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A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand's Resource Management Act 1991[1]

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Abstract
In this article we set out the key components of Integrated Coastal Management (ICM) legislation and show how the Resource Management Act 1991 (RMA) implements ICM in New Zealand. We briefly discuss why ICM is needed and the definition of ICM. We then identify the key tools for delivering ICM, and outline three general components that we consider need to be provided for in any successful legislative framework for ICM, namely: policy goals, legislative provision and decision-making bodies. Next we discuss five specific kinds of tools that we consider an ICM legal framework should make provision for in order to give effect to ICM in decision making. We finish by acknowledging that the ability of ICM to successfully manage intensive use and conflict is not without criticism, and briefly considering these criticisms in light of New Zealand's experience with the RMA.

Keywords
Integrated Coastal Management (ICM); Resource Management Act 1991 (RMA); New Zealand; ocean governance; marine spatial planning; legislative frameworks; institutions; public participation; decision making

Introduction

Integrated Coastal Management (ICM) has emerged as a form of ocean governance that seeks to provide a mechanism for managing the interface between

[1] This article is based on a paper the authors presented to *"Oceans, Coasts and Islands"—The Fifth Global Oceans Conference 2010*, 3–7, May UNESCO, Paris, France. The authors would like to thank Professor Timo Koivurova, Director of the Northern Institute for Environmental and Minority Law, University of Lapland, Finland, for his review and comments on various drafts of this article.

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land and the coastal waters located between the coastal margins and outer limits of the territorial sea. At the turn of the twentieth century the breadth of territorial seas remained relatively narrow.[2] However, by the middle of that century a number of coastal states had begun to unilaterally assert sovereignty over greater areas of sea in order to exercise control over the resources located within them. The Law of the Sea Convention 1982 (LOSC) was negotiated in order to reach agreement (amongst other key issues) on the extent of coastal state jurisdiction over surrounding seas.[3] The LOSC enabled States to extend their territorial seas out to 12 nautical miles.[4] The preamble to the Convention states that its objectives include establishing a legal order for the seas and oceans which promotes "the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment." The LOSC thus attempted for the first time to provide a global framework for the rational exploitation and conservation of the sea's resources and the protection of the environment.[5]

The LOSC has led to greater attention being placed on marine and oceanic management systems.[6] Out of all the major maritime zones sanctioned by the LOSC, the 12-nautical-mile territorial sea is the area subject to the most intensive use and conflict. The effectiveness of ICM in managing intensive use and conflict has been questioned by a number of commentators.[7] This is an issue we return to later in this article. Likewise, the difficulties in implement-

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[2] D. Harris, *Cases and Materials on International Law* (4th ed., Sweet and Maxwell, London 1991) 353. Harris notes that by the turn of the twentieth century there was arguably a general rule that the territorial sea was the distance from the shore that a cannon could fire, which was three nautical miles in width (the "cannon shot" rule).

[3] D. Rothwell and T. Stephens, *The International Law of the Sea*, (1st ed., Oxford and Portland, Oregon 2010) 1–20. It is important to acknowledge that the development of coastal state jurisdiction over the Territorial Sea, Exclusive Economic Zone and Continental Shelf was an incremental process. The negotiation process spanned three United Nations Law of the Sea Conferences (UNCLOS), starting with UNCLOS I and the Geneva Conventions in 1958, and culminating with UNCLOS III and the LOSC in 1982. Other significant issues upon which states reached agreement include governance of the high seas, deep seabed mining, protection of the marine environment, scientific research and settlement of disputes.

[4] LOSC Art. 3.

[5] P. Birnie and A. Boyle, *International Law and the Environment*, (2nd ed., Oxford University Press, New York 2002) 348.

[6] Birnie and Boyle note in this vein that it is understandable that the LOSC is referred to in Agenda 21 as providing "the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources." *Ibid.*, at 349.

[7] K. Nichols, 'Coming to Terms with "Integrated Coastal Management": Problems of Meaning and Method in a New Arena of Resource Regulation' (1999) 51(3) *The Professional*

ing ICM have also been highlighted, notably in Australia, where it has been suggested that ICM will not advance without an appropriate legal framework.[8] The nature of a workable legislative framework is seldom explicated. In 1991, New Zealand arguably became the first nation to pass legislation requiring integrated coastal management of its coastal areas out to the 12-nautical-mile limit of its territorial sea.[9] This was achieved through the Resource Management Act 1991 (RMA), which we contend is a model for the implementation of ICM legislation in developed countries.

In this article we set out the key components of ICM legislation and show how the RMA implements ICM. Our approach to this and the conclusions we reach are based on a combined total of thirty-five years of active engagement in research and implementation of the RMA.[10] We briefly discuss why

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Geographer 388–399; and R. Bille, 'Integrated coastal zone management: four entrenched illusions' (2008) *Surv. Perspect. Integr. Environ. Soc.* 1–12.

[8] G. Westcott, 'Stimulating vertical integration in coastal management in a federated nation: the case of Australian coastal policy reform' (2009) 37 *Coastal Management* 501–513.

[9] J. Sorensen and S. McCreary, *Institutional arrangements for managing coastal resources and environments* (1990), Washington: National Park Service, U.S. Dept. of the Interior; J. Sorensen, 'The international proliferation of integrated coastal zone management efforts' (1993) 21 *Ocean and Coastal Management* 45–80; and J. Sorensen, 'National and international efforts at integrated coastal management: definitions, achievements and lessons' (1997) 25(1) *Coastal Management* 3–41. The aforementioned paper and articles provide the best contemporary reviews on the state of ICM development. Despite many nations having ICM projects or programmes, none appeared to require ICM for their entire territorial sea. H Rennie, 'The coastal environment' in P. Memon and H. Perkins (eds.), *Environmental Planning in New Zealand* (Dunmore Press, Palmerston North 1993) 150–168, provides a detailed review of the rationale and introduction of ICM in New Zealand and notes that fisheries allocation was excluded, thereby failing to fully achieve ICM. It is acknowledged that the exclusion of fisheries allocation (as well as minerals allocation under the Crown Minerals Act 1991) renders New Zealand's regime an imperfect example of ICM. Nevertheless, the RMA was the first international example of domestic legislation to implement ICM of environmental effects across the entire territorial sea. In particular, the RMA manages the environmental effects of all activities within the coastal marine area, including the environmental effects of minerals and petroleum extraction on the surrounding marine environment.

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ICM is needed, the definition of ICM, and identify the key tools for delivering ICM. Next we outline three general components that we consider need to be provided for in any successful legislative framework for ICM, namely: policy goals, legislative provision and decision-making bodies. The RMA is then assessed to determine the extent to which it makes provision for these components, followed by an analysis of five specific kinds of tools that we consider an ICM legal framework should make provision for in order to give effect to ICM in decision making. These are: jurisdiction over the coastal environment, integrated planning, a consent process, public participation and informed decision-making. This is followed by a discussion of how successfully each of these kinds of policy is implemented under the RMA. We finish by acknowledging that the ability of ICM to successfully manage intensive use and conflict is not without criticism. We briefly consider these criticisms in light of New Zealand's experience with the RMA.

Integrated Coastal Management

The Need for ICM

Almost one-third of the world's human population lives within 100 kilometres of the sea and two-thirds of all cities with over 2.5 million inhabitants are located on the coast.[11] The presence of these large and growing populations is causing major problems for coastal areas. Growing populations within cities generate the need for larger sewage treatment plants, expanded landfills for disposal of solid waste, storm-water systems and recreation areas. Nutrients applied in the rural environment to encourage greater horticultural and agricultural yields enter fresh water systems and are flushed out into the sea. Meanwhile, an increasing range of activities, such as aquaculture, fisheries, wind-power and mineral extraction (to name a few), compete for the allocation of space within the offshore environment. This increase in human activity is placing serious pressure on coastal ecosystems and their future productivity. It is recognised that unless steps are taken to manage human activities within the coastal environment, losses of considerable consequence will occur.[12]

Both Robert and Hamish are certified to sit as independent commissioners on local government planning and resource-consent hearings under the RMA.

[11] The Joint Group of Experts on the Scientific Aspects of Marine Protection (GESAMP), *A Sea of Troubles* (2001) 19.

[12] J. Sorensen, *Baseline 2000 Background Report The Status of Integrated Coastal Management*

Cicin-Sain and Knecht point out that the rational management of the resources of coastal areas is made complex by three inherent difficulties.[13] The first difficulty is that prior to the twentieth century the oceans were used principally for two purposes: navigation and fishing. Because of the vastness of the sea and the dependency of these activities on the freedom of passage in open waters, the sea was regarded as common property. Except occasionally in the most congested waters, conflicts between these uses were few and far between. Because there was little conflict between these activities, there was little need to manage their relationship to one another. Hence, traditional coastal and marine resource management is characterised by what is commonly called a single-sector approach, without an integrated spatial planning system such as that found in terrestrial areas.[14] That means that management of the resource is limited to the sector in which it is utilised. For example, fisheries have been managed separately from offshore oil and gas development, which is handled separately from coastal navigation. Yet these activities are now capable of affecting one another and do so with regular frequency. This is before we even begin to take into account the effect that land-based activities can have on the offshore environment and activities.[15]

The second difficulty is that jurisdiction over coastal and ocean areas generally falls to different levels of government. The word jurisdiction has a number of related technical meanings at law. For the purposes of coastal management it means: a government's general power to exercise authority over all persons and things within its territory; and a geographic area within which political or judicial authority may be exercised.[16]

The third difficulty involves "the complexity of the coastal environment itself – its fluid and dynamic nature and the intricate relationships of the marine ecosystems and the environments that support them."[17] Coastal development activities (building of structures, mining, dredging, etc.) can significantly affect the ecology of the coastal area and the functioning of ocean processes and resources. For example, development activities in beach and dune areas can change patterns of sediment transport or alter inshore current systems. This can cause sediment accretion in some areas and erosion in others, leading to the destruction of habitat. Similarly, industrial development in

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as an International Practice Second Iteration August 2002 (University of Massachusetts, Boston 2002).

[13] B. Cicin-Sain and R. Knecht, *Integrated Coastal and Ocean Management-Concepts and Practices* (1st ed., Island Press, Washington, D.C. 1998) 16.

[14] Sorensen and McCreary (n 9).

[15] Cicin-Sain and Knecht (n 13) 16.

[16] *Blacks Law Dictionary* (8th ed., 2004) 867.

[17] Cicin-Sain and Knecht (n 13) 19.

the coastal environment can decrease the productivity of wetlands by introducing pollutants and changing water temperature. Activities further inland, such as logging and agriculture, can damage estuarine and ocean areas through increased flow of sediment, effluent, pesticides and other pollutants.[18]

ICM Defined

ICM is a response to the three central difficulties that are encountered when trying to manage human activities in the coastal environment. In simple terms, it is a regime designed to enable different sectoral interests, jurisdictional areas and environmental effects to be taken into account when making decisions about 'what and where' human activities can be undertaken in the coastal environment. In this sense Cicin-Sain and Knecht have defined ICM, in their seminal work on the topic, as a process that ensures:[19]

> . . . decisions of all sectors (e.g., fisheries, oil and gas production, water quality) and all levels of government are harmonized and consistent with the coastal policies of the nation in question.

Harmonisation and consistency is achieved through the principle of integration. The key forms of integration under ICM can be generally summarised as including:[20]

- intersectoral integration: integration among different coastal and marine sectors, such as aquaculture, oil and gas development, coastal fisheries;
- intergovernmental integration: integration among different levels of government, including international, national, provincial and local levels;
- spatial integration: integration between the land and ocean sides of the coastal zone; and

[18] *Ibid.*, at 16.

[19] *Ibid.*, at 19.

[20] B. Cicin-Sain, R. Knecht, A. Vallega and A. Harakunarak, 'Education and Training in Integrated Coastal Management: Lessons from the International Arena' (2000) 43 *Ocean & Coastal Management* 291–330, 292. 'Intersectoral' is often described as 'horizontal' integration and 'intergovernmental' as 'vertical' integration. Some authors create a separate, fifth category—'international integration' (see B. Cicin-Sain and S. Belfiore, 'Linking marine protected areas to integrated coastal and ocean management: A review of theory and practice' (2005) 48 *Ocean & Coastal Management* 847–868). The authors acknowledge the need for international integration, but consider that this fifth category is unnecessary as it is already captured more generically under the four listed categories.

- science-management integration: integration among the different disciplines important in coastal and ocean management (natural sciences, social sciences, and engineering, and the management entities).

ICM requires coastal decision-makers to take into account the effects that coastal and landward activities can have on the coastal environment and the effects that coastal activities can have on one another, and on landward activities. It has been suggested that the goal of ICM should be to facilitate resource-use decisions that:[21]

> . . . achieve sustainable development of coastal and marine areas, . . . reduce vulnerability of coastal areas and their inhabitants to natural hazards, and . . . maintain essential ecological processes, life support systems, and biological diversity in coastal and marine areas.

The necessary contextual support for the implementation of ICM usually includes a relevantly educated populace, a stable government, and the capacity to draw on interdisciplinary knowledge in decision making and acquire relevant data. These criteria are usually present in developed Western countries. It has also been suggested that an appropriate legal framework and diverse and extensive public participation may be necessary to achieve implementation.[22] We concur with this view, as without legislative provision there is no certainty that best-practice ICM procedures will be implemented in coastal planning or in respect of particular decisions about resource use under coastal plans. Public participation provides the legal framework with legitimacy by ensuring that the full range of interests in the coastal environment is taken into account when preparing plans and making decisions.

Having regard to the aforementioned criteria, we consider that for an effective ICM regime to be established in a developed Western country it is necessary to implement a legal framework that makes provision for five specific kinds of tools.[23] These are: jurisdiction over the coastal environment; integrated planning mechanisms; processes for gaining the rights or consent to use or occupy coastal and marine areas;[24] and provision for public participation

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[21] Cicin-Sain and Knecht (n 13) 40–41.

[22] G. Westcott, 'Stimulating vertical integration in coastal management in a federated nation: the case of Australian coastal policy reform' (2009) 37 *Coastal Management* 501–513.

[23] We are restricting our comments to developed Western democracies and accept that the problems in developing countries may not necessarily be overcome by such an approach. For an analysis of problems in implementing ICM in developing and non-democratic countries see T.-E. Chua, 'Lessons learned from practicing integrated coastal management in Southeast Asia' (1998) 27(8) *Ambio* 599–610.

[24] It is common to refer to "rights" of use and occupation in the coastal environment. It is

and informed decision-making processes.[25] It is our contention that New Zealand's RMA makes effective provision for these five tools and therefore serves as an appropriate model for the implementation of ICM in developed countries.

A Legal Framework for ICM

Policy, Legislation and Decision Making

A successful legal framework for ICM will, in general, make legislative provision for each of the following components:

- policy goals to be achieved;
- general legislative provisions to be used in achieving the policy goals; and
- decision-making bodies to administer the legislative provisions.

The policy goals of the legislation set out the general overarching purpose to be achieved by the regulatory mechanism that the legislation puts in place. It may be that the policy of the legislation is to achieve ICM. More often ICM will be a second-tier policy that is designed to give effect to a broader policy, such as sustainable development. This is particularly the case in Commonwealth jurisdictions such as New Zealand, the United Kingdom, Australia and Canada. The various legislative frameworks of these countries all employ sustainable development in some way to guide the development and use of a wide range of resources (not just those located in or affecting the coastal environment).[26]

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possible that such rights constitute a property right over common or public property. However, the existence of private property rights over the coastal environment is legally contentious and for the purposes of this article we use the term consent. This is the term used under the RMA. For a detailed discussion of property rights over the coastal environment see R. Makgill, 'Public property and private use rights: Exclusive occupation of the coastal marine area of New Zealand' in K. Bosselmann and V. Tava (eds.), *Water and Sustainability: New Zealand Centre for Environmental Law Monograph Series: Volume 3* (NZCEL, Auckland 2011) 77–110.

[25] By "informed" decision-making processes we mean processes that are able to draw on the full gamut of interdisciplinary knowledge—including that provided by biophysical and social science.

[26] See, for example, Local Government Act 2002 (New Zealand), Environment Protection and Biodiversity Conservation Act 1999 (Australia), Planning Act 2008 (England), Federal Sustainable Development Act 2008 (Canada), and HM Government, Scottish Executive, Welsh Assembly Government and Northern Ireland Office, 2005, *One Future- Different Paths: The UK's Shared Framework for Sustainable Development* London: DEFRA.

As discussed, even if ICM is not the central policy of a legislative framework, that legislation should set out a second tier of policy intended to achieve ICM. The remaining legislative provisions are in effect the 'nuts and bolts' used to achieve or implement the central and second tier policy of the legislation. In terms of ICM, these provisions should give effect to the other key tools that we have identified as necessary for achieving ICM, including: jurisdiction over the coastal environment, integrated planning, a consent process, public participation and informed decision-making.

Effective ICM decision making may be carried out by three levels of government (local, provincial/state, and national/central) with jurisdiction over the same areas within the coastal zone.[27] This means that on occasion, all levels of government can be involved in regulatory activity pertaining to a proposed development without the requirement for integrated decision-making being compromised. In situations where there are transnational jurisdictions, such as the European Union, the experience in national and local government integration set out below can be taken as simply adding another level of government and the principles are unchanged. In instances where decision making is carried out at different levels of government, it is important that the respective agencies co-operate, coordinate their efforts, avoid duplication and ensure that decisions are comprehensive.

The Resource Management Act 1991

The RMA is the principal legislation for managing all New Zealand's natural and physical resources. It is important to note that this excludes the allocation of minerals and hydrocarbons (i.e., gas and oil), and all fishing activities (including protection of areas from fishing activities).[28] However, the RMA does address the *effects* of mining activities and of facilities and infrastructure associated with fishing. The exclusion of the effects of fishing and the allocation of fishing space from the RMA have had significant consequences for marine aquaculture. Although this issue is beyond the scope of the present article,[29] it is worth noting that the effects of fishing on fish stocks, non-target

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[27] Cicin-Sain and Knecht (n 13) 164.

[28] Crown Minerals Act 1991, Fisheries Act 1983, Fisheries Act 1996, Marine Reserves Act 1971, and Marine Mammals Protection Act 1978.

[29] For a detailed discussion of these problems, see H. Rennie, 'Coastal fisheries and marine planning in transition' in P. Memon and H. Perkins (eds.), *Environmental Planning & Management in New Zealand* (Dunmore Press Ltd., Palmerston North 2000) 215–222; H. G. Rennie, 'New Zealand Mariculture: Unfairly Challenged?' in D. VanderZwaag and G. Chao (eds.), *Aquaculture Law and Policy: Towards Principled Access and Operations* (Routledge, London and New York 2006) 504–523; and H. Rennie, 'Marine (Aquaculture) Space

species by-catch and on fisheries habitat are provided for under the Fisheries Act 1996 through the quota management system and various regulatory provisions available to the Minister of Fisheries. Although the approach taken is arguably superior to that taken toward fisheries in many other countries, significant concerns remain over the quality of information available to fisheries managers, which make its effectiveness difficult to evaluate.[30]

The RMA was enacted before the Rio Earth Summit and New Zealand's ratification of the LOSC. Instead, New Zealand drew on the Brundtland Report's[31] treatment of sustainable development to shape the purpose of the RMA. The fact that the RMA introduced sustainability into domestic legislation facilitated New Zealand's rapid signing of Agenda 21 and the subsequent ratification of two international environmental agreements and the LOSC, which includes extensive environmental provisions.[32] However, the RMA is deliberately not based on sustainable *development*, but on sustainable *management*.[33] It therefore does not include social development matters, such as the allocation of funds for particular activities or social development. It is effectively a form of development control and regulation.

Allocation: Assessing Transitional Challenges to Local Economies in New Zealand' (2010) 25(3) *Local Economy* 190–207.

[30] R. Burns and G. Kerr, 'Observer effect on fisher by catch reports in the New Zealand ling bottom long-lining commercial fishery' (2008) 42(1) *New Zealand Journal of Marine and Freshwater Research* 23–32; J. Beddington, D. Agnew and C. Clark, 'Current problems in the management of marine fisheries' (2007) 316 *Science* 1713–1716; and B. Chilvers, 'New Zealand sea lions *Phocarctos hookeri* and squid trawl fisheries: by-catch problems and management options' (2008) 5 *Endangered Species Research* 193–204.

[31] G. Brundtland, *Our common future: The World Commission on Environment and Development* (Oxford University Press, Oxford 1987) 44.

[32] The Convention on Biological Diversity 1992 (ratified 1993), the Framework Convention on Climate Change 1992 (ratified 1993), and the LOSC (ratified 1996). It is important to note that Agenda 21 sets out non-binding environmental principles, whereas the three Conventions are legally binding and make provision for legally binding actions to be taken. Nevertheless, New Zealand's RMA, Biosecurity Act 1993 and Local Government Act 2002 are all considered to be largely in accord with the principles of Agenda 21.

[33] The key purpose of the RMA is set out under section 5, which provides that: (1) The purpose of this Act is to promote the sustainable management of natural and physical resources. (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The RMA was conceived as a framework for integrating and rationalising environmental management generally, not just for ICM. To those ends it repealed or modified 59 statutes and modified 50 regulations. To a large extent, the Act is the child of the neo-liberal ideology that swept across New Zealand in the 1980s. It focuses on the effects of activities rather than the activities themselves. Rather than have central government direct where and what type of development should take place, it relies on the market to efficiently decide the most appropriate uses of resources. Using economic terminology, the intent of the Act is to encourage the internalisation of externalities. Consistent with this neo-liberal approach, the purpose of the RMA is intended to *enable* activities which promote people's well-being while creating an obligation to deal with the adverse effects of those activities on the environment. A person's use of their land can only be restricted if it breaches the requirements set out in the RMA or contravenes a rule in a regional or district plan, in which case a resource consent is required. This approach is often referred to as the 'enabling purpose' of the RMA.

Nevertheless, the enabling purpose of the RMA must be balanced with environmental considerations.[34] Accordingly, the sustainable management purpose is only achieved if the social, economic, and cultural well-being generated by an activity is acceptable in terms of the scale and significance of its adverse effects on the environment. This effectively requires an assessment of environmental effects[35] to be carried out for all activities, and the RMA provides clear guidance on the aspects that must be included in such assessments. All decision-making under the RMA is subsidiary to and must achieve the purpose of sustainable management.

Moreover, in the area between mean high water springs and the twelve-nautical-mile limit (the coastal marine area),[36] the enabling principle operates in reverse. At the time the RMA was passed it was assumed that this area was public domain administered by the Crown. The owners were considered to be the public. As a consequence, if one member of the public wishes to acquire space or carry out activities that would affect other members of the public (the other owners), then they are not able to do so unless the rules in a plan allow them to, or they have obtained a 'resource consent' to do so. This is seen as

[34] *Ibid.*, (a) to (c).

[35] An assessment of environmental effects (AEE) is often referred to in international law and other domestic jurisdictions as an environmental impact assessment (EIA).

[36] The distinction between the coastal marine area and the coastal environment is discussed later in this article.

inherently precautionary and restrictive in comparison to the enabling terrestrial regime set out above.

The sustainable management purpose is supported by a second tier of policies described as the 'principles' of the RMA. The most important principles in terms of ICM are the "matters of national importance". These include "the preservation of the natural character of the coastal environment (including the coastal marine area) and its protection from inappropriate subdivision, use, and development" and "the maintenance and enhancement of public access to and along the coastal marine area."[37] Despite their national importance, these principles do not create a veto over decision making under the RMA. Rather they need to be weighed against other competing considerations to determine whether a decision achieves the sustainable management purpose of the RMA.

The legislative provisions that are intended to give effect to the purpose of the RMA include: clear jurisdiction over the coastal environment; integrated planning; formal consent processes for activities; considerable scope for public participation and informed decision-making.

The RMA has jurisdiction over land (including seabed and foreshore), air and water out to the 12-nautical-mile boundary of the territorial sea. The integrated planning provisions follow the cascade principle. National policy statements that are prepared under the RMA have to be given effect at all lower tiers of planning; regional policy statements and plans have to be given effect by lower level district and city plans. During the preparation of plans at the same level, the plans of adjacent authorities and any other plans prepared under the RMA must be considered. The plans set the parameters against which the effects of proposed activities are assessed. If an activity has effects that are prohibited by the plan, then permission for the activity cannot even be applied for and it cannot be undertaken. If the plan permits certain effects, then any activity that has only those effects can proceed without requiring permits. Activities with effects that are not prohibited or permitted fall into one of several levels of discretionary decision-making. Public participation is required at all levels of policy- and plan-making and in consent-granting processes where the activity would have more than a minor environmental effect.

Although the RMA provides for resource rentals or royalties to be charged for the use and occupation of marine space,[38] this has largely not been implemented. The consequence is that marine space is relatively cheap space, with the main costs being those involved in obtaining consent to occupy and use

[37] RMA ss 6(a) and (d).

[38] RMA s 64A. Similarly no royalties are charged for fishing under the fisheries legislation.

the coastal marine area. All resource consents are restricted to a maximum thirty-five-year term, with no guarantee of renewal.

The RMA followed closely behind a rationalisation of governance structures implemented through the Local Government Act 1989 that dramatically reduced the number of local government and quasi-autonomous government bodies. The resultant structure comprises a central government; a tier of regional councils with primary responsibility for administration of common property resources (e.g., water, air, biodiversity, and use of the territorial sea (other than for fishing)); and territorial local authorities (cities and districts) that are responsible for land use (e.g., subdivision and development). The RMA defines the administrative activities that are to be undertaken by these tiers in relation to the coastal environment. Proposed developments by all levels of government are generally subject to the RMA. Thus, central government projects or those of its state-owned enterprises often require approval from regional councils to proceed. The RMA establishes a hierarchy of roles and responsibilities among these agencies. The role of central government is to set policy on matters of national significance and monitor the implementation of the RMA. In terms of ICM, central government is responsible for national coastal policy through the New Zealand Coastal Policy Statement (NZCPS).[39] This document sets out national guidelines that all agencies under the RMA must consider when making decisions about planning or coastal development and resource use.

Regional councils must prepare regional policy statements addressing the resource management issues in their region.[40] In terms of ICM, regional councils also have the responsibility of preparing regional coastal plans in conjunction with the central government's Department of Conservation. These plans are approved by the Minister of Conservation. The plans promote the sustainable management of the coastal marine area (that area between the line of mean high water at spring tide and the outer boundary of the territorial sea) and the coastal environment.[41] Regional councils can also develop regional plans covering land and water areas landward of the coastal plan. Although these plans are optional, in practice, regional councils generally seek to implement regional plans in respect of a region's other natural resources (i.e., those in addition to the coastal marine area). Some, however, have combined their

[39] Two New Zealand Coastal Policy Statements have been issued. The first one, dated 1994, was replaced in 2010.
[40] RMA s 60.
[41] RMA s 64.

regional coastal plan with landward regional plans to create an integrated regional coastal environment plan.[42]

District councils are primarily concerned with the implementation and administration of plans for the integrated management of land use. There is an average of six district councils within the catchment of each regional council. District plans must give effect to regional policy statements. Where an application for consent requires approval from both regional and district councils, the RMA requires a joint hearing to be held unless there are extraordinary circumstances that make this inappropriate.[43]

Adequate Jurisdiction over the Coastal Environment

Although many themes vie for dominance, it seems generally accepted that the overarching goal of all natural resource programs is to ensure and maintain ecosystem integrity and resilience. The prevailing legislative framework must have jurisdiction over the full span of the coastal ecosystem, regardless of the legal jurisdictions involved (including rivers, land, beach and dune system, foreshore and offshore). This will give the government body responsible for administering ICM the benefit of being able to take action in respect of any activity that could have adverse effects on the coastal environment, whether pollution occurs on land and seeps out to the coast or is discharged directly from a vessel out at sea. Similarly, it should enable coastal hazards to be addressed.

New Zealand's Catchment-based Approach

Another feature of the RMA is that it heralded to some extent an ecosystem-based approach to management. Hence the second and third environmental goals of sustainable management under section 5(2) of the Act provide for:

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

It is worth noting that the duty to safeguard the life-supporting capacity of an ecosystem under section 5(2)(b) is different to safeguarding the ecosystem

[42] For example, the Bay of Plenty Regional Council.
[43] RMA s 102.

itself. Nevertheless, the definition of environment under the RMA includes ecosystems.[44] That means that a proposed activity must also be considered in terms of its adverse effects on an ecosystem under section 5(2)(c).

The ecosystem approach is also present in the division of regional councils' spheres of authority into catchments. Catchments are the ecological conduit for the passage of water to the coast. Understanding land-water relationships is the starting point for appreciating the need for holistic management of regions using natural boundaries. The primary determinant of the health of any near-shore marine ecosystem is run-off from contributory catchments. Chemical contamination from run-off results in the overfeeding and, frequently, the poisoning of estuaries. Regional councils, as discussed, have responsibility under the RMA for the integrated management of natural and physical resources within their regions. Their regions include both the land catchment and the offshore environment out to the 12-nautical-mile territorial sea boundary. They are therefore well placed to prepare and implement plans that manage water quality and sediment supply from its origins far inland all the way to the receiving coastal environment.

Coastal Environment

The term coastal environment is not defined in the RMA, but has rather been determined on a case-by-case basis before the courts. According to the courts, the coastal environment is an environment in which the coast is a significant part or element. It generally extends to the dominant ridge or hills behind the coast, but inland areas not visible from the sea are not necessarily excluded.[45] It is interesting that this definition is not as wide as the catchment-based area

[44] RMA s 2. "Environment includes—(a) Ecosystems and their constituent parts, including people and communities; and; (b) All natural and physical resources; and (c) Amenity values; and (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters."

[45] *Crooks and Sons Ltd v. Invercargill City Council*, unreported, Environment Court, (C81/1997). See also *Rennie* (n 9) 152. In November 2010 the New Zealand Government issued the *New Zealand Coastal Policy Statement 2010*. Policy 1(2) provides an inclusive definition of coastal environment largely built from case law: "the coastal environment includes: (a) the coastal marine area; (b) islands within the coastal marine area; (c) areas where coastal processes, influences or qualities are significant, including coastal lakes, lagoons, tidal estuaries, salt marshes, coastal wetlands, and the margins of these; (d) areas at risk from coastal hazards; (e) coastal vegetation and the habitat of indigenous coastal species including migratory birds; (f) elements and features that contribute to the natural character, landscape, visual qualities or amenity values; (g) items of cultural and historic heritage in the coastal marine area or on the coast; (h) inter-related coastal marine and terrestrial systems, including the intertidal

relevant to a water-based ecosystem approach. This is probably because most cases that have come before the courts have concerned landscape issues and therefore have relied on interpretation of the visual environment rather than the complex set of relationships that go to make up an ecosystem.[46] Nevertheless, the Environment Court's refusal to exclude areas not visible from the sea is recognition that what goes to make up the coastal environment should not rely entirely upon anthropocentric values.

Coastal Marine Area

It is important to understand that even though regional councils have jurisdiction over both land and the offshore environment, these areas do have a jurisdictional divide. This divide is known as mean high water springs (MHWS), which is defined as the average greatest landward extent to which the tide extends.[47] The jurisdiction of district councils, who, as discussed, are only responsible for land use, does not extend below MHWS.[48] The area between MHWS and the outer limit of the territorial sea is defined under the RMA as the 'coastal marine area'.[49]

The coastal marine area is accorded special significance under the RMA because it was assumed to be owned by the Crown on behalf of all New Zealanders. It is, in effect, public property, and the preservation of its natural character and its availability for public access are matters of national importance.[50]

It was historically assumed in New Zealand that the Crown had ownership of the coastal marine area. The Crown in turn was seen to hold title to the

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zone; and (i) physical resources and built facilities, including infrastructure, that have modified the coastal environment".

[46] V. Froude, H. Rennie and J. Bornman, 'The nature of natural: defining natural character for the New Zealand context' (2010) 34(3) *New Zealand Journal of Ecology* 332–341; and R. Maplesden, *Natural character—concept development in New Zealand law planning and policy*, *Technical Report 2000/4*, Boffa Miskell 2000, Hamilton, Environment Waikato, 101.

[47] *Gisborne District Council v Falkner*, unreported, Planning Tribunal, (A82/94).

[48] An exception to this is where some district councils have gained permission to extend their boundary to the low-water mark under the Local Government Act for the purpose of passing and enforcing by-laws for such matters as setting the speed limits for people driving on the beach.

[49] Section 2 of the RMA provides that the "coastal marine area" means the foreshore, seabed, and coastal water, and the air space above the water" between the line of mean high water at spring tides and the outer limits of the territorial sea. A specific methodology is provided for calculating the boundary at river mouths.

[50] RMA ss 6(a) and (d).

coastal marine area on trust for the benefit of the public, who had certain rights to the use of that property. These rights were not secured as individual rights, but rather as social rights in the use of social resources. The public's right to the coastal marine area (or foreshore and seabed) has a Roman and common law tradition. Although the common law recognised that the Crown could grant private title over the foreshore and seabed, such grants were subject to the public rights of navigation and fishing (as discussed above in respect of the freedom of the seas). More recently the Crown has been divested of title to the coastal marine area and common law rights to public access have been codified through legislation.[51]

There is a strong presumption against alienation of the coastal marine area in New Zealand. This is akin to the American doctrine of public trust which holds that public land under navigable waters cannot be irrevocably surrendered to private interests.[52] Nevertheless, most activities that take place in the coastal marine area require some degree of occupation of the coastal marine area. The right to occupy the coastal marine area is a privilege which is not conferred lightly, since it effectively restricts the public's right to enjoy the coastal marine area.[53] As discussed, the RMA therefore takes a precautionary approach to consideration of proposals to undertake activities in the coastal marine area.

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[51] R. Makgill and H. Rennie, 'The Marine and Coastal Area Act 2011' (2011) April *Resource Management Journal* 1–7; R. Makgill, 'Feeling Left out at Sea? Navigating No Ownership, Customary Rights and Resource Management' in *Marine and Coastal Area Act: Demystifying the Hype* (New Zealand Law Society, Wellington 2011) 27–64; and Makgill 'Public property and private use rights' (n24) 77 and 87–90. In 1991, when the Resource Management Act was passed, it was presumed that the Crown owned the foreshore and seabed. This presumption was challenged by Maori in the late 1990s and subsequently resulted in the Labour-led Government controversially passing the Foreshore and Seabed 2004 Act (FSA), which declared the foreshore and seabed to be Crown-owned. A review of the FSA was provided for in the 2008 Confidence and Supply Agreement between the National Party and the Maori Party. A Ministerial Panel provided a written report to the Attorney-General on 30 June 2009 recommending that the FSA should be repealed and new interim legislation enacted to provide for, *inter alia*, the legal title to be held by the Crown in trust for those later determined as having the right to title. It is worth noting that the Panel's preferred outcome involved recognition and provision for both customary and public interests in the foreshore and seabed. The subsequent Marine and Coastal Area (Takutai Moana) Act 2011 removes Crown ownership, declares the coastal marine area a commons incapable of ownership, protects public use rights (access, recreation, navigation and fishing) and re-establishes the right of Maori to claim customary marine use rights and title.

[52] Makgill, 'Public property and private use rights' (n 24) 89–90.

[53] *Ibid.*, at 79–80 and 93–97.

Integrated Planning

Planning can be broadly defined as a decision-making process for influencing or determining the way in which physical and natural resources are used. The form that planning takes varies considerably between, and even within nations, but a number of characteristics are universal:[54]

- first, planning is future-oriented, making use of strategies that seek to achieve agreed goals;
- second, it is primarily a public-sector activity, administered by different tiers of government, with local government usually playing a key role;
- third, it is concerned with both shaping and protecting the built and natural environments.

Conventional or Spatial Planning

Conventional planning is characterized by the segregation of land uses into specified geographic zones and dimensional standards stipulating limitations on the type of development activity that is allowed to take place within each type of zone. In Europe, a widely used form of conventional planning is 'spatial planning'.[55] Spatial planning involves managing the spatial organization of entire urban regions, where concerns as diverse as travel systems, economic growth, social inequalities, environmental quality and water resources are drawn together. Spatial planning is thus concerned with the formation of entire patterns of activity across increasingly large territories.[56]

Effects-based Planning

The RMA, as discussed, ushered in a new style of environmental management based on effects rather than activities. This means that New Zealand takes an effects-based approach to planning. Effects-based plans use performance standards and assessment criteria to determine whether proposed development projects are appropriate within different zones. Whereas conventional zoning prescribes the types of activities and land uses that can be undertaken in a particular zone, effects-based planning specifies the level of adverse effects that

[54] S. Jay, 'Planners to the rescue: Spatial planning facilitating the development of offshore wind energy' (2010) 60(4) *Marine Pollution Bulletin* 493, 495–496.
[55] Spatial planning is also known as structure planning in parts of Europe and as regional planning in the USA.
[56] Jay (n 54) 496.

are acceptable within a zone. Accordingly, effects-based plans do not seek to regulate the proposed use or activity, but rather the performance of that use or activity in terms of its effects on the surrounding environment. It follows that planning documents contain rules that control adverse effects rather than specified activities. As a general rule of thumb, if an applicant can show that the adverse effects of a proposed activity will be not more than minor, he/she will invariably be granted consent to undertake his/her proposal.

The clear incentive of the effects-based planning regime is to encourage people to internalise the cost of addressing the effects of their activity by investing in technology, designs or procedures that will reduce adverse environmental effects to an acceptable level. This incentive is strengthened by the public-participation provisions of the RMA which provide two different paths down which an application might proceed. These are the notified and non-notified paths. A notified application requires a public hearing, which is often costly. If an affected party gives written approval for the activity, then the effects of the application on that party are no longer capable of being considered by the regional council processing the application. The process of obtaining written approval from affected parties for an application in the coastal marine area often requires the applicant to offer measures that avoid, remedy or mitigate the environmental effects of the proposed activity. This is because even if a party provides written approval for the activity, thereby excluding consideration of effects on that party, the regional council is still required to consider the effects of the activity on the broader environment[57] Generally applicants will try to make a proposal as environmentally acceptable as possible in order to obtain the agreement of potentially affected persons (e.g., through agreement on mitigation measures or environmental/financial compensation)[58] so that an application can proceed on a non-notified basis.

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[57] Although the effects on the individual party are not considered, the effects on the broader environment are still considered in terms of the purpose and principles of the RMA, and another party might pursue such matters (*Royal Forest and Bird Protection Soc of New Zealand Inc v Kapiti Coast District Council* (2009) 15 ELRNZ 144).

[58] Environmental compensation is distinguished from financial compensation. The former involves a net conservation benefit (*Alexandra District Flood Action Soc Inc v. Otago Regional Council*, unreported, Environment Court (C102/05)). The Environment Court has developed a test to determine whether environmental compensation is sufficiently linked to a development proposal. It should be: (a) a similar area of comparable conservation worth to what is being developed; and (b) managed so as at least to maintain, and usually to restore or improve, the qualities for which it is being conserved; and/or protected in its ownership—usually by vesting it in a local authority (*Memon v. Christchurch City Council*, unreported, Environment Court (C116/03)).

Integration of National, Regional and District Plans under the RMA

The RMA does not define integrated management. Nevertheless, the Act does require:

- regional councils to achieve integrated management of natural and physical resources;[59] and
- district councils to achieve the integrated management of the effects of the use, development, or protection of land.[60]

The Ministry for Environment, in keeping with the central government's role of monitoring the implementation of legislation, prepared a paper on the essential components of integrated management. The components identified are:[61]

- first, there should be integration across media. For example, policies on coastal water quality should be developed in conjunction with polices on land matters affecting water quality.
- second, there is need for integration across agencies. This includes joint-decision-making, joint management methods and responses, and coordinated action in pursuit of shared environmental goals. For example, to ensure that the coastal environment is managed properly, regional and district councils need to work together to ensure that their policy and planning documents are harmonised and do not conflict.

One of the clearest mechanisms for achieving ICM under the RMA is the requirement for regional policy statements and plans (including coastal plans) to give effect to the NZCPS,[62] and for district plans to give effect to the NZCPS and the relevant regional policy statement.[63] The NZCPS promotes the sustainable management of the natural and physical resources of the coastal environment, including the coastal marine area. The NZCPS covers a range of issues, such as national priorities for coastal protection and development, consideration of climate change, clarification of various aspects of Crown land management, controls over private development projects and the implementation of obligations under international treaties and conventions.[64]

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[59] RMA s 30(1)(a).
[60] RMA s 31(1)(a).
[61] Ministry for Environment, 'Not Just an Add On' (1993) March *Planning Quarterly* 18.
[62] RMA ss 62(3) and 67(3)(b).
[63] RMA s 75(3).
[64] RMA s 58.

The NZCPS also sets out the specific circumstances in which a nominee of the Minister of Conservation will be appointed to consider resource-consent applications relating to activities likely to have significant or irreversible adverse effects on the coastal marine area, or which concern a coastal marine area of significant conservation value.[65]

In addition to giving effect to the relevant provisions of the NZCPS in planning documents, local authorities must also have regard to its provisions when considering resource-consent applications.[66] As discussed, the RMA specifies that use and development must not occur in the coastal marine area, (such as the erection of a structure that is fixed in, on, under or over the foreshore or seabed), unless expressly allowed by a rule in a regional coastal plan or resource consent.[67] If a person does wish to carry out an activity that is not expressly allowed by a rule in a regional coastal plan, they need to apply for resource consent to the relevant regional council. The resource-consent process is carried out pursuant to the RMA[68] and the relevant regional plan. When considering a resource-consent application, the regional council must have regard to any actual or potential effects on the environment of allowing the activity, the New Zealand Coastal Policy Statement, regional policy statements, regional (land, water and air) plans and the coastal plan.[69]

Regional coastal plans can integrate management across the land-sea interface by linking with regional plans.[70] As discussed, district plans must give effect to regional policy statements. They also must not be inconsistent with regional plans.[71] District plans in reality tend to make less direct provision for the coastal environment than regional coastal plans. The primary type of effect that district plans tend to regulate is whether residential subdivision and development can take place on the landward side of the MHWS boundary. The major constraints tend to be natural character, amenity, and landscape values. Nevertheless, coastal subdivision and development is increasingly regulated at a regional plan level with regional policy statements providing for such things as metropolitan urban limits, and regional plans addressing coastal setbacks, hazard zones and sewerage disposal requirements. Therefore, if a regional policy statement or plan precludes a coastal area from development, the district plan must be consistent with that requirement. In practice this is

[65] RMA ss 58 (e) and 117. Until 2009, the Minister of Conservation was also the final decision-maker on these applications.
[66] RMA s 104(1)(b)(iv).
[67] RMA s 12 (1).
[68] RMA Part 6 Resource Consents.
[69] RMA s 104(b).
[70] RMA s 64(2).
[71] RMA s 75(4)(b).

generally not a problem, as the areas precluded from development are normally rural areas, and district plans by and large contain rules specifying that residential development in rural areas is not permitted.

Coastal setbacks and hazard zones have significant implications for landowners who have built in areas that may be flooded or eroded by coastal processes, perhaps as a consequence of sea-level rise or climate change. Such issues have been guided by a High Court finding in the mid-1990s that there is no obligation on government to protect properties that were allowed to develop in hazardous areas. Moreover, the RMA and plans made under it over-ride any purported common law rights that land owners might have to protect their land.[72] Managed retreat has been accepted as an appropriate response. As a result, new houses built in hazard zones are usually required to be relocatable.

Coastal Permit or Consent Process

The requirement to obtain a coastal permit or consent is a common procedural requirement used in developed Western countries to regulate proposals to undertake activities in the coastal environment. Legislation giving effect to this ICM tool will generally require anyone who wishes to undertake an activity in a coastal zone to obtain a permit from the government body responsible for administering the coastal environment. The legislation will also set forth policies, and require the preparation of plans, which are to be followed by the governing body when considering whether to grant or deny the proposal. The applicant is normally required to submit an environmental impact assessment to support the application. If the government body considers that the proposal satisfies the policies and plans set out under the legislation, it will grant the coastal permit, usually with conditions aimed at improving the proposal and making it less detrimental to the coastal environment.

Resource Consents / Coastal Permits under the RMA

Regional councils, as discussed, are responsible under the RMA for preparing planning documents in respect of natural and physical resources within their catchments. This means that they also have the function of considering applications for resource consents in respect of natural and physical resources. One example of a resource over which regional councils have jurisdiction is water.

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[72] *Falkner* v. *Gisborne District Council* [1995] 3 NZLR 622; [1995] NZRMA 462 (HC).

In deciding whether to grant a resource consent to take water or discharge (for example, effluent or sediment) into a water body, it is normal for the council to take into consideration the effect of that activity on the receiving coastal environment. Regional councils also have direct jurisdiction over the coastal marine area. That means that they have the function of considering applications for coastal permits to undertake activities in the coastal marine area. This might include such activities as: constructing a building, roadway, or seawall; building a pier; emplacing moorings; or extracting sand. District councils are responsible for land-use and subdivision consents within the terrestrial component of the coastal environment. The most prevalent considerations here relate to the matters of national importance as to whether the proposal will preserve the natural character of the coastal environment and maintain and enhance public access to and along the coastal marine area.[73]

Applicants for a coastal permit or land-use consent must submit an assessment of environmental effects (i.e., environmental impact assessment) to the regional or district council, respectively, for consideration. In considering whether to grant or decline the application, the council must have regard to: any actual or potential effects on the environment of allowing the activity,[74] and any relevant provision of the NZCPS, a regional plan or district plan.[75] As discussed, all decisions under the RMA must achieve the purpose of the Act. Accordingly, in deciding whether to grant or refuse consent, the council must exercise an overall discretion to decide whether the application satisfies the sustainable management purpose of the RMA.[76] If the council is satisfied it can grant the application, and it may impose conditions.[77]

Public Participation

Public participation in the preparation of planning documents and coastal permit applications ensures that all affected interests have an opportunity to be heard. This has two advantages. First, the benefits and costs of addressing all the potential issues are more likely to be equitably distributed if all parties have an opportunity to participate. Second, decisions are likely to be better

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[73] RMA ss 6(a) and (d). For a discussion of "natural character" see Froude *et al.* (n 46).
[74] RMA s 104(1)(a).
[75] RMA s 104(1)(b).
[76] RMA s 104B. It is noted that certain activities, called controlled activities, must be granted consent. Local authorities may only impose conditions on these activities according to the provisions of the plan. In the case of controlled activities, the RMA considers that the decision as to whether the effects of the activity satisfy the sustainable management purpose of the Act is made at the time that the plan is implemented or made operative.
[77] RMA s 108.

informed if all relevant points of view are heard and considered. Public participation in policy and planning activities is of considerable importance in building and maintaining public confidence in the policies and plans that are adopted. This is because a process that is seen as fully open, based on reliable information and good science, and accessible to all interested parties stands a much better chance of long-term success than one that does not encourage participation and where decisions are made behind closed doors. In terms of the resource-consent process, public participation enables a consent authority to consider all potential effects of a proposal that might otherwise go undetected without hearing from potentially affected parties.

Public participation is a fundamental feature of the RMA. Both the NZCPS 1994, and the subsequent NZCPS 2010, were only implemented after extensive public participation and hearings held by an independent board of inquiry. The public are entitled to participate in all regional and district planning processes, including the preparation of regional coastal plans. This includes the right:

- to lodge a submission on a proposed plan;
- appear in support of your submission at a public hearing; and
- lodge an appeal with the Environment Court if you are dissatisfied with the decision of the council.[78]

As noted above, members of the public are given the opportunity to make submissions on notified applications, a public hearing is held and the outcome of the hearing can be appealed to the Environment Court. The Environment Court hears the application on a *de novo* basis (i.e., it hears the entire application afresh and is not limited to questions of law).

The decision to proceed on a non-notified basis is solely in the hands of the relevant council. Furthermore, the decision to proceed on a non-notified basis can only be challenged in the High Court on points of law by way of judicial review. The legal threshold for over-turning an administrative decision on judicial review is very high.[79]

There is a presumption under the RMA that applications will be notified if the adverse effects of the proposal are more than minor. To proceed down a non-notified path, the Regional Council must be satisfied that the adverse

[78] RMA Schedule 1.

[79] Generally referred to as the *Wednesbury* principle, the test for over-turning a decision not to notify is that the decision was so unreasonable that no other reasonable decision-maker could have made the same decision (See *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1947] 2 All ER 680).

effects of the activity on the environment will be minor,[80] and all persons on whom there will be a more than minor adverse effect have given their written approval to the activity.[81] A decision not to notify an application can only be overturned by way of judicial review. Non-notification effectively removes the public and non-governmental organisations from the decision-making process unless they pursue judicial review. Accordingly, a council's decision to allow the application to proceed on either a notified or non-notified basis can only be made once sufficient information is available to it as to the level of effects that the activity will have and the range of people that may be adversely affected. In either case, a successful application for development is dependent on a comprehensive assessment of environmental effects. More problematic for most applicants is whether public consultation should be undertaken or not prior to lodging an application. In this respect we note that applicants who fail to give attention to public consultation in the coastal marine area almost invariably have their application notified. A well-thought-out program of public consultation can help identify potentially affected parties, address concerns and obtain written approval.

Informed Decision-Making

Interdisciplinary integration is required under ICM to ensure that social, engineering and biophysical science are included and integrated into management decision-making at plan, policy and project proposal levels. However, this privileges the Western positivist scientific tradition over epistemologies and ontologies of other cultures (e.g., indigenous peoples such as the Maori, Aborigine or Inuit). Decisions that ignore these other knowledge systems may lack legitimacy for those cultures. We consider that legislation that implements ICM therefore must ensure that the integration of Western science into informed decision-making does not lead to an inappropriate weighting of one type of cultural knowledge system over another.

The RMA includes social and cultural wellbeing and health and safety as part of its purpose. Landscape, amenity, economic, social, health, heritage and cultural impact assessments are all incorporated into the strategic environmental assessment of plans and policies,[82] and into the assessment of environmental effects required for individual consent applications. In New Zealand, as in other developed countries, there is a significant indigenous population,

[80] RMA s 95A(2)(a).
[81] RMA s 95D(e).
[82] Required under section 32 of the RMA.

the Maori. New Zealand is founded on a partnership between the British Crown and Maori chiefs, formalised as the Treaty of Waitangi. Maori comprise approximately fourteen percent of the population and are increasing in number.[83] They have not been restricted to reservations, but are integrated into mainstream New Zealand society. The special rights of Maori deriving from their partnership with the Crown are expressed through what are known as the principles of the Treaty of Waitangi.[84] The Treaty principles have in turn been enshrined in a variety of forms of national legislation.[85] While the Crown retains the right to govern, it has a duty to protect Maori resources (*taonga*) and remedy past Treaty breaches. Maori have a strong political, cultural and spiritual identity, and this is reflected within the prevailing social structure in New Zealand.[86] As claims of Treaty breaches are investigated and resolved, Maori have become increasingly significant players in the economy and in decision making.[87] Recognition of Maori traditions, world view and concepts of managing the environment are key issues, and continue to be a source of tension in coastal management.[88]

The RMA requires all those exercising powers and duties under the Act to take into account the principles of the Treaty. The Department of Conservation, under its founding legislation, is required to give effect to those principles in its role as lead government agency for the coastal environment. The principles are not set out in legislation or the Treaty, but have been elaborated over time through case law. In addition to the general requirement for decision-makers to take into account those principles, regard must be shown to

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[83] Specifically, 565,329 people (14.6 percent) of the usually resident population of New Zealand were recorded as being of Maori ethnicity in the 2006 national census. This includes those who listed Maori as their sole ethnic group or as one of several ethnic groups (Statistics New Zealand *Census New Zealand 2006—QuickStats about Maori*, Wellington: Statistics New Zealand).

[84] *New Zealand Maori Council* v. *Attorney General* [1987] 1 NZLR 641 (CA).

[85] For example, section 8 of the RMA provides that "[i[n achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".

[86] For example, Maori have been appointed to the highest political office (Governor-General), can choose whether to be on general election rolls or on a separate Maori electoral roll, can choose whether to be educated in Maori or English language to the extent resources exist, and intermarriage is common, with Maori being defined as anyone who can prove any Maori ancestry. Maori have full access to the legal systems; special provisions reflecting Maori concepts and giving weight to Maori planning documents are written into general legislation, such as the RMA (e.g., sections 6(e) and (g), 7(a) and 8 of the RMA).

[87] P. McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland 1991). This book provides a detailed discussion on the evolution of Maori legislative rights in New Zealand.

[88] Makgill and Rennie (n 51); Makgill 'Feeling Left out at Sea?' (n 51).

Maori planning documents when plans are made under the RMA.[89] This facilitates the integration of Maori values into the ICM process. The RMA also requires that Maori environmental values are taken into account, or had regard to, when making decisions under the Act.[90] Several of these concepts are not able to be given full or effective expression in English and are not amenable to Western scientific methods. However, the legislative weight given to these values means that they must be addressed in all decision-making processes under the RMA, and Maori experts are accorded weight equivalent to those experts trained in traditional Western education systems and disciplines. This practice has been given further support in the NZCPS 2010, which requires that Maori customary, traditional and intergenerational knowledge be incorporated in regional policy statements, in plans and in consideration of resource-consent applications.[91]

To facilitate good decision-making in respect to the evidence and information that is able to be presented to decision-makers, the RMA requires that the majority of a decision-making panel (and its chair) at the council level must have successfully completed a specialised training course.[92] This applies to elected representatives other than Ministers of the Crown (who very seldom are involved in decision making other than on national-level instruments and particularly contentious consent applications of national significance). This is intended to ensure that decision-makers are informed as to how to assess and question all types of information and evidence presented, and to instil in those considering applications that the decision-making process is judicial and should be devoid of political influence and conflicts of interest.

In summary, the RMA provides for and encourages informed decision-making, integrating different disciplines and cultural knowledge systems into the planning and consent processes. It also provides mechanisms to facilitate objective decision-making and build the capacity for good decision-making.

Critiques of ICM

The major criticisms of ICM have included the difficulty in identifying the area that is 'coastal',[93] the degree of formality and associated organisational

[89] RMA ss 66(2A) and 74(2A).
[90] RMA ss 6(e) and 7(a).
[91] New Zealand Coastal Policy Statement 2010, Policy 2(e).
[92] As discussed, regional and district councils hear resource-consent applications at first instance. Council decisions can be appealed to the Environment Court, whose decisions can be appealed to the higher courts on points of law.
[93] Cicin-Sain and Knecht (n 13).

rigidity of ICM,[94] the way in which ICM facilitates the penetration of capitalism into local communities,[95] and that ICM overemphasises consensual and community-based decision-making, and has unrealistic expectations of scientific knowledge.[96]

We do not intend to provide a detailed analysis of these criticisms here. Instead, we contend that regardless of their validity in the context of other ICM regimes, the RMA is robust under these critiques. Its effects-based approach avoids the rigidities of defining a fixed coastal zone or area and replaces it with a situationally determined coastal environment. There are administrative boundaries (e.g., MHWS) to provide administrative certainty as to responsibilities, but there are also integrative mechanisms across that boundary. The RMA has not required the establishment of a special coastal commission or a large, rigid organisation to 'manage the coast'. Instead, the processes for implementing ICM are integrated into the existing government structures and mechanisms for planning and managing the use of resources generally.

In terms of community and conflict management, community members and organisations are amongst the primary informants on those who have not appropriately addressed the impact of their activities. If the local authorities do not act, the RMA makes provision for members of the public to take action through the Environment Court against breaches of plans and resource consents.[97] Furthermore, the mediation process available through the Environment Court[98] provides a mechanism for conflict resolution, which has seen most disputes settled before proceeding to a hearing. Nevertheless, although the RMA brings stakeholders to the table, it does not seek or expect consensus. Nor does it assume that there is just one local community. Heterogeneity is recognised and given access through the extensive public-participation provisions. The RMA provisions allow for conflicts and trade-offs.

The RMA also does not place positivist Western science on a pedestal, but enables and encourages all knowledge to be brought to the table. The public-participation provisions enable raw emotion and feelings of people to be heard

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[94] S. Born and A. Miller, 'Assessing networked coastal zone management programs' (1988) 16, *Coastal Management*, 229–243; and Bille (n 7).

[95] K. Nichols, 'Coming to Terms with "Integrated Coastal Management": Problems of Meaning and Method in a New Arena of Resource Regulation' (1999) 51 (3) *The Professional Geographer* 388–399.

[96] Bille (n 7).

[97] RMA s 316(1). It is noted that it is the policy of the Environment Court to run its proceedings in a less formal way than the other civil courts. This is to encourage members of the public who cannot afford legal representation to participate in its proceedings, which is regarded as consistent with the RMA's policy of public participation in decision making.

[98] RMA ss 267 and 268.

and taken into consideration in decisions. Submissions to hearings have been presented in poetry, dance, art and song. Maori protocols are observed when appropriate, and mechanisms have been established to protect knowledge of sacred places. Decisions may, and often do, include conditions on consents that require observance of Maori protocols or the empowering of communities through other means.

In a developed, Western, neo-liberal, monetised society like New Zealand's, the question of ICM facilitating the penetration of capital is somewhat moot. However, those with greater capital resources do have advantages in being able to more readily obtain expertise and fund research into the effects of their activities than those with less ready access to capital. Anecdotal evidence suggests that situations have arisen where the Court may have been unaware that it was being given incomplete evidence due to either real or threatened contractual constraints being imposed on experts. One example of this kind of restraint is where experts are informally made aware that they will prejudice the likelihood of gaining future contracts from an applicant if they give evidence for an opponent. Side agreements between an applicant and an affected party are also common and this might be construed as the buying of consents. However, where decision-makers are uncertain as to the accuracy or sufficiency of available information, provision exists under the RMA for them to subpoena witnesses and order further investigations. The extent to which such provisions have been used has not been investigated, but in the authors' experience it is uncommon and generally restricted to large developments with potentially very significant impacts and contested expert evidence.

The delays caused to development as a result of the need to assess the development's environmental effects and associated costs remain the major concern for development interests. On the other side of the coin, the potential for an application to be considered without a public process, the costs of obtaining expertise and the ability for developers to seek costs if a matter proceeds to the Environment Court tend to be the issues of most concern to environmental groups and the general public.

Conclusion: Implications for ICM

In this article we have set out three key components that we consider need to be provided for in any successful legislative framework for ICM. These are: policy goals designed to achieve ICM; legislation to implement those policy goals, and decision-making bodies to administer the legislation. We have identified five specific kinds of tools that we consider an ICM legal framework should make provision for in order to give effect to ICM in decision making.

These are: jurisdiction over the coastal environment, integrated planning, a consent process, public participation and informed decision-making.

The RMA has been described in relation to our suggested key components and specific tools. It is our contention that in most respects the RMA demonstrably meets these criteria. It provides for a clear policy goal, sustainable management, and subsidiary, cascading policy mechanisms to ensure intergovernmental integration. The RMA also provides the empowering legislation and provisions for existing decision-making bodies at central, regional and local government levels to implement integrated planning and consent granting for the coastal environment. It also sets out clear criteria, through its purpose and principles, which reflect most of the fundamental sustainable development principles underpinning ICM. The catchment-based structure of the regional councils, who have primary responsibility for the coastal environment, facilitates ecosystem integration between inland areas and the coastal environment.

It provides adequate jurisdiction to achieve full ICM. Admittedly, the failure to include fisheries within its scope is problematic. However, its other significant departure from ICM is one of its strengths. By adopting sustainable management and an effects-based planning approach, coupled with considerable public participation, it is potentially more effective than alternatives that might be more prescriptive. The RMA requires all activities to undergo assessment of their environmental effects. By empowering the community to have a significant role in decisions, it creates a development context within which it is advantageous for developers to consult with the public, invest in cross-disciplinary and cross-cultural knowledge, information and research, and to avoid, remedy or mitigate adverse effects. It thereby provides a framework which seeks to enable developers and resource users to pursue individual and communal goals without having undue adverse effects on sustainability.

Although the transactional costs under the RMA are significant, these are largely borne by the applicant for development. This has been justified on the basis of economic policy. In particular, according to the RMA's free-market approach to resource use, it is appropriate for developers (and other resource users) to internalise the externalities of their economic activity, including the costs they impose on government administration when seeking development and resource-use approval. This is considered especially apposite in cases where development proposals directly affect public resources.

In all respects, other than fisheries, New Zealand's RMA is a model of best practice in ICM legislation. It provides mechanisms to facilitate intergovernmental, intersectoral and spatial integration. Moreover, it goes beyond simply integrating social science, engineering and biophysical science with

management, and includes cross-cultural knowledge integration. We are not claiming that the on-the-ground outcome has been a significant improvement in the quality of the coastal environment. That would be dependent on many other variables, such as the availability of expert witnesses, funding of hazard-protection measures, and skills in deciding when to notify. However, we contend that the RMA, within the constraints mentioned, does provide a strong model legislative framework for implementing ICM.