

A New Marine Protected Areas Act

Submission on the Government's consultation document

NZ Rock Lobster Industry Council, Paua Industry Council, Fisheries Inshore New Zealand

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Summary

The seafood industry supports marine protection. The health of the aquatic environment is the cornerstone of our business. We also support enhancing recreational fishing opportunity. However, these are two very different objectives which do not belong in the same legislation.

The proposed new MPA Act will not improve the protection of marine biodiversity – indeed, it will have significant adverse effects on the sustainable management of fisheries resources and on the Maori Fisheries Settlement, and its contribution to marine biodiversity protection will be questionable at best.

Further engagement is necessary

The consultation document lacks detail and does not provide a robust basis for developing new law. We recommend that an additional round of public engagement should be undertaken after the receipt of submissions but prior to the drafting of the Bill in order to develop a revised set of proposals to address the serious shortcomings identified in this submission.

Our approach to marine biodiversity protection

The seafood industry supports a risk-based, integrated approach to marine biodiversity protection which recognises that MPAs are just one of many tools – both spatial and activity-based – to help achieve marine biodiversity protection. Where the sustainability of marine biodiversity is at risk from fishing activity, the Fisheries Act should always be the first option for management intervention. MPAs may be appropriate tools where biodiversity is at risk from a range of threats or where the desired level of protection is above and beyond the sustainability requirements of the Fisheries Act.

A planned, risk-based approach

Under the Government's proposals, any person, anywhere in the world, can apply for an MPA at any time. The proposals provide no process for planning and no structured approach to decision-making. In the absence of a planned, risk-based approach, New Zealand will end up protecting the wrong places for the wrong reasons (thereby failing to adequately protect marine biodiversity) and excluding more activities than necessary in order to protect biodiversity (thereby incurring unnecessary economic costs). The Government's stated objective of an appropriate balance between protecting the marine environment and maximising commercial, recreational and cultural opportunities will not be realised.

We recommend the adoption of a planned, risk-based approach to marine biodiversity protection. A national gap analysis and risk assessment will help ensure that priorities for new MPAs are based on the best available information. A risk-based approach entails clear identification of biodiversity protection objectives and an analysis of threats that need to be managed, followed by the adoption of the least-cost mechanism

for managing the identified threats and achieving the objectives. The least-cost mechanism may be an MPA (a marine reserve, species-specific sanctuary or seabed reserve) or it may be another tool such as measures under the Fisheries Act.

Safeguarding the effective operation of the Quota Management System (QMS)

Marine biodiversity protection must not be achieved at the expense of sustainable fisheries management. The proposed MPA Act fails to safeguard the critical role of the QMS in enabling the sustainable utilisation of fisheries and the protection of marine biodiversity. By displacing commercial, recreational and customary catch, the establishment of MPAs jeopardises stock abundance in the surrounding fisheries, and potentially undermines fisheries sustainability. We recommend that when an MPA is established, the affected fisheries should be 'rebalanced' by removing displaced catch from the system and compensating quota owners for their losses. If a risk-based, least-cost approach to marine biodiversity protection is adopted, these losses (and the resultant compensation) should be minimal.

We reject the assertion that compensation should not be payable because MPAs are 'measures to ensure sustainability'. Fisheries sustainability is ensured under the Fisheries Act, not by MPAs. Compensation is an essential tool to help achieve marine biodiversity protection objectives without disrupting the effective operation of the QMS. We also note that further joint work is required to develop appropriate mechanisms to enable displaced ACE-dependent fishers to adjust their activities in response to changed societal expectations.

The protections in section 5(6) of the Marine Reserves Act in relation to existing activities (including fishing) should be retained as they are integral to the current security and value of quota rights, including rights allocated as full and final settlement of Treaty claims.

Enhancing recreational fishing opportunity

Recreational fishing parks are not MPAs as they are not set up to protect marine biodiversity. Like commercial and customary fishers, recreational fishers require abundant, sustainable fisheries – but this can never be achieved by setting aside small areas independently of broader fisheries management considerations. Providing for recreational fishing is a fisheries management issue which has no place in an MPA Act. We recommend that recreational fishing parks (including the proposed parks in the Hauraki Gulf and Marlborough Sounds) be removed from the MPA Act. Instead, measures to improve recreational fishing opportunity should be progressed under the Fisheries Act and by direct engagement between fishing sectors.

We remain open to discussing with government and other stakeholders how the underlying policy objectives of the proposed recreational fishing parks in the Hauraki Gulf and Marlborough Sounds might best be achieved.

Protecting marine biodiversity in the EEZ

Provided the matters raised in this submission are addressed, a risk-based framework for marine biodiversity protection in the EEZ would be preferable to the *ad hoc* approach proposed in the consultation document. Our submission recommends some desirable attributes for an EEZ biodiversity protection regime.

Contents

Summary	1
Introduction	5
Effective marine biodiversity protection is vital for the seafood industry.....	5
The new MPA Act won't improve biodiversity protection.....	6
Further engagement is required	6
In a nutshell: our approach to marine biodiversity protection	7
Key themes and structure of submission	8
Part One: A planned, risk-based approach to marine biodiversity protection	8
Why we need a planned, risk-based approach	8
Recommended solution (1) – a national prioritisation process for MPA planning.....	11
Recommended solution (2) – a more certain engagement and decision-making process.....	12
Part Two: Safeguarding the effective operation of the QMS	14
Why the QMS is important.....	14
Security and certainty are vital for the effective operation of the QMS	16
Misconceived compensation proposals	18
Recommended solution (3) – ‘rebalancing’ the fisheries management regime.....	20
Recommended solution (4) – statutory test to prevent undue impact	24
Part Three: Enhancing recreational fishing opportunity	25
Recreational fishing parks do not protect marine biodiversity.....	25
Recreational fishing parks will not enhance recreational fishing.....	26
Recreational fishing parks are inconsistent with a risk-based approach	27
Recreational fishing parks are a poor fit with the MPA Act	28
Recommended solution (5) – remove recreational fishing parks from the MPA Act	28
Part Four: Protecting marine biodiversity in the EEZ	29
Benefits of a legislative framework for EEZ biodiversity protection	29
UNCLOS and MPAs in the EEZ	30
Recommended solution (6) – attributes of a biodiversity protection regime for the EEZ.....	31
Part Five: Detailed comments on the consultation document	32
The need for a new approach	32
The proposal	33
Economic value.....	38
Recreational fishing parks	41

Implementation.....	44
Concluding comments.....	47
Appendix One:.....	48
Summary of recommendations.....	48
Appendix Two:.....	51
A process to prioritise, plan and implement a representative MPA network	51
Appendix Three:	53
Rebalancing	53

Introduction

1. This submission is made jointly by the NZ Rock Lobster Industry Council, the Paua Industry Council and Fisheries Inshore New Zealand on behalf of our members who are quota owners, fishers and affiliated seafood industry personnel in inshore shellfish and finfish fisheries.



**NZ Rock Lobster Industry
Council**



Paua Industry Council

FISHERIES
INSHORE NEW ZEALAND

The **NZ Rock Lobster Industry Council** (NZ RLIC) is an umbrella organisation for nine regional organisations known as CRAMACs, which operate in each of the rock lobster (CRA) management areas of New Zealand. CRAMAC membership comprises CRA quota owners, processors, exporters, Annual Catch Entitlement (ACE) owners and fishermen in each region.

The **Paua Industry Council** (PIC) is the national representative organisation of the paua industry in New Zealand. The organisation receives its mandate from five regional organisations known as PauaMACs, which represent the interests of quota owners and ACE holders in each of the paua quota management areas.

Fisheries Inshore New Zealand (FINZ) is the representative organisation for inshore finfish, pelagic and tuna fisheries in New Zealand. Its role is to deal with national issues on behalf of the sector and to work directly with, and behalf of, its quota owners, fishers and affiliated sector representative organisations. Collectively, FINZ shareholders own approximately 80% of the inshore finfish sector by value and volume.

2. Together, the fisheries we represent earned New Zealand over \$600 million in export revenue in 2015. Rock lobster (\$305 million) is New Zealand's single most valuable fishery by a considerable margin and paua (\$39 million) is also among the top ten export species by value. The fisheries represented by FINZ together generate around \$300 million.

Effective marine biodiversity protection is vital for the seafood industry

3. The seafood industry supports marine protection. The export earnings and jobs that our members create and the regional communities that our fishing and seafood processing activities support are totally dependent on a healthy marine environment and sustainable fisheries.
4. New Zealand's fisheries resources are managed under our world-leading regime for ensuring the sustainability of fisheries, the Quota Management System (QMS), and other tools established under the Fisheries Act 1996. It is essential – not only for our businesses, but also for the wellbeing of all New Zealanders who enjoy catching fish or eating seafood – that the QMS continues to sustain the fish stocks and the environment on which the productivity of our fisheries resources depends. It is equally essential that the mechanisms available to protect marine biodiversity are applied so as to reinforce the sustainable management of fisheries resources. Effective marine protection requires that our marine management systems work together in an integrated way, rather than undermining each other.

5. NZ RLIC, PIC and FINZ agree that the Marine Reserves Act 1971 is ill-suited to protecting marine biodiversity. That's why for the last twelve years seafood industry organisations have promoted replacing it with a principled, planned approach to marine biodiversity protection that complements other components of New Zealand's marine management regime.¹ While the development of a new Marine Protected Areas (MPA) Act suggests an opportunity to achieve these goals, the Government's proposals in their current form fail to capitalise on the opportunity.

The new MPA Act won't improve biodiversity protection

6. In spite of the short-comings of the Marine Reserves Act, New Zealand's marine biodiversity is secure. Unlike many other countries, much of our marine environment remains unaffected by human extractive activities – for example, over 90% of the seabed in our EEZ has never been contacted by bottom-trawling.² Our fisheries management regime ensures that fisheries are sustainably managed. Biodiversity is also protected by spatial tools (e.g., marine reserves cover nearly 10% of our territorial sea and benthic protection areas cover around 30% of the EEZ) and, equally importantly, by measures that contribute to biodiversity protection at a broader spatial scale – most notably, the QMS.
7. The proposals in the consultation document will not improve the protection of marine biodiversity – indeed, it is likely that implementation of the new MPA Act as proposed will have significant adverse effects on the sustainable management of fisheries resources and that its contribution to biodiversity protection will be questionable at best.
8. The consultation document raises more questions than answers. The proposals lack detail, are unclear, incomplete and – in parts – contradictory. An over-reliance on assertion and a lack of analytical explanation make it difficult for submitters to understand what is intended and why. The proposals perpetuate the current *ad hoc* approach to MPA establishment by failing to deliver a planned, risk-based marine biodiversity protection regime. Existing commercial fishing rights, including Treaty settlement rights, are undermined, threatening the effective operation of the QMS and the sustainable management of fisheries resources. The importance of a principled framework for marine biodiversity protection in the EEZ is completely overlooked and the proposals inexplicably confuse encouragement of recreational fishing with protection of marine biodiversity.

Further engagement is required

9. NZ RLIC, PIC and FINZ are committed to working constructively with government and other sectors to establish a credible, effective framework for protecting marine biodiversity. We understand the Government's desire to get new legislation in place as soon as possible but we emphasise that the current consultation document does not provide a sufficiently robust basis for the drafting of new law. We are aware that many other sectors have expressed similar serious concerns to those identified in our submission.

¹ See for example submissions by seafood industry representative organisation SeaFIC on the Marine Reserves Bill (January 2003), the Marine Protected Areas Policy Statement and Implementation Plan (February 2005) and the Marine Protected Areas Classification and Protection Standard (September 2007).

² Black, J. & Tilney, R. (2015). Monitoring New Zealand's trawl footprint for deepwater fisheries: 1989-90 to 2010-11. New Zealand Aquatic Environment Biodiversity Report No. 142. Ministry for Primary Industries, Wellington, New Zealand.

10. For these reasons we recommend that an additional round of engagement with the seafood industry and other interested parties should take place after the receipt of submissions on the consultation document but prior to the drafting of the Bill. We suggest this engagement should take the form of an expert group, with representation from relevant sectoral interests, working alongside government officials in a structured, facilitated process. The purpose of this additional engagement would be to ensure that multiple perspectives can be brought to bear to make certain that the Bill, when introduced, to the greatest possible extent meets New Zealanders' expectations for marine biodiversity protection. These matters are too fundamental and too important to be resolved at the time they reach a Select Committee.

In a nutshell: our approach to marine biodiversity protection

11. Marine biodiversity can be protected using a collection of different tools – some of which are designed explicitly to protect biodiversity (e.g., the MPA categories proposed in the new Act) and others which have a different primary purpose but have incidental biodiversity protection benefits (e.g., mātaihai reserves). Some of the tools in New Zealand's collection are spatial (e.g., a marine mammal sanctuary) whereas others apply to activities generally (e.g., codes of practice for marine mammal mitigation in fisheries or the incentives for sustainability that underpin the QMS). When it comes to assessing how effective our marine biodiversity protection is, the cumulative benefits of all these tools need to be taken into account.
12. Similarly, if new biodiversity protection priorities are identified, the full collection of tools should be 'on the table'. We support an integrated approach, based on a rigorous assessment of risk, to: (a) the identification of new biodiversity protection needs; and (b) the choice of appropriate tools to meet those needs. In the absence of clear objectives (i.e., why do we need to protect something?) and a rigorous assessment of risks (i.e., what do we need to protect it from?) it is simply not possible to establish a rational and optimal framework for marine biodiversity protection. A risk-based approach ensures that the 'solution' fits the 'problem' and also ensures that the solution will achieve the identified objectives without imposing unnecessary costs.
13. The relationship between marine biodiversity protection and fisheries management is critical in this respect. The purpose of the Fisheries Act 1996 is to provide for the utilisation of fisheries resources while ensuring sustainability (in relation both to fish stocks and to the wider environmental effects of fishing).³ The Fisheries Act's purpose and principles and the tools that it provides are deliberately designed to ensure that fishing is conducted in a sustainable manner, enabling the Act to make a significant contribution to the protection of New Zealand's marine biodiversity.
14. It follows that where risks to biodiversity are caused by fishing, these risks are best addressed under the Fisheries Act. If biodiversity risks attributable to fishing are not currently managed adequately under the Fisheries Act, then the first option should always be to adjust management settings under that Act so that the risks *are* effectively managed. Only where marine biodiversity protection objectives relate to

³ Under the Fisheries Act, 'ensuring sustainability' means maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations, and avoiding, remedying or mitigating any adverse effects of fishing on the aquatic environment. 'Utilisation' means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic and cultural wellbeing.

matters above and beyond fisheries sustainability as defined in the Fisheries Act, or where risks arise from multiple sectors that are not able to be managed under sector-specific legislation, is it appropriate to consider the use of other tools.

15. This risk-based, multi-tool, integrated approach to marine biodiversity protection is consistent with New Zealand's international obligations under the Convention on Biodiversity⁴ and informs the analysis and recommendations throughout our submission.

Key themes and structure of submission

16. The structure of our submission reflects our four key concerns about the proposed new MPA Act, as follows:
- **Part One** analyses the proposed process for establishing MPAs and recommends an alternative process for delivering a planned, integrated, risk-based approach to marine biodiversity protection;
 - **Part Two** outlines how the proposed new MPA Act will undermine existing commercial fishing rights and the effective operation of the QMS and recommends practical solutions that will enable MPAs to be established while also ensuring sustainable fisheries;
 - **Part Three** focuses on enhancing recreational fishing opportunity. It recommends removing provision for recreational fishing parks from the new MPA Act and instead delivering desired outcomes for recreational fishing under the Fisheries Act;
 - **Part Four** identifies the benefits of a more certain and principled biodiversity protection regime for the EEZ and recommends attributes for such a regime; and
 - **Part Five** responds to the questions posed in the consultation document, and includes further recommendations on these matters.
17. A summary of our recommendations can be found in **Appendix 1**.

Part One: A planned, risk-based approach to marine biodiversity protection

Why we need a planned, risk-based approach

Ad hoc vs planned

18. The consultation document accurately identifies some disadvantages of the current *ad hoc* approach to marine biodiversity protection, and concludes that '*the result is an approach to marine protection that incrementally allocates areas for differing purposes, rather than creating a representative and adaptable network of MPAs*'.⁵ To that we would add that, from a fisheries management perspective, the current *ad hoc* approach to marine protection also incrementally allocates fisheries resources to different purposes rather than sustaining fisheries throughout New Zealand's marine environment. Whether examined from the perspective of marine protection or sustainable fisheries, there is no doubt that a structured, planned approach to marine biodiversity protection is desirable.

⁴ For further discussion of this point, see response to Q4 in Part 5 of this submission.

⁵ Consultation Document page 13.

19. However, the MPA Act as proposed will exacerbate rather than rectify the current *ad hoc* approach to MPA establishment for the following reasons:

- Critical terms such as ‘representative’, ‘adaptable’ and (in the case of marine reserves, ‘special’ and ‘unique’) remain undefined, raising the spectre of an ever-increasing MPA network with no discernable end point. For example, in 2007 SeaFIC calculated that, under the policy approach proposed at that time for establishing a ‘comprehensive and representative network of MPAs’, up to 429 marine reserves would be required in inshore waters and 200 in deep water, along with an equal number of replicate ecosystems and habitats protected in other types of MPAs, and an unknown number of MPAs protecting special or unique ecosystems and habitats.⁶ Uncertainty on this scale introduces excessive scope for *ad hoc* MPA establishment and imposes significant costs on all marine users;
- Decisions on MPAs are made in isolation of strategic policy guidance such as the New Zealand Biodiversity Strategy, the MPA Policy,⁷ or an updated MPA policy framework;
- Any person can propose that an MPA be established, provided certain ‘information requirements’ (as opposed to substantive or merit-based requirements) are met;⁸
- The lack of clarity about the early stages of MPA development (prior to Ministers making a decision to progress a proposal) means that community groups or MPA proponents could invest large amounts of time and money in proposals that may never progress beyond initial Ministerial approval;
- The new Act lacks clear statutory decision criteria (see below); and
- The involvement of multiple Ministers in key decisions in the absence of a robust statutory decision framework:
 - reduces transparency and accountability for decision-making; and
 - exacerbates the risk that MPA decisions will reflect internal political tradeoffs rather than the dispassionate implementation of a planned approach to marine biodiversity protection.

20. Significant uncertainty and potential for *ad hoc* decision making is introduced at key stages in the MPA establishment process by the absence of statutory decision criteria and the resultant excessively broad discretion allowed for Ministerial decisions. For example:

- There are no substantive or merit-based criteria (as opposed to information criteria) for decisions on whether or not an MPA proposal is progressed;
- There are no criteria for appointment of members of Collaborative Groups (indeed it is not clear whether members are appointed or self-selected);
- MPA assessment criteria are provided to Collaborative Groups or Boards of Inquiry in terms of reference rather than in the Act itself;

⁶ See footnote 1.

⁷ By ‘MPA Policy’, we mean the Marine Protected Policy and Implementation Plan (2005) and the Marine Protected Areas Classification, Protection Standard and Implementation Guidelines (2008) – both documents prepared by the Department of Conservation and the Ministry of Fisheries.

⁸ This is even more haphazard than the current Marine Reserves Act which specifies in section 5 the particular bodies that may apply for a marine reserve.

- There is no requirement for a structured assessment of costs and benefits of alternative approaches to marine biodiversity protection (such as is required under section 32 of the Resource Management Act 1991 (RMA), for instance); and
- There are no statutory criteria to guide Ministerial decisions on whether or not to establish an MPA.

A risk-based approach

21. A common question raised at the Government's engagement sessions on the proposals was: *'But what are you trying to protect marine biodiversity from?'* Officials struggled to answer this question because the proposed MPA Act fails to adopt a risk-based approach to marine biodiversity protection. By a risk-based approach, we mean a structured approach that asks:
- What are the objectives of protection (what particular biodiversity values need to be protected)?
 - What are the threats to those biodiversity values that need to be managed?
 - What are the ongoing costs associated with managing or excluding particular sources of risk?
 - And, therefore, what is the least-cost management option⁹ that is able to manage the risks and achieve the protection objectives?
22. One of the main consequences of failing to adopt a risk-based approach is that the mechanism (a network of MPAs) comes to be perceived as a valid outcome in itself, rather than one of several available tools to protect marine biodiversity. Other consequences include:
- Inadequate selection of the best tool to manage the identified risks and, consequently, less effective protection of marine biodiversity;
 - Poorly targeted regulatory intervention and/or over-regulation and associated costs (for example, use of an MPA when a non-spatial tool may protect marine biodiversity more effectively and at less cost);
 - A greater than optimal number and area of MPAs in the MPA network. This will not achieve *'an appropriate balance between protecting the marine environment and maximising commercial, recreational and cultural opportunities now and in the future'* (one of the Government's stated objectives)¹⁰ and will result in New Zealand incurring:
 - additional costs associated with maintaining regulatory measures that are unnecessary in order to meet the defined objective; and
 - opportunities forgone for sustainable extractive use of marine resources, with no attendant benefits in terms of biodiversity protection;
 - Lack of legitimacy of MPAs from the perspective of resource users who bear the costs of exclusion from these areas without commensurate benefits of biodiversity protection; and
 - If applied in the EEZ, MPAs that are not risk-based may be inconsistent with the requirements of international law (as discussed in Part Four of this submission).

⁹ By least-cost, we mean least-cost in terms of location, type of biodiversity protection tool, exclusion of and controls on existing activity (and, therefore, costs to existing users, the Fisheries Settlement, the economy, and New Zealanders' existing use and enjoyment of an area), and ongoing monitoring and enforcement.

¹⁰ Consultation document page 10.

23. Building on the approach proposed in the consultation document, we recommend two main changes to the proposed Act in order to ensure a planned, risk-based approach to marine biodiversity protection. Our revised MPA planning and establishment process is shown in flow-chart form in **Appendix Two**.

Recommended solution (1) – a national prioritisation process for MPA planning

24. Redesigning the ‘front end’ of the MPA establishment process will help ensure a planned approach is adopted from the outset. Planning and establishing an effective representative network requires a series science-based technical inputs, including:
- A credible marine biodiversity classification system to help identify the habitat and ecosystem types that may be represented in the network;
 - A regular (for example, every 5 years) national ‘gap analysis’ to review the current performance of the MPA network and to identify habitat and ecosystem types that are not represented in the network; together with
 - A risk assessment process to identify threats to these habitat and ecosystem types that are not adequately managed by existing management regimes.
25. From these technical inputs, decisions about priority habitats and ecosystems for protection in the network can be made periodically by Ministers on a well-informed basis. Only once these general directions have been set is it appropriate for regional or local planning processes (for example, using a collaborative group) to get underway to examine how marine biodiversity protection might best be delivered for an identified priority ecosystem/habitat type or region.
26. It is important that the prioritisation process is statutory, rather than simply defined in government policy, so as to provide a consistent approach over time and certainty for all affected parties. We therefore recommend the following prioritisation process should be set out in the Act.

a)	MFE commissions a national gap analysis every 5 years using: <ul style="list-style-type: none"> • the best available marine environment classification system; and • risk analysis to identify habitat/ecosystem types that are not adequately represented in MPA network <u>and</u> are at risk from threats that are not adequately managed by existing management regimes.
b)	MFE seeks public input on the results of the gap analysis.
c)	The responsible Ministers (Environment, Conservation, Fisheries, Maori Development) make decisions on priorities , after taking account of the outputs of the gap analysis, public input, and resourcing requirements. Priorities may be expressed as: <ul style="list-style-type: none"> • habitat/ecosystem types that require further management intervention to protect marine biodiversity; or • regions or localities in which an MPA planning process will be undertaken (on the basis that a region or locality has a high number of identified priority habitat/ecosystem types).
d)	The Ministers’ decisions on priorities are publicly notified .

Recommended solution (2) – a more certain engagement and decision-making process

27. We support the concept of using Collaborative Groups (CG) or Boards of Inquiry (BOI) to develop MPA proposals through a process of public engagement. In general, we consider that a BOI model should be preferred where the Government prioritisation process (as above) identifies a particular and relatively well defined MPA proposal or group of proposals that need to be consulted on and assessed. In contrast, the CG model is better suited to a longer-term process requiring in the first instance the development of options (i.e., regional planning) with a high level of community engagement.

Use of statutory criteria

28. In order to reduce uncertainty (and associated costs) and provide a more structured and transparent MPA planning process, we recommend the insertion of criteria to guide decision-making at key points in the Act. We note that equivalent contemporary legislation sets out criteria for such matters, including the Resource Legislation Amendment Bill currently before the Local Government and Environment Committee. The key decisions that should be guided by statutory criteria include:

- **Whether a CG or BOI model should be used.** For example, when choosing between the two models, the responsible Minister should consider the advantages and disadvantages of each process in the circumstances; the extent to which local, regional and national interests may be affected; and the extent and timing of any public consultation that has already taken place;
- **Appointment of members of a CG or BOI.** Members of CGs should be selected primarily on the basis of the representation and mandate of members, as well as providing the group with a mix of necessary skills. Consideration should also be given to whether any existing multi-sector marine planning groups in the region meet the required criteria. Although the majority of CG members can be expected to reside in the locality or region in question, this is not necessarily the case for affected quota owners (or their representatives) who may be based anywhere in New Zealand. BOI appointment criteria should focus primarily on achieving a mix of relevant skills and experience, including technical and legal skills;
- **Assessment of MPA proposals by a CG or BOI.** We consider it essential that assessment criteria (see below) are set out in the Act rather than provided by a Minister in terms of reference as proposed. Specifying assessment criteria in terms of reference politicises the assessment process and will severely reduce the credibility and acceptance of MPA planning outputs among affected parties. The terms of reference provided by the lead Minister should simply:
 - Define the scope of the task (reflecting the Ministers' prioritisation decision);
 - Set out any practical matters relating to available information, technical support, ability to commission further advice, consultation and engagement, funding, timeframes and so on;
 - But must not pre-determine a particular outcome by constraining the substantive recommendations of a CG or BOI;
- **Ministerial decisions** on recommendations made by a CG or BOI.

29. We recommend that the following MPA assessment criteria should be taken into account by CGs, BOIs and Ministerial decision-makers.

a)	The effect of the proposal on: <ul style="list-style-type: none"> • Treaty of Waitangi rights and obligations, • existing and future uses and values of the area, and • existing management regimes;
b)	The cumulative effects of the proposal and other spatial management tools on the above three matters;
c)	The current protection (in the area or elsewhere) of the habitat or ecosystem type;
d)	The proposal's contribution to protecting marine biodiversity in a representative network of MPAs;
e)	The threats to the habitat/ecosystem type or area and whether these threats are, or can be, effectively managed under other legislation;
f)	The costs and benefits of the proposal to the environment and the economy;
g)	Whether the proposal meets the biodiversity protection objectives at least cost to existing and future uses and values; and
h)	Alignment with international best practice and commitments.

Commissioning of independent advice

30. For both decision models (CG and BOI) we recommend that the 'independent assessment of economic impact' should be commissioned by the lead agency once the CG or BOI has developed an initial set of proposed MPAs (or MPA options).
31. The economic impact assessment must be available prior to public consultation and should form part of the consultation material so that affected parties may comment on the impact assessment as well as on the proposed MPAs. If a proposed MPA option excludes commercial fishing, then the economic impact assessment should include a 'without prejudice' estimate of the amount of compensation payable, as discussed in Part Two of this submission.
32. The Act should also enable the CG or BOI to commission (via the lead agency) additional expert advice to address matters raised in submissions.

Enabling integrated marine planning

33. The new MPA Act should specifically enable a CG or BOI to recommend the use of tools under other legislation (e.g., the Fisheries Act) instead of, or in addition to MPAs, in circumstances where:
- Other tools provide the most effective, least-cost way of meeting the identified biodiversity protection objectives; or

- The use of other tools is desirable in order to create a package of measures that meet wider community objectives for marine management (including, but not limited to, biodiversity protection objectives).

34. Enabling recommendations to be made on the use of other tools is essential to ensure a risk-based, least-cost approach to marine biodiversity protection and will increase the likelihood that CGs will be able to reach agreement on a package of appropriate management measures.

Merit-based appeals

35. A decision to establish an MPA may have a significant impact on existing property rights, including Treaty settlement rights. It is therefore appropriate that affected rights owners (and other interested parties who made submissions on the proposed MPA) have an opportunity to seek a substantive review of the Ministers' decision from a suitable court. Enabling merit-based appeals also provides:

- An appeal structure that is consistent with other marine biodiversity protection measures in the coastal marine area, including the closure of an area to activities with specified adverse effects under a rule in a regional coastal plan; and
- A further opportunity for parties to reach a mediated or negotiated solution prior to a court hearing.

Part Two: Safeguarding the effective operation of the QMS

Why the QMS is important

36. The QMS is a cornerstone of New Zealand's marine management regime. Simply described, the QMS is a rights-based management framework that provides quota owners with a perpetual right to harvest a proportion of the total allowable commercial catch (TACC) of a fish stock. Because quota shares (individual transferable quota or ITQ) are proportional to the TACC, economic risk and benefit for the seafood industry is directly linked to the productivity of fisheries, providing strong incentives for quota owners to be mindful not only of the sustainability of fish stocks, but also of the health of the marine environment that supports the fisheries. These incentives lie at the core of the success of the QMS.

37. Overseas commentators have endorsed the strengths of New Zealand's fisheries management regime. In 2009 Dr Boris Worm and Professor Ray Hilborn, along with 19 marine and ecosystem scientists from around the world, gave the New Zealand fisheries they assessed the highest possible rating for ecologically sustainable management.¹¹

38. The QMS makes a major contribution to the protection of New Zealand's marine biodiversity by:

- Ensuring the sustainability of fish populations. Sustainability is ensured through the setting and enforcement of scientifically-determined catch limits, underpinned by the incentives the QMS establishes for quota owners; and
- Avoiding, remedying or mitigating any adverse effects of fishing on the aquatic environment, including by protecting marine habitats essential for fish spawning, migration and feeding. Adverse effects of fishing are managed through a range of regulatory and non-regulatory measures, underpinned by the incentives the QMS establishes for quota owners.

¹¹ Worm, B., Hilborn, R., et al. (2009). Rebuilding Global Fisheries. *Science*, 325 (5940):578–585.

39. The QMS has enabled the creation of significant wealth for all New Zealand. In 2009 Statistics NZ calculated an aggregate estimate of quota value of NZ\$4 billion.¹² As discussed in a recent seafood industry submission to the Ministry for Primary Industries, the use of quota value as a proxy for the total wellbeing New Zealanders derive from fisheries is consistent with the World Bank's guidance on national wealth accounting (see **box**).¹³
40. The QMS is also central to the settlement of Maori fisheries claims. A full and final settlement of Maori commercial fishing claims was made possible only because of the characteristics and integrity of ITQ (in particular, its strong property attributes such as perpetual duration) and the sustainability mechanisms embodied in the Fisheries Act. Together, these were sufficient for Maori to accept ITQ as a 'currency' for the settlement of commercial fishing claims in the 1992 Deed of Settlement. As part of the settlement, Maori endorsed the QMS and acknowledged it as the lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand.¹⁴
41. Maori are now major asset owners and participants in the commercial fishing industry, owning in excess of 30 per cent of all quota (valued at over NZ\$1 billion). Maori have a reasonable expectation that the Crown will maintain the value of their fisheries assets by protecting the integrity of quota rights and the QMS, not least because the settlement provided that all current and future claims in respect of commercial fishing rights were fully satisfied and discharged.

Wealth Creation Through the QMS

'Statistics NZ calculated an aggregate estimate of quota value in 2009 of NZ\$4 billion. This valuation is based on a formula where value is a function of expected ACE price (annual benefit) divided by a discount rate (a measure of risk). This same general relationship also applies to the valuation of all other types of fisheries benefit – i.e., conservation, customary and recreational benefit – but there are no observed data on annual benefits or discount rates outside of the commercial sector with which to populate the valuation equation. However, it is reasonable to assume that if quota value is increasing, so too is the overall value of fisheries and hence, the wellbeing that can potentially be provided by fisheries for all users. This assumption is possible because high quota value requires sustainable, abundant fisheries and reduction of risk and uncertainty. Where fisheries are abundant and future risk to abundance is perceived to be low, the benefits able to be obtained by non-commercial users of the same fisheries (including those who favour non-extractive use) will be correspondingly high.'

¹² 2009 is the most recent estimate of quota value, see: http://www.stats.govt.nz/browse_for_stats/environment/environmental-economic-accounts/fish-monetary-stock-account-1996-2009/introduction.aspx

¹³ Initial Seafood Industry Contribution to Fisheries Management Review 2015/16. Creating Value 'Beyond Sustainability' (11 December 2015).

¹⁴ Deed of Settlement, 23 September 1992, Section 4.2.

Security and certainty are vital for the effective operation of the QMS

42. In order for the QMS to continue to contribute effectively to sustainable fisheries, biodiversity protection, wealth generation and the settlement of fisheries claims, it is necessary to understand the attributes of the regime that are critical to its success.

The importance of secure and stable property rights

43. The courts have consistently acknowledged that ITQ is a property right, albeit one that is the product of, and subject to, the constraints of the legislation that created it.¹⁵ It follows that properly made management decisions can reduce quota owners' ability to exercise their property rights – for instance through a reduction in a TACC or the closure of an area to ensure sustainability. The courts have cautioned that even though lawfully made decisions can attenuate ITQ rights, such decisions should not be taken lightly or else the policy intent of the QMS will be undermined.
44. For example, in a 1989 case Justice McGechan observed that *'the object behind [the QMS] seems clearly enough to **create a stable regime** under which stocks of commercial fish species are conserved and under which commercial fishermen have **stable and recognised rights to fish** on a basis on which they can plan and make the considerable financial commitments which this industry requires. **It is not a scheme set up to be dismantled or tinkered with by a Minister as a matter of whim.**'*¹⁶ Later in the same judgement he concluded that *'...regulations cannot be made under [the Fisheries Act] which goes so far as to render ineffective rights enjoyed under the QMS by ITQ holders. **Parliament did not intend to give with the one hand, and then take away with the other.** The property element inherent in the ITQ is to be given proper recognition, but subject to that [the Act's] regulation making power can go as far as may be necessary for proper marine conservation purposes...'*
45. A few years later in the 'snapper case', Justice McGechan expanded on the circumstances in which ITQ rights may or may not be legitimately attenuated. He observed *'It is clear Maori negotiators in 1992 were aware that ITQ held by the [Treaty of Waitangi Fisheries] Commission, and further ITQ to be received by the Commission and Maori, would be subject to reduction along with the TACC on biological grounds. Likewise, it might be increased. **That risk and potential benefit, were known and accepted.** I accept Maori did not envisage, or accept, that TACC and quota might be reduced simply to enable a greater recreational allocation of the resource. **It is highly unlikely Maori would have agreed to surrender Treaty rights for the better gratification of Auckland boatmen.** The thought did not cross the tangata whenua mind.'*¹⁷
46. Underpinning these judgements is an understanding that property rights are not just an end in themselves (or a mechanism to generate wealth for the owner), but an important tool in the management of natural resources. In the case of fishing quota, secure and stable property rights help achieve broader societal objectives such as ensuring the sustainability of fish stocks and implementing Treaty obligations.

¹⁵ 'While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions of the legislation establishing them.' *New Zealand Fishing Industry Association (Inc) v Ministry of Fisheries* (unreported, CA82/97, 22 July 1997, Wellington).

¹⁶ *Sanford (South Island) Limited and Others v Minister of Fisheries and Others* (unreported, CP3/89, 10 November 1989, Wellington, McGechan J), our emphasis.

¹⁷ *New Zealand Fishing Industry (Inc) v Minister of Fisheries* (CA 82/97, 22 July 1997), our emphasis.

Risk and uncertainty erode quota value

47. For the incentives that underpin the QMS to operate effectively, quota has to be valuable – there is little incentive to protect and safeguard property that has been, or is at risk of being, rendered worthless. For quota to have value, the fish stock must be able to be harvested – i.e., the stock must be abundant and areas where fish live must be open to fishing. Because quota is a perpetual right its current value incorporates all future potential value from the commercial harvest of the stock. Many factors influence quota value, but two of the more important are how quota owners perceive future risks to:
- Stock abundance; and
 - Spatial access to fisheries (taking account of the current and anticipated future distribution of the stock within the quota management area).
48. For example, if quota owners consider that there is a high risk that stock abundance will decline or future access will be restricted, this risk will be reflected in a reduction in the value of quota. This intuitive relationship between risk and value has been confirmed by a recent international study of the linkage between the security of property rights and asset value in fisheries regimes. The study found that the market value of property rights is significantly reduced by insecurity arising from ownership disputes, illegal extraction and the possibility of government revocation of rights.¹⁸ The researchers used data from New Zealand to demonstrate that the 1992 Maori Fisheries Settlement, which resolved a key source of insecurity in the ownership of commercial harvest rights, resulted in a marked 3.5 percent decrease in the dividend/price ratio of ITQ, signaling a significant (approximately \$1 billion) increase in quota value.
49. Erosion of quota value is also inextricably linked to sustainability risk. When quota value declines, quota owners will benefit little from investing in the long term health of the fishery. As a result, they may become increasingly focused on short term gain at the expense of the resource, as is the case in many fisheries around the world where open and free access to the fishery resource prevails.
50. The success of the QMS, including its ongoing contribution to biodiversity protection, therefore depends on **secure** property rights and **certainty** with respect to future fisheries abundance and access.
51. Poorly conceived MPAs can exacerbate risks to fisheries abundance and access, thereby eroding quota value and jeopardising the effective operation of the QMS. When government decisions allocate marine space exclusively to other uses such as marine protection, access to fisheries is constrained. And when catch that was previously taken in the area is displaced into surrounding fisheries, the abundance of those fisheries is compromised. In fisheries such as paua and rock lobster, which are fully utilised with a strong spatial dependency, displacement of fishing effort leads to localised depletion outside the closed area as fishers compete to take their existing catch entitlements from a reduced area and, consequently, a smaller resource. Declining stock abundance has a negative effect on catch rates, the economics of commercial fishing, and the fishing opportunities of non-commercial sectors. In the absence of any management intervention to address the displaced catch, stock sustainability thresholds may eventually be breached. While these effects are most apparent in sessile and sedentary species, the same principle applies to all fisheries.

¹⁸ Corbett A Grainger and Christopher J Costello (2014). Capitalizing property rights insecurity in natural resource assets. *Journal of Environmental Economics and Management* 67: 224-240.

52. As long as processes for establishing MPAs continue to breed insecurity about spatial access and stock abundance, the value that New Zealand obtains from our fisheries resources will be impaired. The key policy objective, therefore, is to find ways of enabling reallocation of marine resources so as to allow marine biodiversity to be protected (through MPAs and other mechanisms) without destroying value.
53. Fortunately, the QMS provides its own solution to the dilemma of how to establish MPAs in a manner that does not destroy value and undermine the effective operation of the QMS. If changes in use are facilitated by willing seller/willing buyer quota transactions (or, failing that, market-based compensation), then quota rights will remain secure, the value-destroying impacts of uncertainty will be reduced, and incentives for sustainability will be upheld.

Misconceived compensation proposals

54. The proposed approach to the payment of compensation, as set out in the consultation document, is based on a series of misconceptions about the proper role of compensation in marine management regimes. As a result, the proposals are seriously flawed. Instead of realising the long-overdue opportunity to align the effective operation of the QMS with the biodiversity protection regime, the proposals set these two critical components of our marine management system at loggerheads.

MPAs are not sustainability measures

55. It is asserted on page 20 of the consultation document that *'compensation will not be paid to quota owners in relation to the establishment of seabed reserves, species-specific sanctuaries, or marine reserves because they are measures taken for the purpose of ensuring sustainability'*.
56. New Zealand's statutory scheme clearly attributes the role of ensuring sustainability to the Minister for Primary Industries under the Fisheries Act and, according to the Ministry for Primary Industries, 'scientific assessments show that overall our fisheries are sustainable.'¹⁹ As noted above, sustainability under the Fisheries Act means ensuring not only that fish populations are sustainable, but also that any adverse environmental effects of fishing are avoided, remedied or mitigated. Consistent with our approach to marine biodiversity protection set out in the introduction to this submission, if fishing is identified as a risk to marine biodiversity, then the preferred management option in the first instance should be a measure taken under the Fisheries Act – after all, that is precisely what the Act is intended to achieve. The use of other tools, including but not limited to MPAs, should be considered only where the identified objective is beyond an objective that can be achieved under the Fisheries Act (i.e., if risks other than fishing need to be managed, or if the level of protection required is higher than that encompassed within the Fisheries Act's definition of sustainability).
57. Furthermore, legally and in substance, any decision to establish an MPA is – in Fisheries Act terms – a **utilisation** decision rather than a sustainability decision. This is clear from section 8 of the Fisheries Act which defines 'utilisation' as including 'conserving' fisheries resources to enable people to provide for their social, economic, and cultural well-being. The decision to close an area to fishing in order to protect marine biodiversity is a trade-off between competing utilisation objectives (i.e., utilisation for fishing purposes and utilisation for biodiversity protection purposes). It is no different in this respect

¹⁹ MPI website (fisheries management system review).

from a decision to close an area to commercial fishing in order to provide for recreational fishing. In both cases, no fisheries sustainability issue has been identified; instead a decision has been made to allocate existing fishing grounds to a new use.

58. It follows that the claim that *‘the Fisheries Act makes it clear that the Crown is not liable to pay compensation where measures are taken for sustainability, which includes biodiversity protection’*²⁰ is irrelevant to the payment of compensation for MPAs. MPAs are not established for the purposes of ensuring sustainability under the Fisheries Act, but for purposes that protect biodiversity beyond Fisheries Act requirements. In Fisheries Act terms, MPAs are utilisation measures, for which section 308 of the Act provides no protection from liability to pay compensation.

New Zealand law does not preclude the payment of compensation

59. It is well-established in New Zealand (and similar Commonwealth jurisdictions) that unless there is an express statutory provision otherwise, the presumption is that an Act will not be assumed as intending to interfere with or prejudice established property rights.²¹ If legislation does take property, the courts have held that the statute will be construed as providing for compensation, in the absence of an explicit prohibition otherwise.²² The Government’s offer of compensation to quota owners affected by the proposed recreational fishing parks in the Hauraki Gulf and Marlborough Sounds is presumably intended to recognise these legal principles, which apply equally to the establishment of MPAs for biodiversity protection purposes.

60. The fact that the current Marine Reserves Act and the Marine Mammals Protection Act do not make any active provision for compensation when a marine reserve or sanctuary is established is irrelevant. The pertinent point is that neither Act precludes the payment of compensation. Furthermore, both Acts were established before the QMS was introduced and have not been updated to safeguard the effective operation of New Zealand’s rights-based fisheries management regime.

61. Compensation is a standard element of best practice international guidance on MPA establishment. For example, the IUCN MPA Guidelines have, since 1999, urged that compensation should be an element of national MPA legislation (see **box**).²³

Compensation Assists Protection

*‘Experience shows that the success of conservation management programmes depends critically on the support of local people. Therefore, **where rights and practices are firmly established**, consideration should be given to arrangements for specific benefits to local inhabitants in terms of employment in management or **compensation for lost rights**’*

²⁰ Consultation document page 19.

²¹ *Clifford v Ashburton Borough* [1969] NZLR 446 affirmed *Ashburton Borough v Clifford* [1969] NZLR 927 (CA) at 943.

²² See *Attorney-General v De Keyser’s Royal Hotel* [1920] AC 508 at 542 (HL); *Manitoba Fisheries Limited v Canada* [1979] 1 SCR 101; *Colonial Sugar Refining Company Limited v Melbourne Harbour Trust Commissioners* [1927] AC 343 (PC) at 359; *Belfast Corporation v OD Cars Limited* [1960] All ER 65 at 72 per Lord Radcliffe.

²³ WCPA-IUCN (1999) Guidelines for Marine Protected Areas. Best Practice Protected Area Guidelines Series No 3.

Compensation is a tool to help achieve desired marine environment outcomes

62. It is illogical and self-defeating to ignore the role compensation can play in facilitating value-adding changes in resource use. Compensation is not something that we should even be debating – it is simply a tool to help achieve desired outcomes in the marine environment: in this case, the protection of marine biodiversity and the maintenance of an effective fisheries management regime. Without compensation in the mix of tools, we consider that it is not possible to support the effective operation of our rights-based fisheries management regime while at the same time improving the protection of marine biodiversity.

Recommended solution (3) – ‘rebalancing’ the fisheries management regime

63. If, as recommended in this submission, a risk-based, least-cost approach to marine biodiversity protection is adopted, we expect any displacement of commercial fishing from MPAs to be minimal. However, when an MPA is established that results in a loss of access to a specific fishery, we recommend that a two-step response is required to ‘rebalance’ and restore certainty to the fisheries management regime, thus:

- A fisheries management response removes the displaced catch from the fishery (rebalancing the biological system); and
- A market-based response ensures that affected quota owners are no worse off (rebalancing economic incentives for the effective operation of the QMS).

64. This simple, two-step rebalancing process is shown in diagrammatic form in **Appendix Three**, and is described in more detail below. The aim is that the fishery and the quota owners are left no worse off than they were immediately prior to the establishment of an MPA.

65. Statutory support for a two-step rebalancing process will help the QMS to function more effectively by giving quota owners confidence that – even if access to fisheries is constrained – stock abundance and the value of quota will be maintained following the establishment of an MPA. This will help maintain incentives for sustainable management. A statutory rebalancing framework will also promote:

- **More flexible solutions.** The choice between various protection measures – particularly measures that impose a cost on existing users – may be limited if there is no potential to offer compensation. For example, a proposed marine reserve that was unacceptable in the absence of rebalancing could proceed if displaced fishing effort was removed from the system and market compensation applied. Additional flexibility can create more ‘win-win’ outcomes for the seafood industry, communities and the government. These types of outcomes are better in the long run, as they are less likely to be re-litigated; and
- **Better decisions.** One of the main problems with the establishment of MPAs is that of *fiscal illusion*, where the true cost of an MPA proposal is hidden. When greater areas under protection are demanded in the absence of compensation it costs the majority nothing. The risk is that the minority – the fishing industry – have to shoulder this cost. The even greater risk is that there is nothing to constrain the demands of the majority and the impact they impose on the minority. Such an outcome is sub-optimal from the perspective of all of society. With market-based compensation in the mix, decision-makers are faced with the true costs of their decisions and are more likely to

achieve the Government's stated objective that '*decisions about environmental protection and economic growth are made in a planned and integrated way, based on sound evidence to maximise the benefits to New Zealand*'.

Rebalancing should be the default position

66. We recommend that rebalancing should be the Act's default position (i.e., an automatic response to MPA establishment) and that no statutory 'trigger' be specified.²⁴ Our rationale is that in fully developed sessile and sedentary fisheries, *any* displacement of catch will trigger the need to rebalance the fishery by implementing catch reductions. Avoiding the specification of a statutory trigger is an efficient way of ensuring that numerous small displacements will not have cumulative adverse effects on the utilisation and sustainability of surrounding fisheries.
67. However, all fisheries are different in terms of their spatial distribution, mobility, intensity of use, and predicted stock trajectory. We therefore recommend that quota owners of affected stocks should be able to collectively decide on a case-by-case basis whether to retain the *status quo* fisheries management settings and forgo the associated compensation. The legislation should provide a statutory decision tool to enable the owners of at least 75% of quota shares in a stock to decide to deviate from the default position, and this decision would then bind all quota owners in that stock.²⁵

Step one: Rebalancing the biological system

68. Designing an appropriate fisheries management response to an MPA first involves assessing the amount of displaced catch (i.e., commercial, recreational and customary catch). We recommend that an appropriate methodology be developed and agreed by the seafood industry and government. Factors to consider include:
- Data sources, including appropriate use of fine-scale industry or iwi-collected data;
 - Length of time over which catch is averaged (e.g., five years);
 - Extent to which historical catch represents likely future catch forgone; and
 - Appropriate recognition of collective industry management measures (e.g., effect of voluntary catch-spreading, shelving, or closed areas).
69. When catch is displaced from an MPA, the appropriate fisheries management response is to remove the displaced catch from the surrounding fishery by implementing a catch reduction. Such a catch reduction is not a 'sustainability measure' but is instead a measure to preserve existing utilisation opportunities in the surrounding fishery. Commercial catch reductions can reliably be implemented by cutting the TACC. However, for recreational catch, changes in other management settings (e.g., bag limits or Minimum Legal Size) are likely to be required to implement a meaningful catch reduction. For customary catch, customary fisheries managers (Tangata Tiaki/Kaitiaki) are best placed to implement any necessary measures.

²⁴ By 'trigger' we mean either a numerical trigger (e.g., minimum 5% displacement of catch of a stock) or a trigger that relies on discretionary judgement (e.g., 'material impact').

²⁵ Section 25A of the Fisheries Act (alteration of quota management area with agreement of quota owners) provides a precedent for the use of a binding decision made by a super-majority of owners of at least 75% of quota shares.

Step two: Correcting economic incentives

70. Following a commercial catch reduction as a consequence of MPA establishment, we recommend that the Crown compensates quota owners in the affected stock(s) on a *pro rata* basis for the market value of quota shares equivalent to the forgone commercial catch. Compensation would normally be in the form of a cash payment, but quota owners may also be open to negotiating alternative non-cash compensation of equivalent value (e.g., re-opening of other closed areas).
71. We recommend that compensation should be provided to quota owners in order to ensure that QMS incentives continue to operate as intended. A *pro rata* market-based compensation payment ensures that all quota owners in an affected stock are compensated, reflecting the collective effect of the closure on quota value and QMS incentives.²⁶ We do not recommend the payment of financial compensation to non-commercial fishing sectors because non-commercial sectors are not subject to a management regime that is reliant on economic incentives.
72. In order to provide certainty for all parties, the legislation should include principles to help assess the value of quota equivalent to the displaced catch.²⁷ A prescriptive methodology should be avoided and the valuation process should, as far as possible seek to replicate a negotiated free-market transaction, with valuation based on quota and ACE trade prices for the stock (and for equivalent stocks) over an agreed time period. If valuation cannot be agreed between the Crown and quota owners, then a true arbitration should take place (i.e., unfettered by distortionary regulations such as those that have been applied in the case of the aquaculture UAE provisions).²⁸
73. Because of the compulsory nature of the loss of access to fisheries, we recommend that a multiplier be applied to the calculation of quota value in the form of a solatium (i.e., a payment for other losses paid to an injured party over and above compensation paid for damages). There are numerous legislative precedents for such an approach – for example:
- The aquaculture compensation methodology that applies under Fisheries Act regulations specifies a solatium payment using a multiplier of 1.2 times the assessed quota value; and
 - Changes to the Public Works Act 1981 currently being considered by the Local Government and Environment Committee include an increased solatium payment for landowners whose home is acquired for a public work, and a completely new solatium payment when the land acquired for a public work does not contain the landowner's home.²⁹

²⁶ The alternative approach (i.e., the Crown buying quota on the market and then 'retiring' it) is not preferred because it results in Crown ownership of quota shares, reduces the number of quota shares available for trading (reducing efficiency of the quota market and quality of title), and compensates only those who sell quota and not those who remain in the fishery.

²⁷ The assessment should assume that the forgone catch is a permanent loss, even if the MPA has provision for a future review, because: (a) there is no certainty that fishing will ever be restored and (b) fishing behaviour will change immediately on establishment of an MPA and decisions made by quota owners (removal of effort, selling vessels etc) may have long-term economic consequences.

²⁸ Fisheries (Aquaculture Compensation Methodology) Regulations 2012.

²⁹ Resource Legislation Amendment Bill. These payments are justified on the basis that landowners are subject to losses arising from disruption and other forms of inconvenience (over and above the value of their land) when their land is acquired for a public work.

Assistance for ACE-dependent fishers

74. ACE-dependent fishers (i.e., fishers who purchase ACE from quota owners but do not own quota themselves) can be displaced when MPAs are established. The economic consequences of this displacement are sometimes so great that the fishers' livelihoods are removed. The flow-on effects in local communities can be socially and economically disruptive. These fishers are, in a very real sense, paying the price for society's demands for marine protection above and beyond what is required to ensure sustainability.
75. We suggest that there are two potential (non-exclusive) ways which ACE-dependent fishers may be assisted to transition to new activities that are consistent with society's changed expectations. In the first instance, it may be appropriate for quota owners in a stock to take responsibility for assisting displaced fishers. The rationale for quota owner responsibility is that while a 'rebalancing' TACC reduction removes catch from a fishery, it does not necessarily reduce fishing effort. Displaced fishers may seek to remain in the fishery, introducing inefficiency and tension into the catching sector as the same number of fishers compete to catch fewer fish. It may therefore be in the collective interests of quota owners to facilitate the removal of excess effort from the fishery. The inclusion of a solatium payment in the compensation package provides an opportunity for quota owners to establish a trust fund through which payments to affected commercial fishers could be made as a form of adjustment assistance.
76. The second potential mechanism for addressing the inequitable situation of displaced ACE-dependent fishers is through the provision of adjustment assistance directly by the Crown. It is important to note that if such Crown assistance is provided, it is for social reasons, not in order to help the QMS function more effectively. It is therefore distinct from and additional to compensation provided under the rebalancing recommended in this submission.
77. We consider that the position of ACE-dependent fishers is an issue that would benefit from further policy discussion between representatives of the seafood industry and government.

Consequential amendments to the Fisheries Act

78. We recommend that a statutory framework for rebalancing should be provided under the Fisheries Act rather than the new MPA Act because:
- Rebalancing the biological system (through catch reductions and other management measures) is implemented using Fisheries Act tools; and
 - The assessment of displaced catch and the estimation of the market value of quota shares equivalent to the forgone commercial catch are both matters that are more appropriately addressed under the Fisheries Act.

Recommended solution (4) – statutory test to prevent undue impact

79. The Marine Reserves Act requires that a marine reserve cannot be established if it would ‘interfere unduly with commercial fishing’.³⁰ Equivalent legislation contains similar tests to protect the exercise of commercial fishing rights from the effects of spatial displacement, including:
- The ‘undue adverse effects’ test for new aquaculture development in the Fisheries Act;
 - The requirement in the customary fishing regulations that a mātaihai reserve must not ‘prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement... within the quota management area for the species’; and
 - The requirement in the Marine and Coastal Area (Takutai Moana) Act 2011 that wāhi tapu conditions within a customary marine title area must not affect the exercise of fishing rights to the extent that the conditions prevent fishers from taking their lawful entitlement in a quota management area.³¹
80. These tests, and others like them, are part and parcel of the current definition and security of quota rights. Statutory tests help provide quota owners with certainty about the conditions under which, and the extent to which, their harvest rights may be affected by new uses of an area. In doing so, the tests help ensure the continued operation of the QMS and its underlying incentives.
81. Importantly in the case of the Marine Reserves Act, the test predates both the QMS and the Maori Fisheries Settlement and is therefore built into current quota values. The omission of an equivalent test from the new MPA Act would most likely result in a reduction in quota value and a reduction in the value of the fisheries settlement. We therefore recommend that the new MPA Act should contain a statutory test to prevent undue interference with the exercise of quota rights and to ensure the ongoing effective operation of the QMS. The test should require decision-makers to take account of the cumulative effects of multiple MPAs and other closed areas on fishing for a stock.³²
82. The relationship between our recommended ‘rebalancing’ approach (as discussed above) and the statutory test is as follows:
- When the displaced catch is below the level of the statutory test (i.e., where the impact is not considered to be ‘undue’) MPA establishment proceeds with ‘rebalancing’ for displaced catch (unless quota owners decide to forgo a TACC cut and associated compensation); but
 - When the displaced catch is above the level of the statutory test then the MPA cannot be established unless quota owners agree that the MPA can proceed,³³ in which case the rebalancing provisions apply.
83. This arrangement provides greater flexibility and opportunity for MPA establishment than the current Marine Reserves Act, by enabling MPA establishment to proceed, with the agreement of quota owners, even when a statutory test is triggered.

³⁰ Marine Reserves Act section 5(6).

³¹ MACA Act section 79.

³² Section 186GB of the Fisheries Act provides a precedent for consideration of cumulative adverse effects on fishing when the Minister makes an ‘aquaculture decision’.

³³ Using a 75% decision tool, as discussed above.

Part Three: Enhancing recreational fishing opportunity

84. NZ RLIC, PIC and FINZ support a policy objective of enhancing recreational fishing opportunity. We consider this to be a more appropriate policy objective than improving recreational fishing experience, value or success because opportunity can be controlled by regulatory settings, whereas experience, value and success depend on attributes of recreational fishing participants (expertise, equipment, dedication, knowledge etc) which cannot be altered by adjusting the regulatory settings.

85. While we are committed to enhancing recreational fishing opportunity, we consider that recreational fishing parks:

- Do not protect marine biodiversity;
- Will not enhance recreational fishing;
- Are inconsistent with a risk-based approach; and
- Are a poor fit with the MPA Act.

Recreational fishing parks do not protect marine biodiversity

86. Environment Minister Nick Smith has justified the inclusion of recreational fishing parks in the proposed MPA Act on the basis that recreational fishing parks are MPAs. This is factually incorrect.

87. The IUCN's Best Practice Protected Area Guideline Series reflects international best practice for applying the IUCN protected area management categories to MPAs.³⁴ The IUCN Guidelines adopt a purposive approach to the definition of MPAs. In other words, in order to be an MPA, an area must be managed for the purpose of achieving '*the long-term conservation of nature with associated ecosystem services and cultural values*'. The Guidelines clearly state that spatial areas which may incidentally appear to deliver nature conservation but do not have stated nature conservation objectives should not automatically be classified as MPAs. These include fishery management areas with no wider stated conservation aims and community areas managed primarily for sustainable extraction of fish.

88. The purpose of the Government's proposed recreational fishing areas is to '*to enhance the enjoyment and value of recreational fishing in high-demand areas*'.³⁵ Section 5 of the consultation document makes it clear that recreational fishing parks are intended to '*improve the fishing experience of recreational fishers*' and Section 3.3 proposes that inside recreational fishing parks '*participation in fishing can be actively encouraged*'. As Minister for Primary Industries Nathan Guy said in a media interview, the Government is promoting recreational fishing parks in the Hauraki Gulf and Marlborough Sounds because '*it's hugely important that mum and dad and the kids are able to catch a fish*'. It is clear that recreational fishing parks:

- Do not have a conservation or biodiversity protection purpose; and
- Therefore, do not meet the IUCN's requirements for MPAs; and
- Therefore, cannot contribute to the establishment of a network of MPAs (the stated purpose of the proposed MPA Act) if IUCN is used as a justification for their inclusion.

³⁴ Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas Best Practice Protected Area Guidelines Series No.19 (IUCN 2012).

³⁵ Consultation document page 17.

89. Furthermore, it is misleading to contend that recreational fishing parks have marine biodiversity protection benefits irrespective of their intended purpose. Encouraging people to get out and catch more fish cannot be reconciled with better protection of marine biodiversity. The reality is that it is far more likely that recreational fishing parks will have a harmful effect on sustainable fisheries and biodiversity protection because:
- Mobile fish species will continue to be harvested in waters open to commercial fishing, so stock abundance inside the park is unlikely to increase;
 - Commercial catch displaced from recreational fishing parks will put additional pressure on fish populations outside the park;
 - Commercial fishers displaced from sheltered nearshore waters may be forced to shift from low-scale, low-impact inshore methods to bulk fishing methods that some people perceive to be less environmentally friendly; and
 - Active encouragement of recreational fishing will put additional pressure on fish populations inside the recreational fishing park.
90. The only possible reason the proposed MPA Act includes recreational fishing parks is that marine biodiversity protection and recreational fishing *can* both be managed by spatial tools. That is a poor reason to progress both in the same Bill, particularly as spatial mechanisms are an inferior management tool to *‘enhance the enjoyment and value of recreational fishing’*.

Recreational fishing parks will not enhance recreational fishing

91. As noted above, fish populations in a recreational fishing park will not increase simply because commercial fishing has been prohibited in the area. Even recreational fishers don’t think there will be any improvement in recreational fishing inside recreational fishing parks (see **box**, which is an extract from the Facebook page of recreational fishing lobby group LegaSea).³⁶

LegaSea – Recreational Fishing Group

‘Question: – *Is banning all commercial fishing in the inner Gulf as part of the new MPA going to achieve abundance?*

Answer: *Not really – There are small, commercial family operations that supply the local market and do little damage to the fishery. Overall these guys tend to do a good job. It is the mobile bulk harvesting methods such as trawling and danish seining that are damaging and reduce productivity. These methods are already banned from the inner Gulf so why throw a few small-scale operators under the bus for so little benefit?’*

³⁶ <https://www.facebook.com/LegaSea/posts/844160685692778>

92. Recreational fishers, like commercial and customary fishers, need sustainably managed, abundant fisheries throughout their favoured fishing grounds. Providing exclusive recreational use of some areas does nothing to promote this. Only sound fisheries management that increases the biomass of the stock as a whole can improve recreational fishing opportunity. This is a fisheries management issue, not a marine protection issue. It should be addressed through the Fisheries Act, not under the proposed new MPA Act.
93. The Fisheries Act already has the necessary tools to deliver abundant sustainable fisheries, including adjustments to fish stock biomass levels through the setting of Total Allowable Catches; the allocation of fisheries resources through the setting of TACCs and allowances for recreational and customary fishing; changes in commercial fishing gear selectivity; flexible and targeted spatial measures; and the collection of information to inform fisheries management decisions. Under the Fisheries Act, these tools can be used in an integrated way to enhance recreational fishing, whereas under the MPA Act just one simplistic spatial tool would be available. Furthermore, given the poor integration between the proposed MPA Act and the Fisheries Act (as discussed in Part Two of this submission), there is a high risk that recreational fishing parks established under an MPA Act would detract from effective fisheries management under the Fisheries Act.

Recreational fishing parks are inconsistent with a risk-based approach

94. Recreational fishing parks are inconsistent with the risk-based approach advocated in this submission. First, the consultation document contains no analysis of any ‘problem’ with current recreational fishing opportunity, either generally, or in the case of the two proposed recreational fishing parks. Secondly, the proposals simply assume, with no evidence whatsoever, that commercial fishing is a threat to recreational fishing in ‘high demand areas’ such as the Hauraki Gulf and Marlborough Sounds. Even a cursory analysis suggests that, given the low level of commercial fishing effort for the most prized recreational species in each of the two proposed parks, commercial fishing within the boundaries of the parks is unlikely to be a significant threat to the enjoyment of recreational fishing in comparison with other threats such as environmental degradation and intensive recreational fishing pressure. For example, NIWA analysis estimates that 90% of snapper caught within the area of the proposed Hauraki Gulf Recreational Fishing Park is already taken by the recreational sector.³⁷
95. Under a risk-based approach, a specific objective for recreational fishing would first be identified. Threats to achieving the objective would then be identified and evaluated. Even if commercial fishing was identified as a significant threat, there are well-established existing mechanisms under the Fisheries Act – including the potential for voluntary agreements to be reached – that can manage this risk more effectively and at far less cost than the establishment of a recreational fishing park. In fact, we cannot conceive of a situation in which a recreational fishing park established under an MPA Act would achieve recreational fishing objectives more efficiently and effectively than the use of existing Fisheries Act mechanisms.

³⁷ Bruce Hartill. Recreational fisheries in the Hauraki Gulf. Sea Change – Tai Timu Tai Pari Working Group meeting 26 August 2014 and pers comm.

Recreational fishing parks are a poor fit with the MPA Act

96. On a practical level, recreational fishing parks are a poor fit in an MPA Act. Recreational fishing parks are inconsistent with the stated purpose of the Act (establishing a network of representative MPAs to protect marine biodiversity) and the process for establishing MPAs is poorly suited to recreational fishing parks. For example, if the process outlined in the consultation document is applied:

- Any person, at any time, can propose a recreational fishing park anywhere in the territorial sea. The only limitations are the ‘information requirements’ that the proposal must meet. If the scanty level of supporting information presented in the consultation document for the proposed parks in the Hauraki Gulf and Marlborough Sounds is any indication of what the new Act will require, the statutory barriers to further recreational fishing parks being progressed are slim indeed;
- Decision criteria for MPAs that are established for biodiversity protection purposes will not be suitable for recreational fishing parks, and therefore a parallel set of decision criteria will need to be included in the MPA Act; and
- It is difficult to see how a CG involving recreational and commercial fishing representatives will be able to work together to establish a recreational fishing park, given that one party has everything to lose (i.e., exercise of their fishing rights) and another has everything to gain (spatially exclusive use of an area). Negotiated tradeoffs are simply not possible where there is only one possible outcome and that outcome benefits one party at the expense of the other; and
- Referring the matter to a BOI adds no value over and above the dispute resolution processes that already exist under Part 7 of the Fisheries Act. These provisions enable the Minister for Primary Industries to appoint a Fisheries Dispute Commissioner who is empowered to hold an inquiry and consider submissions and evidence before making a recommendation to the Minister. The existing Fisheries Act dispute resolution processes are superior to the BOI process proposed in the MPA Act because they enable multiple solutions to be applied.

Recommended solution (5) – remove recreational fishing parks from the MPA Act

97. NZ RLIC, PIC and FINZ recommend that the proposed MPA Act should not include:

- Provision for recreational fishing parks to be established; or
- Specific provisions to establish the Hauraki Gulf Recreational Fishing Park and the Marlborough Sounds Recreational Fishing Park.

98. Instead, measures to improve recreational fishing opportunity should be implemented under the Fisheries Act. If the Government considers that the Fisheries Act does not provide adequately for recreational fishing, any enhancements to that Act should be considered as part of the concurrent Ministry for Primary Industries review of fisheries management systems.³⁸

³⁸ <http://www.mpi.govt.nz/law-and-policy/legal-overviews/fisheries/fisheries-management-system-review/>

Part Four: Protecting marine biodiversity in the EEZ

99. The interests of NZ RLIC, PIC and FINZ are primarily in the territorial sea, although some inshore finfish species are also caught in the Exclusive Economic Zone (EEZ). Irrespective of the location of our fishing operations, we have a strong interest in establishing an integrated framework for marine biodiversity protection throughout New Zealand's fisheries waters.
100. The consultation document proposes an *ad hoc* approach to marine biodiversity protection in the EEZ using one-off special legislation, while at the same time rejecting the use of special legislation in the territorial sea. An *ad hoc* approach creates considerable uncertainty and associated risks and costs for quota owners. *Ad hoc* MPA establishment such as the proposed Kermadec Ocean Sanctuary doesn't only have direct impacts on quota owners in the affected area – it also affects the confidence of the industry as a whole in the ongoing security of their harvest rights throughout the EEZ and territorial sea. The concern is 'if it can happen there, it could happen anywhere'.

Benefits of a legislative framework for EEZ biodiversity protection

101. In comparison with the *ad hoc* approach typified by the Kermadec Ocean Sanctuary Bill, a planned, risk-based approach to marine biodiversity protection in the EEZ would:
- Provide certainty of process, if not certainty of outcome – i.e., existing users and other interests could at least be certain that:
 - they will be properly consulted on biodiversity protection proposals; and
 - proposals will be assessed against known statutory requirements (principles, criteria, statutory tests etc);
 - Include statutory checks and balances to prevent arbitrary and unreasonable exercise of decision making powers;
 - Make biological sense by enabling an integrated approach to biodiversity protection across the territorial sea and EEZ; and
 - Provide an opportunity for decisions to be reviewed through judicial processes, which is entirely appropriate when existing property rights may be affected (such an opportunity does not exist when MPAs are established directly by an Act of Parliament).
102. Given these benefits, if we were confident that the proposals in the consultation document would result in the establishment of a structured, risk-based approach to marine biodiversity protection, we would welcome further discussion on how such a regime might be extended to the EEZ (with appropriate adjustments to reflect the different nature of New Zealand's powers and obligations in the EEZ). However, as discussed in this submission, the proposals fall well short of a suitable regime for the territorial sea, let alone the EEZ.
103. Nevertheless, if the concerns identified elsewhere in this submission can be satisfactorily addressed (particularly those matters in Parts One and Two), we believe that consideration should be given to how a statutory regime for marine biodiversity protection in the EEZ might be applied.

UNCLOS and MPAs in the EEZ

104. Extending the proposed MPA Act (even with our recommended amendments) into the EEZ would not necessarily be consistent with international law.³⁹ We are particularly concerned to ensure that any establishment of MPAs in the EEZ is consistent with New Zealand's obligations under the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS provides that States do not have sovereignty in the EEZ – instead they have more limited rights, including:
- A sovereign right to explore and exploit, conserve and manage natural resources, whether living or non-living; and
 - Jurisdiction with regard to the protection and preservation of the marine environment.
105. While a State may regulate activities in order to protect and preserve the marine environment, it can't use its regulatory jurisdiction to expropriate resources or to completely exclude activities. The detailed regime in respect of living resources in the EEZ is contained in Articles 61 and 62 of UNCLOS. These Articles contain the following obligations:
- The Coastal State must promote the objective of optimum utilisation of the living resources of the zone;
 - The Coastal State must make available to other States access to the surplus of the allowable catch of all living resources over and above its domestic harvesting capacity;
 - The best scientific evidence available must be taken into account in assessing conservation and management measures;
 - Conservation and management measures must be designed to maintain or restore populations at levels which can produce the maximum sustainable yield; and
 - The Coastal State may establish laws and regulations for a number of specified purposes, including licensing, fixing quotas and species that may be caught, regulating seasons and areas of fishing and gear and effort controls, enforcement procedures and so on.
106. The ability of States to regulate 'seasons and areas of fishing' in the EEZ has been interpreted by most Coastal States as allowing the imposition of conservation and management measures which close certain areas to fishing for a period. However, there is nothing in Article 62 which can be seen as an authority for the permanent closure of large areas of the EEZ to fishing. Under UNCLOS, the international community has a clear right that any 'no take' permanently closed area should not impact unreasonably on the 'optimum utilisation' rule. This means that an MPA which closed off a whole stock or a significant portion of a stock that could not be fished elsewhere, and as a result was not able to be utilised to optimum levels, would be unlawful. Matters such as the size of the area, the fish populations in the area and their relationships with populations outside the area become very important determinants of lawfulness under UNCLOS.

³⁹ The views in this section of the submission are informed by a legal opinion prepared by Colin Keating for the New Zealand Seafood Industry Council Ltd (2002).

107. Setting aside as a no-take MPA (i.e., a marine reserve) a large area of the EEZ simply on the basis of its contribution to a network of MPAs would clearly not meet the test implicit in the optimum utilisation rule. The ‘surplus allocation’ rule might also be infringed by a large no take marine reserve. We also note the critical importance in international law of scientific evidence and suggest that this requirement would set a relatively high barrier for the establishment of a large marine reserve in the EEZ.

Recommended solution (6) – attributes of a biodiversity protection regime for the EEZ

108. If a biodiversity protection regime were to be established for the EEZ, we recommend that it should share the basic attributes of:
- A planned, risk-based, least-cost approach that makes use of the best available information, as recommended in Part One of this submission; and
 - Mechanisms to protect the effective functioning of the QMS, as recommended in Part Two of this submission.
109. We further recommend that, if a regime were to be established in the EEZ, it should provide for just two categories of MPAs – i.e., seabed reserves and species-specific sanctuaries. We consider the use of no-take marine reserves to be unjustified in the EEZ for two reasons. First, the level of commercial activity in the EEZ is low (currently just fishing and petroleum activities) and the environmental risks of these activities are already managed under the Fisheries Act and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. A marine reserve could therefore not be justified under a risk-based approach to marine biodiversity protection in the EEZ. Secondly, as discussed above, no-take marine reserves may infringe New Zealand’s obligations as a Coastal State under UNCLOS including the ‘optimum utilisation’ rule and the requirement for measures to be technically justified.
110. We recommend that an EEZ biodiversity protection regime should:
- Provide for Boards of Inquiry to assess proposals and undertake consultation and engagement, because the establishment of EEZ MPAs under a risk-based approach is primarily a technical exercise that is not amenable to community-driven tradeoffs;
 - Enable:
 - resource exploration within the MPAs providing any impacts are within agreed bounds (i.e., zero or close to zero), such as non-extractive surveys; and
 - the extraction of resources within an MPA in the event that resources of national interest are discovered, providing the project meets strict statutory criteria – for example, significant positive national economic impact, together with minimal risk to the environment and/or setting aside of equivalent MPAs.

This recommendation is justified on the basis that we have low levels of information about resources in the EEZ and it would be premature to preclude development opportunities that are clearly in the public interest, provided that biodiversity protection objectives can continue to be

met. Furthermore, New Zealand already has legislation in place to balance the environmental effects of resource development against economic benefit in the EEZ;⁴⁰

- Provide for the existing Benthic Protection Areas (BPAs) to transition into the new MPA regime as seabed reserves, so that the protection afforded by the BPAs can be extended to all bottom-impacting activities; and
- Implement the proposed Kermadec Ocean Sanctuary under the new MPA regime so that all EEZ MPAs can be established and managed in an integrated manner.

Part Five: Detailed comments on the consultation document

111. This section of our submission contains responses to the questions posed in the consultation document.

The need for a new approach

Q1. Do you agree there is a need for reform of New Zealand’s approach to marine protection?

112. NZ RLIC, PIC and FINZ agree there is a need for reform and concur with most of the stated problems with the current regime (page 13). However, we disagree with the claim that a significant shortcoming of the current approach to marine protection is that it *‘does not address recreational amenity values including those of recreational fishers in high-demand areas’*. The interests of recreational fishers are currently protected in section 5 of the Marine Reserves Act 1971. Beyond that, providing for recreational fishing is a fisheries management matter, and is not an issue that the marine protection regime *should* address.
113. We agree that the use of special legislation to protect marine biodiversity in the territorial sea is undesirable for the reasons outlined on page 13 of the consultation document (certainty, inconsistency, incremental allocation etc). The use of special legislation in the EEZ – such as that proposed for the Kermadec Ocean Sanctuary – is equally undesirable for the same reasons.

Q2. Are there any significant issues that haven’t been identified?

114. The Marine Reserves Act 1971 predates the implementation of the QMS in 1986 and the settlement of Maori claims to commercial fisheries in 1992. A significant issue that has not been identified is the need to align the regime for protecting marine biodiversity with our fisheries management regime. As discussed in Part Two of this submission, it is vital that marine biodiversity protection, including the establishment of MPAs, does not jeopardise the effective operation of the QMS or the fisheries settlement.
115. Since the introduction of the QMS in 1986, quota owners (including owners of settlement quota) have had a legitimate expectation that market-based transactions would be used to facilitate any transfer of use of fisheries resources, including for marine biodiversity protection purposes, that are beyond the ‘sustainability’ requirements of the Fisheries Act. The development of a new MPA Act provides the opportunity to finally give effect to this expectation.

⁴⁰ See section 59 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

Q3. Are there parts of the existing approach to marine protection that should be retained?

116. We recommend that national gap analysis process in the MPA Policy framework⁴¹ should be retained and explicitly reflected in the new Act as recommended in Part One of this submission.
117. We also recommend that the Marine Reserves Act's statutory tests to protect existing rights and interests should be retained, as discussed in Part Two of this submission.

The proposal

Q4. Do you support the outlined objectives of the new MPA Act?

118. No. We recommend that the MPA Act should have a single overriding objective that focuses on the protection of marine biodiversity, as follows:
- To contribute to the protection of New Zealand's marine biodiversity by establishing marine protected areas.*
119. In contrast to the multiple proposed objectives, a single purpose statement provides the Act with a clear focus. Our recommended wording returns the focus of the Act to the protection of marine biodiversity, whereas the proposed wording focuses on the establishment of a network of MPAs as if this were an end in itself. The geographical scope of the Act (i.e., territorial sea/EEZ) is more appropriately specified in a separate section.
120. We recommend that the purpose of the Act should reflect the fact that MPAs are just one of many tools that can be used to protect marine biodiversity. Our recommended approach is consistent with:
- New Zealand's obligations under the Convention on Biological Diversity,⁴² as set out in the New Zealand Biodiversity Strategy 2000 (NZBS). Objective 3.6 of the NZBS is to '*Protect a full range of natural marine habitats and ecosystems to effectively conserve marine biodiversity, **using a range of appropriate mechanisms, including legal protection***'. Associated Action 3.6a is to '*Develop and implement a strategy for establishing a network of areas that protect marine biodiversity, including marine reserves, world heritage sites, and **other coastal and marine management tools** such as maitaitai and taiapure areas, marine area closures, seasonal closures and area closures to certain fishing methods;*⁴³ and
 - The MPA Policy (2005), which emphasises that an MPA network '***is just one of a wide range of management initiatives designed to protect marine biodiversity***. The other initiatives include effects-based management of the coastal and marine area under the ...RMA, **management for sustainable utilisation of fisheries under the Fisheries Act ...**, protection of marine mammals and

⁴¹ Marine Protected Policy and Implementation Plan (2005).

⁴² Target 11 of the Convention on Biological Diversity is: *By 2020, at least ... 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas **and other effective area-based conservation measures**, and integrated into the wider landscape and seascape* (our emphasis).

⁴³ <https://www.biodiversity.govt.nz/pdfs/picture/nzbs-whole.pdf> (our emphasis).

*threatened species under conservation legislation, and management of marine incursions under the Biosecurity Act.*⁴⁴

121. The Act as proposed simply contains a set of tools and a partially-developed process to apply those tools on a site-specific or local basis – it contains no planning mechanism that would enable the establishment of a ‘representative and adaptable network of MPAs’. The notion of an ‘adaptable’ network is not defined and, so far as we are aware, is not based on international obligations or New Zealand’s domestic policy framework. If a risk-based network planning regime were to be added to the Act, as recommended in Part One of this submission, then the Act’s objective could be expanded to read:

To contribute to the protection of New Zealand’s marine biodiversity by establishing a representative network of marine protected areas.

122. With respect to the remaining proposed objectives:

- We have no substantive objection to objective 2 – *decisions about environmental protection and economic growth are made in a planned and integrated way, based on sound evidence, to maximise the benefits to New Zealand* – but we do not believe that the current proposals will establish a law capable of achieving the objective. These matters may be better addressed in decision criteria and as ‘principles’ that support the primary objective of the Act (see Q5);
- The scope of the ‘customary rights’ that are recognised in objective 3 is unclear, particularly as the Maori commercial fisheries settlement (which is an exercise of customary commercial fishing rights) is not recognised in the proposed Act. These matters would be better addressed in an effective Treaty clause and in provisions equivalent to section 5 of the Fisheries Act (application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992);
- Objectives 4 and 5 describe an approach rather than matters appropriate for statutory objectives; and
- Objective 6 relating to New Zealand’s international obligations is appropriate but need not be a specific purpose of a new Act (particularly if drafting aligned to section 5 of the Fisheries Act is adopted, as proposed above). We note that these obligations include conventions and agreements relating to the sustainable use of fisheries resources.

Q5. Are there additional objectives that should be included in marine protection reform?

123. Our preference is that the purpose of the Act is as simple and specific as possible but that it is supported by principles which must be taken into account by Ministers, Collaborative Groups and Boards of Inquiry. This drafting approach is common in natural resource legislation, including the Resource Management Act and the Fisheries Act.

⁴⁴ MPA Policy and Implementation Plan (2005), page 8.

124. An appropriate set of principles could read as follows:

All persons exercising or performing functions, duties, or powers under this Act, in relation to the protection of marine biodiversity through the establishment of marine protected areas, shall take into account the following principles:

- a) Decisions should be based on the best available information;*
- b) A risk-based approach should be adopted;*
- c) A least-cost approach should be adopted;*
- d) Integrated management solutions using a range of appropriate mechanisms, including legal protection under other statutes, should be preferred.*

125. Terms such as ‘best available information’, ‘risk-based approach’ and ‘least-cost approach’ can be defined in the Act’s definitions. Principle (a) is based on the Fisheries Act section 10; principles (b) and (c) are based on the discussion in Part One of this submission; and principle (d) is based on NZBS Objective 3.6.

Q6. Are the four categories proposed for marine protection an appropriate way to achieve a representative and adaptable network of MPAs?

126. As discussed in Part Three of this submission, we consider that the Act should contain only three categories of protection – i.e., marine reserves, species-specific sanctuaries and seabed reserves. Recreational fishing parks are not MPAs and should not be provided for in an Act with marine biodiversity protection objectives. Statutory criteria reflecting a risk-based approach should be used to determine the most appropriate of the three MPA categories in any particular case – for example a marine reserve is most appropriate when achieving the objective of an MPA requires full protection from all sources of risk and where those risks cannot be adequately managed under existing mechanisms.
127. As it is intended that **marine reserves** will be ‘strictly protected’ from all threats, we recommend that not only should there be no fishing or petroleum or minerals activity in marine reserves, activities authorised under the RMA that threaten the objective of the reserve (marine farming, discharges of contaminants etc) should also be prohibited. In the absence of such prohibitions, fishing will be the only existing activity that is able to be excluded from marine reserves (as petroleum and minerals permit holders can veto the establishment of an MPA within their permit area).
128. We recommend that no explicit provision should be made for marine reserves to protect ‘unique and special sites’. If our proposed risk-based process for identifying sites for a network of MPAs is working effectively, then special sites will be included in the network if they are at risk from threats that cannot be managed through other mechanisms. Making additional provision for ‘unique and special sites’ simply encourages a potentially endless stream of *ad hoc* applications for ‘unique’ marine reserves.

129. In line with the adoption of a risk-based approach to marine biodiversity protection, we recommend that **species-specific sanctuaries** should:
- Be used only if an area-based protection tool better meets the management objectives for the species than other non-area based tools;
 - Be applied only to protected species under the Wildlife Act or Marine Mammals Protection Act; and
 - Not be available to protect species managed under the Fisheries Act if the only identified risk to the species is fishing. In these circumstances, the risk should be managed under the Fisheries Act.
130. Species-specific sanctuaries will overlap in a statutory sense with the current provisions for area-based protection in the Wildlife Act 1953 and the Marine Mammals Protection Act 1978. We therefore recommend that the equivalent provisions in these Acts (wildlife sanctuaries and marine mammal sanctuaries) should be repealed in order to remove legislative duplication and redundancy.⁴⁵
131. Any controls on fishing within a **species-specific sanctuary** or **seabed reserve** should be established under the Fisheries Act, not the MPA Act.⁴⁶ This is appropriate because complex regulations such as those that currently apply to midwater trawling in BPAs are best established under the Fisheries Act by a lead agency with expertise in the design and implementation of fisheries regulations.
132. The consultation document is silent on how activities other than fishing will be controlled within MPAs. In particular, it is not clear how RMA activities will be controlled where these are a threat to achieving the objectives of an MPA. For example, it is logical for the establishment of a seabed reserve to prohibit all RMA activities involving occupation or disturbance of the seabed. Although the consultation document proposes ‘aligning decisions’ under the RMA,⁴⁷ it is not clear how such an alignment will occur in practice – i.e., will there be a lag time of several years before regional coastal plans are amended to recognise an MPA or will alignment occur automatically once an MPA is established? And will the ‘alignment’ enable or require the prohibition of inconsistent activities?
133. To clarify this point, we recommend the addition of a statutory mechanism to provide MPAs with automatic and immediate status in regional coastal plans, with the effect that:
- Activities that are inconsistent with the purpose of the MPA become prohibited activities within the reserve boundaries;
 - Activities outside an MPA that may have adverse effects that are inconsistent with the objective of the MPA must:
 - in the case of existing activities, be reviewed in order to impose consent conditions to avoid, remedy or mitigate the identified adverse effects; or
 - in the case of new activities, be prohibited unless the identified adverse effects can be avoided, remedied or mitigated through the imposition of consent conditions.

⁴⁵ We note however, that in the absence of a comprehensive legislative regime for protecting biodiversity in the EEZ, this would remove the current ability to impose a marine mammal sanctuary in the EEZ.

⁴⁶ The consultation document is silent on how fishing would be controlled within a seabed reserve and is ambiguous on species-specific sanctuaries as it refers (in Table 1) to the management of fisheries resources rather than the management of fishing activity.

⁴⁷ Consultation document page 24.

Q7. If the options outlined in table 1 were applied in an area of interest to you, what impact would that have on your existing or future activities?

134. The impact of a marine reserve, species-specific sanctuary or seabed reserve on the quota owners and fishers that our organisations represent will vary depending on the location, category and controls within the MPA. We emphasise that even a relatively small MPA can have a significant adverse effect when the distribution of the species (and consequently the fishing activity) has a strong spatial dependency, such as in rock lobster, paua, and localised inshore or harbour fisheries. For instance the setting aside of 10% of a coastal area as an MPA may, in effect, remove 40 or 50% of particular inshore fisheries.
135. Depending on the nature and extent of the MPA established, the following types of impacts on commercial fishing interests can be expected.

Direct impacts on individual fishers

By excluding fishers from all or part of their fishing area, an MPA can prevent fishers from harvesting the catch to which they are entitled or make it more costly for them to harvest their entitlement. An affected fisher may need to purchase a new vessel to fish in grounds that are further away, or purchase additional ACE to cover a different mix of catch. The cost of fishing may increase (additional fuel costs, less efficient fishing grounds), and the fisher may not be able to fully catch his or her ACE, leading to reduced revenue. Revenue may also be reduced if fish are not of equivalent quality in new fishing grounds. For that individual, fishing may become uneconomic, forcing the fisher out of business.

If a displaced fisher remains in business, spatial competition among commercial fishers is likely to be exacerbated. Increased competition between commercial fishers and customary or recreational fishers is also likely.

Impacts on quota owners

The establishment of an MPA restricts the spatial parameters of ITQ rights. The direct impacts on quota owners are primarily experienced in the form of reduction in income (if ACE is unable to be caught) and reduction in quota value.

Reductions in quota value can occur for several reasons. First, if many fishers find it difficult to catch their ACE efficiently as a result of spatial displacement, then the TACC may not be caught, leading to reduced ACE prices and a decrease in quota value. Second, displaced fishing effort will shift catch into other parts of the QMA, which may increase the risk of localised depletion, potentially increasing risks to stock sustainability. As a result the TACC may be cut at some time in the future, reducing revenue to quota owners and quota value.

Third, the risk of spatial access constraints in a fishery may become significant, either as a result of actual cumulative closures or simply from a belief that the regulatory framework will enable such closures in future. Significant risk in access to fisheries erodes quota owners' confidence in the future earnings potential of their quota shares, resulting not only in a dramatic drop in quota value, but also undermining the long term incentives for fisheries sustainability provided by the QMS.

<p>Development opportunities</p> <p>Quota owners will be required to forfeit future development opportunities inherent in their quota rights if an MPA is established in an area that is not currently fished but may become suitable for harvesting in future.</p>
<p>Cumulative adverse effects</p> <p>Cumulative effects on individual fishers and quota owners arise when multiple MPAs are established (i.e., a network) and also when MPAs are simply one in a range of areas in which commercial fishing is prohibited or restricted.</p>
<p>Settlement impacts</p> <p>Iwi who own quota and shares in seafood companies as a result of the Maori commercial fisheries settlement will be adversely affected in all the ways described above, with consequent impacts on the value of the settlement.</p>
<p>Flow-on effects on coastal communities, regions and the New Zealand economy</p> <p>Effects on multiple individual fishers, or decisions taken by quota owners or seafood processors as a result of business contraction or regulatory uncertainty, can lead to impacts that are felt throughout coastal communities. Flow-on effects to regions and the national economy may manifest in loss of employment opportunities (the seafood industry provides employment for around 26,000 people, particularly in regions where there are few employment options) and export earnings (\$1.6 billion in 2015).</p>

136. In addition, the imposition of poorly conceived MPAs can have a negative effect on the sustainable management of fisheries, as outlined in Part Two of this submission.

Economic value

Q8. Does the approach take account of the way the fishing sector operates?

137. No (see Part Two of this submission).

Q9. Does the approach take account of the way the oil, gas and minerals sector operates?

138. NZ RLIC, PIC and FINZ have no direct experience in the operation of the oil, gas and minerals sectors. However, we support the need to 'give certainty to industry' in recognition of the 'significant and ongoing investment' made by petroleum and minerals permit holders and recommend that similar recognition be extended to quota owners who have also made significant and ongoing investment in their businesses and in ensuring the sustainability of fisheries resources.

Q10. Are there other economic interests that haven't been covered?

139. As noted above, RMA activities should be prohibited or restricted within and adjacent to MPAs where the activity conflicts with the objective of the MPA. The economic interests of existing RMA consent holders (or people undertaking permitted activities) are not addressed in the consultation document.

140. With respect to the text on page 19 of the consultation document (economic value of MPAs), we observe that:

- MPAs that protect spawning and nursery habitats or sustain food harvesting do not provide economic benefits to fisheries, other than incidentally. Benefits to fisheries through the protection of fisheries habitat are secured primarily through effective fisheries management under the Fisheries Act; and
- Any tourism benefits of MPAs are also incidental to their primary purpose (i.e., protection of marine biodiversity from identified risks) and tourism can equally be a threat to marine biodiversity.

Q11. Is the new MPA Act likely to have the intended effect that decisions about environmental protection and economic growth are made in an integrated way (objective 2)?

141. There is nothing in the consultation document to suggest (let alone require) that decisions about environmental protection and economic growth will be made in an integrated way. In order for objective 2 to be achieved, at the very least, the new MPA Act requires:

- A planned approach to the establishment of a network of MPAs (i.e., with no capacity for *ad hoc* MPAs);
- A risk-based approach to MPA establishment;
- A requirement that the MPA network and individual MPAs are established on a least-cost basis;
- A requirement to use mechanisms other than MPAs where this is the least-cost way of achieving the identified biodiversity protection objectives;
- A statutory test to prevent undue impacts on existing rights and interests;
- Decision criteria to reduce uncertainty and improve transparency and accountability in decision making;
- Mechanisms (including compensation) to make the true costs of decisions visible; and
- Other provisions to safeguard the continued effective operation of the QMS, as recommended in Part Two of this submission.

Q12. What do you think would be the best process for initiating MPA proposals where multiple categories of protection may be needed? and

Q13. Are the proposed decision-making processes the best way of achieving the objectives? and

Q14. What are the advantages and disadvantages of having two different decision-making processes?

142. The proposed processes for initiating and implementing MPAs are confusing and inadequate. Our recommended process for initiating MPA proposals, including in areas where multiple categories of protection may be needed, is set out in Part One of this submission. Part One also recommends enhancements to the two proposed decision making processes (CG or BOI).

143. The two new processes should be available for each of the three MPA categories (marine reserves, species-specific sanctuaries, seabed reserves), whereas provision for recreational fishing should be addressed using Fisheries Act processes only.

Q15. Do you agree with the proposed review arrangements?

144. We support the continuation of review provisions already in place for existing MPAs, including in the Fiordland and Kaikoura marine management areas. We also support the ability to revoke an MPA if a review identifies that revocation of the MPA would better deliver the identified outcomes.
145. However, we recommend that all MPAs in the network, including MPAs that transition from the current Marine Reserves Act, should be reviewed periodically in order to ensure that the MPA continues to meet its identified protection objective and continues to contribute effectively to the MPA network. This is even more important for existing marine reserves as historically they have been established in an *ad hoc* manner for the purposes of scientific study rather than for marine biodiversity protection. Such reserves may no longer be fit for purpose and there could now be better options for achieving the desired outcomes.
146. The periodic review of all MPAs should be mandatory, not discretionary as proposed in the consultation document. The Act should provide that either a review period is identified at the time an MPA is established or, in the absence of a specified review period, a default review period applies. We consider that the use of a CG or BOI review model may be unnecessarily costly and time consuming for many MPA reviews, and that a more streamlined review option should be included (e.g., an appointed reviewer, with opportunity for public input via submissions).
147. We also recommend the periodic review of the entire network to ensure that the MPA network – in combination with measures implemented under other legislation – continues to meet New Zealand’s biodiversity protection objectives. This review can be carried out as part of the national gap analysis proposed in Part One of this submission.
148. Most importantly, meaningful review of MPAs cannot be undertaken without:
- Clarity of purpose and therefore clear criteria for review; and
 - Comprehensive environmental monitoring, including monitoring of fisheries distribution and abundance, within and outside MPAs. Environmental monitoring is necessary to determine:
 - whether an MPA is achieving its identified biodiversity protection objective;
 - whether the MPA network is contributing to overall biodiversity protection objectives; and
 - the impact of individual MPAs and the MPA network on the sustainable management of resources outside of the MPA/network (including as a consequence of the displacement of fishing effort).

149. All such monitoring should be Crown funded and the outputs of the monitoring programme should inform:

- Scheduled reviews of individual MPAs;
- The national gap analysis and any reviews of the network as a whole; and
- Management actions to rectify any identified adverse effects of MPA establishment.

Q16. Are the proposed decision-making processes sufficient to ensure customary interests, rights and values are appropriately taken into account, Treaty of Waitangi principles are met and decisions are consistent with the Crown’s historical Treaty settlement obligations?

150. The proposals for improving iwi/Maori involvement are selective, partial and inconsistent in that they:

- Seek to maintain the integrity of rights and interests recognised under the Marine and Coastal Area (Takutai Moana) Act 2011 while undermining the integrity of rights and interests recognised under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; and
- Claim to fully recognise and maintain existing arrangements for non-commercial customary fishing, including taiāpure and mātaimai reserves, while undermining existing arrangements for commercial fishing under the Fisheries Settlement.

151. The proposed MPA Act undermines the effective operation of the QMS and therefore undermines the settlement of Maori commercial fishing claims as quota is the currency of the settlement. Recommended remedies are set out in Part Two of our submission.

Recreational fishing parks

Q17. Do you support the proposal for recreational fishing parks in the Hauraki Gulf and Marlborough Sounds?

152. No: in Part Three of this submission we recommend that the ability to establish recreational fishing parks, together with the direct establishment of parks in the Hauraki Gulf and Marlborough Sounds, is removed from the proposed MPA Act.

153. However, we remain open to discussing with the Government how the underlying policy objectives of the proposed recreational fishing parks in the Hauraki Gulf and Marlborough Sounds might best be achieved.

154. If, contrary to our primary recommendation in Part Three, the ability to establish recreational fishing parks remains in the MPA Act, then we recommend that recreational fishing parks in the Hauraki Gulf and Marlborough Sounds should be established pursuant to the provisions of the new Act, rather than directly in the legislation. It is premature to establish recreational fishing parks in the Hauraki Gulf and Marlborough Sounds directly in the Act because:

- Consultation with affected parties has been woefully inadequate; and
- There is no policy or legislative framework in place within which these politically-imposed proposals can be evaluated and tested against alternatives.

Q18. What do you think should be the boundary lines for the recreational fishing parks?

155. There is currently no principled basis to establish boundaries for recreational fishing parks in Marlborough or Hauraki because there is no statutory framework in place to guide such decisions. We consider that any recreational fishing parks should be established pursuant to the provisions of the new Act or, preferably, within the Fisheries Act (see Q17). We defer to the views of local commercial fishing representatives on the matter of boundaries.

Q19. Do you think commercial fishing should be allowed to continue for some species within recreational fishing parks? If so, what species would you allow and why?

156. If, contrary to our primary recommendation in Part Three, the ability to establish recreational fishing parks remains in the MPA Act, then we support allowing commercial fishing to continue for some species in a recreational fishing park as this is consistent with a risk-based approach. The default position should be that all commercial fishing continues – i.e., commercial fishing should be prohibited or restricted only to the extent necessary to manage any identified risks to recreational fishing opportunity caused by commercial fishing. Such risks could be identified on a species basis or a fishing method basis but must be scientifically justified using the best available information.

Q20. What do you think about the proposed compensation scheme for commercial fishing affected by the creation of recreational fishing parks?

157. There is no ‘scheme’ set out in the consultation paper. The proposals to compensate ‘commercial fishers’ for the establishment of recreational fishing parks (page 33 of the discussion document) are vague, uncertain in process and outcome, and manifestly inadequate in terms of safeguarding the effective operation of the QMS. For example, it is suggested that compensation may be paid only if, following a case-by-case assessment, ‘*the impact on commercial fishing is deemed to be materially significant*’. The large amount of discretion at all stages of the process provides no certainty to quota owners or to the seafood industry generally and will therefore not restore quota owners’ confidence in the security of their quota rights.
158. The consultation document proposes that the MPA Act will contain ‘*a form of the Undue Adverse Effects test, similar to the one currently used when commercial fishing is affected by proposed aquaculture activity... to determine whether and what amount of compensation is payable*’. We consider the aquaculture compensation provisions in the Fisheries Act to be deeply flawed. As the seafood industry said in a submission at the time, the aquaculture compensation model ‘*facilitates the expropriation of commercial fishing rights, without the quota owners’ consent, for an administratively determined sum of compensation, in a manner that does not apply to commercial transactions in any other sector of the economy.*’⁴⁸ We were so concerned about the potential precedent-setting effect of the aquaculture compensation provisions that in 2012 we wrote to the Government seeking ‘*reassurance that the aquaculture regulations are a ‘one off’ and not reflective of general government policy in relation to safeguarding the security and value commercial fishing rights.*’⁴⁹ The aquaculture model sets an entirely unsuitable precedent for any compensation regime.

⁴⁸ Seafood Industry Council Submission on Undue Adverse Effects of Aquaculture on Fishing (28 September 2011).

⁴⁹ Letter from the NZ Rock Lobster Industry Council to Wayne McNee, Chief Executive, Ministry for Primary Industries, November 2012.

159. The prescriptive methodologies and tests used in the aquaculture model will result in affected quota owners receiving a lower level of compensation for impacts on their harvest rights than they would in a negotiated market transaction.
160. Furthermore, when applied in the context of recreational fishing parks, we consider that an approach based on the aquaculture model:
- Provides no certainty with respect to the level at which displacement of fishing effort is considered ‘undue’ (i.e., it does not answer the question of whether compensation is payable); and
 - Does not (and cannot) determine ‘what amount of compensation is payable’. In the aquaculture model, that is left to the parties to negotiate in the first instance. The consultation document gives no indication as to how the value of compensation will be calculated for recreational fishing parks.
161. If, contrary to our primary recommendation in Part Three, the ability to establish recreational fishing parks remains in the MPA Act, then we recommend that prior to the establishment of a recreational fishing park, compensation should be determined using either of the following processes (in order of preference):
- (1) **Direct negotiation between the parties.** The establishment of recreational fishing parks is a choice to provide exclusive utilisation of marine resources to recreational fishers. Recreational fishers are a small, identifiable subset of society rather than the public or taxpayers generally.⁵⁰ In these circumstances, the only suitable basis for compensation is a market-based solution negotiated directly between the beneficiaries (recreational fishers) or their representatives, and affected quota owners and commercial fishers; or
 - (2) **Rebalancing**, as proposed in Part Two of this submission in relation to the establishment of MPAs for biodiversity protection purposes. However, we recommend that the funds for compensation provided as part of a rebalancing arrangement should ultimately be recovered from the beneficiaries of a recreational fishing park through a licensing arrangement (following the precedent set by the New South Wales government, which established ‘recreational fishing havens’ by taking out an AU\$20 million loan from the NSW Treasury to purchase commercial fishing entitlements in the affected areas, and then paying the loan off using funds generated from recreational fishing licenses).⁵¹

Q21. What do you think about who should manage recreational fishing parks? How could the park management work together with existing groups?

162. If, contrary to our primary recommendation in Part Three, the ability to establish recreational fishing parks remains in the MPA Act, then:
- All commercial fishing within recreational fishing parks should continue to be managed under the Fisheries Act, as currently provided;

⁵⁰ The most robust MPI survey estimates that 530,100 people fished on a recreational basis in 2011-12, an average of just 11.9% of the population at that time.

⁵¹ <http://www.dpi.nsw.gov.au/fisheries/recreational/info/rfh>

- Recreational fishing should also continue to be managed under the Fisheries Act, and:
 - should include mandatory recreational catch reporting; and
 - may also include the establishment of an advisory group to make recommendations to the Minister about the management of recreational fishing within the park; and
- Any form of devolved or delegated management should be conditional upon the establishment of a 'club' of recreational fishers within the park – for example, using a mandatory registration or licensing system. The establishment of a club of recreational users with a genuine stake in the health of the stocks in the area should incentivise collective management responsibility in a similar way to the allocation of quota shares.

163. Legislation should provide that specific management measures within a recreational fishing park must not have an adverse effect on:

- The exercise of customary and commercial fishing rights within or outside the park; or
- The sustainable management of fisheries resources.

Q22. How should benefits and changes created through the proposed park be monitored?

164. If recreational fishing parks are established, then the monitoring and review provisions we recommend under Q15 should apply, irrespective of whether the parks are established under the MPA Act or the Fisheries Act.

165. In addition, recreational catch reporting (species and location) should be mandatory inside and outside recreational fishing parks in order to monitor any changes in fishing activity.

Implementation

Q23. Do you agree with the proposed arrangements for transitioning existing MPAs?

166. As noted in Q15, we consider that existing marine reserves should be subject to review to determine whether they achieve identified biodiversity protection objectives and contribute effectively to the MPA network. It may be more efficient to undertake such reviews prior to transitioning any existing marine reserves into the new Act.

167. While we support in principle BPAs becoming seabed reserves under the new MPA Act, in practice this would mean that – unless an integrated biodiversity protection regime is established for the EEZ – BPAs that extend into the territorial sea would be managed under two different Acts – i.e., the Fisheries Act in the EEZ and the MPA Act in the territorial sea. This distinction is arbitrary and unhelpful in terms of management of the BPAs.

168. We object to the inclusion of recreational fishing parks within the MPA Act (see Part Three of this submission) and therefore consider that the Mimiwhangata Marine Park and Sugar Loaf Islands Marine Protected Area should not transition into the MPA Act unless their purpose and management is amended to achieve specific biodiversity protection objectives as part of a network of MPAs.

Q24. Do you agree that customary management areas should be able to be used alongside the proposed MPA Act to create integrated management packages?

169. Yes. Mātaitai, taiāpure, other Fisheries Act tools (including non-spatial measures) and non-statutory measures should all be able to be used to create integrated management packages. However, we note that:
- Tools such as mātaitai and taiāpure do not have a biodiversity protection purpose – instead they are mechanisms to provide for and manage the utilisation of fisheries resources;
 - Nevertheless, mātaitai and taiāpure may still contribute to biodiversity protection objectives, and should therefore be considered (along with other non-MPA measures such as cable protection zones) as part of the framework for ensuring the effective protection of New Zealand’s marine biodiversity; and
 - Statutory tests for the use of other tools (e.g., the requirement that a mātaitai reserve must not prevent a fisher from harvesting his or her annual catch entitlement) would continue to apply.

Q25. What would be required to ensure the integrity of current protected areas is maintained while achieving the objectives of the new MPA Act?

170. The question implies that ‘current protected areas’ each have a clear objective and that these objectives should be retained and fulfilled post-transition. However, the objectives of existing protected areas are often far from clear – even in the case of marine reserves which have a clear statutory purpose (preserving areas for the scientific study of marine life), those objectives are not always reflected in the management of individual reserves.
171. We recommend that, as part of the transition process, each existing area should be reviewed to ensure that (a) it has a clear objective, and (b) the objective contributes to the purpose of the new Act (protection of marine biodiversity). If the objectives cannot be aligned, then the area should not be recognised under the new MPA Act.
172. It is important that the transition process protects the integrity of agreements reached during community-driven marine planning processes in Fiordland and Kaikoura. The risk of disruption to these agreements by additional MPA proposals made under the new Act will be significant if anyone can propose an MPA and if the Act does not contain an effective, risk-based planning framework. This concern is addressed in part by the recommendations in Part One of our submission. We also recommend that the integrity of the community agreements reached in Kaikoura and Fiordland should be further protected by making consequential amendments to other Acts as follows:
- Amend section 7 of the Kaikoura (Te Tai o Marokura) Marine Management Act 2014 to enable the Kaikoura Marine Guardians to provide advice to the Minister for the Environment, including advice on any new MPA proposal or changes to the existing MPAs within their area; and
 - Amend schedule 13 of the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 to enable the Fiordland Guardians to provide advice relevant to the MPA Act, including advice on any new MPA proposal or changes to the existing marine reserves within their area.

Q26. Are the proposed approaches sufficient to ensure communities are involved in managing MPAs? and

Q27. What role can iwi/Maori play in managing MPAs?

173. The consultation document contains no specific proposals for involving communities in managing MPAs (other than in recreational fishing parks, which are not MPAs), so it follows that the proposed approach will not ensure community involvement in managing MPAs.
174. If communities and iwi/Maori are to have a role in managing MPAs then the purpose of the involvement must be specified in the law. The scope of management functions must be specifically authorised, including functions in relation to advisory, decision-making and service provision roles, together with explicit protections for existing users.
175. We suggest there would be value in exploring the more widespread adoption of a ‘Guardians’ management advisory approach such as has been established in Fiordland and Kaikoura. Statutory guardians could have an advisory role in relation to a broader set of marine management objectives (i.e., not only biodiversity protection) in order to encourage integrated management in an area. However, the MPA Act, with its sole focus on protecting marine biodiversity, may not be an appropriate ‘home’ for such a function.

Q28. Do you agree with managing commercial tourism activities in MPAs in a similar way to how they are managed on public conservation land?

176. It depends on the purpose of the MPA. If an MPA is established for biodiversity protection, then commercial recreation and tourism operations should be subject to similar controls as those on conservation land. Any controls applied under a concession must not interfere with the sustainable management of fisheries under the Fisheries Act.
177. However, if the ability to establish recreational fishing parks remains in the MPA Act (contrary to our primary recommendation in Part Three), then the DOC concessions regime should not apply. For a start, recreational fishing parks are not at all akin to the terrestrial conservation estate. Furthermore, an unnecessarily wide group of commercial recreation and tourism activities would be required to obtain concessions, including water taxis, dive operators, marine transport operators, commercial filming, sporting events and so on. However, we recommend that further consideration is given to the management and control of commercial recreation and tourism activities that are relevant to the parks’ purpose (i.e., enhancing recreational fishing). In particular, consideration should be given to the prohibition or control of recreational charter fishing operations within recreational fishing parks.

Concluding comments

178. NZ RLIC, PIC and FINZ are committed to working constructively with government and other sectors to establish a credible, effective framework for protecting marine biodiversity. As noted at the beginning of the submission, we strongly recommend that an additional round of engagement should take place prior to the drafting of the Bill.
179. In any event, we would welcome the opportunity, whether through a structured process or less formally, to discuss the matters raised in this submission with officials. We can be contacted as set out below.



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Appendix One:

Summary of recommendations

NZ RLIC, PIC and FINZ recommend that:

- a) an additional round of government engagement for the purposes of joint policy development with interested parties takes place after the receipt of submissions on the consultation document but prior to the drafting of the Bill;
- b) a risk-based approach to MPA planning and establishment is adopted, based on clear identification of biodiversity protection objectives and threats to achieving the objectives, and selection of a least-cost management response;
- c) a planned approach to marine biodiversity protection is adopted, including the use of a national gap analysis and risk assessment to identify priority habitat/ecosystem types for protection;
- d) the prioritisation process incorporates opportunity for public input;
- e) greater certainty is provided through the use of statutory decision criteria to guide key decisions such as whether to use a CG or BOI process, appointment of members to CGs and BOIs, and how a CG or BOI or responsible Ministers assess MPA proposals;
- f) terms of reference for CGs or BOIs relate to procedural and practical matters only and do not include assessment criteria for MPAs;
- g) an independent economic impact assessment is made available for public consultation at the same time MPA proposals are consulted on by a CG or BOI;
- h) a CG or BOI is able to commission additional expert advice;
- i) a CG or BOI is able to recommend the use of tools under other legislation where those tools provide the most effective, least-cost way of meeting biodiversity protection objectives or are otherwise desirable in order to create a package of measures to meet wider community objectives;
- j) merit-based appeals to an appropriate court on a Ministerial decision to establish an MPA are provided for;
- k) when an MPA displaces commercial, recreational or customary fishing, a two-step process to 'rebalance' the fisheries management regime is undertaken, comprising:
 - a fisheries management response (i.e., catch reduction) to remove displaced catch from the fishery; and
 - a market-based compensation response that leaves affected quota owners no worse off;
- l) 'rebalancing' is the default response for every decision to establish an MPA, unless the relevant quota owners decide to forgo catch reductions and compensation;
- m) as part of the rebalancing, compensation for MPA establishment is paid on a *pro rata* basis to affected quota owners reflecting the market value of quota shares equivalent to the forgone commercial catch;
- n) prescriptive compensation methodologies are avoided and the quota valuations as far as possible seek to replicate the value of quota under a free-market transaction;

- o) a solatium payment, for example using a multiplier of 1.2, is included in the compensation in recognition of the compulsory nature of the loss of access to fisheries;
- p) the rebalancing described above is implemented under consequential amendments to the Fisheries Act;
- q) further consideration is given (jointly by government and seafood industry representatives) to the development of appropriate mechanisms to enable displaced ACE-dependent fishers to adjust their activities to meet changed societal expectations;
- r) a statutory test similar to the current 'undue interference' test, taking account of the adverse effects of cumulative spatial displacement, is included in the new law;
- s) provision for recreational fishing parks is removed from the new MPA Act;
- t) recreational fishing parks in the Hauraki Gulf and Marlborough Sounds are removed from the new MPA Act;
- u) any measures to improve recreational fishing opportunity are implemented under the Fisheries Act;
- v) if the recommendations in this submission can be addressed in a satisfactory manner, consideration is given to the establishment of a statutory biodiversity protection regime in the EEZ;
- w) if an EEZ regime is established, it:
 - provides for two categories of MPAs – seabed reserves and species-specific sanctuaries;
 - uses a BOI process;
 - makes provision for exploration and extraction of resources in EEZ MPAs in tightly defined circumstances in the national interest; and
 - provides for the transition of existing BPAs to become seabed reserves and integrates the Kermadec Ocean Sanctuary into the MPA regime;
- x) the new MPA Act has a single objective *To contribute to the protection of New Zealand's marine biodiversity by establishing marine protected areas;*
- y) the objective is supported by:
 - an effective Treaty clause;
 - a requirement to act consistently with the fisheries settlement legislation and New Zealand's international obligations; and
 - a set of principles which all persons carrying out functions under the Act must take account of, including the use of the best available information; the adoption of a risk-based and least cost approach; and a preference for integrated solutions;
- z) statutory criteria guide the selection of the appropriate MPA category for a particular MPA;
- aa) no explicit provision is made for marine reserves to protect 'special or unique' ecosystems;
- bb) species-specific sanctuaries are:
 - able to be used only if an area-based protection tool better meets the management objectives for the species than other non-area based tools;
 - applied only to protected species under the Wildlife Act or Marine Mammals Protection Act; and

- not available to protect species managed under the Fisheries Act if the only identified risk to the species is fishing.
- cc) redundant provisions in the Wildlife Act and Marine Mammals Protection Act are repealed;
- dd) any controls on fishing within a species-specific sanctuary or seabed reserve are established under the Fisheries Act;
- ee) MPAs have automatic and immediate status in regional coastal plans, with the effect that RMA activities that are inconsistent with the MPA objectives are prohibited or regulated (whether inside or adjacent to an MPA);
- ff) all MPAs in the network, including current marine reserves, are subject to mandatory periodic review and a more streamlined review option is included;
- gg) comprehensive environmental monitoring is undertaken within and outside MPAs in order to determine:
- whether an MPA and the network as a whole – in combination with other measures that contribute to marine biodiversity protection – is achieving New Zealand’s biodiversity protection objectives; and
 - the impact of an MPA and the network on the sustainable management of resources outside the MPA or network;
- hh) if, contrary to our recommendations, the MPA Act includes provision for recreational fishing areas, then:
- commercial fishing is prohibited only to the extent necessary to manage any demonstrated risks to recreational fishing opportunity from commercial fishing;
 - compensation for affected quota owners is provided on the basis of either: (1) (preferred option) direct negotiation between quota owners and recreational fishers; or (2) the rebalancing approach we recommend for MPAs, but with the costs of compensation recovered from recreational fishers via licensing fees;
 - management measures in a recreational fishing park must not have an adverse effect on the exercise of customary and commercial fishing rights within or outside the park or the sustainable management of fisheries resources;
 - recreational catch reporting is mandatory inside and outside recreational fishing parks; and
 - consideration is given to prohibiting or controlling recreational charter fishing operations within the park boundaries;
- ii) consequential amendments are made to the Kaikoura Marine Management Act and the Fiordland Marine Management Act to enable the Guardians to provide advice on new MPA proposals or changes to the MPA network within their area of responsibility; and
- jj) commercial recreation and tourism operations in MPAs established for biodiversity protection purposes are subject to similar controls to those on conservation land.

Appendix Two:

A process to prioritise, plan and implement a representative MPA network

National gap analysis

Uses best available Marine Environment Classification system.

Identifies habitat/ecosystem types that are:

- not adequately represented in MPA network; and
- at risk from threats that are not adequately managed under existing management regimes.

Undertaken every 5 years, co-ordinated by MFE

Prioritisation process

Public consultation on output of gap analysis.

Responsible Ministers:

- take into account matters specified in Act; and
- make decisions on priority projects.

Decision on priorities **notified**

For each priority ecosystem/habitat type or region:

Ministers decide whether to use a Collaborative Group (CG) or Board of Inquiry (BOI).

Lead Minister appoints members of CG or BOI.

Minister provides terms of reference to CG or BOI.

CG undertakes initial consultation.

CG develops MPA proposal (or set of proposals or options), including use of other tools if appropriate.

Lead Minister provides BOI with MPA proposal (or set of proposals or options).

- The outputs of gap analysis;
- Public input; and
- Resourcing requirements.

Priorities may be expressed as:

- habitat/ecosystem types that require further management intervention for protection of marine biodiversity; or
- regions which have a significant number of identified priority habitats or ecosystems.

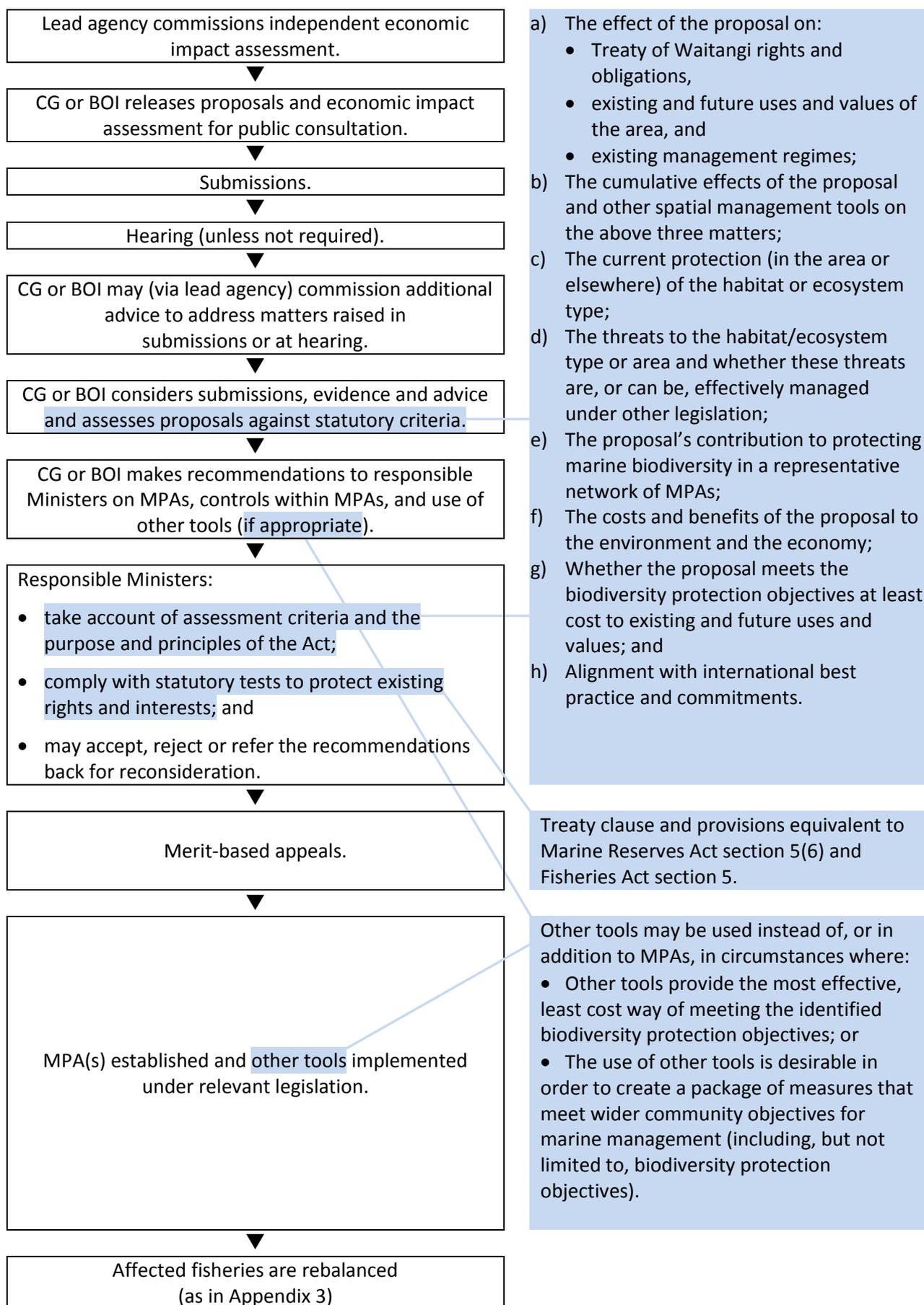
When choosing between a BOI or CG process Ministers consider:

- the advantages and disadvantages of each process in the circumstances;
- the extent to which local, regional and national interests may be affected;
- the extent and timing of public consultation that has already taken place on the MPA proposals.

Statutory criteria guide the appointment process.

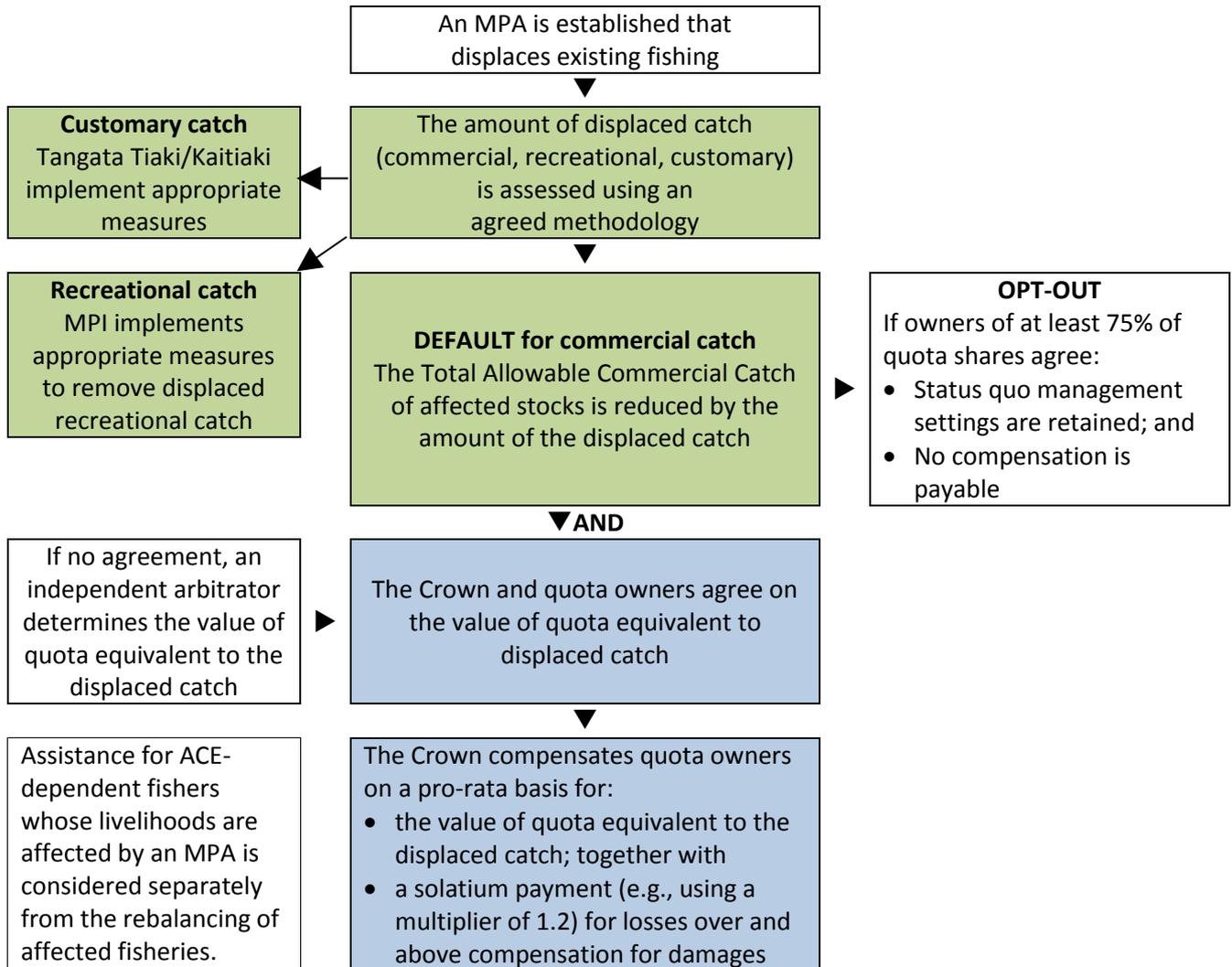
Terms of reference may:

- Define the scope of the task;
- Set out any practical matters relating to available information, technical support, ability to commission further advice, consultation and engagement, funding, timeframes etc;
- But must not pre-determine a particular outcome by constraining the substantive recommendations of a CG or BOI.



Appendix Three:

Rebalancing



In this diagram the green boxes describe the how the biological system is rebalanced (to address displaced catch), and the blue boxes describe how economic incentives are rebalanced (to protect the integrity of the QMS and the Maori Fisheries Settlement).