

**CONCEPT PAPER**

**LEGAL GAZETTAL AND MANAGEMENT OF**  
**COMMUNITY-MANAGED MARINE AREAS**  
**IN CUSTOMARY MARINE WATERS IN**  
**MILNE BAY**

**DRAFT**

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## 1 Introduction

The Institutional Strengthening Program of the Milne Bay Community-Based Coastal and Marine Conservation Project (the Project) aims to establish an enabling environment for marine and near-shore resource management through the Provincial Government and Local Level Governments (LLGs). Part of the Project involves the gazetting and management of Community-managed Marine Areas (CMMAs), in particular to ensure the legal recognition of CMMAs, the rules applying to their management as well as the bodies in charge of managing them.

Consistent with the spirit of the Project, there are specific criteria that have been identified for legal gazettal and management of CMMAs set up by the Project. These include:

- Land tenure must remain with the resource owners wherever possible;
- Resource owners must have a large amount of input into the development of laws for gazettal and management of the CMMAs, as well as for management plans; and
- CMMAs must be community ‘owned’ and managed.

There is also a requirement that legal gazettal of CMMAs meet time constraints for Phase 1 of the Project, and meet the requirements for funding of Phase 2.

This paper has been developed following a review of the literature and legislation regarding the gazetting of marine areas for management of the marine environment in Papua New Guinea. Predominantly, the paper reviews existing legal options for gazettal and management of CMMAs, and focuses on those options that are the most adequate to meet the criteria outlined above. Options are discussed for gazettal and management of CMMAs in Milne Bay, using national, provincial and local level legislation, as well as private contractual arrangements.

It should be noted that recommendations made in this paper are current for May 2006, and will need to be reviewed should amendments be made to current legislation, or new legislation be introduced.

## 2 Analysis of Legislation

### 2.1 National Level Legislation

#### 2.1.1 Conservation Areas Act 1978

##### 2.1.1.1 Spirit and Aims

The *Conservation Areas Act 1978 (CA Act)*, administered by the Department of Environment and Conservation (DEC), aims to preserve the environment and national cultural inheritance by conserving and managing sites and areas having particular biological, topographical, geological, historic, scientific or social importance.<sup>1</sup>

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<sup>1</sup> Purpose of the *Conservation Areas Act 1978*.

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The *CA Act* establishes a National Conservation Council (NCC) to provide advice to the Minister on any matters related to Conservation Areas (CAs) including:<sup>2</sup>

- actions to conserve and improve CAs;
- proposed developments affecting or in the vicinity of a CA; and
- the formulation of rules and regulations for the CA.

The NCC was formed in 2003, but at this stage has not met.

## **2.1.1.2 Establishment**

The process for establishing a CA is lengthy and is outlined below:

1. Where the Minister for Environment and Conservation is of the opinion that an area has particular biological, topographical, geological, historical, scientific or social significance or other special value for the present community or for future generations, he/she may prepare a recommendation that the area be declared a CA.<sup>3</sup> Alternatively, a person or group of persons or authority may make a written request to the Minister to give consideration to making a recommendation that an area be declared a CA.<sup>4</sup>
2. Notification shall be given of the recommendation to the public. The declaration shall be published at DEC, and the offices of the Provincial Government and Local Level Government where the recommended area is situated.<sup>5</sup>
3. Any person may, within 90 days of notification, make a written representation to the Minister.<sup>6</sup>
4. Where a written representation has been made to the Minister, further information may be provided to the Minister, or consultation undertaken, on request;<sup>7</sup>
5. A submission of the recommendation, along with any representations received, is made by the Minister to the National Executive Council (NEC);<sup>8</sup>
6. Decision and notification of decision given by the NEC;<sup>9</sup>
7. A referral to the office of the Head of State for the formal declaration of the area as a CA;<sup>10</sup>
8. The Minister shall, as soon as is practicable, establish a Conservation Area Management Committee for that CA;<sup>11</sup>
9. The CAMC shall prepare a management plan for the conservation area outlining the manner in which land use will be managed and features of special significance conserved;<sup>12</sup>
10. Minister approves the management plan. The Minister who, in his consideration of such a management plan, shall have regard to physical planning considerations;<sup>13</sup>

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<sup>2</sup> s9 *CA Act*.

<sup>3</sup> s12(1) *CA Act*.

<sup>4</sup> s12(2) *CA Act*.

<sup>5</sup> s37 *CA Act*.

<sup>6</sup> s14 (1) *CA Act*.

<sup>7</sup> s14(2) *CA Act*.

<sup>8</sup> s15(1) *CA Act*.

<sup>9</sup> s16 *CA Act*.

<sup>10</sup> s17 *CA Act*.

<sup>11</sup> s25(1) *CA Act*; one CAMC should be declared for each CA.

<sup>12</sup> s27(1)(d) *CA Act*.

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11. The Minister may carry out consultation on rules for the CA with the CAMC, NCC, and landowners. The rules are for the protection, development, land use activities, management and control of the CA;<sup>14</sup> and
12. The Minister makes and approves the rules for management of the CA area.<sup>15</sup>

There are no time limits for the majority of steps in this process, and therefore this detailed process may be both lengthy and cumbersome.

When the CA is gazetted, the tenure of the land remains with the customary owner.

At this stage, no CAs have been gazetted, most probably due to the recent formation of the NCC and the fact that no meetings have taken place to date. However, the NCC is not directly part of the gazettal process. It is possible that DEC may allow for the gazettal of a CA without the provision of advice to the Minister by the NCC, as the NCC will need to meet before any information can be provided to the Minister.<sup>16</sup>

There is no process outlined within the *CA Act* for revoking a CA. However, the *Act* implies that a CA can be revoked.<sup>17</sup>

## **2.1.1.3 Management**

### **2.1.1.3.1 Management Body**

A Conservation Area Management Committee (CAMC) is the management body for management of CAs under the *CA Act*, and is designed to represent the interests of the resource owner. Following the declaration of an area as a CA, a CAMC will be established. The CAMC must consist of at least three members, and all members must be appointed by the Minister.<sup>18</sup> Membership of the CAMC shall reflect the interests of the landowners within the CA, and the Provincial Government, Local Level Government (LLG) or LLG Authority in the province or areas within which the CA is situated.<sup>19</sup>

The CAMC shall determine the Constitution for the Committee,<sup>20</sup> and meet at least once every three (3) months.<sup>21</sup>

The primary function of the CAMC is to manage the CA.<sup>22</sup> Other functions of the CAMC may also include:<sup>23</sup>

- Making recommendations to the Minister on the making of rules applicable

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<sup>13</sup> s27(2) *CA Act*.

<sup>14</sup> s28(1) *CA Act*.

<sup>15</sup> s28(1) *CA Act*.

<sup>16</sup> However, it should be noted that the NCC assists with functions such as rule-making for the CA, and may be required to have met and be fully involved in the establishment of the CA.

<sup>17</sup> s25(5) *CA Act* states that where declaration of a CA is revoked, the management committee for that area shall cease to function.

<sup>18</sup> s25(2) *CA Act*.

<sup>19</sup> s25(3) *CA Act*.

<sup>20</sup> s25(4) *CA Act*.

<sup>21</sup> s26(1) *CA Act*.

<sup>22</sup> s27(1)(a) *CA Act*.

<sup>23</sup> s27(1) *CA Act*.

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- within the CA;
- Providing advice to the Minister in respect of co-ordination of development within the CA;
- Preparing a management plan for the CA outlining the manner in which land use will be managed and features of special significance conserved;
- Directing the work of rangers; and
- Such other functions as are determined by the Minister.

The CAMC has the power to do all things necessary for the performance of its functions.<sup>24</sup>

The implication of the advisory role of the CAMC is that the ultimate power for decision-making and managing the CA lies with the Minister. Therefore, the Minister provides the only means of preventing destructive development within the CA and may come under political pressure to approve development.

### **2.1.1.3.2 Management Plan**

The management plan for the CA is prepared by the CAMC and approved by the Minister.<sup>25</sup> It outlines the manner in which land use will be managed and features of special significance conserved.<sup>26</sup>

The *CA Act* prohibits development or alteration of existing uses, including by the landowner, except in accordance with the management plan or at the discretion of the Minister.<sup>27</sup> This indicates the importance of the management plan, and planning issues that must be considered for the livelihood and development of communities in the CA. In addition to the management plan, rules may apply to the CA. The Minister may, after consultation with the CAMC, NCC, resource owners and any relevant authority, make rules for the protection, development, land use activities, management and control of the CA.<sup>28</sup>

### **2.1.1.3.3 Other Arrangements**

The Minister may, after consultation with the CAMC appoint by written notice, a person to be a ranger for that CA to ensure compliance with the *CA Act*.<sup>29</sup> The ranger has the powers to enter and inspect the CA to ensure compliance with the *CA Act*.<sup>30</sup> It is not specified within the *Act* which agency provides funding for the rangers' functions, but presumably this is the responsibility of the DEC as the implementing agency.

**Cut to another section??** Regarding decisions made by the Minister relating to development in a CA, there is no process in the *CA Act* for appeal of Minister's decisions. Resource owners, or others, wanting to appeal the decision, would have to

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<sup>24</sup> s29 *CA Act*.

<sup>25</sup> s27(2) *CA Act*.

<sup>26</sup> s27(1)(d) *CA Act*

<sup>27</sup> s31(1) *CA Act*; again, this illustrates the power given to the Minister to approve/disapprove a development within a CA.

<sup>28</sup> s28(1) *CA Act*; CELCOR, *Conservation Area (Conservation Areas Act): A community Awareness Material*, Boroko.

<sup>29</sup> s38 *CA Act*.

<sup>30</sup> s39 *CA Act*.



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follow the processes under the *National Court Rules 1983*. The circumstances under which judicial review may be available are where the decision-making authority:

- exceeds its powers;
- commits an error of law;
- commits a breach of natural justice;
- reaches a decision which no reasonable tribunal could have reached; or
- abuses its powers.

Judicial review is only available where the decision of a public authority is being questioned.

#### **2.1.1.4 Advantages**

The key advantages regarding the use of the *CA Act* for marine natural resource management in Milne Bay are:

- The *CA Act* provides recognition to an area declared as a CA for conservation purposes.
- The protected area remains under customary tenure.
- The management body (CAMC) is designed to reflect the interests of the resource owner.
- The CAMC has direct input into the management of the CA.
- The *CA Act* can be used to conserve large areas of land/sea.

#### **2.1.1.5 Disadvantages**

The key disadvantages regarding the use of the *CA Act* for marine natural resource management in Milne Bay are:

- It is not known whether DEC's official position is that the NCC must meet prior to the establishment of a CA, and since the NCC has never met, it is possible they never will.
- The process for establishing a CA is long and cumbersome.
- The ultimate power for decision-making and managing the CA lies with the Minister. This may cause the Minister to be put under political pressure to approve developments. Implications of this would be that the Minister would be inclined to follow or heed the decision or interests of the Government of the day "for the benefit of all in contrast to a minority of resource owners.
- Landowners cannot carry out development on their land, except in accordance with the management plan.<sup>31</sup>
- CAMC is not sufficiently 'community-based' ie. CAMC partly made up of LLG/PG. In addition, Minister has ultimate say with respect to development.
- There is no process in the *CA Act* for appeal of Minister's decisions. This would have to follow the processes under the *National Court Rules 1983*.

#### **2.1.2 Fauna (Protection and Control) Act 1968**

The *Fauna (Protection and Control) Act 1968* (*Fauna Act*) provides for the establishment of three types of protected areas:

- Sanctuaries: All species of fauna are protected, except where the Minister specifies animals or classes of animals that may be lawfully taken or killed in the Sanctuary through notice in the National Gazette;

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<sup>31</sup> It should be noted that landowners may not recognise this authority, despite it being a national law.

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- Protected Areas: A species or class of animals is protected where the Minister has specified the protection of that species or class of animals through notice in the National Gazette; and
- Wildlife Management Areas (WMAs): A form of protected area that allows for the sustainable use of fauna on traditional lands.

The high level of protection and lack of scope for management measures and sustainable development within Sanctuaries and Protected Areas indicates that these protected areas are not appropriate for use as CMMA within Milne Bay. Further, the *Act* does not contain provisions for the establishment of management committees or for the preparation of management plans for Sanctuaries and Protected Areas. For these reasons, Sanctuaries and Protected Areas are not considered viable options for the establishment of a CMMA. Only WMAs under the *Fauna Act* will be discussed further.

### **2.1.2.1 Spirit and Aims of WMAs**

WMAs are a form of protected area that allows for the sustainable use of fauna on traditional lands. The principal behind WMAs is to allow customary landowners to manage the use of wildlife located within their traditional territories and to allow sustainable exploitation levels.

### **2.1.2.2 Establishment**

Declaration of an area to become a WMA is made by the Minister for the environment (the Minister) in consultation, as far as practicable, with local landowners and the LLG.<sup>32</sup>

In practice, landowners, sometimes assisted by non-government organisations (NGOs), take the initiative to lodge an application to DEC for their land to be declared a WMA. When the WMA is gazetted, the tenure of the land remains with the customary owner.

In practice, WMAs may take a long period of time to be gazetted, partly because DEC has difficulties completing the tasks necessary to establish and gazette WMAs due to a lack of financial resources.<sup>33</sup> On 26 January 2006, four marine-based WMAs were gazetted in the Madang area: Tab, Tabad, Sinub and Laugum. The process to have these four WMAs gazetted began in 1997 with local community interests. While the WMAs were declared under the *Fauna Act* in 2000, it took another 6 years to have the WMAs gazetted.

### **2.1.2.3 Management**

#### **2.1.2.3.1 Management Body**

A Wildlife Management Committee (WMC) may be established at the discretion of the Minister<sup>34</sup> as the body to manage the WMA. Although its functions are to manage the WMA, when declaring an area to be a WMA, the Minister has the power to:<sup>35</sup>

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<sup>32</sup> s15(2)(a) *Fauna Act*; Failure to consult the LLG does not invalidate the declaration.

<sup>33</sup> John Genolagani, NBSAP Workshop, Port Moresby, PNG, 21-25 Nov 2005. This could be solved by the Project assisting DEC (financially or by providing temporary staff) in accomplishing the necessary work prior to the gazettal of the WMA.

<sup>34</sup> s16(a) *Fauna Act*.

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- appoint persons to be the members;
- specify the manner in which other persons may become members of the WMC; and
- specify a person or officer to be the agent of the WMC.<sup>36</sup>

Membership of the WMC is not specified in the *Fauna Act*. No specific provisions within the *Fauna Act* clarify the role and power of a WMC.

## **2.1.2.3.2 Management Plan**

Although the Act does not expressly provide for the establishment of a management plan, it provides for the Minister, in consultation with the WMC, to make rules for the protection, propagation, encouragement, management, control, harvesting and destruction of fauna in the WMA.<sup>37</sup> While the *Fauna Act* aims to protect fauna, rules have been made for the protection of flora. For example, the *Fauna (Protection and Control) Garu WMA Rules 1977* prohibit cutting or destroying trees<sup>38</sup> and the *Fauna (Protection and Control) Pokili WMA Rules 1976* prohibit the taking or damaging any tree or plant in the WMA within 1km of a nesting burrow of wild fowl.<sup>39</sup> Although these rules could be challenged on the grounds that the *Fauna Act* only recognises the protection of fauna, rules regarding the protection of flora are supported by the following:

- The title of the Act “*Being an Act to make provision for the protection, control, harvesting and destruction of fauna, and for related purposes*”. “For related purposes” could be interpreted as including flora, since fauna is reliant on flora where flora provides habitat, and is used for nesting and feeding; and
- It is currently recognised that landowners are free to make rules for WMAs that are not necessarily restricted to fauna conservation only.

However, conflicting operations, such as mining or logging, are sometimes undertaken within existing WMAs, because the law concentrates on the protection of fauna., and effectively undermines the purpose and establishment of WMAs.

In practice, the resource owners develop the rules and penalties together with DEC (and conservation NGOs),<sup>40</sup> resulting in the development of a management plan containing the rules and penalties. It should be noted that the Minister *may* make rules applying to a WMA without consulting with the WMC, landowners or LLGs where the area is located.<sup>41</sup>

The Minister may also prescribe, limit, prohibit or restrict the devices, equipment or fishing method used within the CMMA.<sup>42</sup> Management plans for existing WMAs

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<sup>35</sup> s16 *Fauna Act*.

<sup>36</sup> s18 *Fauna Act*; This agent issues licenses and receives the subsequent fees where the rules made for the WMA provide for it. The agent is entitled to receive any remuneration or allowance in respect of his duties as agent

<sup>37</sup> s17(1) *Fauna Act*.

<sup>38</sup> s7 *Fauna (Protection and Control) Garu WMA Rules 1977*.

<sup>39</sup> s5 *Fauna (Protection and Control) Pokili WMA Rules 1976*.

<sup>40</sup> Flip Van Helden, *Lesson Learned in Community-Based Conservation in Papua New Guinea*, TNC / WWF, final report, July 2005.

<sup>41</sup> s17(1),(2)&(4) *Fauna Act*.

<sup>42</sup> s27 *Fauna Act*.

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include rules on the management of specific species, methods of fishing, tools to fish (e.g. mesh size of nets) and sale of catch.

### **2.1.2.3.3 Other Arrangements**

The Minister can, by notice in the National Gazette, appoint an officer to be the Conservator of Fauna,<sup>43</sup> whose powers and duties are prescribed in the notice.<sup>44</sup> The Conservator of Fauna is therefore a government officer. The Conservator of Fauna may:

- Grant a permit authorising the taking of protected fauna;
- Appoint a person to be a ranger;
- Hear appeals on rangers' decisions.<sup>45</sup>

Other powers and duties of the Conservator of Fauna may also be prescribed. The freedom to prescribe a range of powers and duties to the Conservator of Fauna may result in the granting of powers that may interfere with the management of WMAs by landowners. In addition, the fact the Conservator of Fauna is a government officer increases the risk of government control over the management of WMAs.

Rangers are responsible for the enforcement of the Act<sup>46</sup> as well as additional powers and functions attributed by the Conservator of Fauna. They may assist landowners to enforce rules established pursuant to the management plans of WMAs.

A lack of financial resources is often a problem for the daily management of WMAs. For example, in most cases DEC lacks the financial means and field capability to provide for staff in charge of monitoring and enforcing rules within WMAs.<sup>47</sup> Further, the National Government does not necessarily provide financial or administrative support to the WMA as a result of it being listed as a protected area. Where rangers are not provided, protection is largely dependent on the commitment of the community. The Act does not restrict enforcement to rangers or anyone in particular. In the absence of rangers, the implication is that any person, group or corporation can bring this matter before a court, provided he/she proves to the court that they have an interest in the matter, and therefore “standing”, and it would be in the interest of natural justice. Where there is a gross breach in the rules, the police have general powers of prosecution and are more likely to carry out prosecution effectively.

### **2.1.2.4 Advantages**

The key advantages regarding the use of the *Fauna Act* for marine natural resource management in Milne Bay are:

- The Act provides recognition at National level to an area declared as a WMA for conservation purposes.
- WMAs provide a high level of protection over an area with control by local resource owners.
- The tenure remains under customary ownership.

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<sup>43</sup> s4 *Fauna Act*.

<sup>44</sup> s5 *Fauna Act*.

<sup>45</sup> s25 *Fauna Act*.

<sup>46</sup> s21 *Fauna Act*.

<sup>47</sup> Flip Van Helden, *Lesson Learned in Community-Based Conservation in Papua New Guinea*, TNC / WWF, final report, July 2005.

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- It provides local landowners with input into the management of the WMA, and allows for sustainable use of resources.
- The membership of the WMC is not specified and is therefore open and flexible, and therefore the constitution of members can be determined by resource owners to benefit resource owners.

## **2.1.2.5 Disadvantages**

The key disadvantages regarding the use of the *Fauna Act* for marine natural resource management in Milne Bay are:

- Conflicting operations, such as mining or logging, are sometimes undertaken within existing WMAs, because the law concentrates on the development of rules for the protection of fauna. This undermines the purpose and establishment of WMAs.
- DEC has difficulties completing the tasks necessary to establish and gazette WMAs due to a lack of financial resources.<sup>48</sup>
- Once established, no administrative or financial support is provided to the WMA by the National Government as a result of being listed as protected area.
- DEC also lacks the resources to enforce the rules and regulations within WMAs.<sup>49</sup> Geographical, practical and cost issues present problems for the enforcement of WMA rules.
- Enforcement is not community-based. The system for enforcement is open to abuse by rangers and/or the Conservator of Fauna, appointed by the Minister.
- The Minister is not required to consult the landowners and the LLG prior to making rules for the WMA.
- WMA rules regarding management/protection of flora may be challenged in court.
- Membership of the WMC is not specified in the *Fauna Act*. It is therefore open and flexible, and may compromise the interests of the resource owners.
- Appointments of the Conservator of Fauna and Rangers are not compulsory.<sup>50</sup>
- The freedom to prescribe a range of powers and duties to the Conservator of Fauna may result in the granting of powers that may interfere with the management of WMAs by landowners.
- As a government officer, the Conservator of Fauna is able to make rules for WMAs, and there is a risk of government control over the management of WMAs

## **2.1.3 Fisheries Management Act 1998 and Amendments**

### **2.1.3.1 Spirit and Aims**

The current *Fisheries Management Act 1998 (FMA 1998)* aims to promote the management and sustainable development of fisheries. The National Fisheries

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<sup>48</sup> John Genolagani, NBSAP Workshop, Port Moresby, PNG, 21-25 Nov 2005. This could be solved by the Project assisting DEC (financially or by providing temporary staff) in accomplishing the necessary work prior to the gazettal of the WMA.

<sup>49</sup> Flip Van Helden, *Lesson Learned in Community-Based Conservation in Papua New Guinea*, TNC / WWF, final report, July 2005.

<sup>50</sup> s4 & s20 respectively, *Fauna Act*.

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Authority (NFA) is established to carry out this function and to be responsible for the management and development of the fisheries sector.<sup>51</sup> In terms of conservation of the marine environment, the *FMA 1998* provides for the regulation of unsustainable fishing practices, including fishing closures for specified locations or certain species. The provisions of the *FMA 1998* provide that the rights of the customary owners of fisheries resources and fishing rights are required to be fully recognised and respected in all transactions affecting the resource or the area in which the right operates.<sup>52</sup>

Amendments to the *FMA 1998* have been proposed in the Draft *Fisheries Management Act 2005* (Draft *FMA 2005*). The Draft *FMA 2005*, *inter alia*, maintains and expands the protection of rights of customary owners, but specifies that customary fishing rights must be consistent with any applicable Fishery Management Plan (FMP).<sup>53</sup> It also allows for the establishment of marine protected areas (MPAs) under the proposed amendments (see 2.1.3.2).

When considering further discussions in this section, it should be noted that the Draft *FMA 2005* is not in force. Therefore, currently there are no provisions to allow for the Minister to declare MPAs pursuant to the *FMA 1998*. It is not known when the provisions in the Draft *FMA 2005* are expected to be passed.

### **2.1.3.2 Establishment**

The Draft *FMA 2005* provides that the Minister for Fisheries may declare any area of the fisheries waters<sup>54</sup> to be a MPA in accordance with the management objectives and principles of the Draft *FMA 2005*.<sup>55</sup> The Minister must consult, fully recognise and respect the customary owners of fisheries resources and their fishing rights prior to declaring a MPA over an area.<sup>56</sup>

In addition, customary owners of fisheries resources and fishing rights may request the Minister to give full consideration to declaring a MPA over the area in which they exercise ownership of fisheries resources and rights, or any contiguous area.<sup>57</sup>

### **2.1.3.3 Management**

#### **2.1.3.3.1 Management Body**

There is no specific management body prescribed under the Draft *FMA 2005* for management of the MPA. It is likely that if the amendments are passed, management of MPAs would be undertaken by National level fisheries officers, or Provincial Government officers, where appropriate.

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<sup>51</sup> s4 *Fisheries Management Act 1998*.

<sup>52</sup> s26 *Fisheries Management Act 1998*.

<sup>53</sup> A Fishery Management Plan is made pursuant to s30 Draft *Fisheries Management Act 2005* where a fishery is designated to be of national interest. The Plan outlines the objectives of the fishery and specifies management measures, including prohibitions and licensing requirements for that fishery.

<sup>54</sup> s2(1) Draft *Fisheries Management Act 2005* - "fisheries waters" means the internal waters, including lagoons, the territorial sea, the archipelagic waters, the exclusive economic zone and any other waters over which Papua New Guinea exercises or claims jurisdiction or sovereign rights, and includes the bed and subsoil underlying those waters;

<sup>55</sup> s43(1) Draft *Fisheries Management Act 2005*.

<sup>56</sup> s43(3) Draft *Fisheries Management Act 2005*.

<sup>57</sup> s43(2) Draft *Fisheries Management Act 2005*.

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## **2.1.3.3.2 Management Plan**

The Draft *FMA 2005* does not provide for management plans specific to the area defined as a MPA. Instead, conservation and management measures or prohibitions inside a MPA are adopted by a FMP (or regulation).<sup>58</sup> Once the MPA has been declared, all customary fishing activities must be consistent with the management measures set out in the FMP.

## **2.1.3.3.3 Other Arrangements**

Other arrangements for management of the MPA not specified within the legislation would need to be specified within a FMP, or in regulations specific to the MPA. The need for further management arrangements to be specified in Plans or regulations would need to be examined on a case-by-case basis.

## **2.1.3.4 Advantages**

The key advantages regarding the use of the *FMA 1998*, and potentially, the Draft *FMA 2005*, for marine natural resource management in Milne Bay are:

- Establishment of a MPA the Draft *FMA 2005*, would provide a certain level of recognition to an area declared as a MPA for conservation of the marine environment.

## **2.1.3.5 Disadvantages**

The key disadvantages regarding the use of the *FMA 1998*, and potentially, the Draft *FMA 2005*, for marine natural resource management in Milne Bay are:

- The NFA is unlikely to approve a MPA (or even the amendment allowing establishment of a MPA) because it is contrary to the purposes of the NFA.
- The MPA system under the Draft *FMA 2005* restricts customary owners rights by prohibiting fishing activities that are inconsistent with management measures set out in the FMP.
- Rules, conservation and management measures, and prohibitions for the management of a particular MPA will be divided among multiple FMPs for different species. Therefore, to determine the entirety of the rules for one MPA, reference would need to be made to all FMPs. This implies that all FMPs would need to be checked to determine all the rules for a particular area.
- It is not desirable that management of MPAs be undertaken by either the NFA, or the Provincial Government.

## **2.1.4 Organic Law on Provincial Governments and Local Level Governments**

### **2.1.4.1 Spirit and Aims**

The Organic Law on Provincial Governments and Local Level Governments (OLPG&LLG) allows for Provincial and Local Level Governments to draft and implement legislation for a number of purposes. Under s42(1) OLPG&LLG, the Provincial Government can legislate for conservation-related purposes including:

- fishing and fisheries;
- forestry and agro forestry;
- renewable and non-renewable natural resources; and

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<sup>58</sup> s43(4) Draft *Fisheries Management Act 2005*.

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- parks, reserves, gardens, scenic and scientific centres.

This does not allow for the Provincial Government to legislate for protection or conservation of the environment. The OLPG&LLG does, however, allow for the Provincial Government to legislate on renewable and non-renewable natural resources, which can include marine natural resources. In this way, the Provincial Government could develop a law for sustainable use of marine natural resources within Milne Bay Province. Legal advice provided by the Provincial Administration states that, prior to a law being introduced at Provincial level, a policy on the same subject matter as the law would need to be approved by the Provincial Executive Council (PEC). Following the approval of the policy, drafting instructions would need to be developed, and then the bill drafted by the Legal Officer and approved by the Provincial Assembly.<sup>59</sup>

Pursuant to s44(1) of the OLPG&LLG, LLGs can legislate for purposes including:

- local environment;
- domestic animals, flora and fauna;
- protection of traditional sacred sites; and
- the imposition of fines for breaches of any of its laws.

Therefore the LLGs can draft and implement legislation for conservation and sustainable use of marine natural resources as part of the marine environment. This would also allow for the introduction, and management of CMMAs. This type of project has been previously undertaken in the Talasea LLG, near Kimbe in East New Britain.

LLG laws cannot be made in relation to projects in the national interest including large-scale mining, petroleum, forestry, fishing and marine resource features. Any laws at LLG level must be consistent with laws at Provincial and National levels. Where there is an inconsistency, the 'higher' law prevails.

The OLPG&LLG also provides that LLG laws may specify offences and other penalties for breach of LLG laws.

The MBPA also required a policy to be approved, prior to the development of drafting instructions and the drafting of the bill for the presentation to the PEC. The process under the OLPG&LLG for establishing an LLG law is that the LLG must firstly pass the law, and then the law must be approved by the Minister for Local Affairs. A period of 60 days is allowed for the Minister to make comments and a final decision. Where the Minister does not make a comment within the 60-day review period, the LLG law is enacted without amendments.<sup>60</sup>

### ***2.1.4.1.1 Umbrella Provincial Level Law***

A Province-wide law could be drafted of the management and sustainable use of marine natural resources within the Milne Bay Province. The law would be

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<sup>59</sup> A Provincial law, made by the Provincial Assembly is effective where it is made by the Assembly and certified by the Clerk and Chairman that it has been made by the Assembly; s18 *Provincial Governments Administration Act 1997*.

<sup>60</sup> Flip Van Helden *A Policy and Planning Needs Assessment for the Milne Bay Marine Conservation Project*, prepared for UNOPS, March 2001.



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considered an umbrella law, because it would apply across the Province for the establishment of CMMAs. The law would provide general provisions on management of CMMAs, and would define:

- the process for establishment of CMMAs within the Province;
- objectives and rules for the variety of zones that may be set up within CMMA;
- issues regarding the management body, including the structure, membership, and relationship with administrative body; and
- offences and penalties for offences.

A management plan at the Provincial level, including enforcement provisions, would provide for the management measures to be implemented for the CMMA. All other arrangements (e.g. appointment of rangers, enforcement, and coordination of the CMMA management) would be specified in the law.

Due to the fact that consultation would be required across the Province before a Provincial law could be introduced for management and sustainable use of marine natural resources, a Provincial law cannot be developed at this stage (Phase 1) of the Project. Therefore, the remainder of this section will discuss the development of LLG laws. However, once the Project enters into Phase 2, and extends its operation across the Province, it may be feasible to draft and implement a Province-wide law for establishment and management of CMMAs.

## ***2.1.4.1.2 Umbrella Local Level Law***

Pursuant to the OLPG&LLG, the LLG can legislate for purposes related to the local environment. Where an umbrella LLG law was to be drafted, it would cover similar issues as defined for an umbrella Provincial law:

- the process for establishment of CMMAs within the LLG;
- objectives and rules for the variety of zones that may be set up within CMMA;
- issues regarding the management body, including the structure, membership, and relationship with administrative body; and
- offences and penalties for offences.

A management plan at the local level, including enforcement provisions, would provide for the management measures to be implemented for the CMMA. All other arrangements (e.g. appointment of rangers, enforcement, and coordination of the CMMA management) would be specified in the law.

## ***2.1.4.1.3 Case-by-case Local Level Law***

Case-by-case LLG laws would also use the power under the OLPG&LLG to legislate for purposes related to the 'local environment'. However, a law would need to be enacted for the establishment of *each* CMMA, and the associated management body. The law would set out objectives and rules specific to the CMMA for which the law was enacted, and offences and penalties specific to that CMMA. The management plan would be included as an Appendix to the LLG law. All other arrangements (e.g. rangers, enforcement, and coordination of the CMMA management) would be specified in the law.

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## **2.1.4.2 Establishment**

Of the two options for LLG laws, the umbrella law is the most logical, because it allows for CMMAs to be established in the future, by communities not currently participating in the Project's activities. The process for establishment of a CMMA would depend on the process set out in the LLG law. However, it is envisaged that the LLG law would provide for nomination of the area by the resource owners<sup>61</sup> to the LLG Assembly. On receipt of the nomination, the Assembly would consider the merit of the application, and decide whether to approve the nomination. Once approved, the CMMA and the rules for management of the CMMA would be recognised by the resource owners, LLG and wider PNG community.

A LLG law has been used to establish marine protected areas in the Talasea Rural LLG of Kimbe Bay under the OLPG&LLG. This law would be referred to as an example for setting up processes for establishing CMMAs in Milne Bay under an LLG law.

## **2.1.4.3 Management**

### **2.1.4.3.1 Management Body**

The establishment of the management body would be specified in the LLG law. It is likely the process would include nomination of community members by the resource owners. Membership may include, but not be limited to:

- resource owners;
- special interest (women, youth, church, other);
- representative of Ward government;
- representative of LLG Administration; and
- representative from Provincial level (i.e. from Provincial Authority – see below)

The LLG law would also outline the constitution and role of the management body, and would also specify a process under the LLG law for change in membership due to death or for other reasons.

### **2.1.4.3.2 Management Plan**

The terms for the development of the management plan would be specified in the LLG law. The management plan would be drafted by the resource owners and community with the assistance of NGOs. On approval by the LLG Assembly, through a process defined in the LLG law, and once approved, the management bodies, LLG, and other responsible agencies would be required to use all reasonable steps to perform their functions and tasks as outlined under the management plan. The management plan would include a section of enforcement provisions, supported by the LLG law.

### **2.1.4.3.3 Other Arrangements**

All arrangements (e.g. appointment of rangers, enforcement, and coordination of the CMMA management) would be specified within the LLG law.

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<sup>61</sup> Genealogy studies would be undertaken to identify the resource owners.

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Additionally, under the OLPG&LLG, the LLG law may impose penalties for the breach of its locally enacted legislation, and the Provincial Government may establish tribunals of an administrative or quasi-judicial kind.

## **2.1.4.4 Advantages**

- Provides opportunity for the greatest input from resource owners during the drafting of the LLG law (including input regarding culture and tradition), for the establishment and zoning of the CMMA, and development of a management plan.
- Ensures that responsibility for the management of natural resources rests with the resource owners.
- Where the legislation is drafted with community input, it is likely that the CMMA will be successfully managed by the community, as CMMA rules will be followed and enforced by community members.
- LLG laws can be drafted to incorporate aspects of Provincial and National legislation relevant to the conservation and protection of the marine environment.
- Allows for the establishment, by or under a Provincial law, of tribunals of an administrative or quasi-judicial kind
- A Provincial law may make provision for and in respect of the establishment, jurisdiction and administration of other courts and tribunals (including commissions of inquiries) of civil or criminal jurisdiction, or both.<sup>62</sup> This is good in the sense that, if a tribunal were set up and fines were collected by that tribunal, it would be possible to legislate that the fines collected should be paid to the Management Body of the CMMA for purposes of maintaining it. All fines collected by the District Court are considered to be state monies whilst fines collected by the Village Court are to be paid to the Provincial Government.
- Allows a Provincial law or a local-level law to make provision for offences, fines, penalties and forfeitures for offences against the Provincial laws or local-level laws.

## **2.1.4.5 Disadvantages**

- There is a risk that the LLG law may be inconsistent with higher-level laws and will therefore be invalid to the extent of the inconsistency.
- Being a LLG law, it may carry lower penalties for breach of the legislation, and may not provide a large enough deterrent.

## **2.2 Enforcement of National Legislation**

**Tamalis – to rewrite this section in laymen’s terms... To make it more readable**

The two lower levels of the Court system, being the District Court and the Village Court, can be employed to enforce National legislation. Each court has separate legislation to establish the court and the scope of jurisdiction, being the *District Court Act 1963* and *Village Courts Act 1989*. The National Court has concurrent jurisdiction with the District Court and can deal with issues, pursuant to its ancillary powers as a

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<sup>62</sup> s48 OLPG&LLG.

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matter of urgency then transfer the proceedings to the National Court – Tamalis to clarify meaning of this sentence

## 2.2.1 District Court Act 1963 and District Court Regulation 1965

The Minister establishes District Courts being on the second lower level of the court system through Notice in the National Gazette.

### 2.2.1.1 Jurisdiction

District Courts are empowered to enforce, interpret the law and hear proceedings where an offence is punishable on summary conviction or a person is made liable to a penalty, or punishment or to pay a sum of money for an offence, act or omission.<sup>63</sup>

Any individual or legal entity can institute a claim to seek redress before the court provided always that it has a legal basis. Before the court will proceed to hear a complaint, or conduct a trial, the Complainant must, as a requisite, prove to the court that they have standing or an interest in the matter and that there is a *prima facie* case. The onus of proof, unless provided otherwise, is always on the Complainant. Once a complaint is instituted, the Complainant is subject to all rules and procedures of the court.

The *District Court Act* provides strict rules and procedures on how a matter must be instituted before the court, including the particular forms to be filed, and processes for presentation of cases. The Court can hear civil claims up to the value of K10, 000. Where a breach of a particular legislation occurs and the penalty prescribed exceeds this amount, the District Court does not have jurisdiction, and the matter would be referred to the National Court.

Magistrates are appointed by the Judicial and Legal Services Commission<sup>64</sup> pursuant to the *Magisterial Services Act 1975*. They may exercise within and for their jurisdictions the several powers and authorities conferred on them under the District Court Act or any other law. All summonses, warrants, convictions and orders (not being by law authorized to be made by word of mouth only) shall be under the hand of the Magistrate or Clerk issuing or making them.<sup>65</sup> Appointed Magistrates have limited jurisdiction dependent on their Grade; i.e. a Grade Four Magistrate may hear matters of up to K8000.

In the event a matter is brought before the court, where it does not have jurisdiction, the matter may be transferred, or the proceedings dismissed. Furthermore, where a matter is instituted and the Complainant fails to reasonably pursue the matter, the court may use its discretion and strike the matter out or dismiss the proceedings for want of prosecution. Where a matter is struck out, the person has an option to re-institute the proceedings. However where a dismissal has occurred, the only available remedy is to lodge an appeal to the higher court.

### 2.2.1.2 Advantages

- Can hear matters involving claims for sums or penalties of up to K10, 000.

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<sup>63</sup> s20 *District Court Act 1963*.

<sup>64</sup> The Commission is a constitutional authority with its' powers also derived from it.

<sup>65</sup> s7 *District Courts Act 1963*.

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- Flexible in the sense that even after instituting proceedings, may still endorse or order payment of fines and convict based on admission during a mediation.

## 2.2.1.3 Disadvantages

- The Court in Milne Bay is unable to prepare summons on most occasions when a complaint is brought before it and most often, persons are referred to law firms to assist.
- There are strict procedural rules and regulations that a person must comply with for the duration of the proceedings.
- Unless a person is knowledgeable on the law in terms of Rules of Evidence, this may delay effective resolution of the dispute.
- The geographical proximity of a court may be a hindrance on prosecution
- Within the country there are an approximate number of 5-6 Grade Five magistrates who have jurisdiction to hear matters up to and between K8000 and K10, 000. Milne Bay does not have a Grade Five magistrate. They would usually travel on court circuits dependent on the number of filed cases pending for their hearing and determination. Also dependent on funding and authorisation by Chief Magistrate.

## Recommendations

### MOVE

- Prepare forms for purpose of prosecution and attached to the CMMA Management Rules/LLG legislation to facilitate enforcement.
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## 2.2.2 Village Courts Act 1989 and Village Courts Regulation 1974

All Wards are divided into zones within an LLG area. Village court committees are elected within each zone, and include village court officials. All Village Court officials are appointed under an Act of the Provincial Legislature (what is this legislation?). One type of Village Court Official, Village Peace Officers, have powers of enforcement in terms of bringing a matter before a court or reporting to the magistrate any disputes, make Orders against persons likely to commit a breach of the peace or persons that have breached the peace; and has powers of arrest. Interestingly, the application of the *Village Courts Act 1989* is subject to the existence of an Act of the Provincial Legislature (what act?). Where the latter exists, and there are inconsistencies with respect to its establishment and administration, the former will cease to apply.

### 2.2.2.1 Jurisdiction

The jurisdiction of a Village Court may be exercised by a number of Village Magistrates, notwithstanding that the jurisdiction is being exercised at the same time by other Village Magistrates.<sup>66</sup> The implication is that two or more Village Courts have the authority to give effect to a law at any one time in event of a breach, provided that the offence or breach is within their designated area of jurisdiction.

With regard to the civil jurisdiction of the Court, claims for compensation and repayment of debt are limited to claims for up to K1000.<sup>67</sup> The Village Court can also

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<sup>66</sup> s37, *Village Courts Act 1989*.

<sup>67</sup> s45, *Village Courts Act 1989*.

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use its discretion to impose community work on an offender brought before it, as opposed to imposing a fine.<sup>68</sup> This would be dependent on the penalties defined under the law in breach.

In the event that a violation of an LLG law occurs, the court can impose fines to a maximum amount of K200.00 only.

The Village Courts' jurisdiction is limited to violations or contraventions in respect of, or failure to comply with, a Local-level Government law or a law made by or under an Act of a Provincial Legislature, where it is provided that the Village Court may deal with the offence.<sup>69</sup> The Court is bound by customs of the particular area that are imposed when such specified offences, or those similar, are committed.

## 2.2.2.2 Advantages

- A Village Court sitting is usually made up of an odd number of Magistrates sitting **(why is this an advantage? What does it provide for?)**
- A Village Court shall not apply technical rules of evidence but shall admit and consider such information as is available.<sup>70</sup>

## 2.2.2.3 Disadvantages

- All fees chargeable in respect of matters before a Village Court and fines, penalties and forfeitures ordered by a Village Court, are payable to the Provincial Government.<sup>71</sup>
- **Village Courts receive all funding from the fines they collect and which are payable to the Provincial Government. Out of the total of this funds received, the Provincial Government shall pay an equivalent amount to the village court for maintenance and improvement only. It is not clear whether this includes the personnel and system or just the allocated place for sitting of a village court. [This is not clear. Please re-write]**
- Where custom is applicable, it shall be applied even to the extent of inconsistency with Provincial or National legislation.<sup>72</sup>

A person is innocent until proven guilty.<sup>73</sup> The implication here is that, the Complainant must prove that the offence was committed. The offence may be regarded as civil in nature and therefore the ruling of the court would be on the balance of probabilities.

## 3 Analysis of Non-Legislative Options

### 3.1 Conservation Easements and Agreements

#### 3.1.1 Spirit and Aims

In the absence of sufficient and appropriate legislation, or where preferred by the resource owners and agreed to by the Project, a conservation easement or

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<sup>68</sup> s44, *Village Courts Act 1989*.

<sup>69</sup> s41(b) *Village Courts Act 1989*.

<sup>70</sup> s59 *Village Courts Act 1989*.

<sup>71</sup> s13 *Village Courts Act 1989*.

<sup>72</sup> s57(2) *Village Courts Act 1989*.

<sup>73</sup> s58(2) *Village Courts Act 1989*.

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conservation agreement could be used to establish a CMMA. Essentially, the easement/agreement would act as a contract to bind the parties to the terms of the agreement. It is envisaged the aim would be consistent with conservation of the marine environment and management of natural resources.

## **3.1.2 Establishment**

Where a conservation easement/agreement is executed, the Project and the resource owner<sup>74</sup> would agree to establish a CMMA. Specific arrangements under an easement/agreement are as follows:

- Conservation Easement - the contract between the resource owner and the Project would impose a number of limitations and/or obligations on the parties. In effect, the resource owner would transfer their development rights to the Project in exchange for benefits. The conservation easement would state that the resource owners would be able to continue to use their land/marine area in a manner consistent with the limitations/obligations, and with the aim of conserving the environment and managing the natural resources of the specified area. Conservation easements run with the land.
- Conservation Agreement - an agreement is made between the resource owner and the Project, where the resource owners agree to a set of specific terms in exchange/return for payment, usually periodic payments. The conservation easement is usually preferred over the conservation agreement to allow more scope for capacity building.

## **3.1.3 Management**

### **3.1.3.1 Management Body**

A management body could be established within the terms of the agreement, and a constitution or goals/aims of the management body could be included in the schedules to the agreement.

### **3.1.3.2 Management Plan**

A management plan would be drafted according to the requirements and traditional knowledge of the resource owners, and the scientific and management knowledge of the Project. The management plan may either be included in the schedules or a clause could refer the reader to a separate management plan.

### **3.1.3.3 Other Arrangements**

All other arrangements necessary for the management of the CMMA could be provided for within the body of the agreement, or the schedules to the agreement.

## **3.1.4 Advantages**

- The process for establishing the CMMAs is relatively quick and easy, and only requires the Project and the resource owners to agree to have the area defined as an CMMA.
- Conservation easements run with the land.

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<sup>74</sup> As an alternative, resource owners entering into a conservation easement/agreement may form an Incorporated Land Group (ILG) under the *Land Groups Incorporation Act 1974*. In cases where resource owners wish to register their land, they would need to form and ILG.

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## 3.1.5 Disadvantages

- Not enforceable against the resource owners (as a group) unless they have formed an ILG.
- The Project would be required to initiate legal proceedings against the resource owners where a breach has occurred.
- It would be difficult to set penalties. Therefore, it would be up to the courts to decide the penalty.
- No legally recognised gazettal of CMMAs to ensure third party compliance with either conservation easements or agreements. It is not enforceable against a third party.
- Conservation agreements run for a specified period of time, and then the parties must re-negotiate the agreement.

## 4 Community Concerns

### 4.1 Community Landowner Groups

Particular concerns raised during consultation have included the possible roles and functions of associations and Incorporated Land Groups in establishing and managing CMMAs.

#### 4.1.1 Associations

##### 4.1.1.1 Purpose

The purpose of forming an association is to provide a way for communities to pool resources, participate in bringing development to communities and conveying messages to government and other bodies.

##### 4.1.1.2 Establishment and Function

Associations are established under the *Associations Incorporation Act 1966 (AI Act)*. According to the *AI Act*, associations are formed for community purposes as follows:

- for providing recreation or amusement; or
- promoting commerce, industry, art, science, religion, charity, pension or superannuation schemes or other objects useful to the community.

To be incorporated, the association must apply its profits (if any) or other income in promoting its objects and prohibit the payment of any dividend or payment in the nature of a dividend to its members.<sup>75</sup>

The *AI Act* provides rules and procedures on how to incorporate an association, as follows:

1. Draft a constitution for the association.
2. Lodge Form 1 (Notice of Intention to Apply for Incorporation) along with the constitution to the Investment Promotion Authority (IPA).
3. Publish Form 1 in the daily newspaper, with a period of 1 month for objections to be lodged.<sup>76</sup>

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<sup>75</sup> s1(1)(a)-(c) *Associations Incorporation Act 1966*.

<sup>76</sup> Specific grounds of objection are set out in the *Associations Incorporation Act 1966*.



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4. Lodge Form 2 (Application for Incorporation of Association) and pay the registration fee at the IPA with a copy of the constitution.
5. The IPA will post a Certificate of Incorporation when form 2 is approved.<sup>77</sup>
6. Upon receipt of the Certificate, a public officer<sup>78</sup> must be appointed for the association within 14 days.<sup>79</sup>

Once an association is incorporated, it may, in its corporate name, deal with land, including holding, purchasing, selling, or leasing any land.<sup>80</sup> Incorporated associations also have general powers to, *inter alia*, invest moneys,<sup>81</sup> open and operate bank accounts and borrow money for the purpose of carrying out its objects and purpose. Once incorporated, the association is also capable of suing or being sued.<sup>82</sup>

## 4.1.2 Incorporated Land Group

### 4.1.2.1 Purpose

An Incorporated Land Group (ILG) can be formed under the *Land Group Incorporation Act 1974*, to allow customary landowners to hold, manage and deal with land in their own names.<sup>83</sup>

### 4.1.2.2 Establishment and Function

To incorporate a land group, a group of customary landowners must:

1. Prepare a draft of the land group's constitution.<sup>84</sup>
2. Send in the application for incorporation.<sup>85</sup>
3. Notify and publish the application.<sup>86</sup>
4. Consider any comments received.<sup>87</sup>
5. Become incorporated by the Registrar.<sup>88</sup>

Where a group of customary landowners becomes incorporated, the ILG can more easily participate in management of resources in their area. It should be noted that where an ILG is registered, it does not mean that the land is registered. It is also not clear whether customary rights to the use of marine resources can be vested in the ILGs.<sup>89</sup>

## 4.2 Tenure Issues

Tamalis to further discuss National Seas Act, Land Act and land registration (see Colin Filer document)

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<sup>77</sup> s7 *Associations Incorporation Act 1966*.

<sup>78</sup> The Public Officer is responsible for running the Association.

<sup>79</sup> s130 *Associations Incorporation Act 1966*.

<sup>80</sup> s11(1) *Associations Incorporation Act 1966*.

<sup>81</sup> In a manner determined in s20(c) *Associations Incorporation Act 1966*.

<sup>82</sup> CELCOR, *Association: Association Incorporation Act – A community awareness material*, Port Moresby.

<sup>83</sup> CELCOR, *Incorporated Land Group Act – A community awareness material*, Port Moresby.

<sup>84</sup> s5(2), s8 *Land Group Incorporation Act 1974*.

<sup>85</sup> s5(2) *Land Group Incorporation Act 1974*.

<sup>86</sup> s6(1), s33(2) *Land Group Incorporation Act 1974*.

<sup>87</sup> s6 *Land Group Incorporation Act 1974*.

<sup>88</sup> s5(1) *Land Group Incorporation Act 1974*.

<sup>89</sup> Colin Filer, *Legal and Institutional Framework for managing MPAs in PNG* (powerpoint presentation), ANU.

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The *Lands Act 1996* defines customary land as land that is owned or possessed by an automatic citizen or community of automatic citizens by virtue of rights of a proprietary or possessory kind that belong to that citizen or community and arise from and are regulated by custom.

Traditional ownership of land is currently recognised in the Constitution of PNG, the *Lands Act 1996* and the *Customs (Recognition) Act*. Customary land can also be made available under the lease-lease back scheme under the *Lands Act*.<sup>90</sup>

With regard to marine waters, the *Fisheries Management Act 1998 (FM Act 1998)* currently states that all marine waters are owned by the State. However, proposed amendments to the *FM Act* recognise customary ownership of marine waters to 3 nautical miles from the low-tide mark.

## 5 Management Framework Considerations

### 5.1 CMMA Management

A body will be required to directly manage the CMMA and implement the management plan. Due to cultural considerations, it would be pertinent to ensure that this body is designed by the resource owners, with other members of the community constituting part of the management body. The types of CMMA management bodies have been considered as part of the analysis of the above laws. Further discussion on CMMA management can be found in the Recommendations.

### 5.2 Overarching Authority

The Project has been operating in Milne Bay Province since 2001 and has been working with communities to manage marine natural resources and establish CMMAs where appropriate. The Project has also been conducting work relating to marine management including programs on coastcare, education, agriculture, women and youth, fisheries and environmental economics.

In preparation for the eventual Project closure and its transfer to the Milne Bay Provincial Government, an overarching management body is required for coordination of CMMAs in the Milne Bay Province, as well as management of wider marine environment and natural resource issues. There are two legal options for the establishment of such a management body: Special Purpose Authority or Provincial Authority.

#### 5.2.1 Special Purpose Authority

A Special Purpose Authority (SPA) is a corporation with perpetual succession. SPAs must have a seal. They have the power to:

- acquire, hold, dispose of, mortgage or pledge property;
- enter into contracts;
- borrow money;
- invest funds; and

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<sup>90</sup> Division 4, s11 *Lands Act 1996*.

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- institute and defend actions, suits and other legal proceedings to do all things necessary for the effective exercise and performance of its powers and functions.<sup>91</sup>

SPAs are useful for the implementation of laws at local level, and could be effectively used for coordination and management of CMMAs, and for the delivery of public goods and services to landowners who establish CMMAs on customary land.<sup>92</sup>

## **5.2.1.1 Establishment, Modification and Dissolution**

SPAs can be set up under Part VII of the *Local Level Governments Administration Act 1997*. Where one or multiple LLGs desire that a SPA be established to assist the implementation of one or more LLG functions, the LLGs make a recommendation to the Minister.<sup>93</sup> The recommendation must give details about the general purpose, management, funding and staffing of the SPA. It must also contain requirements for the particular function(s) to be implemented, the area(s) to which it should apply, and other relevant details.<sup>94</sup> The Minister considers the recommendation and, if the Minister considers the establishment of the SPA desirable, submits the recommendation to the NEC who decides whether the Head of State should be advised to make the proclamation.<sup>95</sup> The Head of State, acting on this advice,<sup>96</sup> establishes the SPA by proclamation.<sup>97</sup> The proclamation must specify the purposes for which the SPA is established and other necessary details.<sup>98</sup>

In the case of establishing a SPA for CMMAs across the Milne Bay Province, one or more LLGs would be required to make a recommendation, and state that the purpose would be for management of CMMAs in multiple LLGs.

Once established, SPAs may only be modified by proclamation of the Head of State, acting on advice.<sup>99</sup> Modifications to a SPA may be made in relation to:

- The general purpose of the SPA;
  - The composition of membership of the management;
  - Funding;
  - Staffing;
  - The particular function(s) to be implemented;
  - The area or areas it covers;
  - The name of the SPA;
  - Other relevant matters which would make changes in the proclamation necessary;
- or
- The decision to amalgamate, in whole or in part, several SPAs.

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<sup>91</sup> s44 *Local Level Governments Administration Act 1997*.

<sup>92</sup> Colin's paper (SPAs and LLGs)

<sup>93</sup> s43(2) *Local Level Governments Administration Act 1997*.

<sup>94</sup> s43(3) *Local Level Governments Administration Act 1997*.

<sup>95</sup> s43(4) *Local Level Governments Administration Act 1997*.

<sup>96</sup> When the *Local Level Governments Administration Act 1997* mentions a decision by the Head of State "acting on advice", the advice is given through the Minister and the National Executive Council (NEC), as described in s43(4) *Local Level Governments Administration Act 1997*.

<sup>97</sup> s42(1) *Local Level Governments Administration Act 1997*.

<sup>98</sup> s42(2) *Local Level Governments Administration Act 1997*.

<sup>99</sup> s46(1) *Local Level Governments Administration Act 1997*.

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The process for modification may present problems, because as a Province-wide SPA, all LLGs across the Province would need to be consulted and involved in any recommendations made for modification.

Where dissolution of the SPA is required, the Minister, after consultation with the LLG(s) concerned, submits a recommendation to dissolve the SPA to the National Executive Council, who advises the Head of State of the submission.<sup>100</sup> The Head of State then dissolves the SPA by proclamation. The proclamation must make provision for the taking over of the assets and liabilities of the SPA by the State, another Authority or a LLG(s).<sup>101</sup>

## **5.2.1.2 Management and Functions**

A SPA must be managed by a managing body.<sup>102</sup> The managing body must not include members of a LLG<sup>103</sup> and the operations of a SPA must be ‘at arms length’ from a LLG.<sup>104</sup> The membership, manner of appointment and terms and conditions of appointment of members of the management body are ‘as prescribed’<sup>105</sup> and currently no regulations have provided direction on these issues.

## **5.2.1.3 Powers, duties and responsibilities**

The Head of State, acting on advice, may by proclamation vest in a SPA any of the powers, duties and responsibilities of a LLG, except:

- The power to make local level laws;
- The power to impose or levy rates, taxes, charges or fees;
- Executive powers; and
- A power, which any other law may forbid a SPA from exercising.<sup>106</sup>

These vested powers in the SPA must not exceed the powers of a LLG<sup>107</sup> and will not divest a LLG of that power.<sup>108</sup> Nor does the SPA have any powers or functions over a Ward Committee.<sup>109</sup> The National Government may direct the SPA to act as its agent for any matter within its purposes,<sup>110</sup> or to exercise and perform its authority or one of its powers, functions, duties or responsibilities.<sup>111</sup>

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<sup>100</sup> s47(1) *Local Level Governments Administration Act 1997*.

<sup>101</sup> s46(2) *Local Level Governments Administration Act 1997*.

<sup>102</sup> s45(1) *Local Level Governments Administration Act 1997*.

<sup>103</sup> s45(2) *Local Level Governments Administration Act 1997*.

<sup>104</sup> s45(3) *Local Level Governments Administration Act 1997*.

<sup>105</sup> s45(4) *Local Level Governments Administration Act 1997*.

<sup>106</sup> s48(1) *Local Level Governments Administration Act 1997*.

<sup>107</sup> s48(2) *Local Level Governments Administration Act 1997*.

<sup>108</sup> s48(3) *Local Level Governments Administration Act 1997*.

<sup>109</sup> s48(6) *Local Level Governments Administration Act 1997*.

<sup>110</sup> s48(4) *Local Level Governments Administration Act 1997*; In such a case, the State must fully and effectively indemnify and hold safe the SPA against all claims that may be made or taken against it as a result of its acting as agent.

<sup>111</sup> s48(5) *Local Level Governments Administration Act 1997*; It is then the duty of the SPA to comply with such a direction.

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A SPA must, at least annually, present a report to the LLG(s) concerned and the Minister. This report must review the operations of the SPA during the period since the last report.<sup>112</sup>

## **5.2.1.4 Advantages**

- Strong legal basis for the establishment and management of the SPA.

## **5.2.1.5 Drawbacks**

- Lengthy process of establishment. Neither the resources owners, community, LLG/s nor Milne Bay Provincial Government have much control over the National part of the process.
- Dependency on National Government to make certain decisions and modifications.
- Less control at Provincial level and risk of suffering from central government bureaucracy.

## **5.2.2 Provincial Authority**

There is an existing history of Provincial Authorities in the province, with several having been established to date. These include: the Milne Bay Fisheries Authority, Esa'ala Development Authority and the Milne Bay Tourism Bureau. The Provincial Administration also has plans to establish a Provincial Authority (PA) for public transport within the Milne Bay Province.

### **5.2.2.1 Process for Establishment**

No express provisions exist in National or Provincial legislation to provide the power for the establishment of a PA. However, legal advice provided by the Provincial Administration states that policy submissions may be made to the Provincial Executive Council to create a PA, for a purpose for which the Provincial Legislature has law-making powers under s42(1) of the *Organic Law on Provincial Governments and Local-level Governments*. Following approval of the policy, legislation may be made to this effect.

A PA that was set up under these means is the Morobe Province Fisheries PA, which was established under the *Morobe Fisheries Management Authority Act 2002*. The PA was seen as a necessary instrument for the management of fisheries within the province, and relied on the power to legislate on fisheries in s42 of the Organic Law.

#### **5.2.2.1.1 Policy Submission**

The process to be followed is:

1. Development of a policy by the Provincial Division of Planning and Coordination;<sup>113</sup>
2. Circulation of the policy to Chairman and heads of relevant Provincial Government Divisions;
3. Integration of comments from Chairman and heads of relevant Provincial Government Divisions into a policy document;

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<sup>112</sup> s50(1) *Local Level Governments Administration Act 1997*. In addition, the SPA must present a report to the LLG(s) any time they ask for one; s51 *Local Level Governments Administration Act 1997*.

<sup>113</sup> The policy will be developed by CBC&MC Project staff, in collaboration with Division of Planning and Coordination and the Legal Officer

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4. Submission of the policy document by the Division of Planning and Coordination to the PEC; and
5. Approval and endorsement of the policy by the PEC.

Consultation with other stakeholders will also be required throughout this process. These may include relevant National government departments such as NFA and DEC, LLG Executives, LLG Administration, District Administration, private industry, and the communities currently included in the Project.

The format of the policy would be as follows:

- Subject/title;
- Purpose;
- Facts and considerations;
- Views of the Governor;
- Views of other agencies;
- Financial implications;
- Staffing implications;
- Legislative implications;
- Constitutional implications;
- Reform implications;
- Political implications;
- Planning implications;
- Environmental implications;
- Policy implementation; and
- Recommendations.

### ***5.2.2.1.2 Enactment of a Law Establishing the Provincial Authority***

Following endorsement of the policy, a bill will need to be drafted to enable the establishment of the PA. The policy submission will be used as the basis for the development of drafting instructions for the bill. The bill will then be drafted, consistent with the Drafting Rules for Provincial and local level legislation.

Once the bill is drafted, the following process would need to be followed:

1. Provincial Assembly would pass and enact the law.
2. The law would be given to the Department of Intergovernmental Relations for approval by the Minister.
3. Upon ratification by the Minister, the law would be signed by the Provincial Assembly Executive Officer and gazetted in the Provincial Government Gazette.
4. The Minister would conduct a round of consultation with affected National Departments before ratifying the law (non mandatory).
5. The PA is set up as per the provisions of the law.

### ***5.2.2.2 Advantages***

- Easier and quicker to establish: more control possible

### ***5.2.2.3 Drawbacks***

- Weak legal basis, open to potential challenges

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## 6 Consultation

Appendix A outlines the consultation (and work program) that has been carried out by the IS Team.

### 6.1 Community

Ongoing communication and consultation has been conducted with communities in Zone 1 of the Project area that have expressed interest in establishing a CMMA within their customary waters, prior to and following marine, community livelihood and other surveys. Consultation by the Institutional Strengthening (IS) Team has included issues including genealogy, governance/legal institutions and laws/regulations that would be involved in establishing and managing CMMAs.

### 6.2 Other Stakeholders

#### 6.2.1 NFA and Provincial Fisheries

Currently, the Provincial Division of Fisheries and Marine Planning (PD) (Provincial Fisheries) and the National Fisheries Authority (NFA) have a Memorandum of Agreement (MOA) which outlines the nature of the relationship, functions, duties and responsibilities between the two bodies for the management of fisheries within Milne Bay Province.

Preliminary discussions with Provincial Fisheries have highlighted a long-awaited and imminent review and potential amendment to the current MOA. Discussions with both Provincial Fisheries and NFA personnel have indicated that aspects of the proposed CMMAs may conflict with the *Fisheries Management Act 1998*, but that suggested amendments to the MOA by the Project on behalf of the Provincial Fisheries may resolve this problem. Suggested amendments could include:

- Full scale delegation of power by the NFA to Provincial level;<sup>114</sup> or
- Each LLG and/or Provincial Government on behalf of all LLGs in Milne Bay Province, signs an MOA with NFA that gives powers to the LLG to manage CMMAs where they are established. This would encompass all issues for management of CMMAs, including those regarding prohibition of commercial fishing in all CMMAs (except where expressly allowed), and would expressly state that while the CMMA law is at local level, the NFA and *Fisheries Management Act 1998* provide support for the CMMA, CMMA Management Committee, and LLG to uphold the law and management plan.

## 7 Recommendations

The basic recommendations for the legal framework for establishing and managing proposed CMMAs, as well as the management framework, including both CMMA management and overarching bodies for marine natural resource management within the Milne Bay Province are outlined in this section.

### 7.1 Legal Framework

As discussed above, pursuant to the OLPG&LLG, the LLG can legislate for purposes related to the local environment. Of the two options for LLG laws (umbrella law and

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<sup>114</sup> Delegation of power could either be to the Provincial Fisheries or to the Provincial Authority (see Section 7).

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case-by-case law), the umbrella law is the most logical, because it allows for CMMAs to be established in the future, by communities not currently participating in the Project's activities.

With regards to what provisions an LLG-CMMA Law would provide, the following are some of the sections that it would cover:

- A detailed 'checklist' of the process for establishing a CMMA under this law. Some of the major steps in this process would be:
  - Community awareness / consultation;
  - Identification of customary owners and other represented community stakeholders;
  - Some sort of survey of the marine and terrestrial area to be included;
  - Compilation of a management plan including zones, regulations and penalties; and
  - Formation of a CMMA Management Committee.
- A “*tool box*” or menu of the different zones, the objectives and rules for these zones and the penalties that apply to offences. In particular this would coincide with the Regulations part of the Management Plan. The term “*tool box*” is relevant here because the law would allow for communities to tailor the provisions by using only those that are applicable to their particular situation. The law would also be designed to provide a range of rules and penalties, further allowing for flexibility in their application.
- An outline of how to establish the CMMA Management Committee, including who should be represented and its powers and functions.
- A mechanism of “*checks and balances*” that allows for an auditing process by an independent body (possibly the Milne Bay Marine Authority) in order to ensure that the proper processes have been followed and that “*paper parks*” are not being set up.
- A section that addresses the law's relationship with other higher legislation, for example, the Fisheries Management Act.
- A section that addresses the relationship between the CMMA Management Committee or any other local institutions the law sets up, and other higher institutions, in particular the Milne Bay Marine Authority and the National Fisheries Authority.

Appendix B outlines a draft policy submission for the CMMA-LLG law, and an outline of the sections to be included in the law.

Probably the most positive aspect of such a CMMA Law will be that it will provide the necessary frameworks that local communities can continue to use after the Project is shut down. In this, the challenge will be to design the law in such a way that it is adequately strict / tight, thus providing for effective conservation and sustainable resource management, yet is not so stringent that it discourages flexibility and innovation in community-based management, and hampers the ability of new communities to utilise it when the considerable input and resources of the Project are no longer available.

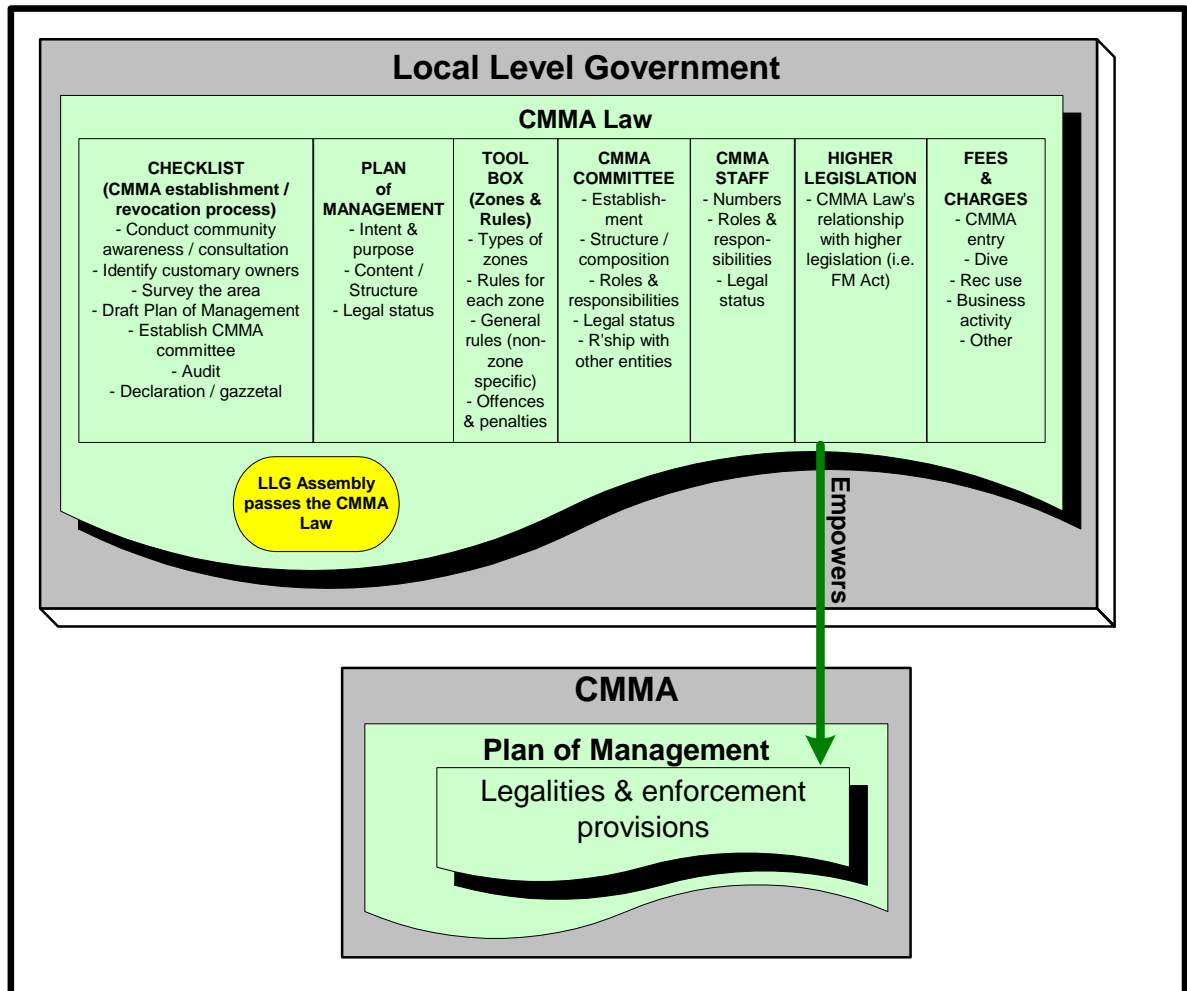
Figure 1 illustrates the structure of the proposed CMMA LLG law, and Figure 2 shows the details of CMMA law and relationship with the CMMA Plan of Management. In addition, as discussed above, a Province-wide law could be drafted for the management and sustainable use of marine natural resources within the Milne



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Bay Province. The law would be considered an umbrella law, because it would apply across the Province for the establishment of CMMAs. Figure 3 outlines how the Province-wide law would be applied to CMMAs throughout Milne Bay.

**Figure 1 Outline of the Proposed CMMA LLG Law**



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Figure 2 Details of CMMA law and relationship with the CMMA

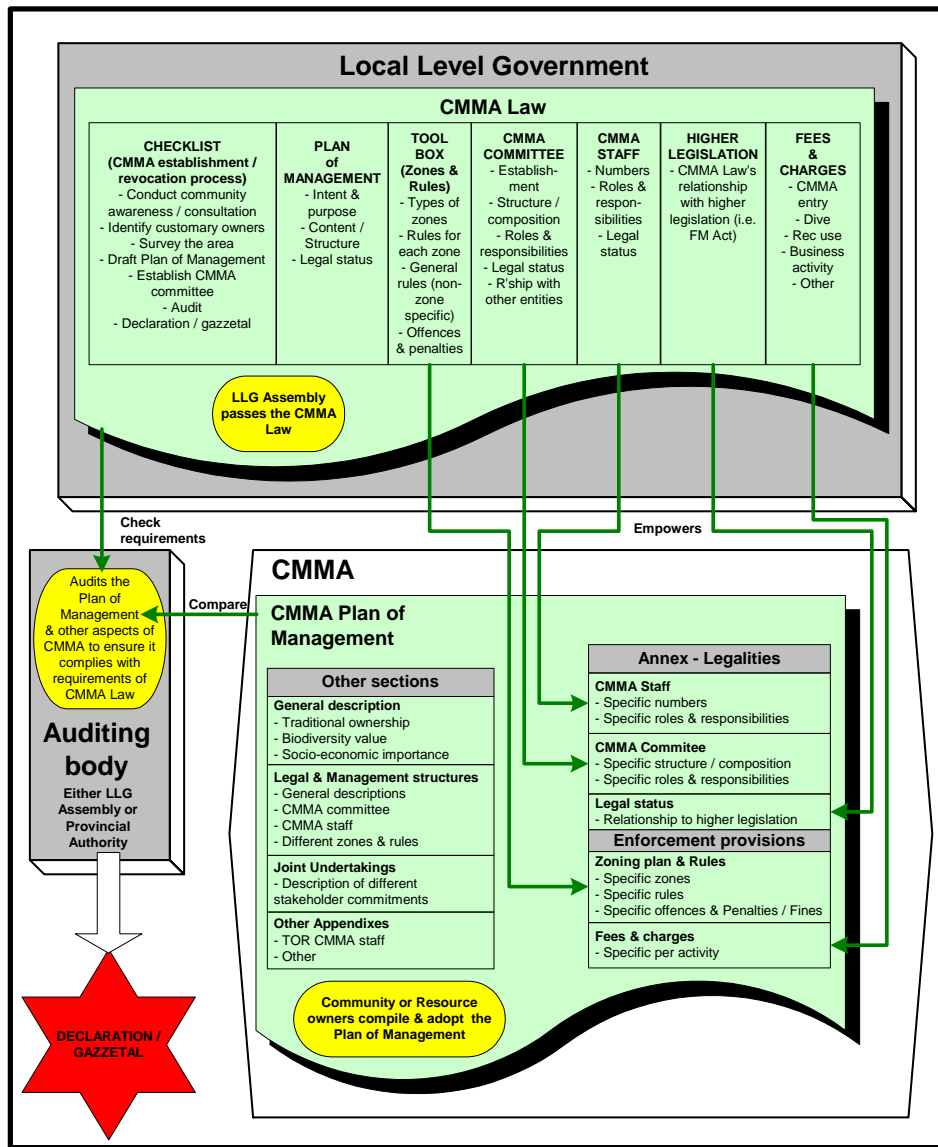
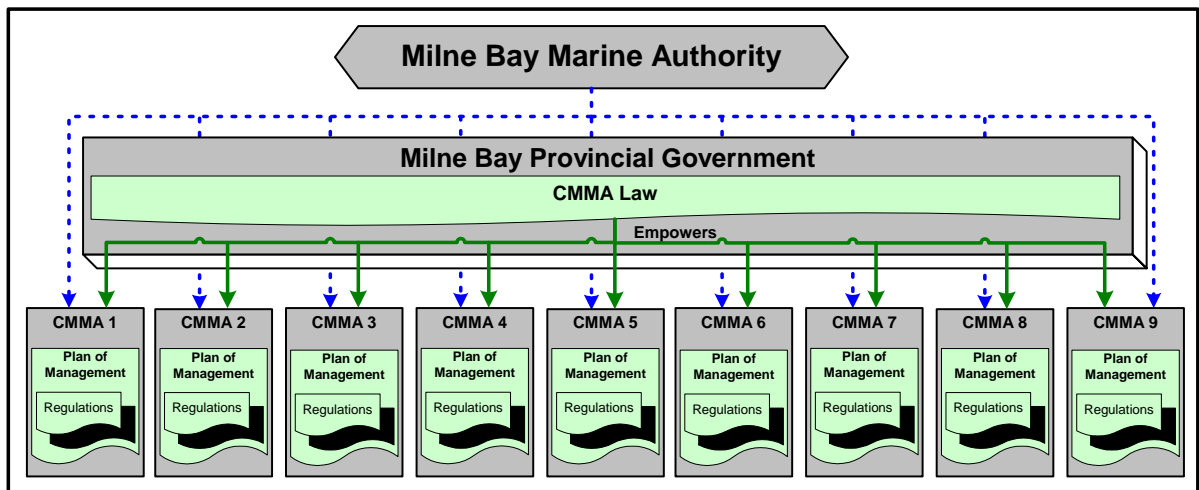


Figure 3 Potential Provincial CMMA Law



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## **7.2 Management Framework**

### **7.2.1 CMMA Management Committee**

The establishment and effective functioning of CMMAs requires appropriate institutions through which the area can be managed. For this reason a committee will be established that has the responsibility for management of the marine area. This will be known as the CMMA Management Committee (CMMA-MC). This committee will be set up and empowered by the LLG Law. Trained and paid staff will also be required for the day-to-day operations and management of the CMMA and they will be known as the CMMA Operations Unit.

Given the range of social, cultural, political and geographical conditions in Milne Bay, it is not possible, or even desirable, to stipulate exactly what form a CMMA-MC must take. Particularly challenging is the issue of representation, as an umbrella law approach cannot cater for the community diversity that exists. While ultimately it is the resource owners that will determine the form of community management that will be set up, membership of the CMMA committee will need to include representatives from other local stakeholder categories in order to achieve true community-based management. It is therefore proposed that the following five categories be included.

- Resource owners from the area where the CMMA will be established.
- Ward government representatives. These could be:
  - Ward Councillors
  - Ward Recorders; or
  - Ward Development Committee (WDC) members.
- General community (representing Resource Users or special interest groups). These could be from:
  - the Church;
  - Youth organizations (based on the National Youth group and association structure);
  - Women organizations (based on the National Women's group and association structure);
  - Community Based Organizations (CBOs); or
  - Traditional community elders.
- LLG Administration designee. These could be:
  - Environment or Fisheries officer;
  - Area manager;
  - Council Clerk (Assembly Executive Officer); or
  - Project officer.
- A Project or Milne Bay Marine Authority representative. This would be the CMMA Manager.

It is important to note that these categories roughly mirror those stipulated for Ward Development Committees under the OLP & LLG. Provisions for gender equality are also consistent with government guidelines for representative groups ranging from WDCs to Provincial Assemblies through to National department committees. Figure 4 gives a proposed composition for CMMA Management Committees, with Figure 5 to illustrate the liaison and coordination role of the resource owners in relation to CMMA operations.

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Figure 4 Composition of CMMA Management Committee

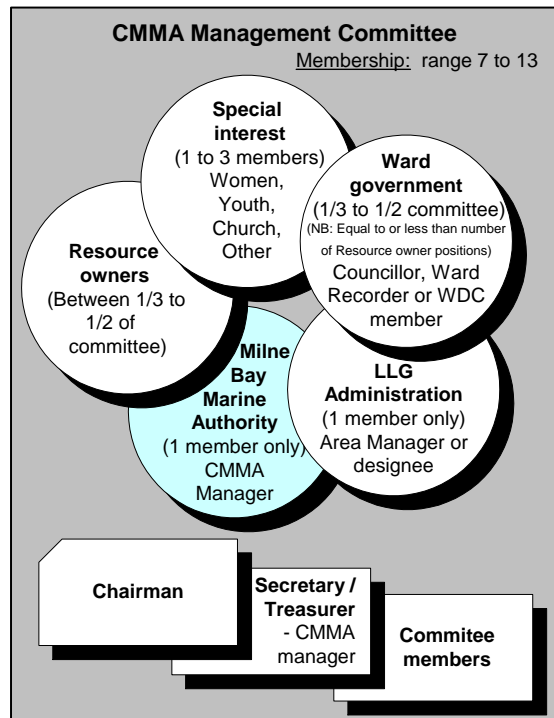
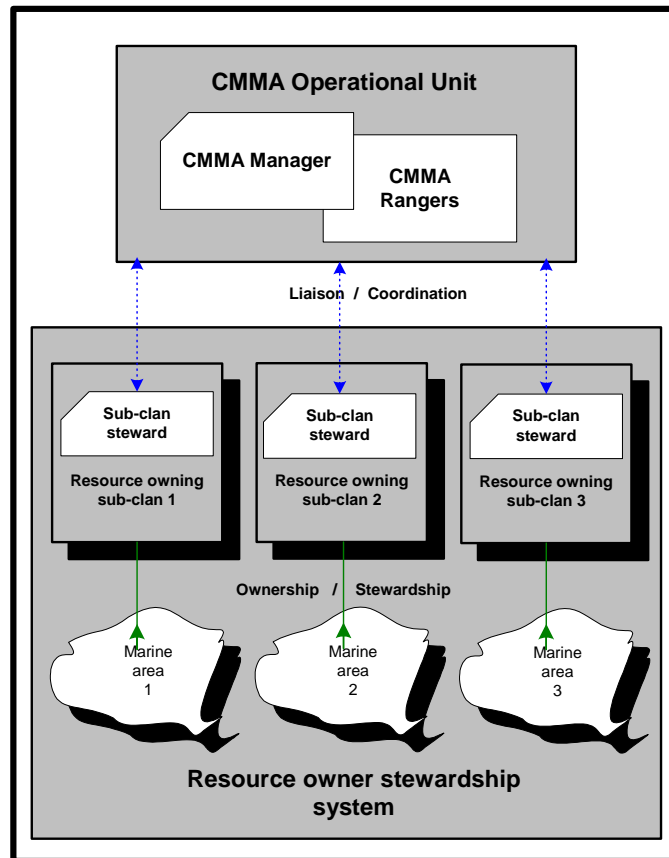


Figure 5 Liaison and Coordination Role of Resource Owners in relation to CMMA Operations



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With regard to the functions, roles and responsibilities of the CMMA-MC these will include the following:

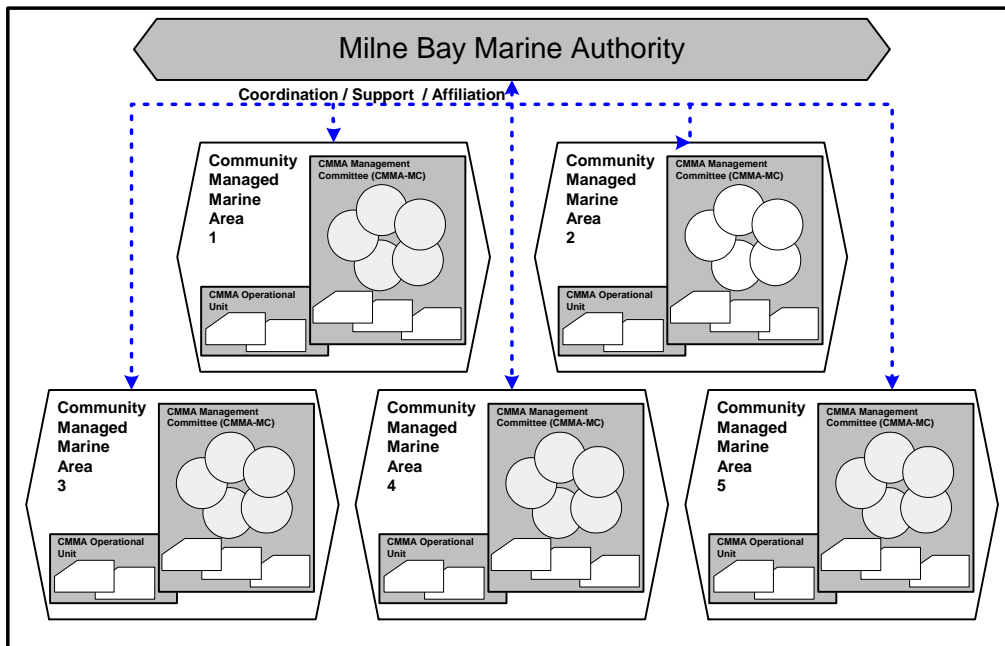
- Report to the Milne Bay Marine Authority on monitoring, surveillance and other aspects required under the management plan; including cases which are beyond the jurisdiction of the Village Court system, e.g. operation of commercial fishery vessels.
- Be the body ultimately responsible for compliance and enforcement. This will include ensuring that the Village Court Magistrate deals with offenders reported by the Operational Staff.
- Plan the yearly and monthly work schedule of the CMMA Operational Staff in conjunction with the Milne Bay Marine Authority staff, and the CMMA manager;
- Conduct yearly performance appraisals of the CMMA Operational Staff in conjunction with the Milne Bay Marine Authority staff;
- Liaise with the Milne Bay Marine Authority staff on immediate issues or problems with regard the CMMA Operational staff;
- Be ultimately in control of the management of the CMMA through the Management Plan document (the committee will have the power to review and modify the Management Plan but within specified limits).
- Compile an annual budget for approval by the Milne Bay Marine Authority staff as well as acquit the previous year's budget;
- Oversee the expenditure of the CMMA budget, which is specifically the duty of the Secretary / Treasurer;
- Represent the CMMA to all outside bodies or agencies;
- Be the liaison point for and represent the CMMA to, the Milne Bay Marine Authority as well as vice versa, which will include mobilisation of community support for any projects within the CMMA and conducting awareness on behalf of the Milne Bay Marine Authority;
- Identify and recommend community projects in the areas of livelihood, environmental rehabilitation, institutional capacity-building or livelihood support infrastructure, within the CMMA community, for support by the Milne Bay Marine Authority; and
- Provide technical support and local knowledge to the CMMA Operational staff in order for them to effectively carry out their functions.

## **7.2.2 Milne Bay Marine Authority**

As discussed above, an overarching management body is required for coordination of CMMAs in Milne Bay Province, as well as for management of wider marine natural resource management issues (a draft policy submission for its establishment and a proposed set of provisions are included in Appendix C). It is proposed that a Provincial Authority (PA) be established to take on this role (see Figure 6 for details of how such a Milne Bay Marine Authority would coordinate a network of CMMAs).

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**Figure 6 Provincial Authority (Milne Bay Marine Authority) link into CMMAs**



At a local level, committees consisting of resource owners and other community representatives will directly manage the CMMAs being established in the Milne Bay Province. The Milne Bay Marine Authority would be tasked with coordinating activities of these CMMAs, providing technical assistance and advice on monitoring and data analysis to the CMMA committees, and sourcing and providing funding to the committees and CMMA administrative staff for their operations (see Figure 6 for how a Milne Bay Marine Authority would coordinate and link in with individual CMMAs).

The Milne Bay Marine Authority will be governed by a strong Constitution, and be comprised of two organisational tiers, i.e. the Board of Directors and Operational Staff.

Apart from coordinating the different CMMAs as a network, the Provincial Authority would also have marine natural resource management functions including:

- Ongoing collaboration with national and international research institutions on research into marine biology, ecology and livelihoods in the Province;
- Collection and management of marine, environmental and socio-economic data within Milne Bay and PNG in a GIS-based form in partnership and close collaboration with the Provincial Planning Department;
- Coordination and remuneration of the local administrative staff required at individual CMMAs, e.g. rangers;
- Provision of support and technical advice to relevant Provincial government partners working in community-based management, community fisheries, tourism, agriculture or other resource management areas;
- Assistance to communities in the future with the establishment of new CMMAs; and

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- Work with the Provincial Government in the area of legal and policy frameworks that continue to support the sustainable management of resources in the Province.

It is also proposed that the Provincial Authority have compliance and enforcement functions. As previously discussed, the Project is pursuing the enactment of an LLG that enables the establishment of CMMAs in collaboration with relevant LLGs, including provisions of rules and regulations and fines and penalties for breaches of these<sup>115</sup>. Further provisions for the protection and use of the natural environment are also contained within various National acts and law, for example with regards to fisheries, the *Fisheries Management Act 1998*. In line with this, the Provincial Authority will primarily have a role in supporting the efforts of relevant enforcement agencies or mechanisms, from Village Courts through to the National Fisheries Authority. For example, activities carried out by the Provincial Authority may include: capacity building for, and logistical support of, community-based compliance efforts; coordination of effective surveillance; liaison with the National Fisheries Authority with regards to commercial breaches; and possibly representation of communities at various judicial levels.

The overall goal will be to ensure the sustainable management of Milne Bay's marine resources and the conservation of its biodiversity with particular emphasis on supporting community-based management efforts.

### **7.2.3 Relationships between the Law, CMMA, CMMA Management Committee, and the Provincial Authority**

The following diagrams outline the relationships between the various documents and management bodies. Figure 7 outlines the relationship between the LLG law and the Provincial Authority, and Figure 8 shows the relationship between the CMMA Management Committee and the Provincial Authority. The relationship between all aspects of the planned establishment and management of CMMAs is illustrated in Figure 9.

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<sup>115</sup> This leads from extensive consultation with community through to Provincial government stakeholders.

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Figure 7 Relationship between the LLG law and Provincial Authority

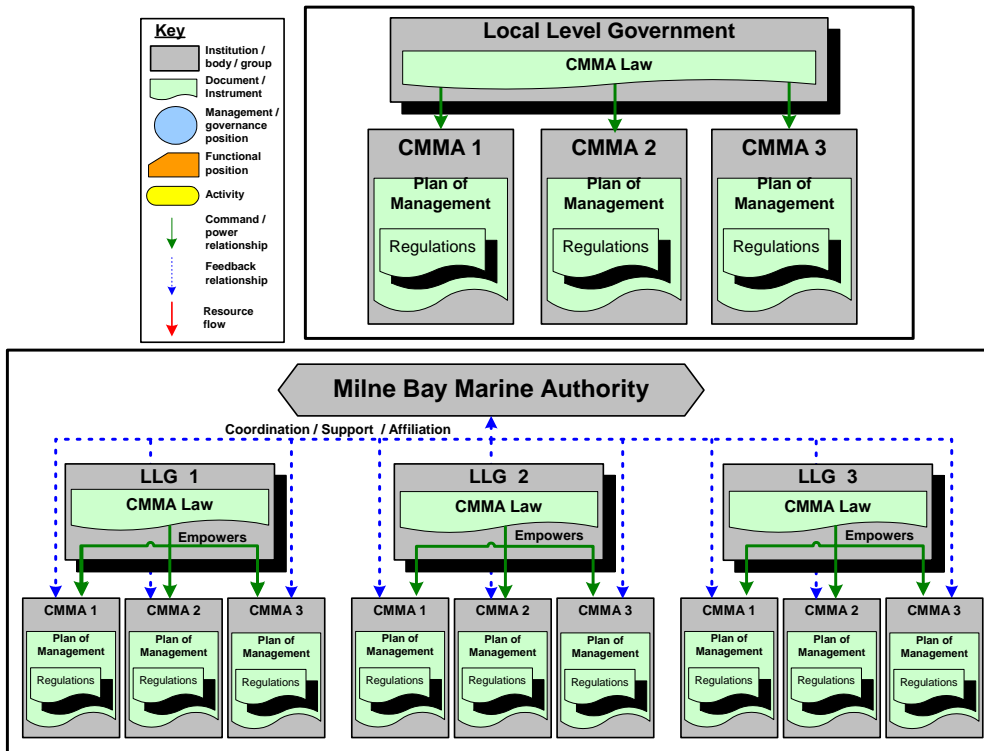
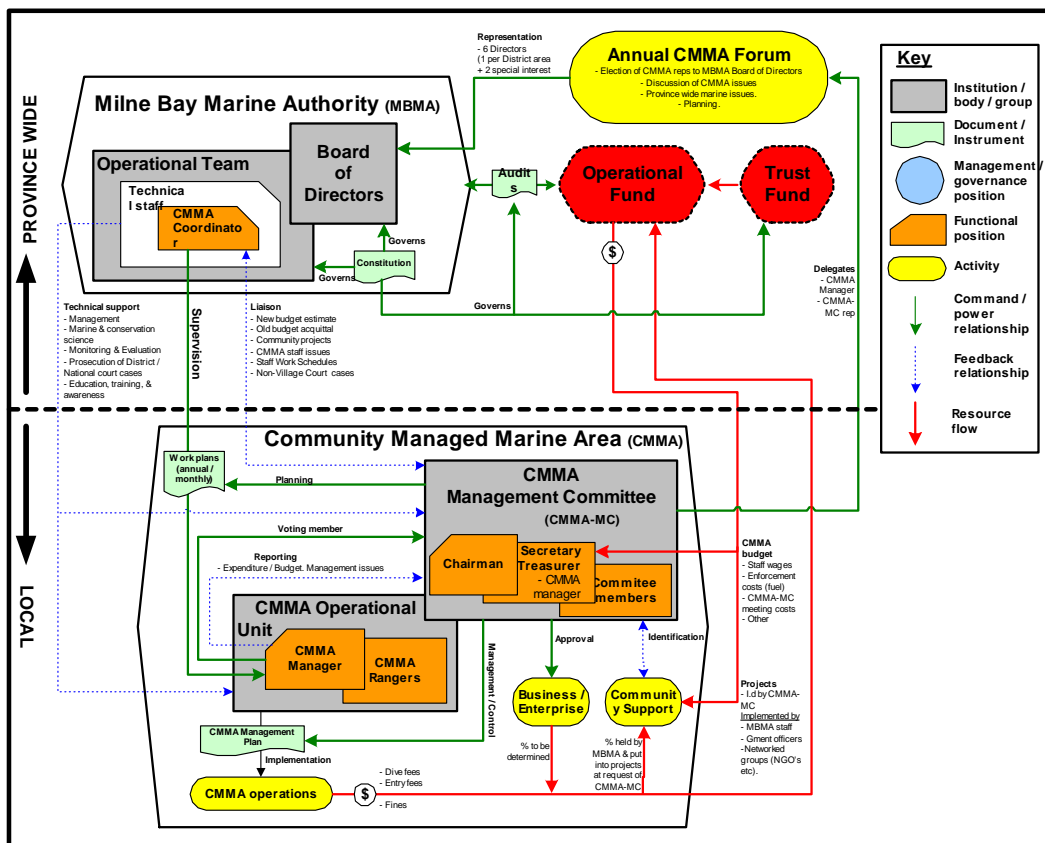


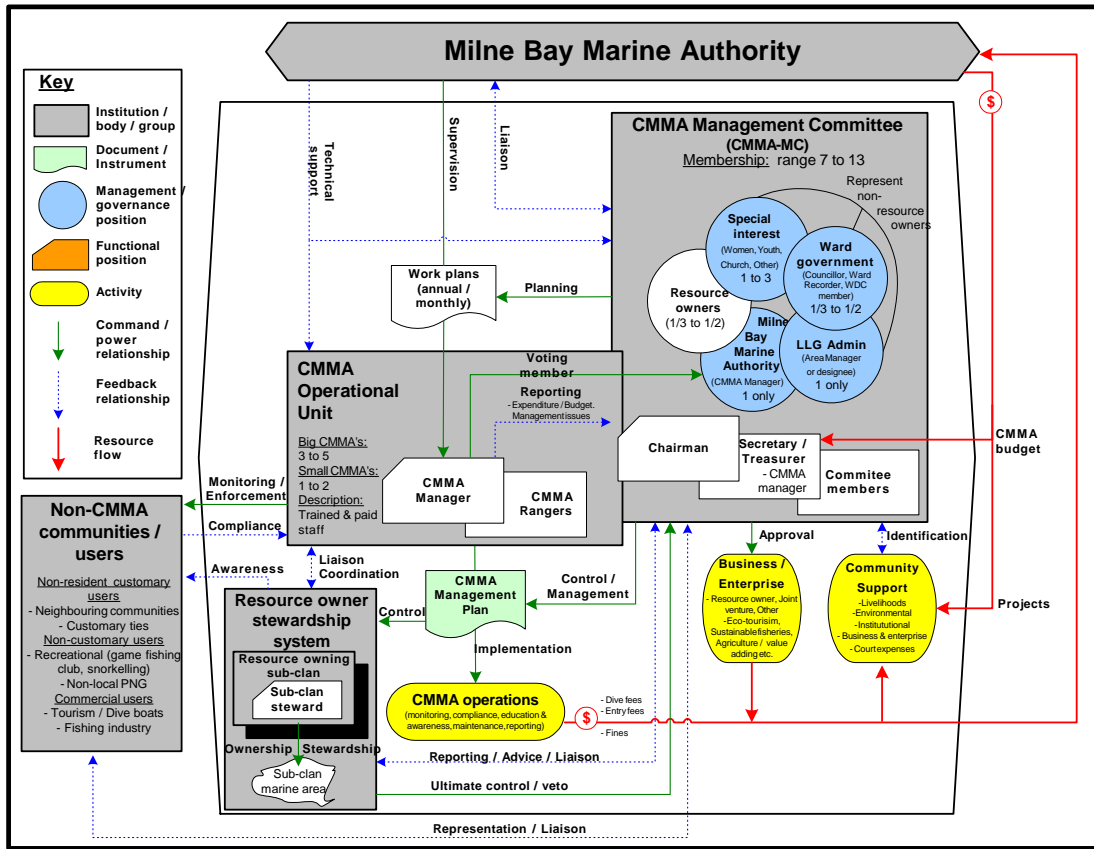
Figure 8 Relationship between CMMA Management Committee and Provincial Authority





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**Figure 9 Relationship between all aspects of the planned establishment and management of CMMAs**



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## 8 APPENDIX A – Consultation Schedule

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## **9 APPENDIX B - CMMA LLG Law: Draft Policy & Sections**

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## **10 APPENDIX C – Provincial Authority Law: Draft Policy & Sections**