

AUSTRALIAN CONSERVATION FOUNDATION

NATIONAL ENVIRONMENTAL LAW ASSOCIATION



# Out of the blue

An act for Australia's oceans



AUSTRALIAN  
CONSERVATION  
FOUNDATION

## ***Out of the blue: an act for Australia's oceans***

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The National Environmental Law Association (NELA) and the Australian Conservation Foundation (ACF) have prepared *Out of the blue* to initiate public discussion about the future of Australia's oceans laws, planning and management.

NELA is a multi-disciplinary national organisation with the objectives of furthering the role of environmental law in Australia and serving the needs of practitioners in law, planning, natural resources and environmental management, environmental science and environmental impact assessment to obtain and exchange information on issues relevant to environmental law and policy. One of its themes is to focus on the harmonisation of environmental laws across Australia.

ACF is committed to inspiring people to achieve a healthy environment for all Australians. For 40 years ACF has been a strong voice for the environment, promoting solutions through research, consultation, education and partnerships. ACF works with the community, business and government to protect, restore and sustain our environment.

*Out of the blue* canvasses a new national approach to oceans planning and management: an Australian Oceans Act and an Australian Oceans Authority to give strong legislative direction to the implementation of Australia's Oceans Policy. It is one view among what are likely to be many on this issue. Some may argue that there is no need for change, or that existing legislation, such as the *Environment Protection and Biodiversity Conservation Act 1999*, could be made use of in its current or a strengthened form, or they may see an Australian Oceans Act needing to be very different from that described here. We expect that these views will be a part of the public discussion process and we welcome them.

Although some of the suggestions contained within *Out of the blue* might not be within the policies of either ACF or NELA, all aspects of the paper have been carefully considered and are seen as important points for public discussion.

*Out of the blue* has been prepared by Chris Smyth, ACF's Marine Campaign Coordinator, in collaboration with Meg Lee, of NELA's Victorian branch, and with the advice and assistance of a steering committee comprising Professor Rob Fowler (University of South Australia) and Associate Professors Greg Rose (University of Wollongong) and Marcus Haward (University of Tasmania). Very useful advice has also been provided by Professorial Fellow Richard Kenchington (University of Wollongong), Professor Richard Hildreth (University of Oregon) and Paddy O'Leary, and participants (see Appendix 1) at a seminar 'Should we clean up our acts in the oceans', which was held on 29 April 2005.

We are now seeking comments on the views within *Out of the blue*. For those wishing to make comments, please forward them to ACF's Marine Campaign Coordinator. Copies of this paper can be downloaded from either the ACF or NELA websites. It is also available on a free CD that also contains pdfs of the *Marine legislative review*, *Oceans eleven* and a summary brochure.

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ISBN-13 978-0-85802-134-1 ISBN-10 0-85802-134-X

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An act for Australia's Oceans

Australian Conservation Foundation  
National Environmental Law Association

March 2006



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## **Actions for the better planning, protection and management of Australia's oceans**

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There are a number of actions that stem from the proposals put forward by this discussion paper, *Out of the blue*. In summary they are:

1. Creation of an Australian Oceans Act and an Australian Oceans Authority, with strong and clear directive and enforcement powers to pilot Australia's oceans<sup>1</sup> planning and management – and industry and government agencies. The Australian Oceans Authority would coordinate the preparation, review, monitoring and auditing processes of regional marine planning to ensure the ecologically sustainable, ecosystem-based management of all human uses and impacts affecting the oceans.
2. The signing of an Intergovernmental Agreement on Australia's Oceans by the Commonwealth, state and territory governments through the Council of Australian Governments. Each of the signatories would commit to pass an Australian Oceans Authority Act that would create nationally consistent and integrated legislative protection, planning and management provisions across state, territory and Commonwealth waters.
3. Establishment of the Australian Oceans Fund, under the Intergovernmental Agreement on Australia's Oceans, to provide the funding for the Australian Oceans Authority and the new planning and management arrangements to achieve national objectives, standards, benchmarks and milestones.
4. Establishment of ecosystem-based and enforceable regional marine planning as the driver for the implementation of Australia's Oceans Policy.
5. Creation of a comprehensive, adequate and representative system of marine national parks across Commonwealth, state and territory waters with consistent processes, targets and terminologies. The identification, selection and establishment of the system would be coordinated by the Australian Oceans Authority.
6. Establishment of a vital role for Indigenous communities in the preparation and implementation of regional marine plans to ensure socially, culturally and environmentally sustainable use and management of 'Sea Country'.

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<sup>1</sup> In this paper Australia's oceans means the Commonwealth Marine Area and those waters comprising state and territory marine waters. Marine region means an area of Australia's oceans that has been defined by the Australian Oceans Authority and proclaimed as an area in relation to which a regional marine plan must be prepared.

## Executive summary

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### Chapter 1 The use and management of Australia's oceans

*Chapter 1 briefly summarises the development of the use and management of Australia's oceans and the environmental impacts associated with that use.*

As the twenty-first century begins, Australia has a complex statutory and regulatory framework for oceans planning and management based on multiple jurisdictions and sector-based management. The implementation of Australia's Oceans Policy could force changes to that framework. So too might the responses to the current marine environmental issues – global warming and climate change, habitat destruction and species loss, overfishing, land-based and oceans-based pollution and introduced marine pests – some of which are discussed in this chapter.

### Chapter 2 The limitations of current administrative and legislative arrangements in our oceans

*Chapter 2 considers the nature of existing administrative and legislative arrangements and their limitations, with special reference to the fisheries sector and to marine protected area processes.*

This chapter reports on the findings of the *Marine legislative review*, a detailed and comprehensive review of 250 existing Commonwealth and state marine-related environmental laws and regulations that apply to the conservation, fisheries, petroleum, shipping and tourism sectors. The Review concluded that the statutes are inadequate in providing for integrated marine management, ecologically sustainable development, ecosystem-based management and multiple-user management.

Two case studies are considered, one about Australia's fisheries, and the other on the implementation of the National Representative System of Marine Protected Areas (NRSMPA), to analyse their current arrangements and implementation.

The first case study reveals that although ecologically sustainable development is now a goal of fisheries statutes, and that there has been progress in sustainable fisheries assessment, fisheries legislation in general includes barriers to ecosystem-based management and multiple-user management – and the number of overfished species is growing.

The second case study indicates that the implementation of the NRSMPA mirrors the roll-out of Australia's oceans planning and management more generally – inconsistent processes and outcomes in a multi-jurisdictional framework. There is a diversity of processes and outcomes for marine protection, with different timetables, targets, consultation processes, zonings and commitments to high levels of protection across the Commonwealth, states and territories. And after 14 years of implementation, the NRSMPA is strongly skewed towards tropical and sub-Antarctic habitats, with little protection given to temperate waters and the continental shelf where ocean use and environmental threats are at their most intense.

Although Australia's Oceans Policy includes commitments to the ongoing establishment of the NRSMPA, there are no targets or timetable for its completion. In broad percentage terms, and with regards habitat protection, Australia is well short of the 2003 World Parks Congress target of at least 20-30 per cent of each marine habitat in the world's oceans strictly protected (in no-take areas) by 2012.



This chapter outlines how the proposed Australian Oceans Act would help overcome the general limitations, and those revealed by the case studies, by giving legislative force to regional marine planning processes and integrated ecosystem-based management with measurable operational objectives, indicators and targets.

Under the Australian Oceans Act, regional marine plans would also provide multiple-user and cross-sectoral planning and management frameworks that allocate resources, effectively engage stakeholders and the community, work to resolve conflict, and provide greater transparency and certainty in fewer but more consistent and effective processes, including those for marine national parks, across Commonwealth, state and territory waters.

### **Chapter 3 Australia's Oceans Policy development and implementation**

*Chapter 3 discusses the development of Australia's Oceans Policy and issues associated with its ongoing implementation.*

The success or failure of Australia's Oceans Policy will be strongly influenced by the institutional arrangements established for its implementation, the evolution of which is described in this chapter.

*Out of the blue* considers whether Australia's Oceans Policy is 'comprehensive and integrated', and whether the administrative and institutional arrangements and processes for regional marine planning are sufficient to achieve the policy's ecosystem-based vision for oceans planning, protection and management.

The paper concludes that although the policy is comprehensive it is not integrated, that the institutional arrangements are insufficient, and that the regional marine planning process – including the South-east Regional Marine Plan – have failed to establish integrated, intersectoral and ecosystem-based planning and management.

Key to the successful implementation of Australia's Oceans Policy is the effective engagement of the states and territories. However, the institutional arrangements established by the Australian Government to implement Australia's Oceans Policy have been largely intragovernmental in nature due to the lack of involvement of the states and territories. This chapter draws on the analysis of various commentators on these issues to conclude that stronger intergovernmental arrangements are needed to ensure state and territory engagement in Australia's Oceans Policy implementation and regional marine planning.

### **Chapter 4 An Australian Oceans Act, Agreement and Fund: Australia's next important steps towards the protection and sustainable use of our oceans?**

*Chapter 4 argues the case for an Australian Oceans Act. It also proposes an Intergovernmental Agreement on Australia's Oceans to overcome the lack of effective intergovernmental arrangements, and an Australian Oceans Fund to resource the implementation of the Act and the Agreement.*

To fulfil its international pledges and commitments in the areas of oceans protection and management – and to effectively implement its Oceans Policy – Australian governments must consider providing stronger legislative direction and supporting institutional reform.

The creation of an Australian Oceans Act and an Australian Oceans Authority, with strong and clear directive and enforcement powers, would pilot Australia's oceans planning and management – and

industry and government agencies – on a course that is new but one that is implicit in Australia's Oceans Policy.

An Australian Oceans Act would enable the coordination of existing legislation within a nationally consistent legislative regime using the proposed Australian Oceans Authority to oversee the implementation of Australia's Oceans Policy and to provide certainty, equity and security for stakeholders.

Similar national frameworks have been established under Commonwealth legislation for the regulation of corporations, trade practices, certain transactional crimes and the National Competition Policy. Further, national approaches can be achieved through agreement by the Commonwealth and the states to legislate in a nationally consistent manner.

Administrative and legislative reform is a critical step in the development of truly sustainable management practices for our coasts and oceans. The success of Australia's Oceans Policy will be judged by how well we 'protect and preserve our marine environment' while providing progress, certainty, a sustainable and secure resource base and an efficient regulatory framework for oceans-based industries whose futures depend on integrated and effective management.

This chapter summarises the contents of the proposed Australian Oceans Act, which is divided into four parts: Preliminary; Australian Oceans Authority; Regional Marine Plans; Management and Enforcement. The Act also includes four schedules that cover operationally related acts, international conventions relating to oceans protection and management, proposed activities that require referral to the Australian Oceans Authority for assessment and approval, and criteria for the identification and selection of marine national parks.

The continuing lack of effective intergovernmental legislative arrangements, and the consequent complex and occasionally conflicting or disputed administrative arrangements, could undermine future oceans planning and management. To overcome this, the discussion paper proposes an Intergovernmental Agreement on the Oceans (IGAAO).

Through the Council of Australian Governments, the Commonwealth and each of the states and territories would sign on to the IGAAO, with the Commonwealth passing the Australian Oceans Act, and each state agreeing to pass a complementary Australian Oceans Authority Act (eg. *Australian Oceans Authority (New South Wales) Act*) that would create nationally consistent legislative protection, planning and management provisions across state, territory and Commonwealth waters, thus driving integrated management of the oceans and a breakdown of the historic but dysfunctional three-nautical-mile jurisdictional and administrative barrier.

By signing the IGAAO the Commonwealth, states and territories would be agreeing to the establishment of national assessment and approvals processes for certain proposals in their waters, the conduct of which they would be accredited. These assessment and approvals processes would be regularly audited by the Australian Oceans Authority to ensure that they effectively enforce the requirements of the relevant regional marine plan.

By signing the IGAAO the states and territories would be given access to the Australian Oceans Fund, which would be established by the IGAAO to provide the funding for the Australian Oceans Authority and the new planning, protection and management arrangements. Through a number of programs the Australian Oceans Authority would use moneys in the Australian Oceans Fund to provide financial assistance to the IGAAO's participating states and territories to improve their oceans planning and management processes to achieve national objectives, standards, benchmarks and milestones. Ongoing funding would be conditional on these improvements being made.

The moneys available in the Australian Oceans Fund should be a major incentive for the states and territories to sign the IGAAO. Such funding was lacking in the process for the development and implementation of Australia's Ocean Policy, with the states and territories coming to view their involvement as a giving up of authority with no financial return.

The Australian Oceans Fund would include financial assistance for such matters as:

- Authority, state and territory marine and coastal mapping, consultation and planning processes and actions for marine, coastal and catchment areas that are integrated with Commonwealth processes
- the costs for institutional arrangements and assessment and approvals processes
- structural adjustment for fishing industries and associated regional communities if necessary
- individuals, communities and sectors working towards stronger oceans protection and sustainability outcomes
- expanded public good marine research
- communications and education programs to increase community knowledge and understanding of Australia's oceans and their values.

States and territories not party to the IGAAO would be unable to source moneys from the Australian Oceans Fund or be accredited to conduct assessment and approvals processes under the IGAAO and the subsequent Australian Oceans Act.

Chapter 4 also considers the advantages for governments and stakeholders, and for the resolution of current ocean matters in each jurisdiction, that could stem from the Oceans Act, Agreement and Fund.

## **Chapter 5 The Australian Oceans Act and regional marine planning**

*Chapter 5 discusses the nature of regional marine planning under the Australian Oceans Act and also considers Indigenous community engagement in planning, and assessments and approvals processes.*

The effective implementation of Australia's Oceans Policy, the establishment of the Australian Oceans Authority, and the roll-out of ecosystem-based regional marine planning with legislative backing, will progress Australia towards integration of the currently disparate elements of oceans planning and management.

It is essential that Indigenous communities are allowed to play a vital role in the preparation and implementation of ecosystem-based regional marine plans to ensure socially, culturally and environmentally sustainable use and management of 'Sea Country'. Indigenous communities have developed a deep and profound knowledge of their environment, a strong sense of ownership and stewardship, and effective and sustainable management strategies to sustain their lives and the environments of coasts and oceans. They should be given the confidence and appropriate support – information, funding and other resources – to enhance their capacity to become involved. And mechanisms should be established within regional marine planning to incorporate their knowledge, rights, responsibilities, perspectives and participation.

In the proposed Australian Oceans Act, the regional marine planning process and the content of the regional marine plans are structured to reflect the eleven steps for regional marine planning outlined in *Oceans eleven*, the conservation sector's report on Australia's Oceans Policy and regional marine planning. The Australian Oceans Authority would coordinate the preparation, review, monitoring

and auditing processes of regional marine planning, as well as the identification and selection processes for marine national parks.

The Authority would begin its preparation of a regional marine plan by releasing a scoping paper and a public notice of its intention to prepare the plan and an invitation to comment. The Regional Marine Plan Working Group, established by the Authority and comprising marine planners from the Authority, the Commonwealth and participating state and territory government agencies, would prepare the scoping paper and draft plan for public release and public comment. A report outlining how the public comments received on the scoping plan had been dealt with would accompany the draft plan. The Working group would also prepare the final plan for Authority, Ministerial, NRMCC and parliamentary approval. From the beginning of the plan's preparation, the Working Group and the Authority would consult with the Regional Marine Advisory Committee and Regional Marine Planning Technical Group formed under the Australian Oceans Act.

Without coordinating the planning and management of Australia's oceans under a single legal framework, difficulties will arise as individual agencies implement regional marine plans in accordance with their own regulatory objectives. Under the Australian Oceans Act, and during the preparation, monitoring, performance, evaluation and review of a regional marine plan, the Commonwealth, state and territory departments, authorities and agencies with oceans planning and management responsibilities would meet with the Australian Oceans Authority and the Regional Marine Planning Working Group to assess how the plan would influence those responsibilities. The final regional marine plan would be in part the culmination of this consideration, with Commonwealth, state and territory agencies then given the task, and supported with resources, for ensuring that individual sectors meet the plan's operational objectives and targets and operate in a manner consistent with the plan.

The preparation of a regional marine plan under the Australian Oceans Act would assess existing and proposed uses within the regional marine planning and management framework laid down in the proposed Australian Oceans Act. Resource allocation would occur at that time. During the period between the proclamation of the plan and its nine-year review, the Authority would each year report on the performance assessment of the plan and, five years after parliamentary approval of the plan, review its resource-use and compliance levels, allocations and activities. These reviews would underpin the adaptive planning approach implicit in ecosystem-based management. Such adaptive management may lead to adjustments to the operational objectives, indicators and targets of the plan.

It would be hoped that most proposals for new uses and changes to existing uses in a marine region could be dealt with during a regional marine plan's preparation, the nine-year review and the review process five years into the plan. Where users have been allocated resources in the regional marine planning process, they can, unless circumstances change in the marine region, carry out their uses during the life of the plan. However, where actions that are listed in Schedule 3 of the Act are proposed, those actions must be referred to an accredited body for assessment and approval. Where the action is proposed for waters or on land covered by a participating state or territory with an accredited referral body, then that body would assess and approve (or refuse) the action. If the action is proposed for waters or on land where a state or territory has not opted into the IGAAO, where an accredited assessment and approval body has not been established, or where a regional marine plan is not yet in force, a proposed action listed in Schedule 3 would have to be referred to the Australian Oceans Authority.

The final section of this chapter considers what the outcome of a regional marine planning process might be with reference to the Representative Areas Program for the Great Barrier Reef Marine Park in Queensland, and the Spencer Gulf Marine Plan in South Australia. Both are examples of spatial management at the regional scale and contain elements that are consistent with the regional marine planning outcomes envisaged under the Australian Oceans Act.

## **Chapter 6 The Australian Oceans Act and the EPBC Act**

*Chapter 6 analyses provisions of the EPBC Act and determines that they can be used to complement but that they do not substitute for the Australian Oceans Act.*

This chapter considers key provisions of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* – bioregional planning and bilateral agreements, the listing of threatened species, ecological communities and key threatening processes, approvals and assessments, Matters of National Environmental Significance, and the significance of impact test – to determine whether the Act could be used to complement the comprehensive and integrated ecosystem-based regional marine planning and management provided by the proposed Australian Oceans Act or remove the need for it at all.

Under Section 176 of the *EPBC Act* the Minister may prepare a bioregional plan for a region that includes provisions and strategies relating to the components of biodiversity, their distribution and conservation status, important economic and social values, heritage values of places, objectives relating to biodiversity and other values, and priorities, strategies and actions to achieve the objectives, as well as mechanisms for community involvement in implementing the plan and measures for monitoring and reviewing the plan.

The discussion paper concludes that the use of Section 176 recognises the need for a legislative basis to regional marine planning and provides a useful tool for marine planners by highlighting the natural values and limits of an area, but that it does not provide a framework for integrated ecosystem-based regional marine planning.

The use to date of the listing of key threatening processes under the *EPBC Act* has been very limited when it comes to protecting Australia's ocean life, but it could be a useful adjunct to an Australian Oceans Act if threatening processes such as overfishing, beach netting for sharks, seabed trawling, land-based pollution, invasive marine pests, habitat conversion and nearshore reclamation were listed.

The same can be said of the need for an expansion of the lists for threatened species and ecological communities, but currently there are no marine ecological communities listed as threatened, and the list of species does not include any marine invertebrates or commercial fish species.

Bilateral agreements under the *EPBC Act* between the Commonwealth and the states and territories currently add limited value but that it is more a function of their content than the concept. Environmental approvals based on national standards in a federal system could reduce the complexity, increase the efficiency and improve the environmental protection of oceans planning and management processes. It could also provide improved integration and very useful performance incentives for the states and territories.

The processes for referral of actions for assessment and approval under the *EPBC Act* have had limited value for oceans protection and are unlikely to capture many future proposals in state waters due to the limited coverage of Matters of National Environmental Significance. A listing of the activities that require referral and assessment in a schedule of the *EPBC Act* (there is listing of this

type in the proposed Australian Oceans Act) would provide greater certainty and integrate well with spatial management of the zoning process under the proposed Australian Oceans Act.

The *EPBC Act* also has provisions relating to the development and planning of a representative system of marine protected areas (MPAs) in Commonwealth waters, sustainable fisheries assessments and state of the environment reporting that can be used to provide indicators of ecosystem health. Each of these provisions can contribute to oceans protection but will require some adjustments under the proposed Australian Oceans Act. The Act would give the Australian Oceans Authority the role of coordinating the identification, selection and establishment of a comprehensive, adequate and representative network of marine national parks within regional marine planning processes, and conducting state of the oceans reporting. This would progress Australia towards an holistic approach to oceans protection and planning.

The current *EPBC Act* lacks that holistic nature of the proposed Australian Oceans Act. Limitations within the structure and purpose of the *EPBC Act* preclude it from being used as an alternative to the proposed Act. In essence, integrated oceans planning and management are not part of its design or operation. However, through a number of amendments, the broad interpretation of provisions, the expansion of lists, and a strengthening of the assessment and approvals processes, the *EPBC Act* could be used to complement the oceans planning, protection and management established under the proposed IGAAO and Australian Oceans Act. But moves to strengthen the *EPBC Act* and to develop a new approach to the protection, planning and management of Australia's oceans will require strong political will and leadership to establish high-quality and effective institutional and legislative arrangements that integrate actions between governments, departments and agencies.

## **Chapter 7 Australian Oceans Act**

*This chapter contains a draft of the proposed Australian Oceans Act.*

### **References**

*A list of references used in the preparation of this discussion paper.*

### **Glossary of acronyms**

*A glossary of acronyms used in this discussion paper.*

### **Appendices**

Appendix 1 provides a list of participants in a workshop held in April 2005 to discuss the development of the Australian Oceans Act proposed in this discussion paper.

Appendix 2 is a table of data on the size, number and protection levels of MPAs in Commonwealth, state and territory jurisdictions.

# Chapter 1 The use and management of Australia's oceans

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*Chapter 1 briefly summarises the development of use and management in Australia's oceans and the environmental impacts associated with that use.*

## 1.1 Evolution of the use and management of Australia's oceans

1.1.1 For thousands of years Indigenous people have lived along Australia's coastline, sustaining their communities with fish, crustaceans, molluscs and other marine resources drawn from their Sea Country: an ongoing source of food, shelter, income, clothing, medicines, cultural ceremonies, spiritual fulfilment and recreation.

1.1.2 With the arrival of Europeans in the 18<sup>th</sup> century the lives of people in many Indigenous coastal communities were shattered and dislocated, yet today their sense of ownership and stewardship of coastal and marine regions is strong, their understanding of 'Sea Country' deep, and their desire to be more engaged in its planning and management is growing.

1.1.3 However, during the nineteenth century the use of many parts of Australia's oceans turned from subsistence to commercial exploitation as they became largely the preserve of sealers, sailors, whalers, fishers and shipping companies, with limited government controls over their activities. As the colonies became states, and as Australia moved towards federation, a growing awareness of marine management issues, especially in relation to the impacts of fishing, led to some statutory and regulatory responses in various jurisdictions.

1.1.4 In the twentieth century, as fishing became more industrialised and shipping also expanded, as the oil and gas industry emerged and developed, and as Indigenous communities, scientists, environmentalists, tourists, educators and many others in the community demanded a greater involvement in decisions about the use and future of the oceans, statutory and regulatory measures were increasingly used to exert government control over the activities of individual sectors – but with little or no integration of sectoral or jurisdictional arrangements.

1.1.5 For the first half of the twentieth century these largely sector-based measures were driven by the states, but from the 1950s the Commonwealth became more active, responding to domestic concerns and also, from 1958, to the developing outcomes of the United Nations Conferences on the Law of the Sea which included international conventions, treaties and agreements relating to such issues as resource management, pollution control, biodiversity conservation and heritage. These international instruments included the International Convention for the Prevention of Pollution from Ships 1973 and the Convention on Biological Diversity 1992<sup>2</sup>.

1.1.6 Issues surrounding the marine jurisdictional divide between the Commonwealth, states and territories (Box 1 describes the events that affected the practical division of responsibility between 1967 and 1989, and Box 2 gives information on the division of powers) came to a head with the election of the Whitlam Labor Government in 1972. The new federal government wished to assert what it deemed to be its constitutional authority over the coastal waters of the states flowing from the UN Conferences on the Law of the Sea and did so through the *Seas and Submerged Lands Act 1973*. The states and territories opposed this and took the Commonwealth to the High Court. They lost, with the High Court in 1975 upholding the Commonwealth's assertion of sovereignty to the low water mark.

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<sup>2</sup> See Schedule 2 of the proposed Australian Oceans Act in Chapter 7 for a selection of oceans-related international instruments.

<b>Box 1 Time line of major developments affecting practical division of responsibility</b>	
<b>Year</b>	<b>Event</b>
1967	Because of the uncertainty and political sensitivity surrounding Commonwealth and state powers with respect to offshore areas, the Commonwealth and state governments entered into a cooperative agreement regarding the exercise of powers in offshore areas. States were responsible for the 'territorial sea'. (Defined at that stage as stretching from the low water mark for three nautical miles seaward). The Agreement related to mineral resources, particularly offshore petroleum. <i>Petroleum (Submerged Lands) Act 1967</i> (Cth) enacted.
1973	<i>Seas and Submerged Lands Act 1973</i> (Cth) enacted. Act reneges on the 1967 Agreement. Asserts Commonwealth jurisdiction over 'territorial sea'.
1975	<i>Seas and Submerged Lands Case</i> : High Court holds that the Act is valid and that the Commonwealth has power over territorial sea from low water mark.
1979	The <i>Seas and Submerged Lands Case</i> was contrary to the popular understanding of the Constitutional division of responsibility relating to marine areas. As a result, the Commonwealth and the states entered into the Offshore Constitutional Settlement (OCS). It created a complex system for the practical division of responsibility. Under the OCS the Commonwealth delegated a significant portion of its responsibility to the states. After negotiations, an agreement between the states and the Commonwealth was made in 1979. It was never reduced to writing due to the reluctance of the courts to view such agreements as other than political in nature. In contrast to the political agreement, the OCS also comprises a legal aspect. To implement the OCS, a novel constitutional mechanism under section 51 (xxxviii) was used whereby the states passed legislation 'requesting' the Commonwealth parliament to enact laws on agreed terms giving states powers with respect to the territorial sea. In response to this request the Commonwealth passed 14 pieces of legislation ('the OCS Acts') which create the broad framework of marine management currently in place. The Commonwealth enacted the Acts under the head of power in section 51(xxxviii) which provides for:  ...the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.  The two most significant pieces of legislation passed by the Commonwealth are the <i>Coastal Waters (State Powers) Act 1980</i> (Cth) (" <b>Powers Act</b> ") and the <i>Coastal Waters (State Title) Act 1980</i> (Cth) (" <b>Title Act</b> "). It is these Acts which form the legal crux of the OCS and which would need to be amended in order to alter the OCS.
1989	<i>Port MacDonnell Professional Fishermen's Association v South Australia</i> (1989) 88 ALR 12, 17 (" <b>Port MacDonnell</b> "). The High Court in this case held that the OCS and the resulting legislation was a valid exercise of the power under section 51(xxxviii) of the Constitution. <sup>3</sup>

<b>Box 2 Division of powers</b>		
<b>Area</b>	<b>Government Responsible</b>	<b>Under what Authority?</b>
Shore to the low water mark	State Government	<i>Seas and Submerged Lands Case</i>
The coastal waters of a State (which extends from the low water mark seaward for 3 miles)	State Government	Section 5(a) <i>Powers Act</i> and <i>Port MacDonnell</i>
The 'adjacent area' to the coastal waters in relation to mining, harbours, other shipping facilities and certain fisheries.	State Government	Section 5(b) and (c) <i>Powers Act</i> and <i>Port MacDonnell</i>
The 'adjacent area' in relation to other matters	Commonwealth Government	Section 5(c) <i>Powers Act</i> and <i>Port MacDonnell</i>
Beyond the 'adjacent area'	Commonwealth Government	Section 51(xxix) of the <i>Constitution</i> and <i>Seas and Submerged Lands Case</i>

<sup>3</sup> The High Court also stated that the Powers Act does not actually extend the limits of the states. Rather, 'it provides that the legislative powers exercisable by the states extend to the making of laws of the designated category.' (The Hon. Malcolm Fraser, 'Coastal Waters (State Powers) Bill (Second Reading Speech)', Parliamentary Debates House of Representatives, 23 April 1980, 2165, 2167). The Commonwealth retains its constitutional responsibility for the oceans from the low water mark. The OCS Acts merely allow States to make laws with respect to this area. Section 5 of the Powers Act itself states that the states powers extend to the 'making of' laws for this area'. It could be argued that the OCS Acts focus on states merely making laws for the area and do not contain any reference to the exclusion of the Commonwealth.



1.1.7 Three years after the High Court's decision, however, the states and territories secured title to their coastal waters – from the shore out to the three-nautical mile limit<sup>4</sup>. They did so under the 1979 Offshore Constitutional Settlement, which was anchored by a resolution of a Premiers' Conference and the *Coastal Waters (State Title)* and *Coastal Waters (State Powers) Acts*, and implemented through a series of agreements between the states and territories and the Fraser Coalition Government (the 'agreed arrangements') that related to seabed rights, petroleum, mining, fisheries, historic shipwrecks, the Great Barrier Reef Marine Park, other marine parks, ship-sourced marine pollution, shipping and navigation and crimes at sea<sup>5</sup>. This set the framework for the current Commonwealth, state and territory management of offshore resources.

1.1.8 The last decade of the twentieth century was a time when ecologically sustainable development (ESD) became part of government policy, the first *State of the marine environment report*<sup>6</sup> highlighted the issues facing Australia's oceans and the need for action, and marine jurisdictions were more clearly defined. This was also the time when the United Nations Convention on the Law of the Sea (UNCLOS) came into force (see Figure 2 for definitions of the marine jurisdictions). The Convention, which now has 146 signatories, gave impetus for nation states to establish oceans policy and ecologically sustainable oceans planning, protection and management.

1.1.9 Australia's oceans are close to double the area of land, the result of Australia's ratification of UNCLOS on 5 October 1994 and its taking responsibility for one of the world's largest ocean territories – the Australian Ocean Territory (AOT) shown in Figure 3. When the claimable shelf areas are included, the total area of the AOT will be 16.1 million square kilometres. By comparison, the area of the Australian landmass is 7.8 million square kilometres and Australia's Antarctic Territory is 6.2 million square kilometres. Should the claims by Australia for extensions to its Exclusive Economic Zone (EEZ) to be accepted, the AOT will comprise:

- 8.6 million square kilometres of the Australian continental EEZ which extends to 200 nautical miles (54%<sup>7</sup> of the AOT). Under UNCLOS Australia has the right to explore and exploit the seabed and water column within its EEZ, but also has the responsibility of care
- 3.3 million square kilometres of claimable continental shelf beyond the EEZ and out to 350 nautical miles should the shelf extend that far (20% of the AOT)
- 2.4 million square kilometres of the Australian Antarctic EEZ (15% of the AOT)
- 1.8 million square kilometres of claimable continental shelf beyond the Antarctic EEZ (11% of the AOT).

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4 Although the outer limits of the coastal waters are defined as the outer limits of the territorial sea in the *Coastal Waters (State Powers) Act* and the states' *Petroleum (Submerged Lands) Act 1967*, both Acts provide that the area continues to terminate three nautical miles from the low water mark notwithstanding any change to the definition of the territorial sea. Australia's territorial sea now has a typical breadth of twelve nautical miles (*Seas and Submerged Lands Act 1973* (Cth)), yet the coastal waters remain at 3 nautical miles.

5 *Coastal Waters (State Powers) Act 1980* (Cth); *Coastal Waters (State Title) Act 1980* (Cth); *Coastal Waters (Northern Territory Powers) Act 1980* (Cth); *Coastal Waters (Northern Territory Title) Act 1980* (Cth); *Seas and Submerged Lands Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) (Royalty) Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) (Registration Fees) Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) (Pipeline Licence Fees) Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) (Production Licence Fees) Amendment Act 1980* (Cth); *Fisheries Amendment Act 1980* (Cth); *Navigation Amendment Act 1980* (Cth); *Historic Shipwrecks Amendment Act 1980* (Cth).

6 Zann, L (ed) (1998), *Our sea, our future. Major findings of the state of the marine environment report for Australia*, Department of Environment, Sport and Tourism, Canberra

7 A percentage of 16.1 million square kilometres

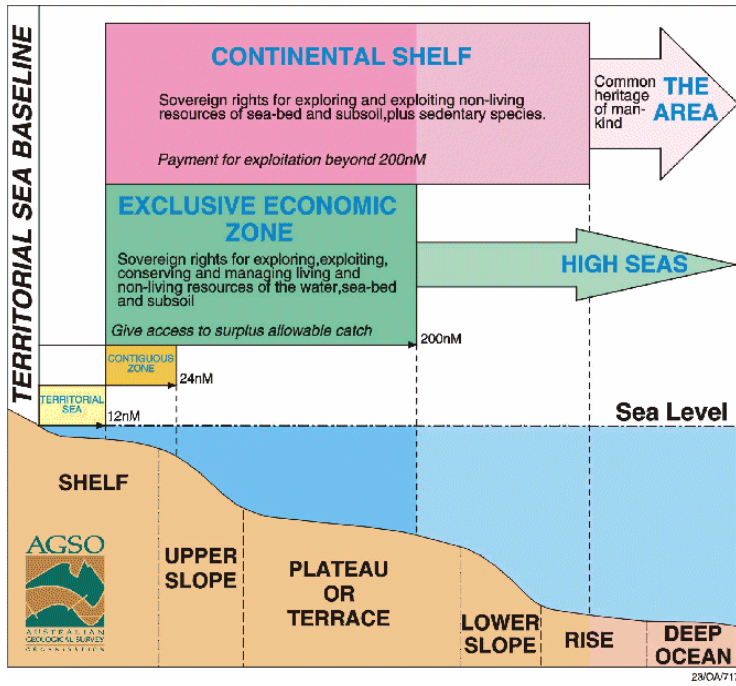


Figure 2 Jurisdictional divisions in the oceans<sup>8</sup>

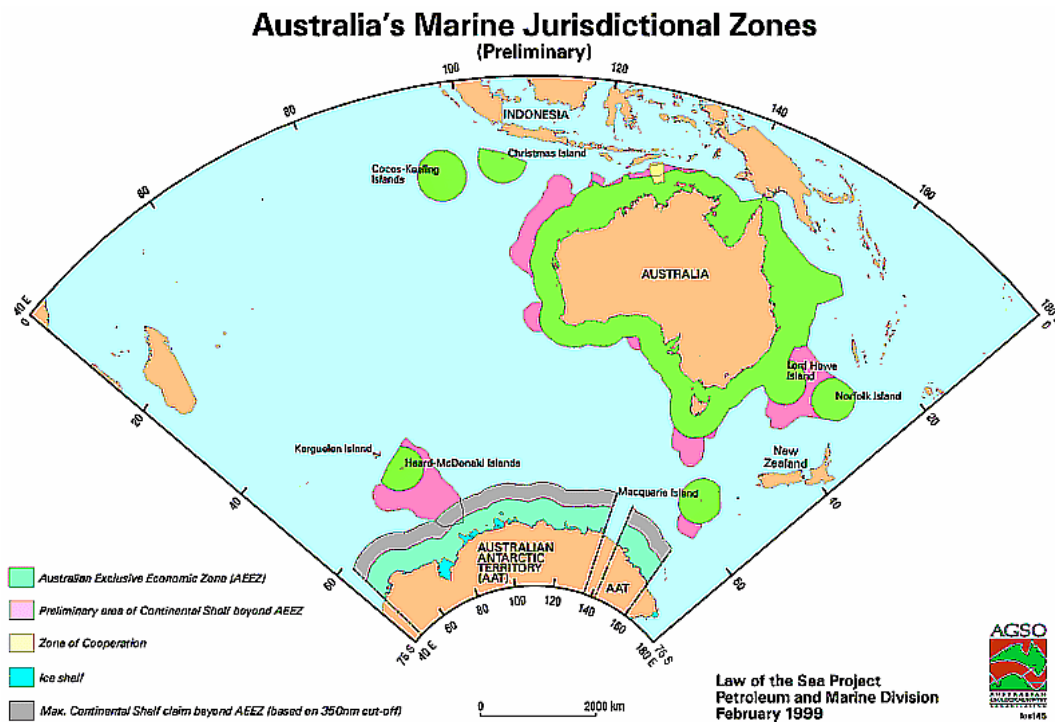


Figure 3 Australia's Ocean Territory<sup>9</sup>

<sup>8</sup> Michaelis, F (1998), 'International Year of the Oceans-1998 Australia's policies, programs and legislation', Research Paper 6 1998-99, Science, Technology, Environment and Resources Group, 8 December 1998, Parliament of Australia, Parliamentary Library

<sup>9</sup> Department of Environment and Heritage, [www.deh.gov.au/biodiversity/abrs/online-resources/fauna/afd/map.html#marinejurisdictionalzones](http://www.deh.gov.au/biodiversity/abrs/online-resources/fauna/afd/map.html#marinejurisdictionalzones)

### **Box 3 Australia's Oceans Policy<sup>10</sup>**

#### *Vision*

Healthy oceans: cared for, understood and used wisely for the benefit of all, now and in the future

#### *Goals*

In seeking to care for, understand and use our oceans wisely, Australia's oceans policy has the following broad goals:

1. To exercise and protect Australia's rights and jurisdiction over offshore areas, including offshore resources
2. To meet Australia's international obligations under the *United Nations Convention on the Law of the Sea* and other international treaties
3. To understand and protect Australia's marine biological diversity, the ocean environment and its resources, and ensure ocean uses are ecologically sustainable
4. To promote ecologically sustainable economic development and job creation
5. To establish integrated oceans planning and management arrangements
6. To accommodate community needs and aspirations
7. To improve our expertise and capabilities in ocean-related management, science, technology and engineering
8. To identify and protect our natural and cultural marine heritage
9. To promote public awareness and understanding

### **Box 4 What is ecosystem-based management?<sup>11</sup>**

Australia's Oceans Policy committed the Commonwealth government to ecosystem-based regional marine planning. This extract from page 13 of *Oceans eleven: the implementation of Australia's Oceans Policy and ecosystem-based management* briefly describes the concept.

Ecologically sustainable development has three core objectives: improving individual and community welfare and wellbeing, increasing inter- and intra-generational equity, and maintaining biodiversity and ecological process. The precautionary principle urges caution when consideration is being given to development proposals and other environmental issues, including planning and management, when scientific knowledge is incomplete or uncertain ... ecosystem-based management has developed to include them both.

Ecosystem-based management is a new approach to looking after the environment. It is a rejection of the old management systems based on sectoral influences, tired management strategies and boundaries drawn from politics, fishing practices or other lines of convenience. In their place it establishes management systems that recognise, respect and protect biological diversity and the functions and dynamic processes of natural ecosystems. Although this might sound like the aims of existing resource management systems, there are two key differences in perspective that set ecosystem-based management apart. The first is that human use is managed to operate within the natural capacity of the ecosystem, not at a level that would require manipulation or control of the ecosystem. The second is recognition that the integrity of natural ecosystems requires protection from human impact, not active management intervention.

Ecosystem-based management is adaptive, with a systems perspective operating across all levels of biological diversity and within ecological boundaries. It maintains ecological integrity – natural genes, species, populations, habitats and ecosystems – and the ecological patterns and processes that support them. And it should never be confused with management actions that interfere and manipulate ecosystems, such as the culling of higher-order predators in an attempt to increase the abundance of commercially targeted fish species. Ecosystem-based management – and regional marine planning – is a step-by-step process that will move us towards a sustainable future for our oceans (and other natural systems to which it is applied). These steps, and the goals of ecosystem-based management, are based on four tenets: holistic, integrated science; adaptive management; collaborative decision making; and socially defined goals and objectives.

1.1.10 At the end of the twentieth century, and during the last month of the 1998 International Year of the Ocean, the Commonwealth government released Australia's Oceans Policy<sup>12</sup> (see Box 3 for the Policy's vision and goals). The policy determined that ecosystem-based regional marine planning and management would be a key part of future oceans planning and management (see Box 4 for a brief description of ecosystem-based management).

10 Commonwealth of Australia (1998) *Australia's Oceans Policy Vol 1*, Canberra, p4

11 Smyth, C, Prideaux, M, Davey, K and Grady, M. (2003) *Oceans eleven: The implementation of Australia's Oceans Policy and ecosystem-based management*, Australian Conservation Foundation, Melbourne, pp13-14

12 Commonwealth of Australia (1998) *Australia's Oceans Policy Vol 1; Australia's Oceans Policy Vol 2: Specific Sectoral Measures*, Canberra

1.1.11 As the twenty-first century begins, Australia has a complex statutory and regulatory framework for oceans planning and management based on multiple jurisdictions and sector-based management, with the key sectors being shipping and related activities, Indigenous interests, maritime security, environment protection, fisheries, petroleum exploration and recovery, and tourism and recreation. In some sectors the legislation is at both state and Commonwealth levels, and in most sectors there are separate management bodies and authorities.

1.1.12 Implementation of Australia's Oceans Policy could force changes to that framework. So too might the responses to the current marine environmental issues – global warming and climate change, habitat destruction and species loss, overfishing, land-based and oceans-based pollution and introduced marine pests. Can these be dealt with by maintaining or adjusting the existing policy, statutory and regulatory framework, or is there need for a new approach?

1.1.13 *Out of the blue* argues the case for a new approach – an Australian Oceans Act. In so doing it considers the environmental threats facing Australia's oceans, the current administrative and legislative arrangements in the oceans planning and management regime, the development and implementation of Australia's Oceans Policy, the nature of regional marine planning, the need for effective intergovernmental arrangements, the use of the *Environment Protection and Biodiversity Conservation Act 1979 (EPBC Act)* to complement oceans planning and management, and the content of the proposed Australian Oceans Act.

## 1.2 The environmental impacts of Australia's ocean use

1.2.1 In 1880 Sir Henry Parkes, who has been dubbed the 'father of federation' in Australia, said when introducing a bill on the 'preservation of fish stocks' to the New South Wales parliament:

*With an extensive sea-board, an apparently unlimited supply of fish, and a very limited consumption, it might naturally be supposed that for many years to come legislation for the preservation of the fisheries of New South Wales would be premature and unnecessary. Experience tells a different tale.*<sup>13</sup>

1.2.2 Marine environmental issues had emerged in Australia during the nineteenth century, but most of the legislative responses were more about resource development (of fish stocks, for instance) or in response to concerns about public health issues associated with water pollution adjacent to growing coastal settlements. It was not until the mid-to-late twentieth century that conservation and environmental acts and regulations became features of the legislative framework of the states and the Commonwealth.

1.2.3 The aim of the expanding legislative framework was to deal with contemporary environmental protection issues, but they were also in response to calls for action from an increasingly educated and environmentally aware community. The focus then was mostly land-based, but community concerns about oceans-based issues are now emerging. The growth of the whale-watching industry, for example, both here and overseas, has helped forge a stronger connection between people and the oceans and heightened their concerns about the future of ocean life. The media has made a significant contribution to this building knowledge of the threats, as indicated by Flaherty and Sampson (2005):

*The threats to marine biodiversity from the impact of human activity have only started to become more widely appreciated by the broader public over the last few decades. This has been largely a result of media coverage of issues including the decline of coastal water quality, the loss of coral reefs, and the decline in fish populations because of overfishing. An awareness of the decline in temperate kelp bed*

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<sup>13</sup> AGPS (1991) 'The development of Australian Fisheries management'. A paper written for the Ecologically Sustainable Development Working Group - Fisheries. (Ref Final Report AGPS Canberra 1991) at [http://members.trump.net.au/ahvem/Fisheries/National/Dev\\_of\\_AustFM.html](http://members.trump.net.au/ahvem/Fisheries/National/Dev_of_AustFM.html)

*communities, seagrass beds, and the loss of saltmarshes and mangrove communities is slowly becoming more widely understood.*<sup>14</sup>

1.2.4 Australia's population is now more than 20 million, with 85 per cent living within 50 kilometres of the coast. It is this population concentration that is at the heart of many of the coastal and nearshore marine issues that have emerged in recent years. These were highlighted in the first *State of the marine environment report* published in 1995, a comprehensive analysis of the trends in Australia's marine environment. The main conclusion was that:

*...on the basis of the existing limited information, and in comparison with both neighbouring countries and equivalent developed countries in the northern hemisphere, the condition or 'health' of Australia's marine environment might be rated as 'generally good', but with many important caveats or qualifiers. The condition of specific areas ranges from 'almost pristine' in very remote, undeveloped areas, to locally 'poor' off many highly developed urban, industrial and intensively farmed areas in the south-east, and south-west of the continent. The condition of offshore environments is better than inshore environments because of dilution of pollutants.*<sup>15</sup>

1.2.5 The 1995 *State of the marine environment report* identified five<sup>16</sup> top concerns:

- declining marine and coastal water/sediment quality, particularly as a result of inappropriate catchment land use practices
- loss of marine and coastal habitat
- unsustainable use of marine and coastal resources
- lack of marine science policy and lack of long-term research and monitoring of the marine environment
- lack of strategic, integrated planning in the marine and coastal environments.

1.2.6 Six years later the 'Coasts and oceans theme report' of the 2001 *State of the environment report* was released. The 'theme report' found that:

*Although there is a consistency between the findings of the 1996 State of the Environment Report and those of this report, many important initiatives have started in this five-year period that will continue to have a positive effect in future years. Substantial progress has been made in addressing the introduction of marine pests, upgrading sewage treatments plants, reusing treated wastewater, treating and reusing stormwater, and implementing measures to achieve sustainability in commercial fisheries and protecting marine biodiversity.*<sup>17</sup>

1.2.7 However, the 'Coasts and oceans theme report' also reported that:

*The quality of estuarine coastal and inshore waters has not improved over the past five years on a national basis. Water quality has improved in specific localities and regions, such as coastal waters off Sydney. Diffuse agricultural runoff and stormwater runoff significantly affects inshore waters. The management of disturbed coastal acid sulfate soils has been recognised as an important issue.*<sup>18</sup>

1.2.8 In addition, the 'theme report' identified a number of emerging<sup>19</sup> marine issues including the:

- future development of aquaculture

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14 Flaherty, T and Sampson, K, (2005) *Taking NRM beyond the shore: integrating marine and coastal issues into natural resource management*, Marine and Coastal Community Network, p43

15 Zann (1995), p90

16 Zann (1995) pp90-95

17 CSIRO (2001), *Australia state of the environment report 2001* (Coasts and Oceans Theme Report), Australian State of the Environment Committee, CSIRO Publishing on behalf of the Department of the Environment and Heritage, p95

18 CSIRO (2001), p95

19 CSIRO (2001), p96

- effects of climate variability and change including coral bleaching and the damage to coastal infrastructure from sea level rises
- continuing development of fishing technology
- ecological effects of invasive species
- continuation of weak attempts at integration of management
- involvement of Indigenous people in fisheries management.

#### **Box 5 Ocean impacts and threats from ocean uses**

##### *Commercial fisheries*

Habitat destruction by fishing gear

Overfishing

Ecological structures changed by removal of targeted species

Bycatch of non-targeted species

Behavioural change in marine mammals attracted to vessel noise

Discarding of caught lower value fish in favour of higher-value fish caught

Use of berley to attract target species can lead to behavioural changes and community structure

Culling of marine animals that compete for fish

Drowning of seabirds attracted to longline operations

Attraction of toothed whale and shark species to longline catches

Entanglement of marine animals in fishing gear

Collisions with marine animals

Expansion of fishing effort into new areas or of newly targeted species where potential impacts are unclear

##### *Aquaculture*

Impact on wild fish stocks targeted as stock and for meal of farmed species

Waste generated by farmed species

Habitat disturbance during construction and operation

Escape of farmed species into surrounding environment leading to competition with and predation of native species

Translocation of pests and diseases on transferred equipment

Pollution from use of antibiotic and chemicals

Changed feeding behaviour of animals attracted to site

Entanglement and death of animals attracted to site

Attraction of scavenger species that displace local species pose a public nuisance

Nutrient stripping that reduces availability to environmental

Displacement of animals by acoustic devices used to keeping them away from site

Harassment of marine mammals

##### *Recreational fisheries*

Ecological impacts of fish removal and overfishing

Death of released animals

Lost gear and litter leading to entanglement of or ingestion by marine animals

Habitat damage from propellers and anchoring and grounding of boats

Trampling of intertidal areas during bait collection and accessing of fishing spots

##### *Other land and oceans-based uses*

Water pollution from waste discharges and rural and urban runoff

Increased nutrients leading to algal blooms and fish kills

Accumulation of nutrients and chemicals in sediments affecting bottom dwelling communities

Entanglement in and ingestion of debris from runoff and discharges

Smothering of habitats by debris accumulated through discharges, loss of containers and other materials swept overboard

Introduced disease-producing organisms in runoff

Noise pollution affecting the behaviour of marine animals

Spills of oils and chemicals from various industry operations

Habitat damage from coastal and marine developments

Habitat damage from trampling and excessive numbers of visitors to sensitive areas

Water contamination from the use of anti-fouling paints

Loss of habitats and marine organisms during channel dredging and the dumping of spoil

Ballast water discharge spreading exotic marine pests and pathogens

Translocation of exotic marine pests on hulls and gear

Collisions with marine animals

1.2.9 The emerging issues, and the impacts and threats from oceans use listed in Box 5, reveal that there is still much work to be done to improve oceans planning and management. Flaherty and Sampson (2005) echo this sentiment while suggesting a way forward:

*Freehold ownership of the ocean does not exist in Australia. The oceans, also known as the 'commons', are a public asset, allowing freedom of passage and access. The concept of the ocean being a public asset, coupled with the lack of scientific knowledge about the way marine environments work, has delayed our realisation of the need to manage human activities in our oceans as much as we do on land.*

*Effective management of human use in coastal and marine ecosystems is made difficult because of the fragmentation inherent in the different management responsibilities of the various layers of government that exist over the coastal zone. The challenges are complex and there is an urgent need for coordination and cooperation across regions to ensure effective responses to threats and a focus on long-term sustainability.<sup>20</sup>*

1.2.10 When Australia's Oceans Policy was released in December 1998 the number of overfished commercial species was six (see Box 8, Section 2.2), but eight years later there are 17. Trawl gear continues to damage seabeds and seamounts, polluted runoff flows into coastal waters, kelp forests, seagrasses and mangroves disappear, whales, dolphins, seals, albatrosses, sharks and a large array of marine life are caught as bycatch or in beach netting programs, and rising global temperatures are a building threat to Australia's ocean life. These are sobering stories that hopefully Australia will end positively as it works to meet the environmental challenges facing the oceans.

1.2.11 An improved understanding of the oceans will be key to resolving these issues, but Flaherty and Sampson (2005) have highlighted severe limitations in current marine conservation research:

*Historically, marine species research has taken a 'dinner plate' approach, with the focus being the key commercially exploited fish and shellfish species from the many thousands of marine species in Australian waters. Little is known about the fish we don't eat, or those species that are caught as a result of bycatch. Our knowledge of marine invertebrates and plant species is also limited, with even less management. Scientists estimate that some 60% of Australia's marine invertebrates are undescribed.<sup>21</sup>*

1.2.12 As Wells (2004) indicates, the broad-scale environmental challenges facing Australia, including land and water degradation, climate change and biodiversity loss:

*... need concerted attention at the national level, whether from the Commonwealth and State governments acting together or the Commonwealth Government acting on its own. And while the Commonwealth and State governments would no doubt argue that they are, jointly, tackling the problems, the evidence is, so far, that this is not occurring successfully enough. As the State of the Environment Report reveals, the broad-scale problems - most of which have been with us for decades- are still with us, and continue to increase in magnitude and severity.<sup>22</sup>*

1.2.13 The previously quoted 1880 comment by Sir Henry Parkes:

*With an extensive sea-board, an apparently unlimited supply of fish, and a very limited consumption, it might naturally be supposed that for many years to come legislation for the preservation of the fisheries of New South Wales would be premature and unnecessary. Experience tells a different tale.<sup>23</sup>*

can be made as relevant today as it was 125 years ago with a little paraphrasing to read:

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20 Flaherty, T and Sampson, K, (2005), p7

21 Flaherty, T and Sampson, K, (2005) p43

22 Wells, K, (2004), *Greening the Australian federation: a proposal for national institutional reform to promote environmental sustainability across Australia*, Australian Conservation Foundation, Melbourne, p1

23 AGPS (1991)

*Australia, with its extensive Exclusive Economic Zone and relatively small population might think that national legislation for the protection, planning and management of Australia's oceans is premature and unnecessary. Experience tells us a different tale.*

1.2.14 Unfortunately for Parkes, the influence of his legislation was subsequently weakened<sup>24</sup>. More than a century on, recent experience tells us that Australia has reached the point where its oceans legislation needs to be strengthened. *Out of the blue* argues that an Australian Oceans Act will enable Australia to better plan and protect Australia's oceans through the establishment of integrated ecosystem-based regional marine planning. By being collaborative, cooperative, nationally consistent, fair and equitable, such planning would provide certainty and a secure future for our oceans that governments, user groups, the community – and ocean life – are seeking.

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<sup>24</sup> [http://members.trump.net.au/ahvem/Fisheries/National/Dev\\_of\\_AustFM.html](http://members.trump.net.au/ahvem/Fisheries/National/Dev_of_AustFM.html)



## Chapter 2 Current legislative and administrative arrangements for Australia's oceans

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*Chapter 2 considers the nature of existing administrative and legislative arrangements and their limitations, with special reference to the fisheries sector and to marine protected area processes.*

### 2.1 General arrangements

2.1.1 The evolution of Australia's oceans planning and management over the past two centuries has created a framework of legislative and administrative arrangements for oceans-based industries that is sector-based and spread across a number of Commonwealth, state and territory jurisdictions. As Veronica Sakell, when Director of the National Oceans Office, indicated:

*...these instruments have been framed largely independently of each other, reflecting the independent nature of sectoral developments, conflicts between sectors and the objectives of different interests has frequently occurred. These sectoral management arrangements were never intended to handle cumulative and cross-sectoral impacts...*<sup>25</sup>

2.1.2 The Offshore Constitutional Settlement (OCS) of 1979 reaffirmed this patchwork of disintegrated arrangements and will continue to undermine any move towards uniformity of regulation and consistency of resource management in Australia's oceans. Such an approach is the antithesis of integrated, ecosystem-based management as noted by the authors of *Oceans eleven* when they called for a major review of the OCS:

*While designed to ensure cooperation with state interests, the Offshore Constitutional Settlement has, in the absence of any overarching Commonwealth control, resulted in divided, sector-based and insular management focused on the exploitation of marine resources within jurisdictional boundaries, not ecological or resource boundaries.*<sup>26</sup>

2.1.3 Concerns about the current administrative and legal arrangements had been raised before. In a 1997 report on multiple-user management prepared for Environment Australia<sup>27</sup>, it was found that:

- the legislative framework is overly complex and cumbersome and does not adequately address multiple-user management
- the activity-based orientation of most of the legislation is a significant impediment to integrated management of different activities
- where multiple use is dealt with it is usually in relation to conservation
- there is no conflict resolution/avoidance framework
- generally, non-traditional economic activities such as tourism and recreational activities are not regulated.

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<sup>25</sup> Sakell, V (undated), 'Australia's oceans policy: integrated oceans management at a regional level', National Oceans Office, Hobart, p1

<sup>26</sup> Smyth et al, p22

<sup>27</sup> Environment Australia (1997), 'Issues Paper 1: Multiple use management in the Australian marine environment: principles, definitions and elements', cited in Lee (2003), p26

2.1.4 During the 2002 consultation phase in the preparation of *Oceans management: the legal framework*<sup>28</sup> for the South-east Regional Marine Plan Assessment Reports, the National Oceans Office sought comments from various stakeholders on the existing legal and administrative arrangements. The feedback indicated that there remained confusion about the roles of the various state and Commonwealth agencies and concerns about their overlap and number, as well as the lack of coordination between them.

2.1.5 A legal analysis, the *Marine legislative review*<sup>29</sup>, conducted for the Australian Conservation Foundation, revealed that in terms of ecologically sustainable development (ESD):

*...numerous pieces of legislation which impact upon marine ecosystems are commencing to incorporate sustainability principles into decision-making processes at least in the sense that the majority of Acts reviewed contain sustainability principles in the objects clauses of the legislation, particularly in the conservation and fisheries sectors. However several sectors appear to have fallen behind in terms of the incorporation of ESD principles.*<sup>30</sup>

2.1.6 The *Marine legislative review* is a detailed and comprehensive review of 250 existing Commonwealth and state marine-related environmental laws and regulations that apply to the conservation, fisheries, petroleum, shipping and tourism sectors. It concludes that they are inadequate in providing for integrated marine management, ecologically sustainable development, ecosystem-based management and multiple-user management.

2.1.7 In conducting the Review, the reviewers tested the legislation against key principles of Oceans Policy by asking a number of questions. Do the objects clauses expressly incorporate or imply ESD in the legislative scheme? Is there a corresponding 'duty to consider objects' on decision makers. Is ecosystem based management provided for? What barriers are there to it? In terms of multiple-user management: Is there any cross-referral to other sectors or agencies prior to grant of approvals/permits?

2.1.8 The Review also found, however, that there were elements in the reviewed legislation and regulations that could be used to contribute to ESD, ecosystem-based management and multiple-user management, but these were limited in their application. In the case of multiple-user management, for instance, some acts had mechanisms for public consultation and others had cross-referral between departments, but these were usually single elements within the legislation rather than comprehensive attempts to establish effective and inclusive multiple-user management.

2.1.9 Box 6 summarises the findings of the Review in relation to the explicit or implied treatment of ecologically sustainable development, ecosystem-based management and multiple-user management in the various pieces of legislation. The number in brackets within columns 2-6 refer to the number of pieces of legislation and regulations that do not expressly or impliedly address ESD, EBM or multiple user management but which have elements (see comments) that in part could contribute to them. The comments relating to each sector's acts are listed by dot point in the order in which the sectors are listed. Where numbers do not appear in the bracket, there were no Acts that had features that partially contributed to ESD, EBM or multiple-user management. In those cases, there is no corresponding dot point appearing in the 'comments' row of Box 6.

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28 National Oceans Office(2002), *Oceans management: the legal framework*, South-east Regional Marine Plan Assessment Reports, Hobart

29 Australian Conservation Foundation (2005), *Marine legislative review*, ACF, Melbourne 2005

30 Australian Conservation Foundation (2005), *Marine legislative review*, ACF, Melbourne 2005, Executive summary, p2

<b>Box 6 Summary of <i>Marine legislative review</i></b>					
<b>Sector (No. of Acts reviewed)</b>	<b>Ecologically Sustainable Development Expressly included in the Act</b>	<b>Ecologically Sustainable Development implied in the Act</b>	<b>Ecosystem-based Management expressly included in the Act</b>	<b>Ecosystem-based Management implied in the Act</b>	<b>Multiple-user Management covered under the Act</b>
<b>Conservation (48)</b>	15 (5)	7 (3)	0 (3)	6 (16)	4 (23)
<b>Fisheries (22)</b>	5 (3)	3 (2)	0	0 (9)	0 (10)
<b>Petroleum (21)</b>	0(0)	0 (8)	0	0 (4)	0 (7)
<b>Shipping (36)</b>	3 (2)	0 (8)	0 (1)	2 (3)	0 (8)
<b>Tourism (33)</b>	0 (1)	0 (3)	0 (2)	0	0 (11)
<i>Comments on bracketed numbers</i>	<ul style="list-style-type: none"> <li>• Weak to broad</li> <li>• Generally</li> <li>• Subordinate to other legislation or linked to convention</li> <li>• Flora and fauna protection</li> </ul>	<ul style="list-style-type: none"> <li>• Possibly could</li> <li>• Conserving fish, resources</li> <li>• Generally</li> <li>• Subordination to other legislation, ministerial settings, protocols and environmental protection</li> <li>• Protection and promotion</li> </ul>	<ul style="list-style-type: none"> <li>• Strategy, management plan, habitat protection or best-practice environmental management</li> <li>• Maybe</li> <li>• Flora and fauna protection and zoned management</li> </ul>	<ul style="list-style-type: none"> <li>• Spatial management, reserves, habitat, species protection, could</li> <li>• Maybe, protecting marine life and ecosystems</li> <li>• Generally or inferred</li> <li>• Could or through related convention</li> </ul>	For all sectors: Ministerial advice, public and cross-agency consultation, consents, referrals and other measures appear separately in some acts

2.1.10 For example, in connection with *ecologically sustainable development*, the comment that ‘Ecologically Sustainable Development expressly included in the Act’ is supplemented by indications that there were 5 Conservation Acts that were weak to broad expressions, 3 Fisheries Acts that generally expressed ESD principles, 0 petroleum Acts, 2 Shipping Acts that were subordinate to other legislation that included elements of ESD, and 1 Tourism Act that had elements of ESD through flora and fauna protection (refer to the *Marine legislative review* for detailed commentary).

2.1.11 When consideration was given to *ecosystem-based management* (see Box 4), the Review found that a minority of the 48 conservation sector Acts examined had ecosystem-based management expressly or implied within their provisions. It could be argued that even though some conservation Acts did include elements of ecosystem-based management, this was largely accidental because their objects deal with the conservation of habitats and ecosystems. After analysis of the other sectors, the Review concluded that:

*... the concept of ecosystem-based management has not filtered into the legislation reviewed in any express or deliberate manner. Further, much of the legislation reviewed revealed numerous barriers to implementation of ecosystems-based management due to the sectoral and species focus of much of the legislation reviewed.*<sup>31</sup>

2.1.12 On *multiple-user management*, the *Marine legislative review* indicated that the:

*...sheer quantity of sectoral-based legislation reviewed ... demonstrates a key barrier to multiple user management - namely the numerous layers of administration and organisations which may need to be dealt with in any one project or usage of a marine area. Further, the lack of an overarching management framework for the multiple and competing ‘uses’ of the oceans makes it difficult to resolve competing priorities.*<sup>32</sup>

31 Australian Conservation Foundation (2005), p4

32 Australian Conservation Foundation (2005), pp6-7

2.1.13 The *Marine legislative review* analysed oceans-based legislation across five sectors in relation to ESD, ecosystem-based management and multiple-user management. When considering the oil and gas sector<sup>33</sup>, as an example, the Review found that in relation to ESD:

*Neither of the key Commonwealth Petroleum Sector Acts, Petroleum (Submerged Lands) Act 1967 (Cth) or the Offshore Minerals contain any express incorporation of ESD. While regulations made under that legislation, the Petroleum (Submerged Lands) (Management of Environment) Regulations 1999 do incorporate ESD into the objectives of the Regulations, there is no express duty on decision-makers under the regulations to consider or fulfil the objectives of the legislation. Each State has mirror petroleum legislation which also mirrors the failure to incorporate ESD<sup>34</sup>.*

2.1.14 According to the Review, on ecosystem-based management:

*On the whole Petroleum legislation fails to incorporate EBM in any way. In fact the regulation of activities at both Commonwealth and State levels imposes few duties on operators and licensees to consider ecosystem integrity and habitat protection. For example the NSW Petroleum (Submerged Lands) Act only requires licensees to conduct activities in a manner that does not interfere with conservation “to a greater extent than is necessary for the reasonable exercise of rights and duties”. Further, decisions as to whether to grant licences do not generally mandate consideration of environmental issues<sup>35</sup>.*

2.1.15 Finally, on multiple-user management in the oil and gas sector, the Review found that:

*The key legislation reviewed did not include cross-referral to other agencies nor significant public consultation prior to decisions being made, including the Petroleum (Submerged Land) Act 1967 (Cth), Sea Installations Act 1987 (Cth), Petroleum (Submerged Lands) Act 1982 (NSW), Petroleum Act 1923 (QLD). Some legislation provides for public consultation and inter-government agency consultation in relation to activities with environmental impacts, namely the Petroleum Act 2000 (SA). However, there are other statutory provisions which appear to be a barrier to successful multiple user management such as the fact that the Petroleum (Submerged Lands) Act 1982 (QLD) prevails over the Marine Parks Act 1982 (QLD) in the event of inconsistency. This is a significant barrier to implementation of both ecosystems based management and multiple user management as it automatically gives precedence to the resource-user over the conservation objectives of the marine legislation<sup>36</sup>.*

2.1.16 When considering inconsistencies and overlap in the administration and regulation of the oil and gas sector through the Petroleum Regulations<sup>37</sup> and the *EPBC Act*, and with particular reference to acreage release and cumulative impacts, the conservation sector report, *Oceans eleven* commented:

*Further, at the time of the acreage release, there is no mechanism for government departments to coordinate their activities and ensure that areas of critical habitat or of conservation importance are excluded. Input that may be provided by the environment agency is not binding on the industry agency releasing the acreage. And industry has little choice but to apply to explore within the acreage blocks, setting it on a collision course with other marine conservation objectives even before the Seismic Guidelines and Petroleum Regulations are considered<sup>38</sup>.*

*Neither the EPBC Act nor the Petroleum Regulations takes into account the cumulative impacts of the activity they are assessing against existing and forecasted activity, either within the sector or from other sectors operating in the same waters. This inconsistency in the assessment of threats sees the oil and gas industry following the seismic guidelines, but no such guidelines exist for shipping, defence, fisheries, fish farming and other marine uses that can create intense noise pollution of potential harm to cetaceans and other marine species<sup>39</sup>.*

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33 The contents of the offshore petroleum bill currently in federal parliament would not cause a change in the conclusions in the analysis of petroleum sector legislation.

34 Australian Conservation Foundation (2005), p4

35 Australian Conservation Foundation (2005), p6

36 Australian Conservation Foundation (2005), p8

37 These have recently been reviewed and revised.

38 Smyth et al, p21

39 Smyth et al, p21

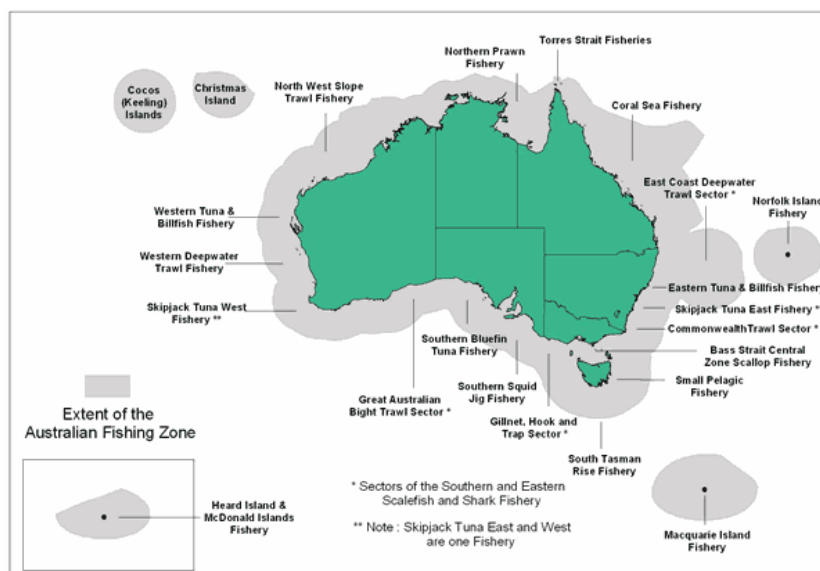


Figure 4: Commonwealth-managed fisheries in Australia<sup>40</sup>

2.1.17 The previous four paragraphs briefly considered the oil and gas sector, one of the five analysed in the *Marine legislative review*. Section 2.2 discusses in more detail the current legislative and administrative arrangements that apply to fisheries management, and Section 2.3 considers the processes and outcomes for the establishment of the National System of Marine Protected Areas (NRSMPA). At the end of each section a brief discussion considers the differences that would be brought to the current arrangements by the proposed Australian Oceans Act outlined in Chapter 7.

## 2.2 Current arrangements for fisheries management

2.2.1 Australia's Fishing Zone is the third largest in the world, but annual fisheries production of 249,000 tonnes (\$2.3billion in value)<sup>41</sup> is relatively small – about 50<sup>th</sup> in the world<sup>42</sup> in terms of tonnes of fish landed – due to the relatively limited natural productivity of our oceans. Even so, more than 500 species of marine finfish and shellfish are caught or farmed for sale by Australia's commercial fishers.

2.2.2 In terms of Australia's fishery production values, rock lobster, tuna, prawns and abalone species dominate the data. Western Australia and South Australia are the key-producing states and the northern prawn fishery, the south-east trawl and eastern tuna and billfish longline and minor line fisheries the most valuable fisheries.

2.2.3 Until the passing of the *Commonwealth Fisheries Act 1952*, the management of Australia's fisheries had been largely the preserve of the states. In 1979 the Offshore Constitutional Settlement (OCS) established agreed arrangements between the Commonwealth and the states under which fisheries could be managed by either the Commonwealth, by a state given responsibility to the edge of the Australian Fishing Zone, by retaining the status-quo with state and Commonwealth legislation, or through a 'joint authority' to manage fisheries that crossed jurisdictional boundaries.

40 Australian Fisheries Management Authority website: [www.afma.gov.au/fisheries](http://www.afma.gov.au/fisheries)

41 Bureau of Rural Sciences (2005), *Fishery status reports 2004*, Status of fish stocks managed by the Commonwealth government, p24

42 Bureau of Rural Sciences (2005), p24

2.2.4 Under the OCS, the states and territories generally manage the fisheries that are found off a single state or territory, while the Commonwealth manages the fisheries that extend into the waters of two or more states or territories. However, the jurisdiction of a state or territory for fisheries management can go beyond the three-nautical-mile limit (also for shipping and mining) if it begins within the limits of that state. It is also possible for the management of state fisheries to extend to the 200-nautical-mile limit, and for Commonwealth fisheries management to extend to the low water mark in state waters.

2.2.5 The next major change for Australian fisheries management was the passing of the *Fisheries Management Act 1991* and the *Fisheries Administration Act 1991*; the latter established the Australian Fisheries Management Authority (AFMA) and Management Advisory Committees, and included the development and provision of fishery management plans based on the principles of ecologically sustainable development (ESD). When assessing the *Fisheries Management Act 1991* in terms of ESD, the *Marine legislative review* found that ESD principles<sup>43</sup> were incorporated generally in the objects, namely:

*...to ensure the exploitation of fisheries resources is conducted in a manner consistent with principles of ESD and the exercise of the precautionary principle, in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment.*<sup>44</sup>

2.2.6 When considering the *Fisheries Management Act 1991* in relation to ecosystem-based management, the Review found that the Act includes the power to regulate methods and equipment for the purposes of conserving the environment, and includes development and adoption of management plans (non-mandatory) for fisheries to achieve ‘ecosystem integrity, intergenerational equity and intra-generational equity’, but that there were barriers to ecosystem-based management:

*The Commonwealth Fisheries Management Act incorporates EBM through the use of management plans which aim to achieve ecosystem integrity. However the main focus of the Act is on target species rather than on ecosystems. Further, the boundaries of ‘fisheries’ are based around species or fishing methods, rather than ecosystem boundaries.*<sup>45</sup>

2.2.7 In addition, the *Marine legislative review* determined that in terms of multiple-user management, the *Fisheries Management Act 1991* does not include any mechanisms to resolve conflict with other sectors such as conservation, shipping and oil and gas, nor are there any provisions for cross-sectoral input into the granting of fishing rights or the development of management plans (the exception to this is s.17A – see next quote below). When considering the broader sweep of Commonwealth and state fisheries legislation in relation to multiple-user management, the *Marine legislative review* concluded:

*Some fisheries legislation provides for consultation with certain limited agencies or bodies, for example the Fish Resources Management Act 1994 (WA) requires consultation with an advisory committee and Aboriginal groups have objection rights. The Fisheries Management Act 1991 (Cth) provides that advertising must be carried out to invite interested persons to be included on a register to be notified when management plans are amended and such persons are then invited to make submissions. However, there are notable gaps where no cross-sectoral referral or public consultation is provided for, for example the Fisheries Act 1935 (NSW) and the Living Marine Resources Management Act 1995 (Tas). There are other pieces of legislation, namely the Fisheries Act 1994 (QLD) which require only “reasonable steps” to be taken to consult. Further, there are numerous bodies set up under the various pieces of fisheries legislation, including AFMA, EA [Environment Australia but now Commonwealth Department of Environment and Heritage], AFFA [Department of Forestry, Fisheries and Agriculture]*

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43 The provisions on ESD will be strengthened under proposed amendments to both Commonwealth fisheries acts announced by the then Fisheries Minister, Senator Ian Macdonald<sup>43</sup>. The amendments will insert the principles of ESD consistent with those expressed in the Environment Protection and Biodiversity Conservation Act 1999.

44 Australian Conservation Foundation (2005b), *Marine legislative review*, Fisheries sector, p2, quote from the Commonwealth Fisheries Management Act 1991

45 Australian Conservation Foundation (2005), *Executive summary*, p5

which have no express legislative inter-linkages and this is a barrier to multiple user coordination and management.<sup>46</sup>

2.2.8 The Commonwealth *Fisheries Management Act 1991* does, however, contribute to a reduced focus on the three-nautical-mile barrier, but as Lee (2003) notes:

*The FMA and FAA clearly go some way towards implementing a system of preservation of ecosystem integrity though the shift away from a focus on the artificial boundary at the 3 nautical miles limit of State waters and an attempt to focus instead on natural boundaries such as fisheries habitats. However, the regime does not fully implant the theory of ecosystems based management as the fisheries management plans are based around preservation of particular species which are the targets of commercial fishing, rather than preservation of ecosystems or their own sake. As set out above, the fisheries boundaries can be based around human activities, which is not the aim of ecosystems management.*<sup>47</sup>

2.2.9 The Commonwealth fisheries legislation also increases the emphasis on environmental management and sustainability. In this regard Haward et al (2001) commented:

*One of the more significant challenges affecting Australian fisheries policy and management has been the increasing external scrutiny of management. This is reflected in growing impact of Commonwealth environmental legislation on fisheries management, development of sustainability indicators, and the extension in 1999 of Schedule 4 of the Wildlife Protection (Regulation of Exports and Imports) Act 1982 to fisheries...*<sup>48</sup>

2.2.10 Section 1.2 lists the threats and impacts of oceans use, including those from fisheries. One of the less visible impacts is effort creep, which occurs through the use of more efficient gear and highly sophisticated fish finding and positioning technologies such as GPS and side-scan sonar that have removed or vastly reduced the natural sanctuaries of fish. To help deal with the issue of fisheries sustainability, Schedule 4 of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* requires that the Commonwealth Minister for Environment and Heritage approve exports based on an assessment of the sustainability of the activity.

2.2.11 Twenty Commonwealth and 93 State fisheries have been assessed (another 16 are yet to be completed), and these are listed in Box 7, which shows the diversity of fisheries but also the species, area and gear-specific nature of fisheries management, and again highlights Australia's disintegrated fisheries and oceans planning and management. Of the 113 with completed assessments, 47 have been assessed to be 'exempt' from the export controls of the *EPBC Act*, while 66 have been approved as a 'wildlife trade operation' with export able to occur while certain conditions are being met (See definition of each term in Box 7). None have failed to pass the assessment.

2.2.12 When the Commonwealth's *Fisheries Management Act 1991* was established, of the 74 commercially fished species managed by the Commonwealth there were 5 overfished species (see Box 8) and 9 with uncertainty about stock levels. By the time Australia's Oceans Policy was released in 1998 there were 6 overfished species and 35 with stock levels that were of uncertain status. In 2004 there were 17 overfished species, a threefold increase from 1992, and 40 with uncertain stock levels, a more-than-fourfold increase in just twelve years. This data could in part reflect better monitoring, but it also indicates that there is serious pressure on Australia's fish stocks and still much to be done to ensure Australia's fisheries are ecologically sustainable.

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46 Australian Conservation Foundation (2005), p7

47 Lee, M (2003): 'What's wrong with 16.1 million km<sup>2</sup> of law?', unpublished paper, p20

48 Haward, M, Bache, S, Tsamenyi, M and Rose, G (2001), 'Fisheries' in Haward (2001), p129. Schedule 4 of the Wildlife Protection (Regulation of Exports and Imports) Act 1982 is the basis on which sustainable fisheries assessments are now carried out by the sustainable fisheries section of the Department of Environment and Heritage under the Environment Protection and Biodiversity Conservation Act.

**Box 7 Commonwealth, State and Territory-managed fisheries and sustainable fisheries assessments<sup>49</sup>**

Commonwealth	Queensland	Victoria
<p>Bass Strait Scallop Central Zone Fishery* Coral Sea Fishery* Eastern Tuna and Billfish Fishery* Heard Island and McDonald Islands Fishery# Informally Managed Fishing Permits* Macquarie Island Toothfish Fishery# New and Exploratory Fisheries in the CCAMLR Region* Norfolk Island n/s Northern Prawn Fishery# Skipjack Tuna Fishery* Small Pelagics Fishery* Southern and Eastern Scafish and Shark Fishery* Southern Bluefin Tuna Fishery* Southern Squid Jig Fishery# Torres Strait Beche-de-mer Fishery* Torres Strait Crab Fishery* Torres Strait Finfish Fishery* Torres Strait Pearl Shell Fishery Torres Strait Prawn Fishery* Torres Strait Trochus Fishery* Torres Strait Tropical Rock Lobster Fishery* Torres Strait Turtle and Dugong n/c Western Trawl Fisheries* Western Tuna and Billfish Fishery#</p>	<p>Blue Swimmer Crab Pot Fishery* Coral Fishery n/s Coral Reef Finfish Fishery* Deepwater Finfish Fishery* Developmental Slipper Lobster Fishery* East Coast Beche-de-mer Fishery* East Coast Inshore Finfish Fishery* East Coast Otter Trawl Fishery* East Coast Pearl Fishery # East Coast Spanish Mackerel Fishery* East Coast Trochus Fishery# East Coast Tropical Rock Lobster Fishery* Eel Fishery# Gulf of Carpentaria Developmental Finfish Trawl Fishery* Gulf of Carpentaria Inshore Finfish Fishery* Gulf of Carpentaria Line Fishery* Jellyfish n/c Marine Aquarium Fish Fishery* Marine Specimen Shell Fishery# Moreton Bay Developmental Beche-de-mer Fishery* Mud Crab Fishery* River and Inshore Beam Trawl Fishery n/c Rocky Reef Finfish Fishery* Spanner Crab Fishery# Stout Whiting (Finfish Trawl) Fishery**</p>	<p>Abalone Fishery# Developmental Jellyfish Fishery* Eel Fishery# Giant Crab Fishery* PQ Aquatics* Rock Lobster Fishery# Scallop n/c Urchin Fishery*</p>
<p><b>NSW</b> Abalone Fishery* Estuary General Fishery# Estuary Prawn Trawl* Lobster Fishery* Ocean Hauling Fishery# Ocean Trap and Line Fishery* Ocean Trawl Fishery* Sea Urchin and Turban Shell Fishery n/s Yabbies (Inland Restricted Fishery) n/s</p>	<p><b>SA</b> Abalone Fishery# Beach-cast Seagrass and Marine Algae Fishery# Blue Crab Fishery# Giant Crab Fishery* Lakes and Coorong Fishery* Pilchard Fishery# Prawn Trawl Fisheries# Rock Lobster (<i>Jasus edwardsii</i>) Fishery# Scallop and Turban Shell Dive Fishery n/s Seahorse Marine Services* Sea Urchin Fishery* Specimen Shell Fishery#</p>	<p><b>WA</b> Abalone Managed Fishery# Abrolhos Island and Mid West Trawl Managed Fishery* Beche-de-mer Fishery* Broome Prawn Managed Fishery# Cocos (Keeling) Islands Marine Aquarium Fish Fishery# Exmouth Gulf Prawn Fishery# Kimberley Prawn Fishery# Mackerel Fishery# Marine Aquarium Fish Managed Fishery* North Coast Shark Fishery and the Joint Authority Northern Shark Fishery n/c Northern Demersal Fishery# Northern Developmental Blue Swimmer Crab n/c Octopus n/c Onslow/Nickol Bay Prawn Fisheries# Pearl Oyster Fishery# Pilbara Fish Trawl Fishery* Pilbara Trap Fishery* Rock Lobster Fishery# Salmon Fishery# Shark Bay Experimental Crab Fishery* Shark Bay Prawn Fishery# Shark Bay Scallop Fishery# Shark Bay Snapper Fishery# South Coast Crustacean Fishery* Specimen Shell Managed Fishery# West Coast Deep Sea Crab Fishery* West Coast Demersal Gillnet and Demersal Longline Interim Managed Fishery and the Joint Authority Southern Gillnet and Longline Limited Entry Fishery n/c West Coast Purse Seine Fishery*</p>
<p><b>NT</b> Aquarium Fishery* Barramundi n/s Demersal Fishery# Finfish Trawl Fishery# Jellyfish fishery* Mud Crab Fishery# Shark Fishery* Spanish Mackerel Fishery# Timor Reef Fishery# Trepang Fishery*</p>	<p><b>Tasmania</b> Abalone Fishery# Bull Kelp Fishery* Commercial Dive Fishery# Eel Fishery# Giant Crab Fishery* Native Oyster Fishery* Octopus Fishery n/c Rock Lobster Fishery# Scalaris Abalone Fishery* Scallop Fishery# Marine Aquarium Fishery*</p>	<p># Exempt: The fishery is being managed in an ecologically sustainable way in accordance with the <i>Guidelines</i>. This fishery will be added to the exempt list for five years and recommendations for action over that time may be made. Product from these fisheries is exempt from the export controls of EPBC Act.</p>
<p>*WTO: Fishery consistent with EPBC Act and not likely to have unacceptable impact in short term. However, there are uncertainties and further action required. Fishery would be declared an approved Wildlife Trade Operation and export can occur while conditions are being met.</p>		<p>n/c Assessment not completed n/s Assessment not started</p>

<sup>49</sup> Commonwealth of Australia (2005), *Catch up* newsletter, Department of Environment and Heritage



<b>Box 8 Commonwealth-managed commercial fisheries: overfished an uncertain status<sup>50</sup></b>										
<b>Year</b>	<b>92</b>	<b>93</b>	<b>94</b>	<b>96</b>	<b>97</b>	<b>98</b>	<b>99</b>	<b>01-02</b>	<b>02-03</b>	<b>04</b>
<i>Overfished</i>	5	5	3	3	4	6	7	11	16	17
<i>Uncertain</i>	9	9	13	17	31	35	38	34	34	40

2.2.13 When considering the sustainable fisheries assessments in terms of ecosystem-based management and multiple-user management, several issues emerge. These are:

- assessments are carried out within a single sector, on a fishery-by-fishery or species-by-species basis underlining the continued sector-based management of Australia's oceans
- management plans approved by the assessment process must acknowledge the *Guidelines for the Ecologically Sustainable Management of Fisheries*<sup>51</sup>. However, the effectiveness of the approval process is put in doubt by the approval of overfished fisheries such as those for southern bluefin tuna, northern Australian shark and those targeted by the Commonwealth government's \$220million *Securing our fishing future* package announced in November 2005 (see 2.2.15)
- reference points (management targets) are often based on maintaining existing catch rates, a crude measure, while in some cases the allowed catches are based on maintaining percentages – ranging from 20-50 per cent – of the pre-fished biomass. Is this sufficient to maintain the biodiversity values of the oceans of which fish are a critical component? What are the impacts of significant biomass removal on the functioning of ecosystems and the provision of ecosystem services? Should more fish be left alive in the oceans and allocated for other uses such as scientific research, conservation and ecotourism? This is a crucial question in establishing an integrated management system based on multiple users and ecosystems.

2.2.14 The establishment of multiple-user and ecosystem-based management through the implementation of Australia's Oceans Policy will most likely lead to cross-sectoral tensions, as Haward et al (2001) imply:

*Fisheries and other marine industries are managed under sophisticated arrangements that deal with jurisdictional issues between governments, but little attention has been given to emergent imperatives such as cross-sectoral decision making. Existing sectoral regimes for managing ocean resources are retained under Australia's Oceans Policy but the basis of management shifts to a situation where fisheries activities are integrated within a 'multiple-use model' of ocean governance.<sup>52</sup>*

2.2.15 Fisheries management is now focusing more on ESD and the environment and the term 'ecosystem-based fisheries management' is used regularly within fisheries management. But the application of this term specifically to fisheries again highlights the sector-based management of fisheries, the antithesis of ecosystem-based management. This is accentuated by how a fishery is defined. It can be based on a species or type of fish, a description of fish by reference to other characteristics such as sex, an area of waters or of seabed, a class of boat or of persons or by the purpose of activities. As Lee (2003) points out, the fisheries regime:

*... does not fully implement the theory of ecosystem-based management as the fisheries management plans are based around preservation of particular species which are the targets of commercial fishing, rather than preservation of ecosystems for their own sake.<sup>53</sup>*

<sup>50</sup> Bureau of Rural Sciences (2005), p5

<sup>51</sup> Commonwealth of Australia, 'Guidelines for the ecologically sustainable management of fisheries', [www.deh.gov.au/coasts/fisheries/guidelines](http://www.deh.gov.au/coasts/fisheries/guidelines)

<sup>52</sup> Haward et al (2001), p131

<sup>53</sup> Lee (2003), p20

2.2.16 In the latter half of 2005 the Prime Minister wrote to the Commonwealth Fisheries and Environment and Heritage ministers and gave them three months to develop proposals that would target the problems of overfishing in Commonwealth-managed fisheries. On 23 November the then Commonwealth Minister for Fisheries, Senator Ian Macdonald, responded with the announcement of the \$220million *Securing our fishing future* package. According to the Minister the package:

*...addresses the profitability and the sustainable future of the industry. The centrepiece of the package is \$150 million for a one-off capped fishing concession buyout focused on reducing the high level of fishing capacity in those Commonwealth fisheries that are subject to over-fishing – or at significant risk of over-fishing in the future. This will also address the displaced fishing effort arising from the creation of Marine Protected Areas in the south east marine region which the Environment Minister, Senator Ian Campbell, and I will be working on in conjunction with industry in the next few months<sup>54</sup>.*

2.2.17 The package also included:

- \$30 million to offset the impacts of reduced fishing activity on onshore businesses most directly linked to the fishing industry (e.g. fish processors, ships chandlers) as well as other targeted assistance including
- \$20 million to establish a Fishing Communities Programme aimed at generating new economic and employment opportunities in vulnerable regional ports affected by reduced fishing activity
- \$21 million to offset the cost of AFMA management levies and for improved science, compliance and data collection<sup>55</sup>.

2.2.18 The *Securing our fishing future* package targeted the Commonwealth fisheries of greatest concern – the southern and eastern fisheries and the northern prawn fishery – and also included reductions in Total Allowable Catches (TACs) for a range of overfished species, including deep sea fish such as orange roughy and oreos, and species nearing an overfished status such as blue warehou and flathead.

2.2.19 The announcement of the *Securing our fishing future* package was cautiously received by the fishing industry and the conservation sector, the latter recognising it as an important step towards sustainable fisheries but also expressing concern about the uncertainty of integration with the marine protected areas process and integrated oceans planning and management more generally, and the vagueness of the rules for applications for structural adjustment. Soon after the package's announcement, the Commonwealth Minister for Fisheries sent a government directive<sup>56</sup> to the Australian Fisheries Management Authority (AFMA) seeking a response on the measures that the Authority would take to support the package. On 16 December 2005 AFMA:

*...announced a series of measures to accelerate existing strategies to end overfishing, recover overfished stocks and manage the broader impact of fishing on the marine eco-system. The measures are designed to comply with the formal Direction issued to AFMA by the Australian Government on Wednesday 14 December, to take decisive action to ensure the sustainability of Commonwealth fish stocks, and to secure the fishing industry's future. Among the actions will be tighter controls on the number of fish to be taken and the level of fishing activity, electronic monitoring of fishing boats, halving of all 'bycatch' and completing risk assessments of all fisheries<sup>57</sup>.*

2.2.20 The AFMA response followed closely on from its announcement of Total Allowable Catches for Commonwealth managed fisheries, including TAC cuts to zero for the Bass Strait Central Zone Scallop Fishery and most deepwater fisheries in the Southern and Eastern Scalefish and Shark Fishery (SESSF):

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54 Macdonald, I (2005), Ministerial Media Release, '\$220m to Secure Australia's Fishing Future', 23 November 2005

55 Macdonald, I (2005)

56 Macdonald, I (2005a), 'Details of the Australian Government's direction to AFMA' attached to media release of 14 December 2005 and sent to AFMA that day.

57 AFMA (2005), 'New measures a watershed for Commonwealth Fisheries', 16 December 2005

*Except for some targeted fishing for orange roughy and alfonsino, most waters below approximately 700m in the SESSF will be closed to fishing from 1 January 2007 to enable the rebuilding of deepwater species from overfishing and to take a more precautionary approach to possible fishing impacts on deepwater ecosystems<sup>58</sup>.*

2.2.21 The *Securing our fishing future* package indicates an increased Commonwealth government commitment to dealing with the issue of sustainable oceans management. However, it again highlights the sectoral and divided jurisdictional (state fisheries are not dealt within the package) nature of oceans planning and management processes. Decisions about management and use in the fisheries sector are made by fishers, fisheries scientists, fisheries managers and fisheries bureaucrats largely in isolation from other sectors. In addition, sectoral management agencies at times find it difficult to separate their management and regulatory role from that of advocating growth and development of the fishery they manage. For example, in South Australia, the Department of Primary Industries and Resources has been heavily involved in advocacy for substantial growth in aquaculture, pre-empting the evolving marine planning and protection processes<sup>59</sup>.

2.2.22 The very slow response to the issue of overfishing in Australia's oceans suggests that individual sectors struggle to resolve fundamental management issues under the existing administrative and legislative arrangements. The fisheries management problems caused by multiple jurisdictions and multiple sectors were recognised by the Australian Government's Bureau of Rural Sciences when commenting on the overfishing of silver trevally in the Bureau's 2004 *Fisheries status reports*:

*Management is complicated by the multi-jurisdictional and multi-sectoral nature of the fishery. About two-thirds of the 2003 catch was taken by dual-endorsed SEF vessels from waters under State jurisdiction. Hence the 2001 to 2003 TACs were exceeded. AFMA's reductions in the SEF TAC have not limited and cannot control catches. A revised OCS arrangement, or State trip limits, are needed to effectively reduce the fishing mortality of silver trevally<sup>60</sup>.*

2.2.23 The proposed Australian Oceans Act establishes integrated and independent decision making within a cross-sectoral framework. It is designed to provide legislative force to regional marine planning processes and to ensure that regional marine plans:

- establish integrated ecosystem-based management rather than sector-based and species-based management
- are enforceable and include measurable operational objectives, indicators and targets based on ecosystems
- provide multiple-user and cross-sectoral management frameworks that independently allocate resources, effectively engage stakeholders and the community, and work to resolve conflict
- provide greater transparency and certainty in fewer but more consistent and effective processes.

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58 AFMA (2005)

59 The oil and gas industry sector operates in a similar way to the fisheries sector with regards to decision making. The Commonwealth Department of Industry Tourism and Resources also advocates strongly for growth in the industry it is to regulate. Packages available at the time of acreage release 'market' the acreage to the industry by highlighting its potential production values.

60 Bureau of Rural Sciences (2005), *Fisheries status reports 2004*



## 2.3 Current arrangements for marine protected areas

2.3.1 Australia's Oceans Policy established Australia as a world leader in marine policy, but it was the proclamation of the Great Barrier Reef Marine Park in 1975 that first captured the world's attention. Since then a number of marine protected areas (MPAs)<sup>63</sup> have appeared in Commonwealth (see map of these MPAs in Figure 5), state and territory waters as part of the establishment processes for the National System of Marine Protected Areas (NRSMPA).

2.3.2 The NRSMPA aims to satisfy the commitments made by the Commonwealth government when it signed the international Convention on Biological Diversity in 1992 (ratified in 1993), which requires all member nations to establish a system of protected areas (on land and sea). The National Oceans Office website describes the evolution of the NRSMPA as thus:

*Building on earlier recognition of the need for a system of marine protected areas that incorporate the range of habitats in our waters, in 1991 the Commonwealth Government announced a 10-year marine conservation program [Ocean Rescue 2000]. A key component of this was expansion of the existing marine reserve system through development of a National Representative System of Marine Protected Areas (NRSMPA). This was subsequently endorsed by States and Territories under the Intergovernmental Agreement on the Environment [1992] and is being implemented in the context of the National Strategy for Ecologically Sustainable Development and the National Strategy for the Conservation of Australia's Biodiversity. The primary goal of the NRSMPA is:*

*...to provide for the protection, conservation, wise use, understanding and enjoyment of marine heritage in perpetuity through the creation of a national representative system of marine protected areas and through management in accordance with the principles of the World Conservation Strategy and the National Strategy for Ecological Sustainable Development of human activities that use or affect the marine environment<sup>64</sup>.*

2.3.3 Implementation of the NRSMPA has been slow and mixed, with the definition of an MPA open to many interpretations. Although national in name, the system more reflects the federal nature of our system of government, with each jurisdiction creating MPAs in its own way and the system evolving with inconsistent processes outcomes for marine protection, and different targets, timelines, consultation processes, zonings and levels and types of protection.

2.3.4 Victoria established a world-first system of highly protected marine national parks and sanctuaries in 2002 after ten years of investigation and consultation. The Commonwealth and the other states have opted for multi-zoned parks with small percentages of high-level protection. Tasmania established two new MPAs in 2004 to add to four tiny ones proclaimed in 1991 and the relatively larger Macquarie Island Marine Reserve in 2000, which extended the island's terrestrial nature reserve to the three-nautical-mile limit.

2.3.5 South Australia has just one MPA, which covers state waters abutting the Great Australian Bight Marine Park in Commonwealth waters. The South Australian government has established a process to develop a South Australian Representative System of MPAs (SARSMPA) by 2010 – the target was originally 2003 – and identified 19 regions in which these could be located. The draft management plan for the first marine park within SARSMPA, the Encounter Bay Marine Park, was released in 2005 and proposed high-level protection covering 12.9 per cent of the park's waters.

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63 A marine protected area (MPA) is an area of sea (which may include land, the seabed and subsoil under the sea) established by law for the protection and maintenance of biological diversity and of natural and cultural resources.

64 National Oceans Office website, [www.oceans.gov.au](http://www.oceans.gov.au)

Box 9 Zones used in multi-zone marine protected areas in Commonwealth and State waters		
Sanctuary	General Use	Whale management and monitoring area
Preservation	Marine Mammal Protection	Estuarine conservation
Marine National Park	Benthic Protection	Main use
Scientific Research	Marine Reserve	Visitor access
Buffer	Restricted Access	Heritage
Conservation Park	General managed use	Wilderness
Habitat Protection	Special purpose areas	Restricted
Habitat/Species Management	Special purpose	Inner marine
Highly Protected	Recreation	Outer marine

2.3.6 New South Wales has established six MPAs, two of which are yet to have zoning plans prepared. Western Australia has ten<sup>65</sup>, while Queensland is currently establishing marine parks that protect new areas but also merge existing marine parks<sup>66</sup>. The largest is the Great Barrier Reef Coast Marine Park abutting the Great Barrier Reef Marine Park in Commonwealth waters. High-level protection proposed for the Great Sandy Marine Park – Northern Section, which will merge Hervey Bay and Wongarra marine parks, is proposed to be 3.8 per cent of the park's total area of 590,000 hectares.

2.3.7 Although in 1992 the National Advisory Committee on Marine Protected Areas was formed (now called the Task Force on Marine Protected Areas and associated with the Natural Resource Management Ministerial Council), comprising Commonwealth, state and territory agencies responsible for marine conservation and fisheries management, and its terms of reference focus on the development and implementation of a national framework for establishing the NRSMPA, the implementation of the NRSMPA mirrors the roll-out of Australia's oceans planning and management more generally – inconsistent processes and outcomes in a multi-jurisdictional framework (the Task Force was reactivated at the end of 2006 after a period of recess).

2.3.8 When considering its distribution, and after 14 years of implementation, the NRSMPA is strongly skewed towards tropical and sub-Antarctic habitats in Commonwealth waters (see Figure 5) and, although there are some temperate coastal waters within the Great Australian Bight Marine Park and state MPAs, little protection has been given to these unique waters even though they are where ocean use and environmental threats are at their most intense (The proclamation of MPAs in the South-east Marine Region aims to begin redressing that imbalance, but see 2.3.16-2.3.22 for further details).

2.3.9 With regards to terminology, the term 'marine park' is the most commonly used for MPAs in all jurisdictions except Victoria, where 'marine national park' and 'marine sanctuary' are used, but at least 27 different zones are used in the multi-zoned MPAs of the various jurisdictions (see Box 9). The processes for MPA identification and selection also vary, with Victoria opting for an independent government advisory body, New South Wales and Western Australia for marine park authorities, and Tasmania, South Australia and Queensland using their conservation departments. The Commonwealth program is coordinated by the Department of Environment and Heritage.

2.3.10 Although Australia's Oceans Policy includes commitments to the ongoing establishment of the NRSMPA, there were no targets or timetable for its completion included. In 2003 the World Parks Congress meeting in Durban, South Africa, when noting that the percentage of the

<sup>65</sup> At the ALP State Conference in November 2005 the ALP committed to create a comprehensive network of marine protected areas along the WA coastline by 2012 that would give high-level protection (no-take) to at least 20-30% of each marine habitat

<sup>66</sup> It is difficult to determine the extent of Queensland's protection due to the unavailability of mapping data.

oceans within protected areas was far behind that found on the land, recommended that at least 20-30 per cent of each marine habitat in the world's oceans be strictly protected (in no-take areas) by 2012<sup>67</sup>. By including this target, the World Parks Congress built on the recommendation made at the 2002 World Summit on Sustainable Development for the world's nations to establish systems of MPAs by 2012.

2.3.11 In broad percentage terms, and in terms of habitat protection, Australia is well short of the World Parks Congress target. About 7.5% of Australia's EEZ (8.6 million km<sup>2</sup>) is contained within MPAs. In comparison, terrestrial protected areas cover about 10% of Australia's land surface. When no-take percentages are considered, the percentage of Australia's EEZ with this strict level of protection is barely over 3%. For state coastal waters the percentages of no-take areas are approximately Victoria 5%, Tasmania 4%, Western Australia and New South Wales 3%, and Northern Territory and SA 1%<sup>68</sup> (see Appendix 1 for data on MPAs in Commonwealth, state and territory waters).

2.3.12 With the Commonwealth government's recommitment to a comprehensive, adequate and representative NRSMPA in Australia's Oceans Policy, there was some expectation that the South-east Regional Marine Plan – the first of the regional marine plans to be prepared – would include such a system of MPAs, but as Reichelt and Wescott (2005) contend, there were different views about the 'scope and depth' of the plan:

*... the [regional marine planning] process did not articulate at an early stage what the plan would look like when it was finished, and where the key decision areas would lie. For example, would resource allocation be included. The stakeholders have had highly varying expectations on the outcomes of the plan. For example it appears that the conservation groups were expecting the final plan to include a comprehensive and representative suite of 'no-take' Marine Protected Areas (MPAs) whilst some industry sectors did not assume that this would be the outcome.*<sup>69</sup>

2.3.13 The final South-east Regional Marine Plan published in 2004 included a proposal for an MPA in each of the Murray Canyons and Zeehan areas (Figure 6 maps these and another 10 MPAs proposed by the Commonwealth in December 2005). The Murray and Zeehan MPAs were determined by the Department of Environment and Heritage after stakeholders from the oil and gas, fisheries and conservation sectors submitted their MPA options as part of the Commonwealth's stakeholder-driven process to identify and select the MPAs for the region. This stakeholder-driven process ran parallel to the regional marine planning process coordinated by a separate body, the National Oceans Office, and continued on after the release of the South-east Regional Marine Plan<sup>70</sup>.

2.3.14 The MPA boundaries were based on benthic characteristics (seabed structures) being used as surrogates for biodiversity:

*Typically the assessment of an area proposed for an MPA requires information on biodiversity (including ecosystem mapping), ecological processes, conservation status, biogeographic characteristics, social interests (including data relating to Indigenous and non-Indigenous values), economic interests (including existing and potential uses) and threatening processes ... However, the level of fine-scale information for MPA decision-making is very limited. As acquiring this information is costly and will take many decades, a precautionary approach to reserve system design is taken. This uses the best*

67 World Parks Congress (2003), Recommendation 22: Building a global system of marine and coastal protected area networks

68 A figure for Queensland cannot be calculated due to the unavailability of mapping data

69 Reichelt, R and Wescott G, (2005), 'Integrated oceans management and the institutional performance of Exclusive Economic Zones: The Australian case', Chapter 5 in Ebbin, S et al (eds) (2005) *A sea change: The Exclusive Economic Zone and governance institution for living marine resources 2005*, p73

70 The ten remaining MPAs included in the Commonwealth's South-east MPAs proposal were identified and selected by DEH without the use of the stakeholder-driven process.

*scientific understanding of surrogates for broad-scale ecosystems and habitats based on bioregional assessments as well as the advice and expertise offered by stakeholders.*<sup>71</sup>

2.3.15 The Department's comments on the availability of scientific information, and those below, indicated that areas of high-level protection would be limited in the South-east, and that IUCN Category VI, the lowest protection level in the IUCN category system, would be the starting point for MPA protection levels:

*Where adequate information exists to make an informed decision, areas of high conservation value will be highly protected. Where information gaps create uncertainties for management and decisions on zoning, the Australian Government will adopt a staged and adaptive approach to setting levels of protection as more information about the specific economic, cultural and ecological values in the area is gathered and assessed.*<sup>72</sup>

*Proposed zoning and management arrangements for the Murray and Zeehan candidate MPAs will be developed as soon as feasible. This will draw on risk assessments, including of typical fishing activities in the Region. The potential displaced fishing effort that could arise from the proposed zoning and management arrangements will be estimated through social and economic assessments for Murray and Zeehan. The Government's policy on MPAs and displaced fishing, released in January 2004, will be applied to the Murray and Zeehan candidate MPAs as soon as the proposed zoning for the Murray and Zeehan candidate MPAs has been determined. The form of activities permitted in multiple use (IUCN VI) zones of MPAs in the South-east Marine Region will be established and made available to stakeholders as soon as possible.*<sup>73</sup>

2.3.16 These policies were finally applied to all Commonwealth waters of the South-east Marine Region (except for the waters around Macquarie Island which, although included in the South-east Regional Marine Plan, were excluded from the South-east MPA proposal because they were deemed by the Commonwealth to have sufficient protection) and a draft proposal for a system of MPAs was announced in mid-December 2005. At that time a stakeholder consultation process was begun in the lead-up to the statutory process for proclamation planned to begin at the end of March 2006. Fig 4 maps the 12 MPAs proposed by the Commonwealth.

2.3.17 The South-east MPA planning process had been a long and delayed one that was expected to continue well into 2006. The delays had been in part caused by the reluctance of the fishing sector to be involved without a Commonwealth government commitment to financial assistance to those fishers affected by the declaration of the MPAs<sup>74</sup>, and the time taken to establish and complete a fishing gear risk assessment<sup>75</sup>. Delays were also caused by the restructuring of the Marine Division of the Department of Environment and Heritage, which resulted in the absorption of the National Oceans Office as a new branch.

2.3.18 The Commonwealth proposal for MPAs in the South-east Marine Region was completed earlier than planned to fit the schedule of the \$220million *Securing our fisheries future* fisheries adjustment package<sup>76</sup> announced by the Commonwealth Fisheries Minister in November 2005. By integrating the timing of the processes, the Government avoided the need for two phases of

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71 Environment Australia (2003), 'Australia's South-east Marine Region: A user's guide to identifying candidate areas for a regional representative system of marine protected areas', August 2003, p17

72 National Oceans Office (2004), South-east Regional Marine Plan, p83

73 National Oceans Office (2004), p85

74 In January 2004 the Commonwealth Government announced its policy statement on 'Marine Protected Areas and Displaced Fishing'. This policy statement indicated that assistance would be considered for those fishers and communities affected by the establishment of marine protected areas, acknowledged that other factors might also lead to the need for such assistance, and outlined the process by which such assistance would be considered. Australian Government, (2004), 'Marine Protected Areas and Displaced Fishing: A Policy Statement', Australian Government, January 2004

75 The fishing gear risk assessment project aimed to determine the impact of fishing gears on the values of potential MPAs. This process became bogged down as bureaucrats, industry, conservationists and marine scientists discussed the merits of the assessment process

76 This package was the response to a Prime Ministerial letter to both the Fisheries and Environment Ministers, giving them three months to deal with the problem of over-fishing



adjustment, one for that associated with improving the sustainability of overfished fisheries, and another due to displaced effort from the marine protected areas.

2.3.19 The MPAs proposed cover 171,000 square kilometres or 14 per cent of the South-east Marine Region. They are multi-zoned MPAs with three management zones:

- *Strict nature reserve* (IUCN category Ia) scientific reference site for research and monitoring. No oil and gas exploration and production, recreational or commercial fishing permitted. Permits required for research, education, recreation and tourism use. This zone, which is the no-take component of the network, is found within 5 of the 12 areas and covers about 40 per cent of the network and 6 per cent of the region. Almost all of this is found on the region's abyssal plain to the south of Kangaroo Island and to the east of north-west Tasmania, but some seamounts are also included
- *Habitat protection zone* (IUCN category VI) which excludes commercial fishing but allows oil and gas exploration and production and recreational and charter fishing. This zone covers about 40 per cent of the network and 6 per cent of the region. Most of this is also over the abyssal plain but located further out to sea than the managed resource protected zone
- *Managed resource protected zone* (IUCN category VI) which provides for oil and gas exploration and production, recreational and charter fishing and commercial fishing, such as abalone and rock lobster, but excludes commercial fishing using demersal trawl, Danish seine, auto longline, mesh netting, demersal longline and scallop dredges. This zone covers about 20 per cent of the network and about 2 per cent of the region.

2.3.20 On the release of the Commonwealth's South-east MPA proposal, the Commonwealth Minister for Environment, Senator Ian Campbell, committed the Australian Government to the achievement of a comprehensive network of MPAs by 2012, the World Summit on Sustainable Development and World Conservation Congress date target, and linked this to regional marine planning:

*The proposed MPA network covers an area two and half time the size of Tasmania and four fifths the size of Victoria. It will build on the Howard Government's already substantial record of establishing MPAs, such as those in the Great Australian Bight, Macquarie Island, Lord Howe Island, and the Tasmanian Seamounts. We have proposed a comprehensive MPA network offering substantial protection to the unique marine environment of the South-east, much of which is largely unexplored and doubtless harbours many unknown species. The Australian Government is pushing ahead with its plan to have established a comprehensive network of MPAs around Australia by 2012 as one of the key outcomes of the regional marine planning process. The South-east MPAs will protect many significant features including undersea mountains and canyon systems which are known to have high biodiversity values.<sup>77</sup>*

2.3.21 Between now and the completion of the final MPAs for release at the beginning of the statutory proclamation process planned for the first half of 2006 (final proclamation by the end of 2006), stakeholders and the Commonwealth will consult on final MPA boundaries and the zonings within them (the structural adjustment for fishers must be resolved by the end of June 2006). During the lead-up to the proclamation process, the proposals will also be assessed by the Scientific Peer Review Panel and the South-east Region MPA Scientific Reference Panel. Both panels were established by the Department of Environment and Heritage in March 2005 in response to criticism by marine scientists about the level of scientific engagement in the process.

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<sup>77</sup> Campbell, I. (2005), Media release 13 October 2005, Minister for Environment and Heritage

2.3.22 The terms of reference for the Peer Review Panel include to ‘provide advice on the extent to which the network of candidate MPAs is likely to meet the NRSMPA principles of comprehensiveness, adequacy and representativeness at a system-wide level’<sup>78</sup>. For its part, the role of the Scientific Reference Panel includes to ‘provide ongoing scientific and technical advice directly to stakeholders on how to interpret the MPA selection specifications and available scientific information to identify candidate MPAs in the South-east region.

2.3.23 The preliminary report<sup>79</sup> of the Scientific Reference Panel’s assessment of the South-east Marine Region MPA proposals was released by the Department of Environment and Heritage on 28 February 2006, and concluded that in relation to comprehensiveness, adequacy and representativeness (CAR):

*Collectively, the areas enclosed by the proposed MPAs are predominantly on the lower slope and abyssal plain. The system fails to meet the design specifications and is unlikely to achieve the CAR aims fully, because it does not include the diversity of depth, location, productivity, sedimentary and geomorphological units, which are our that the areas excluded from protection are main surrogates for biodiversity*<sup>80</sup>.

*The proposed MPA system under-represents the shelf, upper and midcontinental slope. Importantly, benthic values in these depths are also those most under threat from human impacts, especially from direct fishing impact inside 1500 m depth*<sup>81</sup>.

and that:

*... with the exception of the south coast of Kangaroo Island and possibly Banks Strait off northeastern Tasmania, the highly productive areas in the SE have been largely excluded*<sup>82</sup>.

2.3.24 For the implementation of the NRSMPA, the proposed Australian Oceans Act would:

- ensure that consistent, transparent, integrated and inclusive ecosystem-based regional marine planning and marine national parks processes would be established in state and Commonwealth waters. The identification of candidate marine national parks would be based on science, with the mapped options designed by marine scientists. Subsequent to that process, the selection of the marine national parks and their final size and location would be the result of an analysis that used scientific and socio-economic criteria (see Schedule 4 of the proposed Australian Oceans Act in Chapter 7) and included community and stakeholder consultation
- as part of the regional marine planning process, provide for a public advertising and exhibition period, within a statutory time period, which would ensure community consultation and comment before the final park boundaries were proclaimed. This would avoid the inconsistency and variable timetables created by political, departmental or agency inertia or the lack of enthusiasm for adequate marine protection that can at times surface in Commonwealth and state arenas
- marine national parks would provide the core protection for marine biodiversity in the regional marine plan. Other zones would be used in the remaining waters of the marine region to provide for habitat, biodiversity and ecological process protection in the context of ecologically sustainable use of the oceans and ensure that the marine national parks were not compromised

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<sup>78</sup> ‘Comprehensiveness’ includes MPAs that sample the full range of the South-east region’s ecosystems. ‘Adequacy’ includes MPAs of appropriate size and configuration to ensure the conservation of marine biodiversity and integrity of ecological processes. ‘Representativeness’ includes MPAs that reflect the marine life and habitats of the South-east region.

<sup>79</sup> SE MPAs Scientific Reference Panel (2006), ‘General comments on the proposed candidate MPAs, SE Region’, February 2006

<sup>80</sup> SE MPAs Scientific Reference Panel (2006), p1

<sup>81</sup> SE MPAs Scientific Reference Panel (2006), p3

<sup>82</sup> SE MPAs Scientific Reference Panel (2006), p7

- integrate the identification and selection process for marine national parks within the ecosystem-based process for each regional marine plan. Except for a small marine planning pilot project in South Australia that is based on ecosystem boundaries, and which has the potential to be integrated<sup>83</sup> with that state's currently separate MPA process, not one of the states has established ecosystem-based marine planning processes that would create marine plans with core biodiversity protection in no-take areas, a framework that is at the heart of the proposed Australian Oceans Act<sup>84</sup>
- formalise cooperative, collaborative and joint processes and marine national park management arrangements within and between Commonwealth and state department and agencies. Some joint management arrangements already exist (eg. Great Barrier Reef Marine Park) through memoranda of understanding for parks that straddle Commonwealth and state waters.

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83 Currently in South Australia there are separate state-government processes for MPAs, marine planning and aquaculture development

84 Ecosystem-based management processes have been used at the Commonwealth level in the initial zoning and more recent rezoning (Representative Areas Program) of the Great Barrier Reef Marine Park in 2004 (see Section 5.5). In the South-east Regional Marine Planning process, regional marine planning and the MPA process were decoupled, leading to a lack of integration of process and the exclusion of ecosystem-based management principles and processes. The October 2005 announcement by the Minister for Environment and Heritage, that MPA development will be integrated within the regional marine planning process through bioregional plans (see section 6.2 of this paper), indicates a recognition that decoupling was a mistake, but the bioregional planning process is descriptive and narrower, and will not lead to the cross sectoral, integrated and ecosystem-based management that would be established under the Australian Oceans Act outlined in this paper.

## Chapter 3 Australia's Oceans Policy development and implementation

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*Chapter 3 discusses the development of Australia's Oceans Policy and issues associated with its ongoing implementation.*

### 3.1 Australia's Oceans Policy development

3.1.1 Australia ratified the United Nations Convention on the Law of the Sea (UNCLOS) in 1994. UNCLOS:

- imposes an obligation on member states to ensure that the living resources in their EEZs are not endangered by over-exploitation
- imposes a general obligation on states to protect and preserve the marine environment from pollution
- sets out the rights of states to exploit their natural resources pursuant to their environmental policies and in accordance with the duty of protection and preservation.

3.1.2 Subsequent to the UNCLOS ratification, and after a series of conferences, discussion papers, workshops and consultations (see Box 10) developed a constituency of support, the Commonwealth government released in December 1998 Australia's Oceans Policy and, in so doing, became a world leader in the area. It had taken the Commonwealth government just two years after its win in the 1996 federal election to fulfil its election promise to prepare and release an oceans policy (the Australian Labor Party also supported the development of an oceans policy, with PM Paul Keating proposing it in 1995).

3.1.3 UNCLOS was a catalyst for nation states to begin the development of oceans policy. Since the release of Australia's Oceans Policy, New Zealand and Portugal have begun working on national oceans policies, so too Norway, the United Kingdom, India, China, Brazil, Japan, the Philippines, Mexico and Viet Nam. Canada had already passed an Oceans Act in 1997, which contained a process for the establishment of an oceans management strategy/policy which was released in 2002. And Pacific nations are implementing the Pacific Island Regional Oceans Policy that they also adopted in 2002.

3.1.4 In the United States, Congress directed the formation of a Commission on Ocean Policy in the *Oceans Act 2000*. The Commission's *Ocean blueprint for the 21<sup>st</sup> century* released in September 2004 made 212 recommendations for a new national oceans policy. And in June 2005, *Oceans 21*, new legislation to implement the Commission's recommendations, was introduced to the US Congress that authorised \$1.3billion annually to implement regional ocean strategic plans.

3.1.5 The momentum is building and other nations are now catching up to and surpassing Australia in measures to look after the oceans. Although the development of ecologically sustainable oceans planning and management should not be seen as an international race, it is important that Australia consider whether it needs to strengthen mechanisms that underpin its Oceans Policy. If the answer is 'yes', how should this be done?

3.1.6 This paper suggests that, among these mechanisms, legislation is an essential driver. Accordingly, it proposes an Australian Oceans Act, as discussed and outlined in Chapters 4 and 7. But before outlining these measures, it is important to provide a context for that discussion by describing and analysing the development of Australia's Oceans Policy and the arrangements made for its implementation.

### **Box 10 Key events in the development and implementation of Australia's Oceans Policy**

1991 Oceans Rescue 2000 (OR2000) launched with 10-year funded marine conservation program; Intergovernmental Agreement on the Environment commits Commonwealth and States to establish National Representative System of Marine Protected Areas

1992 National Strategy for ESD adopted by all levels of government and provides ecological framework for future oceans policy

1993 Marine and Coastal Community Network (MCCN) established

1994 Australia's Ratification of UNCLOS; Oceans Outlook Congress, Coast to Coast Conference

1995 Our sea, our future: State of the marine environment report

1995 PM Keating commits Commonwealth to development of a coordinated policy on the management of Australia's marine resources

1996 Bipartisan support for an 'integrated and comprehensive' Oceans Policy at federal election; interdepartmental committee established to assist oceans policy development;

1997 PM Howard launched consultation paper on Oceans Policy; MCCN asked to raise community awareness, including use of a questionnaire the response to which helped guide policy development; Ministerial Advisory Group on Oceans Policy (MAGOP) established; discussion papers released and two-day Australian Oceans Forum; Marine Industry Development Plan; Australia's Oceans New Horizons report and Government Policy supporting statement

1998 International Year of the Oceans; MAGOP reports to Minister.

1998 May release of *Australia's Oceans Policy – an issues paper* with more than 650 submissions received; December release of final Australia's Oceans Policy

1999 National Oceans Office becomes executive agency with annual budget of around \$9-10m. IMCRA released

2000 Work begins on South-east Regional Marine Plan in April. South-east Regional Marine Plan Steering Committee formed and includes sectoral representatives

2001 State of the Environment Report released with 'Coasts and oceans theme report'. A snapshot report of the South-east released

2002 South-east Regional Marine Plan Assessments Reports released

2003 Work begins on Northern Regional Marine Plan with snapshot of region and other reports released during the year. Conservation sector's *Oceans eleven* report released.

2004 First regional marine plan released for the South-east Marine Region in May. National Oceans Office loses executive agency status in October and becomes branch of restructured Marine Division of Commonwealth Department of Environment and Heritage. National Oceans Ministerial Board disbanded and Sustainable Environment Committee of Cabinet begins oversight of Australia's Oceans Policy implementation

2005 Work begins on South-west Regional Marine Plan. Federal budget for regional marine planning maintained but no forward budget estimates beyond 2005-2006 financial year. Northern Regional Marine Plan discussion papers released. Department of Environment and Heritage review of regional marine planning and MPA processes. Results in Minister for Environment and heritage announcing in October that regional marine planning would be supported through Section 176 of the *EPBC Act*, with MPA development and bioregional planning integrated to further conservation outcomes but not integrated ecosystem-based management. In November the Australian government released the *Securing our fisheries future* package, followed up by its MPA proposals for the South-east Marine Region.

## **3.2 Determining the institutional arrangements for Australia's Oceans Policy implementation**

3.2.1 The success or failure of Australia's Oceans Policy will be strongly influenced by the institutional arrangements established for its implementation. During the development phase of the policy, the Commonwealth government established the Ministerial Advisory Group on Oceans Policy (MAGOP), a mix of representatives of universities, environmental groups, recreational and commercial fishing groups, planning institutes, farmers, tourism groups, scientists, Indigenous groups, shipowners, and the oil and gas exploration and mining industry to provide advice on the nature and content of a future oceans policy.

3.2.2 MAGOP agreed on the need for the principles of ESD and multiple-use to be within the policy, and most of its members agreed with the need for ecosystem-based management and integrated oceans planning, but it was on the implementation phase's institutional arrangements where agreement could not be reached. As Wescott (2000) notes:

*This disagreement reflects the difference between the conservative view, held mainly by the commercial development industries (fisheries, oil and gas, minerals) that the current regulatory arrangements and*

*procedures were adequate to meet the objectives of an AOP and the reformist view, of other sectors, which believe you needed to establish an explicitly integrated regional planning and management system if an AOP was to be truly integrated and effective. This leads to the secondary issue – that if the latter view is accepted then the institutional arrangements needed to implement an integrated planning and management system would need to be practical and enforceable.*<sup>85</sup>

3.2.3 However, MAGOP did outline four models for the institutional arrangements for the implementation phase of Australia's Oceans Policy, but these were only to be considered if institutional change was deemed necessary by the Government. One of the four models represented no change, while the Group acknowledged that the other three models would require new legislation to support them.

3.2.4 Each of the three models for change comprised a ministerial council of relevant oceans-based ministers with regional boards to provide advice and opportunities for community engagement. The differences were that Model 1 provided the ministerial council with a secretariat and working committees, in Model 2 these were replaced with a national oceans commission, and in Model 3 a coordinating council of government and non-government representatives and a secretariat filled the space between the ministers and the regional body. The national ocean commission of Model 2 would have been a statutory body to:

*... coordinate oceans policy implementation, integrate and present state of the marine environment reporting; protect ocean world heritage values; develop cross-sectoral policy and liaise with Commonwealth agencies, integrate sectors including a directions power over other agencies when they are acting contrary to ESD principles, have delegated performance of Commonwealth environmental assessment, foster best practise state-based planning and pollution control regulatory frameworks with explicit power to make comment on development proposals or practices which threaten ecological sustainability of oceans.*<sup>86</sup>

3.2.5 On 26 May 1998 *Australia's oceans policy – an issues paper* was released for public discussion and clearly indicated (see words underlined for this discussion paper) the approach that the Commonwealth government would follow with regards to the institutional arrangements for policy implementation:

*The option of establishing an independent Commonwealth statutory authority for ocean management with powers to override sectoral and State arrangements will not be further considered. Such an approach is viewed as incompatible with the maintenance of the offshore constitutional settlement (administrative arrangements between the Commonwealth and State governments) and of the basic sectoral management arrangements.*<sup>87</sup>

3.2.6 Although this continues to be the Commonwealth government's position on the issue, *Out of the blue* argues that a statutory authority is necessary to in part overcome the limitations placed on integrated oceans planning management by the OCS.

### **3.3 A 'comprehensive and integrated' Oceans Policy**

3.3.1 Senator Robert Hill, then Environment Minister, committed the Commonwealth government to a 'comprehensive and integrated' oceans policy<sup>88</sup> after the Coalition win in the 1996 federal election. Although these two terms were not defined within the final policy, Wescott (2000) believes them to mean that the policy:

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85 Wescott, G (2000), 'The development and initial implementation of Australia's 'integrated and comprehensive' Oceans Policy' in *Ocean and Coastal Management* 43 pp 853-878, p867

86 Ministerial Advisory Group on Oceans Policy (1998), p12

87 Commonwealth of Australia (1998) *Australia's Oceans Policy An issues paper Caring - using - understanding* May 1998, p31

88 Quoted in Wescott (2000), p854

*...is inclusive of all issues and sectors in the marine environment and is focused towards a common purpose through its vision, objectives and goals ... and ... that the principles and means of implementation of the policy are coordinated and linked to this common purpose.*<sup>89</sup>

3.3.2 Having defined his terms, Wescott (2000) then made an assessment of the policy document and stated that it:

*... is a substantial and comprehensive document that has not attracted any criticism for overlooking or underplaying any sectoral issue. i.e. it appears to have met the aim of being 'comprehensive' set by the Government at its instigation. The second, and more difficult, aim set by the government of it being 'integrated' is yet to be tested in practice and awaits the implementation phase through regional marine planning. In effect the Australian approach has been to postpone the more difficult matters of integration, the resolution of conflicts between sectoral interests and the role of the State and Local Government to this implementation.*<sup>90</sup>

3.3.3 Even though Wescott (2000) believed that the test of the policy's implementation on integration was yet to come, there were many policy references to integration as the means to overcome the impediments of Australia's multi-jurisdictional and sector-based oceans planning, management and protection framework:

*If we were to continue without integrating our oceans planning and management we could not be confident that Australia would avoid following so much of the rest of the world in a spiral of marine resource degradation.*<sup>91</sup>

*While progress has been made, until now management and decision making have not been integrated across the various sectoral interests. Management of our oceans purely on an industry-by-industry basis will not be sustainable in the long run. Activities such as fishing, tourism, shipping, aquaculture, coastal development and petroleum production must be collectively managed to be compatible with each other and with the ecological health of the oceans.*<sup>92</sup>

3.3.4 As mentioned previously, the Commonwealth government determined that there was no need for new legislation or institutional arrangements to implement Australia's Oceans Policy. The necessary improvements in oceans planning, protection and management would be achieved, according to the government, through more-effective coordination and integration of the existing arrangements:

*Building on existing effective sectoral and jurisdictional mechanisms, it promotes ecologically-sustainable development of the resources of our oceans and the encouragement of internationally competitive marine industries, while ensuring the protection of marine biological diversity.*<sup>93</sup>

3.3.5 However, the coordination of existing arrangements in the policy's implementation would require some assistance, therefore Australia's Oceans Policy established a series of arrangements<sup>94</sup> for implementation which included the:

- National Oceans Ministerial Board of key Commonwealth ministers as the decision-making body on regional marine plans
- National Oceans Advisory Group of industry, community and government stakeholders
- regional marine plan steering committees comprising regional stakeholders
- National Oceans Office to provide secretariat, technical support and program delivery for oceans policy initiatives.

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89 Wescott, G (2000) p855

90 Wescott, G (2000), p873

91 Commonwealth of Australia (1998), p11

92 Commonwealth of Australia (1998), p11

93 Commonwealth of Australia (1998), p2

94 Commonwealth of Australia (1998), p15

3.3.6 These institutional arrangements would, according to the policy:

*... emphasise ministerial responsibility, consultation and stakeholder participation and well-coordinated government support.*<sup>95</sup>

3.3.7 As the implementation phase of Australia's Oceans Policy began, there was much work to be done to determine the processes to be used for regional marine planning – a key aspect of the policy – and the more-effective coordination and integration of existing legislative and administrative arrangements. This was proving difficult, and four years into the implementation the Commonwealth government commissioned consultants TFG International to prepare for it the *Review of the implementation of oceans policy*, with the final report in October 2002 making a number of recommendations to improve process, institutional arrangements, the effectiveness of the National Oceans Office and the finalisation of the South-east Regional Marine Plan. One of its conclusions was that:

*Although a general planning approach was provided through Oceans Policy (i.e. the use of regional marine plans to achieve integrated ecosystem based management), there has not been a specific planning and implementation model with clear objectives. There is significant uncertainty about what the SERMP will look like, how it will operate, and the role of the NOO in that framework. This is causing uncertainty and frustration for institutions and other stakeholders and needs to be resolved and clarified as a matter of high priority*<sup>96</sup>.

3.3.8 In response to this, and during the preparation of the draft South-east Regional Marine Plan in 2003, the Commonwealth government sought to clarify its approach to the implementation of Oceans Policy by releasing a new report, *Oceans policy: principles and processes*:

*Oceans Policy: Principles and Processes sets out the Commonwealth Government's approach to making Australia's Oceans Policy more operational. It also aims to help marine managers and users to deliver more sustainable and efficient outcomes. The challenge is to put in place an integrated and ecosystem-based approach to management that will allow decisions to be made on the basis of a comprehensive understanding of the ecosystem, including the role that human activities play within it.*

*Integrated oceans management is an approach that recognises that planning and management need to be integrated across sectoral agencies and spheres of government to satisfy the socioeconomic and ecological objectives of ESD. It is necessary because oceans-based activities may overlap or interact, needing consideration of all uses and values, and an understanding of cumulative impacts on the ecosystem.*<sup>97</sup>

3.3.9 Five mechanisms – Integrated Oceans Process, Oceans Guidelines, Framework for Assessing Oceans Management Performance, Regional Marine Planning and Cross-sectoral Institutional Arrangements – were chosen to deliver this new approach (see Box 11). The National Oceans Office explained the purposes of the mechanisms thus:

*These mechanisms together provide for an integrated approach that can identify strategic priorities for oceans management, bridge across sectoral management responsibilities, engage stakeholders and improve our capacity for ecosystem-based management. It does not replace existing sectoral management arrangements; rather, it is a way to improve efficiency and certainty.*<sup>98</sup>

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95 Commonwealth of Australia (1998), p15

96 TFG International (2002), 'Review of the implementation of Oceans Policy Final Report', 25 October 2002, p1

97 National Oceans Office(2003), *Oceans Policy: principles and processes* 2003, p2

98 National Oceans Office(2003), p3



### Box 11 Mechanisms in the Oceans Policy: Principles and Processes<sup>99</sup>

The **Integrated Oceans Process** is designed to address complex marine issues at a regional or national level. The process will be used to add value to current management arrangements. The Integrated Oceans Process provides:

- best practice for integrated marine management
- clarity of processes for marine managers and stakeholders
- security for industry to plan for future development in a multiple-use context.

**Oceans Guidelines**, together with sectoral guidelines, will provide assistance to marine managers and users to achieve more sustainable and efficient outcomes. The Guidelines will provide:

- ways to apply Oceans Policy to managing oceans activities; and
- advice to oceans users on how to better understand and comply with government requirements.

**Regional Marine Planning** sets out clear regional objectives to assist in achieving ecologically sustainable development in the region. Regional marine planning provides:

- a description of the marine region, with comprehensive social, economic and environmental information;
- an understanding of the main challenges facing the region; and
- targeted strategies to address priority regional issues.

**Cross-sectoral Institutional Arrangements** provide:

- high-level policy and management directions;
- coordination of marine management issues in accordance with the Integrated Oceans Process;
- coordination of marine research priorities; and
- expert multidisciplinary information.

A framework for **Assessing Management Performance** will be underpinned by information collected by sector and information collected at national and regional levels through regional marine planning. The framework will provide:

- feedback on whether management decisions are achieving what they set out to do;
- increased understanding of responses to management; and
- directions to improve management.

Source: *Oceans Policy: principles and processes* National Oceans Office, 2003

### Box 12 Members of the Natural Resource Management Ministerial Council

#### *Commonwealth*

Minister for Agriculture, Fisheries and Forestry  
Minister for Environment and Heritage

#### *New South Wales*

Minister for Environment  
Minister for Natural Resource

#### *Victoria*

Minister for Environment  
Minister for Agriculture

#### *Queensland*

Minister for Natural Resources and Mines  
Minister for Primary Industries and Fisheries

#### *Western Australia*

Minister for the Environment  
Minister for Agriculture, Forestry and Fisheries

#### *South Australia*

Minister for Environment and Conservation  
Minister for Agriculture, Food and Fisheries

#### *Tasmania*

Minister for Primary Industries and Water  
Minister for Environment and Planning

#### *Northern Territory*

Minister for Primary Industry and Fisheries  
Minister for Natural Resources, the Environment and Heritage

#### *Australian Capital Territory*

Minister for Environment

#### *New Zealand*

Minister for the Environment

3.3.10 The Natural Resource Management Ministerial Council, which had replaced the Australian and New Zealand Environment and Conservation Council (ANZECC) in 2001, and which includes environment and primary industry ministers from the Commonwealth, state and territory governments (see Box 12), established a Natural Resource Management Standing Committee and within that a Marine and Coastal Committee. This includes in its membership bureaucrats from departments of environment and primary industry with the task of progressing legislative reform.

<sup>99</sup> National Oceans Office(2003), p5

3.3.11 The role of the Marine and Coastal Committee is to provide advice and support for the Standing Committee on 'issues of national significance relating to the conservation and ecologically sustainable development of marine and coastal ecosystems and resources', and on 'an integrated and strategic approach which is capable of delivering outcomes'<sup>100</sup>. The committee has established working groups on matters such as integrated oceans management, introduced marine pests, fisheries and seal interactions, and ESD.

3.3.12 In a further response to the recommendations of the review of Oceans Policy implementation, the Commonwealth government sought to improve interdepartmental linkages with the establishment of the Oceans Board of Management (OBOM):

*In October 2002 an independent review of the implementation of Australia's Oceans Policy recommended a number of measures aimed at improving the Policy's implementation. The recommendations included establishing a high-level group of officials from agencies with marine interests and responsibilities to provide the opportunity for discussion of complex oceans management issues across the Australian Government. The Government agreed to implement these improvements. The high-level group of officials, now known as the Oceans Board of Management (OBOM), was established in early 2003.<sup>101</sup>*

3.3.13 OBOM oversees Oceans Policy activities, provides advice to government, provides a coordination mechanism between the Marine Division of the Department of the Environment and Heritage and other Commonwealth agencies, ensures accountability, maintains a whole-of-government focus, and approves funding for projects consistent with the development of Oceans Policy.

3.3.14 OBOM comprises representatives from the Commonwealth departments of: Environment and Heritage (Chair); Industry, Tourism and Resources; Agriculture, Fisheries and Forestry; Education, Science and Training; Transport and Regional Services; Finance and Administration; Defence; Prime Minister and Cabinet; the Australian Fisheries Management Authority (Treasury was added in late 2005).

3.3.15 The Oceans Policy review also recommended the establishment of a group that could provide scientific advice in relation to oceans policy. In response the Commonwealth government formed The Oceans Policy Science Advisory Group (OPSAG) in June 2003 to report to the National Oceans Ministerial Board:

*This group provides a forum for priority setting and information sharing among marine science agencies in the Australian Government. It is expected that it will also provide recommendations for research funding and promote better integration of marine science across the Australian Government. This will result in more targeted research, a coordinated research effort, informal collation and interpretation. Membership of OPSAG comprises heads of Australian Government marine science agencies.<sup>102</sup>*

3.3.16 OPSAG is made up of representatives of the agencies that commission, use or conduct oceans science and includes policy makers, managers and science agencies and institutions. The agencies represented on OPSAG are: Department of Education, Science and Training; Land and Water Australia; Australian Maritime Safety Authority; Fisheries Research and Development Corporation; Australian Bureau of Agricultural and Research Economics; Australian Institute of Marine Science; CSIRO; Defence Science and Technology Organisation; Royal Australian Navy; Bureau of Rural Sciences; National Oceans Advisory Group; Australian Fisheries Management Authority; Bureau of Meteorology; Australian Antarctic Division; National Oceans Office; the Great Barrier Reef Marine Park Authority.

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100 Natural Resource Management Ministerial Council website: [www.mincos.gov.au](http://www.mincos.gov.au)

101 National Oceans Office website: [oceans.gov.au/oceans\\_board\\_of\\_management](http://oceans.gov.au/oceans_board_of_management)

102 National Oceans Office (2003a), 2002-2003 Annual Report, p16

3.3.17 The National Oceans Ministerial Board, OPSAG and OBOM were integrated in the way shown in Figure 7. Except for those covering the NRMCM and NOAG, the arrangements, and where decision-making has occurred, have been largely intragovernmental at the national level.

### 3.4 Australia's Oceans Policy implementation and regional marine planning

3.4.1 Regional marine planning is a key element in the implementation of Australia's Oceans Policy:

*The Commonwealth's commitment to integrated and ecosystem-based planning and management will be implemented through the introduction of a major Regional Marine Planning process. The process will be designed to improve linkages between different sectors and across jurisdictions. Regional Marine Plans – based on large marine ecosystems – will integrate sectoral commercial interests and conservation requirements.<sup>103</sup>*

3.4.2 The Oceans Policy review in 2002, when considering progress on the implementation of the policy, acknowledged the enormity of the task for regional marine planners:

*The scale of the proposed regional marine planning for Australia's offshore jurisdiction is unprecedented in the world. Other countries have embraced the concept of regional marine planning at ecosystem scales but have not proceeded as far as Australia, either in planning or implementation. The general consensus from experts involved in marine planning and management in Australia and internationally is that Australia leads the way. For over twenty years the Great Barrier Reef Marine Park has been a model for integrated planning and management of tropical marine areas on a large scale. More recently the Great Barrier Reef Marine Park Authority has embarked on revised zoning scheme for the whole Reef Region to improve the protection of marine biodiversity based on a program to protect representative areas or bioregions. This is the first large-scale bioregionalisation of marine environments in the world for management purposes. The SeRMP [South-east Regional Marine Plan] will be the second<sup>104</sup>.*

3.4.3 The South-east Regional Marine Plan, covering waters off South Australia, Victoria, Tasmania and New South Wales, was the first plan under Australia's Oceans Policy, and is currently the only regional marine plan to be completed. The regional marine plans for the other regions shown in Figure 8 – South-west, North-west, North, North-east and Antarctica – were to be completed by 2009<sup>105</sup>, but this has now been extended to around 2012 in the new Department of Environment and Heritage approach to regional marine planning announced in October 2005.

3.4.4 The South-east Regional Marine Plan was released in May 2004 for a cost of \$16-17million<sup>106</sup> (Oceans Policy implementation has to date cost around \$50million) and after the release of *Oceans policy: principles and processes*. The two documents should be viewed as companions when determining the nature of the Commonwealth government's approach to the regional marine planning process at that time. The South-east Plan is a compendium of actions, some of which were already in place at the time of the plan's release, with time-frames for completion. Integration is dealt with through the institutional arrangements and processes described in *Oceans policy: principles and processes*, which is discussed in Section 3.3 of this paper.

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103 Commonwealth of Australia (1998), p11

104 TFG International (2002), p1

105 Troy, S (2004)

106 Commonwealth of Australia (2004), Official Committee Hansard, Senate, Environment, Communications, Information Technology And The Arts Legislation Committee, Estimates (Budget Estimates), Thursday, 27 May 2004, Canberra, p100

# Integrated Oceans Management

## Oceans Policy Science Advisory Group (OPSAG)

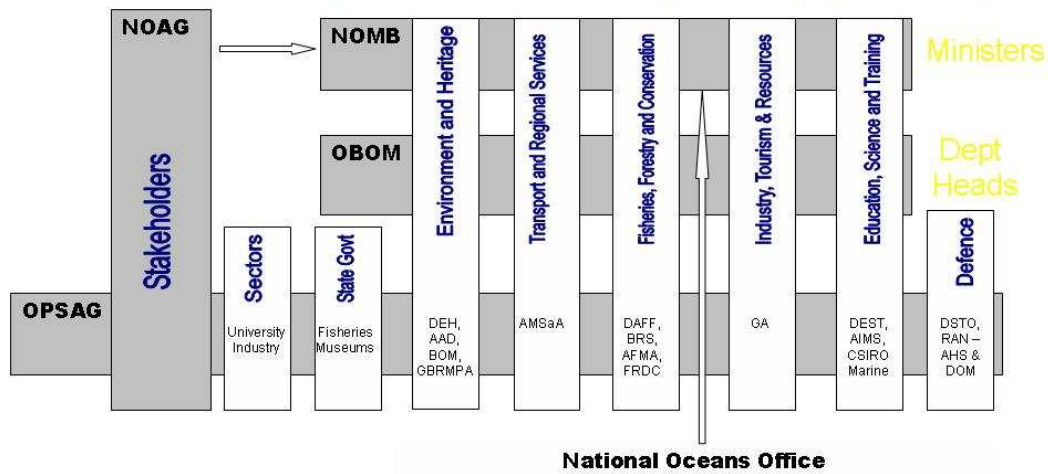


Figure 7 Integrated oceans management<sup>107</sup>

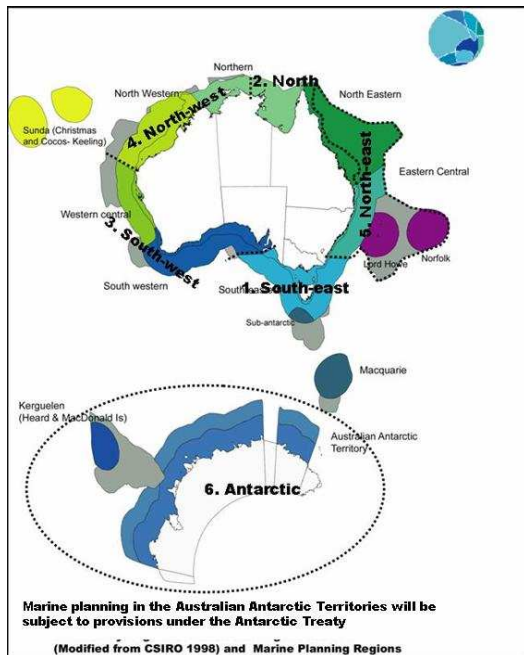


Figure 8 Marine regions to be planned<sup>108</sup>

107 Troy, S (2004) Science and Australian oceans management steps towards an integrated approach, a presentation to the Australia Marine Sciences National Conference in Hobart, 6-9 July 2004. The agencies are: National Oceans Advisory Group (NOAG), National Oceans Ministerial Board (NOMB), Oceans Board of Management (OBOM), Oceans Policy Scientific Advisory Group (OPSAG), Department of Environment and Heritage (DEH), Bureau of Meteorology (BOM), Australian Antarctic Division (AAD), Great Barrier Reef Marine Park Authority (GBRMPA), Australian Maritime Safety Authority (AMSaA), Department of Agriculture, Fisheries and Forestry (DAFF), Bureau of Rural Sciences (BRS), Australian Fisheries Management Authority (AFMA), Fisheries Research and Development Corporation (FRDC), Geoscience Australia (GA), Department of Education, Science and Training (DEST), Australian Institute of Marine Science (AIMS), Commonwealth Scientific and Industrial Research Organisation (CSIRO Marine), Defence Science and Technology Organisation (DSTO), Royal Australian Navy (RAN), AHS, DOM

108 Troy, S (2004) There were, however, no completion dates mentioned in the October 2005 planning announcement by the Minister for Environment and Heritage which committed the Commonwealth to regional marine planning processes grounded in Section 176 of the EPBC Act covering bioregional plans (see Chapter 6 of this paper for a discussion of this section and others in the EPBC Act relevant to marine planning).

### 3.5 Australia's Oceans Policy implementation: the impetus for legislative change

3.5.1 Has Australia's Oceans Policy lived up to the promise made by Senator Robert Hill when he said that it would be 'comprehensive and integrated'? Are the administrative and institutional arrangements sufficient to achieve the policy's ecosystem-based vision for oceans planning, protection and management? How effective is the regional marine planning process?

3.5.2 As revealed by the *Marine legislative review*, the existing legislative and administrative arrangements do little to support and largely hinder the implementation of ecosystem-based management and multiple-user management. To foster more-effective coordination and integration in oceans planning and management, to improve communications between Commonwealth ministers and departments and national institutions and agencies, and to assist the implementation of Australia's Oceans Policy, the Commonwealth government established several new arrangements which included the National Oceans Ministerial Board, the Oceans Board of Management and the Oceans Policy Scientific Advisory Group (you can see their relationship in Figure 7). These Commonwealth intra-governmental arrangements<sup>109</sup> were established but their deliberations and decisions are not freely available and it is therefore difficult to determine their contribution to the integration of oceans planning and management.

3.5.3 Without intergovernmental arrangements in place to effectively involve the states and territories, their contribution has and will continue to be limited in the implementation of Australia's Oceans Policy. State involvement in discussions about oceans planning and management does occur in the Natural Resource Management Ministerial Council's Natural Resource Management Standing Committee, and the Marine and Coastal Committee reporting to the Standing Committee has at times established working groups on specific oceans issues. However, reports on their discussions and decisions within them are also not publicly available, again making it difficult to determine their effectiveness in progressing integrated oceans planning and management.

3.5.4 The effectiveness of the largely intragovernmental institutional arrangements put in place for the implementation of Oceans Policy has been brought into question by the disbandment of the National Oceans Ministerial Board in late 2004 and the removal of executive status from National Oceans Office, which had been isolated in Hobart away from the department and agencies whose Ministers sat on the board. The office has now been absorbed as a branch in a restructured Marine Division of the Department of Environment and Heritage.<sup>110</sup>

3.5.5 With the disbanding of the National Oceans Ministerial Board the implementation of Oceans Policy is now the concern of the Sustainable Environment Committee of the federal Cabinet, which comprises the Prime Minister, the ministers who were members of NOMB, and the Minister for Fisheries, thus increasing the status of the implementation process.

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109 Significant modifications were made to these during 2005 – see 3.5.4

110 The changes to the National Oceans Office were described in an answer to a question on notice from Senator Wong, who asked: What is the impact of the abolition of the NOO on the staff numbers, budget and output on oceans policy? Answer: The National Oceans Office (NOO) was not abolished. The NOO was absorbed into the Department of the Environment and Heritage with effect from 27 October 2004. The staff, appropriation revenue and assets were formally transferred to the Department of the Environment and Heritage under the relevant provisions of the Public Service Act (1999) and the Financial Management and Accountability Act (1997). There was no impact on the level of staffing, budget or work on implementing Oceans Policy as a result of the machinery of government changes. This work is now undertaken within the Marine Division. Quoted from: Senate Environment, Communications, Information Technology and The Arts Legislation Committee, Answers to questions on notice, Environment And Heritage, Budget Estimates 2005-2006, May 2005, Answer No. 78

3.5.6 Associated with these changes, the Department of Environment and Heritage recently reviewed its commitments to regional marine planning and MPAs and the ongoing role and scope of the National Oceans Office Branch. As a result of this review, the Commonwealth Minister for Environment and Heritage, Senator Ian Campbell, announced on 13 October 2005 that:

*...the Government would bring its program of Regional Marine Planning under the Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act)...The EPBC Act is one of the most comprehensive pieces of environment protection legislation anywhere in the world. This initiative will give new impetus to the implementation of Australia's Oceans Policy. Under the new approach, regional marine plans will be established under section 176 of the EPBC Act, acting as a key document to guide the Minister, sectoral managers and industry about the key conservation issues and priorities in each marine region.<sup>111</sup>*

3.5.7 The Minister went on to say that:

*These plans will become key reference documents for industry and give forward notice of EPBC Act matters that businesses may face in seeking approval for their activities in a marine region. The new process will streamline regional marine planning and provide the additional guidance and consistency that has been sought by industry and other users of the marine environment. The plans will draw on Australia's growing marine science and socio-economic information base to provide a detailed picture of each marine region. It will describe each region's key habitats, plants and animals; natural processes; human uses and benefits; and threats to the long-term ecological sustainability of the region. The plans will give details about the various conservation-related statutory obligations under the EPBC Act that are operational in any region, such as those relating to recovery planning for threatened species. These new bioregional plans will also provide the platform for developing the National Representative System of Marine Protected Areas in Commonwealth waters around Australia.<sup>112</sup>*

3.5.8 The changes outlined by the Minister imply a recognition that, to date, the implementation of regional marine planning – and the South-east Regional Marine Plan – has failed to establish integrated, intersectoral and ecosystem-based planning. The Department will now pursue regional marine planning for those matters within its own purview and responsibilities<sup>113</sup>, using in particular provisions of the *EPBC Act*, rather than those matters in the purview of other sectors such as fisheries and oil and gas.

3.5.9 Other changes associated with this new approach based on the *EPBC Act* are that the Oceans Board of Management was expanded to include Treasury, Finance, Prime Ministers Department and Defence, and a regional profile, draft plan and final plan will require approval from the ministers after agreement from the OBOM. The use of the *EPBC Act* to drive the implementation of Australia's Oceans Policy will be discussed in Chapter 6.

3.5.10 Prior to Minister Campbell's announcement, the Commonwealth had maintained a funding commitment for the 2005-2006 budget at a similar level to that which it funded the National Oceans Office<sup>114</sup>, although there are no forward budget estimates beyond 2005-2006:

*Australia's marine industries generate more than \$30 billion annually. The development of regional marine plans helps improve our understanding of the biodiversity of the marine environment and the economic potential of Australia's oceans. Marine planning has already made great contributions to science and vastly increased our knowledge of the marine environment. In 2005-06, the Government will continue to provide annual funding of \$9.4 million for the implementation of regional marine planning, while reviewing this programme to determine future funding. This will enable DEH to progress the regional marine plan for Northern Australia, including the Torres*

111 Campbell, I (2005), Media release 13 October 2005, Minister for Environment and Heritage

112 Campbell, I. (2005a), 'Questions and answers: New approach to Australian Government marine planning', p1, Minister for Environment and Heritage, Department of Environment and Heritage

113 Matters of National Environmental significance (World Heritage properties, Ramsar wetlands, nationally threatened species and ecological communities, migratory species, Commonwealth marine environment and Commonwealth-managed fisheries, nuclear actions and national heritage places), MPA development and management, sustainable fisheries assessment, state of the environment reporting

114 The annual funding for the National Oceans Office, which became an executive agency in December 1999, was: 2001-2002 \$9.066m; 2002-2003 \$9.066m; 2003-2004 \$9.093m; 2004-2005 \$9.342m. In 2000-2001 the office was allocated funding from the Department's Marine Group which had a total allocation of \$21m in that financial year.

*Strait, initiate the gathering of marine science information in South-Western Australia, and to continue implementation of the South-East Regional Marine Plan.*<sup>115</sup>

3.5.11 Influencing the Minister's change of direction was the fact that although regional marine planning was to be at the heart of the implementation of Australia's Oceans Policy, in seven years since the release of the policy there had been just one plan completed, the South-east in 2004, and progress on the northern and south-west plans was and continues to be slow. On the preparation of the South-east Regional Marine Plan the 2002 review of Oceans Policy concluded that:

*Although a general planning approach was provided through Oceans Policy (i.e. the use of regional marine plans to achieve integrated ecosystem based management), there has not been a specific planning and implementation model with clear objectives. There is significant uncertainty about what the SERMP will look like, how it will operate, and the role of the NOO in that framework. This is causing uncertainty and frustration for institutions and other stakeholders and needs to be resolved and clarified as a matter of high priority.*

3.5.12 With the release of the report *Oceans Policy: principles and processes*, the Commonwealth government sought to provide that clarification. Even so, when the final South-east Regional Marine Plan was published four years after its preparation began, the public response to its release was mixed:

*Environmental groups have criticised the plan, saying it doesn't go far enough to protect the unique marine environment off south-eastern Australia, but fishing and resource industry representatives say it strikes an appropriate balance ...*

*Australian Seafood Industry Council convener Geoff Fuller said the marine plan was a responsible approach to managing the ocean. Australian Petroleum Production and Exploration Association executive director Barry Jones said the processes outlined in the marine plan balanced business and environmental interests ...*

*Australian Conservation Foundation campaigns director John Connor said the plan was, at best, a plan for a plan. 'There are no clear environmental accountability outcomes or even a zoning plan', Mr Connor said.*<sup>116</sup>

3.5.13 The conservation sector was also critical of *Oceans Policy: principles and processes*, believing that it was:

*... a very disappointing discussion of the future for regional marine planning and oceans management. It is frequently referred to in the Draft SERMP [South-east Regional Marine Plan] and appears designed to fill the gaps in the Draft SERMP or to provide another planning process outside the scope of regional marine planning. It is the view of the conservation sector that this document downgrades or sidelines the importance of regional marine planning and creates an inconclusive and vague process as an overlay or add-on to regional marine planning.*<sup>117</sup>

3.5.14 These comments reflect what Wescott (2000) referred to as the differences between 'conservative' and 'reformist' ideals within the Ministerial Advisory Group on Oceans Policy (MAGOP). As Reichelt and Wescott (2005) noted, one of the key tensions in the regional marine planning process is based on the differing expectations of the plan. The fear of Wescott (2000) about the scope of the process in regional marine plans has been borne out:

*The RMPS [regional marine plans] could simply take the general statements in the Australian Oceans Policy to the next jurisdictional level (from national to regional) without actually having a great influence over management of human use of the marine environment. This might be useful in a strategic sense but*

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115 Environment Budget Overview 2005-06, Department of Environment and Heritage website: [www.deh.gov.au](http://www.deh.gov.au)

116 AAP News Wire, 'Ocean plan garners mixed response', Friday 21 May 2004

117 Australian Conservation Foundation, Australian Marine Conservation Society, Victorian National Parks Association, Whale and Dolphin Conservation Society (2004), Conservation sector submission on the Draft South-east Regional Marine Plan, January 2004, p7

would beg the question of when the tough issues of resource allocation, conflict between resource users and actual cross-sectoral integration will occur.<sup>118</sup>

3.5.15 Resource allocation was not carried out for the 2004 South-east Regional Marine Plan. According to Wescott (2000), the absence of conflict resolution, which in part stems from discussions about resource allocation, will prevent true integration of oceans planning and management:

*If the Australian Oceans Policy is to be truly integrated, then resource allocation decision will need to be made and these will undoubtedly lead conflict – hence the need to instigate a method of conflict resolution prior to the first intersectoral dispute.*<sup>119</sup>

3.5.16 The 2002 review of Oceans Policy believed that the policy itself provided little guidance for regional marine planning:

*The Oceans Policy document was very comprehensive and has earned much praise. However it is seen by some to have limitations. First, it has the characteristics of being a document that was ‘all things to all people’. That is, it included specific statements that resonated with specific interest groups without specifying how any clashes between interests would be resolved.*

*More importantly, it did not represent an agreed position with the States and Territories and has not been subsequently endorsed by them. In addition, while it took a non-legislative and co-operative approach which has been described as being “judicious and politically realistic”<sup>2</sup>, it did not provide guidance about how tensions would be resolved between the following aims:*

- *an integrated management approach;*
- *the maintenance of existing sectoral and jurisdictional management arrangements; and*
- *effective implementation*<sup>120</sup>.

3.5.17 According to Reichelt and Wescott (2005), three issues with the South-east Regional Marine Plan process resulted in the slowing of its preparation:

*The first issue is the low level of participation of the state (i.e. regional) governments to the South-east Regional Marine Plan (SERMP) prior to its commencement ... As a result, integrated planning and management has not occurred as there is a legal, but not ecological, boundary at the border between the state government and Commonwealth waters which is three nautical miles offshore ... Secondly, there is the issue detailing the scope and depth of the RMP before commencing the preparation of the RMP ... For example, would resource allocation be included? The stakeholders have had highly varying expectations on the outcomes of the plan ... Thirdly, there is a need to address potential resources use conflict issues during the RMP process ... The Oceans Policy talks about maintaining a balance between conservation and sustainable development. This tension highlighted very early in the process that the implementation phase required a clear method of resolving conflict between interest groups (Alder and Ward, 1999).*<sup>121</sup>

3.5.18 According to Australia’s Oceans Policy, complementary management regimes will need to be established in both State and Commonwealth waters in order to implement ecosystems-based marine planning.

*Implementing an Australian Oceans policy will need better coordination between the national, State and Territory Governments in integrating planning and management to ensure that jurisdictional boundaries do not hinder effective management. The Government will seek the early and full endorsement of Australia’s Oceans Policy by the States and Territories.*<sup>122</sup>

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118 Wescott, G (2000) p874

119 Wescott, G (2000), p874

120 TFG International (2002), p8

121 Reichelt, R and Wescott G, (2005), p73

122 Commonwealth of Australia (1998), p3



*State and Territory Governments will be invited to endorse Australia's Oceans Policy as an agreed national approach, and will play an important part in ensuring its effective implementation.*<sup>123</sup>

3.5.19 But the states determined not to sign on to Australia's Oceans Policy and have also failed to engage in regional marine planning processes. Wescott (2000) indicated that if the states did not become involved in the South-east Regional Marine Plan it:

*... will rob the policy of being truly integrated across all sea areas and linked to the impact of land use on the marine environment*<sup>124</sup>.

3.5.20 The 2002 review of Oceans Policy formed a similar view:

*State/Commonwealth co-operation is essential for an effective oceans policy - anything less than a national approach will significantly limit long term effectiveness. Indeed, this is widely acknowledged as being the biggest impediment to achieving the broad objectives of Oceans Policy*<sup>125</sup>.

3.5.21 Wescott (2000) also referred to the impediments and issues that would influence the successful implementation of Australia's Oceans Policy:

*There are also some impediments to Australian development and implementation of an oceans policy including the risk of domination by one, or a few, sectoral groups in the development of a policy and the risk of interagency rivalries and territoriality dominating the development of a policy to the exclusion of the crucial issues and other stakeholders.*<sup>126</sup>

*Whether the initiative stays with the existing powerful sectoral interests (industry, government departments, central government bureaucrats) whether a constituency for integrated non-sectoral implementation of a comprehensive policy continues to develop and is sufficiently influential to offset pre-existing power elites and to establish new integrated institutional arrangements.*<sup>127</sup>

3.5.22 The implementation of Australia's Oceans Policy could well force changes to the sector-based legislative framework for oceans planning and management, as noted by Rothwell and Kaye (2001):

*... a closer review of the fine detail of Australia's Oceans Policy reveals that implementation of the policy does raise a number of important legal issues which would, if fully developed, result in adjustments to the legal regime. In summary, the legal implications of implementation of the Oceans Policy include:*

- 48 clearly defined commitments to adjust the existing legal regime
- 36 commitments which have the potential to result in adjustment of the existing legal regime
- 29 which directly refer to Australia's implementing of international marine obligations.

*The position, therefore, is that a thorough implementation of the Oceans Policy will result in a need for some adjustment of the legal regime.*<sup>128</sup>

3.5.23 Change to current legislative and administrative arrangements could also be forced by the responses to the current environmental issues in the oceans – global warming, habitat destruction, species loss, overfishing, pollution and pests. Can these be dealt with by maintaining or adjusting the existing policy, statutory and regulatory framework, or is there need for a new approach? Martijn Wilder, when a member of the National Oceans Advisory Group (NOAG), noted in a presentation to the Australian Oceans Forum in 2000:

*Consistency will be required not only within a marine area itself, but also between adjoining future RMP(Regional Marine Plan) areas particularly where cross-marine ecosystem issues arise. The*

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123 Commonwealth of Australia (1998), p2

124 Wescott, G (2000) pp873-4

125 TFG International (2002), p8

126 Wescott, G (2000), p861

127 Wescott, G (2000), p868

128 Rothwell, D and Kaye, S, (2001), 'Australia's legal framework for integrated oceans and coastal management' in *Integrated oceans management: issues in implementing Australia's Oceans Policy*, Marcus Haward (editor), Cooperative Research Centre for Antarctica and the Southern Ocean, Research Report 26 May 2001 Hobart, Australia, p25

situation is not dissimilar from that between Australia's EEZ and the High Seas. Issues such as migratory fish stocks and cross jurisdiction pollution flows cannot be managed in the absence of a consistent legal regime. This also means coordinating existing state legislation for the control of marine pollution that originates on land... Ultimately however, if existing regimes are simply unable to provide the framework for the introduction of the RMP's, then there will be no option but to consider greater legislative reform. The alternatives to legislation, such as codes of conduct and new administrative arrangements, are unlikely to be enforceable and will leave the long term viability of strong and effective RMP's uncertain...<sup>129</sup>

3.5.24 The release of Australia's *State of the environment 2001*, and its 'Coasts and oceans theme report' in March of that year, also outlined the need for a national approach:

... One of the key responses for sustainable management of Australia's oceans under the (Oceans) Policy is the development of regional marine plans that will address marine conservation and management issues on the bases of ecosystem rather than jurisdictional boundaries ... In particular, there is a need to develop and implement systems that are effective in integrating (as opposed to coordinating) across sectors to meet agreed environmental objectives and define strategies and targets for sectors to implement ...<sup>130</sup>

3.5.25 *Out of the blue* argues that for Australia's Oceans Policy to be successfully implemented, and to ensure effective intragovernmental and intergovernmental arrangements and the integration of oceans planning and management, there is the need for the legislative support that would be provided by the Australian Oceans Act outlined in Chapter 7.

### **3.6 Australia's Oceans Policy implementation: the absence of effective intergovernmental arrangements**

3.6.1 With the lack of sign-on by the states and territories to Australia's Oceans Policy, the Commonwealth's institutional arrangements for its implementation were largely intragovernmental at the national level – National Oceans Ministerial Board (NOMB) and the Oceans Board of Management (OBOM), with the National Oceans Office reporting to the NOMB, although the Natural Resource Management Ministerial Council established a Marine and Coastal Committee comprised of state and Commonwealth bureaucrats.

3.6.2 Wescott (2000) acknowledges the crucial importance of Commonwealth and state cooperation if the effective jurisdictional integration of oceans planning and management is to occur.

*Finally, the historical friction between the various levels of government (National, State and local) in Australia, particularly in environmental matters, was going to be difficult. Australia, a federated nation, needs a national, as distinct from a Commonwealth (Federal) policy to meet the aim of being 'comprehensive and integrated'. In Australia this means the State Governments, with control of land management and sea management out to three nautical miles, are critical participants in the development and implementation of an Australian Oceans Policy.*<sup>131</sup>

3.6.3 Herr and Haward (2001) also comment on the influence of federalism on the successful implementation of Australia's Oceans Policy:

*In establishing a commitment to integration 'across sectors and jurisdictions' the Oceans Policy aims to overcome problems and limitations, particularly those imposed by federalism, that could constrain appropriate, sustainable and rational use of Australia's marine resources. Whether it can do this will*

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129 Wilder, M in, National Oceans Advisory Group, Australian Oceans Forum, National Oceans Advisory Group papers, 2000, p34

130 CSIRO (2001), p86

131 Wescott (2000), pp861-2

*depend, in substantial part, on whether this policy initiative can be fitted into the federal system in a way that is widely supported by the States.*<sup>132</sup>

3.6.4 Herr and Haward (2001) also believe that the vagueness of the policy's implementation strategies and the negative influence of the OCS arrangements could undermine that policy implementation:

*In outlining implementation arrangements, however, the Policy was rather more vague on the precise mechanisms that would link the Commonwealth's general objectives to the States and their responsibilities. This implementation ambiguity may prove a substantial impediment as the Regional Marine Plans will be binding on all Commonwealth agencies. In Australia's Oceans Policy the central emphasis is on intra-governmental, rather than the intergovernmental, coordination in the implementation of the policy ...*

*... Ironically, the 'success' of the OCS in establishing sectorally-based intergovernmental arrangements that, in most cases, recognise state interests and responsibilities may constrain the implementation of regional marine plans outside Commonwealth waters. Thus, while intergovernmental relations offshore remain a critical element in the planning process, the mechanisms for achieving this involvement are highly speculative.*<sup>133</sup>

3.6.5 Rothwell and Kaye (2001) extended this theme to consider the legal imperatives of effective oceans policy implementation and concluded that:

*If one of the goals of the RMP [regional marine plan] process is to develop complementary management regimes for both Commonwealth and State management of these areas, it seems inevitable that there will be a need to assess the adequacy of the legal regime and if necessary make adjustment to achieve the desired outcome...*<sup>134</sup>

*However, the Oceans Policy challenges Australian governments to take offshore management to a new and sophisticated level which will surely test the political commitment to cooperative federalism. Integrated marine management which respects the need for biodiversity conservation within complex ecosystems that extend from tropical to sub-polar environments however demands a totally integrated response from governments at all levels. While much of the challenge then will remain at the policy and management level, there is also the need to ensure that the legal regimes are complete and effective.*<sup>135</sup>

3.6.6 Bringing the states and the Commonwealth together will not be easy, as Wells (2004) notes:

*However, the history of Commonwealth/State relationships on the environment has had two defining characteristics ever since the Commonwealth's powers began to be interpreted more widely. Firstly, the States have fiercely guarded their rights in this area, which has traditionally been seen as a matter for the States to regulate. Secondly, the Commonwealth has demonstrated a considerable reluctance to legislate unilaterally.*<sup>136</sup>

3.6.7 But there are instances where they have come to an agreement, including on the oceanic environment. To ensure that Australia could meet its international obligations under the *International Convention for the Prevention of Pollution from Ships 1973 (MARPOL)*, there was recognition of the need for a national approach to port facilities and shipping activities in state coastal and internal waters. Each state had its own set of rules and standards and at the time was reluctant to voluntarily align with Australia's international obligations.

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132 Herr, R and Haward, M (2001), 'Australia's Oceans Policy: policy and process' in *Integrated oceans management: issues in implementing Australia's Oceans Policy*, Marcus Haward (editor), Cooperative Research Centre for Antarctica and the Southern Ocean, Research Report 26 May 2001 Hobart, Australia, p2

133 Herr, R and Haward, M (2001), p8

134 Rothwell, D and Kaye, S, (2001), p 26

135 Rothwell, D and Kaye, S, (2001), p29

136 Wells, K, (2004), p2

3.6.8 To deal with this situation the Commonwealth prescribed change that did not usurp a state's right to legislate in its own territory, but required it to develop consistent legislation that allowed proper implementation of international protection standards. The states did not have to change, but until such time as they did, Commonwealth legislation and the associated standards would apply in addition to state legislation (the effect of the Commonwealth legislation would be 'rolled back' once the states and territories complied). This enabled the development of national strategies and avoided disputes over implementation or refusal by states to accept international standards where it did not suit them politically.

3.6.9 Broader agreements on the environment have also been made between the Commonwealth, states and territories. At a Special Premiers' Conference held in October 1990, the Prime Minister, premiers and chief ministers agreed to develop an Intergovernmental Agreement on the Environment (IGAE), and this came into effect on 1 May 1992, largely through the insistence of the states. The IGAE committed the Commonwealth, states and territories to providing a mechanism by which to facilitate:

- *a cooperative national approach to the environment*
- *a better definition of the roles of the respective governments*
- *a reduction in the number of disputes between the Commonwealth and the States and Territories on environment issues*
- *greater certainty of Government and business decision making and*
- *better environment protection.*<sup>137</sup>

3.6.10 Under the IGAE the parties agreed that:

*Each State will continue to have responsibility for the development and implementation of policy in relation to environmental matters which have no significant effects on matters which are the responsibility of the Commonwealth or any other State.*

*Each State has responsibility for the policy, legislative and administrative framework within which living and non living resources are managed within the State.*<sup>138</sup>

3.6.11 It is difficult to measure how effective the IGAE has been in achieving the five key objectives listed above due to its lack of clear, quantifiable or measurable targets. The use of the terms such as 'better', 'greater' and 'reduction' give no indication of how much better, greater or less these matters need to be to achieve success. And, like the OCS 12 years before, it further etched the boundaries between each of the states and territories and the Commonwealth. The most tangible outcome of the IGAE was the establishment of the National Environment Protection Council (NEPC) and the development of the National Environment Protection Measures (NEPM) associated with it. This required complementary legislation in each of the states and territories.

3.6.12 The 1992 IGAE came a year after the Commonwealth had announced its ten-year marine conservation program, Oceans Rescue 2000, which included a commitment to establish the National Representative System of Marine Protected Areas (NRSMPA). Five years later the Commonwealth, states and territories entered into The Heads of Agreement on Commonwealth-State Roles and Responsibilities for the Environment. In relation to the oceans, the 1997 Heads of Agreement expressly provided that:

*Commonwealth responsibility involves meeting obligations in international agreements and in Commonwealth legislation in relation to waters outside those waters under state control pursuant to the Offshore Constitutional settlement, except where formal Commonwealth/State management arrangements are in place (eg. specific fisheries) or where waters are under Commonwealth direct management (eg. the*

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137 Intergovernmental Agreement on the Environment 1992, found at [deh.gov.au/esd/national/igae/](http://deh.gov.au/esd/national/igae/)

138 Intergovernmental Agreement on the Environment 1992

*Great Barrier Reef Marine Park). The Commonwealth has responsibility for control of sea dumping in Australian waters.*<sup>139</sup>

3.6.13 The Commonwealth, states and territories have cooperated on the establishment of the National Environment Protection measures, the National Water Initiative and the Natural Heritage Trust. But on the development and implementation of Australia's Oceans Policy, the Commonwealth has been unable to effectively engage state and territory governments. New South Wales, Victoria, Tasmania and South Australia did not engage in the process for the South-east Regional Marine Plan, Queensland and the Northern Territory showed more interest in the Northern Regional Marine Plan but withdrew, and South Australia and Western Australia are still considering their involvement in the South-west Regional Marine Plan. Negotiations are continuing between the Commonwealth and the states and territories in the south-west and north, and memorandums of understanding are being pursued at the time of writing.

3.6.14 Two key factors that have to date determined, and which will continue to determine, state involvement in regional marine planning and integrated oceans management are funding and influence. In the case of regional marine planning processes there have been insufficient incentives for state engagement, and the processes have been overseen by the National Oceans Ministerial Board comprising five Commonwealth Ministers – Environment, Transport, Science, Industry and Agriculture, Forestry and Fisheries (and now the Sustainable Environment Committee of federal Cabinet). The states have had no role to play in these decision-making processes and have been reluctant to engage because they see themselves giving away authority and getting nothing in return.

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139 Intergovernmental Agreement on the Environment 1992

## Chapter 4 An Australian Oceans Act, Agreement and Fund: Australia's next important steps towards the protection and sustainable use of our oceans?

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*Chapter 4 argues the case for an Australian Oceans Act. It also proposes an Intergovernmental Agreement on Australia's Oceans to overcome the lack of effective intergovernmental arrangements, and an Australian Oceans Fund to resource the implementation of the Act and the Agreement.*

### 4.1 An Intergovernmental Agreement on Australia's Oceans to underpin the implementation of Australia's Oceans Policy

4.1.1 *Out of the blue* has already discussed the current sector-based and multi-jurisdictional planning and management arrangements and the roles and responsibilities of the states, territories and the Commonwealth (see Chapters 1-3). To overcome this disintegration of management, mechanisms must be found to engage the states and to bridge the three-nautical mile barrier to integrated regional marine planning.

4.1.2 One mechanism would be a review and subsequent amendment to the OCS to provide for the integration of oceans planning and management across jurisdictions. The most certain way of amending the OCS Acts would be for the states and territories to request the Commonwealth to amend the legislation. The Commonwealth could then amend the legislation with clear authority under section 51 (xxxviii) of the *Constitution*. Such a combined request from the states would seem unlikely, and an alternative would be for the Commonwealth to unilaterally pass legislation covering Commonwealth and state waters. A cooperative approach would, however, provide more certainty, and one such approach would be to establish new arrangements under an Intergovernmental Agreement on Australia's Oceans (IGAAO).

4.1.3 This discussion paper proposes that each of the states and territories agree, through the Council of Australian Governments, to the provisions of the IGAAO, and to pass an Australian Oceans Authority Act (eg. *Australian Oceans Authority (New South Wales) Act*) that would create strong and consistent legislative protection, planning and management provisions across state and Commonwealth waters, thus driving integrated management of the oceans and creating a permeable three-nautical-mile barrier. The IGAAO would not undermine the states' and territory titles to their coastal waters, and the Australian Oceans Act would recognise that such title is vested in each State and Territory pursuant to the *Coastal Waters (State Title) Act 1980* and the *Coastal Waters (Northern Territory Title) Act 1980*.

4.1.4 The 2002 review of Australia's Oceans Policy implementation also acknowledged the need for a cooperative approach between jurisdictions and recommended a formal agreement:

*The maritime environment is affected by land based as well as coastal and offshore activity. The jurisdictional allocation of responsibilities under the Constitution and the Offshore Constitutional Settlement do not readily facilitate effective management of the maritime environment. Indeed, they make effective implementation of an Australian Oceans policy very complex and difficult<sup>140</sup>.*

*A multi-faceted approach to developing further engagement with jurisdictions should be pursued. This should involve a more formal expression of agreement about integrated oceans management between jurisdictions should be pursued without the complications of establishing detailed legal and institutional arrangements up front. This could require the States, Territories and the Commonwealth signifying an 'in principle' objective of developing a more integrated approach to oceans management, and having a clear, common understanding of what this means<sup>141</sup>.*

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140 TFG International (2002), p20

141 TFG International (2002), p8

### Box 13 Options considered by the Review of Oceans Policy<sup>142</sup>

#### Model 1 (Australian Oceans Policy)

- formal Commonwealth/State and Territory agreement on an Australian Oceans policy), including legal and institutional arrangements
- a special Ministerial Council with working committees and external reference groups and an independent secretariat
- an Australian Oceans Authority to implement agreed arrangements

#### Model 2 (Integrated Oceans Management)

- Commonwealth/State and Territory agreement on working co-operatively towards integrated oceans management (and a clear definition of what this means)
- oversight by an existing Ministerial Council, with working groups and external reference groups
- implementation through existing institutions or through modified arrangements if specific agreements are reached
- development of stronger integration mechanisms over time as agreements are reached

#### Model 3 (Current Approach)

- officer level engagement through bilateral arrangements and working groups on integrated oceans management
- implementation through existing institutions
- development of stronger integration mechanisms over time as agreements are reached

4.1.5 In relation to a Commonwealth-state-territory agreement, the review believed that:

*Ideally this agreement should occur at the Council of Australian Governments. This would provide an overall context for appropriate intergovernmental organisations to development options for improving integration and co-ordination. It would provide a context for cross-jurisdictional interaction without the need to commit to specific legal and institutional arrangements at this time. However, it would not preclude these from being established later if mutually agreed<sup>143</sup>.*

4.1.6 The 2002 review did not rule out ‘specific legal and institutional arrangements’ but believed that an option including these would be more complex and delay agreement being reached. It favoured the second of the three options (see Box 13) it considered and referred to it as Integrated Oceans Management:

*Model 1 would require significant commitment from jurisdictions. It runs the risk of switching the focus of effort to inherently difficult legal and institutional considerations at a time when an understanding of what integrated oceans management requires is still emerging and the political imperatives for such an initiative are lacking. Model 3 is essentially the status quo...Model 2 represents a more formal expression of agreement about integrated oceans management between jurisdictions but without the complications of establishing detailed legal and institutional arrangements up front<sup>144</sup>.*

4.1.7 The proposals of *Out of the blue*, an Australian Oceans Act, an Australian Oceans Authority, an Intergovernmental Agreement on Australia’s Oceans, and the involvement of the Natural Resources Management Ministerial Council, is consistent with Model 1 of the 2002 review. Such an approach will require ‘significant commitment’ from all jurisdictions. If achieved, that commitment would be one its strengths because it will elevate the future of oceans planning, protection and management to the status that is needed to deal with the issues associated with environmental impacts and sector-based and multi-jurisdictional management.

## 4.2 An Australian Oceans Act

4.2.1 The management of human interactions with dynamic and largely unknown ocean systems is complex. There are no guarantees on the operation of natural ocean processes, but we can provide certainty in the management and regulation of oceans-based activities. To do this, while also ensuring that ocean uses do not compromise one another or the oceanic environment,

<sup>142</sup> TFG International (2002), p9

<sup>143</sup> TFG International (2002), p9

<sup>144</sup> TFG International (2002), p9

requires clear, streamlined and integrated ecosystem-based management arrangements anchored in appropriate legislation and supplied with the best-available environmental, economic, cultural and social information.

4.2.2 However, as already discussed in this paper, current administrative and legal arrangements for oceans-based industries are strongly sector-based, tailored to meet the needs of particular industries, are not integrated across the oceans, and have few if any references or provisions relating to other impacts, cumulative effects or biophysical constraints. Ecologically sustainable development is reflected to some degree in each sector's management, but progress towards sustainability is undermined by the disparate and isolated nature of that management, making it impossible to determine collective cumulative impacts or to quantify the relationship of collective operations to the carrying capacity of the Australia's oceans.

4.2.3 To fulfil its international pledges and commitments in the areas of oceans protection and management – and to effectively implement its Oceans Policy – Australia must consider providing strong legislative direction and supporting institutional and legislative reform. *Out of the blue* suggests that an overall vision anchored in strong legislation is needed. One that is not just about providing checks and balances according to single impacts, but promotes the integration of the management, use and conservation of the oceans.

4.2.4 The creation of an Australian Oceans Act and an Australian Oceans Authority, supported by complementary legislation in the states and territories, would pilot Australia's oceans planning and management – and industry and government agencies – on a course that is new but one that is implicit in Australia's Oceans Policy. It would also enable the coordination of existing legislation within a nationally consistent legislative regime using the Authority to oversee the policy's implementation and provide certainty, equity and security for all stakeholders.

4.2.5 The Australian Oceans Act proposed in this paper would not be an omnibus act in the style of the *Environment Protection and Biodiversity Conservation Act 1999* and replace existing ocean-based legislation. Nor would the existing agencies be necessarily removed from their current responsibilities to manage sectors and monitor and report on specific factors. The change would be that their actions would take place within a coordinated and national decision-making framework, one that would assess the cumulative impact of each sector and implement a shared vision for the future use and conservation of Australia's oceans.

4.2.6 The establishment of an Australian Oceans Act, and complementary legislation within each state and territory to establish an Australian Oceans Authority, would not be the first time that jurisdictional boundaries have been crossed to ensure the proper application of national strategies. National frameworks have been established under Commonwealth legislation for the regulation of corporations (*Corporations Act 2001*), trade practices (*Trade Practices Act 1974*), certain transactional crimes (*Criminal Code Act 1995*), the National Competition Policy (including the National Competition Council) and, to ensure that Australia could meet its international obligations under the *International Convention for the Prevention of Pollution from Ships 1973* (MARPOL), there was recognition of the need for a national approach to port facilities and shipping activities in state coastal and internal waters. A national approach like that proposed in *Out of the blue* can be achieved through agreement by the Commonwealth and the states to legislate in a nationally consistent manner, as was also the case with gun control laws and National Environmental Protection Measures.

4.2.7 Without dedicated legislation, Australia's Oceans Policy will continue to be no more than policy guidance for Commonwealth agencies. The reluctance of the states to participate in the development or implementation of the South East Regional Marine Plan – the only regional marine plan adopted so far under the Oceans Policy – illustrates this dilemma. Legal impetus will



be at best, indirect, and by way of sector-focused legislation that has little or no capacity to provide certainty or to accommodate integrated oceans planning and management.

4.2.8 The authors of the conservation sector report on Australia's Oceans Policy and regional marine planning, *Oceans eleven*, believe that the policy should be:

*... used to combine the disparate building blocks of current oceans management into a purpose-built structure that ensures ecologically sustainable use and conservation. Ecosystem-based management will provide the foundation upon which the structure is built; but integrated legislative and administrative arrangements will bind the structure's blocks together.*<sup>145</sup>

4.2.9 Administrative and legislative reform is a critical step in the development of truly sustainable management practices for our coasts and seas. The success of Australia's Oceans Policy will be judged by how well we 'protect and preserve our marine environment' while providing progress and certainty for oceans-based industries whose futures depend on integrated and effective management.

### 4.3 Contents of the Australian Oceans Act

4.3.1 The proposed Australian Oceans Act is outlined in Chapter 7 and is divided into four parts and includes four schedules.

4.3.2 Part 1 is the preliminary part of the Australian Oceans Act and outlines the purposes and objects of the Act, the principles of ecologically sustainable development and ecosystem-based management, and the applications and relationships of the Act. It defines the area to which this Act applies, recognises the coastal waters of the states, outlines the relationship of the Act with state laws, and its application to state waters.

4.3.3 Australia's Oceans Policy was clear in its intent that oceans planning and management be grounded in the principles of ecologically sustainable development and ecosystem-based management. But the *Marine legislative review* has shown that very few acts and regulations of relevance to the use and protection of the oceans (more than 250 were reviewed) give sufficient or any weight to these principles. The principles are therefore included in the proposed Australian Oceans Act to give legislative force to their consideration in relation to administrative decisions about activities in the oceans and to encourage their inclusion in legislative reform in other oceans-based sectors and jurisdictions.

4.3.4 Part 2 of the Australian Oceans Act provides the structure, power and functions of the Australian Oceans Authority, its board, the Regional Marine Advisory Committees and Regional Marine Planning Technical Groups. It also establishes the Regional Marine Plan Working Group, a mix of Authority, Commonwealth, state and territory marine planners given the task of preparing the regional marine plan under the auspices of the Authority.

4.3.5 The creation of a single, statutory Australian Oceans Authority to oversee the implementation of the Australian Oceans Act is central to the development of the approach to integrated oceans planning and management as outlined in this paper. The Australian Oceans Authority would derive its power from the Australian Oceans Act, and would report to the Natural Resource Management Ministerial Council (NRMMC). The NRMMC would delegate the Commonwealth Minister for Environment and Heritage to report to federal parliament.

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145 Smyth et al (2003), p20

4.3.6 The main mechanism for delivery of Australia's Oceans Policy is regional marine planning, and Part 3 of the Australian Oceans Act outlines the nature and purpose of regional marine plans and the role, functions and powers of the Australian Oceans Authority in relation to them, the review of regional marine plans, the process for structural adjustment assistance, and proposals for management plans with Indigenous communities.

4.3.7 The purpose of each regional marine plan is to implement Australia's Oceans Policy framework and to tailor its objectives to specific regional needs. Under the Australian Oceans Act, regional marine plans would establish clearly defined outcomes across all sectors and be relied upon to ensure fair decision making and conflict resolution regarding resource access.

4.3.8 Regional marine plans would be the main vehicle for involving the Commonwealth, state and territory governments, resource users and the community in decision making, for engendering stewardship, for ensuring flexible and adaptive management arrangements, and for establishing performance regimes for auditing and review. In Part 3 of the Australian Oceans Act it is also proposed that in the development of a regional marine plan the Australian Oceans Authority coordinate the process for identification, selection and proclamation of marine national parks.

4.3.9 Part four of the Australian Oceans Act deals with referral, assessment and approvals processes for proposed uses and for the enforcement of regional marine plans.

4.3.10 The Australian Oceans Act outlined in Chapter 7 includes a number of schedules linked to various sections of the Act. The schedules cover operationally related acts, international conventions relating to ocean protection and management, proposed activities that require advice or direction from the Australian Oceans Authority in assessments and approvals process, and criteria for identification and selection of marine national parks.

4.3.11 Section 8 of the proposed Australian Oceans Act also requires decision makers under the list of Acts in Schedule 1 to act consistently with the objects of the Australian Oceans Act when making decisions. This is an indirect way of incorporating the objects of the Australian Oceans Act into the numerous Acts that affect the oceans. To ensure consistency of objects in all decisions affecting the oceans, state and territory acts are included in the proposed Australian Oceans Act. This could be achieved either by the Commonwealth legislating unilaterally or preferably, by the states and territories agreeing to the listing.

#### **4.4 The Australian Oceans Act and intergovernmental arrangements**

4.4.1 To enable integration and cooperation between jurisdictions the proposed Australian Oceans Act includes provision for the state nomination of members to the Australian Oceans Authority Board, for marine planners from participating state and territory governments to be members of the Regional Marine Plan Working Group, which would prepare the regional marine plan for a region, and for involvement in the oversight of the IGAAO and in reporting and approvals processes through the Natural Resource Management Ministerial Council (NRMMC). Further, the IGAAO would provide funding to support the participating states and territories to support their involvement in regional marine planning.

4.4.2 To encourage the integration of Commonwealth and state marine planning and management processes the Intergovernmental Agreement on Australia's Oceans (IGAAO) would see the participating states, territories and the Commonwealth agreeing to nationally consistent and integrated planning, management, assessment, approval and regulatory processes, including marine national park identification and selection processes.

4.4.3 The IGAAO would list the areas for which these nationally consistent and integrated processes would be developed, including assessment and approvals processes for proposed actions, waste management regulations (eg. ballast water, aquaculture and ocean outfalls), marine national park identification, selection and proclamation, integrated ocean, coast and catchment planning. The Australian Oceans Authority would be given the role of developing the detail of these processes in consultation with all jurisdictions and relevant stakeholders.

4.4.4 Participating parties to the IGAAO would, on agreeing to the assessment and approvals processes for proposed actions, be accredited to conduct the processes, whereas certain proposed actions (see Schedule 3 of the Australian Oceans Act) in the waters of non-participating governments would have to be referred to the Australian Oceans Authority for assessment and approval.

4.4.5 The Commonwealth-state-territory complementary legislative approach that would be outlined in the IGAAO could be likened to the agreement between the Commonwealth and the states to establish the National Environment Protection Council (NEPC), although clearly it would differ in its scope and objectives and target the three-nautical-mile barrier to ensure that protection and the management of use in state waters and Commonwealth waters was consistent, integrated and marked by a cooperative approach. The establishment of the NEPC – a national body with responsibility for making environment protection measures – was provided for in the IGAE and has as its objectives to:

- *ensure that the people of Australia enjoy the benefit of equivalent protection from air, water and soil pollution and from noise, wherever they live, and*
- *decisions by businesses are not distorted and markets are not fragmented by variations between jurisdictions in relation to the adoption or implementation of major environment protection measures.*<sup>146</sup>

4.4.6 Complementary legislation establishing the NEPC was passed in all jurisdictions, for example the *National Environment Protection Council Act (Western Australia)*. When assessing the *National Environment Protection Council Act*, the *Marine legislative review* sounded a warning in relation to such agreements:

*Because the Act and IGAE are primarily focused upon achieving agreement between the Commonwealth and all States and Territories, it advocates a “lowest common denominator” approach to environmental protection. Consequently, States who might otherwise have established a higher standard of protection may now be content to comply with the lowest standard of protection all jurisdictions were agreeable to. A better, though perhaps politically unlikely, approach would be to use the IGAE and national environmental protection measures to lift the standard of environmental protection provided in those States with the least interest in legislating for such measures themselves.*<sup>147</sup>

4.4.7 Warnings such as these will need to be heeded when drafting the IGAAO and its associated legislation. So too should the lessons of the NRSMPA, the establishment of which was also begun by intergovernmental agreement. Its implementation has, as discussed in Section 2.3, created multiple models and processes, inconsistencies and lengthy delays in protection.

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146 Intergovernmental Agreement on the Environment 1992

147 Australian Conservation Foundation (2005a), p42

4.4.8 Wells (2004) believes that features of the National Competition Policy model are useful to consider in assisting with what the author dubs ‘greening of the federation’, especially:

- *its wide-ranging, detailed, COAG-approved reform agenda*
- *its provision of billions of Commonwealth dollars to the States in return for implementing that agenda, and*
- *its emphasis on a national statutory body tasked with assessing State progress in meeting that agenda.*<sup>148</sup>

4.4.9 If oceans planning and management were to be based on such a model – and these three features are reflected in the structure of the Australian Oceans Act proposed here – then the challenge would be to develop mechanisms that provide incentives for the states and territories to participate. In the case of competition policy, productivity gains are generated that can feed into financial rewards for the States. To encourage integrated oceans planning and management, the Commonwealth might be able to offer financial incentives derived from various sources including consolidated revenue, levies and royalties.

## 4.5 The Australian Oceans Act and ministerial councils

4.5.1 Institutional arrangements established for the National Competition Policy model sidestepped a ministerial council approach, preferring to use COAG, which is the most senior and authoritative committee within the cooperative federal structure. Wells (2004) believes the COAG approach has more gravitas<sup>149</sup> and avoids some of the weakness inherent with ministerial councils:

*... many of the Councils lack a legislative basis. This can lead to a lack of stability in arrangements over the long-term. There is also a lack of consistency in processes and outcomes within and across the Councils. For example, Councils often adopt measures without securing them in legislation, and sometimes fail to take other meaningful steps to secure the goals set out in those measures. In addition, while the Ministerial Council process is aimed at better co-operation and coordination, the States often act in their own ‘self-interest’, which can result in slow and cumbersome processes to agree common standards, strategies and guidelines, and a lowest-common-denominator approach.*<sup>150</sup>

4.5.2 Under the agreements associated with the National Competitions Policy, all Australia governments committed to the reviewing and changing of legislation that restricted competition:

*The objective of the legislation review program is to remove restrictions on competition that are found not to be in the interests of the community, for example, legislation that restricts entry into markets or constrains competitive behaviour with markets.*

*Over 1700 pieces of legislation were identified by governments for review, extending across a range of industries and sectors. To access information relating to a specific industry, refer to the relevant sector available on this web site*<sup>151</sup>.

4.5.3 This discussion paper proposes that the Intergovernmental Agreement on Australia’s Oceans would be signed by the members of COAG, with the NRMMC given oversight of its implementation. The IGAAO would set out the agreed, nationally consistent processes and standards that would need to be achieved over time to overcome the ‘lowest common denominator’ approach referred to by Wells (2004). The implementation of the IGAAO would be funded by the Australian Oceans Fund.

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148 Wells, K, (2004), p3

149 Like Ministerial Councils, COAG has no legislative basis, and its decisions do not always result in legislation.

150 Wells, K, (2004), p2

151 National Competition Council website section on Legislative Review, [www.ncc.gov.au/activity](http://www.ncc.gov.au/activity)

4.5.4 Because of the ongoing planning and management responsibilities of the Authority, and its regular consulting and reporting to ministers, the involvement of COAG should not go beyond the initiation of the IGAAO and the receipt of progress reports. Although Wells (2004) has highlighted the weaknesses of the ministerial council model, this paper suggests that the NRMCC can play a vital role in overseeing the implementation of the IGAAO (Box 12 lists the ministerial membership of the NRMCC, a mixture of environment and resource management portfolios). Involving the NRMCC would encourage collaboration and engagement among the states, territories and the Commonwealth in oceans planning, protection and management.

4.5.5 The NRMCC would sign-off on regional marine plans before their tabling in federal parliament by the Commonwealth Minister for Environment and Heritage. It would also receive and comment on progress reports provided by the Australian Oceans Authority (a secretariat would be formed by the Authority to assist the NRMCC in its consideration of regional marine planning) on the implementation of the IGAAO, Australia's Oceans Policy and regional marine planning. Further, it would report on the results of Australian Oceans Authority reviews and audits of planning and management processes, including assessments and approvals, and the use of the Australian Oceans Fund. The Council could also initiate investigations and policy development through its existing standing committee and its Marine and Coastal Committee.

4.5.6 Involving the NRMCC in oceans planning, protection and management would help overcome the current narrow focus in the delivery of natural resource management (NRM). Flaherty and Sampson (2005), when noting the issues arising from the urbanisation of the coastal zone, the demise of ocean water quality, the overexploitation of ocean life and the translocation of marine pests, lamented such a focus:

*In recent years the Australian Government has invested significant resources into its Natural Heritage Trust (NHT) in an attempt to address a number of these issues. Under the second phase of the NHT, the planning and investment to address issues has been largely decentralised to a regional delivery model under the catchcry of 'natural resource management' (NRM).*

*So far, NRM in Australia has focused on the most obvious problem: land degradation. It is time now to extend our stewardship to the coastal and marine environments, which are equally important to our future, equally fragile, but much harder to fix when degraded.*

*Good NRM management is founded on a catchment-to-coast-to-marine approach<sup>152</sup>.*

4.5.7 Under the Australian Oceans Act the Australian Oceans Authority would report to the Natural Resource Management Ministerial Council (NRMCC). If it were to report directly to the Commonwealth Minister for Environment and Heritage, this would undermine efforts to establish integrated and effective intergovernmental arrangement and also provide a level of influence for the Minister inappropriate to the states and territories.

## 4.6 The Australian Oceans Fund

4.6.1 To provide the funding for the Australian Oceans Authority and the new planning and management arrangements, the IGAAO could establish an Australian Oceans Fund with a long-term commitment to funding. The Australian Oceans Fund would be similar to the Australian Water Fund established under the 2004 Commonwealth, state and territories National Water Initiative<sup>153</sup>, with potential sources of moneys to be considered including general revenue, levies, licensing and existing disparate expenditures.

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152 Flaherty, T and Sampson, K, (2005), p6

153 The National Water Initiative has received broad-based community support, including ACF, the National Farmers' Federation, and the Australian Bankers' Association.

4.6.2 Through a number of programs, the Australian Oceans Authority would use the Australian Oceans Fund to provide investment funds to the IGAAO's participating states and territories to improve their oceans planning and management processes, and to achieve national objectives, targets and milestones, with ongoing funding conditional on their meeting of these. States and territories not party to the IGAAO would be unable to source funds from the Australian Oceans Fund, and referrals for assessment and approval of proposed actions in their waters would have to be made to the Australian Oceans Authority.

4.6.3 The investment provided by the Australian Oceans Fund would drive the coordination, cooperation and integration of planning, protection and management in Australia's oceans. The return on such investment would come from increased efficiencies in governance arrangements including the reduced costs of duplication and those stemming from environmental degradation. Private and public sector investment is likely to be stimulated by the investment certainty and opportunities generated by the IGAAO and the Australian Oceans Act.

4.6.4 The Australian Oceans Fund should be sufficient to provide financial assistance for:

- Authority, state and territory ocean and coastal mapping, consultation, planning and management processes and actions for ocean, coastal and catchment areas that are integrated with Commonwealth processes<sup>154</sup>
- the costs of institutional arrangements and assessment and approvals processes
- structural adjustment for fishing industries and associated regional communities if necessary<sup>155</sup>
- individuals, communities and sectors working towards stronger oceans protection and sustainability outcomes<sup>156</sup>
- expanded public good ocean research
- communications and education programs to increase community knowledge and understanding of Australia's oceans and their values.

4.6.5 Resourcing of the Australian Oceans Fund could come from a number of sources including general revenue, a consolidation of existing allocations, and licenses and levies on ocean users. The principles to follow in identifying those sources would be that it be new or existing money, not funds taken away from other environmental programs, and that it be a long-term commitment.

## **4.7 The advantages for governments and stakeholders from the Oceans Act, Agreement and Fund**

4.7.1 For the Commonwealth government, the Oceans Act, Agreement and Fund provide the opportunity to again put Australia at the forefront of international action to better plan and protect its oceans. This would come through the establishment of a framework that would work across the sectoral and jurisdictional boundaries that currently divide Australia's administrative and legislative arrangements for oceans planning and management. This will require national leadership to integrate the work of the states, territories and the Commonwealth in a cooperative, collaborative

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<sup>154</sup> This would enhance the implementation of ecosystem-based regional marine planning, Australia's Oceans Policy and the NRSMPA, and enable the preparation and implementation of one regional marine plan covering adjacent Commonwealth and state waters in the marine region

<sup>155</sup> Regional marine planning processes will make determinations about the allocation of marine resources between different marine uses and could lead to changes in the way the marine environment is used, leading to both positive and negative economic and social effects. The proposed Australian Oceans Act includes a process and bodies for assessing and granting assistance to those parties affected by regional marine planning and the establishment of marine national parks

<sup>156</sup> Under the proposed Australian Oceans Act, the Australian Oceans Authority would support this by providing guidance and assistance to communities to promote their local seascapes and coastscapes

and consistent approach. There are also opportunities for the Commonwealth to stimulate private and public investment in the implementation of the Act, Agreement and Fund.

4.7.2 The reluctance of the states and territories to engage in the development and implementation of Australia's Oceans Policy, and more recently the Commonwealth's regional marine planning process, stems from the lack of incentives or perceived advantage to encourage their involvement. The Australian Oceans Act, Agreement and Fund, and their associated processes and institutional arrangements would, as for the Commonwealth, provide the states and territories with the opportunity to demonstrate leadership on issues that cross jurisdictional and sectoral boundaries and that would benefit from an integrated, consistent and cooperative national approach. The Act, Agreement and Fund would also provide the states and territories with a number of incentives for them to cooperate in integrated marine management. The states and territories would be:

- represented on the board of the Australia Oceans Authority
- formally engaged in the development of regional marine plans through regional marine planning working groups established under the Australian Oceans Act and comprising state and Commonwealth marine planners
- able to source funds through the Australian Oceans Fund to cover institutional and process costs
- involved in the oversight of the Australian Oceans Act through their membership of the Natural Resource Management Ministerial Council
- accredited to run assessment and approvals process for proposed actions in Australia's oceans within the area covered by the regional marine plan with which they associated
- able to forge cooperative, collaborative and consistent interstate arrangements and processes through the Intergovernmental Agreement on Australia's Oceans that will help them deal with national issues that threaten their waters, such as ballast water and introduced marine pests, illegal fishing, climate change, threatened species and oceans protection.

4.7.3 The new approach to oceans planning and management outlined in this discussion paper would also provide opportunities to resolve certain planning and management issues in the Commonwealth, states and territory ocean jurisdictions. In Box 14 some current oceans environmental matters in each jurisdiction (they are not necessarily exclusive to that jurisdiction but are applied to it for illustrative purposes) have been chosen to illustrate how the Australia Oceans Act, Agreement and Fund would help resolve those issues.

4.7.4 For the various stakeholders, there will be a number of common benefits – certainty, security, consistency, more-effective consultation, equity and transparency in planning, management and consultation processes – but also ones that relate more to their specific objectives. Indigenous communities will gain greater recognition, opportunities and capacity for their engagement in regional marine planning, including joint management options. Commercial and recreational fishers will in particular benefit from the increased certainty and consistency surrounding oceans planning and management, and the increase in monitoring and research into oceans resources and actions to improve oceans health. The conservation sector will see ecosystem-based management and core areas of high-level protection as elevating the status of the natural values of Australia's oceans. Healthier oceans will also be good for the tourism industry, and increased public good oceans research will provide more opportunities for scientists.

## 4.8 Non-participants in the Intergovernmental Agreement on Australia's Oceans

4.8.1 The Intergovernmental Agreement on Australia's Oceans, the Australian Oceans Act and the Australian Oceans Fund provide incentives for state and territory involvement in an all-Australian approach to oceans planning, protection and management. However, there may be some states and territories that decline to sign the IGAAO. Their absence would reduce the effectiveness of the holistic approach outlined in this paper, but would also isolate them from the institutional benefits established by the IGAAO, the Act and the Fund, as outlined in 4.7.2. Non-participating states and territories would be unable to be:

- given access funds from the Australian Oceans Fund
- accredited to conduct assessment and approvals proposals for actions proposed for areas covered by a regional marine plan
- party to the bilateral or multi-lateral agreements that might be associated with the implementation of the IGAAO, Act and Fund.

4.8.2 Section 34 of the Australian Oceans Act in Chapter 7 outlines the process that would be used to ensure consistency of planning and management processes and outcomes in waters where there is no participating state or territory, where a participating state or territory is yet to be accredited, or where a regional marine plan has yet to be applied (Section 5.4 of this paper provides further discussion on this aspect of the proposed Act). In each of these circumstances, referrals by proponents of proposed actions listed in Schedule 3 in the relevant state or territory jurisdiction would be made to the Australian Oceans Authority. Where proponents fail to refer, civil penalties would apply under the Act.

4.8.3 This approach to non-participants to the Intergovernmental Agreement would see Commonwealth legislation, possibly under the external affairs power, being used to override that of the states and territories in territorial seas and the adjacent area. These jurisdictions might make a constitutional challenge claiming that such an approach constituted an acquisition of title (proprietary rights to the seabed vested in the states and territories under the *Title Act*) and required compensation on 'just terms' as per section 51(xxxi) of the *Constitution*. However, the High Court in a 1998 decision held that that a 'purely statutory right is by nature susceptible of modification' and that extinguishment of that right will not constitute acquisition of property (see *Commonwealth v WMC Resources* (1998) 194 CLR 1).

4.8.4 A detailed discussion of the potential for challenge to such an approach by non-participants to the Agreement, and the arguments supporting or opposing such constitutional challenges, is beyond the scope of this paper. Suffice it to say that an holistic approach involving Commonwealth, state and territory governments is crucial to the successful implementation of Australia's Oceans Policy and effective planning, protection and management across Australia's oceans. The opting out by some governments, without arrangements put in place to maintain integration and consistency of process and outcomes, would undermine that approach and a sustainable and secure future for Australia's oceans.



<b>Box 14 Australian Oceans Act, Agreement and Fund and current ocean issues</b>		
<b>Jurisdiction</b>	<b>Issue</b>	<b>Australian Oceans Act and Intergovernmental Agreement on the oceans</b>
Commonwealth	Petroleum offshore acreage release	The release of areas in Australia's oceans to elicit interest and applications from the oil and gas industry for petroleum exploration and extraction is known as 'acreage release'. Although there is communication between the Commonwealth departments of Industry, Tourism and Resources and Environment and Heritage on the choice of the areas, there is no public consultation or exhibition process. Under the Australian Oceans Act, the allocation of any ocean resources to the oil and gas industry would occur during the regional marine planning process and would have to be consistent with the objectives of the Act and the regional marine plans.
Queensland	Integrated land and ocean management to protect Great Barrier Reef	One of the main threats to the Great Barrier Reef is the quality of runoff from its urban and rural catchments. The referrals process under the Australian Oceans Act would capture actions on land that could lead to pollution of the Great Barrier Reef, while the Fund could be used to support actions that reduce land-based and marine-based sources of pollution, such as investment in sewage pump-out infrastructure at all ports to handle tour boat wastes currently discharged on the Reef.
Western Australia	Illegal fishing and shark overfishing	Illegal fishing of oceans species, including sharks (and their finning), in Commonwealth waters, and overfishing of sharks in north-western Australia, is of major concern because of issues of unsustainable fishing practices (a combination of illegal fishing by Indonesian fishers, and recent shark overfishing by Australian fishers), potential marine pest invasions in illegal fishing boats, and border security. The forging of the IGAAO would strengthen the basis for a consistent and cooperative arrangement between the Australian governments that could underpin environmental security and negotiations with the Indonesian authorities.
Northern Territory	Indigenous community engagement	Indigenous communities in the Northern Territory have developed a deep connection with their Sea Country, but to date their aspirations in oceans planning and management are yet to be met. Effective regional marine planning requires Indigenous community engagement. This would be recognised under the Australian Oceans Act, and the Oceans Fund could be used to increase the capacity of Indigenous communities to be involved.
Victoria	Ocean outfalls and stormwater discharges	There are more than 180 ocean outfalls around Australia's coast discharging waste into the oceans, as well as many thousands of stormwater drains. All contribute to a decline in ocean water quality. The Gunamatta outfall on the Mornington Peninsula is one of the most controversial, with local groups campaigning for its closure. The IGAAO would reaffirm concern about ocean outfalls and stormwater discharges, the regional marine planning process would set clear water quality operational objectives and performance indicators, the Australian Oceans Authority would ensure these are monitored, and the Australian Oceans Fund would provide moneys to develop alternatives, with a priority for closure of those unable to meet the plan's objectives.
South Australia	Aquaculture	As pressure mounts on the stocks of wild fish in the oceans, there are increasing calls for the expansion of ocean-based aquaculture. In South Australia this has resulted in the establishment of aquaculture projects separate to the processes for marine planning and marine protected areas. Under the Australian Oceans Act, all uses seeking resource allocation would be considered within the regional marine planning process and their establishment would be dependent upon whether such use would be consistent with or undermine the objectives of the Act and the regional marine plan.
Tasmania	Introduced marine pests	Tasmania has its fair share of introduced marine pests. The best known is the northern Pacific seastar which, after colonising the Derwent estuary, found its way across Bass Strait to Port Phillip Bay. Currently the state, territory and Commonwealth governments are unable to reach consensus on the system for control of domestic ballast water, with Victoria introducing its own regulatory framework. To ensure a consistent approach to ballast water control, and to help tackle the problem they cause in Tasmania and other jurisdictions, the Intergovernmental Agreement on Australia's Oceans would reaffirm the issue as of concern, and the Australia Oceans Act would give the Ocean Authority the responsibility of developing the management system, in consultation with the various governments, to ensure that the objectives of the Act and regional marine plans were met.
New South Wales	Threatened oceans species	The grey nurse shark is now estimated to number less than 500 along the east coast of Australia and could be extinct within a generation. The species is now listed as endangered. Protection of its 19 critical habitats is essential to survival of the species. To date the NSW government has been reluctant to create no-take areas around the critical habitats in part due to the cost of buying out the effort of commercial fishers and charter boat operators in the areas. The Oceans Fund could be used to provide structural adjustment to the fishers and operators affected and to also invest in further grey nurse shark research.

## Chapter 5 The Australian Oceans Act and regional marine planning

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*Chapter 5 discusses the nature of regional marine planning under the Australian Oceans Act and also considers Indigenous community engagement in planning, and assessments and approvals processes.*

### 5.1 Preparing regional marine plans under the Australian Oceans Act

5.1.1 The implementation of Australia's Oceans Policy, the establishment of the Australian Oceans Authority, and the roll-out of ecosystem-based regional marine planning processes with legislative backing is raised by *Out of the blue* as a means of progress towards integration of what are currently disparate elements in oceans planning and management. Key to this is the regional marine planning process.

5.1.2 According to the authors of *Oceans eleven*, there are eleven necessary steps in the development of ecosystem-based regional marine plans<sup>157</sup>:

1. Engaging stakeholders and educating the community
2. Gathering necessary baseline data
3. Identifying operational objectives, indicators and targets
4. Considering the selection of habitat for protection
5. Assessing the risks to ecosystem values, operational objectives and system and species indicators
6. Achieving the operational objectives and indicator targets (this would include implementation processes to realise the designs, plans, objectives and targets)
7. Designing research, information and monitoring systems
8. Designing performance assessment and review
9. Designing a compliance strategy
10. Finalising the regional marine plan
11. Reviewing the regional marine plan to ensure adaptive management.

5.1.3 Under the Australian Oceans Act proposed in this paper, the regional marine planning process and the content of the regional marine plans have been structured to reflect these eleven steps. The Australian Oceans Authority would coordinate the preparation, review, monitoring and auditing processes of regional marine planning, as well as the identification and selection processes for marine national parks.

5.1.4 Australia's Oceans Policy gives clear indications as to what is expected from regional marine plans:

*The Commonwealth's commitment to integrated and ecosystem-based planning and management will be implemented through the introduction of a major regional marine planning process. Regional marine plans – based on large marine ecosystems – will integrate sectoral commercial interests and conservation requirements.*<sup>158</sup>

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157 Smyth et al (2003) pp51-54, Table 3

158 Commonwealth of Australia (1998), p11

5.1.5 Under the Policy, regional marine plans could include ‘zoning for multiple or single uses’, ‘resource-specific allocations for access and use’, and ‘sustainability indicators, monitoring, reporting and adaptive development of management controls’<sup>159</sup>. This discussion paper maintains that the waters between and surrounding areas of high-level protection should be managed through the regional marine plan in a manner that is consistent with at least IUCN Category VI:

*Managed Resource Protected Area: Protected Area managed mainly for the sustainable use of natural ecosystems. Area containing predominantly unmodified natural systems, managed to ensure long term protection and maintenance of biological diversity, while providing at the same time a sustainable flow of natural products and services to meet community needs*<sup>160</sup>.

5.1.6 The Authority would begin its preparation of a regional marine plan by releasing a scoping paper and a public notice of its intention to prepare the plan and an invitation for public comment. The Regional Marine Plan Working Group, established by the Authority and comprising marine planners from the Authority, the Commonwealth and participating state and territory government agencies, would prepare the scoping paper and draft plan for public release and public comment. A report outlining how the public comments received on the scoping plan had been dealt with would accompany the draft plan. The Working group would also prepare the final plan for Authority, Ministerial, NRMMC and parliamentary approval. From the beginning of the plan’s preparation, the Working Group and the Authority would consult with the Regional Marine Advisory Committee and Regional Marine Planning Technical Group that had been formed by the Authority.

5.1.7 Under the Australian Oceans Act it is also proposed that in the development of a regional marine plan the Australian Oceans Authority coordinate the process for identification, selection and proclamation of marine national parks<sup>161</sup> (which must be integrated with regional marine planning processes and use the criteria listed in Schedule 4 to carry out the identification and selection processes). This would ensure the necessary whole-of-government, arms-length and integrated approach to marine national parks development.

5.1.8 Although the processes described in the previous paragraphs are relatively straightforward, competing and conflicting uses and disparate aims have the potential to generate conflict within and between sectors, between sectors and governments, between governments and between departments and agencies. The management of such conflict is an important component of the regional marine planning processes under the proposed Australian Oceans Act. By being integrated, collaborative, inclusive, transparent and accountable, and by removing a large degree of uncertainty, often the cause of conflict, it is anticipated that a degree of conflict would be avoided.

5.1.9 The consultation and stakeholder engagement processes during the scoping, draft and final phases of the regional marine plans should be designed to manage conflict, and the proposed Regional Marine Advisory Committee would assist such conflict management. An appropriate regional management structure that is relevant and provides effective engagement opportunities for regional users and the region’s broader community will also contribute to conflict management by recognising that each participant is a legitimate user of the oceans. Further, the proposed Australian Oceans Authority would identify the existing sources of conflict and

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159 Commonwealth of Australia (1998), p13

160 United Nations Environment Program website: [www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/protected\\_areas/categories/~main](http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/protected_areas/categories/~main)

161 The term ‘marine national park’ is used for areas of the oceans that are highly protected (IUCN Categories Ia, Ib and II – Strict Nature Reserve, Wilderness Area and National Park respectively). The Victorian marine national park system is based on this definition, as is the Marine National Park Zone in the Great Barrier Reef Marine Park Zoning Plan 2003 which occupies 33% of the 347,000km<sup>2</sup> marine park. The Victorian marine national park network covers five per cent of that state’s waters but, unlike the comprehensive zoning of all waters in the Great Barrier Reef Marine Park, there has been no attempt to develop marine plans to spatially manage the remaining 95 per cent.

determine how these would be managed through regional marine planning mechanisms such as zoning and resource allocation.

5.1.10 Conflict can be also managed by Government policy and actions that are beyond the scope of the proposed Australian Oceans Authority, such as by using structural adjustment packages or other government assistance, and the proposed Australian Oceans Act has provisions for a structural adjustment process. The management structures of existing marine management agencies such as the Management Advisory Committees of the Australian Fisheries Management Authority can also assist conflict management.

5.1.11 Where these processes fail to effectively manage the conflict – and planning decisions in the process may well generate conflict, as might misinterpretation of planning decisions – then the Australian Oceans Authority would refer the matter to a compulsory process of the independent Regional Marine Planning Panel for recommendation (this process would be available by right to those in dispute). The panel, comprising three persons with relevant expertise, two nominated by the NRMCC and the Chair nominated by the Authority, would report to the NRMCC via the Authority. The NRMCC would consider the matter for decision in consultation with the Authority and the relevant ministers of participating states and territories.

5.1.12 Where persons are dissatisfied with decisions made by the Authority or accredited bodies in the referral and assessments and approvals processes, or with decisions made by either the Regional Marine Planning Assistance Assessment Panel or the Regional Marine Planning Panel, they have the right to take their case to the Administrative Appeals Tribunal.

## **5.2 Indigenous community involvement in regional marine planning**

5.2.1 For thousands of years Indigenous Australians have shared a close bond with the land and sea – their ‘Country’. Indigenous communities continue to use estuaries, beaches, dunes, reefs, mudflats, mangroves, seagrass beds, rock platforms and coastal waters, along with the coastal heaths, ranges and forests of the hinterland, for food, clothing, medicines, shelter, cultural ceremonies, spiritual fulfilment and recreation.

5.2.2 As the 20th Century progressed, Indigenous people faced new challenges and diminished control in managing their ocean and coastal estates. It must be acknowledged that by far the majority of detrimental impacts to Australia’s seas and coasts have not been caused by Aboriginal people, nor have they benefited from these economically or socially, yet the impact on their own lives and ocean and coastal estates has often been severe. A two-way approach utilising both Indigenous and non-Indigenous knowledge, including scientific approaches, would ensure that the use and management of the oceans is ecologically sustainable for the future.

5.2.3 Indigenous communities have developed a deep and profound knowledge of their environment, a strong sense of ownership and stewardship, and effective and sustainable management strategies to sustain their lives and the environment of coasts and oceans. It is therefore essential that Indigenous communities play a vital role in the preparation and implementation of ecosystem-based regional marine plans to ensure socially, culturally and environmentally sustainable use and management of ‘Country’. To achieve this, Indigenous communities should be given the confidence and appropriate support – information, funding and other resources – to enhance their capacity to become involved. And mechanisms should be established within regional marine planning to incorporate their knowledge, rights, responsibilities, perspectives and participation.

<b>Box 15 Indigenous issues and perspectives in Northern Australia</b>	
<b>Indigenous issues and perspectives</b>	<b>Management challenges</b>
Particular groups of Aboriginal people have rights and responsibilities to particular areas of the sea.	How to reflect area-based Aboriginal rights and responsibilities in fisheries and other marine management?
Sea country extends inland to the furthest limit of saltwater influence – it includes beaches, salt pans, mud flats, beach ridges (which become islands in very high tides, additional wet season effects), etc. Land and sea are inseparably connected.	How to integrate marine and coastal management to reflect the holistic Aboriginal view of maritime environments?
Visitors to sea country require permission from Traditional Owners before entering the area or using resources. Current arrangements, particularly for fisheries, are not addressing this.	How to build customary requirements for seeking permission for access and resource use into contemporary fisheries and other marine activities?
Visitors using sea country resources must share those resources with Traditional Owners.	How to establish benefit-sharing arrangements between Traditional Owners and marine industries?
Special cultural sites, dangerous story places etc. must be respected and avoided.	How to communicate and protect cultural sites, while retaining privacy and cultural protocols?
Aboriginal people have an established tradition of trading in local marine resources, within their own group, between groups and with outsiders – for example with Macassans.	How can customary trading relationships be recognised in contemporary marine resource management?
Use and management of sea country and marine resources are central to the maintenance of Aboriginal culture, identity and economy.	How can this fundamental, non-transferable connection between people, sea country and marine resources be recognised?
Coastal Traditional Owners have traditionally built their economy on local sea country resources.	How can the economic futures of small, isolated Traditional Owner communities and outstations be supported through marine resource management?
Aboriginal use and management of sea country is intimately connected with complex cultural values and practices, including language, customary law, stories, songs, ceremonies, belief systems, social structures etc.	How can the complexity of cultural values, practices and knowledge associated with sea country be maintained? What is the role of marine planning and management in maintaining these values and practices?
Aboriginal connection to sea country has resulted in very long associations between groups of people and their descendants with particular coastal and marine areas.	How can this continuing long-term relationship be recognised in contrast to the largely transient non-Indigenous population?
Traditional Aboriginal society equipped each generation with the skills and knowledge to use and manage their sea country.	What training, education and other capacity building is needed to equip current and future generations of Traditional Owners to manage their sea country in the context of greater complexity in marine management?
To make it worthwhile for Traditional Owners and their representative organisations to engage comprehensively in the regional marine planning process, key Aboriginal issues must be addressed as a priority.	How can the regional marine planning process proceed in ways meaningful to Aboriginal people?
People are tired of meetings and committees and talks that do not lead to practical changes and outcomes.	How can development of the regional plan itself operate to allow Traditional Owners to address real management issues for their sea country?
Sea country decisions are made at the local or subregional level according to traditional law and knowledge.	How can Oceans Policy work to strengthen this system and support this extensive knowledge base in a way that is culturally appropriate?

5.2.4 The needs of Indigenous communities will vary from region to region, but they should be supported to take the initiative in the development of ongoing management strategies that include joint or devolved decision making and that also underpin equity of use. Such strategies should include culturally appropriate Indigenous participation, with Indigenous people taking the lead if they so wish, community employment opportunities, representation on planning and management committees if desired, and Indigenous involvement in coastal and marine natural resource management currently carried out by Commonwealth and state agencies.

<b>Box 16 Comparison of government and Indigenous concepts of sea country management<sup>162</sup></b>	
<b>Statutory marine management</b>	<b>Aboriginal sea country management</b>
Sea and sea bed owned and managed by governments	Sea and sea bed owned and managed by clan groups and/or wider kinship groups
Land owned and managed separately from the sea	Coastal land and sea managed together as sea country
Fisheries, other marine resources, environment, shipping, etc. managed by separate agencies under separate legislation that covers all state, territory or Commonwealth waters	Integrated management of all sea country environments, resources, access and use by Aboriginal groups on a local area basis
Political and statutory boundaries between state, territory, Commonwealth and international waters	Sea country estates extend seaward to the horizon or to where clouds are visible

5.2.5 The regional marine planning and management processes should recognise and reflect the different perspectives that Indigenous people have on such matters. These are illustrated in Box 15, which provides a summary of regional marine planning perspectives of Northern Australian Indigenous communities, and the management challenges associated with them, as expressed in a recent National Oceans Office planning document.<sup>163</sup>

5.2.6 Outcomes within the regional marine plan that would reflect such objectives could include zones that give priority to Indigenous management and economic opportunity to support traditional subsistence and economic use, or that permit only limited entry for cultural purposes, or that provide special protection for endangered species that are culturally significant, or that encourage regional agreements.

5.2.7 The use of measures that empower communities – both Indigenous and non-Indigenous – to nominate management zones or protected areas to improve the oceans health and ensure their sustainable use would encourage ongoing community engagement in regional marine planning (see Section of Australian Oceans Act in Chapter 7). Such community nominations would be within the process, parameters and criteria set down in the Australian Oceans Act and implemented within the regional marine plan.

5.2.8 Ecosystem-based regional marine planning requires that management strategies and operational objectives are based on the natural boundaries of ecosystems. In many cases, however, Indigenous ocean and coastal estates stemming from culture and traditional law will be defined on a subregional or local scale. This is illustrated in Box 16, which considers the different concepts evident in Aboriginal sea country management and statutory marine management.

5.2.9 Involving Indigenous people in the making of decisions about zoning and boundaries will create more opportunities to ensure ecosystem-based management can work for Indigenous interests. The delivery of management strategies that involve Indigenous communities will likely require a sub-bioregional approach to management zones and actions and this should be reflected in the final regional marine plan.

### **5.3 The relationship of regional marine plans to existing management agencies**

5.3.1 Australia's Oceans Policy characterises Regional Marine Planning as:

*The Commonwealth's commitment to integrated and ecosystem-based planning and management will be implemented through the introduction of a major Regional Marine Planning Process. The process will be designed to improve linkages between different sectors and across jurisdictions...In developing Regional Marine Plans, the Commonwealth will seek the participation of the relevant States and Territories, to ensure, as far as possible, the integration of planning and management across State and Commonwealth*

<sup>162</sup> National Oceans Office(2000), p74

<sup>163</sup> National Oceans Office(2000), *Living on Saltwater Country Part D: Conclusions, Consultants*, A report for the Northern Indigenous Land and Sea Management Alliance, pp171-72

waters... All relevant agencies will be required to abide by the outcomes of the Plans. In developing the framework for Regional Marine Planning, the Government will consult with stakeholders on the need for and form of a statutory base for the development and implementation of Regional Marine Planning. (Integrated and ecosystem based oceans planning and management, National Oceans Office).<sup>164</sup>

5.3.2 Without coordinating management of Australia's oceans under a single legal framework, difficulties will arise as individual agencies implement regional marine plans in accordance with their own regulatory objectives. The interpretation of a regional marine plan by those agencies that rely on the *Environment Protection and Biodiversity Conservation Act* will from time to time be different from those agencies whose interpretation is guided by the *Admiralty Act*, *Fisheries Management Act* or *Petroleum (Submerged Lands) Act*, etc. That there is no legislation that directly binds all Commonwealth agencies to a single interpretation of the objectives and directives of a regional marine plan already creates conflict among agencies due to disparate and sometimes conflicting objectives.

5.3.3 According to the *Marine legislative review*, which assessed more than 250 Commonwealth and state Acts and regulations of relevance to ocean use, planning and management, multiple-user management is poorly dealt with – separate acts, separate agencies and authorities and separate sets of regulations with little legislative direction to refer to other sectors and user groups.

5.3.4 To help overcome this fragmentation, *Out of the blue* argues that an Australian Oceans Act is required to drive forward integration. This legislative approach would not lead to the abolition of existing Commonwealth legislation and the management agencies, but would leave the consideration of new agencies or changed responsibilities for existing ones to governments as Australia works towards more effective oceans planning for management, protection and sustainable use.

5.3.5 The authors of *Oceans eleven* described the role of government agencies in the regional marine planning process thus:

*Governments, agencies and stakeholders would then negotiate the targets and strategies necessary to achieve operational objectives for each of the sectors that use the marine environment, underpinning the achievement of the ecosystem objectives. Included would be recommendations on permitted uses and their locations, and timetables for steps in decision-making processes. These must be backed up by commitments to independently assessed compliance and enforcement, expanded research and monitoring, community education and engagement, and performance assessment and review.*

*As much as regional marine planning is a management process, it is also a resource allocation process. There should be lines on maps, and these should show the locations for marine protected areas, fishing grounds, oil and gas fields and other sectoral uses. The lines will be the result of a negotiation process that has assessed the values of ecosystems and their use, weighed and considered the impacts on these ecosystems, established operational objectives for protecting these ecosystems, and set targets for reaching them. These must be consistent with the plan and also with Oceans Policy.*

*Without such a negotiation process and the allocation and spatial management of resources, the plan will merely be a reactive approvals process, rather than what is needed, a pro-active and adaptive ecosystem-based management system that provides the support framework for achieving ecologically sustainable development.*<sup>165</sup>

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164 Commonwealth of Australia (1998), p11

165 Smyth et al, p50

5.3.6 Under the Australian Oceans Act and during the preparation, monitoring and review of a regional marine plan, the Commonwealth departments, authorities and agencies – and participating state and territory government agencies – with oceans planning and management responsibilities, would meet with the Australian Oceans Authority and the Regional Marine Plan Working Group to assess how the plan would influence those responsibilities. The final regional marine plan would be the culmination of this consideration, with Commonwealth, state and territory management agencies then given the task of ensuring that individual sectors meet the plan's operational objectives and targets and operate in a manner consistent with the plan. Any relevant Commonwealth, state and territory consent authorities would also need to take the regional marine plan into account in their deliberations and operations.

5.3.7 It would be expected that during the regional marine planning process and associated interagency discussions, the needs and aspirations of each sector would be articulated by the agency responsible for that sector, while the Australian Oceans Authority would ensure that these aspirations are analysed within the context of the regional marine plan's objectives and those of integrated oceans planning and management.

5.3.8 For example, within the preparation and implementation of the regional marine plan the Australian Fisheries Management Authority (AFMA) would need to consider the effects that certain operational objectives might have on Total Allowable Catches (TACs), individual transferable quotas, gear types, closures, fishing locations and statutory fishing rights, and to eventually implement the necessary changes to its management arrangements. The Australian Maritime Safety Authority (AMSA) would need to consider the effect on shipping operations and their safety, while the Department of Industry, Tourism and Resources (DITR) might need to adjust actions in relation to acreage releases, oil and gas exploration and extraction techniques and locations.

5.3.9 The adjustments required in the management regimes of line agencies would be part of the final regional marine plan, and the results of the adjustments would provide feedback for adaptive management in the plan. The regional marine plans would be spatially, temporally and scientifically based with operational objectives, indicators and targets that would be measurable, definable and enforceable within the management arrangements of the line management agencies. Where adaptive management feedback determined that adjustments were required to these features, this would be made only after the Authority informed relevant Commonwealth, state and territory agencies, relevant stakeholders and the NRMCC.

## **5.4 Assessment and approvals processes in regional marine planning**

5.4.1 The preparation of a regional marine plan under the Australian Oceans Act would assess existing and proposed uses within the marine region's regional planning and management framework and resource allocation would occur at that time. Proposals for new uses and changes to existing uses in a marine region would be dealt with during this time, and open to public scrutiny and comment under the Act.

5.4.2 During the period between the proclamation of the plan and its review (every nine years for a complete review under the Australian Oceans Act), the Authority would each year report on the performance assessment of the plan, and five years after parliamentary approval of the plan review its resource-use levels, allocations and activities. These reviews would underpin the adaptive planning approach implicit in ecosystem-based management.

5.4.3 Adaptive management may from time to time require adjustments to operational objectives, indicators and targets during the plan's life, and the Regional Marine Advisory Committee, Regional Marine Planning Technical Group and relevant management agencies



would be asked for input on these changes. The changes could be the result of new knowledge or a significant deterioration in monitored features of the region's oceans. Where adjustments are required, the Authority would consult with relevant stakeholders and any modifications to the plan would be reported to the NRMMC.

5.4.4 Proposals for use of areas along the coast or in catchments that flow into the marine region should also be captured in the Oceans Act's assessment and approvals processes. The Natham Dam Case<sup>166</sup> has highlighted the need for consideration of the off-site impacts of developments. The Authority, and consent authorities accredited by the Authority, should have development proposals in catchment and coastal areas abutting a marine region, and which could lead to environmental impact in the oceans, referred to them to enable assessment of the effect that such developments could have on the integrity of the regional marine plan<sup>167</sup>.

5.4.5 During the life of the plan, those users that had been allocated resources in the planning process would be able to carry out their uses, unless circumstances within the marine region changed and required adjustments to the nature, level or location of use. Additional other actions not allocated resources at the time of the planning process could be proposed during the plan's life. Some of these may be able to be accommodated under the objectives of the plan. Proposals for actions that are listed in Schedule 3 of the Australian Oceans Act would be referred by proponents to a publicly transparent and accredited assessment and approvals process (see Section 34 of the proposed Australian Oceans Act in Chapter 7).

5.4.6 Where the proposed action listed in Schedule 3 is intended to be carried out in an area within a regional marine plan and where a state, territory or Commonwealth body has been accredited to conduct assessment and approvals processes, that body would determine whether the action could occur without breaching the conditions of the regional marine plan or the provisions of the Australian Oceans Act. The Authority would be required to advertise the proposal on the internet and invite public comments. During the assessment processes the government body could consult with relevant stakeholders, government agencies, the Regional Marine Advisory Committee, the Regional Marine Plan Working Group and the Regional Marine Planning Technical Group. In cases where the accredited body determined that the action could occur, it would approve the action but may attach conditions. Where it was determined that a breach of the regional marine plan or provisions of the Australian Oceans Act would occur, the proposal would be refused. In each circumstance, the proponent or any person who made comments in relation to the proposal who was dissatisfied with the accredited body's decision would have the right to appeal to the Administrative Appeals Tribunal.

5.4.7 Where no accredited body exists because the state or territory waters where the proposal is intended to be conducted are within the jurisdiction of a state or territory that is not a party to the IGAAO, or the participating state or territory has not yet received accreditation or a regional marine plan has not yet been put in place, then the proponent would refer the action to the Australian Oceans Authority for assessment and approval. Again, the proposal would be advertised on the internet and public comments sought. And again, in making its decision, the Authority would consult with relevant stakeholders, government agencies, the Regional Marine

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166 'In Queensland Conservation Council Inc v Minister for the Environment & Heritage [2003] FCA 1463 ("the Nathan Dam Case"), Nathan Justice Susan Kiefel of the Federal Court of Australia overturned decisions of the Federal Environment Minister for refusing to consider the impacts of major associated downstream agricultural development on the Great Barrier Reef World Heritage Area when assessing the impacts of a major dam.' According to McGrath the result of the Nathan Dam Case is that 'when assessing the impacts of a proposal under the s75 of the EPBC Act, the Federal Environment Minister is first to consider 'all adverse impacts' the action is likely to have. The widest possible consideration is to be given in the first place, limited only by considerations of the likelihood of it happening. By that means the Minister should exclude from further consideration those possible impacts which lie in the realms of speculation'. Quotes from McGrath, C (2003) Environmental Defenders Office (Qld) EDO Alert! Conservationists win battle in Federal Court over proposed Nathan Dam!, 22 December 2003

167 This would require amendments to the statutes governing the relevant land-based consent authorities

Advisory Committee, the Regional Marine Plan Working Group and the Regional Marine Planning Technical Group. The right of appeal to the Administrative Appeals Tribunal would also apply for proponents or persons who made public comments.

5.4.8 In cases where the Authority becomes aware of a proposed action or actions that should have been referred by a proponent but that proponent has failed to do so, the Authority can serve notice to the proponent that the proposal must be referred to it.

5.4.9 This assessment and approvals process would be in addition to that of the *EPBC Act*, which deals with actions that have the potential for a significant impact on Matters of National Environment Significance, a number of which are relevant to the Australia's oceans (See section 6.9 of this paper for a proposal to amend the *EPBC Act* to ensure referrals with a likely oceans impact are also referred to the Australian Oceans Authority for approval).

5.4.10 Accredited assessment and approvals processes would be regularly audited by the Australian Oceans Authority to ensure that they effectively enforce the requirements of the relevant regional marine plan and achieve the objects of the Australian Oceans Act and the objectives, targets and milestones of the IGAAO. Ongoing related funding for the participating states and territories would be dependent on positive audits and the achievement of the objectives, targets and milestones over time.

5.4.11 The scheduled list of proposed actions that would have to be referred for assessment and approval could include, as a starting position:

- changes in gear and the location of a fishery
- expansion of shipping traffic or change in its nature (eg. potentially hazardous/polluting if spilt cargoes)
- a new fishery targeting a previously untargeted species
- a new shipping lane
- creation of or expansion of a marine national park
- bioprospecting and subsequent exploitation of ocean life
- mining operations for previously untargeted deposits
- tidal or wave-based energy production projects
- desalination projects
- the use of super trawlers.

## **5.5 Regional marine plans: what might they look like?**

5.5.1 The eleven steps of *Oceans eleven* that should be used to create an ecosystem-based regional marine plan highlight the importance of process to achieve the desired outcome, a regional marine plan that works on the water. This section considers the Great Barrier Reef Marine Park Representative Areas Program (RAP), which culminated in a rezoning of the marine park, and the Spencer Gulf Marine Plan in South Australia, to shed some light on what a regional marine plan might look like (reference is also made to the South-east Regional Marine Plan).

**Box 17 Main phases of the Representative Areas Program for the Great Barrier Reef Marine Park<sup>168</sup>**

Commencement of Representative Areas Program 1998  
Collation of data sets 1998-1999  
Development of map of bioregions 1999-2000  
Development of biophysical operating principles and set of social, economic and cultural principles  
First formal community participation phase May-August 2002  
Identifying options for no-take area networks  
Developing draft zoning plan late 2002 to mid-2003  
Second formal community participation phase June to August 2003  
Revised zoning plan November 2003  
Regulatory impact statement November-December 2003  
Submission of the zoning plan to Parliament December 2003

5.5.2 The *Great Barrier Reef Marine Park Act (GBRMP Act)* was passed in 1975 and the multi-zoned park was created progressively, with varying levels of protection assigned to each zone between 1977 and 1988, well before the NRSMPA was established. At 344,000 square kilometres in area it is a very large marine park – a large ocean ecosystem – that is greater in area than the combined jurisdictional coastal waters of Western Australia, South Australia, Victoria, Tasmania, New South Wales and Queensland.

5.5.3 The initial cycle of zoning in the marine park achieved 4.6 per cent of its waters in high-level protection (green zones). The recent rezoning by the RAP process, the phases of which are listed in Box 17 (an extract of the zoning maps appears in Figure 9), addressed a number of issues in the context of review and adaptive management. The most prominent of these was the need, in the light of World Heritage obligations (the Great Barrier Reef became a World Heritage property in 1981) and the precautionary principle, for more comprehensive and no-take protection of representative areas of all bioregions within the Great Barrier Reef Region. As a result the marine park now has 33.6 per cent of its waters in high-level protection (referred to as ‘marine national park’ zones).

5.5.4 The *GBRMP Act* contains detailed provisions which provide for the Authority to coordinate and consult in the zoning process. Throughout the marine park’s history, all zoning plans have been passed through both houses of the federal parliament with bipartisan support. The zoning plans have been soundly based on best-available contemporary science and decision rules to provide a systematic approach to address the objects of the *GBRMP Act*. The recent RAP developed and used a set of biophysical principles to guide the identification of protection levels to meet the World Heritage obligations, including the scientifically based precautionary targets of at least 20 per cent of each habitat to be strictly protected within marine national park zones.

5.5.5 The processes and outcomes for the Great Barrier Reef Marine Park are similar to the regional marine planning processes outlined in the Australian Oceans Act outlined in Chapter 7, and to those recommended in *Oceans eleven*. The Great Barrier Reef Marine Park zoning plan is arguably the first ecosystem-based marine plan on a regional scale in Australia (and the world), but there are differences between the process, outcomes and institutional arrangements of the Great Barrier Reef Marine Park zoning plan and that which would be produced under the regional marine planning processes of the Australian Oceans Act.

5.5.6 One of the key differences is that the Great Barrier Reef Marine Park Authority is a park management agency with the primary objective of biodiversity conservation consistent with reasonable use, a much narrower purview than that of the proposed Australian Oceans Authority, which is a planning rather than a management body. In the case of the RAP, the planning of

<sup>168</sup> Great Barrier Reef Marine Park Authority (undated), ‘Great Barrier Reef Marine Park the Representative Areas Program, an ecosystem approach to protecting biodiversity’, a two-page brochure

sectoral management arrangements such as fisheries are not infused within the zoning plan other than determining the purposes for which zones may be used or entered. In this case fisheries management is undertaken by the Queensland Department of Primary Industries and Fisheries under fisheries management plans developed separately to the RAP zoning plan, but such plans cannot be inconsistent with the RAP zoning plan.

5.5.7 The consultation process conducted by the Great Barrier Reef Marine Park Authority during the RAP was extensive, and financial assistance was given to affected commercial fishers<sup>169</sup>. However, there has been strong opposition to the new zoning plan from commercial and recreational fishers and some local members of parliament in the Commonwealth government, with demands for the Great Barrier Reef Marine Park Authority to be absorbed into the Department of Environment and Heritage in a similar way to how the National Oceans Office was absorbed. *The Great Barrier Reef Marine Park Act* – and the Authority – is currently under review by the Department of Environment and Heritage, with an emphasis on governance and consultation arrangements. The Department is the likely beneficiary of any changes to the role, structure and status of the Authority.

5.5.8 In South Australia, the Coast and Marine Branch of the state's Department of Environment and Heritage has developed the Spencer Gulf Marine Plan. As the Department's website explains, this plan is:

*... part of a broader strategy to develop a Marine Planning Framework for the State's waters. Marine planning is a key initiative of Our Seas and Coasts: A Marine and Estuarine Strategy, which was launched in 1998. Within this strategy, the commitment entitled 'Sustainable Use' calls for an ecosystem based management approach for the ecologically sustainable use of the marine environment ... A series of Marine Plans adopting a zoning system to accommodate a range of activities will be developed for the State's waters. Each zone will have identified uses compatible with the values of that area. Marine biodiversity conservation and multiple uses such as shipping, fishing, recreational activities and aquaculture will be accommodated within the zones. These outcomes will be developed, within a climate of equity and fairness amongst user groups through comprehensive consultation with the community, industry and government.*<sup>170</sup>

5.5.9 The aim of South Australia's Marine Planning framework<sup>171</sup> is to integrate the management of current and future activities within the capacity of ocean and coastal ecosystems. The Department of Environment and Heritage used the *Oceans eleven* process<sup>172</sup> to provide an initial foundation to the planning process and established Ecologically Sustainable Development, ecosystem-based management and the use of the precautionary principle as the underlying principles.

5.5.10 Six marine plans will eventually cover the eight marine bioregions identified in South Australia's waters; the Spencer Gulf Marine Plan is the first of these to be completed. As part of the Spencer Gulf planning process the Department has conducted public consultation, published a background document, *Focus: A regional perspective of Spencer Gulf*, mapped the gulf's bioregions (two) and biounits (seven), assigned Ecological Rating Zones (1-4)<sup>173</sup> to each of the

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169 As at 30 August 2005 the Australian Government had paid \$40,340,969 (by 28 February 2006 this had increased to \$55.3million according to 'Trawling for answers' in *The Australian*, p11) in assistance to those impacted by the Great Barrier Reef Marine Park Authority's RAP zoning. This comprised 119 licences bought out through the tender process, 18 full business restructure assistance pay-outs (to purchase new equipment), 383 simplified business restructure assistance payments, 336 approvals for business advice and 94 payments to individual employees. Source: Over \$40 million for impacts of reef RAP, media release 30 August 2005 from Minister for fisheries, Senator Ian Macdonald. When addressing delegates at the International Marine Protected Areas Congress in Geelong on 24 October 2005, the Minister for Environment and Heritage, Senator Ian Campbell, indicated that the final amount for compensation was expected to be \$100million.

170 deh.sa.gov.au

171 Department for Environment and Heritage (2006), *Marine planning framework for South Australia*, February 2006

172 Day, V (2005) pers. comm. Val Day is Marine Planning Project Manager Coast and Marine Conservation in the Department for Environment and Heritage, South Australia

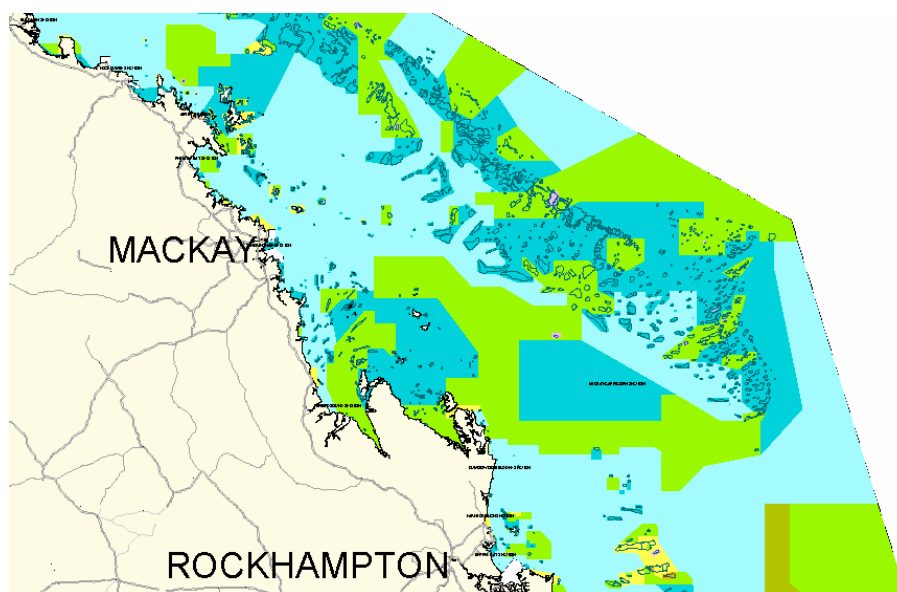
173 Zoning is based upon rating areas according to their ecological importance to the functioning of the whole ecosystem. ER1 is critical to the functioning of the ecosystem, ER2 essential and ER3 contributing. ER4 is poorly understood and requires a precautionary approach.

biounits, including goals, objectives and strategies for each zone, and developed a performance assessment system<sup>174</sup> with values, performance indicators and monitoring protocols to determine whether the plan is maintaining or improving ecosystem condition.

5.5.11 The South Australian marine planning approach differs from the regional marine planning processes outlined in the proposed Australian Oceans Act by not including the identification and selection of marine protected areas. The state government has established a separate process for MPA establishment with a zoning system different to that of the marine plans, but consideration is currently being given to how the MPAs and the marine plans can be integrated<sup>175</sup>.

5.5.12 Another key difference between the South Australian approach and that outlined in this paper is that an aquaculture development program of the South Australian Department of Primary Industries and Resources has been allocating coastal waters to aquaculture projects in advance of the marine planning and marine protected area processes, removing the opportunity for cross-sectoral and integrated marine planning. In addition, the spatial management implicit in the marine plan does not zone for specific uses, as say the Great Barrier Reef Marine Park zoning plan does. Rather, the Spencer Gulf Marine Plan provides the basis for assessing the impact of proposals for use and is therefore reactive in its process.

5.5.13 What the above analysis shows is that processes and expertise have been developed and are continuing to be so in Australia that could enable the establishment of spatial, ecosystem-based management with key objectives, indicators and targets within monitoring and performance assessment systems as outlined in the regional marine planning approach in this paper.



**Figure 9 A Great Barrier Reef Marine Park zoning plan map<sup>176</sup>**

174 If the value was 'seabirds and shorebirds', the performance indicator for ERI could be 'no change in number of, or relative, importance of, breeding, feeding and roosting locations of shorebirds', and the monitoring could be 'counts of locations and relative importance'. This is based on the Department of Environment and Heritage (2004), *Draft Performance Assessment System, Spencer Gulf Marine Plan*.

175 Day, V (2005) pers. comm.

176 Courtesy Great Barrier Reef Marine Park Authority. Map key: Light blue, General use; Dark blue, Habitat protection; Green, Marine national park; Yellow, Conservation park; Olive, buffer.

## Chapter 6 The Australian Oceans Act and the EPBC Act

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*Chapter 6 analyses provisions of the EPBC Act and determines that they can be used to complement but do not substitute for an Australian Oceans Act.*

### 6.1 Introduction

6.1.1 The *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* came into force in 2000, combining in an omnibus act a number of existing pieces of Commonwealth environmental legislation including the *National Parks and Wildlife Conservation Act 1975*, *Whale Protection Act 1980*, *World Heritage (Properties Conservation) Act 1983* and *Endangered Species Protection Act 1992*.

6.1.2 The *EPBC Act* (see Box 18 for its objects) is an attempt to implement a framework for integrated management. It does this by providing for the:

- conduct of environmental impact assessment and strategic environmental assessment of activities that are likely to have ‘significant impact’ on seven listed matters of environmental significance: world heritage properties, Ramsar wetlands, nationally threatened species and ecological communities, migratory species, Commonwealth marine environment and Commonwealth-managed fisheries, nuclear actions and national heritage places<sup>177</sup>
- identification and monitoring of biodiversity, including an obligation to the survey of cetaceans
- preparation of strategic assessments of Commonwealth-managed fisheries
- nomination of and listing of threatened species (including seabirds, seals, sea-snakes, crocodiles, dugong, turtles, pipefish)
- preparation of recovery plans for listed species
- preparation of threat abatement plans in relation to key threatening processes
- preparation of bioregional plans in Commonwealth areas
- establishment of bilateral agreements between the Commonwealth and the states and territories for the delegation of the assessments and approvals process under the Act.

#### **Box 18 Objects of the EPBC Act**

The objects of this Act are:

(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources

(c) to promote the conservation of biodiversity

(ca) to provide for the protection and conservation of heritage

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples

(e) to assist in the co-operative implementation of Australia’s international environmental responsibilities

(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity

(g) to promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

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<sup>177</sup> Commonwealth Marine Area in the marine environment are defined under the Australian Oceans Act as all waters, seabed and airspace above waters which are not otherwise vested in State or territory by virtue of Section 4 of the *Coastal Waters (State Title) Act 1980* or Section 4 of the *Coastal Waters (Northern Territory) Act 1980*.

### 6.1.3 According to Rothwell and Kaye (2000), the Act:

*... represents one of the most substantial adjustments to Australian environmental law in nearly 20 years and seeks to both solidify and consolidate the Commonwealth's legislative powers with respect to the environment and in the process impact significantly on State environmental law and policy.*

And they believe that:

*The EPBC Act has the potential to become the cornerstone in Australia's new marine management regime complementing the jurisdictional boundaries outlined in the Seas and Submerged Lands Act. However, challenges remain. The EPBC Act is by no means complete. It does not seek to directly address marine pollution, fisheries management or non-living resource management. There is also the challenge of special areas such as the Great Barrier Reef, the Torres Strait, the Timor Sea and the Southern Ocean. The legal response to Australia's Oceans Policy would therefore seem to have just begun and while the initial responses are favourable, final assessment will depend on implementation and further integration of the legal regime.<sup>178</sup>*

### 6.1.4 The EPBC Act enshrines the principles of ESD, but when assessing the EPBC Act in relation to ecosystem-based management, the Marine legislative review concluded that:

*The leading piece of legislation which attempts to address ecosystems management is again the conservation sector legislation and in particular, the EPBC Act. This provides that one of the objects of the Act is "to protect ecosystems by means that include the management of reserves, the recognition and protection of ecological communities and the promotion of off-reserve conservation measures." One of the matters of national environmental significance which is protected by the Act is "Commonwealth Marine Areas". In this sense the whole marine ecosystem is sought to be protected, however there is an artificial dividing line through the marine ecosystem at the commencement of State/Territory waters. However, in the majority of the operative provisions of the Act, the focus generally returns to protection of individual species.<sup>179</sup>*

### 6.1.5 The EPBC Act contains a form of multiple-user management, through the assessments of actions deemed to have a significant impact on the Commonwealth marine environment, but it is limited to what Bateman refers to as:

*... harmonisation of a particular activity with certain environmental concerns ...<sup>180</sup>*

rather than the assessment of the cumulative and long-term effects of the wide range of activities from shipping to mining to fishing and so on. This inadequacy, according to Bateman:

*... may well stem from an over-emphasis on activity-based legislation rather than an area-based approach.<sup>181</sup>*

### 6.1.6 The Marine legislative review also questions the Act's potential for multiple-user management when it states:

*The Act does not provide any overarching framework for full consideration of the effects of multiple users of the marine environment.<sup>182</sup>*

### 6.1.7 On 13 October 2005 the Minister for Environment and Heritage, Senator Ian Campbell, announced that the EPBC Act will be used to drive the implementation of regional marine planning under Australia's Oceans Policy, explaining that:

*One of the original commitments under Australia's Oceans Policy was to explore whether there was a need to give regional marine planning a statutory basis. Our conclusion based on implementation experience is that there is. When Oceans Policy was developed the EPBC Act was no more than*

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178 Rothwell, D and Kaye, S, (2001), pp17-18

179 Australian Conservation Foundation (2005), p5

180 Bateman, S (1999), The development of Australia's oceans policy: implications for marine environmental law and policy in Leadbeter, Gunningham and Boer (eds) Environmental Outlook No 3. Law and Policy, Federation Press, 1999, p218

181 Bateman, S (1999), p218

182 Australian Conservation Foundation (2005a), p4

*proposed legislation. But when you look at the section on bioregional planning, it is tailor made for delivering regional marine plans.*<sup>183</sup>

6.1.8 In light of this change of direction, and the Commonwealth's acceptance that a legislative basis is required for regional marine planning, this section of the discussion paper briefly considers key provisions of the *EPBC Act* – bioregional planning and bilateral agreements, the listing of threatened species, ecological communities and key threatening processes, approvals and assessments processes, Matters of National Environmental Significance, and the significance of impact test – to determine whether the *EPBC Act* could either be used to ensure comprehensive and integrated ecosystem-based regional marine planning and management and remove the need for an Australian Oceans Act or complement its provisions.

## 6.2 Bioregional plans in Section 176 of the *EPBC Act*

6.2.1 Could the *EPBC Act's* bioregional plans and bilateral agreements provide for integrated oceans planning and management? Rothwell and Kaye (2000), when commenting 'that the new Act could provide the basis for giving effect to many initiatives found within the Oceans Policy' said:

*Of particular note are 'Bioregional Plans', which can be made by the Commonwealth in cooperation with a State or Territory when the bioregion is not wholly within a Commonwealth area*<sup>184</sup>

*A bioregional plan must be taken into account by the Minister when making decisions under the Act, and have the potential to be the device for the finalisation of regional marine plans under the Oceans Policy.*<sup>185</sup>

6.2.2 Under Section 176 of the *EPBC Act* (see Box 19) the Minister may prepare a bioregional plan for a bioregion that is within a Commonwealth area or cooperate with a state or territory for a bioregion that is not wholly within a Commonwealth area. A bioregional plan may include provisions about the components of biodiversity, their distribution and conservation status, important economic and social values, heritage values of places, objectives relating to biodiversity and other values, and priorities, strategies and actions to achieve the objectives, mechanisms for community involvement in implementing the plan and measures for monitoring and reviewing the plan.

### **Box 19 Section 176 Bioregional plans**<sup>186</sup>

- (1) The Minister may prepare a bioregional plan for a bioregion that is within a Commonwealth area. In preparing the plan, the Minister must carry out public consultation on a draft of the plan in accordance with the regulations.
- (2) The Minister may, on behalf of the Commonwealth, co-operate with a State or a self-governing Territory, an agency of a State or of a self-governing Territory, or any other person in the preparation of a bioregional plan for a bioregion that is not wholly within a Commonwealth area.
- (3) The co-operation may include giving financial or other assistance.
- (4) A bioregional plan may include provisions about all or any of the following:
  - (a) the components of biodiversity, their distribution and conservation status
  - (b) important economic and social values
  - (ba) heritage values of places
  - (c) objectives relating to biodiversity and other values
  - (d) priorities, strategies and actions to achieve the objectives
  - (e) mechanisms for community involvement in implementing the plan
  - (f) measures for monitoring and reviewing the plan.
- (5) Subject to this Act, the Minister must have regard to a bioregional plan in making any decision under this Act to which the plan is relevant.

<sup>183</sup> Campbell, I (2005a), p1

<sup>184</sup> Rothwell, D and Kaye, S, (2001), p28

<sup>185</sup> Rothwell, D and Kaye, S, (2001), pp28-29

<sup>186</sup> EPBC Act, Section 176 Bioregional plans



6.2.3 The way in which the provisions of Section 176 are interpreted will be critical to whether they can be used to ensure integrated and ecologically sustainable oceans planning, protection and management. A broad interpretation of Section 176 might provide for many of the elements that should appear within a regional marine plan. Perhaps the ‘objectives’ could include operational objectives, ‘monitoring’ could include indicators and targets, and ‘strategies and actions’ could include risk analyses, compliance and enforcement, resource allocation, management zones and timelines.

6.2.4 The recent choice of section 176 by the Minister for Environment and Heritage as the legislative basis for future regional marine planning will test the use of its provisions. At the time of the announcement the Minister pointed out that:

*Under the new approach of marine bioregional planning we will be focusing much more clearly on achieving conservation outcomes, and doing so under a framework of ecologically sustainable development<sup>187</sup>.*

6.2.5 The website of the National Oceans Office Branch of the Commonwealth Department of Environment and Heritage sheds further light on the new approach:

*The plans will draw on Australia's growing marine science and socio-economic information base to provide a detailed picture of each marine region. Each plan will describe a region's key habitats, plants and animals; natural processes; human uses and benefits; and threats to the long-term ecological sustainability of the region. The plans will give details about the various statutory obligations under the EPBC Act that apply in any region, and will describe Government's range of conservation measures in place, such as those relating to recovery planning for threatened species.*

6.2.6 Bioregional plans under the new approach announced by the Minister will be more informative and strategic than managerial, and focus on conservation values rather than cross-sectoral integration or coordination. Although a bioregional plan will have a legislative basis derived from Section 176, it will not be a legislative instrument imposing the force of law. Nevertheless, recommendations in marine bioregional plans on MPAs and other regulations could lead to legislative instruments. The outcomes proposed in this new approach to bioregional plans include:

- identification of strategic conservation values in the bioregion
- regional assessment of risks from existing and emerging pressures
- objectives and indicators for conservation values
- recommended integrated marine conservation strategy including networks of candidate MPAs, evaluation of risks to Matters of National Environmental Significance
- conservation tools, policy responses, work programs and marine science priorities
- monitoring the state of the marine environment and the assessment of the performance of conservation measures<sup>188</sup>.

6.2.7 The processes and outcomes likely from the use of Section 176 may have some similarities with the regional marine planning model adopted by the National Oceans Office after the release of the South-east Regional Marine Plan in May 2004 and before the office's absorption by the Department of Environment and Heritage (see Figure 12). However, the approach based on section 176 lacks cross-sectoral integration of planning and management and multiple-use risk assessment. It remains unclear what the risk analyses, objectives, indicators and integrated marine conservation strategies will actually mean in practice. There is also an absence of consultation and statutory time periods in the planning process.

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<sup>187</sup> Campbell, I. (2005a)

<sup>188</sup> Presentation by Marine Division of Commonwealth Department of Environment and Heritage to the Steering Committee of the Marine Conservation Sector Liaison Project, November 2005

## The Way Forward - The model for future RMPs

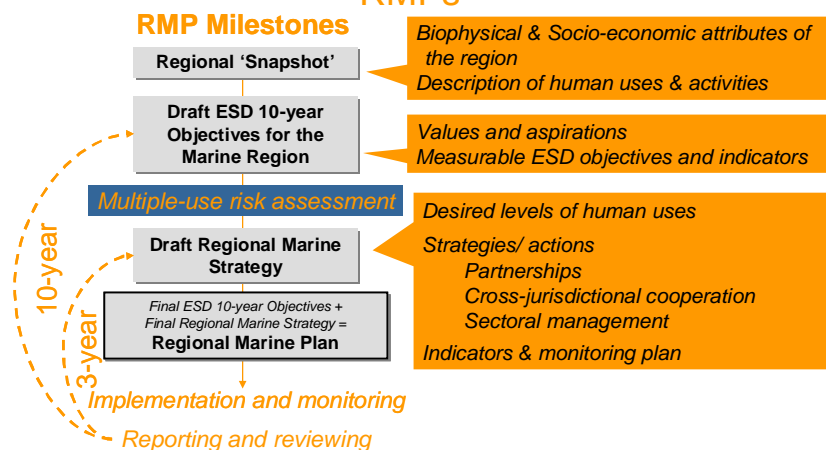


Figure 12 A model for future regional marine plans<sup>189</sup>

6.2.8 There is still much that is unknown about the detail of the new regional marine planning approach under Section 176. Even so, there are limitations to its use in integrated ecosystem-based planning:

- the frequent use of the term ‘may’ in this section of the *EPBC Act* empowers but does not direct the Minister to take specific steps
- the plan cannot go beyond the Commonwealth Marine Area without state cooperation, which has not been forthcoming thus far in the implementation of regional marine planning
- the Minister must give regard to the plan when making decisions about proposed actions but is not directed by the plan
- there are no compliance and enforcement provisions or powers for integration of management across sectors
- the plan will largely be prepared for use in the referrals as part of the assessment and approvals processes under the *EPBC Act*, which in themselves have limitations with regards to oceans planning and management (see Section 6.6 of this paper).

6.2.9 The outcome from the use of Section 176 is likely to be a very descriptive strategic plan – largely an inventory of conservation assets and uses in the marine region. Although this will be useful to marine planners by highlighting the natural values and natural limits of a marine region, it will give far less certainty and fall well short of the proactive and cross-sectoral ecosystem-based regional marine planning necessary for the effective implementation of Australia’s Oceans Policy that is outlined in the Australian Oceans Act.

### 6.3 Bilateral agreements

6.3.1 The *EPBC Act* allows for bilateral agreements with the states and territories that could be used to devolve assessment and approvals processes to the states. Assessment bilaterals have been signed with the Northern Territory, Queensland, Western Australia and Tasmania (to transfer responsibility for assessments, not approvals, to those states), but those with the ACT, South Australia, New South Wales and Victoria have remained in draft form for the past 6 years.

<sup>189</sup> Troy, S (2004)

6.3.2 The Intergovernmental Agreement on Australia's Oceans would have Commonwealth, states and territories agreeing to strong and nationally consistent standards, objectives, targets and processes on a number of matters relating to oceans planning, protection and management. Participating governments could also be accredited by the Australian Oceans Authority to coordinate assessment and approvals processes, which would be audited and reviewed by the Authority against the national benchmarks and standards, and they may enter bilateral and multi-lateral agreements for action to deal with issues of particular concern.

6.3.3 The devolvement of decision-making processes could be seen as being at odds with the desire to bring integration and coordination of processes under a national framework unless strong national benchmarks, standards and processes of a national framework were adopted by the states and territories. This was recognised by the *Marine legislative review*:

*The structure of the approval process protects only matters deemed to be of national environmental significance. This can have the effect of dividing whole ecosystems into particular components, protecting particular species or aspects of the environment instead of referring to the ecosystem as a whole. This is also apparent in the conservation of biodiversity section of the EPBC Act.<sup>190</sup>*

6.3.4 The *Marine legislative review* also noted that bilateral agreements can entrench divided jurisdictions and produce different approaches when consistency would be preferred:

*If bilateral agreements are reached with the states the approval and assessment processes instituted by the Act will be divided again by State or Territory rather than assessing actions under one national system. As State, Territory and Commonwealth protected areas legislation has not been designed to be complementary and therefore different management regimes have been set up by the different jurisdictions and therefore apply differentially to Commonwealth and State/Territory waters by the Act, the goal of a national ocean's policy along ecosystem boundaries is far from achieved.<sup>191</sup>*

6.3.5 Although Macintosh and Wilkinson (2005) warn that not one of the bilaterals under the existing *EPBC Act* have 'resulted in anything other than minor changes to state and territory processes',<sup>192</sup> environmental approvals based on national standards in a federal system could be used to:

- reduce the complexity, increase the efficiency and improve the environmental protection of oceans planning and management processes
- provide improved integration and greater certainty and consistency between jurisdictions
- provide very useful encouragement to the states and territories to resist pressure to achieve short-term economic goals at the expense of long-term sustainability goals.

6.3.6 However, the practice has thus far been different. The usefulness of bilaterals under the *EPBC Act*, and also under the Intergovernmental Agreement on Australia's Oceans, will be the direct result of the level of political will and leadership that underpins and promotes them, and the quality of the institutional and legislative arrangements and the standards, benchmarks, objectives and processes established by them.

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190 Australian Conservation Foundation (2005a), p4

191 Australian Conservation Foundation (2005a), p4

192 Macintosh, A and Wilkinson, D (2005), Environment Protection and Biodiversity Conservation Act, A Five Year Assessment, The Australia Institute, Discussion Paper Number 81, July 2005, pviii

## 6.4 Key threatening processes

6.4.1 The use of the key threatening processes provision within the *EPBC Act* could provide support for regional marine planning and protection through existing and new listings, recovery plans and threat abatement plans. Unfortunately, in practice this provision is currently of limited value.

6.4.2 A key threatening process is one that threatens or may threaten the survival, abundance or evolutionary development of a native species or ecological community. It is listed under the *EPBC Act* if it could cause a native species or ecological community to become eligible for adding to a threatened list (other than conservation dependent), or cause an already listed threatened species or threatened ecological community to become more endangered, or if it adversely affects two or more listed threatened species or threatened ecological communities.

6.4.3 Of 16 key threatening processes listed under the Act, only 3 relate to the oceans. They are:

- incidental catch (bycatch) of sea turtle during coastal otter-trawling operations within Australian waters north of 28 degrees south
- incidental catch (or bycatch) of seabirds during oceanic longline fishing operations
- injury and fatality to vertebrate marine life caused by ingestion of, or entanglement in, harmful marine debris.

6.4.4 The three key threatening processes that relate to oceans are very specific and limited to bycatch and entanglement. However, this need not be the case. If threatening processes such as overfishing, beach netting for sharks, habitat destruction by seabed trawling, land-based pollution and invasive marine pests were listed under the *EPBC Act*, then these provisions could complement Australian oceans legislation and regional marine planning.

## 6.5 Listing of threatened species and ecological communities

6.5.1 Macintosh and Wilkinson (2005) are critical of the administration of the lists of threatened species and ecological communities:

*The administration of the lists that are linked to the EAA [Environment and Assessment and Approval] regime has also been unsatisfactory. Numerous species and ecological communities that are eligible for listing as threatened have not been listed for what appear to be political reasons. For example, no commercial marine fish species has been listed, despite the fact that the evidence suggests that a number (including the southern bluefin tuna) meet the listing criteria. Similarly, in the five years since the Act commenced, the Minister has listed only ten ecological communities when the available evidence suggests the total number of threatened terrestrial ecosystems and ecological communities alone is in the vicinity of 3000.<sup>193</sup>*

6.5.2 Beynon et al (2005) are also critical of the outcomes of the listing process:

*Ecological communities, which should be the bastion of biodiversity protection, are missing out. Despite literally thousands of threatened ecological communities meeting the criteria for EPBC protection, only 31 are listed. A mere 10 have been added in the five years since EPBCA enactment, the others brought forward from the previous Endangered Species Protection Act 1992.<sup>194</sup>*

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193 Macintosh, A and Wilkinson, D (2005), pvii

194 Beynon, N, Kennedy, M and Graham, A, (2005), *Grumpy old greenies*, Humane Society International, p3

6.5.3 In September 2005 the Commonwealth Minister for Environment and Heritage did not accept the Threatened Species Scientific Committee advice that the southern bluefin tuna meets the criteria for listing and protection as an endangered species. This would suggest that the listing and protection of commercially targeted ocean life will be very difficult, especially those with a high market value. The refusal to list the species follows the Minister's accreditation of the fishery early in 2005 after the completion of the fishery's sustainability assessment. This was approved even though the population of the species is 5-20% of its 1960s population and though fishing, as recognised by the Threatened Species Scientific Committee, is causing it to be endangered.

6.5.4 As concluded in the previous discussion on the listing of key threatening processes, an expansion of the lists for threatened species and ecological communities would be a very useful adjunct to the provisions of an Australian Oceans Act. However, currently there are no ecological communities in the oceans listed as threatened, and the list of species does not include any ocean invertebrates or commercial fish species.

## 6.6 Environmental referrals, assessments and approvals

6.6.1 One of the ways in which the *EPBC Act* is designed to conserve the environment and protect biodiversity is the regulation of actions that are likely to have a significant impact on the seven Matters of National Environmental Significance through the use of an assessment and approvals process. The seven Matters are World Heritage properties, national heritage places, wetlands of international importance (Ramsar wetlands), threatened species and ecological communities, migratory species, Commonwealth marine areas and nuclear actions. Each has relevance to protection of the Australia's oceans.

6.6.2 The proponent of an action – a project, development, undertaking, activity, or series of activities – that might be likely to have a significant impact must refer the details of the action to the Commonwealth Minister for Environment and Heritage. There are a number of exemptions to this process, including for actions existing before the Act was proclaimed, and those actions to which approval has been given under a state process the subject of a bilateral agreement between that state and the Commonwealth under the Act (Section 29).

6.6.3 Under the *EPBC Act* the Minister must determine whether a referred action requires approval, based on whether the impact of the action is likely to be significant or not. If it is deemed to have that impact, then it becomes a 'controlled action' and is subjected to an approval process that could eventually see the action approved, approved with conditions or refused. Macintosh and Wilkinson (2005) analysed the first six years of the environmental assessment and approval (EAA) process under the *EPBC Act* and concluded that:

*In almost all areas, the regime has failed to produce any noticeable improvements in environmental outcomes. The activities that pose the greatest threat to the Act's 'matters of national environmental significance' are rarely being referred to the Minister and, when they are, the Minister is not taking adequate steps to ensure appropriate conservation results.*<sup>195</sup>

6.6.4 Very few actions in the oceans have been referred under the *EPBC Act*. Macintosh and Wilkinson (2005) believe that:

*The lack of referrals from the fisheries sector may be a result of the fact that when the strategic assessment of fisheries management plans are complete under Part 10 of the Act, it is likely that the majority of commercial fishing activities in Commonwealth managed fisheries will be exempt from the operation of relevant EAA provisions. DEH has also given an assurance to fisheries that it would not support the*

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<sup>195</sup> Macintosh, A and Wilkinson, D (2005), pvii

*prosecution of fishers for contraventions of certain provisions of the Act until the strategic assessment process has been completed.*<sup>196</sup>

6.6.5 The fisheries assessments are now almost complete, and time will tell whether new proposed actions in fisheries, including aquaculture, and other oceans-based uses are referred due to there being likely significant impacts on the Matters of National Environmental Significance. If they are to occur in the Commonwealth Marine Area, which covers the vast bulk of Australia's oceans, then actions may be referred. However, there is little that could be done currently under the *EPBC Act* to capture proposals in extensive areas of state waters where many environmental impacts on oceans are at their most intense. Of the other Matters of National Environmental Significance, World Heritage Areas, Ramsar sites and national heritage places are largely on land. And although migratory species such as whales could be protected, there are no listed ecological communities in the oceans, nor ocean invertebrates or commercial fish species listed under the schedules of the Act.

6.6.6 One of the other key issues surrounding the assessment and approvals process under the *EPBC Act* is the significance of impact test which requires proponents of an action to determine whether the action will likely have a significant impact on matters covered by the Act. According to Macintosh and Wilkinson (2005a), the significance test has a number of limitations:

*It is often the case that the requisite degree of knowledge does not exist. For example, it is often extremely difficult to even identify or locate a threatened species or ecological community, let alone conclude with any degree of certainty whether a given action is likely to have a significant impact on it.*<sup>197</sup>

*The reliance of the process [environment assessment and approvals] on the 'likely to have a significant impact' test also ensures it has very high information costs. For the regime to be administered and enforced effectively, the Government would require a continual physical presence in the states and territories and a comprehensive database on the condition of relevant aspects of the environment.*<sup>198</sup>

6.6.7 One way to overcome this limitation is to establish scheduled lists of actions that require referral and assessment in the *EPBC Act*. Such a schedule is included in the proposed Australian Oceans Act. This schedule, coupled with spatial management within the zones established under a regional marine plan, would provide greater certainty and not rely on the establishment of a comprehensive national oceans database. As Macintosh and Wilkinson state, the:

*... main advantage of a zoning structure is that it would reduce legal uncertainty by focusing regulatory attention on the nature of the action (rather than the nature and magnitude of the effects) and enable the Commonwealth to focus its attention on clearly identifiable areas. The reduction in legal uncertainty and concentration on specified areas could reduce administration and compliance costs, allowing environmental outcomes to be achieved in a more cost-effective manner.*<sup>199</sup>

## 6.7 Conclusions

6.7.1 This chapter has analysed a number of provisions in the *EPBC Act* that are of relevance to oceans planning, protection and management to determine whether they can be used to complement or substitute for an Australian Oceans Act.

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196 Macintosh, A and Wilkinson, D (2005), p6

197 Macintosh, A and Wilkinson, D, (2005a) In press *EPBC Act – The Case for Reform*, Australasian Journal of Natural Resources Law and Policy

198 Macintosh, A and Wilkinson, D, (2005a), p24

199 Macintosh, A and Wilkinson, D, (2005a), p28

6.7.2 In the case of Section 176 of the *EPBC Act*, its planned use by the Commonwealth government to support bioregional planning in Australia's oceans recognises the need for a legislative basis to regional marine planning. It provides a useful tool for marine planners by highlighting the natural values and limits of an area, but it does not provide a framework for integrated ecosystem-based regional marine planning.

6.7.3 The use of the listing of key threatening processes under the *EPBC Act* has been, to date, very limited when it comes to protecting Australia's ocean life. Listing could be a useful adjunct to an Australian Oceans Act if threatening processes such as overfishing, beach netting for sharks, seabed trawling, land-based pollution and invasive marine pests were listed. The same can be said of the need for an expansion of the lists for threatened species and ecological communities, as there are no ecological communities in the oceans listed as threatened, and the list of species does not include any ocean invertebrates or commercial fish species.

6.7.4 Bilateral agreements between the Commonwealth and the states and territories have been of limited value, but that it is more a function of their content than the concept. Environmental approvals based on national standards in a federal system could reduce the complexity, increase the efficiency, and improve the environmental protection, of oceans planning and management processes.

6.7.5 The processes for referral of actions for assessment and approval under the Act have done little for oceans protection and are unlikely to capture many future proposals in state waters due to the limited coverage of Matters of National Environmental Significance. A listing of the activities that require assessment in a schedule of the *EPBC Act* (there is listing of this type in the proposed Australian Oceans Act) would provide greater certainty and integrate well with spatial management of the zoning process under the proposed Australian Oceans Act. An amendment to Section 74 of the Act to ensure that the actions with the potential for significant impact on the Commonwealth Marine Area, and other ocean areas covered by Matters of National Environmental Significance, are referred to the Australian Oceans Authority, would support the objects of the Australian Oceans Act outlined in this paper.

6.7.6 The *EPBC Act* also has provisions relating to the development and planning of a representative system of MPAs in Commonwealth waters (see Section 2.3 of this paper), sustainable fisheries assessments that relate to fisheries management and export approvals (see Section 2.2 of this paper) and state of the environment reporting that provides indicators of ecosystem health (the proposed Australian Oceans Act gives the task of state of the oceans reporting to the Australian Oceans Authority). Each of these provisions can complement those of the Australian Oceans Act and encourage progress towards an holistic approach to oceans protection and planning.

6.7.7 It is arguably the lack of completeness identified by Rothwell and Kaye (2001), and a number of other limitations within the structure and purpose of the *EPBC Act*, that preclude it from being used as a substitute for the proposed Australian Oceans Act. The *EPBC Act* is tailor-made for the reactive assessment of proposed actions or activities that might significantly impact Matters of National Environment Significance, including Australia's oceans, but proactive integrated oceans planning and management are not part of its design or operation. However, the various provisions of the *EPBC Act* have, with broad interpretation, the expansion of lists, and the broadening of its reach and a strengthening of its assessment and approvals processes, the potential to complement but not substitute an Australian Oceans Act. But moves to strengthen the *EPBC Act* and to develop a new approach to the protection, planning and management of Australia's oceans will require strong political will and leadership and high-quality institutional and legislative arrangements.

## Chapter 7 Australian Oceans Act

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*This chapter summarises and then presents the proposed Australian Oceans Act.*

### **Summary of the Australian Oceans Act**

The proposed Australian Oceans Act outlined in this chapter is divided into four parts and includes four schedules.

Part 1 of the Australian Oceans Act outlines the purposes and objects of the Act, the principles of ecologically sustainable development and ecosystem-based management, and the applications and relationships of the Act.

Part 2 of the Australian Oceans Act provides the structure, power and functions of the Australian Oceans Authority, its board, advisory committees and Technical Groups, and the Regional Marine Plan Working Groups. Central to the development of Australian Oceans Act is the creation of a single, statutory Australian Oceans Authority to oversee the implementation of the Australian Oceans Act.

Part 3 of the Australian Oceans Act outlines the nature and purpose of regional marine plans and the role, functions and powers of the Australian Oceans Authority, the review of regional marine plans, the process for structural adjustment assistance, and proposals for management plans with Indigenous communities. In this part it is also proposed that in the development of a regional marine plan the Australian Oceans Authority coordinate the process for identification and selection of marine national parks.

Part 4 of the Act covers the processes for referrals, assessment and approvals for proposed uses, and the enforcement and review provisions for regional marine plans.

Four schedules to the Australian Oceans Act cover operationally related acts, international conventions relating to ocean protection and management, proposed activities that require referral to the Australian Oceans Authority, and criteria for the identification and selection of marine national parks.

The following outline of an Australian Oceans Act includes text for a number of sections and clauses.



# Australian Oceans Act

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## Preamble

The Commonwealth, the States, the Australian Capital Territory and the Northern Territory have entered into an Agreement known as the Intergovernmental Agreement on Australia's Oceans setting out certain responsibilities of each party in relation to Australia's oceans.

That Agreement provides that the Commonwealth, the States, the Australian Capital Territory and the Northern Territory will make joint legislative provision for the establishment of a body, the Australian Oceans Authority, to coordinate oceans planning, management and protection processes in Commonwealth, state and territory waters.

That Agreement further provides that once the form of the joint legislative provision for the establishment of the Australian Oceans Authority has been agreed to, the Commonwealth, the states, the Australian Capital Territory and the Northern Territory will submit to their parliaments or legislative assemblies, and take such steps as are appropriate to secure the passage of bills containing that legislation.

The Parliament of Australia enacts:

## Part 1 Preliminary

### 1 Short title

This Act may be cited as the Oceans Act 2006.

### 2 Commencement

The several provisions of this Act shall come into operation on a day or the respective days to be fixed by proclamation or successive proclamations of the Governor in Council published in the *Government Notices Gazette*.

### 3 Purposes and Objects

- (1) The purpose of this Act is to create a legislative framework for the management of Australia's oceans and ocean resources having regard to the principles of ecologically sustainable development and ecosystem-based management.
- (2) It is the intention of Parliament that in the administration of this Act regard should be given to the principles of ecologically sustainable development and ecosystem-based management set out in Sections 4 and 5.
- (3) The objects of this Act are to:
  - (a) Provide the legislative foundation for ecosystem-based oceans planning and management
  - (b) Provide a framework for the coordination of implementation of existing Commonwealth legislation
  - (c) Ensure integrated management of ocean, coastal and catchment environments
  - (d) Ensure collaborative and integrated planning, management and protection of Australia's oceans
  - (e) Ensure that decisions that affect Australia's oceans made under existing legislative instruments adhere to the principles of ecologically sustainable development and ecosystem-based management
  - (f) Ensure the accountable and transparent management of Australia's oceans utilising clear environmental quality and performance targets and standards
  - (g) Promote a co-operative approach to the protection, planning and management of Australia's oceans involving governments, the community, oceans-based industries and Indigenous peoples
  - (h) Assist in the co-operative implementation of Australia's international environmental responsibilities with respect to Australia's oceans
  - (i) Promote the optimal utilisation of Australia's ocean resources.

- (4) In order to achieve its objects, the Act:
  - (a) Defines Commonwealth functions in relation to management of Australia's oceans
  - (b) Provides mechanisms to ensure actions which may threaten Australia's oceans and their associated natural and cultural values are assessed in accordance with the principles of Ecologically Sustainable Development and Ecosystem-based Management as set out in Sections 4 and 5
  - (c) Establishes the Australian Oceans Authority
  - (d) Gives Regional Marine Plans statutory force and provides a mechanism for the making of regional marine plans and the establishment of a system of marine national parks.
  - (e) Requires all decisions made under operationally related Acts to be consistent with the Act and the principles of Ecosystem-based Management and Ecologically Sustainable Development as set out in Sections 4 and 5.

#### **4 Principles of Ecosystem-based Management**

The principles of Ecosystem-based Management are to:

- (1) Maintain ecological processes in all areas of Australia's oceans including, for example, water and nutrient flows, community structures and food webs, and ecosystem links.
- (2) Maintain the biological diversity of Australia's oceans, including the capacity for evolutionary change.
- (3) Maintain viable populations of all native species in Australia's oceans in functioning biological communities.
- (4) Protect the integrity of Australia's oceans ecosystems from human impact.
- (5) Manage human use within the natural capacity of Australia's oceans ecosystems.
- (5) Ensure inter-agency cooperation.
- (6) Ensure the assessment of cumulative impacts of actions across Australia's oceans ecosystems.
- (7) Ensure consideration is given to ecological, political, generational and cultural factors in decision-making processes.
- (8) Ensure consultation with, and the active involvement of, users and the community in management and decision-making processes.

## **5 Principles of Ecologically Sustainable Development**

The principles of Ecologically Sustainable Development are to:

- (1) Ensure effective integration of both long-term and short-term economic, environmental, social and equitable considerations in decision-making processes.
- (2) Ensure that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- (3) Uphold the principle of intergenerational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.
- (4) Ensure that the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making.
- (5) Promote improved valuation, pricing and incentive mechanisms.

## **6 Act to Bind Crown**

- (1) This Act binds the Crown in each of its capacities.

## **7 Application of Act**

*Extension to external Territories*

- (1) This Act extends to each external Territory.

*Limited extraterritorial application*

- (2) This Act applies to acts, omissions, matters and things in the Australian jurisdiction, and does not apply to acts, omissions, matters and things outside the Australian jurisdiction except so far as the contrary intention appears.

*Application to everyone in Australia and Exclusive Economic Zone*

- (3) A provision of this Act that has effect in relation to a place that is within the outer limits of the Exclusive Economic Zone (whether the place is in the zone or in Australia or an external Territory) or that is on or in the continental shelf applies in relation to:
  - (a) all persons (including persons who are not Australian citizens)
  - (b) all aircraft (including aircraft that are not Australian aircraft)
  - (c) all vessels (including vessels that are not Australian vessels).

Note: A reference to Australia or to an external Territory generally includes a reference to the coastal sea of Australia or the Territory (as appropriate). See Section 15B of the Acts Interpretation Act 1901.

## **8 Administration of this Act to Achieve Objects and Objectives**

- (1) The Minister, the Authority and other persons or bodies involved in the administration of this Act, and any other person or body required to make a decision under this Act or another operationally related Act listed in Schedule 1 from time to time, must act consistently with, and seek to further:
  - (a) the objects of this Act
  - (b) the principles of Ecologically Sustainable Development and Ecosystem-based Management set out in Sections 4 and 5.

## **9 Relationship with State Law**

- (1) This Act is not intended to exclude or limit the concurrent operation of any law of a State or Territory, except so far as the contrary intention appears.
- (2) Where a related operational State or Territory Act, listed in Schedule 1 by agreement with a participating State or Territory, is inconsistent with the objects of this Act, this Act prevails to the extent of any inconsistency.
- (3) This Act applies to State and Territory waters to the extent that is constitutionally permissible.

## **10 Relationship with Other Commonwealth Acts**

- (1) Except where the contrary intention is expressed in this or any other Act, this Act is in addition to and does not limit or derogate from the provisions of any other Act.
- (2) Where a related operational Act listed in Schedule 1 from time to time is inconsistent with the objects of this Act, this Act prevails to the extent of any inconsistency.

## **11 Application of this Act to State Marine Waters**

- (1) This Act recognises that the title to each State and Territory's coastal waters is vested in each State and Territory pursuant to the *Coastal Waters (State Title) Act 1980* and the *Coastal Waters (Northern Territory Title) Act 1980*.

## **12 Interpretation**

**Agreement** means the agreement made on the xx day of the xx month of the year 2xxx between the Commonwealth, the states, the Australian Capital Territory and the Northern Territory, a copy of which is set out in the Schedule (NB: Not in this discussion paper).

**Australia's Oceans** means the Commonwealth Marine Area and those waters comprising State and Territory marine waters.

**Marine Region** means an area of Australia's oceans that has been defined by the Australian Oceans Authority and proclaimed as an area in relation to which a regional marine plan must be prepared.

**Participating Jurisdiction** means the Commonwealth, a participating State or a participating Territory.

**Participating State** means a State:

- (a) that is a party to the Agreement and
- (b) in which an Act that corresponds to this Act is in force in accordance with the Agreement.

**Participating Territory** means a Territory:

- (a) that is a party to the Agreement and
- (b) in which an Act that corresponds to this Act is in force in accordance with the Agreement.

**Australia's Oceans Policy** means the documents entitled:

Australia's Oceans Policy Vol.1: Caring, understanding, using wisely  
(Commonwealth of Australia, 1998).

Australia's Oceans Policy Vol.2: Specific sectoral measures (Commonwealth of Australia, 1998).

### **Commonwealth Marine Area**

(1) Each of the following is a *Commonwealth Marine Area*:

- (a) any waters of the sea inside the seaward boundary of the exclusive economic zone, excluding, for the purposes of this Act:
  - (i) waters, rights in respect of which have been vested in a State by Section 4 of the *Coastal Waters (State Title) Act 1980* or in the Northern Territory by Section 4 of the *Coastal Waters (Northern Territory Title) Act 1980* and
  - (ii) waters within the limits of a State or the Northern Territory
- (b) the seabed under waters covered by paragraph (a)
- (c) airspace over waters covered by paragraph (a)
- (d) any waters over the continental shelf, excluding:
  - (i) waters, rights in respect of which have been vested in a State by Section 4 of the *Coastal Waters (State Title) Act 1980* or in the Northern Territory by Section 4 of the *Coastal Waters (Northern Territory Title) Act 1980* and
  - (ii) waters within the limits of a State or the Northern Territory and
  - (iii) waters covered by paragraph (a)
- (e) any seabed under waters covered by paragraph (d)
- (f) any airspace over waters covered by paragraph (d).



*State and Territory Marine Waters* include those waters covered by the Coastal Waters Act in each State and Territory.

*Operationally Related Act* includes those Acts listed in Schedule 1.

*Regional Marine Plan* is an ecosystem-based plan prepared for a marine region of Australia's oceans to implement Australia's Ocean Policy and to ensure ecologically sustainable ocean protection and use.

*Marine National Park* is an area of Australia's oceans that has been identified within a regional marine plan as requiring the highest level of protection.

### **13 Reporting by the Minister for Environment and Heritage**

- (1) The Minister for the Environment and Heritage will provide a report on the progress in implementing the provisions of the Agreement to the federal parliament on behalf of the Natural Resource Management Ministerial Council.
- (2) The Minister shall table in Parliament the annual report of the Australian Oceans Authority.

### **14 Reporting by the Natural Resource Management Ministerial Council to the Council of Australian Governments**

- (1) The Natural Resource Management Ministerial Council shall provide an annual report to the Council of Australian Governments on progress in the implementation of the Agreement.
- (2) The Natural Resource Management Ministerial Council shall consult with the relevant State and Territory government ministers of participating States and Territories on matters relating to assessment and approval processes, marine national park proposals and amendments to regional marine plans where such matters are relevant to areas within or adjacent to the coastal waters of those states and territories.

## **Part 2 Australian Oceans Authority**

### **15 Establishment of the Australian Oceans Authority**

- (1) There is established by this Act an Authority by the name of the Australian Oceans Authority.
- (2) The Authority:
  - (a) is a body corporate with perpetual succession
  - (b) shall represent the Crown in right of the Commonwealth
  - (c) shall have a common seal
  - (d) may sue and be sued in its corporate name

- (e) shall, subject to this Act, be capable of taking, purchasing, leasing, holding, selling and disposing of real and personal property for the purpose of performing its functions and exercising its powers under this Act
  - (f) shall be capable of doing and suffering all such acts and things as bodies corporate may by law do and suffer and which are necessary or expedient for the purpose of performing its functions and exercising its powers under this Act.
- (3) The common seal of the Authority shall be in such custody as the Authority directs and shall not be used except as authorized by the Authority.

## **16 Board of the Authority**

- (1) There is to be a Board of the Authority.
- (2) The Board is to consist of 16 Board members, being:
  - (a) the Chairperson and
  - (b) 15 part-time members appointed by the Governor-General on the recommendation of the Minister.
- (3) The Commonwealth must nominate a person to be appointed as the Chair in consultation with State and Territory Governments. The Commonwealth may nominate no more than 7 other persons to be appointed as Board Members.
- (4) Each State and Territory Government may nominate a person to be a Board member providing that the State or Territory is a participating State or Territory in the Intergovernmental Agreement on Australia's Oceans. No more than 8 members shall be nominated by State and Territory governments.
- (5) A person is not eligible for appointment as a Board Member unless the person has a high level of expertise in an area relevant to the function of the Authority. Relevant areas include, but are not limited to, the following:
  - (a) Marine management and policy development
  - (b) Ecologically sustainable oceans use
  - (c) Marine science
  - (d) Oceans-based communications and education
  - (e) Indigenous knowledge of and relationships with the marine environment
  - (f) Environmental law
  - (g) Public sector governance
  - (h) Environmental auditing of programs, policy and processes.

## 17 Powers, Duties and Functions of the Authority

The powers duties and functions of the Authority shall be to:

- (1) Administer this Act and any regulations and Orders made thereunder.
- (2) Develop, manage, regulate and review Regional Marine Plans under this Act that incorporate quantified targets designed to meet the objectives of Regional Marine Plans as set out in Section 24 of this Act.
- (3) Coordinate within the regional marine planning process the identification and selection of a comprehensive, adequate and representative system of marine national parks.
- (4) Establish a national assessment and approval process to be used by the Authority and Commonwealth and participating State and Territory government agencies accredited by the Authority to conduct assessments and approvals.
- (5) Establish nationally consistent and integrated oceans planning, management and regulatory processes in consultation with all jurisdictions and relevant stakeholders for matters identified by the Agreement.
- (6) Oversee resource allocation for ecologically sustainable non-extractive and extractive oceans uses in each marine region.
- (7) Conduct strategic assessment and periodic review of State, Territory and Commonwealth agencies that assess proposals and carry out management activities in the marine environment under accreditation from the Authority or under operationally related Acts, ensuring that decision-makers adhere to the principles of Ecosystem-based Management and Ecological Sustainable Development and applicable Regional Marine Plans in their decision-making.
- (8) Provide ongoing and regular auditing of State, Territory and Commonwealth decision-making processes to ensure that the principles of Ecosystem-based Management and Ecologically Sustainable Development are applied in accordance with Regional Marine Plans.
- (9) Investigate and report to Parliament or make recommendations to relevant ministers about the findings of assessments and audits carried out under this section.
- (10) Integrate data collection, research, information sharing, communications and education as part of the process of developing the full range of relevant knowledge to be applied to the planning and decision-making processes. This includes scientific, economic and social studies and local and Indigenous knowledge.
- (11) Ensure that Indigenous communities are given opportunities, with appropriate resources, to effectively engage in planning and management decision-making and actions in relation to their Sea Country.

- (12) Advise on significant inconsistencies between operationally related Acts and, where necessary, provide expert advice on amendments to those Acts to ensure the smooth functioning of this Act.
- (13) Assess proposed actions that are referred to it under this Act.
- (14) Provide secretariat support for the Natural Resource Management Ministerial Council.

## **18 Regulations**

- (1) The Governor-General may make regulations upon the recommendation of the Authority prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## **19 Australian Oceans Authority Reporting**

- (1) The Authority will report to the Natural Resource Management Ministerial Council
- (2) The Authority shall at least once a year make a report to the Natural Resource Management Ministerial Council on the operation of the Act and the progress in the preparation and implementation of Regional Marine Plans including reviews and audits of referrals, approvals and assessment processes, achievement of operational objectives and their targets, and reviews of Regional Marine Plans. The report shall be laid before both Houses of Parliament by the Commonwealth Minister for Environment and Heritage within fourteen days of the making thereof if Parliament is sitting and if Parliament is not sitting then within fourteen days after the meeting of Parliament.
- (3) The Authority shall table at the Natural Resource Management Ministerial Council draft Regional Marine Plans for comment, and final Regional Marine Plans for approval before their tabling in federal Parliament by the Commonwealth Minister for Environment and Heritage.
- (4) The Authority shall every five years prepare and publicly release a State of the Oceans Report. The report will present comparative data on the health of Australia's oceans and the trends in regularly monitored environmental health indicators.
- (5) The Authority shall, five years after federal parliament approval of a Regional Marine Plan, report to the Natural Resource Management Ministerial Council on an assessment and review of the resource-use levels, allocations and activities within a Regional Marine Plan.

## **20 Regional Marine Plan Working Groups**

- (1) A Regional Marine Plan Working Group will be established by the Authority for each marine region.

- (2) A Regional Marine Plan Working Group will comprise marine planning officers from the Authority, the Commonwealth and the participating State and Territory governments relevant to that region.
- (3) The function of the Regional Marine Plan Working Group is to prepare the Regional Marine Plan for the marine region.

## **21 Regional Marine Planning Technical Groups**

- (1) The Authority may from time to time, establish a Regional Marine Planning Technical Group and may dissolve any such Regional Marine Planning Technical Group.
- (2) The function of the Technical Group will be to provide expert advice to the Authority and the Regional Marine Plan Working Group on matters including to:
  - (a) provide technical advice on the formulation, implementation and review of Regional Marine Plans
  - (b) provide technical advice concerning the adjustment of a Regional Marine Plan or regulations
  - (c) provide technical advice from a regional perspective to the Authority.
- (3) A Regional Marine Planning Technical Group is to consist of such number of members as the Authority determines, and to include people with skills and expertise that are relevant to the nature of the technical advice required within each marine region.
- (4) The Authority is to ensure that the persons appointed as members of a Regional Marine Planning Technical Group are able to provide relevant technical advice in the formulation, implementation and review of Regional Marine Plans.

## **22 Regional Marine Advisory Committees**

- (1) A Regional Marine Advisory Committee will be established by the Authority for each marine region.
- (2) The function of a Regional Marine Advisory Committee is to advise the Regional Marine Plan Working Group and the Authority on regional marine planning matters including to:
  - (a) advise on the formulation, implementation and review of Regional Marine Plans
  - (b) provide advice concerning the amendment of a Regional Marine Plan or regulations
  - (c) provide advice from a regional perspective to the Regional Marine Plan Working Group and the Authority.

- (3) A Regional Marine Advisory Committee is to consist of such number of members as the Authority determines.
- (4) The Authority is to ensure that the persons appointed as members of a Regional Marine Advisory Committee represent a range of interests and expertise appropriate to the functions of the committee for the region and include a representative from each of the industry, community, conservation and Indigenous sectors within the region.
- (5) A Regional Marine Advisory Committee may operate in the way it determines, subject to any regulations and the Terms of Reference given to it by the Authority.
- (6) The regulations may provide for the operation and procedures of a Regional Marine Advisory Committee.
- (7) The regulations may allow a Regional Marine Advisory Committee to determine its own procedure on any matter.

## Part 3 Regional Marine Planning

### 23 Making Regional Marine Plans

- (1) The Authority may make and review Regional Marine Plans for any marine region that is a part of Australia's oceans for the purpose of furthering the objectives set out in this Act.
- (2) All Regional Marine Plans existing at the date of commencement of this Act are deemed to have been made under this section.

### 24 Objectives of Regional Marine Plans

The objectives of Regional Marine Plans are to:

- (1) Implement the vision of healthy oceans cared for, understood and used wisely for the benefit of all, now and in the future.
- (2) Ensure ocean uses are ecologically sustainable.
- (3) Ensure the optimal utilisation of ocean resources.
- (4) Preserve and protect important places and significant species in Australia's oceans while promoting sustainable management of industry and threat minimisation.
- (5) Provide the framework and processes for implementing ecosystem-based management in Australia's oceans.
- (6) Integrate ecosystem-based management with ocean management processes of oceans-based industries and their management authorities.

- (7) Integrate ecosystem-based management within and across industry, government and agency jurisdictions contiguous with or affecting of Australia's oceans.
- (8) Identify and protect natural and cultural oceans heritage.
- (9) Provide a framework for the identification, selection, establishment and management of a comprehensive, adequate and representative system of Marine National Parks integrated with regional marine planning processes.
- (10) Promote understanding and protection of the biological diversity of Australia's oceans, their ecological processes and their resources.
- (11) Ensure effective community engagement in Regional Marine Planning.
- (12) Ensure that Indigenous communities are given the capacity to be effectively involved in Regional Marine Planning and management decision-making and action.
- (13) Ensure that the environmental and management knowledge of Indigenous communities is effectively integrated through a collaborative process with non-Indigenous oceans knowledge bases in the Regional Marine Plan.
- (14) Encourage Indigenous employment opportunities in planning and management actions.
- (15) Ensure that management boundaries are based on ecosystems and that their development is informed by Indigenous knowledge of Sea Country through a collaborative process including consideration of the cultural boundaries of Indigenous communities.
- (16) Ensure that decisions in relation to oceans resource allocation are environmentally, socially, culturally and economically balanced.
- (17) Improve expertise and capabilities in oceans-related management, science, technology and engineering.
- (18) Foster increased community understanding of Australia's oceans and appreciation of the need for their conservation and ecologically sustainable use.
- (19) Regulate the use of Australia's oceans so as to protect them while allowing for their reasonable use.
- (20) Regulate exploitative activities so as to minimize the deleterious effect of those activities on Australia's oceans.
- (21) Reserve some areas of Australia's oceans for their appreciation and enjoyment by the public.

## 25 Contents of Regional Marine Plans

- (1) A Regional Marine Plan for an area must seek to further the objectives of this Act.
- (2) Regional Marine Plans must include:
  - (a) a description of the marine region's natural, social, cultural and economic values
  - (b) a description and mapping of the marine region's ecosystems and their values
  - (c) a list and explanation of operating principles or decision rules that will be/have been used to develop the Regional Marine Plan
  - (d) maps identifying zones and ecologically sustainable purposes and use (multiple and single) permissible in those zones and the level of activity of those uses (including seasonal and sequential use)
  - (e) identification of existing impacts on and threats to Australia's oceans ecosystems
  - (f) identification of measurable operational objectives, indicators and targets – environmental, social, cultural and economic – for ecologically sustainable oceans protection and use
  - (g) a public, transparent and accredited performance assessment and review process (which will be used for evaluation and audit)
  - (h) assessment of the risks to ecosystem, economic, cultural and social values in the marine region and to the achievement of the operational objectives of the plan
  - (i) actions to achieve the operational objectives and indicator targets
  - (j) research, information and monitoring systems
  - (k) a comprehensive, adequate and representative system of Marine National Parks
  - (l) a framework for the management of permitted uses within zones and Marine National Parks
  - (m) a framework for compliance and enforcement
  - (n) a communications and education strategy
  - (o) actions to engage stakeholders and the wider community
  - (p) mechanisms for collaboration with Indigenous people to ensure community knowledge, perspectives and participation inform the planning and ongoing management of Sea Country
  - (q) mechanisms to encourage community proposals for management zones and Marine National Parks within the process outlined in Section 28
  - (r) zones that give priority to subsistence and ecologically sustainable economic use by Indigenous communities.



## 26 Process for Developing Regional Marine Plans

- (1) The Authority shall publish a notice in the *Government Notices Gazette*, a newspaper circulating throughout the land area directly adjacent to the relevant marine region and on the internet stating that the Authority is to begin a regional marine planning process for the marine region.
- (2) The Authority will, with the assistance of the Regional Marine Plan Working Group, prepare and publish a Regional Marine Plan scoping paper identifying and discussing the information and issues for the marine region and inviting public representations prior to developing the first draft of each Regional Marine Plan, in collaboration with relevant State and Territory governments, within 36 months of its establishment.
- (3) As part of the regional marine planning process the Authority under this Act shall prepare a draft Regional Marine Plan and a final Regional Marine Plan.
- (4) The Authority will identify existing government and non-government organisations that may be particularly interested in the marine region which the relevant Regional Marine Plan addresses and shall request comments from them during the regional marine planning process.
- (5) The Authority will seek to engage the relevant Commonwealth, State and Territory Governments in regional marine planning processes to ensure that they are integrated across Commonwealth, State and Territory marine waters.
- (6) The Authority will establish a consultation process within the land area directly adjacent to the relevant marine region that includes meetings with interested government and non-government organisations, community fora and promotion within the regional media.
- (7) The Regional Marine Plan scoping paper to be prepared by the Authority shall investigate the marine region's environmental, social, cultural and economic values and issues.
- (8) On completing the scoping paper the Authority shall:
  - (a) publish the scoping paper
  - (b) give notice in the *Government Notices Gazette* and in a public notice in a newspaper circulating in the land area directly adjacent to the relevant marine region and on the internet that the scoping paper is available, and from where the public can obtain a copy, and stating that any submission to the Authority in relation to the report will be considered by the Authority if they are made by a date not less than 60 days of such notice providing details on how to make a comment.
- (9) The Authority shall consider any submissions in relation to such scoping paper made by any person or body within 90 days of notice being given under subsection (8)(b) and may incorporate any part of the submission or representation from any such person or body organisation in preparing the draft Regional Marine Plan.

- (10) Not earlier than 90 days after notice being given under subsection (8)(b) the Authority shall:
- (a) publish a notice in the *Government Notices Gazette* and a newspaper circulating throughout the marine region and on the internet announcing that the draft Regional Marine Plan is available and from where copies of it can be obtained and specify an address to which submissions may be forwarded and providing details on how to make a comment
  - (b) send a copy of the draft Regional Marine Plan to:
    - i. the Council of any municipality within the marine region covered by the draft Regional Marine Plan
    - ii. any public authority or government department that in the opinion of the Authority has an interest in the region covered by the draft Regional Marine Plan
    - iii. any person or body who made a submission under subsection (8)
- (11) Any person or body can make submissions to the Authority in relation to the draft Regional Marine Plan and these shall be considered by the Authority if they are made by a date not less than 60 days of such notice being given under subsection (10)(a).
- (12) The Authority shall consider any submissions in relation to such draft Regional Marine Plan made by any person or body within 90 days of notice being given under subsection (10)(a) and may incorporate any part of the submission or representation from any such person or body organisation in preparing the final Regional Marine Plan.
- (13) Where, in the opinion of the Australian Oceans Authority, the planning process or the development of a Regional Marine Plan would benefit from independent recommendations on any matter, it may refer the matter to a Regional Marine Planning Panel for its consideration and recommendation.
- (14) The Regional Marine Planning Panel shall comprise three independent persons with no institutional obligations to the Australian Oceans Authority or the participants in the planning process. Two members shall be nominated by the Natural Resource Management Ministerial Council, and the chair of the Panel shall be nominated by the Australian Oceans Authority.
- (15) The Australian Oceans Authority shall advise the Natural Resource Management Ministerial Council of the Regional Marine Planning Panel recommendations and its response to those recommendations. This advice will be submitted to the Natural Resource Management Ministerial Council as part of the materials recommending adoption of or variation to the Regional Marine Plan.
- (16) The Natural Resource Management Ministerial Council shall consider the advice provided under subsection (15) and formulate a decision for the Regional Marine Plan. In preparing that advice the Natural Resource

Management Ministerial Council shall also seek advice from relevant State and Territory ministers in participating governments.

- (17) When the Authority submits its final Regional Marine Plan to the Natural Resource Management Ministerial Council it shall be accompanied by a copy of any submissions received from any person or body, department, authority or council pursuant to the provision of subsection together with comment by the Authority on these submissions.
- (18) On receipt of the final regional marine plan of subsection (17) the Natural Resource Management Ministerial Council shall, during consideration of the plan, seek the advice of relevant State and Territory ministers in participating governments in that region.
- (19) After receiving the advice referred to in subsection (18), and having considered the final regional marine plan, the Natural Resource Management Ministerial Council may:
  - (a) accept the Regional Marine Plan as so submitted; or
  - (b) refer it to the Authority, together with its suggestions, for further consideration.
- (20) Where the Regional Marine Plan has been so referred to the Authority, it shall, as soon as practicable after the receipt of the Regional Marine Plan, give further consideration to the plan, having regard to the suggestions of the Natural Resource Management Ministerial Council, and again submit the Regional Marine Plan, with or without alterations, to the Natural Resource Management Ministerial Council, together with its comments on the suggestions of the Natural Resource Management Ministerial Council.
- (21) When the Regional Marine Plan is again submitted to the Natural Resource Management Ministerial Council, it shall, as soon as practicable after receipt of the Regional Marine Plan, accept it as so submitted or after making such alterations as the Council thinks fit.
- (22) Where the Natural Resource Management Ministerial Council makes alterations to a Regional Marine Plan under subsection (19), it shall prepare a report specifying the alterations and setting out any views expressed by the Authority in respect of the matters to which the alterations relate, and the report shall accompany the Regional Marine Plan when it is laid before both Houses of the Commonwealth Parliament under Section 33 of this Act.

## **27 Marine National Parks in Regional Marine Plans**

- (1) Regulations may provide for the designation of Marine National Parks in Australia's oceans by identifying such areas in a relevant Regional Marine Plan.
- (2) The Authority shall coordinate the identification and selection processes for Marine National Parks to be included in a Regional Marine Plan in accordance with the criteria for identification and selection listed in Schedule 4.

- (3) The Authority shall coordinate the public consultation processes associated with the identification, selection and declaration of Marine National Parks to be included in the Regional Marine Plan process as outlined in Section 26.
- (4) The preparation and review of Marine National Park management plans in Australia's oceans, and the day-to-day management of the Marine National Parks, shall be carried out by Departments or agencies at Commonwealth, State, Territory and regional levels deemed appropriate by the Authority and in collaboration with the Commonwealth and relevant State and Territory Governments.
- (5) Where a Marine National Park is established near or across waters of abutting jurisdictions, the respective Commonwealth departments or agencies and their State and Territory counterparts shall seek to conclude and implement cooperative management arrangements for the Marine National Park.

## **28 Regional Marine Planning and Community Engagement**

- (1) Individuals and community groups shall be encouraged and supported by the Authority to engage in regional marine planning and management processes to promote oceans protection and ecologically sustainable use.
- (2) The Authority shall provide advice on biophysical and scientific information, clear processes to guide community initiatives, capacity for individuals and community groups to provide comment in relation to proposed decisions of the Authority, and assistance to communities to promote the values of their marine region.
- (3) In the preparation of the regional marine scoping paper, and the draft and final Regional Marine Plan for a marine region, the Authority must engage interested parties and the general community by:
  - (a) holding community fora within the marine region during the preparation of the scoping paper and draft Regional Marine Plan
  - (b) liaising and consulting regularly with representatives of oceans-based industries, Indigenous communities and conservation organisations during the preparation of the scoping paper and draft Regional Marine Plan
  - (c) establishing a Regional Marine Advisory Committee and a Regional Marine Planning Technical Group for the region covered by the plan.
- (4) An individual or body in the community shall be able to make a proposal for a Marine National Park or management zone to be established within a marine region during the preparation or review of a Regional Marine Plan, in which case, such a proposal must be dealt with under the provisions for the preparation and review of regional marine plans in Sections 26 and 32.
- (5) Where a proposal for a Marine National Park or a management zoning is made for a marine region by an individual or community body, the Authority shall determine whether:

- (a) the proposal meets the purpose of the Act and the objectives of the Regional Marine Plan and would not undermine those objectives
  - (b) the proposal contains sufficient information to enable the values of the area and the likely impacts of the proposed activity to be assessed
  - (c) the proponent has consulted with the Traditional Owners, Native Title holders and claimants, and the parties to any Indigenous Land Use Agreements in the area
  - (d) the proponent has consulted with representatives of those likely to be affected by the proposal
- (6) If the Authority determines that the criteria in subsection (5) (a)-(d) have been satisfied, it shall have the proposal included in the regional marine planning process outlined in Section 26.

## **29 Plans of Management and Groups with Special interest in a Marine Region**

- (1) The Authority may enter into an agreement or arrangement with a group of people who are representative of a community group that has a special interest in the marine region of a Regional Marine Plan. Such a group can include people who have some form of native title to the area or its resources or are parties to an Indigenous Land Use Agreement, are Native Title claimants or have some other special identification with the marine region or its resources.
- (2) The agreement or arrangement in subsection (1) may relate to the development and/or the implementation of a plan of management for, or for a species or ecological community within, the area concerned and may, if the Authority considers it appropriate, provide that, if such a plan of management is prepared, the community group is to manage the area, or the species or ecological community within the area, jointly with the relevant management agency in accordance with the Regional Marine Plan.

## **30 Regional Marine Planning and Financial Assistance to Affected Parties**

- (1) Users of Australia's oceans deemed eligible for financial assistance as a result of Authority decisions in implementing a Regional Marine Plan can make applications for that assistance from the Regional Marine Planning Assistance Assessment Panel.
- (2) The Regional Marine Planning Assistance Assessment Panel is to consist of 3 members who are to be appointed by the Natural Resource Management Ministerial Council, being:
  - (a) a chairperson who has, in the opinion of the Natural Resource Management Ministerial Council, extensive knowledge and experience in any one or more of the following areas, industry, commerce, economics, law or public administration
  - (b) one person, selected by the Natural Resource Management Ministerial Council, from a panel of 3 persons associated with and familiar with the affected industries and jurisdictions

- (c) one person who, in the opinion of the Natural Resource Management Ministerial Council, has expertise in financial matters.
- (3) Financial assistance will be available to those licensed commercial Commonwealth, State and Territory fishers and tourism operators that can prove a loss of income or increased costs associated with the gaining of their income.
- (4) The formula for financial assistance and the conditions under which financial assistance shall be granted shall be dealt with in the regulations made under this Act.
- (5) Where an eligible applicant for financial assistance is dissatisfied with the decision made by the Assessment Panel, that applicant can appeal that decision to the Administrative Appeals Tribunal.

### **31 Adjustments to a Regional Marine Plan**

- (1) From time to time, to satisfy the requirements of adaptive management, and as the result of monitoring, auditing and review processes, the Authority may make adjustments to the operational objectives, indicators, targets and other features of a Regional Marine Plan.
- (2) Before making such adjustments identified under subsection (1), the Authority shall notify the Natural Resource Management Ministerial Council, relevant Commonwealth, State and territory agencies, and relevant stakeholders, for comment.
- (3) The adjustments will then be made to the Regional Marine Plan and become part of the Regional Marine Plan for that marine region.

### **32 Review of Regional Marine Plans**

To ensure adaptive management, and in addition to ongoing monitoring and performance programs, each Regional Marine Plan must be reviewed by the Authority.

- (1) The Authority must adopt specific indicators against which compliance with actions in the Regional Marine Plan are reviewed. The compliance review must be reported on annually and published by the Authority on a website established for that purpose.
- (2) The resource-use levels, allocations and activities within the Regional Marine Plan must be reported on annually and reviewed 5 years by the Authority after the final plan's approval by federal parliament and assessed in relation to past and projected operational needs.
- (3) The entire Regional Marine Plan must be reviewed at least every 9 years after the plan's approval by federal parliament.
- (4) In the review process the Authority must pursue a collaborative and integrated process with the Commonwealth, State and Territory Governments, and community, industry and Indigenous groups.

### **33 Regional Marine Plans to be Laid Before Parliament**

- (1) Where a Regional Marine Plan has been accepted under Section 26, the Commonwealth Minister for Environment and Heritage shall cause it to be laid before both Houses of the Parliament as soon as practicable and not later than 15 sitting days after the day on which it was accepted.
- (2) Either House of the Parliament, within 15 sitting days after the plan has been laid before that House, may, in pursuance of a motion upon notice, pass a resolution disallowing the plan.
- (3) If, before the expiration of 15 sitting days of a House of the Parliament after the plan has been laid before that House:
  - (a) that House is dissolved or, being the House of Representatives, expires, or the Parliament is prorogued; and
  - (b) a resolution for the disallowance of the plan has not been passed by that House; the plan shall, for the purposes of this section, be deemed to have been laid before that House on the first sitting day of that House after the dissolution, expiry or prorogation, as the case may be.
- (4) If either House of the Parliament passes a resolution in accordance with subsection (2) disallowing the plan, the Natural Resource Management Ministerial Council shall direct the Authority to prepare a fresh plan and the Authority shall thereupon reconsider the matter and prepare a fresh plan, and Section 26 applies accordingly.
- (5) If neither House of the Parliament passes a resolution in accordance with subsection (2) disallowing the plan, the Natural Resource Management Ministerial Council shall, as soon as practicable after the expiration of the last day upon which such a resolution could have been passed, by public notice state that the plan is to come into operation on a date specified in the notice (not being a date earlier than the date of publication of the notice in the *Government Notices Gazette*) and the plan shall come into operation on that date.
- (6) A notice referred to in subsection (5) shall specify an address or addresses at which copies of the plan may be inspected or purchased and may contain a description of the zone or zones to which it relates or any other particulars of the plan.

## **Part 4 Management and Enforcement**

### **34 Referrals and Approvals**

- (1) Any proposal to undertake an activity listed in Schedule 3 within an area covered by a regional marine plan that has commenced operation, shall be referred to the Authority by the proponent if the activity is proposed to be undertaken:

- (a) within a State or Territory, including its territorial waters, that is not a participating State or Territory for the purposes of this Act or
  - (b) within a State or Territory, including its territorial waters, that is a participating State or Territory for the purposes of this Act but which has not been accredited by the Authority in relation to its assessment and approval processes under the relevant operationally-listed Acts referred to in Schedule 1 or
  - (c) within a Commonwealth marine area or within an external adjacent area where the activity will have a significant impact on the Commonwealth marine area.
- (2) As soon as practicable after receiving a referral of a proposal to take an action, the Authority must cause to be published on the Internet:
- (a) the referral and
  - (b) an invitation for anyone to give the Authority comments within 10 business days (measured in Canberra) on whether the activity is consistent with the matters that the Authority must have regard to as listed in subsection (4).
- (3) Where an activity listed in Schedule 3 is referred to the Authority under subsection (1), or as a result of the making of regulations under subsection (9) (a), the Authority may:
- (a) approve the undertaking of the activity, including subject to such conditions as it thinks fit or
  - (b) refuse to allow the activity to be undertaken.
- (4) In reaching its decision under subsection (3), the Authority shall have regard to:
- (a) the purposes and object of this Act
  - (b) the principles of ecosystem-based management
  - (c) the principles of ecologically sustainable development
  - (d) the provisions of the relevant regional management plan
  - (e) any comments received under subsection (2) and
  - (f) any comments provided to the Authority by the relevant Regional Marine Planning Advisory Committee or Regional Marine Planning Technical Group.
- (5) The proponent, or any person who has made comments pursuant to subsection (2) with respect to an activity referred to the Authority under subsection (1) or under regulations made under subsection (9)(a), may appeal to the Administrative Appeals Tribunal against a decision of the Authority made pursuant to subsections (3) and (4).
- (6) The Authority may accredit participating State or Territory or Commonwealth agencies in relation to its assessment and approval processes under the relevant operationally-listed Acts in Schedule 1 where it is satisfied that those



processes will be implemented in a manner that is consistent with, and gives effect to, the matters referred to in subsection (4).

- (7) The Authority shall monitor and review at regular intervals the operation of the relevant assessment and approval processes within accredited participating State or Territory or Commonwealth agencies
- (8) If the Authority considers, as a result of its monitoring and review action under subsection (7), that there has been a substantial failure within an accredited participating State or Territory or relevant Commonwealth decision-making body to implement its assessment and approval processes in a manner that is consistent with, and gives effect to, the matters referred to in subsection (4), it may suspend or withdraw its accreditation of the relevant State or Territory or relevant Commonwealth decision-making body.
- (9) Regulations may be made for the purpose of giving further effect to this section, including:
  - (a) providing for the referral of prescribed activities within or adjacent to a marine region to the Authority for assessment and approval where a regional marine plan has not yet commenced operation in relation to such region
  - (b) describing the information required to be submitted by a proponent to the Authority where referral is required under this section
  - (c) providing for comment to be obtained from the relevant Regional Marine Planning Advisory Committee and Regional Marine Planning Technical Committee in relation to activities referred to the Authority under this section.
- (10) If the Authority is aware of a proposal to undertake, or the undertaking of, an activity that, in its opinion, requires referral to it for assessment and approval under this section but which has not been so referred by the proponent, the Authority may by notice in writing served on the proponent require that the proposed activity be referred to it by the proponent.

### **35 Offence Not to Comply**

- (1) Once made in accordance with this part, a Regional Marine Plan has statutory force under this Act and is binding on all Commonwealth, State and Territory authorities, agencies and departments.
- (2) Any person who:
  - (a) undertakes, or commences to undertake, an activity that is required to be referred to the Authority for assessment and approval under this section without having referred the proposed activity to, and obtained the relevant approval from, the Authority or
  - (b) fails to comply with a notice served by the Authority under Section 34 (10) or

- (c) fails to comply with a condition of an approval granted by the Authority under this section.

is guilty of an offence.

*Penalty: 500 penalty units.*

## **36 Enforcement of Act and Regional Marine Plans**

### *Applications for injunctions*

- (1) If any authority, agency or person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act, a Regional Marine Plan or the regulations:

- (a) the Natural Resource Management Ministerial Council or
- (b) any person, persons or incorporated or unincorporated group, regardless of whether or not any right of that person, persons or incorporated or unincorporated group has been infringed

may apply to the Federal Court for an injunction.

### *Prohibitory injunctions*

- (2) If a person has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of this Act or the regulations, the Court may grant an injunction restraining the person from engaging in the conduct.

### *Additional orders with prohibitory injunctions*

- (3) If the court grants an injunction restraining a person from engaging in conduct and in the Court's opinion it is desirable to do so, the Court may make an order requiring the person to do something (including repair or mitigate damage to the environment).

### *Mandatory injunctions*

- (4) If a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail to do an act, and the refusal or failure did, does or would constitute an offence or other contravention of this Act or the regulations, the Court may grant an injunction requiring the person to do the act.

### *Interim injunctions*

- (5) Before deciding an application for an injunction under this section, the Court may grant an interim injunction:
  - (a) restraining a person from engaging in conduct or
  - (b) requiring a person to do an act.

### *No undertakings as to damages*

- (6) The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.

## Schedule 1 Operationally Related Legislation

This is a representative list of the Commonwealth, state and territory legislation to illustrate what could be included in this Schedule. The final list would be settled through a process of consultation between the Commonwealth, state and territory governments.

<p><b>Commonwealth</b>  <i>Aboriginal and Torres Strait Island Heritage Protection Act 1984</i>  <i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>  <i>Antarctic Marine Living Resources Conservation Act 1981</i>  <i>Antarctic Treaty (Environment Protection) Act 1980</i>  <i>Antarctic Treaty Act 1960</i>  <i>Australian Heritage Council Act 2003</i>  <i>Australian Maritime Safety Authority Act 1990</i>  <i>Australian Tourist Commission Act 1987</i>  <i>Ballast Water Research and Development Funding Collections Levy Act 1998</i>  <i>Biological Control Act 1984</i>  <i>Carriage of Goods by Sea Act 1991</i>  <i>Control of Naval Waters Act 1918</i>  <i>Crimes at Sea Act 2000</i>  <i>Customs Act 1901</i>  <i>Defence Act</i>  <i>Environment Protection (Sea Dumping) Act 1981</i>  <i>Environment Protection and Biodiversity Conservation Act 1999</i>  <i>Export Control Act 1982</i>  <i>Fisheries Administration Act 1991</i>  <i>Fisheries Management Act 1991</i>  <i>Foreign Fishing Boats Levy Act 1991</i>  <i>Foreign Fishing Licences Levy Act 1991</i>  <i>Great Barrier Reef Marine Park Act 1975</i>  <i>Hazardous Wastes (Regulation of Exports and Imports) Act 1989</i>  <i>Historic Shipwrecks Act 1976</i>  <i>Native Title Act 1993</i>  <i>Navigation Act 1912</i>  <i>Offshore Minerals Act 1994</i>  <i>Petroleum (Submerged Lands) Act 1967</i>  <i>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</i>  <i>Quarantine Act 1984</i>  <i>Sea Installations Act 1987</i>  <i>Seas and Submerged Lands Act 1973</i>  <i>Submarine Cables and Pipelines Protection Act 1963</i>  <i>Torres Strait Fisheries Act 1984</i>  <i>Wildlife Protection (Regulation of Exports and Imports) Act 1982</i></p>	<p><b>New South Wales</b>  <i>Coastal Protection Act 1979</i>  <i>Commercial Vessels Act 1979</i>  <i>Environmental Planning and Assessment Act 1979</i>  <i>Fisheries Act 1935</i>  <i>Fisheries Management Act 1994</i>  <i>Forestry and National Park Estate Act 1998</i>  <i>Marine Parks Act 1997</i>  <i>Marine Safety Act 1998</i>  <i>National Parks and Wildlife Act 1974</i>  <i>Native Title (New South Wales) Act 1994</i>  <i>Native Vegetation Conservation Act 1994</i>  <i>Navigation Act 1901</i>  <i>Petroleum (Submerged Lands) Act 1982</i>  <i>Ports Corporatisation and Waterways Management Act 1995</i>  <i>Protection of the Environment Operations Act 1997</i>  <i>Recreation Vehicles Act 1983</i>  <i>Sea Carriage of Goods (State) Act 1921</i>  <i>Threatened Species Conservation Act 1995</i>  <i>Tourism New South Wales Act 1984</i></p> <p><b>Northern Territory</b>  <i>Aboriginal Land Act 1978</i>  <i>Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park Act 1981</i>  <i>Energy Pipelines Act 1982 (No 2)</i>  <i>Fisheries Act 1988</i>  <i>Marine Pollution Act 1999 No 43</i>  <i>Northern Territory Tourist Commission Act 1979 No. 124</i>  <i>Petroleum (Submerged Lands) Act 1981 1982 No. 50</i>  <i>Petroleum Act 1984 No 50</i>  <i>Territory Parks and Wildlife Conservation Act 1997</i></p> <p><b>Queensland</b>  <i>Animal Care and Protection Act 2001</i>  <i>Biological Control Act 1987</i>  <i>Coastal Protection and Management Act 1995</i>  <i>Fisheries Act 1994</i>  <i>Integrated Resort Development Act 1987</i>  <i>Marine Parks Act 1982</i>  <i>Maritime Safety Queensland Act 2002</i>  <i>Nature Conservation Act 1992</i>  <i>Petroleum (Submerged Lands) Act 1982 No 22</i>  <i>Tourism Queensland Act 1979</i>  <i>Transport Operations (Marine Pollution) Act 1995</i></p>	<p><b>South Australia</b>  <i>Aquaculture Act 2001</i>  <i>Coast Protection Act 1972</i>  <i>Development Act 1993</i>  <i>Environment Protection (Sea Dumping) Act 1984</i>  <i>Environment Protection Act 1993</i>  <i>Fisheries Act 1982</i>  <i>Harbours and Navigation Act 1993</i>  <i>Historic Shipwrecks Act 1981</i>  <i>National Parks and Wildlife Act 1972</i>  <i>Native Vegetation Act 1991</i>  <i>Petroleum Act 2000 No. 60</i>  <i>Pollution of Waters by Oil and Noxious Substances Act 1987</i>  <i>South Australian Ports (Disposal of Maritime Assets) Act 2000</i>  <i>South Australian Tourism Commission Act 1993</i>  <i>Wilderness Protection Act 1992</i></p> <p><b>Tasmania</b>  <i>Biological Control Act (1986)</i>  <i>Coastal and Other Waters (Application of State Laws) Act 1982</i>  <i>Environmental Management and Pollution Control Act (1994)</i>  <i>Living Marine Resources Management Act 1995</i>  <i>Marine and Safety Authority Act 1997</i>  <i>Petroleum (Submerged Lands) Act 1982</i>  <i>Pollution of Waters By Oil and Noxious Substances Act 1987</i>  <i>Roads and Jetties Act 1935</i>  <i>Threatened Species Protection Act (1995)</i>  <i>Tourism and Recreational Development Act 1977</i>  <i>Tourism Tasmania Act 1996</i>  <i>Whales Protection Act (1988)</i></p> <p><b>Victoria</b>  <i>Coastal Management Act 1995</i>  <i>Conservation, Forests and Lands Act 1987</i>  <i>Cultural and Recreational Lands Act 1963</i>  <i>Environment Effects Act 1978</i>  <i>Environment Protection Act 1970</i>  <i>Fisheries Act 1995</i>  <i>Flora and Fauna Guarantee Act 1988</i>  <i>Marine Act 1988</i>  <i>National Parks Act 1975</i>  <i>Petroleum (Submerged Lands) Act 1982</i>  <i>Petroleum Act 1998</i>  <i>Pollution of Waters by Oil and Noxious Substances Act 1986</i>  <i>Port Services Act 1995</i></p>
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**Western Australia**

*Caravan Parks and Camping Grounds Act 1995*  
*Conservation and Land Management Act 1984*  
*Environmental Protection Act 1986*  
*Fish Resources Management Act 1994*  
*Fisheries Adjustment Schemes Act 1987*  
*Fishing and Related Industries Compensation (Marine Reserves) Act 1997*  
*Fishing Industry Promotion Training and Management Levy Act 1994*  
*Harbours and Jetties Act 1928*  
*Land Administration Act 1997*  
*Marine and Harbours Act 1981*  
*Maritime Archaeology Act 1973*  
*Pearling Act 1990*  
*Petroleum (Submerged Lands) Act 1982*  
*Petroleum Act 1967 No 72*  
*Pollution of Waters by Oil and Noxious Substances Act 1987*  
*Port Authorities Act 1999*  
*Rottneest Island Authority Act 1987*  
*Sea Carriage of Goods Act 1909*  
*Water and Rivers Commission Act 1995*  
*Waterways Conservation Act 1976*  
*Western Australian Coastal Shipping Commission Act 1965*  
*Western Australian Land Authority Act 1992*  
*Western Australian Marine Act (Sea Dumping) Act 1981*  
*Western Australian Marine Act 1982*  
*Western Australian Tourism Commission Act 1983*

## Schedule 2 International Conventions, Treaties and Agreements Influencing Oceans Management in Australia

Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment between the Government of Australia and the Government of Japan (JAMBA)  
Agreement for the Protection of Migratory Birds and their Environment between the Governments of Australia and the People's Republic of China (CAMBA)  
Antarctic Treaty 1959  
Australia-Netherlands Agreement Concerning Old Dutch Ships 1972  
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989  
Convention concerning the Protection of the World Cultural and Natural Heritage 1972  
Convention for the Conservation of Antarctic Seals 1972  
Convention for the Conservation of Southern Bluefin Tuna 1993  
Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific Region 1989 and Protocols  
Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP) and related Protocols  
Convention on Biological Diversity 1992  
Convention on Conservation of Nature in the South Pacific 1976 (Apia Convention)  
Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR)  
Convention on the Conservation of Migratory Species of Wild Animals 1979 (Bonn Convention)  
Convention on Trade in Endangered Species of Wild Fauna and Flora 1973  
Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971 (Ramsar Convention)  
International Convention for the Prevention of Pollution from Ships 1973  
International Convention for the Safety of Life at Sea 1974 (SOLAS) and Protocol of 1988  
International Convention for the Tonnage Measurement of Ships 1969  
International Convention of lead Lines 1966  
International Convention on Oil Pollution Preparedness, Response and Cooperation 1991  
International Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972  
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978  
International Convention on the Regulation of Whaling 1946  
Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships  
Protocol on Environmental Protection to the Antarctic Treaty 1991 (Madrid Protocol)  
Protocol to the SPREP for the Prevention of Pollution of the South Pacific Region by Dumping 1986  
SPREP Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region 1986  
Torres Strait Treaty 1978  
United Nations Convention on the Law of the Sea 1982  
USSR-Australia Migratory Bird Agreement

## Schedule 3 List of Actions that are to be Referred for Assessment and Approval

This is a representative list of the scheduled actions required to be referred by proponents for assessment and approval by the Australian Oceans Authority pursuant to Section 34 of this Act. The final list would be settled through a process of consultation with interested parties: expansion of shipping traffic

- changes in gear and the location of a fishery
- a new fishery targeting a previously untargeted species
- a new shipping lane
- creation of or expansion of a marine national park
- bioprospecting and subsequent exploitation of ocean life
- mining operations for previously untargeted deposits
- tidal or wave-based energy production projects
- desalination projects
- the use of super trawlers

## Schedule 4 Criteria for Identification and Selection of Marine National Parks

<b>Criteria</b>	<b>Explanation</b>
<i>Ecological</i>	
Comprehensiveness	The full range of biophysical diversity (habitat types) is included in a system of marine national parks
Adequacy	Ability to maintain conservation objectives of individual marine national parks (eg. each unit large enough) and of marine national park system (eg. units close enough together). The size of each national park based on its status, condition, vulnerability and disturbance
Representative	Representative at the levels of biogeographic region, bioregion, ecosystem, habitat and community types. A minimum amount of each bioregion should be included
Criticalness	Degree to which life stages of valued species (eg. rare, endangered, commercial) and important ecosystem processes are dependent on the habitat or area
Irreplaceability	The degree to which a particular habitat is irreplaceable if lost to development or degradation
Naturalness	Degree of protection from human disturbance (favours remote locations and those adjacent to terrestrial parks)
Important species and communities	Includes key species for maintenance of ecosystem processes (eg. seagrass) and significant habitats that help protect rare, threatened, endemic or migratory species. Also include threatened marine ecological communities and critical habitat of listed threatened species
Rarity, uniqueness	Contains rare, unique, iconic or unusual biogeographic qualities, habitats, geological or biological features. Incorporating all of a biophysical feature or place maximises the ecological benefits gained from managing whole ecological units
Vulnerability	Fragile areas receive higher ranking in selection process
Diversity	Variety of habitats or communities; species richness, species diversity (within habitats). Danger that natural areas that are less diverse but of ecological importance will be ignored in selection process
Redundancy	Degree of replication built into the system
Distribution	The marine national park network should reflect that community types, habitats and ecological processes can cover wide latitudinal and longitudinal ranges. High-level protection should exist throughout the water column in recognition of vertical linkages between habitats and species
Ecological processes	The siting of individual areas in the network should reflect currents, dispersal patterns, migratory routes of fish and whales, upwelling areas, spawning aggregations and congregation sites of high-order predators or other important keystone and indicator species
Productivity	Higher priority given to the more productive areas in the selection process
<i>Scientific, cultural, pragmatic and economic</i>	
Benchmarking	Value to monitoring of ecological effects of protection
International value	Areas covered by international conventions
Research	Scientific value for research
Diversity	People are more impressed by areas with high species diversity, and hence see more value in protecting them
Special species or features	Feel-good value of protecting unique, unusual, rare endangered species (eg. endangered mammals)
Feasibility	Take into account ability to manage, enforce and monitor (favours areas adjacent to existing coastal protected areas). Also the level of conflict generated towards proposal
Educational value	Value to formal and informal marine education programs
Restorability	Potential for restoration to natural state
Cultural value	Indigenous and non-indigenous
Recreational and tourism value	Economic and social values and contribution to community wellbeing
Accessibility	For public education and involvement
Scenic beauty	Value to scenic appreciation of marine and coastal environments

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## A glossary of acronyms used in *Out of the blue*

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AAD	Australian Antarctic Division
ACF	Australian Conservation Foundation
AFMA	Australian Fisheries Management Authority
AIMS	Australian Institute of Marine Science
AMSA	Australian Maritime Safety Authority
ANZECC	Australian and New Environment and Conservation Council
AOT	Australian Oceans Territory
BOM	Bureau of Meteorology
BRS	Bureau of Rural Sciences
COAG	Council of Australian Governments
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DAFF	Department of Agriculture, Fisheries and Forestry
DEH	Department of Environment and Heritage
DEST	Department of Education, Science and Training
DITR	Department of Industry, Tourism and Resources
DSTO	Defence Science and Technology Organisation
EBM	Ecosystem-based Management
EEZ	Exclusive Economic Zone
EPBC Act	Environment Protection and Biodiversity Conservation Act
ESD	Ecologically Sustainable Development
FAA	Fisheries Administration Act
FMA	Fisheries Management Act
FRDC	Fisheries Research and Development Corporation
GA	Geoscience Australia
GBRMP	Great Barrier Reef Marine Park
GBRMP Act	Great Barrier Reef Marine Park Act
GBRMPA	Great Barrier Reef Marine Park Authority
IGAAO	Intergovernmental Agreement on Australia's Oceans
IGAE	Intergovernmental Agreement on the Environment
IMCRA	Interim Marine and Coastal Regionalisation of Australia
IUCN	International Union for Conservation of Nature
MAGOP	Ministerial Advisory Group on Oceans Policy
MARPOL	Marine Pollution Convention
MCCN	Marine and Coastal Community Network
MPA	Marine Protected Area
NELA	National Environmental Law Association
NEPC	National Environment Protection Council
NEPM	National Environment Protection Measure
NOAG	National Oceans Advisory Group

NOMB	National Oceans Ministerial Board
NOO	National Oceans Office
NRMMC	Natural Resource Management Ministerial Council
NRSMPA	National Representative System of Marine Protected Areas
OBOM	Oceans Board of Management
OCS	Offshore Constitutional Settlement
RAN	Royal Australian Navy
RAP	Representative Areas Program
RMP	Regional Marine Plan
SERMP	South-east Regional Marine Plan
SESSF	South-east Shark and Scalefish Fishery
TAC	Total Allowable Catch
UNCLOS	United Nations Convention on the Law of the Sea

## **Appendix 1 Participants in the 29 April, 2005 seminar: 'Should we clean up our acts in the oceans?'**

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Simon Mustoe, Director AES-Applied Ecology Solutions Pty Ltd

Brian Cuming, Westernport and Peninsula Protection Council

Paddy O'Leary, ACF Councillor (NT)

John Coulter, ACF Councillor (SA)

Dr Ian McPhail, Victorian Commissioner for Environmental Sustainability

Simon Devecha, ACF Councillor (SA)

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Justin McCaul, ACF Community Outreach Officer

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Averil Bones, Adviser to Leader Australian Democrats Lyn Allison

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Darren Kindleysides, International Fund for Animal Welfare

Sonia Lloyd, Parks Victoria

Ingrid Holliday, Marine Biodiversity & Natural Resources Department of Sustainability and Environment

Annette Jones, Project and Policy Officer Office of the Commissioner for Environmental Sustainability

Indra Soysa, Yarra Regional Services Environment Protection Authority

## Appendix 2 Marine Protected Areas in Australia's Oceans

Marine protected areas in Australia's oceans				
Jurisdiction	Date	MPA Area (ha)	Area of MPA in no-take (ha)	% of MPA in no-take
<i>Commonwealth waters</i>				
Ashmore Reef National Nature Reserve	1983	58843	55045	93.5
Cartier Island Marine Reserve	2000	17200	17200	100
Coringa-Herald National Nature Reserve	1982	885261	885261	100
Lihou Reef National Nature Reserve	1982	843000	84300	100
Elizabeth and Middleton Reefs Marine National Park Reserve (in review)	1987	842896	na	
Great Australian Bight Marine Park	1998	1939500	0	0
Heard Island and McDonald Islands Marine Reserve	2002	6460000	6460000	100
Lord Howe Island Marine Park	2000	300500	96208	32.1
Macquarie Island Marine Park	1999	16,200,000	5,800,000	35.8
Mermaid Reef Marine National Nature Reserve	1991	53987	53987	100
Ningaloo Marine Park	1987	243600	0	0
Solitary Islands Marine Reserve	1993	12962	79	0.6
Tasmanian Seamounts Marine Reserve	1999	38894**	0	0
Great Barrier Reef Marine Park	1975	34,440,000	11539500	33.5
<i>Queensland waters</i>				
Great Barrier Reef Coast Marine Park	2004	12,199,400ha	na	na
Moreton Bay Marine Park (plan in review)	1993	342725	<1700	<0.5
Great Sandy Marine Park (northern section)	Proposed	590550	22501	3.8
Hervey Bay Marine Park (to be replaced by Great Sandy Marine Park)	1989	197794	0	0
Wongarra Marine Park (to be replaced by Great Sandy Marine Park)	1991	10706	109	1.0
<i>Western Australian waters</i>				
Hamelin Pool Marine Nature Reserve	1990	11,574,000)	317000	2.7
Jurien Bay Marine Park	2003	132000	132000	100
Marmion Marine Park	1987	82376	3050	3.7
Montebello Islands Marine Park	1987	9500	41	0.4
Barrow Island Marine Park	2004	58375	28640	49.1
Ningaloo Marine Park		4169	4169	100
Rowley Shoals Marine Park	1987	263,343	88365	33.6
Shark Bay Marine Park	1992	87,674	21169	24.1
Shoalwater Islands Marine Park	1990	748,735	37870	5.1
Swan Estuary Marine Park	1990	6,545	0	0
	1990	346	0	0
<i>Northern Territory waters</i>				
Gurig		7,183,900	70,000	1
		na	na	na
<i>South Australian waters</i>				
Great Australian Bight Marine Park (South Australian section)	1995/96	6,003,200	59000	1
Encounter Bay Marine Park (proposed)	2005	168320	59000***	35
		243315	31388	12.9
<i>Victorian waters</i>				
Cape Howe Marine National Park	2002	1,021,300	52000	5
Point Hicks Marine National Park	2002	4050	4050	100
Beware Reef Marine Sanctuary	2002	4050	4050	100
Ninety Mile Beach Marine National Park	2002	220	220	100
Corner Inlet Marine National Park	2002	2750	2750	100
Wilsons Promontory Marine National Park	2002	1550	1550	100
Bunurong Marine National Park	2002	15550	15550	100
Yaringa Marine National Park	2002	2100	2100	100
French Island Marine National Park	2002	980	980	100
Churchill Island Marine National Park	2002	2800	2800	100
Mushroom Reef Marine Sanctuary	2002	670	670	100
Port Phillip Heads Marine National Park	2002	80	80	100
Point Cooke Marine Sanctuary	2002	3580	3580	100
Jawbone Marine Sanctuary	2002	290	290	100
Ricketts Point Marine Sanctuary	2002	30	30	100
Barwon Bluff Marine Sanctuary	2002	115	115	100
Point Danger Marine Sanctuary	2002	17	17	100
Point Addis Marine National Park	2002	25	25	100
Eagle Rock Marine Sanctuary	2002	4600	4600	100
Marengo Reefs Marine Sanctuary	2002	17	17	100
Twelve Apostles Marine National Park	2002	12	12	100
The Arches Marine Sanctuary	2002	7500	7500	100
Merri Marine Sanctuary	2002	45	45	100
Discovery Bay Marine National Park	2002	25	25	100
	2002	3050	3050	100

<b>Jurisdiction</b>	<b>Date</b>	<b>Area (ha)</b>	<b>Area no-take (ha)</b>	<b>% no-take</b>
<i>Tasmanian waters</i>				
Governor Island Marine Reserve	1991	2,235,700	91000	4
Tinderbox Marine Nature Reserve	1991	53		
Maria Island National Park Marine Reserve	1991	52		
Ninepin Point Marine Nature Reserve	1991	1248	1248	100
Macquarie Island Marine Reserve	1991	63		
Kent Group Marine Reserve	2000	74715	74715	100
Port Davey-Bathurst Harbour Marine Reserve	2004	29000	14000	48.3
	2004	18000	10000	55.6
<i>New South Wales waters</i>				
Batemans Marine Park	2005	880,200	25300	2.8
Cape Byron Marine Park	2002	85000	na	na
Jervis Bay Marine Park	1997	22700	6105	27.5
Lord Howe Island Marine Park	1999	22000	4253	19.3
Port Stephens-Great Lakes Marine Park	1999	48000	12500	26
Solitary Islands Marine Park	2005	97200	na	na
	1997	71000	8650	12.2
<p>The MPAs listed are those that have been established under national parks, marine parks or nature conservation acts of parliament. The table excludes the relatively small intertidal protection areas and aquatic reserves established under fisheries legislation in New South Wales, and the aquatic reserves in South Australia, Western Australia and the Northern Territory. It also excludes Queensland's fish habitat and dugong protection areas that in part overlap the Great Barrier Reef Marine Park but also provide little protection for marine biodiversity.</p> <p>*area of Australia's Exclusive Economic Zone of 8.6million square kilometres. ** The Tasmanian seamounts reserve only give no-take protection below 500m beneath the surface, not to the entire water column and is therefore listed as zero no-take. ***a small part of this area in the sanctuary zone in the Great Australian Bight Marine Park allows line fishing from beaches. na. not available.</p>				