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CONSULTANCY FOR THE SOUTH PACIFIC BIODIVERSITY CONSERVATION PROGRAMME

LEGAL AND INSTITUTIONAL MODELS FOR CONSERVATION AREAS

ENVIRONMENTAL DEFENDERS OFFICE

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1. INTRODUCTION

The aim of this consultancy is to prepare a broad analysis of legal and institutional options for the establishment and management of Conservation Areas in fourteen independent Pacific Island countries. The full terms of reference for the consultancy are annexed at Appendix 1.

The protection of biodiversity in regulatory systems worldwide has tended to focus on endangered and threatened species protection legislation and/or habitat protection through the creation of parks and reserves, often areas where human use is severely limited. The SPREP Biodiversity Conservation Program aims to develop a broader model for protecting diversity which combines sustainable uses with biodiversity protection measures.

In most of the SPREP countries subject of this consultancy customary use of land and marine areas continues at the village level. This reflects the considerable extent of customary land and marine tenure in many SPREP countries. "Customary ownership and use" is used in this report to mean those rules of ownership and land use which have evolved by practice or custom at the village level and are generally accepted in the community as customary law.

Customary use of land and marine resources is compatible with biodiversity conservation objectives in many circumstances (Eaton 1985, 14-16). Exploitative resource use, as occurs in the case of logging and fishing by non-traditional methods for yields greater than subsistence level, is not compatible with biodiversity protection.

Another cause of substantial pressure on natural areas is overuse due to population pressure where the use by customary land-owners continues using traditional methods.

The legal models discussed below include various aspects of planning and controlling land-use as part of an overall model. This is particularly important if conservation areas are defined over large areas of land. This planning and control need not be imposed by a national government; it is more likely to succeed if it is at the initiative of landowners.

Responsibilities arising from international treaty obligations may be relevant to national government action. Relevant environment treaties are referred to in other SPREP reports and are to be considered comprehensively in the National Environment Management Strategies (NEMS) and Regional Environmental Technical Assistance (RETA) reports (see Eaton 1985, Pulea 1987, Thomas 1989). This area will not therefore be considered exhaustively in this report. The most significant treaties for this report are listed in Appendix 2.

Other relevant reports have been prepared on behalf of SPREP. The consultants found these reports invaluable in highlighting and discussing issues relevant to this consultancy.

2. CONTROLLING RESOURCE USE

Conservation areas do not exist in a legal vacuum. In any country there will be a number of other pieces of legislation which impinge on conservation area management. If a conservation area is established and includes various land-use categories which include resource

exploitation whether by traditional or non-traditional methods the adequacy of laws relating to environmental impact assessment, planning, landowner identification, fisheries, mining and logging must also be considered. The most important of these in the Pacific Island context are considered below.

2.1 Impacts on Marine Areas From Land-based Sources

Protection of the marine environment is very important for the South Pacific region because of its significance to the cultural and economic life of its people. Environmental issues which affect the marine environment include pollution from land-based sources, waste disposal, coastal development activity, increased sedimentation due to land use changes, over-exploitation of living marine resources and natural disasters.

Competing interests between landowners arise already for example because of land use which affects the water quality for landowners downstream. Where possible, control of land uses which will impact on freshwater or marine environments will need to be considered through land use planning principles.

Marine conservation areas need to be established in a holistic way recognising the connection between land and sea. This means either incorporating catchment areas into the marine conservation area or proscribing by agreement and regulation the protection that must be given to conservation area catchments.

2.2 Fisheries

Protection in conservation areas should include regulation of fisheries resources. Fisheries are often controlled by a national government agency which issues permits for fishing to non-customary entities. Full consultation with customary landholders, or those having customary use rights, before permits are issued is essential. Permits should not be issued for customary use areas if there is local opposition.

Information about the permits should be readily available in the relevant areas and should be written in appropriate languages. Management plans for fisheries resources should also take account of customary use requirements. Monetary penalties or other sanctions for offences, such as exclusion from the fishery for a period, must be adequate, with provision for enforcement by local people. Part, or all, of any fines levied as penalty should be returned to local communities.

2.3 Forestry Resources

In many SPREP countries forests are required for customary uses and is also used for commercial purposes by customary and non-customary landholders or occupiers. Permits for logging activity conducted by local and foreign interests are generally allocated through a national forestry department. Laws to regulate forestry should include provisions for management plans for a conservation area which are made and approved by landowners to be recognised.

Civil and criminal law sanctions for any breaches of forestry laws should exist, with monetary penalties which are recovered in court to be distributed among local communities as well as provincial and

national governments. Information on licences should be readily available in appropriate languages. Any contracts entered into by landowners must be equitable and provide for enforceable and effective penalties for breaches.

2.4 Land Use Planning

An important aspect of conservation area management will be the use of planning skills and concepts to ensure that land use is compatible with customary use and activity in conservation areas. The consultants do not wish to propose an extensive legal framework as a means of achieving this end but emphasise the importance of this aspect in any management regime to be applied in conservation areas.

3. EXISTING MODELS FOR PROTECTED AREAS

In many countries the best known type of protected area is a national park. The traditional notion of a national park is an area of wilderness, uninhabited, managed for tourist and recreational use. This model has come to be known as the "Yellowstone" model after the national park of the same name in the United States. The land is usually owned and managed by the government and established under specific legislation.

For many countries the model has limitations which make it unsuitable. Other legal and administrative systems have been applied to conserve specific areas and ensure sustainability.

The "Yellowstone" model of a national park has not worked well in the Pacific. This is because of the failure of this model to adequately deal with customary land tenure existing over an area designated as national park, the lack of state owned land and a shortage of resources to assist with management. Because tourism is generally not so well-advanced, the management of national parks is more obviously a net cost to the government.

IUCN has ten classifications for parks and protected areas although Carew-Reid has stated that none of these classifications are suitable to the land tenure systems in the South Pacific (Carew-Reid 1990, 32).

There are many existing examples of "protected" areas in SPREP countries being areas identified for nature conservation purposes. According to Eaton the most common of these areas are Nature Conservation Reserves/Managed Nature Reserves/ Wildlife Sanctuaries (IUCN, Category IV) followed by National Parks and Provincial Parks, (IUCN Category II) (Eaton 1985, 21).

We consider in this report examples of protected areas which apply some of the management systems identified by IUCN. As the models being discussed in this report do not closely parallel the different models identified by IUCN the material has been treated as useful background information.

There is a wide range of models for conservation areas operating in different parts of the world. Several of these models in both land and marine areas are discussed below. The models were chosen to show a variety of arrangements for the management of protected areas and to better understand the principles which should apply to conservation area establishment and management.

3.1 MODEL 1 Fauna (Protection & Conservation) Act, Papua New Guinea

An alternative model to national parks in state land is found in Papua New Guinea under the Fauna (Protection & Conservation) Act.

3.1.1 Title and Tenure

Land title is held by the customary land owners.

3.1.2 Management

Besides protecting individual species which are listed in a schedule to the Act, the Act provides for three types of protected areas. These are wildlife sanctuaries, protected areas and wildlife management areas.

In a wildlife sanctuary it is an offence to take or kill any animal other than an animal of a species declared by the Minister. Protected areas provide protection only for certain species of fauna which have been declared to be protected. Local rules may allow these species to be hunted but any device, equipment or method for taking or killing them may be prohibited.

Wildlife management areas (WMA's) are formed at the instigation of landowners on customary owned land. The areas and the rules which govern them are given recognition through their gazettal by the government.

The first two types of protected areas described above are declared by the national government, while WMA's are at the initiative of the landowners. Landowners wishing to propose a wildlife management area form a management committee. Rules are then drawn up by the local management committee to manage the fauna in whatever way the landowners see fit. The rules may provide for the "protection, propagation, encouragement, management, control, harvesting and destruction of fauna" in those areas. They may provide for licences to hunt, licence fees and royalties to be paid for any animals taken.

Enforcement of the rules of the wildlife management areas has not always been effective. Villagers and other government offices charged with enforcing the rules are sometimes uncertain about their content and the procedures for apprehending and proceeding against offenders. The rules themselves may not be sufficiently comprehensive or easily understood. They tend to emphasise the protection of the fauna but not its habitat (Eaton 1988). There appears to be no requirement to have a development or management plan.

3.2 MODEL 2 Uluru National Park, Australia

Several National Parks have been established in the Northern Territory, Australia which are owned and managed by Australian Aborigines. Uluru National Park management is described in detail with references to important features of parks under similar arrangements where necessary.

The history of ownership of the land by the traditional owners and the establishment of Uluru as a conservation area is vastly different from the experience of many Pacific nations. Land was given back to Aboriginal customary landowners by the Australian government on the basis that it would be leased back to the Director of the Australian

National Parks & Wildlife Service (now the Australian Nature Conservation Agency, ANCA) for use as a National Park under the National Parks and Wildlife Act 1975 (Cth). While this may seem to have been blackmail, the degree of control exercised by the Aborigines and the compensation received for loss of free use were landmarks for Australia in the recognition of aboriginal owners and rights to manage (Willis 1992).

3.2.1 Title and Tenure

The land is held by the Uluru-Katatjuta Land Trust, a body set up under the Aboriginal Land Rights (Northern Territory) Act 1976. The land is leased to the Director of the ANCA. An annual fee is payable to the owners. This fee is indexed to increase with inflation and is reviewed every five years.

Under the lease the owners of the Park are entitled to live in the park and to use its land for traditional purposes. This right is found in Clause 2 of the lease which allows

(a) use and occupation in accordance with Aboriginal tradition,

(b) hunting and food gathering other than for the purposes of sale,

(c) traditional use of any area of the park for ceremonial and religious purposes, and

(d) the right to reside anywhere in the Park subject to the Plan of Management.

The only limits are those imposed by the Plan of Management, for reasons of safety or for protection of the Park.

The lease imposes further important obligations on the Director of the ANCA. He or she is required: (clause 7 (1))

(a) to promote and protect the interests of relevant Aboriginals,

(b) to protect areas and things of significance to relevant Aboriginals,

(c) to encourage the maintenance of the Aboriginal tradition of relevant Aboriginals,

(d) to take all practicable steps to provide Aboriginal administration, management and control of the Park,

and: (clause 9)

(p) to encourage Aboriginal business and commercial initiatives and enterprises within the Park.

3.2.2 Management

Uluru is managed by a Board of Management consisting of six traditional owners or their representatives and four government nominees. The Director of ANCA, the Nominee of the Federal Minister for the Environment, the Nominee of the Federal Minister for Tourism

and an arid lands scientist.

Other parks with Aboriginal involvement in management have had Boards of Management which included people who worked in the park, including traditional owners, Aboriginal and non-Aboriginal rangers. The same power relations existed in Board Meetings as in staff meetings and Aboriginal people were not necessarily in a position of power, even though they had a majority vote (Willis 1992). Hence traditional owners replace park staff on the Board in Uluru.

The functions of a board under the National Parks & Wildlife Conservation Act Uluru traditional owners replace park staff on the Board in Uluru are

> "(a) to prepare, in conjunction with the Director, plans of management in respect of that park or reserve;
>
> (b) to make decisions, being decisions that are consistent with the plan of management in respect of that park or reserve, in relation to the management of that park or reserve;
>
> (c) to monitor, in conjunction with the Director, the Management of that park or reserve; and
>
> (d) to give advice, in conjunction with the Director, to the Minister on all aspects of the future development of that park or reserve."

Each member of the Board has a single vote, except the chairman who has a casting vote. All matters at board meetings are discussed in both English and Pitjantjatjara with translators. The meetings are open and many Aboriginal people attend in addition to the board members.

3.3 Model 3 Nitmiluk National Park, Australia

3.3.1 Title and tenure

Nitmiluk and Gurig National Parks were established under Northern Territory legislation (the Coburg Peninsula Land & Sanctuary Act and Nitmiluk (Katherine Gorge) National Park Act.

The Nitmiluk (Katherine Gorge) National Park has 13 members, 8 of whom are traditional Aboriginal land owners nominated by the Jaywon Aboriginal Land Trust. Politicians are banned from membership of this board.

3.3.2 Management

The plan of management is made by the Board of Management. All decisions of the board must be made in conformity with the plan of management, as must the day to day management of the park by the ANCA. In this way the wishes of the traditional owners are implemented in the day to day management.

The plan is published in English with Pitjantjatjara summaries. It commences with relevant material concerning the traditional owners, including their culture, history and the natural environment. The plan acknowledges that traditional Aboriginal activities are vital to the survival of the Aboriginal people.

Plans of management must be tabled in Parliament and may be disallowed by resolution passed within 14 days. If a plan of management is disallowed twice, in each case a mechanism for resolution is provided.

The plan of management recognises that there will be areas where uses of the park conflict between customary landowners and visitors. The plan makes provision for different zones so that specific management strategies can be employed where priority land uses have been identified. For example, sacred sites may be zoned to restrict access by non-Aboriginal people. This may be put into effect by signposting and/or fencing.

Rangers and wardens are appointed under the National Parks & Wildlife Conservation Act 1975 (Cth) and police have the same powers as wardens. The Park regulations are formulated by the Board of Management. The plan of management seeks to ensure that Park staff know the regulations and give feedback identifying potential problems and suggesting a workable strategy.

3.4 MODEL 4 Yadua Taba, Fiji.

An example of using traditional negotiation and agreement processes for the establishment of a conservation area can be found in Fiji. The uninhabited island of Yadua Taba is home to a unique iguana species. Although the island is uninhabited it was used for goat farming, slash and burn agriculture and coconut farming. These activities were threatening the habitat of the iguana and therefore the existence of the iguana. There was an urgent need for protection and the formal legislative lease procedure which exists can be prolonged.

3.4.1 Title and Tenure

Title remains with the Customary landowners.

3.4.2 Management

In 1980 the National Trusts for Fiji submitted a project proposal to IUCN which received funding from the World Wide Fund for Nature (WWF). An agreement was reached with the customary landowners under which the goats were to be moved to the nearby island of Yadua, where the traditional owners of Yadua Taba live. The members of the mataqali (the land owning unit) are to ensure that the iguana habitat is free from any outside interference, including visiting yachts and tourists. In return the National Trust is to compensate the landowners for $1,500 per annum to act as honorary wardens of the island.

3.5 MODEL 5 National Parks, Japan

Japan's system of protected areas is based upon a zoning system. Each national park is divided into 3 categories:

i) specially protected areas
ii) special areas
iii) ordinary areas (Third South Pacific National Parks and Reserves Conference, *Conference Report* Vol. 2, p 213).

3.5.1 Management

The specially protected areas are strictly regulated with consent

required from Japan's Environment Agency to take any resource. The special areas are divided into categories, each with its own criteria for the regulation of the activities of private owners.

In an ordinary area, local people may be allowed to utilise natural resources on a sustainable basis using traditional means. The Japanese Natural Parks Law allows for a range of activities and development in each designated area. Where land has previously been of traditional significance to local people then traditional uses are allowed to continue. The Japanese model is in a somewhat different situation from the Pacific because 70% of the land contained within the national park estate is publicly owned and 30% privately owned.

Local people derive few benefits directly from the national park, although indirect benefits are expected to flow from an increase in tourism. Where private landholders are greatly restrained in the use of their land within the park, a reduction in taxes is available. Nevertheless the zoning appears to be imposed by the government and conflicts do occur.

Enforcement in the national parks is undertaken by officials of the Environment Agency and local government.

3.6 MODEL 6 Annapurna Conservation Area Project, Nepal

The Annapurna Conservation Area is located approximately 200 kilometres west of Kathmandu. The area encircles the major peaks of the Annapurna Range together with catchments of the Marsyangdi, Modi Kola and Kali Gandaki rivers. It is also the site of the most visited trekking area in Nepal. Over 40,000 people live in the Annapurna Conservation Area and in 1991 over 38,000 trekkers visited the area.

3.6.1 Management

The Annapurna Conservation Area Project (ACAP) works through various management committees. The main committee, the Conservation and Development Committee, consists of fifteen members with at least one member from each of the nine local political areas and at least one woman member.

The project was established in 1986 by the King Mahendra Trust for Nature Conservation. This organisation is a Non Government Organisations (NGO) but with obvious government support. The objective of the project is to benefit the inhabitants by ensuring sustainable use of resources. The area therefore is not strictly speaking managed for bio-diversity conservation, but such conservation may be a by-product.

ACAP has been resourced with funding from donor agencies. However from 1992 the grants have been reduced by almost 50% and the shortfall is to be made up by a user fee charged on international trekkers. The local people generally contribute 50% of the cost of specific community development projects.

The ACAP has established various forest management committees. These committees have zoned areas of the forest into protected, fuel wood collection, fodder and timber zones. An example of a protected area is the Annapurna Sanctuary. All trekkers must either carry their own kerosene for cooking or stay at lodges which are obliged to use kerosene. This approach has only been partially successful because on

average one porter is employed for each trekker and the porters, who often come from other districts, either do not know or do not follow the rules regarding use of kerosene.

Several members of the ACAP staff have studied park management overseas. Several local lodge owners have attended a week long training session designed to cover food preparation, hygiene and the general business of running a lodge. The introduction of simple technology in the form of more efficient stoves has helped to reduce the use of wood.

This model does not require the transfer of title to or rights in land. There is no legislative framework for the project.

3.7 MODEL 7 Isabel Province, Solomon Islands

During 1993 Isabel Province enacted a series of ordinances to provide for the protection of land for customary and conservation purposes, the management of marine and freshwater resources and the protection of water sources.

3.7.1 Conservation Areas

Nomination

Any owner of land may apply to the Provincial Executive for a declaration that part or all of his/her land be set aside as a conservation area. The application must contain a signature of every owner of land within the proposed conservation area or of persons authorised to sign on behalf of the owners. The application must be signed by at least three bona fide representatives of each customary land holding group owning land within the proposed area and must contain a description of the consultation which took place. This consultation must be done as fully as reasonably practicable with all persons with customary rights over the affected land.

No person may sign as a representative unless that person is regarded according to customary law as able to speak on behalf of the customary land holding group.

The legislation provides that the executive may not declare any land to be a conservation area if it knows of any dispute over the ownership of the land. There is also limited power for owners of the land who did not sign an application to apply to remove or make amendments to a conservation area. Thus the provincial legislation provides a mechanism for ensuring that all landowners are represented while at the same time acknowledging that the formal process under the Land And Titles Act, which is national legislation, may decide that there are additional or different owners involved.

Management

When an application is made for a declaration that land be set aside as a conservation area, the rules which are proposed to apply for the use of that land must be included with the application. The ordinance provides for a set of model rules, setting out activities which are prohibited in a conservation area. These activities are:

* Cutting of any tree which is over two metres in height, except where such tree is to be used for the construction of a customary

building.

* Clearing or cultivation of any land for any purpose.

* Access for the reconnaissance prospecting or mining of any minerals (including oils and gases)

* Earthwork of any kind

These rules are obviously not comprehensive. They make no mention of key matters relating to biodiversity protection, for example hunting and trapping of native species of birds and animals. These can be built in, however.

The Provincial Government has given the responsibility of establishing a record which

* defines the boundaries of the conservation areas,

* states the rules which are to apply to those areas and

* includes maps marked with places protected by the ordinance.

Responsibility for public notification of a declaration rests with the Provincial Government at first instance and with the Area Council for notification at the village level. The person or persons who made the application are responsible for marking the boundaries of the conservation area appropriately.

The ordinance makes it an offence to break any of the rules applying to the conservation area. Liability is extended to directors and managers of companies. The primary responsibility for enforcing the rules is with the owner or owners of the land. An offender can avoid prosecution by paying a penalty to a village chief of up to $300.00.

The legislation makes no provision for positive management of the land.

3.7.2 Marine and Freshwater Areas

The Isabel Province Marine and Freshwater Areas Ordinance 1993 was enacted to provide for the management of marine and freshwater resources. Areas are nominated using much the same process as described above for conservation areas. However, the rights to declare such an area are restricted to persons with customary rights over the marine area or owning land under or adjacent to the freshwater area. Rules made under the ordinance are expressed to apply to the use of the resources within the area.

As mentioned earlier, activities in the catchment area, such as logging on step slopes, can impact marine and freshwater areas many kilometres away. This ordinance does not address, therefore, the management of marine and freshwater areas in a comprehensive manner.

3.7.3 Water Sources

The Isabel Province Rural Water Supply Protection Ordinance 1993, as the name implies, aims to protect water supplies in rural areas. An area of land identified as the catchment for a water supply system must be designated and rules established to regulate the use of the

area. The written consent of the Chief and owners of all land within the Protected Water Supply Area is required before designation of an area can take place.

As with Conservation Areas and Marine and Freshwater Areas, rules must be drawn up governing the use of the area. The model rules provided in the schedule prohibit the following activities:

* Cutting of any tree which is over two metres in height,

* Clearing or cultivation of any land, removal of any topsoil or any earthworks for any purpose

* Keeping of any animals

* Access for the reconnaissance prospecting or mining of any minerals (including oils and gases)

* Use or diversion of water for any purpose other than the distribution of water for the use of people residing in the village or local community benefiting from the water supply

* Defecating or urinating in, or in a place likely to result in the contamination of, the water supply

* Any other activity which is, or is likely to, result in the contamination of the water supply

Again, this Ordinance makes no provision for positive management of the catchment area. It does however control the use of the area in a way which recognises the integrated nature of a catchment system. It also maintains the requirement that all landowners who affected must agree to the rules and to be bound by them.

3.8 MODEL 8 Fagatel Bay, American Samoa

The approach taken by the United States government in the preservation of Fagatel Bay national marine sanctuary encompasses several important process points which involve the traditional users of the area.

The reserve is established under the Marine Protection Research and Sanctuaries Act 1972 (a United States Act). The American Samoan government nominated the area for designation noting its high conservation value. After preliminary public consultation, an issues paper about establishing the area as a sanctuary was prepared and distributed by the National Oceanic and Atmospheric Administration,(NOAA) which administers the Sanctuary Programs Division within the Federal Office of Ocean and Coastal Resource Management.

A public workshop was held to get further comments on the feasibility of the proposed sanctuary before the proposal was finalised.

3.8.1 Management

As part of the sanctuary establishment process a draft environmental impact statement and sanctuary management plan were developed. Concerns expressed by the traditional users included:-

i) sanctuary designations may not blend with the traditional

lifestyle and cultural attitudes of the Samoan people.

ii) with the introduction of the Federal programme, local participation in the process may be eliminated.

iii) The availability of native Samoans qualified to manage the sanctuary may be a limiting factor in effective sanctuary management.

After considering submissions NOAA and the American Samoan government developed a final environmental impact statement and sanctuary management plan. The management plan proposed regulations governing use of the reserve, a programme of education, research and a commitment to coordination of various levels of government in management.

The response to the concerns mentioned above was to allow traditional use within the sanctuary. An agreement was also made to train local assistant managers to the stage where they could be managers, although there was no commitment to train any other staff.

While the concerns and lifestyle of traditional Samoans were apparently taken into account, both the environmental impact statement and the sanctuary management plan were made by the American Samoan government in conjunction with the NOAA. Day-to-day management of the reserve is with the American Samoan development planning office. Overall administration lies with the US based NOAA.

Because of the designation, USA federal funding is available to manage the reserve.

3.9 MODEL 9 Marine Parks, New Caledonia

New Caledonia is surrounded by a lagoon which is enclosed by a barrier reef over 1000 kilometres long. Over half of the territory's population lives in Noumea, the capital. There has been a major impact on the marine resources close to Noumea. In response to the impact of fishing and tourist related activities on these areas the New Caledonian government established several types of marine reserves under the fisheries legislation.

3.9.1 Management

Yves Merlet reserve is perhaps the most restrictive of the conservation areas examined. Not only are fishing and the collection of any resources prohibited in the area but the passage of boats through the area is prohibited. These regulations can be waived for traditional canoes and customary fishing activities. This area was established as a reference area for biological and ecological studies.

Special marine reserves have been established by the government around some islands which are close to Noumea and have great tourist potential. In these areas no fishing or collecting of any sort is allowed and access is controlled by the government.

On the barrier reef opposite Noumea, a rotating reserve system has been established. Of the three distinct parts of the reef separated from one another by channels, one part is closed each three years in rotation with the others. The aim of this reserve is to enable regeneration of stocks of plant and animal life without duly

restricting access of fishermen to fishing grounds. This last mentioned system suffers from the problem that there was no assessment of the environment or the level of harvesting before the restrictive measures were introduced. There is still no monitoring of the system so that any evaluation is subjective and to date has been based on anecdotal reports by divers who have been in the area.

Lastly, specific fishing zones have been established to allow harvesting of specific resources from the sea, for example coral and aquarium fish. These activities are only allowed by permit with monitoring of the impact and also of the statistics resource taken.

3.10 MODEL 10 Great Barrier Reef Marine Park, Australia

The Great Barrier Reef comprises 2,500 individual reefs and coral islands. They range in size from less than 1 hectare to more than 100 square kilometres. The reef is the world's largest and most complex expanse of living coral reefs.

The Great Barrier Reef Marine Park was established by the Great Barrier Reef Marine Park Act 1975 (Commonwealth). The Act defines a "Great Barrier Reef Region". Areas in that region can be declared as part of the Marine Park and then zoned to define the uses which are allowed or prohibited.

3.10.1 Management

The Act establishes a Great Barrier Reef Marine Park Authority. The authority consists of a full time chairman and two part time members. The functions of the Authority are set out in section 7 of the Act and they include making recommendations to the Minister relating to the care and development of the Marine Park, carrying out research, and preparing zoning plans.

A Great Barrier Reef Ministerial Council was established in 1979 to co-ordinate policy on the reef between Commonwealth and State governments.

Part IV of the Act provides for a Great Barrier Reef Consultative Committee. The Committee consists of a member of the Authority and up to 12 other members appointed by the Minister. The functions of the Committee are to provide advice to the Minister and the Authority upon matters relating to the Marine Park including advice as to areas that should be parts of the Marine Park. The Committee includes representatives from relevant government departments, tourism, scientists, conservation groups and professional fishermen.

3.10.2 Zoning Plans

When an area is declared to be part of the Park the Authority must prepare a zoning plan. Before doing so the Authority must invite interested persons to make representations in connection with the proposed plan. In preparing the plan regard must be had to the following objects

(a) The conservation of the Great Barrier Reef
(b) The regulation of the use of the Marine Park so as to protect the Great Barrier Reef while allowing the reasonable use of the Great Barrier Reef region

(c) The regulation of activities that exploit the resources of the Great Barrier Reef region so as to minimise the effect of those activities on the Great Barrier Reef

(d) The reservation of some areas of the Great Barrier Reef for its appreciation and enjoyment by the public

(e) The preservation of some areas of the Great Barrier Reef in its natural state undisturbed by man except for the purposes of scientific research.

When the Plan has been prepared the Authority must make the Plan available for public inspection and invite people to make comments. The Plan and any comments on the Plan are forwarded to the Minister who may accept the Plan or refer it back to the Authority together with suggestions, for further consideration.

3.11 MODEL 11 Buccaneer Archipelago National Marine Park, Australia

In the north western Kimberley area of Western Australia, all land and marine waters are divided into specific clan areas of local customary landowners known as "danbun". There is currently a proposal for a Buccaneer Archipelago National Marine Park in this area. Even though this model has not been tested, it is worthy of review because it is a model proposed by traditional owners for management by traditional owners of a marine park.

3.11.1 Title and Tenure

The land is proposed to be held by a representative Aboriginal Association (similar to a land trust) under the Land Act of Western Australia. The waters of the Marine Park are to vest in the Western Australia National Parks & Nature Conservation Authority (NPNCA) and be leased back to the Aboriginal Association.

3.11.2 Management

The Park is to be managed by a Board of Management comprising Aboriginal, state government officials and other representatives with an Aboriginal majority. It is intended that the entire family group be consulted for each danbun area. This is to address the problems which have occurred in the past when individuals have been singled out by developers to make decisions on development affecting traditional Aboriginal lands. The individuals have not always clearly understood the implications of the request or have agreed to arrangements which do not suit the whole community because duress has been applied.

A series of bush meetings is to be held to ensure that the issues are clearly understood by all interested parties. Once a consensus has been reached on how to address the issues, the traditional owners and other aboriginal people with an interest elect a committee to make decisions on their behalf. When decisions are required on larger issues which are beyond the scope of the committee's power, further bush meetings are held.

The importance of these bush meetings is that all Aboriginal owners and people with interests in the land are present and that they are held in the locality.

There are existing commercial interests in the proposed Marine

National Park. These are the pearl oyster culture and trochus industries. These industries are currently not permissible within a marine national park. The CALM Act would need to be amended to accommodate these interests.

An important matter for consideration in national park management structure in Australia is that the future discretion of a Minister cannot be fettered. In Western Australia, the Minister for Conservation and Land Management Act (CALM) has the ultimate authority for management of conservation areas. Thus the Minister can veto a decision of the board of management but only where that veto does not result in a breach of the lease conditions which are the basis for joint management. The situation is the same as for Uluru National Park described elsewhere in the report (Nesbitt & Gulinji Nangaa 19.., Birckhead et at 1992).

3.12 Summary

An important aspect of the success of many of the conservation areas described above is the way establishment and management of the area is conducted with the central involvement of customary or traditional landowners. Management can be conducted through formal and informal mechanisms.

Consideration of these models demonstrates some successful and less successful experiences with protected areas. Several examples are drawn from different legal and social systems to those in the South Pacific, such as Australia and Japan. These examples are useful to demonstrate the scope for structured management regimes which aim to incorporate a range of interested parties and land uses. Two examples, the PNG Wildlife Management Areas and the Uluru National Park in Australia, demonstrate ways in which management of land areas have been dealt with in a legislative framework.

Possibly because of the complexity of managing marine areas, models of successfully managed areas are harder to find. The Great Barrier Reef Marine Park in Australia provides one example of a managed marine area with many conflicting pressures. This approach is unlikely to be desirable in its structure to the same extent in South Pacific countries however. Similarly the experience in New Caledonia and American Samoa demonstrates some of the difficulties.

No model described is entirely appropriate for the South Pacific in terms of implementing the conservation area concept envisaged. Few legal systems anywhere have tried to implement comprehensively that approach, particularly for marine areas which involve managing land based sources of impact in addition to managing the marine area itself. The Isabel Province models in Solomon Islands ought to be examined closely over time. They have only recently been introduced and it will be important to determine:

* whether areas are in fact established as conservation areas, marine and freshwater areas and water supply areas; and

* whether active management of these areas takes place.

4. RELEVANT FEATURES OF SPREP COUNTRIES

Each SPREP country subject of this consultancy has its own unique legal system but it is useful to highlight relevant features in order

to better discuss appropriate legal and institutional frameworks which can incorporate the necessary activities. General characteristics of the fourteen countries relevant to legal and institutional arrangements for a conservation area include the following important aspects.

The majority of land is held under customary land ownership, the precise nature of which varies between countries. National or provincial governments do not own a great deal of land which they can control directly through ownership. Decisions are made at the village level about land and marine resource use but there is no formal legal recognition of these decisions by national or provincial governments. Conflicts arise where various government departments are responsible for activities which impact on land use at the local level.

Customary ownership and use of marine areas is complex. In many countries areas below the high water mark are claimed by governments. National legislation specifies this but is disputed by customary owners. The extent of the area claimed by customary owners varies. Where reefs exist customary ownership is often claimed out to these reefs. Customary use rights, however, such as fishing and navigation are generally recognised.

Management of marine areas is complex because of ownership disputes and involves issues under international and national laws as well as customary law. This is compounded by the fact that **management of marine areas also requires management of the land** forming a catchment for the rivers and streams which feed into the marine areas. This may involve several groups of landowners, some of whom may not even have a boundary with the coast. One obvious cause of damage is the silting of marine areas due to erosion caused by logging, particularly on steep slopes.

There is constitutional recognition of customary law but this will often be expressed as being subject to the laws of the national parliament. Customary land ownership cannot be overridden by national laws without compensation.

5. ESTABLISHING CONSERVATION AREAS

Given the general institutional framework in SPREP countries identified above, the following aspects need to be considered for each SPREP country in deciding possible options, both legal and administrative, for establishing conservation areas.

Management of an area by customary landholders and/or government as a conservation area is one of the most important aspects of ensuring that a conservation area can exist. This factor is crucial regardless of the nature of legal and administrative arrangements adopted. Management includes the control and management of natural resources in the conservation area as well as land use and activities.

Land use planning in some form is important. A conservation area cannot be managed in isolation; the surrounding areas must also be managed, particularly catchments and wildlife corridors linking protected areas. As models for conservation become more complex, there is a blurring of a distinct protected area boundary into a system for management or zoning of the whole land for various purposes. The National Environment Management Strategy (NEMS) and Regional Environmental Technical Assistance (RETA) reports generally

support some form of land use planning.

5.1 Legal Means

One means of establishing conservation areas is the passing of specific legislation to establish conservation areas. Legislation can include provisions related to land tenure and management and control of conservation areas.

Other legislation may also need to be amended, given the broad issues involved in establishing conservation areas. Legislation concerned with wildlife protection laws, resource management and land use are examples. Conservation area options do not exist in a vacuum. They must co-exist with these other pieces of legislation which are likely to impact on conservation areas management particularly in the areas of forest and marine resources.

The need for specific conservation area legislation will depend on several factors such as whether support for customary control of land use and marine resource use is necessary (as is likely in many cases) and what other legislation and administrative arrangements exists to support the conservation area concept.

As customary land owners are increasingly subject to pressures and opportunities for non-customary land and resource use, the establishment of a legal framework to give effect to their wishes, and indeed maintain their rights, may become more necessary. Landowners ought to be involved in the preparation of any such legislation to ensure its support and practical success. Any measures established should encourage an approach by land holders which enhances the conservation area concept whilst enabling traditional use to continue.

If national governments become involved in management or wish to formally establish a national conservation area system legislation can provide a framework for this also.

5.1.1 National or Provincial Conservation Area Legislation

National conservation area legislation establishing a framework for each country is one obvious approach but needs careful consideration. There is likely to be a divergence of views about the relevance of legislation in providing a legal framework for conservation area establishment. A piece of national legislation which provides a process for conservation area identification and establishment in general terms, together with a management process, could be useful if national or provincial government support and protection are considered desirable. Given the recent signing of the Biodiversity Convention by most SPREP countries, national governments may feel under some obligation to implement specific legislation establishing a framework for conservation areas.

Care must be taken with the drafting of such legislation. Any legislation which seeks to establish what are perceived as national controls is likely to be counter-productive because local customary owners and users will feel removed from the process of identification, management and protection. Any legislation should be preceded by consultation and an education program explaining its potential benefits and problems and its scope.

The legislation can be prescriptive, specifying how conservation area

selection is to be carried out and providing for a management regime. Alternatively it could incorporate some of the concepts discussed below as part of a legal and administrative package. In some cases no legislation may be necessary. The Yadua Taba conservation area is an example of this. In other cases existing legislation can be amended to incorporate conservation area goals. The National Environment Management Strategies (NEMS) and Regional Environmental Technical Assistance (RETA) recommendations should be considered in this regard.

Proposed legislation should include the strengthening of customary law by providing that management plans drawn up are to be based on customary practices. Mere Pulea has considered the difficulties in codifying customary law because it is not static (Pulea 1985). She noted that customary law can be determined according to "current customary usage" (Pulea 1985, 34). Using this wording enables a broad view to be taken when considering the application of customary law under legislative provisions or a management plan.

5.1.2 Legislation to give effect to landowner decisions

Another approach to consider is legislation which gives effect to landowner decisions regarding conservation areas. The objective of this type of legislation is to provide legislative protection for management and land use decisions made by customary owners and users for conservation areas. Such legislation should not be coercive on customary owners and users. It should simply provide a mechanism for decisions made by customary landowners which is compatible with the objectives to be given legislative recognition. Decisions which the legislation applies to would be binding on government departments whose activities may impinge on conservation areas.

Consideration should also be given in any legislation, and in any new institutional arrangements for conservation areas, to providing mechanisms for better integration and recognition of decision-making at the local and national level. This will be addressed in part by the suggestion above for legislation to provide mechanisms for customary owner and user decisions to be binding in conservation areas.

Further possibilities of integration should also be considered in relation to any local or area committees proposed as co-ordinating bodies. Their role may require clarification in legislation in relation to landowner associations, customary landowner communities generally and national and provincial government departments.

Another consideration noted above is that most SPREP countries have national and/or provincial legislation dealing with controls on activities such as logging and fishing. Different government departments are likely to be responsible for administering the legislation depending on the area of activity. Permits issued by governments for resource use, such as fisheries and logging licences, should only be issued with the informed consent of customary owners. Consultation with customary landholders is not sufficient (Pulea 1988, 39). Even with that consent, conditions placed on permits need to be drawn with enforcement and monitoring aspects in mind.

5.1.3 Effective Wildlife Protection Laws

Wildlife protection laws could be considered as part of any package of laws. These should include offences particularly targeting non-

customary methods of killing wildlife. Killing for customary purposes and livelihood needs should not be punishable under these laws. (Such killing may still be punishable if it is contrary to the rules of any conservation area which is established).

Adequate and appropriate penalties are important. By providing that penalties are payable, at least in part, to local people encourages their involvement in ensuring that laws are enforced. Customary landowners or those having customary rights should be involved in enforcement measures.

Sanctions must be appropriate to both local and national circumstances. For example, loss of a privilege or punishment under customary law may be an alternative to monetary penalties, which have with the substantial problem of enforcement and prosecution to overcome.

5.1.4 Environmental Impact Assessment

Environmental impact assessment (EIA) should be mandatory for all non-customary activities which may have a significant impact on conservation areas. EIA for conservation area projects should also be considered on the same basis. EIA procedures can be implemented through guidelines, as has occurred already in some SPREP countries. Conservation area legislation can also include EIA requirements or procedures. Alternatively, separate legislation specifying EIA can be passed.

5.2 Legal means other than legislation

There are several ways of legally creating protected areas over customary land apart from legislative means. These ways were identified at the SPREP Workshop on Customary Tenure, Traditional Resource Management and Nature Conservation as **acquisition of land by government, leasehold held by government or the creation of an easement** (rights over the use of land granted to government or non-government agencies) (Thomas 1989, 11-12).

Resumption of land is another, often controversial, option open to governments. There will generally be power reserved under the Constitution or other statute to a national government to resume land provided adequate compensation is paid. The power will usually be exercisable for specific purposes only, such as where land is needed for public works.

In most cases resumption or acquisition is unlikely to be the most desirable approach in SPREP countries not least because of the substantial difficulties in controlling land management in these areas. These problems are identified in the next section in relation to the "Yellowstone" national park model.

A key issue in conservation area management is the involvement of local landowners and occupiers. Any legal system created must ensure that appropriate management takes place. One example of this is identified by Mere Pulea in the National Environmental Management Strategies (NEMS) Fiji report (page viii)

> "Reserves established by lease could also allow for the active participation of the landowners... Native land protected through a leasehold system [has potential] where the customary authority

and communal organisation must be taken into account [in management decisions]".

5.3 Administrative Arrangements

Administrative arrangements for establishing conservation areas can occur in various ways, for example, by **agreement between governments and local landowners.** Creating conservation areas in this way may or may not require legislative backing depending on the extent of support at both local and government level. Such agreements may be legally binding between the parties without specific legislative backing, but there remains the problem of making the agreement publicly known and enforcing the terms of the agreement against third parties.

Land owned by government can of course be dedicated to conservation area use if the government considers that appropriate.

5.3.1 Integration of Government Activity and Conservation Area Management

A related issue to the recognition of customary owner control of resources in conservation areas is the role of government departments. Several may have responsibilities which impact on conservation areas. The role of government departments at every level needs to be clarified and perhaps integrated with an existing agency or a new agency established to coordinate a national conservation area programme. This will hopefully provide a mechanism for resolving conflicts between various government departments whose activities impinge on conservation areas.

The need for co-ordination is demonstrated when regard is had to the Ningaloo marine conservation area described above. Various governments and departments have jurisdiction over different areas and the limits of each jurisdiction are often difficult to determine. Adequate resourcing of the government department responsible for conservation is also important.

5.3.2 Education

An important part of any system introduced must be an educational programme relating to biodiversity. Arguably, this is the most important aspect of conservation area implementation. Without popular support, conservation areas are likely to fail, regardless of the laws implemented to try to protect them.

As well as government initiatives to assist conservation objectives in protected areas there is also scope for greater encouragement of non-government organisations (NGOs) through legal and institutional mechanisms. NGO has a wide meaning. It could be, but does not have to be, an incorporated group under national or provincial laws. NGOs exist in many countries such as landowner associations, womens groups, church groups and industry groups. NGOs can play a major role in the education of the community about management issues and in policy implementation.

5.4 Limitations on Legal Measures

Any legal or institutional system proposed can only assist other measures such as economic incentives to enhance customary land and resource use in a sustainable way.

Some of the examples of successful conservation areas reviewed in the course of the consultancy were established without recourse to legal means other than local customs. Management systems were largely developed by the local communities with little or no involvement from national or provincial governments. Any legal and institutional framework must complement initiatives at the local level. Giving effect to the wishes of a community is a positive role that can be played by a national or provincial government.

This is increasingly important where protection is sought from the activities of people from outside the community who might not know or respect customary laws. Giving legal force to local initiatives may also afford protection from other statutory provisions which might not provide adequate protection to landowners. For example the Forest Resources and Timber Utilisation Act in Solomon Islands provides certainty of land ownership in order that logging companies might be sure that any agreement they reach is protected from future claims. The Act does not provide the protection that the Land and Titles Act does in establishing in a fair and open manner the various land owners.

Overall the consultants emphasise the need to properly integrate the various pieces of legislation impacting on conservation area management.

6. ESTABLISHING EFFECTIVE MANAGEMENT IN CONSERVATION AREAS

A central observation to be made from a review of the experiences of those involved in conservation area management throughout the world is that local communities and land owners should take a central role in decision making. This is also clear from several of the models above, for example, the Uluru and PNG models. At the IV World Congress on National Parks and Protected Areas, February 1992 in Caracas Venezuela several resolutions were made about the need to put all protected area systems on a sound legal and financial footing and enable local people to benefit from protected areas. Four objectives were identified:

* increase local community involvement in the planning, use and management of protected areas
* improve knowledge of protected areas and the resource needs of local communities
* develop sustainable use and management methods to assist local communities
* establish appropriate mechanisms through which to assist local communities

In assessing a particular model it is instructive to look for mechanisms which ensure land owners have that central role. These include:

1. identification of the conservation area

2. identification of the people with interests in the area

3. identification of the threats to biodiversity protection

4. representation of all interest holders in management

5. a plan of management to address or prevent threats and provide a mechanism for enforcement of the plan of management

6. education about issues in general and the plan of management in particular

7. resourcing management, education and enforcement

8. a benefit to land owners as a result of the management of conservation areas

A discussion of options available to achieve these key objectives now follows.

6.1 Identification of Conservation Areas

One way to identify conservation areas has been to choose land which has not been used for other economic purposes. However areas which are important for biodiversity conservation will often be subject to many competing interests of resource use and development and therefore not readily "available" as protected areas.

Another way to identify areas is to choose significant examples of a type of habitat. This identification may be the result of an inventory of biodiversity resources prepared by an appropriate "expert". This inventory would ideally provide details of how much of each category of ecosystem remains, point to areas which are threatened and therefore set priorities for the areas which require the most urgent attention. This method could be important because local communities may not be aware of the national and international importance of the biodiversity of their land.

A problem with this method has been that the initiative has come from central governments and has often resulted in restrictions upon local people who had traditionally owned and used the land. These initiatives may well have been for the best intentions. For example in Nepal the creation of Royal Chitwan National Park in 1973 and its extensions resulted in the forced relocation of villages from within the Park boundary. Those people who live on the edge of the Park are prohibited from obtaining former benefits, for example forest products, yet they are subject to attack and crop loss from animals living in the park, such as tiger and rhino.

A further method for identification of areas to be managed to preserve habitat and/or species is through the experiences of local communities. With cultures based on close association with and use of the environment, local communities may be best placed to know when a particular component of that environment is under stress and what steps to take to reduce that stress (Thomas 1989, 115). This method has found some success in Papua New Guinea with the identification and management of Wildlife Management Areas under the Fauna (Protection and Conservation) Act.

If legislation enabled any landowner to nominate an area as a conservation area, nominations could then come from the community which has identified the need for protection of its resources or from the government which has identified a national need for preservation.

It will be important to clarify which values and resources are to be given highest conservation priority. Areas will almost certainly be proposed for reasons other than biodiversity conservation. For example, WWF has identified the protection of subsistence resources from over-harvesting, the gaining of formal recognition of tenure and

resource ownership, income generation, protection of cultural values by reinforcing the authority of customary owners and the protection of significant sites as other purposes behind the creation of Wildlife Management Areas in PNG (WWF 1992).

6.2 Identification of Interested Parties

The consultants believe that it is important for all parties with an interest in the proposed conservation area to participate in decisions concerning the area. This participation may be allowed to differing degrees, depending on the interest involved.

The identification of all relevant landowners stands out as one of the most important and difficult tasks. Many countries have a process for determining customary land ownership. For some customary owners this may appear cumbersome and time-consuming.

It is possible to develop an alternative, locally organised system of determining land ownership for the purpose of establishing and managing conservation areas. The Isabel Province models provide this alternative system. They do not purport to override the national system, nor would they have any effect if they purported to deprive a legitimate owner of his or her ownership.

The making of submissions in relation to the designation of conservation areas ought to be open to anyone. In the Fagatel Bay model the draft Plan of Management was put on display for comment and an inquiry was later held. Both of these processes were open to any member of the public to make submissions. The number of parties can be ascertained by providing for a process for expression of interest. For example, a person with an interest must register in some way within a given time.

6.3 Threats to Biological Diversity

The consultants believe that the determination of whether some action or process is threatening biodiversity should not be part of a political decision-making process, but should be determined by people with knowledge of biodiversity and the threats posed to it. This would include both traditional land users and scientists.

Environmental impact assessment before an activity takes place can be an efficient method of anticipating and dealing with threats before they occur.

Sometimes the threat will be all too obvious; over use or over exploitation of a resource, as happened in the situation in Noumea described above.

The response to a threat to biodiversity is inherently a political decision; it is at this stage that value judgments must be made as to how to address the threat.

6.4 Representation in Decisions

In the Great Barrier Reef model, the Minister administering the park appoints members to represent various interests on an advisory committee. The danger in this approach is that appointments may not be truly representative.

Some of the models described above provide for a board of management for a conservation area with a majority of members held by the traditional landowners. This ensures representation of the landowners in management.

To ensure full representation, a process must be put in place which provides for

* a system of representation agreed upon by all relevant landowners, based on customary law principles

* proper notice to be given of any proposal,

* adequate time to consult and respond to any proposal.

6.5 Plan of Management and Enforcement

The aim of a plan of management is

1. To reconcile competing interests in a sensitive and responsive way.

2. To identify priorities for allocation of available resources, indicating particular resource management programs.

3. To describe management prescriptions, specific strategies and the underlying philosophy.

4. To facilitate public understanding of, and involvement in, the planning process (Birckhead 1992, 143).

By way of formally sanctioning a plan of management drawn up by traditional owners, the national or provincial law of a country can reinforce any customary law. This does not mean that customary law is codified; the plan of management should be reviewed regularly and will evolve as customary law and conservation measures change.

Enforcement which can involve and benefit local landowners is highly desirable. Legislation which provides for enforcement must include local involvement and benefits such as the payment of penalties to landowners. This is discussed below.

6.6 Education

Education about the benefits of conservation areas for local landowners is extremely important. This should be part of any consultation processes established to identify potential conservation areas. This obviously requires resources and a role for government, non-government organisations and customary landowners. Education and management are closely linked in the conservation area concept.

6.7 Resourcing management, education and enforcement

An important aspect of the overall establishment and continuation of a conservation area will be the provision of adequate resources where these are needed for aspects such as management, education and enforcement of laws and regulations which restrict activities in a conservation area. This issue is linked to the possible benefits likely to accrue to customary landowners. These resources may be

derived from governments but opportunities for income generating activities which are compatible with a conservation area can also be considered such as, for example, appropriate tourism.

6.8 Benefits to Customary Landowners

It is very important to ensure that benefits for customary landowners are identified, are clearly communicated and are supported by governments. If the approach is taken of strengthening the management role of local communities it is likely that possible benefits can be perceived more easily.

7. REVIEW OF EXISTING LEGAL INSTRUMENTS IN SOME SPREP COUNTRIES

A review of seven of the National Environment Management Strategies (NEMS) and Regional Environment Technical Assistance (RETA) draft reports and recommendations about what changes could be considered in the context of each countries legal framework is contained in Appendix 3. Most of the countries subject of this consultancy have some provision for the identification and establishment of protected areas. Other aspects of controlling activities in conservation areas such as species protection laws are considered.

The draft RETA and NEMS reports prepared for SPREP show that few countries have legislation providing a comprehensive framework for conservation areas on a national basis. Several countries do have existing legislative provisions for creating protected areas which are generally dedicated to conservation purposes. None have systems for management similar to the PNG wildlife conservation areas provided for in legislation, for example. Existing laws for protected areas could be amended in some cases to provide the appropriate framework for establishing conservation areas if legislation is considered necessary.

8. CONCLUSION

There is a need to develop models for protecting diversity which combine sustainable uses with biodiversity protection measures. The "Yellowstone" model of a national park, a conservation area without people living in it, is not appropriate for most areas in the Pacific because most land is in private ownership. Even in countries where the government owns large areas of land, alternative models for biodiversity protection are being examined. This is because it is not always possible to find representative areas of all habitat types on government owned land. A range of more sophisticated and creative options will be necessary.

Customary land owners are increasingly subject to pressures and opportunities for non-customary land and resource use. A key aspect of conservation area management is the need to support customary landowner management decisions particularly where these continue customary usage. The establishment of a legal framework is important to give effect to the wishes of these landowners and maintain their rights. Legislation should include the strengthening of customary law.

Legislation which seeks to establish what are perceived as national controls is likely to be counter-productive because local customary owners and users will feel removed from the process of identification,

management and protection.

Information about conservation areas, their management, resource use licences and permits and relevant legislation should be readily available in local areas and should be written in appropriate languages and format. The consultants are currently preparing illustrated pidgin guides to Solomon Islands forestry legislation and forestry licences. The aim is to make the law more accessible to those people who are affected by it.

Conservation areas exist in a broader legal framework. There will be a number of other pieces of legislation which affect conservation area management, including mining, forestry and fisheries legislation. These areas of legislation need to be assessed to ensure that they do not unreasonably conflict with or undermine the values of conservation areas. Similarly it will be important to co-ordinate the activities of government departments which may impact on conservation areas.

Land use planning is important in order to manage areas both inside and outside conservation areas. Planning need not be a system imposed from "outside" which restricts a landowners rights, but ought to be at the initiative of landowners. As models for conservation become more complex, there can be a blurring of protected area "boundaries" into a system for management or zoning of the whole land for various purposes.

This concept of land use planning is especially important in the context of land uses which will impact on the marine environment. These upstream uses will obviously need to be considered to protect marine conservation areas, recognising the connection between land and sea. This means incorporating catchment areas into any planning for marine conservation areas.

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ANNEX 1 - TERMS OF REFERENCE

The Terms of Reference for this consultancy are as follows:

1. To prepare a broad analysis of legal and institutional arrangements which may be relevant to the establishment and management of Conservation Areas in the independent Pacific Island countries and which take into account the above background information.

2. The analysis will be undertaken over a period of six weeks, and a final report, of about 15 pages of more including recommendations and tables where useful, will be submitted to the PA Team Leader by 17 July 1992. A synopsis of the report, of 4-6 pages, will form a separate attachment. The report and synopsis will be provided in the form of both hard and electronic copies, the latter in both WordPerfect 5.1 and ASCII formats.

3. The analysis will provide a broad overview of opportunities where traditional and modern systems of law can be reinforced to support and strengthen CA establishment.

4. Based on an analysis of models and legislation existing in various countries and parts of the world, the report should define a suite of possible options for the establishment and management of CAs in PICs.

(a) An analysis of models and legislation existing in various countries and parts of the world for conservation areas and management structures.

(b) Possible options for the establishment of conservation areas in Pacific island countries.

(c) Identification of potential legal and institutional problems in the establishment and management of CAs with special consideration to existing land tenure systems in the Pacific Islands and the involvement of modern and traditional forms of management and resource use rules. This task will substantially be a gathering and review of the information contained in the legal consultants reports in the NEMS and RETA projects.

5. Contact details for the PA Team Leader to whom the draft and final reports should be sent are as follows:

    Iosefatu Reti, Team Leader
    South Pacific Biodiversity Programme
    SPREP, PO Box 240, Apia, Western Samoa.

6. The consultancy is concerned with the following countries which are participating in the BCP:

Cook Islands	Federated States of Micronesia
Fiji	Kiribati
Marshall Islands	Nauru
Niue	Palau
Solomon Islands	Tokelau
Tonga	Tuvalu
Vanuatu	Western Samoa

ANNEX 2 - INTERNATIONAL TREATIES

1. International Agreements

Relevant to national government action may be responsibilities arising from international treaty obligations which can give rise to national legislation. These treaties or conventions are both regional and global in scope.

1.1 Regional Conventions

There are two major regional environmental treaties dealing with the environment of the South Pacific and both refer to the need to establish protected areas.

1.1.1 The Convention for the Conservation of Nature in the South Pacific 1976 (Apia Convention) encourages parties (Article II) to create protected areas. It did not come into force until 1990 and few SPREP countries have ratified it (Cook Islands, France, Fiji, Australia and Western Samoa have). It is limited in scope. It prohibits the exploitation of resources in national parks from commercial profit, except after the fullest examination (Article 3). Other provisions require State parties to generally protect flora and fauna from exploitation, including developing lists of indigenous fauna and flora threatened with extinction (Article 5). Provision must also be made for customary use of areas and species in accordance with traditional cultural practices (Article 6). Does the fact that this has not gained much support amongst SPREP countries suggest that its focus on a limited view of protected areas is not attractive to many South Pacific countries?

1.1.2 The Convention for the Protection of Natural Resources and Environment of the South Pacific 1986 (SPREP Convention) provides for a broad environmental management regime for marine areas. Its provisions concern issues such as marine pollution from boats and land-based sources, disposal of wastes and the storage of hazardous substances. It also refers specifically to the need to create protected areas to protect rare and endangered flora and fauna as well as their habitat. The Convention encourages State parties to establish laws which will discharge obligations under the Convention. There are also two protocols attached to the convention; the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping and the Protocol concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region. The SPREP Convention has been signed and ratified by Australia, Cook Islands, Fiji, France, the Marshall Islands, the Federated States of Micronesia, New Zealand, PNG, Western Samoa and the Solomon Islands and is in force. It has been signed by Nauru, Palau, Tuvalu, the UK and the USA.

In the preamble to both treaties the need to take into account the traditions and cultures of the Pacific people in their customs and practices is specifically recognised. Such treaties have been part of the basis for the SPREP 1991-1995 Action Plan For Managing the Environment of the South Pacific Region. The Plan is a regional strategy identifying various priorities for environmental assessment, environmental management and law, species protection and protected areas. Prior to the Action Plan, the Action Strategy for Nature Conservation and Protected Areas in the South Pacific was also developed. It is a regional strategy to promote

sustainable development and the conservation of biodiversity developed at the Fourth South Pacific Conference on Nature Conservation and Protected Areas held in Vanuatu in 1989.

1.2 Global Environmental Treaties

There are several international treaties which are or can be important in terms of promoting national conservation efforts.

1.2.1 The Convention for the Protection of the World's Cultural and Natural Heritage 1972 (World Heritage Convention) is one of these although this has not generally been adopted in the South Pacific. The World Heritage Convention has only been ratified by the Solomon Islands amongst PIC countries. Australia and New Zealand have also ratified it. Its benefits have to be seen as much more relevant in the South Pacific if it is to become an important international convention in the region. Listing as a world heritage site under the Convention can bring obvious benefits in terms of attractions for ecotourism but also many management and other problems due to the presence of tourists. Landowners in areas such as the Hundstein ranges in PNG have been introduced to the world heritage concept and received the idea with interest. It is clearly important that world heritage listing have the support of local people and that management of these areas take place only with their full participation and co-operation.

1.2.2 The Convention on International Trade of Endangered Species 1973 (CITES) aims to protect endangered species through restrictions and prohibitions on international trade in flora and fauna and is considered to have been a reasonably effective convention in achieving its aims. Few SPREP countries have signed or ratified the Convention.

1.2.3 The Convention on Biological Diversity 1992 (Biodiversity Convention) is the most recent convention to arise with direct implications for biodiversity conservation. The Convention was opened for signature at the United Nations Conference on Environment and Development in June 1992. The Cook Islands, Fiji, Marshall Islands, PNG, Vanuatu and Australia have ratified the Convention. Federated States of Micronesia (FSM), Nauru, Western Samoa, Solomon Islands and Tuvalu have signed but not yet ratified it. The Convention places general obligations on parties, subject to a party's ability to fulfil these obligations (the wording used in the Convention is 'as far as possible and as appropriate'). The general terms of the convention reflect the complexity of the issue it endeavours to cover.

Article 6 refers to the obligation of parties to develop national strategies, plans or programs for the conservation and sustainable use of biological diversity. Article 7 refers to the responsibility of contracting parties to undertake identification and monitoring of biological diversity. Under Article 8 parties are required to give emphasis to in-situ conservation of biodiversity; the conservation of ecosystems, natural habitats and species in their natural surroundings. Parties should also develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity. The emphasis is on conservation and sustainable use of biological resources both within and outside protected areas. Linked with in-situ conservation are the

promotion of ecosystem and natural habitat protection and maintenance of viable populations of species; promotion of sustainable development in areas outside the protected area system; development or maintenance of necessary legislation and/or other regulatory provisions for the protection of threatened species and populations and where a significant threat to biological diversity has been identified regulation or management of the relevant activities.

Article 13 requires parties to undertake public education and awareness of the importance of biodiversity. Article 14 requires that parties introduce appropriate environmental impact assessment procedures for proposed projects that are likely to have a significant impact on the environment. Parties are also to introduce appropriate arrangements to ensure that the environmental consequences of programs and policies that are likely to have significant impacts on biological diversity are taken into account. Importantly the convention also raises the need to protect genetic resources from exploitation (Article 15) an important issue for many SPREP countries. The Convention requires that compensation be paid to developing countries for the extraction of genetic materials from those countries. A number of these clauses require State parties to develop and undertake action programs to ensure biodiversity protection.

The convention will provide for the needs of developing countries to enable them to implement the Convention measures, including new and additional financial resources and appropriate access to relevant technologies. Article 20 concerning financial resources specifically acknowledges, "... the dependence on, distribution and location of, biological diversity within developing country Parties, in particular small island States."

Thirty ratifications are required before the convention will come into force. The convention is expected to come into force in early 1994.

1.2.4 **The Convention for the Protection of Migratory Birds** (Bonn Convention) is aimed at protecting migratory species and particularly territory included in the range of those species. Party States are obliged to protect habitat and migratory pathways as well as the species.

1.2.5 **The Convention for the Protection of Wetlands** (Ramsar Convention) is aimed at the conservation of wetlands and their flora and fauna particularly in relation to their significance to the transboundary paths of species of migratory waterfowl. Under the convention significant wetlands are listed which parties are then obliged to protect.

2. Marine Area Conservation

2.1 In the area of marine protection the **Law of the Sea Convention** 1982 recognises the right of national governments to control their inland waters and territorial seas out to 12 miles from national baselines. This area of control or influence is now extended out to 200 miles in the Exclusive Economic Zone. It also places obligations on parties to protect marine areas from pollution and other harmful activities.

Although the Convention is not in force most of its provisions, including all those mentioned above, are regarded as reflecting customary international law and therefore appropriate state practice.

2.2 The **South Pacific Forum Fisheries Agency Convention** 1979 has provisions related to the conservation of fisheries resources in the region.

2.3 The **Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific** 1989 requires that State parties prohibit the import of fish and fish products caught using a driftnet. Port access to fishing vessels using driftnets is also restricted.

2.4 The **International Convention on the Prevention of Pollution by Dumping of Wastes and Other Matter** (London Convention) aims to control pollution of the sea by dumping of waste and other matter. The **International Convention for the Prevention of Pollution from Ships** (MARPOL) aims to control pollution from ships at sea.

3. Effectiveness of International Conventions

The effectiveness of international and regional conventions is determined by the extent to which these are ratified and implemented by State parties. Whether States are interested in implementing international obligations depends on a number of factors such as the relevance of obligations to national requirements and the significance of an issue at the international level. For many Pacific Island countries fulfilling international obligations has important resource implications. The provision of funding for national implementation of conventions is an important consideration. The Biodiversity Convention is an important international milestone in developing biodiversity protection and provides a significant impetus for biodiversity protection program development for State parties. Its importance in the development of national policy in the Pacific cannot yet be fully predicted but there already appears to be a high level of interest in its implementation in the South Pacific. The availability of resources to assist in implementation under the Convention are important and directly relevant to the effectiveness of the Convention in the South Pacific. Article 21 of the Convention deals with financial mechanisms. The interim funding body is the Global Environment Facility (GEF) and this will provide money only to developing countries.

Conventions can be useful and important in providing an international framework for regional and domestic policies and legislation. There are already two important regional strategy documents produced which regional agreements provided impetus for. Because international agreements are consensus documents which require a wide range of interests to be taken into account they generally incorporate the differing views of the contracting parties who are involved in the negotiations. The Biodiversity Convention for example had substantial input from G77 countries in its completion through the UN negotiating process.

ANNEX 3 - DRAFT NATIONAL ENVIRONMENT MANAGEMENT STRATEGY (NEMS) AND REGIONAL ENVIRONMENT TECHNICAL ASSISTANCE (RETA) REPORTS CONSIDERED FOR THIS CONSULTANCY.

Paragraph 4(c) of the consultancy requires consideration of the NEMS and RETA reports presently being prepared for SPREP. Some of these have been made available to the consultants in draft form:

1. Federated States of Micronesia
2. Fiji
3. Kiribati
4. Republic of the Marshall Islands
5. Palau
6. Solomon Islands
7. Tuvala
8. Tonga (part only)

The Fiji report in final form has also been received.

Some of Palau's environmental legislation was provided by SPREP;

* Endangered Species Act and amendments and regulations,
* Wildlife Management Act,
* Natural Heritage Resources System Act (query bill?)
* Palau Forest Practices Act and Marine Resource regulations.

1. FEDERATED STATES OF MICRONESIA

Constitution and Customary Law and Land Tenure

The Constitution protects Micronesian traditions and the communal land tenure systems.

The draft RETA Report notes that constitutional and jurisdictional questions are an impediment to the establishment of effective environmental controls. A central legal question is the way in which powers are delegated between the state and national governments in relation to environmental regulation as the States have strong legal powers to control their own affairs.

A broad range of government departments are concerned with environmental matters. The Department of Human Resources has the main responsibility, linking it to health and sanitation efforts. In the consultants view better coordination of the activities of the relevant government departments is important.

Protected Areas

There are few legally established protected areas in Federated States of Micronesia (FSM) and there is no legislation for this purpose.

Recommendations: The tentative recommendation of the RETA Report is that the Federated States of Micronesia presently requires more comprehensive nature preservation legislation. Legislation for the administration and protection of marine and terrestrial areas should include several concepts, including:

1. The establishment of a protected areas agency either as part of a government department or as an independent authority. Preferably this should be the same institute that oversees environmental

health protection.

2. Certain areas should be defined for protection with distinctions for different use.

3. There need to be advisory bodies which include customary land owner participation.

4. Enforcement powers.

5. The power to make regulations.

6. Any system of protected areas must maintain traditional rights and practices as much as possible.

7. Because of the innovation of government or regulatory control over private customarily held land and waters, public hearings, public education and close interaction between national and state departments may well be the proper starting point for a comprehensive network of protected areas.

Species Conservation

There is legislation providing for conservation of species which limits the taking selling possessing or exporting of listed endangered species plants or animals. The legislation relates also to any species listed under the CITES Convention (FSM is not yet a party to this treaty).

Recommendations: The tentative recommendations of the draft RETA Report are that additional funding and training is required to promote effective management of species protection measures and enforcement of legal protection. Legislative efforts to conserve living resources must be coordinated and updated.

Role of State Governments

Each of the four states of FSM has its own legislation and constitution which in the case of Kosrae includes a provision that "a person has the right to a healthful clean and stable environment". The state government is required to protect by law the environment, ecology and natural resources of Kosrae.

The constitution also provides for municipal level government, which can pass ordinances. Most environmental law has tended to be state law. Legislation includes endangered species legislation as well as fishing controls. No current legislation protects marine interests and land areas through any kind of national park or reserve system.

Recommendation: As noted in the draft RETA review the relationship between the laws at the state and national level require clarification. This impacts on the establishment of Conservation Areas as there could be conflicting national and state programs.

2. FIJI

Constitution and Customary Law

The 1990 Constitution protects customary land rights. Any dealing which affects Fijian land, custom or customary rights or any

alteration to the Native Lands Act and the Native Land Trust Act requires a majority of all members votes and including 18 of 24 nominees of the Bose Levu Vakatuarga in the Senate.

Land Tenure

The Native Lands Act 1985 defines in section 2 the ownership of native land vested in native owners as "the Mataqali or other division or subdivision of the natives having customary right to occupy and to use any native lands". Under the Native Land Trust Act of 1940 a Board of Trustees called the Native Land Trust Board was established. This controls and administers native lands for the benefit of the Fijian owners. Native land is subject to the provisions of the State Acquisition of Lands Act, the Forest Act, the Petroleum (Exploration & Exploitation) Act and the Mining Act (s.7).

Leases of Native Land

The Native Land Trust Board is empowered to make leases or licences over native land subject to certain restrictions. In some cases an environmental impact statement is required as part of the consent conditions for a particular lease.

Species Protection

The Birds & Game Protection Act 1923 provides protection to all birds other than those listed as introduced species. Licences can be obtained for particular purposes only from the relevant Minister. For all game birds a season is specified. The Fisheries Act provides some protection for turtles.

Recommendations: The NEMS report concludes that the Birds & Game Protection Act is deficient as it does not protect other wildlife, reptiles, mammals or amphibia. It is also recommended that the wildlife legislation drafted in 1979 and 1984 be reviewed and updated to bring in appropriate framework legislation.

Protected Areas

The NEMS Report states that Fiji does not have a clear policy on protected areas or what the national priorities and goals of protected areas should be. There is no comprehensive legislation in Fiji for protected areas but there are several pieces of legislation which provide for varying degrees of protection.

Nature reserves may be declared under the Forest Act 1953 as part of a Reserve Forest (s.7). Nature reserves have been established by the Ministry of Forestry in this way.

Native land leased under the Native Land Trust (Leases & Licences) Regulation creates protected areas which are natural reserves. The forest species Dakua at Waisale is protected under the leasehold system.

The Sightok Sand Dune National Park is the only gazetted National Park at present. No legislation or guidelines exist to manage national parks in Fiji. The National Trust manages several areas including the Garrick Memorial Park, a large area of forest area in the Navua area donated by the Garrick family.

Customary law plays an important role in the management and preservation of traditional protected areas such as sacred sites, old village sites, burial grounds and areas protected for their spiritual and cultural significance.

The National Trust for Fiji Act 1970 established the National Trust. That body is given the responsibility for promoting the permanent preservation of lands and reefs which have natural, historic or natural interest or beauty. (s.3).

Recommendations: The NEMS report states that National Parks and Reserves legislation to cover terrestrial and marine areas is needed. A national strategy to identify conservation areas generally appears to be necessary. The NEMS report points out that the use of leasehold to establish areas such as the Waisale Dakua Reserve System has potential to enable greater flexibility than would protected areas created or established under statute.

Planning and Assessment

There is provision for planning in both town and rural areas under the Town Planning Act 1946. This Act has provision for the local authority to consult with the National Trust to "order the conservation of a site, object or area of natural beauty". There are also environmental impact assessment provisions in the legislation.

Recommendation: The NEMS report recommends that the enforcement of planning laws be improved. The environmental impact assessment procedures should also be located in other legislation to strengthen and broaden its effectiveness. The drafting of a national land use policy is also recommended.

3. KIRIBATI

The Constitution and Customary Law

The Kiribati's constitution states that the customs and traditions of Kiribati must be upheld when implementing the Constitution. It does not declare that these are part of basic law.

There is recognition of customary law in the Laws of Kiribati Act 1989. Customary law has effect unless it is inconsistent with legislation (s.5(2)).

Land Tenure

The majority of land in Kiribati is under traditional ownership. The Native Lands Ordinance provides that native land cannot be alienated by sale, lease or otherwise to a person who is not a native (s.5(1)). Under s.28 of the Native Lands Ordinance the Gilbert and Phoenix Islands Lands Code is declared to be the code of laws governing land rights from March 1963 in all Kiribati. The code contains customary laws and describes the system of native land tenure.

Marine Zone

Kiribati Fisheries Ordinance 1978 s.2(1) prohibits the taking of fish in any area forming part of the ancient customary fishing ground of a people by other people unless they have a licence.

Protected Areas

There is no legislation providing for national or marine parks. Legislation aimed at wildlife conservation has been passed which sets aside special areas where fauna and habitat are protected.

Under the Prohibited Areas Ordinance (Cap 77), the President can declare any island to be a prohibited area where it is reasonably required in the interest of public health, environmental conservation or in fulfilment of Kiribati's international treaty obligations (s.3(1)). If an area is prohibited entry is completely forbidden. There are presently four declared prohibited areas.

Under the Closed Districts Act 1990 the President can declare certain districts to be closed over parts of an island. This can also occur where it is reasonably required in the interests of public health, environmental conservation or in the fulfilment of Kiribati's international treaty obligations. There are about four closed districts at present. A range of people is allowed entry into closed districts including natives of the area, those ordinarily resident and government officers. Other people can obtain a licence to enter subject to conditions.

Under the Wildlife Conservation Ordinance (Cap 100) any area can be declared a wildlife sanctuary. Six islands have been declared wildlife sanctuaries. The Ordinance is aimed at protecting wildlife from direct human interference. It does not contain any provisions dealing with the protection of habitat. In wildlife sanctuaries hunting killing or capturing of all birds and other animals and wilful damage to nests are also prohibited. Fish are not protected.

Recommendations: Present provisions for conservation areas are inadequate. In the consultants view the existing provisions for Closed Districts and Wildlife Sanctuaries have potential for the establishment of both terrestrial and marine conservation areas. Appropriate management structures must be instituted. Wildlife Sanctuaries managed in ways similar to those in PNG could be considered. The importance of customary laws and rights is already recognised by the constitution in relation to land. In the establishment of marine protected areas in areas controlled by the national government consideration should be given to the impact and management of customary land use.

Species Protection

There is legislation aimed at protecting birds and animals (not fish), the Wildlife Conservation Ordinance. Birds and animals can be declared fully or partially protected in designated areas. Most species are declared partially protected. If they are protected under the Act it is illegal to hunt, kill, acquire, sell, search for or wilfully take eggs out of the nests. Licences can be given which are exceptions to these prohibitions.

Wildlife Wardens can be appointed to enforce the legislation but these are presently few in number and enforcement is a problem.

Recommendations: The consultants understand that tentative recommendations in the draft NEMS Report in relation to Species Protection laws are:

i) An adequate definition of wildlife must be included in legislation. This must compliment the fisheries legislation.

ii) Legislation is required which ensures wildlife habitat is protected from development as well as direct interference.

iii) Alternative strategies to criminal sanctions are needed if enforcement is to be successful. One possibility is to build on existing customary controls, perhaps by finalising these by the enactment of by-laws for example.

iv) A major research effort to discover what environmentally sensitive traditional controls do exist is required. Based on these it may be necessary to have some degree of regulated harvesting which limits quantity and/or enables closed seasons.

Physical Planning and Assessment

Planning laws now apply in some areas of Kiribati particularly in town and urban areas. The Land Planning Ordinance 1973 provides control over land use and development and establishes Local Planning Land Boards. The central board is to prepare a general land use plan for each designated area. Two persons chosen by the majority of the village elders within a designated area to be co-opted onto the board while the plan is in preparation.

There is provision for public scrutiny of the plan and the right to make submissions which must be considered by the board. A detailed land use plan is then prepared by the local board according to any directions given by the central board. This plan must indicate in detail the use or class of use to which each part of land can be put. Development in designated areas is supposed to be by permission of the local board only.

Recommendations: The tentative conclusion of the draft NEMS Report is that provision should be made for environmental impact assessments as part of the planning process.

4. REPUBLIC OF THE MARSHALL ISLANDS

Constitution and Customary Law

Article X provides for the preservation of certain traditional rights under the Marshall Islands constitution. Formal statutory declarations of customary law are reserved for the Parliament under section 2 of Article X if "these are necessary or desirable to supplement the established rules of customary law or to take account of any traditional practice."

Land Tenure

The Marshall Islands Constitution preserves traditional rights of land tenure. Under the Real and Personal Property Act, only Marshall Island citizens, their wholly owned corporations and the government of the republic can hold title to RMI Land. Under the Public Lands & Resources Act all marine areas below the ordinary high water mark belong to the government. Exceptions include the reinstatement of customary ownership rights in fishery or traps or any other rights to the shoreline and near reef area abolished by the Japanese administration. This provision does not enjoy widespread acceptance

in the community.

The Land Acquisition Act of 1986 provides for government acquisition of lands for public use on payment of just compensation. This has been rarely invoked. The tentative recommendation of the RETA Report is that the government must focus on customary land issues in order to function effectively in land use and environment protection measures.

Local Government

Article IX of the Constitution gives the right of local government to all inhabited atolls and islands. The Local Government Act 1980 specifies the operations of local government, which include the development of land, water and agricultural resources; transportation; provision of safe drinking water and energy supplies; and public safety. The jurisdiction of local government under the constitution includes internal waters and extends 5 miles to sea.

Protected Areas

There is no specific protected area legislation.

The Marshall Islands Marine Resources Authority (MIMRA) has power to conserve and manage living resources of the Republic under the MIMRA Act but has tended to focus on commercially viable fisheries development. The National Environment Protection Authority (NEPA) has also power to regulate and preserve natural aspects of the nation's heritage but has been seen to be occupied with urban environment issues.

The Tourism Act of 1991 establishes a Marshall Islands Visitors Authority. This has power to identify and recommend likely conservation areas with tourism potential but this has also not been implemented.

Recommendations: The tentative recommendations of the draft RETA study are that there is urgent need for a national resource conservation policy. Protected marine areas can be declared under the Marine Resources Act but none have been implemented. Under the NEPA Act there is also provision for protection of marine or estuarine areas but none have been declared. Application of this legislation should be considered.

Species Protection

Under the Marine Resources Act there is provision for control of destructive fishing methods which do not include customary fishing practices.

There is an Endangered Species Act. If any species is listed by regulation the Act places limits on the taking or selling possession or exporting of endangered species plant or animal. It also prohibits imports into the republic of any species listed by the CITES Convention. Other acts are also provided such as the Marine Mammal Protection Act.

Recommendations: The tentative conclusions of the draft RETA report are that regulatory controls are inadequate. There are problems with enforcement due to lack of funding and training, communication

difficulties, transport difficulties and lack of updated information on species requiring protection.

Environmental Planning & Assessment

The National Environmental Protection Authority has responsibilities in relation to environmental impact assessment. Under the Coast Conservation Act 1988 the Director of Coast Conservation is responsible for submitting a comprehensive coast zoning management plan within 3 years of the Act coming into operation. The Director can also issue permits for proposed developments which are consistent with that management plan and can require an environmental impact statement to be prepared by an applicant for a licence.

The Planning and Zoning Act 1987 requires every local government council to establish a planning commission and subsidiary planning office. The commission is supposed to act as an advisory body to the local government council in matters relating to planning and zoning. The national government chief planner may also act as an adviser to local government councils in setting environmental standards for municipal areas. The NEPA legislation requires that a statement must be included "in every recommendation or report on proposals for legislation and other major government actions significantly affecting the human environment".

Recommendation: The Coast Conservation Act has not yet been implemented. Similarly the Planning and Zoning Act 1987 needs to be implemented. No local councils have physical planners.

5. PALAU

Full information about Palau's legal system was not available. There are several features of legislation which Palau has passed in relation to protected areas and wildlife protection which are useful provisions to consider.

Species Protection

The Palau Endangered Species Act provides for the prohibition of activities such as selling, possessing, importing and exporting threatened or endangered species of plants or animals (s.4). It is possible to obtain a permit to undertake scientific study.

There is an exception for the taking of species of endangered or threatened plants or animals for subsistence or for traditional uses, where the Minister determines that this does not endanger the species involved. This exception applies only to bona fide indigenous inhabitants of the islands (s.6 point 2.2).

The Wildlife Management Act of Palau provides that Wildlife Management must be implemented to ensure the existence of viable and diverse wildlife populations for the use and enjoyment of future residents and visitors while allowing regulated use in the present. The Bureau of Resources & Development is required to develop comprehensive wildlife classification schemes, regulations to control the harvest or collection of wildlife and a licensing system for persons harvesting wildlife species. It must also recommend key portions of the habitat of sensitive or rare wildlife species for inclusion in the natural heritage reserve system.

The Act provides that traditional laws relating to wildlife conservation be recognised as legally enforceable to protect wildlife resources (s 11). If the traditional entity or state government action fails, the Director is authorised to intervene. The Director can also enter into agreements with traditional entities to establish a co-operative enforcement system. This can include the authorisation of wardens selected from local people to enforce regulations.

Traditional law penalties can be imposed by traditional entities whenever the Director determines that this penalty will be enforcing the regulations promulgated by the Bureau of (s 10). This kind of provision is useful in providing power for local people to enforce wildlife protection laws.

The Fisheries Reorganisation and Consolidation Act provides for the regulation of the harvesting of fish, monitoring of fisheries and the preparation of management plans for Fisheries. Traditionally recognised fishing rights are to be preserved and respected whenever possible without compromising the effectiveness of the Act and must be considered when promulgating harvest or collection regulations (s.8).

Protected Areas

The Natural Heritage Reserves System Act provides for the designation of areas nominated by the Bureau of Resource & Development to be included in the "ROP Natural Heritage Reserve System". The aim is that these reserves be managed by the Ministry of Resources & Development in consultation with State Government officials (s.3). This Act is to apply to state owned land, private land or other areas donated to the State for the specific purpose of inclusion in the ROP Natural Heritage Reserve or any land purchased by the State to establish ROP Natural Heritage Reserve (s.4).

In the amended Natural Heritage Reserve System Act there is provision for reserves, sanctuaries and refuges to be established. Reserves are to protect large areas supporting unique communities of natural flora and fauna. These are expressed to include use allocating zones ranging from general use to complete protection. Sanctuaries are to protect critical habitat for sensitive species or unique geological sites and are generally closed.

Refuges can be established to protect particular species of animals or plants and any use compatible with that protection. Permits will be required to undertake activities such as scientific research or collection of plants and animals species in these reserves. The reserves can apply in terrestrial, marine or freshwater areas.

An interesting provision is found in the penalties section in s.7(f) whereby any person can commence civil action in the Supreme Court to restrain any person who is in violation of the Act including the National or State Governments and to compel the Minister of Resources & Development to perform mandatory duties required under this Act. Under many legal systems, in countries such as Australia and the USA, there has been acceptance of the important role that citizen action can take to enforce environmental laws. Such actions can only take place where adequate resources are made available such as legal representation. Relying on this kind of enforcement alone is unlikely to be satisfactory in terms of compelling the relevant Minister to take action.

Fines obtained from violations are divided evenly between the State and the National Government. Traditional laws relating to fisheries conservation are required to be recognised as legally valid and enforceable to protect marine and freshwater resources. Traditional entities or state governments can be authorised to take initial enforcement action. If this fails the national government can intervene.

In the consultant's view the Palau legislation provides some useful provisions for the recognition of traditional practices in species protection and management legislation. Further information is needed on the effectiveness of the legislation on the ground.

6. SOLOMON ISLANDS

Constitution

Under the Solomon Islands Constitution customary law is part of Solomon Islands law but cannot be applied if it is inconsistent with Acts of Parliament or the Constitution (Article 75 Constitution). Parliament can regulate customary law (Schedule 3, Constitution).

Land Tenure

Approximately 87 per cent of land in the Solomon Islands is held under customary ownership. Under the Constitution of the Solomon Islands only Solomon Islanders can own land. Any other person can only hold land for a fixed term limited under the Land & Titles Act to 75 years. Much of the remainder of the island is government owned. Accordingly the customary land tenure system and traditional land use practices are the basis for land management.

Customary Land is defined under the Land & Titles Act. The land and sea below the high water mark are generally regarded as government land. The Fisheries Act recognises traditional fishing rights to the extent that traditional users can control fishing in their customary waters.

Protected Areas

The National Parks Act 1954 provides for the establishment of National Parks. There are limitations on hunting and residing in the park. The Queen Elizabeth II Park near Honiara has not been a success. Since gazettal there has been little management of the Park.

The Simbo Megapode Management Area Ordinance 1990 relating to Western Province creates a type of protected area. The aim is to protect the habitat of megapodes explain. The area is customary land. Application to a management committee of the customary owners is required before entry.

In the consultants view consideration could be given to comprehensive national conservation or protected area legislation.

Recommendation: The tentative recommendation of the draft RETA report is that comprehensive legislation ought to passed to provide for important ecosystem protection in designated protected areas. Title to designated protected areas should remain with customary owners of that area. One option considered is the leasing of customary land on a long-term basis.

Provincial Ordinances

The Isabel Province Wildlife Sanctuary (Amendment) Ordinance 1991 establishes the Anarvon Wildlife Sanctuary. The by-laws allow only the Warden of the Sanctuary, people who ordinarily live in the Sanctuary or people who have customary rights over the land to live in it. Other people can only do so for limited purposes, such as the study of wildlife, scientific research collecting firewood or copra. These activities require a permit.

More recent ordinances in Isabel to provide for the designation and protection of conservation areas, marine and freshwater areas and water supply areas are dealt with in the body of the consultants report. Several other provinces also have ordinances relating to the protection of historic places and/or wildlife management area ordinances relating to the preservation of cultural heritage.

Planning

The Solomon Islands has a Town & Country Planning Act at the national level. This aims to regulate planning at both national and provincial levels. Planning presently occurs mostly in urban areas of the Solomon Islands rather than at the village level. The definition of development under the Town & Country Planning Act is limited to building, engineering and mining work and does not apply to agriculture, fishing and forestry developments.

The development control provisions do not apply to customary owned land and do not therefore apply to the majority of Solomon Islands.

7. TUVALU

Constitution and Customary Law

The principles of the constitution are part of the basic law of Tuvalu (s.13). All laws must be "reasonably justifiable in a democratic society that has a proper respect for human rights and dignity" taking into account "traditional standards, values and practices" (s.15). There is also general declaration of the right to life and security of the person, subject to the rights of others, the national interest and Tuvaluan values and culture (s.11).

The recognition of customary law is found in the Laws of Tuvalu Act 1987. Customary law does not have any effect if it is inconsistent with legislation (s.5(2)).

Land Tenure

In Tuvalu most of the land is held in customary ownership. The land tenure is based on customary law land used transferred and inherited in accordance with the Native Lands Ordinance 1957 as amended in the Tuvalu Land Code.

The Marine Zone

The Foreshores & Lands Reclamation Ordinance provides that the state and not individuals own the foreshore and seabed. This right is subject to public rights of fishing, navigation and passing over the foreshore as well as certain private rights.

Protected Areas

There is no legislation for national or marine parks.

As in Kiribati there is provision for prohibited areas to be declared. Entry is forbidden. Prohibited areas apply to whole islands and not parts thereof. No island has been declared to be a prohibited area.

There is provision for closed districts to be declared over parts of islands. At present no closed districts have been declared. A range of people can have access to these areas under licence. They are also open to those ordinarily resident and government officers. They do not have any objective as conservation zones and do not provide protection from interference in the natural environment from existing population or development pressures.

Under the Wildlife Conservation Ordinance the minister can declare an area to be a wildlife sanctuary. There are no wildlife sanctuaries declared at present.

Species Protection

There are no provisions dealing with the protection of habitat under the legislation. Under s.8 of the Wildlife Conservation Ordinance there are specific provisions concerned with wildlife protection relating to all birds and other animals. Fish are not protected under this ordinance. These protections operate both inside and outside wildlife sanctuaries. Birds and animals outside wildlife sanctuaries can be declared either fully or partially protected (s.3(1)(b)).

Physical Planning

The Local Government Ordinance does not have a planning authority. Local councils are given wide powers to enable them to promote planning regulations. These functions include the preparation and control of schemes for approved housing layouts and settlements and controls over the construction of buildings.