Regulating Plastics in Pacific Island Countries

A GUIDE FOR POLICYMAKERS AND LEGISLATIVE DRAFTERS

25 SPREP
Secretariat of the Pacific Regional Environment Programme

GPML
Global Partnership on Marine Litter

GPA
Global Programme of Action for the Protection of the Marine Environment from Land-based Activities

NSW EDO
DEFENDING THE ENVIRONMENT ADVANCING THE LAW

ACKNOWLEDGEMENTS

This guide was produced jointly by the Secretariat of the Pacific Regional Environment Programme (SPREP) and Environmental Defenders Office Ltd (EDO NSW) (a public interest environmental law organisation based in Australia).

UN Environment and the Global Programme of Action acknowledges the financial contribution of the Norwegian government toward the Global Partnership on Marine Litter and this publication.

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SPREP and EDO NSW would like to warmly thank all those who have contributed to the development of this guide.

This guide is not legal advice.

This guide is policy advice only, not legal advice. While all care has been taken to be accurate, given the different legal systems of each Pacific Island Country, it is not possible in this general guide to give advice that is tailored to individual countries' circumstances. Governments, organisations and individuals must seek legal advice and further policy advice on their particular circumstances, to determine appropriate policy and law reform options.

SPREP LIBRARY CATALOGUING-IN-PUBLICATION DATA

Regulating plastics in Pacific Island Countries: a guide for policymakers and legislative drafters. Apia, Samoa: SPREP, 2018.

60 p. 29 cm.

ISBN: 978-982-04-0888-3 (print)
978-982-04-0887-6 (e-copy)

1. Plastics – Regulation – Handbooks, Manuals, etc. – Oceania.
2. Plastics – Law and legislation – Oceania.
3. Plastics – Management – Oceania.
I. Pacific Regional Environment Programme (SPREP).
II. Title.

668.4

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The Pacific environment, sustaining our livelihoods and natural heritage in harmony with our cultures.

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TABLE OF CONTENTS

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Executive Summary

Next to climate change, plastics arguably represent the greatest environmental threat facing the planet today. In response, Pacific Island Countries (PICs) are working to become world leaders in the management and regulation of plastics in their region.

This guide contains the policy foundations and high level policy settings for key areas of plastics regulation. Policymakers and legislative drafters in relevant PICs can use this guide to inform, develop and expand on laws to regulate the production, use and disposal of plastics.

This guide is divided in two parts:

- **Part A** sets out the background and context for plastics regulation, including identifying key concepts that might guide policy and legislative development.
- **Part B** of this guide provides a selection of 'drafting instructions' for key identified areas for plastics regulation. It does so recognising and building on existing and new efforts to regulate and reduce the region's plastic production, consumption and waste.

The key priority areas for plastics regulations covered in this guide are as follows:

1. **Single-Use Plastic Products – Appendix 1**
2. **Microplastics in Personal Care Products – Appendix 2**
3. **Marine Plastic Pollution: Garbage from Ships & Dumping at Sea – Appendix 3**
4. **Container Deposit Schemes – Appendix 4**
5. **Visitor Environmental Levies – Appendix 5**
6. **Statutory Environment Funds – Appendix 6**

For each priority area of plastics regulation, the drafting instructions outline a broad objective and potential regulatory approaches, including regulatory scope, exemptions, further considerations and definitional issues, sectors and stakeholders who may be affected, and a brief summary of potential challenges and opportunities.

In this guide, drafting instructions refer to a 'policy narrative' of desirable regulatory aims, provisions and further considerations. Given the wide range of legislative systems and existing laws in the Pacific, the drafting instructions contained in this guide are not legal advice, but provide an indicative reference point for PICs, their policymakers, lawmakers and drafters.

The drafting instructions in this guide have been prepared in a 'modular' format to reflect the fact that the Pacific Regional Environment Programme (SPREP) member jurisdictions each have different legislation and administrative arrangements. Each jurisdiction will therefore be best placed to determine whether, where and how such policy narratives should be enacted, in accordance with (among other things) existing legislation, enforcement mechanisms and priorities.

For example, in some jurisdictions it may be possible to implement the policies set out in this guide by way of regulations under existing legislation (acts of parliament), or by adding new parts to existing legislation. In other cases, entirely new acts may be required.

Invariably, drafting legislation will involve an iterative process between policymakers and legislative drafters. This guide is therefore also intended to serve as a useful starting point for this process.

The overall long-term objectives of the policies and drafting instructions in this guide are to:

1. prevent, reduce, or eliminate plastic entering the environment (land, air and sea) through waste prevention and the management of plastic waste; and

2. facilitate the long-term recovery of all plastic waste, whether recyclable or not, to assist in moving the Pacific region towards a circular economy approach.[1]

It is also recognised that a level of harmonisation, consistency and joint action amongst Pacific nations is desirable, in accordance with guiding principles of the *Cleaner Pacific 2025* Strategy. Building on existing strengths, it is hoped that this guide provides a basis for shared experience, discussion, comparison and improvement of regulatory measures over time.

This guide provides drafting instructions in selected key areas for plastics regulation, rather than seeking to cover all potential areas for regulation. The intent of this approach is twofold: First, to provide a potential pathway to legislation development in these key areas for relevant PICs who do not already have measures in place, but who wish to consider them.

Second, to give policy makers in all SPREP member jurisdictions an indication of a format and style that drafting instructions could entail for other areas of plastic regulation in future (subject to each member's protocols).

In selecting the approach and priorities for these drafting instructions, the authors have referred to international and regional agreements and strategies, experts in plastics regulation and legislative drafting, academic literature, and existing and emerging legislation from the Pacific and around the world.

The key areas covered in this guide generally relate to the management of consumer (rather than industrial) plastics, particularly plastics likely to make their way into the marine environment. Aspects of solid waste management, product stewardship and extended producer responsibility have also been incorporated in some areas (for example, container deposit schemes). Detailed integration with domestic waste management and improved recycling systems will be an important factor to consider in each jurisdiction, and regionally.

Beyond this guide, another significant area for future regulation in the consumer sector is the release of microplastics from clothing and fabrics. Plastics from industry (including manufacturing, agriculture, construction and automotive) are a largely uncharted territory, particularly within the Pacific context. These are areas for further research and consideration, including lifecycle assessments and waste profiling to identify priority issues and sectors.

Overall, it is hoped that this guide assists PICs to build on existing laws and institutions to protect their environments, economies and societies from plastic pollution, improve waste management and recovery, and find alternative and practical solutions to avoidable plastic use.

[1] On 'circular economy' see 3.2.1 below.

PART A
BACKGROUND AND CONTEXT

1. The problem

The production, consumption and disposal of plastics poses serious threats to the Pacific environment, human health, and the economy. Pacific Island Countries (PICs) are at the front-line of these threats due to their unique geographic, environmental, and social characteristics. Plastic pollution poses a particular transboundary challenge, being one of the fastest-growing threats to the health of the world's oceans.[2] Yet 80% of marine pollution litter originates on land[3] – requiring solutions that focus on all aspects of the plastic lifecycle. With this comes challenge and opportunity.

PICs face particular challenges in managing plastic waste and pollution, including:

- Differing (or non-existent) laws and policies that address plastics and other pollution locally;
- Geographic spread and isolation between countries;
- Difficulty in accessing affordable alternatives to plastic;[4]
- Large quantities of imported material and packaging due to limited local manufacture and production;
- Limited options to dispose of waste, particularly single-use plastics;
- Unnecessary amounts of waste produced by tourism;[5]
- Unique and fragile marine and island ecosystems;
- Vulnerability to natural disasters and climate change;
- Economic constraints, including constraints to recycling (as the small size of PICs can inhibit economies of scale from recycling infrastructure), limited waste stream segregation, limited incentives to recycle, and expensive transportation to other recycling markets.[6]

However, PICs also have emerging opportunities to manage plastic pollution in the region, including:

- The opportunity to collaborate and increase the bargaining power of individual countries through a regional approach;
- Increased funding opportunities and donor interest in managing plastic pollution, including the European Union Waste Management Programme;

2 Patricia Villarrubia-Gómez, Sarah E.Cornella, and Joan Fabresb 'Marine plastic pollution as a planetary boundary threat – The drifting piece in the sustainability puzzle' (Online, 7 December 2017), accessed August 2018. Available at: https://www.sciencedirect.com/science/article/pii/S0308597X17305456 .

3 Eunomia Research & Consulting Ltd., *Plastics in the Marine Environment* (Eunomia, 2016). Available online (8th September 2016) at: http://www.eunomia.co.uk/reports-tools/plastics-in-the-marine-environment/.

4 United Nations Environment Programme (UNEP), *Single-Use Plastics: A Roadmap For Sustainability* report (UNEP, 2018) 60, accessed in July 2018. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/25496/singleUsePlastic_sustainability.pdf?sequence=1&isAllowed=y.

5 UNEP, *Global Waste Management Outlook*, (UNEP, 2015), 46, accessed in July 2018. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/9672/-Global_Waste_Management_Outlook-2015Global_Waste_Management_Outlook.pdf.pdf?sequence=3&isAllowed.

6 Ibid, 47.

- Promoting an environment free of waste and pollution for the livelihoods of Pacific island peoples and the economic bases of PICs, including tourism;
- The growing number of local initiatives to combat plastic pollution, including container deposit schemes and plastic bag bans;
- Increasing progress in the way waste dumps are managed in a number of PICs, including the rehabilitation of a number of open dumpsites into semi-aerobic landfills;
- Expanded garbage collection services and recycling initiatives in a number of countries;
- Urban and village clean-up campaigns to deal with existing legacy waste;
- Promising technological advances, such as micro-factories for resource recovery;[7] and
- Business development opportunities for local industries and groups, including women, to generate solutions and deliver lower-impact alternatives to single-use plastic products.

[7] See e.g. S. Vorrath, 'Innovation: UNSW "microfactories" transform waste into green gold', RenewEconomy, 17 October 2017, at https://reneweconomy.com.au/innovation-unsw-microfactories-transform-waste-into-green-gold-98471/ and J. Chadwick, 'UNSW launches 'world-first' e-waste microfactory' ZDNet, 5 April 2018 https://www.zdnet.com/article/unsw-launches-world-first-e-waste-microfactory/.

2. Legal context

2.1 International frameworks

There are several international frameworks relevant to plastic pollution and these are set out below. It is of note that there is currently no binding international agreement for which the reduction of marine plastic litter and microplastics is a primary objective. While several of the international frameworks below relate to marine pollution, others encompass land-based sources. This paper primarily focuses on the regulation of land-based plastic as the major source of plastic waste and pollution. Effectively integrating land-based and marine pollution regulation remains critical.

The following international binding agreements are relevant:

1. United Nations Convention on the Law of the Sea 1982 (UNCLOS) is the overarching international instrument regulating oceans and use of ocean resources. UNCLOS creates a general obligation on States to protect and preserve the marine environment (Article 192). It calls on States to take measures to prevent, reduce and control pollution of the marine environment (Article 194) and land-based sources (Article 207). States are required to adopt laws to prevent, reduce and control pollution of the marine environment; and establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution (Article 210). States are also required to establish and adopt international laws and standards to prevent, reduce and control pollution of the marine environment from their own vessels (Article 211). UNCLOS also includes provisions on enforcement and provides for global and regional cooperation and coordination for the protection and preservation of the marine environment (section 6).

   UNEP has noted:

   implementation of these provisions should be strengthened at the global, regional and national levels, including through the adoption of adequate implementing legislation and by mainstreaming oceans issues.[8]

2. International Maritime Organisation Convention on Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972 (London Convention) regulates land-based waste dumped at sea. States undertake to *'take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea'* (London Convention, Article 1; London Protocol Article 2).

3. The 1996 Protocol to the London Convention (London Protocol) extends this duty to the elimination of pollution of the sea caused by dumping or incineration at sea of wastes or other matter where practicable. The Protocol adopts a 'precautionary approach' and general prohibition on dumping waste or other matter at sea, except for wastes listed in Annex I.

4. MARPOL Annex V is an optional annex to the International Convention for the Prevention of Pollution from Ships (MARPOL), the principal convention of the International Maritime Organization. MARPOL Annex V prohibits the discharge of garbage, including operational plastic waste, from ships in all maritime zones.

   UNEP notes that:

   there are, however, implementation and compliance challenges concerning MARPOL Annex V and exemptions that exclude most fishing vessels from relevant measures.[9]

5. The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* is focussed on the export and import of hazardous and other wastes, but also addresses pollution by requiring Parties to ensure a minimum generation of hazardous wastes and other wastes (Article 2.a) and to ensure the availability of adequate disposal facilities for the environmentally sound management waste (Article 2.h). If certain plastics are defined as "hazardous" or "other wastes" they may fall within the Basel Convention.[10]

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8 UNEP, *Combating marine plastic litter and microplastics: An assessment of the effectiveness of relevant international, regional and subregional governance strategies and approaches* (UNEP, 2017) 17.

9 Ibid.

10 The Waigani Convention, a regional agreement under the Basel Convention, has been adopted by some PICs.

- Plastics do not fall under the definition of hazardous wastes under Article 2. However, pursuant to Article 3, parties may adopt national legislation to include as hazardous wastes substances not listed under Annex I of the Convention.[11]

Other, non-binding programmes and frameworks relevant to plastics include the following:

1. The UN Environment Regional Seas Programme aims to encourage global environmental responsibility with regards to sea-based pollution.[12] UNEP oversees programmes in several regions, including the Pacific region, each with their own Action Plan (see e.g. 2.2 below).
2. The Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA) is the only global initiative aimed at addressing the connectivity between terrestrial, freshwater, coastal and marine ecosystems by providing guidance to national and/or regional authorities. The GPA secretariat has established and is strengthening global multi-stakeholder partnerships, including the Global Partnership on Marine Litter.
3. Honolulu Strategy – a Global Framework for Prevention and Management of Marine Debris is the only global instrument for marine litter. It is a voluntary framework strategy developed by the UN Environment and National Oceanic and Atmospheric Administration (NOAA) Marine Debris Program.
4. Food and Agriculture Organisation (FAO) Code of Conduct for Responsible Fisheries addresses abandoned, lost or discarded fishing gear.

2.1.1 Sustainable Development Goals

The framework seeks to work towards several UN Sustainable Development Goals (SDGs). In particular, SDG 14.1 states that *'by 2025, prevent and significantly reduce marine pollution of all kinds, particularly from land-based activities, including marine debris and nutrient pollution.'* The framework also works towards the following relevant SDGs:

- **SDG 3.9:** By 2030, substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination.
- **SDG 6.3:** By 2030, improve water quality by reducing pollution, eliminating dumping and minimising release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.
- **SDG 8.4:** Improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation, in accordance with the 10-year framework of programmes on sustainable consumption and production, with developed countries taking the lead.
- **SDG 12.5:** By 2030, substantially reduce waste generation through prevention, reduction, recycling and reuse.
- **SDG 14.2:** By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans.

[11] UNEP, *Combating marine plastic litter and microplastics: An assessment of the effectiveness of relevant international, regional and subregional governance strategies and approaches* (UNEP, 2017).

[12] UN Environment, 'Regional Seas Programme and its work on Sea-based pollution', UN Environment (online), accessed July 2018, available at: https://www.unenvironment.org/news-and-stories/video/regional-seas-programme-and-its-work-sea-based-pollution.

2.2 Pacific Regional Framework

There are several regional frameworks and strategies in the Pacific that are relevant to the protection of the environment with respect to plastic pollution. These include the following:

1. The Convention for the Protection of the Natural Resources and Environment of the South Pacific region, 1986 (Noumea Convention), entered into force in 1990.[13] The Noumea Convention seeks to protect, manage and develop marine and coastal environments in the South Pacific. The Noumea Convention obligates parties to protect, manage and endeavour to take all appropriate measures to prevent, reduce and control pollution and to ensure sound environmental management and development of natural resources, using the best practicable means at their disposal and in accordance with their capabilities (Article 5).

   The following Protocols to the Noumea Convention are relevant:

   a. the *Protocol for the Prevention of Pollution of the South Pacific Region by Dumping* (Pacific Dumping Protocol)[14] under the Noumea Convention requires States to adopt legislation to implement the London Convention and Protocol;

   b. the *Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region* (Emergencies Protocol)[15] aims to enhance cooperation among the Parties to protect the South Pacific Region from threats and effects of pollution incidents.[16]

2. *Cleaner Pacific 2025 Pacific Regional Waste and Pollution Management Strategy sets out the policy context and key actions to minimise marine litter across the Pacific Island Countries and Territories. It is specifically focused on Pacific Island Countries and Territories and was developed in consultation with all island members.*

   This guide draws on the four strategic goals of the *Cleaner Pacific 2025*, adapting and applying them to plastics regulation in order to:

   - **prevent the generation of wastes and pollution** to eliminate risks to human health and the environment, and reduce overall management costs;
   - **recover resources from waste** and pollutants, and other measures, in order to reduce residual waste and to contribute to national economic and social development;
   - **improve management of residual wastes, chemicals and pollutants,** from which resources cannot be recovered, appropriate storage, collection, treatment and disposal to minimise the risks to human health and the environment; and
   - **improve monitoring of the receiving environment,** to increase understanding and support informed decision-making on appropriate measures to protect public health, the environment and support remediation.

3. *Pacific Regional Waste and Pollution Management Strategy Implementation Plan 2016–2019* aims to develop country profiles on marine litter and implement demonstration projects to raise awareness of the issue.

4. *Pacific Marine Action Plan: Marine Litter 2018–2025.* It is noted that SPREP and its members are in the process of finalising a Pacific Regional Action Plan to address the issue of marine litter in the Pacific region. Subject to its approval, it is understood that the *Pacific Marine Action Plan: Marine Litter 2018–2025* will address:

   - the role of a comprehensive policy and regulatory framework for marine waste management;
   - proposed actions on key sources of marine litter for each year of implementation;
   - a frame of reference for priority regulatory and policy initiatives for marine litter; and
   - practical considerations to implement and measure the progress of the Plan.[17]

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[13] *Convention for the Protection of the Natural Resources and Environment of the South Pacific region* (Noumea Convention).

[14] Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (Pacific Dumping Protocol) [1986] PITSE 16 (24 November 1986), in force 22 August 2005. http://www.paclii.org/pits/en/treaty_database/1986/16.html

[15] *Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region* (Emergencies Protocol).

[16] Note that the Emergencies Protocol will be superseded by the Protocol on Oil Pollution preparedness, response and cooperation in the Pacific region and the Protocol on hazardous and noxious substances pollution, preparedness, response and cooperation in the Pacific region once they enter into force.

[17] SPREP, *Draft Pacific Marine Action Plan: Marine Litter 2018–2025* (SPREP Library Cataloguing-in-Publication Data, Apia, Samoa 2018). Available at: https://www.sprep.org/attachments/Circulars/prap_marine_litter.pdf . Accessed August 2018.

2.3 National and local level responses

Legislative and policy instruments seeking to manage plastic pollution at the national and sub-national level have been adopted in over 60 countries.[18]

Examples of legislation in Pacific Island Countries to regulate single use plastic bags, plastic foam,[19] drink bottles and other single use plastic products include the following:

- Cook Islands: *Environment Act 2003 – Environment (Mitiaro) Regulations 2008; Environment Act 2003 – Environment (Atiu and Takutea) Regulations 2008;* and the *Environment Act 2003 – Environment Act (Ozone Layer Protection) Regulations 2008* (plastic foam);
- Fiji: *Environment and Climate Adaptation Levy (Plastic Bags) Regulations 2017; Environmental Levy (Budget Amendment) Act 2017;*
- Kiribati: *The Special Fund (Waste Materials Recovery) Act 2004;*
- Marshall Islands: *Styrofoam and Plastic Products Prohibition, and Container Deposit Act 2016;*
- Niue: *Environment Act 2003 – Ozone Layer Protection Regulations 2007* (plastic foam);
- Palau: *RPPL No. 10-14: Plastic Bag Use Reduction;*
- American Samoa: *Public Law 31; Environmental Health [Title 25]* (s 25.2034);
- Samoa: *Plastic Bags Prohibition on Importation Regulations 2006;* and the *Lands, Surveys and Environment Act 1989 – Ozone Layer Protection Regulations 2006* (plastic foam);
- Tonga: *Waste Management (Plastic Levy) Regulations 2013;* and the *Ozone Layer Protection Act 2010, amended by the Ozone Layer Protection (Amendment) Act 2014)* (plastic foam);
- Vanuatu: Three orders under the *Waste Management Act No. 24 of 2014:*
  - *Waste Management Regulations Order No. 15 of 2018;*
  - *Private Waste Operator's Licence Fees Order No. 16 of 2018;* and
  - *Waste Management (Penalty Notice) Regulation Order No. 17 of 2018;* and
  - the *Ozone Layer Protection Act 2010* (plastic foam).

[18] United Nations Environment Programme (UNEP), ***Single-Use Plastics: A Roadmap For Sustainability*** report (UNEP, 2018) viii, accessed in July 2018. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/25496/singleUsePlastic_sustainability.pdf?sequence=1&isAllowed=y.

[19] See e.g. Niue, Vanuatu, and Cook Islands' legislation for a standard definition of "plastic foam".

Niue's Regulations, at clause 5(b), prohibit the importation of:

…any plastic foam, or any goods that contain plastic foam, that is or are manufactured using any CFC [chlorofluorocarbon] (including any extruded polystyrene foam, polystyrene boardstock and any thermoformed plastic packaging such as supermarket meat/produce trays, egg cartons, fast-food containers, disposable plates and cups, horticultural packaging trays and packaging netting.

3. Analytical approach and key concepts

In order to develop a robust approach to legislative drafting, this guide adopts an analytical framework that divides legislation into a number of key components as set out in section 3.1. Key concepts for effective plastics policy that inform this guide are at section 3.2.

3.1 Analytical framework

This project adopts an analytical framework that identifies environmental legislation as comprising 5 elements:[20]

- goals;
- objects;
- principles;
- tools and mechanisms; and
- governance and institutions.
- Legislation comprising these elements is more likely to be logical, consistent and effectively implemented.

3.1.1 Goals

Goals operate as a foundational basis for the law. These are often derived from an overarching societal goal incorporating community values and environmental management.[21]

Identification of goals must be supported by processes such as consultations and discussions that are inclusive and representative.

3.1.2 Objects

The objects of legislation are its aims or intended outcomes. They are included in an objects clause and give legal effect to the goal or goals by:

- requiring administering agencies to take the objectives into account when undertaking their activities;[22] and
- providing guidance to Courts when statutory interpretation is necessary.[23]

Two types of objects clauses can be used in legislation: [24]

- objects that elaborate the agreed goal or goals of environmental law (e.g. an object to promote ecologically sustainable development); and
- a limited number of objects that are specific to a particular statute (e.g. a fisheries statute could include objects to conserve fish stocks, promote ecologically sustainable fishing, etc.).

[20] This framework is based on the analytical framework recently developed by the Australian Panel of Experts in Environmental Law (APEEL): Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

[21] Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017), 16.

[22] Ibid, 29-33.

[23] Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

[24] Ibid.

It is not uncommon for environmental laws to contain objects that are competing or conflicting.[25] When this occurs, one object may be prioritised at the expense of the other. It may therefore be helpful to provide an hierarchy of objects or some guidance as to how conflicting objects are intended to interact.

3.1.3 Principles

For the purposes of this analysis, a principle is something that is capable of either guiding 'how something happens or works', or operating 'as a rule that is to be followed'.[26] Two types of principles can be identified: design principles and directing principles.[27] The distinction between these principles is fictional, but may be a useful tool for the user to understand when and how the principles can be applied.

Design principles

Design principles are not necessarily explicitly stated in legislation; instead, they guide the design of the content of legislation. They also provide guidance for policy development and implementation. In terms of legislative content, design principles will influence the choice of legislative objects, directing principles, and tools and mechanisms.

The following design principles are identified in the 'key concepts section':

- Circular economy model;
- Sustainable materials management;
- Extended producer responsibility;
- Polluter pays principle;
- Sustainable consumption and production;
- Smart regulation;
- Environmental democracy.

Directing principles

Directing principles guide the application and implementation of legislation. The clauses often require that the exercise of responsibilities be consistent with the stated principles.[28]

Directing principles identified in the 'key concepts' section include the precautionary principle and the (harm) prevention principle.

3.1.4 Tools and mechanisms

Tools and mechanisms refer to practical processes and systems that are used to achieve legislative goals and objects, and to operationalise principles.

Examples of tools and mechanisms to govern plastic pollution include:

- product bans (e.g. for high environmental impact, single-use, substitutable products);
- economic instruments and behavioural incentives based on a *polluter pays approach* (e.g. product levies, deposit/refund schemes or service levies that internalise costs);
- licences and permits (e.g. licences granted to bottle manufacturers, recycling companies or plastics importers, and permits for lawful dumping of organic waste);

[25] Ibid, 3.

[26] Ibid, Pt. 3.

[27] Ibid.

[28] Ibid, 39-42.

- technology design and product specification standards (e.g. standards for plastic contents, recycled or recyclable materials);
- prohibitions on harmful practices (e.g. disposal of shipping garbage or dumping of land-based plastic waste at sea);
- performance standards (e.g. targets for percentage of waste recycled);
- reporting requirements (e.g. pollution and incident reporting, annual returns for container deposit schemes);
- management plans (e.g. for recycling centres or shipping garbage);
- penalties such as warning letters, fines, confiscation of banned products, vessel impoundment and imprisonment;
- co-management arrangements;
- community rights to information access;
- community rights to bring legal challenges; and
- periodic reviews of laws and regulations to ensure they are effective and up-to-date.

Not all tools and mechanisms need be legislated. Tools and mechanisms can be non-mandatory and sit outside of legislation. Examples include:

- voluntary reporting for the purposes of strengthening a company's 'social licence to operate';
- education and awareness programmes;
- voluntary industry commitments; and
- government-backed voluntary programmes, and voluntary product certification.

3.1.5 Governance and institutions

Effective implementation of environment laws requires strong governance and institutional frameworks. In the present context, governance refers to the systems and processes that determine how power and authority are exercised to manage resources. One aspect of governance are the institutions or agencies that are created to support and implement the laws and the systems of governance.

3.2 Key concepts

3.2.1 Circular economy model

The aim of a circular economy is to maintain resources at their highest possible value. A circular economy aims to reduce resources used by promoting better design, production, use, reuse and recycling. This is an alternative to a linear economy which makes (often remotely) goods and imports them into PICs, leaving them with the waste.[29] There is growing recognition of the benefits of a circular economy approach, including by UNEP and the EU.[30]

Implementing a circular economy for plastics within PICs is a long-term challenge because most plastic products are imported and few domestic options exist for recycling or reusing waste.

The figure below illustrates the key features of a circular economy in a PIC context.

[29] *Marine Action Plan: Marine Litter 2018–2025,* page 10.

[30] Example of circular economy strategies in the European Union: http://ec.europa.eu/environment/circular-economy/pdf/plastics-strategy.pdf.

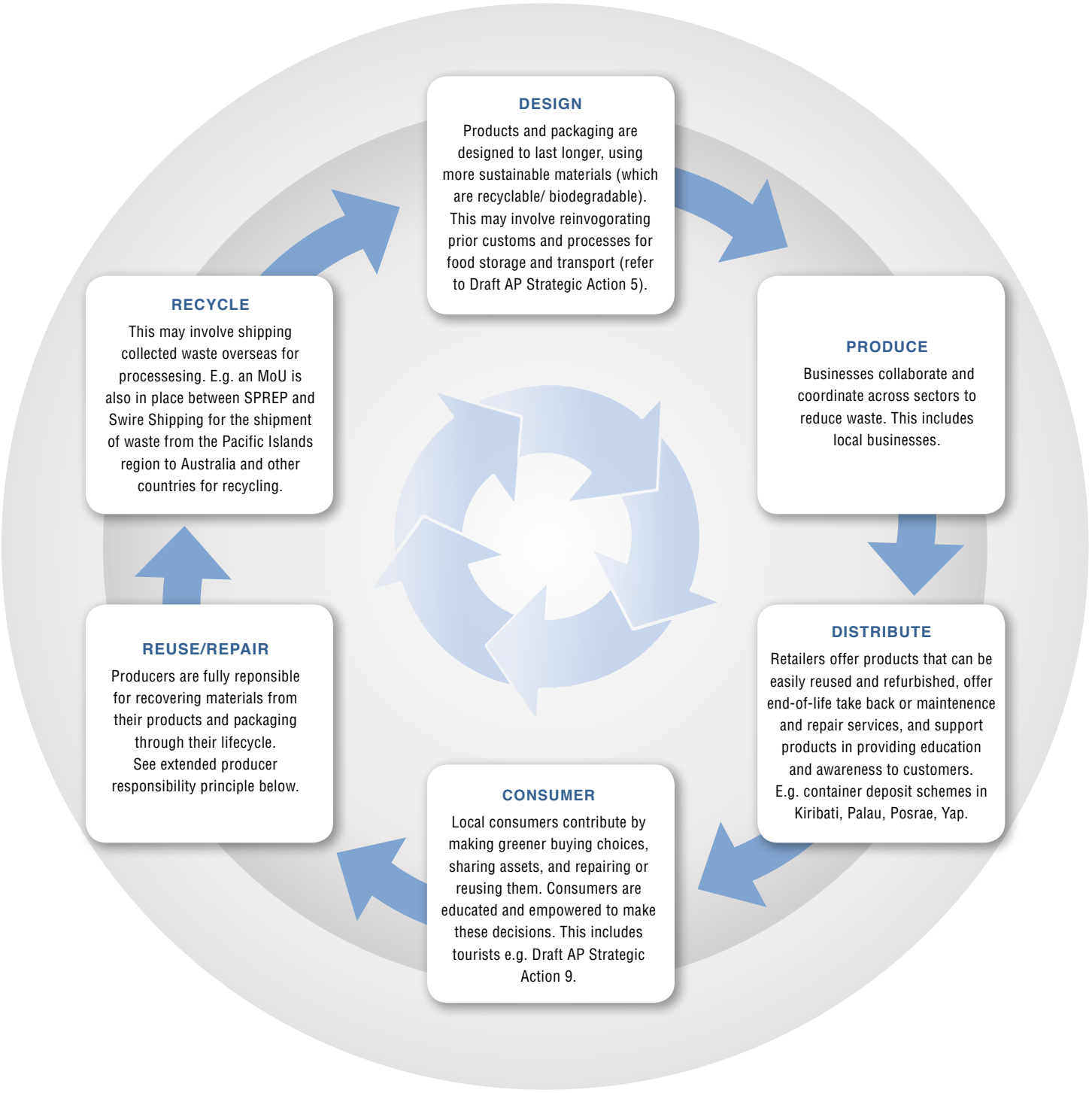

FIGURE 1: An overview of a circular economy in a PIC context. Adapted from *2017 Strategy for a Waste-free Ontario*.[31]

[31] Original available at: www.ontario.ca/strategy-waste-free-ontaria-building-circular-economy.

3.2.2 Sustainable Materials Management

Sustainable materials management (SMM) is an approach to using and reusing materials more productively over their entire life cycles.[32] The principle of SMM promotes the reduction and prevention of waste. This approach can be applied across the supply chain.

The model framework considers the prioritisation of regulations according to the '5Rs':

- **Reduce** – lessen the use of unnecessary materials (e.g. avoid disposable products, design packaging with fewer and thinner layers);
- **Reuse** – original use product was designed for;
- **Repair** – design for repair not dispose at end of life, e.g. parts to be used across multiple models;
- **Recycle** – convert to new plastic applications, add to public infrastructure (e.g. roads), housing, etc.;
- **Recover** – resource generation (Waste-to-Energy, pyrolysis, etc.) – care must be taken to meet environmental controls.

3.2.3 Extended producer responsibility

Extended producer responsibility (EPR) occurs where producers have responsibility for the treatment or disposal of post-consumer products. This is particularly relevant for PICs, where goods are often produced in other countries and then imported to PICs for consumption. EPR provides a source of finance from producers that internalises waste management costs, as well as an incentive for the producer to prevent waste, improve product design and support recycling. Because of the relatively small markets in the Pacific islands, EPR may be best approached at a regional level to increase bargaining power.

3.2.4 Polluter pays

The *polluter pays* principle holds that those who generate pollution and waste should bear the costs of containment, avoidance or abatement.

3.2.5 Sustainable consumption and production

Sustainable consumption and production (SCP) refers to the use of services and related products that minimise the use of resources and toxic materials, in addition to minimising waste created over the life cycle of the product.[33] This involves redesigning the way in which goods and services are produced and consumed and drive the revitalisation of industrial and socio-economic development towards non-pollutant, no-waste, low-carbon, resource efficient, socially inclusive, green and circular economies. The broader principle of SCP can be applied across the entire supply chain of plastic products and engage policy makers, businesses, retailers, academia, civil society and consumers.

3.2.6 Smart regulation[34]

Smart regulation provides that environmental law utilise a combination of regulatory tools in order to produce the most effective policy outcomes':[35]

- The 'policy mix principle'. This results in the use of a range of complementary tools and mechanisms to address a single issue: e.g. economic (such as container deposit schemes), information-based (inventories), and self-regulation (voluntary standards);

[32] More information available at: https://www.epa.gov/smm.

[33] See SDG 12; available at: https://www.un.org/sustainabledevelopment/sustainable-development-goals/.

[34] 'Smart regulation' is a set of principles developed by Neil Gunningham; see Neil Gunningham and Peter Grabosky, ***Smart Regulation: Designing Environmental Policy*** (Clarendon Press, 1998).

[35] Gunningham and Grabosky, above n 19, 15.

- The ‘parsimony principle’. This involves the adoption of tools and mechanisms that promote a least resource-intensive approach to regulation;
- The ‘escalation principle’. This involves legislation with an ‘hierarchy’ of tools and mechanism options available to deal with different situations (including for offences and penalties). Laws would be structured so that lower-scale options are deployed first, with escalation an option if lower-scale options are unsuccessful.

3.2.7 Environmental democracy

Principle 10 of the Rio Declaration acknowledges the importance of citizen participation and identifies three fundamental rights to achieve this: access to information; access to public participation; and access to justice.[36] These procedural justice rights are given most explicit protection in the United Nations Economic Commission for Europe’s Aarhus Convention.[37] They are also promoted in the UNEP *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010).[38]

3.2.8 Precautionary principle

The *precautionary principle* states that where there is a risk or threat of serious or irreversible damage, lack of full scientific certainty must not be used as a reason for postponing cost-effective measures to prevent environmental degradation (Rio Declaration Principle 15). Action should be taken to minimise serious harm, despite scientific uncertainty.

3.2.9 Prevention principle

The (harm) *prevention principle* requires action to be taken to prevent *known* risks of environmental harm from materialising (included in Rio Declaration Principle 2). That is, the prevention principle applies even where the precautionary principle is not triggered. Key concepts such as SMM, SCP and waste minimisation employ the prevention principle, adopting a systems approach to minimise plastic waste generation at the source of production and import.

[36] *Report of the United Nations Conference on Environment and Development (Rio Declaration)* UN Doc A/CONF.151/26 (1992), Principle 10.

[37] *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001). Available at: https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

[38] Adopted by UNEP Governing Council, decision SS.XI/5, part A of 26 Feb 2010. Available at wedocs.unep.org.

PART B

DRAFTING INSTRUCTIONS FOR THE REGULATION OF PLASTICS IN THE PACIFIC

4. Drafting Instructions for key areas

General drafting instructions are provided for the following key areas of plastics regulation:

1. **Single-Use Plastic Products – Appendix 1**
2. **Microplastics in Personal Care Products – Appendix 2**
3. **Marine Plastics: Garbage from Ships & Dumping at Sea – Appendix 3**
4. **Container Deposit Schemes – Appendix 4**
5. **Visitor Environment Levies – Appendix 5**
6. **Statutory Environment Funds – Appendix 6**

The regulatory proposals are structured to address the following factors (where relevant):

- Product/Issue;
- Broad objective;
- Examples of jurisdictions and legislation;
- Scope of regulation (product or activity regulated, who is regulated);
- Exemptions;
- Further specific considerations;
- Staging and commencement;
- Compliance and enforcement – offences and penalties;
- Stakeholders affected (e.g. supply chain, consumers, government);
- Likely challenges and opportunities.

In selecting the approach and priorities for these drafting instructions, the authors have referred to international and regional agreements and strategies, experts in plastics regulation and legislative drafting, academic literature, and existing and emerging legislation from the Pacific and around the world. As regulatory options are further refined, and priorities pursued, the strategic goals and 14 guiding principles of *Cleaner Pacific 2025* will provide a useful reference point for designing and implementing Pacific plastic regulation.[39]

[39] Those guiding principles are: (1) Reduce, Reuse, Recycle, Return; (2) Product stewardship; (3) Polluter pays principle; (4) Proximity principle; (5) Transparency; (6) Public consultation and participation; (7) Multisectoral approach; (8) Regionalism; (9) Sound decision-making (10) Precautionary approach; (11) Proactive approach (12) Adherence to regional and international convention (13) Public-private partnership; and (14) Selection of appropriate and affordable technology: SPREP, *Cleaner Pacific 2025: Pacific Regional Waste and Pollution Management Strategy 2016–2025* (SPREP Library Cataloguing-in-Publication Data, Apia, Samoa 2016), accessed August 2018. Available at: https://sustainabledevelopment.un.org/content/documents/commitments/1326_7636_commitment_cleaner-pacific-strategy-2025.pdf.

5. Threshold legal and administrative considerations

Importantly, prior to embarking on the process of drafting specific legislation, PICs will need to consider their existing legislative frameworks to determine matters such as:

- What is the constitutional basis for the jurisdiction to regulate the relevant sectors, products or processes concerned?
- What international and regional instruments and obligations applicable to the jurisdiction may complement or conflict with this particular regulatory proposal (and how can this be managed)?
- What existing domestic legislation or policy may complement or conflict with this particular regulatory proposal (and how can this be managed)?
- Having reviewed existing relevant legislation and government administration, what is the most appropriate location of, and mechanism to, enact this regulatory scheme (e.g. under which existing Act, if any?)
- Are there any members of society or other sectors not governed by the regulation that may be unintentionally disadvantaged by the regulatory proposal?
- Which agency is primarily responsible for policy and legislative development and implementation? Which agencies will play a support role or joint regulatory role?
- Which agency (and which officers) will oversee compliance and enforcement?
- What is the likely cost for agencies to implement and oversee the scheme?
- What options are available for sustainable funding or cost recovery (e.g. existing environment fund or levy, new environment fund or levy, international development funds, public-private partnerships, process for cost recovery orders, etc.)?

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APPENDICES

APPENDIX 1 SINGLE-USE PLASTIC PRODUCTS

1. Product/Issue

- Single-use plastic bags;
- Single-use plastic takeaway products;
- Styrofoam or polystyrene containers and takeaway products (may be addressed together with the above, or separately).

2. Broad objective

To reduce and eliminate single-use plastic bags and take-away products entering the waste stream and the environment.

Broadly, this legislative option prohibits (bans):

- the importation, manufacture, distribution, sale and supply of:
  - singleuse plastic (SUP) take-away products,
  - SUP foam take-away products (e.g. styrofoam/polystyrene), and
  - SUP shopping bags.

3. Examples of jurisdictions and legislation

SPREP member jurisdictions with, or moving towards, a ban on single-use plastic shopping bags include: American Samoa, Commonwealth of the Northern Mariana Islands, Guam, Pohnpei and Yap States of the Federated States of Micronesia, Palau, Republic of the Marshall Islands, Samoa and Vanuatu.[40]

As an alternative policy option, Fiji has placed a levy on single-use plastic shopping bags.[41]

4. Scope of regulation (product and activity regulated; who is regulated)

SUP 'take-away products' and SUP 'shopping bags' would be defined based on local consultation, and preferably consistently within the Pacific region. For example:

- SUP 'take-away products' are intended to include plastic cutlery (knives, forks and spoons), cups, plates, straws and food containers designed or supplied as single-use items;
- SUP 'shopping bags' are intended to include bags supplied for the purpose of:

[40] SPREP, 29 June 2018. Available at: https://www.sprep.org/news/pacific-islands-moving-towards-banning-single-use-plastic, accessed July 2018.

[41] For details please see Part A of this document, p.13-14.

- enabling goods to be taken away from the place where they are sold; or
- enabling goods to be delivered.[42]
- 'plastic foam take-away products' could be separately defined as banned products. Alternatively, plastic foam (including styrofoam, polystyrene, etc.) could be included in the meaning of plastic and SUP take-away products.[43]

These SUP products would be distinguished from relevant 'pre-packaged' retail goods that are exempted or excluded from the definitions.[44] See 'Exemptions' below.

The **ban on importation** is intended to apply to any person (individual or corporation) who seeks to import SUP shopping bags or SUP takeaway products into the jurisdiction.

The **ban on manufacture or distribution** is intended to apply to any person who seeks to manufacture or distribute SUP shopping bags or SUP takeaway products within the jurisdiction.

The **ban on sale or supply** is intended to apply to retail outlets (e.g. supermarkets), as well as importers and manufacturers (noted above). That is, importers and manufacturers are prohibited from selling or supplying SUP shopping bags or SUP takeaway products to retailers. In turn, and perhaps more importantly, retailers are prohibited from selling or supplying these products to retail customers (consumers).

The scope of regulation (regarding who is regulated) may differ according to the plastic product. For example, the prohibition on SUP plastic bags may primarily target the supermarket sector. The prohibition on SUP takeaway products may primarily target the sectors of food and beverage service (hospitality), catering and take-away food retailers. In some cases there may be overlap across these products. For example, where a takeaway outlet provides SUP cutlery or straws in a SUP shopping bag.

Considerations in determining regulatory scope and key definitions include:

- the characteristics of prohibited shopping bags, usually defined by plastic thickness which is an indication of its reusability (e.g. 35-49 microns);
- particular products and circumstances such as styrofoam, degradable bags and online shopping (addressed below);
- how retailers are defined, such as by the number of employees,[45] turnover, or type of business;[46]
- scope of planned exemptions (addressed below).[47]

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42 See *Environment (Wales) Act 2016* (Wales UK), *Part 3 – Charges for carrier bags*, s. 54 (Meaning of "carrier bag").; and *Vanuatu Waste Management Regulations Order No. 15 of 2018*, "single use plastic bag" definition. This excludes 'a plastic bag that is an integral part of the packaging in which goods are sealed prior to sale.' It is understood the intent is to distinguish from goods that are bagged in-store.

43 Expanded polystyrene cups and take-away containers may be technically recyclable, but to do so they cannot be contaminated with leftover food or mixed with other materials like paper, plastics, glass, or grit. Also, in the marine environment, plastic foam can act as a sponge for other contaminants. The need to keep foam clean means it must first be cleaned and then collected separately. Plastic foam is so light and bulky that it is too expensive to collect as a separate stream in household recycling programs (where they exist), while widespread uptake of drop-off depots may be unlikely. See further, City of Vancouver, Draft Single-Use Item Reduction Strategy, accessed August 2018, at: https://vancouver.ca/files/cov/draft-single-use-item-reduction-strategy.pdf.

44 See e.g. *Vanuatu Waste Management Regulations Order No. 15 of 2018*, "single use plastic bag" definition. This excludes 'a plastic bag that is an integral part of the packaging in which goods are sealed prior to sale.' It is understood the intent is to distinguish from goods that are bagged in-store.

45 For instance, refer to *The Single Use Carrier Bags Charges (England) Order 2015* (UK), Schedule 1, article 2.

46 See e.g. American Samoa: Public Law 31, s. 3; "retailer establishment" means a place where goods, food, food products, wares, or products are offered to the public for sale or lease, including but not limited to markets, grocery, and retail merchandise stores.

47 See e.g. Antigua and Barbuda, *The External Trade (Shopping Plastic Bag Prohibition) Order 2017*, Schedule of exemptions (e.g. plastic bread wrapping; bags/wraps/sheets for meat and fish; bin liners; other 'primary packaging' used solely for products listed in the schedule.

Where a total ban may prove problematic or undesirable, an environmental tax may be considered with proceeds contributing to an environmental fund to assist in managing the waste generated.[48]

Overall, the scope of regulation should fit the purpose and fulfil (or significantly contribute to) the ultimate, overarching aim to eliminate plastic from the waste stream and environment.

Exemptions

It is important that the scope of the law clearly defines which sectors and products (or particular applications of those products) are regulated and exempt.

As with staging and commencement above, refining exactly which businesses are subject to the law (and when and how) is likely to require detailed consideration and consultation within the jurisdiction.

Sectors which may be considered for exemption from the prohibition (i.e. where a ban would not apply) may include, where:

- the primary driver of SUP take-away products (in relation to import, manufacture, supply or sale) is public health and hygiene (including exceptional circumstances such as disaster recovery); and
- there is a genuine and demonstrated need for the use of prohibited products (e.g. the use of straws by disabled persons).

Where a total ban may prove problematic or undesirable, an environmental tax may be considered with proceeds contributing to an environmental fund to assist in managing the waste generated.

If appropriate, the law could directly prescribe certain sectors, such as hospitals and similar facilities, as exempt. Other sectors could be added on the basis above, by order of (or to the satisfaction of) the relevant Minister or regulatory agency head.

Note that certain products may be wholly exempted because they are already regulated by another scheme, which is proposed to continue. For example, in some jurisdictions this may include beverage container deposit and recycling schemes.

Exemptions could also apply to the application of prohibited products in particular circumstances. For example, SUP shopping bags in connection with the sale of a particular product (meat, seafood);[49] or SUP takeaway containers supplied by a certain sector. Circumstances should be limited, necessary, defined and specific.

6. Further specific considerations (for scope)

Application in each PIC

As noted, each PIC will need to consider its existing legislative frameworks to decide how to deal with a range of upfront legal and administrative considerations. For example, where laws should be promulgated, and which ministry is responsible.

More recently, the Samoan government has drafted a *Policy On Banning Plastics In Samoa 2018,* that proposes to ban various plastic products including shopping bags; packing bags; plastic straws; and food packaging containers (styrofoam). As an alternative, the policy proposes the implementation of the use of paper materials. The proposed ban will take effect in several stages. The Ministry will plan a consultation with the Ministry for Revenue on proposed levies on items to phase out as follows: by 2020 the ban will apply to plastic and styrofoam cups targeting licensed importers and creating an exemption based on *health and any other special purposes*; and, by 2021, the ban will apply to plastic bottles targeting licensed importers and businesses. In addition to this, the policy proposes to make some changes to the current domestic legislation, namely by revoking the *Plastic Bag Prohibition on Importation Regulations*

[48] E.g. Fiji has placed a levy upon single-use plastic shopping bags.

[49] See e.g. *Vanuatu Waste Management Regulations Order No. 15 of 2018*, for a "single use plastic bag" definition.

2006 and 2013 Amendments (made under the *Lands, Surveys and Environment Act 1989*) by way of new regulations being enacted under section 12 of the *Waste Management Act 2010.*

Definitions

The following terms will need to be clearly and concisely defined (among others):

- plastic and single-use plastics (SUPs);[50]
- plastic foam (or similar term, including but not limited to styrofoam and polystyrene[51]);
- retailer or retail outlet/establishment (a targeted or phased regulation could include subsets of retailers – for example 'supermarkets', 'small retailers', etc.);[52]
- reusable (in the context of legal alternatives);
- (SUP) shopping bag;[53]
- straw;[54]
- supermarkets (or large supermarkets and small supermarkets);
- (SUP) takeaway products (e.g. including plastic cutlery (knives, forks, spoons and chopsticks), cups, plates, straws and food containers designed or supplied as single-use items);
- other retailers (whether targeted, subject to staged regulation, or exempt) – such as community markets, food and beverage franchises, takeaway outlets and restaurants who may supply eat-in or take-away service, and public events.

Plastic foam take-away products (Styrofoam, polystyrene etc.)

Jurisdictions may consider whether to address plastic foam packaging together or separate from other SUPs.[55] For example, some countries have started with a ban on other SUPs and then proposed extensions of the ban to plastic foam.

An important consideration is that, if plastic foam is *excluded* from an initial ban on SUP take-away products, this may perversely increase production and take-up of plastic foam as an alternative.

The persistence of plastic foam in the land and marine environment, its potential to release and absorb toxins, and low viability of recycling options makes it a significant target for regulation alongside other SUP take-away products.

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50 See e.g. *Maharashtra Plastic and Thermocol Products (Manufacture, Usage, Sale, Transport, Handling and Storage) Notification, 2018* (India).

51 See e.g. *Styrofoam and Plastic Products Prohibition Act 2016* (Marshall Islands), s. 2, accessed July 2018: https://rmiparliament.org/cms/images/LEGISLATION/BILLS/2016/2016-0028/StyrofoamandPlasticProductsProhibitionAct2016.pdf; see also amending Act at: http://rmicourts.org/wp-content/uploads/2018/06/P.L.2018-54-Styrofoam-cups-and-plates-and-plastic-products-prohibition-and-container-deposit-Amendment-Act-2018-1.compressed.pdf.

52 See e.g. *Environment (Wales) Act 2016* (Wales), s. 56 defines "seller of goods, accessed July 2018: http://www.legislation.gov.uk/anaw/2016/3/pdfs/anaw_20160003_en.pdf.

53 See e.g. *Plastic Shopping Bags Ban Act 2010* (ACT) Part 2 s. 6, accessed July 2018: http://www.legislation.act.gov.au/a/2010-49/current/pdf/2010-49.pdf.

54 See e.g. *Vanuatu Waste Management Regulations Order No. 15 of 2018*, which offers a "straw" definition:
'a drinking straw:
made, in whole or in part, of plastic; and
Designed for one-time use,
but does not include a straw that forms an integral part of the packaging of a food item;

55 See e.g. *Vanuatu Waste Management Regulations Order No. 15 of 2018*, "disposable container" definition (i.e. styrofoam).

Degradable bags

Jurisdictions may decide whether the ban should also apply to compostable, degradable and biodegradable bags – as the composition of these products can create similar pollution problems as they persist and break down.

A precautionary approach may include these products as banned until such time as peer-reviewed scientific studies conclude they are a safe alternative and the necessary facilities are available in the jurisdiction, or otherwise by arrangement (e.g. where commercial composting facilities are required to break down products).

As a secondary option, use of degradable bags could be limited to certain contexts, such as in bin liners and commercial compost facilities, etc.

Online shopping

It is preferable that the prohibition also extends to online shopping that involves SUP shopping bags or take-away products. Treating and categorising online shopping in the same way as other sectors is intended to avoid loopholes and inequity.

Practicalities of banning these products in an online context – including for education, compliance and enforcement – may need further consultation and regulatory design.[56]

7. Staging and commencement

Staged commencement may help to relieve certain commercial concerns, enable further policy development and definition, and provide time for public awareness campaigns which will be essential to the regulatory scheme's success.

The intent is that the ban on importation, manufacture and distribution would commence first. For example, six months after the government's policy announcement. This would be subject to required legislative or regulatory processes in the relevant jurisdiction.

The ban on sale or supply would also apply to importers, manufacturers and distributors (with commencement on a date known in advance). It is therefore intended that the legislation should not cause the deliberate 'acceleration' of import and manufacture of single-use plastics for later sale or supply. While the ban on sale should prevent this perverse outcome, this could be noted in industry consultations.

The **ban on retailers** selling or supplying to retail customers (consumers) may also be staged in a targeted way. For example:

1. beginning with large supermarkets,
2. small supermarkets,
3. smaller retailers/boutiques and other points of sale (e.g. community markets).

The latter could be brought into the scheme after a given time (e.g. 3 to 6 months after large supermarkets) or as specified and notified by further executive order.

8. Alternatives, incentives and promotion

In designing, implementing and phasing-out a SUP product ban, it is important that:

- feasible alternatives are available for users of products that will be prohibited;
- businesses and consumers are aware of those alternatives;
- alternatives are reasonably accessible in the course of people's businesses and daily lives (including for vulnerable sectors of society);

[56] Along with plastic bag levies, another example of policy alternatives is a 'take-back scheme', where product delivery includes recovery of regulated products used in delivery, however this also raises compliance monitoring and enforcement issues.

- regulated entities and consumers have sufficient time, and take responsibility, to make reasonable adjustments to production and consumption practices; and
- alternative products do not have perverse impacts (e.g. equally poor or worse environmental outcomes, incentivising unsustainable production, etc.).

Any regulatory transition should be accompanied by public outreach, education and promotion of alternative products that are environmentally safe and preferable. Jurisdictions may have a clear idea of socially acceptable alternatives to SUP shopping bags and take-away products.

If appropriate, the law or definitions could provide a non-exhaustive list of safe and permissible alternatives. The aim would be to clarify the scope of the ban and encourage take-up of alternatives. For example, 'reusable shopping bags' or baskets (cloth, recycled paper, woven natural fibres) and 'reusable plastic cups' (i.e. those designed for the purpose of reuse and as a replacement for SUP products). In the context of family and cultural events, reusable picnic sets could be encouraged.

Where necessary and feasible, the use of environmental impact assessment or lifecycle analysis could be used (and integrated into the law) to determine whether a product should be prescribed as a permissible alternative.

Note that if the legislation does not prescribe alternative products or a process for doing so, the product ban will still be effective on its own terms. Stakeholders will then rely on other sources such as information campaigns to identify permissible alternative products.

Public awareness campaigns (for businesses, industry and consumers) should include incentives and promotion to identify and encourage take-up of alternatives. Stakeholder forums could identify and discuss environmentally sustainable alternatives and associated community and business development opportunities. Women must have a prominent role in consultation and generation of solutions. Disadvantaged groups, remote and vulnerable communities should also be engaged to avoid inequitable and undesirable outcomes.

9. Compliance and enforcement – offences and penalties

Each jurisdiction will need to specify which agency will oversee compliance and enforcement once the regulatory scheme has commenced. This may be the same agency responsible for policy development and implementation (such as the Environment Department), or a separate agency (such as an Environment Protection Authority). Legislation may specify the regulator or this may be done administratively.

The regulator and its authorised officers should be empowered to seize, confiscate and destroy prohibited items[57] and enter premises and ask questions for the purposes of investigation (a warrant may be required for residential and other prescribed premises).

Authorised officers should be required to carry an identification card while exercising such powers.

The legislation should state, in specific terms, that it is an offence against the Act (or regulations, etc.) to do each of the things that are prohibited (import, manufacture, distribute, sell or supply, etc.).

Offences and penalties for littering could also be reviewed and updated (or introduced) to capture the momentum of plastic bans and awareness campaigns. The offence could be limited to depositing or abandoning 'litter' in a public place[58] or in another place where the litter could reasonably fall, be washed or blown into a public place (other than a rubbish bin or waste management facility).

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[57] See e.g., *Styrofoam and Plastic Products Prohibition Act of 2016* (Marshall Islands), accessed July 2018. Available at: https://rmiparliament.org/cms/images/LEGISLATION/BILLS/2016/2016-0028/StyrofoamandPlasticProductsProhibitionAct2016.pdf; *Environment Act 2003 – Environment (Atiu and Takutea) Regulations 2008*, s. 44(4); and *Environment Act 2003 – Environment (Atiu and Takutea) Regulations 2008*, s. 45(4) (Cook Islands), accessed July 2018. Available at: http://www.paclii.org/cgi-bin/sinodisp/ck/legis/sub_leg/ea2003eatr2008562/ea2003eatr2008562.html.

[58] See e.g. *Vanuatu Waste Management Regulations Order No. 15 of 2018*, s. 4, "Littering offence".

The maximum penalties for committing an offence should also be set. These may include fines and/or imprisonment, and would need to be fixed according to relativities in the individual jurisdiction. Higher penalties should apply to corporate offenders, but individual penalties should also be an adequate deterrent to offences. Higher maximum penalties could also be set for repeat offences.

If appropriate, offences could be assigned a category or 'tier', such as very serious (tier 1), moderately serious (tier 2) or minor offences (tier 3).

The legislation or administrative arrangements would specify that legal proceedings for offences are to be brought in a relevant court (based on the standard up-to-date provisions and procedures of the jurisdiction).

If appropriate, the regulator could also be empowered to issue 'infringement notices', in particular for minor offences. A person issued with an infringement notice has the option to pay the fine (without recording a conviction for the offence) or defend the allegations in court. Whether infringement notices are suitable will depend on the jurisdiction. As there is no in-built judicial oversight, governance safeguards may be needed to ensure such notices are not vulnerable to corruption or abuses of power.

10. Stakeholders affected (e.g. supply chain, consumers, government)

- Importers;
- Domestic manufacturers;
- Intermediate parts of the supply chain (resellers, couriers, etc.);
- Retailers (large);
- Retailers (small);
- Consumers;
- Private and public waste managers;
- Government – environment, trade, customs, food/health, land and water agencies.

11. Likely challenges and opportunities

A ban on single-use plastic (SUP) bags and take-away products has already been embraced in a number of PICs as well as other nations. Opportunities exist to share knowledge, learn lessons and review progress. Growing public awareness globally has contributed to a 'policy window' to regulate these products. The need for alternatives to SUP products presents new opportunities for local industries and manufacturing.

Challenges include timing of phase-outs, potential industry and other stakeholder resistance, identification of alternatives to all products, stimulating behavioural change amongst businesses and consumers, and countering the potential for black markets in banned products to arise.

Many of these challenges can be addressed through well-planned and ongoing stakeholder consultation and public awareness campaigns.

APPENDIX 2 MICROPLASTICS IN PERSONAL CARE PRODUCTS

1. Product/Issue

Plastic microbeads or microplastics (as additives to toothpastes, shampoos, soaps, other cosmetics and personal care products).

2. Broad objective

To reduce and eliminate unnecessary or avoidable microplastics from production processes, and to prevent pollution from microplastics which may be irreversible.

Examples of jurisdictions and legislation

A number of North American and European states have placed a ban on products containing microbeads.[59] Other jurisdictions, including Australia, are pursuing a voluntary phase-out.[60]

3. Scope of regulation (product and activity regulated, who is regulated)

The intent of this regulatory option is to prohibit the import, manufacture and sale of personal care products such as soaps, toothpastes, shampoos, body washes and other 'rinse-off cosmetics' that contain intentionally-added 'plastic microbeads' or other microplastics.

While the term 'rinse-off cosmetics' has been used in the United States, a term such as 'personal care products' or similar terminology may be considered and preferred.

The intent is to capture the majority of microplastics that may occur in personal household products and may therefore be a key source of microplastic pollution in waterways and oceans.

The ban would apply to importers, manufacturers, distributors and retail sellers.

Depending on the jurisdiction, this may be done by introducing or amending laws related to waste management, health and consumer product regulation, or trade, commerce and manufacturing.

Separate to the legislation, baseline environmental information (pre-ban) and ongoing scientific studies should be conducted to:

- assess the levels of microplastics entering the waste stream and potentially causing water pollution;
- identify potential sources beyond rinse-off cosmetics (cleaning products and medical or industrial applications, including plastic pellets for manufacturing); and
- consider voluntary, co-regulatory and regulatory options for those sources.

[59] E.g. the *Microbead-Free Waters Act of 2015* (USA) inserted a ban on microbead manufacture, distribution and interstate trade under the *Federal Food, Drug, and Cosmetic Act* (21 U.S.C 331), s. 301. Available at: http://uscode.house.g.ov/browse/prelim@title21&edition=prelim, accessed July 2018. For a global overview see further *International policies to reduce plastic marine pollution from single-use plastics (plastic bags and microbeads): A review* in Marine Pollution Bulletin Volume 118, Issues 1–2, 15 May 2017, pages 17-26 at p 21. In Europe, see e.g. *The Environmental Protection (Microbeads) (England) Regulations 2017* (UK), accessed July 2018. Available at: https://www.legislation.gov.uk/uksi/2017/1312/contents/made, accessed August 2018.

[60] By 1 July 2018. More information available at: http://www.environment.gov.au/protection/waste-resource-recovery/national-waste-policy/plastics-and-packaging/plastic-microbeads.

4. Exemptions

No specific exemptions have been identified that fall within the definitions above, noting that the ban is tied to personal care products or rinse-off cosmetics, broadly defined.

Industrial and medical products applications of microplastics may need separate approaches and are out of scope here.[61]

If there are necessary medical or industrial applications of microplastics that could be captured by the definition, and that should be exempt on public interest grounds, these could be identified through detailed consultations.

For example, the treatment of over-the counter pharmaceuticals could be subject to staged implementation (non-prescription drugs) or if necessary, specific exemption (prescription drugs).

Circumstances for exemption should be limited, necessary, defined and specific.

5. Specific considerations for scope

Key terms to be defined are:

- 'personal care products', 'rinse-off cosmetics' (or preferred term for the Pacific);
- 'plastic microbead' and (other) microplastics;
- 'retailers' and other stakeholders in the supply chain who may be regulated.

For example, 'plastic microbead' could be defined as any solid plastic particle that is less than five millimeters in size and is intended to be used to exfoliate or cleanse the human body (or a part of the human body).[62]

The term 'rinse-off cosmetic' (or an agreed and preferred term) should be defined to include but not be limited to the following: soap, hand wash, body wash, shampoo and conditioner, toothpaste and sunscreen.[63]

Retailers and other regulated entities could be defined in conjunction with bans on single use plastic bags and take-away products (above).

6. Staging and commencement

A cosmetic microbead ban could be staged to enable the depletion of stock on hand within the jurisdiction.

For example, a ban on import and manufacture could come into effect six months from a policy announcement, with additional time (6-12 months) for the ban on distribution and sale to take effect.

Further information on appropriate staging and commencement could be gathered through consultation and product analysis, in domestic and Pacific regional markets.

By way of example, the US ban on manufacture of microbeads in cosmetics came into effect 1 July 2017, with the ban on distribution and interstate trade effective 1 July 2018. A one-year extension applies to microbeads in non-prescription drugs.[64]

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61 For example, voluntary, co-regulatory or regulatory measures to prevent industrial water pollution from plastic pellets widely used in plastics manufacturing; or working with whitegoods manufacturers and clothing companies to filter and reduce the prevalence of synthetic clothing fibres in the marine environment.

62 See e.g. *Federal Food, Drug and Cosmetic Act* (USA) *21 U.S.C. 331*, s. 301(ddd)(2).

63 While there may be legal argument whether sunscreen is a rinse-off product, it should be specified.

64 I.e. In a case of a rinse-off cosmetic that is a non-prescription drug, ban on manufacturing applies 1 July 2018; ban on distribution and sale applies 1 July 2019.

7. Alternatives, incentives and promotion

Unlike shopping plastic bags and single use plastic take-away products, cosmetic products that contain microbeads are generally interchangeable and readily substitutable for cosmetic products that do not contain plastic microbeads. Where abrasive additives are necessary, natural and environmentally safe alternatives should be explored.

While industry and consumer engagement will be necessary to the success of this regulatory option, the scale of this engagement is likely to be much narrower than for SUP shopping bags and take-away products.

Offences, penalties and enforcement

The relevant legislation should state that a breach of any prohibition described above, after the prescribed date when the prohibition takes effect, is an offence. Penalties should be prescribed, with larger penalties for corporations, increasing with repeat offences.

Jurisdictions will need to determine relevant agencies, responsibilities and methods of overseeing compliance with (and enforcement of) the ban throughout the supply chain.

8. Stakeholders affected (e.g. supply chain, consumers, government)

- Importers;
- Local manufacturers (where relevant);
- Distributors;
- Supermarkets;
- Chemists;
- Other retailers;
- Consumers;
- Government agencies related to consumer health, trade and commerce, waste management and environment.

9. Likely challenges and opportunities

A mandatory phase-out and ban of plastic microbeads in cosmetics will decrease the use of unnecessary or avoidable microplastics in production processes. In turn this decreases the risk of serious and irreversible pollution of the marine environment, ecology and food chain.

Technical specifications and lessons can be learned from international experience and support.

There is a risk that, if Pacific nations continue to *permit* the import, manufacture and sale of cosmetic products containing microplastics – while bans and phase-outs proceed internationally – the Pacific could become a 'dumping ground' for surplus, unnecessary and environmentally-harmful products that are banned in other regions.

Consultation is necessary with a limited pool of key business, industry and retail stakeholders to prepare for a phase-out of import, manufacture, distribution and sale in the near-term.

This consultation should be supported by general public awareness campaigns about what 'microplastics' and microbeads are, why they are a problem, and what alternatives are available (including non-microbead products and natural abrasives).

While these campaigns need not be expansive in scale, they may also help prepare the ground for extended regulation of other polluting microplastics in the Pacific in future.[65]

[65] To give one example, a ban on plastic glitter is under consideration in some countries. See Meggie Morris, ' War on glitter: Scientists and environmentalists move to ban the use of sparkly microplastics', *ABC News*(online), 11 December 2017. Accessed August 2018, available at: http://www.abc.net.au/news/2017-12-01/experts-call-for-glitter-microplastics-ban/9218222.

APPENDIX 3 MARINE PLASTIC POLLUTION: GARBAGE FROM SHIPS & DUMPING AT SEA

1. Issues

This appendix addresses two aspects related to marine plastic pollution – ship-based garbage pollution and the dumping of land-based waste at sea. That is:

- Marine pollution from ships, particularly garbage containing plastics, in accordance with the *Convention for the Prevention of Pollution from Ships* (**MARPOL**), Annex V; and
- Dumping of land-based waste that contains any form of plastics, in accordance with the **London Protocol**[66] and the **Pacific Dumping Protocol**.[67]

2. Broad objective

In relation to garbage from ships – to prevent the discharge of garbage that contains all forms of plastic (including fishing gear), and originating from domestic and foreign vessels and platforms (regardless of size or flag (country of registration)), in all maritime jurisdictions (including ports and marine internal waters).

Background information on dumping Protocols and Conventions is at **Attachment 3B**.

Related conventions that are not dealt with in detail here are the Stockholm Convention (on persistent organic pollutants), the Basel Convention and the regional Waigani Convention (transboundary movement of hazardous and other wastes, theoretically including plastics).[68]

3. Examples of jurisdictions and legislation

MARPOL (Prevention of pollution from shipping)

As at 2016, at least 10 SPREP member countries[69] and six SPREP member territories[70] had ratified or accepted Annex V of MARPOL on garbage from shipping (see *Cleaner Pacific 2025* Strategy, Table 3, at **Attachment 3C** to these instructions).[71]

This means several PICs have implemented legislation to prevent garbage pollution from ships and other vessels (as outlined below). A central theme is that such legislation generally prohibits the discharge of 'garbage' – including plastics, synthetic ropes and fishing gear – except in accordance with the Act or regulations.

For example, Fiji's *Marine (Pollution Prevention and Management) Regulations 2014* prohibits the discharge of garbage except in accordance with the regulations.[72] *Garbage* includes (among other things) 'all plastics' and 'fishing

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66 *London Protocol On Prevention Of Pollution By Dumping Wastes And Other Matters,* 1996. This is a protocol to the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*,1972. Both are available at: http://www.imo.org/en/OurWork/Environment/LCLP/Pages/default.aspx, accessed August 2018.

67 Protocol for the Prevention of Pollution of the South Pacific Region by Dumping. Available at: http://faolex.fao.org/docs/texts/mul-67024.doc, accessed August 2018.

68 On their present and future application, see K. Raubenheimer and A. McIlgorm, 'Can the Basel and Stockholm Conventions provide a global framework to reduce the impact of marine plastic litter?' (2018) *Marine Policy*, Online first 1-6.

69 Kiribati, Marshall Islands, Niue, Palau, PNG, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

70 American Samoa, French Polynesia, Guam, New Caledonia, Commonwealth of the Northern Mariana Islands, Wallis and Futuna (as Parties through their metropolitan country). SPREP Metropolitan members include Australia, France, NZ, UK, USA.

71 However, fewer jurisdictions had ratified or accepted ***both*** MARPOL Annex V ***and*** the London (Dumping) Convention and Protocol.

72 Division VII. Available at: https://drive.g.oogle.com/file/d/0B3X4hvYvdbHEYzQwUjdfNFd3TXM/view, accessed July 2018. See further, ***Maritime Transport Decree 2013*** (Fiji), at https://msaf.com.fj/legislation/, accessed July 2018.

gear'.[73] For example, the regulations require shipmasters and owners to prevent the discharge of plastics and other non-compliant garbage to be retained and discharged at shore facilities.[74] It is also an offence to discharge harmful substances.[75] Reporting obligations apply to discharges, escapes, ship damage, etc.

Papua New Guinea's *Marine Pollution (Ships and Installations) Act 2013* states: *'The discharge of plastics in any form from any vessel is prohibited*'.[76] The maximum penalty for discharging garbage in breach of this section is five years imprisonment.

Samoa's *Marine Pollution Prevention Act 2008* states that, unless an exception applies: 'no pollutant or harmful substance may be discharged from a vessel, platform or place on land into Samoan waters, or from a Samoan vessel into any waters'.[77] This prohibition 'includes, but is not limited to, any oil, plastics, synthetic ropes and synthetic fishing nets'. The maximum penalty is 10 years imprisonment.

The Solomon Islands' *Shipping (Marine Pollution) Regulations 2011* similarly states (subject to exceptions):

> *…no pollutant or harmful substance [including plastics] may be discharged from a vessel, platform or place on land into Solomon Islands waters, or from a Solomon Islands vessel into waters.*[78]

Tonga's *Marine Pollution Prevention Act 2002* similarly states:

> *No pollutant or harmful substance, including but not limited to oil, plastics, synthetic ropes and synthetic fishing nets may be discharged from a vessel, platform or place on land into Tongan waters or from a Tongan vessel into any waters.*[79]

Tuvalu's *Marine Pollution Act 1991* states that (other than as permitted by regulations):

> *If any garbage or sewage is discharged or escapes from any ship, or from any fixed or floating platform, or from any other man-made structure into Tuvalu waters…*
>
> *[or from any Tuvaluan ship into the sea outside Tuvalu waters]…*
>
> *the owner or master of the ship…or person in charge of the apparatus [or operations]*
>
> *…commits an offence under this section.*[80]

The examples above provide a range of useful reference points for jurisdictions that have yet to adopt MARPOL Annex V.

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73 *Marine (Pollution Prevention and Management) Regulations 2014* (Fiji), regulation 2.

74 *Marine (Pollution Prevention and Management) Regulations 2014* (Fiji), regulation 54. Regulations 51-53 limit dumping of garbage except for finely ground organic material and non-harmful cleaning agents, etc.

75 Clause 5. Harmful substances are defined to include 'all victual, domestic, and operational waste': see *Maritime Transport Decree 2013* (Fiji), s.128, 'harmful substance'. This may include plastic waste: see e.g. *Marine (Pollution Prevention and Management) Regulations 2014*, clause 2 'garbage'.

76 *Marine Pollution (Ships and Installations) Act 2013* (PNG), s. 34 (Discharge of garbage). *Garbage* is defined as "all kinds of victual, domestic and operational waste, including all forms of plastics, dunnage, cargo-lining and packaging materials…". Available at: http://nmsa.gov.pg/wp-content/uploads/2017/02/Marine-Pollution-Ships-Installations-Act-2013.pdf, accessed August 2018.

77 *Marine Pollution Prevention Act 2008* (Samoa), s. 9. Available at: http://extwprlegs1.fao.org/docs/pdf/sam78877.pdf, accessed August 2018.

78 *Shipping (Marine Pollution) Regulations 2011* (Solomon Islands), clause 9(2). Note that 'garbage' also meets the definition of pollutant (clause 2), and includes 'all kinds of food, domestic and operational waste, including plastics', accessed August 2018. Available at: http://extwprlegs1.fao.org/docs/pdf/sol148261.pdf.

79 *Marine Pollution Prevention Act 2002* (Tonga), s. 5, accessed August 2018. Available at: https://www.ffa.int/system/files/MarinePollutionPreventionAct2002.pdf.

80 *Marine Pollution Act 1991 (Tuvalu)*, s. 5(1), accessed August 2018. Available at: https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1992/1992-0001/MarinePollutionAct_1.pdf.

Dumping of waste at sea (including plastics)

The *Protocol for the Prevention of Pollution of the South Pacific Region by Dumping* (Pacific Dumping Protocol) to the Noumea Convention[81] is a regional agreement consistent with the London Convention.[82]

In brief, Parties to the Pacific Dumping Protocol endeavour and agree to act consistently with the Protocol in prohibiting and regulating dumping of waste at sea. This includes adopting a permit system for dumping of certain types of waste, and appointing authorities to consider criteria, issue permits for dumping, record information and monitor the marine environment (see Attachment 3B for details).

As at 2016, at least eight SPREP member countries[83] and seven SPREP member territories[84] had ratified or accepted the Pacific Dumping Protocol.[85] This involves translating obligations into domestic marine pollution and waste laws. While several Pacific nations have also ratified or accepted the London Convention 1972, fewer are noted as ratifying or accepting the updated London Protocol of 1996. That Protocol shifts from the 'permissive' approach under the Convention, to a 'prohibitionist' and precautionary approach to dumping. That is, the London Protocol generally prohibits marine dumping of any substance unless it is demonstrated not to damage the environment.

Overall, while a regional approach to plastics from shipping and dumping is desirable, there are inconsistencies in Pacific membership to the various Conventions and Protocols.

Marine pollution laws in Pacific Island Countries can be further consolidated by considering the options outlined below, in conjunction with domestic requirements and regional priorities.

4. Scope of regulation

The following are high-level drafting instructions for policymakers' consideration. They relate to two related issues relevant to marine plastic pollution: garbage from ships, and dumping of land-based waste at sea. These issues must be subject to specialised international law advice relevant to each jurisdiction.

As the *Cleaner Pacific 2025* Strategy (2016) notes:

> *The capacity of Pacific island countries and territories to prevent and respond to shipping impacts is currently limited…*
>
> *In addition, several Pacific island countries have not become Parties to the various conventions and protocols relating to the protection of the marine environment, including the MARPOL, London and Noumea Conventions.[86]*
>
> *To address these inadequacies, SPREP has been implementing the Pacific Ocean Pollution Prevention Programme (PACPOL) in partnership with the IMO since 1998.*

Relevant marine pollution issues identified in the *Cleaner Pacific 2025* Strategy include (among others):

- disposal at sea of ships' waste;
- marine litter including plastics, general garbage and abandoned, lost or discarded fishing gear; and
- inadequate facilities to receive ships' waste in regional ports.[87]

81 *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*, 1986.

82 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 1972.

83 Cook Islands, Federated States of Micronesia, Fiji, Marshall Islands, Nauru, PNG, Samoa, Solomon Islands.

84 American Samoa, French Polynesia, Guam, New Caledonia, Commonwealth of the Northern Mariana Islands, Tokelau, and Wallis and Futuna (as Parties through their metropolitan country). Associated SPREP Metropolitan members include France, NZ and USA.

85 See *Cleaner Pacific 2025* Strategy, Table 3, at **Attachment 3C** to these instructions.

86 Table 3 to the *Cleaner Pacific 2025* Strategy – reproduced at Attachment 3C to these instructions.

87 SPREP and JICA, *Cleaner Pacific 2025* (2016), 34-35.

In 2014 SPREP Members approved the third PACPOL Strategy for 2015-20.[88] PACPOL assists Pacific Island Countries to become members of the IMO and effectively implement IMO Conventions and Protocols, including the MARPOL Convention, uniform application of revised Annex V (garbage from ships); and the London Protocol (dumping of waste at sea).[89]

Prevention of (plastic) pollution by garbage from ships

Plastic garbage pollution poses a serious threat to the environment, human health and the economy. PICs are at the frontline of these threats due to their geography, socio-economic conditions and unique environments.

As noted, a major intent of these high-level drafting instructions is to give effect to the provisions of MARPOL Annex V (garbage), as modified by the Protocols of 1978 and 1997. It is estimated that around one third of ship waste is dumped at sea.[90]

Importantly, MARPOL prohibits the disposal of all fishing gear and plastics at sea.

Ideally, marine pollution laws would apply broadly – to domestic and foreign vessels and platforms, regardless of size or flag (country of registration). These laws would also apply in all maritime jurisdictions in which jurisdictions can legally exercise powers under the law of the sea (including ports and territorial waters). Where permissible, aspects of marine pollution laws may also apply to the exclusive economic zone.[91]

First, jurisdictions who have not done so should strongly consider ratifying, accepting, approving or acceding to MARPOL Annex V.

Second, in order to implement Annex V domestically, the legislation or regulations should prohibit the discharge of any fishing gear or other garbage that contains plastic (among other things). The provisions should aim to comply with the 2017 Guidelines for the implementation of MARPOL Annex V (2017 Guidelines) (and as amended from time to time).[92]

In particular, provisions should require ships to maintain garbage management plans, including garbage disposal log books, receipts and placards, that comply with the 2017 Guidelines. Ideally these requirements would apply to all types and sizes of vessels, including fishing vessels (compliance considerations are noted below).

Third, jurisdictions should work to provide adequate port reception facilities, including regional port reception facilities, in accordance with international standards. The IMO notes:

> *As provided in regulation 8.3, Small Island Developing States (SIDS) could satisfy the requirements for providing adequate port reception facilities through regional arrangements when, because of those States' unique circumstances, such arrangements are the only practical means to satisfy these requirements. Parties participating in a regional arrangement must develop a Regional Reception Facility Plan, taking into account the guidelines developed by IMO.*[93]

Examples of more detailed port regulations would include harmonising 'no-special-fee' systems for port facilities across the region (or locally-determined reasonable cost), to encourage appropriate disposal rather than discharge at sea; and mandating that all vessels discharge all waste before leaving ports or before leaving the region.[94]

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88 SPREP and IMO, *PACPOL 2015-2020 Strategy and Work Plans* (**PACPOL Strategy 2015-2020**). Available at: http://macbio-pacific.info/wp-content/uploads/2017/08/PACPOL-strategy-2015-2020-1.pdf, accessed Aug. 2018.

89 PACPOL Strategy 2015-2020, pp 22-23 and 60.

90 See e.g. SPREP, Pacific Conversations, 'Plastic Ocean Or Pacific Ocean?', May 2017, accessed August 2018. Available at: https://www.sprep.org/news/plastic-ocean-or-pacific-ocean-pacific-conversations-sprep.

91 See e.g. the Noumea Convention, and the Waigani Convention (*Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region*, 1995).

92 Adopted by the most recent International Maritime Organisation (IMO) Resolution MEPC.295(71), accessed August 2018. Available at: http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-(MEPC)/Pages/MEPC-2016-17.aspx.

93 IMO, 'Prevention of Pollution by Garbage from Ships', accessed August 2018. Available at: http://www.imo.org/en/OurWork/Environment/PollutionPrevention/Garbage/Pages/Default.aspx .

94 Both approaches are being used in the Baltic Sea region.

Fourth, and relatedly, the regulations should enable and implement port inspection procedures – including to review and audit garbage management plans, and garbage disposal receipts for all types of vessels (including fishing vessels).

Fifth, garbage disposal practices on ships should also be linked with observer programmes and reporting procedures on board all fishing vessels.[95] Regulations may be able to specify risk-based requirements for mandatory observer procedures.

Sixth, in order to reduce the quantity of fishing gear lost by snagging, regulations should limit the type of gear that vessels may use (through fishing licences or other mechanisms). This could be informed by international standards and regional surveys of abandoned and lost fishing gear. Inspections and penalties should apply.

Finally, regulations and guidelines should be developed for fish aggregating devices (FADs), their retrieval and allowable materials. For example, this could include prohibiting or regulating certain plastic materials; encouraging biodegradable materials (promoting local sustainable materials and industries); and developing national FAD management plans.[96]

Voluntary initiatives to support such regulatory measures are outlined under 6 below.

Dumping of (plastic) waste at sea

While drafting instructions in relation to dumping at sea are limited in this paper, policymakers should consider the following broad matters for adoption:

Ratify, accept, approve or accede to the London Protocol;

- Ratify, accept, approve or accede to the **Pacific Dumping Protocol**;
- Identify **shipping permit conditions that prevent** the dumping of material that may contain plastics (in any form), including permit applications for the dumping of sewage waste and dredged material;
- Procedures for **port inspections** during the loading of material for the purpose of dumping or incineration;
- Identify conditions for the **boarding of vessels** by inspectors; and
- Regulate the **export of wastes** or other matter for the purpose of dumping or incineration.

5. Exemptions

According to SPREP, there were almost 93,000 shipping traffic movements in the Pacific islands region in 2013. Over half of these – almost 50,000 – were fishing vessels.[97]

It is important that marine pollution laws clearly define and limit any exemptions from the general prohibition on disposal of garbage containing plastics. These should be not inconsistent with the standard MARPOL exemptions, such as for the accidental or other exceptional discharges or loss of garbage at sea.[98] It should also be made clear upfront which ships are exempt from garbage management plans and placards.

More generally, it is noted that proposed regulatory schemes are to apply broadly. However, each PIC will need to give specific and detailed consideration to the interaction between marine pollution laws that reflect MARPOL, and the rights and customs of traditional peoples, including artisanal fishers.

Where relevant and practicable, traditional and naturally biodegradable materials could be promoted (such as for fishing gear) and exempt from regulations, whereas plastic fishing gear may be subject to prohibition or regulation under fishing licences.

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[95] See e.g. K. Richardson et al., 'Marine pollution originating from purse seine and longline fishing vessel operations in the Western and Central Pacific Ocean, 2003–2015', *Ambio*, 2017 Mar, 46(2): 190–200, accessed August 2018. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5274615/.

[96] (See e.g. Western & Central Pacific Fisheries Commission, https://www.wcpfc.int/folder/fad-management-plans), accessed August 2018.

[97] *Cleaner Pacific 2025*, Figure 3, page 34.

[98] MARPOL, Annex V, Regulation 7 contains emergency or non-routine exceptions, for example.

Where relevant to the London Protocol or the Pacific Dumping Protocol, provisions should also identify exemptions for the dumping of wastes or other matter at sea, which may otherwise be prohibited. Permits for dumping should require transparent, scientifically-based criteria and processes, taking a precautionary approach to avoid harm.

6. Further specific considerations

Regulatory measures such as those outlined above are important. Nevertheless, it is recognised that compliance and enforcement around small PICs with large coastlines raises particular challenges.

A range of co-regulatory and non-regulatory supporting mechanisms should be employed to minimise marine plastic pollution from shipping. The 2017 Guidelines outline schemes and incentives that can be considered. This includes the creation of positive incentives and initiatives to facilitate more effective compliance, the removal of disincentives, and voluntary or opportunistic measures to reduce marine plastic pollution.[99]

Jurisdictions may wish to consider and identify priorities from the following brief examples:

- Encourage fishing vessels within all maritime jurisdictional zones (including the high seas) to **retrieve abandoned, lost or discarded fishing gear** and retain the material on board for discharge to port reception facilities;
- Where fishing gear retrieval is not possible or does not occur, fishing vessels could be **required to report** location, type and size of abandoned/lost gear;
- Implement **fishing gear 'take back' schemes**, and provide collection points for unused fishing gear (see below);
- Implement '**Fishing-for-Litter' programmes** or similar (see below);
- Implement **marine spatial planning** to prevent gear loss by gear conflict;
- Promote **reverse logistics programmes** (as a form of product stewardship)[100], using empty cargo space to safely transport unused fishing gear and plastic waste.

For example, fishing gear take back schemes involve a deposit/refund approach. They may require fishers to pay a deposit upon the purchase of fishing gear. Once the gear reaches the end of life stage, fishers return the net and retrieve the deposit. This can incentivise recycling of gear that would otherwise be burned, dumped or irresponsibly managed. This has been recommended by European Union bodies and reports.[101]

Fishing-for-litter programmes offer a financial reward to those who return derelict gear and other wastes found in the sea to port facilities. A recycling initiative could offer the same kind of reward system, but the source of funding would be from the recycling sector instead of local or regional governments. For example, Fishing for Litter programmes have been implemented in Scotland,[102] Hawaii[103] and South Korea.[104]

7. Staging and commencement

Given the interaction with international conventions, jurisdictions will need to establish project management and implementation timelines to consolidate their marine pollution laws. Refer to the PACPOL Strategy 2015–20 for further details.

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99 *2017 Guidelines for the Implementation of MARPOL Annex V* (Resolution MEPC.295(71)), part 6.

100 Product stewardship promotes responsible practices by industry throughout the lifecycle of products in order to reduce the generation of plastic waste during production, consumption, transport and final treatment processes.

101 See e.g. Rezero, *Rethinking Economic Incentives for Separate Collection* (2017), report for Zero Waste Europe, accessed August 2018. Available at https://www.zerowasteeurope.eu/wp-content/uploads/2017/07/Rethinking-economic-incentives2.pdf.

102 See *Fishing for Litter*: http://www.fishingforlitter.org.uk/what-is-fishing-for-litter, accessed August 2018.

103 In Hawaii, fishers are asked to report derelict fishing nets at sea. A team of trained volunteers then go to the reported location and remove the fishing gear. Once the gear is professionally retrieved, the commercial fishermen are awarded cash according to the weights of the reported derelict nets or gear.

104 In South Korea, fishers are responsible for both reporting and retrieving the gear themselves.

8. Compliance and enforcement

It is recognised that applying certain MARPOL requirements – such as garbage management plans and disposal logbooks to foreign and domestic fishing vessels of various sizes – presents a significant practical challenge for Pacific Island Countries, including in the areas of community engagement, compliance and enforcement.

Upfront consultation, staged implementation and ongoing support from government are essential to maximise uptake and effectiveness. This should include progressive development and review of resources and templates for smaller-scale fisheries. Fisheries licensing (applications, fees and renewals) should be further leveraged as a key opportunity for interaction, engagement and reinforcement of self-monitoring.

Penalties for non-compliance should be set at appropriate levels that reflect the relative scale of non-compliance and environmental risk of marine plastic pollution. Penalties should also be set at levels sufficient to deter poor marine garbage management practices. Provisions should include criminal penalties (which may include seizure and forfeiture of vessels) for known violations of domestic law.

Where relevant to the London Protocol, provisions should also set penalties for non-compliance at an appropriate level to deter dumping or incineration at sea of wastes or other matter containing plastics.

In developing offences and penalties, jurisdictions should obtain legal advice as to when and where (geographically) their regulators' powers can be exercised. For example, coast guards and similar authorities may be empowered to conduct surveillance and other enforcement activities (on relevant waters) to prevent unlawful discharge of garbage, transportation of material for dumping, or unlawful dumping.

To support compliance in the area of port inspections, regulators should use a risk-based approach to target vessel types with higher environmental risks and lower likelihood of compliance.

In addition to budget allocations, fines from enforcement should be re-invested in the relevant regulatory bodies and their compliance and monitoring programmes (including through statutory Environment Funds).

Regional approaches to investing in the capacity of port authorities and coastguards could also be considered.

9. Stakeholders affected

Provisions consistent with these instructions would likely affect, or need to consider, the following stakeholders (noting this is not an exhaustive list):

- Shipowners;
- Logistics companies;
- Shipmasters, crew and officers of ships;
- Professional associations (e.g. unions) of crew and officers;
- Fishermen and fishing corporations;
- Local and artisanal fishers;
- NGOs (e.g. Global Green Growth Institute); and
- Government departments and agencies including Environment, Customs, port authorities and coast guards.

10. Challenges and opportunities

Improving Pacific marine pollution laws to better address plastic pollution is a large task, but the challenges of *not* addressing the issue are greater, and already with us.

As noted, several Pacific Island Countries have ratified or acceded to international Conventions and Protocols related to marine pollution and plastics, including the:

- MARPOL (pollution from ships, including Annex V on garbage);

- London Convention and Protocol (dumping at sea); and
- Pacific Dumping Protocol to the Noumea Convention.[105]

However, few PICs have accepted all of these Conventions and their Protocols, which presents challenges and opportunities for a regionally consistent and comprehensive approach. In addition, at a global level, international law is only gradually catching up with the specific challenges presented by plastic pollution.

On one hand, international law may be seen to add a layer of complexity to implementing domestic marine pollution laws. On the other hand, these Conventions and Protocols provide a consistent, 'off-the-shelf' framework that has been tested by other nations, globally and regionally, that can be customised to jurisdictions' needs.

After design and adoption, resourcing challenges to implement and enforce marine pollution laws are significant. PICs with large coastlines face particular challenges, and solutions may lie in regional collaboration and capacity-building. Smart regulation also uses incentives and voluntary initiatives to stimulate compliance and self-monitoring, with various supporting initiatives outlined above.

Other challenges may include:

- economic constraints on imposing additional costs on local industries;
- managing multiple and diverse stakeholder engagement, and trust; and
- potential for corporate backlash due to perceived regulatory burden.

Other opportunities may include:

- improving the long-term economic viability of shipping by reducing hazards posed by marine plastic garbage;
- improving the long-term viability of the fishing industry in the Pacific;
- reducing the threat of entanglement and mortality of marine wildlife;
- increasing public amenity for local communities and tourist visitors;
- preserving the unique and fragile marine ecosystems of Pacific islands;
- developing new markets (e.g. sustainable fishing gear), sources of revenue or cost recovery (*polluter pays* approaches);
- increased funding opportunities and donor interests from exploring and expanding international commitments; and
- protecting long term public health, and reducing costs in the environmental, waste management and health sectors.

[105] See *Cleaner Pacific 2025* Strategy, Table 3, reproduced at **Attachment 3C** below. On related international agreements, including the Stockholm Convention (persistent organic pollutants) and Basel Convention (transboundary movement of hazardous and other wastes, theoretically including plastic), see K. Raubenheimer and A. McIlgorm, 'Can the Basel and Stockholm Conventions provide a global framework to reduce the impact of marine plastic litter?' (2018) *Marine Policy*, Online first 1-6.

ATTACHMENT 3A

Background to the Convention for the Prevention of Pollution from Ships, 1973/1978 (MARPOL), Annex V

MARPOL is the International Convention to address ship-based sources of pollution (and prevent discharge of harmful substances or effluents containing such substances). Over 150 nations have ratified or adopted optional Annex V on garbage from ships.[106]

Annex V prohibits the discharge of all garbage into the sea (regulation 3), except as provided in regulations 4, 5 and 6 of the Annex (relating to food waste, non-harmful cargo residues, cleaning agents and additives and animal carcasses), and certain emergency situations (regulation 7).[107]

Ships are recommended to use port reception facilities as the primary means of discharge for all garbage.[108]

Garbage includes (among other things) all kinds of food-related, domestic and operational waste from ships, all plastics, cargo residues and fishing gear.[109]

Discharge into the sea of all plastics – including but not limited to synthetic ropes, synthetic fishing nets, plastic garbage bags and incinerator ashes from plastic products[110] – is prohibited (regulation 3.2), subject to exceptions under regulation 7.

Exceptions to the general prohibition, under regulation 7, include:

- securing the safety of the ship or of those on board or saving a life at sea;
- accidental loss of garbage due to damage to the ship or equipment (having taken all reasonable precautions to prevent or minimise loss);
- accidental loss of fishing gear (having taken all reasonable precautions to prevent such loss); or
- discharge of fishing gear to protect the marine environment, the ship or crew.

If plastic is mixed with other garbage it must be treated as if it is all plastic, and subject to the most stringent procedures for the handling and discharge.[111]

[106] IMO, Prevention of Pollution by Garbage from Ships, accessed August 2018. Available at: http://www.imo.org/en/OurWork/Environment/PollutionPrevention/Garbage/Pages/Default.aspx.

[107] MARPOL Annex V, Regulation 7 provides limited exceptions to Regulations 3-6.

[108] *2017 Guidelines for the Implementation of Annex V,* at 1.2.

[109] MARPOL, Annex V, Regulation 1(9).

[110] MARPOL, Annex V, Regulation 1(13).

[111] *2017 Guidelines for the Implementation of Annex V,* para 2.4.6.

ATTACHMENT 3B

Background on the Pacific Dumping Protocol to the Noumea Convention, and London Convention and Protocol on Dumping

Under the *Convention for the Protection of the Natural Resources and Environment of the South Pacific, 1986* (Noumea Convention), two Protocols were put in place which respectively deal with dumping,[112] and combating pollution emergencies.[113]

The first of these Protocols, the Pacific Dumping Protocol, is a regional agreement consistent with the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 1972 (London Convention).[114]

By 2016, at least eight SPREP member countries[115] and seven SPREP member territories[116] had ratified or accepted the Pacific Dumping Protocol.[117] A number of PICs have not ratified the Protocol, or its parent, the Noumea Convention.

Parties to the Pacific Dumping Protocol agree to **prevent, reduce and control pollution from the dumping of wastes or other matter**, generally where the Noumea Convention applies (Articles 2 and 3).

Any dumping that does take place within the territorial sea, exclusive economic zone, or continental shelf of a Party is by **prior permit only** (Article 3.2).

Dumping of wastes or other matter listed in Annex I to the Protocol is generally **prohibited** (Article 4), except in disasters and emergencies (Articles 9 and 10). Annex I prohibitions relevantly include:

4. Persistent plastics and other persistent synthetic materials, for example, netting and ropes, which may remain in suspension in the sea in such a manner as to interfere materially with fishing, navigation or other legitimate uses of the sea.

Special permits are required prior to dumping waste listed at Annex II (Article 5), and **general permits** are required prior to dumping other matter not listed (Article 6). Permits are dealt with further in Articles 11 and Annex III (establishment of criteria). Annex IV enables substances to be allocated as prohibited or permitted (Annex I-II).

Parties also agree to implement laws to regulate dumping that are no less effective than internationally recognised rules within the London Convention framework (Article 3).

The next step is to ensure such laws adopt a 'prohibitionist' and precautionary approach to dumping, in accordance with the 1996 London Protocol. Certainly, nothing in the Pacific Dumping Protocol *prevents* other measures to prohibit or prevent dumping (Articles 4 & 13).

The dumping of waste or material in relation to the normal operation of ships is not covered by the Pacific Dumping Protocol.[118] However, the MARPOL Convention Annex V addresses disposal of operational waste and other garbage from ships.

The diagram below notes how MARPOL, the London Convention (LC) and London Protocol (LP), together with Regional Agreements like the Noumea Convention and its Pacific Dumping Protocol, provide a regulatory framework for sea and land-based activities:[119]

[112] *Protocol for the Prevention of Pollution of the South Pacific Region by Dumping*, 1986 (**Pacific Dumping Protocol**).

[113] *Protocol concerning co-operation in combating pollution emergencies in the South Pacific region,* 1986.

[114] *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 1972.

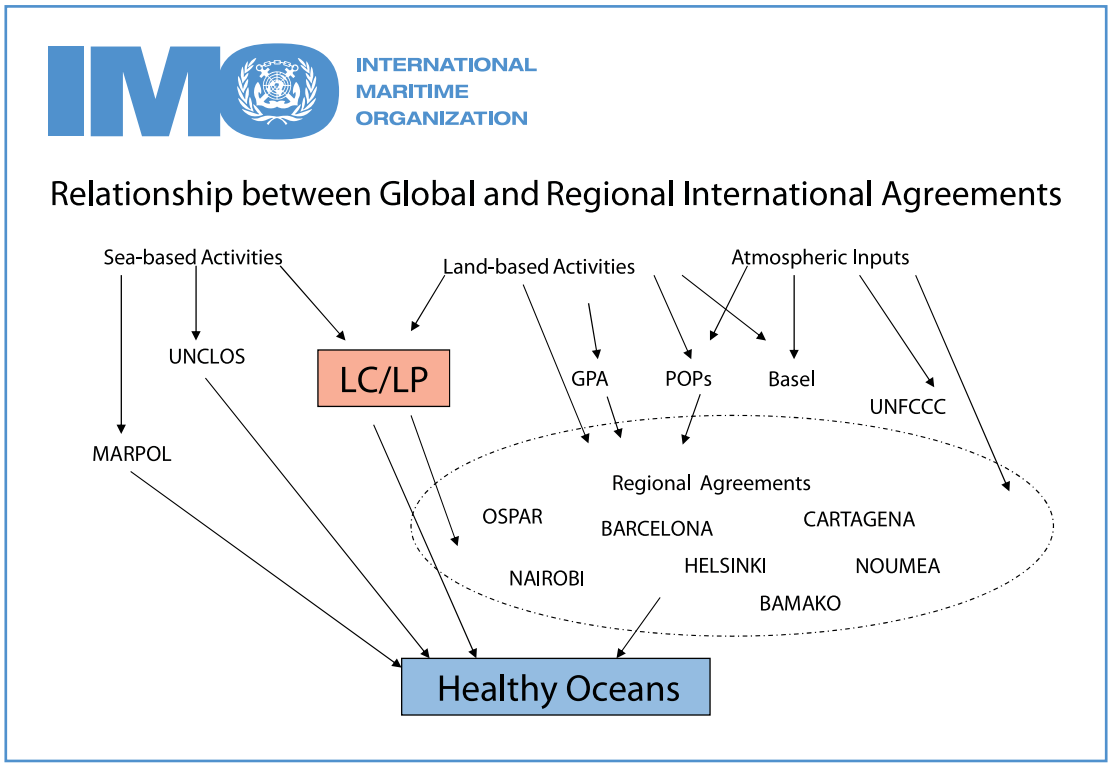
[115] Cook Islands, Federated States of Micronesia, Fiji, Marshall Islands, Nauru, PNG, Samoa, Solomon Islands.

[116] American Samoa, French Polynesia, Guam, New Caledonia, Commonwealth of the Northern Mariana Islands, Tokelau, and Wallis and Futuna (as Parties through their metropolitan country). Associated SPREP Metropolitan members include France, NZ and USA.

[117] See *Cleaner Pacific 2025* Strategy, Table 3, at **Attachment 3C** to these instructions.

[118] See further B. Boer, *'Environmental Law and the South Pacific: Law of the Sea Issues'* in J. Crawford and D. Rothwell, *The law of the sea in the Asian Pacific region: developments and prospects*, 1995, p.67-92 at p 82.

[119] A. Birchenough, 'IMO and Other Global Agreements for the Protection of the Marine Environment and their Relation to the London Protocol', Office of the London Convention/Protocol and Ocean Affairs, IMO National Workshop on the London Protocol, Kiev, Ukraine, 14–15 November 2017, 38, accessed August 2018. Available at: https://mtu.gov.ua/files/nahaievska/2017_11_15_LK/LP%20Ukraine_LP%20legal%20framework%20&%20other%20conventions.pdf.



Source: A. Birchenough, 'IMO and Other Global Agreements for the Protection of the Marine Environment and their Relation to the London Protocol', Office of the London Convention/Protocol and Ocean Affairs, 2017.

Solomon Islands © Carlo Iacovino

ATTACHMENT 3C

CLEANER PACIFIC 2025 STRATEGY (2016), TABLE 3 (pp. 14-15)

Pacific Island Countries and Territories Participation in International and Regional Waste, Chemicals, and Pollution Treaties

International and regional (Pacific) Conventions	SPREP Member Countries														SPREP Member Territories							Metropolitan Members				
	Cook Islands	FSM	Fiji	Kiribati	Marshall Islands	Nauru	Niue	Palau	PNG	Samoa	Solomon Islands	Tonga	Tuvalu	Vanuatu	American Samoa	French Polynesia	Guam	New Caledonia	CNMI	Tokelau	Wallis and Futuna	Australia	France	New Zealand	United Kingdom	USA
Stockholm Convention	x	x	x	x	x	x	x	x	x	x	x	x	x	x		x*		x*			x*	x	x	x	x	s
Basel Convention	x	x		x	x	x		x	x	x		x				x*		x*			x*	x	x	x	x	s
Waigani Convention	x	x	x	x		s	x	s	x	x	x	x	x	x						x*		x		x		
Rotterdam Convention	x				x					x		x				x*		x*			x*	x	x	x	x	s
Montreal Protocol	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x*	x*	x*	x*	x*	x*	x*	x	x	x	x	x
Minamata Convention								s		s					x*		x*		x*			s	s	s	x	x
MARPOL 73/78 (Annex I/II)	x			x	x		x	x	x	x	x	x	x	x	x*	x*	x*	x*	x*		x*	x	x	x	x	x
MARPOL 73/78 (Annex III)				x	x		x	x	x	x	x	x	x	x	x*	x*	x*	x*	x*		x*	x	x	x	x	x
MARPOL 73/78 (Annex IV)				x	x		x	x	x	x	x	x	x	x		x*		x*			x*	x	x		x	
MARPOL 73/78 (Annex V)				x	x		x	x	x	x	x	x	x	x	x*	x*	x*	x*	x*		x*	x	x	x	x	x
MARPOL Protocol 97 (Annex VI)	x			x	x		x	x		x		x	x	x	x*	x*	x*	x*	x*		x*	x	x		x	x
London Convention 72				x		x			x		x	x		x	x*	x*	x*	x*	x*		x*	x	x	x	x	x
London Convention Protocol 96					x							x		x		x*		x*			x*	x	x	x	x	
INTERVENTION Convention 69			x		x				x			x		x	x*	x*	x*	x*	x*		x*	x	x	x	x	x
INTERVENTION Protocol 73					x							x		x	x*	x*	x*	x*	x*		x*	x	x	x	x	x
CLC Convention 69			D		D				D			D	D	D								D	D	D	D	
CLC Protocol 76					x								x	x		x*		x*			x*	x	x		D	
CLC Protocol 92	x		x	x	x		x	x	x	x	x	x	x	x		x*		x*			x*	x	x	x	x	
FUND Convention 71			D		D				D			D	x	D								D	D	D	D	

International and regional (Pacific) Conventions	SPREP Member Countries														SPREP Member Territories							Metropolitan Members				
	Cook Islands	FSM	Fiji	Kiribati	Marshall Islands	Nauru	Niue	Palau	PNG	Samoa	Solomon Islands	Tonga	Tuvalu	Vanuatu	American Samoa	French Polynesia	Guam	New Caledonia	CNMI	Tokelau	Wallis and Futuna	Australia	France	New Zealand	United Kingdom	USA
FUND Protocol 76					x									x		x*		x*			x*	x	x		D	
FUND Protocol 92	x		x	x	x		x	x	x	x		x	x	x		x*		x*			x*	x	x	x	x	
FUND Protocol 2003																x*		x*			x*	x	x		x	
OPRC Convention 90					x			x		x		x		x	x*	x*	x*	x*	x*		x*	x	x	x	x	x
HNS Convention 96										x		x														
HNS PROT 2010																										
OPRC/HNS 2000								x						x		x*		x*			x*	x	x			
Bunkers Convention 2001	x			x	x		x	x		x		x	x	x		x*		x*			x*	x	x	x	x	
Anti Fouling Convention 2001	x			x	x		x	x				x	x	x	x*	x*	x*	x*	x*		x*	x	x		x	x
Ballast Water 2004	x			x	x		x	x				x	x			x*		x*			x*		x			
NAIROBI WRC 2007	x				x		x	x				x	x												x	
Hong Kong Convention																x*		x*			x*		x			
Noumea Convention	x	x	x		x	x			x	x	x				x*	x*	x*	x*	x*	x*	x*	x	x	x		x
- Dumping Protocol	x	x	x		x	x			x	x	x				x*	x*	x*	x*	x*	x*	x*		x	x		x
- Emergencies Protocol		x	x		x	x			x	x	x				x*	x*	x*	x*	x*	x*	x*	x	x	x		x
- Dumping Protocol (Amended)																										
- Oil Pollution Protocol		s	s		s					s													s			s
- HNSP Protocol		s	s		s					s													s			

Legend: X = ratification, acceptance, approval or accession; X* = Party through its metropolitan country; S = signature; D = denunciation

APPENDIX 4 CONTAINER DEPOSIT SCHEMES

1. Product/Issue

A 'container deposit law' or scheme that provides a small refundable deposit (e.g. 5-10 cents) to consumers or collectors who return prescribed beverage containers for recycling (e.g. alcohol and soft drink cans and/or bottles of a specified size).

Container deposit schemes have been used for several decades as a primary tool for product stewardship and extended producer responsibility (EPR). Administrative approaches differ widely, so container deposit schemes should be subject to detailed feasibility studies for the relevant jurisdiction.

2. Broad objective

To promote extended producer responsibility for plastic bottles (and other beverage containers), provide an incentive to increase recycling and recovery rates, and reduce the impacts of plastic waste in landfill and the environment.

3. Examples of jurisdictions and legislation

Several South Pacific Island nations have a container deposit law (CDL) in place, including Fiji,[120] Guam,[121] Kiribati,[122] Micronesia,[123] and Palau.[124]

For example, the Palau scheme has a reported 90% recovery rate in areas covered.[125] Factors that contribute to current success and potential for future up-cycling are legislation, technical capacity,[126] financial support for establishment and operation,[127] recycling economics, tourism, and a culture of environmental stewardship.

In Kiribati, the beverage container deposit law is linked to the *Special Fund (Waste Materials Recovery) Act 2004*, and part of the *Kaoki Mange!* ('Send back the rubbish!') Project.[128]

In Kiribati, container deposit money is initially collected from importers of cans and bottles by the Customs Service at first entry (and later paid by each retail consumer). This money is deposited into the Special Fund set up under the

[120] *Environment Management (Waste Disposal and Recycling) Regulations 2007,* and *Environment_Management_Container_Deposit_Regulations_2011* (Fiji).

[121] Public Law 30-221, *Guam Beverage Container Recycling Act* (Guam).

[122] The *Special Fund (Waste Materials Recovery) Act 2004* (Kiribati).

[123] State Law 5 –15, Title 9, Chapter 22 and Title 10, S. 205(1)(d); Kosrae Recycling Program (Kosrae State Code 9.2201-9.2210); Recycling Program Regulations (Micronesia).

[124] The Republic of Palau Public Law No. 7-24; Beverage Container Recycling Regulations.

[125] L. *Starkey, Challenges to Plastic Up-Cycling in Small Island Communities: a Palauan Tale* (Center for Marine. Biodiversity & Conservation 2017), 18, accessed July 2018. Available at: https://canvas.ucsc.edu/files/204587/download?download_frd=1.

[126] At the Koror State recycling facility in Palau, since 2004, this up-cycling centre has grown from a very small facility to a robust facility that is able to recycle 50% of Koror's waste (through composting, beverage bottle recycling, a glass blowing kiln and pyrolysis). Ibid, 15.

[127] E.g. the success of the Koror State (Palau) recycling facility and the implementation of pyrolysis benefited from significant financial support from Japan and the knowledge and follow through of the director of the Koror State recycling centre (Katsuo Fuji). Ibid, 16.

[128] See e.g. *Kaoki Mange Annual Report* (2005), for an explanation of the project goals and success, accessed in July 2018. Available at: http://www.bottlebill.org/assets/pdfs/legis/world/kiribati2005.pdf. See further in ***Island Business,*** 'Return the Rubbish' a hit in Kiribati, (13 February 2008), accessed in July 2018. Available at: http://www.bottlebill.org/legislation/world/details/kiribati-article.htm . *Kaoki Mange* also includes a deposit-based ($5) lead-acid battery recycling program and a car recycling programme, plus initiatives to reduce organic/landfill waste.

2004 Act, to finance the consumer refund scheme.[129] Container deposit money in the Special Fund is only available for refunds on containers for which a deposit has been paid (or associated recycling activities).

The consumer brings the container to designated collection points, and receives four cents per item (or 20 cents for five cans/bottles).[130] The Kaoki Mange Operator (a private entity) claims back five cents from the Special Fund for every item refunded. This includes one cent that the Operator keeps as a contribution to running costs (e.g. container crushing and export for recycling), as described in regulations.

The Kiribati approach, with upfront deposit collection and links to that country's Special Fund, differs from other jurisdictions in the Pacific islands and Australia.

4. Scope of regulation (product or activity regulated, who is regulated)

As several jurisdictions demonstrate, there are numerous ways to scope and implement container deposit laws.

Detailed scoping for each jurisdiction would require comprehensive analysis and integration with existing waste legislation, recycling schemes and environmental funds. Jurisdictions can learn from each other's experience as well as domestic priorities. Joint schemes or regional container processing could also be considered.

Below are some key considerations for scope. However, this is not exhaustive.

A primary scoping and design consideration is how a container deposit scheme could build on existing domestic infrastructure – to increase the level of recycling of beverage containers, and reduce the level of litter and pollution. For example:

- Does the jurisdiction have a mandatory licensing scheme for importing or bottling beverages?
- If so, does it require the licensee or applicant to demonstrate how used bottles will be collected and/or recycled (e.g. jointly with other businesses)?
- Are licensing fees directed to waste management and recycling?
- Do licence conditions require or prohibit certain bottle sizes or types, or require that containers are made from recyclable (or recycled) materials?[131]
- What is the level and coverage of waste depots and recycling infrastructure?
- Could a container deposit scheme leverage or help expand infrastructure?

While licensing is beyond the scope of these instructions, container deposit and import/bottling licence schemes should complement and support one another. For example:

- Require importers and bottling licensees to demonstrate suitable waste management and/or recycling arrangements;[132]
- Examine opportunities to link licensing fees to recycling infrastructure (noting geographic coverage and equity issues are key challenges to deposit schemes);

[129] The deposit money is paid by Customs according to the account code for the Special Fund administered by the Ministry of Finance. The *Special Fund (Waste Materials Recovery) Act 2004* aims to provide access to solid waste services and improve Kiribati's ability to deal with water and land pollution caused by uncollected and uncontained wastes.

[130] This rate of refund is determined in the Regulations attached to the Special Fund Act.

[131] The optical scanners used to identify types of plastic at many recycling facilities using the reflection of light deem black plastic unrecyclable in the current infrastructure being applied in various countries. Unless newer technology is used, coloured plastics cannot be sorted well and the final recycled plastic is difficult to keep at the same colour quality that retailers expect. However, it is believed that Container Deposit Schemes can help address this problem. Where such schemes are in place, they can help to further sort and separate containers from the general waste stream. In Japan, for instance, the PET beverage industry voluntarily decided to only use clear PET and change the colour on the labels of the bottles to keep the marketing colour (green for 7Up, etc.) and not the colour of the bottle themselves, so that recycling targets could be met for PET. These labels must be designed to be removed.

[132] See e.g. Fiji's *Environment Management (Waste Disposal and Recycling) Regulations 2007*, Part 7.

- Regulate or prohibit bottle sizes,[133] materials and sources[134] in licence conditions to maximise the proportion of bottles covered by container deposit schemes;
- How might existing waste collection infrastructure (levels/coverage) inform the ways that consumers could most easily return bottles and access refunds? (E.g. could retailers double as return locations, or are 'depots' more suitable?).

The mechanism for ensuring the deposit is added to the cost of beverages across the supply chain is important, and may vary with scheme design and administration. A key consideration is whether a government administrator collects the refund upfront (as in Kiribati), or whether private operator(s) process containers and administer refunds according to set regulations.

Whether this involves a mix of public and/or private operators, there must be clear role definition, governance, oversight and enforcement, and transparent record-keeping. This should include annual returns from recyclers and others in the supply chain. This provides data and assurance as to how many bottles are in the system, how many refunds are being claimed, and levels of funding to/from different sources.

As with environmental levies, container deposit schemes may (or may not) be linked to statutory Environmental Funds, as in Kiribati. Again this depends on the jurisdiction.

The legislation or regulations should clearly define the scope of beverage containers that do and do not attract a consumer refund. This relates to:

- container size (ounces or litres);
- materials (e.g. PET plastic, other recyclable/recycled content specifications);
- product content (e.g. alcohol, dairy or non-dairy, etc.);[135] and
- source (e.g. inclusion of imported and domestically manufactured bottles; whether and how the import of used bottles needs to be regulated).[136]

Consistent labelling and bottle suitability requirements for these refundable beverage containers (including size, materials and other conditions) should be clearly set out wherever detailed regulations or standards are prescribed.

The level of consumer refund should be consulted on, with reference to other existing schemes and domestic circumstances, and then established by law. Jurisdictions should consider the legal mechanism for setting and revising the refund amount in future (e.g. higher refund to incentivise behaviour, adjust for inflation, etc.).

Legislation or regulations may assign parts of the total 'deposit' to different recipients. For example, the deposit may be divided between consumer refunds, recycling centre and scheme administration costs, environmental funds or charities.[137]

The diagram below is an example of a generic deposit-refund system. It shows how the deposit may be passed along the supply chain, from initiation (noting distributors would include importers) to redemption (of refund) by consumers:

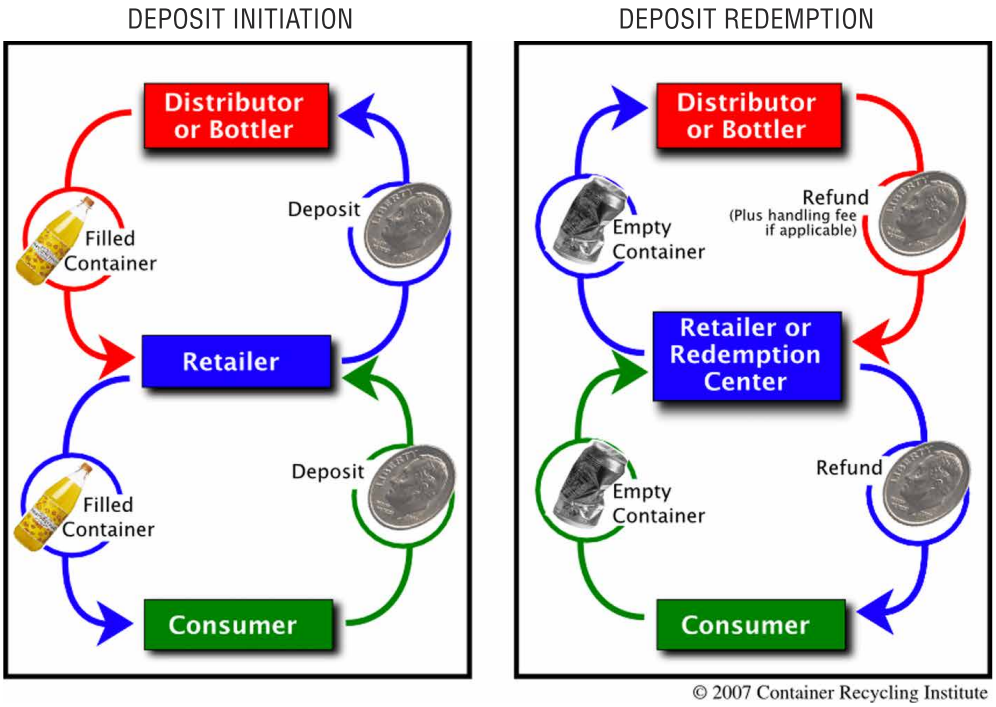
[133] E.g. San Francisco has prohibited sale of small plastic bottled water (<600mL approx.).

[134] It may be necessary to regulate/prohibit import of used bottles if these risk fraudulent refund claims.

[135] E.g. Palau includes glass, PET (polyethylene terephthalate), HDPE (high density polyethylene) and metal beverage containers up to 32 ounces (about 950g). Beverage types include beer, ale, or other drink produced by fermenting malt; mixed spirits; mixed wine; tea and coffee drinks (regardless of dairy-derived product content); soda; non-carbonated water; all non-alcoholic drinks.

[136] These decisions may have international trade law implications, e.g. if imports are treated differently. As above, another source consideration is new ***versus*** used bottles (used bottles may create fraud risks).

[137] In Palau, the 10 cent deposit is split between consumers (5 cents), redemption centres and the government administrator (2.5 cents each). See e.g. (accessed July 2018): https://reloopplatform.eu/wp-content/uploads/2017/05/BOOK-Deposit-Global-Pacific-Island-States.pdf.



Source: Container Recycling Institute, Bottle Bill Resource Guide [138]

5. Exclusions

The more beverage containers that are excluded, the lower the total amount recouped by the scheme (whether for consumers, environmental funds or recycling), the lower the incentives to recycle, and the lower the scale of pollution reduction on land and waters.

This needs to be balanced with infrastructure considerations and recycling economics, including the ability to recycle bottles that are over or under a certain size. Joint schemes and regional processing could also be part of the solution.

Again to give an example, the Palau scheme excludes liquids which are:

- a syrup, in a concentrated form, or typically added as a minor flavouring ingredient, such as extracts;
- liquid which is ingested for medicinal purposes only;
- liquid that is designed and consumed only as a nutritional supplement and not as a beverage;
- products frozen at the time of sale to the consumer; products designed to be consumed in a frozen state;
- instant drink powders; milk and other dairy-derived products.

6. Further specific considerations

Initial scheme design will need to determine the source(s) of start-up funding that may be available to design and establish container deposit schemes. As a starting point, principles of *product stewardship*, *extended producer responsibility* and the *polluter pays principle* point to the need for beverage companies to bear the costs of managing their product waste.

Related considerations include:

- What is the role of corporate responsibility in funding initiatives and action to manage waste and minimise litter and marine pollution?
-

[138] Available at: http://www.bottlebill.org/about/whatis.htm, accessed August 2018.

- What is the role of government in funding upcycling initiatives (value-adding), and is there scope to leverage public-private partnerships with universities, industries and local manufacturers?
- Can existing fee structures be expanded to further allocate money to up-cycling initiatives?
- What is the role of international development agency grants?

There should be opportunities for local community involvement (including women) in designing and participating in up-cycling or value-adding processes for collected materials.

Relevant considerations in this area include the composition of plastic, available or transferrable technologies (including public-private partnerships above), and assessment of economic feasibility and environmental sustainability of alternative up-cycling options and initiatives.[139]

Key definitions and terminology will depend on the regulatory scope and exclusions.

Verifiable auditing and tracking systems are usually required to ensure objectives and targets are met.[140]

The enabling legislation should stipulate the record keeping and audit roles of all major scheme participants. In particular, requirements that:

- the numbers of containers going through the system are accurately tracked and reconciled;
- payments for those containers (both refunds and fees) are accurate, fair and timely;
- accurate and transparent records of all transactions relating to containers are maintained; and
- comprehensive and ongoing audit processes are in place.[141]

To ensure that the objectives of the scheme are being met, administrative targets could be set against those objectives such as: redemption targets; total refund targets; and container refund point access targets.

To encourage transparency, targets could be established in the relevant regulations, with a requirement that the scheme operator regularly report on performance against the targets to parliament via the relevant Minister.

7. Supporting measures

Container deposit laws are more likely to succeed in conjunction with other legislative and non-legislative measures to reduce and manage waste – from expanding infrastructure for solid waste management, consumer education, local business development, environmental levies; through to sustainable materials management and product design.

Among other measures below, recommendations from a recent case study of Palau are potentially applicable to other small island communities:[142]

- Expanding municipal waste collection may provide additional opportunities to expand container deposit infrastructure (such as collection points). In turn this can help to address potential inequities of access to refund schemes;
- Environmental levies may be used to increase funding to waste collection;
- 'Up-cycle' solutions (which value-add to collected material) may be suited to some small island communities

[139] Areas for further study and analysis include funding mechanisms, behavioural economics, the composition of plastics, suitable technologies, environmental sustainability and economic feasibility.

[140] Marsden Jacob Associates, Report prepared for EPA Tasmania, *Development of a Model Framework for a CRS for Tasmania* (Marsden Jacob Associates, April 2018), accessed in July 2018. Available at: http://epa.tas.gov.au/Documents/H893229_MJA_CDS%20Framework%20Report_Final.pdf.

[141] Marsden Jacob Associates, Report prepared for EPA Tasmania, *Development of a Model Framework for a CRS for Tasmania* (Marsden Jacob Associates, April 2018), at p. x, accessed in July 2018. Available at: http://epa.tas.gov.au/Documents/H893229_MJA_CDS%20Framework%20Report_Final.pdf.

[142] L. *Starkey, Challenges to Plastic Up-Cycling in Small Island Communities: a Palauan Tale*, Center for Marine Biodiversity & Conservation, 2017,accessed in July 2018. Available at: https://canvas.ucsc.edu/files/204587/download?download_frd=1 .

because they can be locally implemented, provide a variety of options, and have potential to be profitable.[143] Public-private partnerships could be explored, including with Pacific and overseas universities;

- Increased communication and collaboration between engaged organisations, government agencies, businesses, and individuals can increase human capacity to identify and implement upcycling initiatives;
- Identify or create financial incentives for recycling and upcycling that address the lack of value on post-consumer plastics. For example, conduct further research on the economic feasibility of up-cycling initiatives through an analysis of the waste stream and the composition of plastic litter, to assess opportunities for a steady supply of plastic feedstock.

8. Staging and commencement

Container deposit laws may require significant lead time, given the need for detailed consultation, scheme design, and infrastructure roll-out (e.g. collection points). Preliminary scoping, design and consultations can take years, particularly against industry resistance.

Excluding this initial period, at least 12 months may be required between passage of the relevant legislation and regulations and scheme commencement, to provide sufficient time for effective planning and implementation. In other contexts, 18 months has been suggested as a recommended period to set up or implement a model scheme, based on a review of multiple past schemes.[144] However, a longer period may be required to deal with challenges of infrastructure in the Pacific.

To allow a run-up to peak periods, the scheme could commence during a period of low beverage consumption, such as in the winter months.[145]

9. Compliance and enforcement

Appropriate sanctions should be considered for both operators and commercial participants regulated by the container deposit law. Offences and penalties would need to be tailored to fit the scheme design. For example, if a private operator is selected to accept and recycle containers or disburse refunds, failure to meet critical performance targets could result in sanctions.[146]

For regulated entities such as importers, bottlers, retailers and collection companies, appropriate offences and penalties should apply for breaching requirements of the Act or regulations (such as failure to pay deposits or meet manufacture/import standards). Offences may also apply for breach of import/bottling licence conditions.

Sanctions should be graduated and proportionate, with serious infringements resulting in prosecution and fines, suspension or cancellation of licences or operating responsibilities.[147] Lower level sanctions such as (where appropriate) infringement notices should be sufficient to encourage improved performance.

A mandatory container deposit scheme, with incentives for voluntary consumer participation, reduces the number of major compliance targets (entities). Consumer incentives can be further supported by littering offences.

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143 L. Starkey, *Challenges to Plastic Up-Cycling in Small Island Communities: a Palauan Tale*, Center for Marine Biodiversity & Conservation, 2017, 5.

144 See e.g. '2018- A Model Framework for a Container Refund Scheme in Tasmania' accessed July 2018. Available at: http://epa.tas.gov.au/policy/other-topics/resource-recovery/container-deposit-scheme.

145 Marsden Jacob Associates, Report prepared for EPA Tasmania, *Development of a Model Framework for a CRS for Tasmania* (Marsden Jacob Associates, April 2018), at p.59, accessed in July 2018. Available at: http://epa.tas.gov.au/Documents/H893229_MJA_CDS%20Framework%20Report_Final.pdf.

146 Marsden Jacob Associates, Report prepared for EPA Tasmania, *Development of a Model Framework for a CRS for Tasmania* (Marsden Jacob Associates, April 2018), p.24, accessed July 2018. Available at: http://epa.tas.gov.au/Documents/H893229_MJA_CDS%20Framework%20Report_Final.pdf.

147 Marsden Jacob Associates, Report prepared for EPA Tasmania, *Development of a Model Framework for a CRS for Tasmania* (Marsden Jacob Associates, April 2018), p.24. Deposit funds, infrastructure, etc. would need to be safeguarded in case of cancellation of a scheme operator.

10. Stakeholders affected

- business stakeholders (beverage importers, distributors and retailers);
- state and/or national governments;
- beverage consumers;
- waste management companies and consultants;
- NGOs and community organisations; and
- researchers.

11. Likely challenges and opportunities

Container deposit laws are a common example of product stewardship that enable nations to internalise costs of plastic waste management and create financial incentives for waste reduction and other positive social-spin offs (such as value-adding).[148]

Upcycling initiatives may bring further opportunity to stimulate local economic development and reuse, and can facilitate wider community awareness about the impacts of plastics. This requires robust assessment of volume, supply and demand.

According to the recent Palau study, interview participants identified challenges in areas such as:

- geography (e.g. plastic leakage into the ocean from key overseas sources such as China, Indonesia, Philippines, Thailand and Vietnam);
- limited societal awareness (about wider impacts and quantities of plastics, emerging upcycling technologies, widespread cultural usage of plastics);
- lack of capacity and resources (and the need for a champion of initiatives);
- inequitable scheme outcomes (limited infrastructure, few collection points);
- funding for start-up and follow-through, including for sustainable upcycling (given a lack of value on most post-consumer plastics);
- technology issues (which technologies are suitable for the situation given the jurisdiction's geographic, social, government and economic circumstances).[149]

[148] For example, in Koror State (Palau), the fuel produced from pyrolysis is used to power the recycling centre, and other buildings. Total savings from the 'bio-power' are about $100,000 annually, increasing to $150,000 upon completion of the expanded Glass Craft Centre.

[149] Lark *Starkey, Challenges to Plastic Up-Cycling in Small Island Communities: a Palauan* Tale (Center for Marine. Biodiversity & Conservation 2017), at p.8-15.

APPENDIX 5 VISITOR ENVIRONMENTAL LEVIES

1. Product/Issue

Environmental levies on tourism activities to target the generation and management costs of plastic waste (e.g. arrival or departure taxes, in-country services taxes).

2. Broad objective

To reduce plastic waste and pollution generated by the tourism industry (land and sea), and alleviate the burden on publicly funded solid waste services, consistent with a *polluter pays* and *user pays* approach.

3. Examples of jurisdictions and legislation

For many South Pacific countries, tourist-related taxes include hotel taxes, arrival or departure taxes and services taxes – which have enabled governments to directly benefit from tourism.[150]

Fiji, Niue and Palau[151] are examples of Pacific nations with arrival/departure taxes. New Zealand is now proposing an International Visitor Conservation and Tourism Levy.[152]

Fiji has an Environment and Climate Adaptation Levy (formerly Environmental Levy) that incurs a 6% charge on prescribed services such as accommodation, meals and beverages, charter flights, tourist vessels, water sports and other recreational services.[153]

Since 2017, Niue has applied a NZ$80 fee as a departure tax on all people departing Niue by aircraft or vessel unless they are exempted under regulation 4. The classes of people exempted include crew members of a scheduled, military, diplomatic or licensed commercial aircraft or vessel; children; diplomatic staff accredited by the Government of Niue; and transit passengers.[154]

Two direct taxes related to tourism in Palau are the traveller's tax and the hotel occupancy tax. Both were increased recently in an effort to regulate the number of tourist arrivals and preserve the environment.[155]

Another example of an Environmental Fund is the one created for the 'surf permit' created by the Kosrae State (Federated States of Micronesia) under their Kosrae State Code as part of their revenue fund. The legislative purpose is stated as being twofold: limiting the tourist numbers to a sustainable threshold and to contribute to the economic and social development of Kosrae.[156]

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150 See e.g. "Annual Review Of Visitor Arrivals In Pacific Island Countries 2017", June 2018, South Pacific Tourism Organisation, 45, accessed July 2018. Available at: https://www.corporate.southpacificislands.travel/wp-content/uploads/2017/02/2017-AnnualTourist-Arrivals-Review-F.pdf.

151 For Palau, in accordance with RPPL No. 10-16, effective January 01, 2018, the 'Palau Pristine Paradise Environmental Fee' (PPEF) of $100 USD is included in the price of every international airline ticket into the Republic of Palau. RPPL No. 10-16, accessed July 2018. Available at: http://palaugov.pw/wp-content/uploads/2017/04/RPPL-No.-10-02-re.-Amendments-to-Environmental-Impact-Fee.pdf.

152 Refer to the NZ Government's website for more details and further case studies supporting the consultation process, available at: http://www.mbie.g.ovt.nz/info-services/border-changes/international-visitor-conservation-tourism-levy.

153 *Environment and Climate Adaptation Levy Act 2015* (Fiji).

154 See Departure Tax Regulations 2017 (Niue), accessed August 2018. Available at: http://www.gov.nu/wb/media/NIUE%20REGULATIONS/Reg%202017-02b%20Departure%20Tax%20Regulations%202017.PDF.

155 See e.g. the *Palau Pristine Paradise Environmental Fee*.

156 A surf permit scheme was established pursuant to Title 10, s.s 11.1701 to 11708 of the Kosrae State Code (Federated States of Micronesia) accessed July 2018. Available at: http://kosraestatejudiciary.com/wp-content/uploads/2018/05/Final-Kosrae-State-Code-of-Laws-as-of-September-2013-1.pdf.

New Zealand's proposed *International Visitor Conservation and Tourism Levy*[157] will apply to most international visitors entering New Zealand who intend to stay for less than twelve months, and it will be collected through a visa fee which will be processed by the relevant immigration authority. The exemptions being proposed are applicable to Australian citizens, permanent residents and citizens from most Pacific Islands Forum countries.

4. Scope of regulation (product and activity regulated; who is regulated)

The intent of this regulatory option is to establish an environmental (waste management) levy or tax for each international visitor entering a Pacific island country, via air or sea.

While the informal scope may be 'tourists', the term 'international visitor' is more expansive as it captures business visitors and others who should be included.

There are a range of ways that jurisdictions could implement this regulatory option. For example, this may include a levy (or part of a levy) imposed by way of:

- arrival taxes for cruise ship passengers (explicitly earmarking these taxes, or part thereof, as a *user pays* environmental levy);
- departure taxes at airports (as above);
- levies for prescribed in-country accommodation, food and recreation services;
- levies on particular (plastic) products with a waste management cost or negative impact, to influence behaviour (reflecting the *polluter pays* principle).

However it is noted that existing taxes of this nature may go to consolidated revenue.

Importantly, it is proposed that this levy is directly connected to a dedicated Environmental Fund – either one already established in the jurisdiction, or a newly created fund (addressed further below).

Explicitly identifying new or existing levies (or a portion of them) as environmental charges may help to decrease potential resistance from visitors and tourism operators. Public trust will be maintained and increased if there is a direct requirement to earmark collected levies for environmental management.

Detailed scoping as to whom and when the levy applies will help to determine how levies will be collected, e.g. via visa fees, booking agencies, customs entry, or as a point-of-service levy which is added to a visitor's bill for prescribed activities.

Overall, the scope of regulation should fit the objective to manage and reduce plastic waste from tourism and other visitor activities, reduce the impost on public waste services, and raise awareness of the link between these activities and impacts.

Potential exemptions and additional considerations are outlined below.

5. Exemptions

Legislation may differentiate between residents and non-residents of Pacific island countries, either waiving the levy for Pacific residents or reducing the levy amount, e.g., the environmental levy would apply to tourists from Australia and New Zealand, but not from Fiji or the Cook Islands.

Limited exemptions could also apply to other classes of visitor or sector if necessary.

Sectors which may be considered for exemption (i.e. where the levy would not apply) may include where:

[157] Refer to the NZ Government's website for more details and further case studies supporting the consultation process, available at: http://www.mbie.g.ovt.nz/info-services/border-changes/international-visitor-conservation-tourism-levy.

- an evidence-based regulatory impact statement or similar reputable study indicates that applying the levy to certain sectors will prejudice the interests of the jurisdiction's economy (e.g. New Zealand proposal referred above);[158] or
- Applying the levy is otherwise against the public interest (e.g. arrival/departure tax for temporary disaster relief workers; other necessary diplomatic reasons).

Potential exemptions can be identified in prior consultation with customs agencies, tourism bodies and other stakeholders, and the public interest evidence examined.

6. Further considerations

As in other areas there are a range of upfront legal and administrative considerations for which each jurisdiction will need to consider existing legislative frameworks.

Safeguards will be needed to manage governance risks and complexity in this area. These may include clear legislative parameters as to when levies are collected, who collects them, where levy money is consolidated, and what it is to be used for.

Specific transparency measures may be required where private businesses are involved in collecting environmental levies (e.g. monthly returns or annual audits). These measures should be proportionate to the scale and revenue of businesses.

Complexity can be managed through upfront consultation and iterative design, limiting the number of agencies involved, establishing clear roles and relationships.

In designing and implementing environmental levies, it is also important that:

- jurisdictions consider how any new environmental levies interact with existing taxes and statutory funds (including explicit environmental taxes and funds);
- secure mechanisms link environmental levies with environmental programmes (e.g. mandatory direction of levies to statutory funds);
- visitor environmental levies are set at a reasonable rate, considering the cost and impact of waste management and competing potential to deter visitors;
- programmes and monitoring can demonstrate a clear connection between levies and results (e.g. visible litter or waste reduction after levy is implemented or adjusted, improved waste management such as increased bins in public spaces, greater coverage of rural areas);
- levies and rates are regularly reviewed for their effectiveness and suitability;
- jurisdictions cooperate to consider potential cumulative impacts of levies across the region, particularly for multi-stop voyages such as cruise liners;
- regional approaches are explored to harmonise levies, share resources and implement waste reduction and environmental monitoring programmes.

Definitions

The following terms would need to be clearly and concisely defined (among others):

- international visitor;
- tourist;
- prescribed travel modes if required (cruise ship, ferry, air service, etc.);
- prescribed activity sectors if required (food and beverage services, recreational activities, etc.).

[158] Ministry of Business, Innovation & Employment (NZ), *Consultation on International Visitor Conservation and Tourism Levy* (June 2018) 4; 11, accessed August 2018. Available at: http://www.mbie.g.ovt.nz/info-services/border-changes/international-visitor-conservation-tourism-levy/discussion-document-ivl.pdf.

7. Supporting measures

Environmental levies are more likely to succeed in conjunction with other measures to reduce and manage waste, including single-use plastic bans (discussed separately) and *non-legislative* programmes to address plastic consumption by international visitors.

Examples of non-legislative supporting measures may include, for example:

- Establishing per capita waste reduction targets for cruise liners and other tourism sectors where waste is measurable;
- Establishing a voluntary certification programme for large resorts, cruise liners, large ferries and airlines to encourage plastic waste reduction actions;

Procurement policies and agreements (linked to the above) for example to:

- replace disposable plastic products with alternate materials;
- reduce usage of disposable plastic products (e.g. water bottles);
- personal care products such as shampoos, packaged condiments);
- purchase recyclable plastic products or products with recycled content;
- purchase locally-made products with traditional materials (e.g. baskets); and
- systemically reduce the enterprise's retail and operational packaging.

8. Compliance and enforcement – Offences and penalties

Legislation should prescribe offences and penalties for (among other things):

- failing to pay or collect environment levies;
- failing to keep or provide proper records where required by law;
- deliberate avoidance of levy obligations; and
- provision of false or misleading information.

Authorised investigation and audit officers should be appointed by legislation, regulation or by administrative means.

Additional orders and penalties could be available to recover the benefits derived from a breach (e.g. from a business that diverts levy revenue for private gain).

9. Stakeholders affected

- Peak tourism bodies (e.g. South Pacific Tourism Organisation);[159]
- Waste, Chemicals and Pollutants Steering Committees;[160]
- Private tourism agencies and businesses (where levies affect prescribed activities);
- Cruise operators, large ferry operators and airline services;
- Hotels, lodges, resorts, bars and clubs (where levies affect prescribed activities);
- National Tourist Offices and Departments of Tourism;
- Visa/Customs agencies; and
- Tax offices and officials (e.g. Inland Revenue Services and Commissioners).

[159] SPTO is promoting the development of a framework for accommodation standards in the Pacific; exploring the feasibility of a Pacific Ecotourism Association; and a Code of Ethics for the industry.

[160] Intended to support coordination and monitoring of WCP activities across responsible agencies. See SPREP, *Cleaner Pacific 2015, Implementation Plan 2016-2019* accessed July 2018. Available at: https://www.sprep.org/attachments/Publications/WMPC/cleaner-pacific-strategy-imp-plan-2025.pdf.

10. Likely challenges and opportunities

Environmental levies are a practical means of implementing a *user pays system* and a *polluter pays approach* to plastic waste management and pollution reduction.

Environmental levies are consistent with several guiding principles in the *Cleaner Pacific 2025* Strategy – including a multisectoral approach, regionalism and public-private partnerships.[161] Revenue from levies can address knowledge and data gaps, and encourage private sector engagement with pollution and waste management[162] (including through awareness-raising and complementary supporting activities).

Key challenges include stakeholder and agency coordination, scheme governance and transparency, and limiting administrative complexity (which can hinder compliance and effectiveness and disguise potential corruption).

As noted, adopting a user pays approach without deterring visitors and local businesses remains a challenge, but one that is soluble, through sound design, governance and implementation.

Jurisdictions with existing environmental levies or taxes may wish to consider whether part of these existing levies can be explicitly directed to plastic waste management and pollution reduction caused by international visitors (or whether this will have a perverse impact on effective environmental programmes that are currently funded). Options to refine or increase existing levies could also be considered.

Finally, there are multiple benefits to adopting a mandatory direction to consolidate or 'ring-fence' environmental levies into a statutory Environment Fund – including benefits for governance, clearer administration, public trust and visitor confidence. This is addressed below.

[161] Relevant *Cleaner Pacific 2025* principles include: (7) Multisectoral approach: waste management and pollution control approaches shall involve multiple sectors (such as climate change, biodiversity conservation, health, tourism and agriculture) in order to improve the success and effectiveness of interventions; (8) Regionalism: regional cooperation and collaboration through genuine partnerships shall be undertaken where appropriate to complement national efforts, overcome common constraints, share resources and harness shared strengths; and (13) public-private partnership: [t]*he comparative and competitive advantages of the private sector shall be harnessed to improve the delivery of waste management and pollution control services through a contractual relationship between private and public entities.*

[162] See e.g. Annex 1 of the Commission Decision on the Annual Action Programme 2018, Part 1, in favour of the Pacific Region to be financed from the 11th European Development Fund" (EU), at p.2, accessed July 2018. Available at: https://ec.europa.eu/europeaid/sites/devco/files/aap-financing-pacificregion_2018part1-annex1-c_2018_204_en.pdf.

APPENDIX 6 STATUTORY ENVIRONMENT FUNDS

1. Product/Issue

Statutory Environmental Fund for environmental, waste management, compliance and enforcement and monitoring programmes.

2. Broad objective

To provide sustainable resourcing for environmental, waste management and monitoring programmes in the jurisdiction (or jurisdictions jointly), including for plastic waste and pollution.

3. Examples of jurisdictions and legislation

A number of Pacific island jurisdictions already have Environmental Funds, including Kiribati and Fiji.[163]

Also, in Australia for example, the New South Wales Environment Protection Agency (NSW EPA) administers a statutory Environmental Monitoring Fund.[164]

4. Scope of regulation (product or activity regulated, who is regulated)

It is intended that an Environment Fund is directly linked to environmental levies and other similar fees and charges in the jurisdiction.

Subject to jurisdictions' existing arrangements, it is proposed that an account, called the Environmental Fund (the Fund), be established as part of the government's special deposit accounts.

Where a waste management levy is already in place, the jurisdiction may wish to consider whether or not a separate fund should be established, specific to tourism or other environmental levies.

Within the Fund, a separate account is to be established for each environmental, waste management and monitoring programme.

Money in the Fund is to be under the control of the Minister or regulator (such as an EPA), and may be expended only for the purposes authorised by the legislation.

The following are to be paid into the Fund:

- any environmental levy paid by tourists or international visitors;
- any environmental levy paid by a licence holder under a relevant Act (e.g. licence fees connected with plastic bottle import or manufacture could include an environmental levy component);
- money advanced by the Treasurer for payment into the Fund;
- the proceeds of investment of money in the Fund;
- any gift or bequest of money for the purposes of the Fund;
- any other money appropriated by the jurisdiction's Parliament for the purposes of the Fund, or required by law to be paid into the Fund.

[163] See e.g. *Special Fund (Waste Material Recovery) Act 2004* (Kiribati).

[164] *Protection of the Environment Administration Act 1991* (NSW) s. 295ZA.

The following are to be paid out of the Fund:

- the costs of environmental, waste management, compliance and enforcement and monitoring programmes (specifics may be further designated by regulations);
- such other costs relating to these programmes .as the regulator directs to be paid;
- any other related matter in accordance with the regulations.

Money in the Fund may be invested in the manner authorised by relevant public governance legislation in the jurisdiction. If there is no such legislation – in any other manner approved in writing by the Treasurer and published on an online register.

The Minister or regulator responsible for the fund is to publish an annual report on income and expenditure relating to the Fund within a set number of months of the end of each financial year.

5. Stakeholders affected

A number of private sector stakeholders who would be affected by the requirements pay levies that are directed to the Environment Fund (see discussion above).

However, key stakeholders in relation to designing, establishing and administering an Environmental Fund itself are likely to include government agencies and their Ministers. For example:

- Department of Environment;
- Environment Protection Authority;
- National Tourist Offices and Departments of Tourism;
- Visa/Customs agencies;
- Tax offices and officials (e.g. Inland Revenue Services and Commissioners).

6. Likely challenges and opportunities

As with environmental levies, statutory Environment Funds are a practical means of implementing a *user pays system* and a *polluter pays approach* to plastic waste management and pollution reduction. Revenue paid into funds can contribute to well-designed and targeted programmes for environmental management, waste management, compliance and enforcement, and monitoring to address data gaps and support continuous improvement.

Key challenges include relatively limited revenue inputs, how to limit, prioritise and properly administer outgoing funding, stakeholder and agency coordination; fund governance and transparency.

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25 SPREP
Secretariat of the Pacific Regional Environment Programme

GPML
Global Partnership on Marine Litter

GPA
Global Programme of Action for the Protection of the Marine Environment from Land-based Activities

NSW EDO
DEFENDING THE ENVIRONMENT ADVANCING THE LAW