

Advancing Marine Spatial Planning in Marae Moana (Cook Islands Marine Park): Policy Paper

**Prepared for Marae Moana Technical Advisory Group
and Ridge to Reef Project**

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Acronyms and abbreviations

| | |
|-------------|---|
| CLO | Crown Law Office |
| EEZ | Exclusive Economic Zone |
| GBRMP | Great Barrier Reef Marine Park |
| GBRMPA | Great Barrier Reef Marine Park Authority |
| GEF | Global Environment Facility |
| GIS | Geographic information system |
| IMSP | Inshore Marine Spatial Plan |
| IMSP | Island Marine Spatial Plan (<i>synonymous with Inshore Marine Spatial Plan</i>) |
| IUCN | International Union for Conservation of Nature |
| Marae Moana | Cook Islands Maori term for the Cook Islands marine estate; means 'Our nourishing source of life; respected, cared for and used wisely, today and for generations to come'. |
| MMC | Marae Moana Council |
| MMCO | Marae Moana Coordination Office |
| MPA | Marine protected area |
| MRA | Marine Resources Act |
| MSP | Marine spatial plan |
| NMMSP | National Maraе Moana Spatial Plan |
| NEP | National Environment Policy |
| NES | National Environment Service |
| nm | nautical miles |
| OMSP | Offshore Marine Spatial Plan (<i>synonymous with National Maraе Moana Spatial Plan</i>) |
| PAMP | Protected Areas Management Policy |
| PACS | Protected Areas Classification System |
| Ra'ui | traditional form of resource management and conservation as used in Cook Islands |
| R2R | Ridge to Reef |
| TAG | Technical Advisory Group |
| UNDP | United Nations Development Program |

Executive summary

Overview

The *Marae Moana Act 2017* (the Act) established the Marae Moana within the waters of the Cook Islands and provides for its integrated management. Part 3 of the Act covers policy and spatial planning and specifies that regulations must be developed and in place to guide development of marine spatial plans (MSPs).

This policy paper assesses the Act and aims to identify implications, issues and constraints that the legislation may pose to the effective development of MSPs. The paper provides the policy basis for technical and policy advice by the Marae Moana Technical Advisory Group, decision making by the Marae Moana Council, and development of MSP Regulations and changes to the Act.

The paper advocates that these issues are addressed before the first MSP process formally begins. This is particularly important because the MSPs will be the first for Marae Moana, they are the primary planning instrument under the Act, and will have legacy impacts for at least the next 10 years. It is critically important that the legislative and regulatory basis for MSPs is progressive and sound at the outset: any deficiencies will remain in the system for the medium to long term.

The paper is structured around four primary themes:

- General marine spatial planning provisions
- Zoning scheme design and definitions
- Refined zoning scheme
- Other issues.

General marine spatial planning provisions

The Act provides for two types of MSPs: national marae moana spatial plan and island marine spatial plans. To improve clarity and understanding, this paper proposes that these names are changed to offshore MSP (OMSP) and inshore MSP (IMSP).

The Act defines the OMSP planning area as being 12 nautical miles (nm) from the baseline to the 200 nm mark of the Exclusive Economic Zone (EEZ). There isn't a specific legal definition of the geographic extent of IMSPs, however, it can be inferred from the Act that they cover internal waters (where it exists), and the territorial sea (from the baseline out to the 12 nm mark).

Section 24 of the Act establishes a "marine protected area" (MPA) of 50 nm around all 15 islands. Mining and large-scale fishing are prohibited in these areas. Establishment of these areas has profound implications for preparation of the OMSP and IMSPs.

Analysis of this section of the Act has identified four important issues that require resolution:

- **Terminology:** use of the naming *marine protected area* is the cause of considerable confusion amongst agencies and stakeholders. Another source of misunderstanding is because Section 24 areas and the Island Protection Zone (provided for under Section 23) are effectively synonymous – their stated purpose is identical. This situation of two 'zones' with the same purpose only adds to the confusion that exists.

A simple change to terminology is proposed: to rename both the Section 24 "Marine Protected Areas" and "Island Protection Zone" as "Marine Conservation Zone" and consider this as one zone with the same purpose.

- **Status:** although not identified in the Act as a zone *per se*, areas established by Section 24 are a zone: it is just that they have been established under the Act rather than identified through a MSP process as will be the case for other zones. These areas are a zone - with statutory protections - that occupy the territorial seas (to 12 nm) and part of the OMSP (between 12 - 50 nm). The paper clarifies this situation.

- **Geographic extent of Section 24 areas:** the wording in the Act creates legal and planning uncertainty around the precise geographic extent of these areas. This policy paper interprets the Act such that lagoons and any waters between high water mark and reef edges (ie. internal waters) are **not** included in the Section 24 areas. This means internal waters could, in theory, be subject to mining and/or large-scale commercial fishing (although in practice this is highly unlikely). This may have been an oversight or error during the legislative drafting process. Changes to the wording in the Act are proposed to clarify the geographic extent of Section 24 areas and address these issues.
- **Use of Marae Moana zones within Section 24 areas:** analysis of the Act has identified that Marae Moana zones are only to be used in the OMSP, that zones cannot be used in the inshore environment (internal waters and territorial seas). This provision has an important bearing upon the overall IMSP process and how the process is communicated to stakeholders, the end product and how it might be used, and the associated benefits for marine conservation and resource management. Communication and consultation undertaken as part of IMSP processes should make it very clear that (a) the Marine Conservation Zone (Section 24 MPAs) already exists across all IMSP areas, and (b) other Marae Moana zones cannot be used.

Zoning scheme design and definitions

The Act establishes a system of six zones, each with a stated purpose, that are to be applied in the OMSP. This policy paper assesses the existing zoning system and finds that there are important gaps and shortfalls, and areas that require clarification. Recommendations for improvement include:

- Refinement of zone names and descriptions so that purpose and intended use is better defined.
- Inclusion of additional zones so that the full range of values and intended uses of the Marae Moana are recognised and allowed for.
- Rationalisation and redesign of the overall zoning scheme so there is a clearer distinction between individual zones.
- Clarification of what resource use and other activities are permitted in each zone.

This policy paper considers that there is a need for two **new zones**. It proposes the use of Regulations to create a Seabed Mining Zone. The objective of this zone would be to set aside areas that are most viable and suitable for seabed mining activities. However, inclusion of an area in a Seabed Mining Zone would still require a range of other government approvals and permissions before mining could proceed.

This paper also proposes creation of a Preservation Zone, a very highly protected zone set aside for conservation purposes and where scientific reference and research can be undertaken in relatively undisturbed areas.

Rationalisation and refinements to existing zones are also proposed to simplify and strengthen the overall system as follows:

- The Restricted Commercial Fishing Zone, Seabed Minerals Activity Buffer Zone and Ocean Habitat Preservation Zone are removed from the zoning scheme.
- The Island Protection Zone is renamed as Marine Conservation Zone to better describe its purpose.
- The National Marine Park Zone is redefined. This is the only very highly protected, 'no take' zone in the scheme, however, the current definition under the Act means that the zone could rarely if ever be applied in practice. This is a significant deficiency. Inability to use the zone would mean that there were not any strictly protected no-take areas in place; extractive resource use in one form or another would be permitted across the entire Marae Moana.
- Although potentially allowable under the Act, the paper proposes that vertical zoning through the water column is not used due to evidence of strong linkages between benthic and pelagic

components of the ecosystem and the considerable difficulty of effective compliance and enforcement.

Refined zoning scheme

The policy paper presents a **revised zoning scheme** as follows:

| | Zone # | Marae Moana zone name | Status under Act | Marae Moana zone description | IUCN category |
|---------------------------|--------|---------------------------|-----------------------------|--|---------------|
| Resource extraction zones | 1. | Seabed Mining Zone | New | Provide for seabed minerals activities where consistent with the primary purpose of the Act; apart from when zone areas are being actively mined, a range of other ecologically sustainable uses would generally be allowed. | NA |
| | 2. | General Use Zone | Existing | Provide for the protection of pelagic and benthic habitats of the Marae Moana, while allowing a range of ecologically sustainable uses [(Section 23(1a)]. | NA |
| | 3. | Marine Conservation Zone | Existing; name change | Protect the pelagic, benthic, coral reef, coastal, and lagoon habitats of the Marae Moana and, accordingly, all seabed minerals activities and large-scale commercial fishing in the area are prohibited, but other ecologically sustainable uses are permitted (Section 23(1)(d) and Section 24). | IV |
| No-take zones | 4. | National Marine Park Zone | Existing; definition change | Provide for the strict preservation of the natural integrity and ecological values of relatively large, representative habitats and areas of high value for biodiversity conservation of the Marae Moana [(Section 23(1f)]. | II |
| | 5. | Preservation Zone | New | Provide for (a) the protection of the natural integrity and values of discrete areas of the marae moana, free from extractive and visitor activities, and where consistent with (a); (b) scientific research to be undertaken in relatively undisturbed areas. | Ia |

This paper builds on earlier work and presents a **draft zoning and activity guide** that specifies permitted and prohibited activities (uses) in each zone. This guide is an essential part of the MSP Regulations and requires further stakeholder input.

Other issues

This policy paper makes recommendations about the **legal status of MSPs and zones**. It proposes that specified zones in the OMSP would be given statutory protection and IMSPs would be

government policy. This is a nuanced approach and would give greater certainty to resource use industries (mining and commercial fishing) that operate in the offshore environment.

The paper proposes that the following zones as established through the OMSP process are categorised as marine protected areas (MPAs) under Section 25 of the Act and be given legal status:

- Marine Conservation Zone
- National Marine Park Zone
- Preservation Zone.

The Seabed Mining Zone and General Use Zone would not be categorised as MPAs and therefore are not proposed for statutory protection.

The paper describes the legislative basis for development of **procedures for the preparation, evaluation and review of MSPs.**

The paper makes recommendations about the processes for **legislative development.** It highlights where the Act is explicit and how it might be used for development of Regulations that will improve the efficacy of the MSP process. Where the statutory basis is less clear, advice should be sought from Crown Law Office about what changes can be covered through development of Regulations and what will require change to the Act. The paper provides the basis for development of drafting instructions for (a) preparation of MSP Regulations, and (b) amendments to the Act. The steps required to develop and finalise regulations and amendments to the Act are outlined.

Other regulatory provisions and policy projects that have important bearing upon MSP are identified. Of particular importance are Sections 27-29 of the Act that requires the development of a schedule of marine-based activities. However, the Act is complex and circuitous and open to interpretation that should be considered through formal legal opinion.

The paper also highlights the importance of other projects – the Protected Areas Management Policy (PAMP) and Protected Areas Classification System (PACS) – and their close relationship to MSP.

Summary of recommendations

The recommendations made throughout this policy paper are listed below:

- Recommendation #1: Rename national marae moana spatial plan (NMMSPP) as offshore marine spatial plan (OMSP).
- Recommendation #2: Rename island marine spatial plan (IMSP) as inshore marine spatial plan (IMSP).
- Recommendation #3: The planning area for the Offshore Marine Spatial Plan (OMSP) is 12 nm from the baseline to the 200nm mark of the EEZ.
- Recommendation #4: Although there is some discrepancy in the Act, Suvarrow is treated the same as other islands and is covered by an Island Marine Spatial Plan (IMSP) and not the OMSP.
- Recommendation #5: the planning area for all Inshore Marine Spatial Plans (IMSPs) are internal waters (if any), and territorial seas from the baseline out to the 12 nm mark.
- Recommendation #6: Throughout Section 24 of the Act replace terminology of “Marine Protected Area” with “Marine Conservation Zone”.
- Recommendation #7: Amend the wording of Section 24 of the Act as follows:

24 Marine conservation zone established

(1) A marine conservation zone (~~measured from each coastline and~~ as shown in Schedule 1) is established around all islands of the Cook Islands as follows—

(a) the outer limit of the area is a line measured seaward from the baseline of the territorial sea described in section 5 of the Territorial Sea and Exclusive Economic Zone Act 1977, every point of which is 50 nautical miles from the nearest point of the baseline:

(c) the area includes the territorial sea described in section 3 and internal waters described in section 4 of that Act:

(d) that part of the area lying outside the internal waters and territorial sea is part of the exclusive economic zone described in section 8 of that Act.
- Recommendation #8: Communication and consultation undertaken as part of IMSP processes should make it very clear that (a) the Marine Conservation Zone already exists across all IMSP areas, and (b) other Marae Moana zones cannot be used.
- Recommendation #9: MSP Regulations are used to create a Seabed Mining Zone.
- Recommendation #10: Until such time as seabed mining activity is approved and operational, other marine-based activities such as commercial fishing and tourism are permitted to occur within a Seabed Mining Zone area.
- Recommendation #11: As per Section 23(2) of the Act use the MSP Regulations to create a Preservation Zone with the following objective and description:

Provide for

(a) the protection of the natural integrity and values of discrete areas of the Marae Moana, free from extractive and visitor activities, and

(b) where consistent with (a), scientific research to be undertaken in relatively undisturbed areas.
- Recommendation #12: The Restricted Commercial Fishing Zone is removed from the zoning scheme.
- Recommendation #13: The Seabed Minerals Activity Buffer Zone is removed from the zoning scheme.
- Recommendation #14: Rename the Island Protection Zone as Marine Conservation Zone to better describe its purpose.

- Recommendation #15: The Ocean Habitat Preservation Zone is removed from the zoning scheme.
- Recommendation #16: Change the description of the national marine park zone as follows: ... provide for the strict preservation of the natural integrity and ecological values of representative, relatively large ~~specific coral reef, coastal, and lagoon habitats~~ areas of high value for biodiversity conservation of the Marae Moana. ~~that are remote from any permanent human settlement and are not within the jurisdiction of any Island Government~~
- Recommendation #17: Vertical zoning through the water column of the Marae Moana is not used due to evidence of strong linkages between benthic and pelagic components of the ecosystem and the considerable difficulty of effective compliance and enforcement.
- Recommendation #18: The amended zoning scheme as outlined in Section 5.1 and Table 3 is approved.
- Recommendation #19: The draft zoning and activity use guide in Table 4 is reviewed and further developed at a stakeholder workshop.
- Recommendation #20: IMSPs would have status of government policy.
- Recommendation #21: The Marine Conservation Zone, National Marine Park Zone, and Preservation Zone, as identified in the OMSP, are established by Order in Executive Council as “further marine protected areas” (as provided for under Section 25 of the Act).
- Recommendation #22: Develop procedures for preparation, evaluation and review of MSPs and incorporate into the MSP Regulations; preliminary work already completed should form the basis of procedures.
- Recommendation #23: With reference to Table 5 of this Policy Paper, the provisions of Section 35 of the Act be used to the maximum extent possible to develop Regulations that will improve the efficacy of the MSP process.
- Recommendation #24: With reference to Table 6 of this policy paper, advice is sought from Crown Law Office about what changes can be covered through development of Regulations and what might require change to the Act.
- Recommendation #25: The process for further legislative development as outlined in Section 8.2 is adopted.
- Recommendation #26: Crown Law Office provides legal opinion on the interpretation of Section 27(4) of the Act (regarding schedule of marine-based activities).
- Recommendation #27: Once the draft OMSP is in place and it is clearer how the zoning scheme will be applied, TAG should develop a schedule of marine-based activities as per Section 27 of the Act.

1. Introduction

1.1 Project outline

The Cook Islands Ridge to Reef (R2R) project is funded by the Global Environment Facility (GEF) in partnership with the UNDP and Cook Islands Government. The project aims to enhance the capacity of the Cook Islands to effectively manage its protected areas and sustainably manage its productive landscapes at local scales while considering food security and livelihoods. This includes the operationalisation of the Marae Moana and the establishment and strengthening of various forms of protected and locally managed areas including protected natural areas, community conservation areas, and ra'ui sites.

In so doing, the project will support the Cook Islands in maintaining traditional resource management and conservation systems and approaches. This includes a lead role for traditional and local leaders, and the local communities they represent, in the identification, declaration and management of protected areas, while also integrating these traditional systems into a formal legal and institutional system of protected areas.

The project will support the Government in tailoring policy, regulatory and institutional frameworks to suit the specific characteristics of the Cook Islands and of the Marae Moana, recognising that protection and sustainable use will need to be zoned and planned carefully, and that tenure over most land areas is vested in local communities through traditional tenure systems.

The project has been designed to engineer a paradigm shift in the management of marine and terrestrial protected areas - from a site centric approach to a holistic 'ridge to reef' management approach, whereby tourism and agriculture activities in production landscapes adjacent to marine and terrestrial protected areas will be managed to reduce threats to biodiversity.

The project started in July 2015 and was originally intended to be completed in July 2019. However, approval was provided for a no-cost project extension to 6 June 2021.

The Cook Islands National Environment Service (NES) is the lead executing agency for R2R, responsible for project management, coordination and collaboration with implementation partners.

The project has seven outputs:

- Output 1.1: Strengthened legal / regulatory and policy frameworks for protected areas
- Output 1.2: Expanded and strengthened management systems for protected areas
- Output 1.3: Strengthened institutional coordination and capacities at the national and local levels for the participatory management of protected areas
- Output 1.4: Financial sustainability framework developed for system of protected areas
- Output 2.1: Ridge to Reef approaches integrated into land use and development planning
- Output 2.2: Biodiversity conservation mainstreamed into agriculture sector
- Output 2.3: Biodiversity conservation mainstreamed into tourism sector.

This policy paper contributes to Outputs 1.1 and 1.2.

1.2 Aims

This policy paper aims to:

- Assess the *Marae Moana Act 2017* and identify implications, issues and constraints that the legislation may pose to the effective development of marine spatial plans (MSPs).
- Identify and analyse a range of important policy issues that should be addressed before the MSP process formally begins
- Provide the policy basis for technical and policy advice by the Marae Moana Technical Advisory Group (TAG), decision making by the Marae Moana Council (MMC), and development of MSP Regulations and changes to the Act.

1.3 Structure of this document

This policy paper is structured as follows:

Section 1 Introduction: project outline and identification of policy aims.

Section 2 Legislative and policy context: overview of the main legislative provisions and policy setting for marine spatial planning.

Section 3 General marine spatial planning provisions: identification of policy issues and proposed responses regarding naming and geographic extent of MSPs, and issues with Section 24 marine protected areas.

Section 4 Zoning scheme design and definitions: assessment of the existing zoning system and priority areas for improvement; proposals for new zones and refinements to existing zones; and alignment of IUCN protected area categories with Marae Moana zones.

Section 5 Towards a refined zoning scheme for Marae Moana: presentation of a consolidated and integrated zoning system and associated zoning and activity use guide that outlines permitted and prohibited activities (uses) in each zone.

Section 6 Legal status of MSPs and zones: proposed approaches to give legal or government policy status to MSPs.

Section 7 Procedures for preparation, evaluation and review of MSPs: legislative basis for preparation, evaluation and review of MSPs.

Section 8 Marine Spatial Planning Regulations: use of the Act to develop MSP Regulations and steps required to develop and finalise regulations and amendments to the Act.

Section 9 Further regulatory and policy reform: identification of other provisions of the Act and other policy projects that have important bearing upon MSP.

Recommendations are made in bold, highlighted text.

2. Legislative and policy context

The *Marae Moana Act 2017* (the Act) established the Marae Moana within the waters of the Cook Islands and provides for its integrated management. Processes to develop the legislation are described by Anon. (2014), Maki (2014) and Rose (2014).

The Act provides for a system of marine spatial planning (MSP), including zoning plans and management measures for marine-based activities. The legislative provisions that relate to MSP have been extracted from the Act and are described in Annex 1.

Part 3 of the Act covers policy and spatial planning and specifies that regulations must be developed and in place to guide development of a National Marae Moana Spatial Plan (NMMSP) [Section 22(5)] and Island Marine Spatial Plans (IMSPs) [Section 26(6)].

At their January 2018 meeting the Marae Moana Council directed the TAG to complete MSP procedures (by June 2018) and to prepare an IMSP for Suvarrow Island (by December 2019). These deadlines have not been met, however initial work has been undertaken and dialogue initiated between the previous Director of Marae Moana Coordination Office (MMCO) and the Crown Law Office (CLO) about MSP procedures.

Development of MSPs was given a renewed emphasis and priority in 2020, with financial, technical and operational support being provided through the R2R Project (Twyford 2020a). Initial work is underway to collect, consolidate and analyse available information as the basis for formal spatial planning. Given the Ridge to Reef Project closes in mid-2021 and financial support for MSP has now largely ceased, it is suggested the Cook Islands Government should seek support for MSPs from potential donors and partners.

The Act establishes important principles and processes for MSP; it also has important implications and creates some issues that policy-makers should be aware of including important gaps and deficiencies in the Act that will negatively impact on MSP outcomes unless addressed. These issues are addressed later in this paper.

This policy paper advocates that these issues and gaps are addressed before the first MSP process formally begins. This is particularly important because the MSPs will be the first for Marae Moana, they are the primary planning instrument under the Act, and will have legacy impacts for at least the next 10 years. It is critically important that the legislative and regulatory basis for MSPs is progressive and sound at the outset: any deficiencies will remain in the system for the medium to long term.

This MSP policy paper is intended to inform the next stage of development of MSPs. Subject to review and advice of TAG, and decisions by the Council, the paper is proposed to provide the policy basis for drafting of MSP Regulations and amendments to the Act.

Issues, implications, policy options and recommendations are identified in Sections 3-4.

3. General marine spatial planning provisions

This section identifies policy issues and proposed responses under three areas:

- Naming of MSPs (Section 3.1)
- Geographic extent of MSPs (Section 3.2)
- Issues with Section 24 marine protected areas (Section 3.3).

3.1 Naming of MSPs

Sections 4 and 21 of the Act provide for two types of marine spatial plans: national marae moana spatial plan and island marine spatial plans.

For the national marae moana spatial plan (NMMSP), the wording “national” is confusing as it suggests that the MSP applies to the entire marine estate of the Cook Islands, when that is not the case - the intended area covered by the NMMSP is the Exclusive Economic Zone (EEZ) (ie. 12 nautical miles (nm) from the baseline to the 200nm line) and continental shelf.

Island marine spatial plans (IMSPs) are to cover inshore waters out to 12nm (see Section 3.2.2 for discussion about the geographic extent of IMSPs). Use of the word “island” is confusing as it suggests that the plans apply to islands (terrestrial areas) when that is not the case.

Having clear and unambiguous names of MSP planning areas is an essential prerequisite to an effective MSP process. This policy paper proposes changes to the names of MSPs to improve clarity and understanding¹.

Recommendation #1: Rename national Marae Moana spatial plan (NMMSP) as offshore marine spatial plan (OMSP).

Recommendation #2: Rename island marine spatial plan (IMSP) as inshore marine spatial plan (IMSP).

3.2 Geographic extent of MSPs

The geographic extent of MSPs is defined in the Marae Moana Act and it defers to definitions in the Maritime Zones Act 2018 (which replaced the previous Territorial Sea and EEZ Act 1977).

¹ Hereafter in this paper, the terms and acronyms of offshore MSP (OMSP) and inshore MSP (IMSP) are used, except where directly referencing the Act: in those cases, the exact wording in the Act is used.

3.2.1 Offshore marine spatial plan

Sections 22(1) and 21(2) of the Marae Moana Act define the geographic extent of the OMSP as follows (emphasis added):

(1) The Technical Advisory Group must, as soon as practicable after this Act comes into force, begin preparing for approval by the Council the national marae moana spatial plan for the entire exclusive economic zone and continental shelf.

(2) The national marae moana spatial plan must not include any area within the internal waters or the territorial sea, except where those internal waters or territorial sea fall outside the jurisdiction of any Island Government and are not internal waters or territorial sea of the island of Rarotonga.

Section 4 of the Marae Moana Act states that the key terms in the above - “exclusive economic zone”, “continental shelf”, “internal waters” and “territorial sea” – have the same meaning as in the Continental Shelf Act 1964 and Territorial Sea and EEZ Act 1977. Both these Acts have been repealed and replaced by the Maritime Zones Act 2018; full legal definitions are in Annex 1.

Another important term is ‘baseline’; it is defined in the Maritime Zones Act 2018 as follows:

6. Baseline of territorial sea - *The baseline from which the breadth of the territorial sea is measured is—*

(a) the low-water mark along the coast of the Cook Islands; or

(b) where there is a coral reef along any part of the coast of the Cook Islands, the low-water mark along the outer edge of the coral reef.

In summary, interpretation of the definitions indicates that the planning area for the OMSP is 12 nm from the baseline to the 200nm mark of the EEZ (Figure 1).

The situation regarding the continental shelf is confusing. Initial GIS mapping suggest that most continental shelf areas exist in close proximity to islands. There are also two small areas in the EEZ, west of Rarotonga and south of Palmerston Island. There does not appear to be any shelf outside the EEZ.

There are no policy, planning implications or practical implications arising from this situation. The OMSP would cover the two continental shelf areas mapped in the EEZ: this is consistent with Section 22(1) of the Act. However, some areas of continental shelf also occur within the territorial seas and surrounding some islands: these areas of continental shelf will be covered by IMSPs and not within the OMSP – this represents a minor technical inconsistency with Section 22(1).

The definition of the OMSP also refers to jurisdictions under the Island Government Act 2012-13. According to this Act, all inhabited islands of the country are under the jurisdiction of island governments. Therefore, as per Section 22(2) of the Marae Moana Act, the OMSP excludes the internal waters and territorial seas of these outer islands and Rarotonga.

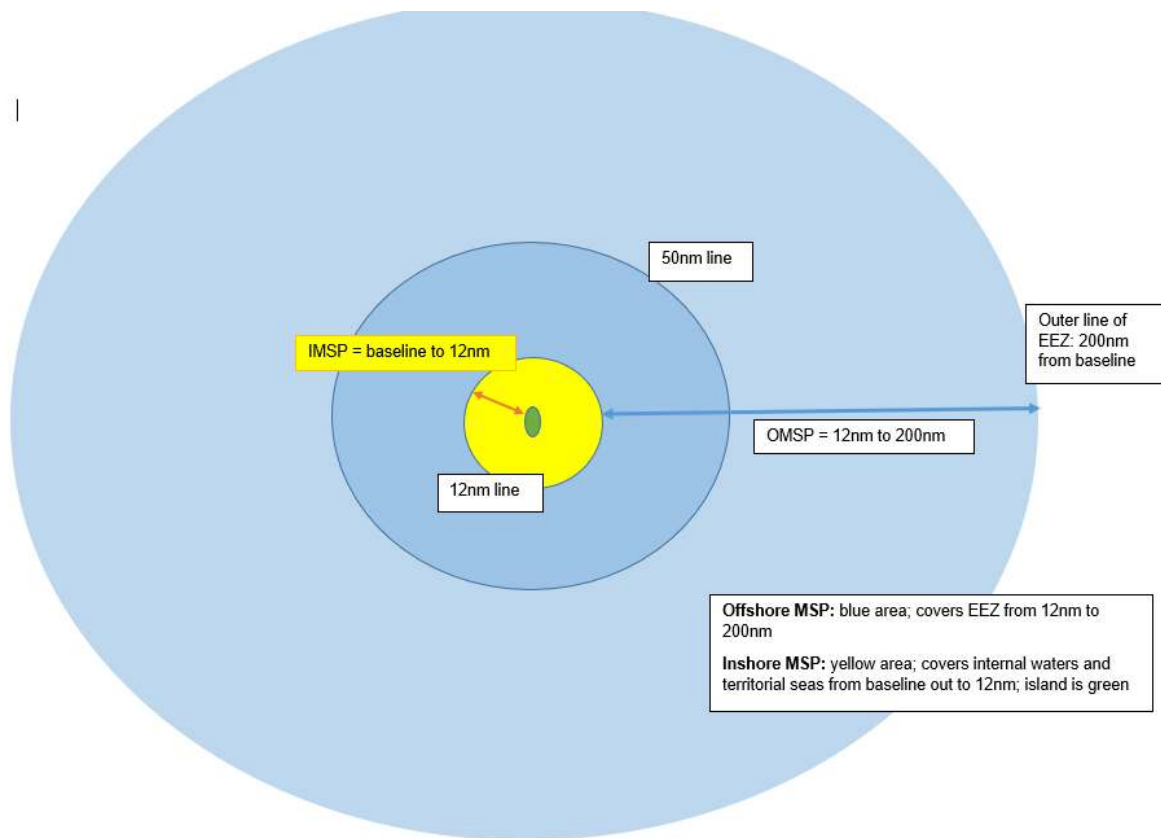
The situation with regards Suwarrow Island is different because it is not under the jurisdiction of any Island Government. Given this, the OMSP process could in theory include Suwarrow. Note however that Section 15(f) of the Marae Moana Act is explicit as it states:

The Technical Advisory Group must—

(f) prepare an island marine spatial plan for Suwarrow, and evaluate, review, and update the plan periodically.

For the purposes of this policy paper, Suwarrow is treated the same as other islands and is proposed to be covered by an IMSP and not the OMSP.

Figure 1. Geographic extent of marine spatial plans (MSPs)



Recommendation #3: The planning area for the Offshore Marine Spatial Plan (OMSP) is 12 nm from the baseline to the 200nm mark of the EEZ.

Recommendation #4: Although there is some discrepancy in the Act, Suvarrow is treated the same as other islands and is covered by an Island Marine Spatial Plan (IMSP) and not the OMSP.

3.2.2 Inshore marine spatial plans

There isn't a specific definition in the Marae Moana Act of the geographic extent of IMSPs, however, Section 26 provides guidance.

(2) On the request of a community group on Rarotonga, the House of Ariki, or the Koutu Nui, the Technical Advisory Group must assist them to prepare for approval by the Council an island marine spatial plan for affected internal waters and territorial sea areas.

(3) On the request of an Island Government, the Technical Advisory Group must assist that Island Government to prepare for approval by the Council an island marine spatial plan for affected internal waters and territorial sea areas. (emphasis added by author)

It can be inferred from Section 26(2) and Section 26(3) that IMSPs for all islands - apart from Suvarrow (see explanation below) - are to cover "affected internal waters and territorial sea areas" (refer Annex 1 for legal definitions).

For practical purposes the geographic extent of IMSPs can be considered to be (a) any internal waters and (b) from the baseline out to the 12 nm mark (Figure 1).

In the case of Suvarrow Island, Section 26(1) of the Act makes no reference to internal waters and territorial seas and leaves it open:

26(1) The Technical Advisory Group may, on its own initiative, prepare for approval by the Council an island spatial plan for Suvarrow.

As discussed in Section 3.2.1, it is proposed that an IMSP is prepared for Suvarrow that covers all internal waters and from the baseline out to the 12 nm mark (ie. the same as other islands).

Recommendation #5: the planning area for all Inshore Marine Spatial Plans (IMSPs) are internal waters (if any), and territorial seas from the baseline out to the 12 nm mark.

3.3 Section 24 marine protected areas

3.3.1 Legislative background

Section 24 of the Marae Moana Act establishes a “marine protected area” (MPA) of 50 nm around all 15 islands of the Cook Islands (see Annex 2).

The Act states (emphasis added):

Section 24 - Marine protected area established

- (1) A marine protected area of 50 nautical miles (measured from each coastline and as shown in Schedule 1) is established around all islands of the Cook Islands as follows—
- (a) the outer limit of the area is a line measured seaward from the baseline of the territorial sea described in section 5 of the Territorial Sea and Exclusive Economic Zone Act 1977, every point of which is 50 nautical miles from the nearest point of the baseline:
 - (b) the area includes the territorial sea described in section 3 of that Act:
 - (c) that part of the area lying outside the territorial sea is part of the exclusive economic zone described in section 8 of that Act.

The purpose of the marine protected area is:

- (2) ... to protect the pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana and, accordingly, all seabed minerals activities and large-scale commercial fishing in the area are prohibited, but other ecologically sustainable uses are permitted.

Section 24 has profound implications for preparation of the OMSP and IMSPs. In essence the MPA is a zone - with statutory protections - that occupies the territorial seas (to 12 nm) and part of the OMSP (between 12 - 50 nm); internal waters are excluded (although see Section 3.3.3 for recommendations on this issue).

Analysis of this section of the Act has identified three important issues that require resolution:

- Use of the name *marine protected area*
- Geographic extent of Section 24 areas
- Use of Marae Moana zones within Section 24 areas.

These issues are considered separately below.

3.3.2 Naming and status

Use of “marine protected area” (MPA) terminology in this section of the Act is the cause of considerable confusion amongst agencies and stakeholders, and this confusion can only be expected to increase in the community once MSP processes begin (see Twyford 2021 for discussion of terminology issues associated with protected areas).

Part of the confusion relates to the establishment of these actual areas while at the same time establishing a process for establishment of zones through the offshore MSP process².

Although not identified in the Act as a zone *per se*, for all intents and purposes, areas established by Section 24 are a zone: it is just that they have been established under the Act rather than identified through a MSP process as will be the case for other zones.

Another source of potential misunderstanding is because Section 24 areas and the Island Protection Zone [Section 23(1)(d)] are effectively synonymous – the stated purpose is identical as follows:

- Island Protection Zone: Protect the pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana and, accordingly, all seabed minerals activities and large-scale commercial fishing in the area are prohibited, but other ecologically sustainable uses are permitted [(Section 23(1)(d)].
- Marine protected area: ... protect the pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana and, accordingly, all seabed minerals activities and large-scale commercial fishing in the area are prohibited, but other ecologically sustainable uses are permitted [(Section 24(2)].

This situation of two ‘zones’ with the same objectives only adds to the confusion that exists.

A simple change to terminology is proposed: throughout Section 24 of the Act, replace “Marine Protected Area” with “Marine Conservation Zone”. In all other respects – purpose and description, and statutory protections established in Section 24 – there would be no changes to wording of the Act.

This simple change would have multiple benefits:

- Discontinuation of the term “MPA” would reduce already widespread confusion and misunderstanding that exists about MPAs.
- Enhance the zoning scheme design.
- Clearly demonstrate that each Section 24 area forms part of the overall Marae Moana zoning scheme.

Recommendation #6: Throughout Section 24 of the Act replace terminology of “Marine Protected Area” with “Marine Conservation Zone”³.

3.3.3 Geographic extent

The wording used in Section 24(1) of the Act creates legal and planning uncertainty around the precise geographic extent of these areas. Specifically, the wording “measured from each coastline” and “measured seaward” creates uncertainty because the word *coastline* is not defined. Indeed, the Maritime Zones Act 2018 uses the word *baseline* as basis for key definitions as follows.

6. Baseline of territorial sea

The baseline from which the breadth of the territorial sea is measured is—

- (a) the low-water mark along the coast of the Cook Islands; or
- (b) where there is a coral reef along any part of the coast of the Cook Islands, the low-water mark along the outer edge of the coral reef.

7. Internal waters

The internal waters comprise any areas of the sea that are on the landward side of the baseline of the territorial sea of the Cook Islands.

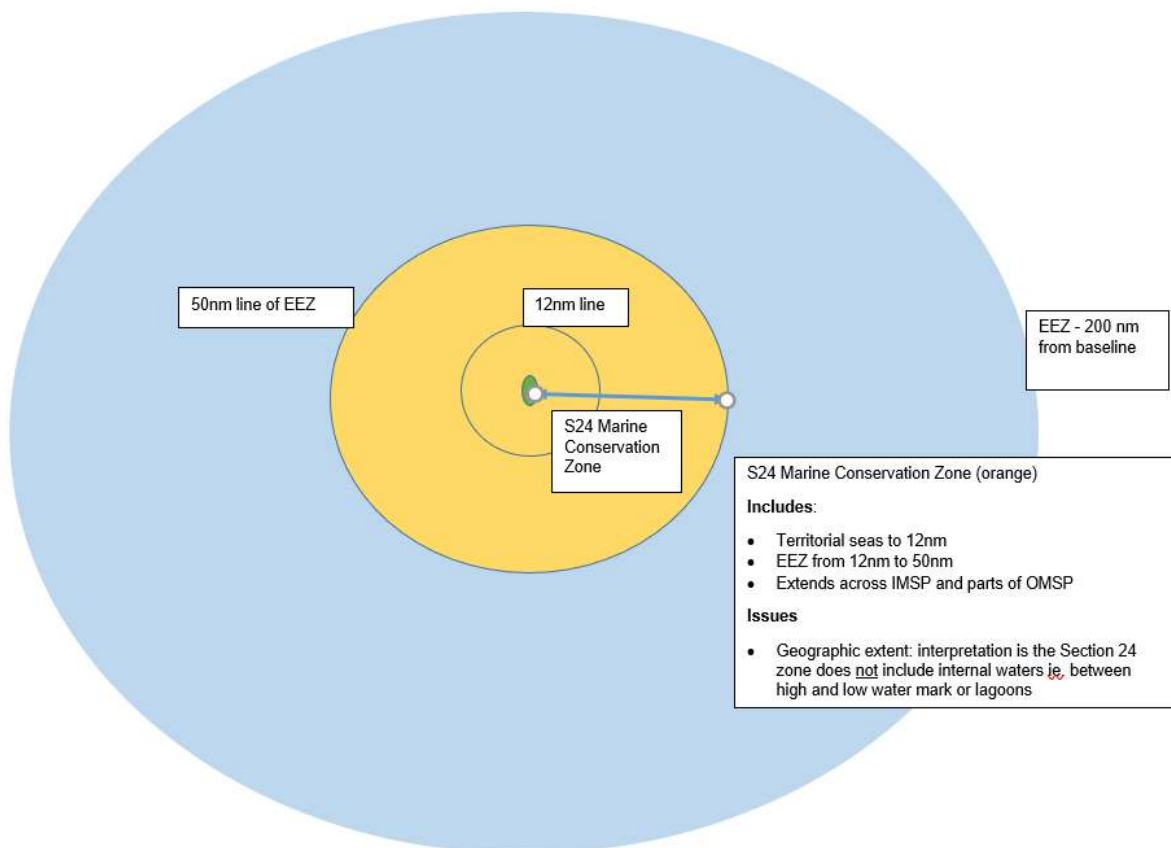
² Section 23 of the Act describes a system of zones to be used in the Offshore MSP process; detailed discussion about zones is provided in Section 4 of this policy paper.

³ Hereafter in this paper, the term Marine Conservation Zone is used instead of Marine Protected Area (in context of Section 24 of the Act) except where directly referencing the Act: in those cases, the exact wording in the Act is used.

In contrast, use of the terminology *measured from each coastline* and *measured seaward* plus specific reference only to *territorial sea* [Section 24(1)(a, b) of Marae Moana Act] means that Section 24 areas can only be interpreted as **exclusive** of internal waters (ie. lagoons and any waters between high water mark and reef edges are not included in the Section 24 areas). This is despite the stated purpose of Section 24 areas being *to protect coastal, and lagoon habitats*. This purpose highlights that internal waters were to be included in these Section 24 areas; the fact that they appear to be excluded seems an oversight or perhaps an error during the legislative drafting process.

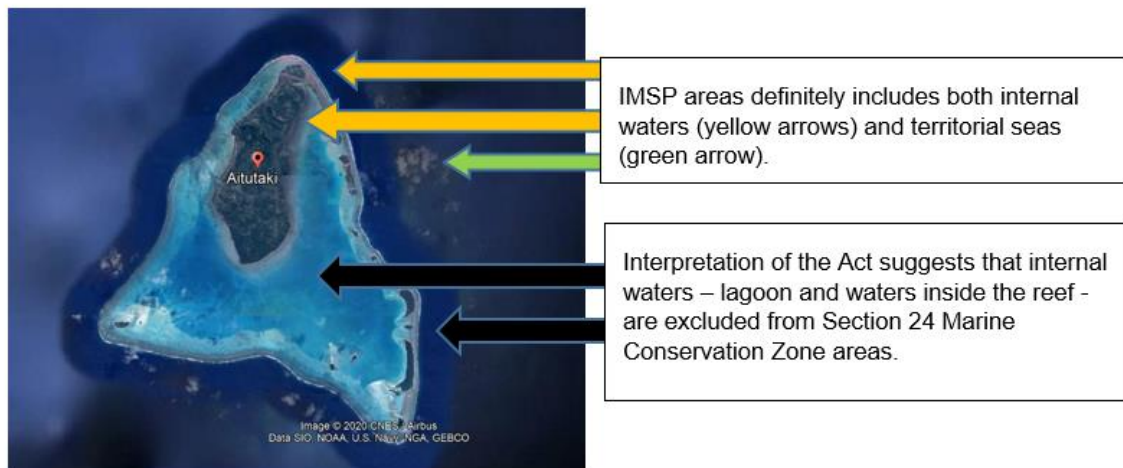
Figure 2 illustrates the geographic extent of Section 24 areas as per the Marae Moana Act and as interpreted by the author.

Figure 2. Geographic extent of Section 24 areas



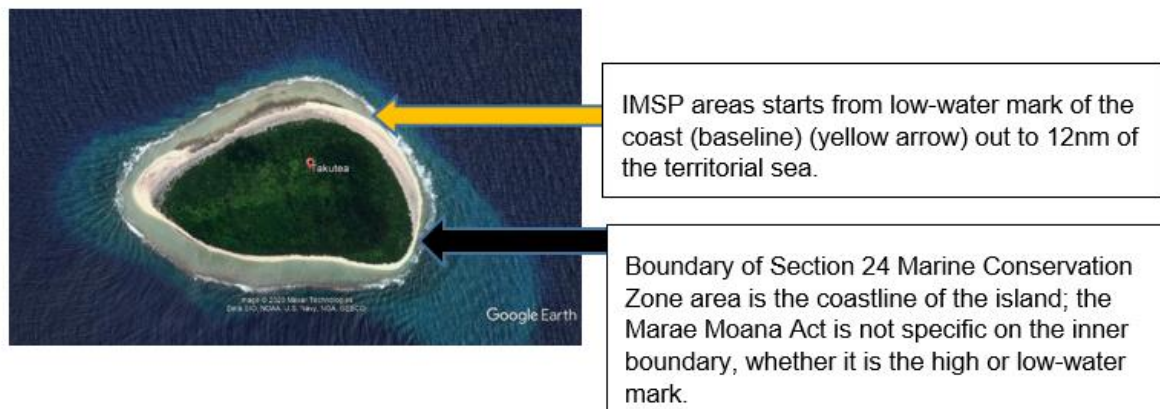
The geographic extent of Section 24 areas for islands that have an internal lagoon and fringing coral reefs (such as Aitutaki) and atoll islands without internal waters (no lagoon or fringing reefs) (such as Takutea) are illustrated in Figures 3 and 4 respectively.

Figure 3. Boundary of IMSP planning area and Marine Conservation Zone, Aitutaki Island



For islands such as Aitutaki it appears that internal waters – the lagoon and waters from the low water mark to the outer edge of the fringing reef – are excluded from the Section 24 Marine Conservation Zone.

Figure 4. Boundary of IMSP planning area and Marine Conservation Zone, Takutea Island



For those islands where there are no internal waters (eg. cays such as Takutea), the *baseline* is the low-water mark of the coast. This means that the territorial seas extend from the low-water mark (baseline) to the 12nm mark. In this instance the inner boundary of the IMSP is the baseline (low-water mark). In contrast, the inner boundary of the Section 24 Marine Conservation Zone is the 'coastline' which is not defined by the Marae Moana Act - whether high or low-water mark – hence the uncertainty. Figure 4 shows the situation.

In summary, it is clear that the planning area for IMSPs includes internal waters (internal lagoons, inshore waters from low-water mark to the outer edge of the coral reef). However, the author's interpretation of the Act suggests that these internal waters are not included in the Section 24 Marine Conservation Zone. This means these areas potentially could be subject to mining and/or large-scale commercial fishing (although in practice this is highly unlikely). This may have been an oversight or error during the legislative drafting process and represents a legal loophole.

Changes to the wording in the Act are proposed to clarify the geographic extent of Section 24 areas and address the issues raised above.

Recommendation #7: Amend the wording of Section 24 of the Act as follows:

24 Marine conservation zone established

(1) A marine conservation zone (~~measured from each coastline and~~ as shown in Schedule 1) is established around all islands of the Cook Islands as follows—

(a) the outer limit of the area is a line measured seaward from the baseline of the territorial sea described in section 5 of the Territorial Sea and Exclusive Economic Zone Act 1977, every point of which is 50 nautical miles from the nearest point of the baseline:

(c) the area includes the territorial sea described in section 3 and internal waters described in section 4 of that Act:

(d) that part of the area lying outside the internal waters and territorial sea is part of the exclusive economic zone described in section 8 of that Act.

3.3.4 Inshore zoning provisions

Analysis of Section 24 of the Act has identified that Marae Moana zones cannot be used in the inshore environment (internal waters and territorial seas). The Act is clear that zones are only to be used in the OMSP as follows (emphasis added):

22 National marae moana spatial plan

(3) The national marae moana spatial plan must include the zones specified in section 23 and provide appropriate measures to make the zones effective.

23 National marae moana zones

(1) The zones for the national marae moana spatial plan are—

(2) Regulations made under section 35 may create additional national marae moana spatial plan zones.

It is understood that this was a deliberate decision made during legal drafting in recognition that Section 24 areas were being established across inshore waters, and that such areas would put in place strong conservation measures (prohibition of mining and large-scale commercial fishing).

This provision is significant and consequential and has important bearing upon the overall IMSP process and in particular how the process is communicated to stakeholders, the end product and how it might be used, and the associated benefits for marine conservation and resource management.

In effect, it would mean that any IMSP could not put in place Marae Moana zones (those set in Section 23 and to be applied throughout the OMSP). It may be expected that some stakeholders and island communities might want “no take” zones (eg. a National Marine Park Zone) within an IMSP area. Currently, this would not be permissible under the Act and could not be an outcome of any IMSP process. This exclusion may call into question the utility and purpose of IMSPs if higher-level marine conservation measures cannot be put in place for inshore waters. Some stakeholders may consider that IMSPs are a ‘hollow’ process as the spatial planning process does not allow for protection of important inshore values or separation of conflicting uses.

This policy paper does not suggest that any changes to these legislative arrangements are required at the current time. However, communication and consultation undertaken as part of IMSP processes should make it very clear that (a) the Marine Conservation Zone (Section 24 MPAs) already exists across all IMSP areas, and (b) other Marae Moana zones cannot be used.

Despite the legislative provisions under the Act, this should not preclude use of other mechanisms such as ra'ui, ra'ui mutukore and other community-based approaches to protect biodiversity and manage natural resources in inshore waters, as long as such approaches are consistent with the Marae Moana Act and requirements under Section 24 (refer Twyford 2021 for discussion about this issue).

Recommendation #8: Communication and consultation undertaken as part of IMSP processes should make it very clear that (a) the Marine Conservation Zone already exists across all IMSP areas, and (b) other Marae Moana zones cannot be used.

4. Zoning scheme design and definitions

4.1 Assessment of existing zoning system

Section 23(1) of the Act establishes a system of six zones (each with a stated purpose, refer Annex 1) that are to be applied in the OMSP:

- (a) general use zone
- (b) restricted commercial fishing zone
- (c) seabed minerals activity buffer zone
- (d) island protection zone
- (e) ocean habitat preservation zone
- (f) national marine park zone.

The Act establishes a sound basis for zoning, however there are important gaps and shortfalls, and areas that require clarification. This is a complex area that requires careful analysis and well-informed decision making.

Application of zoning schemes in other jurisdictions - such as from other Pacific Island countries through the MACBIO project (eg. Tonga⁴) or from the Great Barrier Reef Marine Park (GBRMP) (eg. Day et al. 2019b & c) - provide rich learning opportunities for recently established areas like Marae Moana. Good practice design of marine zoning schemes typically emphasises that:

- Zone names should be clear, self-explanatory about objective, and short (described in 3-5 words, where possible).
- Zone names should avoid a focus on permitted or prohibited resource uses (for instance, avoid zones with names like “No fishing zone”).
- The objectives of each zone should be carefully defined, such that each zone can be clearly differentiated from another.
- The number of zones should be limited (4-5 zones is an optimal number).

The names and descriptions of Marae Moana zones were assessed as part of this policy paper, through the MSP workshop held in Rarotonga in August 2019 and through review by the TAG in May 2020. Suggestions for improvement included:

- Refinement of zone names and descriptions so that purpose and intended use is better defined.
- Inclusion of additional zones so that the full range of values and intended uses of the Marae Moana are recognised and allowed for.
- Rationalisation and redesign of the overall zoning scheme so there is a clearer distinction between individual zones. At present, there is an unnecessary and confusing level of overlap between zones, and inadequate differentiation and distinction.

⁴ Marine and Coastal Biodiversity Management in Pacific Island Countries (MACBIO) project; refer <http://macbio-pacific.info/tonga/>

- Clarification of what resource use and other activities are permitted in each zone. The current lack of clarity will significantly compromise MSP and make it very difficult for stakeholders and MSP planners to properly select and use zones to best effect. The August 2019 workshop commenced development of a zoning and activity guide for inclusion in the MSP Regulations; this, and the outcomes of the May 2020 TAG workshop, provides a basis for further development, ideally through a full workshop of TAG members and other selected stakeholders.

In the following sections, policy options to address these issues are identified and assessed.

4.2 Proposed new zones

Section 23(2) of the Act allows for Regulations to be made under Section 35 of the Act to “create additional NMMSP zones”. Section 16(g) allows TAG to “recommend to the Council amendments to be made to any legislation, including regulations”.

This policy paper considers that there is a need to use this section and for Regulations to create two new zones: a Seabed Mining Zone (Section 4.2.1 of this paper) and a Preservation Zone (Section 4.2.2); rationale follows.

4.2.1 Seabed Mining Zone

Under the existing zoning scheme, the Act is not explicit about where seabed mining would be permitted: there is no single zone that makes specific provision for seabed mining.

This policy paper interprets the Act as only allowing for mining in the General Use Zone. However, this is likely to be the zone that covers the largest geographic area in the OMSP⁵. It is expected that very large areas in the OMSP would be allocated to the General Use Zone and therefore by default set aside for potential seabed mining. However, it can also be expected that large parts of the General Use Zone would include areas where there is no intention to ever mine: either because the mineral resource is not located there, and/or the resource is not viable to be mined for geophysical, logistical, economic, social and/or environmental reasons.

The Act is somewhat more explicit when it comes to specifying where seabed mining is not permitted. The Seabed Mining Buffer Zone, Island Protection Zone and Section 24 areas all clearly prohibit seabed mining, and mining is presumed to be excluded from the National Marine Park Zone (discussed more below). However, zone descriptions for the Restricted Commercial Fishing Zone and Ocean Habitat Preservation Zone are ambiguous and open to interpretation as to whether or not mining is permitted. This ambiguity and lack of certainty will make planning extremely difficult.

This policy paper proposes that MSP Regulations (to be developed subsequent to this policy paper) be used to create an additional zone – Seabed Mining Zone - as per Section 23(2) of the Act. The objective of this zone would be to set aside areas that are most viable and suitable for seabed mining activities. However inclusion of an area in a seabed mining zone would not be an “as of right” activity: there are a range of other government approvals and permissions that would be required before mining could proceed.

Activities permitted in a Seabed Mining Zone (such as commercial and game fishing, tourism, research) needs consideration. There are likely to be an extended time delays between release of the first OMSP (and hence identification of Seabed Mining Zone areas) and the commencement of any mining operations (potentially 2025-30). Given this, it is likely that temporal arrangements could and should be used to good effect. This paper proposes that until such time as the mineral resource was actually explored and proven, and determined as economically, logistically and environmentally viable for extraction, approved by Government, and the mine operational, other uses such as commercial fishing and tourism operations should be permitted in a Seabed Mining Zone.

⁵ Early zoning plans in the GBRMP had a General Use Zone covering approximately 60% of the total marine park.

Recommendation #9: MSP Regulations are used to create a Seabed Mining Zone.

Recommendation #10: Until such time as seabed mining activity is approved and operational, other marine-based activities such as commercial fishing and tourism are permitted to occur within a Seabed Mining Zone area.

4.2.2 Preservation Zone

Under the existing zoning scheme there is no provision for a very highly protected zone set aside for conservation purposes and where scientific reference and research can be undertaken in relatively undisturbed areas. The Act states that the OMSP may have such an objective:

23(3)(d): The objectives of a national marae moana spatial plan may include— preserving some areas of the marae moana in a natural state, undisturbed except for the purposes of scientific research that cannot be undertaken elsewhere in the marae moana.

Establishment of a zone to put this objective into practice would strengthen the design of the zoning scheme and enact the intention of the Act.

Recommendation #11: As per Section 23(2) of the Act use the MSP Regulations to create a Preservation Zone with the following objective and description:

Provide for

- (a) the protection of the natural integrity and values of discrete areas of the Marae Moana, free from extractive and visitor activities, and**
- (b) where consistent with (a), scientific research to be undertaken in relatively undisturbed areas.**

4.3 Refinements to existing zones

Having clear and unambiguous zone names is an essential prerequisite to an effective MSP process and is especially important as a means of reducing confusion and misunderstandings amongst marine planners and stakeholders. This policy paper proposes changes to the names and descriptions of zones to improve clarity and understanding. These changes are proposed to be accommodated in the MSP Regulations as provided for under Section 35(e) of the Act.

The proposed changes to existing zones – and proposed new zones (see Section 4.2 of this paper) - need to be seen not as separate proposals but instead as an integrated package that aims to redesign and enhance the overall zoning scheme.

4.3.1 General Use Zone

Section 23(1) of the Act specifies:

- (a) a **general use zone** to provide for the protection of pelagic and benthic habitats of the marae moana, while allowing a range of ecologically sustainable uses.

No changes are proposed to this zone.

4.3.2 Restricted Commercial Fishing Zone

Section 23(1) of the Act specifies (emphasis added):

- (b) a **restricted commercial fishing zone** to provide for the protection of pelagic and benthic habitats of the marae moana by restricting most large-scale commercial fishing activities, while allowing other ecologically sustainable uses.

Presumably seabed mining would not be permitted in this zone given the aim of the zone is “*protection of pelagic and benthic habitats*”. Although the definition is not clear, exclusion of mining seems a reasonable deduction: it is difficult to reconcile that there was any intention to restrict fishing, yet allow mining, given mining would degrade if not destroy the benthic habitat, in direct contravention of the zone objective.

Use of the word ‘restricting most’ is vague and ambiguous and would be very difficult to apply in the MSP process. A complete prohibition on large-scale commercial fishing would make the zone description unambiguous. If these changes are accepted - that large-scale commercial fishing and seabed mining are excluded - then this zone effectively mirrors the Island Protection Zone (see Section 4.3.4 below) and Marine Conservation Zone as established under Section 24 of the Act. Having three ‘zones’ that are near identical in purpose would mean the Restricted Commercial Fishing Zone is therefore redundant.

This highlights the need to redesign and rationalise the zones so that overall there are fewer, and so there are very clear distinctions in the resource uses permitted in each zone.

This policy paper proposes that the Restricted Commercial Fishing Zone is removed from the zoning scheme. Where a zone is required that provides high levels of protection from resource extraction (industrial mining and fishing) yet still allow for multiple-use, then the Marine Conservation Zone (as renamed) is used (refer Sections 3.3.2 and 4.3.4).

Recommendation #12: The Restricted Commercial Fishing Zone is removed from the zoning scheme.

4.3.3 Seabed Minerals Activity Buffer Zone

Section 23(1) of the Act specifies:

(c) a **seabed minerals activity buffer zone** to provide for the protection of pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana by prohibiting all seabed minerals activities, while allowing other ecologically sustainable uses.

By definition this zone is intended to be used as a buffer zone around any seabed mining areas. It is unclear how this zone would be applied to useful effect in the OMSP and its practical implementation. Experience from other zoning schemes is that buffer zones offer few if any benefits and are very difficult to apply because there are many unresolved issues, such as: what size (width) should the buffer be?; what distance from a mining zone?; how does management of the buffer zone differ from the General Use Zone?; and so on.

For Marae Moana, one can imagine the conundrum: should the buffer zone be wrapped around the entire General Use Zone, this being where seabed mining is potentially permitted? Or around individual seabed mining areas? (refer Section 4.2.1 for proposal to create a new seabed mining zone).

This policy paper proposes an alternative approach: based on the values and proposed uses of ocean areas adjoining any seabed mining zone, use the most appropriate zone. In practice this might mean that a mining zone is surrounded by or adjoined by any of the four other zones proposed in the zoning scheme (General Use Zone, Marine Conservation Zone, and so forth).

Furthermore, if the Seabed Mining Zone is created as part of the zoning scheme (as proposed in Section 4.2.1), then mining would no longer need to be a permitted resource use in the General Use Zone. Under that scenario, there is an obvious duplication between the Seabed Minerals Activity Buffer Zone and General Use Zone; this renders the Buffer Zone redundant as it would have no useful application and only serve to duplicate the objectives of the General Use Zone and complicate the MSP process and its future operational implementation.

Recommendation #13: The Seabed Minerals Activity Buffer Zone is removed from the zoning scheme.

4.3.4 Island Protection Zone

Section 23(1) of the Act specifies:

(d) an **island protection zone** to provide for the protection of the pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana by prohibiting all seabed minerals activities and large-scale commercial fishing, while allowing other ecologically sustainable uses.

The purpose of this zone is almost exactly the same as that defined for the Marine Conservation Zone⁶ established under Section 24(2) of the Act:

The purpose is to protect the pelagic, benthic, coral reef, coastal, and lagoon habitats of the Marae Moana and, accordingly, all seabed minerals activities and large-scale commercial fishing in the area are prohibited, but other ecologically sustainable uses are permitted.

There are two issues that need to be addressed here: *firstly*, the naming of the Island Protection Zone, and *secondly* how the zone might be applied in offshore areas and used in conjunction with the Marine Conservation Zone (as renamed).

Changed naming

The name 'island protection' is misleading on two counts:

- the zone is marine only; islands are excluded, and
- this zone cannot be used in inshore waters nor around or to protect islands; this is because (a) Section 24 areas are already established in this space (from coastline to 50 nm), and (b) zones can only be established in offshore waters, long distant from islands.

Hence the naming 'island protection' is misleading as the zone cannot be used in that setting or for that purpose.

Recommendation #14: Rename the Island Protection Zone as Marine Conservation Zone to better describe its purpose.

Zone application

In practice, this zone – renamed from Island Protection Zone to Marine Conservation Zone - would only be used in offshore waters. Having the same name as the Section 24 Marine Conservation Zone (which covers the area to the 50 nm mark of the EEZ) – and because both areas have the same purpose - would be highly advantageous as it allows for complementary zoning throughout the OMSP area. This will reduce confusion amongst stakeholders and users of Marae Moana.

The only difference between the two types of Marine Conservation Zone is the process for establishment:

- Where applied under Section 23(1)(d), the zone is established through the OMSP process.
- As applied under Section 24 – from coastline of all islands out to the 50 nm mark of the EEZ (and therefore within both the IMSPs and the OMSP) - the zone is already established under the Act.

In summary, this approach would mean both areas have the same purpose as currently defined in the Act. From the perspective of community awareness and understanding, permitted activities, operational management and compliance, both zones types would be the same, just established differently as per Table 1.

⁶ see Section 3.4.2 for proposal to rename the "Marine Protected Area" as Marine Conservation Zone.

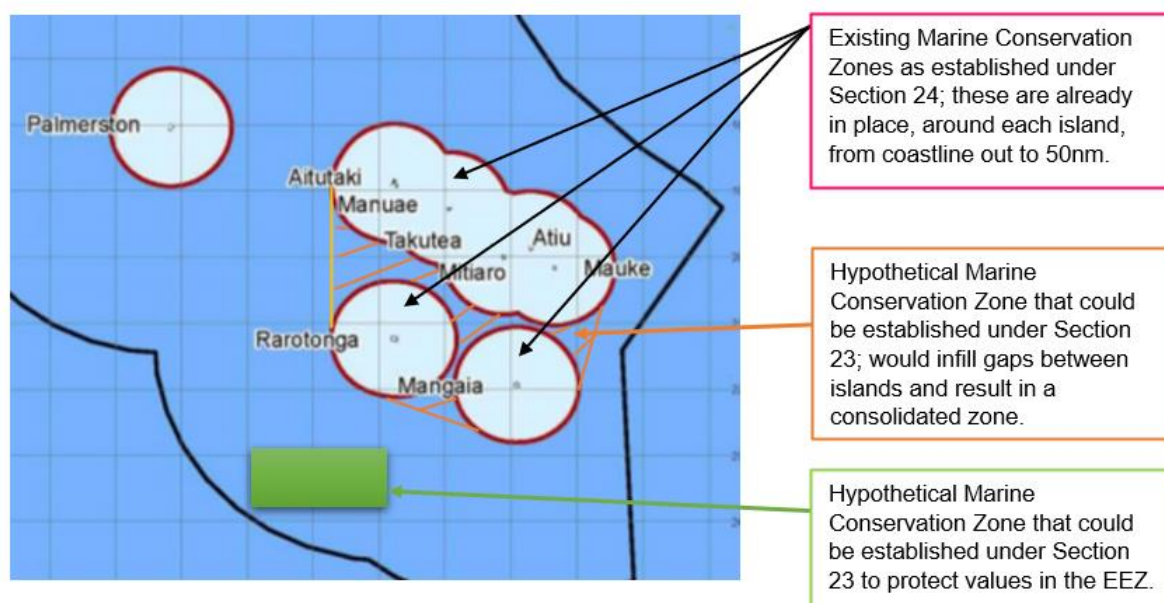
Table 1. Options for establishment of Marine Conservation Zone areas

| Section of Act | Planning area | Description/application |
|----------------|--------------------------------|-----------------------------------|
| S24 | Inshore and offshore (to 50nm) | Already established under the Act |
| S23(1)(d) | Offshore | To be identified through OMSP |

This outcome gives planners and policy makers the flexibility to choose the most appropriate type of Marine Conservation Zone to best suit the circumstances.

Figure 5 provides a theoretical example of how the two different types of Marine Conservation Zone might be applied across part of the southern Marae Moana. In this example, there are already Marine Conservation Zone areas established and proclaimed (under Section 24) of the Act around the islands of Rarotonga, Mangaia, Mauke, Atiu, Mitiaro, Takutea, Manuae and Aitutaki. The OMSP might aim to consolidate and reinforce these zone boundaries in offshore areas; this could be done using a Marine Conservation Zone under Section 23. Elsewhere in the southern Marae Moana, the OMSP process might identify important values that warrant protection through another Marine Conservation Zone area.

Figure 5. Theoretical example of application of Marine Conservation Zones



4.3.5 Ocean Habitat Preservation Zone

Section 23(1) of the Act specifies (emphasis added):

- (e) an ocean habitat preservation zone to provide for the protection and management of sensitive and ecologically valuable pelagic and benthic habitats by prohibiting potentially damaging activities, while allowing other ecologically sustainable uses.

The aims of the Ocean Habitat Preservation Zone are somewhat ambiguous and there appears to be overlap and duplication with the purpose of other zones. On the one hand, with its emphasis on habitat preservation, the Ocean Habitat Preservation Zone has similar aims and seems to overlap with the National Marine Park Zone. On the other hand, it allows for ecologically sustainable use and hence has close affinity to the aims of the Marine Conservation Zone.

Overall, the lack of clear aims and definition for this zone would make it difficult to apply through the MSP process. Furthermore, the zone cannot be readily differentiated from the National Marine Park Zone and Marine Conservation Zone hence its retention in the zoning scheme is questionable. Removal of the Ocean Habitat Preservation Zone would also serve to reduce the number of zones to a more manageable number (4-5 zones being optimal).

Overall, this policy paper considers that the Ocean Habitat Preservation Zone is redundant and should be removed from the scheme.

Recommendation #15: The Ocean Habitat Preservation Zone is removed from the zoning scheme.

4.3.6 National Marine Park Zone

Section 23(1) of the Act specifies (emphasis added):

(f) a **national marine park zone** to provide for the strict preservation of the natural integrity and ecological values of specific coral reef, coastal, and lagoon habitats of the marae moana that are remote from any permanent human settlement and are not within the jurisdiction of any Island Government.

Consistent with the zone name and description (ie. wording of “strict preservation”), this is a very highly protected, ‘no take’ zone.

However, by virtue of the current description, there are probably no cases where this zone could be used throughout the entire Marae Moana. As explained elsewhere in this paper (Section 3.3.4), there is no provision in the Act to use Marae Moana zones in IMSPs. Even if there was, the definition specifies that the National Marine Park Zone cannot be used in areas that are under the jurisdiction of Island Governments, which is all outer islands (apart from Suvarrow)⁷ and Rarotonga.

This means that the zone could in theory only be used in offshore areas. However, the Act also specifies that the zone is to be used for “specific coral reef, coastal, and lagoon habitats”. Apart from some poorly known, deep water mesophotic coral reefs (Rongo et al. 2020, p64) these habitats do not exist in offshore areas meaning that the zone effectively exists in name only and not application.

This is a significant deficiency. The National Marine Park Zone is the only no-take zone in the Marae Moana zoning scheme. Inability to use it would mean that an outcome of the OMSP process would be there were no strictly protected no-take areas in place across the entire Marae Moana; extractive resource use in one form or another would be permitted across the entire Marae Moana. This would not represent sound practice at international or regional levels.

Recommendation #16: Change the description of the national marine park zone as follows:

... provide for the strict preservation of the natural integrity and ecological values of representative, relatively large ~~specific coral reef, coastal, and lagoon habitats~~ areas of high value for biodiversity conservation of the Marae Moana. ~~that are remote from any permanent human settlement and are not within the jurisdiction of any Island Government~~

4.4 IUCN categories

The International Union for the Conservation of Nature (IUCN) has developed a global system to categorise protected areas (Dudley 2008). Supplementary guidelines were released in 2019 to increase the accuracy and consistency of assignment and reporting of the IUCN categories when applied to marine and coastal protected areas (Day et al. 2019a).

The supplementary guidelines make provision for the application of protected area categories to an MPA and to different zones within a broader managed area; this is particularly relevant to oceanscape areas like Marae Moana. Table 2 has a synthesis of the IUCN categories and definitions.

⁷ As per the Island Government Act 2012-13

Table 2. Summary of IUCN protected area categories

| IUCN category | Definition |
|----------------------|---|
| Ia | Category Ia are strictly protected areas set aside to protect biodiversity and also possibly geological/ geomorphological features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of the conservation values. Such protected areas can serve as indispensable reference areas for scientific research and monitoring. |
| Ib | Category Ib protected areas are usually large, unmodified or slightly modified areas, retaining their natural character and influence, without permanent or significant human habitation, which are protected and managed so as to preserve their natural condition. |
| II | Category II protected areas are large natural or near natural areas set aside to protect largescale ecological processes, along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities. |
| III | Category III protected areas are set aside to protect a specific natural monument, which can be a landform, sea mount, submarine caverns, geological feature such as a cave or even a living feature such as an ancient grove. They are generally quite small protected areas and often have high visitor value |
| IV | Category IV protected areas aim to protect particular species or habitats and management reflects this priority. Many category IV protected areas will need regular, active interventions to address the requirements of particular species or to maintain habitats, but this is not a requirement of the category |
| V | Category V protected areas are where the interaction of people and nature over time has produced an area of distinct character with significant ecological, biological, cultural and scenic value: and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values. |
| VI | Category VI protected areas conserve ecosystems and habitats together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in natural condition, where a proportion is under sustainable natural resource management and where low level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area. |

Reference: Day et al. (2019a)

The IUCN categories are useful for global reporting and should form a part of the Marae Moana zoning scheme (proposals are in Section 5.1). It is important however that the IUCN categories are an adjunct to – that they come after and respond to the Marae Moana system - and not drive it.

4.5 A word about vertical zoning

The Marae Moana Act potentially allows for the application of vertical zones. Section 4 defines “zone” as follows (emphasis added):

- (a) means an area of the Marae Moana that is designated as a zone for the purposes of this Act; and
- (b) includes an area specified or defined by reference to 1 or more of the following—
 - (i) geographical coordinates;
 - (ii) distances from islands or other basepoints;
 - (iii) elevations above or below sea level.

Vertical zoning in the water column is the subject of considerable debate in the global MPA community. Overall, IUCN, the World Commission for Protected Areas (WCPA) and leading MPA professionals are strongly opposed to the use of vertical zoning and recommend against it (eg. Day et al. 2019a & b). Extracts from these publications make a strong case against vertical zoning.

- All protected areas exist in three dimensions, but the vertical dimension in MPAs is often a substantial management consideration. In MPAs, management may need to address the airspace above the sea surface, the water surface, the water column (or parts of it), the seabed and the sub-seabed, or just one or a combination of two or more of these elements. For example, some MPAs protect just the seabed/benthos and not the water column above. It is therefore important that an MPA has a clear description of the dimensions that are actually protected. Vertical zoning can be problematic because many of these elements have strong ecological interactions. In consequence, IUCN has a strong presumption against vertical zoning of MPAs (Day et al. 2019a).
- IUCN does not recommend the use of vertical zoning, as there is increasing evidence of strong linkages between benthic and pelagic components of the ecosystem.... Moreover, vertically tiered management is particularly difficult, if not impossible, to effectively police and enforce. Given levels of connectivity between the overlying water column and the seabed, some MPAs are declared including a specified depth into the seabed; similarly, given linkages between the water surface and the overlying airspace, some MPAs also formally include a specified height of airspace to allow regulatory controls (e.g. for seabirds or to regulate low flying aircraft) (Day et al. 2019a).
- In a very few cases, parts of the water column within MPAs have been formally vertically zoned, to take account of the three-dimensional nature of the marine environment. Thus a zone may be distinguished for part of the water column with a different management regime from that of the seafloor: benthic fishing is usually prohibited in the zone that includes the seabed, but pelagic fishing may still be allowed in the water column. IUCN is opposed to the use of vertical zoning. It often does not make ecological sense, as interactions between benthic and pelagic systems and species are not yet fully known, and surface or mid-water fisheries may in fact impact the benthic communities below. Evidence of ecological linkages between seabed and open water habitats have been reviewed by O'leary & Roberts (2018) (Day et al. 2019a).
- Furthermore, enforcing vertical zoning is extremely difficult if not legally impossible (see also section 7 for concerns that vertical zoning can also result in double-counting when reporting). The three-dimensional nature of the marine environment can nevertheless be recognised by designating a single zone that clearly stipulates what can and cannot occur in each realm – pelagic and benthic. For example, the Habitat Protection Zone in the Great Barrier Reef Marine Park in Australia is designed to protect sensitive benthic habitats from any damaging activities such as trawling but allows other types of fishing (e.g. trolling, line fishing, netting) to occur in the overlying waters. However, the benthic and pelagic habitats are not categorised separately, even though the importance of managing different parts of the marine environment is recognised through an integrated approach.

Similarly, the GBRMP Buffer Zone (category IV) allows for trolling of pelagic fish only, and prohibits all other fishing thus protecting the seafloor habitats and associated species, but there is also no vertical zoning (Day et al. 2019a).

- ... Discourage vertical zoning in the water column, for both ecological and compliance reasons. Some MPAs have formally applied vertical zoning, allocating part of the water column to a different zone from that of the sea floor (e.g. allowing pelagic fishing in the water column but prohibiting benthic fishing). There is uncertainty in the way benthic and pelagic systems and species interact, and researchers are only just beginning to understand how surface or mid-water fisheries may in fact be ecologically connected to benthic communities below. Furthermore, enforcing vertical zoning is extremely difficult. The three-dimensional nature of the marine environment can still be recognized by designating a single zone that clearly stipulates what can and cannot occur throughout the entire water column, e.g. the Habitat Protection Zone in the GBRMP (Day et al. 2019b).

Recommendation #17: Vertical zoning through the water column of the Marae Moana is not used due to evidence of strong linkages between benthic and pelagic components of the ecosystem and the considerable difficulty of effective compliance and enforcement.

5. Towards a refined zoning scheme for Marae Moana

5.1 Zoning scheme

The following section takes the proposals made in Section 3-4 of this policy paper and presents these as a consolidated and integrated system (Table 3); this has been done so the concepts can be readily viewed and understood as a holistic package. An indicative IUCN category is allocated for those Marae Moana zones that meet the global definition of a marine protected area (discussed in detail by Twyford 2021). It is important to stress however that the overall scheme and individual zones require improved definition as recommended in this policy paper; once that is done, the IUCN categories can be applied with greater confidence.

Recommendation #18: The amended zoning scheme as outlined in Section 5.1 and Table 3 is approved.

5.2 Zoning and activity use

An essential part of the MSP Regulations should be the specification of permitted and prohibited activities (uses) in each zone: effective marine spatial planning cannot proceed without this.

Development of a zoning and activity guide is a substantial undertaking and requires extensive input and consultation from stakeholders. Some initial work on a guide was undertaken at the Cook Islands MSP workshop in August 2019.

This policy paper builds on this earlier work and presents a draft zoning and activity guide (Table 4); this guide is based upon the revised zoning scheme as proposed in Section 5.1.

A follow-up workshop of government officials and other stakeholders should be conducted to review and refine this zoning and activity guide.

Recommendation #19: The draft zoning and activity use guide in Table 4 is reviewed and further developed at a stakeholder workshop.

Table 3. Proposed Marae Moana zoning scheme

| | Zone # | Marae Moana zone name | Status under Act | Marae Moana zone description | IUCN category |
|----------------------------------|---------------|------------------------------|-----------------------------|--|----------------------|
| Resource extraction zones | 1. | Seabed Mining Zone | New | Provide for seabed minerals activities where consistent with the primary purpose of the Act; apart from when zone areas are being actively mined, a range of other ecologically sustainable uses would generally be allowed. | NA ⁸ |
| | 2. | General Use Zone | Existing | Provide for the protection of pelagic and benthic habitats of the marae moana, while allowing a range of ecologically sustainable uses [(Section 23(1a)]. | NA ⁸ |
| | 3. | Marine Conservation Zone | Existing; name change | Protect the pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana and, accordingly, all seabed minerals activities and large-scale commercial fishing in the area are prohibited, but other ecologically sustainable uses are permitted (Section 23(1)(d) and Section 24). | IV |
| No-take zones | 4. | National Marine Park Zone | Existing; definition change | Provide for the strict preservation of the natural integrity and ecological values of relatively large, representative habitats and areas of high value for biodiversity conservation of the marae moana [(Section 23(1f)]. | II |
| | 5. | Preservation Zone | New | Provide for (a) the protection of the natural integrity and values of discrete areas of the marae moana, free from extractive and visitor activities, and where consistent with (a); (b) scientific research to be undertaken in relatively undisturbed areas. | Ia |

⁸ IUCN policy precludes any mining and industrial fishing in protected areas hence the IUCN category is not applicable for the Seabed Mining Zone and General Use Zone. The issue of mining and fishing in Marae Moana and implications for designation of marine protected areas is discussed in detail by Twyford (2021).

Table 4. Draft zoning and activity use guide for Offshore Marine Spatial Plan (OMSP)

| Activity (note 1) | Seabed Mining Zone | General Use Zone | Marine Conservation Zone (note 2) | National Marine Park Zone | Preservation Zone |
|---|---------------------------|-------------------------|--|----------------------------------|--------------------------|
| Seabed minerals activity (mining) (note 3) | Y | N | N | N | N |
| Large-scale commercial fishing (note 4) | T | Y | N | N | N |
| Benthic/demersal long lining | T | Y | N | N | N |
| Dredging, pumping (sand, aggregate) | T | Y | N | N | N |
| Telecommunication lines | T | Y | Y | N | N |
| Small-scale commercial fishing (note 5) | T | Y | Y | N | N |
| Drifting Fish Aggregation Devices (dFADs) | T | Y | N | N | N |
| Fish Aggregating Devices (FADs) | T | Y | Y | N | N |
| Game/ charter fishing (note 6) | T | Y | C | N | N |
| Recreational line and/or spear fishing | T | Y | Y | N | N |
| Recreational boating, diving, photography | T | Y | Y | Y | N |
| Shipping | T | Y | Y | Y | C |
| Commercial tourism operations/activities | T | Y | Y | Y | N |
| Research | T | Y | Y | Y | Y |
| Dumping of solid and liquid waste including sewage, ballast water, burial from marine vessels | T | Y | N | N | N |

T = Timing dependent: activity is in principle permitted in the zone at specific times when consistent with seabed mining operations; case-by-case permissions or other approval processes (eg. fishing licences, mining leases, tourism permissions, etc) may still be required.

Y = Yes: activity is in principle permitted in the zone; case-by-case permissions or other approval processes (eg. fishing licences, mining leases, tourism permissions, etc) may still be required.

N = No: activity is not permitted in the zone.

C = Conditional: activity may be permitted in the zone, refer conditions.

Notes:

1. Section 27 of the *Marae Moana Act 2017* requires that a schedule of marine-based activities be prepared and for management measures to be developed and implemented for zones as specified in the Offshore Marine Spatial Plan (OMSP).
2. This Activity Use Guide applies to the OMSP. The Marine Conservation Zone (MCZ) is already established (through Section 24 of the Act) and is in place from the coastline of each island to the 50 nm line of the EEZ. Therefore, this zone covers:
 - (a) From the coastline of each island to the 12 nm mark; this represents the planning area for each of the IMSPs. A separate Activity Use Guide will be required for all the activities of relevance to these inshore areas.
 - (b) Part of the planning area for the OMSP, namely from the 12 – 50 nm mark around each of the 15 Cook Islands. The Activity Use Guide in Table 4 applies to the MCZ already established around each island.
 - (c) Additional MCZ areas might be identified through the OMSP process between the 50-200 nm lines of the EEZ; the Activity Use Guide in Table 4 will also apply to any of these areas.

3. Seabed minerals activity is defined under the *Marae Moana Act 2017* as having the same meaning as in section 7(1) of the *Seabed Minerals Act 2009*. The *Seabed Minerals Act* in turn states:

"seabed minerals activity" means activities associated (with) prospecting operations, exploration operations or recovery operations in respect of minerals on the Seabed of the Cook Islands and includes the carrying out of a seismic survey, or any other kind of survey or the taking of samples with the intention that the survey data or information derived from the samples as the case may be, for the purpose of discovering minerals.

4. Large-scale commercial fishing is defined under the *Marae Moana Act 2017* as "fishing that is subject to the licensing and authorisation provisions of section 20 of the *Marine Resources Act 2005*". The *Marine Resources Act* (MRA) in turn states:

Section 20. Licence or Authorisation Required for Fishing and Related Activities in the fishery waters-

(1) No vessel 10 metres or more in length shall be used in the fishery waters for -

(a) fishing;

(b) related activities;

(c) any other activity as may be provided under this Act;

otherwise than under the authority of any valid licence, authorisation and fishing right as may be required under this Act, fishery plan or any access agreement or fisheries management agreement entered into pursuant to Part 1 of this Act.

5. This type of commercial fishing is not referred to or defined in the *Marae Moana Act*. For the purposes of this policy paper, small-scale commercial fishing is defined as any commercial fishing that does not require licence or authorisation under Section 20 of the *Marine Resources Act 2005* (ie. fishing conducted in a vessel less than 10 metres in length).
6. Charter fishing boats that are 10 metres or more in length would presumably need to be licenced as per the definition in Section 20 of the *MRA*. Large charter boats would then be classified as large-scale commercial fishing activities under the *Marae Moana Act* and not be permitted to fish in the Marine Conservation Zone (consistent with Section 24 of the *Marae Moana Act*). This needs technical and policy opinion by Ministry of Marine Resources (MMR) and legal opinion by CLO.

6. Legal status of MSPs and zones

6.1 Inshore MSPs

Approval processes for IMSPs are specified in the Act and described in Section 7.2 below. This policy paper proposes that IMSPs would be government policy.

Recommendation #20: IMSPs would have status of government policy.

6.2 Offshore MSP zones

Section 25 of the Act makes provision for the establishment of further “marine protected areas” – and to specify the purpose of such areas and their permitted activities - by Order in Executive Council. Annex 1 has a full extract from the Act; key provisions are below:

25 Further marine protected areas may be established

(1) The Queen’s Representative may, by Order in Executive Council made on the recommendation of the Prime Minister,—

(a) establish 1 or more further marine protected areas within the marae moana, either by extending any part of the marine protected area established by section 24 or by establishing any marine protected area outside the area established by that section:

(b) specify the purpose of a marine protected area established by the Order:

(c) prohibit or restrict the carrying out of specified activities in the marine protected area.

Section 5.1 of this policy paper outlines a refined zoning scheme for Marae Moana that would be applied through the OMSP process. This policy paper further proposes that Section 25 of the Act be used to give legal status to those zones established through the OMSP process that meet the definition of a marine protected area. For the purposes of this policy, the following zones are proposed to be defined as MPAs and would be included in the Order for establishment under Section 25:

- Marine Conservation Zone
- National Marine Park Zone
- Preservation Zone.

The Seabed Mining Zone and General Use Zone would not meet the definition of an MPA (refer Twyford 2021) hence would not be proposed for establishment under Section 25.

This is a nuanced approach and would give greater certainty to resource use industries (mining and commercial fishing) that operate in the offshore environment.

Recommendation #21: The Marine Conservation Zone, National Marine Park Zone, and Preservation Zone, as identified in the OMSP, are established by Order in Executive Council as “further marine protected areas” (as provided for under Section 25 of the Act).

7. Procedures for preparation, evaluation and review of MSPs

The following section describes the legislative basis for preparation, evaluation and review of MSPs. The Act specifies different provisions for the offshore MSP (Section 7.1) and inshore MSPs (Section 7.2).

7.1 Procedures for Offshore Marine Spatial Plan

In relation to the preparation, evaluation and review of the OMSP⁹, the Act states that (emphasis added):

10 The duties and functions of the Council are to—

(b) approve the national marae moana spatial plan;

22(4) The Technical Advisory Group must evaluate, review, and update the national marae moana spatial plan in accordance with any regulations made under this Act;

22(5) The national marae moana spatial plan must be prepared in accordance with any procedure prescribed by regulations made under this Act.

7.2 Procedures for Inshore Marine Spatial Plans

In relation to the preparation and approval of IMSPs¹⁰, the Marae Moana Act states (emphasis added):

10 The duties and functions of the Council are to—

(e) approve island spatial plans for Rarotonga and Suvarrow, and any revisions of the plans;

26 Island marine spatial plans

(1) The Technical Advisory Group may, on its own initiative, prepare for approval by the Council an island spatial plan for Suvarrow.

(2) On the request of a community group on Rarotonga, the House of Ariki, or the Koutu Nui, the Technical Advisory Group must assist them to prepare for approval by the Council an island marine spatial plan for affected internal waters and territorial sea areas.

(3) On the request of an Island Government, the Technical Advisory Group must assist that Island Government to prepare for approval by the Council an island marine spatial plan for affected internal waters and territorial sea areas.

(4) All Island Marine Spatial Plans must be made available to the public for comment before they are approved.

(5) The Council may approve an island marine spatial plan (other than for Rarotonga or Suvarrow) only on the request and with the approval of the affected Island Government.

(6) Island marine spatial plans must be prepared in accordance with the procedure prescribed by any regulations made under this Act.

The review process for IMSPs as specified in the Act is differentially applied across islands as follows (emphasis added):

10 The duties and functions of the Council are to—

(e) approve island spatial plans for Rarotonga and Suvarrow, and any revisions of the plans;

⁹ Section 3.1 proposes that the National Marae Moana Spatial Plan is renamed as Offshore Marine Spatial Plan.

¹⁰ Section 3.1 proposes that Island Marine Spatial Plans are renamed as Inshore Marine Spatial Plans.

15 Duties and functions of Technical Advisory Group

The Technical Advisory Group must—

- (f) prepare an island marine spatial plan for Suvarrow, and evaluate, review, and update the plan periodically;

The Act is silent on the need for and arrangements for any review of MSPs for islands other than Suvarrow and Rarotonga.

Preliminary work has been completed to draft procedures for preparation, evaluation and review of MSPs in the style required for Regulations; this information is available from the author upon request.

Recommendation #22: Develop procedures for preparation, evaluation and review of MSPs and incorporate into the MSP Regulations; preliminary work already completed should form the basis of procedures.

8. Marine Spatial Planning Regulations

8.1 Legislative framework for Regulations

The Act has a set of clear provisions that are proposed to be used to develop MSP Regulations. Table 5 highlights where the Act is explicit and how it could be used for development of Regulations.

Table 5. Use of the Act for development of Regulations

| Act reference | How to be used |
|---|--|
| S22(5) The national marae moana spatial plan must be prepared in accordance with any procedure prescribed by regulations made under this Act. | Development of procedures for the preparation of the OMSP. |
| S35(b) The Queen’s Representative may, by Order in Executive Council, make regulations for prescribing procedures to be followed by the Technical Advisory Group in developing plans. | Give effect to the Zoning and Activity Guide |
| 22(4) The Technical Advisory Group must evaluate, review, and update the national marae moana spatial plan in accordance with any regulations made under this Act. | Development of procedures for the review, evaluation and update of the OMSP. |
| 23(2) Regulations made under section 35 may create additional national marae moana spatial plan zones. S35(c) The Queen’s Representative may, by Order in Executive Council, make regulations for defining additional zones for marae moana spatial plans for the purposes of section 23(2). | Creation of additional zones: <ul style="list-style-type: none"> • Seabed Mining Zone • Preservation Zone |
| 26(6) Island marine spatial plans must be prepared in accordance with the procedure prescribed by any regulations made under this Act. | Development of procedures for the preparation of IMSPs; scope should be expanded to include procedures for review, evaluation and update of IMSPs. |

| Act reference | How to be used |
|---|---|
| <p>25(1) The Queen’s Representative may, by Order in Executive Council made on the recommendation of the Prime Minister,—</p> <p>(a) establish 1 or more further marine protected areas within the marae moana, either by extending any part of the marine protected area established by section 24 or by establishing any marine protected area outside the area established by that section:</p> <p>(b) specify the purpose of a marine protected area established by the Order:</p> <p>(c) prohibit or restrict the carrying out of specified activities in the marine protected area.</p> | <p>Provide statutory provision for the Marae Moana zones (apart from Seabed Mining Zone and General Use Zone) established through the OMSP process.</p> <p>As discussed in Section 6 of this policy paper, the intention is for these zones to be designated as “further marine protected areas” through an Order in Council.</p> |

This policy paper proposes that the provisions of Section 35 of the Act be used to the maximum extent possible to develop Regulations that will improve the efficacy of the MSP process.

Recommendation #23: With reference to Table 5 of this Policy Paper, the provisions of Section 35 of the Act be used to the maximum extent possible to develop Regulations that will improve the efficacy of the MSP process.

Table 6 outlines changes and additions that are proposed through Regulations, however the statutory basis is less clear. Advice should be sought from Crown Law Office about what changes can be covered through development of Regulations and what will require change to the Act. It is again noted that Section 16(f) allows the TAG to recommend legislative changes to the Council.

Table 6. Proposed use of Regulations where statutory basis is less certain

| MM Act reference | How to be used |
|---|--|
| <p>35 Regulations</p> <p>The Queen’s Representative may, by Order in Executive Council, make regulations for all or any of the following purposes—</p> | |
| <p>(d) prescribing measures that are necessary or expedient to give full effect to the purpose of the marine protected area established by section 24</p> | <p>Rename Section 24 Marine Protected Area as Marine Conservation Zone.</p> <p>Refined definition of Section 24(1) to clarify geographic extent and adjusted name.</p> |
| <p>(e) providing for any other matters contemplated by this Act, necessary for its full administration, or necessary for giving it full effect.</p> | <p>Rename National Marae Moana Spatial Plan as Offshore Marine Spatial Plan and Island Marine Spatial Plans as Inshore Marine Spatial Plans.</p> |
| | <p>Rename Island Protection Zone as Marine Conservation Zone.</p> |
| | <p>Strike out of Seabed Minerals Activity Buffer Zone [Section 35(c)] and Restricted Commercial Fishing Zone [Section 35(d)].</p> |
| | <p>Refinement to description of National Marine Park Zone (Section 23(1)(f)).</p> <p>Development of procedures for the review, evaluation and update of IMSPs.</p> |

Recommendation #24: With reference to Table 6 of this policy paper, advice is sought from Crown Law Office about what changes can be covered through development of Regulations and what might require change to the Act.

8.2 Process for legislative development

This policy paper provides the basis for development of drafting instructions for (a) preparation of MSP Regulations, and (b) amendments to the Marae Moana Act 2017. Table 7 outlines the steps required to develop and finalise regulations and amendments to the Act.

Table 7. Process for legislative development

| Activity | Lead responsibility |
|--|--|
| Policy paper considered by TAG and advice provided to Council on the recommendations | TAG |
| Marae Moana Council makes decisions on policy paper | Marae Moana Council |
| Develop MSP Policy based on Council decisions | MMCO (potentially with assistance of a consultant/adviser) |
| Develop ToR and engage Legal Adviser | CLO and MMCO |
| Prepare Drafting Instructions | CLO and MMCO |
| Develop draft Regulations and amendments to the Act | Legal Adviser |
| Provide inputs and refinements to draft Regulations and amendments to the Act | TAG, Council |
| Finalise Regulations and Act; manage passage through Parliament | Council |

Recommendation #25: The process for further legislative development as outlined in Section 8.2 is adopted.

9. Further regulatory and policy reform

9.1 Marine-based activities

Section 27 of the Act covers marine-based activities; it establishes a process to specify marine-based activities to be permitted and prohibited in specified zones as follows:

Section 27 - Scheduled marine-based activities

- (4) The schedule of marine-based activities must include, but is not limited to,—
- (a) each marine-based activity that the national marae moana spatial plan either—
 - (i) prohibits from being undertaken in any of the zones described in section 23(1)(a) to (d)¹¹; or
 - (ii) prohibits from being undertaken in any of the zones described in section 23(1)(a) to (d) without a licence or permit obtained in accordance with laws of the Cook Islands; and
 - (b) each marine-based activity regulated or prohibited by a management measure under section 29.

¹¹ Section 23(1)(a) to (d) means General Use Zone [zone (a)], Restricted Commercial Fishing Zone [b], Seabed Minerals Activity Buffer Zone [c], and Island Protection Zone [d].

Section 27 is complex, circuitous with Sections 28 and 29, and can be interpreted in different ways. The specific reference of Section 27(4) to zones a-d and the lack of mention of the Ocean Habitat Preservation Zone [zone (e)] or the National Marine Park Zone [zone (f)] is particularly noteworthy and difficult to comprehend.

This policy paper interprets Section 27(4) as meaning that all and any activities undertaken in the Ocean Habitat Preservation Zone and/or the National Marine Park Zone would require a permission (licence or permit). This interpretation needs legal opinion.

Furthermore, it is noted that Section 27(1) requires the TAG to develop a schedule of marine-based activities and provides direction on the process and specifications for such a schedule¹². Although this schedule does not require inclusion in Regulations, it does require gazettal and is closely connected to MSPs and the zoning scheme.

Accordingly, it is recommended that TAG remains ready to develop the schedule. This should be done when the MSP Regulations are completed and passed by Executive Council, and once the draft OMSP is in place and it is evident how the zoning scheme will be applied across the maritime areas of the Cook Islands. At that time, the content and application of the schedule of marine-based activities should be clearer.

Recommendation #26: Crown Law Office provides legal opinion on the interpretation of Section 27(4) of the Act (regarding schedule of marine-based activities).

Recommendation #27: Once the draft OMSP is in place and it is clearer how the zoning scheme will be applied, TAG should develop a schedule of marine-based activities as per Section 27 of the Act.

9.2 Protected Areas Management Policy

The National Environment Service (NES) is developing a National Environment Policy (NEP). Substantial work has been undertaken to assess the *Environment Act 2003*, identify key policy issues, and develop possible solutions; a draft Policy is expected in 2021.

The review has concentrated on the Act's objectives, structure and definitions, governance, geographical coverage and application, and so forth, and on specific environmental protection themes: pollution, environmental impact assessment, waste management, and biodiversity conservation.

It is recognised by NES and other government stakeholders that the breadth and complexity of issues associated with terrestrial and marine protected areas management is beyond the scope of the NEP. There needs to be a separate yet closely linked Protected Areas Management Policy (PAMP) that feeds into and informs the NEP and eventual changes to legislation.

A PAMP project is currently underway with wide-ranging scope (Twyford 2020b) including:

- Review, assessment and analysis of the key protected areas acts: *Marae Moana Act*, *Environment Act*, *Marine Resources Act*.
- Development of an integrated classification system for terrestrial and marine protected areas – a *Protected Areas Classification System (PACS)* – that would be incorporated into changes to legislation. This is a major piece of policy work and will recognise and mitigate the legislative gaps and considerable confusion that currently exists around protected areas terminology and concepts. The output will be a classification system that suits Cooks Islands and accommodates the country's unique land ownership. A PACS Policy Paper is available (Twyford 2021).

¹² A draft schedule of marine-based activities was developed by MMCO in mid-2019 but not finalised.

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Annex 1. Main legislative provisions that cover marine spatial planning¹³

Note: all text originates from the Marae Moana Act 2017 except where noted otherwise. **Emphasis added.**

| Section of the Act | Text from Act |
|-----------------------------------|--|
| Part 1 Preliminary matters | |
| 3 Purposes | (3) In order to achieve its purposes, this Act— (d) provides for a system of marine spatial planning, including zoning plans and management measures for marine-based activities: |
| 4 Interpretation | <p>continental shelf has the same meaning as in section 2 of the Continental Shelf Act 1964.</p> <p>This Act has been repealed and replaced by the Maritime Zones Act 2018 that has the following definition:</p> <p>12. Continental shelf</p> <p>(1) The continental shelf comprises those areas of the seabed and subsoil of the submarine areas that extend beyond and adjacent to the territorial sea throughout the natural prolongation of the land territory of the Cook Islands—</p> <p>(a) to the outer edge of the continental margin; or</p> <p>(b) where the outer edge of the continental margin does not extend up to that distance, to a distance of two hundred nautical miles from the baselines of the territorial sea.</p> <p>(2) However, if an agreement is in force between the Cook Islands and an opposite or adjacent coastal State providing for the delimitation of a continental shelf boundary, the relevant area and limits of the continental shelf of the Cook Islands must be delimited in accordance with that agreement.</p> |
| | <p>internal waters has the same meaning as section 4 of the Territorial Sea and Exclusive Economic Zone Act 1977.</p> <p>This Act has been repealed and replaced by the Maritime Zones Act 2018 that has the following definition:</p> <p>4. Internal waters - The internal waters of the Cook Islands include any areas of the sea that are on the landward side of the baseline of the territorial sea of the Cook Islands.</p> |
| | <p>exclusive economic zone has the same meaning as in the Territorial Sea and Exclusive Economic Zone Act 1977.</p> <p>This Act has been repealed and replaced by the Maritime Zones Act 2018 that has the following definition:</p> <p>11. The exclusive economic zone</p> |

¹³ Key words and phrases that highlight intent and help to identify issues, are highlighted in **yellow**.

| Section of the Act | Text from Act |
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| | <p>The exclusive economic zone of the Cook Islands comprises those areas of the sea, seabed, and subsoil that are beyond and adjacent to the territorial sea having, as their outer limits, a line measured seaward from the baseline described in section 6, every point of which line is not more than 200 nautical miles from the nearest point of the baseline.</p> |
| | <p>territorial sea has the same meaning as in section 3 of the Territorial Sea and Exclusive Economic Zone Act 1977.</p> <p>This Act has been repealed and replaced by the Maritime Zones Act 2018 that has the following definition:</p> <p>3. The territorial sea - The territorial sea of the Cook Islands comprises those areas of the sea having, -</p> <p>(a) as their inner limits, the baseline described in section 6; and</p> <p>(b) as their outer limits, a line measured seaward from that baseline, every point of which is distant 12 nautical miles from the nearest point of the baseline.</p> <p>6. Baseline of territorial sea - The baseline from which the breadth of the territorial sea is measured is—</p> <p>(a) the low-water mark along the coast of the Cook Islands; or</p> <p>(b) where there is a coral reef along any part of the coast of the Cook Islands, the low-water mark along the outer edge of the coral reef.</p> |
| | <p>island marine spatial plan means a marine spatial plan for any of the Cook Islands</p> |
| | <p>large-scale commercial fishing means fishing that is subject to the licensing and authorisation provisions of section 20 of the Marine Resources Act 2005.</p> <p>Section 20. Licence or Authorisation Required for Fishing and Related Activities in the fishery waters-</p> <p>(1) No vessel 10 metres or more in length shall be used in the fishery waters for -</p> <p>(a) fishing;</p> <p>(b) related activities;</p> <p>(c) any other activity as may be provided under this Act;</p> <p>otherwise than under the authority of any valid licence, authorisation and fishing right as may be required under this Act, fishery plan or any access agreement or fisheries management agreement entered into pursuant to Part 1 of this Act.</p> |
| | <p>marine spatial plan means a plan for a specified marine area that includes a map of the marine area and that is produced as a result of</p> |

| Section of the Act | Text from Act |
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| | a public process of analysing and allocating the spatial and temporal distribution of human activities to achieve ecological, economic, and social objectives |
| | national marae moana spatial plan means the national marae moana spatial plan approved under section 22 |
| | <p>seabed minerals activity has the same meaning as in section 7(1) of the Seabed Minerals Act 2009</p> <p>7(1) "seabed minerals activity" means activities associated prospecting operations, exploration operations or recovery operations in respect of minerals on the Seabed of the Cook Islands and includes the carrying out of a seismic survey, or any other kind of survey or the taking of samples with the intention that the survey data or information derived from the samples as the case may be, for the purpose of discovering minerals;</p> |
| | <p>zone—</p> <p>(a) means an area of the marae moana that is designated as a zone for the purposes of this Act; and</p> <p>(b) includes an area specified or defined by reference to 1 or more of the following—</p> <p>(i) geographical coordinates:</p> <p>(ii) distances from islands or other basepoints:</p> <p>(iii) elevations above or below sea level.</p> |
| Part 2 Marae moana | |
| 10 Duties and functions of Council | The duties and functions of the Council are to— (b) approve the national marae moana spatial plan; and (d) monitor the work of agencies under Part 5 in implementing the aspects of the national marae moana spatial plan and management measures for which those agencies are responsible; and (e) approve island spatial plans for Rarotonga and Suvarrow, and any revisions of the plans; |
| 15 Duties and functions of Technical Advisory Group | The Technical Advisory Group must— (b) prepare and review the national marae moana spatial plan; and (d) monitor the work of agencies under Part 5 in implementing the aspects of the national marae moana spatial plan and management measures for which those agencies are responsible; and (f) prepare an island marine spatial plan for Suvarrow, and evaluate, review, and update the plan periodically; and (g) assist in the preparation of island marine spatial plans for Rarotonga and Island Governments; and (h) undertake public education and promotional activities to raise awareness of the restrictions imposed by the national marae moana spatial plan and the management measures; |

| Section of the Act | Text from Act |
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| 16 Discretionary functions of Technical Advisory Group | The Technical Advisory Group may perform all or any of the following functions as it thinks fit— (g) recommend to the Council amendments to be made to any legislation, including regulations: |
| Part 3 Marae Moana Policy and Spatial Planning | |
| 20 Objective of marae moana spatial planning | 1) The objective of marae moana spatial planning is to promote the purposes of this Act by delineating zones within the marae moana and specifying the reasons or uses for which each zone may or may not be used or entered. (2) To achieve the objective, this Part provides for the preparation of spatial plans for the marae moana. |
| 21 Types of marae moana spatial plan | The types of marae moana spatial plans are— (a) the national marae moana spatial plan; and (b) the island marine spatial plans. |
| 22 National marae moana spatial plan | (1) The Technical Advisory Group must, as soon as practicable after this Act comes into force, begin preparing for approval by the Council the national marae moana spatial plan for the entire exclusive economic zone and continental shelf. |
| | (2) The national marae moana spatial plan must not include any area within the internal waters or the territorial sea, except where those internal waters or territorial sea fall outside the jurisdiction of any Island Government and are not internal waters or territorial sea of the island of Rarotonga. |
| | (3) The national marae moana spatial plan must include the zones specified in section 23 and provide appropriate measures to make the zones effective. |
| | (4) The Technical Advisory Group must evaluate, review, and update the national marae moana spatial plan in accordance with any regulations made under this Act. |
| | (5) The national marae moana spatial plan must be prepared in accordance with any procedure prescribed by regulations made under this Act. |
| 23 National marae moana zones | (1) The zones for the national marae moana spatial plan are— |
| | (a) a general use zone to provide for the protection of pelagic and benthic habitats of the marae moana, while allowing a range of ecologically sustainable uses: |
| | (b) a restricted commercial fishing zone to provide for the protection of pelagic and benthic habitats of the marae moana by |

| Section of the Act | Text from Act |
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| | restricting most large-scale commercial fishing activities, while allowing other ecologically sustainable uses: |
| | (c) a seabed minerals activity buffer zone to provide for the protection of pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana by prohibiting all seabed minerals activities, while allowing other ecologically sustainable uses: |
| | (d) an island protection zone to provide for the protection of the pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana by prohibiting all seabed minerals activities and large-scale commercial fishing, while allowing other ecologically sustainable uses: |
| | (e) an ocean habitat preservation zone to provide for the protection and management of sensitive and ecologically valuable pelagic and benthic habitats by prohibiting potentially damaging activities, while allowing other ecologically sustainable uses: |
| | (f) a national marine park zone to provide for the strict preservation of the natural integrity and ecological values of specific coral reef, coastal, and lagoon habitats of the marae moana that are remote from any permanent human settlement and are not within the jurisdiction of any Island Government. |
| | (2) Regulations made under section 35 may create additional national marae moana spatial plan zones. |
| | (3) The objectives of a national marae moana spatial plan may include— (a) protecting areas in the marae moana that are of high conservation value: (b) protecting and conserving the biodiversity of the marae moana, including ecosystems, habitats, populations, and genes: (c) reserving some areas of the marae moana for public enjoyment and appreciation: (d) preserving some areas of the marae moana in a natural state, undisturbed except for the purposes of scientific research that cannot be undertaken elsewhere in the marae moana. |
| 24 Marine protected area established | (1) A marine protected area of 50 nautical miles (measured from each coastline and as shown in Schedule 1) is established around all islands of the Cook Islands as follows— (a) the outer limit of the area is a line measured seaward from the baseline of the territorial sea described in section 5 of the Territorial Sea and Exclusive Economic Zone Act 1977, every point of which is 50 nautical miles from the nearest point of the baseline: (b) the area includes the territorial sea described in section 3 of that Act: |

| Section of the Act | Text from Act |
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| | <p>(c) that part of the area lying outside the territorial sea is part of the exclusive economic zone described in section 8 of that Act.</p> <p>(2) The purpose of the marine protected area established by subsection (1) is to protect the pelagic, benthic, coral reef, coastal, and lagoon habitats of the marae moana and, accordingly, all seabed minerals activities and large-scale commercial fishing in the area are prohibited, but other ecologically sustainable uses are permitted.</p> |
| <p>25 Further marine protected areas may be established</p> | <p>(1) The Queen’s Representative may, by Order in Executive Council made on the recommendation of the Prime Minister, —</p> <p>(a) establish 1 or more further marine protected areas within the marae moana, either by extending any part of the marine protected area established by section 24 or by establishing any marine protected area outside the area established by that section:</p> <p>(b) specify the purpose of a marine protected area established by the Order:</p> <p>(c) prohibit or restrict the carrying out of specified activities in the marine protected area.</p> <p>(2) The boundaries of a marine protected area established by Order in Executive Council must be described in the Order that establishes the area, and the Order must include a map that sufficiently describes the area or the relevant coordinates for the area.</p> <p>(3) Before the Prime Minister recommends to the Queen’s Representative that an Order be made under subsection (1),—</p> <p>(a) the Prime Minister must ensure that public notice of the proposal is given, and the notice must—</p> <p>(i) state that a plan of the proposal is available for inspection at a place and at times specified in the notice; and</p> <p>(ii) invite interested persons and organisations to lodge with the Prime Minister’s office any written objections to or comments about the proposal before a specified date; and</p> <p>(b) the Prime Minister must give full consideration to all objections and submissions received in relation to the proposal.</p> <p>(4) Except by an Act of Parliament,—</p> <p>(a) no marine protected area established by an Order made under subsection (1) can be disestablished:</p> <p>(b) no part of a marine protected area established by section 24 or under this section can be excluded from that marine protected area:</p> <p>(c) no Order made under subsection (1) can be repealed, except where it is replaced in the manner provided in subsection (5).</p> <p>(5) An Order (the principal Order) made under subsection (1) may be amended or replaced in the same manner (except that subsection (3)(a)(i) does not apply) for the purpose of—</p> <p>(a) making any change of a technical or administrative nature which would enable the principal Order to better achieve any purpose for which it was made:</p> <p>(b) correcting any errors or changing any numbering in the principal</p> |

| Section of the Act | Text from Act |
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| | <p>Order:</p> <p>(c) updating or deleting, as the case may require, any reference to the name or title of a body, an office, a person, a place, or a thing that has been changed or no longer exists.</p> <p>(6) Without limiting any prohibitions or restrictions specified in an Order establishing a marine protected area, an activity is deemed to be prohibited in the marine protected area if it is inconsistent with the specified purpose of the area or is not ecologically sustainable.</p> |
| 26 Island marine spatial plans | <p>(1) The Technical Advisory Group may, on its own initiative, prepare for approval by the Council an island spatial plan for Suvarrow.</p> <p>(2) On the request of a community group on Rarotonga, the House of Ariki, or the Koutu Nui, the Technical Advisory Group must assist them to prepare for approval by the Council an island marine spatial plan for affected internal waters and territorial sea areas.</p> <p>(3) On the request of an Island Government, the Technical Advisory Group must assist that Island Government to prepare for approval by the Council an island marine spatial plan for affected internal waters and territorial sea areas.</p> <p>(4) All Island Marine Spatial Plans must be made available to the public for comment before they are approved.</p> <p>(5) The Council may approve an island marine spatial plan (other than for Rarotonga or Suvarrow) only on the request and with the approval of the affected Island Government.</p> <p>(6) Island marine spatial plans must be prepared in accordance with the procedure prescribed by any regulations made under this Act.</p> |
| Part 4 Scheduled marine-based activities | |
| 27 Scheduled marine-based activities | <p>(4) The schedule of marine-based activities must include, but is not limited to,—</p> <p>(a) each marine-based activity that the national marae moana spatial plan either—</p> <p>(i) prohibits from being undertaken in any of the zones described in section 23(1)(a) to (d); or</p> <p>(ii) prohibits from being undertaken in any of the zones described in section 23(1)(a) to (d) without a licence or permit obtained in accordance with laws of the Cook Islands; and</p> <p>(b) each marine-based activity regulated or prohibited by a management measure under section 29.</p> |
| Part 5 Compliance with management measures | |
| 28 Agencies to be notified of scheduled marine-based activities | <p>(1) When the national marae moana spatial plan comes into force, the Council must notify each agency in writing of the scheduled marine-based activities for which that agency is responsible for developing and implementing management measures.</p> |

| Section of the Act | Text from Act |
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| | (2) Whenever the Council approves any revision of the schedule of marine-based activities after the national marae moana spatial plan comes into force, the Council must, as soon as practicable, notify each affected agency of the additional marine-based activities for which that agency is responsible for developing and implementing management measures. |
| Part 7 General and miscellaneous provisions | |
| 35 Regulations | <p>The Queen’s Representative may, by Order in Executive Council, make regulations for all or any of the following purposes—</p> <ul style="list-style-type: none"> (a) prescribing any other agency for the purposes of paragraph (e) of the definition of agency in section 4, whether generally for the purposes of this Act or for any particular purposes specified in the regulations: (b) prescribing procedures to be followed by the Technical Advisory Group in developing plans: (c) defining additional zones for marae moana spatial plans for the purposes of section 23(2): (d) prescribing measures that are necessary or expedient to give full effect to the purpose of the marine protected area established by section 24: (e) providing for any other matters contemplated by this Act, necessary for its full administration, or necessary for giving it full effect. |

Schedule 1 Marine protected area established by this Act

