, Yamamoto and Short 1992, Charles 1997, Haward et al 2003).

One important aspect of community involvement relates to the role of the fishing industry itself. Seeing the industry as a community provides important theoretical and practical insights into fisheries management. In terms of theory the developing literature dealing with common pool resources emphasises community solidarity as a means of providing effective 'self management'. In practice, while fisheries may be fragmented and a unified view difficult to ascertain, the role of industry self-management is an integral component in ensuring compliance with both externally imposed management arrangements and community based codes of practice. Compliance with management measures is clearly more likely when these measures can be shown to directly benefit the fisher's economic performance. Fisheries in New Zealand have been regulated with the use of market-based tools, although there is now a shift towards voluntary approaches and self management of activities in the EEZ (see later).

New Zealand Fisheries Management

New Zealand followed the traditional pattern, common to other jurisdictions, of enacting sectoral-based legislation to govern use of resources in, and protection of, the marine and coastal environment. These legislative and administrative arrangements were seen as considerable constraints on policy development and implementation, 'leading to gaps, overlaps and inefficiencies' (Parliamentary Commissioner for the Environment 1999, preface).

In 1983 amendments to the *Fisheries Act* introduced far-reaching changes. As part of this reform to fisheries management the introduction of the quota management system (QMS) occurred with a trial based on a developmental deep-water fishery in 1983 (Wallace and Weeber 2005, 516). From this initial model the QMS was introduced more broadly in inshore fisheries in 1986 (Wallace and Weeber 2005, 516). The New Zealand QMS was designed to address two motivations (Connor 2004, 181): first the

desire to reduce pressure on stocks in inshore fisheries and second 'the desire for a mechanism to allow the domestic industry to capture rents and build capacity in the offshore sector' (Connor 2004, 181). The latter was achieved by encouraging joint ventures between New Zealand and foreign companies, leading to a rapid development in offshore and deep-water fishery skills and capacity. New Zealand interests took opportunities to purchase deep-sea trawlers from United Kingdom companies, themselves subject to increasing constraints within the European Union, for the developing orange roughy fishery in the early 1980s.

These market type arrangements have encouraged the introduction of corporate models of governance in New Zealand fisheries, with quota association 'companies' taking the place of traditional associations or councils. The Orange Roughy Management Company, for example, was formed in 1991, and the Hoki Fisher Management Company was formed in 1997 (Wallace and Weeber 2005, 518). In its extreme form the use of tradeable rights and the creation of quasi-market approaches by such 'trades' in fisheries management tackles the 'tragedy of the commons' by creating private property regimes, based on what have been termed 'privatarian' approaches to common pool resources (Haward and Wilson 2000). The development of individual transferable quotas (ITQs) creates quasi property rights, provides an opportunity to utilise market mechanisms and allows the market to determine the value of the quota or its component 'units'. Setting the total allowable catch (TAC) and determining quota and unit shares of the TAC provides a powerful tool for fisheries managers in the control of fishing effort and 'technology creep'. One effect has been to increase the direct interest and involvement of fishers in the management of their fisheries and help (Haward and Wilson 2000) and enhance the network nature of governance. As Ferguson has recognised the emphasis on the tragedy of commons 'deflects analytic attention away from the actual socio-organizational arrangements able to overcome resource degradation and make common property regimes viable' (Ferguson 1997, 295).

The introduction of the QMS was not without its controversy and its critics. The introduction of quota-based fisheries have been criticized for first privatising what has been a common pool resource, and second for not adequately returning resource rents to the broader community. In New Zealand claims for Maori to access fisheries entitlements, and challenges to initial resource rental charges (Wallace and Weeber 2005, 519) led to court action with the dispute settled with Maori gaining an initial ten per cent quota allocation, 'a promise of 20 percent of future allocations and a half share in a large quota holding company, Sealords' (Wallace and Weeber 2005, 519).

New Zealand also implemented major administrative reforms and legislative change affecting management of terrestrial (including coastal) environments and resources. The *Resource Management Act* (RMA) enacted in 1991 was the culmination of 'a massive legislative and administrative reform process as the question of "sustainable development" increased in political salience' (Haward 1995, 104). The reform process preceding the introduction of the RMA was 'unprecedented', with the proposed legislation subject to almost four years of development, formal legislative review and public consultation. The RMA achieved bi-partisan political support. Initially proposed by the Labour Party (in power between 1984 and 1990), the RMA was enacted by a newly elected National Party government. The scope of the process and its outcomes were staggering, the RMA saw 700 statutory bodies in such diverse areas

as harbour management trusts and drainage boards abolished, and 167 separate pieces of legislation revoked (Haward 1995, 103-104).

The RMA provided the framework or architecture for development of major national resource and environmental management polices, although a major weakness was the failure to include fisheries within the RMA framework. The RMA dealt with Aquaculture by providing the framework for resource consent (occupation of space) whilst the *Fisheries Act* 1983 gave provision for marine farming permits. Under this joint legislative approach 'marine farmers require both a resource consent from the relevant regional council (under the RMA) and a marine farming permit from the Ministry of Fisheries (granted under the Fisheries Act)' (Gibbs and Woods 2003). The coastal permits of farms that have joint permits can be reviewed under the *Aquaculture Reform (Repeals and Transitional Provisions) Act* 2004 (see Ministry for the Environment, Ministry of Fisheries and Department of Conservation 2006). Aquaculture is the fastest growing seafood industry in New Zealand (New Zealand Aquaculture Council 2006).

Developing an Oceans Policy

The development of an oceans policy in New Zealand resulted from an *ad hoc* collection of regulations and legislation dealing with the ocean domain. The focus of the oceans policy process was based on 'integration' and 'holistic' approaches to regulation. Community and market approaches were intertwined with this regulatory process to address the sectoral needs.

This process began following the New Zealand election of 27th November 1999 when a new Labour government took office. Early support for action on management of New Zealand's marine jurisdiction occurred with the release of the Parliamentary Commissioner for the Environment report – *Setting Course for a Sustainable Future: The Management of New Zealand' Marine Environment* – in December 1999 (Parliamentary Commissioner for the Environment 1999). This report has been seen as 'probably the most influential motivator for the New Zealand government to undertake the development of an Oceans policy for its marine environment' (Foster 2002, 16). The Commissioner's recommendation to develop an oceans policy was reflected in the observation that '[a] much more cohesive government approach to marine management is urgently required' (Parliamentary Commissioner for the Environment 1999, preface). The Commissioner commented

> We have an extraordinary plethora of legislation and agencies with marine responsibilities. There are 18 main statutes, 14 agencies and six government strategies for marine management. We have also signed up to at least 13 international conventions with marine implications (Parliamentary Commissioner for the Environment 1999, preface).

In March 2000 the New Zealand Biodiversity Strategy was released. In the same month the Minister for Environment was tasked by Cabinet with responsibility for developing an oceans policy (Mansell 2004, 5). New Zealand then sent a representative to participate in 'Towards a Regional Marine Plan for the South East' National Oceans Forum held in Hobart, Tasmania in April 2000. Cozens argued that *Australia's Oceans Policy* at the time provided New Zealand a 'point of reference,

giving guidance and principles of direction, to national and local policy makers…' (Cozens 2000, 18).

In July 2000 an *ad hoc* Ministerial Group of six ministers with responsibilities for economic and environmental matters affecting New Zealand's ocean domain was formed. This Ministerial Group was Chaired by the Minister of Energy, Fisheries, and Research Science and Technology and comprised Ministers of Foreign Affairs and Trade, Conservation, Maori Affairs, Commerce, and Environment (Foster 2002, 17). It was asserted that 'collectively these Ministers have responsibility for economic and environmental outcomes in relation to the marine environment and Treaty of Waitangi considerations, reflecting the need for the policy to address these considerations' (MACOP 2001, 10). An Ocean Policy Secretariat was also established. The Secretariat was 'a group of officials who continue to work in their respective agencies and are coordinated by the Minister for the Environment's office' to oversee and support ocean policy development (Mansell 2004, 11; Foster 2002, 17-19). In short a 'whole of government approach' to improve integration across sectors was sought by the New Zealand government.

The 'scope of the project was approved by Cabinet' on 18 September 2000 (Mansell 2004, 6; Foster 2002, 18), and the New Zealand government announced the development of a national Oceans Policy. This initiative was spearheaded by deliberations of the Cabinet Policy Committee in July 2000 that dealt with the proposal for an ocean policy, noted impetus for oceans policy deriving from international and domestic drivers and in passing included developments in Australia and Canada (Foster 2002, 17; Vince 2008).

The relationship between Maori, the Treaty of Waitangi and coastal and ocean areas and resources was 'a key policy consideration' (Mansell 2004, 10). It was recognised that the policy development process needed to ensure that Maori interests were respected, and that they were involved and engaged in 'all levels of participation' in the process. As Mansell notes these were 'particularly poignant pleas in light of subsequent events surrounding the foreshore and seabed where these values were noticeably absent' (Mansell 2004, 10).

The Process and the Policy

The New Zealand government proposed developing the policy in three stages:

- Defining the Vision – consulting the community over the values placed on the marine environment
- Design the Vision – designing policies to achieve the vision set out by Zealanders in the first stage
- Deliver the Vision – implementing the policy (Ministry of Fisheries press release 6 July 2001; Mansell 2004, 6).

The first stage was to be facilitated by an eight person Ministerial Advisory Committee (MAC) chaired by Dame Catherine Tizard. Dame Catherine was a former New Zealand Governor-General (13 December 1990 – 21 March 1996). The MAC was involved in an extensive period of consultation with New Zealanders 'to find out what local people value about the oceans' (Ministry of Fisheries press release 6 July

2001). The MAC believed that the oceans policy provided a means to 'manage conflicts between different management regimes' (MACOP 2001, 11).

The New Zealand oceans policy process was characterised by a focus on public consultation. Forty-seven meetings and 24 hui were held across New Zealand, including meetings on Stewart Island and on Chatham Island from 25 June to 13 August 2001. Over 2,000 people attended these meetings, with 1,160 written submissions being received by the MAC and 300,000 downloads from the MAC consultation website (MACOP 2001). Eight hundred submissions (69 per cent of total) were individual submissions and there were a total of 360 submissions (31 per cent of total) from groups – ranging in size from two to 31,000 members. The MAC was required to report to the oceans policy Ministerial Group on the results of the consultation by 30 September 2001. The consultation process was extensive and significant, with the MAC's report providing useful 'insights' from the consultation. Importantly these insights included discussion of 'consultation overload', and a degree of cynicism in the effect of consultation. It also identified the problems of 'consultation fatigue' among Maori, and concern at the lack of co-ordination among government consultation processes (MACOP 2001, 44).

The MAC emphasised New Zealanders' links to the coastal and marine environment, with the nation's physical setting as a group of islands in 'a corner to the world's largest ocean' (MACOP 2001, 15) giving its people a close connection to the sea. The MAC noted the spiritual and physical connection Maori placed on their relationship to the oceans, and the need for Oceans Policy to recognise and incorporate *tangata whenua* – the Maori world view. The MAC noted the importance placed on 'a healthy sea' as the basis for the oceans policy by many contributors to the consultation. The MAC also noted that in addition to providing an essential resource the 'oceans also support a complex infrastructure that a modern society and economy need to function' (MACOP 2001, 27). This focused the MAC to establish the link between oceans policy and 'a healthy society'. The development of the vision underpinning New Zealand's oceans policy was encapsulated in the statement 'Healthy Oceans: New Zealanders understand marine life and marine processes and, accordingly take responsibility for wisely managing the health of the ocean and its contribution to the present and future social, cultural, environmental and economic well being of New Zealand' (Mansell 2004, 6). This statement was shortened and adopted by Cabinet as 'healthy oceans, wisely managed for the greatest benefit to New Zealand, now and in the future' (Benson-Pope 2005, 2).

Developing the Oceans Policy

In the early months of 2002, the challenge for the New Zealand government was to keep stakeholders involved in oceans policy development. In February, the Minister for Fisheries, Pete Hodgson addressed the Ngai Tahu Waipounamu Treaty Festival and outlined the key issues for stage two of policy development. These included: integrated management, the need for holistic management systems, and voluntary compliance (Hodgson 2002).

Other key issues included decision making models; the co-existence of the oceans policy and Treaty of Waitangi; the development of an information management framework; and policy monitoring (Hodgson 2002). The Oceans Policy Secretariat focused on addressing these issues. They commissioned Enfocus Ltd, URS New

Zealand and Hill Young Cooper to prepare a 'stocktake' of the oceans in November 2002 (Enfocus Ltd et al 2002). The purpose of this research was to provide an overview of the strengths and weaknesses of the oceans management approaches in New Zealand. Second, it examined key themes across legislation. Unlike Australia and Canada's state and provincial issues integrating approaches across jurisdictions, New Zealand's focus was on the extent of legislative cohesion on ocean issues. The report concluded that the legal instruments and government strategies have 'no unifying thread or theme' and that 'each has been developed for a different purpose and therefore has a different utility' (Enfocus Ltd et al 2002, 43).

On 14 March 2003 the Ocean Policy Secretariat released a series of 11 working papers on issues as part of the second stage of the ocean policy process. Meetings were held in Auckland and Wellington in late March 2003 with a *hui* also held in Wellington. The Ocean policy Secretariat provided a document summarising feedback from the meeting and from written comment in April 2003 (Oceans Policy Secretariat 2003).

The following institutional arrangements were suggested in 2003:

- Ad Hoc Ministerial Group;
- Oceans Policy External Reference Group;
- Officials Steering Group;
- Oceans Policy Secretariat;
- Working Groups;
- Oceans Policy Group Chair; and
- Departmental Reference Group (New Zealand, 2003).

In May 2003, the research report *Oceans Management at the Local Level* produced for the Oceans Policy Secretariat by Enfocus Ltd. summarized the findings of surveys completed by local authorities and Department of Conservation conservancies. This report was indicative of the 'bottom-up' approach to implementation being pursued by the Secretariat. Following this, on the 30th June 2003, the Centre for Advanced Engineering released a report prepared for the Secretariat titled *Economic Opportunities in New Zealand's Oceans: Informing the Development of Oceans Policy*. The myriad of reports released by the Oceans Secretariat up until 2003 demonstrated their thoroughness and aim to 'leave no stone unturned' in oceans policy development. The work undertaken from 2000-2003 in New Zealand provided an important base to oceans policy development and implementation.

Oceans Policy: Shoals, Squalls and the Question of Foreshore and Seabed Title

The policy development process was abruptly terminated in mid 2003. Following the New Zealand Court of appeals decision in *Ngati Apa, Ngati Koata & Ors v Ki Te Tua Ihu Trust & Ors* (the *Ngati Apa* case) in June 2003 the New Zealand government took the view that issues regarding the ownership of the foreshore and seabed between the Maori and the Crown needed to be resolved before any further oceans policy development continued. The *Ngati Apa* case saw a longstanding legal precedent relating to status of Maori title over coastal and seabed areas challenged by the Court of Appeal. The decision in the *Ninety Mile Beach* case ([1963] NZLR 261) decided in 1963 'shut down Maori claims to customary title in the foreshore by ruling that any customary interests in the foreshore and seabed were extinguished by implication, if

the adjoining dry lands were investigated by the Native Land Court, the Maori Land Court's predecessor' (Charters and Erueti 2005, 261).

The principal legal question was whether the Maori Land Court had the authority to exercise jurisdiction in relation to the foreshore and seabed (Charters and Erueti 2005). The Court of Appeal found that the Maori Land Court had jurisdiction, with the court also overturning the decision in the *Ninety Mile Beach* case. Soon after the Court of appeal decision the New Zealand government 'announced that it would introduce legislation to overrule the decision' (Charters and Erueti 2005, 262).

In August 2003 the government announced that it was proposing legislation that would 'declare the entire foreshore and seabed public domain, guarantee a general right of access along the foreshore' and alter the Maori Land Court's jurisdiction (Charters and Erueti 2005, 262). The *Foreshore and Seabed* Bill was introduced into the New Zealand parliament in early 2004. Prior to this the matter had been taken up by the Waitangi Tribunal that gave strong criticisms over both the policy underpinning the proposed legislation and process undertaken by the government. In July 2004 Maori organisations submitted a request to the United Nations Committee on the Elimination of Racial Discrimination to review the Bill.

The Bill was referred to a select committee that invited public submission. The select committee could not agree on amendments to the Bill, being 'sharply divided along party lines' (Charters and Erueti 2005, 264), although 'substantial amendments' were presented when the Bill returned to parliament for a second reading on 16 November 2004 (Charters and Erueti 2005, 264). The *Foreshore and Seabed Act*, a landmark piece of legislation in New Zealand's history of conflict over land ownership, was finally enacted on 24 November 2004. The United Nations Committee on the Elimination of Racial Discrimination, although its decisions are not enforceable against New Zealand (Charters and Erueti 2005), brought down its decision in March 2005, determining that the *Foreshore and Seabed Act* discriminates against Maori. This determination was rejected and opposed by the New Zealand Government. The lack of resolution over Maori concerns is likely to shape oceans governance debates into the future. The Minister, perhaps responding to the acrimonious political and public debate over the *Foreshore and Seabed Act*, stated that his intension 'for the development of oceans policy to continue to be an inclusive process' (Benson-Pope 2005, 2).

New Zealand's Ocean Policy: Implementing a Framework

On the 11 February, 19 March and 4 June 2004, the Ministry of Environment held informal workshops to 'test ideas' on oceans policy priority. Participants included representatives from government agencies, consultants and NGOs. The outcomes of these workshops were summarised in two papers - *Getting Our Priorities Right: The Role of Information in Setting Priorities for Management of New Zealand's Ocean* and *Offshore Options: Managing Environmental Effects in New Zealand's Exclusive Economic Zone* - which were both released in June 2005 by the Ministry for the Environment. The *Priorities* paper began by referring to the *Draft Oceans Policy*, which at the time was yet to be passed by Cabinet. It stated that it is 'a first step towards identifying a preferred, adaptive approach for setting future ocean priorities, together with specific actions needed to build information, tools and concepts that might underpin this approach' (Ministry for the Environment 2005, vi).

The *Offshore Options* paper focused on current environmental legislation in the EEZ and management gaps; international environmental management of activities in the EEZ; and options for improving the environmental management in the EEZ (Ministry for the Environment 2005). Of the latter, it identified four options for improving environmental management:

- *Option 1 – the voluntary approach:* government would work with industries operating in the EEZ to develop appropriate environmental management procedures. Compliance with these procedures would be voluntary (at least initially).
- *Option 2 – filling the gaps in current legislation:* this would involve putting in place new legislation to cover activities not already covered, and improving the environmental management provisions of existing legislation as necessary.
- *Option 3 – one Act to manage all resources in the EEZ:* all of the current legislation applying in the EEZ would be replaced by one Act controlling resource management (including the allocation of resources and/or management of their effects) in the EEZ.
- *Option 4 – an 'umbrella' Ac*t: a new statute would be developed requiring environmental assessments to be carried out for all activities with potentially significant environmental effects (similar to the approach taken under Australia's *Environmental Protection and Biodiversity Conservation Act* 1999). Detailed regulation of specific activities through existing legislation would continue (Ministry for the Environment 2005, v).

The Ministry for the Environment recommended in the paper that a voluntary approach be taken along with the development of an 'umbrella Act'. Interestingly, the voluntary approach was reflective of the aims highlighted by Hodgson in 2002. The *Offshore Options* paper instigated the new approach of the third stage of oceans policy implementation.

On the 21st November 2005 the *Seachange 05: Managing our Coastal Waters and Oceans* Conference was held in Auckland. This conference was organised by the EDS with the aim to, 'evaluate recent national policy developments affecting the management for New Zealand's coastal and marine areas' (EDS 2005). EDS had undertaken its own analysis of oceans policy initiatives in Australia, Canada, and the USA to help inform and focus on issues facing new Zealand's development of 'an effective oceans policy' (EDS 2005; see also Peart 2005). A key speech from the New Zealand Minister for the Environment, the Hon David Benson-Pope announced that the Oceans Policy development process had resumed.

The recommencement of the oceans policy resulted in a change to the original plans for the third implementation stage. The *Offshore Options* paper steered the direction of the oceans policy from a widely focussed plan to one targeting the management of New Zealand's EEZ. The New Zealand Government had 'agreed that oceans policy development will focus on fixing the most pressing marine problems in the short term while taking amore coordinated and integrated approach to marine management over time' (Ministry for the Environment, 2007). The decisions dealing with marine issues

are to be made within the scope of the *Draft Oceans Policy Framework*, a one page overview of the 'vision', 'conditions', 'operating principles' and 'process principles' that will guide the sustainable development of New Zealand's oceans (Ministry of the Environment 2007).

As recommended by the Ministry for the Environment in the *Offshore Options* paper, voluntary approaches to managing the environmental impacts of marine activities in the EEZ were developed. This form of self-regulation enables those involved in these activities to have responsibility and control over their actions. In March 2006, the *Environmental Best Practice Guidelines for the Offshore Petroleum Industry* paper was released and it stated that 'until there is an oceans policy, industry and government agree to voluntary principles to manage environmental impacts beyond New Zealand's territorial sea' (Ministry for the Environment 2006, 2).

In August 2007, the first step towards a legislative component to the oceans policy was explored through the release of the discussion paper *Improving Regulation of Environmental effects in New Zealand's Exclusive Economic Zone* (Ministry for the Environment 2007). The paper was open for public comment until 30 September 2007, with a summary of submissions flagged to be released during late November. This Discussion paper identified two different options for legislative change to the *Offshore Options* paper. Instead of an 'umbrella Act', the Discussion paper recommended:

- Option 1: the establishment of legislative mechanisms focused on filling key gaps in EEZ environmental regulation and promoting a consistent approach across statues, including the assessment of cumulative effects.
- Option 2: Develop an entirely new regime for managing all activities in the EEZ (Ministry of the Environment 2007, 10).

Whilst these options are open for public comment, the Discussion paper emphasised that the 'preferred option' would be option 1, to fill in the key gaps in existing legislation. The paper outlined some key questions to be considered if this option were to be implemented, including: 'who should make the final decisions on 1) rules, 2) applications? The minister, the administering department or an independent agency?' (Ministry of the Environment 2007, 21). In addition, there was a call for discussion to whether an existing agency or a new agency be developed to administer the legislation. Ironically, this is a similar debate that was held during the development of the oceans policy and the Oceans Secretariat. The options are currently being considered by Cabinet.

Conclusion

At one level one can mount an argument that the New Zealand experience reinforces the fact that much policy work was reactive, responding to political agendas set by government through election promises or program commitments, or responding to issues forced onto the political agenda by the pace of events. This argument is supported by the rapid pace of development following the October 1999 election, and more starkly the government's decision to abandon this process following the *Ngati Apa* case, and its and actions that led to the *Foreshore and Seabed Act 2004*.

The development of fisheries and oceans policies has also demonstrated the complex interactions between different groups of actors such as the fishing industry, the Maori and the New Zealand government. The stalling of the development of the policy in

2003 provided a pause to refocus the direction of the oceans policy. However, this pause also ceased the initial momentum and enthusiasm that the development of the policy generated. Beggs and Hooper (2005) rightly claim that 'development of New Zealand's oceans policy has been ambitious and visionary', yet 'progress has been comprised by several "too hard" issues'. Sectoral integration and holistic approaches became 'too hard issues' and resulted in one area of focus for the oceans policy at a time (currently EEZ environmental management). This has also left the oceans policy at the 'lee shore' rather than in a 'safe harbour'. While the policy process has moved on, important and unresolved issues (such as Maori land issues) remain.

The focus on voluntary and self-management approaches to manage environmental impacts within New Zealand's EEZ reveals a shift from the use of market based tools towards community and co-management forms of governance. While market tools and regulation remain dominant approaches in the management of New Zealand's ocean and marine resources, co-management and other community forms of governance may become more prevalent in future policy development. This policy development is likely to occur in the following areas: aquaculture; Maori involvement in fisheries and oceans management; and deep seabed exploration (if New Zealand's application claim for the extension of the Continental Shelf is accepted by the UN's Commission on the Limits of the Continental Shelf – see Easton 2008).

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