

**Department of Sustainability, Environment, Water, Population and
Communities (DSEWPaC)**

Submission to the

Senate Standing Committee on Environment and Communications

Inquiry in relation to the

**Environment Protection and Biodiversity Conservation Amendment
(Bioregional Plans) Bill 2011**

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Relationship between Marine Bioregional Plans and Commonwealth Marine Reserves

Overview and Policy Background

The Marine Bioregional Planning Program was introduced in 2006-07 to replace the earlier cross-sectoral regional marine planning program under which the South-east regional marine plan had been made under the leadership of the former National Oceans Office. The identification of Commonwealth marine reserves had previously been undertaken separately by Environment Australia (now the Department of Sustainability, Environment, Water, Population and Communities (DSEWPAC)).

The two programs were brought together administratively, with the development of marine bioregional plans brought under the auspices of the EPBC Act for the first time and the identification of future Commonwealth marine reserves to be undertaken through the marine bioregional planning process. The Commonwealth marine reserves identified through the marine planning process will form the Commonwealth waters component of the National Representative System of Marine Protected Areas which has been under development by the Commonwealth, state and Northern Territory governments since its creation was first agreed by these jurisdictions in 1998.

While legally they are two separate decisions, the making of Marine Bioregional Plans and the declaration of marine reserve networks together will establish the high level framework for Commonwealth environmental management and conservation in each marine region.

A draft Commonwealth marine reserve network for each region will be published simultaneously with the draft Marine Bioregional Plan and a single public consultation process will cover both proposals. For the draft reserves network, however, this public consultation does not fulfil a statutory purpose and does not replace the statutory public consultation process required under section 351 of the *Environment Protection and Biodiversity Conservation 1999* (EPBC Act).

The outcome of the dual consultation process will be:

- a) a decision by the Environment Minister to adopt a Bioregional Plan for the region; and
- b) a separate policy decision by government on its preferred design of a representative marine reserve network for the same region.

The government's preferred marine reserve network will then be subject to the processes of public consultation and reporting by the Director of National Parks, leading to a decision by the Minister as set down in the EPBC Act before the reserves are proclaimed by the Governor-General (as set out later in this submission).

This two-phase consultation process on marine reserves, while not statutorily necessary, has been established by government to ensure that the public and stakeholders have ample opportunity to have input to the decision-making process.

It is current practice for the decision on the government's preferred marine reserve network for a region, as well as the decision to recommend declaration of new marine

reserves, to be subject to a Regulation Impact Statement.

In view of the potential for marine reserves to displace or otherwise impact existing uses of Commonwealth waters, it is also accepted practice for marine reserve proposals to be subject to a socio-economic analysis undertaken during the (first, non-statutory) public consultation process.

Bioregional Plans under the EPBC Act

Section 176 of the EPBC Act allows the Minister to prepare bioregional plans for bioregions in Commonwealth areas. It also allows the Minister to cooperate with states and territories or other people to prepare bioregional plans where the bioregion is not wholly within a Commonwealth area. While bioregional planning is currently focussed on bioregions in the Commonwealth marine area, they may also be made in relation to land-based bioregions.

Bioregional plan may include provisions about all or any of the following:

- components of biodiversity, their distribution and conservation status
- important economic or social values
- heritage values of places
- objectives relating to biodiversity and other values
- priorities, strategies and actions to achieve the objectives
- mechanisms for community involvement in implementing the plan
- measures for monitoring and reviewing the plan.

A bioregional plan is not binding on the Environment Minister or private citizens. Section 176 requires only that the Minister, subject to the EPBC Act, must have regard to a bioregional plan in making any decision under the Act to which the plan is relevant.

A bioregional plan may also form the basis of a declaration by the Minister under section 37A, that particular actions, taken in accordance with the plan, do not require assessment and approval under the Act. This mechanism provides certainty for industry and other stakeholders.

The legislative status of bioregional plans

Section 5 of the *Legislative Instruments Act 2003* relevantly provides the following definition of a legislative instrument:

- (1) Subject to sections 6, 7 and 9, a *legislative instrument* is an instrument in writing:
 - (a) that is of a legislative character; and
 - (b) that is or was made in the exercise of a power delegated by the Parliament.
- (2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
 - (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

- (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

A bioregional plan is an instrument in writing that is made in the exercise of a power delegated by Parliament (s 5(1)(b)). However, a bioregional plan is not of a legislative character and therefore do not meet the criterion in s 5(1)(a) of the definition of a legislative instrument. A bioregional plan does not declare the law or alter the rights or obligations of the Commonwealth or private citizens. Rather its purpose is to provide the Minister with comprehensive information which must be considered when making relevant decisions under the Act.

Section 176(4A) expressly clarifies that bioregional plans are not legislative instruments. The EPBC Act was amended in 2006 to include s176(4A). The explanatory memorandum to the *Environment and Heritage Legislation Amendment Bill (No. 1) 2006* makes it clear that this was a technical amendment. It states:

This item is to clarify that the instrument referred to in subsections 176(1) and (2) of the Act are not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003.

A declaration under section 37A that particular actions taken in accordance with a bioregional plan do not require assessment and approval is a legislative instrument.

Because they are not legislative instruments, Bioregional Plans are not currently disallowable.

The effect of the proposed Bill is not to make bioregional plans legislative instruments, but to make them disallowable non-legislative instruments under the *Acts Interpretation Act 1901*.

Aims of marine bioregional plans

Marine bioregional plans will describe the marine environment and conservation values of each marine region, set out broad objectives for their biodiversity, identify regional priorities and outline strategies and actions to address these priorities.

The Australian Government's high level objectives for the marine bioregional planning program and the broader management of Commonwealth marine areas are to:

- conserve biodiversity and maintain ecosystem health;
- ensure the recovery and protection of threatened species; and
- improve our understanding of biodiversity and ecosystems and the pressures they face.

Marine bioregional plans will contribute to the achievement of these objectives by:

- supporting strategic, consistent and informed decision-making under Commonwealth legislation in relation to Commonwealth marine areas;
- supporting efficient administration of the EPBC Act to promote the ecologically sustainable use of the marine environment and its resources; and
- providing a framework for strategic intervention and investment by government to meet its policy objectives and statutory responsibilities.

Marine bioregional plans will contribute towards a more preventative approach to managing the environmental impacts of human activities by identifying and describing a region's conservation values and priorities for managing those values. This will enable decision-makers within government and industry to consider the interactions between proposed activities and conservation values, and the cumulative impacts of activities on the Commonwealth marine environment.

Marine bioregional plans will apply to Commonwealth marine areas (also referred to as Commonwealth waters). Planning is not being undertaken in the coastal waters of the states and the Northern Territory. Under Part 3 of the EPBC Act, a Commonwealth marine area is protected from certain actions both within and outside the area and is a matter of national environmental significance. Generally, it is unlawful under the EPBC Act to undertake an action that has, will have or is likely to have a significant impact on a matter of national environmental significance without approval from the Minister responsible for implementing the EPBC Act. Civil and criminal penalties apply.

Marine bioregional planning process

Marine bioregional plans are being developed with input from scientific and other experts, and in consultation with stakeholders. The process has five basic steps:

Characterisation of the region, including its natural systems and conservation values: a *bioregional profile* for each region brings together the available scientific information about a region's biophysical and broad socio-economic characteristics and conservation values.

Regional assessment of the conservation values: this step consolidates information about the conservation values, their status and the pressures on them. The assessment is being used to categorise pressures on conservation values and identify regional priorities in relation to managing these pressures.

Development and release of a draft marine bioregional plan: consultation with stakeholders and the community provides essential input in developing a marine bioregional plan. The EPBC Act requires the Minister to consult publicly on a draft of the plan. The consultation will help ensure the plan is based on accurate information and builds a shared understanding of the conservation objectives and priorities within a region.

Release of the marine bioregional plan: following the Minister's consideration of all input received on the draft plan it is finalised and released.

Update and review of the marine bioregional plan: plans are reviewed periodically to accommodate new information and data about conservation values and the pressures acting upon them, regional priorities and government policy priorities, and management and regulatory arrangements.

Marine bioregional plans and future decision-making under the EPBC Act

The requirement to have regard to a marine bioregional plan in making decisions applies only to the Commonwealth Minister administering the EPBC Act. The marine bioregional plans will provide comprehensive information about each marine region which assists government decision-making relevant to the Commonwealth marine environment.

Decisions under the EPBC Act of relevance to marine bioregional plans include:

- EPBC Act assessments and approvals for proposed actions in Commonwealth waters (Parts 3, 7, 8, 9 and 10 of the Act)
- cases in which environmental approval are not needed (Part 4)
- fisheries strategic assessments and export approvals (Parts 10 and 13A)
- listing and recovery of species and ecological communities (Part 13)
- the protection of heritage values and places in the marine environment (Part 15).

The information provided in marine bioregional plans will assist decision-makers in the Australian Government and other jurisdictions to collaborate more effectively across jurisdictional and sectoral boundaries. Marine bioregional plans are underpinned by an ecosystem approach. This approach will help government decision-makers to consider issues across jurisdictional, sectoral and disciplinary boundaries, so that actions are not considered in isolation from one another.

Commonwealth Marine Reserves

Background

Commonwealth marine reserves (also referred to as “marine parks” and “marine protected areas”) are one mechanism the Commonwealth has used since the 1970s to manage and protect the environment of Commonwealth waters. The first marine reserve in Commonwealth waters, the Great Barrier Reef Marine Park, required its own Act of Parliament due to the fact that it spans both Commonwealth and State waters. From 1975 to 2000, Commonwealth marine reserves were declared under the *Australian National Parks and Wildlife Act 1975* and, since 2000, they have been declared under the EPBC Act.

The Commonwealth has declared 26 marine reserves, apart from the Great Barrier Reef Marine Park. A full list of current Commonwealth marine reserves is at [Attachment A](#) to this submission.

Declaring a Commonwealth marine reserve

Under the EPBC Act, the Governor-General of Australia may declare a Commonwealth reserve at the conclusion of a statutory process that involves mandatory public comment periods.

Areas that can be declared Commonwealth MPAs

Under section 344 of the EPBC Act the Governor-General can declare a Commonwealth reserve in an area of sea that is:

- in a 'Commonwealth marine area' - generally speaking the area from the edge of State and Northern Territory coastal waters (generally 3 nautical miles from the shore) out to 200 nautical miles from the shore (i.e. the waters inside the seaward boundary of the exclusive economic zone around Australia and its external territories, except the waters inside the seaward boundary of the

coastal waters of the States and the Northern Territory, which generally extend 3 nautical miles seaward from the territorial sea baselines) and

- outside Australia in an area that Australia has international obligations to protect under an agreement with one or more other countries.

A Commonwealth marine reserve includes the seabed under the declared sea area. The declaration can also include in the reserve the subsoil of the seabed (to a depth stated in the declaration).

Declaration process

The process leading to the declaration of a Commonwealth reserve under the EPBC Act is:

1. The Director of National Parks publishes a notice inviting the public to comment on the proposal to declare a Commonwealth reserve over the area, allowing a minimum period of 60 days for comments. This notice includes a statement of the proposed name of the reserve, the proposed boundaries of the reserve and any zones within the reserve, the purpose for which the reserve is to be declared, the IUCN¹ (International Union for the Conservation of Nature) category that the reserve (and any zones) will be assigned to, and the purposes for which it is intended to manage and use the reserve.
2. Any native title holders, registered native title claimants and native title representative bodies for the area are notified of the proposed declaration, and given an opportunity to comment, in accordance with the requirements of the *Native Title Act 1993*.
3. The Director of National Parks provides the Environment Minister with a report on the Commonwealth reserve proposal. The report must include any comments received and the Director's views on the comments.
4. If necessary a Regulation Impact Statement examining any impacts that declaration of the proposed Commonwealth reserve would have on business is prepared.
5. The Environment Minister considers the report from the Director of National Parks.
6. The Minister decides not to proceed and thus the declaration process ends here **OR**
The Minister is satisfied a reserve should be established and the Governor-General is advised accordingly.
7. The Governor-General makes a Proclamation declaring the area to be a Commonwealth reserve. The Proclamation: names the reserve; states the purposes for which it is declared; states the depth of any seabed included in the reserve; and, assigns the reserve to an IUCN category.

¹ IUCN, the International Union for the Conservation of Nature, has identified seven international categories which form the basis for the Australian IUCN Reserve Management Principles.

The Proclamation is registered on the Federal Register of Legislative Instruments.

Although Proclamations of Commonwealth Marine Reserves are legislative instruments, they are not disallowable.

Stages in the process to establish Commonwealth Marine Reserves

The combined Marine Bioregional Planning and marine reserves programs are staged through time to maximise public, stakeholder and expert input. For each planning region, the following milestones define the program:

- The Goals and Principles for the establishment of the National Representative System of Marine Protected Areas in Commonwealth Waters in a region are published in the relevant bioregional profile.
- Publication of Areas for Further Assessment to provide stakeholders with information about the probable locations of new marine reserves i.e. broad areas containing the conservation values to be included in the reserves.
- Draft Proposal for Public Consultation. Maps and detailed information on the draft reserve network for each region will be published with the draft Bioregional Plan. A 90 day public consultation process will follow.
- Socio-economic Analyses and Regulation Impact Statements will be prepared in parallel with the public consultation process.
- Announcement of the Government's preferred regional marine reserve network will occur after the close of public consultation and when the government has considered all inputs, including the socio-economic analysis and Regulation Impact Statements.
- Publication and Public Consultation on a Formal Proposal by the Director of National Parks will occur some time after the government has decided and announced its preferred network for a region.
- Declaration of Commonwealth Marine Reserves happens after the Minister has received a report from the Director of National Parks and a report on the Director's consultations on the proposal.

Department of Sustainability, Environment, Water, Population and Communities

29 March 2011

ATTACHMENT A

List of Commonwealth Marine Reserves under the Environment Protection and Biodiversity Conservation Act 1999 (as at 24 March 2011)

1. Ashmore Reef National Nature Reserve
2. Cartier Island Marine Reserve
3. Cod Grounds Commonwealth Marine Reserve
4. Coringa-Herald National Nature Reserve
5. Lihou Reef National Nature Reserve
6. Elizabeth and Middleton Reefs Marine National Nature Reserves
7. Great Australian Bight Marine Park (Commonwealth Waters)
8. Lord Howe Island Marine Park (Commonwealth Waters)
9. Mermaid Reef Marine National Nature Reserve
10. Ningaloo Marine Park (Commonwealth Waters)
11. Solitary Islands Marine Reserve (Commonwealth Waters)
12. Heard Island and McDonald Islands Marine Reserve
13. Apollo Commonwealth Marine Reserve
14. Beagle Commonwealth Marine Reserve
15. Boags Commonwealth Marine Reserve
16. East Gippsland Commonwealth Marine Reserve
17. Flinders Commonwealth Marine Reserve
18. Franklin Commonwealth Marine Reserve
19. Freycinet Commonwealth Marine Reserve
20. Huon Commonwealth Marine Reserve (incorporating the Tasmanian Seamounts Marine Reserve)
21. Macquarie Island Commonwealth Marine Reserve

22. Murray Commonwealth Marine Reserve
23. Nelson Commonwealth Marine Reserve
24. South Tasman Rise Commonwealth Marine Reserve
25. Tasman Fracture Commonwealth Marine Reserve
26. Zeehan Commonwealth Marine Reserve