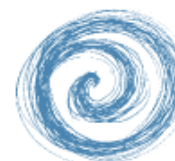


# OCEANS POLICY SECRETARIAT

WORKING PAPER TWO  
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**OCEANS POLICY**

## OCEAN USE RIGHTS

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## Introduction

1 The Crown, under international law, has sovereignty, and certain sovereign and jurisdictional rights relating to the oceans depending on the area of the ocean in question. It exercises this responsibility through various domestic laws that set up management frameworks to authorise specific uses or underpin common law uses and international freedoms. The statutory processes to create, allocate, and protect use rights define the nature and extent (attributes) of the use rights. Case law also contributes to the evolving interpretation of the nature and extent of use rights.

2 The purpose of this paper is to identify issues or problems associated with the creation, allocation, and protection of ocean use rights. ‘Use rights’ encompasses *public uses* such as sailing, swimming and recreational fishing; and *exclusive uses* such as ports, marine farms and commercial fishing. The term includes both extractive and non-extractive uses of the ocean.

3 This paper does not discuss resource ownership rights,<sup>1</sup> ecosystem rights,<sup>2</sup> or Treaty of Waitangi rights<sup>3</sup>.

4 Use rights define who may do what, where and for how long. Use rights generally also include responsibilities to avoid damage to the environment and avoid encroaching on other people’s use rights. Use rights may result from positive specification and allocation, or from protection of common law or international law rights.

5 Use patterns change over time in response to changing population pressures, evolving social values, emerging technologies, and new market conditions. Consequently, the processes to create new use rights and reconcile competing uses are critical to the specification of use rights.

## Relationship to Ocean Policy outcomes

6 To achieve best value, management of the ocean must enable a pattern of public and exclusive uses that is continually adjusting in response to new demands and opportunities. A fundamental outcome with respect to ocean use rights is to retain the oceans as a source of public enjoyment and well-being while encouraging investment to create wealth for New Zealand.

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<sup>1</sup> With very limited exceptions there are no private ownership rights to the seabed or wild living resources in New Zealand’s oceans. The Crown owns the seabed within the Territorial Sea, although this position is being appealed to the High Court by several iwi. Ownership of the seabed, living resources, and the water column beyond the Territorial Sea is precluded under the United Nations Law of the Sea, which only recognises Coastal States’ sovereign rights to use and manage resources in the EEZ and Continental Shelf.

<sup>2</sup> Ecosystem rights, including protection of intrinsic values, are generally expressed in law in the form of limits (responsibilities) on the exercise of use rights. Paper Four (environmental issues) discusses issues relating to environmental management.

<sup>3</sup> Paper Three (Maori and Oceans Policy) addresses specific issues relating to the role of the Treaty in Oceans Policy.

7 To achieve this, at least in part, it is necessary to specify use rights in a manner that is clear – that is, people know what they can and cannot do – and in a manner that encourages wealth creation and environmental stewardship. Clear specification of use rights includes detailing the processes and principles to reconcile conflicting uses so that users know how and under what conditions their existing use can be restricted to enable ongoing wise use of the ocean.

8 This paper identifies aspects of our processes to create, allocate and protect use rights that result in unnecessary or unreasonable uncertainty for the users, and consequently discourages investment in wealth creation (including protection of public uses) and environmental stewardship.

## **Current management in relation to oceans use rights**

9 A range of extractive and non-extractive use rights exist for our oceans – for instance rights to take fish, withdraw natural gas, occupy space for marinas, go sailing, and enjoy the natural character of the coast. Some rights are held by the public, other rights are held by individuals or groups. The specification of rights varies across different uses. There is nothing inherently wrong with the variety of specification of use rights in the ocean; in general they reflect reasonable differences in the nature of the activity they enable.

10 Ocean use rights are created, protected and allocated (or preserved) under a variety of statutes, including the Resource Management Act, Marine Transport Act, Fisheries Act, Marine Mammals Protection Act, Marine Reserves Act, Crown Minerals Act and Continental Shelf Act. Part 1 of the Ocean Policy Stocktake describes the full regulatory framework for ocean management.

## **Processes to provide for and protect public uses and enjoyment**

11 Most public uses are provided for (and protected) under the Resource Management Act coastal planning criteria and procedures. Recreational fishing is provided for under the Fisheries Act. The Marine Mammals Protection Act (MMPA) provides for absolute protection of marine mammals – which delivers on a social value not to harvest marine mammals.<sup>4</sup> The Marine Reserves Act protects areas for public uses (e.g. research and scenic sites) and to protect biodiversity (a component of ecosystem integrity). Designation of areas for defence training, including weapons firing and exercises with other countries, is provided for both within and beyond the territorial sea.

12 Coastal plans under the Resource Management Act are guided by the New Zealand Coastal Policy Statement and can include regional rules designating a range of public uses as ‘permitted activities’, while simultaneously including zoning rules to manage incompatible activities (such as swimming and water skiing). Applications for resource consents under the Resource Management Act must be evaluated against the

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<sup>4</sup> The Wildlife Act also provides for absolute protection of certain species of marine wildlife, but in most cases these species are either threatened or grow too slowly to support a sustainable take. The Wildlife Act includes provisions to allow harvest of specific native species. Both the Wildlife Act and the MMPA acknowledge that fishing may lead to inadvertent killing of protected species.

regional coastal plan to judge the acceptability of any impacts on public uses and enjoyment.

### **Processes to provide for new exclusive use rights**

13 The Resource Management Act provides for the creation of exclusive use rights in the territorial sea by granting coastal permits. Coastal permits are granted for specific activities, for fixed periods of time and subject to conditions to manage potentially adverse impacts on the environment and other users. As with other resource consents, there are no renewal rights for coastal permits. Coastal permits are granted on a first come, first served basis, insofar as they are consistent with the coastal plan. The aquaculture reform proposes to allocate future aquaculture space by tender.

14 Under the Fisheries Act, Individual Transferable Quota (ITQ) are created and allocated at the time a fishery enters the quota management system. The initial ITQ are allocated principally on the basis of catch history, with 20% going to Maori in accordance with the Fisheries Deed of Settlement. Once allocated by government, ITQ is a tradeable, ongoing share in the allowable commercial catch. The Fisheries Act also contains procedures to create spatial rights, notably customary fisheries management areas. Exercise of ITQ and all other fishing is subject to limits and restrictions to ensure environmental sustainability. These restrictions are subject to review every year.

15 Rights to extract minerals and petroleum are created and allocated under the Crown Minerals Act and Continental Shelf Act. These rights are granted on a 'use it or lose it' basis. Within the territorial sea these activities also require resource consents under the Resource Management Act. Beyond the territorial sea there is no statutory requirement for consideration of impacts on other users of specific or general authorisations.

16 Navigation rights and laying of submarine cables are international freedoms provided under the United Nations Convention on the Law of the Sea, some of which extend into the territorial sea<sup>5</sup>. Navigation and laying of submarine cables are regulated under international agreements as well as domestic laws (e.g. Maritime Transport Act, Submarine Cables and Pipelines Protection Act).

### **Processes to reconcile conflict among competing uses**

17 Reconciliation of competing uses regulated by the Resource Management Act can occur through coastal planning (especially zoning rules) and resource consent procedures.

18 Reconciliation of competing fishing interests occurs under the Fisheries Act through the process of allocating the total allowable catch among the different fishing sectors (customary, recreational and commercial). Where spatial conflict arises, it can be addressed through the dispute resolution procedures (Part VII) and methods closures in the Fisheries Act.

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<sup>5</sup> For example, navigation cannot be restricted in the Cook or Foveaux Straits.

19 Under the Crown Minerals Act, reconciliation between competing potential users of mineral permits can occur through establishment of minerals programmes and permit allocation criteria.

## **Problems with the current management**

20 There are a number of issues arising from the current management of ocean use rights, which are discussed below.

### **Management and provision of public amenity uses**

21 Issues here include:

- ‘hot spot’ demand areas (e.g. Northland, Tasman, Coromandel). There is a mismatch between the funding base for provision of public uses (mostly regional) and the source of demand for the activities (big cities, national, international)
- cumulative erosion of public amenity values as discretionary coastal consents are granted
- poor management of impacts of public uses on the environment and other users, namely
  - recreational fishing/coastal stripping
  - sewage from boaties
  - cumulative effects/overcrowding.

### **Conflict among existing users**

22 Issues here include:

- recreational fishing versus commercial fishing, especially in inshore areas and for prime recreational species (snapper, blue cod, kahawai)
- difficulties for the recreational sector to use the Fisheries Act dispute resolution procedures
- conflict between incompatible public uses, namely
  - conflict with ocean-based recreation in its various forms (e.g. jet skis, beach buggies)
  - increasing numbers of tourists (e.g. Abel Tasman, Doubtful Sound and Ninety Mile Beach).

### **Conflict between existing uses and new uses**

23 Conflict between existing uses and new uses include:

- conflict between fishing and aquaculture, and between fishing and marine reserves
- conflict between public amenity uses and new coastal uses, such as aquaculture or new shellfisheries

- absence of public return for exclusive uses undermines public legitimacy (e.g. concern that Individual Transferable Quota are allocated free to incumbents, and the absence of coastal charges, which leads to a sense of government ‘giveaways’ and unfair speculative returns to private individuals).

### **Missing attributes to enhance wealth creation**

24 A number of attributes that could enhance wealth creation are missing, namely:

- the lack of protection for navigational freedoms and fishing from unreasonable displacement by new spatial activities (especially the cumulative effect of new activities)
- the limited statutory processes to lower the transaction cost of collective decision-making, especially for fisheries.

### **Regulatory gap for certain activities**

25 Outside the territorial sea there are limited regulatory processes to authorise spatial activities other than petroleum and mineral extraction. The Continental Shelf Act contains little guidance and relies on the discretion of officials and ministers.

- If, for example, a deep-sea aquaculture development and petroleum pipeline were proposed for the same area of marine space, there would be no formal process to assess and reconcile the potential conflicts between the two activities, or between these activities and fishing
- Two years ago an Australian company applied for a minerals prospecting permit over a seamount in the Kermadec Range. The Continental Shelf Act gives the Minister of Energy the authority to grant permits, but does not specify any considerations or timeframes for the decision-making process. The seamount was subsequently closed off to fishing, under the Fisheries Act, as a precautionary measure to protect a potentially fragile and diverse ecosystem. The prospecting permit has only recently been granted – following an ad hoc process to resolve competing interests involving the same Minister with different portfolios and protracted discussions among officials. Ad hoc processes of this nature do not promote investor confidence.

26 There are no clear processes to provide for marine amenity areas to meet the growing interest in fish-viewing. Such amenity areas could support activities ranging from snorkelling on coastal reefs to submarine tourism on seamounts. Absence of clear processes, both within and beyond the territorial sea, leads to unmet demand and use of other tools, such as marine reserves, to achieve a solution.

## **Assessment of issues**

### **What are the key problems?**

27 Key problems related to the creation, allocation and protection of ocean use rights needing immediate action are:

- conflicts between competing users
- management and provision of public amenity uses.

28 Issues needing to be addressed in the near future are:

- attributes of use rights to enhance wealth creation
- regulatory gaps for certain activities

### **Why are these problems occurring?**

29 There are some overarching reasons for the problems set out above.

### **Absence of comprehensive and fair processes to reconcile conflict between uses**

30 Conflict between uses arises because of the direct effects of displacement and the indirect effects of activities. These effects are, in turn, driven by increased pressure from existing uses or as a consequence of new uses emerging in a particular location. Conflict between fishing and aquaculture is being partially addressed through the aquaculture reform. However, it is foreseeable that the intensity of conflict between ocean uses will increase in future unless fair processes to reconcile competing uses are established.

31 The need for fair processes to reconcile competing uses arises from current problems, however it is likely to be of greater importance in relation to managing potential future conflicts.

32 Most of the ocean statutes contain some mechanism to reconcile conflicts that arise among users or between uses that are the focus of the statute. However, there are no effective means to reconcile conflicts between uses regulated under different statutes. This problem is most acute with respect to conflict between fishing and other spatial uses of the ocean, especially in inshore areas.

33 Existing processes are not fair because consideration of the impact of new use rights on existing users is either partial or non-existent and, in effect, allows reallocation (or restriction) of use rights from existing users to new users without mitigating the adverse effects.

34 There is poor integration of the Fisheries Act with other ocean statutes, in particular the Resource Management Act. Under the Resource Management Act, fishing rights can be encroached upon to provide for other uses. The fishing industry is put in a position in which it must object to a proposed plan or coastal permit because this is the only means to prevent impacts on their activities (and, hence, to protect their investment in fishing gear and quota). This results in unnecessarily high planning costs (e.g. Tasman/Golden Bay). Similarly, fishing activities are often accused of

causing damage to the coast with little redress for other users through the Resource Management Act. There is an unmet demand for more local management of inshore fishing.

35 Under the Fisheries Act, there is no requirement to consider impacts on other users. In general, the creation of individual transferable quota has minimal direct impact since the fish are already being caught. However, establishment of a new fishery can impact on other existing uses of an area (e.g. establishment of a new cockle harvesting area may interfere with other public uses of the beach). There are also limited means to impose restrictions on fishing to implement agreements that may facilitate co-existence with non-fishing uses (e.g. restrict recreational fishing in certain reefs to provide for fish-viewing amenity areas, in the knowledge that adverse effects will be mitigated by the regional council building new boat ramps to improve access to nearby recreational fishing grounds.)

36 While the Resource Management Act does allow for planning for the coastal area, in practice this has been of limited effectiveness due to insufficient strategic direction in the plans, capability and funding constraints, and limited allocation tools. The focus of the Act is on environmental effects, and in reality, most uses are authorised on a first-come first-served basis. There are limited means within the Act to select what might be the best use in any particular area.

37 Some activities that were in existence before the Resource Management Act came into force have existing use rights (such as ports), and there are difficulties in using charging or other mechanisms to gain any public return for the use of space (there is no direction about public return for the use of public space within the Act).

38 The statutory processes to reconcile competing uses regulated by different ocean statutes are either non-existent or ad hoc. Tools to implement potential agreements are often limited in terms of effectiveness (timeliness, flexibility, and scope). The effect of these limitations is to restrict opportunities for interested parties to reach agreements that are mutually beneficial.

### **Inappropriate attributes to enhance wealth creation and environmental stewardship**

39 Resource consents, petroleum permits and Individual Transferable Quota are clearly defined use rights; however, they do not necessarily have the attributes that maximise opportunities to achieve best value for New Zealand. Some changes to attributes of existing use rights could enhance wealth creation/investment and innovation by reducing uncertainty.

40 One option might be to consider the merit of options to enable continuity of certain marine uses authorised under the Resource Management Act on the condition that ongoing improvements in environmental performance are assured, and the default position that areas can return to public use remains.

41 In the case of fishing rights and navigation rights, it is desirable to increase their security against attenuation arising from authorisation of new uses. In addition, investment in collective activities, such as resource enhancement and conflict

resolution, can be encouraged if the transaction costs of decision-making, and binding in potential free riders, could be lowered.

42 Absence of a public return (resource rent or royalty) for uses authorised under the Resource Management Act and Fisheries Act can undermine the public legitimacy of the exclusive use rights granted.

43 At an operational level, there is inadequate mapping or recording of use rights in the ocean. Accurate recording can increase certainty about who has rights where. This can, among other things, help to identify the interested parties when conflict arises. The Cadastral Survey Act 2002 provides a statutory regime that can be expanded to cover the marine area in a more coherent manner.

### **Regulatory gap in relation to certain uses**

44 There is no statutory framework to authorise and regulate certain uses, both within and beyond the Territorial Sea. This is most acute for offshore, surface ocean uses such as aquaculture and potential power generation. This gap is also discussed in other background working papers (see Paper Four, Environmental Issues and Paper Nine, Future Changes).

### **Operational constraints in relation to provision of public uses**

45 Regional councils undertake protection and management of many public uses, especially public amenity uses. Many councils face significant operational challenges, related to funding and capability.

46 Inadequate coastal planning results in conflict between incompatible public uses, and excess reliance on coastal consents for discretionary activities. In both cases, public amenity values are eroded over time with no clear limits.

47 Provision of public uses requires adequate funding to maintain the quality of experience and to protect the environment from the impacts of use. When the funding base is regional and the demand is from users outside the region, provision can become unaffordable for the region.

## **Conclusions**

48 In combination, these issues result in unnecessary uncertainty for existing and new users of the ocean. This uncertainty leads to:

- the need to devote resources to preventing any ‘encroachment’ (because there are limited opportunities for mutual agreements to be reached)
- delayed or missed marketing opportunities
- undesirable cumulative effects on public use and enjoyment
- underinvestment, especially in research and institution building.

49 It is foreseeable that the range and intensity of oceans uses will change over time, particularly in response to population changes and emerging technologies. In the

absence of change, problems associated with conflict between competing uses will amplify and become more intractable in the future.

50 The existing framework to create, allocate and protect use rights requires some key reforms if New Zealand is to maintain a healthy ocean environment while encouraging investment to meet our social, cultural and economic needs and aspirations.

## Appendix. Key expectations – social context

The attributes of ocean use rights must reflect New Zealand’s social context and values. Key expectations of ocean uses, as identified through Stage One of the Oceans Policy, are:

- *ecological sustainability*. Human activities should not compromise the ecological integrity of the ocean. A corollary is that all ocean uses should be subject to environmental restrictions that may alter over time as our understanding of ocean ecosystems improves.
- *widespread public access*. The ocean is valued as a public common, where public access is the norm. A corollary is that coastal space should not be permanently set aside for private use, except in limited circumstances.
- *respect for existing uses*. Both public and exclusive uses of the ocean contribute to the well-being of the nation. These users have an expectation of being able to continue their use, provided it does not harm the environment or interfere with the uses of others. A corollary is that reallocation of uses should respect existing uses, to the extent that existing uses are socially acceptable.
- *individual and collective responsibility*. As a democratic society, we value individual and collective responsibility for our actions. A corollary is that users should be able to exercise choice—and face the consequences, both positive and negative, of their decisions. Tools to hold users accountable should seek to maximise voluntary compliance and ensure that users can take actions to avoid harmful consequences.
- *respect for the Treaty of Waitangi*. The Treaty is a unique part of our cultural heritage. Maori—in particular—expect the uses and users of the ocean to reflect and recognise Treaty rights and responsibilities.
- *recognition of international freedoms*. Both domestic and international shipping interests expect navigational freedoms to be recognised (This expectation derives directly from international obligations under the United Nations Convention on the Law of the Sea.)
- *recognition of national defence needs*. New Zealand’s defence and security agencies expect to have appropriate access to the oceans to provide for New Zealand’s defence needs.

## Glossary

**Public uses** include activities that relate to public enjoyment of our ocean and social values attached to the ocean. They are non-commercial activities for the user, but commercial activities such as tourism operators may support and enhance the public use. Public uses are either open to anyone in New Zealand (i.e. non-exclusive) or managed for the benefit of all. Public uses may be restricted to particular locations—e.g. water skiing lanes. Two cases of public uses managed for the benefit of all are heritage values (historic sites) and defense needs—both of which generally require the public to be excluded in order for the public benefit to be provided or protected.

**Exclusive uses** are any uses that are either limited to a defined group or individual (e.g. QMS fisheries, coastal consents, and petroleum permits) or require some degree of public exclusion to favour a defined group or individual (e.g. shipping lanes or cable protection zones). Exclusive use rights seldom require total restriction of public uses and access. In general, public uses are restricted, in effect, because they are incompatible (for instance sailing and surface aquaculture) or where necessary to protect public safety (e.g. ports) or to prevent theft (e.g. intertidal oyster farms).

**Use rights** encompasses public uses such as sailing, swimming and recreational fishing; and exclusive uses such as ports, marine farms and commercial fishing. The term includes both extractive and non-extractive uses of the ocean

**Attributes** (characteristics) of use rights include duration, transferability, transformability, enforceability, exclusivity, and compensability. The optimal specification of attributes depends on the nature of the activity and the natural resource. In addition, to retain social legitimacy, attributes of use rights must adapt to changing social contexts.