



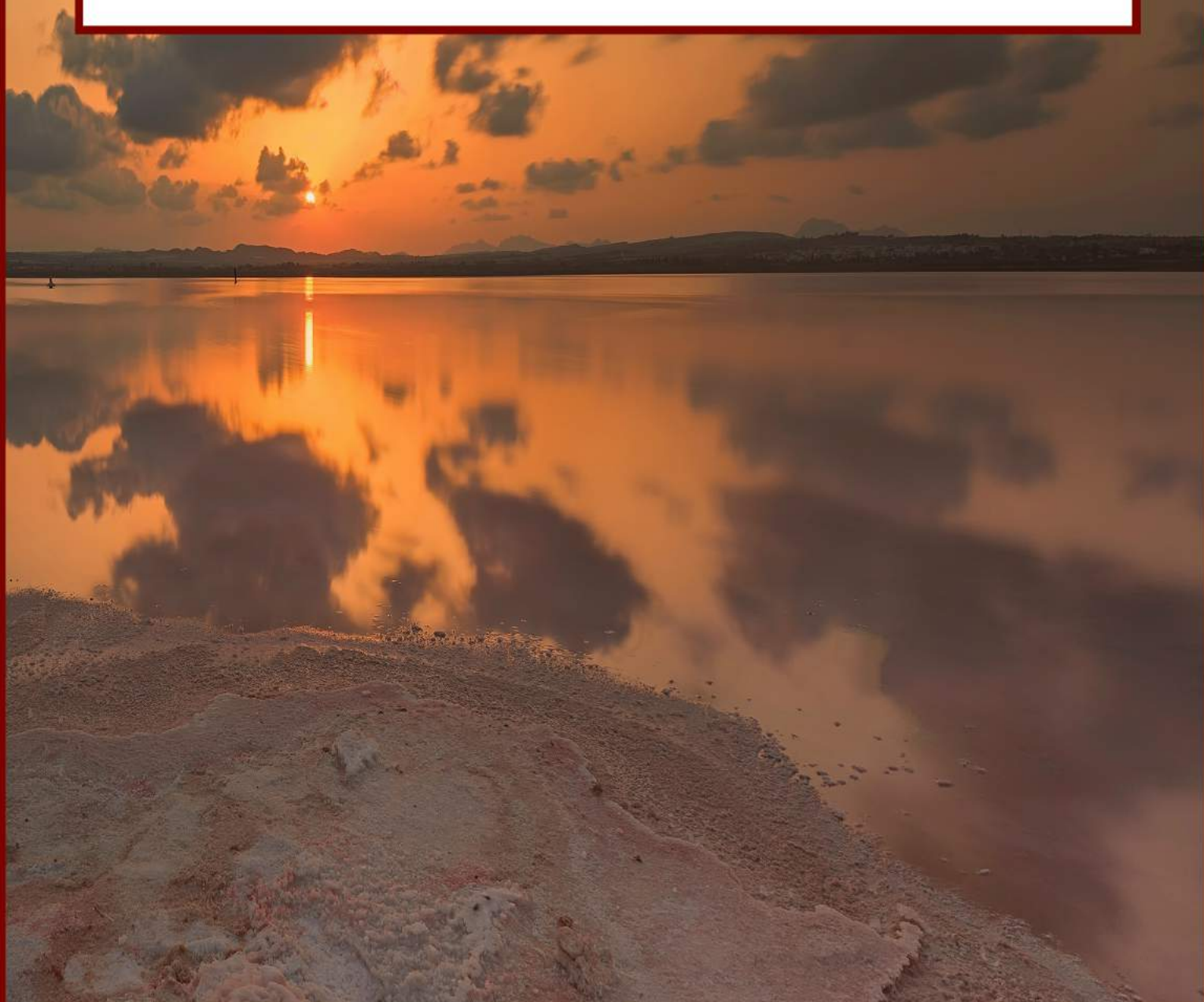
Oceans Law and Policy Services  
Pacific

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*Legal Bulletin*

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## EDITORS' NOTES



James Sloan  
Co-Editor



Kevin Chand  
Co-Editor

2016 has been a tumultuous year. In February 2016 TC Winston, the most powerful cyclone to hit land in the Southern Hemisphere, destroyed homes, crops and lives as it cut a huge swathe across Fiji. It led to a period of national disaster, from which Fiji has emerged resolute to build back stronger. It is too soon to write of positives in relation to TC Winston but bright spots included the cooperation between the Fiji government and the Australian and New Zealand military forces that provided vital services and equipment to access remote and badly affected places in Fiji. From a fisheries perspective, TC Winston has brought the need to have well managed and well stocked coastal fisheries areas into sharp focus.

While TC Winston and the recovery efforts have dominated 2016, it has also been a busy and significant year for Oceans and Fisheries and we report in this bulletin on a summary of key oceans events that have happened during 2016. We report on the final consultations that were held for Fiji's National Fisheries Policy. These consultations were held in November 2016 with stakeholders in Suva, and starting in 2017 we look forward to the considerable achievement of Fiji's first ever National Fisheries Policy that will in the words of the expert consultancy team "tell the World how Fiji manages its fisheries".

How Fiji manages its fisheries is likely to become a key part of 2017, because in June 2017, Fiji will co-host with Sweden a high-level United Nations Conference to Support the Implementation of SDG 14— Conserve and sustainably use the oceans, seas and marine resources for sustainable development. At this event, Fiji will have the opportunity demonstrate the progress that it is making to conserve and sustainably manage its vital fisheries resources as well as demonstrate regional leadership in fisheries management.

This leads to our final two topics in this bulletin. We briefly discuss the importance for Fiji of adopting a process towards the creation of marine protected areas (MPAs). MPAs can be a useful fisheries management tool, but they can also be ineffective or detrimental to the overall aim of sustainably managing fish if they do not emerge from a careful decision-making process. By setting out an administrative law perspective we set out the unique opportunity Fiji has to get this decision-making process right. Finally, in terms of regional leadership we are joined by Dr. Transform who responds to our questions in relation to the Parties to the Nauru Agreement (PNA) and the evolving fisheries sector and emergence of regional co-operation to manage valuable tuna resources.

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2016 witnessed the creation of some of the largest MPAs in the world and the passing into force of several international agreements that ranged from curbing IUU activities to battling climate change and its impacts. The recognition of the growing crisis our oceans face has resulted in a more pronounced effort at various levels of governance that set a clear precedent going forward.

## Marine Protected Areas

Some of the world's largest MPAs were announced or entered into force in 2016. The largest of these was the designation of Antarctica's Ross Sea MPA which spans an area of 1.55million square kilometres. The Ross Sea MPA was jointly sponsored by the U.S. and New Zealand but failed to reach a consensus amongst the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) members for the past few years until this past October. This MPA is expected to come into force in December 2017 and includes a no-take area, approximately 70% of the total MPA area. The Ross Sea is a critical habitat for a myriad of marine species that include penguins, seals, krill, whales, and others.

The Pitcairn Islands Marine Reserve, was formally brought into force as a no-take reserve on September 15, 2016. The Pitcairn Islands is an overseas U.K. territory and so the legal designation of the marine reserve is administered by the U.K. government. This reserve covers an area of 830,000 square kilometres and serves as a habitat for at least 1,249 species of marine mammals, seabirds, and fish. One of the primary reasons for the creation of this reserve was to combat illegal fishing by foreign fleets in Pitcairn waters.

Further north in Hawaii, the existing Papahānaumokuākea Marine National Monument was expanded in 2016 by 1,146,798 square kilometres to 1,508,870 square kilometres by President Obama using his executive authority under the U.S. Antiquities Act of 1906. By virtue of this expansion, Papahānaumokuākea Marine National Monument became the largest MPA in the Pacific Ocean. These waters are rich in biodiversity and are home to endangered species that include blue whales, sea turtles, and the last Hawaiian monk seals. This area is also of significance to native Hawaiian culture. US President Obama similarly used his executive authority in designating the Northeast Canyons and Seamounts Marine National Monument, spanning an area of 12,725 square kilometres, the first of its kind in the Atlantic Ocean. This area with its deep sea canyons and seamounts provide habitats to vibrant ecosystems and rich biodiversity from deep sea coral to turtles and whales.

## Port State Measures Agreement

IUU fishing is one of the greatest challenges facing the fisheries industry globally and in June 2016, in response to growing concerns around this activity the FAO Port State Measures Agreement (PSMA) entered into force. PSMA is an international treaty with the primary objective to *“prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.”* This agreement sets the minimum standards at a state port to identify and deal with IUU offenders.

It also creates harmonised port State measures, enhancing regional and international cooperation resulting in a highly cost-effective method of combatting IUU fishing because the necessary actions are conducted at a designated port, as opposed to expensive monitoring, inspecting or pursuing vessels at sea. Port state measures also act as an effective barrier for fish caught from IUU activity from access to national and international markets. Removing this access to the

market effectively removes the economic incentive to catch fish illegally in the High Seas or foreign EEZs thereby reducing IUU fishing activities.

## Shark protection under CITES

At the 17th CITES Conference of the Parties, four species of sharks and nine species of mobula rays (a cousin of the better known manta ray of which little is known) were added to Appendix II of CITES, thereby mandating the regulation of their trade. This move follows a growing recognition of the need to protect sharks from finning, bycatch overfishing. With their slow reproductive cycles, sharks are particularly vulnerable to harvesting, and this provides a means to curb their exploitation.

## Biodiversity in Areas Beyond National Jurisdiction

The High Seas cover an area over two-thirds of the world's oceans and contains a vast array of marine life and resources, however, this area lies outside the jurisdiction of any State, and lacks any form of comprehensive protection or management. Earlier this year there were two United Nations Preparatory Committee (PrepComm) meetings to continue negotiations on a treaty to protect biodiversity on the High Seas. The PrepComm meetings serve as a forum to discuss and negotiate what the text of the treaty will include. There are two final PrepComm meetings in 2017 before the draft text of the treaty is ready. An important element of this treaty is a mechanism to create MPAs on the High Seas. This would allow areas beyond national jurisdiction to be protected under international law and binding on the international community.

The United Nations' Convention on Biological Diversity in 2010 set a target to conserve at least 10% percent of oceans by 2020, and in 2015 this was adopted by the UN as part of its Sustainable Development Goals. However, science-based studies indicate that at least 30% of marine habitats need to be put aside to protect biodiversity, preserve ecosystem services, and achieve socioeconomic priorities. To achieve a 30% MPA coverage of the oceans, it will be necessary to look beyond national jurisdiction and to create MPAs on the High Seas.

## The Paris Agreement

The Paris Agreement entered into force on November 2016. Its central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. COP 22 in Marrakech began in the shadow of Donald Trump's election as president of the US with many fearing this could eventually result in the US pulling out of the Paris Agreement. Ultimately COP 22 did not result in the implementation of the Paris Agreement that many had hoped but rather, it set out a framework for action to address climate change as well as detailed plans for conducting the preparatory work for implementation. The Paris Agreement is important for Pacific Islands due to its potential to see global emissions reduced substantially, coupled with funding potential for climate change adaption and mitigation.

Here in the Pacific, the ocean is intrinsically connected with our cultures and shared history. Our totems often take the form of sea creatures like sharks and turtles. The effects of climate change threaten the health of our large ocean spaces, but also our land in terms of sea level rise and the increasingly destructive cyclones that are associated with warming oceans. The Pacific has become a global leader in advocating for the protection of the ocean and the environment, and while a lot has been achieved in 2016 the main challenges for implementation and action lie ahead of us.



Fiji is on the brink of adopting its first National Fisheries Policy that will provide an overarching framework explaining how Fiji will manage its fisheries. The Honourable Minister for Fisheries, Semi Koroilavesau explains in the foreword that the purpose of the National Fisheries Policy is to "provide a clear and unequivocal policy that will provide direction for the development and management of Fiji's fisheries."

At the final round of consultations on the National Fisheries Policy held in Suva on 17-18 November 2016, and led by the Ministry for Fisheries, this considerable achievement was expressly recognised by facilitator Pio Manoa, a legal officer with the Food and Agriculture Organisation and an expert in oceans law and policy with a wealth of experience in the Pacific region.

The achievement of creating Fiji's first National Fisheries Policy is testament to the leadership and vision of the Minister and officers from the Ministry for Fisheries, and to the dedication of the team of experts who led the consultations and were assisted by the Director of Fisheries, George Madden and several senior Fisheries officers. The final consultation for 2016 was opened by the Honourable Minister for Fisheries and the expert consultation team included Ian Freeman, a fisheries adviser at the Forum Fisheries Agency (FFA) and Ian Bertram a coastal fisheries science and management adviser with the Pacific Community.

Mr Freeman explained that the emergence of Fiji's National Fisheries Policy had encompassed 14 months, involved 4 separate stakeholder consultations, and one cyclone, TC Winston, which had not so much moved the goalposts for the team but "blown them over".

Non-governmental organisations and civil society were invited to attend the final consultation from 2pm to 5pm on 17 November and this consultation was opened and closed by the Director of Fisheries. Separate consultation time slots were provided for government agencies and statutory bodies, fishing industry members and the aquaculture sector.

The National Fisheries Policy covers all 3 identified fisheries sectors: Offshore fisheries, inshore fisheries, and the aquaculture sector. The consultation team explained that the National Fisheries Policy was an overarching document that explained how Fiji would manage its fisheries, while more specific details would appear in implementation

plans that would be made in accordance with the National Fisheries Policy. Presentations by officers from the Ministry for Fisheries took participants through each of the sectors and following the sector presentation time was provided for participant input through questions and answers facilitated and responded to by Mr Manoa, Mr Freeman and Mr Bertram.

During the consultation, Mr Freeman confirmed that this was the last opportunity to be consulted on the National Fisheries Policy before it was finalised and launched early in 2017. However, in response to timing concerns and due to some confusion around whether the latest draft National Fisheries Policy was before participants, Mr Freeman provided an additional 14 days for written submissions. The participants were grateful for this additional time, and Mr Manoa added that it was important to get the National Fisheries Policy right first time around.

The consultancy team presented on what was referred to as version 6 of the National Fisheries Policy and following comments across all 3 sectors from participants, the document will be updated by the consultancy team and version 7 will be circulated for final comments.

The version that was reviewed contained a vision and a mission.

*Vision: "Sustainable, well-managed fisheries that provide long-term economic, social, ecological and food security benefits to Fijian communities and future generations."*

*Mission: "Use participative approaches to provide transparent and accountable fisheries management and development services, as a trusted provider, to achieve a healthy ecosystem, economic growth, food security and sustainable livelihoods."*

The National Fisheries policy set out principles that included the need for the involvement of women in fisheries, co-management of fisheries, empowered coastal communities and sustainable management of fisheries and 11 key policy goals and a number of cross cutting issues and strategies that it will aim to meet across all 3 sectors and address identified issues in each sector.

The thrust of these key policy goals is to achieve sustainable management of fisheries in compliance with national and international legal frameworks, allow for the collection of data and use of innovative and adaptive management techniques that respond to existential threats like climate change and natural disasters within an overall environment that is collaborative, transparent, consultative, fair and accountable.

From a legal and governance perspective, the impressive achievement of Fiji's first National Fisheries Policy will provide clearer direction for fisheries management decisions, and the collaborative and consultative approach bodes well for an area that contains a complex mix of existing commercial and traditional rights.

While the adoption of the National Fisheries Policy will be a big step in the right direction for Fiji the Honourable Minister for Fisheries was quick to point out that his recent and comprehensive review of the state of Fiji's fisheries has revealed some big challenges for Fiji and his Ministry going forward, and these include: overfishing, illegal activities and enforcement challenges. The Honourable Minister is determined to get the Ministry for Fisheries ready to meet the multiple challenges it will face in 2017, and encourages all stakeholders to support the vision set out in Fiji's National Fisheries Policy.

# MPA DECISION MAKING, AN ADMINISTRATIVE LAW PERSPECTIVE

The Fiji government has made a bold commitment to designate MPAs across 30% of its ocean spaces. If this goal is realised, MPA status will be declared over approximately 390,000 square kilometres of Fiji's ocean spaces. The protection of these marine resources serves several purposes and includes food security for communities, particularly in times of need, and in terms of economic value. In 2014 Fiji's fisheries were estimated to be worth approximately F\$250million.

MPAs restrict the way a designated area of ocean is used. The benefits of MPAs include enabling depleted marine stocks to replenish, boosting fish catches in areas surrounding the MPA and the promotion of conservation alongside of socio-economic development including promoting tourism development and other alternative livelihood strategies.

However, MPAs may also be ineffective, and in certain situations make things worse by undermining human security and social-ecological wellbeing. MPAs can have far reaching impacts on culture, economy, subsistence activities and ecosystems in the short term and long term. This is because the designation of a MPA will alter, restrict, reduce, or remove pre-existing rights and commercial interests to use the ocean space in question.

At present, Fiji's legislation provides two legal processes that empower the Ministry of Fisheries to designate a MPA, these are:

- The Fisheries Act, 1942 (Fisheries Act) which only applies to qoliqoli areas, traditional fishing grounds that have been mapped pursuant to the Fisheries Act and in which traditional rights holders enjoy harvesting and other rights to the natural resources within the qoliqoli; and
- The Offshore Fisheries Management Decree 2013 (Offshore Decree) which applies to the creation of any MPA outside the traditional fishing grounds (qoliqoli), and will include the territorial sea, and EEZ areas.

This means the decision maker is the Minister for Fisheries who makes any decision to designate a MPA on behalf of the Fiji Government. The task of the decision-maker is never an easy one because it requires balancing arguments for and against the decision, and in the context of MPA designation it requires consideration of the legal and governance context as well as how the decision may adversely impact pre-existing rights and interests to the ocean area in question.

Fiji is a common law jurisdiction and its independent judiciary enjoys supervisory jurisdiction in relation to decisions that are taken by Ministers exercising power as the executive branch on behalf of government. This includes the Court's jurisdiction to scrutinise decisions taken to designate a MPA pursuant to the Fisheries Act or the Offshore Decree.

The High Court's power of scrutiny is however limited. The High Court will not listen to an appeal of a decision to designate a MPA on its merits, but it will consider whether the legislative power existed to designate the MPA and whether a fair process was accorded by the Honourable Minister before the MPA was

designated. While it is not possible to pre-empt every possible legal argument, it is likely that a failure to take into account or hear from those who would be adversely affected by the designation of the MPA would provide good grounds to challenge a designation of a MPA. In short, the Court is only concerned whether a fair decision-making process was undertaken prior to the decision being made and if the Court determines that a fair process was not followed it may effectively cancel the decision of the Minister, who may then make the same decision again in accordance with a fair process.

This means that an administrative law perspective may assist in the creation of MPAs that are effective. This is because Fiji's administrative law principles require a careful decision making process that takes into account all of the pre-existing rights and interests of those whose rights may be altered, restricted or removed by the decision to designate a MPA. In addition, that decision-making process should also hear from and take into account technical and scientific evidence in relation to why the MPA should be designated. The decision-maker can then weigh up the arguments and pre-existing interests in the final decision, and because the decision is made through regulations may be able to find a way to mitigate any potential adverse effects of the designation.



Fiji's administrative law principles therefore provide a unique opportunity to implement a decision-making process that will result in effective MPA designations. This is because the process itself should enable Fiji to take decisions to reach the best possible decisions for effective MPAs.

A simple and inclusive decision making process would include: following the minimum requirements in the legislation (Fisheries Act and Offshore Decree), assessing the pre-existing interests in the ocean area in question, providing sufficient public notice of the intention to designate the MPA, setting out the process for listening to submissions from all interested parties including scientific and fisheries experts and providing an opportunity for those who may be adversely affected by the MPA designation to be heard. Following such a process should provide the best opportunity for a balanced and rigorous decision based on relevant considerations and arguments both for and against the designation to emerge. Finally, the decision should be communicated in writing with reasons and may include particular conditions intended to mitigate any adverse impact on existing rights or interests.

## Q&A WITH DR. TRANSFORM

Dr. Transform Aqorau, former CEO of the Parties to the Nauru Agreement (PNA) answers a few questions about the PNA and immediate challenges going forward.

The PNA is a regional agreement between Federated States of Micronesia, Kiribati, the Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands and Tuvalu that focuses on the management of shared fisheries resources for the benefit of Pacific Islands. The PNA represents self-organisation by a group of Pacific Islands to manage their valuable fisheries resources through co-operation and a shared understanding that sustainable management will lead to long-term economic benefits.

### ***What is PNA's vision for Rights Based Management in the region?***

PNA have instituted the purse seine and now longline vessel day scheme (VDS) which essentially strengthens the rights of members in the fishery. What the VDS has done is transform the power base and rights in the fisheries by making PNA members sellers of days and fishing opportunities, rather than just taking the price which the fishing companies set. It has also allowed PNA members to sell their days through different methods like tendering and auctions which they could never do previously because there were no instruments through which they could do this. I guess you could argue that the creation of the group was premised on applying rights based fisheries management because the vision of the founders was to ensure that they get a bigger share of the value of their resources. They were not able to do this immediately because it takes time to build the foundation blocks as well as ensuring that the international and regional legal framework supported this. The conclusion of the UN Fish Stocks Agreement and the Western and Central Pacific Fisheries Convention (WCPFC) ensured that the necessary framework for the clarification of rights found expression in law. The WCPFC has helped to clarify the strengthening of these rights also in an economic sense which the PNA member countries have been able to use to add value to their fishery.

### ***There has been a recent move in the Pacific and the world to conserve marine resources through the creation of MPAs, with several PNA members creating large MPAs. How do these new MPAs affect existing arrangements and licenses in PNA areas?***

There is some debate about whether MPA's actually conserve fisheries resources especially where those resources migrate through different zones, so there is some doubt as to whether these large scale MPA's will even have the efficacy expected of them. That is why it is important to manage the fishery as a whole and not manage the fishery by compartmentalising zones when the fish don't stop at these closed areas. There is also some controversy about whether these MPA's that are being proposed are actually supported by any scientific analysis that closing them off will actually have any conservation benefit. In other words, we do not know whether they will remove a proportion of overfishing and result in rebuilding of stocks when those same fish that swim through the closed areas are caught elsewhere. This is why MPA's probably won't be as effective for managing migratory stocks. So far the closures in the Phoenix Islands in Kiribati and the Palau marine sanctuary have not affected PNA arrangements.

### ***The impact of climate change on fish stocks while still not fully understood yet, does pose a threat to the fisheries sector in the Pacific. What mitigation or adaptation strategies are being considered by PNA member with respect to this?***

There is some modelling that has been done by SPC on the impact of climate change which shows a shift towards the east of the stocks. These are just models however which depend on parameters that are fed into the model, but for these models we have a fairly good idea of the impacts of climate change. The VDS is already designed to take these shifts in migratory movements of the fish by allowing for trading so you could probably say that they have taken these potential mitigation measures in place to ensure they do not lose too much economically.

### ***How do you see the role of PNA moving forward in terms of sustainability and playing a role in stewardship of the Ocean?***

The PNA have been advocating stronger measures in the region. They have largely been responsible for instituting the 3 Months FAD closure, the closure of the 2 western high seas pockets, 100% Observer coverage etc. They are now working on FAD tracking and registration and also have MSC certification for free school skipjack and yellowfin tuna. They are also pushing for stronger controls on the high seas for longline fishing, and have also pushed for better data from these vessels. No one is more impacted from fishing than Pacific Island countries themselves so they have been the strongest advocates for better management of their resources.

*“No one is more impacted from fishing than Pacific Island countries themselves so they have been the strongest advocates for better management of their resources.”*



Dr. Transform Aqorau

**CONTACT:**

**Oceans Law and Policy Services**

(t) +679 331 9167

(a) 8 Holland St  
GPO Box 2025  
Government Buildings  
Suva, Fiji

(w) [www.sas.com.fj](http://www.sas.com.fj)

James Sloan ([james@sas.com.fj](mailto:james@sas.com.fj))  
Kevin Chand ([kevin.chand@stanford.edu](mailto:kevin.chand@stanford.edu))

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