

Analysis of environment-related legislation in Niue

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Contents

Abbreviations	iv
1 Background	1
1.1 The International Waters Project (IWP)	1
1.2 The activities of the IWP	1
1.3 Advancing the IWP in Niue.....	1
2 Relevant legislative areas	2
2.1 Community involvement in coastal fisheries management	2
2.2 Marine pollution	3
2.3 Transboundary movements of hazardous wastes.....	4
2.4 Dumping of wastes at sea (including ballast and wastes from vessels).....	5
2.5 Dumping of wastes and littering (on-shore)	5
2.6 Climate Change/Protection of the Ozone Layer	6
2.7 Environment Impact Assessments	7
2.8 Protection of wildlife (whale protection).....	7
2.9 Protection of migratory species	8
2.10 Extraction of sand, corals etc.....	8
2.11 Regulation of aquaculture, fish processing etc.	9
2.12 The Continental Shelf.....	9
2.13 Obligations under international treaties generally	9
2.14 Other matters	11
3 Summary and recommendations	12
3.1 Summary of gaps, overlaps and conflicts	12
3.2 Prioritising the legislative reforms.....	12
3.3 Some enabling amendments to the Environment Act 2003.....	13
References	14
Annex 1: Discussion paper — legislative initiatives to give effect to the draft Niuean National Management Plan for Coastal Fisheries	15
Annex 2 — Key features of marine pollution regulations	18
Annex 3 — Scope of amendments to regulate transboundary movements of hazardous wastes	19
Annex 4 — Features of anti-dumping and littering laws	20

Abbreviations

CBD	Convention on Biological Diversity
DAFF	Department of Agriculture, Forestry, and Fisheries
ED	Environment Department
GEF	Global Environment Facility
IWP	International Waters Project
NCSO	National Council for Sustainable Development
OEA	Office of External Affairs (Niue)
SPREP	Secretariat of the Pacific Regional Environment Programme

1 Background

1.1 The International Waters Project (IWP)

In October 1995 the 8th Pacific Regional Environment Programme meeting endorsed a proposal to prepare a Strategic Action Programme for International Waters. At the request of the South Pacific Forum the development of the proposal was coordinated by the South Pacific Regional Environment Programme (renamed the Secretariat of the Pacific Regional Environment Programme, or SRPEP). Throughout 1997 the Strategic Action Programme was formulated with funding assistance provided by the Global Environment Facility (GEF).

The International Waters Project (IWP)¹, which was formulated to implement the Strategic Action programme, is a 7-year, USD 12 million initiative concerned with management and conservation of marine, coastal and freshwater resources in the Pacific islands region, and is specifically intended to address the root causes of environmental degradation related to trans-boundary issues in the Pacific. The project includes two components: an Integrated Coastal and Watershed Management (ICWM) component, and an Oceanic Fisheries Management component (the latter has been managed as a separate project). It is financed by the GEF under its International Waters Programme. The ICWM component is implemented by the United Nations Development Programme (UNDP) and executed by SPREP, in conjunction with the governments of the 14 independent Pacific Island countries: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. The ICWM component focuses on integrated coastal watershed management, and supports national and community-level actions that address priority environmental concerns relating to marine and fresh water quality, habitat modification and degradation and unsustainable use of living marine resources through a 7-year phase of pilot activities, which started in 2000 and will conclude in early 2007.

1.2 The activities of the IWP

The IWP has sought to combine the following activity areas:

- Integrated conservation and management of coastal resources, including fresh water resources;
- Integrated conservation and sustainable management of oceanic resources;
- Prevention of pollution through the integrated management of land based or marine based wastes; and
- Monitoring and analysis of shoreline and near-shore environments to determine vulnerability to environmental degradation.

These activities reflect the National Environment Management Strategies prepared for Pacific Island countries between 1990 and 1996, which describe strategies for achieving environmental objectives relating to the integration of environmental consideration in economic development, improved environmental awareness and education, the management and protection of natural resources, and improved waste management and pollution control

1.3 Advancing the IWP in Niue

To facilitate the achievement of the above objectives, and implement the IWP in Niue, the following actions have been undertaken:

¹ IWP is formally titled Implementation of the Strategic Action Programme of the Pacific Small Islands Developing States.

(a) A review of natural resource- and environment-related laws in Niue. This has been completed and is the subject of a separate report.² Relevant features of the review have been reproduced in this report

(b) An analysis of Niue’s legislation to determine gaps, overlaps and conflicts. This analysis has involved:

- Analysing the strengths and weaknesses of existing legislation and proposed laws (i.e. Bills).
- Assessing the effectiveness of legislation supporting the government’s responsible management of the environment and ensuring the sustainable use and conservation of natural resources.
- Assessing the efficacy of Niue’s legislation as a means of pursuing responsible environmental management;
- Identification of barriers to the effective implementation and enforcement of existing legislation.
- Identification of how particular gaps and areas of overlap and conflict can be addressed (including amendments to existing legislation or the enactment of new laws).

These matters are the focus of this Report. They are considered in the context of 13 areas of relevance.

2 Relevant legislative areas

2.1 Community involvement in coastal fisheries management

Relevance to this Review

The IWP focuses on the involvement of the community in the formulation and implementation of laws relating to the conservation and protection of marine areas, and also on the recognition of traditions, culture and traditional authority.

Current state of Niue’s laws

The **Niue Village Councils Act** is outdated and its effectiveness is affected by references to former offices and the previous colonial authority and administration. There are concerns about the means by which by-laws can be brought into force. Other aspects of this law mitigate against making use of it to provide for the effective management of marine protected areas in villages.

The **Domestic Fishing Act** makes clear provision for the declaration of marine reserves but little or no provision for the management of reserves after their establishment. The concept of a reserve under section 7 of the Act seems to be based upon the declaration of a “no-go” zone, rather than the establishment of an area within a village in which a flexible and effective management regime may be applied. There are aspects of the enforcement of such regimes that need to be addressed. There is some doubt about the application of aspects of a management regime to parts of the coastal zone in aid of the protection of the marine environment.

Niue’s Draft National Management Plan for Coastal Fisheries

A draft Management Plan for Niue’s coastal fisheries has been prepared and is reviewed in the

² See Powell, G. 2007. Review of environment-related legislation in Niue. IWP-Pacific Technical Report No. 51. Apia Samoa: SPREP.

Discussion Paper in Annex 1. It is proposed that coastal fisheries shall be a designated fishery under section 12 of the Territorial Sea and Exclusive Economic Zone Act 1997. This will complement the Tuna and Billfish Management Plan.

The coastal fisheries plan envisages that management shall be implemented through the Domestic Fishing Act and a number of amendments to this Act have been suggested. These changes are entirely consistent with the pilot projects being undertaken under the IWP³ (see Fisk 2007a, 2007b, 2007c). They rely heavily on a cooperative approach to management involving both village and government authorities. Village by-laws applying to the management of Village Fishing Grounds are a core feature of the Plan.

Legislative Reform Options

There is merit in considering the addition of provisions to the Domestic Fishing Act to address the deficiencies that are noted above, and to implement the Coastal Fisheries Management Plan. These could facilitate:

- the retention of the concept of a marine reserve;
- the addition of a concept of village based marine protected areas, where management regimes are applied under village by-laws;
- a licensing regime for all fishers in Niue's coastal waters;
- the inclusion of aspects of the management of the coastal zone to ensure the proper management of the adjoining marine environment;
- the clarification of enforcement procedures, including the role of Honorary Village Fishing Wardens;
- clear procedures for the formulation of management plans and the making and ratification of by-laws;
- the maintenance of a Register of Niuean Fishers; and
- access to protected areas for research and conservation purposes.

A draft amendment to the Domestic Fishing Act has been prepared and provided separately.

2.2 Marine pollution

Relevance to this Review

Applying criminal sanctions to persons and vessels responsible for causing pollution from oil spills and discharge is a critical feature of a nation's environment protection regime. Many international conventions that relate to shipping and environmental protection require that adequate domestic legislation be in place. The capacity of government agencies to respond to pollution emergencies arising from oil spills is also an important obligation.

Proposed amendments to the Protocol to the SPREP Convention dealing with responses to marine pollution incidents would necessitate the inclusion of a number of matters in relevant domestic laws in Niue. The SPREP Protocol states the need for cooperation in combating pollution in cases of emergency and requires Parties to take all necessary measures to prevent, reduce and control marine pollution, or the threat of pollution.

³ See Fisk, D. 2007. Niue sustainable coastal fisheries pilot project: Literature review and pilot baseline survey. IWP-Pacific Technical Report No. 38. Apia Samoa: SPREP.

Issues raised in consultations

There is an expectation that the number of fishing vessels operating in nearshore waters will increase dramatically following the commissioning of the fish processing plant in Niue. The possibility of significant pollution emergencies is seen as requiring this area of the law to be treated as a priority.

The model Marine Pollution Prevention Bill has been considered but is regarded as being too cumbersome and unlikely to be easily applied in Niue. Significant re-working of the draft has been requested to make it applicable to the circumstances in Niue.

Current state of Niue's laws

No adequate laws relating to marine pollution, and the responses to it, now exist in Niue. The regulation-making power under the Territorial Sea and Exclusive Economic Zone Act 1997 (Section 60) includes the power to make regulations concerning the prevention of marine pollution, whether originating from land based sources or discharge at sea.

Legislative Reform Options

The model Marine Pollution Prevention Bill can form the basis for effective legislation in this area and thereby fill a significant gap in Niue's laws. It must be comprehensively reviewed and revised to be made applicable to Niue's circumstances. Relevant provisions could be re-stated as regulations under the Territorial Sea and EEZ Act 1997 or the Environment Act 2003.

Note that Annex 2 identifies the key features of appropriate Regulations.

2.3 Transboundary movements of hazardous wastes

Relevance to this Review

The Basel Convention regulates the movement of hazardous wastes and other wastes on a global basis. The Convention specifies (in its annexes) the criteria for assessing hazardous wastes. The Parties are obliged to prohibit the export of hazardous wastes or other wastes if the State of import does not consent to the specific import, or has prohibited the import of such wastes. The Convention prescribes measures to apply to the proposed import or export of wastes. Parties are required to implement their own national legislation regulating hazardous wastes and to inform the Basel Secretariat of such information. A competent authority and a focal point must be designated.

Under the Waigani Convention each Party must ban the importation of all hazardous wastes and radioactive wastes from outside the Convention area. They must also prohibit the dumping of hazardous wastes and radioactive wastes at sea. The Parties are to cooperate to ensure that no illegal import of hazardous wastes and radioactive wastes from a non-Party enters areas under the jurisdiction of a Party.

The scope of the Waigani Convention includes radioactive wastes and domestically prohibited goods. It prohibits the import of hazardous wastes into its Convention Area.

Current state of Niue's laws

There are no laws in Niue that effectively deal with the issue of transboundary movements of hazardous wastes into Niue or through Niue's maritime zones.

Legislative Reform Options

This deficiency should be addressed by appropriate amendments to the territorial seas legislation. As noted in this Report these changes could also deal with the issues of dumping and incinerating wastes at sea.

The issues to be covered in an amending Bill are suggested in Annex 3. The movement of wastes into and through Niue could otherwise be dealt with by prescribing wastes to be prohibited substances under the proposed Biosecurity law and the Customs Act.

2.4 Dumping of wastes at sea (including ballast and wastes from vessels)

Relevance to this Review

Proposed amendments to the Protocol to the SPREP Convention dealing with the dumping of wastes at sea may necessitate the inclusion of the following matters in relevant domestic laws in Niue:

- adoption of the Precautionary Principle;
- reverse listing approach — having a “White List” of relatively inert materials that may be considered for dumping, rather than a “Black List” of prohibited materials;
- standardisation of Annexes and their contents; a
- adoption of the “Polluter Pays” principle;
- standardisation of definitions; and
- provision for prohibition of incineration of wastes at sea.

Issues raised during consultations

Again it was noted that the increase in the number of fishing vessels likely to be operating in Niue’s waters makes this a priority area for law reform.

Current state of Niue’s laws

There are no laws in Niue that deal effectively with the issues of dumping and incinerating wastes at sea. The draft Biosecurity Act would prohibit the dumping of wastes and discharge of ballast waters by vessels. This is seen as important due to the anticipated increase in the number of fishing vessels operating in Niue’s coastal waters to serve the fish processing plant.

Legislative Reform Options

The issue of dumping and incineration of wastes at sea might be best dealt by amendments to the territorial seas legislation, and possibly by regulations made under that law. This could be done in conjunction with amendments needed to regulate the transboundary movements of hazardous wastes.

2.5 Dumping of wastes and littering (on-shore)

Relevance to this Review

Controls over the dumping of wastes on land and in relation to littering are important features of an environmental protection regime. The effect on coastal waters is evident in many countries where such activities are not effectively controlled.

Current state of Niue’s laws

It is difficult to find any effective provisions in Niue’s laws that deal with controls over littering and the dumping of wastes on land. Such matters are an appropriate function for the newly created Environment Department to address and regulate.

Legislative Reform Options

Comprehensive littering and anti-dumping Regulations could be made under the Environment

Act. Some key features of these are identified in Annex 4.

2.6 Climate Change/Protection of the Ozone Layer

Relevance to this Review

There is a clear obligation under the Montreal Protocol to enact legislation to impose a regulatory regime in relation to ozone depleting substances. The following are matters about which legislative provision is required to give effect to Niue's obligations in relation to ozone depleting substances:

- Prohibitions on Importation
- Prohibitions on the Importation of Certain Goods
- Exemptions in relation to imports
- Prohibitions on Exportation
- Prohibitions on Manufacture
- Prohibitions on Sales
- Exemptions in relation to sales
- General Principles to be applied in relation to permits
- Quarantine and pre-shipment permits
- Medical permits
- Base year permits
- General provisions in relation to permits
- Goods for which no permit may apply
- Environment Officers
- Powers of Environment Officers
- Seizure of substances and goods
- Forfeiture of seized substances and goods
- Call-up of substances and goods
- Offences and penalties

Issues raised during consultations

Niue has recently assumed the obligations under the Protocol.

Some confusion has arisen concerning the application of New Zealand's laws in this context. It is now appreciated that those laws would have little relevance to Niue in the context of the Protocol, and that appropriate regulations are needed.

A country plan is currently being developed and shall form the basis of the necessary legislative provisions.

Current state of Niue's laws

There is no law in Niue currently giving effect to these matters.

Legislative Reform Options

The deadlines for making appropriate legislative arrangements in this area require that these matters be given a degree of priority

2.7 Environment Impact Assessments

Relevance to this Review

The effective assessment of environmental impacts from development activities is a key feature of an environmental protection regime.

Issues raised during consultations

It was noted that the new Environment Act does not make substantive provision in relation to EIA's. This is to be left to Regulations.

It was also noted that the newly established fish processing plant has proceeded with no formal environmental assessment.

Current state of Niue's laws

As noted above the new Environment Act envisages that EIA Regulations will be made to provide a legal foundation to such a regime. Interestingly the Tourist Authority Act makes reference to the need for all tourist developments to be assessed in this way, but no substantive provision is made.

At one time an environmental planning law was proposed, and in fact drafted for Niue. This does not appear to be proceeding at present. Some appropriate provision could instead be made in EIA Regulations.

Legislative Reform Options

Formulating appropriate EIA Regulations should be a priority. Such laws exist in other jurisdictions. Interestingly however few Pacific island countries can boast the enactment and effective application and enforcement of such laws. Whilst their drafting may be relatively easy, the difficulties in getting them promulgated and then applied when necessary should not be underestimated.

2.8 Protection of wildlife (whale protection)

Relevance to this Review

The protection of wildlife is a key element of a countries environment protection regime.

Niue shares the privilege of visits by migratory whale species with other countries in the region. It is important that laws guarantee the safety of whales and provide an environment that is conducive to their periodic migration through Niue's waters.

Current state of Niue's laws

Niue's Wildlife Ordinance 1972 is outdated and in need of review. Animals and birds can be declared as absolutely or partly protected species and their habitats can be protected. Police constables are vested with the role and powers of wildlife wardens.

"Protected fish species" under the Territorial Sea and Exclusive Economic Zone Act 1997 include:

- (a) all species of whales identified within or under the groups of right whales, grey whales and rorquals; and
- (b) all species of whales identified within or under the groups of sperm whales, beaked whales, belugas whales, narwhals, dolphins and porpoises. (Turtles, rays and sharks are also protected).

There is also a prohibition on the export of whales under regulation 3 of the Domestic Fishing

Regulations.

Legislative Reform Options

The Wildlife Ordinance should be reviewed and replaced with regulations made under the Environment Act 2003. The role of police constables as wildlife wardens might be transferred to environment officers. Implementation of international conventions relating to the trade of endangered species should be accommodated in the regulations.

Guidance might be taken from other jurisdictions as to the most appropriate regulatory regime to be applied to the protection of whales in Niue waters. The Kingdom of Tonga may have relevant laws, and regard may be had to the laws of the Australian States of Victoria and Queensland. Consultations with commercial and community representatives in Niue should be undertaken.

2.9 Protection of migratory species

Relevance to this Review

The protection of migratory fish species is an area that is becoming increasingly important in the region. Niue shall need to have the capacity to meet its obligations and to conserve its resources.

Current state of Niue's laws

Regulations may be made under the Territorial Seas and EEZ Act on a broad range of issues, including matters for the implementation of UNCLOS, the UN Fish Stocks Agreement and the WCPT Convention. Regulations may apply to Niuean nationals and Niuean registered vessels fishing on the high seas or in the waters of other nations. They may also implement any decisions of international and regional fisheries management bodies.

Legislative Reform Options

With the assistance of regional bodies, consideration should be given to meeting Niue's obligations to conserve migratory fish species, and to otherwise implement international and regional fish management agreements. Regulations made under the territorial seas legislation would be the most appropriate means for achieving these objects.

2.10 Extraction of sand, corals etc

Relevance to this Review

The extraction of sand and corals from coastal areas can have a clear adverse effect on the environment. Controls can be effectively exercised by an agency empowered to grant permits for such activities and to require the reinstatement of affected areas.

Current state of Niue's laws

No law in Niue has been sighted which makes provision in this regard. It is clear from the outdated Mining Act that "minerals" does not include sand, coral, gravel, stone or earth for the purposes of that law.

Legislative Reform Options

Regulations could be made under the Environment Act to deal with these matters.

2.11 Regulation of aquaculture, fish processing etc.

Relevance to this Review

In most jurisdictions the commercial exploitation of the fisheries resource is the subject of detailed statutory regulation. This is aimed at conserving the resource and maximizing returns from its exploitation.

Current state of Niue's laws

No laws have been sighted in Niue that would facilitate the regulation of matters relating to the exploitation of its fishery resources. Regulations may be made under the Territorial Sea and Exclusive Economic Zone Act 1997 in relation to these matters.

Legislative Reform Options

Amendments could be made to the Domestic Fishing Act 1995, or Regulations could be made under that Act or the Territorial Sea and Exclusive Economic Zone Act 1997, to require a permit for the following activities:

- Aquaculture operations
- The export and import of fish
- Fish processing establishments
- Authorisations for transshipment
- The requirement that fish processed in Niue meet the standards applying in the countries where it is to be marketed.

2.12 The Continental Shelf

Relevance to this Review

The right to control the continental shelf is an important aspect of a nation's sovereignty. It has considerable environmental implications particularly in relation to the exploitation of resources. In this case however its effectiveness may be questioned due its foundation in the New Zealand jurisdiction.

Current state of Niue's laws

The Continental Shelf Act 1964 (NZ) is both out-dated and inappropriate. Its object is to protect the continental shelf of New Zealand.

Legislative Reform Options

Consideration should be given to applying a new law to the continental shelf of Niue.

2.13 Obligations under international treaties generally

Relevance to this Review

Protection of Niue's environment can be greatly facilitated by the making of appropriate laws and applying effective regulatory regimes in many areas covered by a wide range of international conventions and regional agreements.

Issues raised during consultations

It is proposed that the Office of External Affairs shall be the designated focal point for the purposes of the Cartagena Protocol. The OEA is the designated focal point under the CBD.

The OEA is seen as the appropriate agency for overseeing compliance with Niue's international obligations.

The organizational structure of the ED supports the clarification in its legislation of roles relevant to the implementation of Niue's international obligations.

Current state of Niue's laws

No law has been sighted which formally gives responsibility in relation to the implementation of treaty obligations. A number of laws however do make provision for the making of Regulations to give effect to such obligations. These are:

- Environment Act (multilateral agreements)
- Territorial Seas and EEZ Act (On a broad range of issues, including matters for the implementation of UNCLOS, the UN Fish Stocks Agreement and the WCPT Convention. Regulations may apply to Niuean nationals and Niuean registered vessels fishing on the high seas or in the waters of other nations. They may also implement any decisions of international and regional fisheries management bodies.)
- Niue Island General Laws (Amendment) Act 2003 (For the implementation of the International Convention for the Safety of Life at Sea 1974 and the International Shipping and Port Security Code)

Legislative Reform Options

Consideration might be given to formally allocating and vesting responsibilities in relation to Niue's international obligations in the OEA and the ED. These might relate to matters such as

- liaising with relevant government departments and agencies and providing assistance to the OEA to identify international Conventions relating to the environment that are in Niue's interests to become a Party;
- consulting with other departments and agencies, and the broader community, in relation to the obligations that Niue will assume under any such Convention;
- ensuring Niue's effective representation at meetings of the Parties of a Convention and other relevant meetings;
- liaising with relevant regional and international bodies to ensure that Niue meets its obligations under a Convention;
- managing or participating in any project, or part of a project, aimed at implementing any aspect of a Convention;
- disseminating information in relation to the subject matter of any Convention, and creating public awareness about the provisions of any Convention;
- preparing any necessary Report, and reporting on a regular basis to the Minister and Cabinet in relation to the implementation of any Convention;
- sharing information and otherwise providing such cooperation as is required by a Convention;
- recommending that any law be amended or enacted in order to effectively implement any requirement of a Convention; and
- working in conjunction with relevant government departments and agencies to implement any obligation under a Convention.

2.14 Other matters

Other important issues have been raised that do not have a direct link to the areas of focus under the IWP. They are nonetheless noted here due to the emphasis that has been placed on them during consultations and to highlight the need to consider the enactment of appropriate laws in these contexts.

A. *Protection of traditional knowledge and intellectual property*

Issues raised during consultations

There is a call from the community for the effective protection of Niuean heritage and the enforcement of intellectual property rights arising from its culture and creations.

It is acknowledged that the current laws of New Zealand origin have little or no relevant or effectiveness in this regard.

Current state of Niue's laws

Laws relating to the recognition and protection of intellectual property rights in Niue include the Copyright Act 1962 (NZ), the Designs Act 1953 (NZ), the Merchandise Marks Act 1954 (NZ), the Patents Act 1953 (NZ) and the Trademarks Act 1953 (NZ). These are all out-dated laws of New Zealand origin. They apply the provisions of the New Zealand laws that were in force as at the 19th October 1974. The registration of intellectual property in New Zealand does operate to accord protection for that right in Niue. But it is questionable whether they meaningfully contribute to the protection of Niuean intellectual property and so they have not been reviewed here. It is acknowledged by the Government of Niue that an appropriate legislative framework for the protection of such rights is needed.

Legislative Reform Options

The expertise that is available in the region on these matters should be drawn upon to formulate, draft and enact appropriate legislation to protect the rights of Niueans in this context and to give effect to the relevant rights stated in the CBD. These include the important areas of access to Niue's genetic resources and to an equitable sharing arrangement for any benefits arising from the development of its resources.

B. *Safety of small vessels*

Issues raised during the consultations

As noted elsewhere, there is an expectation of a dramatic increase in the number of fishing vessels operating in Niue's coastal waters after commencement of operations at the fish processing facility.

The safety of fishing canoes in the vicinity of powered vessels was a particular matter of concern amongst Niue's canoe fishermen.

Current state of Niue's laws

No laws have been sighted in Niue which impose safety requirements applying to small vessels operating in its waters.

Legislative Reform Options

A law might be drafted to impose appropriate safety requirements on small fishing vessels. It has been suggested that power boats should not approach closer than 100 metres to a Niuean canoe.

3 Summary and recommendations

3.1 Summary of gaps, overlaps and conflicts

The Terms of Reference require an identification of areas of gaps, overlap and conflict in Niue's laws applying to the areas relevant to the IWP.

Summary of the identified gaps

It is the gaps in Niue's laws that are the clearest outcome of this legislative review and analysis. The gaps have been primarily identified in the following areas:

- Marine pollution prevention
- Controls over the transboundary movement of hazardous wastes and the implementation of the Basel and Waigani Conventions
- Regulating the dumping and incineration of wastes at sea
- Anti-littering and disposal of wastes on land
- Ozone layer protection
- EIA Regulations
- Protection of whales in Niue's waters and of wildlife generally
- Regulating the extraction of sand and corals
- Licensing of aquaculture and fish processing establishments, the enforcement of processing standards and controls over transshipments
- Niue's continental shelf
- Implementation of Niue's international obligations

Summary of the identified overlaps and conflicts

As noted above the principal outcome has been the aspect of the gap analysis. However the following areas of overlap and potential conflict are identified –

- (a) The declaration of marine reserves under the Domestic Fishing Act but providing for their management in some cases using by-laws made under the Niue Village Councils Act.
- (b) The prospect of prescribing prohibited wastes under the Biosecurity Bill, the Customs Act and new laws regulating the transboundary movements of wastes. (This should not be seen as problematic).
- (c) The implementation of laws relating to the protection of migratory fish species may create areas of overlap between the responsibilities of the Fisheries Division of DAFF and of the ED. There are other areas where this has to be addressed also.
- (d) The regulation of the continental shelf as if it is part of New Zealand's jurisdiction would seem to give rise to a sovereignty issue.
- (e) The roles of the OEA, DAFF and the ED in the context of implementing Niue's international obligations gives rise to some potential for conflict. This may be addressed by formally vesting these roles in the respective agency under a law.
- (f) Overlaps arise in the enforcement context. Consideration might be given to some rationalization and harmonisation of the powers of the police, environment officers, wildlife officers, quarantine officers etc.

3.2 Prioritising the legislative reforms

The areas of village involvement in coastal fisheries protection, the prevention of marine

pollution and the regulation of transboundary movements of hazardous wastes through Niue's waters have been identified as the areas of priority for legislative action.

The other areas to be prioritised include:

1. Marine pollution prevention
2. Controls over the transboundary movement of hazardous wastes and the implementation of the Basel and Waigani Conventions
3. Regulating the dumping and incineration of wastes at sea
4. EIA Regulations
5. Anti-littering and disposal of wastes on land
6. Ozone layer protection
7. Protection of whales in Niue's waters and of wildlife generally
8. Regulating the extraction of sand and corals
9. Licensing of aquaculture and fish processing establishments, the enforcement of processing standards and controls over transshipments
10. Niue's continental shelf
11. Implementation of Niue's international obligations
12. Harmonisation of the enforcement powers and the role of "officers"

(This is a preliminary prioritization only and should be carefully considered so as to reflect Niue's priorities for legislative reform in this general area.)

3.3 Some enabling amendments to the Environment Act 2003

It may be advisable to make some amendments to the recently enacted environment law to ensure that the Regulations proposed in this Review have a solid basis in the Principal Act. These amendments would be useful in the biosafety context as well.

Consideration should be given to making the following changes:

- (a) Section 16 should be amended to state that the NCSD is empowered to exercise any other function vested in it by any other Act or by Regulations made under the Environment Act.
- (b) It may also be appropriate to amend section 15 to provide that the Minister shall be the Chairperson of the NCSD, as no provision in this regard seems to have been made.
- (c) Section 32 should be amended to clarify the range of penalties which may be imposed for breaches of Regulations.

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Annex 1: Discussion paper — legislative initiatives to give effect to the draft Niuean National Management Plan for Coastal Fisheries

1. Background

1.1 By September 2003 DAFF completed a draft National Management Plan for the Coastal Fishery (“Coastal Fishery Plan”).

1.2 This Plan complements the provisions of the Tuna and Billfish Management and Development Plan (“the Tuna Management Plan”) which covers aspects of Niue’s off-shore fisheries.

1.3 The Tuna Management Plan and the Coastal Fishery Plan comprise the two core management regimes proposed for Niuean fisheries.

2. Fisheries Management Plans

2.1 These Plans have their legal foundation in Part 5 of the Territorial Sea and Exclusive Economic Zone Act 1997 (“the TSEEZ Act”).

2.2 Section 12 empowers Cabinet to declare a fishery to be a designated fishery in the national interest and to provide for its effective conservation and efficient use.

2.3 The Director of DAFF may direct a Fisheries Officer to prepare and implement a management and development plan for a designated fishery (section 13). Section 13(2) specifies eight key components of these plans. The draft Coastal Fishery Plan has been drafted in accordance with these requirements.

2.4 Development Plans can be varied by Cabinet on the basis of a report submitted by the Director (section 14). Exemptions from compliance with Plans may also be approved by Cabinet. The Draft Coastal Fishery Plan recommends that no exemptions be granted.

2.5 Section 17 makes contravention or non-compliance with a Plan an offence. A significant fine of \$100,000 is prescribed. It is also an offence to fail to comply with a direction given by an authorized officer which is consistent with a Plan.

3. Key Features of the Draft Coastal Fishery Plan

3.1 The Plan envisages that while a designated coastal fishery shall be declared under the TSEEZ Act, the coastal fishery shall be managed in accordance with the Domestic Fishing Act 1995 (“the DF Act”). It is acknowledged that the TSEEZ Act “does not provide a complete mechanism for the licensing or protection of coastal fisheries”.

3.2 Much emphasis is placed upon implementing the Plan through “the 1995 Domestic Fisheries Act and the Niue Village Councils Ordinance of 1967, particularly through the by-laws that Village Councils are allowed to make for the protection of fish resources”.

3.3 Pilot schemes are proposed and some aspects of these are said to relate to –

- (a) the definition of Village Fishing Grounds
- (b) the bringing of all coastal fishing under a formal permit and licensing system
- (c) the introduction of indicator-based monitoring
- (d) shifting the balance of responsibility towards a co-management system that fully involves Village in addition to Government.

3.4 The need “to negotiate and legally define Village Council coastal fisheries jurisdictions extending either to the 500m isobaths (the limit of “Nearshore Waters” defined by this Plan) or to the inner boundary of the Territorial Sea on the Low Water

Mark” is noted.

3.5 Village Councils are to be encouraged “to use their By-law making powers to manage fisheries within their fishing areas, possibly including:

- a. Setting up permit systems that define what type of fishing is allowed by each permitted fisher and in what sub-area of the Village fishing area...;
- b. Nominating Honorary Village Fisheries Wardens to be charged with locally implementing certain measures of this plan, particularly fisheries monitoring and surveillance, with expenses to be paid from any permit receipts;
- c. Defining the extent, period and types of exclusions of any fono or marine protected areas that are felt necessary by the Council.

3.6 It is proposed that a licensing regime shall be applied by amendments to the DF Act for all vessel-based fishing in Village Fishing Grounds.

(It is later noted in the Plan however that the regime shall apply to all fishers – “whether vessel-based or not, and whether subsistence or commercial”). The licences shall be in addition to the licence provided for by section 18 of the DF Act which deals with matters of boat safety. Licences may only be issued on the authority of a written permit given by a Village Council. This may however be overridden “in exceptional circumstances resulting from social equity or national interest considerations”. (Although the person or body who may grant such exemptions is not identified). It is suggested that the “Government” may consider modifying the allocation of licences or permits to different groups, possibly through a limitation on the number of licences issued to each group, or try to develop alternative fishing and aquaculture opportunities for disadvantaged groups”. The Niue Fisheries Service shall review policy guidelines applying to the issuing of licences from time to time. Licences shall not be transferrable and shall have no monetary value. They shall be valid for a twelve month period, after which they must be renewed.

3.7 It is proposed that a Niue Register of Fishers shall be maintained. Good standing on the register shall be a requirement for applicants for fishing licences.

3.8 It is also proposed that the establishment of sportfishery, commercial or other associations representing fishers shall be encouraged, and that these bodies shall be regularly consulted with.

3.9 The plan notes the importance of environment impact assessment procedures and advocates that coastal fisheries be on the “check-list” of possible impacts to be assessed in all cases.

4. Aspects of the Legislative Amendments needed to give effect to the Draft Plan

4.1 The following amendments to the DF Act have been canvassed in the Plan:

- (a) clarifying the role of Village Councils as “co-managers”
- (b) defining the area of Village responsibility (ie the jurisdictional limits of Village based authority), and the concept of Village Fishing Grounds
- (c) implementing a licensing system applying to all fishers in coastal areas, and applying the endorsed Policy annexed to the Plan (a large degree of flexibility is noted in this context relating to the licensing of fishing in certain areas, at certain times, using certain gear, for certain species and with certain approvals by Village Councils or otherwise)
- (d) empowering Village Councils to issue permits as a pre-condition for the licensing of fishers in Village Fishing Grounds
- (e) the appointment and empowerment of Honorary Village Fishing Wardens (whose

responsibilities shall include “monitoring of fishing activity, reporting of illegal fishing to fisheries officers or the Police, and possibly administering the issue of Village Fishing Permits for the Village Council, and possibly coordinating the monitoring of fishery and ecosystem indicators”).

(f) the maintenance of the Niue Register of Coastal Fishers should have a firm legislative basis (The right to obtain a licence shall be conditional upon having “good standing” on the register).

5. Observations

5.1 General Observations

The Draft Coastal Fishery Plan appears to be comprehensive and workable, and to be consistent with the requirements of section 12 of the TSEEZ Act.

5.2 Village By-laws

The concept of co-management of the coastal fisheries resources by Government and Villages is central to the Draft Plan, and most effectively implemented by the recognition of Village Council by-laws. The Plan envisages that these would be made under the out-dated Niue Village Councils Act but it is suggested that this could be more usefully done if the amendments made to the DF Act included provision for the making of such by-laws under its authority. This is preferable for the following reasons –

- (a) The Niue Village Councils Act is generally out-dated and in need of replacement.
- (b) It is understood that particular problems have been identified in relation to the procedures for the ratification of by-laws made under the Act and for giving legal effect to them.
- (c) It is preferable that the management regime be based in the DF Act and not a combination of laws.

5.3 Consequences of breaches of the Coastal Fishery Plan

Quite apart from the penalties imposed by any applicable regulations or by-laws made in support of the Draft Plan, it must be noted that all breaches of any such provision shall also attract the maximum penalty of a \$100,000 fine under section 17 of the TSEEZ Act.

5.4 Progressing the Legislative Reforms

It was proposed that amendments would be drafted to the DF Act to give effect to the by-laws that are proposed for the pilot projects in two villages. It is now apparent that a much broader range of amendments are called for. These can be drafted now but a decision in relation to this must take account of the need to consult broadly on such matter before a drafted outcome is finalized. This may be particularly so in relation to the proposals to introduce a comprehensive licensing system, the issuance of village fishing permits and the role of Honorary Village Fishing Wardens.

Annex 2 — Key features of marine pollution regulations

A draft Regional Model Marine Pollution law was prepared in 2000 with the assistance of SPREP, SPC and IMO. This draft has been considered in Niue and it is felt that it is cumbersome and poses difficulties to effectively apply the full range of its provisions. There is clear merit in these views.

Regulations dealing with marine pollution issues could be made under either the Territorial Seas and EEZ Act or the Environment Act. It is suggested that they be considered in the context of the former Act, while regulations dealing with land-based pollution might be best made under the new Environment Act.

The Marine Pollution Regulations should deal with the following issues –

1. Marine pollution prevention (implementation of the MARPOL Convention)
2. Marine pollution response
3. Marine casualties (dealing with vessels in distress)
4. Liability and compensation for oil pollution damage
5. Dumping and incineration of wastes

Annex 3 — Scope of amendments to regulate transboundary movements of hazardous wastes

Amendments to the Territorial Sea and Exclusive Economic Zone Act 1997 could be made to provide for the following matters:

1. Rights of Innocent Passage

The right of innocent passage for vessels through Niue's territorial sea should be stated. This should be a right of passage at no cost.

2. Prohibited passage

Prohibited passage can be stated to be any passage of a foreign vessel through the territorial sea which is prejudicial to the peace, good order and security of Niue, and may specifically prescribe the following activities –

- (a) threats or use of force
- (b) unauthorised use of weapons
- (c) collecting information prejudicial to Niue's security
- (d) launching or landing any military device
- (e) loading or unloading any commodity, currency or persons contrary to Niue's laws
- (f) willful or serious marine pollution
- (g) unlicensed fishing activities
- (h) carrying out scientific or hydrographic research without approval
- (i) interfering with communications facilities
- (j) any passage in contravention of Niue's obligations and rights under international conventions relating to the movement, dumping and incineration of hazardous wastes

Powers may be given to suspend a right of innocent passage.

Obligations can be placed on the movements by submarines and underwater vehicles through the territorial sea.

3. Jurisdiction over foreign vessels

The application and extent of Niue's criminal and civil jurisdiction over foreign vessels passing through the territorial sea should be clarified.

4. Declaration of the contiguous zone

Provision should be made for the declaration of the contiguous zone, and the jurisdiction Niue exercises over it.

Annex 4 — Features of anti-dumping and littering laws

Regulations made under the Environment Act could provide effective arrangements for dealing with littering and illegal dumping of wastes. The following are some worthwhile features of such a law:

1. **Definitions –**
 - “authorised dumping sites”
 - “hazardous wastes” and “noxious wastes”
 - “public place”
2. **Offences –**
 - (a) littering in public places
 - (b) littering on property belonging to other persons
 - (c) dumping hazardous or noxious wastes on public or private property
3. **Duties –**
 - (a) to keep land and premises clean
 - (b) to remove wastes and hazards
 - (c) not to burn off at certain times
 - (d) not to deal with or dispose of litter and wastes by other prescribed means
4. **Enforcement –**
 - (a) Notice to clean premises, remove wastes etc.
 - (b) Infringement Notices
 - (c) Action taken by officers to clean up and seek cost reimbursement
 - (d) Liability of employers
 - (e) Proof of matters relating to wastes
 - (f) Application of penalties to community purposes
 - (g) Community work orders