

New Zealand Seafood Industry Council Submission on the Marine Reserves Bill, 2003

Executive Summary

1. The New Zealand Seafood Industry Council (SeaFIC) represents the generic interests of all sectors of the New Zealand seafood industry. The seafood industry's business is totally dependent on the sustainability of fisheries resources and on the well being of the wider marine environment. Our activities as a sector are based firmly within a framework of sustainable development and we see marine biodiversity protection as being an essential component of that framework. We view marine reserves as one of a suite of available methods for contributing to marine biodiversity protection.
2. SeaFIC does not believe that the Bill will improve the protection of marine biodiversity. Indeed, for the reasons outlined in this submission, it is likely that the implementation of the Bill in its current form would have significant adverse effects on the sustainable management of fisheries resources and that its contribution to biodiversity protection will be *ad hoc* at best.
3. We consider that the premature consideration of the Marine Reserves Bill in advance of an agreed Oceans Policy risks perpetuating the very problems that the Oceans Policy process was established to resolve – ie, fragmented, inconsistent legislation without clear overarching policy goals. This concern is evidenced by the lack of integration between the Bill and other regulatory and voluntary mechanisms that contribute to marine biodiversity protection. The changes proposed in the Bill are not simply technical or operational matters; they have fundamental impacts on New Zealand's international obligations, on property rights in the marine environment, and on accountability in government decision making. We therefore urge the Committee to consider deferring consideration of the Bill until the Oceans Policy is complete.
4. The Bill is being promoted as the main plank of the Government's policy target of protection of 10% of New Zealand's marine environment by 2010. We are concerned that the valid policy objective of halting the decline of New Zealand's biodiversity has been lost sight of, and that the focus of the Bill is simply one of increasing the area covered by marine reserves. "Protecting 10% by 2010" is a slogan – not a marine biodiversity protection policy. The Bill contributes nothing in the way of strategic policy or statutory guidance that might assist in ensuring that a 10% protection target does indeed result in benefits to the management of marine biodiversity.
5. The industry is also concerned that the policy focus on numerical targets could – in combination with the lack of checks and balances in the Bill – facilitate the establishment of no-take marine reserves with significant adverse effects on the seafood industry, the communities supported by the industry, and on the fisheries management regime. Our submission documents the economic and social costs that can arise from the creation of a marine reserve and discusses the interactions between fisheries management and marine protection. We make a number of

recommendations to ensure that marine reserves can be established without undermining the sustainable management of fisheries resources or the wellbeing of extractive users of marine resources.

6. We are concerned that the Bill promotes marine reserves as an end in themselves, rather than as a tool – in fact, one of several available tools – to contribute to specific biodiversity protection objectives. We draw the Committee’s attention to the fact that the Bill has been introduced to help implement New Zealand’s commitments under the 1992 UNEP Convention on Biological Diversity. The context and objectives of this Convention reflect the concepts of sustainable utilisation – as opposed to protection being viewed in isolation of use or as an end in itself.
7. The lack of clarity about *why* biodiversity should be protected is a major failing of the Bill. This has led to confusion in the drafting of the Bill about whether marine reserves are a biodiversity protection mechanism, or a device to reallocate coastal space from extractive uses (eg, fishing) to non-extractive uses (eg, looking at fish). We recommend that the Bill should be refocused purely on biodiversity protection.
8. In this submission we propose an alternative approach to marine biodiversity protection that acknowledges that there is a range of statutory and non-statutory means for protecting marine biodiversity. Within this spectrum, marine reserves have a role of providing high level protection for special ecosystems that are at risk from a range of threats that cannot be managed adequately under other more flexible and less costly forms of protection. We consider that there are four key aspects to determining the most appropriate management response to threatened marine biodiversity. These are:
 - What are the objectives of protection?
 - What are the risks to biodiversity that need to be managed?
 - What are the ongoing costs associated with managing or excluding particular sources of risk? – and therefore;
 - What is the least cost management option that is able to manage the risks and achieve the protection objectives?
9. SeaFIC submits that while the industry’s alternative approach to protecting marine biodiversity is consistent with New Zealand’s Biodiversity Strategy, the Convention on Biodiversity and UNCLOS, the Bill as introduced is inconsistent with these broader policy requirements.
10. SeaFIC’s primary recommendation to the Committee is to consider the desirability of completing the Oceans Policy prior to finalising the Bill. Should the Committee decide to progress the Bill in advance of the Oceans Policy, we recommend the following changes:
 - (a) **narrow the purpose** of the Bill to focus on protecting “outstanding, rare, distinctive, or internationally or nationally important marine communities and ecosystems” where these ecosystems are under threat from a range of risks that cannot be managed through more targeted mechanisms, and delete all references to protection of common, widespread or degraded ecosystems;

- (b) require decisions on individual marine reserves to be consistent with an agreed, **strategic framework** for marine biodiversity protection;
- (c) ensure that marine reserves have **clear protection objectives** and that their performance in achieving those objectives is monitored and evaluated;
- (d) require both proposers of marine reserves and decision makers to evaluate whether a marine reserve is the “**best method/least cost**” approach for biodiversity protection. By “best method/least cost” we mean the method that achieves the protection objectives at the least cost to affected stakeholders and to government;
- (e) ensure that decision makers are required to transparently and objectively **evaluate the costs** of marine reserves and weigh them up against the benefits in terms of the purpose of the Act (ie, protection of biodiversity);
- (f) add a *de novo* **appeal provision** to the Bill;
- (g) remove from the Bill all provisions that may result in the establishment of a marine reserve moving beyond biodiversity protection and having an **allocative effect** – ie, a transfer of benefits from the current rights holders to another set of users (eg, from fishing to tourism);
- (h) ensure that the scheme of the Act encourages proposers of marine reserves to safeguard the integrity of the fisheries management regime by reaching agreement with affected rights holders on innovative ways of **mitigating the impact** of the reserve; and
- (i) amend the Bill to adequately reflect New Zealand’s obligations under **international law**.

Contents

INTRODUCTION	1
PART ONE - WHY IS THE MARINE RESERVES BILL IMPORTANT FOR THE SEAFOOD INDUSTRY?.....	2
Fishing and the protection of biodiversity	2
Impacts of marine reserves on fishing and fisheries management – What’s at stake?.....	3
Social and economic costs for commercial fishing	3
Impacts on Maori commercial fishing	4
Valuing the economic impacts of marine reserves on fishing – a case study.....	4
Impacts of marine reserves on sustainable fisheries management.....	5
More fish for everyone?	6
Protecting marine biodiversity – seafood industry policy	8
Choosing the right mechanisms	8
Measuring marine protection	9
PART TWO - WHERE DOES THE MARINE RESERVES ACT FIT IN THE BIGGER PICTURE?	11
International biodiversity commitments	11
Sustainable utilisation & the Convention on Biological Diversity.....	11
IUCN Policy on Marine Protected Areas.....	12
New Zealand’s Biodiversity Strategy	12
Oceans Policy – putting the cart before the horse	13
PART THREE - WHAT IS WRONG WITH THE BILL?	14
Purpose of the Bill is too wide	14
Marine reserves seen as an end in themselves, rather than as a tool to help achieve biodiversity protection objectives.....	15
Marine protected areas strategy.....	16
Specifying marine reserve objectives.....	17
Applying a best method/least cost test	17
Monitoring and evaluating performance of marine reserves	19
Decision making processes lack balance and rigour	20
Reinstatement of concurrence role	21
<i>De novo</i> appeal provision	21
Confusion of purpose of marine reserves - biodiversity protection or reallocation of use rights?	22

Marine reserves as a biodiversity protection mechanism – implications for fisheries management	23
Marine reserves as an allocative mechanism – implications for fisheries management	24
Mitigating adverse effects on rights holders – the role of adjustment assistance or compensation	24
International obligations associated with expanding marine reserves into the EEZ	26
New Zealand’s obligations under UNCLOS	26
Protection and preservation obligations do not override sustainable use.....	27
PART FOUR - RECOMMENDED AMENDMENTS	29
cl 3 Interpretation.....	29
cl 7 Purpose	29
cl 9 Principles	30
cl 10 Decision-making principles	31
New Part Marine Biodiversity Protection Strategy	31
New clause Duty to monitor	32
cl 36 Management plans	32
cl 37 Who must prepare management plans.....	32
cl 48 Consultation and consideration during preparation of proposal	33
cl 49 Contents of proposal	33
cl 62 Independent report.....	34
cl 63 Consultation with Ministers	35
cl 64 Final report to Minister	35
New clauses Appeal provisions	36
cl 66 Matters Minister must consider	36
cl 67 Minister’s decision	36
cl 73 Commencement of review	39
cl 83 Exercise of powers	39
Part 6 Regulations, repeals and amendments, and transition	39

Introduction

1. The New Zealand Seafood Industry Council (SeaFIC) is the primary umbrella organisation representing the generic interests of all sectors of the New Zealand seafood industry, a sector that includes fishers, marine farmers, seafood processors, wholesalers, retailers, and exporters. SeaFIC is owned by 27 shareholders – each of which represents a particular sector of the seafood industry. Our shareholders collectively represent around 94% of the seafood industry by value. SeaFIC plays a leading role in developing and presenting the seafood industry’s response on all legislative proposals affecting the industry.
2. The seafood industry’s interest in the Marine Reserves Bill is significant. The well-being of the marine environment is fundamental to the industry’s economic, social and environmental contribution to New Zealand. The seafood industry is also a major rights holder and user of resources in the marine environment. Our involvement with the Marine Reserves Act, and in the wider issues of management of the marine environment, is long standing. Piopiotahi Marine Reserve, established in 1993, was proposed by the New Zealand Federation of Commercial Fishermen. In some other cases, the industry has opposed marine reserve proposals that have had an adverse effect on our ability to exercise commercial fishing rights. Secure rights of access to the marine environment underpin the industry’s contribution and are also fundamental to protecting the integrity of New Zealand’s fisheries management regime.
3. SeaFIC acknowledges the need for a legislative mechanism to provide “high level” protection for marine biodiversity. We agree that the Marine Reserves Act in its current form is ill-suited to this purpose. However, we do not believe that the Bill, as introduced, will improve the protection of marine biodiversity – indeed, it is likely that implementation of the Bill in its current form would have significant adverse effects on the sustainable management of fisheries resources and that its contribution to biodiversity protection will be *ad hoc* at best. Furthermore, we consider that many of the approaches adopted in the Bill are inappropriate in light of the bigger questions being addressed in the concurrent Oceans Policy process.
4. SeaFIC has consulted widely within the industry in the preparation of this submission.
5. Our submission is made in four parts.
 - Part One provides a context for the rest of the submission by setting out why the Marine Reserves Bill is so important for the seafood industry.
 - Part Two examines bigger picture within which the Marine Reserves Bill sits (ie, the Biodiversity Strategy and the Oceans Policy).
 - Part Three outlines the industry’s main concerns with the Bill.
 - Part Four offers a set of solutions, in the form of recommended amendments to specific clauses.

Part One

- Why is the Marine Reserves Bill important for the seafood industry?

Fishing and the protection of biodiversity

6. The seafood industry's business, and the jobs and communities that the industry supports, are totally dependent on the sustainability of fisheries resources and on the wellbeing of the wider marine environment. From the industry's perspective, it is essential that New Zealand's fisheries management regime protects the biodiversity on which the productivity of our fisheries resources depends. It is equally essential that the mechanisms available to protect biodiversity are applied so as to reinforce – rather than undermine – the sustainable management of fisheries resources.
7. We consider that the environmental performance of the fisheries management regime has improved significantly over the past two decades. The fisheries management regime now makes good provision for biodiversity protection, and improvements in implementation will continue to be made. However, both the current Marine Reserves Act and the new Bill give scant regard to existing mechanisms designed to ensure the sustainable management of fisheries resources and fail to recognise the advances in fisheries management that have taken place since the 1971 Marine Reserves Act was passed.
8. The Fisheries Act 1996 in s9 requires decision makers to take into account a series of environmental principles, including the need to **maintain the biological diversity** of the aquatic environment. The Act contains a number of regulatory mechanisms that can give effect to this requirement, including the setting of catch limits, area closures, restrictions on particular types of fishing gear or practices, and the setting aside of areas to provide for customary fishing (taiapure and mataitai). The Minister of Fisheries may also approve fisheries plans that can contain measures to ensure that fishing activity takes place in a manner that maintains biodiversity.
9. Outside of, and complementary to, the Fisheries Act provisions, the seafood industry continues to implement voluntary initiatives to contribute to wider biodiversity goals (see Box 1).

Box 1: Examples of voluntary industry-initiated biodiversity protection measures

- Seabird bycatch mitigation programmes in long line fisheries;
- Codes of practice to reduce interactions with marine mammals in inshore set net fisheries;
- Marine mammal exclusion devices to safely eject marine mammals from trawl nets; and
- Voluntary closed areas for purposes such as:
 - protecting unique areas of biodiversity;
 - protecting areas that are important for fish life cycles (eg; elephant fish breeding areas are protected off the Canterbury coast); and
 - avoiding interactions with rare or protected species such as Hector's/Maui's dolphin.

Impacts of marine reserves on fishing and fisheries management – What’s at stake?

10. The Bill has been introduced in the context of assisting to meet the Government’s target of protecting 10% of New Zealand’s marine environment by 2010. The establishment of no-take marine reserves on this scale will have a significant impact on the ability of *all* fishers (including commercial rights holders, and customary and recreational fishers) to exercise their harvest rights and opportunities. Even a relatively small reserve can have a significant effect on fisheries with a strong spatial dependency (eg, species such as rock lobster or paua, localised inshore or harbour fisheries). For instance the setting aside of 10% of a coastal area as a marine reserve may, in effect, remove 40 or 50% of particular fisheries. Marine reserves can also restrict the space available for new marine farming activity. Potential effects of marine reserves on commercial fishing include:
- social and economic costs, including job loss; and
 - impacts on the sustainable management of fisheries.

Social and economic costs for commercial fishing

11. Access to the marine environment is essential if the seafood industry is to realise its social and economic contribution for New Zealand. The stakes are high. The seafood industry¹:
- provides employment for 27,000 people (including direct and flow-on employment effects);
 - returns \$1.5 billion dollars in export earnings to the New Zealand economy annually;
 - contributes a total revenue to New Zealand from seafood and all associated businesses of \$4.5 billion annually;
 - is, in many parts of the country, a significant contributor to regional employment and GDP. For example in Nelson, if there were no seafood industry, the regional economy would be worse off by \$383 million per year and would have 5440 less full time jobs. Nearly one third of Nelson City’s GDP and employment is attributable to the seafood industry alone.
12. Economic impacts on commercial fisheries from the creation of a marine reserve can occur at the level of individual fishers and at the level of an entire fishery. A marine reserve can exclude individual fishers from all or part of their fishing area, thereby preventing them from harvesting the catch to which they are entitled. It can also make the activity of fishing more costly – for example by increasing travel costs or requiring investment in larger vessels to travel further from port. These effects on individuals can lead to effects that are felt throughout coastal communities, particularly when seen in the context of a 10% protection target.

¹ Statistics in this paragraph from McDermott Fairgray Group, May 2000 “The New Zealand Seafood Industry Council Economic Impact Assessment for New Zealand Regions”.

13. Impacts on individual fishers can also add up to effects that are felt across an entire fishery. These fishery-wide effects can be immediate – for example, the total allowable commercial catch of a stock might not be caught because of exclusion of access to harvesting areas. Impacts can also be felt far into the future, such as the loss of future potential for fishery development because of removal of an area from the fishery. Fishery-wide effects, if significant, can ultimately result in a reduction of catch limits and a reduction in the value of commercial harvest rights (quota). Cumulative effects are also significant at both an individual and a fishery-wide level when marine reserves are simply one in a range of areas from which commercial fishing is excluded or restricted (as illustrated for instance, in [Figure 1](#) – see page 10 of this submission).

Impacts on Maori commercial fishing

14. Maori are extremely significant participants the New Zealand seafood industry, currently owning or controlling around 33% of the industry. Maori investment in the industry is grounded in the assets received by Te Ohu Kai Moana (TOKM – the Treaty of Waitangi Fisheries Commission), through the 1989 and 1992 fisheries settlements. The assets that TOKM holds – now worth over \$700 million – include quota and significant investment in several major fishing companies. Additional quota is owned directly by iwi fishing companies. Aside from the Maori ownership interests in New Zealand’s commercial fisheries, the industry is a large employer of Maori, who make up 22% of the workforce. These statistics reflect the successful implementation of the Maori Fisheries Act 1989, one of the purposes of which is *to facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing.*
15. Marine reserves that, individually or cumulatively, affect the ability of commercial fishers to exercise their harvest rights will therefore:
- Reduce opportunities for Maori to engage in the business and activity of fishing;
 - Erode the value of commercial fishing rights (quota) and consequently the value of the settlement of Maori commercial fishing claims under the Treaty of Waitangi; and
 - Potentially lead to the risk of further Treaty claims.

Valuing the economic impacts of marine reserves on fishing – a case study

16. SeaFIC has commissioned a case study to demonstrate that:
- (a) there are methodologies available to evaluate the economic impacts of marine reserves on commercial fishing; and
 - (b) these costs can be significant.
- The results of the case study are summarised in [Box 2](#).

Box 2: Case study – economic impacts of marine reserves on commercial fishing

In late 2002 SeaFIC commissioned a study to illustrate that the creation of a marine reserve has significant costs for the community due to the loss of value from commercial fisheries, and that these costs can readily be quantified.

The report *An assessment of Costs associated with the Proposed Nugget Point Marine Reserve* was completed by PA Consulting in January 2003.

The report presents a methodology for assessing the costs that would be incurred if a marine reserve were established at Nugget Point on the Southland coast, using the commercial paua fishery as a case study.

Impacts of the proposed marine reserve fall in two main categories, a) a long-term reduction in the available resource due to reduced fishing grounds, and b) additional effects, such as job losses and increased fishing costs for the remaining fishers. The analysis indicates that the most significant cost is associated with the reduction in available resource.

Although the proposed Nugget Point marine reserve represents less than 1/1000th of the area of the the paua 5D quota management area (PAU 5D QMA), a significant proportion of the commercial paua catch comes from this area. Historically the paua beds at Nugget Point have contributed approximately 8% of the annual commercial catch in the PAU5D QMA. Accordingly, the minimum expected long-term reduction of the resource is 8% of the total commercial catch from the QMA.

The report considered a range of scenarios with different commercial catch levels (expressed through changes to the TACC) and different industry behaviour. These alternate scenarios postulate increased pressure on the fish stock and slower recovery of the fish stock to sustainable levels. **Based on current export value of paua, and an appropriate economic multiplier reflecting associated indirect impacts on the economy, the net present value of the lost paua resource attributable to the creation of a marine reserve ranges between \$8.6 million and \$16.7 million across all scenarios.**

The case study does not estimate the full cost of the proposed reserve, but provides a reliable illustration of the magnitude of the associated costs through focusing on a single commercial fishery (the paua fishery).

The full report is available on www.seafood.co.nz.

Impacts of marine reserves on sustainable fisheries management

17. Of more significance perhaps than the immediate and obvious costs of marine reserves in relation to the business and activity of fishing, are the effects that marine reserves or other 'no take' areas can have on the integrity of our fisheries management regime. The purpose of the Fisheries Act is to provide for the utilisation of fisheries resources while ensuring sustainability. The main mechanism for achieving the purpose of the Act is a rights-based tool – the Quota Management System (QMS). The successful operation of the QMS relies upon the maintenance of the incentives provided by secure commercial

fishing rights in the form of individual transferable quota (ITQ). Quota owners have the clearest incentive to operate their businesses not only for profit but also for sustainable fishing outcomes – as that will maximise the capital value of ITQ. Quota owners must constantly safeguard both the fish stocks that quota represents and the environment that sustains the stocks – in a similar way to how responsible farmers safeguard and enhance soil structure to retain and improve productivity.

18. If the security of fishing rights is eroded, for instance through marine reserves on the scale envisaged by this Bill, access to the harvest entitlements provided through quota will be restricted, and the incentives provided by ITQ for responsible, long-term investment in the sustainability of fisheries resources and the marine environment will be weakened. It is therefore essential that, in the establishment of marine reserves, explicit consideration is given to the need to maintain the integrity of the QMS. Our submission contains recommendations to this effect.

More fish for everyone?

19. It is sometimes claimed that the fishing industry should support marine reserves because marine reserves create “more fish for everyone”. Arguments of this type tend to propose either that marine reserves are a useful fisheries management tool in themselves (eg, to provide a “buffer against unsustainable catch levels”) or that marine reserves, regardless of their actual purpose, can have benefits for the management of fishstocks.
20. These arguments are not supported by science or by common sense. Internationally, evidence that marine reserves benefit fisheries management in regimes where fishing effort is already controlled (eg, through catch limits) is weak². In New Zealand, there have been no studies that demonstrate marine reserves create “more fish for everyone” outside the reserve boundary.
21. Under New Zealand’s fisheries management regime, fish stocks are managed in defined areas and catch limits are set for most species so that the fish stocks can be sustained over time. Catch limits already have a number of “safeguards” built into them. For instance, the catch limits are set at a level that ensures the productivity of the population is maintained (e.g. enough large fish to ensure sufficient egg

² The authors of a major recent international review on the role of marine reserves as fisheries management tools found that while there is reasonable empirical evidence of improvement of fish abundance and biomass **inside** marine reserves, there is virtually no empirical evidence for benefits for fisheries outside reserves. The authors report that much of the evidence that is used to advocate the use of reserves for fisheries management is largely theoretical and circumstantial both because of the newness of the topic and because of the difficulties involved in measuring spillover and larval dispersal (the two main mechanisms by which benefits to fisheries might arise). Experiences of concrete benefits to fisheries are often limited to either the recovery of highly depleted stocks, or involve subsistence-scale tropical reef fisheries. These studies cannot be related directly to the world’s commercial fisheries and there is little documented evidence that in a well managed fishery no-take areas offer additional advantages (Ward, T. J., Heinemann, D. & Evans, N. (2001) *The Role of Marine Reserves as Fisheries Management Tools. A Review of Concepts, Evidence and International Experience*. Bureau of Rural Sciences. Department of Agriculture, Fisheries and Forestry – Australia).

production). Catch limits also take account of environmental factors that influence the fish population. This system means that – unlike many other countries – New Zealand’s fish populations are not generally subject to “over fishing”.

22. When a marine reserve is established, some studies show that some species within the reserve become more abundant and larger than outside a marine reserve. It is sometimes suggested that larger, more abundant fish inside a reserve will produce more eggs and that larvae will be transported outside the reserve, enhancing the surrounding fish population (a theory known as *larval export*). In reality, larval export does not apply in the case of pelagic, migratory or highly mobile species, or in the case of species with locally restricted larval dispersal. For species where larval export may be a factor, it will only result in more fish outside the reserve if egg production is limiting the amount of fish outside the reserve. Most fish species are highly fertile, producing many more eggs than needed to sustain the population. The process for setting sustainable catch limits ensures that the spawning population and egg production do not limit the availability of fish. In most cases it is environmental conditions, not egg production, that limit fish availability.
23. In summary, more or larger fish inside a reserve does not necessarily equate to more fish outside the reserve. SeaFIC is unaware of any examples in New Zealand where the establishment of a marine reserve has resulted in increased commercial catch limits or recreational bag limits in the surrounding area. Marine reserves are unlikely to result in “more fish for everyone” in New Zealand’s fisheries (see [Box 3](#)).

Box 3: Marine reserves and fisheries management.

“Well I think there’s one thing that proponents of marine reserves, and I’m one of them, have got wrong and that is that they’ve said that marine reserves help the quota management system, they help sustainability. Well frankly they don’t or if they do ...it’s only a wee bit. If I were to invite you to imagine that there was no catch limits on crayfish for example but we had lots of marine reserves where crayfish couldn’t be taken from and the rest of the coastline was, anyone could go in and take what they liked, would that be sustainable? No it wouldn’t. And what’s happened in off-shore jurisdictions in other countries is that marine reserves have been used not as reserves but as a sort of stopgap measure go try and get sustainable management. We have sustainable management, at least we are getting towards sustainable management in the form of the quota management system and no-one wants to throw it out and it is a much more powerful tool for sustainable management than marine reserves. Marine reserves have other functions ... but they don’t particularly help the snapper fishery or the hoki fishery or whatever”

- Hon. Pete Hodgson, Minister of Fisheries, on Environment Matters, 1YA, 1 June 2002.

24. In order to get the full picture of what happens to fisheries when a marine reserve is established, it is also necessary to look at what happens to the existing fishing activity. Fishers (commercial and non-commercial) who previously fished in the area of the reserve will either stop fishing or will move to the area outside the reserve still available for fishing. If fishers move, fishing activity will increase in the smaller remaining area outside of the reserve. In the industry’s experience, the concentration

of fishers after a marine reserve is established is likely to lead to increased conflicts within and between different types of fishers (customary, commercial and recreational) and greater competition to catch fewer fish. The establishment of the Te Tapuwae o Rongokako marine reserve in October 1999 provides a good example of this effect and is indicative of the likely consequences of the establishment of reserves with a similar scale of displacement under the new Bill.

25. Increased competition in a smaller area can ultimately result in the catch limits for the fishery being reduced – i.e. fewer fish for everyone.

Protecting marine biodiversity – seafood industry policy

26. As noted elsewhere in this submission, the seafood industry's business is totally dependent on the sustainability of fisheries resources and on the well being of the wider marine environment. Our activities as a sector are based firmly within a framework of sustainable development. Such an approach is completely consistent with New Zealand's obligations under the Convention on Biological Diversity.

Choosing the right mechanisms

27. The industry's approach to marine biodiversity protection acknowledges that there is a range of statutory and non-statutory means for protecting marine biodiversity. Some of these mechanisms have biodiversity protection as their primary purpose, others have the effect of protecting marine biodiversity irrespective of their primary purpose. All, however, contribute to achieving biodiversity protection objectives and their cumulative effect needs to be taken into account when considering both the status of New Zealand's marine biodiversity and the incremental impacts of any new protection proposals. The measures include:

- Fisheries Act mechanisms (fisheries plans, taiapure, mataitai, and regulations governing seasonal and gear restrictions and closed areas);
- Resource Management Act 1991 mechanisms (primarily regional and district plan provisions, and resource consent conditions);
- Provisions of the Reserves Act 1977, the Wildlife Act 1953 (for seabirds) and the Marine Mammals Protection Act 1978 (including marine mammal sanctuaries);
- Cable protection zones under the Submarine Cables and Pipelines Protection Act 1996;
- Marine parks and other areas protected under special legislation (Sugarloaf Islands, Hauraki Gulf etc);
- Marine reserves;
- Non-statutory initiatives, such as those outlined in Box 1 of this submission.

28. We emphasise that area-based protection is not the only approach to ensuring that marine biodiversity is maintained. The seafood industry would rather see sustainable utilisation practices (which do not have an adverse effect on biodiversity) across the whole marine environment than a restricted and narrow interpretation of 'protection' to refer only to highly protected island-like biodiversity zoos.

29. The industry sees marine reserves as fulfilling an important role in providing high level protection within this suite of mechanisms. Unlike some of the other protection mechanisms identified above, marine reserves are not a multiple use tool – they do not allow for sustainable extractive utilisation. Because of the high costs associated with exclusion, marine reserves should be used only to protect special ecosystems that are at risk from a range of threats that cannot be managed adequately under other more flexible and less costly forms of protection.
30. We consider that there are four key aspects to determining the most appropriate management response to threatened marine biodiversity. These are:
- What are the objectives of protection? (eg, to protect an outstanding or distinctive ecosystem; to protect an area representative of more widespread ecosystem types; to protect a particular habitat type; to protect a rare species etc);
 - What are the risks to biodiversity that need to be managed? (mining, fishing, runoff etc);
 - What are the ongoing costs associated with managing or excluding particular sources of risk? And
 - What, therefore, is the least cost management option that is able to manage the risks and achieve the protection objectives?
31. For example, if the biodiversity of a unique benthic community was shown to be at risk from the effects of bottom trawling, then the Fisheries Act would be an appropriate management mechanism. If the biodiversity of a harbour was at risk from urban and agricultural runoff, then the Resource Management Act would be the appropriate mechanism. If a unique marine ecosystem was at risk from a range of threats, then a marine reserve may be an appropriate mechanism.

Measuring marine protection

32. It is clear from the record of the First Reading of the Bill that the Government views this Bill as the main plank in meeting its target of protecting 10% of New Zealand's marine environment by the year 2010. The Minister of Conservation, the Hon Chris Carter, in his speech referred to the 10% target and went on to say that³:

In the 30 years since the Marine Reserves Act became law, only 16 marine reserves have been created. Those around the North and South Islands average just 1000 hectares each, and, in total, cover just 0.1 percent of the coastal sea. By contrast, we protect 30% of mainland New Zealand in national parks and reserves. This Government is committing to address this imbalance.

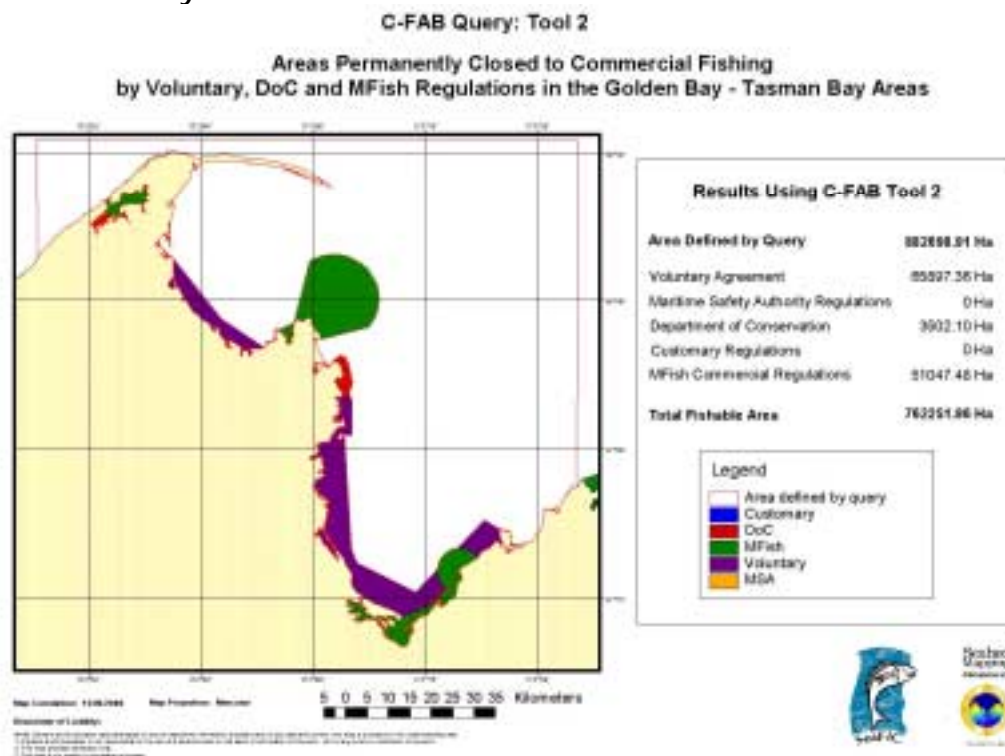
33. SeaFIC considers that a policy based on protecting 10% or 20% of the marine environment, or one of establishing – for instance – 10 new marine reserves over the next three years, simply encourages ad hoc, opportunistic establishment of marine protected areas and is unlikely to provide an optimal approach to biodiversity protection. A target-based approach to marine biodiversity protection treats the

³ Marine Reserves Bill, First reading. 15 October 2002.

establishment of a closed area as an end in itself, rather than as simply a tool to contribute to particular biodiversity protection objectives.

34. Nevertheless, a discussion of percentages of the marine environment under some form of “protection” is relevant to the policy context of this Bill, and to that end, SeaFIC notes that in many areas, more than 10% of the marine environment is already protected in some way. For instance, [Figure 1](#) shows that nearly 14% of the 882,699 Ha area encompassing Golden Bay, Tasman Bay and Farewell Spit is subject to some form of protection (including marine reserves). [Box 4](#) identifies the percentages of the inshore area of New Zealand’s marine environment and the EEZ that are currently closed to various forms of commercial fishing⁴. These figures need to be kept in mind when considering the very limited role of marine reserves in implementing any target-based protection objectives.

Figure 1: Areas permanently closed to commercial fishing in Golden Bay & Tasman Bay



⁴ Note that there may be overlaps between the categories of closures shown in Box 4. For instance, an area closed to commercial trawling under a voluntary agreement may also be subject to a closure to set netting under commercial fisheries regulations. Information in Box 4 is obtained from C-FAB, a GIS based spatial mapping tool owned by SeaFIC and Seabed Mapping International Ltd. The information on closures in the EEZ is from Seabed Mapping International Ltd (2000)

Box 4: Percentages of the New Zealand's marine environment from which various types of commercial fishing are excluded

In the **inshore area** of New Zealand's waters (ie, inside the 200m depth contour):

- 1% is closed to fishing under Department of Conservation legislation (including marine reserves);
- <0.7% is closed to fishing under Maritime Safety Authority legislation (eg, cable protection zones);
- 21% is closed to various forms of commercial fishing under voluntary agreements;
- 9% is permanently closed to various forms of commercial fishing under commercial fisheries regulations; and
- 66% is closed to various forms of commercial fishing on a temporal basis under commercial fisheries regulations.

45.3% of the **Exclusive Economic Zone** (ie, the area out to 200 nautical miles) is inaccessible to the large vessels of the deep sea trawling fleet (note that some parts of this area remain available for other forms of fishing). Specifically:

- 2.6% is closed to trawling through seamount closures regulated under the Fisheries Act 1996;
- 15.3% is closed to the deep sea trawling fleet by Fisheries Act regulations excluding vessels over 46 metres long;
- 15.2% is closed to trawling in FMA10 (that part of the EEZ that surrounds the Kermadecs) by virtue of limited ITQ being allocated in this area; and
- 33.9% is too deep for trawling (ie, deeper than 1500 metres).

Part Two

- Where does the Marine Reserves Act fit in the bigger picture?

35. Marine reserves are simply a tool – they are not an end in themselves. The wider objectives to which marine reserves contribute are those set out in:

- the Biodiversity Strategy (which in turn, implements in part New Zealand's international commitments under various Conventions);
- the Oceans Policy (when completed); and
- the Marine Protected Areas Strategy (currently in development).

International biodiversity commitments

Sustainable utilisation & the Convention on Biological Diversity

36. The Explanatory Note to the Bill states that the Bill helps to implement the New Zealand Biodiversity Strategy. The Biodiversity Strategy was prepared in February 2000 as part of New Zealand's obligations under the 1992 UNEP Convention on Biological Diversity. It is important to recall that the context and objectives of the Convention reflect the concepts of **sustainable utilisation**, as opposed to protection being viewed in isolation of use or as an end in itself (see Box 5).

Box 5: Objectives of the UNEP Convention on Biological Diversity

- the conservation of biological diversity;
- the sustainable use of its components; and
- the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

IUCN Policy on Marine Protected Areas

37. The IUCN position on Marine Protected Areas is also relevant to the Marine Reserves Bill. In 1988 the IUCN adopted a resolution⁵ calling for the establishment of a global network of marine protected areas (MPAs). That resolution, and the 1999 IUCN Guidelines for MPAs that followed it, clearly acknowledge ‘wise use’ as part of the reason behind MPAs. In contrast to the Marine Reserves Bill, the IUCN position is not based solely on ‘no take’ protection. The IUCN Guidelines (section 2.4, emphasis added) state in respect of domestic MPA legislation:

*The legislation should therefore tackle the issue of sustainable use, linking it to conservation objectives. Without the co-operation of most users of the sea and coastal environment, especially fishers, neither conservation nor ecologically sustainable use will be achieved. **The legislation should overtly recognise the linkage between protection and maintenance of ecological processes and states, and the sustainable use of living resources.***

New Zealand’s Biodiversity Strategy

38. The New Zealand Biodiversity Strategy is consistent with both the Convention on Biological Diversity and the IUCN position, in that it contemplates a range of different types of marine protected areas of a multi-use kind, rather than simply the ‘no take’ reserves contemplated in the Bill. Objective 3.6 of the Biodiversity Strategy – Protecting marine habitats and ecosystems – is to:

Protect a full range of natural marine habitats and ecosystems to effectively conserve marine biodiversity, using a range of appropriate mechanisms, including legal protection.

And, implementing this objective, is Action (a), to:

Develop and implement a strategy for establishing a network of areas that protect marine biodiversity, including marine reserves, world heritage sites, and other coastal and marine management tools such as mataitai and taiapure areas, marine area closures, seasonal closures and area closures to certain fishing methods.

39. SeaFIC considers that the Bill as introduced does not reflect the international perspective on marine biodiversity protection as articulated by the IUCN and in the

⁵ IUCN General Assembly Resolution 17.38 (1988)

Convention on Biological Diversity. Neither does it facilitate an approach to biodiversity protection that makes use of a range of different protection measures, as envisaged in the Biodiversity Strategy. Our submission contains a series of amendments to ensure the Bill is consistent with this wider policy context.

Oceans Policy – putting the cart before the horse

40. The Oceans Policy project was established by the Government to identify goals and principles for managing the marine environment and to develop strategies for the best way to achieve those goals. The project was initiated in response to a need for clear goals and an integrated and comprehensive policy and legal framework for oceans management. The development of the Marine Reserves Bill has taken place in advance of, and largely in isolation of, the Oceans Policy project.
41. We draw the Committee's attention to the fact that the Bill does not simply address technical or operational matters – its objectives have been broadened and it proposes a fundamentally different approach to the protection of both special and “representative” areas of biodiversity. It has significant property rights effects through the transfer of benefits between various categories of users of natural resources. It changes the decision making and accountability structures of government by removing the concurrence role currently exercised by the Ministers of Fisheries and Transport. It extends coverage into the Exclusive Economic Zone and has significant international law implications. These are not minor changes.
42. SeaFIC has consistently expressed the view that reviewing and amending the current Marine Reserves Act, although important, is not sufficiently urgent to warrant it proceeding in advance of the Oceans Policy⁶. Until the overarching policy goals are clear, it is difficult to see how sensible decisions can be made about one of the tools to implement the policies (ie, the Marine Reserves Act). To develop one tool in isolation of the other elements that contribute to the sustainable management of our oceans environment risks perpetuating the very problems that the Oceans Policy process was set up in response to – ie, fragmented, inconsistent legislation without overarching policy goals.
43. The premature promotion of the Marine Reserves Act review also denies an important opportunity to link the effects of terrestrial activities with the protection of marine biodiversity. SeaFIC can see little value in setting aside areas as a marine reserve in the absence of mechanisms to integrate management of land-based risks such as sewage, run-off and sedimentation with management of marine biodiversity. The Oceans Policy can provide such integration. The Marine Reserves Bill – in spite of assertions to the contrary during the First Reading of the Bill – does not contain any provisions that require the integrated management of the effects of land-based pollution on marine biodiversity.

⁶ The recent establishment of the Auckland Islands Marine Reserve demonstrates that the current Act can provide a rapid reserve establishment process.

44. SeaFIC strongly urges the Committee to give consideration to the desirability of completing the Oceans Policy **prior** to finalising the Marine Reserves Bill. Should, however, the Committee decide to proceed with its consideration of the Bill, we recommend the approach set out in the remainder of this submission.

Part Three

- What is wrong with the Bill?

45. In summary, SeaFIC submits that the Bill, as introduced, contains the following five major problems:
- The purpose of the Bill is too wide – the high level of protection and exclusion it provides is out of step with its broad purpose;
 - The Bill promotes marine reserves as an end in themselves rather than as one of several available tools to achieve specific biodiversity protection objectives;
 - There is a lack of balance and rigour in the Bill’s decision making processes – in particular there is no requirement for the costs and benefits of marine reserves to be considered in explicit and transparent way;
 - The Bill confuses the protection of special or representative areas of biodiversity with the reallocation of coastal space from extractive to non-extractive uses. In so doing it jeopardises the sustainable management of fisheries; and
 - The extension of the Bill into the EEZ does not adequately reflect New Zealand’s obligations under international law.
46. These five problems are explored in more detail in this part of our submission. Solutions – in the form of specific amendments to the Bill – are proposed in Part 4.

Purpose of the Bill is too wide

47. The purpose of the Bill is primarily to “conserve indigenous marine biodiversity”. SeaFIC supports the shift from the purpose of the current Act (which provides for areas to be preserved “for the scientific study of marine life”) to a purpose that is focused primarily on biodiversity protection. For that reason we support the notion that all marine reserves should be strictly ‘no take’.
48. We consider, however, that the scope of biodiversity protection encompassed in the purpose of the Bill is out of step with both the high level of protection that marine reserves are capable of providing, and with the range of alternative, lower cost mechanisms that are available to contribute to marine protection.
49. As noted elsewhere in this submission, there is a range of mechanisms that contribute to protecting marine biodiversity from various human activities. Each of these mechanisms differs in the types of risks it is designed to manage, the level of protection afforded, and the costs associated with exclusion of the activities targeted for control. Marine reserves provide a high level of protection from a range of sources of risk, but they also come at high cost because they exclude all types of extractive

use – including some forms of sustainable extractive use that have no adverse effects on biodiversity. It is therefore appropriate that marine reserves have a relatively narrow purpose – their role is at the highest end of the spectrum of tools available for marine protection.

50. SeaFIC therefore supports the notion of marine reserves to protect “outstanding, rare, distinctive, or internationally or nationally important marine communities and ecosystems”, but **only where these ecosystems are under threat from a range of risks that cannot be managed through more targeted mechanisms**. For instance, if the only source of risk to a unique bryozoan community with a restricted distribution is bottom-impacting fishing methods, then the most appropriate risk management mechanism is the Fisheries Act, not a marine reserve. This is because under the Fisheries Act, control can be targeted directly at the source of the risk (ie, bottom-impacting fishing methods) while allowing other sustainable extractive activities (eg, longlining) to continue because they are not having an adverse effect on the bryozoan habitat. A marine reserve is a blunt, less flexible protection mechanism that excludes all extractive activity, regardless of the risk to biodiversity, and is therefore always a high cost option for protection.
51. SeaFIC considers that there is no justification for exclusive, high-level protection of “representative examples of the full range of marine communities and ecosystems that are common or widespread”. Specifically:
- the fact that a particular ecosystem type is common or widespread suggests that risks to biodiversity for that ecosystem type are relatively well managed through existing mechanisms;
 - given the high cost associated with exclusion of existing extractive activities, it is unlikely that marine reserves would ever be the least cost tool for protecting common ecosystem types; and
 - the lack in the Bill of any requirement for strategic identification of “representative” areas for protection, and the fact that “any person” may make an application, means that the purpose of the Bill simply encourages fragmented, *ad hoc* use of a tool that would be more effectively employed in a selective, targeted manner, consistent with the strength of protection and exclusion it affords.
52. In order to address these concerns, we propose amendments to **clauses 7 (purpose) and 67 (Minister’s decision)**.

Marine reserves seen as an end in themselves, rather than as a tool to help achieve biodiversity protection objectives

53. As noted elsewhere in this submission, SeaFIC is concerned that the Bill promotes marine reserves as an end in themselves, not as a tool to contribute to specific biodiversity protection objectives. We consider that the focus should be on biodiversity protection, not on marine reserve establishment *per se*. Refocusing the Bill on the true outcome (biodiversity protection) rather than the immediate outcome (establishment of a marine reserve) requires:

- A comprehensive strategy to clarify what the Biodiversity Strategy Objective 3.6 (ie, to protect a full range of natural marine habitats and ecosystems to effectively conserve marine biodiversity...) might mean in practice:
- Clear articulation of the specific biodiversity protection objectives for the area under consideration;
- An evaluation of whether a marine reserve is the best mechanism for achieving the specified objectives; and
- An ongoing requirement to monitor and evaluate whether a marine reserve is performing with respect to the specified objectives.

54. We consider that these four requirements are particularly relevant in the case of marine reserves (as opposed to other methods of protecting marine biodiversity) because, out of the range of methods available, marine reserves provide the highest level of protection and consequently, result in the highest level of exclusion of existing activities, with associated costs.

Marine protected areas strategy

55. SeaFIC is concerned that there is currently no coherent government policy or strategy for marine protection. A Marine Protected Areas Strategy is currently in development by the Ministry of Fisheries and the Department of Conservation, but has not been consulted on or finalised. Such a Strategy could help clarify what protection of a “full range of natural and marine habitats and ecosystems to effectively conserve marine biodiversity” might mean in practice and the place of the various marine protection tools, including marine reserves, in a comprehensive policy framework. In the absence of a comprehensive policy framework, protection mechanisms are likely to be applied in an *ad hoc*, opportunistic manner, rather than in a rational, strategic way that would better ensure that the overall objectives for protection are met.

56. Even if the MPA Strategy was complete, there is no statutory link between the MPA Strategy and the Bill. There is, therefore, no requirement for decision makers to ensure that any single marine reserve application is consistent with the Strategy and is the best option (compared with other potential sites for protection) for achieving the objectives of the Strategy.

57. Our concerns about the risks associated with *ad hoc*, opportunistic establishment of marine reserves are exacerbated by the provision in clause 47 of the Bill, enabling any person to propose the establishment of a marine reserve. If any person is allowed to propose a marine reserve, it is essential that the Bill requires decision makers to ensure that the proposal is consistent with the broader policy frameworks and objectives for marine protection. Options for achieving this include either:

- (a) Giving the MPA Strategy statutory status in the Bill; or
- (b) Amending **clause 67** (Minister’s decision) to ensure that marine reserves are consistent with the broader policy framework for marine protection.

58. Giving the MPA Strategy statutory status in the Bill has the advantages of ensuring that strategic issues are addressed through a transparent, formal process, and providing certainty for all parties prior to the Act coming into full effect. It would entail the addition of new clauses:
- setting out a procedure for the preparation of a formal marine biodiversity protection strategy;
 - specifying the contents of the Strategy (eg, policies, objectives, analysis of available implementation methods, methodology for evaluating costs and benefits etc); and
 - requiring that no decisions can be made under the Act until the Strategy has been completed.
59. Either of these approaches would be satisfactory in achieving a more strategic approach to the use of marine reserves and other protection mechanisms. However, in the absence of any such amendment, we would prefer to see **clause 47** amended to restrict the proposer of a marine reserve to agencies with specific biodiversity protection responsibilities.

Specifying marine reserve objectives

60. One of the industry's main concerns about marine biodiversity protection is the lack of clearly articulated objectives. In debates about marine protection there is frequently confusion between principles (eg, a precautionary approach) and tools (eg, spatial closures such as marine reserves), with the actual objectives of a marine reserve or other biodiversity protection mechanism (ie, setting out in detail the risks the marine reserve is expected to manage, and the anticipated ecological outcomes). The Bill provides for marine reserve objectives to be specified only at the management planning stage once a marine reserve has already been established, and even then a management plan is not always compulsory. Inexplicably, in our view, the Bill does not require objectives to be specified at the application stage. We question how decision makers can determine whether a marine reserve will be an effective management mechanism in the absence of any specific management objectives.
61. We recommend an amendment to **clause 49 (contents of proposal)** to require the specific protection objectives of a marine reserve to be included in the proposal.

Applying a best method/least cost test

62. The Biodiversity Strategy is premised on the availability of a range of methods contributing to the protection of marine biodiversity. The Cabinet decision that established the Marine Reserves Act review sought to have marine reserves complement other statutory tools. Elsewhere in this submission we emphasise the range of methods that can contribute to biodiversity protection. Given this emphasis on the range of available tools, SeaFIC finds it astounding that the Marine Reserves Bill does not require decision makers to evaluate whether a marine reserve is the best means of meeting protection objectives.

63. It is standard good regulatory practice (and a requirement of the Government's Code of Good Regulatory Practice) to:

*Adopt and maintain only regulations for which the costs on society are justified by the benefits to society, and that **achieve objectives at lowest cost**, taking into account alternative approaches to regulation.*

The "Efficiency Guidelines" in the Code of Good Regulatory Practice include:

*Regulatory design should include an identification and assessment of the most feasible regulatory and non-regulatory alternatives to addressing the problem; and
When government intervention is desirable, **regulatory measures should be the minimum required**, and least distorting, in achieving desired outcomes.*

64. SeaFIC considers it essential that proposers of marine reserves and decision makers are required to evaluate the alternative means of achieving the protection objectives and to select the "best method/least cost" approach. By "best method/least cost" we mean the method that achieves the protection objectives at the least cost to affected stakeholders and to government. Costs in this instance relate primarily to opportunities foregone because of unnecessary regulatory intervention, rather than direct monetary costs.
65. For outstanding or rare ecosystems, it is likely – but not inevitable – that a marine reserve will be an appropriate form of protection. For areas that are representative of common or widespread ecosystem types, however, it is by no means clear that a marine reserve will always be the best approach. We consider that in these cases, given the costs associated with marine reserves, particularly in relation to commercial fishing rights and the Fisheries Deed of Settlement, a failure on the part of proposers to document that a marine reserve is the least cost approach to protection, would leave the decision maker vulnerable to legal challenge. We therefore submit that a "best method/least cost" analysis provides:
- a useful discipline to the evaluation process for outstanding ecosystems; and
 - an essential component of the process for "representative" ecosystems (should, contrary to the recommendations in this submission, protection of representative ecosystems remain within the scope of this Bill).
66. The advantages of including a "best method/least cost" requirement in the Bill would be:
- More effective, consistent and co-ordinated implementation of the Biodiversity Strategy by ensuring that key sites have the appropriate level and security of protection;
 - A quicker process and lower costs for marine reserve proposers. Imposing unnecessary costs and impinging unnecessarily on existing rights will not engender support for marine protection;

- Less risk of general undermining of the fisheries management regime and less risk of creating additional Treaty grievances by breaching the Fisheries Deed of Settlement; and
- Less risk of legal challenge to marine reserve establishment.

67. The “best method” analysis needs to take place early in the application process, before proposers invest significant time and effort in developing a proposal. We therefore recommend changes to:

- clauses **48 (consultation and consideration during preparation of proposal)** and **49 (contents of proposal)** to ensure that proposers give consideration to alternative approaches; and
- clause **67 (Minister’s decision)** to ensure that the decision maker is placed under an obligation to ensure a least cost approach to regulation.

68. As an aside, and in the context of selecting a “best method/least cost” approach for biodiversity protection, we note that:

- Marine reserves are implemented by regulation. They therefore provide no greater security of longterm protection than any other regulatory protection measures (such as those provided under the Fisheries Act) that can be imposed and revoked through similar processes;
- Penalties and enforcement provisions of the Fisheries Act are more stringent than those under the Marine Reserves Act and the current Bill.

Monitoring and evaluating performance of marine reserves

69. SeaFIC is concerned that the populist policies of target-based marine protection (eg: 20% protection by 2010, 10 new marine reserves in the next 3 years) will lead to biodiversity protection being measured by performance indicators such as the number of marine reserves or the percentage of the marine environment under some form of protection. Declaring a certain number of marine reserves or a certain proportion of space to be protected in a marine reserve network does not necessarily demonstrate that either the network or the individual marine reserves within it are effective in protecting biodiversity. For instance, a marine reserve that is not able to be effectively enforced, is unlikely to achieve anything.

70. SeaFIC considers that a major shortcoming of the Bill is that it provides for the establishment of marine reserves – and the consequent exclusion of sustainable extractive activities – without imposing any obligations for scientific monitoring of whether the marine reserve is achieving the objectives for which it was established. We note that if marine reserves are indeed effective mechanisms for protecting biodiversity, then an obligation to monitor and evaluate their performance will provide evidence that will increase community confidence in marine reserves as a management mechanism and facilitate future reserve establishment. A requirement to monitor and evaluate performance is also consistent with the IUCN’s recent report on

evaluating the effectiveness of marine reserves⁷, which states that *first and foremost, evaluation should be seen as a normal part of the process of management.*

71. We consider that the Bill should contain very general monitoring and evaluation requirements, and that the details of monitoring and evaluation programmes should be provided in management plans. To this end, we recommend:
- amendments to **clause 36 (management plans)** and **clause 73 (commencement of review)**;
 - the addition of a general duty on reserve managers to gather information and monitor to the extent necessary to effectively carry out their functions under the Bill; and
 - a requirement to prepare a management plan for every marine reserve, including those established under the 1971 Act.

Decision making processes lack balance and rigour

72. As noted earlier in our submission (paragraph 11 and following), economic and social costs are inevitable from the creation of a marine reserve because it prevents sustainable extractive use by commercial, customary and recreational fishers. Consequently, it is essential that decision makers are required to transparently, rigorously, and objectively evaluate the costs of marine reserves and weigh them up against the benefits in terms of the purpose of the Act (ie, protection of biodiversity). SeaFIC considers that the Bill in its current form does not provide for such an evaluation. Simply put, the Bill assumes a number of benefits of marine reserves, but this is not balanced by any recognition of costs (monetary and non-monetary).
73. This approach is out of step with other equivalent legislation that seeks to balance matters of public good against private rights – for instance, the Resource Management Act and the Fisheries Act. In each of these cases, the purpose of the Act provides balance (encompassing both utilisation and sustainability), and the decision making processes require explicit consideration of costs and benefits of decisions (for instance, in s32 of the Resource Management Act). Given that the Bill is supposedly assisting to implement the Biodiversity Strategy, and that the Convention on Biological Diversity is an agreement about *sustainable utilisation*, we consider that the decision making processes in the Bill need to reflect this balance.
74. Our specific concerns with the lack of balance in the Bill’s decision making processes are that:
- Nowhere in the extensive decision processes is there a requirement to evaluate the costs and benefits of a marine reserve;
 - The principles (clause 9) fail to require decision makers to take into account the adverse effects of marine reserves (for instance, their effects on existing use rights and the integrity of the fisheries management regime);

⁷ IUCN (2000). Evaluating Effectiveness: A Framework for Assessing the Management of Protected Areas. World Conservation Union, Cambridge, UK and Gland, Switzerland.

- There is no concurrence role for any other Minister, thereby removing an opportunity for balance that is currently provided by the procedural requirement for concurrence from the Ministers of Transport and Fisheries. The replacement provisions for consultation Ministers are restricted in scope and weak in effect;
- The provisions for an independent report to be obtained (clause 62) provide some balance, but are toothless in their current form.

75. We recommend that balance be re-inserted into the decision making processes of the Bill through amendments to:

- **clauses 9 and 10 (principles)**, explicitly recognising the costs associated with marine reserve establishment in the “front end” of the Bill;
- **clause 49 (contents of a proposal)**, requiring an analysis of costs and benefits of establishing a marine reserve by the proposer;
- **clauses 62 and 63** to make the provision for an **independent report** more meaningful;
- **clause 64 (final report to Minister)**, to give balanced weight to the views of consultation Ministers; and
- **clause 66 (matters Minister must consider)**, requiring the Minister to have regard to the full costs and benefits of establishing a marine reserve.

Reinstatement of concurrence role

76. SeaFIC considers that an alternative means of addressing the concerns discussed in the preceding paragraphs would be for the reinstatement of the existing concurrence role of the Minister of Fisheries. We consider that the strongest reasons for continuing the concurrence role are in relation to:

- a) maintenance of the integrity of the QMS, and
- b) protection of the Fisheries Deed of Settlement.

On balance however – and provided that points a) and b) are adequately addressed by other means in the Bill – we prefer that rigour be provided through the checks and balances in the Bill’s decision-making processes and through the use of comprehensive decision criteria, rather than through splitting the accountability for marine reserve decisions. We are more concerned with how the decisions are made, than with who makes them.

De novo appeal provision

77. SeaFIC also recommends the addition of a *de novo* appeal provision to the Bill.

Under the current Marine Reserves Act, and under the Bill as introduced, a decision to establish a marine reserve is subject only to judicial review, and not to appeal on matters of substance or merit in an *enquiry* mode. We propose an appeal process along the lines of that for water conservation orders under Part IX of the Resource Management Act. This would entail an appeal body holding an enquiry and reporting its findings and recommendation to the Minister of Conservation, who would still be responsible for the final decision.

78. We consider that an appeal process on matters of substance:
- is consistent with equivalent terrestrial situations where ‘public good’ decisions that can have significant effects on individuals and on private property rights are able to be appealed;
 - enables a body of case law to develop to aid in interpretation of the statutory tests and criteria, thereby improving consistency of decisions;
 - provides an additional incentive for marine reserve proposers to reach agreement with affected rights holders and existing users about appropriate mitigation arrangements; and
 - alleviates some of the current frustrations of all types of fisheries rights holders who have no real forum in which the substance of decisions that affect their livelihood and wellbeing can be reviewed.
79. With respect to the appropriate body to hear an appeal, we note that there are some advantages in the Environment Court taking on this role. That Court has experience in examining the substance of decisions in an enquiry mode and it is already responsible for appeals on various other matters which require the making of tradeoffs between individual rights holders and matters of public good under a variety of statutes (eg: Resource Management Act, Public Works Act and Local Government Act (road stopping provisions)).

Confusion of purpose of marine reserves - biodiversity protection or reallocation of use rights?

80. One of the industry’s greatest concerns with the Bill is that it moves beyond its primary purpose of biodiversity protection and has the effect of allocating coastal space between competing uses. The purpose statement of the Bill (clause 7) makes it clear that the purpose of the protection afforded by marine reserves is to preserve and protect indigenous marine biodiversity as a valuable outcome in itself (whether in relation to representative examples of biodiversity, or outstanding ecosystems). This relatively clear purpose is, however, muddled in subsequent clauses that make reference to:
- facilitating public use and enjoyment of marine reserves and protecting the quality of the “experience” (clause 9(e)); and
 - any additional benefits (other than those of conserving indigenous marine biodiversity) that may arise directly from the establishment of a marine reserve (clause 67(4)(b)).
81. SeaFIC submits that, as a result of the clauses identified above, the Bill as introduced confuses two completely different concepts – marine reserves as a biodiversity protection tool, and marine reserves as a mechanism to reallocate use from extractive to non-extractive users. These two concepts have dramatically different implications for fisheries management (which are outlined in more detail below). SeaFIC strongly submits that the Bill should focus entirely on biodiversity protection, and that any clauses providing for reallocation of use rights by way of establishment of marine reserves should be deleted.

Marine reserves as a biodiversity protection mechanism – implications for fisheries management

82. Under New Zealand’s fisheries management regime, quota shares (ITQ) provide rights holders with an opportunity to harvest a share of the available yield of fish. ITQ does not give rights holders exclusive access to an area. Nor does it offer absolute protection from reduction of either access or harvest opportunities. However, the success of our fisheries management regime and the incentives that it provides for responsible, long-term investment in the sustainability of fisheries resources and the marine environment does depend on rights holders having certainty about the *purposes* for which their access to marine areas or their share of available harvest might be constrained, and the *circumstances* under which that constraint might occur.
83. For example, changes to commercial harvest levels or area closures can be made under the Fisheries Act for the purposes of ensuring sustainability of fisheries resources. These types of management measures reinforce the value of commercial harvest rights, and reinforce the incentives provided by ITQ and therefore do not impinge on the integrity of the fisheries management regime.
84. A further example of a constraint on the exercise of commercial harvest rights is through management measures that are imposed for general, justifiable ‘public good’ reasons – such as protection of biodiversity via marine reserves. Such measures can, in certain circumstances, be considered a legitimate constraint on the exercise of commercial harvest rights. However, the acceptability of ‘public good’ measures depends on the measures being:
- a) scientifically justified; and
 - b) ‘optimal’ in a regulatory sense – ie, the lowest cost intervention to achieve the management objective.
85. As an example of the application these conditions, the use of a marine reserve to protect a common ‘representative’ ecosystem is unlikely to be either scientifically justified (from a risk management point of view) or the least cost approach to protection, consistent with good regulatory practice. If, notwithstanding these matters, a marine reserve is still adopted as the tool of political choice, then the decision would have significant implications for the integrity of the fisheries management regime and decision makers would need to turn their minds towards ways of ‘re-balancing’ the system and restoring the incentives for sustainable fisheries management. This is discussed in more detail in paragraph 88 below.
86. SeaFIC therefore submits that if, as recommended in this submission, the Bill focuses on marine reserves purely as a biodiversity protection mechanism then, in order to ensure the integrity of the fisheries management regime, the Bill needs to be amended to:
- Tighten the purpose of the Bill so that it provides high level protection for special ecosystems that are at risk from a range of threats;

- Restrict any consideration of “benefits” to the direct purpose of the Bill (biodiversity protection); and
- Inject balance in decision making process with respect to the fisheries management implications of marine reserves. This requires a clear role for Minister of Fisheries, and appropriate criteria for fisheries management to be considered. We propose amendments to **clause 3** (matters which the Minister of Fisheries is consulted on), **clause 48** (consultation requirements for proposers), **clause 64** (taking account of the views of consultation Ministers), and **clause 67** (decision making criteria).

Marine reserves as an allocative mechanism – implications for fisheries management

87. If, contrary to the recommendations in this submission, clauses 9(e) and 67(4)(b) are retained, then the Bill will have an allocative effect with respect to the use of marine resources. This means that marine reserves will result in and be used to effect a transfer of benefits from the current rights holders to another set of (non-extractive) users. In providing for such transfers, the Bill moves beyond the provision of simple public good benefits by discriminating between different types of resource user. Marine reserves and other management measures that have an allocative effect can have a significant impact on the quality and security of commercial harvest rights by creating an extra degree of uncertainty about the future value of the quota, with no attendant benefits to the rights holders. The potential in these circumstances to interfere with the effective operation of the Quota Management System is significant.

Mitigating adverse effects on rights holders – the role of adjustment assistance or compensation

88. SeaFIC submits that in circumstances where a marine reserve may interfere with the effective operation of the QMS (whether because it has an allocative effect, or because it is not a least cost, scientifically justifiable public good measure), it is essential that consideration is given to measures to ‘re-balance’ the incentives provided by commercial harvest rights. To fail to consider such measures is to risk unsustainable fisheries management outcomes.
89. The measures we are referring to include compensation, adjustment assistance and other innovative means of mitigating adverse effects on existing rights holders. We consider that such rebalancing should occur only in circumstances where it will reinforce the working of the overall marine management system (both fisheries management and biodiversity protection), and thus its potential to function better.
90. The Bill is currently silent on compensation for affected rights holders. SeaFIC is not recommending a specific “compensation” clause. Rather, we believe that the scheme of the Act should encourage proposers of marine reserves to ensure that a marine reserve proposal does not undermine the fisheries management regime. We consider

that leaving the options open for compensation or adjustment assistance has four major benefits.

91. First, it provides additional flexibility in the range of available policy tools. The choice between various protection measures – particularly measures that impose a cost on existing users – may be limited if there is no potential to offer compensation. This is because marine reserves are not a particularly flexible instrument and compensation provides an opportunity to ‘fine tune’ a proposal to achieve a better result. Additional flexibility can create more ‘win-win’ outcomes for both fishers and the government (on behalf of wider society). These types of outcomes are better in the long run, as they are less likely to be re-litigated. Seen in this light, compensation is also an appropriate instrument as it reinforces the incentives system inherent in the property rights based fisheries management regime.
92. The second benefit is through the provision of adjustment assistance. As noted earlier in this submission, the costs associated with marine reserves can fall disproportionately on individuals. In addition to direct costs associated arising from marine reserves, fishers also face adjustment costs, as they adapt to the new environment or diversify into other forms of economic activity. Assisting the most severely impacted fishers to make this adjustment can help align the operation of the industry with society’s changing expectations. This suggestion is not without precedent. When the government introduced provisions into the Forests Act to ensure the sustainable management of the indigenous forest resource, it paid adjustment assistance to those impacted. The intent of the payments was to help the industry move its operations on to a more sustainable footing, or for those impacted to move to alternative forms of economic activity.
93. Property rights are not absolute and unchanging. Fishing rights – like any other property right – are held subject to a general understanding of the constraints imposed by the community (expressed through judicial interpretation, statutory definition or direct community or peer pressure) with the knowledge that those constraints will evolve over time, but that the right will not be unduly altered without consent or compensation⁸. When commercial fishers acquired their rights to the fisheries they paid a price that reflected their assessed likelihood that measures would be put in place to address biodiversity protection. This assessment will have taken into account the policy intentions of the day. In a dynamic world where new information becomes available and society’s demands vary, there is a need for flexibility to allow trade off decisions to be tailored to the evolving environment. The third benefit of compensation is that it facilitates this flexibility by enabling these tradeoffs to be made.
94. The final benefit of compensation is to do with incentives for decision makers. One of the main problems with the establishment of marine reserves is that of *fiscal illusion*, where the true cost of a marine reserve proposal is hidden. When greater areas under

⁸ Guerin, K. Protection against Government Takings: Compensation or Regulation? New Zealand Treasury, September 2002.

protection are demanded in the absence of compensation it costs the majority nothing. The risk is that the minority – commercial fishers – have to shoulder this cost. The even greater risk is that there is nothing to constrain the demands of the majority and the impact they impose on the minority. Such an outcome is sub-optimal from the perspective of all of society. Compensation addresses these risks as Ministers have to exercise their discretion subject to an overt fiscal constraint.

95. SeaFIC urges the Committee to keep in mind the above discussion when considering how the Bill should address the issue of compensation or adjustment assistance. We emphasise that fishers and commercial rights holders are not generally in favour of compensation and view it as an option of last resort. We would prefer to see a biodiversity protection regime that uses scientifically justified, least cost mechanisms and provides for sustainable extractive uses.

International obligations associated with expanding marine reserves into the EEZ

96. SeaFIC considers that while some new provisions for biodiversity protection in the EEZ may be appropriate, it does not follow that simply extending the Marine Reserves Act into the EEZ would be consistent with international law. Our research in preparing this submission, including the expert advice we have received⁹, confirms that there was little consideration given to international implications during the drafting of the Bill. Advice provided by officials appears to have simply assumed compliance with international law. As a result, the Committee's attention must now be drawn to the failure of the Bill as currently drafted to adequately reflect international law. The IUCN Guidelines on Marine Protected Areas emphasise that MPA legislation should take an international perspective¹⁰:

Legislation and policy should be shaped by and support regional, international and other multilateral treaties or obligations... The obligations of international treaties such as UNCLOS and the Convention on Biological Diversity are pertinent here.

New Zealand's obligations under UNCLOS

97. SeaFIC is particularly concerned to ensure that any establishment of marine reserves in the EEZ is consistent with New Zealand's obligations under UNCLOS (the United Nations Convention on the Law of the Sea). We emphasise that, under Article 56 of UNCLOS, a Coastal State has a *sovereign right* to explore and exploit, conserve and manage the natural resources, whether living or non-living, of the EEZ. It has *jurisdiction* with regard to the protection and preservation of the marine environment. It does not have sovereignty in the EEZ. The distinction between these concepts is deliberate and particularly important in the context of marine reserves because it reflects the overall balance of interests accommodated in UNCLOS. The right given with respect to protection and preservation of the marine environment is a much more

⁹ Advice prepared for SeaFIC by Colin Keating, Chen Palmer & Partners, 25 October 2002

¹⁰ IUCN Guidelines at page 15.

limited right (jurisdiction, not a sovereign right). This means that a State is authorised to regulate activities in order to protect and preserve the marine environment. However, it can't use its regulatory jurisdiction to expropriate resources or to exclude activities.

98. The detailed regime in respect of living resources in the EEZ is contained in Articles 61 and 62 of UNCLOS. These Articles contain the following obligations:

- The Coastal State must promote the objective of optimum utilisation of the living resources of the zone;
- The Coastal State must make available to other States access to the surplus of the allowable catch of all living resources over and above its domestic harvesting capacity;
- The best scientific evidence available must be taken into account in assessing conservation and management measures;
- Conservation and management measures must be designed to maintain or restore populations at levels which can produce the maximum sustainable yield;
- The Coastal State may establish laws and regulations for a number of specified purposes, including licensing, fixing quotas and species that may be caught, regulating seasons and areas of fishing and gear and effort controls, enforcement procedures and so on.

99. The ability of States to regulate in the EEZ “seasons and areas of fishing” has been interpreted by most Coastal States as allowing the imposition of conservation and management measures which close certain areas to fishing for a period. However, there is nothing in Article 62 which can be seen as an authority for the permanent closure of large areas of the EEZ to fishing. SeaFIC emphasises that under UNCLOS, the international community has a clear right that any ‘no take’ permanently closed area should not impact unreasonably on the ‘optimum utilisation’ rule. This means that a marine reserve which closed off a whole stock or a significant portion of a stock that could not be fished elsewhere, and as a result was not able to be utilised to optimum levels, would be unlawful. Matters such as the size of the area, the fish populations in the area and their relationships with populations outside the area become very important determinants of lawfulness under UNCLOS.

100. SeaFIC submits that setting aside as a marine reserve a large area of the EEZ simply on the basis of it being a ‘representative sample’ would clearly not meet the test implicit in the optimum utilisation rule. The ‘surplus allocation’ rule might also be infringed by a large no take marine reserve. We also note the critical importance in international law of scientific evidence and suggest that this requirement would set a relatively high barrier for the establishment of a marine reserve in the EEZ.

Protection and preservation obligations do not override sustainable use

101. As with all international conventions, UNCLOS embodies a very complex balance between the interests of the various parties. Part XII of UNCLOS, in particular Article 192, establishes a general obligation on States to protect and

preserve the marine environment. Article 193, however, makes it clear that this does not undercut the right of States to exploit natural resources, provided this is done in accordance with the duty in Article 192. In the EEZ, Article 192 must be read consistently with the specific rights and limitations in Article 56 and associated Articles discussed above.

102. UNCLOS must also be read in association with the obligations in the Convention on Biological Diversity (see paragraph 36 of this submission). We draw the Committee's attention to Article 22 of the Convention on Biological Diversity, which provides as follows:

- (1) *The provisions of this Convention shall not affect the rights and obligations of any contracting party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity.*
- (2) *Contracting parties shall implement this Convention with respect to the marine environment consistently with rights and obligations of States under the Law of the Sea.*

103. It is clear from Article 22(2) that the parties to the Convention intended that UNCLOS should not be in any way overridden by the Convention. The distinction between the two paragraphs of Article 22 is extremely important. The exception which is included in paragraph (1), which enables the Convention on Biological Diversity to prevail over other Conventions in cases where the "exercise of those rights and obligations would cause a serious damage or threat to biological diversity", does not apply with respect to the rights and obligations of States under the Law of the Sea. It is clear therefore, as a matter of law, that the 1992 Convention cannot be used to compel an interpretation of UNCLOS that would otherwise not be permissible.

104. In order to better reflect international law pertaining to the EEZ, as discussed in the paragraphs above, SeaFIC recommends an amendment to **clause 67 (Minister's decision)**.

Part Four

- Recommended amendments

SeaFIC recommends the following set of amendments to the Marine Reserves Bill. In the proposals below, deleted text is ~~struck out~~, and recommended new text is underlined. Brief explanations follow each recommended amendment, and references are provided to the main body of this submission, where more detailed justifications for the proposed amendments can be found.

cl 3 Interpretation

Amend as follows:

... consultation Ministers means -

- (a) the Minister of the Crown responsible for fisheries, for consultation about fisheries management, fishing rights, customary food gathering, commercial fishing, recreational fishing, marine farming and the deed dated 23 September 1992 referred to in paragraph (1) of the preamble to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

Explanation

The existing concurrence role of the Minister of Fisheries has been replaced with an extremely weak and restricted consultation role. It is essential that the Minister responsible for maintaining the integrity of New Zealand's fisheries management regime is explicitly required to be consulted on fisheries management and fishing rights (the basis of the management regime). Marine farming should also be referred to explicitly.

cl 7 Purpose

Amend as follows:

The purpose of this Act is to conserve indigenous marine biodiversity in New Zealand's foreshore, internal waters, territorial sea and exclusive economic zone for current and future generations, by preserving and protecting within marine reserves –

- ~~(a) representative examples of the full range of marine communities and ecosystems that are common or widespread; and~~
- (b) outstanding, rare, distinctive, or internationally or nationally important marine communities and ecosystems; and
- (c) natural features that are part of the biological and physical processes of the marine communities and ecosystems referred to in paragraphs (a) ~~and (b)~~, in particular those natural features that are outstanding, rare, unique, beautiful or important.

- where the biodiversity of those marine communities and ecosystems is under threat from a range of risks.

Explanation

The Bill should focus on providing high level protection of special ecosystems that are at risk from a range of threats. A more focused purpose means that:

- marine reserves will be more effectively integrated with other more targeted and flexible protection mechanisms; and
- the high level of protection that marine reserves provide will be applied in a manner commensurate with the costs associated with exclusion of existing users.

Paragraphs 47-51 provide further justification of this proposal.

cl 9 Principles

Amend sub-clauses (a), (b) and (e) as follows:

- (a) a marine reserve should include the range of habitats and marine communities that distinguish the marine area in which the marine reserve is situated and be of a size, design and condition (~~or potential condition~~) that can be reasonably expected to —(i) ~~provide effective protection for the populations, marine communities, and natural ecological processes occurring within it;~~ and (ii) reflect the known composition and ecological patterns and processes of the habitat or marine community.
- (b) The marine communities and ecosystems in a marine reserve should be maintained in, ~~or restored to,~~ a natural state.
- ...
- (e) the use and enjoyment of marine reserves should be allowed, if consistent with the purpose of this Act. ~~and appropriate provision should be made to facilitate that use and protect the quality of the experience.~~

Insert a new sub-clause as follows:

- (f) marine reserves should be located and designed with due regard to any actual or potential adverse effects on existing uses and values of the area.

Explanation

Subclause (a)(i) is a principle derived from terrestrial biodiversity protection and is inappropriate for the marine environment. Ocean environments and their life forms and processes are linked together across vast geographical areas. Very significant areas of our oceans would need to be set aside from sustainable use in order to provide total protection for “populations” and “natural ecological processes”. SeaFIC submits that this is inconsistent with the intent of the Biodiversity Strategy and New Zealand’s obligations under UNCLOS. It also ignores the fact that size and design are not the sole determinants of protection – biodiversity in a very large coastal reserve will still be under threat if steps are not taken to control the adverse effects of land-based activities (siltation, run-off etc).

The references to restoration in sub-clause (b) and the phrase “or potential condition” in sub-clause (a) imply that marine reserves should be established not

just in high quality ecosystems, but also in degraded ecosystems. SeaFIC considers that if an ecosystem is degraded, it will have been degraded by a particular type of threat – for instance, pollution or localised depletion of fishstocks. The appropriate response to a degraded ecosystem is to manage the specific risks to that ecosystem, not to set it aside as a marine reserve. We also have some concerns about the phrase “natural state”. We suggest that the concept of “natural state” is inappropriate in the oceans environment, which humans have been utilising for hundreds of years. The phrase also fails to reflect the dynamic nature of marine ecosystems.

The current wording of principle (e) provides for “facilitation of use” and protection of “quality of experience”. These matters are not directly related to the purpose of the Bill (biodiversity protection), and provide for the transfer of use rights from extractive use to non-extractive use through the mechanism of marine reserves (see paragraph 80-81). Changes to or transfers between existing rights should be beyond the scope of this Bill.

New principle (f) is one of a suite of amendments SeaFIC is proposing in order to inject more balance into the Bill’s decision making processes, and to acknowledge that marine reserves are not without cost.

cl 10 Decision-making principles

Amend sub-clause (3) as follows:

(3) The fact that information is uncertain or incomplete does not, of itself, justify postponing or not making a decision about establishing or not establishing a marine reserve.

Explanation

Sub-clause (3) contains a precaution in favour of establishment of a marine reserve when information is uncertain or incomplete, whereas uncertainty may apply equally to the social and economic costs of reserve establishment and lead to a decision not to establish a marine reserve.

New Part Marine Biodiversity Protection Strategy

Insert a new Part, after existing Part 1, to require the development of a Marine Biodiversity Protection Strategy. We do not propose specific wording for this Part, but recommend that it should cover the process for preparing a strategy, the contents of the strategy, a requirement for decision makers to act consistently with the Strategy, and a requirement that no decisions be made under this Act until the Strategy has been approved.

Explanation

This is one of two alternative recommendations (see also the recommendation with respect to clause 67(2)(e) below) to ensure that marine reserves and other

biodiversity protection measures are deployed effectively in a strategic manner, and to avoid an ad hoc approach to reserve establishment (see paragraphs 55-58). We recommend a strategy development process similar to the provisions for developing the “methodology” for decision making under the Hazardous Substances and New Organisms Act 1996.

New clause Duty to monitor

Insert a new clause, after existing clause 35, as follows:

() Duty to monitor – The manager of a marine reserve must gather such information, and undertake or commission such research, as is necessary to effectively carry out its functions under this Act and under any relevant approved management plan, statement of general policy or conservation management strategy.

Explanation

See explanation for clause 36.

cl 36 Management plans

Insert a new provision in subclause (2) as follows:

(2) A management plan for a marine reserve –

...

(c) must state the procedures to be used to monitor, evaluate and review the effectiveness of the marine reserve and of the management plan as a means of achieving the objectives of the marine reserve.

Explanation

An obligation to monitor and evaluate the performance of marine reserves is required in order to ensure that the reserve achieves its intended biodiversity protection objectives. Such a requirement is also consistent with IUCN guidelines.

cl 37 Who must prepare management plans

Amend subclause (2) as follows:

(2) An advisory body for a marine reserve, or, if there is no advisory body, the Director General must prepare a management plan for the marine reserve. ~~if preparation of a management plan is required by—~~

~~(a) a conservation management strategy; or~~

~~(b) the Minister, after consultation with the Director General and any advisory body for the marine reserve.~~

Explanation

The preparation of a management plan should be compulsory, regardless of who manages the reserve. In the absence of a management plan, the reserve will lack clear objectives, and there will be no specified means of evaluating its performance with respect to achieving both the purpose of the Act and the specific purpose(s) of the reserve.

cl 48 Consultation and consideration during preparation of proposal

Amend as follows:

In preparing a proposal under section 47, the Director General or the proposer, as the case may be, must, -

- (a) ~~if practicable~~, consult –
 - (i) iwi or hapu who are tangata whenua of the marine area concerned; and
 - (ii) iwi or hapu who have customary access to the marine area concerned; and
 - (iii) interested persons, including existing users of the marine area concerned;
 and
- (b) keep a record of that consultation; and
- (c) consider ways of avoiding or mitigating adverse effects on existing uses of the marine area concerned if those ways do not compromise the purpose of this Act and are consistent with its principles; and
- (d) consider whether, and be satisfied that, a marine reserve is the least cost method for managing any identified risks to biodiversity in the marine area concerned.

Explanation

The proposer is proposing a new use of an area that can have significant costs for existing users. Consultation should not be optional, it should be mandatory. Existing users of a marine area are, in the case of commercial fishers, including those who exercise commercial fishing rights provided under the Fisheries Deed of Settlement, not simply “interested persons”. They have property rights that apply in that area, and this should be explicitly acknowledged in the consultation requirements of the Bill.

SeaFIC supports the intent of subclause (c) and considers that it is an essential component of the responsibilities of marine reserve proposers.

New subclause (d) is one of a suite of amendments SeaFIC is proposing to require proposers and decision makers to consider the best means of achieving protection objectives through the least cost mechanism. Further explanation of this approach is provided in paragraphs 62-66.

cl 49 Contents of proposal

Insert the following new provisions in sub-clause (1) between existing clauses (b) and (c):

(1) A proposal must –

...

(-) contain a statement of the objectives of the proposed marine reserve; and
(-) identify the other means, both statutory and non-statutory, in place of a marine reserve which may be used for achieving the objectives of the proposed marine reserve, and set out the reasons for and against using a marine reserve and the principal alternative means available for achieving the proposed objectives; and
(-) carry out an evaluation of the likely benefits and costs of the principal alternative means including the extent to which each is likely to be effective in achieving the stated objectives and the likely implementation and compliance costs.

Amend sub-clause 2 as follows:

(2) A proposal must not relate to a marine area –

(a) for which a lease or licence under the Marine Farming Act 1971 or a coastal permit for aquaculture activities under the Resource Management Act 1991 is in force.

Explanation

The amendments to sub-clause (1) are part of a suite of changes to require proposers and decision makers to:

- (a) be explicit (by specifying objectives) about the contribution that the reserve is intended to make to biodiversity protection; and
 - (b) be satisfied that a marine reserve is the best and least cost mechanism for achieving the specific protection objectives.
- (see paragraphs 60-66 for further explanation).

The approach we are recommending is similar to s32 of the Resource Management Act. The intent is to require proposers, at the earliest possible stage of a proposal, to give explicit consideration to the alternative means available, and the costs and benefits of alternative approaches. We consider that this is standard, good decision making practice and will result in a better fit between particular risks to biodiversity and the solutions proposed to manage those risks.

The amendments to sub-clause (2) recognise that existing marine farms are managed under one of two regimes – these being the Marine Farming Act 1971, and the Resource Management Act 1991. There is no justification for distinguishing between the effects on marine farmers governed under the two regimes as the economic impacts on those farmers will be identical. The Resource Management Act definition of aquaculture activities includes marine farming and spat collecting.

cl 62 Independent report

Amend sub-clause (1) as follows:

(1) Within 40 working days of the receipt of the draft report prepared by the Director General under section 61, the Minister must (if the Director-General is the applicant), or may (in other cases, including at the request of a consultation Minister), obtain an independent report on the administrative process followed by the Director General regarding the application.

Explanation

SeaFIC supports the mandatory requirement for the Minister to seek an independent report if the Director General is the applicant. However, we consider that consultation Ministers should also be able to request an independent report, if they consider it to be desirable, in cases where the Director General is not the applicant. This might occur in cases, for instance, where a consultation Minister had a concern that the process may not have dealt fairly with interested parties for which that Minister has a particular responsibility (eg; for matters related to the Fisheries Deed of Settlement).

cl 63 Consultation with Ministers

Insert a new sub-clause, between existing clauses (1) and (2) as follows:

(-) As soon as practicable after receiving the independent report referred to in section 62, the Minister must provide a copy of the independent report to each consultation Minister.

Explanation

Consultation Ministers should receive a copy of the independent report, as this is part of the package of material relevant to the Minister of Conservation's final decision.

cl 64 Final report to Minister

Amend as follows:

The Director-General must, after ~~having regard to~~ taking into account any views received from consultation Ministers under section 63...

Insert a new sub clause (2) as follows:

(2) The Director-General must, as soon as practicable, make available by whatever means the Director-General considers appropriate, a copy of the final report to the Minister to:

(a) each consultation Minister:

(b) the applicant: and

(c) every person who made a submission on the application.

Explanation

A requirement to “have regard to” the views of consultation Ministers is the weakest possible statutory reference. In the absence of a proper concurrence role, SeaFIC considers that, at a minimum, the Director General should be required to take into account the views of consultation Ministers. A weaker reference than this would defeat the purpose of having consultation Ministers responsible for providing input on the specified matters.

New sub-clause (2) is recommended in the interests of transparent decision making, and as part of our proposed appeal process (see new clauses below).

New clauses – appeal provisions

Paragraphs 77-79 of this submission discuss the need for an appeal provision to be added to the Bill. We have not prepared specific amendments to implement this recommendation, but envisage that such clauses would cover:

- public notification of the Director General’s final report and recommendation to the Minister of Conservation;
- a provision enabling the applicant or any affected party to appeal the recommendation to an appropriate body;
- provisions requiring, in the event of an appeal, the appeal body to hold an enquiry and report its findings and recommendation to the Minister of Conservation; and
- provision for the Minister to make the final decision and an obligation on the Minister to give reasons if the recommendation of the appeal body is not accepted.

cl 66 Matters Minister must consider

Insert a new sub-clause in the matters to which the Minister must have regard in considering an application, as follows:

(x) the full costs and benefits of establishing and maintaining the marine reserve.

Explanation

This is part of a suite of amendments SeaFIC is proposing in order to ensure that the decision making processes in the Bill are balanced with respect to considering both costs and benefits of marine reserve establishment (see paragraphs 72-74).

cl 67 Minister’s decision

Amend sub-clause 67(2)(c)(iii) by placing commercial fishing and recreational fishing in separate clauses, as follows:

- (c) will have no undue adverse effect on any of the following:...
- (iii) commercial fishing, fisheries management or fishing rights:
- (iv) recreational fishing:

Insert two new sub-clauses in clause 67(2) as follows:

- (d) if intended to protect representative examples of the full range of marine communities that are common or widespread, is the least-cost method, including methods available under other enactments, for achieving that protection; and
- (e) is consistent with any statements of government policy that are intended to help fulfil New Zealand's obligations under the International Convention on Biological Diversity.

Insert a new sub-clause, after clause (2), as follows:

() In considering whether an effect is an undue adverse effect under subsection 2(c) the Minister must have regard to any cumulative effect which arises over time or in combination with other effects.

Amend sub-clauses (3) and (4) as follows:

(3) An adverse effect is not undue under subsection (2)(c) if the Minister is satisfied that either:

- (a) the benefit to the public interest in establishing the marine reserve outweighs the adverse effect; or
- (b) the adverse effect is able to be mitigated by means of any agreement reached between the proposer and those parties adversely affected by the establishment of a marine reserve.

(4) In considering the public interest under subsection (3), the Minister must have regard only to –

- ~~(a) the benefit of preserving and protecting marine communities and ecosystems to conserve indigenous marine biodiversity; and~~
- ~~(b) any benefits that may arise directly from the establishment of the marine reserve that the Minister considers relevant.~~

Insert a new sub-clause (5) in as follows:

(5) The Minister shall not recommend the making of an Order in Council under section 71 which is inconsistent with rights and obligations under the international law of the sea.

Explanation

Sub-clause (2): Including recreational and commercial fishing in the same sub-clause means that if there is an adverse effect on one but not the other, then this might not be considered “undue”. Under the current Marine Reserves Act, recreational and commercial fishing are considered separately. Any change to this separate consideration would reduce the recognition given to commercial fishing

rights. It is also essential that explicit consideration be given to effects not just on the activity of commercial fishing, but also on the integrity of the fisheries management regime and fishing rights.

New subclause (2)(d) is part of a suite of amendments designed to impose on decision-makers a discipline to adopt the most appropriate protection mechanism that is available at least cost (see paragraphs 62-66). This is particularly relevant in the case of marine reserves intended to protect “representative” marine ecosystems, should the Committee decide not to accept SeaFIC’s recommended change to the purpose of the Bill.

New subclause (2)(e) is one of two alternative recommendations¹¹ to ensure that the establishment of new marine reserves occurs in a strategic, planned manner and is not ad hoc and opportunistic (see paragraphs 56-59).

The new sub-clause following sub-clause (2) is intended to take account of cumulative effects, particularly those effects that may arise as a result of a combination of a marine reserve and other management measures in place the wider area potentially affected by the reserve.

Subclauses (3) and (4): SeaFIC considers that the **only** benefits that should be considered in the Minister’s decision are those directly related to the purpose of the Bill – ie, the protection of marine biodiversity. If any other benefits are included in the evaluation, then the establishment of a marine reserve could result in a reallocation of use rights from existing legitimate extractive users to non-extractive uses. We consider that such a reallocation of rights is a fundamental matter that is out of scope of the Marine Reserves Act review, and is not a matter that should be contemplated in advance of the Oceans Policy.

Subclauses (3) and (4) as currently drafted mean that a very significant adverse effect on existing rights holders might still be considered not undue if it were balanced by a set of benefits to other users. The unprincipled reallocation of rights undermines the integrity of New Zealand’s fisheries management regime (for further explanation see paragraphs 17, 18 & 80-87). The amendments SeaFIC proposes are part of a suite of recommendations to ensure the sustainable management of fisheries resources.

We consider that the only situation in which an effect that would otherwise be “undue” should be allowed to persist, is in circumstances where the affected parties reach agreement on a mechanism to facilitate that transfer of use rights (eg, through compensation or adjustment assistance). This is provided for in our proposed amendment to sub-clause (3).

New subclause (5): The Bill as currently drafted does not adequately reflect international law, as expressed in the international law of the sea (UNCLOS).

¹¹ See also “New Part – Marine Biodiversity Protection Strategy”, above.

Further explanation is provided in paragraphs 96 and following of this submission.

cl 73 Commencement of review

Amend sub-clause (1)(b) as follows:

- (b) the Minister considers for any reason that a marine reserve may no longer meet the purpose of this Act or the objectives for which it was established.

Explanation

This is part of a suite of amendments to ensure that marine reserves are used only where they are the best management method to achieve specified biodiversity protection objectives. The amendment extends this concept through to the Bill's review provisions and ensures that a marine reserve remains the most appropriate means of meeting a specified set of objectives.

cl 83 Exercise of powers

Amend sub-clause (1)(a) as follows:

- (1) An enforcement officer or honorary enforcement officer may exercise his or her powers under this Act only if
- (a) the officer has reasonable grounds to believe that an offence ~~will be~~, is being or has been committed...

Explanation

The ability of officers to exercise their powers (eg, search of vessels) when they believe that an offence "will be" carried out, is out of step with equivalent legislation. For instance, under the Fisheries Act, such powers may be exercised only where an officer believes that an offence is being or has been committed. It is also difficult to imagine in practice how an officer might be convinced that an offence "will be" committed.

Part 6 Regulations, repeals and amendments, and transition

Insert a new clause deeming all marine reserves established under the Marine Reserves Act 1971 to be marine reserves under the Marine Reserves Act [2003].

Explanation

The Bill is silent on the status of marine reserves established under the 1971 Act. In the interests of consistent and effective implementation of marine biodiversity policy objectives, deeming all existing marine reserves to be marine reserves under the new Bill has the advantages of:

- aligning the management provisions for all marine reserves (eg, management planning etc); and

- enabling review of existing marine reserves to determine whether they contribute effectively to marine biodiversity protection, and any other objectives for which they were initially established (eg, scientific study)

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