

# Towards an effective legal framework for marine protected areas in Fiji

## Policy and Law Discussion Paper



How can MPAs be established under existing legislation  
and what are the possible scenarios for future regulation?



# Acknowledgements

## Producer

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## GLOSSARY

|                                       |   |
|---------------------------------------|---|
| <b>1999 IUCN Guidelines</b>           | Graeme Kelleher (ed) <i>Guidelines for Marine Protected Areas</i> (IUCN, 1999)  |
| <b>2011 IUCN Guidelines</b>           | Barbara Lausche (2011) <i>Guidelines for Protected Areas Legislation</i> (IUCN, 2011)   |
| <b>CBAM</b>                           | Community-Based Adaptive Management   |
| <b>CBD</b>                            | Convention on Biological Diversity  |
| <b>CBRM</b>                           | Community-Based Resource Management   |
| <b>CFRO</b>                           | Customary Fishing Rights Owners   |
| <b>Constitution</b>                   | The <i>Constitution of the Republic of Fiji 2013</i>  |
| <b>DoE</b>                            | Department of Environment (Fiji)  |
| <b>DoL</b>                            | Department of Lands (Fiji)  |
| <b>Draft Inshore Decree</b>           | Draft Inshore Fisheries Management Decree (Fiji)  |
| <b>EEZ</b>                            | Exclusive Economic Zone   |
| <b>EIA</b>                            | Environmental Impact Assessment   |
| <b>EMA</b>                            | <i>Environment Management Act (No. 1 of 2005) (Fiji)</i>  |
| <b>Existing Fisheries Legislation</b> | <i>Fisheries Act [Cap 158] 1942 (Fiji)</i> and <i>Offshore Fisheries Management Decree (No. 78 of 2012) (Fiji)</i> <sup>1</sup> (excluding the Regulations made under these statutes) |
| <b>Existing MPA Mechanisms</b>        | All of the existing MPA mechanisms in Fiji, including the informal, <i>Fisheries Act</i> , <i>Offshore Decree</i> , SLA and EMA mechanisms.   |
| <b>Fisheries Act</b>                  | <i>Fisheries Act [Cap 158] 1942 (Fiji)</i>  |
| <b>Fisheries Regulations</b>          | <i>Fisheries Regulations [Cap 158] (Fiji)</i>   |
| <b>FLMMA Network</b>                  | Fiji Locally Managed Marine Areas Network   |
| <b>FMP</b>                            | Fisheries Management Plan   |
| <b><i>iTaukei</i></b>                 | The Indigenous people of Fiji   |
| <b>IMCAM</b>                          | Integrated Marine and Coastal Areas Management  |
| <b>IUCN-based Recommendations</b>     | Recommendations for MPA legislation drawn from the 2011 IUCN Guidelines for the purposes of this paper  |
| <b><i>iQoliqoli</i></b>               | Traditional/customary fishing grounds mapped in accordance with a process established by the Fisheries Act, 1942  |
| <b>Legislation</b>                    | Refers generally to both Primary Legislation and Regulations  |
| <b>LMMA</b>                           | Locally Managed Marine Area   |
| <b>Marine Reserve Regulations</b>     | <i>Fisheries (Shark Reef Marine Reserve) (Serua) Regulations [Cap 158] 2014</i> and <i>Fisheries (Wakaya Marine Reserve) Regulations [Cap 158] 2015</i>                               |
| <b>MARPOL</b>                         | <i>International Convention for the Prevention of Pollution from Ships</i>  |
| <b>MCS</b>                            | Monitoring, Compliance and Surveillance   |
| <b>MoF</b>                            | Ministry of Fisheries (Fiji)  |

|  |  |
|--|--|
| <b>MPA</b>                                 | <p>Marine Protected Area. This paper has adopted the MPA definition arising from the Subsidiary Body on Scientific, Technical and Technological Advice of the Convention on Biological Diversity (CBD), namely:<sup>2</sup></p> <p><i>Marine and Coastal Protected Areas mean any defined area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna, and historical and cultural features, which has been reserved by legislation or other effective means, including customs, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings</i></p> |
| <b>NTROC</b>                               | National <i>iTaukei</i> Resource Owners Committee  |
| <b>OFAC</b>                                | Offshore Fisheries Advisory Council  |
| <b>Offshore Decree</b>                     | <i>Offshore Fisheries Management Decree (No. 78 of 2012)</i>   |
| <b>Offshore Regulations</b>                | <i>Offshore Fisheries Management Regulations 2014</i>  |
| <b>PAC</b>                                 | Protected Areas Committee  |
| <b>Primary Legislation</b>                 | Refers only to primary legislation (i.e. Acts and Decrees) and excludes Regulations  |
| <b>Regulations</b>                         | Refers to regulations made under Primary Legislation   |
| <b>Serua Shark Reef Reserve Regulation</b> | <i>Fisheries (Shark Reef Marine Reserve) (Serua) Regulations [Cap 158] 2014</i>  |
| <b>SLA</b>                                 | <i>State Lands Act [Cap 132] 1946 (formerly Crown Lands Act)</i>   |
| <b>SLR</b>                                 | <i>State Lands (Leases and Licences) Regulations</i>   |
| <b>Tabu</b>                                | A customary prohibition. In the context of fisheries, it is a prohibition, or a restriction, on fishing activity in a particular area usually within traditional fishing grounds ( <i>iQoliqoli</i> ). <i>Tabus</i> can be declared either on a strictly customary basis or as part of a Fisheries Management Plan within LMMA sites. <i>Tabu</i> (pronounced tambu) is the word from which taboo is derived.  |
| <b>TLFC</b>                                | <i>iTaukei</i> Lands and Fisheries Commissions   |
| <b>UNCLOS</b>                              | <i>United Nations Convention on the Law of the Sea</i>   |
| <b>Wakaya Marine Reserve Regulation</b>    | <i>Fisheries (Wakaya Marine Reserve) Regulations [Cap 158] 2015</i>  |
| <b>Yaubula</b>                             | Natural resources  |



## EXECUTIVE SUMMARY

### *Background, purpose and methodology*

In 2005, the government of Fiji committed to protecting at least 30% of Fiji's marine areas using 'comprehensive, ecologically representative networks of MPAs [marine protected areas], which are effectively managed and financed'.<sup>3</sup> In order to establish a comprehensive and ecologically representative network of marine protected areas (**MPAs**), Fiji must first have in place a suitable legal framework, that is, appropriate policies and legislation.

The purpose of this paper is to support the development of a comprehensive legal framework for the establishment and management of an effective network of MPAs in Fiji which is based on science and suited to the Fiji context.

MPAs are not just aimed at limiting fishing activity but also promote a whole range of potential uses that address critical issues such as: food security, resilience to natural disasters and adaptation to climate change.

To create a network of MPAs suited to the Fiji context is a significant challenge that will not be achieved through law reform alone, as it requires a multi-disciplinary approach and involves consultation and agreement with communities, the Ministry of Fisheries, NGOs, fisheries experts, economists and lawyers, amongst others. It is also crucial to understand, respect, and work within, Fiji's unique law and governance context that includes the recognition of traditional rights, communities and artisanal fishers. Ultimately, as decisions to create MPAs will affect existing user rights, they can only be developed through a consultative process that takes into account the views and concerns of those who will be affected.

With these contextual issues in mind, in order to support the development of a comprehensive legal framework for the establishment and management of an effective network of MPAs in Fiji, this paper:

- outlines the law and governance context and the existing MPA mechanisms in Fiji (Parts 1, 2, and 3);
- identifies 27 key recommendations that an MPA legal framework should address (**IUCN-based Recommendations**) based on the 2011 Guidelines for Protected Areas Legislation published by the International Union for the Conservation of Nature<sup>4</sup> (**2011 IUCN Guidelines**) (Part 4);
- assesses the adequacy of Fiji's existing MPA mechanisms by reference to the IUCN-based Recommendations (Part 5);
- identifies options for law reform and some possible next steps in this process (Parts 6 and 7).

In summary, Fiji's existing MPA mechanisms can be identified as follows (**Existing MPA Mechanisms**):

- 'Informal' MPAs: customary *tabus* and locally managed marine areas (**LMMAs**);
- the regulation making powers under the *Fisheries Act 1942* (**Fisheries Act**) which have enabled the creation of site-specific MPAs;

- the power to designate MPAs and related regulation making powers under the *Offshore Fisheries Management Decree 2012 (Offshore Decree)*;
- the licensing of foreshore land under the *State Lands Act 1946 (SLA)*<sup>5</sup>; and
- the relevant provisions of the Environment Management Act 2005 (**EMA**), in particular, the environmental impact assessment (**EIA**) processes and the provisions relating to the National Environment Council (**NEC**) which has established the Protected Areas Committee (**PAC**).

### **Key findings**

The analysis undertaken in this paper reveals that whilst the Existing MPA Mechanisms have some notable strengths, they are deficient in a number of respects and do not adequately form a comprehensive legal framework for establishing and managing MPAs. The key strengths and weaknesses of the Existing MPA Mechanisms are summarised below. **Appendix B** outlines the strengths and weaknesses of the Existing MPA Mechanisms in relation to each of the 27 IUCN-based Recommendations.

### **Strengths of the Existing MPA Mechanisms**

The key strengths of the Existing MPA Mechanisms include:

- **Customary *tabus***: A key strength of customary *tabus* is their flexibility. *Tabus* can be imposed (or revoked) by chiefly decision.
- **LMMAs**: LMMAs go some way to bridging the gap between customary and ‘modern’ law as they, among other things, combine traditional knowledge and practices with modern scientific and technical expertise in MPA management.<sup>6</sup>
- **The Offshore Decree**: Although not designed or ideally suited to regulating inshore marine areas, in particular *iQoliqoli*, the *Offshore Decree* has a number of important strengths, including relatively strong ‘objective’ and ‘principles and measures’ clauses and the powers to establish advisory committees.<sup>7</sup>
- **The SLA MPA mechanisms**: Strengths of the SLA mechanisms include the conferral of a statutory right on the Customary Fishing Rights Owners (**CFROs**) as lessee or licensee where SLA leases or licenses are granted, public notification and consultation requirements prior to the grant of a foreshore lease, and the practice of compensating CFROs for the loss of customary fishing rights when foreshore leases and licences are granted.<sup>8</sup> It should be noted however that the SLA was not designed as an instrument for establishing MPAs. There are significant difficulties with seeking to use the SLA for this purpose, including that it is unclear as to whether the Department of Lands (**DoL**) has the jurisdiction or authority to regulate activities in waters and marine resources above foreshore land and above the seabed beyond the foreshore. For these reasons, SLA leases and licences are not considered in this paper as offering a viable means of establishing MPAs. Nevertheless, as noted here, the SLA mechanisms do demonstrate some strengths which may form the basis of more robust systems.
- **The EMA**: The EMA does not contain provisions that enable MPAs to be established. However, the EMA does play an important role in relation to MPAs. While there is some scope to strengthen this role, some key relevant aspects and

strengths of the EMA include:

- The EMA requires proposals that 'could harm or destroy designated or proposed protected areas' to be subject to the EIA process. This process may offer some protection to marine protected areas.<sup>9</sup>
- The EMA establishes the NEC which has, in turn, established the PAC. The PAC is recognised by the national government as responsible for providing advice and leadership on meeting the national goal of protecting Fiji's marine areas using MPAs.<sup>10</sup>

## **Weaknesses of the Existing MPA Mechanisms**

The key weaknesses of the Existing MPA Mechanisms include:

- **Lack of a comprehensive oceans or marine protected areas policy:** Whilst there are a range of policies broadly relevant to MPAs, there is no specific policy for MPAs in Fiji. This leaves a policy gap in relation to the development of MPA legislation and the establishment and management of MPAs.<sup>11</sup>
- **Harmonisation issues:** An effective regulatory system requires that all relevant legislation is harmonised, or in other words, is consistent and compatible. A key harmonisation issue which will need to be resolved by amending Primary Legislation is the overlap of the jurisdictions of the *Fisheries Act* and the *Offshore Decree*. Specifically, the *Fisheries Act* regulates fishing activities in inshore areas. However, the *Offshore Decree* is stated to apply to inshore and offshore areas and is to prevail in the event of inconsistency with any other law. This is not an optimal situation and may create instances where measures under the *Offshore Decree* unintentionally override the operation of the *Fisheries Act*.<sup>12</sup>
- **Limited institutional options:** The Existing MPA mechanisms do not provide scope to create a separate, independent agency tasked with establishing and managing MPAs.<sup>13</sup>
- **Scope to strengthen and extend the function and powers of the PAC:** The function and powers of the PAC could be made more secure and could be extended through amendments to existing or by making new Primary Legislation.<sup>14</sup>
- **No effective and mandatory requirements for coordination and consultation between relevant stakeholders in the establishment and management of MPAs.**<sup>15</sup>
- **No formal recognition of voluntary conservation areas:** The issue of bringing voluntary conservation areas like LMMAs into the formal legal system is one of the most pressing issues facing coastal marine management in Fiji today. A range of options may be available and they will require extensive consultation and consideration before any particular approach is adopted.<sup>16</sup>
- **No sustainable financing arrangements for MPAs.**<sup>17</sup>
- **Failure to establish a network of MPAs and a lack of systems planning and strategic planning**<sup>18</sup>: To date, MPAs appears to have been created on an ad hoc basis rather than in accordance with a robust plan. Systems planning is a way to ensure that individual protected areas, and systems of protected areas, are developed and understood in context. Systems and strategic planning will include land use and marine spatial planning. Marine spatial planning will allow for a variety

of levels of protection and permitted uses.

- **No allowance for compensation to CFROs:** Neither the *Fisheries Act* nor the *Offshore Decree* creates scope for compensating CFROs if MPAs impact their fishing rights.<sup>19</sup>
- **Scope to strengthen the EIA process:** While it is significant that the EIA process under the EMA extends to MPAs, there are a number of areas in which that process can be strengthened. In particular:
  - (a) Under the current arrangements, even if a proposed activity has undergone an EIA assessment and the assessment identifies that it is likely to cause harm to a protected area, the activity can still be approved.
  - (b) The definition of 'development activities' to which the EIA process applies specifically excludes fishing activities, meaning that EIAs would not be required for fishing activities.<sup>20</sup>

### **Options for law reform and a pathway forward**

Given the limitations of the Existing MPA Mechanisms, there is a strong case for law reform. In these circumstances, there appear to be 3 broad options for proceeding:

- **Option 1: Making comprehensive MPA regulations** – Develop a comprehensive MPA legal framework by making detailed MPA regulations using the regulation making powers under the Existing Fisheries Legislation.
- **Option 2: Amending Existing Primary Legislation** – Develop a comprehensive MPA or protected areas legal framework by making amendments to Existing Fisheries Legislation and/or other existing Primary Legislation.
- **Option 3: Making New Primary Legislation** – Develop a comprehensive MPA framework by making new MPA or protected areas legislation.

Further work will be required to comprehensively review these possible options. However, a preliminary analysis of Option 1 indicates that this option will not address some of the key weaknesses of the Existing MPA Mechanisms. Therefore, in any further analysis of the options for law reform, it is likely that Option 2 or 3 will warrant close consideration. A fundamental question in this context is whether any new regime will cover both terrestrial and marine areas, or simply be limited to marine areas.

Also, in any further analysis, the 2011 IUCN Guidelines and the IUCN-based Recommendations discussed in this paper will provide a useful reference for identifying key areas that amended or new legislation will need to address. This further work would also benefit from the findings of the legislative review undertaken with the support of the Marine and Coastal Biodiversity Management in Pacific Island Countries Project (**MACBIO Report**).<sup>21</sup> The MACBIO Report reviews policies and legislation relevant to MPAs in Fiji to identify areas of conflict, synergy and gaps. The MACBIO report is broader in focus than this paper and outlines policies, strategies, and plans relevant to MPAs at the international, regional, national and provincial levels whilst this paper examines in close detail the technical aspects of the Existing MPA Mechanisms by reference to the IUCN-based Recommendations. Further, the IUCN-based Recommendations presented in this paper provide a basis for developing a new MPA regime and critically analysing any new MPA regime which may be proposed. The papers exist as complementary resources. Relevantly,

the MACBIO Report recommends that the Government of Fiji consider developing new legislation that specifically provides for MPAs, either through changes to existing legislation or developing new legislation.<sup>22</sup>

In addition, MPA legislation could be developed using the analytical framework outlined in FELA's publication, "Regulating Coastal Fisheries: Policy and Law Discussion Paper".<sup>23</sup> This framework views environmental laws as comprising 5 elements: goals, objects, principles, tools and mechanisms, and governance and institutions.<sup>24</sup>

In progressing any law reform program, it would be useful to develop a clear roadmap for reform in consultation with all relevant stakeholders. Some possible next steps which may be included in any roadmap include:

- **Protecting high priority conservation areas:** Whilst work is being undertaken to develop a comprehensive MPA framework, high priority conservation areas can be identified and protected, utilising the Existing MPA Mechanisms. These MPAs can then be transitioned into any new regime.<sup>25</sup>
- **Developing a comprehensive oceans or MPA policy:** Early policy development will inform and assist subsequent analysis and legislative drafting.
- **Determining the preferred approach to legislative reform:** Building on the present analysis, it would be appropriate for a further detailed analysis of Options 1, 2 and 3 to be undertaken. Once this further analysis is complete, the preferred approach to legislative reform can be determined following appropriate stakeholder consultation.
- **Drafting and implementation of new MPA or protected areas legislation:** Depending on the preferred approach to legislative reform, new MPA or protected areas legislation can be drafted and implemented in consultation with all key stakeholders. A key part of this process will be harmonising all related legislation.

## 1. Introduction

### 1.1 *Background: MPAs, the Existing MPA Mechanisms and other relevant legislation*

Protected areas are recognised globally as essential for conserving biodiversity.<sup>1</sup> They also play a key role in maintaining critical ecosystem services. In island states such as Fiji, protected areas play a critical role in maintaining the marine resources that provide the majority of the population with their staple source of protein and a source of revenue. They are also the foundation of many important customary practices.

In 2005 the government of Fiji, recognising the importance of managing fisheries sustainably, committed that 'by 2020, at least 30% of Fiji's inshore and offshore marine areas (*iQoliqolis*) will have come under a comprehensive, ecologically representative network of MPAs, which are effectively managed and financed'.<sup>2</sup> This commitment has been reiterated at international fora,<sup>3</sup> and national policies have recognised the key role of protected areas in maintaining ecosystem services and enabling sustainable development.

There is no single, global definition of a marine protected area (**MPA**), nor has Fiji adopted one in national legislation. This paper has adopted the MPA definition arising from the Subsidiary Body on Scientific, Technical and Technological Advice of the *Convention on Biological Diversity (CBD)*, namely:<sup>4</sup>

*Marine and Coastal Protected Areas mean any defined area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna, and historical and cultural features, which has been reserved by legislation or other effective means, including customs, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings.*

Another widely recognised definition is the definition of 'protected area' adopted by the International Union for the Conservation of Nature (**IUCN**) (which captures both terrestrial and marine protected areas).<sup>5</sup> The current IUCN definition of a protected area is 'a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'. The CBD definition differs from the IUCN definition in at least two important respects. First, the IUCN definition places primacy on nature conservation, as an area will not qualify as a protected area unless nature conservation is the primary **objective**. In contrast, the CBD definition emphasises **effect**, so that a protected area must have the effect that the area 'enjoys a higher level of protection than its surroundings'. Second, the CBD definition makes express reference to customs, which are a very important element of fisheries management in Fiji.

The CBD definition is arguably better suited to the Fijian context, where a protected area may be declared under customary law for a primary reason other than nature conservation (such as a sign of respect for a deceased chief, or for a mix of reasons, including nature conservation, without a clear indication of which is the primary objective).<sup>6</sup> This is not to say that Fiji should simply adopt the CBD definition in its legislation. Instead, there should be a discussion involving all relevant stakeholders to determine the most appropriate definition for Fiji.

As the IUCN noted in its 1999 *Guidelines for Marine Protected Areas*:<sup>7</sup>

*For most countries a broad, integrated approach to conservation and management*

*of marine resources is a new endeavour which is not adequately provided for in existing legislation. Thus, before an MPA can be established, it may be necessary to review and revise existing legislation and/or develop new legislation.*

This closely represents the current situation in Fiji: there is no comprehensive, statutory system for establishing MPAs, and no legislative definition of 'MPA', however there are some existing mechanisms for establishing MPAs. Further, Fiji has been in the process of reviewing and modernising its marine law and policy for a number of years. This process is ongoing.

For the purposes of this paper, the existing MPA mechanisms are divided into two groups: statutory law mechanisms (referred to as 'formal' mechanisms) and customary law mechanisms (referred to as 'informal' mechanisms). The vast majority of existing MPAs in Fiji are established using informal mechanisms with Customary Fishing Rights Owners (**CFROs**) establishing *tabu* areas MPAs in their respective traditional fishing grounds (*iQoliqoli*). These *tabu* areas, while not established by legislation, may recognise fishing restrictions in the relevant area and may be a condition to a fishing licence granted pursuant to the Existing Fisheries Legislation. *Tabu* areas may be created by the CFRO either by:

- (a) declaring a *tabu*<sup>8</sup> on a strictly customary basis; or
- (b) establishing a locally managed marine area (**LMMA**). LMMAs are also established under customary law and can include *tabus* as one of a number of fisheries management tools (although in this context, *tabus* are a reference specifically to no-take zones), in partnership with the Fiji Locally Managed Marine Areas Network (**FLMMA Network**).

The main formal mechanisms for establishing MPAs exist under the *Fisheries Act 1942* (**Fisheries Act**) and the *Offshore Fisheries Management Decree 2012* (**Offshore Decree**) (together, referred to as the **Existing Fisheries Legislation**):<sup>9</sup>

- (a) The *Fisheries Act* enables MPAs to be established by making regulations. Currently, there have been two MPAs established in this way. In addition, the *Fisheries Regulations* (**Fisheries Regulations**) allow for the gazettal of restricted areas.
- (b) The *Offshore Decree* enables the Permanent Secretary responsible for fisheries to designate MPAs. The *Offshore Fisheries Management Regulations 2014* (**Offshore Regulations**) allows for the scheduling of restricted and prohibited areas. Schedule 1 to the *Offshore Regulations* already lists some prohibited and restricted areas. Importantly, these do not have the effect of prohibiting or restricting all types of fishing in all circumstances. Instead, the restrictions and prohibitions apply specifically only to *vessels* (defined as foreign fishing vessels and Fiji fishing vessels) and only in some circumstances.

In addition to the Existing Fisheries Legislation, the licensing mechanism under the *State Lands Act 1946* (**SLA**) has been used in an ad hoc fashion to establish two foreshore MPAs. Relevantly, however, the Department of Lands (**DoL**) has recently discontinued the practice of granting SLA licences for MPAs.

**Table 1**, below, provides a snapshot of the existing MPAs in Fiji under each of the mechanisms currently available.

| Table 1. Snapshot of MPAs In Fiji               |   |
|---|---|
| Mechanism/legal basis                           | Total number  |
| Customary law (FLMMA)                           | 135 LMMAs incorporating 466 <i>tabu</i> (no-take) areas |
| Customary law (strictly community <i>tabu</i> ) | Unknown   |
| <i>State Lands Act</i> (licences)               | 2   |
| <i>Fisheries Act</i> (regulations)              | 2   |

As discussed in Parts 3 and 5 of this paper, there are distinct merits to some aspects of the SLA lease and licencing mechanisms. However, the SLA does not appear to have been designed as an instrument to regulate the marine environment (or MPAs more specifically). There are significant difficulties with seeking to use it for this purpose, including that it is unclear as to whether the Department of Lands has the jurisdiction or authority to regulate activities in waters and marine resources above the foreshore land and above the seabed beyond the foreshore. As a result, SLA leases and licences are not considered in this paper as offering a viable long-term mechanism for establishing a comprehensive network of MPAs. However, the SLA mechanisms may offer some important lessons useful for developing the preferred legal framework for MPAs. For this reason, this paper includes an analysis of the SLA mechanisms.

Another important statute in the present context is the *Environment Management Act 2005* (EMA). The EMA does not contain provisions that enable MPAs to be established. However, it does play an important role in relation to MPAs and is considered in some detail in this paper.

All of the existing MPA mechanisms, including the informal, *Fisheries Act*, *Offshore Decree*, *SLA* and *EMA* mechanisms, are collectively referred to in this paper as the **Existing MPA Mechanisms**.



## 2. The law and governance context

### 2.1 Law and governance framework

This part of the paper provides an overview of the law and governance context in Fiji. This will frame later discussion and assist in the assessment of the strengths and weaknesses of Existing MPA Mechanisms.

#### *Dual governance system*

The law and governance arrangements that apply to Fiji's fisheries are complex, incorporating:<sup>10</sup>

*both a modern legal framework, based on English common law ... and a traditional iTaukei system of law and governance deeply rooted in the country's history and customs.*

This has sometimes been described as a 'dual' governance system, combining both customary elements and western (or 'formal') elements.<sup>11</sup>

Prior to Fiji's Cession to Great Britain in 1874, all of Fiji's land and inshore waters were held under customary communal tenure and governed by customary law. Cession to Great Britain resulted in the introduction of the common law doctrine of public trust. This in turn resulted in Crown (State) ownership of – among other things – the sea, the shores, and the natural resources contained therein. While customary ownership of land was recognised, the State asserted ownership of Fiji's foreshores and seabed. Recognition of customary rights over the foreshores and seabed was limited to customary fishing rights. This disrupted traditional integrated governance as well as land and marine resource management systems. Some communities have long held concerns about the rights that were lost as a result of this process.

The *Constitution of the Republic of Fiji 2013 (Constitution)* continues to recognise customary ownership of land.<sup>12</sup> In relation to the foreshore and the sea, the Constitution recognises the customary right of access to marine resources (i.e. customary fishing rights) but does not recognise resource ownership, with the government retaining 'ultimate control over the actual law-making and public administration functions pertaining to near shore fisheries, as well as ownership of near shore fishing areas'.<sup>13</sup> Notably, the Constitution only guarantees a right to compensation or payment of royalties for infringement of customary fishing rights if such infringement is a result of mining operations.<sup>14</sup> As discussed later in this paper, customary fishing rights are established and recognised formally under the *Fisheries Act*.

The role of Provincial Councils is also an important element of Fiji's law and governance framework.<sup>15</sup> Fiji is organised into 14 provinces, each of which has a Provincial Council. Within the 14 provinces there are 187 districts (*Tikina*)<sup>16</sup> and approximately 1171 registered villages (*koro*).<sup>17</sup> Sloan and Chand describe the important role of Provincial Councils as follows:

*These Provincial Councils do not have a law making function, but they do serve as a primary channel of communication between central Government and traditional leaders, particularly those representing the Ministry of iTaukei Affairs and, in turn the iTaukei Affairs Board (TAB).*

This chain of communication operates through *Turaga ni Koro* – village representatives who are appointed by Villages Councils – and *Mata ni Tikini* – district representatives. The

*Turaga ni Koro* report to the *Mata ni Tikina*, who in turn report to the Provincial Council (the head of which has the title of *Roko Tui*).<sup>18</sup> These representatives are paid an amount by the *iTaukei* Affairs Board for their duties.

Sloan and Chand summarise the function of this system as follows:<sup>19</sup>

*Between these individuals – the Roko Tui, the Mata ni Tikina, and the Turaga ni Koro – and the Village Council and Provincial Council meetings, all local activities are vetted and are ultimately conveyed to relevant Government officers (e.g., within the department of Fisheries, or Environment, or Lands), thus ensuring that both branches of the dual governance system are well-informed and able to perform their respective duties.*

It is also relevant to note that Provincial Councils also include a Provincial Administrator who is typically a government officer from the Ministry of Rural Development.

The *iTaukei Affairs Act* provides a statutory mechanism to bridge customary and ‘modern’ law. The *iTaukei Affairs Act* empowers the *iTaukei* Affairs Board, subject to the approval of the Minister of *iTaukei* Affairs, to make ‘regulations for peace, order, welfare and good governance of Fijians’, ‘to be obeyed by all Fijians’.<sup>20</sup> It also empowers Provincial Councils, subject to the approval of the *iTaukei* Affairs Board, to make by-laws for the ‘health, welfare and good government’ of those residing in, or being members of, the community of the relevant Province. They may also, subject to the approval of the Minister, impose rates or charges on those community members.<sup>21</sup>

### **Law and policy context**

In addition to the *Fisheries Act*, the *Offshore Decree*, the SLA, and the EMA, **Appendix A** briefly introduces the following statutes which have also been identified as being of particular relevance to MPAs. This list should not however be taken to be exhaustive.<sup>22</sup>

- *Regulation of Surfing Areas Decree 2010*
- *Marine Spaces Act 1978*
- *Continental Shelf Act 1978*
- *Mining Act 1966*
- *International Seabed Mineral Decree 2013*
- *National Trust for Fiji Act 1970*
- *Forest Decree 1992 (and the Forest Bill 2016)*
- *iTaukei Lands Act*<sup>23</sup>
- *iTaukei Land Trust Act 1940*
- *Maritime Safety Authority of Fiji Decree 2009*
- *Maritime Transport Decree 2013*
- *Ship Registration Decree 2013*
- *Maritime (Navigation Safety) Regulations 2014*

As regards policy, there is currently no comprehensive oceans or MPA policy in Fiji. There are, however, a number of policies that are broadly relevant to MPAs, including the following:<sup>24</sup>

- Green Growth Framework for Fiji: Restoring the Balance in Development that is Sustainable for Our Future 2014
- Action Plan for Implementing the Convention on Biological Diversity's Programme of Work on Protected Areas 2011
- National Biodiversity Strategy and Action Plan (**NBSAP**) (2007-2011)/NBSAP Implementation Framework 2010-2014 and Draft 2015 NBSAP
- Integrated Coastal Management Framework of the Republic of Fiji 2011
- National Environment Strategy (NES) 1993
- Filling the gaps: identifying candidate sites to expand Fiji's national protected area network (Outcomes report from provincial planning meeting, 20-21 September 2010)
- Mangrove Management Action Plan 2013
- National Climate Change Policy 2013
- Draft Revised Mangrove Management Plan for Fiji (2013)
- Marine Resource and Management Guidelines for the Shark Reef Marine Reserve, Serua – Fiji 2015
- Roadmap for Democracy and Sustainable Socio-Economic Development 2010-2014
- Fiji Tuna Management and Development Plan (2014-2018)
- Sea Cucumber Management Plan 2015

It should be noted that a draft National Fisheries Policy is in the process of being finalised. However, that policy does not appear to consider MPAs in detail.

## **2.2 Key regulatory challenges of the existing law and governance framework**

This law and governance framework raises a number of challenges for developing a comprehensive MPA legal framework. Two challenges in particular emerge as recurring themes in the analysis undertaken in this paper:

- **The 'dual' law and governance framework**

One of the key challenges is regulating marine areas in the context of a dual governance system which comprises both customary law and western law, with customary law continuing to play an important role in many communities.<sup>25</sup> There are only limited mechanisms in the formal legal system to create a bridge between customary and 'modern' law. In the context of MPAs, the use of Locally Managed Marine Areas (**LMMAs**) is one attempt to bridge the gap between customary and modern management techniques. However, a significant issue is that LMMAs are not recognised under the formal law. This presents ongoing challenges for their effective implementation.

- **Harmonisation of laws and policies**

There are a wide range of existing laws and policies that are relevant to MPAs in Fiji. This presents the considerable (but not insurmountable) challenge of ensuring that all

relevant laws and policies are harmonised, that is, they are made consistent and compatible so that they work in a complementary fashion to support the achievement of the same goals.

It would also be beneficial for the statutory framework to be simplified as much as possible: a complex statutory framework with a large number of interrelated statutes will be more difficult both to understand and to implement. This is relevant both to those affected by the law and those implementing the law.

### 3. The Existing MPA Mechanisms

#### 3.1 Informal MPAs: customary tabus and LMMAs

##### Customary tabus

Long before fisheries activities were regulated by statutes, *iTaukei* people were managing marine resources under customary law, in particular by declaring *tabus* in traditional fishing grounds (*iQoliqolis*).<sup>26</sup>

*Tabus* are measures under customary law that prohibit certain behaviour or activities, such as taking fish or other marine resources. *Tabus* can be species-specific or site-specific, can last indefinitely or for a limited period of time (according to local reports, in modern times they usually last for two years), and can be lifted temporarily and/or renewed. Notably, although *tabus* have the effect of conserving marine resources, conservation may not be the primary reason for declaring a *tabu*, with spiritual and cultural factors (such as the death of a chief) being major reasons.

Although Fiji's cession to Britain resulted in the state taking legal ownership of the foreshore and inshore marine areas, the use of *tabus* as a marine management practice has continued. To this day, there are a large (but uncounted) number of *tabus* in Fiji.

Locally Managed Marine Areas (**LMMAs**) (discussed immediately below) are also established in *iQoliqoli* and utilise *tabus* as management tools. To enable differentiation between *tabus* that do and do not form part of an LMMA, *tabus* that do not form part of an LMMA are referred to in this paper as 'customary *tabus*'.

For the purposes of this paper, customary *tabus* are considered to be a form of MPA – although it must be noted that there are significant challenges to the effectiveness of some customary *tabus* as MPAs. On this basis, the vast majority of existing MPAs in Fiji are in the form of customary *tabus*.

A key characteristic of customary *tabus* is their flexibility, which is both a strength and a weakness. *Tabus* may be revoked or temporarily lifted by chiefly decision, for example to provide fish for a particular occasion, or to respond to changing needs (such as the destruction of crops following a cyclone). They can also be adjusted in response to changing fish stock and ecosystem status, and as such are well suited to an adaptive management approach to marine resource management. However, flexibility has its downsides as lifting *tabus* frequently can undermine sustainable fisheries management outcomes. Factors that can cause *tabus* to be lifted too frequently, or for too long, include growth in the population that relies on a particular fishing ground for food security, pressure to meet the needs of a growing tourism sector, and increasing demand for cash income within communities.

##### LMMAs

There are no statistics on the number or efficacy of customary *tabu* areas in existence prior to Fiji's cession to Britain. However, it is clear that the effectiveness of fisheries management and of *tabus* in traditional fishing grounds has improved greatly in recent years with the growth of LMMAs and the support and technical resources provided by the Fiji Locally Managed Marine Areas (**FLMMA**) Network.

The FLMMA Network was established in 2001. It is:<sup>27</sup>

*a non-profit, charitable association ... working to promote and encourage the*

*preservation, protection and sustainable use of marine resources in Fiji by the owners of marine resources.*

Until recently, the (former) Department of Fisheries acted as the FLMMA Secretariat. This has recently changed and the FLMMA Secretariat is now an independent unit, with the Chairmanship of the Secretariat held by the Ministry of *iTaukei* Affairs.

LMMAs are co-managed by Customary Fishing Rights Owners (**CFROs**) and FLMMA partners (which include non-government organisations, the Fiji government,<sup>28</sup> research institutes, the private sector, and individuals) to promote and encourage the preservation, protection and sustainable use of marine resources in Fiji's coastal communities.

Although LMMAs are 'informal' in the sense that they exist outside of legislation, they are more 'formal' and more regulated than customary *tabus*. LMMAs are managed according to a management plan, and use a range of marine management tools, including (but not limited to):

- closures (also known as no-take zones or, in this context, *tabus*). Such closures can be permanent, temporary, or subject to periodic suspension;
- fishing gear restrictions;
- species-specific harvesting restrictions; and
- seasonal restrictions.

The FLMMA Network adopts a Community-Based Adaptive Management (**CBAM**) approach, whereby 'local stakeholders develop a natural resource management plan and implement it, monitor, analyse and communicate the results, and then revise the management plan as needed and continue'.<sup>29</sup> CBAM adopts the key concepts of community-based resource management and adaptive management.<sup>30</sup> According to the 2011 FLMMA Operations Guide.<sup>31</sup>

*A site can be said to be practising CBAM if it meets all the following criteria:*

- 1. Planned and managed by local stakeholders (though not exclusively)*
- 2. Widely-agreed management plan exists*
- 3. Actively managed according to management plan*
- 4. The plan is "regularly" reviewed*

In addition, in 2014 FLMMA reported that LMMMA sites are increasingly:<sup>32</sup>

*employing **yaubula** management equivalent to ecosystem-based management, also commonly known as Ridge to Reef (R2R), whereby management of the iQoliqoli is set in the context of broader watershed and spatial management.*

Further, as described by the 2011 FLMMA Operations Guide, all FLMMA sites are required to carry out monitoring (to varying degrees, depending on the nature of the site).<sup>33</sup>

The following diagram, extracted from the 2014-2018 FLMMA Strategic Plan, provides an insight into the FLMMA approach:

## The FLMMA Approach

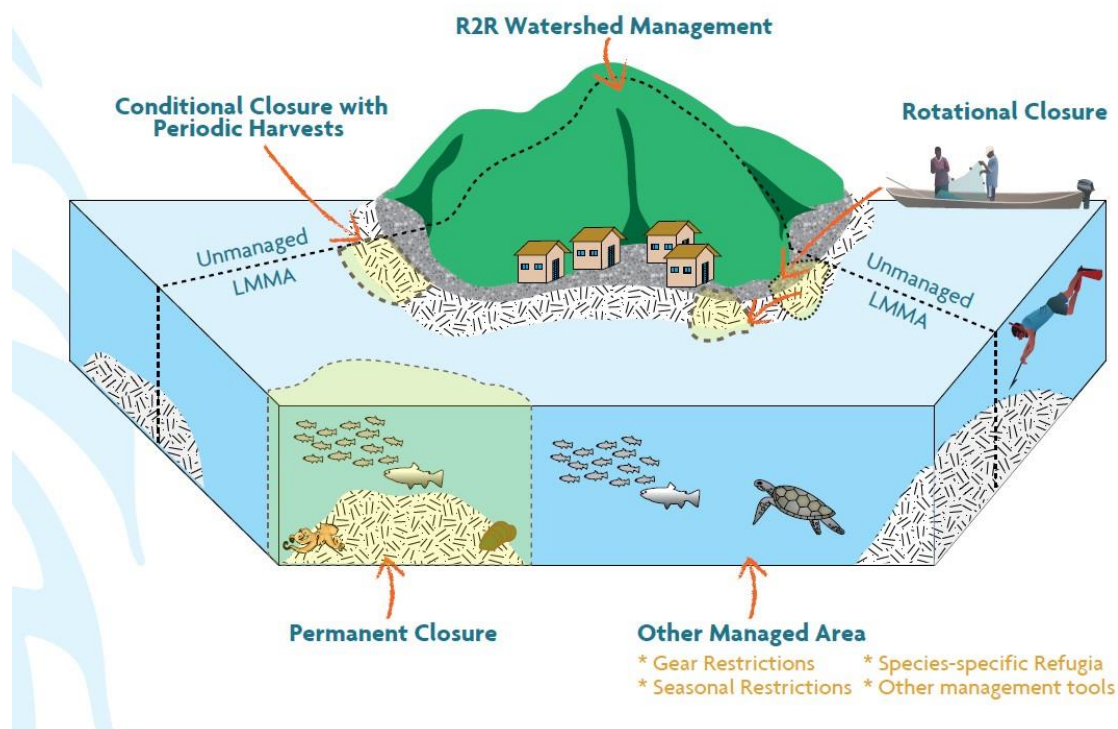


Figure 1: 'The FLMMA Approach' (Source: 2014-2018 FLMMA Strategic Plan)

In 2014, The FLMMA Network reported that it had established 466 no-take zones (*tabus*) in 135 of the 410 registered *iQoliqoli* areas in Fiji.<sup>34</sup> FLMMA's objective is:<sup>35</sup>

*to have established [by 2018] a durable system of contiguous LMMAs covering the entirety of Fiji's inshore fishing areas.*

### 3.2 Fisheries Act and Regulations

#### 3.2.1 Fisheries Act 1942

The *Fisheries Act* does not have any stated objects but is described in its long title as 'An Act to make provision for the regulation of fishing'. The main tools in the Act for regulating fishing are the licensing and permit systems,<sup>36</sup> vessel registration, and bans on the use of explosives. There is no specific mechanism for creating MPAs. However, section 9 (the regulation-making provision) creates scope for implementing fishing restrictions via regulations (discussed further below).

#### Protection of customary rights

The *Fisheries Act* establishes a system for recognising customary rights to access and use resources within *iQoliqoli* that have been registered under the *Fisheries Act*.<sup>37</sup> This has two components:

- (a) Registration of the members of each *iQoliqoli* by the iTaukei Land and Fisheries Commission (TLFC):<sup>38</sup>

This establishes formal recognition of an *iTaukei* person's right to access and use the resources in the *iQoliqoli* attached to his/her *Yavusa* (*tribe*), making that person a CFRO in that particular *iQoliqoli*. Each *iTaukei* person is registered at

birth as a member of the *Mataqali* (clan and land ownership unit) of his or her father. In turn, each *Mataqali* is part of a *Yavusa* (tribe and fishing grounds unit). Fishing rights are thus dependent on land ownership.

- (b) Requiring individuals to obtain permits in order to fish in registered *iQoliqoli*.

The permit provisions are complicated to navigate and there are some exceptions to the requirement to obtain a customary fishing permit. To summarise, they provide the following:

- (a) **CFROs do not require a permit** to fish in their registered *iQoliqoli* unless the activity requires a licence under the *Fisheries Act*.<sup>39</sup>

**CFROs do require a licence** to fish, including in their registered *iQoliqoli*, if they take fish for trade or business purposes<sup>40</sup>, **unless**:

- (a) they are taking fish with a line from the shore or with a spear;<sup>41</sup> or
- (b) the Minister has, by regulation, exempted them from the need to possess a licence.<sup>42</sup>

In other words, CFROs can fish in their registered *iQoliqoli* for subsistence by any method (except with explosives or using any other prohibited methods) without a permit. They can also fish for trade or business in their registered *iQoliqoli* without a licence as long as they only fish with a line from the shore or with a spear or have been granted an exemption.

- (b) **Non-CFROs** generally **do** require a permit to fish in a registered *iQoliqoli*. However, they do not require a permit if:<sup>43</sup>

- (a) the method they use to take the fish is a hook and line, a spear, or a portable fish trap which can be handled by one person; and
- (b) the fish is not taken by way of trade or business.

It should be noted though that the complex drafting of the relevant provisions creates scope for multiple, inconsistent interpretations. This raises compliance and enforcement challenges, among others.<sup>44</sup>

Permits under the *Fisheries Act* are issued by the Commissioner of the Division in which the *iQoliqoli* is located.<sup>45</sup> Notably, whilst the *Fisheries Act* provides that the relevant CFROs and the Fisheries Officer must be consulted before a permit is granted, the decision is ultimately at the discretion of the Commissioner.

The *Fisheries Act* does not address the relationship between permit conditions and licence conditions. Under the terms of the Act, if a licence applicant also needs a permit then those permit conditions will be attached to the conditions of the licence such that the permit conditions become conditions of the licence. In this way, breach of customary *tabu* by a permit holder becomes an enforceable offence under the *Fisheries Act*.<sup>46</sup>

As noted further below, the Fisheries Regulations specifically address the situation where a permit-holder applies for a licence under the *Fisheries Act*. Until recently, there was an established but unregulated practice of permit applicants making 'goodwill payments' to CFROs in exchange for permission to fish in *iQoliqoli*. However, the government recently prohibited this practice and is now conducting consultation towards establishing a new permit fee system to be managed by the (now) Ministry of Fisheries (**MoF**).

Local practice by the former Department of Fisheries appears to go further than the Act,



such that applicants for a fishing licence in 'inshore' areas have been required to first obtain a permit, even if the licence applicant does not intend to undertake fishing within an *iQoliqoli*. The effect of this is that inshore fishing licences reportedly end up being tied to an *iQoliqoli* which can frustrate management of *iQoliqoli* by CFROs. This does not appear to align with the intention of the provisions, which were intended to enable application for fishing licences that would only apply to areas outside of *iQoliqoli*.

### **Making regulations under the Fisheries Act**

As noted earlier, although the *Fisheries Act* does not contain a specific MPA mechanism and does not refer to MPAs, the regulation-making power in s 9 can – and has been – used to establish MPAs. Section 9 (extracted in full in the text box below) sets out a range of matters that the Minister can regulate, all of which could potentially be utilised to develop aspects of an MPA regime. Of particular note is s 9(b), which specifically envisages the creation of 'restricted areas', and s 9(g), which is a catch-all regulation-making power. Notably, the s 9(g) catch-all power:

- includes a specific reference to making regulations relating to the 'conservation, protection and maintenance of a stock of fish'; and
- is stated in very broad terms. It is not limited to regulations that are 'required' or 'permitted' to be made under the *Fisheries Act*, but extends to 'regulating **any other matter relating to** the conservation, protection and maintenance of a stock of fish which may be **deemed requisite**' (emphasis added).

Three regulations have already been made that are relevant to MPAs:

- (a) the *Fisheries Regulations*, which enable the creation of 'restricted areas'; and
- (b) two regulations that each create single 'marine reserves'.

#### **Fisheries Act s 9 – The power to make regulations**

9. The Minister may make regulations:-

- (a) prohibiting any practices or methods, or employment of equipment or devices or materials, which are likely to be injurious to the maintenance and development of a stock of fish;
- (b) prescribing areas and seasons within which the taking of fish is prohibited or restricted, either entirely or with reference to a named species;
- (c) prescribing limits to the size and weight of fish of named species which may be taken;
- (d) prescribing limits to the size of nets or the mesh of nets which may be employed in taking fish either in Fiji fisheries waters or in any specified part thereof;
- (e) regulating the procedure relating to the issue of and cancellation of licences and the registration of fishing boats and prescribing the forms of applications and licences therefore and the conditions to be attached thereto;
- (f) prescribing the fees to be charged upon the issue of licences and the registration of fishing vessels which fees may differ as between British subjects and others;
- (g) regulating any other matter relating to the conservation, protection and maintenance of a stock of fish which may be deemed requisite.

### 3.2.2 Fisheries Regulations

The *Fisheries Regulations* are the principal regulations under the *Fisheries Act*. The Fisheries Regulations address: Licences and Registration (Part II); Prohibited Methods and Areas (Part III); Mesh Limitations Part (IV); Size and Limits of Fish and Prohibitions (Part V); and Exemptions (Part VI). In Part III of the Fisheries Regulations regulation 11 addresses ‘restricted areas’ and reads as follows:

*No person, unless he is authorised in writing under the hand of the Commissioner of the Division in which the area described in the Fifth Schedule is situated shall, within such area, kill or take fish or any kind whatsoever, except by hand net, wading net, spear or line and hook.*

However, no restricted areas are currently listed in the Fifth Schedule to the regulations. Instead, the Minister has used his powers under section 9 of the *Fisheries Act* to prescribe two new Marine Reserve Regulations, detailed below.

As noted above, the *Fisheries Regulations* address situations where existing permit holders apply for licences. It requires permit holders to produce their permit to the licensing officer when applying for a licence ‘in order that the particulars thereon may be included in the application and recorded on the licence.’<sup>47</sup>

### 3.2.3 Marine Reserve Regulations

Two marine reserve regulations have been reviewed for the purposes of this paper:

- (a) *Fisheries (Shark Reef Marine Reserve) (Serua) Regulations 2014 (Serua Shark Reef Reserve Regulation)*; and
- (b) *Fisheries (Wakaya Marine Reserve) Regulations 2015 (Wakaya Marine Reserve Regulation)*.

(Together, the **Marine Reserve Regulations**.)

The Marine Reserve Regulations demonstrate that there is already scope for establishing ad-hoc, site-specific MPAs under the *Fisheries Act*.

Each of the Marine Reserve Regulations creates a single ‘marine reserve’. The Serua Shark Reef Reserve is located off the Southern coast of Viti Levu, south of the coastal village of Galoa<sup>48</sup> and the Wakaya Marine Reserve is located off the coast of, and encompassing, the northern two-thirds of Wakaya Island.<sup>49</sup>

The Marine Reserve Regulations are largely in the same terms, although the *Serua Shark Reef Reserve Regulation* is focussed more specifically on protecting sharks. **Table 2**, below, provides an overview of the Marine Reserve Regulations. It uses bold text in quotations to identify the minor areas of difference between the two.

| Table 2. The Marine Reserve Regulations |  |  |
|---|--|--|
|   | <b><i>Serua Shark Reef Reserve Regulation</i></b>  | <b><i>Wakaya Marine Reserve Regulation</i></b>   |
| <b>Purpose</b>                          | ‘Conserving, protecting and maintaining <b>shark species</b> and marine organisms including coral within the area.’ (s 3(1)) | ‘Conserving, protecting and maintaining <b>species of fish, sharks, rays, cetaceans, sea turtles and all</b> marine organisms including coral within the area.’ (s 3(1)) |

|   |  |  |
|---|--|--|
| <b>Process</b>  | Both reserves are established and defined by the regulations (i.e. the regulations establish MPAs, they do not create <i>processes</i> for establishing MPAs).   |  |
| <b>Restrictions in the Reserves</b>   |  |  |
| <b>Fishing restrictions</b>   | There is a complete prohibition of:<br>'Any fishing activity or activity consisting of the collection of any species of <b>shark</b> or marine organisms including within the coral.' (reg 3(5))                       | There is a complete prohibition of:<br>'Any fishing activity or activity consisting of the collection of any species of <b>fish</b> or marine organisms including within the coral.' (reg 3(5))  |
| <b>Other restrictions</b>   | There is a complete prohibition on: <ul style="list-style-type: none"> <li>the use of any mooring other than that provided in the Reserve (reg 3(2)).</li> <li>the disposal of rubbish or waste. (reg 3(3))</li> </ul> |  |
| <b>Restrictions in the Buffer Zone</b>  |  |  |
| <b>Both Regulations create a buffer zone around the reserve (Schedule 4; Regs 2, 4)</b>   |  |  |
| <b>Fishing restrictions</b>   | There is a complete prohibition of:<br>'The use of any form of indiscriminate fishing gear and any fishing equipment used specifically to target <b>sharks</b> .' (reg 4(2))   | There is a complete prohibition of:<br>'The use of any form of indiscriminate fishing gear and any fishing equipment used specifically to target <b>any species of fish, sharks, rays, cetaceans, sea turtles and any marine organisms</b> .' (reg 4(2)) |
| <b>Restrictions in the Coastal Zone</b>   |  |  |
| <b>Both regulations define the Coastal Zone as 'the area within 2 kilometres from the high water mark and includes areas from the high water mark up to the Marine Reserve' (reg 2)</b> |  |  |
| <b>Development restrictions</b>   | There is a complete prohibition of:<br>'Any development activity or undertaking within the Coastal Zone of the Marine Reserve ... except with the approval of the Department of Fisheries.' (reg 3(4))                 |  |
| <b>Penalties</b>  |  |  |
| <b>Offences in the Reserve and Coastal Zone</b>   | A fine of between \$500-\$10,000 and/or imprisonment for up to 6 months. (reg 3(6))  |  |
| <b>Offences in the Buffer Zone</b>  | A fine of between \$500-\$5,000 and/or imprisonment for up to 6 months. (reg 4(3))   |  |
| <b>Enforcement powers for the Department of Fisheries in the Reserve</b>  | 'The Department of Fisheries may seize any marine organism, fishing equipment, conveyance including vehicles and vessels used for their transport, or other property involved in a breach of [reg 3(5)].' (reg 3(7))   |  |
| <b>Enforcement powers for the Department of Fisheries in the buffer zone</b>  | 'The Department of Fisheries may seize any <b>shark</b> species or marine organism captured or any fishing equipment involved in a breach of [reg 4(2)].' (reg 4(4))   | 'The Department of Fisheries may seize <b>any species</b> or fish or marine organism captured or any fishing equipment involved in a breach of [reg 4(2)].' (reg 4(4))   |
| <b>Exemptions</b>   | 'The Minister may authorise activities otherwise prohibited under these Regulations for the purpose of scientific research.' (reg 5)   |  |
| <b>Guidelines</b>   | 'The Minister may, by notice in the Gazette, issue guidelines for the proper management of the areas within the Marine Reserve and the Buffer Zone.' (reg 6)   |  |

### 3.2.4 Draft Inshore Fisheries Decree

In 2010, three draft laws were developed by the Department of Fisheries with the aim of replacing the *Fisheries Act*: Inshore Fisheries Decree, the Offshore Fisheries Management Decree, and the Aquaculture Decree. The *Offshore Decree* commenced in January 2013 and the Aquaculture Decree was presented to Parliament as the *Aquaculture Bill 2016* in 2017. However, the draft Inshore Fisheries Decree [Third Draft for National Consultation in 2011] (**Draft Inshore Fisheries Decree**) remains in draft form and it is not known when or whether it will progress into law.

The Draft Inshore Fisheries Decree makes it an offence for a person to kill or take fish of any kind in an 'aquatic protected area'.<sup>50</sup> It further provides the Minister with a power to make regulations prescribing 'aquatic protected areas'.<sup>51</sup>

The provisions of the Draft Inshore Fisheries Decree, although making a specific reference to protected areas, are in similar terms to the *Fisheries Act* and therefore will not provide for a comprehensive marine protected areas regime. The Draft Inshore Fisheries Decree does however contain a provision for formally recognising LMMAs through the mechanisms relating to Customary Fisheries Management and Development Plans (**CFMDPs**). While the CFMDP provisions could be strengthened in a number of respects, they offer a possible starting point for developing a means of recognising informal MPAs under the formal system.<sup>52</sup>

### 3.3 Offshore Fisheries Management Decree and Regulations

The *Offshore Decree* and *Offshore Regulations* are significantly more detailed than the *Fisheries Act* and the regulations made under that Act. They establish a far more sophisticated fisheries management framework and also capture many concepts of best practice fisheries management.<sup>53</sup>

Given the length and detail of the *Offshore Decree* and *Offshore Regulations*, the overview and commentary in this paper is limited to a general analysis of some of the key mechanisms that are relevant to MPAs.

#### 3.3.1 Offshore Fisheries Management Decree

##### *The power to designate MPAs*

The *Offshore Decree* explicitly provides for the establishment of MPAs. It empowers the Director of Fisheries to 'identify and recommend the designation of' MPAs and the Permanent Secretary to designate MPAs.<sup>54</sup>

However, the *Offshore Decree* does not define what an MPA is and does not contain any provisions that expand upon the purpose and nature of the power to designate (or manage) MPAs.

##### *Objects and principles*

Unlike the *Fisheries Act*, the *Offshore Decree* has 'objectives' and 'principles and measures' provisions.<sup>55</sup> These provide assistance when interpreting the scope of the Permanent Secretary's power to designate MPAs. They also assist with interpreting the scope of the Regulation-making provisions (discussed below).

The stated objective of the *Offshore Decree* is to:<sup>56</sup>

*conserve, manage and develop Fiji fisheries to ensure long term sustainable use for the benefit of the people of Fiji.* (emphasis added)

The *Offshore Decree* also requires the Decree's provisions to be interpreted in accordance with Fiji's international and regional obligations.<sup>57</sup> Further, if there is any inconsistency between the *Offshore Decree* and any other law or instrument having the force of law in Fiji, the *Offshore Decree* prevails to the extent of that inconsistency.<sup>58</sup>

The 'principles and measures' clause imposes a list of requirements that apply to the Minister, Permanent Secretary and Director (as appropriate), when they are 'performing functions or exercising powers' under the *Offshore Decree*. Some of the more relevant provisions for the purposes of this paper include the following:<sup>59</sup>

6. *The Minister, Permanent Secretary or Director, as appropriate, when performing functions or exercising powers under this Decree, shall—*

(a) *adopt measures to ensure the long-term sustainability of fisheries resources and promote the objective of their optimum utilisation;*

...

(d) *apply the precautionary approach in accordance with this Decree;*

....

(g) *protect biodiversity in the marine environment, especially habitats of particular significance for fisheries resources;*

...

(i) *take into account the interests of artisanal, subsistence fisheries and local communities including ensuring their participation in the management of fisheries;*

(j) *maintain traditional forms of sustainable fisheries management;*

...

Other subparagraphs include references to elements of the ecosystem approach and best practice fisheries management.

### **Regulation-making provisions<sup>60</sup>**

The *Offshore Decree* contains two regulation-making provisions: ss 21 and 104.

Section 104 is the main regulation-making power. It can be summarised as follows:

- s 104(1) sets out the Minister's broad, overarching power. It provides that the Minister (emphasis added):

*may make such Regulations as may be **necessary** to give effect to the provisions of this Decree **and for due administration.***
- s 104(2) sets out a detailed list of 24 subject-specific powers but does not limit the generality of the general power under s 104(1);
- s 104(3) specifically empowers the Minister to regulate to 'provide for a regime of statutory fishing rights' and sets out nine subject-specific powers; and
- s 104(4) provides powers to make regulations that are specific to 'promoting the effectiveness of conservation and management measures adopted by sub regional, regional or global fisheries management organisations' and sets out 13 subject-specific powers. The powers listed in this section relate largely to

port access, landing, fish processing and packaging, and inspection. However, it includes a broad power to make regulations ‘providing for any other measures that may be agreed to by sub-regional, regional or global fisheries organisations, treaty or arrangements to which Fiji is a party’.

Section 21 is a subject-specific regulation-making power. It provides that the Minister (emphasis added):

***shall** make Regulations as considered necessary or expedient for the purpose of giving effect to -*

- (a) international conservation and management measures adopted by regional fisheries management organisations; or*
- (b) a treaty or arrangements to which Fiji is a member.*

This power may therefore provide support for making MPA regulations where these are developed in order to give effect to international or regional agreements or treaties.

It is notable that, whereas s 104 is framed as a power that *allows* the Minister to make regulations (i.e. ‘The Minister **may** make Regulations...’), s 21 is framed as a legislative duty (i.e. ‘The Minister **shall** make Regulations’). However, this ‘duty’ is qualified somewhat by including the words ‘as considered necessary or expedient’. This subjective element may detract from any implication that there is an imperative to act. Nevertheless, it would appear that the provision is likely to offer authority for instituting a range of measures via regulations that reflect international agreements.

### **Other relevant provisions**

Some of the other provisions of the *Offshore Decree* that are of relevance to establishing MPAs, include the following:

- (a) **Administration:** The *Offshore Decree* places responsibility for the administration of offshore fisheries with the Minister, the Permanent Secretary and the Director of Fisheries.<sup>61</sup>
- (b) **Advisory committees:** The Permanent Secretary has the power to ‘appoint such committees as he or she determines necessary to advise or make recommendations on any areas under his or her authority’.<sup>62</sup> Importantly, the Permanent Secretary’s authority includes advising the Minister on any matter relating to the conservation, management, development and sustainable use of fisheries resources and designating MPAs.<sup>63</sup>
- (c) **Offshore Fisheries Advisory Council (OFAC):** The *Offshore Decree* establishes the OFAC, the purpose of which is to ‘advise the Minister on policy matters relating to fisheries conservation, management, development and sustainable use’.<sup>64</sup> The composition of the OFAC is regulated and must include representatives of named ministries,<sup>65</sup> representatives of the fishing industry and a representative of non-government organisations. There is no requirement that it includes a representative of CFROs (which may be attributable to the *Offshore Decree* purportedly regulating *offshore* waters, whereas *iQoliqoli* are all located in *inshore* waters).
- (d) **Designated fisheries:** The Minister of Fisheries has the power to declare ‘designated fisheries’.<sup>66</sup>  
*where, having regard to scientific, social, economic, environmental and*

*other relevant considerations, such fishery—*  
*(a) is important to the national interest; and*  
*(b) requires management measures for ensuring sustainable use of the fishery resource.*

The definition of ‘fishery’ in the *Offshore Decree*<sup>67</sup> suggests that a designated fishery would refer to a specific species, not a geographic area. However, designated fisheries may nevertheless be a useful tool in an MPA regulatory framework.

If a fishery has been designated, then a Fisheries Management Plan (**FMP**) must be prepared. FMPs are subject to minimum content requirements.<sup>68</sup> FMPs are also required to ‘protect the fishing interests of artisanal, subsistence and small scale fishers’.<sup>69</sup>

- (e) **Monitoring, control, surveillance (MCS) and enforcement:** The *Offshore Decree* contains detailed provisions concerning MCS and enforcement.<sup>70</sup> These sections include, for example, a power of the Minister to appoint authorised officers, powers of entry and search, powers to question persons and require production of documents, powers of arrest, powers to use reasonable force, and the power to seize and later sell seized property. It also establishes the Fiji Observer Programme.<sup>71</sup>
- (f) **Fixed penalty notices:** Fisheries officers and authorised officers have the power to issue Offshore Fixed Penalty Notices.<sup>72</sup> These notices enable a person to bypass court determination by paying a fixed penalty for an offence.

### 3.3.2 *Offshore Fisheries Management Regulations*

#### *MPAs and prohibited and restricted areas*

The *Offshore Regulations* do not contain any explicit reference to MPAs. However, Part 2 of the *Offshore Regulations* (‘Fisheries Conservation, Management and Development’) does provide for the establishment of ‘prohibited areas’ and ‘restricted areas’ by listing such areas in Schedule 1 to the regulations. If an area is listed, then ‘[u]nless otherwise authorised by these regulations, a foreign fishing vessel and Fiji fishing vessel shall not conduct any fishing or related activities’ in the area. It is notable that the restriction or prohibition is by reference to the *vessel* rather than the individual or the activity; as such, it will not apply to fishing that does not use a ‘foreign fishing vessel’ or a ‘Fiji fishing vessel’.<sup>73</sup> The restrictions are also incomplete in that they do not capture all fishing methods (prohibited areas) or all vessel types (restricted areas). If an area has been declared as ‘prohibited’ under the *Environment Management Act 2005 (EMA)* (‘or any other written law’), it is considered prohibited for the purposes of this provision.<sup>74</sup> The restricted and prohibited areas provision does not apply to persons who are conducting fishing or related activities ‘for the purposes [sic] personal use or consumption’.<sup>75</sup>

Schedule 1 currently reads as follows:

| <b>SCHEDULE 1<br/>(Regulation 3)</b>  |   |  |
|---|---|--|
| <b>PROHIBITED AND RESTRICTED AREAS</b>  |   |  |
| <i>Prohibited Areas</i>   |   |  |
| <b>Name</b>   | <b>Coordinates and description</b>  |  |
| <b>Reef systems</b>   | All areas within 3 nautical miles radius of reef systems within Fiji fisheries waters. This prohibition shall not apply to vessels using the drop line method targeting deep sea water snapper species. |  |
| <b>Internal waters</b>  | All internal waters within Fiji fisheries waters. <sup>76</sup>   |  |
| <b>RESTRICTED AREAS (APPLICABLE TO SPECIFIED CATEGORIES OF FISHING VESSELS)</b> |   |  |
| <b>Name</b>   | <b>Coordinates</b>  | <b>Applicable vessels</b>  |
| <b>Restricted area – Archipelagic waters and Territorial sea</b>                | The coordinates of the archipelagic waters and territorial sea of Fiji are described in the <i>Marine Spaces Act 1978</i> (Cap. 158A) and delineated in official charts.                                | <p>Restriction applicable to foreign fishing vessels, locally-based foreign fishing vessels, and Fiji fishing vessels with a fish hold capacity equal to or greater than 40 cubic metres.</p> <p>This restriction does not apply to Fiji longline vessels with a fish hold capacity less than 40 cubic metres targeting tuna and tuna like species and that utilise no more than 2500 hooks per set.</p> |

### **Other relevant provisions**

Some of the other provisions of the *Offshore Regulations* that are of relevance to establishing MPAs include the following:

- (a) **Fisheries conservation measures:** Part 2 includes provisions for, establishing seasonal and species restrictions; a prohibition on killing, taking, landing, selling, etc. endangered or listed species; a prohibition on the use of certain types of fishing methods or gear;<sup>77</sup> and, declaring that an international conservation or management measure is applicable to Fiji fishing vessels and foreign fishing vessels in Fiji fisheries waters, and to Fiji fishing vessels beyond Fiji fisheries waters.
- (b) **Licence requirements:** Part 4 sets out requirements for licences and authorisations. All 'Fiji fishing vessels' are required to obtain a licence in order to be used for fishing or related activity within Fiji fisheries waters.<sup>78</sup> Part 4 also sets out licensing requirements for sport and recreational fishing, exploratory and test fishing, scientific research, and fishing beyond Fiji fisheries waters.
- (c) **Monitoring, control and surveillance:** Part 5 sets out MCS provisions. These provisions (among others) illustrate that the *Offshore Decree* is geared towards regulating larger, more sophisticated fishing vessels.<sup>79</sup>



- (d) **Fixed penalty notices:** Schedule 11 lists offences for which fixed penalty notices may be issued as well as the applicable penalty payable for each (for natural persons and for corporations/other entities).

### 3.4 State Lands Act: SLA leases and licences

The *State Lands Act 1946 (SLA)* regulates the 'control, administration and disposal of Crown land'. 'Crown land' means (s 2):

*all public lands in Fiji, including foreshores and the soil under the waters of Fiji, which are for the time being subject to the control of Her Majesty by virtue of any treaty, cession or agreement, and all lands which have been or may be hereafter acquired by or on behalf of Her Majesty for any public purpose.*

The question of how to define the 'foreshore' is discussed in more detail in Part 3.4.1, below.

The SLA provides that:

*Subject to the provisions of the Native Land Trust Act, the Mining Act, the Oil Mines Act and the Forest Act, or any other Act for the time being in force, no Crown land shall be sold or leased and no licence in respect of Crown land shall be granted save under and in accordance with the provisions of this Act.*

The SLA is supported by the *State Lands (Leases and Licences) Regulations (SLR)*.<sup>80</sup> Two mechanisms available under the SLA and SLR are of specific interest to MPAs: leases and licences granted over Crown land by the Director of Lands.<sup>81</sup>

Two SLA licences have already been used, on an ad-hoc basis, to establish 'foreshore MPAs'. Whilst SLA leases have not been used to establish MPAs, the SLA sets out specific provisions that apply to the grant of foreshore leases, and these provisions have been used to grant foreshore leases for other purposes. Further, one of the SLA foreshore MPA licences discussed below was originally submitted as an application for a foreshore lease. There have also been reports of CFROs and tourism operators showing interest in using SLA foreshore leases to establish foreshore MPAs. However, this has not been possible due to the DoL's position to date that foreshore leases require CFROs to waive their customary fishing rights (discussed further below). At the outset, it should be noted that the licensing and leasing mechanisms under the SLA are not considered to be a viable long term option for an MPA legal framework in Fiji. However, both the existence and the experience of using the SLA mechanisms offers some useful lessons that can inform the development of a new and comprehensive MPA legal framework for Fiji under other legislation.

#### 3.4.1 Jurisdiction of the DoL over the 'foreshore'

Before discussing the SLA lease and licence mechanisms and their application in marine areas, it is important to consider the scope of the DoL's jurisdiction over marine areas under the SLA.

The SLA regulates 'Crown land'. Crown land is defined as (emphasis added):

*all public land in Fiji, **including foreshores** and the soil under the waters of Fiji, which are for the time being subject to the control of Her Majesty...*<sup>82</sup>

The issue for consideration is whether DoL's jurisdiction to regulate 'all public land, including foreshores' include the marine environment above such land?

Beyond the foreshore, it seems clear that 'Crown land' includes only the seabed and does not include the water column above it.<sup>83</sup> However, this is less clear in relation to the

foreshore. Whether the DoL has jurisdiction over the marine resources in the foreshore area appears to depend on what is meant by 'foreshore'.

'Foreshore' is not defined in the SLA. However, definitions in the *Mining Act*, the EMA and the *Marine Spaces Act* offer some clues:

- (a) The *Mining Act*, as amended by the *Mining (Amendment) Decree 2010*, incorporates an extended definition of 'land' that only applies to special prospecting licences issued under Part II of that Act. That definition includes a definition of the foreshore as:

*that area between the mean high water spring level of the sea and the mean low water spring level of the sea.*

- (b) The EMA defines foreshore as:

*The shore of the sea, channels or creeks that is alternatively covered and uncovered by the sea at the highest or lowest tides.*

The EMA further distinguishes between the foreshore and coastal zones, where the 'coastal zone' is defined as:

*The area within 30 metres inland from the high water mark and includes areas from the high water mark up to the fringing reef or if there is no fringing reef within a reasonable distance from the high water mark.*

The use of the undefined term, 'a reasonable distance', introduces some uncertainty and an element of discretion into the definition of 'coastal zone'.

The definition of foreshore used in the EMA appears to operate as the working definition of foreshore adopted by the DoL when granting licences for foreshore MPAs.

- (c) The *Marine Spaces Act* does not make any express reference to the 'foreshore'. It does state that the outer limit of 'internal waters' is the 'low-water line'.<sup>84</sup> In accordance with the international law of the sea, the Act states that the seaward limit of Fiji's internal waters is delineated by a line drawn along the low-water line of each island. However, when an island has a fringing reef, the line is drawn along the seaward low-water line of the reef, and when there is a small bay, a river estuary or permanent harbour works, the closing lines are drawn between points declared by the Minister of Foreign Affairs.<sup>85</sup>

The definitions used in the EMA and the *Mining Act* echo the generally accepted understanding of foreshore as being the area between the mean high water mark and the mean low water mark, including the mangroves, beachfront and sand or mud flats areas. These definitions also seem to accord with the common law definition of 'foreshore' in the United Kingdom – that the foreshore consists of land lying between the high and low water marks.<sup>86</sup> This is important because this definition appears to have been adopted in Fiji via the Deed of Cession.

On the basis of the above, it is clear that the DoL has jurisdiction over the 'foreshore'. However, it remains unclear whether DoL's jurisdiction over Crown land includes the waters and marine resources above foreshore land. The practice of the DoL in relation to SLA MPAs suggests that it considers that it does have such jurisdiction.<sup>87</sup>

Meanwhile, the MoF still has a clear mandate under the Existing Fisheries Legislation to manage marine resources in Fiji's fisheries waters.<sup>88</sup> This possible overlap of jurisdiction between the DoL and the MoF in relation to foreshore waters raises scope for uncertainty

and conflict. Another point of overlap to note is the jurisdiction of the Maritime Safety Authority (see Appendix A). The Maritime Safety Authority's functions include administering and enforcing the laws specified in the *Marine Spaces Act 1986 (Marine Act)*, 'and any other law relating to the regulation, registration and safety of shipping', and advising the State on matters that relate to 'safety and maritime security'.<sup>89</sup> The *Marine Act* is an Act 'to regulate shipping, to give effect to certain international maritime conventions and for related purposes'.<sup>90</sup>

The above raises multiple issues in relation to both the jurisdiction of the DoL to establish MPAs in marine areas as well as practical issues regarding implementation and enforcement of SLA MPAs.

### 3.4.2 SLA licences<sup>91</sup>

An SLA licence is, essentially, a grant of permission by the Director of Lands to a person or persons to use government land for a specified purpose. The licensee does not accrue an interest or possessory right in the land but merely the personal right to occupy and use it for the purposes permitted under the licence.

The bulk of the provisions that regulate the grant and terms of SLA licences are set out in the SLR, at Part III.<sup>92</sup>

The SLR specifically identifies the purposes for which State land licences may be issued.<sup>93</sup> Neither the SLA nor the SLR include provisions specific to issuing licences over the foreshore (this contrasts with the provisions of the SLA that deal specifically with foreshore leases, discussed further below) and so it appears that MPAs are established by relying on the 'other purposes' category. This means that foreshore licences can be issued by the Director of Lands 'upon such terms and conditions as [the Director] think[s] fit', subject to the approval of the Minister. For licences issued under the 'other' category, the remaining provisions of Part III of the SLR (which regulate, among other things, the form of applications and of licences, mandatory conditions for inclusion in licences, fees and revocation) do not apply.<sup>94</sup> For this reason, it is unclear whether fees can be validly charged for MPA licences without other regulations specifically providing for this. However, it seems possible that fees fall within the scope of the Director's broad discretion to impose 'such terms and conditions' as he/she thinks fit.<sup>95</sup>

All SLA licences are to be recorded in the 'Register of Licences in respect of State Land'.<sup>96</sup>

In contrast to leases (discussed below), the SLA does not require the relevant area (e.g. a foreshore area) to be 'free and discharged from all public rights and privileges' before a licence is granted. Further, there is no requirement for a licensee to obtain a waiver of fishing rights from relevant CFROs, either as a pre-condition to a licence or after a licence is granted. As noted below, this does not appear to be a statutory requirement for leases either but is nevertheless a practice that has been implemented by the DoL. This has had the in-practice effect of making the licensing process easier, faster and cheaper than the lease process and this appears to be an important factor in decisions to issue foreshore licences rather than leases for the purpose of establishing MPAs.<sup>97</sup> In addition, licences do not require extensive public consultation, which leases do. Empirical evidence from the case studies discussed in **Table 3**, below, shows that in practice, restrictions on access and prohibitions of fishing can be negotiated as part of an SLA licence and that it is possible to incorporate consultation with, and compensation for, CFROs.

### Two MPAs that have already been established using SLA licences

Two foreshore MPAs have been established by the Director of Lands by granting SLA licences. Both licences are ‘Special licences to Occupy State Land’<sup>98</sup> and both were granted for a period of five years.

The first MPA licence was granted in 2013 to a tourism operator, the Namotu Island Resort on Malolo Lailai Island. The purpose was marine conservation and the area is known as the Namotu Island MPA. The second MPA licence was granted in 2015 to the Naivuatolu Cooperative Ltd, a legal entity established to represent the community members who are the resource owners. The licence was issued for the purposes of establishing the Waivunia Marine Park in Savusavu.

**Table 3**, below, sets out the details of these two MPAs.

Importantly, the Director of Lands has since advised that the grant of SLA licences for the purpose of establishing MPAs has been suspended.<sup>99</sup>

| <b>Table 3. Existing MPAs established using SLA licences</b> |   |  |
|--|---|--|
|  | <b>Namotu Island MPA<sup>100</sup></b>  | <b>Waivunia Marine Park<sup>101</sup></b>  |
| <b>Technical details of the licence</b>                      | <p>Special Licence to Occupy State Land under reg 30(1) of the SLR, for the purpose of creating a MPA.</p> <p>Term: 5 years from 1 Jan 2013</p> <p>Licensee: Namotu Island Resort</p> <p>The licensed area (purportedly) extends seawards 100m from the mean high water mark up to the edge of the reef. This may extend significantly beyond the ‘foreshore’.</p>  | <p>Special Licence to Occupy State Land under reg 30(1) of the SLR.</p> <p>Term: 5 years from 1 July 2015</p> <p>Licensee: Naivuatolu Co-operative Ltd (<b>NCC</b>)</p> <p>Licence issued for ‘part of the Naivuatolu Marine Conservation Area’.</p>   |
| <b>Background and context</b>                                | <p>The Namotu Island Resort is located in Malolo Lailai Island, in the Mamanuca islands group. The Namotu Island Resort was granted a lease for the development of the resort on the foreshore in 2001. The resort relies strongly on water-based activities (surfing, fishing, diving) and marine biodiversity for tourism.</p> <p>After the commencement of the Surfing Decree 2010, a large number of yachts anchored in the reef in front of the resort and damaged it. There were also issues with people (not resort guests) coming onto the beach in front of the resort, littering and behaving in a disorderly manner.</p> <p>As noted below, the Resort sought an SLA licence in 2011-12.</p> | <p>The Waivunia Marine Park has been in the government plan through the Cakaudrove Provincial Development Board for 4 years.<sup>102</sup></p> <p>Conservation measures have been in place in the marine area that is now part of the marine park for the last 15 years. The area was initially a customary <i>tabu</i> area and later became a community-based MPA.</p> <p>Mataqali Vuniwi is the traditional caretaker of the fishing ground where the Waivunia Marine Park is located. The NCC is operated by Mataqali Vuniwi of Yavusa Wairuku of Waivunia village.</p> <p>The Waivunia Marine Park is a new initiative promoting a holistic (ridge to reef) conservation approach for coastal fisheries management. The objective is to promote conservation of</p> |

**Table 3. Existing MPAs established using SLA licences**

|  | <b>Namotu Island MPA<sup>100</sup></b>  | <b>Waivunia Marine Park<sup>101</sup></b>   |
|--|---|---|
|  |   | natural resources, local communities' livelihood & cultural values and tourism in Savusavu. The initiative has three components: 1) a Marine Park; 2) a Forest Park; and 3) a Cultural Centre.  |
| <b>Reasons applicant sought an SLA licence</b> | The Namotu Island Resort was concerned about the impact of the damage to the reef and of the disorder on the beach on its business. In 2011-12 the resort approached the DoL to address these issues and was advised to apply for a foreshore licence.  | The authors understand that the application to the DoL was initially for a foreshore lease. This option was chosen to pilot an innovative approach for establishing an MPA, promoting the active engagement of communities and for reasons of expediency (i.e. to avoid the delay associated with the process of gazetting the Waivunia Marine Park under the <i>Fisheries Act</i> ). Another reason was concerns of the CFROs about handing over management of the <i>iQoliqoli</i> to the Ministry of Lands in light of weak enforcement of statutory MPAs. However, the DoL chose to issue a licence rather than a lease.  |
| <b>Application process</b>                     | <p>The Resort approached the DoL. The DoL recommended that the Resort apply for a foreshore licence to establish an MPA.</p> <p>Consultation was held involving meeting with government representatives, the Tui Lawa (Chief of the District (<i>Tikina Cokavata</i>))<sup>103</sup> of Malolo, and all chiefs of the Vanua.</p> <p>A licence fee was paid to the DoL.</p> <p>The (then) Department of Fisheries has advised that they were not consulted on the grant of this SLA Licence in Namotu.</p> | <p>A fisheries expert has been advising the community, providing all necessary field work and planning for the Waivunia Marine Park.</p> <p>NCC is the licensee, holding the right of occupation and use of part of the proposed area known as Naivuatuolu Marine Conservation Area, at Savusavu.</p> <p>The licence, held by the CFROs, provides a sense of ownership of the Marine Park and promotes their active engagement. The CFROs acquire with the licence a statutory right that contributes to bridging the gap between customary and statutory governance of the MPA.</p> <p>The boost in tourism in Savusavu that is anticipated from the Waivunia Marine Park is expected to provide income generation opportunities as well as sustain fisheries resources for the local communities.</p> |
| <b>Compensation</b>                            | The community was compensated for approving the licence with the purchase of a generator and its ongoing maintenance.   | The community was to be compensated from the benefits of establishing the Waivunia Marine Park (e.g. tourism revenues).   |

**Table 3. Existing MPAs established using SLA licences**

|  | <b>Namotu Island MPA<sup>100</sup></b>   | <b>Waivunia Marine Park<sup>101</sup></b>  |
|--|--|--|
| <b>Restrictions on access and fishing for the general public in licence area</b>                   | An area 66 foot (20m) wide is reserved along the foreshore landwards for a Public Recreation and Access Reserve.<br>The licence area is a no fishing area for the public.<br>Boats are not permitted to anchor in the licensed area. | Restrictions apply in some parts of the MPA, according to the management plan.<br>Boats are not permitted to anchor in the licensed area.  |
| <b>Restrictions on access and fishing for the local communities/ CFROs holders in licence area</b> | No waiver of fishing rights by CFROs<br>A two year tabu was declared by the community in the reef area.  | The original lease application was accompanied by an agreement by the CFROs to waive their fishing rights. However this was not necessary as DoL decided to issue a licence rather than a lease.   |
| <b>Is there a management plan?</b>   | No management plan   | The licenced area is divided into mapped zones, each zone dedicated to a particular program such as a coral reef program zone, or a conservation tourism zone. A buffer zone is established outside the licenced area.   |
| <b>Enforcement provisions</b>  | The security guards on the island monitor the boats anchoring. If boats are within the 100m licenced area, they kindly request them to move further away. If they do not comply, the security guards call the police.                | It was anticipated that enforcement will be ensured by the communities and that a local diving company would assist with various elements such as patrolling the areas for any activities that may not be in line with NCC's operation and for any illegal activities. |

### 3.4.3 SLA Leases

Leases are legal, written agreements by which the owner of property allows another person to use that property for a specified period of time (the **term**), for specified periodic payments (**rent**), and subject to stated conditions. Lessees obtain a possessory right over the property and the exclusive use of it for the term of the lease, for the purpose of the lease agreement and subject to its conditions. In other words, the lessee obtains both a positive right to occupy and use the land for the agreed purpose, as well as a negative right to exclude others from the area (*jus prohibendi*).

The SLA specifically provides for the lease of State Land. The Ministry of Lands administers a total of 18,000 SLA leases which collectively cover 4% of all State Land. Like SLA licences, these leases are required to be registered in the Register of Leases, kept by the Registrar of Titles. Such leases are then subject to the provisions of the *State Transfer Act*.

The *State Lands (Leases and Licences) Regulations (SLR)* creates nine classes of leases<sup>104</sup> and sets out certain mandatory conditions for each class.<sup>105</sup> None of the classes are identified as 'conservation' leases, however the 'special purpose' category could be used for

conservation purposes. The conditions provision of the SLR for special purpose leases reads as follows:<sup>106</sup>

*A lease for such special purposes as are not hereinbefore mentioned shall specify the purpose for which the land shall be used, the special conditions applicable thereto, and the nature of improvements required to be effected thereon.*

A special purpose lease will also be subject to certain listed conditions, 'so far as they are applicable to the circumstances' of a given case.<sup>107</sup>

The SLA also contains special provisions applicable to leases over foreshore areas, including specific provisions to be included in foreshore leases.<sup>108</sup> The DoL has created a special Foreshore Unit in recognition of the importance of foreshore lands and the seabed. The Foreshore Unit reports to the Assistant Director of Lands. Its purpose is:<sup>109</sup>

*to provide effective, efficient and systematic assessment of all foreshore applications to be in line with Government initiatives in developing a sense of societal and environmental responsibility by making sure that the development not only complements the applicants' needs – but also meets the needs of the nation while safe guarding resources for future generations.*

It is notable that foreshore leases are the only type of leases for which mandatory lease conditions are specified in the Act rather than in the regulations. The SLA requires the following to be satisfied before foreshore leases can be issued:

- Public consultation: The public must be informed prior to lease approval<sup>110</sup> and given 30 days to submit written objections to the Director. The public notification must notify the public of the proposed lease including its substance and the area it will cover. Before determining the lease application, the Minister is required to consider all objections that have been received in accordance with the public consultation provision.
- A declaration by the Minister that the lease does not create a substantial infringement of public rights.<sup>111</sup>
- The Minister of Lands' express approval.<sup>112</sup>

Further, if there is any 'alienated or native land abutting upon or adjoining any foreshore leased' under the SLA, the lessee is required to pay the owner 'compensation for any rights that may be infringed' (ss 22(3)). The SLA provides that if there is a dispute about the appropriate amount of compensation, the amount is to be determined 'in the manner provided in the *Crown Acquisition of Lands Act*'.<sup>113</sup>

The legal effect of this compensation provision on CFROs is somewhat unclear. The rights of CFROs are rights to access and use marine resources rather than rights to land. For this reason, it is arguable that this provision does not require compensation for an infringement of customary fishing rights. However, as discussed earlier, CFRO rights will always be associated with rights to land and the grant of a foreshore lease can infringe upon the ability of customary land rights holders to exercise their associated customary fishing rights. It appears to be for this reason that current practice is for the DoL to require compensation to be paid to CFROs if a foreshore lease is granted. The DoL calculates the compensation payable on the basis of a fisheries assessment that is completed by the (now) MoF.

Whilst the SLA does not appear to require the prior and informed consent of CFROs before granting a lease, practice within DoL has been to require CFROs to grant a waiver of their customary fishing rights for the term of a lease, which in effect requires their consent.<sup>114</sup> As a

result, any lease of the foreshore or the soil under the waters of Fiji that is granted for a purpose that is likely to interfere with the exercise of customary fishing rights, such as a lease issued for the purposes of conservation or tourism, is likely to require (so long as the current practice remains) a waiver of fishing rights by the *iQoliqoli* rights holders.

Combined with the practice of requiring CFROs to be compensated, the requirement for a waiver for customary fishing rights may appear on its face to be beneficial to CFROs. However, there are reports of dissatisfaction with the compensation value offered as well as reports that a waiver may be granted by some members of a CFRO community while others remain dissatisfied. Importantly, this practice of requiring a waiver of customary rights also appears to be unnecessary (at least when applied as a rule): The SLA does not appear to create this rule and there are circumstances in which customary fishing rights may be compatible with, and complementary to, the grant of a foreshore lease. Further, this position by DoL also appears to be at least partially responsible for DoL establishing foreshore MPAs by issuing SLA licences rather than leases: even if a CFRO group wishes to establish a foreshore MPA using an SLA lease, DoL appears to hold the incompatible position that they must simultaneously waive their customary fishing rights.

Notably, there have been reports that the former Minister of Lands had identified possible issues with the practices applied to the grant of foreshore leases, with indications that a new policy to address matters including waiver of fishing rights and payment of compensation would be developed.<sup>115</sup> It is unknown whether the current Minister is pursuing this or a similar agenda. However, it is important to note that this practice of waiver in return for compensation has been in place for more than 40 years and the practice itself reflects the importance that successive Fiji governments have attributed to traditional rights. It is practice that has in all likelihood created legitimate expectations for CFROs that they will receive compensation in return for waiving a legally recognised user right.<sup>116</sup> Currently, the University of the South Pacific is undertaking work on how the value of the rights and hence the compensation amount should be determined with the aim of increasing certainty.

Another point of note is that the SLA provides that if a lease is granted over the foreshore (or any soil under the waters of Fiji), then it is granted:<sup>117</sup>

*free and discharged from all public rights and privileges which may have existed or may be claimed in or over every such foreshore so far as is necessary for carrying out the said purpose [of the lease].*

This provision creates particular issues in relation to foreshore leases issued to tourism operators as it appears to remove all public rights of access to beaches and adjacent reefs within the leased area.

The SLA also does not provide any further guidance to the Minister when making a decision to approve or reject an application for an SLA foreshore lease, such as the consideration of environmental impacts or impacts on traditional fishing grounds.

Another practice within the DoL to be noted is the creation of the concept of 'wet leases'. The Foreshore Unit differentiates between foreshore leases that are granted for areas attached to land (e.g. jetties) and those that are not, which are known as 'wet leases'. Wet leases include, for example, a lease for a pearl farm or a lease that allows a resort to limit access to nearshore areas to allow water activities to occur and to protect species.<sup>118</sup>

**Table 4**, below, sets out the application process that is currently applied by the Foreshore



Unit to applications for foreshore leases. This box captures some of the differences between the formal provisions in the SLA and SLR and current practice.

**Table 4. Current process for granting foreshore SLA leases<sup>119</sup>**

- **Application for a foreshore SLA lease is received by DoL.**
- **In the event that the applicant is a foreign investor, due diligence is carried out to ensure that the investor has the financial capability to undertake the project (Investment Fiji Board, Fiji Revenue and Customs Authority, Reserve Bank of Fiji, Bureau of Statistics).**
- **Application is considered (the process may end there – application is rejected if within protected area.)**
- **Applicant and the Foreshore Officer meet with the resource owners (iQoliqoli custodians) and brief them about the project and ascertain the iQoliqoli owners.**
- **If consent is given and waiver of fishing rights is obtained, ownership of fishing rights in the leased area is verified by the iTaukei Lands and Fisheries Commission (TLFC).**
- **If endorsed by the TLFLC, the application is referred to the MoF for compensation matters.**
- **Investors are advised of the amount of compensation payable. Compensation payment is made to the Department of Trust Account.**
- **The application is referred to other government departments: the Department of Town and Country Planning for zoning approval and the DoE for providing the terms of reference for the EIA. The applicant is also required to obtain a Construction Environmental Management Plan and Operations Management Plan.**
- **Application is advertised pursuant to the SLA and any public objections received are considered by the Director of Lands.**
- **Submission with recommendation is tabled before a special foreshore committee for discussion before a submission is made to the Minister of Lands for consideration.**
- **When the application is approved, a 5-year development lease is granted.**

### **3.5 The Environment Management Act**

The *Environment Management Act 2005 (EMA)* is an Act:<sup>120</sup>

*for the protection of the natural resources and for the control and management of developments, waste management and pollution control and for the establishment of a national environment council and for related matters.*

The EMA does not include any provisions that specifically enable MPAs to be established. However, the EMA has broader, more holistic objectives and purposes than the Existing Fisheries Legislation. These arguably make the EMA more closely aligned with the definition of MPA adopted in this paper than the Existing Fisheries Legislation (see discussion of the definition adopted in this paper in Part 1.1). This raises the question of whether the EMA might be a suitable instrument for regulating MPAs.

Importantly, the EMA also already plays two other important roles in relation to MPAs, as it:

- (a) establishes the National Environment Council (**NEC**), which has in turn established the Protected Areas Committee (**PAC**), a body that is recognised by the national government as responsible for providing advice and leadership in relation to establishing terrestrial and marine protected areas; and
- (b) establishes and regulates the process for EIA.

The EMA also contains regulation-making provisions that could be used to support a broader MPA legislative framework, whether that framework is established under the Existing Fisheries Legislation, under new MPA or protected areas specific legislation, or under other Primary Legislation. To this end, it is notable that there have been suggestions that the Department of Environment (**DoE**) may be a suitable lead-agency for protected areas (rather than, for example, the MoF), taking into account the provisions of the EMA and the current work of the DoE.<sup>121</sup>

This section provides a brief introduction to key provisions in the EMA that are relevant to MPAs and the analysis undertaken in Part 5 of this paper.

### 3.5.1 *The purpose of the EMA and general obligations under the EMA*

The purposes of the EMA are set out in s 3(2) and are:

- (a) to apply the principles of sustainable use and development of natural resources; and*
- (b) to identify matters of national importance for Fiji Islands as set out in subsection (3).*

Section 3(3) provides that any person required to perform a function under the EMA *relating to the use and utilisation of natural and physical resources must recognise and have regard to the following matters of national importance:*

- (a) the preservation of the coastal environment, margins of wetlands, lakes and rivers;*
- (b) the protection of outstanding landscapes and natural features;*
- (c) the protection of areas of significant indigenous vegetation and significant habitat of indigenous fauna;*
- (d) the relationship of indigenous Fijians with their ancestral lands, waters, sites, sacred areas and other treasures; or*
- (e) the protection of human life and health.*

Further, s 4 requires any person performing a function under the EMA that relates to the use of natural resources to 'have regard to the following':

- (a) the traditional owners or guardians of resources;*
- (b) the maintenance and enhancement of amenity values;*
- (c) the intrinsic value of ecosystems;*

- (d) the maintenance and enhancement of the heritage values of building and sites;
- (e) the maintenance and enhancement of the quality of the environment;
- (f) the finite characteristic of natural and physical resources.

### 3.5.2 The National Environment Council (NEC)

Section 7(1) of the EMA establishes the National Environment Council (**NEC**). The composition of the NEC is regulated by s 7(1) and must include representatives of the ministries responsible for land, mineral resources, agricultural, fisheries, forests Fijian Affairs, health and tourism, the General Manager of the Native Land Trust Board, the President of the Local Government Association, a representative of non-government organisations, a representative of the general business community, a representative of the manufacturing industries, and a member to represent the interests of the academic community.

Section 8(1) sets out the functions of the NEC.<sup>122</sup> These are quite broad, ranging from approval of the National Environment Report to ensuring that Fiji implements all environment and development commitments made at regional and international fora.

Section 8(2) also empowers the NEC to ‘appoint any technical committee to advise it on matters affecting environmental protection and resource management.’<sup>123</sup> Similarly, s 8(3) empowers the NEC to ‘appoint a committee for coastal zone management to prepare a coastal zone management plan’.<sup>124</sup> Notably, s 8(4) *requires* the NEC to establish a ‘Resource Owners Committee’ whose function is ‘to advise the Council on any environment matter affecting their resource’. The National *iTaukei* Resource Owners Committee (**NTROC**) was launched in July 2014,<sup>125</sup> although it is coordinated by the Ministry of *i-Taukei* Affairs but reports to the NEC.<sup>126</sup>

Section 11(1) of the EMA states that in carrying out its functions, the NEC may require the Department to carry out a number of specific functions. These include the following:

- ...
- (c) to implement and carry out the EIA process;
- ...
- (f) to co-ordinate conservation and management of natural resources;
- (g) to facilitate the establishment of environmental units in Ministries, departments, statutory authorities, local authorities or facilities;
- ...

Similarly, s 15(1) requires the chief executive of any ‘Ministry, department, statutory authority or local authority’ to establish ‘a unit responsible for environmental management’ if required to do so by the Department. Subsections 15(2)-(3) set out the tasks that employees of such a unit must be able to undertake and the tasks that such a unit will be responsible for. All of these tasks relate to the EIA process.

The EMA requires the NEC to meet at least four times per year.<sup>127</sup> However, until the beginning of this year, the NEC had not met since 2014.

### 3.5.3 The Protected Areas Committee (PAC)

The PAC was established by the NEC in 2008 under s 8(2) of the EMA.<sup>128</sup>

The PAC has developed a Terms of Reference (**PAC ToR**) that has been approved by the NEC. The PAC ToR identifies the PAC as a 'forum or formal mechanism where stakeholders can consult and agree on how to implement activities' to achieve national progress in relation to protected areas.

The functions of the PAC, as set out in the PAC ToR, are:<sup>129</sup>

- (1) to advise the [NEC] on protected area policies and priorities;*
- (2) to support the establishment of an adequate and representative national protected area system, consistent with national and international policy commitments;*
- (3) to facilitate consensus on national priority areas for conservation, including terrestrial, freshwater and marine protected areas;*
- (4) to identify gaps in the existing protected area system, including the extent of protected areas, the state of scientific knowledge and the adequacy of existing management measures;*
- (5) to identify actions for the establishment and effective management of protected areas, to be implemented by government, non-government organisations and the private sector;*
- (6) to identify options for to [sic] resource protected area management, and to support efforts to secure financial resources for protected area management activities; and*
- (7) to facilitate the exchange of information and data sharing between stakeholders.*

The PAC has developed a 2014-2024 Action Plan, with the purpose of supporting Fiji to reach its national targets for MPA and terrestrial protected area coverage.<sup>130</sup> Among other things, this Action Plan identifies the need for a 'continuous commitment' in order to achieve the goal of 30% coverage of coastal and marine areas by MPAs.

Although membership of the PAC is in practice open (i.e. it is essentially open to all those with a relevant interest, including commercial organisations), the PAC ToR does comment on membership of the PAC. It states that PAC membership should include, at a minimum, a representative from the National Trust of Fiji, the Environment Department, the Forestry Department, the (then) Fishery Department, the Department of Culture and Heritage, and the Native Land Trust Board, as well as six representatives from NGOs, academia and the private sector. It also states that additional members may be accepted into the PAC 'on the basis of their experience and expertise in the area'.

The Secretariat of the PAC is housed in the National Trust.

The PAC comprises multiple working groups, including a marine working group.

Importantly, the PAC is recognised by the government as responsible for providing advice and leadership in relation to protected areas and in relation to reaching the goal, mentioned earlier, of protecting at least 30% of Fiji's marine areas under a network of MPAs by 2020.

Also important, however, is the relationship between the NEC and the PAC. Noting that the PAC has been established by the NEC with a key purpose being to advise the NEC on matters affecting environmental protection and resource management, the NEC's inactivity in recent years has hampered the ability of the PAC to effect change.

### 3.5.4 Environmental Impact Assessment (EIA) process

Part 4 of the EMA addresses EIA. It requires ‘approving authorities’<sup>131</sup> to examine all development proposals and determine whether a proposed activity ‘is likely to cause significant environmental or resource management impact’.<sup>132</sup>

‘Development proposal’ is defined in s 2 to mean:

*a proposal for a development activity or undertaking submitted to an approving authority for approval under any written law.*

Importantly, ‘development activity or undertaking’ is also defined in s 2, as follows (emphasis added):

*any activity or undertaking likely to alter the physical nature of the land in any way, and includes the construction of buildings or works, the deposit of wastes or other materials from outfalls, vessels or by other means, the removal of sand, corals, shells, natural vegetation, sea grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals, but does not include fishing.*

Whilst this provision expressly excludes fishing activities from development activities to which the EIA process will apply, this does not have the effect of excluding the assessment of other types of development activities that could have an impact on MPAs.<sup>133</sup>

If the approving authority determines that the activity or undertaking will cause a significant environmental or resource management impact,<sup>134</sup> the EMA requires that it be subject to the EIA process. The EIA process can also be triggered by:<sup>135</sup>

- (a) the proposed development ‘com[ing] to the attention of the unit that it may have a significant environmental or resource management impact’;
- (b) the proposed development causing ‘public concern’; or
- (c) the Minister of Environment forming the view that the development proposed is likely to cause ‘public concern’.

If an approving authority determines that the proposed activity or undertaking will cause a significant environmental or resource management impact, then s 27(4) determines what process will apply. For those types of proposals that are identified in Part 1 of Schedule 2 to the EMA (‘Development Proposals – Part 1 – ‘Approved by EIA Administrator’), the proposal must be subject to the EIA process and must be sent to the DoE for processing by the EIA Administrator. Importantly, paragraph (1)(n) of Part 1 of Schedule 2 captures the following proposals (emphasis added):

*a proposal that could harm or destroy designated or proposed protected areas including, but not limited to, conservation areas, national parks, wildlife refuges, wildlife preserves, wildlife sanctuaries, mangrove conservation areas, forest reserves, fishing grounds (including reef fisheries), fish aggregation and spawning sites, fishing or gleaning areas, fish nursery areas, urban parks, recreational areas and any other category or area designated by a written law.*

Notably, ‘protected area’ is not defined in the Act. However, the description used in Schedule 2, extracted above, does provide guidance as to the scope of ‘protected areas’ for the purposes of the EIA process under the EMA. Nevertheless, it is not clear that this definition will capture ‘protected areas’ that are established under the *Fisheries Act* or other Primary Legislation that go by other names (e.g. ‘restricted areas’). Another area of ambiguity in the above provisions is the use of the word ‘harm’ which is not defined in the EMA.

If a development proposal is required to undergo the EIA process, the approving authority is not permitted to approve the proposal until or unless the EIA report has been approved.<sup>136</sup>

The EIA process involves various elements, including 'screening', 'scoping', preparation of an EIA report, review of the EIA report, and decision on the EIA report.<sup>137</sup> In terms of public comment, the EMA provides that the proponent may (but will not necessarily) be required to invite public comments on the report.<sup>138</sup>

After the EIA Administrator has reviewed the EIA report, they have the power to:<sup>139</sup>

- (a) approve the report, with or without conditions;
- (b) recommend that additional studies or reports be prepared; or
- (c) not approve the report.

Importantly, the EMA does not provide any restrictions or guidelines as to when an EIA report should or should not be approved (for example, if the EIA report identifies that the proposed activity or undertaking is likely to cause significant environmental harm).

Part 6 of the EMA deals with 'Offences and Penalties' and creates an offence of carrying out a development activity or undertaking that is subject to the EIA process without an approved EIA report, as well as an offence of contravening a term or condition of an approval or permit issued under the EMA.

### **3.5.5 Power to make regulations under the EMA**

The Minister's power to make Regulations under the EMA is set out in s 61. Section 61(1) sets out the majority of the matters that the Minister may make regulations for and s 61(3) includes additional powers that may only be exercised after first consulting 'the relevant Minister responsible for Fijian affairs, land, mineral resources, agriculture, fisheries or forests'.

None of the regulation-making powers under s 61 explicitly or impliedly empower the Minister to establish site-specific MPAs under the EMA, or to establish a comprehensive MPA regulation. However, the Minister's powers under s 61 do provide scope to make regulations that would support MPAs that have been established using site-specific MPA regulations, and could also support a comprehensive MPA legal framework established either under regulations or Primary Legislation. For example, s 61 includes a power to prescribe procedures for EIA, a power to 'provide procedures for formulation, implementation and review of the ... National Resource Management Plan', and a power to establish enforcement mechanisms.<sup>140</sup>

The regulation-making power under s 61(3)(e) is particularly interesting as it empowers the Minister:

*(e) to establish guidelines, standards and procedures for the conservation, protection or rehabilitation of any land, river or marine areas.*

Such guidelines, standards or procedures could be designed to support site-specific MPAs established under other legislation (e.g. the Existing Fisheries Legislation and the SLA).

## 4. Elements of a comprehensive MPA legal framework: the 2011 IUCN Guidelines and the IUCN-based Recommendations

This part provides some general observations on designing MPA frameworks and important qualities of MPAs which have largely been drawn from the 2011 IUCN Guidelines.

Further, this part outlines 27 key recommendations for developing effective marine protected areas legislation (the **IUCN-based Recommendations**). The IUCN-based Recommendations have been drawn from the 2011 Guidelines for Protected Areas Legislation published by the International Union for the Conservation of Nature (**2011 IUCN Guidelines**).<sup>141</sup> The 2011 IUCN Guidelines are designed to assist legal drafters, protected areas professionals, policy makers and other stakeholders with the process of developing effective and comprehensive protected areas legislation, including MPA legislation. For the purposes of this paper, the 2011 IUCN Guidelines have been reviewed in order to identify recommendations that are of relevance to a proposed MPA legal framework for the Fiji context. The resultant IUCN-based Recommendations can be used as benchmarks for critically assessing the possible options for MPA regulation in Fiji.<sup>142</sup>

It should be noted, however, that the IUCN-based Recommendations in this paper are a synthesised version of the detailed information contained in the 2011 IUCN Guidelines. Therefore, it is recommended that the 2011 IUCN Guidelines be consulted for further discussion and additional information, where appropriate.

### 4.1 General observations on designing MPA frameworks and important qualities of MPAs

#### 4.1.1 Flexibility in the design of MPA frameworks

It is important to note that there is room for flexibility in the design and function of MPA legal frameworks. Such flexibility is important to ensure that MPA legislation reflects local 'culture, tradition and legal processes'.<sup>143</sup>

Important areas for choice and flexibility when designing an MPA legal framework include the following:

- MPAs can be created by enacting MPA (or PA)-specific legislation or by inserting MPA provisions into existing legislation.
- MPA legislation can contain 'umbrella provisions' for the overall network, which incorporates a mechanism for designating MPA sites within that framework. Alternatively, or in addition, individual MPAs can be established using site-specific MPA legislation (either Primary Legislation or regulations).<sup>144</sup>
- MPA frameworks can anticipate the establishment of many small MPAs (in which activities are highly restricted), or a smaller number of large MPAs (in which there are various areas or zones with varying levels of restriction on use in each).<sup>145</sup>
- Legislation can be more or less prescriptive. Less prescriptive legislation will set out a general framework while delegating decisions on the details (e.g. to local communities). A more prescriptive framework will set out more of the details for each MPA in the legislation.<sup>146</sup> There are advantages and disadvantages to both approaches. The 1999 IUCN Guidelines make the following point:<sup>147</sup>

*Sometimes, powerful local interests in an area favour short-term economic benefits, leading to strong local pressure for over-exploitation of resources. In other cases,*

*the local community will favour the sustainable use and protection of marine resources. Therefore, the law should protect management from unreasonable local pressures by including a sufficiently detailed statement specifying clear objectives and a process for achieving them. Any detail added to the law should be carefully considered because inevitably it will limit the management's flexibility in addressing the unexpected.*

#### **4.1.2 Important qualities of MPAs**

It is also useful to highlight some of the qualities that distinguish MPAs from terrestrial protected areas. These factors inform the 2011 IUCN Guidelines and should be kept in mind when designing an MPA legal framework:<sup>148</sup>

- MPAs can cover very large areas, particularly if an MPA system is extended to include offshore waters. Governing such large areas requires significant resources.
- MPAs can extend beyond national jurisdiction.<sup>149</sup>
- Marine ecosystems are not as well understood as terrestrial ecosystems. This should not be a barrier to establishing MPAs as it is better to have an MPA system that is imperfect than no MPA system at all. However, this 'underscores the need for MPA legislation to provide for incremental implementation'.<sup>150</sup>
- Connectivity between marine, coastal and terrestrial ecosystems is high and it is not possible to effectively manage the range of ecosystems completely independently.
- MPAs require governance of a three dimensional space to a degree that terrestrial ecosystems do not.
- There is a high degree of environmental variability in the oceans.
- Excluding the high seas, '[m]ost marine areas...have traditionally been used by fishing and coastal communities' and these communities may still have customary rights to marine resources.<sup>151</sup>
- Similarly, 'complex property rights exist in many coastal areas and with respect to many marine resources'. Rights may be held collectively, or as a combination of collective and individual rights.<sup>152</sup>
- 'In most coastal countries, a wide variety of government agencies exist with a vast range of marine-related responsibilities and piecemeal interests'. Similarly, there are likely to be a range of stakeholder groups with relevant interests, but, these diverse groups typically 'have little tradition of coordination or little perceived need to collaborate'.<sup>153</sup>

#### **4.2 IUCN-based Recommendations**

The IUCN-based Recommendations identified in this paper have been organised into five interrelated categories:

- A. Policy
- B. Legislative drafting
- C. Governance and institutions
- D. MPA management mechanisms and concepts
- E. Compliance and enforcement



Each of the 27 IUCN-based Recommendations are discussed in turn below.

## **A. Policy**

### **i. Comprehensive biodiversity and conservation policy**

It is important to have a comprehensive, national-level marine and oceans policy that provides ‘a foundation for protected areas legislation’. ‘Ideally, there will be an explicit national or sub-national marine and oceans policy declared by the government or otherwise provided, for example, in the constitution’.<sup>154</sup>

## **B. Legislative drafting**

### **ii. Objectives**

‘Objectives [should] spell out the main purposes and intent of the law’ and can ‘guide implementation and serve as the framework for judging whether actions and decisions are in accordance with the law’.<sup>155</sup>

For the IUCN, the primary objective of all protected areas should be the conservation of nature, and legislation should reflect this.<sup>156</sup> However, as noted earlier, a definition of MPA that is closer to the CBD definition (which does not incorporate a requirement that conservation be a primary objective of MPAs) may be more appropriate in Fiji.

The 2011 IUCN Guidelines also list a range of other subject-specific objectives that could be considered for inclusion.<sup>157</sup>

### **iii. Harmonise legislation**

The IUCN emphasise the importance of ensuring that MPA legislation is compatible with, and will operate harmoniously alongside, all other laws that govern or may impact the marine environment:<sup>158</sup>

*The maze of marine-related laws and regulations and the associated institutional interests in coastal countries present a special challenge. The goal is to create consistency within the national legal framework, and between national laws, local rules and customary practice, to support marine and coastal protected areas and ensure their sustainability.*

### **iv. Definitions and interpretation**

It is important to ensure that definition and interpretation provisions of MPA legislation are well thought through.<sup>159</sup>

### **v. Application<sup>160</sup>**

MPA legislation should include provisions that clearly identify when the legislation applies, including its relationship with other related legislation. It should specifically address what happens in the event of conflict with other legislation. The IUCN specifically recommends that MPA legislation provide that MPA legislation will prevail in the event that conflict with other legislation could threaten the conservation objectives of the MPA site or system.<sup>161</sup>

## **C. Governance and institutions<sup>162</sup>**

### **vi. Institutional arrangements**

MPA governance arrangements should be clearly established in legislation.<sup>163</sup> However, the

2011 IUCN Guidelines recommend that protected areas governance 'be approached with flexibility' as there are multiple factors that are likely to influence the choice of governance arrangements.<sup>164</sup> Further, there are various options for the institutional arrangements for MPA governance. Overall, the 2011 IUCN Guidelines recommend that ultimate responsibility for the national system of protected areas should sit with a high-level policy authority within government, such as a Minister for Fisheries or Environment.<sup>165</sup> Further, legislation should identify a lead protected areas agency which 'should have the clear mandate, scientific competence, technical expertise and public purpose to effectively carry out the objectives and purposes of the legislation.'<sup>166</sup>

Two examples of possible arrangements are:<sup>167</sup>

- Governance by a single, central authority (government department or statutory authority). Such an authority could incorporate multiple smaller units that manage specific sites.
- Governance by multiple agencies which, together, have overarching authority. This option could incorporate smaller units that have delegated responsibility for management of individual sites.

The 2011 IUCN Guidelines also recommend that legislation give any protected areas agency 'clear legal authority to designate management entities for specific sites, as appropriate'.<sup>168</sup>

The IUCN notes that using statutory authorities for MPA management is the choice of many countries, and that this option:<sup>169</sup>

*is attractive for its independence and autonomy from the government in decision making, including fundraising and entering into partnerships with other entities, including non-government entities. ... At the same time, oversight by the minister in charge is necessary to ensure that decisions of the statutory corporation are within its mandate and in furtherance of the objectives and purposes of the protected areas legislation.*

### **vii. Advisory bodies**

Legislation should authorise the 'establishment of advisory bodies for scientific and other matters, on an ongoing or issue-specific basis'.<sup>170</sup> Legislation can achieve this in various ways, including:<sup>171</sup>

- a general provision that authorises the establishment of advisory committees either on a temporary or permanent basis;
- a provision appointing a permanent advisory committee; or
- a combination of both.

### **viii. Coordination and consultation with relevant stakeholders**

The 2011 IUCN Guidelines note that protected areas legislation 'should reflect the need for protected area authorities to coordinate across sectors and jurisdictions'. As such, legislation should incorporate a 'general provision on coordination and consultation'. Coordination and consultation 'should also be listed in the powers and duties of protected areas authorities'.<sup>172</sup> Depending on local legal practice, this could incorporate a 'responsibility of the protected areas agency ... to coordinate and consult on general and specific matters on an ongoing basis'.<sup>173</sup>

Coordination and consultation are likely to be required in relation to policy, technical matters,

across levels of government and also with other governments, to the extent that there are shared resources and ecosystems.<sup>174</sup> Key sectors identified in the IUCN Guidelines that are likely to be important for coordinating MPA governance include ‘fisheries, tourism, navigation, ports, coast guards, customs and commerce’; in Fiji mining is another sector that is likely to be relevant.<sup>175</sup>

Noting the potential existence of existing property rights in traditional fishing grounds in coastal areas, voluntary conservation areas and the importance of co-management, this requirement could also incorporate a careful assessment of the existing communally held rights and collaboration with local communities. This will assist ‘to promote traditional practices, build on local knowledge and recognise marine and coastal protected area governance arrangements where appropriate’.<sup>176</sup>

### **ix. Legal status of proposed MPA sites and jurisdiction to establish MPAs**

Protected areas legislation should clearly identify the type of land and/or marine area over which formal protected areas can be declared.

The 2011 IUCN Guidelines identify three main types of land-ownership that may need to be addressed in protected areas legislation:<sup>177</sup>

- The ‘least complicated’ scenario: Where the proposed site is located on public land under national jurisdiction.
- A ‘relatively uncomplicated’ scenario: Where the proposed site is on public land that is under the jurisdiction of a particular government entity. This would require negotiations so that management responsibility and financial resources can be transferred to the protected areas authority.
- A scenario that ‘may be more complicated’: Where the proposed site ‘contain[s] a combination of tenure rights, even on state-owned land’, including – as is relevant to Fiji’s inshore marine areas – ‘resource rights based on customary law’ such as ‘dedicated fishing grounds’.

Whether MPA legislation for Fiji will need to address all of these scenarios will depend in part on whether the legislation captures both marine and terrestrial protected areas. However, the third scenario is specifically relevant to developing a legislative mechanism for recognising existing property rights and informal MPAs in Fiji.

Mechanisms that could be used in legislation to bring land and/or marine areas within a formal system of protected areas include, for example:<sup>178</sup>

- government acquisition of an area (i.e with title transferred to government);
- negotiation of a conservation agreement (discussed further below under IUCN-based Recommendation x. *Enabling formal recognition of voluntary conservation areas*); and
- recognition of voluntary conservation sites, or sites that have the potential to become voluntary conservation areas, without government acquisition of rights or the negotiation of a conservation agreement. As noted below, for the purposes of this paper, *tabus* and LMMAs are considered to be examples of voluntary conservation areas. Such sites could be recognised by legislation as stand-alone protected areas or as parts of larger protected areas that also incorporate State-owned areas. This approach requires the group undertaking voluntary conservation measures to hold legal title to either the land or resources. In the context of marine resources in Fiji for example, this approach may

require stronger legislative protection of customary fishing rights. (Recognition of voluntary conservation areas – which in this paper relevantly includes *tabus* and LMMAs – is discussed further under IUCN-based Recommendation x. *Enabling formal recognition of voluntary conservation areas*).

#### **x. Enabling formal recognition of voluntary conservation areas**

The 2011 IUCN Guidelines note that governance by indigenous peoples or local communities over conservation areas is '[o]ne of the main new governance approaches for protected areas being promoted by the IUCN and the international conservation community'.<sup>179</sup> The 2011 IUCN Guidelines recommend that:<sup>180</sup>

*As a minimum, protected areas legal frameworks should not hinder such possibilities by restricting powers or defining mandates so narrowly that the necessary tools for recognising new governance options are lacking.*

The IUCN also identifies the importance of 'voluntary conservation initiatives', which are 'conservation initiatives by communities, corporations, NGOs or individuals'.<sup>181</sup> Voluntary conservation areas can be distinguished primarily in two respects:<sup>182</sup>

- 'predominant or exclusive control and management by communities'; and
- 'commitment to conservation of biodiversity or its achievement through various means'.

For the purposes of this paper, *tabus* and LMMAs are examples of voluntary conservation areas.<sup>183</sup>

In relation to all types of voluntary conservation initiatives, the IUCN recommends that legislation:<sup>184</sup>

*[ensures] that the site meets the definition and standards to qualify as a protected area that is part of the formal system. ... [creates] certainty as to the basic rights and responsibilities of all parties by formal agreement, [identifies] indicators to measure performance and accountability, [provides] for scientific monitoring, and [includes] mechanisms to rectify breach of concluded agreements or malfeasance.*

The 2011 IUCN Guidelines also recommend that the legal drafter:

*keep in mind that an area may become a candidate for official recognition ... through different approaches. One approach is where [the area] has already been created by the community and is then proposed for recognition. The other is where someone outside the community (for example, a conservation scientist) identifies an area as having high biodiversity value and proposes it be created and recognised...*

Recognition of voluntary conservation areas could be provided for directly in legislation (for example, by establishing a legislative certification and recognition process for existing voluntary conservation areas).<sup>185</sup>

Another possible option for recognising voluntary conservation areas is the use of conservation agreements. Conservation agreements are agreements between the government and a third party (e.g. a local community) that wishes to have a voluntary conservation area included in the formal protected areas system. Conservation agreements set out:<sup>186</sup>

*substantive provisions identifying important features of the area to be protected, the primary conservation objectives and the corresponding protected area management category ... It is recorded in the official land registry ... [and] [i]f the land is sold or otherwise transferred to another party, the agreement remains in place.*

As such, legislation could incorporate a mechanism for government to enter into conservation agreements with CFROs that are already engaged in, or wish to engage in, voluntary conservation measures. If included in legislation, it should require principles of good governance to apply to their negotiation, and should set out minimum content requirements. Importantly, such a scheme will require clear legislative identification and protection of the rights of CFROs over the conservation area.<sup>187</sup>

#### **xi. Co-management of MPAs**

Co-management of protected areas, '[a]t its most basic level ... involves collaboration between two or more partners in the management of a protected area'.<sup>188</sup>

*One of its principal strengths is its flexibility to involve multiple stakeholders and decision-making relationships, including government agencies, NGOs, local communities, indigenous peoples, private entities and private landowners. These arrangements normally entail partnership or consultative agreements that lay out the specific responsibilities of the main actors sharing authority. The concept is equally applicable at the central and decentralized levels.*

In practice, there is a 'continuum of possible collaborations' with varying levels of involvement by the partners involved, ranging from:<sup>189</sup>

*a purely consultative and advisory role for the non-state entity, to shared responsibility and accountability in formal arrangement (co-management), to independent control.*

Among other things, protected areas legislation should:<sup>190</sup>

- recognise possibilities for 'the management or co-management of [MPAs] by government entities, communities, indigenous corporations, NGOs and even private parties in appropriate cases';
- set out minimum content requirements for co-management agreements, including requiring that co-management agreements are consistent with other legislative requirements; and
- require co-management agreements to be recorded in writing.

Protected areas legislation can also provide additional guidance on the standard content of co-management agreements in Primary Legislation or regulations, 'to help promote effectiveness and consistency'.<sup>191</sup>

#### **xii. Financial arrangements**

Legislation should identify financial arrangements for MPA management. The 2011 IUCN Guidelines identify two sources of funds that have been traditionally relied upon: government budgets and the revenues that are generated by protected areas (e.g. through tourism). The 2011 IUCN Guidelines also note that 'new and innovative financial mechanisms ... are increasingly being explored'.<sup>192</sup> In any case, the 2011 IUCN Guidelines recommend that legislation 'recognise the full range of financial options that may be feasible in the jurisdiction involved. ... [And, where] opportunities arise, it should be clear that an appropriate protected areas authority has the power to pursue their use'.<sup>193</sup>

#### **xiii. Public participation and good governance**

In 2003, the 5th IUCN World Parks Congress endorsed 'the importance of governance as a key concept for protected areas' and '[promoted] good governance as essential for the

effective management of protected areas of all types in the 21<sup>st</sup> century'.<sup>194</sup> Although recognising that 'there is no single definition of 'good governance',<sup>195</sup> the 2011 IUCN Guidelines reiterate nine broad principles for protected areas good governance that were identified in a 2008 IUCN World Commission on Protected Areas publication.<sup>196</sup> Among other things, these incorporate the following important elements:<sup>197</sup>

- A voice for all to participate in social dialogue to reach collective agreement on protected areas management, objectives and strategy.
- Equitable sharing of the costs and benefits of establishing protected areas.
- Not creating or aggravating poverty and vulnerability.
- Ensuring accountability, which requires 'clearly demarcated lines of responsibility, and ensuring adequate reporting and answerability from all stakeholders about the fulfilment of their responsibility'.
- Ensuring that stakeholders have access to all relevant information.
- Respect for human rights, including those of future generations.

#### **D. MPA management mechanisms and concepts**

##### **xiv. The ecosystem approach**

The 2011 IUCN Guidelines state that 'there is ... broad consensus that protected areas must be planned and managed using an ecosystem approach'.<sup>198</sup> Among other things, the ecosystem approach:<sup>199</sup>

*provides an appropriate scale for determining priority biodiversity sites and ecological functions needing protection, as well as for selecting sites, setting boundaries and defining management needs. It facilitates a more relevant assessment of the social, political and economic context of threats to biodiversity and nature conservation, operates to mitigate them, and a framework for cross-sector and multi-jurisdictional partnerships to address complex conservation issues.*

There are twelve 'principles' of the ecosystem approach:<sup>200</sup>

- Principle 1: The objectives of management of land, water and living resources are a matter of societal choice.
- Principle 2: Management should be decentralised to the lowest appropriate level.
- Principle 3: Ecosystem managers should consider the effects (actual or potential) of their activities on adjacent and other ecosystems
- Principle 4: Recognizing potential gains from management, there is usually a need to understand and manage the ecosystem in an economic context. Any such ecosystem-management program should:
  - reduce market distortions that adversely affect biological diversity;
  - align incentives to promote biodiversity conservation and sustainable use; and
  - internalise costs and benefits in a given ecosystem to the extent feasible.
- Principle 5: Conservation of ecosystem structure and functioning, in order to maintain ecosystem services, should be a priority target of the ecosystem approach.

- Principle 6: Ecosystems must be managed within the limits of their functioning.
- Principle 7: The ecosystem approach should be undertaken at the appropriate spatial and temporal scales.
- Principle 8: Recognizing the varying temporal scales and lag-effects that characterize ecosystem processes, objectives for ecosystem management should be set for the long term.
- Principle 9: Management must recognize that change is inevitable.
- Principle 10: The ecosystem approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity.
- Principle 11: The ecosystem approach should consider all forms of relevant information, including scientific knowledge and indigenous and local knowledge, innovations and practices.
- Principle 12: The ecosystem approach should involve all relevant sectors of society and scientific disciplines.

#### **xv. Establishing a network of MPAs**

A 'marine and coastal protected areas network' is:<sup>201</sup>

*A collection of individual marine protected areas operating cooperatively and synergistically, at various spatial scales, and with a range of protection levels, in order to fulfil ecological aims more effectively and comprehensively than individual sites could alone.*

The 2011 IUCN Guidelines note that 'the concept of a global network of marine and coastal protected areas has emerged [at the international level] as an important concept for meeting marine biodiversity conservation goals'.<sup>202</sup>

#### **xvi. Systems planning and strategic planning**

Systems planning is a way to ensure that individual protected areas, and systems of protected areas, are developed and understood in context. This helps to maximise biodiversity outcomes. Legislation should 'provide for a systems planning approach to the selection, establishment and management of individual protected areas' and should require that a strategic plan be developed, and regularly updated, that will operate as a 'long-range planning tool ... for MPA planning, establishment and management'.<sup>203</sup>

Systems and strategic planning will include land use and marine spatial planning.<sup>204</sup> UNESCO defines marine spatial planning as a public process of analysing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that usually have been specified through a political process.<sup>205</sup> Marine spatial planning is becoming an increasingly valuable tool for supporting decision making processes in relation to MPA planning.

#### **xvii. Establishing MPAs**

In order to be recognised as part of the formal protected areas system, legislation must require protected areas be established and designated by law or other effective legal means.<sup>206</sup>

The nomination process should impose qualifying requirements:

- that require the nominated site to satisfy the legislative definition of protected areas (which should in turn conform to international guidelines);<sup>207</sup> and
- that require that the site's values and objectives 'fit within ... the protected areas system overall'.<sup>208</sup>

IUCN-based Recommendations *ix. Legal status of proposed MPA sites and jurisdiction to establish MPAs* and *x. Enabling formal recognition of voluntary conservation areas* are also particularly relevant to this recommendation. As discussed earlier, and noting the significant number of existing voluntary conservation areas in Fiji, MPA legislation should include provisions that specifically enable recognition of existing rights and voluntary conservation areas, providing scope for such areas to become part of the protected areas system through a consultative and fair and reasonable process.

### **xviii. Acquisition of rights and compensation**

Legislation should 'include standard provisions on negotiation, just compensation and the acquisition of lands or use rights determined necessary to fulfil the objectives of the protected areas system and the overall public interest'.<sup>209</sup> Where customary use rights apply, legislation should (among other things) require careful investigation and identification of these rights. Where it is necessary for legally recognised rights to be revoked or surrendered, there should be proper consultation processes and provision for compensation that takes into account the practices that have been taking place in Fiji for more than 40 years.<sup>210</sup>

### **xix. Interim protection**

Legislation should enable MPAs to be protected during nomination, consultation and assessment phases.<sup>211</sup>

### **xx. Delineation of MPA boundaries**

Legislation should specifically address the delineation of MPA boundaries, so that boundaries are 'clearly identified on a map and demarcated on the ground, to the extent possible, using appropriate forms of delineation that are not unsightly or harmful to the environment'.<sup>212</sup> The 2011 IUCN Guidelines note that climate change raises special issues in relation to delineating boundaries and recommends that, for new protected areas, legislation 'require considerations of climate change in the design of outer boundaries in order to provide some flexibility for adaptive management'.<sup>213</sup>

### **xxi. Enabling various levels of protection and using management and zoning plans**

Legislation should recognise that highly protected MPAs, or highly protected zones within large MPAs, are 'normally a necessary component of an MPA network', alongside other less strictly protected zones.<sup>214</sup>

An MPA legal framework should require the development of management plans for each protected area site, or for groups of connected/related areas.<sup>215</sup> Legislation should set out specific minimum content for management plans whilst still allowing for flexibility, including for the purposes of supporting adaptive management. It should also set out mandatory considerations that are to be taken into account when approving management plans.<sup>216</sup>

An MPA legal framework should also recognise zoning as a management tool and should



enable management plans to divide MPAs into zones or units which have different management needs.<sup>217</sup>

#### **xxii. *The IUCN protected areas categories***<sup>218</sup>

The IUCN recommends that legislation requires protected areas to be categorised according to a clearly defined system of management categories. The IUCN recommends that the seven IUCN protected areas categories guide the development of categories for local use that are sufficiently aligned to the IUCN categories to enable global reporting. Development of protected areas categories that meet these requirements necessitates consultation and further consideration to ensure they are adapted to local circumstances.

#### **xxiii. *Environmental and social impact assessment***

Legislation should provide for environmental and social impact assessments of activities that might impact protected areas. These measures can be incorporated in protected areas legislation or in other legislation (e.g. a broader environment statute).<sup>219</sup>

#### **xxiv. *Making further regulations***

‘Not all matters can or should be settled in principal legislation’. Protected areas legislation should include a regulation-making power that unambiguously empowers the relevant minister to make regulations that will address necessary additional matters as needed.<sup>220</sup>

### **E. *Compliance and enforcement***

#### **xxv. *Identifying regulated activities***

The 2011 IUCN Guidelines note the importance of legal frameworks:<sup>221</sup>

*by giving authorities clear and adequate powers to regulate activities inside the designated areas.*

Regulation can also cover activities in areas adjacent to protected areas.<sup>222</sup>

The three main ways to regulate activities are to:

- (a) prohibit activities (either all of the time or under certain circumstances);
- (b) require written permission for certain activities; and
- (c) allow certain activities subject to conditions/rules.

The 2011 IUCN Guidelines recommend that protected areas legislation:<sup>223</sup>

*contain provisions setting out the framework of controls available for use in the protected areas system and in individual sites ... A standard approach is to identify the main types of regulated activities in the legislation and to give the minister in charge (or other appropriate high-level body) the power to make additional regulations as needed.*

Since violation of such provisions ‘normally translate into offences and punishments’, it is important that legislation ‘give adequate guidance for enforcement purposes, covering the full range of anticipated situations’.<sup>224</sup>

If the legal framework incorporates a single, overarching law that applies to MPAs generally, it should include controls that are ‘sufficiently broad and comprehensive to cover anticipated needs for all protected area categories and governance types provided by the legislation’.<sup>225</sup>

If the legal framework establishes MPAs using site-specific legislation, provisions ‘should

provide a framework of controls consistent with that provided for the system and tailored to the requirements of the site.<sup>226</sup>

#### **xxvi. Enforcement, incentives and penalties**

Offence provisions should be drafted with two audiences in mind: those enforcing the provisions and those subject to them. Among other things, MPA legislation should:<sup>227</sup>

- set out a clear definition of 'authorised officers'. This should include existing officers (e.g. police officers, national coast guard/equivalent, navy) as well as specially appointed protected areas officers;
- set out the enforcement functions, duties and powers of authorised officers; and
- provide for authorised officers to have outreach and education roles.

'Offences and penalties under protected areas legislation are normally applied within the broader framework of the country's criminal code'.<sup>228</sup> General recommendations include the following:

- Offence provisions should be clear, 'cover the range of violations that may fall within the provision' and enable a court to 'match the penalty to the seriousness of the offence'.<sup>229</sup>
- Penalties need to be sufficient to act as a deterrent, without being so high as to be 'socially unacceptable and thus difficult to enforce'.<sup>230</sup>
- Ideally, penalties will not be fixed in Primary Legislation as this can make it difficult to amend penalties as needed.<sup>231</sup>
- Provisions for on-the-spot fines or similar may be appropriate for minor offences.<sup>232</sup>
- Civil penalties can be a useful tool as they 'help with recovery from environmental harm by reimbursing the party harmed and restoring environmental features to the extent possible'.<sup>233</sup>
- There may be scope for enabling civil law proceedings to be brought by third parties.

#### **xxvii. Education, outreach & public awareness**

The 2011 IUCN Guidelines recommend that 'strong and ongoing education and awareness building of the public about the importance of coastal and marine protected areas' should be a 'key part of any effective MPA network'.<sup>234</sup> The 2011 IUCN Guidelines identify potential for including education and outreach as elements of MPA management plans, in the role of MPA advisory bodies, and in the role of compliance officers and other authorised officers, and to support community-based compliance efforts.<sup>235</sup> As such, MPA legislation should provide scope for this, and could go as far as specifically referring to or envisaging education, outreach and public awareness activities. It could be added that in the context of the limited resources for enforcement, voluntary compliance through education and awareness should be given high priority.

## 5. Analysis

This part identifies the strengths and weaknesses of the Existing MPA Mechanisms by reference to the IUCN-based Recommendations. Some points of clarification should be made about the present analysis:

- The analysis in this part assumes that regulations under the Existing Fisheries Legislation will only be used to designate site-specific MPAs and not be used to develop a broad ranging MPA regime.
- The 2011 IUCN Guidelines relate specifically to protected areas legislation. For this reason, the IUCN-based Recommendations are not, strictly speaking, designed for analysing informal MPA mechanisms. Nevertheless, the IUCN-based Recommendations have been useful for identifying key issues with the existing informal mechanisms.
- Under the Existing MPA Mechanisms, only two site-specific MPA regulations are in force to date (under the *Fisheries Act*). This low number appears to reflect (at least in part) the reported reluctance of communities and CFROs to have customary MPAs (including LMMAs) gazetted. Multiple reasons have been reported for this reluctance.<sup>236</sup> These reasons are raised, as relevant, in the following discussion.
- Only two other formal MPAs have been established, both of these, under the SLA. As noted earlier in this paper, the SLA is not considered to be a viable option for establishing MPAs moving forward. Nevertheless, this Part includes a discussion of the key strengths and weaknesses of the SLA MPA mechanisms as they offer useful lessons for developing a future MPA legal framework.

### 5.1 *Analysing the Existing MPA Mechanisms against the IUCN-based Recommendations*

The following discussion is organised around each of the relevant IUCN-based Recommendations that raise significant issues. **Appendix B** outlines the strengths and weaknesses of the Existing MPA Mechanisms against each of the 27 IUCN-based Recommendations.

#### A. Policy

##### i. *Comprehensive biodiversity and conservation policy*

A significant weakness of the present law and policy landscape in Fiji is the absence of a comprehensive national policy for oceans or MPA management, noting that at the time of finalising this paper the Government has engaged in the drafting of the Fiji Ocean Policy Framework. While there are a range of policies that are broadly relevant to MPAs (see Part 2.1), there is no national policy dealing specifically with MPAs. This leaves a policy gap when it comes to guiding the development of MPA legislation as well as the establishment and management of MPAs.

In the absence of a policy or plan to guide implementation, there is a risk that MPAs will continue to be established on an ad-hoc basis. In comparison to MPAs that are developed in accordance with a comprehensive policy that is founded in science and community consultation, MPAs established on an ad hoc basis are less likely to result in a comprehensive and ecologically representative network of MPAs. As noted earlier, protected areas are recognised globally as essential for conserving biodiversity. Further, the marine

environment is of critical importance to the economy and the livelihood of the people of Fiji. As such, the absence of a comprehensive policy to guide systematic establishment of MPAs is likely to compromise Fiji's long-term conservation, livelihood and other related objectives.

Policy reform does not require legislative reform and therefore this policy gap could be addressed without legislative amendments. Notably, Fiji is in the process of developing a national fisheries policy that will cover coastal, oceanic and aquaculture fisheries. Fiji also has an 'Integrated Coastal Management Framework'. However, the national fisheries policy is not anticipated to address MPAs and, at least at this stage, the Integrated Coastal Management Framework is framed as an issues paper rather than as a policy document.<sup>237</sup>

## **B. Legislative drafting**

### **ii. Harmonise legislation**

Fiji's marine environment is subject to a complex network of legislation. As a result, developing an effective MPA legal framework will require a comprehensive review of all legislation relevant to MPAs to identify areas of possible inconsistency. Once these have been identified, it is likely that amendments to Primary Legislation will be necessary. A review of legislation, policies, strategies and plans relating to MPAs has recently been undertaken with the support of the MACBIO Project.<sup>238</sup> This work could form a useful starting-point for harmonising Fiji's law and policy.

For the purposes of this paper, at least two harmonisation issues can be identified under the Existing MPA Mechanisms:

#### **(a) Overlap of the jurisdiction of the *Fisheries Act* and the *Offshore Decree* in *iQoliqoli***

The *Fisheries Act* regulates fishing activities in *iQoliqoli* which are in areas often referred to as inshore areas. However, the *Offshore Decree* is stated to apply to both "inshore" and offshore areas and is to prevail in the event of inconsistency with any other law. More specifically:

- Section 3 ('Application') states that the *Offshore Decree* applies to all 'fishing and related activities' and to persons in 'Fiji fisheries waters'.
- 'Fiji fisheries waters' is defined in the *Offshore Decree* to include the internal waters, territorial seas, the archipelagic waters and the exclusive economic zone (EEZ) of Fiji.<sup>239</sup> These waters will capture marine *iQoliqoli*.
- The *Offshore Decree* has in fact been applied to regulate marine areas that are clearly within 'inshore' fisheries areas through the listing of 'restricted' and 'prohibited' areas under the *Offshore Decree*.<sup>240</sup>
- Section 5(4) of the *Offshore Decree* provides that 'the provisions of [the *Offshore Decree*] shall prevail in the event of inconsistency or incompatibility with any other law or instrument having the force of law in Fiji.'

Accordingly, there is an overlap in the jurisdiction of the *Fisheries Act* and the *Offshore Decree*. Some of the issues this overlap raises, and which should be subject to further consideration, include the following:

- (a) Which legislation under the Existing Legislation is most suitable for establishing MPAs within the various marine areas in Fiji?

- (b) If the Fisheries Act is used to establish MPAs within *iQoliqoli* areas is there potential for measures under the *Offshore Decree* to undermine those *Fisheries Act* MPAs?
- (c) Are any of the existing measures under the *Offshore Decree* and *Offshore Regulations* technically inconsistent with existing measures under the *Fisheries Act*? For example, do any of the restricted or prohibited areas under the *Offshore Decree* conflict with existing licences issued under the *Fisheries Act*?

The overlap in jurisdictions adds to the current confusion in relation to what is meant by the terms “inshore”, “coastal”, “nearshore”, and “offshore”. At the centre of the confusion is the difference between the way marine areas are defined under UNCLOS (which are reflected in the *Marine Spaces Act [Cap 158A]*) and the way marine areas are described by different stakeholders in Fiji. Under UNCLOS (and indeed the *Marine Spaces Act*, *Fisheries Act* and the *Offshore Decree*) “Fiji’s fisheries waters” includes (in addition to “internal waters”): Fiji’s “archipelagic waters” with baselines drawn in accordance with UNCLOS; Fiji’s territorial seas which are 12nm from those baselines; and, the EEZ which is the area up to 200nm from the outermost limits of the territorial seas. At the same time, in Fiji: the practice of the Ministry of Fisheries is to apply the *Fisheries Act* only to *iQoliqoli* areas and the *Offshore Decree* to all areas outside *iQoliqoli*; and further, while almost all *iQoliqoli* lie within archipelagic waters, some *iQoliqoli* may extend into the territorial sea.

Therefore, when terms such as “inshore”, “coastal”, and “nearshore” are used, it is not clear whether they refer to: *iQoliqoli* areas only (which include archipelagic waters and some territorial seas); archipelagic waters only; or, archipelagic waters and territorial seas. This confusion could be resolved if all stakeholders including the MoF were to agree on what marine areas are covered by terms like “inshore”, “coastal”, “nearshore”, and “offshore”. Whilst this confusion could be resolved through a policy decision by the MoF, it may be helpful to resolve these issues through legislative means.

### **(b) *The Marine Reserve Regulations***

The Marine Reserve Regulations, made under the *Fisheries Act*, are an example of an attempt to harmonise the *Fisheries Act* with other Primary Legislation, seeking to ensure that MPA protections are not compromised by decisions made under other legislation. The Marine Reserve Regulations do this by purporting to prohibit any development activity within the ‘coastal zone’ (defined as the area within 2 kilometres inland from the high water mark, including the area from the high water mark up to the Marine Reserve) unless first approved by the Department (now Ministry) of Fisheries. In other words, even if other Primary Legislation provides for the approval of an activity within the coastal zone (for example, logging approvals under the *Forestry Decree 1992*), the Marine Reserve Regulations purport to grant the Department of Fisheries a power to reject this approval.

There is a real question as to whether this purported power can be validly maintained in all foreseeable circumstances. In particular, the terms of s 25(b) of the *Interpretation Act* provide that subsidiary legislation cannot be inconsistent with the provisions of any Primary Legislation. Therefore, it is not clear that regulations made under the *Fisheries Act* (an Act whose purpose is ‘to make provision for the regulation of fishing’)<sup>241</sup> can validly prohibit activities that have been approved under other Primary Legislation.

## C. Governance and institutions

### vi. Institutional arrangements

For both the *Fisheries Act* and the *Offshore Decree*, the Minister responsible for MPAs is the Minister of Fisheries. In the case of the *Fisheries Act*, the task of establishing MPAs requires making or amending regulations under that Act and therefore sits with the Minister. In the case of the *Offshore Decree*, the power to designate MPAs sits with the Permanent Secretary.

However, beyond this the Existing Fisheries Legislation does not identify any MPA-specific governance arrangements. For example, the Existing Fisheries Legislation does not identify a particular ministerial unit, department or body that will or may have governance responsibilities specifically for MPAs.<sup>242</sup> Presumably, the governance arrangements applicable to MPAs will be those already applicable to fisheries more generally. MPAs, however, are a tool that go beyond merely managing fisheries. MPAs protect a range of matters within a specific area, (including, for example, historical and cultural features), and have the effect of enhancing marine and/or coastal biodiversity more broadly. These differences raise a question as to whether the existing governance arrangements that have been developed as fisheries management tools are suited to the task of effectively governing MPAs.

One issue for consideration is whether the MoF is the most appropriate ministry to manage MPAs. One alternative ministry is the Department of Environment (**DoE**), given the broad purposes of the EMA.

A further alternative could be to establish a separate and independent statutory authority or agency. The IUCN-based Recommendations do not explicitly recommend that MPAs be regulated by a separate and independent agency. However, the IUCN-based Recommendations do identify this option as being 'attractive for its independence and autonomy from the government' whilst retaining government oversight to ensure that the statutory authority operates in accordance with its mandate.<sup>243</sup> Establishing an independent statutory authority agency would require amending existing, or making new Primary Legislation and this highlights a further weakness of the Existing MPA Mechanisms.

It should be noted that the *National Trust for Fiji Act 1970* (**National Trust Act**) establishes the National Trust for Fiji (**National Trust**). There has been some discussion of whether the National Trust is an appropriate body to manage MPAs. Although the *National Trust Act* sets out broad powers of the National Trust, including to 'promote the permanent preservation for the benefit of the national lands (including reefs) ... having national, historic, architectural or natural interest or beauty', it is not clear that its power to acquire and manage lands extends to the marine environment. If it does not, then for the National Trust to be adopted as a viable MPA management authority, amendments to the *National Trust Act* would be necessary.

It should also be noted that together, s 11(1)(g) and s 15(1) of the EMA enable the NEC to require the DoE to facilitate the establishment of an environmental unit in a 'Ministry, department, statutory authority or local authority'. If regular meetings and activities of the NEC recommence, this power could be used to require the establishment of an environmental management unit in any ministry or agency (e.g. the MoF).

## vii. *Advisory bodies*

Neither the *Fisheries Act* nor the SLA establish or envisage an advisory body for MPAs (or any other relevant purpose) that could offer scientific and other advice to the Minister.

The *Offshore Decree* establishes the OFAC which has scope to provide advice to the government on MPAs. However, the OFAC is not specifically tasked with providing advice on MPAs and it is not ideally constituted for this purpose, with only minimal scientific and technical expertise. Its membership is also dominated by government representatives.

The *Offshore Decree* also enables the Permanent Secretary to appoint 'such committees as he or she determines necessary to advise or make recommendations on any areas under his or her authority'.<sup>244</sup> This power could be used to establish an MPA-specific advisory committee.

One of the strengths of this approach (i.e. appointing committees) is that it could offer the government meaningful input and insight into the establishment and management of MPAs. Its capacity to achieve this would be largely dependent on the composition of the committee or body, its powers and its resourcing. Another strength is that at least some form of committee, within limited powers, could be established without amending Primary Legislation.

One weakness of this approach is that the committee's powers will be limited by the terms of the *Offshore Decree*. It may be possible to maximise its potential impact by inserting more detailed provisions in Primary Legislation or regulations.

Importantly however, the NEC has already established the PAC under s 8(2) of the EMA. The purpose of committees established under s 8(2) is to advise the NEC 'on matters affecting environmental protection and resource management'. Notably, membership of the NEC is required to include representatives from various ministries and departments, including the MoF (s 7(1)). This creates a mechanism for advice provided by the PAC to the NEC to reach the MoF. The PAC was established in 2008. Notably, the PAC appears to be recognised by government as being responsible for providing advice and leadership on meeting the national goal of protecting at least 30% of Fiji's marine areas under a network of MPAs.

In addition, as noted earlier in this paper, a marine working group has been established within the PAC. This working group was established on the PAC's own initiative, suggesting that the PAC is aware that MPAs have qualities that warrant special consideration.

However, there are a number of points of note in relation to the PAC (and, by implication, the marine working group):

- (a) There is no legislative requirement to establish a PAC. Whilst the PAC has been validly established by the NEC using its powers under the EMA, the EMA does not mandate that an advisory body on protected areas be established.
- (b) There is no legislative requirement that the PAC, or any other advisory committee, specifically considers MPAs.
- (c) Membership of the PAC is not regulated by legislation. It appears that, in practice, membership of the PAC is essentially 'open'.<sup>245</sup> This may create vulnerability of the PAC to becoming overly representative of certain interest

groups and under-representative of others. Further, there is no guarantee that PAC members will be suitably qualified to provide appropriate technical advice.

- (d) The NEC's inactivity for an extended period of time from 2014 until recently has presented challenges for the PAC to effect change.

These factors indicate that there is scope for improvement in respect of the legal arrangements regarding the PAC. In particular, the existence of the PAC and the marine working group and their responsibilities with respect to MPAs could be embedded in statute by amending either the EMA, the Existing Fisheries Legislation, or by including relevant provisions in any new MPA specific legislation. Further, provisions to strengthen the operation of the NEC could also be introduced.

### **viii. Coordination and consultation with relevant stakeholders**

In relation to informal MPAs, the management roles and responsibilities established within *iQoliqoli* – either under customary *tabu* or LMMAs – overlap with the legislative jurisdiction of the MoF. As discussed briefly in Part 2.1, Provincial Councils play an important role in facilitating communication between *iTaukei* communities and the national government and this process can be used to support coordination of informal MPA measures and government policy and activity. However, these mechanisms are not specifically designed to ensure that government management decisions and activities do not undermine the measures taken by CFROs in relation to informal MPAs and vice versa.

Notably, LMMAs are specifically designed to be co-managed by CFROs and FLMMA partners, which can include government. Further, the (then) Department of Fisheries was formerly the FLMMA Secretariat and the Chairmanship of the FLMMA Secretariat is currently held by the Ministry of *iTaukei* Affairs. This again supports, but does not guarantee, coordination between relevant stakeholders.

In relation to formal MPAs, none of the existing legislative MPA mechanisms require or envisage coordination or consultation between relevant government agencies to ensure that activities authorised by different agencies are consistent with, and do not pose a threat to, MPAs. The OFAC does offer some scope for coordination. However, MPA governance is not one of its stated roles. If it is intended to be used for this purpose, its membership and processes should be reviewed for adequacy and potential improvements.

In relation to the SLA, there is no requirement for the DoL to consult with other departments or ministries before issuing foreshore leases or licences. This is particularly notable in relation to the MoF and is significant given that the MoF has clear jurisdiction to manage fisheries resources. This point is, however, subject to the exception that a proposed development activity may be subject to the EIA process. If so, no approvals can be granted in the relevant area until the EIA has been approved.

Despite the above weaknesses in the existing MPA legal framework, the PAC has provided a mechanism for coordination and consultation between relevant stakeholders. A 2010 workshop that was facilitated by the PAC provides a specific example of the PAC facilitating coordination and consultation between relevant stakeholders to progress the establishment of a comprehensive network of protected areas (including MPAs).<sup>246</sup>



Also notable is the PAC's current 10-year Action Plan, which has among other things, identified the following actions:<sup>247</sup>

- (a) liaising with a range of relevant ministries and departments (e.g. the Department of *iTaukei* Affairs and the (former) Department of Fisheries) in order to integrate protected areas management plans into 'Provincial Development Strategies and Plans';
- (b) the establishment of Environmental Management Units 'in each Government Department' as potentially operating 'as a platform for the integration of the Aichi Targets of CBD into Department programs and activities'; and
- (c) the '[e]stablishment of Conservation Units in each Provincial Office' as an important action to support Fiji to achieve its protected areas targets.

As already noted, however, the PAC's capacity to effect change has been affected by the NEC's long period of inactivity (see Part 3.5.3).

Also notable is another body established under the EMA, the NTROC. The NTROC has scope to support coordination and consultation specifically with *iTaukei* resource owners.

#### **ix. Enabling formal recognition of voluntary conservation areas**

The existing network of informal MPAs is, in effect, a network of voluntary conservation areas. A key strength of this network is that it implements traditional fisheries management tools and Community-Based Adaptive Management (**CBAM**) (particularly for LMMAs).

A comprehensive MPA legal framework should recognise the existing property rights and the conservation, livelihood and other relevant gains that have been made through these existing mechanisms and should maintain support for customary and community based management. To this end, it is notable that the PAC has identified as a necessary 'action' '[d]iversification of governance types and recognition of integrated community conservation areas (ICCA) through acknowledgment in national legislation or effective means of formal inclusion in national systems'.<sup>248</sup>

Although commercial fishing licences may contain conditions prohibiting fishing in declared *tabu*/no take areas, the Existing Fisheries Legislation does not provide for the formal recognition of voluntary conservation areas. Voluntary conservation areas may be formalised on a site by site basis using the MPA regulations under the *Fisheries Act* or by declaration of MPA sites under the *Offshore Decree*. However, this approach does not appear to be readily amenable to co-management and could effectively lock CFROs out of their *iQoliqoli* areas.

It should be noted that despite this, the *Offshore Decree* specifically recognises the role and rights of customary and small scale fishers in s 6 ('Principles and measures'). Since the *Offshore Decree* sets out only skeletal provisions about establishing MPAs, there may be scope to use regulations to 'fill in the details' and specifically provide for CFROs to play a central role in the process of recognising existing informal MPAs, as well as their ongoing management.

Bringing voluntary conservation areas like LMMAs into the formal legal system is one of the most pressing issues facing the coastal marine management in Fiji today. A range of options may be available and they will require extensive consultation and consideration before any particular approach is adopted. These options include the following:<sup>249</sup>

- (a) As discussed in Part 4, one option for formal recognition of voluntary conservation areas is by the government entering into conservation agreements with the relevant CFROs. Such agreements could incorporate co-management measures but the relevant authority would need a clear statutory power to be able to enter into conservation agreements that bind the government.
- (b) Incorporating appropriate provisions in existing acts, in particular the *Fisheries Act* or the EMA.
- (c) Incorporating appropriate provisions in new legislation, in particular:
  - new fisheries legislation, for example, the Draft Inshore Fisheries Decree and the provisions relating to customary fisheries management and development plans;
  - new MPA or protected areas legislation; or
  - separate legislation dealing specifically with voluntary conservation areas and LMMAs.

#### **x. Financial arrangements**

An effective MPA legal framework will require adequate resourcing to support the full spectrum of associated activities including, for example: identification of MPAs, developing management plans, monitoring and enforcement, education, and ongoing research.

A 2016 report commissioned by the PAC considered the available options for financing Protected Areas in Fiji and attempts to quantify the likely cost of protecting 30% of Fiji's marine environment (the **Financing Protected Areas Report**).<sup>250</sup> That report estimated the relevant costs as follows:<sup>251</sup>

- Inshore waters (identified as an area of approximately 30,000km<sup>2</sup> or around 2.3% of the total marine area): Establishment cost of approximately \$37.2 million; ongoing costs of approximately \$16.9 million annually.
- Offshore (archipelagic) waters<sup>252</sup> (identified as an area of approximately 125,000 km<sup>2</sup> or nearly 10% of the total marine area): Establishment costs of approximately \$12.3 million; ongoing costs of approximately \$1.9 million annually.
- Offshore (EEZ) waters (defined as an area of approximately 1.1 million km<sup>2</sup> or around 88% of Fiji's marine area): Data was not available to allow estimates to be calculated.

In the context of the significant anticipated costs, there is a clear need for substantial, reliable funding for MPAs. In this context, it is notable that neither the *Fisheries Act*, nor the *Offshore Decree*, nor the SLA identify or establish financial arrangements for MPAs. In relation to MPAs established under the SLA, it is also notable that the DoL is not resourced or equipped to undertake monitoring, compliance and enforcement activities in the marine environment. However, the PAC has identified in its 2014-2024 Action Plan the need to achieve 'sustainable financing' in order to achieve the national protected areas goals.<sup>253</sup>

The Financing Protected Areas Report reviews the legislative environment relevant to financing protected areas. The report should be referred to directly for closer analysis of the available financing options under legislation; this will require further legal analysis in order to identify and develop a preferred approach. Yet, for the purposes of this paper it is sufficient

to note the following:

- Important finance legislation in relation to expenditure of public moneys includes the *Constitution*, the *Financial Management Act 2014*, and the *Audit Act*. Importantly, the Constitution requires all 'public moneys' (a term which is defined in the *Financial Management Act 2014*) to be paid into the Consolidated Fund, unless that money is payable by law into any fund established for a specific purpose.<sup>254</sup> All such money (emphasis added).<sup>255</sup>

*whether in the Consolidated Fund or in a statutorily created fund for a specific purpose, may be withdrawn only by 'an appropriation made by law' ... i.e. law passed by Parliament. ... This means that expenditure of money covered by Section 141 [of the Constitution] can be expended only as a result of decisions by the ministers of government and approved by the legislature.*

However, the report suggests that money received 'from an aid donor for the advancement of a government environmental policy' probably does not require legislative approval prior to expenditure.<sup>256</sup>

- The following legislation is also particularly relevant:<sup>257</sup>
  - The *Airport Departure Tax Regulation 1986*, made under the *Airport Departure Tax Act 1986*, imposes a \$200 airport departure tax. This includes a \$10 environmental levy. The levy is to be paid into the Consolidated Fund. The report notes that there is some question as to whether the Act authorises the Minister to raise a levy for environmental purposes. Even if it does, the report notes that 'there is no indication or guarantee that such levy will, in the course of government appropriation, be devoted to environmental purposes'.
  - The *Environmental Levy Act 2015* imposes an environmental levy on persons conducting certain activities. The levy is paid into the Consolidated Fund and, again, '[t]here is no indication or guarantee that such levy will, in the course of government appropriation, be devoted to environmental purposes'. However, 'it could be a source of revenue if it were collected specifically for an Environmental Trust Fund and then paid directly into that fund and not into the government's Consolidated Fund'.

The Financing Protected Areas Report also discusses mechanisms that may be used for financing protected areas. To summarise, these include:<sup>258</sup>

- private initiatives, by establishing a trust deed;
- establishing charities under the *Charitable Trusts Act 1945* (Cap 67);
- utilising the National Trust, established by the *National Trust for Fiji Act 1970*;
- utilising the Fiji Public Trustee Corporation Limited to manage a trust under the *Fiji Public Trustee Corporation Act 2006*;
- the environmental trust fund, established under s 55 of the *Environment Management Act 2005*; and
- establishing a new statutory body for financing and management of protected areas.

Importantly, the report recommends that 'the best method for sustainable financing of protected areas (marine or terrestrial) in Fiji is a statutory trust in partnership with a donor or

coalition of donors'.<sup>259</sup> It also identifies that 'the critical issue for funding is that there be clear and robust management structures and the operations of those structures [must be] transparent'.<sup>260</sup>

In addition to analysing financing mechanisms, the Financing Protected Areas Report also identifies a range of sources and types of funding that could be used to finance protected areas. This list is set out in the extracted table below and could be used to inform the development of funding mechanisms for MPAs:

| Source                      | Mechanism   |
|-----------------------------|---|
| <b>Local</b>                | <ul style="list-style-type: none"> <li>• In-kind</li> <li>• Revenues – e.g. user fees</li> <li>• Community funds – e.g. fund raising, remittances</li> <li>• Local private partner - e.g. tour operators</li> </ul>   |
| <b>National</b>             | <ul style="list-style-type: none"> <li>• Budgetary allocation</li> </ul>  |
| <b>International</b>        | Donors – ODA (bilateral, multilateral) <ul style="list-style-type: none"> <li>• Budget support</li> <li>• Extra-budgetary fund - e.g. trust fund (endowment, sinking)</li> <li>• Project financing</li> </ul> Donors – NGOs, private foundations <ul style="list-style-type: none"> <li>• In-kind support – e.g. technical expertise, governance, community meetings</li> </ul> |
| <b>Innovative financing</b> | <ul style="list-style-type: none"> <li>• Environmental fiscal reform (e.g. environment levy)</li> <li>• Payment for ecosystem services (PES)</li> <li>• Biodiversity offsets</li> <li>• Markets for green products</li> <li>• Biodiversity in climate change funding</li> <li>• Biodiversity in international development finance</li> <li>• Debt swap</li> </ul>               |

Figure 2 Financing mechanisms and sources for protected areas. Source: Nimmo-Bell (2016) 36.

Key points to draw from the above discussion include the following:

- A comprehensive MPA network requires sustainable funding for which there are clear and robust management structures and operations.
- Financing options under the Existing MPA Mechanisms are limited. Importantly, money received and paid into the Consolidated Fund is not guaranteed to flow to MPAs. However, a policy commitment could be made to achieve this in practice. Further, use of international donations is probably not restricted in this way.
- It is not clear that the recommended approach of utilising a statutory trust for MPA financing could be achieved under the Existing MPA Mechanisms. This would depend, in part, on whether it was proposed to use an existing statutory trust or establish a new one. This requires further analysis. As discussed earlier, it is not clear whether the *National Trust Act* could be used for this purpose, without amendment.

#### **D. MPA management mechanisms and concepts**

- xi. Establishing a network of MPAs &**
- xvi. Systems planning and strategic planning**

A weakness of the MPAs already established in Fiji is that they do not form a cohesive 'network' of MPAs that operate 'cooperatively and synergistically'. This is, in part, due to the

absence of a comprehensive policy as well as the absence of mechanisms to encourage or require systems planning and strategic planning. It is also notable that all of the existing MPAs exist in inshore/coastal waters.

### ***xviii. Acquisition of rights and compensation***

Neither the *Fisheries Act* nor the *Offshore Decree* requires compensation for CFROs if establishing an MPA diminishes their customary rights.

Under the SLA, there has been a practice of compensating CFROs for loss of customary fishing rights associated with the grant of a foreshore lease. This practice has been accompanied by a view by the DoL that CFROs are also required to waive their customary fishing rights before a foreshore lease can be granted. As discussed earlier, it is not clear that compensation is strictly required by the SLA and waiver of rights by CFROs does not appear to be strictly necessary. Further, there have been reported issues of CFROs being dissatisfied with the compensation received relative to the loss associated with waiving their customary rights.

In relation to SLA licences issued to establish MPAs, the SLA does not require compensation for CFROs. However, compensation has been provided in practice in the case of the two SLA MPAs reviewed for the purposes of this paper.

### ***xx. Enabling various levels of protection and using management and zoning plans***

The *Fisheries Regulations* only creates scope for a single tool: a prohibition on fishing (subject to ad-hoc exemptions granted by the Commission at the Commissioner's discretion, and exemptions for some types of subsistence and artisanal fishing methods, e.g. fishing by hand net). It does not create scope for multi-zone MPAs or for an organised system of MPAs enabling different MPAs to be subject to different restrictions.

It may be possible for site-specific regulations under the Existing MPA Mechanisms to establish multi-zone MPAs. However, it is possible that such regulations would not get around the issues identified earlier, in Part 3.2, that is: (a) the measures or restrictions in such regulations may not apply to the exempted subsistence and artisanal fishing methods; and (b) it may be argued that the Commissioner would retain the power to grant ad-hoc exemptions to any restrictions in such regulations unless they explicitly state otherwise.

In contrast, although the *Offshore Decree* does not envisage MPAs with zones or different uses, it is likely that the regulation-making powers are sufficiently broad to enable site-specific MPA regulations made under the Existing MPA Mechanisms to incorporate zoning and varied uses.

It should be noted that non-governmental initiatives, with the endorsement of PAC, are piloting marine spatial planning in selected biodiversity hotspots of Fiji, namely the Vatu-i-Ra Seascape and the Great Sea Reef. In addition, Fiji's government in collaboration with the non-governmental organisations is working on the typology of protected areas, adapting to Fiji's context the protected areas categories defined by IUCN.

In relation to management plans, although some of the Existing MPA Mechanisms can involve developing MPA management plans, they are not *required*. The absence of a requirement to establish management plans – including minimum management requirements and content – may undermine conservation and sustainability outcomes.

Significantly, the PAC has identified the need for developing and revising management plans for all protected areas.<sup>261</sup>

### **xxiii. Environmental and social impact assessment**

The EMA requires an EIA process to be undertaken for development proposals where an approving authority has determined that the proposal will cause a significant environmental or resource management impact. There are also limited additional triggers for the EIA process (e.g. if the Minister forms the view that the development proposal is likely to cause public concern).<sup>262</sup> For proposed activities or undertakings that could 'harm or destroy designated or proposed protected areas', the EIA process must be undertaken by the EIA Administrator.<sup>263</sup>

The EIA process has a potential role in managing impacts on MPAs, however it has some limitations:

- (a) Even though certain proposed developments are required to undergo the EIA process, the EMA does not ultimately prevent the approval of activities or undertakings that are likely to harm or destroy MPAs. It also does not provide any guidelines as to when proposed activities or undertakings should not be approved.
- (b) The definition of 'development activities' to which the EIA process applies specifically excludes fishing activities. This significantly limits the extent to which the EIA process under the EMA can be used to protect MPAs. It further leaves the environmental impact assessment of fishing activities to the licensing process administered by the Ministry of Fisheries. However, the Ministry of Fisheries does not require any such assessments either under the *Fisheries Act* or *the Offshore Decree* before issuing fishing licences, leaving a significant gap in the regulatory framework.
- (c) Although harm to 'protected areas' is specifically identified as a trigger for assessment by the EIA administrator, 'protected area' is not defined in the EMA. It is described in some detail in Schedule 2 to the EMA, however this description could be clarified to ensure that it will capture all types of MPAs, including those going by another name. For example, it is unclear that the EIA process necessarily captures potential impacts on 'restricted areas' declared under the *Fisheries Act*.
- (d) The description of protected areas in Schedule 2 to the EMA also does not capture informal MPAs. This is significant when the vast majority of Fiji's MPAs are informal. This could probably be addressed by amending Schedule 2 of the EMA.
- (e) 'Harm' is not defined in the EMA, creating ambiguity as to what types of potential impacts on MPAs will or will not be captured by the EIA process.

Some of these issues could be addressed by the relevant Minister making regulations under his/her power in s 61(1) of the EMA to make regulations amending Schedule 1 or Schedule 2 of the EMA. Further, s 61(3)(e) also empowers the Minister to make regulations that establish guidelines, standards and procedures that apply to the EIA process. Before exercising this power, the Minister is required to consult with 'the relevant Minister responsible for Fijian Affairs, land, mineral resources, agriculture, fisheries, or forestry'. These powers could be used to strengthen the scope for the EIA process to prevent or

mitigate potential harm to MPAs. However, amendment to the EMA itself would be necessary in order to:

- (a) provide limits on when EIA's can or cannot be approved (e.g. to provide that a proposed activity or undertaking that is likely to cause significant harm to an MPA cannot be approved), and
- (b) amend the definition of 'development activities'.

## 6. Options for law reform

### 6.1 Three broad options

While the Existing Legislation enables the establishment of MPAs on an ad hoc basis, there are limitations with the Existing MPA Mechanisms. These weaknesses include harmonisation issues and the difficulty of establishing a network of MPAs in line with IUCN's guidelines. Further, MPAs are not being created that enable various levels of protection with management and zoning plans as MPAs are not just about limiting fishing activity.

Given these existing weaknesses there is a strong case for law reform. In these circumstances, there appear to be 3 broad options for proceeding:

- **Option 1: Making comprehensive MPA regulations** – Develop a comprehensive MPA legal framework by making detailed MPA regulations using the regulation making powers under the Existing Fisheries Legislation.
- **Option 2: Amending Existing Primary Legislation** – Develop a comprehensive MPA or protected areas legal framework by making amendments to Existing Fisheries Legislation and/or other existing Primary Legislation.
- **Option 3: Making New Primary Legislation** – Develop a comprehensive MPA framework by making new MPA or protected areas legislation.

Further work will be required to assess the viability of these options however some initial observations are provided below.

### 6.2 Option 1: Make comprehensive MPA regulations

Option 1 would involve making MPA regulations under the Existing Fisheries Legislation in order to establish a comprehensive MPA regime. Any new (formal) MPAs would then be established in accordance with the terms of the MPA regulation.

A number of preliminary observations can be made in relation to Option 1:

- Option 1 might be attractive as it offers a way to develop a more comprehensive MPA legal framework whilst avoiding the need to amend existing, or make new, Primary Legislation. However, the corollary of this is that regulations may not be as secure as Primary Legislation as they can be more readily amended.
- In developing regulations, it will be necessary to observe two broad requirements. First, regulations must comply with the general conditions imposed on the exercise of a regulation making power under section 25 of the *Interpretation Act 1967*. (For example, s 25(e) of *Interpretation Act* provides that penalties created by regulations cannot exceed \$400 and/or a term of imprisonment of six months, unless the parent Act explicitly permits it.) Second, regulations must not go beyond the scope of the power that has been specifically granted under the relevant Primary Legislation.
- The regulation making powers under the *Fisheries Act* and the *Offshore Decree* are quite broad and could be used to develop MPA regulations which address some of shortcomings of the Existing MPA mechanisms. However, most of the issues noted in Part 5 of this paper are likely to require legislative changes to be fully addressed. For example, amendments to existing or new Primary Legislation would be required to address harmonisation issues, establishing an independent agency for MPAs, securing financing arrangements for MPAs, providing for compensation to CFROs



and making amendments to the EIA process.

- In order to establish a comprehensive MPA network that spans both inshore and offshore waters, it may be necessary to make regulations under the *Offshore Decree* or both the *Offshore Decree* and the *Fisheries Act*. This is because the jurisdiction of the *Fisheries Act* only extends to inshore waters, whilst the *Offshore Decree* extends to both inshore and offshore waters.

### **6.3 Option 2: Amend Existing Primary Legislation & Option 3: Make new Primary Legislation**

Options 2 and 3 involve establishing a comprehensive MPA or protected areas framework through Primary Legislation. The most significant difference between Option 2 and 3 is that in the case of Option 2, the new MPA or protected areas framework would be inserted in Existing Fisheries Legislation and/or other existing Primary Legislation (e.g. the EMA). Option 3, on the other hand, involves establishing a new standalone legislation for MPAs or protected areas.

The following preliminary observations can be made in relation to Options 2 and 3:

- A fundamental question is whether any new regime will cover both terrestrial and marine areas, or simply be limited to marine areas.
- In terms of institutional options, given its conservation focus, it is possible that the DoE may be better placed to take responsibility for MPAs than the MoF.
- An analysis of Option 2 and 3 might include a consideration of the adequacy of the 'aquatic protected areas' provisions and the customary fisheries management and development plan (CFMDP) provisions of the Draft Inshore Fisheries Decree. The 'aquatic protected areas provisions' of the Draft Inshore Fisheries Decree are similar to the corresponding provisions of the *Fisheries Act*. Therefore, the analysis of the *Fisheries Act* contained in this paper will largely apply to those provisions. However, the CFMDP provisions of the Draft Inshore Fisheries Decree seek to establish a new system of recognising voluntary conservation areas such as LMMAs within the formal legal system. Accordingly, these CFMDP provisions will warrant close consideration.
- The introduction of any new MPA regime is likely to require a suite of consequential and complementary amendments to related legislation.

## 7. Determining a pathway forward

The analysis undertaken in this paper indicates that whilst there are some distinctive strengths of the Existing MPA Mechanisms, they do not form a comprehensive legal framework for MPAs. As a result, there appears to be a strong case for law reform.

Based on the preliminary observations in relation to Option 1 above, it appears that this option will not be able to address some of the key weaknesses of the Existing MPA Mechanisms. Therefore, in any further analysis of the options for law reform, it is likely that Option 2 or 3 will warrant close consideration. In any such analysis, the 2011 IUCN Guidelines and the IUCN-based Recommendations discussed in this paper will be useful for identifying key areas that amended or new legislation will need to address.

Any further work would also benefit from the findings of the legislative review undertaken with the support of the Marine and Coastal Biodiversity Management in Pacific Island Countries Project (**MACBIO Report**).<sup>264</sup> The MACBIO Report reviews policies and legislation relevant to MPAs in Fiji to identify areas of conflict, synergy and gaps. The MACBIO report is broader in focus than this paper and outlines policies, strategies, and plans relevant to MPAs at the international, regional, national and provincial levels whilst this paper examines in close detail the technical aspects of the Existing MPA Mechanisms by reference to the IUCN-based Recommendations. Further, the IUCN-based Recommendations presented in this paper provide a basis for developing a new MPA regime and critically analysing any new MPA regime which may be proposed. The papers exist as complementary resources. Relevantly, the MACBIO Report recommends that the Government of Fiji consider developing new legislation that specifically provides for MPAs, either through changes to existing legislation or developing new legislation.<sup>265</sup>

In addition, MPA legislation could be developed using the analytical framework outlined in FELA's publication, "Regulating Coastal Fisheries: Policy and Law Discussion Paper".<sup>266</sup> This framework views environmental laws as comprising 5 elements: goals, objects, principles, tools and mechanisms, and governance and institutions.<sup>267</sup>

In progressing any law reform program, it would be useful to develop a clear roadmap for reform in consultation with all relevant stakeholders. Any such roadmap may include the following components:

- **Protecting high priority conservation areas:** Whilst work is being undertaken to develop a comprehensive MPA framework, high priority conservation areas can be identified and protected, utilising the Existing MPA Mechanisms. These MPAs can then be transitioned into any new regime.<sup>268</sup>
- **Developing a comprehensive oceans or MPA policy:** Early policy development will inform and assist subsequent analysis and legislative drafting.
- **Determining the preferred approach to legislative reform:** Building on the present analysis, it would be appropriate for a further detailed analysis of Options 1, 2 and 3 to be undertaken. Once this further analysis is complete, the preferred approach to legislative reform can be determined following appropriate stakeholder consultation.
- **Drafting and implementation of new MPA or protected areas legislation:** Depending on the preferred approach to legislative reform, new MPA or protected areas legislation can be drafted and implemented in consultation with all key stakeholders. A key part of this process will be harmonising all related legislation.

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## Appendix A – Overview of key statutes relevant to establishing an MPA legal framework<sup>1</sup>

| Responsibility  | Description  |
|---|--|
| <b><i>The Existing Fisheries Legislation : The Fisheries Act &amp; the Offshore Decree</i></b>  |  |
| <b>Ministry of Fisheries<sup>2</sup></b><br><br><b>Minister of Fisheries</b>  | <p>The <i>Fisheries Act [Cap 158] 1942</i> and the <i>Offshore Fisheries Management Decree (No. 78 of 2012)</i> (in force 1 January 2013) are the principle laws regulating Fiji’s fisheries.</p> <p>The <i>Offshore Decree</i> was developed as one of three draft decrees, alongside a draft Inshore Fisheries Management Degree (<b>draft Inshore Decree</b>) and a draft Aquaculture Decree. It was intended that when all draft Decrees three were enacted, the <i>Fisheries Act</i> would be repealed. The draft <i>Aquaculture Decree</i> was recently (second half of 2016) introduced into Parliament,<sup>3</sup> however the draft Inshore Decree appears to have stalled. As a result, the <i>Fisheries Act</i> remains in force. In practice, it appears that the <i>Offshore Decree</i> now regulates ‘offshore’ fisheries and the <i>Fisheries Act</i> regulates the balance, and so both are likely to be necessary parts of any comprehensive MPA legal framework that establishes a network of inshore and offshore MPAs. However, as discussed in Parts 3 and 5 of the main paper, the terms of the <i>Offshore Decree</i> create some uncertainty around the jurisdiction of each of the statutes.</p> <p>Both the <i>Fisheries Act</i> and the <i>Offshore Decree</i> are discussed in more detail in Parts 3.2 and 3.3 of this paper (respectively).</p> |
| <b><i>The State Lands Act 1946</i></b>  |  |
| <b>Department of Lands<sup>4</sup> within the Ministry of Lands &amp; Mineral Resources<sup>5</sup></b><br><br><b>Minister of Lands &amp; Mineral Resources</b> | <p>The <i>State Lands Act [Cap 132] 1946 (SLA)</i> regulates the ownership and management of land that is owned or leased by the State. Relevantly, it creates mechanisms for granting leases and licences over crown land, including special provisions for foreshore leases.</p> <p>The SLA is described in more detail in Part 3.4 of the main paper. The SLA has already been used to establish two ad-hoc MPAs and there are two mechanisms under it that could in theory be used to establish MPAs. These are not considered to be feasible MPA mechanisms moving forward but do offer useful lessons for the future.</p>  |
| <b><i>Regulation of Surfing Areas Decree 2010</i></b>   |  |
| <b>Ministry of Industry, Trade and Tourism</b><br><br><b>Minister of Industry &amp; Trade and Tourism</b>   | <p>The objects of the <i>Regulation of Surfing Areas Decree (No. 35 of 2010) (Surfing Decree)</i> include promoting Fiji ‘as a premier surf travel destination’, to ‘liberalise access to any surfing area in Fiji for the purposes of tourism and recreation’, and ‘to enable unrestricted access to any surfing area by all persons ... engaged in providing and promoting <b>surfing or any water sport</b>’ (emphasis added).<sup>6</sup></p> <p>The <i>Surfing Decree</i> achieves these objectives by ‘providing for the cancellation of any lease, licence or any other instrument of title in relation to any surfing area’, ‘providing for any interest in any surfing area to be absolutely vested in the Director of Lands and on behalf of the State’, and ‘allowing for unrestricted access and use of any surfing area by any person’. ‘Surfing area’ is defined as “those reefs or other foreshore or offshore areas in Fiji, together with any surrounding areas which are used or utilized for surfing or any water sport.</p> <p>The <i>Surfing Decree</i> expressly prevails over any inconsistent law and the cancellation of any existing interests in surfing areas is not accompanied by a right</p>  |



| Responsibility   | Description  |
|--|--|
| <p data-bbox="188 640 325 696"><b>Ministry of Fisheries</b></p> <p data-bbox="188 748 325 804"><b>Minister of Fisheries</b></p> <p data-bbox="188 842 389 925"><b>[Also the Minister of Foreign Affairs]</b></p> | <p data-bbox="427 259 1418 349">to compensation by the existing rights-holder.<sup>7</sup> This includes any exclusive right of access by resort operators and their guests that may have been claimed on the basis of a foreshore or wet lease.</p> <p data-bbox="427 371 1418 524">Although there is no specific reference to the customary fishing rights in the Decree, the strong wording of the Decree does not seem to leave any doubt as to the implications on the rights of CFROs, and particularly on the legality of the practice of CFROs charging surf operators a fee for authorizing the use of their traditional fishing grounds.<sup>8</sup></p> <p data-bbox="628 568 975 607" style="text-align: center;"><b><i>Marine Spaces Act 1978</i><sup>9</sup></b></p> <p data-bbox="427 640 1418 882">The <i>Marine Spaces Act [Cap 158A] 1978</i> defines how Fiji's marine spaces (namely, Fiji's internal waters, archipelagic waters, territorial seas, exclusive economic zone (<b>EEZ</b>) and coastal shelf) are delineated.<sup>10</sup> The Act asserts sovereignty over Fiji's archipelagic waters and territorial seas, and to the airspace above and the seabed and subsoil underneath. The Act asserts Fiji's sovereign rights to the EEZ 'for the purposes of exploring and exploiting, conserving and managing the natural resources ... of the seabed and subsoil and the superjacent waters'.<sup>11</sup></p> |
| <p data-bbox="188 1021 325 1077"><b>Ministry of Fisheries</b></p> <p data-bbox="188 1144 325 1200"><b>Minister of Fisheries</b></p>  | <p data-bbox="616 954 991 992" style="text-align: center;"><b><i>Continental Shelf Act 1978</i></b></p> <p data-bbox="427 1010 1418 1189">The <i>Continental Shelf Act [Cap 149] 1978</i> states that 'continental shelf' means the 'seabed and subsoil of those submarine areas adjacent to the coasts of the islands of Fiji, but beyond the territorial limits of Fiji, to a depth of two hundred metres below the surface of the sea, or, beyond that limit, to where the depth of the superjacent waters admits of exploitation of the natural resources of those areas'. See also <i>Marine Space Act</i> s 7.</p> <p data-bbox="427 1211 1418 1301">The <i>Continental Shelf Act</i> empowers the Minister to designate areas of the continental shelf for exploration and exploitation of natural resources. Such exploration could negatively impact on MPAs.</p> <p data-bbox="427 1323 1418 1480">On the other hand, the Minister has the power to make regulations 'to prohibit or restrict exploration of any specified part of any designated areas or the exploitation of natural resources of the seabed or subsoil which could result in "unjustifiable interference" ... with the conservation of the living resources of the sea'.<sup>12</sup> This power could be used to protect MPAs.</p>   |
| <p data-bbox="188 1570 397 1659"><b>Ministry of Lands &amp; Mineral Resources</b></p> <p data-bbox="188 1693 325 1805"><b>Minister of Mines and Mineral Resources</b></p>  | <p data-bbox="687 1525 919 1563" style="text-align: center;"><b><i>Mining Act 1966</i></b></p> <p data-bbox="427 1570 1418 1603">All minerals, including crude oil in all lands are the property of the State.</p> <p data-bbox="427 1626 1418 1682">The <i>Mining Act [Cap 146] 1966</i> defines land to include water and land covered by fresh or seawater.<sup>13</sup></p> <p data-bbox="427 1704 1418 1794">MPAs may be affected by the detrimental impacts on water quality and fisheries of terrestrial mineral exploration and exploitation authorised at sea, on the foreshores or on land.<sup>14</sup></p> <p data-bbox="427 1816 1418 1939">The Mining Act does not make provision for considering environmental impacts when leases and licences are granted. However, the <i>Environment Management Act 2005</i> and the subordinate regulations require environmental impact assessment (EIA) of mining activities.</p>  |

| Responsibility   | Description   |
|--|---|
| <p><b>Ministry of Lands &amp; Mineral Resources</b></p> <p><b>Minister of Lands and Mineral Resources</b></p>                            | <p style="text-align: center;"><b>International Seabed Mineral Management Decree 2013</b></p> <p>The <i>International Seabed Mineral Management Decree (No. 21 of 2013)</i> regulates Fiji's application or sponsorship of an application of a body corporate to explore or exploit seabed mineral resources in areas beyond national jurisdiction.</p> <p>The Decree requires 'any person engaged in seabed minerals activities' to immediately cease seabed mineral activities if the International Seabed Authority issues evidence that proceeding will be reasonably likely to cause significant adverse impact to the marine environment, fisheries or conservation activities (s 32).</p>  |
| <p><b>Establishes the National Trust for Fiji and the Council of the Trust</b></p> <p><b>Controlled by the Ministry of Education</b></p> | <p style="text-align: center;"><b>National Trust for Fiji Act 1970<sup>15</sup></b></p> <p>The purpose of the National Trust is (s 3) (emphasis added):</p> <ul style="list-style-type: none"> <li>(a) <i>to promote the permanent preservation for the benefit of the nation of lands (including reefs) ... having national, historic, architectural or natural interest or beauty;</i></li> <li>(b) <i>the protection and augmentation of the amenities of any such land or building and their surroundings and to preserve their natural aspect and features;</i></li> <li>(c) <i>to protect animal and plant life; and</i></li> <li>(d) <i>to provide for the access to and enjoyment by the public of such lands, buildings and chattels.</i></li> </ul> <p>The Council of the Trust is responsible for arranging and managing the entire business of the Trust (s 6).</p> <p>One of the 'special powers' of the Trust is to enter into 'conservation agreements' with those who hold an interest in land. This power may create a mechanism for the government to enter into voluntary conservation agreements over customary land rights holders. However, this power does not appear to be relevant to CFROs as they do not own land (or reefs).</p> <p>However, the National Trust may also be relevant because it creates scope for protecting land – including reefs – if it has been identified as 'having national, historic, architectural or natural interest or beauty' (s 3(a)).</p> |
| <p><b>Ministry of Forests</b></p> <p><b>Minister of Forests</b></p>  | <p style="text-align: center;"><b>Forest Decree 1992 and the Forest Bill 2016</b></p> <p>Mangroves play an important role in coastal fisheries ecosystems and the harvesting of mangrove forests requires a licence under the Forest Decree. However, the Department of Lands, as representative of the State who owns the foreshores, has the lead role in the management of mangrove forests areas.</p> <p>Regulation of forests is also relevant in relation to the possible impacts of forestry activities on nearshore MPAs (although assessment and consideration of these impacts this may be captured largely or entirely under the EMA). Logging licences are issued by the Department of Forests, include licences to log mangroves.<sup>16</sup></p> <p>The Forest Bill (No. 13 of 2016) 2016 was tabled in Parliament in early 2016. However, it is yet to be enacted. 'Protection forests', one of the forest categories under the Bill, is defined so that it 'may also include' mangrove forests.<sup>17</sup></p>   |

| Responsibility   | Description  |
|--|--|
| <b>iTaukei Land Trust Board (TLTB)</b>                         | <p style="text-align: center;"><b>iTaukei Lands Act &amp; iTaukei Land Trust Act 1940</b></p> <p>Along with the Fisheries Act, the <i>iTaukei Lands Act &amp; iTaukei Land Trust Act</i> are 'among the most important pieces of legislation recognising and defining the limits of customary rights and traditional law'.<sup>18</sup> It should be noted that the definition of iTaukei land under those statutes does not include foreshore and inshore marine areas.</p>   |
|  | <p style="text-align: center;"><b>Maritime Safety legislation</b></p> <p>There are numerous statutes that regulate maritime safety and for which the Maritime Safety Authority of Fiji has responsibility. These include:</p> <ul style="list-style-type: none"> <li>• <i>Maritime Safety Authority of Fiji Decree (No. 2 of 2010)</i> (created the Authority and delegated powers to it)</li> <li>• <i>Maritime Transport Decree (No. 20 of 2013)</i></li> <li>• <i>Ship Registration Decree (No. 19 of 2013)</i></li> <li>• <i>Maritime (Navigation Safety) Regulations 2014</i></li> </ul> <p>The <i>Marine Transport Decree 2013</i> and regulations made under it (the <i>Maritime (Navigation Safety) Regulations 2014</i>) are the only laws identified for the purposes of this paper that specifically refer to MPAs and Marine Reserves (although they define neither). The regulations create the following specific obligations in relation to MPAs and Marine Reserves, breach of which incurs a significant penalty:<sup>19</sup></p> <ul style="list-style-type: none"> <li>• The Maritime Safety Authority must be notified of '<i>any MPAs or marine reserves applicable to Fiji waters that limit navigation of ships or that is to be protected by Ships Routeing Systems or Ships Reporting System</i>' (s 23(1)).</li> <li>• '<i>Proposals for Marine Protected Areas and Marine Reserves that will be affected by international shipping activities must be submitted to the International Maritime Organisation by the Authority for approval and must comply with the provisions of IMO resolution A.927(22)</i>'.</li> <li>• '<i>Proposals for Ships Routeing Systems or Ships Reporting Systems as a result of the declaration of marine protected areas or marine reserves must be submitted to the International Maritime Organisation by the Authority for approval and must comply with the provisions of IMO resolution A.572(14)</i>'.</li> <li>• '<i>Any declared marine protected area and marine reserve must be clearly marked on nautical charts and if possible marked with buoys</i>'.</li> <li>• '<i>Discharge from ships of any marine pollutant is prohibited in marine protected areas and marine reserves</i>'.</li> </ul> <p>The <i>Marine (Pollution Prevention and Management) Regulations 2014</i> also create general restrictions on the discharge of harmful substances.<sup>20</sup></p> |
| <b>Maritime Safety Authority of Fiji (statutory authority)</b> |  |

## Appendix B – Strengths and weaknesses analysis of developing MPAs under the current regulatory framework

| Strengths and weaknesses of the existing formal and informal MPA mechanisms  |   |   |   |  |
|--|---|---|---|--|
| IUCN-based Recommendations   | Informal MPA mechanisms (customary tabus and LMMAs)   | Fisheries Act (making site-specific Regulations under s 9)  | Offshore Decree (making site-specific Regulations under s 104)  | SLA licences and leases  |
| <b>A. Policy</b>   |   |   |   |  |
| <p><b>i. Comprehensive biodiversity and conservation policy</b></p> <p><i>A comprehensive marine and oceans policy is key to providing a sound foundation for protected areas legislation.</i></p>   | <p><b>Weakness</b></p> <p>There is no comprehensive oceans or MPA policy, to guide the establishment of informal MPAs.</p>                                |   |   |  |
|  | <b>B. Legislative drafting</b>  |   |   |  |
| <p><b>ii. Objectives</b></p> <p><i>Legislative objectives should spell out overarching or guiding objectives. For the IUCN, the primary objective of all protected areas should be the conservation of nature. This may not be appropriate for Fiji.</i></p> | <p><b>Weakness</b></p> <p>There is no legislation to set out overarching or guiding objectives</p>  | <p><b>Weakness</b></p> <p>There are no objectives in the <i>Fisheries Act</i>, other than a general statement in the long title of the Act that it is an Act 'to make provision for the regulation of fishing'.</p> | <p><b>Strength</b></p> <p>Although there are no MPA-specific objectives in the Offshore Decree, s 5 (Objective) incorporates conservation and long-term sustainable use as an objective of the Decree.</p> <p>Further, s 6 (Principles and measures) incorporates various principles that may support the development of an effective MPA network, including ensuring long term sustainability of fisheries resources and ensuring the participation of artisanal, subsistence and local community fishers in fisheries management.</p> | <p><b>Weakness</b></p> <p>There are no objectives in the SLA or SLR to guide the establishment of MPAs using SLA licences or leases.</p> |
|  | <p><b>Strength</b></p> <p>However, FLMMA's vision, goals and approach go some way to guiding the development and implementation of MPAs (LMMAs only).</p> |   |   |  |

| Strengths and weaknesses of the existing formal and informal MPA mechanisms   |  |   |  |                         |
|---|--|---|--|-------------------------|
| IUCN-based Recommendations  | Informal MPA mechanisms (customary tabus and LMMAs)  | Fisheries Act (making site-specific Regulations under s 9)  | Offshore Decree (making site-specific Regulations under s 104) | SLA licences and leases |
|   | <p><b>Strength - EMA</b><br/>It is apparent from section 3 of the EMA that the EMA it has a broader conservation focus than the Existing Fisheries Laws (in particular the Fisheries Act).</p> |   |  |                         |
| <p><b>iii. Harmonise legislation</b><br/><i>MPA legislation should operate harmoniously, or consistently, with all relevant laws.</i></p>                                     | -  | <p>Overlap of the jurisdiction of the <i>Fisheries Act</i> and the <i>Offshore Decree</i>: This creates ambiguity as to how the two interact and whether the Offshore Decree can or should be used to regulate coastal fisheries, in particular <i>iQoliqoli</i>.</p> <p>Marine Reserve Regulations These purport to require the Minister of Fisheries to approve activities impacting the 'coastal zone', however, the relevant provisions of the Marine Reserve Regulations may not be valid.</p> | -  |                         |
| <p><b>iv. Definitions and Interpretation</b><br/><i>The definition and interpretation provisions of MPA legislation should be carefully drafted.</i></p>                      | <p><b>Weaknesses</b><br/>There is no agreed definition of MPA.</p>   |   |  |                         |
| <p><b>v. Application</b><br/><i>MPA legislation should include provisions that clearly identify when it applies and its relationship with other, related legislation.</i></p> | -  | See comments above in relation to iii Harmonise Legislation.  |  | -                       |

| Strengths and weaknesses of the existing formal and informal MPA mechanisms  |  |   |  |   |
|--|--|---|--|---|
| IUCN-based Recommendations   | Informal MPA mechanisms (customary tabus and LMMAs)  | Fisheries Act (making site-specific Regulations under s 9)  | Offshore Decree (making site-specific Regulations under s 104)   | SLA licences and leases   |
| <b>C. Governance and institutions</b>  |  |   |  |   |
| <p><b>vi. Institutional arrangements</b></p> <p><i>Legislation should clearly establish MPA governance arrangements, including identifying a lead protected areas agency.</i></p>  | <p><b>Weakness</b></p> <p>There is no statutory authority or independent agency responsible for MPAs, nor a specific unit of the MoF that specialises in MPAs.</p>   |   |  |   |
|  | <p><b>vii. Advisory bodies</b></p> <p><i>Legislation should authorise the establishment of advisory bodies to provide the protected areas agency/government with advice on scientific and related matters.</i></p> | <p><b>Strength - EMA</b></p> <p>The National Environment Council (NEC) established the Protected Areas Committee (PAC) in 2008. It is recognised by the government as being responsible for providing advice and leadership on protected areas.</p> <p><b>Weakness - EMA</b></p> <p>However, there are some limitations to relying on the PAC in its current form as the sole advisory body for MPAs. In particular, whilst the PAC has been established by the NEC under the EMA, the EMA does not mandate the establishment of the PAC. Also, although the NEC is required under statute to meet four times per year, it has not met since the current National government took office in 2014.</p> |  |   |
| <p><b>Weakness</b></p> <p>There are no formal, State-sponsored advisory bodies to support or guide the establishment of customary MPA.</p> <p><b>Strength</b></p> <p>However, the FLMMMA Network offers advice and support to CFROs,</p> |  | <p><b>Weakness</b></p> <p>There is no provision under the <i>Fisheries Act</i> or the MPA regulations requiring or enabling the establishment of an MPA advisory body.</p>  | <p><b>Strength</b></p> <p>The <i>Offshore Decree</i> establishes the OFAC. The Minister could formally request that the OFAC provide advice about MPAs.</p> <p>The Permanent Secretary also has the power to appoint committees. This power could be used to establish an MPA-specific advisory committee.</p> <p><b>Weakness</b></p> <p>Membership of the OFAC is heavily weighted in favour of government representatives.</p> | <p><b>Weakness</b></p> <p>The SLA does not establish or envisage an advisory body to guide the establishment of SLA MPAs.</p> |

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|--|--|---|--|--|
| <p><b>viii. Coordination and consultation with relevant stakeholders</b><br/><i>Legislation should provide for coordination and consultation with relevant stakeholders.</i></p> | <p><b>Strength</b><br/>LMMAs are specifically designed to be co-managed by CFROs and FLMMA partners, which can include government.</p> <p><b>Weaknesses</b><br/>Whilst there is some coordination between CFROs and government through the FLMMA network, it is not systematic and it is not mandatory.</p> <p>Importantly, governance of customary <i>tabus</i> and LMMAs overlap with the MoF's statutory jurisdiction and there is no formal process for coordination between informal and formal management tools.</p> | <p><b>Weakness</b><br/>There is no requirement under the <i>Fisheries Act</i> or the MPA regulations for coordination between the MoF and other relevant government agencies.</p>   | <p><b>Weakness</b><br/>There is no requirement under the <i>Offshore Decree</i> for coordination or consultation between the MoF and other relevant government agencies in relation to MPAs.</p> <p><b>Strength</b><br/>However, the OFAC does create a mechanism for formal communication between relevant government agencies and scope for these agencies to have input into fisheries management issues.</p> | <p><b>Weaknesses</b><br/>There is no legal obligation for consultation with relevant departments (e.g. MoF), although in practice this usually happens.</p> <p>Notably, MoF has advised that its personnel were not consulted in the grant of the MPA SLA licence in Namotu.</p> |
| <p><b>ix. Legal status of proposed MPA sites and jurisdiction to establish MPAs</b><br/><i>Protected areas legislation should</i></p>  | <p><b>Weakness</b><br/>Jurisdiction and authority of CFROs is limited by lack of recognition under law. As a result, management measures</p>   | <p><b>Weakness</b><br/>As noted earlier in relation to Harmonisation, there is some uncertainty as to whether the <i>Offshore Decree</i> is intended to have jurisdiction over inshore fisheries, in particular <i>iQoliqoli</i>.</p> |  | <p><b>Weaknesses</b><br/>There is lack of clarity around the scope of the DoL's jurisdiction to regulate the marine environment. Although</p>  |

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|--|--|---|--|---|
| <p><i>carefully identify what types of land and/or marine areas over which protected areas can be established, and will need to identify mechanisms for bringing land/marine areas within the scope of this power.</i></p>                   | <p>can be undermined by legislation and government activities/decisions.</p>   |   |  | <p>the DoL has jurisdiction over the 'foreshore', it is not clear whether this incorporates the water (and marine environment) above foreshore land.</p> <p>DoL does not appear to have jurisdiction over waters beyond the foreshore.</p>  |
| <p><b>x. Enabling formal recognition of voluntary conservation areas</b></p> <p><i>Protected legislation should establish mechanisms for incorporating existing voluntary conservation areas into the formal protected areas system.</i></p> | <p><b>Strength</b><br/>The existing network of informal MPAs is, in effect, a network of voluntary conservation areas. Strength of the network of LMMAs is that it implements traditional fisheries management and Community Based Adaptive Management (CBAM).</p> <p><b>Weaknesses</b><br/>Legal recognition of <i>tabus</i> and LMMAs is very limited; the only scope is to seek inclusion of conditions in permits that reflect the management measures in the <i>iQoliqoli</i>. This is up to the discretion of the Commissioner and, even if included, they will not apply to all types of fishing by all people.</p> | <p><b>Strengths</b><br/>Site-specific MPA regulations or gazettal of restricted areas can be made to formalise pre-existing customary MPAs.</p> <p><b>Weaknesses</b><br/>The above mechanism is limited. Only two site-specific MPA regulations have been made and no restricted areas have been gazetted.</p> <p>Formalising customary MPAs by gazetting restricted areas or making new site-specific Regulations can replace customary rights and management or can create a perception that customary rights have been displaced. This may have consequences for community buy-in and effectiveness. Also, this approach may only be suitable for a limited number of sites.</p> <p>None of the MPA regulations made to date recognise or envisage scope of community based resource management in MPAs.</p> | <p><b>Weakness</b><br/>The <i>Offshore Decree</i> does not incorporate any mechanism for formal recognition of voluntary conservation areas.</p> <p><b>Strength</b><br/>However, s 6 of the <i>Offshore Decree</i> does specifically require consideration of the role and rights of customary and small scale fishers when decision-makers are making decisions/exercising powers under the <i>Offshore Decree</i>.</p> | <p><b>Strengths</b><br/>A distinct merit of SLA leases and licences is the statutory right conferred on the lessee or licensee. Where CFROs are the lessee or licensee, this right reinforces the CFRO's legal right of access that could otherwise be over-ruled by the grant of a development lease by DoL or a fishing licence by the MoF.</p> <p>Similarly, when CFROs obtain a lease or licence, governance and tenure stays with them rather than being transferred to the government as may occur in the case of MPA regulations under the <i>Fisheries Act</i> or <i>Offshore Decree</i>. This reinforces a sense of ownership and fosters stewardship of the MPA.</p> <p><b>Weaknesses</b><br/>However, the SLA does not require foreshore leases or licences to contain minimum content that reflects the IUCN-</p> |



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|   |  |   |   | based Guidelines.  |
| <b><i>xi. Co-management of MPAs</i></b><br><i>Legislation should recognise possibilities for co-management.</i>               | <b>Strength</b><br>Co-management is one of the key strengths of LMMAs, as FLMMA adopts an explicit co-management approach to LMMAs.<br><br><b>Weakness</b><br>However, informal co-management is neither mandatory nor systematic under law. | <b>Weaknesses</b><br>In the case of restricted areas, current practice is for CFROs to surrender the right to manage <i>iQoliqoli</i> (or the portion of it that is gazetted) to the State. The perceived loss of community ownership once areas are gazetted as restricted areas is one of the reported barriers to CFROs using the Fisheries Act to establish 'formal' MPAs. Further, observations have been made that gazettal can result in disengagement of communities resulting from loss of ownership and responsibility.<br><br>The Marine Reserve Regulations do not envisage or create scope for community-based control or decision-making, and require local communities to cede control they may have previously exerted over the MPAs. | <b>Weakness</b><br>The <i>Offshore Decree</i> does not incorporate provisions that require community based resource management.<br><br><b>Strength</b><br>However, two of the principles identified in s 6 of the <i>Offshore Decree</i> do provide some support for ensuring that CFROs participate in fisheries management and for maintaining 'traditional forms of sustainable fisheries management'. (However, as principles clauses these are likely to have limited enforceability). | <b>Strength</b><br>One of the distinct merits of the SLA mechanisms is the statutory right conferred on the CFRO as lessee or licensee. This reinforces the CFRO's legal rights of access and provides scope for (although doesn't guarantee) MPA co-management. |
|   | <b>Strength</b><br>The PAC has identified that developing and implementing a 'co-management framework' is a necessary element of its 10 year Action Plan to establish a comprehensive network of effective protected areas.                  |   |   |  |
| <b><i>xii. Financial arrangements</i></b><br><i>Legislation should provide for financial arrangements for MPA management.</i> | <b>Weakness</b><br>There is no statutory mechanism to ensure that customary MPAs are adequately resourced.   | <b>Weakness</b><br>There are limited human and financial resources within the MoF to support consistent, effective monitoring, compliance and enforcement activity.   | <b>Weakness</b><br>There is no policy or statutory provision that specifically identifies the need to provide resources for establishing and management MPAs.   | <b>Weakness</b><br>There is no policy or statutory provision that specifically identifies the need to provide resources for establishing and management MPAs.  |

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| <p><b>xiii. Public participation and good governance</b><br/> <i>Legislation should provide for appropriate opportunities for public participation and good governance.</i></p>   | <p><b>Strength</b><br/>                     FLMMA's processes incorporate some good governance principles (e.g. through the engagement and participation of local stakeholders).</p> <p><b>Weakness</b><br/>                     The decision to create customary <i>tabus</i> is not necessarily based on a consensus of all relevant/impacted CFROs (this problem is less likely to occur in relation to LMMAs).</p>   | <p><b>Weaknesses</b><br/>                     The <i>Fisheries Regulations</i> do not contain any detail stating who establishes MPAs and how, other than an inference that they are established by Gazettal and insertion into Schedule 5. This raises issues of transparency and public participation.</p>  | <p><b>Weaknesses</b><br/>                     The appeal provision (s 43) does not appear to apply to MPA designations.<br/><br/>                     It may be possible for the <i>Offshore Decree</i> to be used to regulate inshore fisheries and displace customary fishing rights and customary MPAs.</p>  | <p><b>Strength</b><br/>                     In the case of SLA leases, there is a legal obligation for public consultation and consideration of any objections submitted.</p> <p><b>Weakness</b><br/>                     SLA leases have been granted to tourism operators who have an interest in restricting public access.</p> |
| <p><b>D. MPA management mechanisms and concepts</b></p>   |  |   |   |  |
| <p><b>xiv. Ecosystem approach</b><br/> <i>Protected areas should be planned and managed applying the 'ecosystem approach'. There are 12 'principles' of the ecosystem approach that have been identified in the Convention on Biological Diversity.</i></p> | <p><b>Strengths</b><br/>                     Both customary <i>tabus</i> and LMMAs are community-based approaches to fisheries resource management and have strong elements of the ecosystems approach, including decentralised management and flexibility.</p> <p><b>Weakness</b><br/>                     Customary <i>tabus</i> can be lifted by chiefly decision. This can conflict with sustainable resource management. This is more likely to be an issue if a <i>tabu</i> has been declared for reasons that are not primarily</p> | <p><b>Weakness</b><br/>                     The <i>Fisheries Regulations</i> rely on a single management tool: a complete restriction on fishing. Even this tool is limited: in its current form, complete no-take zones cannot be established.<br/><br/>                     Although the Marine Reserve Regulations are a more nuanced tool than gazettal of restricted areas, scope for truly adaptive and comprehensive site-specific MPA regulations is limited by the scope of the regulation-making power in the <i>Fisheries Act</i>. The existing Marine Reserve Regulations do not contain any explicit measures to support or encourage adaptive MPA</p> | <p><b>Strengths</b><br/>                     The objectives (s 5(1)) and 'principles and measures' (s 6) clauses incorporate elements of the ecosystem approach.<br/><br/>                     'Conservation' is explicitly incorporated as an objective of the <i>Offshore Decree</i>.<br/><br/>                     Adaptive management is supported through, e.g.: s 6(l) which includes data collection as an element of the 'principles and measures' provision; and s 9(1)(g), which incorporates the promotion of fisheries research in the Director's functions and authorities</p> | <p><b>Strength</b><br/>                     SLA licences and leases could be designed to enable both collaborative and adaptive management.</p>  |

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|  | related to conservation.  | management.   | <p>Section 41 supports the approval of marine scientific research.</p> <p><b>Weakness</b><br/>                     Whilst it seems likely that the <i>Offshore Decree</i> can be used (and is being used) to regulate inshore fisheries, beyond some references to protection CFROs and traditional fisheries management in s 6, the Decree does not appear to address the interaction of inshore and offshore marine ecosystems.</p> |   |
| <p><b>xv. Establishing a network of MPAs</b><br/> <i>It is important to establish a network of MPAs that operate cooperatively and synergistically.</i></p> <p><b>xvi. Systems planning and strategic planning</b><br/> <i>Systems planning is a way to ensure that individual protected areas, and systems of protected areas, are developed and understood in context. Legislation should require a strategic plan to be developed and regulatory updated to operate as a 'long-range planning tool ... for MPA planning, establishment and management'.</i></p> | <p><b>Strength</b><br/>                     The FLMMA Network can be used to support the development of MPA networks and may be able to encourage a strategic planning approach to establishing MPAs.</p> <p><b>Weaknesses</b><br/>                     There is no government policy to drive or support the development of MPA networks or a strategy-planning approach to establishing MPAs.</p> <p>Customary MPAs are limited to <i>iQoliqoli</i> and so there is no scope for planning an MPA network that incorporates offshore waters.</p> | <p><b>Weaknesses</b><br/>                     There is no policy or statutory principles or mechanisms to require or encourage the establishment of a network of MPAs or to require/encourage strategic planning for MPAs.</p> <p>The MPAs made under the <i>Fisheries Act</i> and Marine Reserve Regulations to date do not form part of a comprehensive scheme or network of MPAs. They have been created on an ad hoc basis.</p> | <p><b>Weakness</b><br/>                     The <i>Offshore Decree</i> does not anticipate or identify the importance of developing a network of MPAs or taking a strategic planning approach to establishing MPAs.</p>   | <p><b>Weaknesses</b><br/>                     The MPAs made under the SLA licence provisions to date do not form part of a comprehensive scheme or network of MPAs. They have been created on an ad hoc basis.</p> <p>There is no policy or statutory mechanism to require or support the establishment of a network of MPAs or to require/encourage strategic planning for MPAs.</p> |

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| <p><b>xvii. Establishing MPAs</b><br/> <i>Legislation must require protected areas to be established and designated by law or other effective means.</i></p>   |   | <p><b>Weakness</b><br/> None of the existing formal MPA mechanisms incorporate a definition of an MPA nor establish a staged process for nominating, assessing, developing and establishing new MPAs.</p>  |  |  |
|  | <p><b>Strengths</b><br/> The establishment process for both customary <i>tabus</i> and LMMAs is flexible and relatively fast.<br/><br/> LMMAs are subject to various requirements (e.g. the development of management plans) that support LMMAs to achieve their management objectives.</p> | <p><b>Weaknesses</b><br/> The gazettal process is reportedly lengthy and cumbersome; this is a clear barrier to establishing MPAs using this mechanism.<br/><br/> No restricted areas have been gazetted under the <i>Fisheries Regulations</i>.<br/><br/> Only two MPAs ('marine reserves') have been created by making Regulations under the <i>Fisheries Act</i>.</p> |  |  |
| <p><b>xviii. Acquisition of rights and compensation</b><br/> <i>Legislation should set out a system for negotiation, acquisition of lands and just compensation. In cases where the area is subject to customary rights, legislation should require careful investigation and identification of rights and provide for compensation of any revocation or surrender of legally recognised rights.</i></p> | -   | <p><b>Weaknesses</b><br/> Neither the <i>Fisheries Act</i> nor the <i>Offshore Decree</i> require compensation to be provided to CFROs if establishing MPAs diminishes their customary rights.</p>   |  | <p><b>Strength</b><br/> In relation to SLA leases and licences, there has been a practice of requiring licensees to obtain a waiver of customary fishing rights and payment of compensation to CFROs.<br/><br/> <b>Weaknesses</b><br/> Although there has been a practice of requiring compensation to be paid to CFROs, this is not mandatory. Further, there have been reported issues of CFROs being dissatisfied with the compensation amount.<br/><br/> More generally, the practices of requiring a waiver for customary</p> |

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|  |   |  |   | fishing rights and payment of compensation can delay establishment.        |
| <p><b>xix. Interim protection</b><br/> <i>Legislation should enable MPAs to be protected during nomination, consultation and assessment phases.</i></p>  | -   | <p><b>Weaknesses</b><br/>           None of the existing formal MPA mechanisms offer interim protection for MPAs that are under a preliminary nomination or assessment stage.</p>  |   |  |
| <p><b>xx. Delineation of MPA boundaries</b><br/> <i>Legislation should require MPA boundaries to be clearly identified and demarcated.</i></p>   | <p><b>Weaknesses</b><br/>           The boundaries of customary <i>tabus</i> are sometimes unclear (unmarked or disputed). This can result in unintentional breaches of <i>tabu</i>.</p>  | <p><b>Strength</b><br/>           The Marine Reserve Regulations identify the marine reserve boundaries (including buffer zones) using maps in schedules to the Regulations. The Serua Shark Reef Marine Reserve Regulation also includes GPS coordinates of the Marine Reserve and buffer zone.</p> <p><b>Weaknesses</b><br/>           There are no statutory requirements as to minimum standards for delineating MPA boundaries.</p> | <p><b>Weakness</b><br/>           The <i>Offshore Decree</i> (and Regulations) do not impose any requirements on the delineation or identification of MPA boundaries.</p>   |  |
| <p><b>xxi. Enabling various levels of protection and using management and zoning plans</b><br/> <i>Legislation should recognise various levels of protection and require the development of management and zoning plans.</i></p> | <p><b>Strengths</b><br/>           LMMAs incorporate areas within MPAs that have different levels of protection and allowable uses.<br/>           LMMAs are required to develop and implement management plans.<br/>           Management measures adopted for informal MPAs are</p> | <p><b>Strength</b><br/>           In practice, the MoF has advised that it requires MPAs established under the <i>Fisheries Act</i> to have management plans.<br/>           It may be possible for site-specific regulations to establish multi-zone MPAs.</p> <p><b>Weaknesses</b><br/>           Although there is a practice of</p>  | <p><b>Strength</b><br/>           It is likely that site-specific MPA regulations could require management plans and establish multi-zone MPAs.</p> <p><b>Weaknesses</b><br/>           The <i>Offshore Decree</i> (and Regulations) does not mandate the use of management plans nor anticipate multi-use or zoned</p> | <p><b>Weaknesses</b><br/>           Management plans are not required.</p> |

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|   | <p>typically developed and communicated in ways that are accessible and relevant to community members.</p> <p><b>Weakness</b><br/>Customary <i>tabus</i> do not utilise formal management plans.</p> | <p>requiring MPAs to have management plans, this is not mandatory. There is also no formal guidance setting out minimum required content for management plans.</p> <p>The <i>Fisheries Act</i> only explicitly identifies a single tool: a complete restriction on fishing (subject to some exemptions) – it does not specifically envisage multi-zone MPAs. Similarly, it does not envisage an organised system of MPAs that incorporates MPAs that are subject to varying restrictions.</p> <p>Restricted areas only incorporate one type of restriction: no-take areas.</p> <p>The Marine Reserve Regulations do not incorporate varied use restrictions or zones. The one mechanism included that allows limited scope for multiple-uses is the scope to grant permission for scientific research.</p> | <p>MPAs.</p>  |   |
| <p><b>Strength</b><br/>However, it is notable that the PAC in its ‘Action Plan 2014-2024’ has identified the need for developing and revising management plans for all protected areas.</p> |  |  |   |   |
| <p><b>xxii. IUCN Protected Areas categories</b><br/><i>Legislation is recommended to use IUCN’s protected areas categories to guide the development of MPAs.</i></p>                        | <p><b>Weakness</b><br/>There is no system of categorising LMMAs according to the IUCN protected areas categories (or any other system of protected areas categories).</p>                            | <p><b>Weaknesses</b><br/>The <i>Fisheries Act</i> does not incorporate or envisage the development of categories of MPAs.</p>  | <p><b>Weaknesses</b><br/>The <i>Offshore Decree</i> (and Regulations) does not incorporate or envisage the development of categories of MPAs.</p> | <p><b>Weaknesses</b><br/>The SLA does not incorporate or envisage the development of categories of MPAs. However, for licences, licence conditions may create scope for creating different MPA ‘types’.</p> |

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| <p><b>xxiii. Environmental and social impact assessment</b><br/> <i>Legislation should provide for environmental and social impact assessments of activities that might impact protected areas.</i></p> | <p><b>Strength</b><br/>           There is a general requirement under the EMA that an environmental impact assessment (EIA) process be undertaken if a proposed development activity could 'harm or destroy designated or proposed protected areas'.<br/>           The Minister has the power to make regulations that establish guidelines, standards and procedures to apply to the EIA process. These could provide some redress for the weaknesses identified below.</p> <p><b>Weaknesses</b><br/>           Even if the EIA process finds that harm or destruction is likely to, or will, occur, a development can still be approved.<br/>           The definition of 'development activities' to which the EIA process applies specifically excludes fishing activities. This limits, to some extent, the EMA's capacity to protect MPAs.<br/>           'Protected area' is not defined in the EMA although guidance is provided in Schedule 2. It does not appear to include informal MPAs and may not capture MPAs if they are established under another name (e.g. as 'restricted areas').<br/>           'Harm' is also not defined in the EMA.</p> |  |  |  |
| <p><b>xxiv. Making further regulations</b><br/> <i>Protected areas should include a regulation-making power that will enable additional matters to be addressed in regulations.</i></p>                 | -   | <p><b>Weakness</b><br/>           All of the powers in relation to MPAs are contained in the regulations however those powers are unlikely to be sufficient to develop a comprehensive MPA legal framework that addresses all of the IUCN-based Recommendations.</p> | -  |  |
| <b>E. Compliance and enforcement</b>  |   |  |  |  |
| <p><b>xxv. Identifying regulated activities</b><br/> <i>Legislation should clearly identify regulated activities in or near designated areas.</i></p>   | -   |  |  |  |
| <p><b>xxvi. Enforcement, incentives and penalties</b><br/> <i>Appropriate enforcement,</i></p>  | <p><b>Strengths</b><br/>           Compliance and enforcement within CFRO communities is supported by customary</p>   | <p><b>Strengths</b><br/>           In cases where MPA measures are enforceable, the enforcement powers under the <i>Fisheries Act</i> can be</p>   | <p><b>Strengths</b><br/>           The Offshore Decree sets out in detail a broad range of enforcement powers. These are</p> | <p><b>Strengths</b><br/>           A CFRO licence may support the cohesion and strength of customary governance, thereby</p> |

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| IUCN-based Recommendations  | Informal MPA mechanisms (customary tabus and LMMAs)  | Fisheries Act (making site-specific Regulations under s 9)  | Offshore Decree (making site-specific Regulations under s 104)  | SLA licences and leases  |
|---|--|---|---|--|
| <p><i>incentives and penalties should be provided for in legislation.</i></p> | <p>governance and a sense of resource ownership.</p> <p>LMMAs incorporate monitoring activities.</p> <p>Management rules are developed by and for the CFRO community which increases the likelihood that they will be understood and respected by the community.</p> <p><b>Weaknesses</b><br/>Effective enforcement in customary MPAs is limited due to the lack of state sanctioned enforcement powers.</p> <p>Compliance and enforcement of customary <i>tabus</i> in particular is underpinned by respect for the chiefly system and spiritual beliefs. Erosion of traditional knowledge in younger generations reportedly results in non-compliance with <i>tabus</i>, both by members of the CFRO group and members of other communities.</p> | <p>utilised.</p> <p><b>Weaknesses</b><br/>However, the limited scope for statutory enforcement of MPAs is one of the reported reasons for CFROs being reluctant to formalise marine management under the <i>Fisheries Act</i>.</p> <p>There are recognised weaknesses with the system of 'honorary fish wardens'. In particular, it has been reported that honorary fish wardens encounter conflicts of interest.</p> <p>More generally, there are also reported difficulties obtaining full commitment from CFROs to enforcement under the <i>Fisheries Act</i> where enforcement measures may clash with customary practices and obligations.</p> <p>There are also only limited government resources available for enforcement purposes. For this reason, effectiveness is dependent upon the commitment of the entire local CFRO group to abide by the fishing Regulations.</p> | <p>more comprehensive than those in the <i>Fisheries Act</i>.</p> <p><b>Weaknesses</b><br/>The Offshore Decree does not address the issue of compliance and enforcement at the local community level.</p> | <p>supporting compliance and enforcement.</p> <p>When the licensee is a community, tourism operator, surfing operator, the police may assist with monitoring and enforcement.</p> <p>When the licensee is a tourism operator, resort staff and police may assist with monitoring and enforcement.</p> <p>Communities can assist with monitoring and enforcement when a <i>tabu</i> has been declared in the licensed area.</p> <p>SLA licences create scope for state-support in enforcement.</p> <p><b>Weaknesses</b><br/>Non-gazetted MPAs are not enforceable under fisheries legislation by fisheries officers or fish wardens.</p> <p>Although SLA licences create scope for state-support in enforcement, DoL is not resourced for enforcement in the marine environment.</p> <p>DoL is concerned with compliance by the lessee rather than breach by third parties.</p> |



| Strengths and weaknesses of the existing formal and informal MPA mechanisms   |  |   |  |   |
|---|--|---|--|---|
| IUCN-based Recommendations  | Informal MPA mechanisms (customary tabus and LMMAs)  | Fisheries Act (making site-specific Regulations under s 9)  | Offshore Decree (making site-specific Regulations under s 104)   | SLA licences and leases   |
|   | <p><b>Strength</b><br/>The EMA may provide scope to support and enhance compliance and enforcement measures for MPAs. For example, it is an offence under the EMA to contravene a term or condition of a permit or approval issued under the EMA.</p>  |   |  |   |
| <p><b>xxvii. Education, outreach &amp; public awareness</b><br/><i>Education and awareness building are important to an effective network of MPAs. Legislation should provide scope for this.</i></p> | <p><b>Strengths</b><br/>The FLMMA Network provides local communities with education, training and support.<br/>The FLMMA Network supports communities to develop locally appropriate management tools and communicate the management measures to communities in a comprehensible form.</p> <p><b>Weaknesses</b><br/>Communities relying solely on customary <i>tabus</i> are unlikely to have access to education, training and resources to support effective resource management. Further, without external support, traditional management measures lack the benefit of modern scientific expertise which can be complementary.</p> | <p><b>Weakness</b><br/>Neither the Fisheries Act nor the MPA regulations identify an educational or public awareness role by on the part of public officials or government.</p> | <p><b>Strength</b><br/>Section 9(1)(g) incorporates the promotion of fisheries training and education in the Director's functions and authorities.</p> | <p><b>Weakness</b><br/>The SLA does not identify an educational or public awareness role in relation to SLA MPA compliance on the part of public officials or government.</p> |

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## Glossary and Executive Summary

<sup>1</sup> Note: Section 107(1)(b) of the Revised Edition of the *Laws (Consequential Amendments) Act 2016* makes amendments to the *Interpretation Act 1967* which have the effect that any existing Decree or Promulgation may be referred to in any other law, document or legal proceeding, as an 'Act'. However, the provision does not formally change the name of all such Decrees and Promulgations to 'Acts'. In this paper, the original names of statutes have been used (e.g. this paper refers to the *Offshore Fisheries Management Decree*, rather than to the *Offshore Fisheries Management Act*).

<sup>2</sup> Ad Hoc Technical Expert Group on Marine and Coastal Protected areas (UNEP/CBD/SBSTTA/8/INF/7), as cited in Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting, 7th mtg, Agenda Item 18.2, UN Doc UNEP/CBD/COP/DEC/VII/5 (13 April 2004) para 10.

<sup>3</sup> Speech by the Minister of Foreign Affairs & External Trade and Head of the Delegation to the Review of the BPOA +10, the Honourable Minister Kaliopate Tavola, cited in Cristelle Prate and High Govan, *Our Sea of Islands Our Livelihoods Our Oceania, Framework for a Pacific Oceanscape: a Catalyst for implementation of Ocean Policy* (SPREP, 2010).

<sup>4</sup> Barbara Lausche, *Guidelines for Protected Areas Legislation* (IUCN, 2011) ('2011 IUCN Guidelines').

<sup>5</sup> However, the SLA was never designed as an instrument to regulate the marine environment (or MPAs more specifically). There are significant difficulties with seeking to use it for this purpose, including that it is unclear as to whether the Department of Lands has the jurisdiction or authority to regulate activities in waters and marine resources above the foreshore land and above the seabed beyond the foreshore. As a result, SLA leases and licences are not considered in this paper as offering a viable long-term mechanism for establishing a comprehensive network of MPAs. However, the SLA mechanisms may offer some important lessons that may be useful when developing the preferred legal framework for MPAs. For this reason, analysis of the SLA mechanisms has been included in this paper.

<sup>6</sup> See discussion in this paper relating to the following IUCN-based Recommendations: *viii. Coordination and consultation with relevant stakeholders; xi. Co-management of MPAs; xiv. The ecosystem approach; and, xxvii. Education, outreach & public awareness.*

<sup>7</sup> See discussion in this paper relating to the following IUCN-based Recommendations: *ii. Objectives; x. Enabling formal recognition of voluntary conservation areas; xi. Co-management of MPAs; vii. Advisory bodies; and, viii. Coordination and consultation with relevant stakeholders.*

<sup>8</sup> See discussion in this paper relating to the following IUCN-based Recommendations: *xi. Co-management of MPAs; xiii. Public participation and good governance; and, xviii. Acquisition of rights and compensation.*

<sup>9</sup> See discussion in this paper relating to IUCN-based Recommendation *xxiii. Environmental and social impact assessment.*

<sup>10</sup> See discussion in this paper relating to the following IUCN-based Recommendations: *vii. Advisory bodies; and, viii. Coordination and consultation with relevant stakeholders.*

<sup>11</sup> See discussion in this paper relating to IUCN-based Recommendation *i. Comprehensive biodiversity and conservation policy.*

<sup>12</sup> See discussion in this paper relating to IUCN-based Recommendation *iii. Harmonising legislation.*

<sup>13</sup> See discussion in this paper relating to IUCN-based Recommendation *vi. Institutional arrangements.*

<sup>14</sup> See discussion in this paper relating to IUCN-based Recommendation *viii. Coordination and consultation with relevant stakeholders.*

<sup>15</sup> See discussion in this paper relating to IUCN-based Recommendation *viii. Coordination and consultation with relevant stakeholders.*

<sup>16</sup> See discussion in this paper relating to IUCN-based Recommendation *x. Enabling formal recognition of voluntary conservation areas; and, xiii. Public Participation and good governance.*

<sup>17</sup> See discussion in this paper relating to IUCN-based Recommendation *xii. Financial arrangements.*

<sup>18</sup> See discussion in this paper relating to IUCN-based Recommendation *xv. Establishing a network of MPAs & xvi. Systems planning and strategic planning.*

<sup>19</sup> See discussion in this paper relating to IUCN-based Recommendation *xviii. Acquisition of rights and compensation.*

<sup>20</sup> See discussion in this paper relating to IUCN-based Recommendation *xxiii. Environmental and social impact assessment.*

<sup>21</sup> Jim Muldoon and Maria-Goreti Mauvesi, *Review of Legislation, Policies, Strategies and Plans Relating to the Development of Marine Protected Areas in Fiji* (MACBIO, 2016). The MACBIO Report reviews policies and legislation relevant to MPAs in Fiji to identify areas of conflict, synergy and gaps. The MACBIO report is broader in focus than this paper and covers in some detail the policies, strategies, and plans at the international, regional, national and provincial levels whilst this paper examines in close detail the technical aspects of the Existing MPA Mechanisms by reference to the IUCN-based Recommendations. Both papers exist as complementary resources for developing MPA frameworks in Fiji.

<sup>22</sup> Jim Muldoon and Maria-Goreti Mauvesi, above n 21, 9.

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<sup>23</sup> Fiji Environmental Law Association and EDO NSW, *Regulating Coastal Fisheries: Policy and Law Discussion Paper* (University of South Pacific Press, 2016).

<sup>24</sup> This framework is based on the analytical framework recently developed by the Australian Panel of Experts in Environmental Law (APEEL), APEEL, *The Foundations for Environmental Law: Goals, Objects, Principles and Norms – Technical Paper 1* (APEEL, 2017).

<sup>25</sup> Some priority MPA locations have already been identified in the Fiji National Biodiversity Action Plan and the Protected Areas Committee (PAC) has also identified priority marine eco region areas: Patrina Dumaru, *Integrated coastal management framework of the Republic of Fiji: Opportunities and issues for managing our coastal resources sustainably* (Department of Environment, 2011), 19.

## Main Paper

<sup>1</sup> See, e.g., Nigel Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (IUCN, 2008) 2.

<sup>2</sup> Hugh Govan, 'Community Conserved Areas: A Review of Status & Needs in Melanesia and Polynesia' (Review Paper, Indigenous Peoples' and Community Conserved Territories and Areas (ICCA), February 2009) Annex 1; Chris Pratt & Hugh Govan, *Our Sea of Islands - Our Livelihoods - Our Oceania, Framework for a Pacific Oceanscape: A Catalyst for Implementation of Ocean Policy* (Working Paper, Pacific Islands Forum Secretariat, November 2010), 21.

<sup>3</sup> Within the 'SIDS Action Platform', developed to support the follow up to the Third International Conference on Small Island Developing States (SIDS Conference), there are six identified 'priority areas'. One of these is 'Oceans, Seas and Biodiversity'. Within that priority area, Fiji has entered into a Partnership known as 'Sustainable Development of Marine Resources through Effective Management of 30% of its Seas by 2020'. Partners are the Wildlife Conservation Society (WCS), FLMMA, the World Wide Fund for Nature – South Pacific, the IUCN, Conservation International and the Waitt Foundation: see *Sustainable Development of Marine Resources through Effective Management of 30% of its seas by 2020*, UN Conference on Small Island Developing States 2014

<http://www.sids2014.org/index.php?page=view&type=1006&nr=2566&menu=1507>.

<sup>4</sup> Ad Hoc Technical Expert Group on Marine and Coastal Protected areas (UNEP/CBD/SBSTTA/8/INF/7), as cited in Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its 7th mtg, Agenda Item 18.2, UN Doc UNEP/CBD/COP/DEC/VII/5 (13 April 2004) para 10.

<sup>5</sup> Dudley, above n 1, 8.

<sup>6</sup> Govan and Jupiter note that the primacy given to nature conservation in IUCN definitions of MPAs 'sits ill with the bulk of functioning Pacific island protected areas that are driven by local aspirations to achieve sustainable livelihoods based on healthy resources': Hugh Govan and Stacey Jupiter, 'Can the IUCN 2008 Protected Areas Management Categories Support Pacific Island Approaches to Conservation?' (2013) 19(1) *Parks* 73, 76. See also: Stacey Jupiter et al, 'Filling the gaps: identifying candidate sites to expand Fiji's national protected area network' (Outcomes report from provincial planning meeting, Wildlife Conservation Society, 20-21 September 2010) 22.

<sup>7</sup> Graeme Kelleher (ed), *Guidelines for Marine Protected Areas* (IUCN, 1999). Note: the 1999 Guidelines have been superseded by the 2011 Guidelines (there are also a large range of other IUCN published documents that relate to protected areas regulation and management).

<sup>8</sup> A *tabu* or prohibition may be declared in a particular area, or for particular species, and may be of varied length.

<sup>9</sup> In addition to these mechanisms and those identified under the *State Lands Act 1946*, below, there are some other, more minor mechanisms that are not discussed in this paper, including scope for reefs to be protected under the *National Trust for Fiji Act 1970*.

<sup>10</sup> James Sloan and Kevin Chand, 'A Review of Near Shore, Fisheries Law & Governance in Fiji' (Siwatibau & Sloan, 2015).

<sup>11</sup> See, e.g., Fiji Environmental Law Association and EDO NSW, *Regulating Coastal Fisheries: Policy and Law Discussion Paper* (University of South Pacific Press, 2016), 21.

<sup>12</sup> *Constitution* s 28(1).

<sup>13</sup> *Constitution* s 26(8)(g).

<sup>14</sup> *Constitution* s 30(1); Sloan and Chand, above n 10, 5-6.

<sup>15</sup> Provincial Councils are established pursuant to ss 7-8 of the *iTaukei Affairs Act*. For a helpful overview of the structure of the government of Fiji, as outlined in the *Constitution*, see: Sloan and Chand, above n 10, 14-15. Sloan and Chand also identify government ministries and departments that are relevant to the governance of near shore fisheries: 15-16.

<sup>16</sup> Tikina can be established under the *iTaukei Affairs Act* or exist by virtue of law or custom that was in existence at the commencement of the *iTaukei Affairs Act* (s 2).

<sup>17</sup> Sloan and Chand, above n 10, 18.

<sup>18</sup> Under s 12 of the *iTaukei Affairs Act*, the Minister may, with the advice of the *iTaukei Affairs Board*, appoint a Roko of a province.

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- <sup>19</sup> Sloan and Chand, above n 10, 19. Sloan and Chand also go into further detail explaining the customary governance arrangements.
- <sup>20</sup> *iTaukei Affairs Act* s 6(1). See also Sloan and Chand, above n 10, 9.
- <sup>21</sup> *iTaukei Affairs Act* s 7(2).
- <sup>22</sup> The review of legislation in Appendix A draws in part on: *Review of Legislation, Policies, Strategies and Plans Relating to the Development of Marine Protected Areas in Fiji* (Supported by the Marine and Coastal Biodiversity Management in Pacific Island Countries (MACBIO) Project). A 2016 report (Nimmo-Bell (2016) *Options for sustainable financing for protected areas in Fiji* (Draft Report for the Wildlife Conservation Society and World Wide Fund for Nature, Suva, Fiji)) considers financing options for protected areas in Fiji and includes a brief overview of legislation specifically relevant to that issue. Legislation identified in that paper but not discussed in this paper includes: *Financial Management Act 2004*, *Audit Act [Cap 70]*, *Airport Departures Act 1986*, *Environmental Levy Act 2015*, *Charitable Trusts Act [Cap 67]* and the *Fiji Public Trustee Corporation Act 2006*.
- <sup>23</sup> Formerly known as the *Native Lands Act 1905*.
- <sup>24</sup> Jim Muldoon and Maria-Goreti Mauvesi, *Review of Legislation, Policies, Strategies and Plans Relating to the Development of Marine Protected Areas in Fiji* (MACBIO, 2016), 12. The need to undertake this process was identified in: *PAC Action Plan to Achieve Aichi Target 11*.
- <sup>25</sup> See, e.g. Sloan and Chand, above n 10, 9.
- <sup>26</sup> The size of *iQoliqolis* varies, and they are typically composed of several *mataqalis* (traditional land-owning unit). Each *mataqali* within a given *iQoliqoli* is allocated a particular area of the *iQoliqoli*. When a CFRO from another *mataqali* want to fish in an area other than that of his/her own *mataqali*, they have to formally request permission from the chief of that *mataqali*. (This was explained to FELA personnel by a CFRO from the Waivunia Marine Park in Savusavu). One of the benefits of LMMAs is they ensure consultation and support of all CFROs on a fisheries management plan and on the declaration of *tabus*, as well as continuous monitoring of the sites.
- <sup>27</sup> Hugh Govan and Semisi Meo, *The Way We Work Together: Guidelines for members of the FLMMA Network* (FLMMA, 2011).
- <sup>28</sup> The Department of Fisheries, the Department of Environment, the Ministry of iTaukei Affairs, and the iTaukei Affairs Board.
- <sup>29</sup> FLMMA, *Strategic Plan 2014-2018* (FLMMA, 2014) 5. See also the definition of 'Community-based adaptive management' adopted in Govan and Meo, above n 27, 17.
- <sup>30</sup> Govan and Meo, above n 27, 17.
- <sup>31</sup> Govan and Meo, above n 27, 17 (emphasis original).
- <sup>32</sup> FLMMA, above n 29, 4.
- <sup>33</sup> Govan and Meo, above n 27, 11-13.
- <sup>34</sup> Of the 410 registered *iQoliqoli* areas, 385 are marine *iQoliqoli* and 25 are freshwater *iQoliqoli*: Govan et al, *Locally-Managed Marine Areas: A guide for practitioners* (LMMMA Network, 2008) 2, cited in Erika Techera and Shauna Troniak, *Marine Protected Areas Policy and Legislation Gap Analysis: Fiji Islands* (IUCN, 2009) 29.
- <sup>35</sup> FLMMA, above n 29, 17.
- <sup>36</sup> Notably, the Act essentially carves out subsistence fishing, and some artisanal fishing, from the requirements to obtain licences and permits.
- <sup>37</sup> *Fisheries Act 1942 ('Fisheries Act')* s 13(1).
- <sup>38</sup> This is defined by the customary group known as *Vanua* or *Yavusa* which each *iTaukei* individual belongs to. See: Sloan and Chand, above n 10, 20, which provides a comprehensive explanation of the traditional system of resource ownership and rights, and its intersection with the modern governance system.
- <sup>39</sup> *Fisheries Act* s 13(1).
- <sup>40</sup> *Fisheries Act* s 5(3).
- <sup>41</sup> *Fisheries Act* s 5(3)(a).
- <sup>42</sup> *Fisheries Act* s 5(3)(b).
- <sup>43</sup> *Fisheries Act* s 13(1).
- <sup>44</sup> Annabelle Minter, *Compliance and Enforcement for Coastal Fisheries Management in Fiji* (IUCN, 2008), discusses the licence and permit provisions in the *Fisheries Act* at 13-15.
- <sup>45</sup> Fiji is divided into 4 administrative divisions: Northern Division, Central Division, Western Division and Rotuma.
- <sup>46</sup> *Fisheries Act* s 10(2)(a).
- <sup>47</sup> *Fisheries Regulations* reg 4(1).
- <sup>48</sup> The area of the reserve and the buffer zone is illustrated in a map located in the Schedule to the Regulations. The area of the reserve is rectangular in shape and the Schedule to the Regulations also gives the GPS coordinates of the boundaries of both the reserve and the buffer zone.
- <sup>49</sup> The area of the reserve and the buffer zone is illustrated in a map located in the schedule to the Regulations. The map does not include GPS coordinates but gives the total area of the proposed marine reserve as 16.389 square kilometres.

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<sup>50</sup> *Draft Inshore Fisheries Decree* s 19.

<sup>51</sup> *Draft Inshore Fisheries Decree* s 38.

<sup>52</sup> Fiji Environmental Law Association and EDO NSW, above n 11, pp 36-39.

<sup>53</sup> For a discussion of concepts of best practice fisheries management, see: Fiji Environmental Law Association and EDO NSW, above n 11.

<sup>54</sup> *Offshore Decree* ss 9(1)(i) and 8(1)(b), respectively.

<sup>55</sup> *Offshore Decree* ss 5 and 6, respectively.

<sup>56</sup> *Offshore Decree* s 5(1).

<sup>57</sup> *Offshore Decree* s 5(3).

<sup>58</sup> *Offshore Decree* s 5(3).

<sup>59</sup> *Offshore Decree* s 6.

<sup>60</sup> This section summarises key elements of the regulation-making provisions in the *Offshore Decree*, namely, ss 104 and 21. It is recommended that the reader refer directly to the legislation and the full text of these provisions, in particular s 104 which is a lengthy and detailed provision.

<sup>61</sup> *Offshore Decree* ss 7-9.

<sup>62</sup> *Offshore Decree* s 8(4).

<sup>63</sup> *Offshore Decree* s 8(1)(a)-(b).

<sup>64</sup> *Offshore Decree* ss 10-11.

<sup>65</sup> *Offshore Decree* s 12. Required members are the Solicitor General, and the ministries responsible for the Environment, Foreign Affairs, Finance, National Planning and Transport.

<sup>66</sup> *Offshore Decree* s 16.

<sup>67</sup> *Offshore Decree* s 2 (definition of 'fishery'): 'one or more stocks of fish or any fishing operation based on such stocks which can be treated as a unit for conservation and management purposes, taking into account geographical, scientific, social, technical, recreational, economic, and other relevant characteristics'.

<sup>68</sup> *Offshore Decree* s 17.

<sup>69</sup> *Offshore Decree* s 17(3)(f).

<sup>70</sup> *Offshore Decree* ss 45-75.

<sup>71</sup> *Offshore Decree* ss 68-73.

<sup>72</sup> *Offshore Decree* Part 9, s 97.

<sup>73</sup> *Offshore Decree* s 2 (definition of 'foreign fishing vessel'): 'any fishing vessel other than a Fiji fishing vessel'; 'Fiji fishing vessel' is defined to mean 'a vessel which is registered in Fiji under the *Marine Act 1986* and is operated and authorised to fish in accordance with Fiji law and includes a Fiji chartered fishing vessel'. 'Fishing vessel' means 'any vessel, ship or other craft which is used, equipped to be used or of a type that is normally used for fishing or related activities'. 'Vessel' means 'any boat, ship, hovercraft or other water-going craft which is used for or equipped to be used for or of a type normally used for fishing or related activities'.

<sup>74</sup> *Offshore Fisheries Management Regulations 2014* (Fiji) ('*Offshore Regulations*') reg 3(1). It should be noted, however, that the EMA does not contain any provisions that explicitly refer to declaring an area as 'prohibited'.

<sup>75</sup> *Offshore Regulations* reg 3(3).

<sup>76</sup> 'Internal waters' is not defined in the *Offshore Decree* or the *Offshore Regulations* and the authors have not identified any case law that considers the definition for the purposes of the *Offshore Decree* or *Offshore Regulations*. It seems likely that the definition set out in s 3 of the *Marine Spaces Act 1978* (Fiji) ('*Marine Spaces Act*') would apply. *Marine Spaces Act* s 3 (definition of 'internal waters'): 'the outer limits of the internal waters of Fiji shall be a line drawn along the low-water line of the coast of each island, provided nevertheless that in the case of islands situated on atolls or islands having fringing reefs the line shall be drawn along the seaward low-water line of the reef'. However, where the Minister draws 'closing lines' in accordance with s 3(2), then 'in the case of mouths of rivers, bays and permanent harbor works', the internal waters 'shall include all waters on the landward side of those closing lines'. This definition appears to be in accordance with Article 8 of *The United Nations Convention on the Law of the Sea*.

<sup>77</sup> Including those listed in reg 6(1).

<sup>78</sup> *Offshore Decree* ss 15 and 32. 'Fiji fisheries waters' is defined in s 2 as 'the internal waters, the archipelagic waters, the territorial sea, the exclusive economic zone and any other waters over which Fiji exercises its sovereignty or sovereign rights, and includes the bed and subsoil underlying those waters'.

<sup>79</sup> *Offshore Decree* s 31(1): fishing licences and authorisations shall not be issued unless a Mobile Transceiver Unit has been installed on the relevant vessel.

<sup>80</sup> Formerly the *Crown Lands (Leases and Licences) Regulations*.

<sup>81</sup> *State Lands Act* ('SLA') s 10. Such leases or licences are to be 'made out from and in the name of the Director of Lands for and on behalf of the Crown', with the person who holds the office of Director of Lands deemed to be the lessor or licensor while that person holds that office.

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<sup>82</sup> Note that 'land' is not defined in the SLA. It is defined in s 2 of the *Interpretation Act [Cap 7] 1978* (Fiji) ('*Interpretation Act*') : "land" includes messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure and description, and whatsoever may be the estates therein'. 'Land' is also defined in s 2(1) of the *Land Transfer Act 1978*: "land" includes land, messuages, tenements and hereditaments, corporeal and incorporeal, of every kind and description, together with all buildings and other fixtures, paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals and quarries, and all trees and timber thereon or thereunder lying or being unless any such are specially excepted'. The latter definition again does not include marine areas although it does include watercourses, which would capture e.g. streams or rivers flowing on land. In either case, neither of these definitions contradicts the interpretation of the DoL's jurisdiction over marine areas as described in this part.

<sup>83</sup> Notably, the definition of 'Crown land' makes a point of stating that Crown land includes 'the soil under the water of Fiji' but does not state that Crown land includes 'the waters of Fiji'. As noted above, 'land' is not defined in the SLA but is defined in s 2 of the *Interpretation Act* and s 2 of the *Land Transfer Act [Cap 131] 1978*.

<sup>84</sup> *Marine Spaces Act* s 3(1).

<sup>85</sup> *Marine Spaces Act* s 3(2).

<sup>86</sup> *Mellor v Walmesley* [1905] 2 Ch 162, cited in Hardinge Stanley Giffard Halsbury and Quintin Hogg Hailsham of St. Marylebone, Halsbury's Laws of England (Butterworths, 1<sup>st</sup> ed, 1973). 'Seashore or foreshore': at part 325. John Corkill, *Principles and Problems of Shoreline Law* (NCCARF, 2012) 14 confirms that this accords with the common law definition in Australia. *Tokyo Corporation v Mago Island Estate Limited* [1992] 38 FLR 25 confirms that when Fiji was ceded to Great Britain in 1874, the Deed of Cession surrendered possession of the foreshore to the state, and that ownership of land by others would capture land above the high water mark. However, this decision does not define 'foreshore' and research for this paper has not identified any other Fijian case law that does.

<sup>87</sup> Examples of the sorts of developments that DoL previously has issued licences and leases over in the foreshore include jetties, marina areas, integrated tourism development, gravel or sand extraction, MPAs, aquaculture, and harvesting mangroves: Thomas Fesau, 'Presentation at FELA's EIA Legal Training' (delivered at the Foreshore Unit, Department of Lands, 2014) <[www.fela.org.fj/presentations.html](http://www.fela.org.fj/presentations.html)>.

<sup>88</sup> *Fisheries Act* s 2.

<sup>89</sup> *Maritime Safety Authority of Fiji Act (No 2 of 2010)* s 36.

<sup>90</sup> *Marine Act 1986*, Long title.

<sup>91</sup> SLA Parts III, IV.

<sup>92</sup> *State Lands (Leases and Licences) Regulations* ('SLR') regs 29-43.

<sup>93</sup> SLR regs 29-30. These purposes are: grazing; the removal of sand, lime and common stone; the cultivation of annual crops; residence; and 'other' State land licences are commonly granted for activities such as gravel extraction or sand extraction from the sea.

<sup>94</sup> SLR regs 30(2), 31-42.

<sup>95</sup> SLR regs 14, 30(2), 41, 42.

<sup>96</sup> SLA s 14. There is some question as to the fees that can be charged to MPA licences since, whilst reg 14 provides that 'it shall be lawful for the Director of Lands to charge and collect in respect of the preparation and registration of any licence and for any matter in connection therewith such fees as may be prescribed.'

<sup>97</sup> FELA, Interview with the Department of Lands (January 2016).

<sup>98</sup> Issued under SLR reg 30(1).

<sup>99</sup> FELA, Interview with Director of Lands, William Singh, (10 March 2016).

<sup>100</sup> FELA, Interview with Mr Scott O'Connor, Managing Director, Namotu Island Resort, (Telephone, 30 March 2016). This licence has not been sighted by the authors.

<sup>101</sup> Department of Fisheries, Pamphlet produced by NaiVuaTolu Cooperative Community.

<sup>102</sup> The Cakaudrove Provincial Development Board is an initiative of the government under the Ministry of Rural & Maritime Development and Disaster Management. The Cakaudrove Provincial Development Board discusses, prioritises and monitors all development projects that pass through the Village and Tikina Council meetings that are below Fiji \$50,000: Email correspondence between FELA and the Cakaudrove Provincial Council, 21 February 2017.

<sup>103</sup> As noted earlier, a *Tikina* is a District. A *Tikina Cokovata* can be a combination of districts that have a common traditional reference or name.

<sup>104</sup> SLR reg 7: Agricultural, residential, commercial, grazing, industrial, dairying, tramway, quarry and special leases.

<sup>105</sup> SLR regs 13-21.

<sup>106</sup> SLR reg 20.

<sup>107</sup> SLR regs reg 21.

<sup>108</sup> SLA s 22.

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<sup>109</sup> Fesau, above n 87.

<sup>110</sup> The public notice requirement, SLA s 21(2), requires that ‘the substance of the lease together with a sufficient description of the property intended to be comprised therein, shall be inserted by the applicant, with the prior approval of the Director of lands – (a) in two consecutive issues of the ordinary Gazette; and (b) twice, within seven days of the first issue, in a newspaper circulating in Fiji.’

<sup>111</sup> SLA s 21(1).

<sup>112</sup> SLA s 21(1).

<sup>113</sup> SLA s 22(3).

<sup>114</sup> This practice appears to have been instituted by a decision of Cabinet that was recorded in two Fiji government cabinet papers in 1974 and in 1978 at a time that the Fiji government was keen to encourage resort and tourism development in Fiji: Sloan and Chand, above n 10, 9.

<sup>115</sup> Repeka Nasiko, ‘Leases not processed correctly’, *Fiji Times* (online), 4 February 2015 <<http://www.fijitimes.com/story.aspx?id=293952>>.

<sup>116</sup> J Sloan and K Chand “An analysis of property rights in the Fijian qoliqoli” *Marine Policy Journal*, Volume 73 October 2016, pages 76-81.

<sup>117</sup> SLA s 22(1).

<sup>118</sup> FELA, Interview with the Department of Lands’ Foreshore Unit (18 January 2016).

<sup>119</sup> Fesau, above n 87.

<sup>120</sup> *Environment Management Act 2005* (Fiji) (‘EMA’), long title.

<sup>121</sup> Muldoon and Mauvesi, above n 24, 12; Jupiter, above n 6, 50.

<sup>122</sup> They are: (a) to approve the National Report [see s 23]; (b) to approve the National Environment Strategy; (c) to monitor and oversee the implementation of the National Environment Strategy; (d) to facilitate a forum for discussion of environmental issues; (e) to make resolutions on public and private sector efforts on environmental issues; (f) to ensure that commitments made at regional and international fora on environment and development are implemented; (g) to advise the government on international and regional treaties, conventions and agreements relating to the environment; and (h) to perform any other functions conferred under this Act or any other written law.

<sup>123</sup> EMA s 8(2).

<sup>124</sup> EMA s 8(3).

<sup>125</sup> *Fiji National iTaukei Resource Owners Committee (NTROC) launched* (1 August 2014) REDD+ Fiji <<http://fiji-reddplus.org/content/fiji-national-itaukei-resource-owners-committee-ntroc-launched>>.

<sup>126</sup> FELA, Conversation with Ms Sarah Tawake, Acting Principal Environment Officer, Department of the Environment (21 February 2017). Note: As discussed elsewhere, the NEC has not convened a meeting since the current national government took office in 2014.

<sup>127</sup> EMA s 10(1).

<sup>128</sup> Jupiter, above n 6, 4.

<sup>129</sup> Terms of Reference for the National Protected Areas Committee (PAC): A Technical Committee for the National Environment Council (2009). See also Jupiter, above n 6, 4, citing *Protected Area Committee Report 2009* to the National Environment Council.

<sup>130</sup> PAC, ‘Action Plan 2014-2024’.

<sup>131</sup> ‘Approving authority’ is defined in s 2 as ‘in respect of a development proposal, ... a Ministry, department, statutory authority, local authority or person authorised under a written law to approve the proposal’: EMA s 2.

<sup>132</sup> EMA s 27.

<sup>133</sup> Techera and Troniak, above n 34, 27.

<sup>134</sup> ‘Significant environmental or resource management impact’ is defined in s 2 of the EMA as ‘an impact on the environment, either in the context of the setting of the proposed development or in the context of the intensity of the proposed development’s effect on the environment, and includes,...’ (this is followed by a long list of examples including, e.g. ‘(a) the degree to which public health and safety are affected; ... (f) the potential for cumulative environmental impacts; ... (j) the degree to which fish and wildlife resources of ecological, commercial, subsistence and recreational importance are jeopardised...’).

<sup>135</sup> EMA s 12(3)(b)-(c).

<sup>136</sup> EMA s 27(5).

<sup>137</sup> EMA s 28(1).

<sup>138</sup> EMA s 30(2).

<sup>139</sup> EMA s 31(1).

<sup>140</sup> EMA ss 61(1)(h)), 61(3)(a), 61(3)(d). Note: Regulations made under s 61(3) cannot be made until the Minister has first consulted ‘the relevant Minister responsible for Fijian Affairs, land, mineral resources, agriculture, fisheries, or forestry’: s 61(3).

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<sup>141</sup> Barbara Lausche, *Guidelines for Protected Areas Legislation* (IUCN, 2011) ('2011 IUCN Guidelines'). The 2011 IUCN Guidelines are broadly consistent with the 16 concepts identified in FELA's recent coast fisheries paper: Fiji Environmental Law Association and EDO NSW, *Regulating Coastal Fisheries: Policy and Law Discussion Paper* (University of South Pacific Press, 2016). These concepts specifically focussed on fisheries issues, however, they are broadly relevant to MPAs. They are: (1) Obligation of States to protect and preserve the marine environment; (2) The ecosystem approach; (3) Community based resource management; (4) Integrated marine and coastal areas management; (5) The precautionary approach; (6) Adaptive management; (7) Best available science; (8) Research, data collection and analysis; (9) Effective legal and administrative frameworks; (10) Protecting the rights of small-scale fishers and CFROs; (11) Addressing identified target-issues; (12) Marine and coastal protected areas; (13) Management plans; (14) Monitoring, compliance and surveillance (MCS) and enforcement; (15) Maximum sustainable yield; (16) Providing education, training, resourcing and support to communities.

<sup>142</sup> The 2011 IUCN Guidelines significantly expanded upon a previous IUCN publication, which set out recommended minimum content for MPA legislation: Kelleher, above n 7.

<sup>143</sup> Kelleher, above n 7.

<sup>144</sup> Barbara Lausche, above n 141.

<sup>145</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 253; An example of a large MPA that is characterized by multiple use zones and is regulated under a single, subject-specific piece of legislation is the Australian Great Barrier Reef, regulated by the *Great Barrier Reef Marine Park Act 1975* (Cth).

<sup>146</sup> Lausche, *2011 IUCN Guidelines*, above n 141, xi.

<sup>147</sup> Kelleher, above n 7, 11.

<sup>148</sup> All page-references in the following list are references to the 2011 IUCN Guidelines, above n 143.

<sup>149</sup> This paper does not assess the existing fisheries statutes for their ability to regulate MPAs that extend outside of Fiji's waters, although this is an issue that should be considered, noting that Fiji shares maritime boundaries with many other Pacific Island Countries and Territories.

<sup>150</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 214-15.

<sup>151</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 218.

<sup>152</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 219. For a discussion of these complex rights from a property law perspective, see J Sloan and Kevin Chand, "An analysis of property rights in the Fijian qoliqoli" *Marine Policy Journal* Volume 72, October 2016, pages 76-81.

<sup>153</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 220.

<sup>154</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 244.

<sup>155</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 199.

<sup>156</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 4.

<sup>157</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 120-1.

<sup>158</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 264.

<sup>159</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 111-12.

<sup>160</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 114-16.

<sup>161</sup> If Fiji adopts a definition of MPA that allows for primary objectives other than, or in addition to, conservation, such a provision could identify other specific types of conflicts that result in MPA legislation prevailing.

<sup>162</sup> The IUCN published a governance-specific manual: Borrini-Feyerabend et al, *Governance of Protected Areas: From understanding to action (Best Practice Protected Area Guidelines Series No. 20)* (IUCN, 2013). It describes four 'Governance Types': Governance by government (Type A), Shared governance (Type B), Governance by private actors (Type C), Governance by indigenous peoples and local communities (Type D).

<sup>163</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 125, 250.

<sup>164</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 92.

<sup>165</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 125-6.

<sup>166</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 127.

<sup>167</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 124-5.

<sup>168</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 129.

<sup>169</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 128.

<sup>170</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 134-5.

<sup>171</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 134.

<sup>172</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 136.

<sup>173</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 136.

<sup>174</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 136.

<sup>175</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 252.



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- <sup>176</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 252. Broader public consultation and participation is also addressed in IUCN-based Recommendation *xiii. Public participation and good governance*.
- <sup>177</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 140-2.
- <sup>178</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 141.
- <sup>179</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 81.
- <sup>180</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 76.
- <sup>181</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 8.
- <sup>182</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 85, citing IUCN World Parks Conference, *Decision v/26*, IUCN-WPC/2003/v/26, (2003). also further discusses the IUCN-WCPA Guidelines 'and associated literature' as elaborating on these characteristics.
- <sup>183</sup> The 2011 IUCN Guidelines provide that voluntary conservation areas must satisfy the long-term conservation requirement to fit the IUCN-WCPA definition. However, for the purposes of this paper the test suggested for application is whether the area fits within the CBD definition of MCPA, quoted in the Introduction.
- <sup>184</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 80.
- <sup>185</sup> See Fiji Environmental Law Association and EDO NSW, above n 11.
- <sup>186</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 172.
- <sup>187</sup> It is relevant to note that Fiji's draft *Inshore Fisheries Decree* [Third Draft for National Consultation] proposes the introduction of a new legislative mechanism called 'customary fisheries management and development plans' (CFMDPs). As currently drafted, this mechanism lacks some of the elements of a conservation agreement. However, it does offer at least the beginnings of a related mechanism for recognising existing voluntary conservation areas in Fiji. There are also a number of specific weaknesses with this mechanism, as currently drafted. However, with further development, the CFMDP mechanism may be an option for formal statutory recognition of voluntary conservation areas. The strengths and weaknesses of CFMDPs are discussed further in: FELA and EDO NSW, above n 11. One of the approaches raised in that discussion paper, as a way to strengthen the CFMDP mechanism, is to develop a formalised certification system for MPAs prior to formal recognition under legislation.
- <sup>188</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 89.
- <sup>189</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 89-91.
- <sup>190</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 133, 252.
- <sup>191</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 133.
- <sup>192</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 203-6, 263-4.
- <sup>193</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 203.
- <sup>194</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 42.
- <sup>195</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 40.
- <sup>196</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 43; Dudley, above n 1.
- <sup>197</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 43.
- <sup>198</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 3.
- <sup>199</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 23.
- <sup>200</sup> *Convention on Biological Diversity (CBD)*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); Conference of the Parties to the Convention on Biological Diversity, *Decision v/6: Ecosystem Approach*, 5<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/5/23 (15-26 May 2000) 103-109; Conference of the Parties to the Convention on Biological Diversity, *Decision VIII/11: Ecosystem Approach*, 7<sup>th</sup> mtg, Agenda item 19.4, UN Doc UNEP/CBD/COP/DEC/VII/11 (13 April 2004) annex 1.
- <sup>201</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 246.
- <sup>202</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 246.
- <sup>203</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 138, 249-250. As noted in the 2011 IUCN Guidelines, 'the Ninth meeting of the Conference of the Parties to the CBD, in 2008, went considerably further with its guidance on MPAs, adopting a decision that essentially defined what would comprise a network of MPAs (CBD COP 2008 IX/20). This decision contains scientific guidance on the required properties and components for a site to be part of an MPA network, including in open-ocean waters and deep-sea habitats': Lausche *2011 IUCN Guidelines*, above n 141, 233.
- <sup>204</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 138, 141.
- <sup>205</sup> "Marine Spatial Planning." *UNESCO Marine Spatial Planning Initiative* 2014. [http://www.unesco-ioc-marinesp.be/marine\\_spatial\\_planning\\_msp](http://www.unesco-ioc-marinesp.be/marine_spatial_planning_msp).
- <sup>206</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 149.
- <sup>207</sup> As discussed elsewhere, Fiji may prefer to adopt its own definition of 'Protected Area' and MPA if the IUCN definition is not contextually appropriate.
- <sup>208</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 150.

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- <sup>209</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 157.
- <sup>210</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 158.
- <sup>211</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 156-7.
- <sup>212</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 154.
- <sup>213</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 155.
- <sup>214</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 255.
- <sup>215</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 163.
- <sup>216</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 163. The pages immediately following this discuss general drafting considerations, management plan requirements and management plan content.
- <sup>217</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 167.
- <sup>218</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 25-8.
- <sup>219</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 201-2.
- <sup>220</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 206.
- <sup>221</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 174.
- <sup>222</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 174.
- <sup>223</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 174.
- <sup>224</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 174.
- <sup>225</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 174.
- <sup>226</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 174.
- <sup>227</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 188-93.
- <sup>228</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 193.
- <sup>229</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 193.
- <sup>230</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 194.
- <sup>231</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 194.
- <sup>232</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 195.
- <sup>233</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 196.
- <sup>234</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 222.
- <sup>235</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 36-7, 134-5, 138, 186, 188, 190, 192, 249 and 263.
- <sup>236</sup> Minter, above n 44.
- <sup>237</sup> Patrina Dumar, *Integrated coastal management framework of the Republic of Fiji: Opportunities and issues for managing our coastal resources sustainably* (Department of Environment, 2011).
- <sup>238</sup> Muldoon and Mauvesi, above n 24. The need to undertake this process was identified in: *PAC Action Plan to Achieve Aichi Target 11*.
- <sup>239</sup> *Fisheries Act 1942 ('Fisheries Act')* s 2 (definition of 'exclusive economic zone') includes these elements. Notably, the definition used in the *Offshore Decree* also 'includes the bed and subsoil underlying' any of the identified waters, which is not included in the definition used in the *Fisheries Act*.
- <sup>240</sup> Schedule 1 lists restricted and prohibited areas that are clearly located within 'inshore' fisheries areas (e.g. 'reef systems' and areas within 3 nautical miles of reef systems are prohibited areas). As such, these areas are likely to overlap with *iQoliqoli*. Application to customary fishing may be limited as these prohibitions only apply to foreign or Fiji fishing vessels – this excludes un-registered local vessels (e.g. canoes). Further, reg 3(3) specifically states that the regulations do not apply to fishing or related activities in prohibited or restricted areas 'for the purposes [of] personal use or consumption'.
- <sup>241</sup> *Fisheries Act*, Long title.
- <sup>242</sup> An example of legislation identifying a requirement to establish particular units within Ministries or Departments, and for those units to have particular responsibilities, is the EMA. Section 12 of the EMA requires the DoE to have a 'unit responsible for environmental impact assessment', s 13 of the EMA requires the DoE to have 'a unit responsible for resource management', and 14 of the EMA requires the DoE to have a waste management and pollution control unit.
- <sup>243</sup> Lausche, *2011 IUCN Guidelines*, above n 141, 128.
- <sup>244</sup> *Offshore Decree* s 8(4).
- <sup>245</sup> Although, as noted in Part 3, the PAC ToR states that PAC membership should, at a minimum, include representatives from various relevant Departments and agencies
- <sup>246</sup> The workshop was facilitated by members of the PAC. The workshop was held for the administrators of Fiji's Provinces and its purpose was to describe and discuss progress under the Convention on Biological Diversity's Programme of Work on Protected areas. Workshop participants identified sites for protection, identified recommendations for establishing a representative network of protected areas, and developed strategies for implementing these recommendations: Stacey Jupiter et al, above n 6.

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- <sup>247</sup> PAC, '2014-2024 Action Plan'.
- <sup>248</sup> PAC, '2014-2024 Action Plan'.
- <sup>249</sup> See Fiji Environmental Law Association and EDO NSW, above n 11.
- <sup>250</sup> Nimmo-Bell, *Options for sustainable financing for protected areas in Fiji* (Wildlife Conservation Society and World Wildlife Fund for Nature, 2016). Note: The version reviewed is marked as 'draft'. The authors have been informed that this is because the PAC has yet to endorse the report; otherwise, it is a final document.
- <sup>251</sup> Nimmo-Bell, above n 250, 18-25.
- <sup>252</sup> This description of Offshore (archipelagic) waters again hints at a general confusion around Fiji's marine areas. Fiji's archipelagic waters include almost all iQoliqoli, and Fiji's territorial sea extends 12nm from its archipelagic baselines and its EEZ 200nm from the same baselines. This accords with UNCLOS. As noted above, all stakeholders including the MoF need to agree what marine areas are covered by terms like "coastal", "nearshore", "inshore" and "offshore". The term archipelagic offshore, appears to add to the confusion.
- <sup>253</sup> PAC, 'Action Plan 2014-2024'.
- <sup>254</sup> *Constitution* ss 139-140. *Financial Management Act 2014* s 2.
- <sup>255</sup> Nimmo-Bell, above n 250, 27.
- <sup>256</sup> Nimmo-Bell, above n 250, 28.
- <sup>257</sup> Nimmo-Bell, above n 250, 28-9.
- <sup>258</sup> Nimmo-Bell, above n 250, 29-32.
- <sup>259</sup> Nimmo-Bell, above n 250, 3.
- <sup>260</sup> Nimmo-Bell, above n 250, 3.
- <sup>261</sup> PAC, 'Action Plan 2014-2024'.
- <sup>262</sup> EMA s 8(3)(c).
- <sup>263</sup> EMA s 27, Sch 2, Part 1.
- <sup>264</sup> Jim Muldoon and Maria-Goreti Mauvesi, above n 24.
- <sup>265</sup> Jim Muldoon and Maria-Goreti Mauvesi, above n 24, 9.
- <sup>266</sup> Fiji Environmental Law Association and EDO NSW, above n 11.
- <sup>267</sup> This framework is based on the analytical framework recently developed by the Australian Panel of Experts in Environmental Law (APEEL), APEEL, *The Foundations for Environmental Law: Goals, Objects, Principles and Norms – Technical Paper 1* (APEEL, 2017).
- <sup>268</sup> Some priority MPA locations have already been identified in the Fiji National Biodiversity Action Plan and the Protected Areas Committee (**PAC**) has also identified priority marine eco region areas: Patrina Dumaru, *Integrated coastal management framework of the Republic of Fiji: Opportunities and issues for managing our coastal resources sustainably* (Department of Environment, 2011), 19.

## Appendix A

- <sup>1</sup> This review was conducted by the authors in support of this paper. It draws in part on: Jim Muldoon and Maria-Goreti Mauvesi, Review of Legislation, Policies, Strategies and Plans Relating to the Development of Marine Protected Areas in Fiji (MACBIO, 2016).
- <sup>2</sup> The MoF was created in September 2016. Previously, the Department of Fisheries was under the Ministry of Fisheries and Forests. The organisational chart of the Department (now Ministry) of Fisheries website shows that there are five major divisions: Eastern, Northern, Offshore, Research, and Western. Department of Fisheries, *Organisation Structure* (2014) <<http://www.fisheries.gov.fj/index.php/about-us/organisation-structure>>.
- <sup>3</sup> It is not recorded a having been passed in 2016 on the Parliamentary website: Parliament of the Republic of Fiji, *Acts* <<http://www.parliament.gov.fj/Parliament-Business/Acts.aspx>>.
- <sup>4</sup> There are six major divisions: State Land Administration, Corporate Services, Survey, Valuation, Fiji Geospatial Information Management and Land Use: *Our Vision*, Ministry of Lands and Mineral Resources <<http://www.lands.gov.fj/index.php/department/department-of-lands>>.
- <sup>5</sup> The Ministry comprises the Department of Lands and Survey, which administers 'all public lands in Fiji, including foreshores and the soil under the waters of Fiji': SLA s 2, and the Department of Mineral Resources, which administers Fiji's mineral resources in Fiji's land and waters.
- <sup>6</sup> *Regulation of Surfing Areas Decree (No. 35 of 2010)* (Fiji) ('*Surfing Decree*') s 3.
- <sup>7</sup> *Surfing Decree* s 4.
- <sup>8</sup> However, controversy on this point raised during public consultations prompted the former Minister for Lands and Mineral Resources, Mereseini Vuniwaqa, to declare in November 2014 that "the Surfing Decree was not introduced to take away the benefits that fishing owners previously enjoyed", adding that "the Surfing Decree does not stop investors from entering into agreements with iQoliqoli fishing rights owners".
- <sup>9</sup> Noting that the *Marine Spaces Act* no longer regulates the registration or licensing of vessels, nor any area that is covered by the *Offshore Decree*.

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<sup>10</sup> The *Marine Spaces Act* defines these marine spaces in accordance with international law, in particular the *United Nations Convention on the Law of the Sea*, opened for signature on 10 December 1982 (entered into force 16 November 1994).

<sup>11</sup> This accords with the provisions of UNCLOS, which recognize sovereignty of coastal states over territorial seas but only sovereign rights (i.e. rights that are less than full sovereignty) over the EEZ: UNCLOS, above n 10, Arts 2, 56.

<sup>12</sup> *Continental Shelf Act [Cap 149] 1970* (Fiji) ('*Continental Shelf Act*') s 10(1)(g).

<sup>13</sup> *Mining Act [Cap 146] 1966* (Fiji) ('*Mining Act*') s 2.

<sup>14</sup> Run off may cause water contamination, turbidity and siltation.

<sup>15</sup> As amended by the *National Trust for Fiji (Amendment) Act (No. 40 of 1998)* (Fiji).

<sup>16</sup> Development proposals that 'could destroy or damage an ecosystem of national importance, including, but not limited to... [a] mangrove swamp', or that 'could alter tidal action, wave action, currents or other natural processes of the sea, including but not limited to reclamation of ... mangrove areas' require approval by the EIA Administrator and may require formal environmental impact assessment: *EMA* s 27, Schedule 2 cl 1(j), (n).

<sup>17</sup> *Forest Bill (No. 13 of 2016) 2016* s 13.

<sup>18</sup> James Sloan and Kevin Chand, 'A Review of Near Shore, Fisheries Law & Governance in Fiji' (Siwatibau & Sloan, 2015), v.

<sup>19</sup> *Maritime (Navigation Safety) Regulations 2014* (Fiji) s 23(1)-(6).

<sup>20</sup> This Regulation was made for the purposes of enabling Fiji to be a party to the International Convention for the Prevention of Pollution from Ships (**MARPOL**) and to implement the provisions of MARPOL at domestic law.



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