Assessment Report

Ocean management

the legal framework

The South-east Regional Marine Plan

Title:
Ocean management – the legal framework
The South-east Regional Marine Plan
Assessment Reports

Disclaimer:
This report was prepared by the National Oceans Office to assist with consultation on the development of the South-east Regional Marine Plan, as part of the Commonwealth Government's *Australia's Oceans Policy*. The views expressed in this report are not necessarily those of the Commonwealth. The Commonwealth does not accept responsibility for the contents of this report.

Sourcing:
Copies of this report are available from:

The National Oceans Office
Level 1, 80 Elizabeth St, Hobart
GPO Box 2139
Hobart TAS 7001
Tel: +61 3 6221 5000
Fax: +61 3 6221 5050
www.oceans.gov.au

For further information about this report, contact Ester Guerzoni, Public Affairs Officer, tel (03) 6221 5000.

Credits:

Design: CSIRO Marine Research

Prepress: Photolith

Printing: Printing Authority of Tasmania

Published by the National Oceans Office

Photographs: Ship in rough seas, cray pots © CSIRO Marine Research Division; king prawn tail © Karen Gowlett- Holmes; puffer fish and ship's anchor © Dave Stephenson

State Library Ref:
Ocean management – the legal framework
South-east Regional Marine Plan
Assessment Reports

1-877043-20-6

The National Oceans Office is an Executive Agency of the Commonwealth Government of Australia

Contents

Executive Summary

This assessment report attempts to describe broadly the Commonwealth legislation that affects how we use and protect our oceans in the South-east Marine Region (SEMR). This is the management and institutional framework of the SEMR.

We need to understand the framework in order to decide how it can be used to implement regional marine plans, or if the framework ultimately needs to be varied or supplemented for regional marine planning.

Our management of our oceans is not made up by a single framework for oceans use, but has arisen historically from sectoral planning, eg fisheries agencies regulate fishing and environment agencies regulate the use of the environment. This approach is jurisdictionally based and characterised by a multiplicity of legislation. More than 100 pieces of Commonwealth legislation apply to ocean use and ecosystem health in the South-east Marine Region (see Appendix I).

This Report describes broadly the management of the sectors and divides them into the following chapters:

- overarching legislative framework of marine regulation in Australia
- shipping and related activities
- Indigenous interests
- maritime security
- environment protection
- living marine resources
- seabed and subsoil activities
- tourism and recreation.

The report then presents some concerns and issues regarding the current framework for managing Australia's oceans, as well as possible issues for implementing a regional marine plan. Key stakeholders presented these issues and views to the National Oceans Office during a workshop conducted to assist the assessment process.

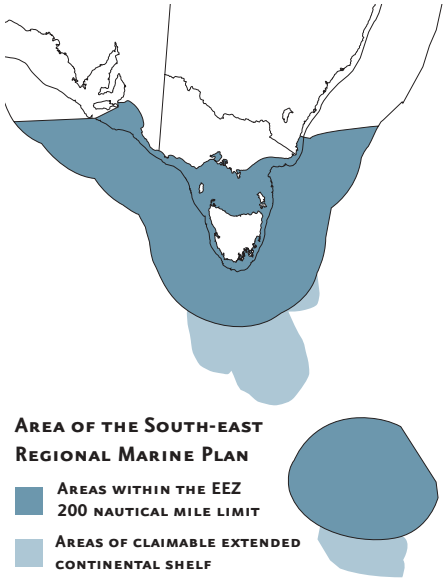
Preface

Australia's Oceans Policy and regional marine planning provides a framework for the people of Australia to explore, use, protect and enjoy our extensive marine resources. As its base, the Policy recognises the need to protect the biological diversity of the marine environment while at the same time promoting and encouraging sustainable, secure marine industries.

Regional marine planning is a way of achieving the *Oceans Policy* vision. It uses large marine ecosystems as one of the starting points for the planning process by creating planning boundaries that are based on ecosystem characteristics – a major step towards ecosystem-based management.

This assessment report is one of six that are an initial step in better managing Australia's oceans. They provide a knowledge base for developing the South-east Regional Marine Plan – the first regional marine plan being implemented under *Australia's Oceans Policy*.

The South-east Marine Region brings together three of the large marine ecosystems: the South-eastern, the South Tasman Rise and Macquarie.



The South-east Marine Region covers over 2 million square kilometres of water off Victoria, Tasmania (including Macquarie Island), southern New South Wales and eastern South Australia.

The Region includes both inshore (State) waters (from the shore to three nautical miles outside the territorial baseline) and Commonwealth waters (from three to 200 nautical miles outside the territorial baseline), as well as the claimable continental shelf beyond the Exclusive Economic Zone.

To build a solid understanding of the complexities of the Region, information on ecosystems and human activities was gathered for both State and Commonwealth waters across six areas:

- biological and physical characteristics – identifying the key ecological characteristics in the Region, their linkages and interactions
- uses within the South-east Marine Region – describing our knowledge of the nature and dimension of human uses and their relationship with each other
- impacts on the ecosystem – providing an objective analysis of how activities can affect the Region's natural system
- community and cultural values – ensuring community wishes and aspirations are reflected in the planning process
- Indigenous uses and values – gaining an understanding of and support for Indigenous interests in the Region
- management and institutional arrangements – analysing current legislative and institutional frameworks to determine the best mechanism for implementing regional marine plans.

Specific scientific projects have filled gaps in our knowledge wherever possible and have clarified some areas in our understanding of the deep ocean's ecosystems. Specialist working groups of stakeholders and experts in their fields have provided invaluable direction and input to the planning process. As well, stakeholder workshops, community surveys and consultations have all helped build our knowledge base and have provided a voice for the people of the South-east Marine Region. Without this consultation, the picture would not be complete.

Moving forward

The six assessment reports are about increasing our understanding and appreciation of the Region's wealth and ecosystem diversity, and starting to define what we want for the Region. From this shared understanding, we will move forward to define a plan that maintains ocean health and supports competitive yet sustainable industries, as well as enhancing the enjoyment and sense of stewardship the people of Australia feel for the oceans.

While the Region includes State coastal waters, the South-east Regional Marine Plan will focus on the Commonwealth ocean waters.

The shared values and understanding of the Region gathered during the assessment stage give us a foundation for building a plan for the Region. The National Oceans Office has produced an Assessment Summary which brings together the key findings of the six assessment reports.

Supporting this Summary is a Discussion Paper which provides topic areas to help communities, industry and government begin discussion on the planning objectives, issues and concerns for the South-east Regional Marine Plan. The Discussion Paper also details the next stage of the planning process for the South-east Regional Marine Plan.

Your input into the regional marine planning process is important. To register your interest or for more information about the South-east Regional Marine Plan, *Australia's Oceans Policy* and the National Oceans Office, visit www.oceans.gov.au, or phone (03) 6221 5000.

Introduction

A challenge confronting the implementation of *Australia's Oceans Policy* is to work within the existing legal and institutional framework for the South-east Marine Region. Much of this framework is dictated by two core elements:

- the Australian Constitution and associated legal and political mechanisms that have evolved over 100 years of operation
- international obligations dealing with maritime and ocean matters to which Australia is a subject.

While the marine environment was not a central issue during the debates leading to Federation, the sharing of power between the Federal Government and constituent States was a fundamental principle of the Constitution. This still remains the case as Australia commences its second century as a nation. During the past 100 years, regulation and management of the offshore environment have become more critical. There has been a gradual development of sophisticated mechanisms for institutional sharing of regulatory control and management of offshore areas between the Commonwealth, States and the Territories. These institutional arrangements are crucial to understanding the offshore legal and political regime in Australia.

No less significant are Australia's international law obligations incurred under a multitude of both multilateral and bilateral conventions and treaties dealing with the law of the sea, maritime law, and the environment. These instruments confer upon Australia certain rights (such as the capacity to exploit the marine environment and its resources) and obligations (such as the obligation to preserve and protect the marine environment). Reconciling these rights and obligations is a major issue for Australia, which has both sovereignty to twelve nautical miles, and sovereign rights over a vast offshore domain extending from tropical waters in the north to polar waters in the south.

The core elements of the regulatory framework for Australia's offshore areas are supported by a range of additional legal, policy and political mechanisms. It is within these parameters that the implementation of *Australia's Oceans Policy* must operate.

State legislation has not been examined in this Report, except where it is necessary to describe the management arrangements between the Commonwealth and State/Territories.

Within this Report, the word 'State' or 'States' may be a reference to one of two separate and distinct entities. A 'State' may be a country recognised by international law, for example, a country that is a signatory to an international treaty will be described as a party State. Alternatively, a 'State' may be one of the six States of the Australian Federation. The meaning of the term 'State' within this Report will depend upon the context in which it has been used.

The management and institutional arrangements assessment process

An expert Working Group was convened to direct the assessment. The Working Group includes:

- Professor Martin Tsamenyi (Centre for Maritime Policy, University of Wollongong)
- Martijn Wilder (Baker and McKenzie)
- Don Rothwell (Faculty of Law, University of Sydney)
- Robin Warner (Royal Australian Navy)
- Marcus Haward (Institute of Antarctic and Southern Oceans Studies)
- Mark Zanker (Attorney-General's Department)

The Working Group provided expert advice on the collection of information. The Group also assisted with reviewing the content of this report.

Our understanding of the management of the Region was assisted by workshop discussions between the Working Group and South-east Marine Region stakeholders. The Working Group also talked to stakeholders about their aspirations for implementation of the South-east Regional Marine Plan.

Chapter 1
Overarching legislative framework of marine regulation in Australia

1.1. Introduction

The overarching legislative framework of marine regulation in Australia is dominated by Australia's constitutional structure (and the arrangements that have been made under it) and Australia's international law obligations – principally those relating to the law of the sea. Following the development of the law of the sea in the mid 20th Century, a need arose to reconcile our international law obligations with the Constitution of 1901. The reconciliation was achieved through the *Seas and Submerged Lands Act 1973* (Cth) followed by the Offshore Constitutional Settlement in 1979 and the related implementing legislation. This chapter describes the background to the constitutional and law of the sea developments that have taken place throughout the 20th Century. It describes the framework they now provide for the overarching legislative regime and then the framework itself.

Any discussion of Australian law that applies to offshore areas needs to be viewed in the context of international law. The scope of Australian law and the nature of the powers that can be used are all affected by the content of international law, so before embarking on an analysis of the domestic situation, a brief overview of relevant international law is necessary.

At international law, Australia possesses the right to regulate activities and impose its laws in the seas next to its coastline. The nature of these powers has been developing over many years and is presently found in the *1982 United Nations Convention on the Law of the Sea* (LOSC).[1] The LOSC sets out the basic rules for the exercise of jurisdiction by a coastal State. The greater the distance from the coast, the lesser the jurisdiction a State has over those waters. These zones and the relevant rights granted to a coastal State are set out in Table 1.

The LOSC represents the most significant of the international legal obligations with which Australia has undertaken to comply, affecting our legislative powers to regulate foreign ships in Australian waters. The LOSC sets out a general framework of internationally agreed responsibilities and jurisdictions including those for a ship's Flag State (which grants a ship the right to sail under its flag) and sets responsibilities and jurisdictions for the Coastal States (through whose maritime zones the ship sails) and Port States whose port the ship has entered. The LOSC recognises the sovereignty of the Coastal State over foreign flag ships in the territorial sea but subject to their right of innocent passage. Innocent passage is defined as being passage that is 'not prejudicial to the peace, good order or security of the Coastal State'.

Within this report a 'baseline' is a starting point for the measurement of offshore jurisdictional zones such as the territorial sea. The rules for marking the baseline are defined in international law. The usual marking point is the low water mark, however, special provisions allow the inclusion of river mouths and bays. There are also special provisions in relation to archipelagoes, heavily indented coastlines and offshore islands.

Australia has been a party to the LOSC since it entered into force in late 1994, and was an enthusiastic participant in the diplomatic negotiations that gave rise to the Convention. Shortly before the LOSC entered into force, the Commonwealth passed the *Maritime Legislation Amendment Act 1994* (Cth), which was designed to bring Australian offshore practice into line with international obligations. These amendments had the effect of adjusting the *Seas and Submerged Lands Act 1973* (Cth) so as to make it consistent with the LOSC.

1. [1994] Australian Treaty Series No 31; in force 16 November 1994.

Table 1: *Zones and rights for coastal States.*

Zone	Definition	Coastal State Jurisdiction
Internal Waters	Waters within the baselines defining the territorial sea (usually above low water mark). These waters mostly comprise bays, estuaries and ports	Full sovereignty as if land territory (ie, no right of innocent passage). May regulate the conduct and safety of foreign flag ships in internal waters as required, subject to any rights conferred by international treaty
Territorial Sea	12 nautical miles seaward of the baselines (usually low water mark)	Sovereignty. Australia may impose comprehensive controls in this area, with the exception that it must respect the right of innocent passage of foreign vessels. Foreign ships are allowed to navigate through the territorial sea to transit these waters without entering any port or in the course of proceeding to or from internal waters or calling at a port
Contiguous Zone	Between 12 nautical miles and 24 nautical miles seaward of the territorial sea baselines	Limited enforcement jurisdiction in relation to customs, fiscal, sanitary and immigration matters
Exclusive Economic Zone (EEZ)	Between 12 nautical miles and 200 nautical miles seaward of the territorial sea baselines	The right to explore and exploit the living and non-living resources of the EEZ and the concomitant obligation to protect and conserve the marine environment. Foreign flag ships have rights closely associated with those applying on the high seas, such as freedom of navigation
Continental Shelf	Subject to the provisions of Article 76 of LOSC, between 12 nautical miles and 200 nautical miles from the baseline and the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline where the outer edge of the continental margin does not extend to that distance	The exclusive right to explore and exploit the living and non-living resources of the shelf, while not infringing or resulting in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in LOSC
High Seas	All parts of the sea that are not included in other maritime zones (internal waters, territorial sea and the EEZ)	No State may subject any part of the high seas to its sovereignty. The high seas are open to all States and they have the right to freedom of navigation over the high seas. In general, a flag State has the exclusive right to exercise jurisdiction over its ships on the high seas

1.2. The Commonwealth-State constitutional history

The contemporary offshore jurisdiction available to the States is directly linked to issues surrounding their offshore jurisdiction as colonies before Federation. The latter half of the 19th Century saw the British Colonial Office develop the doctrine of colonial extraterritorial legislative incompetence.[2] This doctrine prevented colonies (such as New South Wales) from making laws that applied beyond the limits of their colony. When combined with the English decision of *R v Keyn (The Franconia)*,[3] which indicated that the common law jurisdiction of the courts ended at the sea shore in the absence of legislation, the result was to limit severely the ability of the colonies to make laws for their offshore areas.[4] Between 1901 and World War II, virtually no legislation for offshore areas was passed by the States, nor the Commonwealth, except for inshore fisheries within three nautical miles.

1.2.1 Exercise of Commonwealth power over the offshore

This situation was also reflected in the Commonwealth Constitution, which was drafted during the 1890s, and entered into force in 1901. The Constitution does give the power to the Commonwealth to regulate both external affairs [s 51(xxix)] and fisheries beyond territorial limits [s 51(x)].[5] However before Federation and for many years afterward, it was believed that the former power had no application to fisheries, and that the latter related only to waters beyond the territorial sea.[6] It was believed that the State Parliaments had jurisdiction over the territorial sea.[7] As such the Commonwealth took little action in relation to offshore areas.

In the early 1950s, the Commonwealth Government moved to regulate offshore fisheries beyond three nautical miles, with the *Fisheries Act 1952* (Cth) and the *Pearl Fisheries Act 1952* (Cth), repealed by the *Continental Shelf (Living Natural Resources) Act 1968*.[8] The first Act dealt with fisheries in general beyond three miles, while the latter two sought to achieve the regulation of sedentary fisheries, such as pearl shell, trochus and béche-de-mer beyond the territorial sea.

[2] The doctrine reached what might be described as its 'zenith' in limiting the competency of colonial legislatures in *MacLeod v Attorney-General (NSW)* [1891] AC 455; see the discussion in D P O'Connell, 'The Doctrine of Colonial Extra-territorial Incompetence' (1959) 75 *Law Quarterly Review* 318 esp at 323–327.

[3] (1876) 2 Ex D 63.

[4] This is discussed in D P O'Connell, 'Problems of Australian Coastal Jurisdiction' (1958) 35 *British Yearbook of International Law* 199 at 226–229. That is not to say that colonial Parliaments did not attempt to pass legislation for their adjacent maritime areas. Before Federation, both Queensland and Western Australia passed legislation to regulate conduct in waters offshore. *The Pearl Shell and Bêche-de-Mer Fishery Act 1881 (Qld)* and its amending Act in 1891 extended Queensland jurisdiction to certain fishing activities within one league of that colony's coast. The Western Australian legislation went further, with the *Pearl Fishery Act 1886* (WA) and *Sharks [sic] Bay Pearl Fishery Act 1892* (WA) applying to waters even beyond three nautical miles: W R Edeson, 'Australian Bays' (1968–69) 5 *Australian Yearbook of International Law* 5 at 28; D P O'Connell and A Riordan, *Opinions on Imperial Constitutional Law* (1971) 196–197; see generally C J Colombos, *The International Law of the Sea* (1967) 406.

[5] The latter was the same power given to the Federal Council of Australasia: *Federal Council of Australasia Act 1885* (Imp) s15(c).

[6] The proposition that the Commonwealth would have no power over the territorial sea is evident from the Constitutional Convention debates over the precursor to s 51(x) in 1898: see *Debates of the Australasian Constitutional Convention*, Vol V (1990) 1855–1865 and 1872–1874.

[7] Ibid; O'Connell, above n 4, 225–226.

[8] This may also have reflected a growing belief that the Commonwealth's position as regards offshore areas was stronger against the States than was first believed. This change in position was analysed by Professor O'Connell in the 1950s, long before High Court litigation in the late 1960s and 1970s. It is important to note however that the Commonwealth legislation was not intended to operate in competition with State law: O'Connell, above n 4, 202.

The Acts were based on s 51(x) of the Constitution, and did not significantly alter the situation in relation to activities subject to State regulation.[9]

In the 1960s, the discovery of oil in the seabed beneath Bass Strait led the Commonwealth Government to reconsider Australia's offshore regime. Before 1960 no legislation existed to regulate the exploration for and exploitation of undersea oil deposits. There was some difference of opinion as to whether State or Commonwealth legislation would be appropriate for the task.[10] Conflict between the Commonwealth and States was avoided by the negotiation of a compromise arrangement dealing with offshore petroleum exploitation.

The Commonwealth Parliament passed the *Petroleum (Submerged Lands) Act 1967* (Cth), and each State passed complementary legislation to deal with offshore areas.[11] The Australian continental shelf was divided into vast regions with each State having some responsibility for administration of the area. Revenue derived from each region was to be shared between the Commonwealth and the relevant State,[12] although in 1967, the only affected State was Victoria.[13] The regions were huge, and almost certainly extended over areas of the deep seabed, internationally beyond Australia's jurisdiction.[14]

This did not mean that Australia was in breach of its international obligations under the 1958 *Convention on the Continental Shelf* [15] as the settlement was a domestic arrangement, and of itself it did not amount to a claim over the continental shelf of the State areas. These arrangements have been continued today.

1.2.2 The Seas and Submerged Lands Act

The most significant legislative action to date addressing the management of Australia's offshore areas was the passing of the *Seas and Submerged Lands Act 1973* (Cth). This vested all of the territorial sea in the Commonwealth, except those State waters that existed immediately before Federation.[16] Waters within the limits of the State would only be those that could be regarded as such at common law, and therefore such waters would typically be relatively small bays, harbours and estuaries. The Act also sought to give effect to the provisions of the 1958 *Convention on the Territorial Sea and Contiguous Zone* [17] and 1958 *Convention on the Continental Shelf*.[18] The Act allowed Proclamations to be made for territorial sea baselines, the breadth of the territorial sea, the closing of historic bays, the limits of the continental shelf and the making of the limits of both the territorial sea and the continental shelf charts.

9 It is notable that the Commonwealth's legislation did not seek to dispossess the States of their perceived jurisdiction to three nautical miles. As such, the Acts applied not only to waters beyond the three nautical mile limit of a State, but to all waters offshore of a territory: DP O'Connell, 'Australian Coastal Jurisdiction' in International Law in Australia 246 at 281–282.

10 The Victorian Parliament passed the *Underseas Mineral Resources Act 1963* (Vic) to deal with the problem.

11 By passing complementary legislation, the difficulty over ultimate responsibility was removed, as regardless of which level of Government was responsible for the continental shelf, both levels had passed identical legislation. It was therefore unimportant to determine the validity of either the Commonwealth or the State Acts: see R Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (1990) 66.

12 The petroleum miner was to pay a 10% royalty to the adjacent State and Commonwealth Governments, based on the value of oil extracted at the wellhead, as well as an additional 1% override royalty. In dividing the 10% royalty, the adjacent State received 60% and the Commonwealth 40%. The State also received all of the override royalty: R D Lumb, 'Australian Coastal Jurisdiction' in K W Ryan (ed), *International Law in Australia* (1984) 370 at 383; Cullen, above n 11, 66–67.

13 To date, drilling has produced revenue in the regions allocated to Western Australia, the Northern Territory and the Ashmore and Cartier Islands Territory.

14 For example the deep ocean waters between Tasmania and Macquarie Island were within the Tasmanian area of responsibility.

15 [1963] Australian Treaty Series No 12.

16 *Seas and Submerged Lands Act 1973* (Cth) s 6. The exception of waters within State limits at Federation is found in s 14 of the Act.

17 [1963] Australian Treaty Series No 12.

18 [1963] Australian Treaty Series No 12.

The Seas and Submerged Lands Act did not alter Australia's position at international law. It was merely a domestic reorganisation of Australia's offshore legislative regime. The Act did not see the claiming of any extended areas of jurisdiction, and while it did permit the formal claiming of historic bays and territorial sea baselines, there were no comprehensive moves in that direction for ten years. Fundamentally, although the *Seas and Submerged Lands Act* was domestically a significant step for Australian law of the sea practice, it had no impact on Australian international practice, and did not alter or extend previously asserted Australian rights to offshore areas.

The States responded to the passage of the Act by referring the constitutionality of the legislation to the High Court, leading to the decision in *New South Wales v The Commonwealth* (commonly referred to as the *Seas and Submerged Lands Case*).[19] While the High Court's decision has been a fertile source of commentary, it is not proposed to examine the decision in detail, as it raised constitutional rather than international law of the sea issues. It is sufficient to say that the Court determined that the Commonwealth's position was in fact correct, and that it was responsible for all waters and seabed beyond the low-water mark.[20]

The core of the analysis of the High Court was the discussion of the limits of the Australian colonies immediately before Federation. The majority judges, Chief Justice Barwick, and Justices McTiernan, Mason, Jacobs and Murphy, were of the view that the colonies' sovereignty ended at the low-water mark. Each of these judgments relied on *R v Keyn* (commonly referred to as *Keyn's Case*) to substantiate that conclusion. Their judgments also indicated, although for a variety of reasons, that the Commonwealth Parliament had the power to legislate, and had power over, these offshore areas, consistent with international law. As such the Commonwealth had the power to deal with all maritime areas that were not part of a State, and according to the Court, all waters (save certain internal waters) fell into this category.

1.3. The Offshore Constitutional Settlement

The decision in the *Seas and Submerged Lands Case* caused much disquiet amongst the States. A change of government in Canberra saw the Commonwealth and State Governments begin negotiations on jurisdiction in offshore areas. In 1979, the negotiations concluded with the finalisation of the Offshore Constitutional Settlement (OCS).[21]

The OCS confirmed the High Court and the *Seas and Submerged Lands Act* position that sovereignty over all offshore areas (aside from those that were part of a State at Federation) was vested in the Commonwealth. However, the OCS surrendered to the States jurisdiction over the sea and seabed within three nautical miles of the baselines of the territorial sea. This allowed the States to maintain the traditional control they had enjoyed over the territorial sea before the *Seas and Submerged Lands Act*, without the necessity of altering State boundaries. Notably, the OCS was expressly stated to be in accord with Australia's international obligations with respect to the territorial sea.[22]

[19] (1975) 135 CLR 337.

[20] Detailed discussions of the case see Cullen, above n 11, 86–90; see also R D Lumb, *The Law of the Sea and Australian Offshore Areas* (1978) 69–76.

[21] For more detailed discussions of the OCS see M Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13 *Marine Policy* 334; Cullen, above n 11, 104–129; M Crommelin, 'Offshore Mining and Petroleum: Constitutional Issues' (1991) 3 *Australian Mining and Petroleum Law Journal* 191; B R Opeskin and D R Rothwell, 'Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles' (1991) 22 *Ocean Development and International Law* 395 at 408–410; R Cullen, 'Canada and Australia: A Federal Parting of the Ways' (1989) 18 *Federal Law Review* 53 at 75–77; R Cullen, 'The Encounter between Natural Resources and Federalism in Canada and Australia' (1990) 24 *University of British Columbia Law Review* 275 at 297–298; and the discussions in the (1979) 53 *Australian Law Journal* 605; (1976) 50 *Australian Law Journal* 206; (1980) 54 *Australian Law Journal* 517.

[22] See *Coastal Waters (State Title) Act 1980* (Cth) s 6 and *Coastal Waters (State Powers) Act 1980* (Cth) s 6.

The Settlement was achieved through conjoint State and Commonwealth legislation, and came into effect in 1983.[23] It consisted of a series of related Acts of Parliament passed by the Commonwealth and by each State and Territory. The OCS is implemented throughout the South-east Marine Region. The two key pieces of the package were the *Coastal Waters (State Powers) Act 1980* and the *Coastal Waters (State Title) Act 1980*, the impact of which is outlined below.[24]

The Coastal Waters (State Powers) Act vests within each State the power to make laws governing the adjacent ocean to their territory out to three nautical miles. This amounts to a grant of plenary extraterritorial authority, as the Act explicitly states it does not extend the limits of a State.[25] As such, a State can validly make laws for activities taking place in a three-mile belt of territorial sea without having to establish any direct connection with the State,[26] as would be required with other instances of legislation having extraterritorial effect.[27]

The Coastal Waters (State Title) Act fulfils an analogous function to the *Coastal Waters (State Powers) Act*. It vests title to three nautical miles of adjacent territorial sea in each State as if those waters and seabed were located within the limits of the State. This was described at the time as the vesting of proprietary rights in the States to the relevant waters and seabed, and was therefore complementary to the granting of power to regulate the areas. If new territorial sea baselines are drawn, as happened in 1983 and 1988, the area subject to State title is changed appropriately. Existing arrangements, such as the Great Barrier Reef Marine Park, remain unchanged by the legislation.[28]

The OCS recognises the need for cooperative federalism in the management of ocean resources. Commonwealth and State/Territory Governments may agree to joint management arrangements of particular marine living resources that are found in waters subject to both Commonwealth and State control. Such arrangements may allow for the management of the resources by State authorities, even in waters outside the State three mile territorial sea. There are over 50 such arrangements.

Any doubts over the validity of the OCS or its enacting legislation were finally put to rest in 1989. In *Port MacDonnell Professional Fishermens' Association v South Australia*[29] the High Court confirmed the valid application of State fisheries legislation founded on a Commonwealth-State agreement over jurisdiction based on the OCS. The Court also took the opportunity to expressly indicate that the Settlement's legislative framework was a valid exercise of power under s 51(xxxviii) of the Constitution.[30]

[23] The Commonwealth, on the request of the States, passed the *Coastal Waters (State Title) Act 1980* (Cth) and the *Coastal Waters (State Powers) Act 1980* (Cth) pursuant to s 51(xxxviii) of the Constitution. Reliance on this head of power is explicit in the case of the latter Act, being referred to in its Preamble.

[24] For the Northern Territory, the relevant pieces of legislation are the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) and the *Coastal Waters (Northern Territory Title) Act 1980* (Cth).

[25] This limitation is important, as to alter the limits of a State would have had ramifications under s 123 of the Constitution.

[26] This does not prevent the Commonwealth from retaining its control over particular activities within the State territorial sea, such as petroleum pipelines, navigation structures, quarantine matters, and defence: s 4(2) *Coastal Waters (State Title) Act 1980* (Cth).

[27] See *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1.

[28] See *Coastal Waters (State Title) Act 1980* (Cth) s 4(3).

[29] (1989) 168 CLR 340.

[30] See R Cullen, 'Case Note: *Port MacDonnell PFA Inc v South Australia*' (1990) 16 *Monash University Law Review* 128.

1.4. Recent developments

The OCS was concluded in 1980, and predated by over a decade Australia's ratification of the LOSC. Nevertheless, many of the salient items of the Convention were already identifiable at that time. Indeed, Australia had declared a 200 nautical mile fishing zone, based on the concept of the Exclusive Economic Zone (EEZ) that was to be incorporated in the LOSC, in November 1979, and the OCS clearly envisaged Australian practice changing with developments in international law. Most notable of these changes was the recognition in the OCS that Australia might extend its territorial sea in the future. When that occurred, as it did in 1990,[31] the States were to retain jurisdiction to only three nautical miles, with the Commonwealth retaining jurisdiction over the remaining nine miles of territorial sea. In addition, the OCS guarantees the continuation of international law rights that Australia owes other countries in regard to the territorial sea, most notably the right of innocent passage.

Ultimately the OCS gives the States in the South-east Marine Region title and jurisdiction over a belt of territorial sea three nautical miles from the territorial sea baselines. The Commonwealth retains rights to make laws with respect to all activities geographically external to Australia,[32] and aside from the matters handed to the States under the OCS, can deal with all marine matters in the Region.

The recent development in Australian law of the concept of native title under the *Native Title Act 1993* (Cth) has raised for consideration whether the Commonwealth, and previously the British, ever possessed radical title over offshore areas. This matter was given some consideration in the recent High Court decision of *Commonwealth v Yarmirr* [33] when the Court was asked to consider native title over the sea, sea-bed and sub-soil in Northern Territory offshore waters. In the course of its judgment, the High Court considered the continuing impact of *Keyn's Case* in an Australian context. While there was disagreement,[34] the Court did take the view that it was clear that at no time "before Federation did the Imperial authorities assert any claim of ownership to the territorial sea or sea-bed".[35] Such title relied upon international law identifying the territorial sea as an area over which a coastal State possessed certain sovereign rights. Therefore, notwithstanding contemporary developments concerning native title, it is clear from the High Court's perspective that nothing disturbs the basic foundations upon Australia law, sovereignty, and title over offshore areas.

[31] See Opeskin and Rothwell, above n 21, 395.

[32] See *R v Polyukovich* (1991) 172 CLR 501.

[33] [2001] HCA 56.

[34] See the dissenting opinion of McHugh J at [2001] HCA 56 at 181.

[35] [2001] HCA 56 at 59 per Gleeson CJ, Gaudon, Gummow, Hayne JJ.

Chapter 2
The regulatory framework for shipping and related activities

2.1. Introduction

Shipping activities are governed by a mix of international and national law in Australia and accordingly this is an area where the Commonwealth has principal responsibility. Much of the traditional focus in shipping law in Australia has concentrated on the *Navigation Act 1912* (Cth), which regulates a multitude of ship-related activities. However, ship activities as they impact on the marine environment are addressed more under international law, which the Commonwealth has given effect to under relevant national laws. As such, this chapter begins with an overview of the relevant international law before assessing national law.

Shipping is a world-wide industry by which the bulk of the world's trade is carried.[36] As a result shipping links with many other industries and the regulatory framework are highly complex. The framework extends widely, so that it involves regulators of many activities; it also extends deeply, so that it reaches from the highest level of international regulation down through national, State and local government. This chapter begins by examining the international context for Australian shipping regulation. The principal Commonwealth Acts regulating shipping are then considered, followed by shipping institutions and structures. Finally, consideration is given to other issues and mechanisms relevant to shipping regulation including pilotage, reporting systems, institutions relating to accidents and spills and port control.

The complexity of shipping extends throughout the public and private sectors. This chapter mainly deals with public regulation. Private sector regulation is only mentioned in part. The private sector network is a huge field relating to carriage of goods by sea, marine insurance, fiscal and tax structures, safety of ships, certification of crews, port management, workplace health and safety, inter-model transport management and so on.

2.2. The international context

International law has a great influence on the domestic regulation of shipping due to the international nature of the industry and forms the basis for much of the Commonwealth's primary regulatory instrument for shipping, the *Navigation Act 1912* (Cth). Shipping is subject to two forms of international conventions. First, there are those that regulate generally ocean activities such as fishing, mining, and navigation. These conventions fall principally under the law of the sea. Secondly, are those conventions that have a specific shipping focus and regulate a range of activities that ships are engaged in. Many of these conventions are concluded by the International Maritime Organisation (IMO), the principal intergovernmental organisation responsible for shipping. There are over 30 IMO conventions that specifically relate to shipping and many are directed to regulation of the marine environment and marine pollution from ships. Australia is a party to most of them.

[36] Over 90% of Australian trade is carried in ships.

2.2.1. UN Convention on the Law of the Sea 1982

Australia was a founding member of the LOSC, which came into force on 16 November 1994, and it has taken its obligations seriously. Part XII of the convention imposes an obligation "to protect and preserve the marine environment".[37] The LOSC has many positive obligations, which include to "take all necessary measures to ensure that activities … are so conducted as not to cause damage by pollution to other States and their environments …".[38] There are seven sections in Part XII and within Section 5 there are provisions whereby States parties are to adopt laws and regulations to reduce and control pollution of the marine environment from land-based sources, as well as vessels, artificial islands, installations and structures.

2.2.2. Intervention Convention

As a result of the *Torrey Canyon* incident in 1967, the IMO arranged a conference that passed the 1969 Intervention Convention.[39] In default of the ship owner or flag States dealing with a maritime casualty, the Convention gives power to the coastal States' government to intervene and address the pollution consequences of the incident.[40] This may extend to taking control of the vessel and removing it from that maritime area.

2.2.3 MARPOL 73/78

Australia was a party to the original international convention regulating oil discharge from ships, the *International Convention for the Prevention of Pollution of the Sea by Oil 1954* (OILPOL),[41] and is a party to the more extensive current international convention known as MARPOL 73/78.[42] Under the terms of this Convention much more regulatory control was imposed on tanker operations and MARPOL went well beyond oil pollution. Each of its six annexes deals with a separate aspect of marine pollution from ships:

- Annex I addresses the discharge of oil from ships and regulates how and when a ship may discharge oil into the sea[43]
- Annex II addresses the discharge or escape of noxious liquid substances, which means chemicals in practice[44]
- Annex III addresses harmful substances carried in packaged form, such as freight containers[45]
- Annex IV addresses the discharge of sewage from ships (this has not yet entered into force internationally and Australia has not ratified it)
- Annex V addresses discharge of garbage from ships into the sea and how and when garbage may be discharged[46]
- Annex VI addresses air pollution from ships, including engine emissions, ozone-depleting substances, vapour emissions from oil tankers and shipboard incineration (has not yet entered into force).

[37] Article 192.

[38] Article 192(4).

[39] *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969* (1970) 9 International Legal Materials 25; [1984] Australian Treaty Series No 4. A Protocol done at London on 2 November 1973 extended the provisions, especially as to the list of toxic substances that came under the convention (from oil only).

[40] The Convention entered into force internationally on 6 May 1975 for Australia on 5 February 1984. The protocol to the Convention, to which Australia is a party, entered into force on 30 March 1983. Australian domestic legislation has given effect to it.

[41] 327 United Nations Treaty Series 3.

[42] *International Convention for the Prevention of Pollution from Ships*, done at London on 2 November 1973. (1973) 12 International Legal Materials 1319; (1978) 17 International Legal Materials 546; [1988] Australian Treaty Series No 29.

[43] It entered into force internationally on 2 October 1983 and for Australia on 14 January 1988.

[44] It entered into force internationally on 6 April 1987 and for Australian on 14 January 1988.

[45] It entered into force internationally on 1 July 1992, and for Australia on 10 January 1995.

[46] It entered into force internationally on 31 December 1988 and for Australia on 14 November 1990.

2.2.4 SOLAS and STCW

The *International Convention for the Safety of Life at Sea 1974* (SOLAS)[47] is the main international convention regarding the safety of merchant ships. Flag States are responsible for ensuring their flagged ships meet construction, equipment and operation standards that are consistent with their safety. SOLAS also deals with the number and qualifications of personnel for ships. Chapter IX, as amended, introduced an International Safety Management Code (ISM Code) for passenger, tanker and cargo ships and mobile drilling units of 500 gross tonnage and above – the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978* (STCW).[48] STCW provides for basic requirements on training, certification and watchkeeping on an international level.[49] Port States may apply requirements to all ships that visit its ports, irrespective of whether the flag State subscribes to the SOLAS or STCW conventions. There are, of course, many other conventions relating to the construction and operation of ships.

2.2.5 Oil Pollution Preparedness Convention (OPRC)

The *International Convention on Oil Pollution Preparedness, Response and Cooperation 1990* (OPRC)[50] facilitates international cooperation and mutual assistance in preparing for and responding to a major oil pollution incident and encourages countries to develop and maintain an adequate capability to deal with oil pollution emergencies. Legislation with the single purpose to implement the OPRC has not been enacted in Australia. Instead, the provisions of the OPRC are given effect through administrative action by the Australian Maritime Safety Authority (AMSA) (see 2.5.2.4) and other government agencies and departments. Australia has several bilateral agreements under which assistance is given to other countries in the region with oil spill control advice and training reflecting the obligations of this Convention.

2.2.6 London Convention

Adopted following the 1972 Stockholm Conference on the Human Environment, the 'London Dumping Convention' [51] originally addressed the deliberate dumping of waste at sea. It has since been amended to deal with incineration and renamed the 'London Convention'. Under the Convention 'dumping' is defined as the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures, other than in the normal operations. The usual exceptions are made for emergencies and the safety of the vessels or platforms and the persons connected with them.[52] The 1996 Protocol to the London Convention[53] was ratified by Australia following passage of the *Environment and Heritage Legislation Amendment Act 2000* (Cth). That Act included amendments to the *Environment Protection (Sea Dumping) Act 1981* (Cth) to implement the Protocol.[54] The *Environment Protection (Sea Dumping) Act 1981* (Cth) is administered by the Department of the Environment and Heritage (Environment Australia). Applications to dump are made to this Department, or to the Great Barrier Reef Marine Park Authority, to which power is delegated to issue permits for dumping in the area of the marine park.[55]

[47] 1184 United Nations Treaty Series 278; [1983] Australian Treaty Series No 22.

[48] 1361 United Nations Treaty Series 190; [1984] Australian Treaty Series No 7.

[49] See web site www.imo.org/Convention.contents.asp.

[50] (1991) 30 International Legal Materials 733; [1995] Australian Treaty Series No 12.

[51] *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, done at London on 29 December 1972. 1046 United Nations Treaty Series 120; [1985] Australian Treaty Series No 16.

[52] Australia ratified it and it entered into force for Australia on 20 September 1985.

[53] *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter 1972* (1997) International Legal Materials 7 (Not yet in force).

[54] Commencing on 16 August 2000.

[55] See chapter 5.7.1.6.

2.2.7 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal

Because of the success of the London Convention in preventing dumping of toxic wastes into the sea, an international trade in toxic wastes emerged. This involved shipping the banned material to a company in a country that was not a party to the Convention. This country then dumped or incinerated the materials. To counter this practice, the 1989 *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal*[56] was ratified, to control the export and import of hazardous wastes.

2.2.8 Civil Liability Convention

The 1969 *International Convention on Civil Liability for Oil Pollution Damage* (CLC)[57] requires oil tankers to have compulsory insurance against pollution damage liabilities caused by persistent oils carried on board such ships. Persistent oils include crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried as cargo or in bunkers. In the shipping industry, such liability insurance is usually provided by a Protection and Indemnity (P&I) Scheme, which is a mutual risk club.[58] The Convention applies to an oil spill occurring in the EEZ, with the upper limit of liability set at 59.7 million SDRs.[59]

2.2.9 Fund Convention

The *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (Fund Convention)[60] also deals with compensation for tanker oil spills and comes into play if the CLC does not cover the clean-up costs or the amount of damages.[61] Under this convention the oil companies are required to be parties to a mutual fund to pay damages and for oil spill clean-up costs. This fund is administered from its headquarters in London. The distinctions of the Fund Convention from the CLC are, firstly, that the costs fall on the oil companies and not on the tanker owners, and secondly, the compensation comes from a mutual fund into which the oil companies pay rather than from an insurer. Under the Fund Convention the levies are calculated on an amount per ton of oil landed in a participating country after carriage by sea. Only those participating countries where this amounts to more than 150 000 tons of oil each year are required to contribute.

[56] (1989) 28 International Legal Materials 657; [1992] Australian Treaty Series No 7 done at Basel on 22 March 1989.

[57] 973 United Nations Treaty Series 3; [1984] Australian Treaty Series No 3; the CLC came into force internationally on 19 June 1975.

[58] The P&I Clubs are mutual insurance companies that gradually grew out of the mutual insurance hull, and then other risks, societies of the 18th century. Their main base was, and is, in Great Britain although there are several whose headquarters are in Europe, Japan and the USA.

[59] The Special Drawing Right (SDR) is the Unit of Account under the CLC and many other international conventions. The exchange rate varies, as does any other exchange rate, and can be ascertained from any international banking source.

[60] (1972) 11 International Legal Materials 284; [1995] Australian Treaty Series No 2.

[61] *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* done at Brussels on 18 December 1971. There was a Protocol done at London on 19 November 1976 (as well as the 1992 Protocol, as to which see below).

2.2.10 HNS Convention

The *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996* (HNS Convention)[62] seeks to extend the benefits from the CLC and the Fund Convention to several thousand categories of cargo that are carried by sea. This Convention is structured in two tiers. The first requires the ship owners to take insurance (like the CLC). The second tier is a mutual indemnity provision which requires the cargo owners to contribute to the HNS Fund, like the Fund Convention. The HNS Convention applies to damage caused in the territory of a Party State (including the territorial sea), contamination in the EEZ, damage caused by a ship registered in a Party State, or preventive measures wherever taken.[63] It does not apply to oil damage under the CLC or Fund Conventions, to damage by certain radioactive materials, or damage by war ships.[64]

The HNS Convention has attracted little support because of the large number of materials that it purports to cover when carried as cargo by sea. The IMO is pressing IMO members to review the matter to see if their governments will ratify the Convention. In response to this the Australian Government presently has the matter under review and supports the Convention in principle. As it has not ratified the Convention there is presently no Australian legislation giving force to it.

2.3 Offshore Constitutional Settlement

The division of jurisdiction between the Commonwealth and the States and Territories in relation to shipping is established by the Shipping and Navigation Agreement under the OCS. Under this agreement, it was determined that the Commonwealth would have responsibility for:

- trading vessels on an interstate or international voyage
- fishing vessels and fishing fleet support vessels on an overseas voyage
- ships belonging to the Commonwealth or a Commonwealth authority
- offshore industry mobile units and vessels, other than those confined to one State or Territory.

As such, the States and Northern Territory are responsible for trading ships on interstate voyages, fishing vessels, pleasure craft and inland waterway vessels. This Agreement also has implications for the division of jurisdiction over ship-sourced pollution (see Chapter 5).

2.4 Legislation

There is a vast array of Commonwealth legislation that touches on the regulation of shipping. The most important legislative instruments are:

- *Navigation Act 1912*
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*
- *Environment Protection (Sea Dumping) Act 1981*.

The *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Environment Protection (Sea Dumping) Act 1981* are dealt with in Chapter 5.

[62] *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996* (done at London 3 May 1996) 35 International Legal Materials 1406.

[63] Article 3.

[64] Article 4.

2.4.1 Navigation Act 1912

The *Navigation Act* provides the legislative basis for many of the Commonwealth's responsibilities with respect to maritime matters including ship safety, the coasting trade, employment of seafarers and shipboard aspects of the protection of the marine environment. It also regulates wrecks and salvage operations, tonnage measurement of ships and the survey, inspection and certification of ships.

The general application of the Act is based on the Shipping and Navigation Agreement under the OCS (see above 2.3). Section 2 of the Act governs the application of the Act, unless expressly excluded. This section is based on the Shipping and Navigation Agreement under the OCS, whereby the division of responsibility between the States and Territories and the Commonwealth was to be governed by the nature of the voyage that a ship was undertaking. Hence, the Act is stated to apply to:[65]

- trading ships on an overseas or interstate voyage
- Australian fishing vessels on overseas voyages
- fishing fleet support vessels on overseas voyages.

The Act does not apply to pleasure craft,[66] inland waterways vessels[67] or military vessels.[68]

The effect of Section 2 is modified by provisions of the Act giving effect to certain provisions of the SOLAS Convention and MARPOL 73/78. The Act provides a scheme allowing for the implementation of certain parts of these two provisions through complementary legislation by the Commonwealth and the States and Northern Territory. In accordance with this scheme the *Navigation Act 1912* is applied to all ships, including those excluded by s 2, except to the extent that a State or Northern Territory law gives effect to the relevant provision of the international convention, in which case the *Navigation Act* is limited to those ships provided for in s 2.[69] Section 2 is also excluded in relation to the Division of the Act giving effect to provisions of the *International Convention on Salvage 1989*, although no allowance is made for complementary State or Territory application of the Convention.[70]

The application of the Act is also extended where a declaration is made or certificate issued under the Act to a vessel to which the Act would not otherwise apply.[71] Section 2 is also expressly excluded in relation to the provisions of the Act relating to pilotage.[72]

There are 11 *Parts to the Navigation Act 1912*, and eight treaties that it implements. Only one of the treaties (the MARPOL Convention) directly concerns ecological or pollution issues:

- Part I reflects the current jurisdiction of the Commonwealth over trading vessels engaging in interstate or overseas trade. It also provides for declarations of certain other vessels not otherwise coming under this definition to be covered by the Act, including the temporary importation of foreign owned and/or crewed vessels
- Parts II and III make extensive provision for the crewing of ships, including matters such as employment, health, accommodation and discharge
- Part IIIA provides for the licensing of coastal pilots.

[65] *Navigation Act 1912* (Cth) s 2.

[66] *Navigation Act 1912* (Cth) s 1(c).

[67] *Navigation Act 1912* (Cth) s 1(d).

[68] *Navigation Act 1912* (Cth) s 3; this is modified in relation to ss 259–61 in relation to the consequences of collisions (s 261A).

[69] See *Navigation Act 1912* (Cth) ss 187 (Ch 5 of the Regulations Annex to SOLAS Convention); 267 (Regs 13–9 and 22–5 of Annex I MARPOL); 267N (Reg 13 of Annex II of MARPOL); 267ZB (Reg 1–6 of Annex III of MARPOL); 267ZE (Reg 3, 4, 6, 7, 11 of Annex IV of MARPOL).

[70] *Navigation Act 1912* (Cth) s 317.

[71] *Navigation Act 1912* (Cth) ss 8A (offshore industry vessels); 8AA (trading ships on an intra–State voyage); 8AB (fishing fleet support vessels on a voyage other than an international voyage); s 187AA (certain certificates under Pt IV).

[72] *Navigation Act 1912* (Cth) s 186A.

Part IV deals with ship standards and operations, covering a wide variety of matters. Many of these provisions give effect to a number of international conventions, produced under the framework of the IMO, to which Australia is a party. Six international instruments are included in the Act as schedules:

- *International Convention for the Safety of Life at Sea 1974* and *Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea 1974*
- *Convention on the International Regulations for Preventing Collisions at Sea 1972*
- *Convention on Safe Containers 1972* and 1981 Amendments.
- *International Convention on Load Lines 1966*
- *International Convention on Tonnage Measurement of Ships 1969*.

In addition to these Conventions, the *Navigation Act 1912* also gives effect to the ship construction and equipment provisions of MARPOL. The *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* gives effect to the provisions of that Convention regulating ship operations (see Chapter 5).

The broad areas regulated by Part IV include:

- survey, inspection and certification of ships (Divisions 1, 2, 2A, 2B, 2C)
- unseaworthy ships (Division 3)
- cargo (Division 9, 10)
- load lines (Division 5)
- collisions (Division 11)
- special provisions for ships carrying oil, noxious liquids or harmful substances (Divisions 12, 13, 12B)
- ship equipment, including safety equipment (Divisions 4, 6, 6A, 7)
- sewage (Division 12C)
- accident and ship movement reporting (Divisions 13, 14).

Most of these areas are dealt with by certification and survey processes:

- Part V deals with passengers and Parts VA and VB deal with special purpose ships and the offshore industry respectively. There is some overlap between Part VB and the *Petroleum (Submerged Lands) Act 1967*. The *Petroleum (Submerged Lands) Act 1967* is given supremacy in the case of any inconsistency[73]
- Part VI reserves the coasting trade (ie inter-State trade) for vessels licensed by the Minister, subject to conditions relating to employment conditions for seamen. A permit is required for an exemption from this reservation. Permits are only granted by the Minister where there is no available or satisfactory licensed vessel and it is in the public interest
- Part VII of the Act deals with wrecks and salvage
- Part VIII with the exclusion of ship-owner liability
- Parts IXA-X with the review of decisions and legal proceedings
- Part XA deals with the tonnage measurement of ships and implements the Tonnage Measurement Convention.

The *Navigation Act 1912* (Cth) was subject to a legislation review which reported in June 2000 and made 113 recommendations, with its key findings being:

- the prime objective of the legislation should be ship safety and marine environment protection, based on mainstream internationally agreed measures
- regulation of other matters, such as workplace relations and commercial relationships, only to be retained in the legislation if they are directly related to safety or environment protection or if they are unique to shipping
- a performance-based approach to be followed in the new legislation with a clear statement of the duties of persons connected with ship operations and provision of greater flexibility for industry to manage safety performance
- the many changes proposed by the review suggest that new shipping legislation should be developed, rather than the *Navigation Act 1912* amended.

[73] *Navigation Act 1912* (Cth) s 283K.

2.5 Shipping institutions and structures

2.5.1 International institutions

As shipping is an international industry, it is regulated by a series of multilateral treaties promulgated by international organisations. There are a number of international fora dealing with different aspects of maritime regulation, the major bodies are the International Maritime Organization and the International Labour Organization.

2.5.1.1 International Maritime Organization (IMO)

The primary forum is the International Maritime Organization (IMO), a specialised agency of the United Nations dealing with matters relating to ship safety and marine environment protection. Australia is a party to nearly all of IMO's international conventions and continues to be involved at IMO in identifying measures to ensure their effective global implementation with the aim of reducing substandard shipping.

The IMO is headed by its Secretary-General and has its headquarters based in London. The IMO structure consists of an Assembly, a Council and five main committees: the Maritime Safety Committee (MSC), Marine Environment Protection Committee (MEPC), Legal Committee, Technical Co-operation Committee and a Facilitation Committee.

2.5.1.2 International Labour Organization (ILO)

The International Labour Organisation (ILO) is the United Nations' specialised agency that seeks the promotion of social justice and internationally recognised human and labour rights. The ILO formulates international labour minimum standards in the workplace and regulates conditions across the entire spectrum of work related issues. It is a tripartite structure that involves government, employer and worker representatives and special maritime conferences are convened that focus on seafarer working conditions.

To facilitate this role the IMO has five committees, namely the Maritime Safety Committee, Marine Environment Protection Committee, Legal Committee, Facilitation Committee and the Technical Cooperation Committee.[74]

2.5.1.3 Inter-governmental organisations

Inter-governmental organisations also play a role in shipping activities:

- World Meteorological Organisation
- International Hydrographic Organisation
- International Maritime Satellite Organisation.

Relevant non-governmental maritime organisations include:

- Commonwealth Shipping Committee
- Comite Maritime International (CMI)
- International Chamber of Shipping
- International Association of Ports and Harbours
- International Association of Lighthouse Authorities
- International Union of Marine Insurers
- Baltic and International Maritime Council (BIMCO)
- International Tanker Owners Pollution Federation (ITOPF)
- International Group of P & I Clubs
- International Transport Workers Federation
- International Salvage Union (ISU)
- International Maritime Bureau
- International Association of Classification Societies.

[74] IMO website www.imo.org.

2.5.2 Australian government institutions and structures

2.5.2.1 Department of Transport and Regional Services

The Department of Transport and Regional Services' (DOTARS) role is to provide policy advice to the Minister for Transport and Regional Services, conduct research, analysis and safety investigations, provide safety information and advice based upon these investigations and to perform regulatory functions.

DOTARS works with other Commonwealth agencies, State and Territory governments, stakeholders and international bodies to achieve its broad objective of promoting economic, social and regional development by enhancing Australia's infrastructure performance.

The Department is involved in a range of initiatives that seek to protect the environment such as the domestic and international ban on antifouling paints that contain tributlytin and minimisation of risk from harmful aquatic organisms in ballast water and on ships hulls. It is a member of the Management Committee for the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances (refer 2.5.2.6). The portfolio has an active program in the development of seafarer training and welfare.

In relation to shipping DOTARS administers[75] a wide range of legislation including:

- *Australian Maritime Safety Authority Act 1990* (Cth)
- *Carriage of Goods by Sea Act 1991* (Cth)
- *Lighthouses Act 1911* (Cth)
- *Marine Navigation Levy Act 1989* (Cth)
- *Marine Navigation Levy Collection Act 1989* (Cth)
- *Marine Navigation (Regulatory Functions) Levy Act 1991* (Cth)
- *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* (Cth)
- *Maritime College Act 1978* (Cth)
- *Navigation Act 1912* (Cth)
- *Protection of the Sea (Civil Liability) Act 1981* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund-Customs) Act 1993* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund-Excise) Act 1993* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund-General) Act 1993* (Cth)
- *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth)
- *Protection of the Sea (Powers of Intervention) Act 1981* (Cth)
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth)
- *Protection of the Sea (Shipping Levy) Act 1981* (Cth)
- *Protection of the Sea (Shipping Levy Collection) Act 1981* (Cth)
- *Shipping Grants Legislation Act 1996* (Cth)
- *Shipping Registration Act 1981* (Cth)
- *Ships (Capital Grants) Act 1987* (Cth)
- *Submarine Cables and Pipelines Protection Act 1963* (Cth)
- *Trade Practices Act 1974, Part X* (Cth)

[75] Some of the powers under these acts are exercised by AMSA, a portfolio Agency (refer section 2.5.2.2).

Internationally Australia participates at the International Maritime Organization (IMO – refer 2.5.1) and contributes as a member of the major committees. DOTARS participates in these committees through direct involvement or by supporting the delegation.

DOTARS is committed to the APEC process as an active member of the Transportation Working Group (TPT-WG). The Department contributes to APEC's objective of economic development in the Asia-Pacific Region, through projects such as those fostering safe and environment friendly transport systems.

2.5.2.2 Australian Maritime Safety Authority

The Australian Maritime Safety Authority (AMSA) is established under the *Australian Maritime Safety Authority Act 1990* (Cth), which came into effect on 22 October 1990. The responsible Minister under the Act is the Minister for Transport and Regional Services. AMSA is also governed by the *Commonwealth Authorities and Companies Act 1997* (Cth).

The main objects of the *Australian Maritime Safety Authority Act 1990* are to:

- promote maritime safety
- protect the marine environment from pollution from ships and other environmental damage caused by shipping
- provide a national search and rescue service
- promote the efficient provision of services by AMSA.[76]

The AMSA commenced operations on 1 January 1991 and has the following statutory functions, to:

(a) combat pollution in the marine environment

(b) provide a search and rescue service

(c) provide, on request, services to the maritime industry on a commercial basis

(d) provide, on request, services of a maritime nature, on a commercial basis to the Commonwealth, a State, a Territory or their authorities or agencies

(e) perform such other functions as are conferred on the Authority by or under any other Act

(f) provide consultancy and management services or to perform any other prescribed functions relating to any of the above matters and

(g) perform functions incidental to any of the previously described functions.

The AMSA's services are mainly provided, on a cost recovery basis, from levy revenue sources and some fees for services. It also receives Community Service Obligation funding from the Commonwealth Government specifically relating to search and rescue, maritime safety communications and boating safety education.

[76] *Australian Maritime Safety Authority Act 1990* (Cth) s 2A.

The AMSA exercises powers and has responsibility for performance of functions under a number of enactments:

Ship Operations

- *Navigation Act 1912* (Cth) and Marine Orders made under that Act relating to:
  - construction standards for ships
  - survey of ships
  - safety of ships
  - crewing of ships
  - qualifications of seafarers
  - cargoes and passengers
- *Lighthouses Act 1911* (Cth), relating to the provision of the national network of marine aids to navigation
- *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth), relating to the discharge of functions as the Inspectorate under the Act.

Registration of Ships

- *Shipping Registration Act 1981* (Cth)

Marine Pollution

- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth)
- *Protection of the Sea (Powers of Intervention Act) 1981* (Cth)
- *Protection of the Sea (Shipping Levy) Act 1981* (Cth)
- *Protection of the Sea (Shipping Levy Collection) Act 1981* (Cth)
- *Protection of the Sea (Civil Liability) Act 1981* (Cth)
- *Protection of the Sea (Oil Compensation Fund) Act 1993* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Customs) Act 1993* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Excise) Act 1993* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – General) Act 1993* (Cth)

Levies relating to the funding of AMSA's ship safety and regulatory services

- *Marine Navigation Levy Act 1989* (Cth)
- *Marine Navigation Levy Collection Act 1989* (Cth)
- *Marine Navigation (Regulatory Functions) Levy Act 1991* (Cth)
- *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* (Cth)

2.5.2.3 Australian Transport Council[77]

The Australian Transport Council (ATC) provides a forum for Commonwealth, State, Territory and New Zealand Ministers with transport portfolio responsibilities to consult and provide advice to governments on the coordination and integration of all transport issues at a national level. Its vision is to maximise the contribution of effective transport to Australia's productivity, quality of life and equity. The ATC is supported by the Standing Committee on Transport (SCOT), comprising a nominee of each ATC Minister. SCOT is in turn supported by a formal committee structure that provides advice on a range of policy and technical matters. Of particular note in this regard is the Australian Maritime Group Sub-Group of SCOT, which includes representatives of the relevant Commonwealth, State and Territory departments and initially considers maritime matters. This sub-group is supported by the AMG Safety Sub-Group, an Industry Advisory Panel, the AMG Education Sub-Group and the AMG NatPlan Sub-Group.[78]

[77] See http://www.dotars.gov.au/atc/atcabout.htm.

[78] See http://www.trucknbus.com.au/atn/tbg2001/atc/index.cfm.

2.5.2.4 Environment Australia

Environment Australia (EA) undertakes a variety of functions relevant to shipping. It works cooperatively with Commonwealth and Sate agencies on international and domestic maritime pollution policy and its implementation. On the international level, it participates in the International Maritime Organization and administers the 1996 Protocol to the London Convention and the Act that implements this Convention domestically, the *Environment Protection (Sea Dumping) Act 1981* (Cth). These aspects are dealt with in greater detail in Chapter 5. In brief, the *Environment Protection (Sea Dumping) Act 1981* imposes restrictions on loading, dumping and incinerating wastes at sea. This regime requires permits for dumping or incineration, with special permits required for those materials that must be dumped with special care, and general permits for other materials.[79]

EA is also working towards domestic and international bans on antifouling paints for ships containing tributlytin. In addition, on the domestic level it participates in the ANZECC Maritime Accidents and Pollution Implementation Group. It also is involved in the Introduced Marine Pests Program and Ballast Water Mitigation Program, funded by the Natural Heritage Trust, supporting cooperative projects to assist the implementation of introduced marine pest prevention, control and management.[80]

EA also administers the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), which is dealt with in greater detail in Chapter 5. In brief, this Act imposes an environmental assessment and approval regime on actions likely to have an effect on matters of national environmental significance, which includes Commonwealth marine areas.[81] The Act also establishes special regimes for biodiversity conservation, including the management and protection of protected areas, such as marine protected areas[82] and species, including cetaceans and endangered marine species.[83]

2.5.2.6 National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances

The aim of the National Plan is to protect the natural and built environments of Australia's marine and foreshore zones from the adverse effects of oil and other noxious or hazardous substances. It also aims to minimise those effects where protection is not possible. The Plan's statement is:

> …to maintain a national integrated Government/industry organisational framework capable of effective response to oil pollution incidents in the marine environment and to manage associated funding, equipment and training programs to support National Plan activities.

The National Plan provides a national framework for responding promptly and efficiently to marine pollution incidents by designating competent national and local authorities and by maintaining:

- the National Contingency Plan, which includes the organisational relationship of various groups involved, both public and private
- detailed State, local and industry contingency plans and communications arrangements for mobilising resources and responding to incidents
- an adequate level of strategically positioned response equipment, balanced with the risk involved, and programs for its use
- a comprehensive national training program to familiarise government and industry personnel with the requirements involved in planning for, and responding to, spilled marine pollutants, including conducting regular exercises.

[79] See http://www.ea.gov.au/coasts/pollution/index.html.

[80] See http://www.ea.gov.au/coasts/pollution/index.html.

[81] See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Chs 2 and 4.

[82] See http://www.ea.gov.au/coasts/mpa/index.html

[83] See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch 5.

The plan recognises that, other than in favourable circumstances, current technology does not exist to prevent weather-driven oil coming ashore on a coastline or to guarantee the prevention of environmental damage and economic loss, and that in many cases the most environmentally friendly solution may be to leave it alone and let nature take its course.[84] The major site of equipment is at the AMOSC, which is near Geelong, Victoria. Aircraft are on stand-by at short notice to airlift the equipment to wherever it is required.

The geographical area covered by the National Plan includes all Australian territorial seas, the EEZ and the High Seas where an oil spill threatens Australian interests. Wide powers are given to the relevant Ministers, both Commonwealth and State under legislation. An owner, charterer or salvor may, therefore, be given instructions as to how the marine casualty is to be dealt with.

The effectiveness of an oil spill response depends upon a number of factors. These include the location, oil type and volume, weather conditions, and the availability of human and physical resources. No single response method will meet all the demands of an oil spill. Methods for responding to oil spills include the use of chemical dispersants and containment and recovery using booms and skimmers. In most cases little can be done to recover chemicals that have spilled into the sea.

2.5.3 Australian non-government institutions and structures

There are a large number of non-government Australian institutions and structures that relate to shipping and other marine industries. The principal ones include:

- Australian Ship Owners Association (ASA) – promotes the interests of Australian ship owners and operators, ship managers and towage operators
- Association of Australian Ports and Marine Authorities (AAPMA) – peak body representing the interests of member ports and marine authorities in Australia
- Shipping Australia Ltd – association of foreign shipping operators in Australia
- Australian Ship Repairers Group – represents the interests of the Australian ship repair industry with the aim of promoting the industry's interests to the shipping industry and to governments[85]
- Maritime Law Association of Australia and New Zealand (MLAANZ) – association of maritime lawyers. The international group, of which MLAANZ is a member, is the Comite Maritime International (CMI)
- Australian Maritime Network – established to promote Australia's maritime industry with membership drawn from all sectors of the industry
- National Bulk Commodities Group – association of Australian shippers of bulk cargoes (iron ore, coal, bauxite etc)
- Australian Peak Shippers Association – association of shippers other than bulk cargoes.

[84] Oil will break down into its natural constituents over time, whether in the sea or on the shore.

[85] See http://www.asrg.asn.au/index.html.

2.6 Other shipping regulations

2.6.1 Pilotage

A pilot provides expert guidance for a vessel through navigationally hazardous parts of the coast or while a vessel is entering, leaving or moving within, a port. In Australia, port pilotage is regulated by State and Territory Governments. Coastal pilotage services are regulated by the Commonwealth under Part IIIA of the *Navigation Act 1912* (Cth). The only coastal pilotage services are those operating along the Queensland coast in the Great Barrier Reef and Torres Strait region.

In 1990, the IMO determined that the Great Barrier Reef met its stringent ecological criteria for declaration as a Particularly Sensitive Sea Area and endorsed associated special protective measures. One of those measures was the introduction of a compulsory pilotage regime within a specified area within the Great Barrier Reef. The current compulsory pilotage area is implemented under the *Great Barrier Reef Marine Park Act 1975*. This requires specified vessels to carry a licensed pilot when taking passage through the inner route, specifically between Cape York (latitude 10°41'S) and the vicinity of Cairns Roads, north of Cairns (latitude 16°40'S) or when passing through the Hydrographers Passage. The requirement applies to all vessels of 70 m or more in length and all loaded oil and chemical tankers or liquefied gas carriers of any length.

2.6.2 Australian ship reporting systems

Ship reporting services are used by regulatory agencies to keep track via radar and radio of ships in their region, provide navigational and marine safety information and facilitate a response to an emergency situation requiring search and rescue, marine pollution prevention and vessel traffic services.

In Australia, the AUSREP Ship Reporting System was established in 1973 in accordance with the International Convention for the Safety of Life at Sea's (SOLAS) general principles for ship reporting systems. In 1996, the IMO adopted a regulation under SOLAS making mandatory the use of ship reporting systems approved by the IMO. The SRS is given effect by Division 14, Part IV, of the Commonwealth *Navigation Act 1912*.

AUSREP reporting is compulsory for certain ships including:

- all Australian flag ships and ships engaged in the coasting trade while in the AUSREP area
- foreign flag ships from arrival at the first Australian port of call until their final port of call. Foreign ships are encouraged to continue participation voluntarily while within the AUSREP area
- Australian fishing vessels on an overseas voyage.

Ships provide their position about every 24 hours to allow monitoring of ship locations and to confirm the safety of the ship and its crew. If a ship fails to report, checks are made with the ship, its owners, agents, and charterers, and the Ship Reporting System may broadcast to other shipping. If these checks are unsuccessful, a search may be commenced.

The REEFREP Ship Reporting System requires mandatory reporting for certain ships in the Torres Strait and inner route of the Great Barrier Reef. It was implemented from 1 January 1997 as a joint responsibility between the Queensland Department of Transport and the Australian Maritime Safety Authority. This was one of the first mandatory ship reporting systems adopted by the International Maritime Organization in the world. It is given effect by Marine Orders Part 56 made pursuant to the Commonwealth *Navigation Act 1912* (Cth).

It applies to all ships of 50 m or more in length and all oil tankers, liquefied gas carriers and chemical tankers regardless of length, which are required to report their entry and exit, and at designated reporting points every 80 to 100 nautical miles along the coast in the REEFREP area. This area extends from the Torres Strait and includes the waters of the Great Barrier Reef between the Australian coast and the outer edge of the Reef from Cape York southwards to Capricorn Channel off the coast between Mackay and Gladstone.

2.6.3 Shipping incidents and inquiries

Under the Navigation Act 1912 there is power to establish regulations for the reporting or investigation of maritime casualties. In accordance with this power, the Commonwealth has enacted regulations relating to marine casualties and their investigation, the Navigation (Marine Casualty) Regulations. These Regulations provide discretionary powers to the Inspector of Marine Accidents to investigate marine casualties falling within the Commonwealth's jurisdiction. The Inspector heads the Marine Investigation Unit (MIU) of the Australian Transport Safety Bureau (ATSB). The role of the Unit is to investigate incidents such as loss of life or serious injury aboard ship, the loss of a ship, fires, collisions and groundings, damage to or caused by a ship, serious damage caused to the environment by a ship or incidents where any of the above may reasonably have occurred. Masters and owners are obliged to report a marine casualty. All ATSB accident reports are made public. Reports include a critique of the reasons for the casualty. The purpose is to help prevent a similar accident occurring in the future.

2.7 Port State Control[86]

Under international law, each nation State, such as Australia, has the sovereign right to exercise control over foreign flag ships that are operating within areas of its territorial jurisdiction. Several international instruments adopted by the IMO and the ILO also provide international authorisation to nation States for the conduct of control inspections of ships of other State parties to the conventions visiting their ports. Such inspections are called Port State Control. These inspections are conducted in Australia by AMSA marine surveyors appointed under the *Navigation Act 1912* (Cth) to ensure that foreign ships:

- are seaworthy
- do not pose a pollution risk
- provide a healthy and safe working environment
- comply with the relevant conventions.

Inspectors conduct an initial inspection of critical areas of the ship and to ensure that the ship's certification is valid. Where certification is invalid or there are clear grounds to suspect non-compliance with the relevant convention, a more detailed inspection is conducted. Where the compliance deficiencies of the ship are found to be serious enough, the ship is detained until they are rectified. In addition to the provisions of the *Navigation Act 1912* and Marine Orders, the surveyors are guided by a set of Instructions to Surveyors and a Ship Inspection Program Manual, based on a number of resolutions by the IMO and ILO. The inspection program also focuses on the aims of the Asia-Pacific and Indian Ocean Memoranda of Understanding on Port State Control, which join the major maritime nations of the Asia-Pacific and Indian Ocean regions to common Port State Control strategies.

[86] See AMSA, *Port State Control Report 2000* (2001) 1.

Chapter 3
The regulatory framework for Indigenous use

3.1 Introduction

No area of Australian law has seen such significant change in the past ten years as that relating to Indigenous land rights, with the enactment of the *Native Title Act 1993* (Cth) (NTA) featuring as one of the most significant pieces of legislation enacted since Federation. While there has been considerable community attention on and debate over native title to land, the landmark *Mabo* decision, which first recognised common law native title in Australia, did not deal with native title to marine areas.[87] This issue is one that the courts in Australia have sought to address in the past five years, leading to the recent High Court decision in the *Croker Island Case*, also commonly called and referred to throughout this Report as *Yarmirr*.[88] This decision establishes the existence of native title in the territorial sea, although the extent of rights recognised offshore is of a more limited nature than can be recognised on land. This chapter outlines some of the history concerning the development of native title in Australia, examines the *Native Title Act 1993* (Cth) (NTA) and highlights some relevant court decisions.

3.2 Native title legislation and the marine zone

3.2.1 The scope and purpose of the legislation

The NTA provides the framework for the recognition and protection of native title and seeks to regulate transactions that impact on native title. 'Native title' or 'native title rights and interests' are the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters.[89] For native title to be established it must be shown that the relevant rights and interests are possessed under the traditional laws and customs acknowledged and observed by the peoples concerned. It is through these traditional laws and customs that the peoples concerned have a connection with the land and/or waters, and the rights and interests are recognised by the common law of Australia.

3.2.2 The application of native title legislation to the offshore area

The NTA contemplated that native title may exist offshore, although this would depend on the operation of the common law to afford such recognition.[90] Section 6 extends the operation of the Act to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*. In the NTA, coastal sea is defined in accordance with s 15B of the *Acts Interpretation Act 1901*.[91]

[87] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 (*Mabo*).

[88] The *Commonwealth v Yarmirr*, *Yarmirr v Northern Territory* [2001] HCA 56 (11 October 2001) (*Yarmirr*).

[89] NTA s 223.

[90] NTA s 223(1)(c).

[91] NTA s 253.

The recognition of native title offshore was confirmed in *Yarmirr*.[92] The majority of the High Court concluded that, apart from an important qualification in relation to exclusivity, the 'terms' upon which the assertion of sovereignty was and is made in relation to the territorial seas showed no 'necessary inconsistency' with the continued recognition of native title rights and interests.[93] Where there is no inconsistency, the common law recognises native title offshore and gives it effect.[94] The *Yarmirr* case did not involve any claim to sea country outside the 12 nautical mile limit, although there are existing applications extending into the EEZ.

The High Court stated that the assertion and international recognition of sovereignty over the sea did not amount to a claim of ownership.[95] Therefore, the passing of legislation concerning the territorial waters was an assertion of sovereignty not ownership. Whatever the powers and title recognised by legislation under the Offshore Constitutional Settlement, and changes to the area considered as territorial waters over time, they had no impact upon the recognition of native title.[96]

The 'terms' upon which the Crown asserts sovereignty over the territorial waters, to which the Court in *Yarmirr* refers, are the right of innocent passage under international law and, as a matter of domestic law, the public rights to navigate and to fish. The majority judgement held that while these rights did not preclude the recognition of offshore native title entirely, they imposed a significant limitation on the recognition.[97] Therefore, native title cannot be recognised as an exclusive title over the seas.

3.2.3 Determination of native title

Although the NTA provides for the determination of native title, it does not specify the content of the title. These matters are left to be determined within the framework of the common law. They depend upon the nature of the title and the particular circumstances of each case. However, the NTA recognises that the exercise and enjoyment of native title rights and interests in relation to land or waters may include hunting, fishing, and gathering.[98]

A determination by the Federal Court that native title exists specifies who are the holders of the native title; the nature and extent of the rights and interests; whether or not the native title held amounts to exclusive possession; and the relationship between the native title and any other interest that may exist in relation to the area.[99] It has been held that s 225 (which sets out the requirements of a determination) is a 'compendious provision' and does not require that these matters be defined exhaustively.[100]

[92] *Yarmirr*.

[93] *Yarmirr* at [61].

[94] *Yarmirr* at [42].

[95] *Yarmirr* at [52].

[96] *Yarmirr* at [71]. This was the subject of complex argument and discussion in the lower courts. For a summary see Stephen Sparkes, 'Native Title all at Sea', paper presented to The Past and Future of Land Rights and Native Title: Native Title Legal Conference, AIATSIS, Townsville, 28–30 August 2001 (updated 12 October 2001).

[97] Refer to *Yarmirr* at [41].

[98] NTA s 223(2).

[99] NTA s 225.

[100] *Ward v State of Western Australia* (1998) 159 ALR 483 at 505; *State of Western Australia v Ward* [2000] FCA 191 (3 March 2000) (the Miriuwung Gajerrong appeal) at 211 (this case is currently on appeal to the High Court of Australia).

3.2.4 Institutional Arrangements and Decision-Making

Table 2: *Institutional arrangements relevant to native title.*

Institution	Functions
The Federal Court	• Jurisdiction, exclusive of all other courts except the High Court, to hear and determine applications that have been filed in the Federal Court, (s 81) and non-exclusive jurisdiction in relation to any other matters under the Act [s 213(2)], including determinations that native title does or does not exist (ss 94A, 225), and determinations of compensation (s 94) • Referral of applications for mediation through the National Native Title Tribunal (NNTT), or direction of parties to conferencing (ss 86B(1), 88) • Hear appeals from the Registrar [s 109D (2)] or questions of law referred (ss 169, 145) • The Federal Court and High Court also develop a body of case law concerning the meaning of native title at common law [see s 223(1)(c)] and the interpretation and operation of the Act
State and Territory Bodies	• The State Supreme Courts can hear and determine a common law native title application • Recognised State and Territory bodies can hear and make an approved determination for the purposes of the NTA
National Native Title Tribunal (NNTT) (Pt 6, especially s 108)	• Conduct mediation at the direction of the Federal Court • Respond to requests for assistance or mediation • Conduct research for the purposes of carrying out its functions • Provide public information and education • Receive and determine applications under the right to negotiate (s 75)
The Native Title Registrar (Pt 5)	• Provide notice of applications referred by the Federal Court • Provide assistance to applicants and respondents (s 78) • Receive objections to registration of Indigenous Land Use Agreements (ILUAs) (s 77A) • Maintain a Register of Native Title Claims, the National Native Title Register and the Register of ILUAs • Assist in the management of the administration of the NNTT (ss 96, 129)
Representative Aboriginal/Torres Strait Islander bodies (eg State Aboriginal Land Councils and Torres Strait Regional Authority (Pt 11)	• Facilitate preparation of applications • Assist in resolving disagreements among applicants • Represent applicants in relation to native title proceedings and negotiations • Certify applications for approved determinations of native title and for registration of ILUAs • Identify potential native title holders and notify them of relevant matters • Be a party to certain ILUAs

3.2.5 Interaction of native title legislation with management instruments for marine areas

The determination of native title requires an examination of the relationship between the claimed native title rights and other interests in the area (s 225). The High Court has repeatedly affirmed that where an inconsistency arises between native title and other interests, the non-native title interest prevails.

Native title can be lost through extinguishment by "a valid exercise of sovereign power inconsistent with the continued right to enjoy native title".[101] Extinguishment can occur either through a legislative Acts which demonstrates a clear and plain intention to extinguish native title rights; by a grant of an interest that is wholly or partly inconsistent with the continued enjoyment of native title; or where the Crown 'validly and effectively' appropriates land to itself in a manner or for a purpose inconsistent with native title.[102]

The NTA ensured there could be no doubt as to the validity of past acts that may have extinguished or otherwise affected native title, through its validation provisions. Past acts in relation to offshore areas are most likely to be Category D past acts and therefore, the non-extinguishment principle would apply.[103] However, the act may fall into other categories so the past act category needs to be considered on a case-by-case basis.

The non-extinguishment principle applied when assessing the impact of past and future acts, like the "clear and plain intention test", reflects the "seriousness of the consequences" for Indigenous peoples.[104] In accordance with the non-extinguishment principle, native title is suspended to the extent of any inconsistency with the future act and in certain circumstances compensation is payable. As a corollary, where the act is removed, the native title rights and interests are again fully effective.[105]

Sections 47, 47A and 47B of the Act represent a similar approach. Under those provisions, past extinguishment may be disregarded where certain criteria are met.

Native title is not extinguished by legislation that merely regulates the use of land or waters generally or the enjoyment of native title more specifically. Nor do regimes of control and management of resources extinguish it where there is no inconsistency with the continued enjoyment of the underlying native title.[106] Similarly, where the Crown grants limited rights or interests, for example in some forms of limited lease or licences, native title is only affected to the extent of any inconsistency.

Therefore, it may be that in some circumstances, native title, once proved, would not be found to have been extinguished by the rights and interests that currently exist in relation to Australia's oceans. The relationship between native title and other interests will depend on the relative extent of each and the potential for co-existence.

3.2.6 Future act provisions

In relation to future proposals, the NTA declares that native title is recognised and protected according to the NTA[107] and cannot be extinguished except according to the procedures set out in the Act (ss 10–11). The definition within the NTA of 'offshore places' is important in determining the application of the future acts regime. 'Offshore places' are any land or waters to which the NTA extends, other than land or waters in an onshore place. An 'onshore place' is defined to mean land and waters within the limits of a State or Territory.

[101] *Mabo* at 69 (Brennan J).

[102] Ibid, see also per Deane and Gaudron JJ, at 110.

[103] Category D past acts are any act that is not a Category A, B or C past act, which cover certain grants of freehold, certain leases, and mining leases.

[104] *Mabo* at 64 (Brennan J).

[105] NTA s 238(6).

[106] *Yanner v Eaton* [1999] HCA 53 (7 October 1999) (Gummow J).

[107] NTA ss 10–1.

Subdivision H of the future act regime contains water management regimes, including the issuing of fishing licences. Many offshore acts are likely to be considered under Subdivision N.[108] The NTA requires that all future acts affecting native title must comply with the procedures set out in the NTA. The procedural rights required for a future act under Subdivision H specifies that native title holders, native title claimants or their representatives must receive notice of the act, and be provided an opportunity to comment.[109] For offshore acts under Subdivision N, the procedural rights are those that would apply to any "corresponding non-native title rights and interests". This test requires thought when assessing what kinds of interests, especially offshore interests, 'correspond' to the unique form of title recognised by the High Court in *Yarmirr*. For offshore acts to which other provisions, such as I or L may apply, there are no procedural rights.

It appears that native title holders may have no greater rights than those provided to other interest holders by the legislation authorising the act. In most instances it is likely that this will entail no more than a right to be notified, to make comment and an entitlement to compensation. The right to negotiate under the NTA certainly does not apply offshore. It should be noted that these procedural rights apply equally to native title applicants as well as registered native title holders.[110] This recognises that native title exists at common law regardless of a determination by a court.

Some notifications are required to include a "clear description of the area that may be affected" and "a description of the general nature of the act".[111] Recent cases however have revealed that the courts will not require authorities to provide native title holders with clarity as to the precise area affected, that would be sufficient to identify particular places of significance. Furthermore, the courts are not prepared to invalidate acts that fail to comply with these requirements.[112]

3.2.7 Compensation

Native title holders whose rights have been affected by past or future acts are entitled to compensation under the NTA.[113] Under common law, the High Court held in *Mabo* that governments were free to discriminate against Indigenous peoples in the arbitrary extinguishment of their interests in land without compensation, despite the constitutional, statutory and common law protection afforded to non-Indigenous interest holders.[114] However, they recognised that such practices were racially discriminatory and therefore prohibited by the *Racial Discrimination Act* introduced in 1975. 'Just terms' provisions and compulsory acquisition laws were to apply equally to native title.[115]

The validation of past acts relating to offshore areas under the NTA, while ensuring their validity, gives rise to compensation. The compensation is payable by either the Commonwealth or the State, depending on who the act is attributed to, but not by any third party who acquired an interest as a result. Compensation, if not specifically provided for in the relevant Division of the past acts provisions, is provided for in Division 5. It is determined, under s 51, on the basis of 'just terms' if it relates to a compulsory acquisition or otherwise in accordance with the principles set out in any relevant compulsory acquisition legislation. Section 51A seeks to limit compensation to the value of a freehold estate. This principle would be difficult to apply to offshore acts, although the operation of the provision is unclear as it is subject to the 'just terms' test.

[108] However Subdivisions E,I,J & L may also apply depending on the act involved.

[109] NTA s 24HA(7).

[110] However Subdivisions I, L and in some cases H, do not require any procedural rights to be provided.

[111] Native Title (Notice) Determination 1998 s 8(3) *Gazette* 2 September 1998.

[112] *Harris v Great Barrier Reef Marine Park Authority* [1999] FCA 1070 (5 August 1999) (Kieffel J); *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* [2001] FCA 414 (11 April 2001).

[113] NTA ss 17, 20

[114] This assessment of the ratio of *Mabo* depends on the statement of Mason CJ and McHugh summarising the Court's finding, at 15–16.

[115] *Mabo v Queensland [No 1]* (1988) 166 CLR 186.

The NTA also provides for non-monetary compensation where requested by a party. These provisions apply to offshore acts [s 24NA(5)] but may also be relevant to onshore compensation negotiation where native title holders may be seeking outcomes involving offshore interests, such as commercial fishing ventures or management and conservation outcomes in relation to the coastal waters or territorial seas.

3.2.8 Indigenous Land Use Agreements

Indigenous Land Use Agreements (ILUAs) are an option for native title holders and other interest groups to enter into negotiations separate to the determination process. The subject matter over which an ILUA can be reached is broad enough to capture most land and water management issues and commercial developments. Over 30 ILUAs are now registered with the National Native Title Tribunal, but over 150 are currently being negotiated through the Tribunal processes. Even more agreements are being negotiated outside of the ILUA process. The NTA provides for three different types of ILUAs, depending upon the subject matter of the agreement, the parties to be involved and the procedures for registration.[116]

3.2.9 Preservation of Indigenous fishing rights

Some fisheries management regimes provide for Indigenous people to take fish without a licence for personal or cultural use.[117] Section 211 of the NTA also provides an exemption for certain non-commercial native title rights from licensing arrangements. The Act recognises that there may be Commonwealth, State or Territory laws that would prohibit or restrict persons from hunting, fishing, gathering or carrying out cultural and spiritual activities offshore.[118] Native title holders are not restricted from carrying out such activities or gaining access for those purposes so long as they are carrying out these activities as an exercise of the native title right and only for the purpose of satisfying their personal, domestic or non-commercial communal needs.[119] As a result, the relevant law's validity is unimpaired but its operation is suspended in relation to the exercise of native title rights and interests.[120] This exemption does not apply in relation to legislation aimed at environmental protection, research or public health or safety [s 211 (1) (ba)].

[116] For greater detail see Diane Smith, 'Indigenous Land Use Agreements: New Opportunities and Challenges under the Amended Native Title Act', *Land Rights Laws: Issues of Native Title* Regional Agreements Paper no 7 (December 1998). See also, Patricia Lane, 'A Quick Guide to ILUAs', in Bryan Keon-Cohen (ed), *Native Title in the New Millenium* (2001) (also available at nntt.gov.au).

[117] eg Tasmania's *Living Marine Resources Management Act 1995* (Tas) s 60(2)(c).

[118] NTA s 211(1)(b).

[119] NTA s 211(2).

[120] The *State of Western Australia v Commonwealth* (1995) 183 CLR 373 at 474.

3.3 Legislation to recognise and protect cultural heritage

Another type of regulatory regime that is relevant to Indigenous use of the marine zone is legislation concerned with Indigenous cultural heritage.

3.3.1 Aboriginal and Torres Strait Island Heritage Protection Act 1984 (Cth)

The key statute is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). This Act preserves and protects areas or objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition from injury or desecration. The Act protects such areas and objects that are in Australia and in Australian waters.

The Act applies in the territorial sea, the EEZ, the continental shelf and extends to every external Territory.[121]

Management tools within the legislation are:

- declarations that may be made over maritime zones for the protection of Aboriginal or Torres Strait Islander areas of significance
- declarations that address the protection of significant Aboriginal areas and objects (Pt 2) describing the area to be protected and contains provisions for protection and preservation of the area from injury or desecration.[122] A maritime area may be subject to a declaration
- the Minister may make an emergency declaration in relation to a significant Aboriginal area for up to 60 days where such an area is under serious and immediate threat of injury or desecration[123]
- the Minister may also make a declaration in relation to a significant Aboriginal area or object under serious and immediate threat of injury or desecration for a specified period.[124] Emergency declarations may be made by Authorised Officers for a period of up to 48 hours[125]
- special provisions that govern the declaration of an area or object in Victoria.[126]

[121] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 5.

[122] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 11.

[123] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 9.

[124] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 10(1) and 12.

[125] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) Pt 2 Div 2.

[126] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 8A and Pt 2A.

Chapter 4
The regulatory framework for maritime security

4.1 Introduction

For an island State like Australia, maritime security is a principal issue of national interest. International law recognises Australian sovereignty and jurisdiction over a vast maritime area stretching from the tropical north to the waters of the Southern Ocean. This carries for Australia both rights and responsibilities over the area. The concept of maritime security, while certainly including traditional naval operations, is relatively wide in scope. The term could easily accommodate enforcement issues in relation to a number of pieces of quite separate legislation, including crime prevention, migration, customs, quarantine, fisheries and maritime safety. Obviously in a summary of this type it is not possible to address all of these areas in great depth. However, there is consideration of the principal areas affecting maritime security in Australia, and the legislative and administrative structures in place to address them. First, maritime defence will be considered, then other aspects of maritime security, including enforcement powers in relation to fisheries regulation, customs and quarantine, migration and environmental regulations. Finally, agencies associated with enforcement are considered.

4.2 Maritime defence

As a starting point, it is appropriate to consider the arrangements in place with respect to maritime defence. Under s 51(vi) of the *Constitution*, the Commonwealth has the power to make laws with respect to defence. While the head of power is not exclusive, the ability of the States to make laws with respect to defence is extremely limited, as the States are explicitly prohibited from raising naval or military forces without the consent of the Commonwealth under s 114. The defence power has been the subject of significant litigation before the High Court of Australia. Typically, legislation made pursuant to the head of power is given a wide reading, which is broadened considerably during times of war.

The legislative action taken by the Commonwealth with respect to maritime security is concentrated in a number of statutes directed at the regulation of waters for the Royal Australian Navy (RAN). In keeping with the High Court's approach to s 51(vi), the powers granted under this legislation are relatively wide, and their potential for interference with other ocean uses is extensive. The RAN and its personnel are regulated under a number of Commonwealth statutes, including the *Defence Act 1903* (Cth), the *Naval Defence Act 1910* (Cth) and the *Defence Force Discipline Act 1982* (Cth). These provisions have the effect of ensuring that all the vessels of the RAN meet the definition of a 'warship' under Article 29 of the LOSC, and this in turn permits the valid exercise of enforcement jurisdiction by those vessels in a manner consistent with international law.[127] The domestic aspects of this enforcement are discussed in the second half of this chapter. Before turning to them, it is appropriate to address issues in respect of the most traditional areas of maritime defence.

[127] Article 29 of the LOSC provides: For the purposes of the Convention, 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the Government of the State and whose name appears under the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

There are two principal pieces of legislation concerned with maritime defence that impact on the use of the oceans by others: the *Control of Naval Waters Act 1918* (Cth) and the *Defence Act 1903* (Cth).

The *Control of Naval Waters Act 1918* provides for the declaration of 'naval waters' by Proclamation of the Governor-General. Such waters can be proclaimed within a distance of five nautical miles of a defence installation, or within two nautical miles of any defence land upon which there is no installation. An installation is widely defined and includes a naval establishment, dock, slipway, dockyard, arsenal, mooring or wharf owned or used by the Commonwealth, or any fixed structure, apparatus or equipment used by the Commonwealth for naval defence.[128]

The Act provides an array of restrictions that can be imposed upon vessels and aircraft in, or in the vicinity of, naval waters. These include regulations for mooring; restrictions on entry for persons, ships, aircraft and vehicles; prohibitions or regulation of explosives; restrictions on lights and fires; requiring the presence of persons on board vessels; powers of search and inspection; and blanket provisions to prohibit the doing of any act or thing in naval waters, the adjacent airspace or adjacent foreshore. While the scope for these regulations is extremely wide, in practice the regulations made are far more limited.

Specific powers are also granted to a number of individuals. The Minister for Defence can prohibit the building of any jetty, wharf, building or structure on the foreshore of any naval waters. The Minister may also prohibit the construction of any factory or store for explosives, oil or other inflammable material within two miles of naval waters and within five miles of a dockyard.[129]

The Governor-General appoints a superintendent to administer activities relating to specific naval waters. The superintendent may choose to give binding orders to the master of any vessel in naval waters to anchor, moor, unmoor or remove the vessel from naval waters. Failure to comply, including where no one is aboard the vessel renders the master liable to a $1000 fine.[130] The same powers are available with respect to any vessel, vehicle or aircraft upon the foreshore of naval waters.[131]

The potential impact of the *Control of Naval Waters Act 1918* on Australian ports in the South-east Marine Region, and nationally, is substantial. Defence establishments are located in areas adjacent to a number of busy ports, including the port of Sydney, parts of Port Phillip Bay, and Darwin harbour. The extent of these waters can also be wide, for example the whole of Jervis Bay on the New South Wales south coast is designated naval waters.[132] Given the ability under the Act to restrict access to, or limit the types of buildings that can be constructed on the foreshore adjacent to naval waters, the application of the Act could substantially interfere with day-to-day use of areas to an extent that few would currently be aware.

The *Defence Act 1903* (Cth) also has a potentially significant impact upon the use of certain parts of the waters under Australian jurisdiction. Section 124(1)(qaa) of the Act permits the making of regulations to establish defence practice areas. Such areas can be closed to shipping or other activities during exercises. These are dealt with specifically under Part XI of the *Defence Force Regulations 1952* (Cth). Under clause 49 of the Regulations, the Minister for Defence can give notice of the creation of a defence practice area over any land, sea or airspace in or adjacent to Australia. If notice of an exercise is given, persons without a reasonable excuse may commit an offence by being

[128] *Control of Naval Waters Act 1918* (Cth) s 2(1).

[129] *Control of Naval Waters Act 1918* (Cth) s 5.

[130] *Control of Naval Waters Act 1918* (Cth) s 6.

[131] *Control of Naval Waters Act 1918* (Cth) s 6A

[132] An administrative arrangement is in place between the Navy and the NSW Marine Parks Authority in respect of Jervis Bay that provides for coordination and consultation.

within a practice area, and can be removed. The use of a practice to close temporarily the territorial sea is consistent with international law under Article 25 of the LOSC, except in the cases of international straits where passage cannot be suspended. The RAN and Royal Australian Air Force (RAAF) practice areas are scattered around the Australian coast, the most notable and most regularly used being the Eastern Australian Exercise Area (part of which is in the South-east Marine Region) off the south coast of New South Wales and the Western Australian Exercise Areas near Perth. In fact, the whole of the Australian EEZ is permanently declared a submarine exercise area.[133]

4.3 Other aspects of maritime security

In the context of other areas of law with relevance to maritime security, security will be taken to relate to broader questions of ensuring activities taking place in Australia's offshore approaches are legitimate, and issues in relation to the enforcement of Australian law.

There are several pieces of legislation that vest offshore enforcement responsibilities in the Australian Defence Force (ADF) or other agencies. Most notably among these are the *Migration Act 1958* (Cth), the *Fisheries Management Act 1991* (Cth) and the *Customs Act 1901* (Cth), which also contains powers available to the ADF to deal with offences under the *Quarantine Act 1908* (Cth). These are by no means the only legislation available.

Section 84 of the *Fisheries Management Act 1991* (Cth) sets out the principal powers of officers with respect to fishing in waters outside State fisheries. Vessels may be boarded on a reasonable belief of unauthorised fishing. The Act permits the boarding and searching of vessels, the arrest of vessels and their direction to an Australian port.[134] Complementary powers exist under the *Environment Protection (Sea Dumping) Act 1981*[135] (Cth), the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth)[136] and under the *Petroleum (Submerged Lands) Act 1967* (Cth).[137]

Powers under the *Migration Act 1958* (Cth) to deal with suspected illegal entry vessels (SIEVs) have recently been amended by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth). Powers to board and search vessels in the territorial sea and contiguous zone existed under the *Migration Act 1958* (Cth) before these amendments.[138] The amendments provide for a greater range of responses, including directing that a vessel proceed to another place, which can include a place in the territorial sea or contiguous zone.[139]

In relation to customs, under Part XII of the *Customs Act 1901* (Cth), officers have, among other things, powers to board vessels, search vessels,[140] seize goods, and require vessels be taken to the nearest Australian port.[141] These powers are exercisable in Australian territorial waters, and now extend to the contiguous zone under the *Border Protection Amendment Act 1999* (Cth). This legislation also enhances powers under the *Fisheries Management Act 1991* (Cth) and the *Migration Act 1958* (Cth), and explicitly authorised the use of the doctrine of 'hot pursuit', in a manner consistent with Article 111 of the LOSC.[142]

[133] See *Annual Notice to Mariners* No 8 [3].

[134] *Fisheries Management Act 1991* (Cth) s 84.

[135] *Environment Protection (Sea Dumping) Act 1981* (Cth) s 29.

[136] The power to board under the Act requires consent or a warrant: *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) s 46. There is also a power to direct a vessel to a location in Australia or away from Australia: *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) s 45.

[137] *Petroleum (Submerged Lands) Act 1967* (Cth) s 140E.

[138] *Migration Act 1958* (Cth) Div 13, especially s 251.

[139] Clause 6 Schedule 1 *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) provides for a new s 245F of the *Migration Act 1958* (Cth).

[140] *Customs Act 1901* (Cth) ss 184A, 185, 185A and 187.

[141] *Customs Act 1901* (Cth) s 185.

[142] Schedules 1, 2 and 3 *Border Protection Amendment Act 1999* (Cth).

Under the *Quarantine Act 1908* (Cth), quarantine officers have the right to board and inspect vessels up to a limited distance outside the territorial sea. Inspection is also allowed if the ship's next port of call is in Australia.[143] They can also board and inspect installations in Australian waters.[144] The Act can also provide that the quarantine officer can take control of prescribed goods,[145] and, if necessary, order medical examinations for all persons on the vessel.[146] The quarantine officer may also remain aboard for as long as he or she considers necessary, and is to be provided with food and accommodation by the vessel's master if necessary.[147]

4.4 Maritime enforcement

In addition to there being a multiplicity of legislation, there are a variety of agencies with roles to play in maritime enforcement. Firstly, there is the ADF, which by virtue of the variety and flexibility of the platforms it possesses, has a wide range of enforcement tasks. As a result, ADF personnel are given extensive powers as officers under a wide range of legislation, including the *Migration Act 1958* (Cth),[148] the *Fisheries Management Act 1991* (Cth),[149] although the ADF is only involved in foreign fisheries enforcement, the EPBC Act[150] and the *Customs Act 1901* (Cth).[151]

Secondly, there are State law enforcement agencies, principally the Water Police detachments in each State. These bodies essentially deal with search and rescue and inshore criminal activities. The work rarely extends beyond the three nautical miles of territorial sea under the jurisdiction of a State. However, a number of Memoranda of Understanding exist in order to coordinate the approaches of these agencies and the ADF in relation to law enforcement activities, for example the *Memorandum of Understanding for the Response to an Illegal Landing of a Suspect Illegal Entry Vessel on Australian Territory*. In addition, police officers may act as authorised persons under a number of pieces of Commonwealth legislation, including the *Customs Act 1901* (Cth),[152] the *Migration Act 1958* (Cth),[153] the EPBC Act,[154] the *Fisheries Management Act 1991* (Cth)[155] and the *Environment Protection (Sea Dumping) Act 1981* (Cth).[156]

Thirdly, there are officers appointed under the agencies for the administration of the relevant legislation discussed above. For example, the Customs Service maintains eight small patrol vessels, and a variety of other craft, that can undertake a variety of activities in support of the objectives of the *Customs Act 1901* (Cth). Similarly, Fisheries Officers can be appointed under the

[143] *Quarantine Act 1908* (Cth) s 70.

[144] *Quarantine Act 1908* (Cth) s 70AA.

[145] *Quarantine Act 1908* (Cth) s 70B.

[146] *Quarantine Act 1908* (Cth) s 72.

[147] *Quarantine Act 1908* (Cth) s 71.

[148] An officer under the *Migration Act* is the same as an officer under the *Customs Act: Migration Act 1958* (Cth) s 5. The amendments under the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) provide that a member of the ADF is an officer under s 5 of the *Migration Act 1958* (Cth).

[149] A member of the ADF is an officer under the Fisheries Management Act for all purposes: *Fisheries Management Act 1991* (Cth) s 4.

[150] A person in command of a Commonwealth ship can bring a vessels to port upon a reasonable suspicion of the commission of an offence under the Act: EPBC Act s 403.

[151] Officer includes a member of the ADF for the purposes of a boarding: *Customs Act 1901* (Cth) s 185.

[152] *Customs Act 1901* (Cth) s 183UA.

[153] *Migration Act 1958* (Cth) s 5.

[154] Inspector includes, for certain purposes a member of the AFP: EPBC Act s 397.

[155] Any member of the AFP or the police of a State or Territory is an officer under the Act: *Fisheries Management Act 1991* (Cth) s 4.

[156] Any member of the AFP or police of a territory is an inspector under the Act: *Environment Protection (Sea Dumping) Act 1981* (Cth) s 27.

Fisheries Management Act 1991 (Cth),[157] which are State fisheries officers who undertake compliance activities in the AFMA managed fisheries and, with respect to foreign vessels, investigate and undertake enforcement of those offences detected on RAN patrols and from in-port inspections. Much of the surveillance work (though not the enforcement) is undertaken by Coastwatch, a branch of the Customs Service. Coastwatch acts for a variety of client organisations including Customs, the Australian Quarantine and Inspection Service (AQIS), AMSA, the Great Barrier Reef Marine Park Authority (GBRMPA), the Department of Immigration and Multicultural Affairs, the Australian Federal Police (AFP) and Environment Australia (EA).

A final point to note relates to the application of criminal law to Australian marine areas under the new *Crimes at Sea Act 2000* (Cth). There are several ways in which this can be accomplished. Firstly, Australian law applies aboard Australian flag vessels, and regardless of where in the world an Australian registered vessel is, Australian law will continue to apply.[158] Secondly, Australian law applies according to coastal State jurisdiction. The applicable law will be determined by the nature of the offence and the maritime zone in which it occurred. This will be the case for foreign vessels as well as Australian vessels, with the exception of foreign warships. Thirdly, Australian law will apply to offshore installations located in waters subject to Australian jurisdiction.[159] Finally, Australian criminal law will apply to the acts of Australian citizens aboard a foreign vessel,[160] and to foreign vessels whose next port of call is Australia.[161]

At international law, Australian warships or police vessels can take steps to enforce such law, but not within the territorial sea of another country.[162] Within domestic law, the *Crimes at Sea Act 2000* does not indicate an appropriate enforcement agency. Past practice would indicate that State and Federal police may use their own resources to deal with criminal activities close to shore, and act in concert with the ADF in respect of criminal activities further from shore.

[157] *Fisheries Management Act 1991* (Cth) s 83.

[158] The criminal law of the Jervis Bay Territory is the appropriate law applied to Australian flag vessels: *Crimes at Sea Act 2000* (Cth) s 6.

[159] Schedule 1, Part 2 *Crimes at Sea Act 2000* (Cth) and *Sea Installations Act 1987* (Cth) ss 46 and 47.

[160] *Crimes at Sea Act 2000* (Cth) s 6(2).

[161] *Crimes at Sea Act 2000* (Cth) s 6(3).

[162] To enforce Australian law in another country's territorial sea, without that country's consent, would be inconsistent with the right of innocent passage under Part II Section 3 of the LOSC.

Chapter 5
The regulatory framework for environmental protection

5.1 Introduction

A key component of Commonwealth policy towards activities and areas offshore since the 1992 Rio Conference on Environment and Development has been a recognition of certain environmental values. These values are clearly reflected in Australia's international law obligations under instruments such as the 1992 *Convention on Biological Diversity* and *Agenda 21*. As Australia has sought to take action in reliance upon these international instruments, a large number of international, national, State and Territory laws have emerged to form the regulatory framework for protection of the marine environment in the waters of the South-east Marine Region.

This chapter describes the international context in which domestic environmental laws operate in the Region and the OCS, and other domestic inter-governmental arrangements for marine environmental management. It also explains the operation of Commonwealth domestic regulations for environment protection within these frameworks. The discussion of Commonwealth laws is organised into four broad categories: integrated management, pollution control, biodiversity conservation and cultural heritage conservation. Although all marine environmental management issues inter-relate, the sectoral approach is adopted here for convenience.[163]

5.2 International regulatory context for environment protection

International laws and institutions play a major role in the formulation and operation of Australian, and in particular Commonwealth, environmental regulations applicable in the South-east Marine Region. For example, treaties often drive the language used in the domestic laws formulated to reflect and fulfil a treaty's obligations. International institutions implementing treaties or policies also actively facilitate domestic implementation. Thus, a treaty's Conference of Parties might adopt resolutions on further actions that will often be mirrored in Australia's domestic responses.

Due to the inter-connections between traditional sectors of marine environmental management, the many international treaties and institutions have overlapping activities and mandates. Thus, although they are listed here in the broad categories set out above, based upon the environmental sectors they focus on, their various provisions often cover other sectors too. The treaties are set out in the Table 3.

Land-based marine pollution, a significant source of marine pollution, is not fully regulated under international treaties. Part XII of the LOSC refers to land-based marine pollution, but it does not create a comprehensive regime for its control. To date there is no binding international instrument regulating land-based marine pollution to which Australia is party, though there exists a number of non-binding international instruments such as the 1995 Washington Declaration[164] and *Agenda 21*, which refer to the importance of it being regulated.

[163] For discussion of fisheries see chapter 6 and shipping see chapter 2.

[164] Declaration on Protecting the Marine Environment from Land-Based Activities, reproduced in (1996) 26 *Environmental Policy and Law* 37.

Table 3: *International treaties and institutions for environmental protection.*

Category	Sector	Treaty/International Instrument
Resource Management	Regional cooperation	*United Nations Convention on the Law of the Sea 1982*
	Impact assessment	*Convention for the Protection of the Natural Resources and Environment of the South Pacific Region* (SPREP) 1986 and related Protocols
	Integrated coastal development	*SPREP Protocol concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region 1986**
	Management measures	*Convention on the Conservation of Antarctic Marine Living Resources 1980* (CCAMLR)
Pollution Control	Dumping of waste at sea	*Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972* (London Convention)
		1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter 1972 (Not yet in force)
		Protocol to SPREP for the Prevention of Pollution of the South Pacific Region by Dumping 1986
	Ships	*International Convention for the Prevention of Pollution from Ships* (MARPOL) *1973/78*
		International Convention on Oil Pollution Preparedness, Response and Cooperation 1990
		International Convention on Civil Liability for Oil Pollution Damage 1992
		International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (Fund Convention)
		International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 as amended 1973
Biodiversity		*Convention on Biological Diversity 1992*
		Agenda 21 (non-binding)
	Endangered species	*Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973* (CITES)
		Convention for the Conservation of Antarctic Seals 1972

Category	Sector	Treaty/International Instrument
Biodiversity ctd	Cetacea	*International Convention for the Regulation of Whaling 1946*
	Migratory species	*Convention on Conservation of Migratory Species of Wild Animals 1979* (Bonn Convention)
		Agreement on the Conservation of Albatrosses and Petrels 2001 (under Bonn Convention)
		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 1974 (JAMBA)
		Agreement for the Protection of Migratory Birds and their Environment between the Governments of Australia and the People's Republic of China 1986 (CAMBA)
		USSR-Australia Migratory Birds Agreement
	Protected areas (including marine and coastal parks)	*Convention on Wetlands of International Importance Especially as Waterflow Habitat 1971* (Ramsar Convention)
Cultural Heritage	Historic Shipwrecks	*Convention on Conservation of Nature in the South Pacific 1976* (Apia Convention)
	Other Heritage	*Australia – Netherlands Agreement concerning Old Dutch Shipwrecks 1972*
		Convention concerning the Protection of the World Cultural and Natural Heritage 1972
		ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage 1996
		ICOMOS Charter for the Protection and Management of the Archaeological Heritage 1990
		ICOMOS International Cultural Tourism Charter 1999

* Although the area covered by this Convention is outside the South-east Region, the AFMA requires fisheries in waters adjacent to the CCAMLR area, including Macquarie Island fisheries (within the South-east Region), to be conducted in a complementary manner, with some restrictions imposed by the AFMA exceeding CCAMLR requirements.

5.3 Australian inter-governmental regulatory context

5.3.1 Offshore Constitutional Settlement

New arrangements for environmental regulation were included within the ambit of the OCS adopted by the Commonwealth, States and Territories in 1979 to address inter-governmental coordination in offshore marine management.[165] The OCS successfully addressed aspects of coordination for environmental management of marine parks, historic shipwrecks and offshore installations.

The division of responsibility in relation to ship-based marine pollution is provided for in the Shipping and Navigation Agreement under the OCS (see also 2.3). The ship-based pollution aspects of this Agreement are implemented by the *Navigation Act 1912* (Cth) (construction and equipment) (see 2.4.2) and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) (ship operations). The Agreement emphasises the need for Australian regulation to reflect current international standards and establishes a mechanism that enables Australia to become party to international maritime conventions without the need for legislation in every jurisdiction for Australia to comply with any such conventions on ratification.

Pursuant to the Agreement, a 'savings clause' in Commonwealth legislation enables the Commonwealth to give effect to the convention in all jurisdictions. It also allows the Commonwealth law to give way when there is applicable State or Territory legislation in relation to the coastal sea adjacent to that State or Territory (ie up to three nautical miles from the coast). The Commonwealth legislation also has no effect on vessels that have a strong connection with the State (the 'nexus' provision) or where there is some constitutional limitation on the Commonwealth.

The OCS was less conclusive in relation to other aspects of marine environmental regulation. For land-based sources of marine pollution, dumping for disposal of waste at sea and for commercial whaling it was simply agreed that discussions would continue. Accordingly, since 1979, inter-governmental arrangements have developed for dumping and whaling through the adoption of Commonwealth legislation. No significant progress has been made in relation to inter-governmental coordination concerning the regulation of land-based sources of marine pollution. It is important to note in relation to Australia's obligations under the LOSC that pollution under that Convention is defined as "the introduction by man, directly or indirectly, of substances or energy in the marine environment, *including* estuaries".[166] Virtually by definition, estuaries are within the limits of a State, ie above the low water mark, and therefore are also likely to be within the limits of a State and outside Commonwealth jurisdiction.

5.3.2 Intergovernmental agreement on environment

Issues of inter-governmental coordination were revisited in the Intergovernmental Agreement on the Environment (IGAE) adopted by the Commonwealth, States and Territories in 1992. In conformity with the *Seas and Submerged Lands Case (New South Wales v The Commonwealth)* [167] and the OCS, the IGAE provides that Commonwealth responsibilities and interests in national environmental matters include ensuring that the policies or practices of a State or Territory do not result in significant external adverse effects on maritime areas within Australia's jurisdiction, subject to existing Commonwealth legislative arrangements relating to maritime areas. It also provides that these Commonwealth interests and responsibilities cover foreign policy relating to the environment, including negotiation of, participation in and implementation of environmental treaties.

[165] For details on the 1979 Offshore Constitutional Settlement and its implementation see chapter 1, 2.3 and White, *Marine Pollution Laws of the Australasian Region* (1994), section 7.1.

[166] LOSC art 1(4).

[167] (1975) 135 CLR 337.

5.3.3 Council of Australian Governments

The Council of Australian Governments (COAG) developed the 1997 Heads of Agreement on Commonwealth/State Roles and Responsibilities for the environment in recognition of the need to make the IGAE operate more effectively. The Heads of Agreement put in place a framework for inter-governmental relations on the environment with Commonwealth responsibility focussed on matters of national environmental significance. Of the thirty matters of national environmental significance identified in the document, the Commonwealth's environmental impact assessment and approval processes relate to seven. All of these are relevant to the marine environment. Key aspects of the Commonwealth's responsibilities are being implemented through the EPBC Act.

In June 2001, Australian intergovernmental Ministerial management councils were restructured by COAG. The Natural Resources Management Council (NRMC) was created, subsuming natural resources management issues from the Australia and New Zealand Environment and Conservation Council (ANZECC), as well as the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ) and the Ministerial Council on Forestry, Fisheries and Aquaculture (MCFFA). Thus, the NRMC now assumes responsibility for national guidelines for aspects of marine environmental management previously set by ANZECC. Of relevance to historic shipwrecks, the Environment Protection and Heritage Council was also created, by amalgamating non-natural resources components of ANZECC and the Heritage Ministers' Meeting.

5.3.4 Additional arrangements

There are other arrangements for intergovernmental coordination of Australian regulation of the marine environment. Noteworthy among these is the provision in the Commonwealth Constitution giving federal Parliament concurrent legislative power with the States over quarantine matters. The provision has led to the establishment of the Australian Quarantine and Inspection Service (AQIS).

The National Environment Protection Council (NEPC) was established in 1994 under mirror legislation enacted in all Australian jurisdictions to develop national environment protection measures. It sets legally binding environmental standards operating within the context of Ministerial Management Councils responsible for coordinating relevant policy formulation by Commonwealth, State and Territory governments.

In addition, there are bilateral Service Level Agreements between the States and Commonwealth in relation to the management of adjacent marine protected areas in each affected State.

5.4 Commonwealth legislation overview

Within this framework for Australian inter-governmental coordination, Commonwealth leadership is evident in areas specifically governed by certain environmental treaty obligations and by Commonwealth legislation. These include conservation of cetaceans and other migratory species, protected areas, sea dumping, pollution from ships, quarantine and, of course, all matters in Commonwealth waters.

The main Commonwealth laws relevant to marine environmental management, excluding wild capture fisheries, are listed in Table 4.

As is evident, the EPBC Act crosses several categories of marine environmental management. In relation to integrated management, it makes provisions for environmental impact assessment and strategic environmental assessment. In relation to biodiversity conservation, it provides protection for nationally threatened native species, internationally protected migratory species, cetaceans and other marine species and protected areas. Other Commonwealth legislation addresses the issues of pollution control and cultural heritage.

State legislation regulates most activities in the first three nautical miles of the territorial sea or 'coastal waters' of the South-east Marine Region. That legislation is beyond the scope of this chapter, although some is referred to in the context of provisions in Commonwealth legislation for inter-governmental coordination and cooperation.

Table 4: *Commonwealth laws relevant to marine environment management.*

Category	Sector	Legislation
Integrated Management	Impact assessment and approval	EPBC Act *National Environment Protection Council Act 1994.* *Sea Installations Act 1987*
Biodiversity	Endangered species Marine mammals Migratory species Protected areas (including marine and coastal parks)	EPBC Act EPBC Act EPBC Act EPBC Act
World Heritage	World Heritage values	EPBC Act
Pollution Control	Dumping of waste at sea Ships	*Environment Protection (Sea Dumping) Act 1981* *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* *Protection of the Sea (Civil Liability) Act 1981* *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* *Protection of the Sea (Powers of Intervention) Act 1981* *Submarine Cables and Pipelines Protection Act 1963* *Carriage of Goods by Sea Act 1991*
Cultural Heritage	Historic shipwrecks Offshore cultural heritage	*Historic Shipwrecks Act 1976* *Navigation Act 1912 (Part VII)* *Australian Heritage Commission Act 1975*

5.5 Integrated environmental management laws

5.5.1 Environmental impact assessment

At international law the LOSC,[168] SPREP,[169] and the 1992 *Convention on Biological Diversity*[170] each require that environmental impact assessment be performed where a proposed activity is likely to have significant adverse impacts on the environment or on conservation.

The EPBC Act operationalises an environmental assessment and approval regime for actions likely to have a significant impact on matters of national environmental significance (NES).[171] The six matters of NES currently covered by the EPBC Act are all relevant to the marine environment. They are:

- World Heritage Properties
- Ramsar Wetlands
- nationally threatened species and ecological communities
- migratory species
- Commonwealth marine areas
- nuclear actions.

The EPBC Act applies to areas under Australian jurisdiction, which includes both Commonwealth and State and Territory marine waters. In relation to the Commonwealth marine area trigger, the environmental assessment and approval regime applies to actions taken in a Commonwealth marine area and under State or Territory jurisdiction, that are likely to have a significant impact on the environment in a Commonwealth marine area.[172] Similarly, where Commonwealth-managed fishing activities in State or Territory coastal waters might affect those coastal waters, the environmental assessment and approval regime also applies.[173]

Other actions requiring assessment and approval under the EPBC Act include activities on Commonwealth land and any action by the Commonwealth.[174]

The most common activities that trigger assessment processes in relation to Commonwealth marine areas, listed species or communities or migratory species are:

- oil and gas projects: mainly activities at the production, rather than exploration level and seismic surveys
- aquaculture: this mostly occurs in State waters, but the levels are increasing
- defence activities
- port proposals.

The EPBC Act also makes special provision in relation to fisheries. Activities in State or Territory-managed fisheries do not trigger the assessment and approval procedures under the EPBC Act unless they have an impact on matters of national environmental significance other than Commonwealth marine areas.[175] The EPBC act also requires a strategic assessment (see 5.5.2) of Commonwealth-managed fisheries where they lacked a management plan at the commencement of the EPBC Act (July 2000); or where a decision is made to either determine that a management plan is required or that a management plan is not required. Strategic assessment is available for State or Territory-managed fisheries, but only at the request of the State or

[168] LOSC arts 204–6

[169] SPREP art 16 [1990] Australian Treaty Series No 31.

[170] *Convention on Biological Diversity 1992* art 14. [1993] Australian Treaty Series No 32.

[171] EPBC Act Ch 2.

[172] EPBC Act s 23(2).

[173] EPBC Act s 23(3).

[174] EPBC Act ss 26–8.

[175] EPBC Act s 23(5) and (6).

Territory Minister or an individual.[176] If the Minister endorses a fisheries management policy or plan embodied in a management plan, he or she may declare that actions approved in accordance with the management plan do not require approval under Pt 9 of the EPBC Act in relation to a specific matter of national environmental significance.[177]

If an action is referred to the Minister on the basis that it is likely to have a significant impact on a national environmental significance matter, and the Minister decides that the action is a controlled action, the actions must be assessed. The options available to the Minister for an environment impact assessment are: assessment on preliminary documentation; public environment report; an environmental impact statement; a public inquiry; or an accredited process.[178] Provision is made for bilateral agreements between the Minister and a State or Territory providing for the accreditation by the Commonwealth of State or Territory environmental assessment processes and, in limited circumstances (based on accredited management plans), State or Territory approval decisions.[179] Currently, a bilateral agreement has been settled with Tasmania. Three are nearing completion (Western Australia, the Northern Territory and New South Wales) and negotiations are continuing with Victoria and Queensland. South Australia has indicated that it does not wish to enter into a bilateral agreement at this stage.

Under the *Sea Installations Act 1987* (Cth),[180] which is being considered as an option for the legislative framework for the Basslink electricity cable, an environmental impact assessment and advice form the Commonwealth Environment Minister may be required under the EPBC Act. This assessment is in connection with an application for a permit to construct a sea installation, such as a pipeline or floating hotel, in waters under Commonwealth jurisdiction. A similar arrangement exists under the *Environment Protection (Sea Dumping) Act 1981* (Cth).

5.5.2 Strategic assessment

The EPBC Act introduces a form of strategic environmental impact assessment that, instead of assessing the impacts of individual actions, applies instead to policies, plans and programs.[181] Such assessments can apply to actions to be taken in an area offshore from States and Territories. The strategic assessment process produces a public report that may make recommendations concerning the policy, plan or program. If the Minister chooses to endorse a policy, plan or program following a strategic assessment, the Minister may decide to use a less onerous assessment for an individual action under the plan,[182] program or policy. Such an assessment is being conducted in relation to the proposed offshore program in Commonwealth waters under the *Petroleum (Submerged Lands) Act 1967* (Cth). The Minister may also declare or make a bilateral agreement that actions approved in accordance with an accredited management plan, embodying the endorsed plan policy or program, do not require approval under the EPBC Act.[183]

[176] EPBC Act Pt 10 Div 1.

[177] EPBC Act s 153.

[178] EPBC Act Ch 4.

[179] EPBC Act ss 29–31 and Ch 3.

[180] Sea *Installations Act 1987* (Cth) s 20.

[181] EPBC Act s 146.

[182] Under EPBC Act s 87.

[183] Under EPBC Act s 33 (declaration – must table plan in Parliament); EPBC Act Ch 3 (Bilateral agreements).

5.5.3 Guidelines for ecologically sustainable management of fisheries

The Commonwealth Guidelines for Ecologically Sustainable Management of Fisheries[184] is a non-legislative instrument that has an important role in the assessment of fisheries under the EPBC Act.[185] The Act requires an environmental assessment before approval is granted, for the export of fish. These Guidelines are used for both the strategic assessments of fisheries and for the assessment of approvals for fish exports under the EPBC Act.[186] These Guidelines set out the requirements for an ecologically sustainable fishery:

- **Principle 1:** A fishery must be conducted in a manner that does not lead to over-fishing, or for those stocks that are overfished, the fishery must be conducted such that there is a high degree of probability that the stock(s) will recover.
- **Principle 2:** Fishing operations should be managed to minimise their impact on the structure, productivity, function and biological diversity of the system.

In accordance with these Principles and Guidelines, the management regime must take into account arrangements in other jurisdictions and adhere to arrangements under Australian laws and international agreements. It need not be a formal statutory fishery management plan, but should:

- be documented, publicly available and transparent
- be developed through a consultative process providing opportunity to all interested and affected parties, including the general public
- ensure that a range of expertise and community interests are involved in individual fishery management committees and during the stock assessment process
- be strategic, ie containing objectives and performance criteria by which the effectiveness of the management arrangements are measured
- be capable of controlling the level of harvest in the fishery using input and/or output controls
- contain the means of enforcing critical aspects of the management arrangements
- provide for the periodic review of the performance of the fishery management arrangements and the management strategies, objectives and criteria
- be capable of addressing, monitoring and avoiding, remedying or mitigating any adverse impacts on the wider marine ecosystem in which the target species lives and the fishery operates
- require compliance with relevant threat abatement plans, recovery plans, the National Policy on Fisheries Bycatch and bycatch action strategies developed under that policy.

5.5.4 National Environment Standards

The IGAE includes provision for the establishment of national environment standards. This has been put into effect legislatively through the *National Environment Protection Council Act 1994*,[187] which establishes the National Environmental Protection Council (NEPC), consisting of a Minister from the Commonwealth and each participating State and Territory.[188] The NEPC can adopt National Environment Protection Measures (NEPMs),[189] which are legally enforceable standards once adopted by each participating Australian jurisdiction under its own NEPC mirror legislation.

[184] Available at: http://www.ea.gov.au/coasts/fisheries/assessment/guidelines.html.

[185] See also below 5.6.2.

[186] See, eg, *Terms of Reference for the Strategic Assessment of the Bass Strait Central Zone Scallop Fishery*: http://www.ea.gov.au/coasts/fisheries/assessment/pubs/tor_bass.doc.

[187] http://www.nepc.gov.au/about.html.

[188] *National Environment Protection Council 1994* (Cth) s 9(1) currently all the States, the Northern Territory and the Australian Capital Territory are participating: ibid.

[189] There is mirror legislation in all the States and Territories. NEPMs are implemented at the Commonwealth level by the *National Environment Protection Measures (Implementation) Act 1998* (Cth).

NEPMs can cover a range of sectors, including ambient marine, estuarine and fresh water quality.[190] As of 2001, no national water quality standards have been adopted, although they were under discussion in 1998. *Australia's Oceans Policy* further commits the Commonwealth to supporting the development of national marine and estuarine water quality standards.

5.6 Biodiversity conservation laws

5.6.1 Identification of biodiversity

The *Convention on Biological Diversity*, the Apia Convention[191] and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)[192] obligate their Parties to take steps for the conservation and sustainable use of biological diversity. In fact, while the IGAE had given all aspects of ecologically sustainable development equal weight, the EPBC Act gives priority to the conservation of biodiversity.[193] The first step required is identification and monitoring of the components of biological diversity and of the processes and activities that threaten those components.[194] Annex I of the *Convention on Biological Diversity* provides a list of categories of habitats, species and communities for this purpose.

Under the EPBC Act, a Biological Diversity Advisory Committee is established and includes representatives of government; the scientific, conservation, rural, and business sectors; and Indigenous communities. The Committee broadly advises on conservation and ecologically sustainable use of biological diversity.[195] Section 171 of the Act gives the Environment Minister power to "cooperate with, and give financial or other assistance to, any person for the purpose of identifying and monitoring the components of biodiversity". The Minister is obliged to prepare inventories of listed threatened species, including cetaceans, that are in areas of Australian jurisdiction, including the marine environment, and to maintain those inventories in an up-to-date condition.[196] It is proposed to put in place regulations under the EPBC Act that control access to biological resources in Commonwealth areas. The Minister also has power to prepare a bioregional plan in Commonwealth areas, including Commonwealth marine areas.[197] The matters that may be included in a bioregional plan include descriptions of the components of biodiversity, such as their distribution and conservation status; objectives relating to biodiversity; and priorities, strategies and actions to achieve those objectives.

Sections 514A to 514X of the *Environment Protection and Biodiversity Conservation Act 1999* define the office of the Director of National Parks. The functions of the Director include administering and protecting the biodiversity within Commonwealth reserves. Powers and functions relevant to marine protected areas (ie Commonwealth reserves established to protect the marine environment) have been delegated by the Director to the Marine and Water Division of Environment Australia.

[190] *National Environment Protection Council Act 1994* (Cth) s 14(1).

[191] [1990] Australian Treaty Series No 41.

[192] [1976] Australian Treaty Series No 29.

[193] See EPBC Act s 3A(d): 'the conservation of biological diversity and ecological integrity should be the *fundamental consideration* in decision making' (Emphasis added).

[194] *Convention on Biological Diversity* 1992 art 7; Apia Convention art 5.

[195] EPBC Act ss 504–5.

[196] EPBC Act ss 172–5.

[197] EPBC Act s 525.

5.6.2 Threatened species and communities

The *Convention on Biological Diversity* requires that parties promote recovery of threatened species,[198] as does the Apia Convention.[199]

The EPBC Act provides for the listing of native threatened species and ecological communities.[200] A Threatened Species Scientific Committee, appointed by the Environment Minister, advises on the listing of threatened species, as well as responses to protect them.[201]

The EPBC Act also protects listed species and communities through the creation of punishable offences for non-permitted taking, killing, injuring, moving, trading or keeping of a member of a listed threatened species or ecological community in a Commonwealth area.[202] Such actions are permissible in accordance with a permit or in certain other circumstances, eg an emergency or accident.[203] There are similar offences for listed migratory species,[204] listed marine species[205] and whales and other cetaceans.[206] In addition, the Minister must ensure that a recovery plan, the content of which is prescribed by the Act,[207] is in place for each species.[208] For listed marine species, a wildlife conservation plan may be made.[209] Furthermore, proposed actions that are likely to have a significant impact upon listed threatened native species or ecological communities are subject to environmental impact assessment and approval processes.[210]

Threats to biodiversity may be identified under the Act as key threatening processes if they threaten the survival, abundance or evolutionary development of a native species or ecological community.[211] Such key threatening processes may be the subject of a threat abatement plan made under s 270B. The Commonwealth has responsibility for implementing such plans and both the Commonwealth and its agencies must comply with them.[212]

Section 301A of the Act provides an extensive regulation making power for the control of non-native species. It allows regulations to provide for a list of non-native species that do or may threaten biodiversity in Australia or would threaten biodiversity if they were brought into Australia. Where a species is on the list, the regulations can control import of and trade in the species and provide for the making of plans to reduce or eliminate the impacts of such species on biodiversity. Alien species may also be addressed by listing them as key threatening processes under the Act[213] if they threaten Australian native species or ecological

[198] *Convention on Biological Diversity 1992* art 8(f).

[199] Apia Convention art 5(3).

[200] EPBC Act ss 178–94.

[201] EPBC Act ss 502–3.

[202] EPBC Act ss 196–6E.

[203] EPBC Act s 197. Although it is an offence not to notify the Secretary of the Environment Department of such actions (s 199).

[204] EPBC Act ss 209–23.

[205] EPBC Act ss 248–66A and Pt 13.

[206] EPBC Act ss 224–47.

[207] EPBC Act s 270.

[208] EPBC Act s 269A.

[209] EPBC Act Pt 13 Div 5 Subdiv B.

[210] EPBC Act ss 18–9.

[211] EPBC Act s 188(3).

[212] EPBC Act ss 268–9.

[213] EPBC Act s 183.

communities.[214] Control on the import of alien species is also achieved by the regulations under the *Customs Act 1901* (Cth) and the *Quarantine Act 1908* (Cth).[215]

The 1973 *Convention on International Trade in Endangered Species of Flora and Fauna*[216] is implemented by the Pt 13A of the EPBC Act. It broadly aims to ensure that trade in wildlife and wildlife products (not only endangered wildlife) is not detrimental to a species' survival or the ecosystem it lives in. In addition, Pt 13A also aims to prevent the introduction of pests that could adversely affect the Australian environment. As part of this broad aim, the Act regulates the export of Australian native wildlife and wildlife products (including living marine resources), the import of many live animals and plants, and the import and export of all wildlife that is internationally recognised as endangered or threatened. It does this by setting up a permit system for the export and import of listed species and by making it an offence to import or export listed species without a permit.

5.6.3 Migratory species

Listed migratory species within a Party's jurisdiction must be protected in accordance with the *Convention on Biological Diversity*,[217] the 1979 Bonn Convention and the associated *Agreement on the Conservation of Albatrosses and Petrels*,[218] JAMBA[219] and CAMBA.[220] These obligations are implemented in Australia under the EPBC Act. The EPBC Act requires that the Minister for Environment establish a list of migratory species including all species listed under the Bonn Convention for which Australia is a Range State; all species on lists established under JAMBA and CAMBA and all native species identified in a list or instrument made under an international agreement approved by the Minister.[221] The *Agreement on the Conservation of Albatrosses and Petrels*, when it comes into force, will have an impact on management of these species in the South-east Marine Region.

The EPBC Act also carries offences for injuring, killing, taking, trading, keeping or moving of migratory species in Commonwealth areas.[222] Such actions are not offences if the migratory species is taken with a permit or in various other circumstances, such as preventing a risk to human health or an unavoidable accident, so long as the death, injury or taking is notified to the Secretary of the Environment Department.[223] In addition, actions that are likely to have a significant impact on a listed migratory species are prohibited unless the approval of the Commonwealth is obtained or one of the various exemptions available under the Act is in place.[224] Furthermore, the Minister may make a wildlife conservation plan with respect to listed migratory species,[225] with which Commonwealth agencies are required to take reasonable steps to comply.[226]

[214] EPBC Act s 188(3)–(4).

[215] See also chapter 4 above.

[216] [1976] Australian Treaty Series No 29.

[217] *Convention on Biological Diversity 1992* arts 2–4.

[218] Bonn Convention art 3, [1991] Australian Treaty Series No 32: *Agreement on the Conservation of Albatrosses and Petrels 2001* art 1 (not yet in force) – text available at http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2001/8.html.

[219] [1981] Australian Treaty Series No 6 art 1.

[220] [1988] Australian Treaty Series No 22 art 1.

[221] EPBC Act s 209.

[222] EPBC Act s 210–1E.

[223] EPBC Act ss 212 and 214.

[224] EPBC Act s 20.

[225] EPBC Act s 285.

[226] EPBC Act s 286.

5.6.4 Cetaceans

A ban on commercial whaling has been in place since 1986 under the *International Convention for the Regulation of Whaling* (Schedule) 1946.[227] Corresponding protection is provided for cetacean species under the EPBC Act. The Act establishes the Australian Whale Sanctuary, which comprises the waters of the EEZ; State or Territory coastal waters and waters inside the terrestial sea baseline that are prescribed under the Act.[228] It is an offence to take an action that results in the death of a cetacean[229] or to take, trade, keep, move, or interfere with a cetacean[230] in either the Sanctuary or in other areas.[231] Outside the Sanctuary the prohibition is limited to Australian citizens and residents, the Commonwealth and its agencies and Australian aircraft or vessels.[232] The obligation not to interfere with a cetacean is a more stringent requirement than that which applies to other threatened or migratory species. It was primarily in order to help seismic operations comply with this obligation that the Guidelines for Interactions between Offshore Seismic Operations and Whales were developed.[233]

It is also an offence to treat or possess a whole or part of a cetacean illegally taken or killed.[234] Possessing or treating cetaceans that have been unlawfully imported in Australia is also an offence.[235] Furthermore, foreign whaling vessels must obtain the Environment Minister's permission to enter an Australian port.[236] The Minister may also make a wildlife conservation plan for cetaceans.[237]

5.6.5 Listed marine species

The EPBC Act requires that the Minister for Environment establish a list of marine species.[238] It is an offence to take an action that results in the death or injury of a listed marine species[239] or to take, trade, keep or move a listed marine species in Commonwealth areas.[240] Such actions are not offences if the listed marine species is taken with a permit or in various other circumstances, such as preventing a risk to human health or an unavoidable accident, although it is an offence not to report such death, injury or taking to the Secretary of the Environment Department.[241]

5.6.6 Protected areas

The *Convention on Biological Diversity* contains provisions relating to site conservation, requiring the establishment and management of protected areas including buffer zones, the protection of threatened species and the control of alien species and living modified organisms.[242] Similarly, protected areas may be established for internationally listed wetlands under the Ramsar Convention;[243] for internationally listed natural areas under the 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage*,[244] and under the Apia Convention.[245]

[227] [1948] Australian Treaty Series No 18.

[228] EPBC Act s 225.

[229] EPBC Act ss 229–9A.

[230] EPBC Act ss 229B–9C.

[231] EPBC Act ss 229–9A.

[232] EPBC Act s 224.

[233] http://www.ea.gov.au/epbc/assessapprov/guidelines/seismic/index.html.

[234] EPBC Act ss 229D–30.

[235] EPBC Act ss 233–4.

[236] EPBC Act s 236.

[237] EPBC Act Pt 13 Div 5 Subdiv B.

[238] EPBC Act s 248.

[239] EPBC Act ss 254–254A.

[240] EPBC Act ss 254B–E.

[241] EPBC Act ss 255–6.

[242] *Convention on Biological Diversity* 1992 art 8.

In 1991, the Commonwealth Government initiated the Ocean Rescue 2000 program to assist the States and Northern Territory in establishing a system of marine protected areas that would include samples of all Australian marine ecosystems. In 1992 the Australia New Zealand Environment and Conservation Council (ANZECC), comprising government ministers of environmental departments, established a National Advisory Committee on Marine Protected Areas with terms of reference to coordinate the development of a National Representative System of Marine Protected Areas (NRSMPA). In 1997 the Federal Environment Minister reaffirmed the Commonwealth Government's commitment to establishing the NRSMPA. The National Advisory Committee became a Task Force on Marine Protected Areas, which developed a Strategic Plan of Action to establish the NRSMPA. In 1999 the Commonwealth Government reaffirmed its commitment to NRSMPA in *Australia's Oceans Policy*, and its establishment in Commonwealth waters is a key task of regional marine planning. Commonwealth, State and Northern Territory governments continue to identify and declare marine protected areas in each jurisdiction independently of each other, with officials meeting as the Task Force on Marine Protected Areas to coordinate the strategic development of the NRSMPA. It remains to be seen whether the Task Force will continue in its present form, reporting to ANZECC's successor, the Natural Resource Management Ministerial Council.

The NRSMPA is being established using the Interim Marine and Coastal Regionalisation for Australia (IMCRA), although the National Representative System will be much broader than the familiar mesoscale regionalisation of IMCRA, which is confined to the continental shelf. Australian marine protected areas are managed by State or Territory authorities in coastal waters, and by Commonwealth authorities in waters beyond coastal waters. Where a marine protected area overlaps coastal waters and those beyond, where possible the Commonwealth and States use similar or complementary legislation, subject to cooperative management arrangements. All States in the South-east Marine Region have protected areas legislation, although only New South Wales and South Australia have specific marine park legislation. Unlike other areas of marine regulation, for example in relation to petroleum exploration and exploitation and living marine resource exploitation, Commonwealth and State park management laws, though similar, are not designed to be complementary.

The EPBC Act establishes five different types of Commonwealth protected area, not all of which need occur within a geographic area under Commonwealth jurisdiction. However, some types of protected area may overlap the same geographic area. The different types of Commonwealth protected areas are: World Heritage properties; Ramsar wetlands; biosphere reserves; Commonwealth reserves; and conservation zones.

5.6.6.1 World Heritage Properties

The EPBC Act is the vehicle by which Australia implements its obligations under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*. This Convention applies to both natural and cultural heritage. Under the EPBC Act, the Commonwealth has the power to submit properties for inclusion on the World Heritage List. This may be exercised if the Environment Minister is satisfied that the Commonwealth has endeavoured to reach agreement on the listing and management arrangements for the property with both the owner or occupier of the property as well as the State or Territory government in which the property is located.[246] The Convention and the *Operational Guidelines for Implementation of the World Heritage Convention* set out the rules for nomination, assessment, listing, management and monitoring of World Heritage sites at international law. A 'declared

[243] [1975] Australian Treaty Series No 48 art 2.

[244] [1975] Australian Treaty Series No 47 art 11.

[245] Apia Convention art 3.

World Heritage property' includes properties on the World Heritage List, properties submitted for inclusion on the List and properties that the Minister is satisfied are likely to have world heritage values where those values are under threat.[247] Australia administers 14 World Heritage sites. Of these, four properties include Commonwealth marine waters: Macquarie Island, Lord Howe Island, Heard and McDonald Islands and the Great Barrier Reef. Macquarie Island, including the surrounding territorial sea out to 12 nautical miles, is the only one directly involving a marine area in the South-east Marine Region.

Actions that are likely to have a significant impact on a 'declared World Heritage property' are prohibited unless they have the approval of the Commonwealth Environment Minister or unless one of the various exemptions available under the Act is in place.[248] The Minister must make a management plan for a property on the World Heritage List if that property is in a Commonwealth area,[249] which includes external territories (other than Norfolk Island) and marine areas to the extent of Australian jurisdiction.[250] Where the property is wholly or partly in an area controlled by a State or self-governing Territory, then the Commonwealth must endeavour to ensure that a management plan is prepared and implemented in cooperation with the relevant State or Territory.[251]

5.6.6.2 Ramsar Wetlands sites

The Commonwealth may designate wetlands under the Ramsar Convention.[252] Under the EPBC Act, the Commonwealth must aim to reach agreement on the designation of and management arrangements for the wetland with the owner or occupier of the wetland and government of the State or Territory where it is located.[253] A 'declared Ramsar wetland' is a wetland designated under the Convention or a wetland of international importance that is under threat and that is declared as such by the Minister.[254]

The Minister must make a management plan for a wetland designated under the Ramsar Convention if that wetland is in a Commonwealth area,[255] which includes external territories (other than Norfolk Island), areas owned by the Commonwealth and marine areas to the extent of Australian jurisdiction.[256] Where the designated wetland is wholly or partly in an area controlled by a State or self-governing Territory, then the Commonwealth must aim to ensure that a management plan is prepared and implemented in cooperation with the relevant State or Territory.[257] Actions that have, will have or are likely to have a significant impact on a 'declared Ramsar wetland' are prohibited unless the approval of the Commonwealth Environment Minister is obtained or unless one of the various exemptions available under the Act is in place.[258]

[246] EPBC Act s 314(1)–(2).

[247] EPBC Act ss 13–4.

[248] EPBC Act ss 12 and 15A.

[249] EPBC Act s 316.

[250] EPBC Act s 525.

[251] EPBC Act s 321.

[252] Ramsar Convention art 2.

[253] EPBC Act s 316(1)–(2).

[254] EPBC Act ss 17–17A.

[255] EPBC Act s 328.

[256] EPBC Act s 525.

[257] EPBC Act s 333.

[258] EPBC Act s 16.

5.6.6.3 Biosphere reserves

Biosphere reserves are established under the World Network of Biosphere Reserves, and initiated by the International Coordinating Council of the Man and the Biosphere Program of UNESCO. Under the EPBC Act, regulations may specify Australian Biosphere Reserve Management Principles.[259] Where such reserves are in Commonwealth areas, the Minister may make a management plan for the reserve and the Commonwealth must take reasonable steps to comply with the plan and the Management Principles.[260] Where the reserves are not in Commonwealth areas the Minister may cooperate with a State to prepare and implement a management plan for the reserve.[261] The Commonwealth may give financial or other assistance for the protection or conservation of the reserve.[262]

5.6.6.4 Commonwealth reserves

Under the EPBC Act, Commonwealth reserves may be declared over several kinds of areas, including a sea in a Commonwealth marine area or a sea outside Australia where Australia has obligations relating to biodiversity or heritage under an international agreement. Australian governments refer to Commonwealth reserves that protect the sea as 'marine protected areas' although that term is not defined under the Act. The declaration must assign the reserve or each part of the reserve to one of the following categories: strict nature reserve, wilderness area, national park, national monument, habitat/species management area, protected landscape/seascape or managed resource protected area.[263] The characteristics of each of these categories (known as IUCN categories) are outlined in s 347 and in the Regulations.

A large range of listed activities are prohibited in a Commonwealth reserve, except in accordance with a management plan,[264] with greater restrictions for wilderness areas.[265] There is an extensive power to make regulations controlling activities in Commonwealth reserves.[266] The Director of National Parks or – where one is appointed – the Board in conjunction with the Director, must prepare a management plan for each Commonwealth reserve.[267] The Minister must approve the plans.[268] Where a management plan is in operation the Director must give effect to the management plan and the Commonwealth or a Commonwealth agency must not act inconsistently with the plan.[269] Macquarie Island Marine Park and the Tasmanian Seamounts Marine Reserve are the only Commonwealth marine protected areas in the South-east Marine Region.

5.6.6.5 Conservation zones

Conservation zones may be declared in areas outside Commonwealth reserves. The purpose of a conservation zone is to allow for interim protection while the features of areas within the zone are assessed for inclusion in a Commonwealth reserve (s 390D). There is extensive power to make regulations controlling activities in conservation zones (s 390E). However where a conservation zone is created, previous usage rights in relation to the land are protected (s 390H).

[259] EPBC Act s 340.

[260] EPBC Act ss 338–9.

[261] EPBC Act s 338.

[262] EPBC Act s 341.

[263] EPBC Act s 346.

[264] EPBC Act s 354.

[265] EPBC Act s 360.

[266] EPBC Act s 356.

[267] EPBC Act s 366.

[268] EPBC Act s 370.

[269] EPBC Act s 362.

5.7 Regulation of shipping and marine pollution control law[270]

Commonwealth, State and Territory law regulating pollution from shipping is predominantly based upon Australia's various international obligations under the framework created by the 1982 LOSC and further developed under specific instruments such as MARPOL and the London Convention. While the Commonwealth retains principal constitutional power in this field, the States also have complementary legislation applying in States' waters (see 5.3.1).

5.7.1 Commonwealth legislation

5.7.1.1 Protection of the Sea (Powers of Intervention) Act 1981

The *Protection of the Sea (Powers of Intervention) Act 1981* gives effect to the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969* (Intervention Convention). This allows coastal States that are parties to the Convention to take measures on the high seas necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil. The Convention was prepared at a time when the concept of the EEZ was not recognised so its reference to the 'high seas' is generally accepted as referring to the seas beyond the territorial sea. *The Protection of the Sea (Powers of Intervention) Act 1981* applies to ships on the high seas (including the EEZ) and in the territorial sea. However, it provides in s 5 that it is to be construed as being in addition to any State law and is not in derogation or substitution for it.

Intervention is authorised if there is a grave and imminent danger to the coastline of Australia, or to the related interests of Australia, from pollution or the threat of pollution of the sea. The powers authorised by the Intervention Convention include to issue directions to the owner, master or salvor to take steps to deal with the situation or, failing that actually take steps to move, sink or destroy the ship or cargo.[271] The Act gives these powers to the Minister in relation to an Australian flagged ship wherever in the world the ship may be, or to deal with any foreign flagged ship in internal waters or the territorial sea. Not following directions validly given under the Act could give rise to a prosecution. The power to recover expenses incurred in giving effect to dealing with the vessel or its cargo is contained in Part IV of the *Protection of the Sea (Civil Liability) Act 1981* (Cth).

The States, except Tasmania and Western Australia, also have intervention legislation.

5.7.1.2 Protection of the Sea (Prevention of Pollution from Ships) Act 1983

The ship operation aspects of MARPOL 73/78 are implemented in Australia under the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth). It is currently administered by AMSA. Annexes I, II, III and V of MARPOL are given effect under different parts of the Act.[272] Part II of the Act implements Annex I by making it an offence by the master and the owner if there is a discharge of oil or an oily mixture from an Australian ship into the sea, with the usual exceptions to the offence contained in the convention (accident, approved discharge, etc).[273] Similar provisions are set out in the Act relating to Annexes II, III and V. Waste disposal record books are to be kept and inspectors have wide powers.

Many provisions under MARPOL 73/78 require ships to have certain construction configuration (especially tankers) and that ships carry particular equipment (such as oily water separators). These requirements are given force in Australian legislation by the Commonwealth *Navigation Act 1912* (Cth).[274]

[270] See also Chapter 2 above.

[271] Intervention Convention art 8.

[272] In the 1982 Act the parts are: Part II (Oil); Part III (Noxious liquid substances); Part IIIA (Packaged harmful substances); Part IIIB (Sewage) and Part IIIC (Garbage). Part IIIB has never been proclaimed to come into effect because Annex IV of MAPROL has never come into effect.

[273] *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) s 9.

[274] For further detail on the *Navigation Act 1912* (Cth) see chapter 2.4.1.

The *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) has wide application as it binds the Commonwealth, each of the States and Norfolk Island[275] and has application within and outside Australia and extends to the EEZ. It applies to Australian flagged ships wherever they may be and to foreign flagged ships in Australian ports or the territorial sea. Like the *Navigation Act 1912* (Cth), this Act is also underpinned by the Shipping and Navigation Agreement under the OCS. This Agreement allows the Commonwealth to implement changes to MARPOL 73/78 for all jurisdictions, but has a 'savings clause' that allows State or Territory legislation to apply where it deals with the matter (see 2.3 and 5.3.1 above).[276] The Act, like MARPOL 73/78, is prescriptive. As such, the AMSA inspectors check whether ships comply with MARPOL 73/78 in the Port State Control regime (see 2.7). Ships that do not comply are liable to be detained until the defect is remedied. Prosecution is another enforcement option under the Act. In 2001, the MARPOL 73/78 legislation was amended to broaden the enforcement powers currently available, including allowing prosecutions for negligence.

5.7.1.3 Protection of the Sea (Civil Liability) Act 1981

The provisions of the CLC were given force in domestic Australian law by the *Protection of the Sea (Civil Liability) Act 1981* (Cth).[278] The Act gives power to make claims against a tanker that spills oil, or threatens to do so. Claims are made against the ship owner, but this means in practice against the P&I Club that insures the ship (see 2.2.8 above). Australian ships and foreign flagged ships that visit Australian ports are required to hold this insurance. This Act is divided into separate parts, of which Part 1 provides for, amongst other things, the Gazettal of those countries that have agreed to the provisions of the Convention. Part II gives effect in domestic law to most of the CLC, which makes relevant tanker owners liable for "any pollution damage" that is caused by oil or other toxic substances that have escaped or been discharged. There are exceptions, such as war, and the owner also has the right to limit liability. Under Part III Australian oil tankers and foreign flagged oil tankers visiting Australian ports are bound to carry the requisite proof of insurance required by the convention. Australian courts are given the jurisdiction to hear disputes and review administrative decisions by Australian government officials.

Part IIIA requires ships other than oil tankers that have a gross tonnage of 400 or more and that are carrying oil as bunkers to carry a relevant insurance certificate when visiting an Australian port. This is an Australian domestic requirement and not related to the CLC.

Under Part IV of the Act the Minister is given power to recover any expense which has been incurred in relation to the *Protection of the Sea (Powers of Intervention) Act 1981* (Cth). AMSA is given the authority to recover the expense to which it may have been put in cleaning up oil spills from tankers or in taking precautions in case a spill should occur (Part IVA). Between Part V and the Regulations under the Act provision is made for the prosecution of offences and for governance of the Act.

5.7.1.4 Protection of the Sea (Oil Pollution Compensation Fund) Act 1993

The *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth) gives effect to the Fund Convention (see 2.2.9). This provides for the calculation of an annual levy that oil companies must contribute to the oil pollution compensation fund established by the Fund Convention. It provides for enforcement of the levy against the Australian oil companies, if that should be necessary. The *Oil Pollution Compensation Fund Act 1993* is supported by three Acts that give effect to the levies that are imposed by the Fund from year to year on Australian oil companies.[279]

[275] *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) s 4.

[276] *Protection of the Sea (Prevention of Pollution from Ships Act 1983* (Cth) s 5.

[277] International Maritime Conventions Legislation Amendment Bill 2001.

[278] This Act was amended by the Protection of the Sea (Civil Liability) Amendment Act 2000, which amendments are all now in force.

[279] The *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund – Customs) Act 1993*, and the two related Acts *Protection of the Sea (Oil Pollution Compensation Fund – Excise) Act 1993* (Cth) and *Protection of the Sea (Oil Pollution Compensation Fund – General) Act 1993* (Cth).

Under these Acts, the participating oil companies are required to keep records, make reports and to pay the levies imposed by the Fund. AMSA is empowered to enforce these provisions, and the 'Fund' is deemed to be a legal entity in Australian courts to enforce requisite payments (the levies). The main part of the Act gives persons who have suffered damage or incurred expense in cleaning up oil spills the right to compensation and, if necessary, the right to sue to enforce their claims. The Act provides that the Fund will compensate any person unable to obtain full and adequate compensation for the damage or costs of cleaning up the oil pollution under the CLC and the *Protection of the Sea (Civil Liability) Act* enforcing it.

5.7.1.5 Hazardous Waste (Regulation of Exports and Imports) Act 1989

Australia gave effect to the Basel Convention (see 2.2.7) in the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth). Under the Act persons who wish either to import or export 'hazardous waste', or have a proposal concerning it, must apply for a permit. 'Hazardous waste' is defined in the several annexes to the Basel Convention and these are picked up by the Act. The purpose of the Act is to prevent Australia playing any part in an international trade in hazardous waste that could lead to its being dumped in the sea.

The Act sets out strict guidelines under which the Minister is to make a decision on applications for permits. The Act also requires that the waste be disposed of in Australia "having regard to the desirability of using facilities in Australia". Waste can not be disposed of in Antarctica.[280] The powers given to the Minister are wide, but there is some check on them as appeals from the Minister's decision can be taken to the Administrative Appeals Tribunal, which is an independent legal tribunal.

5.7.1.6 Environment Protection (Sea Dumping) Act 1981

The 1972 London Convention aims to prevent pollution that is liable to create hazards to human health, harm marine life, to damage amenities, or to interfere with other legitimate uses of the sea (see 2.2.6).[281] The London Convention, as it is commonly known, operates in waters under the national jurisdiction of coastal States (except internal State waters) as well as in international waters. Parties are under an obligation to prevent marine pollution caused by dumping and to prohibit the dumping of wastes except as specified in the annexes to the Convention.[282]

The London Convention bans sea dumping of radioactive and industrial wastes. It also bans incineration at sea of industrial wastes. A Protocol to the Convention was adopted in 1996. When it enters into force internationally, it will prohibit all dumping except for that classified as non-harmful under Annex 1 of the Protocol. The SPREP *Protocol for the Prevention of Pollution of the South Pacific Region by Dumping 1986* is formulated in terms that reflect the form of the London Convention before its revision by the 1996 Protocol.

The *Environment Protection (Sea Dumping) Act 1981* (Cth) implements the 1996 Protocol in Australia. The Act regulates dumping from all ships, aircraft or platforms and loading for the purpose of dumping at sea in all 'Australian waters' through prohibiting dumping unless a permit has been obtained. It does not apply to seabed mineral resource operations or to operational wastes from normal shipping activities. The Act also regulates all artificial reef construction in Australian waters.

[280] *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) s 17.

[281] London Convention art 1.

[282] London Convention arts 2 and 4.

The *Environment Protection (Sea Dumping) Act 1981* (Cth) defines 'Australian waters' to include the territorial sea of Australia and any external Territory; any area that is on the landward side of that territorial sea; the Australian EEZ; and any area of sea that is above the Australian continental shelf. This definition excludes any internal waters 'within the limits of a State or of the Northern Territory'.[283] Waters 'within the limits of a State or of the Northern Territory' are not necessarily coterminous with 'internal waters' at international law. The limits of a State or the Northern Territory is defined by common law, usually the low water mark, however, international law, as encapsulated in LOSC, defines internal waters as those on the landward side of the baselines defining the territorial sea.[284]

The Commonwealth Minister may make a declaration to 'roll back' the application of Commonwealth sea dumping legislation to the outer limits of the coastal waters where suitable State or Territory legislation exists.[285] However, the Minister reserves the right to declare that State or Territory laws do not apply in respective coastal waters if they do not adequately give effect to the London Convention. Tasmania has its own Sea Dumping Act,[286] although the Commonwealth has withdrawn authorisation under the *Environment Protection (Sea Dumping) Act 1981* (Cth) for Tasmania to issue licences. South Australia has passed its own Sea Dumping Act but has not proclaimed its entry into force.[287]

The 1996 Protocol, in Annex 1, lists the seven categories of wastes or other matter that may be considered for dumping at sea, and for which a permit may be given. These are:

- dredged material
- sewage sludge
- fish waste, or material resulting from industrial fish processing operations
- vessels and platforms or other man-made structures at sea
- inert, inorganic geological material
- organic material of natural origin
- bulky items, primarily comprising iron, steel, concrete and similarly unharmful materials, for which the concern is physical impact, limited to those circumstances where such wastes are generated at locations having no practicable access to disposal options other than dumping (for example, small islands with isolated communities).

Except in an 'emergency situation', no other substances may be considered for dumping.

5.7.1.7 Environment Protection and Biodiversity Conservation Act 1999

The EPBC Act does not explicitly regulate shipping operations but it has jurisdiction over certain shipping activities, particularly in relation to actions that are likely to have a significant impact on a matter of national environmental significance. The jurisdiction mainly relates to actions or omissions in the operation of ships that damage, or are likely to damage, the marine environment and also includes a strong regulatory power, which has not yet been utilised, for controlling non-native species that could be introduced via shipping.[288]

[283] *Environment Protection (Sea Dumping) Act 1981* (Cth) s 4.

[284] See, for example, *New South Wales v The Commonwealth* (1975) 135 CLR 337, 476 (Mason J); LOSC arts 7, 8, 9(6).

[285] *Environment Protection (Sea Dumping) Act 1981* (Cth) s 9.

[286] *Environment Protection (Sea Dumping) Act 1987* (Tas).

[287] *Environment Protection (Sea Dumping) Act 1984* (SA).

[288] EPBCA s 301A.

Apart from fishing, introduced, invasive pest species may be the most significant medium-term threat to marine biodiversity. As no use has yet been made use of the regulatory powers of Section 301A of the *Environment Protection and Biodiversity Conservation Act 1999*, the *Quarantine Act 1908* is the main tool for preventing and controlling marine pests. The Australian Quarantine and Inspection Service has introduced mandatory ballast water management requirements to reduce the risk of new introductions from ballast carried on international voyages.[289]

5.7.1.8 Special areas

Provisions under other legislation take account of marine pollution in special areas off the Australian coast and also stemming from special activities. Three major areas and activities illustrate the point.

The *Great Barrier Reef Marine Park Act 1975* (Cth) provides the Commonwealth with control over the Great Barrier Reef Marine Park, which is managed by the Great Barrier Reef Marine Park Authority (GBRMPA). Although this 'special area' is not within the South-east Marine Region, it is an important example of marine management. The Act aims to balance conservation objectives with wealth generating activities in an attempt to achieve both inter-generational and intra-generational equity. Management is conducted through management and zoning plans and a system of permits. Permits are required for commercial uses and the number issued is restricted. Mining in the park is prohibited with very limited exceptions.[290] The zoning and management plan system should provide a systematic and participatory approach for regulating multiple use in the Park. The Park is within the World Heritage Area and some three percent of this area is within Queensland waters, requiring joint management between the Commonwealth and Queensland governments. Furthermore, day-to-day management of the Park is undertaken by Queensland agencies, subject to GBRMPA's mandate, and Queensland legislation also applies.[291] All of the marine environmental conventions and legislation relating to ships apply in the Reef, together with the regulation applied by the GBRMPA. The compulsory pilotage provisions for certain parts of the Reef are contained in the Act.[292]

The areas offshore from the Australian coast for the exploration and exploitation of oil and gas are of increasing importance to the Australian economy. Legislation in this category regulates non-living marine resources on the continental shelf and installations and structures on the sea-bed. The main legislation is described in Chapter 7. This brief assessment will principally focus on the environmental management aspects of legislation regulating offshore oil and gas.

The *Petroleum (Submerged Lands) Act 1967* (Cth)[293] establishes a management regime based on a system of permits, leases and licences for the exploration for and exploitation of offshore petroleum resources outside the coastal waters of States and Territories, including the construction and operation of pipelines and infrastructure for processing, transportation etc.

The Act has a formal mechanism for cross-jurisdictional participation in decision making to the extent that States and the Northern Territory participate in Joint Authorities with the Commonwealth, meaning that considerations of relevance to two (conceivably three) tiers of government are brought into the process. There is also national coordination of changes to the legislation and its operation through the means of a Commonwealth-States Ministerial Council and associated Officials Committees. The States and Northern Territory also largely mirror the Commonwealth arrangements in coastal waters.

[289] For more information see the AQIS website: www.aquis.gov.au.

[290] See the *Great Barrier Reef Marine Park Act 1975* (Cth) s 38.

[291] See the list available at http://www.gbrmpa.gov.au/corp_site/about_gbrmpa/legislation_regulations.html.

[292] See the *Great Barrier Reef Marine Park Act 1975* (Cth) ss 59A-M.

[293] See 7.3.1.

A grant by the Commonwealth would also activate the operation of the EPBC Act, which operates in a complementary manner by assessing and deciding if actions of higher level concern (potentially impacting on matters of national environmental significance, affecting cetaceans and involving activities in parks and reserves) can proceed.

In addition, in relation to both exploration and development proposals, there exist administrative arrangements for consultation with other agencies and stakeholders generally. Underpinning this, the Act provides that a titleholder undertaking petroleum operations may not interfere with: navigation; fishing; the conservation of the resources and the sea bed; any operations of another person being lawfully carried on by way of exploration for, recovery of or conveyance of a mineral whether petroleum or not; construction or operation of a pipeline; or the exercise of native title rights or interests to a greater extent than is necessary. Interference is permitted if required for the reasonable exercise of the rights and performance of the duty of the licensee, however, the licensee is expected to negotiate with the holders of other rights to reach an accommodation.[294]

In relation to the decision to release acreage, the Commonwealth Department of Industry, Tourism and Resources, which administers this Act, consults widely with other Commonwealth departments and agencies, the States and Northern Territory, the petroleum industry and other stakeholders. These consultations determine whether particular acreage is released, any conditions that might be attached to the permits and the specific information supplied to those with an interest in bidding for these titles. The latter includes expectations of any specific environmental concerns or other interests that may need to be addressed before any activity is approved within the title area. The Department has also implemented arrangements to consult broadly with those with possible native title rights.

Under the recent *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) petroleum activities should be conducted in accordance with the principles of ecologically sustainable development. The Regulations require activities to have an environment plan, incorporating appropriate environmental performance objectives and standards (see 7.3.1.2).

The *Offshore Minerals Act 1994* (Cth) [295] sets out the management scheme and licensing system for the mining and exploration for minerals. The Act also sets conditions that may be attached to exploration and mining licences. A licence holder is required to take into account a number of factors, including: steps to protect the environment in the licence area; protect wildlife; minimise the effect on the environment of the licence area and the area surrounding the licence area of activities carried out in the licence area; and repair any damage to the environment caused by activities in the licence area.[296] These provisions address only aspects of ecosystem integrity and fall short of providing a comprehensive framework for multiple use management. The *Offshore Minerals Act 1994* (Cth) has a similar non-interference provision to the *Petroleum (Submerged Lands) Act 1967* (Cth).[297]

5.7.1.9 The Sea Installations Act 1987 (Cth) [298]

The *Sea Installations Act 1987* (Cth) controls installations, through a system of permits, associated with exploring or exploiting natural mineral resources other than petroleum in waters within Commonwealth jurisdiction. The EPBC Act also may apply to sea installations and provides an opportunity to further address issues relating to ecosystem integrity.

[294] *Petroleum (Submerged Lands) Act 1967* (Cth) s 124.

[295] See 7.3.2.

[296] *Offshore Minerals Act 1994* (Cth) s 254.

[297] *Offshore Minerals Act 1994* (Cth) s 44.

[298] See 7.3.3.

5.7.1.10 State and Territory legislation

Australia's State and Territory Parliaments have given effect to a number of international conventions concerning the protection and preservation of the marine environment. The States and the Northern Territory have large coastlines to protect and have implemented considerable legislation covering shipping and the marine environment.

Such legislation is implemented in accordance with the OCS (see also 5.3.1) whereby the Commonwealth and the States agreed to share jurisdiction over various activities from the low water mark to the three nautical mile limit.

5.8 Heritage protection laws

The *Australian Heritage Commission Act 1975* (Cth) establishes the Australian Heritage Commission.[299] It is an independent body whose function is to advise the Minister for Environment on matters relating to the National Estate,[300] including:

- identifying places to be included in the National Estate and maintain a register
- actions to conserve, improve and present the National Estate
- granting financial or other assistance by the Commonwealth for the above.

The National Estate consists of those places within the natural or cultural environment of Australia that have aesthetic, historic, scientific or social significance.[301] It covers both natural and cultural heritage. The National Estate can extend to the territorial sea and continental shelf.[302]

The Australian Heritage Commission must inform persons affected and the general public of an intention to include an area on or remove an area from the Register of the National Estate.[303] Landowners and local authorities must be informed and objections considered before listing.[304] The Commonwealth is constrained from taking any action that adversely affects a place in the Register or the Interim List (ie places undergoing the registration process)[305] unless there is no feasible and prudent alternative to this action, in which case damage must be minimised.[306] Any action that might significantly affect a place in the Register must be referred to the Australian Heritage Commission for comment. An action is considered to have an adverse effect on a place in the Register if it diminishes or destroys any of the national estate values that led to its inclusion in the Register. However, this section does not place any direct legal constraints or controls over the actions of States, local government or private owners.

The Act is to be repealed with the passage of the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000 (Cth), which will replace the Commission with a Council to advise the Minister. It will also create a National Heritage List and a Commonwealth Heritage List. These Lists will operate under the EPBC Act, following amendments to it proposed under the Environment and Heritage Legislation Amendment Bill 2000 (Cth).

There is provision for the transfer of sites currently listed under the *Australian Heritage Commission Act 1975* (Cth) to the proposed National List, as the Minister may transfer eligible places in the Register to the proposed Commonwealth List within six months of the new heritage legislation coming into force. The old Register would remain relevant as an indicative guide on what location, place or areas may count as part of the environment, due its cultural aspects, for the purposes of the EPBC Act.

[299] *Australian Heritage Commission Act 1975* (Cth) s 6.

[300] *Australian Heritage Commission Act 1975* (Cth) s 7.

[301] *Australian Heritage Commission Act 1975* (Cth) s 4.

[302] *Australian Heritage Commission Act 1975* (Cth) s 4(2).

[303] *Australian Heritage Commission Act 1975* (Cth) s 23.

[304] *Australian Heritage Commission Act 1975* (Cth) s 24A.

[305] *Australian Heritage Commission Act 1975* (Cth) s 26.

[306] *Australian Heritage Commission Act 1975* (Cth) s 30.

The EPBC Act would impose legal obligations for the management of places on the new lists and for environmental impact assessments for proposed actions that might detrimentally affect their heritage values. The States of the South-east Marine Region have each legislated for heritage protection, although these laws address only cultural heritage.

5.9 Historic shipwrecks laws

Under the 1972 *Agreement between Australia and the Netherlands Concerning Old Dutch Shipwrecks*, the Netherlands transferred to Australia all its rights and title to wrecked vessels of the Dutch East India Company that are lying off the coast of Western Australia. The Agreement sets out guiding principles for disposing of relics from the shipwrecks, with the prime purpose of preserving them. Article 303 of the LOSC grants further control over archaeological and historical objects to coastal States out to 24 nautical miles from their coasts, although sub-section 303(4) might arguably extend coastal control to wrecks located even further afield on the continental shelf. Assisting in implementation of Article 303(4), the *Convention on the Protection of Underwater Cultural Heritage* was adopted by UNESCO on the 2nd of November 2001. It will protect underwater cultural heritage, including ships wrecked more than 100 years ago and situated in the territorial waters of States, on the continental shelf and on the deep seabed. The text stipulates that the first option is *in situ* preservation, rather than recovery.

The *Historic Shipwrecks Act 1976* (Cth) provides a framework for protecting shipwrecks, providing a blanket protection for wrecks more than 75 years old and allowing the Minister for the Environment and Heritage to declare younger relics and wrecks to be protected. In its original form, the Act applied to waters adjacent to a State's coasts upon Commonwealth proclamation and automatically to waters adjacent to a Territory's coast. In 1980 the Act was amended so as to apply to waters adjacent to a State only with the consent of the State.[307] Proclamations have been made applying the Act to the waters adjacent to each State and Territory. In the Region, specific provisions for the protection of historic shipwrecks in State waters not subject to the Commonwealth Act, such as waters within the limits of State waters, have been adopted in South Australia, Victoria and Tasmania.[308] New South Wales can apply its general heritage legislation.[309] Some of the Minister's responsibilities under the Commonwealth Act have been delegated to agencies in each State and the Northern Territory and on Norfolk Island. These generally administer the Commonwealth Act on a day-to-day basis and are also responsible for the State/Territory legislation.

The *Historic Shipwrecks Act 1976* (Cth) aims to protect the heritage values of shipwrecks and relics. Any person who finds a wreck must inform the Minister for Environment and Heritage,[310] who maintains a register of them.[311] The Minister may declare a protected zone of up to 800 m radius around shipwrecks *in situ*.[312] Few such protected zones have been declared in the Region, having been declared adjacent to Queensland (7), New South Wales (2), Northern Territory (1), Victoria (1) and Western Australia (2). Actions that would damage, destroy, interfere with, dispose of, or remove a declared historic wreck or relic from Australian waters are prohibited.[313] Regulations can be made to prohibit: bringing into or use of equipment in a protected area that will damage the wreck; passage of a ship carrying certain substances through the protected area; trawling, diving or other under water activities; and mooring or use of ships within the protected zone.[314]

[307] *Historic Shipwrecks Act 1976* (Cth) s 4A.

[308] *Heritage Act 1995* (Vic); *Historic Shipwrecks Act 1981* (SA); *Historic Cultural Heritage Act 1995* (Tas).

[309] *Heritage Act 1977* (NSW).

[310] *Historic Shipwrecks Act 1976* (Cth) s 10.

[311] *Historic Shipwrecks Act 1976* (Cth) s 12.

[312] *Historic Shipwrecks Act 1976* (Cth) s 6.

[313] *Historic Shipwrecks Act 1976* (Cth) s 13.

[314] *Historic Shipwrecks Act 1976* (Cth) s 14.

Chapter 6
The regulatory framework for living marine resources[315]

6.1 Introduction

The law of the sea has greatly enhanced Australia's offshore sovereign rights and jurisdiction over living marine resources. Following the OCS, responsibility for the management of living marine resources in Australia is shared between the Commonwealth and States and the Northern Territory. The traditional dividing line between the States and Commonwealth is three nautical miles from the territorial sea baselines (usually the low-water mark), with the Commonwealth responsible for fisheries beyond the three nautical mile limit. The OCS allows the States, Northern Territory and the Commonwealth to enter into arrangements to manage a fishery in accordance with either a State/Territory or Commonwealth law to better reflect fishing practices and where fish are caught. This chapter summarises the international context, reviewing in particular the relevant international instruments dealing with fishing and marine living resource management. Consideration is then given to the domestic legal framework, covering the relevant legislative instruments and institutions, management mechanisms and non-legislative arrangements and institutions relevant to the management of living marine resources.

There are three main statutory regimes applying to the exploitation of marine living resources under Commonwealth jurisdiction. The first is that under the *Fisheries Administration Act 1991* (Cth) and the second that under the *Fisheries Management Act 1991* (Cth). Together these two Acts establish relevant management institutions and mechanisms. Two specialised regimes exist in relation to the Torres Strait and Antarctic fisheries.

The main regime that applies to the fisheries that the Commonwealth regulates in the South-east Marine Region is under the *Fisheries Management Act 1991* (Cth) and the *Fisheries Administration Act 1991* (Cth). Aquaculture is the responsibility of State agencies in this Region, with the Commonwealth providing support through national programs for research, quarantine, fish health, food safety, market access and trade, business development and farm management assistance.[316]

6.2 The international context

International law and institutions impact on the regulation of the exploitation of marine living resources in two main ways. The first is by establishing Australia's sovereignty and sovereign rights over such resources, which allows Australia both to exploit and to regulate the exploitation of living marine resources. International instruments also influence the way that such resources are exploited, both through imposing binding obligations and through the influence of non-binding, hortatory instruments that may, for example, set out guidelines in relation to the conservation of such resources.[317] Some of the main international instruments influencing the regulation of living marine resources in the South-east Marine Region are listed in Table 5.

[315] Internet addresses in this chapter were current as at 1 March 2002.

[316] http://www.affa.gov.au/content/output.cfm?ObjectID=D2C48F86–BA1A–11A1–A2200060B0A00888.

[317] See Appendix II.

Table 5: ***International instruments influencing the regulation of living marine resources in the South-east Marine Region.***

Instrument	Effect on Regulation
United Nations Convention on the Law of the Sea 1982	• Binding • Establishes Australia's sovereignty and sovereign rights over living resources out to 200 nautical miles from the low-water mark • Imposes obligations in relation to the conservation of resources
Convention on the Conservation of Southern Bluefin Tuna 1993	• Binding • Regulates the exploitation of Southern Bluefin Tuna in Australian waters
Agreement for the Establishment of the Indian Ocean Tuna Commission 1993	• Sets up the Indian Ocean Tuna Commission to manage the conservation and exploitation of tuna and billfish in the Indian Ocean extending to the meridian of longitude 141 east
Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific 1989	• Binding • Prohibits the use of long driftnets in waters adjacent to the eastern coast of Australia
Agreement on the Implementation of the United Nations Convention on the Law of the Sea Of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995	• Binding • Implements provisions of the United Nations Law of the Sea Convention relating to conservation and enforcement of regulations in relation to highly migratory and straddling fish stocks

FAO Code of Conduct for Responsible Fisheries 1995	• Non-binding
	• Establishes principles for responsible fishing and fisheries, taking into account all the relevant biological, technological, economic, social, environmental and commercial aspects of fisheries
	• Contains a Compliance Agreement component that is binding. Australia is currently considering acceptance of this Agreement
	• Several International Plans of Action have been concluded under the framework of this agreement:
	  • International Plan of Action for reducing Incidental Catch of Seabirds in Longline Fisheries
	  • International Plan of Action for the Conservation and Management of Sharks
	  • International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
	  • International Plan of Action for the Management of Fishing Capacity

Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR)	• Binding • Provides for internationally agreed management measures for the Sub-Antarctic and Antarctic regions, with the objective of the conservation of Antarctic marine living resources with conservation defined to include rational use*

* Although outside the South-east Marine Region, Macquarie Island fisheries are required to be conducted in a complementary manner.

6.3 OCS and living marine resources

The basic unit of management for the purposes of managing the exploitation of living marine resources in all Australian jurisdictions is the fishery. Legislation governing the management of living marine resources enables fisheries to be defined by such criteria as species or fish characteristics, fishing method, boat type, class of persons, geographic area or a combination of any of these factors.[318] The division of responsibility between Commonwealth and the States and for fisheries management is determined under the OCS. Four management categories currently exist:

- State management, where a fishery is located off only one State, arrangements can be made to manage that fishery under a State law
- Commonwealth management, where a fishery is adjacent to more than one State, the fishery can, by agreement between all parties, be managed by the Commonwealth
- Joint Authority management, where the Commonwealth and one or more of the States can form a single legal entity which manages a fishery under a single law, whether Commonwealth or State
- status quo management, where State laws control fishing in coastal waters within three nautical miles from shore and Commonwealth laws control fishing beyond the three nautical mile line to the 200 nautical mile limit of the Australian Fishing Zone (AFZ), ie there is no OCS agreement in place.

6.3.1 State management

Where a single jurisdiction applies and enforces the legal framework of a fishery, sustainable management is more easily achievable. However, as fisheries often border a number of States, only two other options for management are available – Commonwealth management and Joint Authority management.

6.3.2 Commonwealth management

The Commonwealth manages a number of fisheries under Commonwealth law with enforcement contracted out to the States. The Southern Bluefin Tuna fishery is currently being run under such an arrangement.

6.3.3 Joint Authority management

Joint Authority arrangements have been successfully implemented in some States. There are two forms of the Joint Authority model. The first is where both the Federal and State Ministers are involved in the day-to-day administration and policy decisions of the fishery and the second is where the powers of delegation other than the power of delegation itself are extended to the State Minister.

This management option has only been implemented in a few fisheries. The main reason is that Joint Authorities tend to be administratively cumbersome and tend to perpetuate the problems of divided responsibility even though the single jurisdiction and associated licensing arrangements could be beneficial.[319]

However, even where fisheries have been managed under Commonwealth law, States have remained involved through Management Advisory Committees (notable in the South East Trawl and Southern Shark fisheries). It has been commented that these committees have perpetuated to a large extent all the disadvantages of divided responsibility.[320]

[318] In the South-east Marine Region: *Fisheries Management Act 1991* (Cth) s 4; *Fisheries Management Act 1994* (NSW) s 6; *Living Marine Resources Management Act 1995* (Tas) s 6; *Fisheries Act 1995* (Vic) s 7. South Australia legislation provides for fisheries to be defined by regulation, but does not have an illustrative list of defining factors: *Fisheries Act 1982* ss 5 and 46.

[319] *New Directions for Commonwealth Fisheries Management in the 1990s* – A Government Policy Statement, December 1989.

[320] Ibid at n 1.

6.3.4 Status quo management

OCS arrangements have been reached with respect to a number of fisheries, however, there are some important fisheries that have no OCS arrangements in place. A lack of OCS agreement with respect to such fisheries has been acknowledged in the past as a significant obstacle to fisheries management.[321]

A lack of OCS agreement has also been acknowledged as placing an undue burden on industry in terms of the necessity for multiple licences and logbooks, as well as creating considerable enforcement difficulties.[322]

Fisheries management is constantly being reviewed to balance the overall management needs of the fisheries and of the fishers to address issues such as excess capacity.

Where no OCS arrangement has been concluded for the management of a fishery, the principal Commonwealth legislation, the *Fisheries Management Act 1991* (Cth) applies to the Australian Fishing Zone (AFZ). This zone is defined as the waters adjacent to the coast of Australia out to 200 nautical miles (the limits of the EEZ), excluding the coastal waters of a State (ie waters within three nautical miles of the territorial sea baselines defining the territorial sea).[323] Thus the traditional division of responsibility between the Commonwealth and the States and the Northern Territory (ie three nautical miles from the baselines) is retained (see Chapter 1).

Under any management arrangement, the Commonwealth retains jurisdiction over foreign fishing vessels.

The fisheries legislation of the Commonwealth, every State and the Northern Territory contain similar provisions for the conclusion and operation of such arrangements.[324]

6.3.5 Commonwealth-managed fisheries

Commonwealth-managed fisheries in the South-east Marine Region are:

- migratory tuna fisheries (except off New South Wales)
- Bass Strait Scallop Central Zone Fishery
- Southern Shark Fishery (except off New South Wales)
- South Tasman Rise Fishery
- Macquarie Island Fishery
- Great Australian Bight Trawl Fishery
- Jack Mackerel Fishery
- South East Non-Trawl Fishery
- South East Trawl Fishery
- Southern Squid Jig Fishery.

While these fisheries are managed by the Australian Fisheries Management Authority (AFMA) on behalf of the Commonwealth, the jurisdictional arrangements applying to each fishery are complex. The scope of each of these fisheries (in terms of species, methods and area of waters) is defined by a complex array of detailed arrangements that have been negotiated between the Commonwealth Government and the various State Governments in the Region.

For example, although the Southern Shark Fishery is managed by AFMA on behalf of the Commonwealth, the fishery:

- does not include any waters off New South Wales (under an OCS arrangement between the Commonwealth and NSW Governments)
- does not include all species of sharks in all areas of the fishery (the OCS arrangements in place between the Commonwealth and each of the South Australian, Victorian and Tasmanian State Governments for this fishery only cover school and gummy sharks, even though a number of other shark species are also caught).

[321] *Fisheries Reviewed*, Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure, December 1993.

[322] Ibid, n 1.

[323] *Fisheries Management Act 1991* (Cth) ss 4, 5 and 7. Section 12 has provision to extend the application of the Act to the limits of the continental shelf in relation to sedentary organisms.

[324] In the South-east Marine Region: *Fisheries Management Act 1991* (Cth) Pt 5; *Fisheries Management Act 1994* (NSW) PT 5; *Fisheries Act 1982* (SA) Pt 2; *Living Marine Resources Management Act 1995* (Tas) Pt 7; *Fisheries Act 1995* (Vic) Pt 2.

The only Joint Authority in the South-east Marine Region is between the Commonwealth and Tasmania for the management of the Jack Mackerel Fishery in Tasmanian waters and the adjacent Commonwealth waters in accordance with Tasmanian law.

It should be noted that recreational fishing is under State and Territory jurisdiction within the AFZ with a capacity to bring scientific recreational fishing under Commonwealth control if that fishing is included in a *Fisheries Management Act 1991* (Cth), fishery plan of management.

6.3.6 Aquaculture

As aquaculture is generally carried out close to the shore, it is under the control of State Governments. The Commonwealth provides a national strategy for investment direction and assists with the following aspects of aquaculture:[325]

- commonwealth fishery status report (Bureau of Rural Sciences)
- international sales initiatives (AUSTRADE)
- quarantine (AQIS)
- research and development (Fisheries Research and Development Corporation)
- national food and hygiene standards (Australia New Zealand Food Authority)
- seafood quality (Australia Seafood Industry Council)
- control and management of diseases and aquatic organisms (National Office of Animal and Plant Health)
- statistics and economic forecasts (Australian Bureau of Agriculture and Resource Economics).

6.4 Legislation

There are two primary Commonwealth instruments regulating the exploitation of living marine resources:[326]

- *Fisheries Management Act 1991* (Cth)
- *Fisheries Administration Act 1991* (Cth).

These Acts are supplemented by the *Fishing Levy Act 1991* (Cth), which imposes a levy on fishing concessions under the *Fisheries Management Act 1991* (Cth).

Two other Acts, the *Torres Strait Fisheries Act 1984* (Cth) and the *Antarctic Marine Living Resources Conservation Act 1981* (Cth), regulate specific fisheries outside the Region.

It is important to note that other legislative instruments, especially the EPBC Act, prove an additional regulatory layer for the exploitation of living marine resources. This Act, and other environmental legislation, is addressed in a separate chapter.[327] It is important to note here, however, that strategic assessments are being conducted under the EPBC Act for each fishery managed in accordance with the *Fisheries Management Act 1991* (Cth). This assessment will enable activities to be assessed in accordance with a management plan or policy under the *Fisheries Management Act 1991* (Cth), without the need for each individual concession to be assessed under the EPBC Act. Such an assessment is required by the EPBC Act to be commenced for all Commonwealth fisheries that did not have a management plan at the time that the Act came into force (July 2000) within five years of that date.[328]

[325] http://www.brs.gov.au/fish/aqua.html.

[326] As amended by the *Fisheries Legislation Amendment Act 1999* (Cth) to implement the *Agreement on the Implementation of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995*.

[327] See chapter 5.

[328] EPBC Act s 150.

6.4.1 Fisheries Management Act 1991

The *Fisheries Management Act 1991* (Cth) governs the management of all Commonwealth fisheries in the South-east Marine Region. The Act's prime function is as a 'tool box' from which the management body (the Australian Fisheries Management Authority) can draw appropriate management tools for the fishery (see further below 6.7).[329] The Act itself does not directly regulate any fisheries.[330] Instead, direct regulation is conducted through regulations, concessions and management plans made in accordance with the Act.

The *Fisheries Management Act 1991* (Cth) contains the provisions providing for the making of arrangements to manage a fishery in accordance with the law of either the Commonwealth or a State or Territory, and enabling the creation of Joint Authorities (See above 6.3).[331]

In addition, the *Fisheries Management Act 1991* (Cth) contains the provisions for surveillance and enforcement of Commonwealth fisheries laws;[332] prohibiting drift net fishing;[333] collecting levies and charges;[334] and implementing the 1987 *Treaty of Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America*.[335]

The *Fisheries Management Act 1991* (Cth) was amended by the *Fisheries Legislation Amendment Act (No 1) 1999* (Cth), which implements the *Agreement on the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995* (1995 UN Agreement) (See Table 5).[336]

Recreational fishing is under State and Territory jurisdiction within the AFZ (not just within three nautical miles) with a capacity to bring specific recreational fishing under Commonwealth control if that fishing is included in a *Fisheries Management Act 1991* (Cth) fishery plan of management.

6.4.2 Fisheries Administration Act 1991

The *Fisheries Administration Act 1991* (Cth) establishes the institutional administrative machinery responsible for managing Commonwealth-managed fisheries, other than Joint Authorities.[337] These institutions, which are discussed in greater detail below (see 6.5), are:

- **Australian Fisheries Management Authority:** established by the Act, the authority is responsible for day-to-day management of Commonwealth fisheries. The Act also provides for the independence and accountability of AFMA[338]
- **Management Advisory Committees:** these are not directly established by the Act, but provision is made for AFMA to establish these MACs for fisheries in order to enable the involvement of industry and other interest groups in the management of fisheries[339]
- **Fishing Industry Policy Council:** to be established as an advisory council to the Minister, particularly to promote its development, the Council has never been in operation despite the Act stating that it is established.[340]

[329] See esp *Fisheries Management Act 1991* (Cth) Pts 3 and 4.

[330] Other than Marlin and Driftnet fishing: *Fisheries Management Act 1991* (Cth) Pt 2.

[331] *Fisheries Management Act 1991* (Cth) Pt 5.

[332] *Fisheries Management Act 1991* (Cth) Pt 6.

[333] *Fisheries Management Act 1991* (Cth) Pt 2.

[334] *Fisheries Management Act 1991* (Cth) Pt 7.

[335] *Fisheries Management Act 1991* (Cth) Sch 1; See also Appendix for information on the 1995 UN Agreement.

[336] *Fisheries Legislation Amendment Act (No 1) 1999* (Cth) Sch 2.

[337] This Act is also to be amended by the *Fisheries Legislation Amendment Act (No 1) 1999* (Cth).

[338] *See Fisheries Administration Act 1991* (Cth) Pt 2.

[339] *Fisheries Administration Act 1991* (Cth) Pt 2 Div 5.

[340] *Fisheries Administration Act 1991* (Cth) Pt 3.

6.5 Legislative bodies

There are numerous institutions that have, or would have,[341] roles relevant to the management of fisheries in Commonwealth marine areas:

- Agriculture, Fisheries and Forestry–Australia (AFFA)
- Australian Fisheries Management Authority (AFMA)
- Management Advisory Committees
- Fishing Industry Policy Council
- Joint Authorities
- State and Territory authorities.

Two other institutions have important roles in relation to fisheries-specific research in Commonwealth marine areas:

- fisheries assessment groups
- the Fisheries Research and Development Corporation (FRDC). [342]

6.5.1 Agriculture, Fisheries and Forestry–Australia[343]

Agriculture, Fisheries and Forestry–Australia is a government department, within which the Fisheries and Aquaculture Branch has responsibility for broad fisheries policy. It represents Australia's fishing and aquaculture interests both domestically and in the international arena and is involved in developing policies and programs that address Australia's rights and obligations in relation to fish stocks shared with other nations. It also negotiates in the international arena on behalf of Australia.

As part of its role in domestic fisheries, AFFA ensures consistency between the priorities and development activities of AFMA and the Fisheries Research and Development Corporation (FRDC) and the overall government policy framework. AFFA also provides policy advice, administers the payment of Commonwealth funding to the FRDC and AFMA and ensures that the FRDC and AFMA comply with its statutory reporting requirements. AFFA is also involved in the selection processes for the FRDC and AFMA boards.

AFFA also provides secretariat support for, and participates in, the Marine and Coastal Resources Committee (Standing Committee) under the Primary Industries Ministerial Council, which provides coordination of national approaches and sharing of information between the Commonwealth and States in relation to primary industries.

Recent participation in regional and international fora on fisheries conservation and management issues relevant to the South-east that AFFA regards as of particular note include:

- participating in the setting of global Southern Bluefin Tuna quota and national allocations through the meetings of the Commission on the Conservation of Southern Bluefin Tuna (CCSBT)
- representing Australian interests in the management of shared fish stocks with New Zealand, such as occurs in relation to the South Tasman Rise
- participating in the preparatory conferences on the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Oceans*
- participating in CCAMLR matters
- participating at the annual meeting of the South Pacific Fisheries Forum
- participating at the FAO technical working groups on reducing the over-capacity problem of high seas fishing with its consequent impacts on sustainable fisheries

[341] As noted, the Fishing Industry Policy Council has not been established.

[342] Other bodies, such as CSIRO, Bureau of Rural Sciences and ABARE have important research roles in relation to fisheries. These two bodies are covered here due to the fact that their role is confined to fisheries research.

[343] See http://www.affa.gov.au/content/output.cfm?ObjectID=D2C48F86–BA1A–11A1–A220006oB0A00872.

- participating in the meeting of the Eastern Antarctic Coastal States (EACS – includes Norway, France, New Zealand and South Africa) to resolve the problem of illegal fishing for Patagonian Toothfish in Antarctic waters
- participating in biennial Organisation for Economic Cooperation and Development (OECD) meetings
- providing input into a program of work analysing impacts of subsidies on fishing in order to reduce the over-capacity problem on high-seas fishing with its consequent impacts on sustainable fisheries
- participating in the Asia Pacific Economic Cooperation (APEC) Fisheries Working Group (FWG)
- attending meetings and providing input in consultation with industry on the APEC Early Voluntary Sectoral Liberalisation (EVSL) initiative
- representing Australian interests in the management of shared fish stocks with Indonesia, France and Papua New Guinea
- promoting quarantine and fish health activities that will lead to long-term benefits for Australian aquaculture industries through recent Australian membership of the Network of Aquaculture Centres in Asia (NACA)
- representing Australia's interests on fisheries issues under CITES and the Bonn Convention
- developing high-seas and remote-area fisheries policies that support the 1995 UN Agreement
- developing and implementing strategies to deal with illegal fishing in the Australian EEZ
- providing strategic fisheries input to support Australia's involvement in international agreements such as the LOSC and the *FAO Code of Conduct for Responsible Fishing*
- providing secretariat support for Australia's role as the Lead Shepherd of the APEC Fisheries Working Group during 2001.[344]

6.5.2 Australian Fisheries Management Authority

AFMA has primary responsibility for the day-to-day administration of Commonwealth fisheries resources. AFMA is a statutory authority, established by the *Fisheries Administration Act 1991* (Cth), external to, but working with AFFA. AFMA is independent of the Minister, although still accountable to the Minister and Parliament. The Minister also has an exceptional power, which has never been exercised, to issue directions to AFMA.[345] The Minister must also accept management plans and AFMA's statutory plans and reports.[346] AFMA also reports annually to the peak industry body,[347] the Australian Seafood Industry Council,[348] and holds an annual public meeting to report to industry, stakeholders and the public.[349] In its operations AFMA works with Management Advisory Committees (see below) and various research bodies, including the:

- Fisheries Research and Development Corporation (FRDC)
- Commonwealth Scientific and Industrial Research Organisation (CSIRO)
- Bureau of Rural Sciences (BRS)
- Australian Bureau of Agricultural and Resource Economics (ABARE).

AFMA has three branches: Fisheries, Operations, and Strategy and Planning; their responsibilities are set out in the Table 6.

[344] See http://www.affa.gov.au/content/output.cfm?ObjectID=D2C48F86–BA1A–11A1–A2200060B0A00873.

[345] *Fisheries Administration Act 1991* (Cth) s 91.

[346] *Fisheries Management Act 1991* (Cth) s 18.

[347] *Fisheries Administration Act 1991* (Cth) s 89.

[348] *Fisheries (Administration) Regulations* (Cth) reg 3.

[349] *Fisheries Administration Act 1991* (Cth) s 90.

In addition there are three Committees established by AFMA that provide advice to the Board:

- **AFMA Board Finance and Audit Committee:** reports to the Board on draft annual financial statements; compliance with statutory requirements and financial reporting; the scope of the Audit Strategy; issues arising from the annual audit and review of the report and recommendations of the Australian National Audit Office; the Committee's review of the effectiveness of internal controls and adequacy of systems; management information; the financial year budget; the drafting of the Annual Report and the ethical behaviour of AFMA and its senior management, which is monitored by the Committee
- **Research Committee:** advises the Board on the strategic directions, priorities and funding for research and acts as the Commonwealth Fisheries Research Advisory Board to advise the Fisheries Research and Development Corporation
- **Environment Committee:** advises the Board on strategies to address conservation and environmental issues; strategies to pursue AFMA's legislative objectives; identifies gaps in research related to conservation, protection and use of the marine environment; and advises the Research Committee on the research that is required to fill any such gaps; and reviewing AFMA's bycatch action plans, exploratory management reports and other documents related to AFMA's environmental responsibilities.

Table 6: *The AFMA branch responsibilities.*

Branch	Responsibilities
Fisheries	• Fisheries, divided into sections (grouped according to amongst other things, similarity in fishing method, species or area): – Bass Strait Central Zone Scallop; Southern Squid Jig; Torres Strait; Coral Sea; Cocos (Keeling) Islands, Norfolk Island and Christmas Island Fisheries – Northern Prawn; North West Shelf; Western Trawl and Northern Joint Authority Fisheries – South East Trawl; South Tasman Rise and Great Australian Bight Trawl Fisheries – Southern Shark and South East Non-Trawl Fisheries – Sub-Antarctic Fisheries – Southern Bluefin Tuna; Southern and Western Tuna and Billfish, Jack Mackerel and Eastern Tuna and Billfish Fisheries • Environment
Operations	• Compliance • AFZ Observer Program • Data Management Program • Research Program • Licensing • Systems
Strategy and Planning	• Policy, planning and communications • Human resources • Legal services • Executive secretariat • Financial management

The primary tasks undertaken by AFMA are:[350]

- devising fisheries management regimes, fisheries adjustment and restructuring programs (to date these have been implemented by AFFA) and exploratory and feasibility fishing programs for Commonwealth fisheries
- processing licensing and entitlement transactions for Commonwealth fisheries (excluding the Torres Strait)
- consulting and negotiating with foreign governments and business interests on foreign fishing vessel access to Australian fisheries and ports
- establishing research priorities for fisheries under AFMA management and ensuring that research is carried out, including ensuring that the biological and economic state of each fishery is continually assessed and that any gaps in knowledge are filled by research funded by the FRDC and AFMA research funds
- maintaining a substantial data collection program, including logbooks, and observer services
- enforcing the provisions of the *Fisheries Management Act 1991* (Cth) and the *Torres Strait Fisheries Act 1984* (Cth) in conjunction with other relevant Commonwealth agencies through the detection and investigation of illegal fishing within the AFZ and Commonwealth fisheries (with the implementation of the 1995 UN Agreement by the *Fisheries Legislation Amendment Act (No 1) 1999* (Cth), the zone of enforcement is extended to include the high seas for some purposes)
- consulting and exchanging information with overseas fisheries agencies and participating in an advisory capacity in international fora, including the Commission for the Conservation of Southern Bluefin Tuna, the Forum Fisheries Commission, CCAMLR and the Indian Ocean Tuna Commission
- complying with reporting obligations under the *Fisheries Administration Act 1991* (Cth).

AFMA is required to perform its functions in accordance with statutory objectives stated in the *Fisheries Administration Act 1991* (Cth) and the *Fisheries Management Act 1991* (Cth) (see below 6.6).

6.5.3 Management Advisory Committees

The establishment of Management Advisory Committees (MACs) by AFMA is provided for under the *Fisheries Administration Act 1991* (Cth).[351] AFMA also designates the powers that a particular MAC shall have. The functions of MACs include:

- advising AFMA with respect to the management of the fishery, and priorities for research
- providing a forum for the discussion of matters relevant to the management of the fishery and for communication between the fishery managers and participants
- monitoring and reporting to the authority information related to the fishery
- performing management tasks delegated to the MACs by AFMA
- preparing of an annual budget for the management of the fishery for consideration by AFMA.[352]

MACs generally consist of an independent Chair, an AFMA member and up to seven other members from commercial industry, the scientific community, the environment/conservation sector and, where appropriate, the recreational and charter fishery sectors and State governments. MACs have the capability to appoint sub-committees, which usually deal with matters related to research, compliance and financial matters.

[350] See *Fisheries Administration Act 1991* (Cth) s 7; http://www.afma.gov.au/about%20afma/default.php and OECD, *Towards Sustainable Fisheries: Country Reports* (1997) 8.

[351] *Fisheries Administration Act 1991* (Cth) Pt 2 Div 5.

[352] See *Fisheries Administration Act 1991* (Cth) s 57; OECD, above n 350, 9.

The following Commonwealth-managed fisheries in the South-east Marine Region currently have MACs:[353]

- South East Trawl Fishery: South East Trawl Fishery Management Advisory Committee (SETMAC)
- Southern and Western Tuna and Billfish Fishery: Southern and Western Tuna and Billfish Management Advisory Committee (Southern and Western Tuna MAC)
- Eastern Tuna and Billfish Fishery: Eastern Tuna and Billfish Fishery Management Advisory Committee (Eastern Tuna MAC)
- Southern Bluefin Tuna Fishery: Southern Bluefin Tuna Fishery Management Advisory Committee (SBTMAC)
- Southern Shark Fishery: Southern Shark Fishery Management Advisory Committee (SharkMAC)
- Great Australian Bight Trawl Fishery: Great Australian Bight Trawl Fishery Management Advisory Committee (GABMAC)
- Bass Strait Central Zone Scallop Fishery: Bass Strait Central Zone Scallop Fishery Management Advisory Committee (ScallopMAC)
- South East Non-Trawl Fishery: South East Non-Trawl Fishery Management Advisory Committee (SENTMAC)
- Southern Squid Jig Fishery: Southern Squid Jig Fishery Management Advisory Committee (SquidMAC)
- Heard and McDonald Islands Fishery and Macquarie Island Fishery: Sub-Antarctic Fisheries Management Advisory Committee (SouthMAC).

6.5.4 Fishing Industry Policy Council

The *Fisheries Administration Act 1991* (Cth) makes provision for the establishment of a Fishing Industry Policy Council (FIPC). The FIPC was to have the objectives of facilitating the exchange of views between persons having an interest in the industry and of developing a unified approach to matters affecting the industry.[354] The FIPC was to do this through inquiring into matters affecting the industry; developing recommendation that are consistent with principles of ecologically sustainable development, to safeguard the industry and consultation in relation to matters affecting the industry.[355] However, as stated above, this Council has not been established.[356]

6.5.5 Joint Authorities

Joint Authorities are management bodies that can be established under the *Fisheries Management Act 1991* (Cth) and corresponding State and Territory legislation, in accordance with the OCS, to provide for joint management of fisheries. A Joint Authority consists of the Commonwealth Minister and the relevant State/Territory fisheries Ministers. While a Joint Authority undertakes the high-level policy and management steering functions for the fishery, day-to-day administration is undertaken by either AFMA or the appropriate State/Territory fisheries administration agency, depending on whether the fishery is managed under Commonwealth or State/Territory law. The only Joint Authority operating in the South-east Marine Region is for the management of Jack Mackerel in accordance with Tasmanian law in waters adjacent to Tasmania.

[353] http://www.afma.gov.au/about%20afma/afma%20management%20advisory%20committees.htm.

[354] *Fisheries Administration Act 1991* (Cth) s 97.

[355] *Fisheries Administration Act 1991* (Cth) s 98.

[356] AFFA, *Commonwealth Fisheries Policy Review*, Issues Paper (2001).

6.5.6 State and Territory authorities

State and Territory fisheries management authorities play a role in the management of fisheries in Commonwealth marine areas where an arrangement has been made in accordance with the OCS and the *Fisheries Management Act 1991* (Cth) for the management of a fishery in accordance with a State or Territory law. This is so whether or not a Joint Authority has been established. Regulation of recreational fishing is also the primary responsibility of State and Territory agencies, although provisions of the EPBC Act, particularly in relation to listed species, apply to species taken through recreational fishing.[357] State and Territory agencies also have responsibilities in ensuring compliance with Commonwealth fisheries laws through undertaking specific compliance functions by providing manpower and expertise, while AFMA provides overall coordination, policy direction, technical advice and funding.

The relevant State and Territory authorities in the South-east Marine Region are:

- NSW Fisheries (New South Wales)
- Department of Primary Industries, Water and Environment (Tasmania)
- Department of Natural Resources and Environment (Victoria)
- Primary Industries and Resources South Australia (PIRSA) (South Australia).

6.5.7 Fisheries Assessment Groups[358]

Fisheries Assessment Groups have been established for each major fishery group or individual species under Commonwealth management. The Groups include fishery scientists, fishery economists, management and other interest groups. The role of the Groups is to synthesise biological system and economic information to provide advice to AFMA. The Groups also coordinate, evaluate and undertake fishery assessment activity in each fishery, essentially providing risk assessment of management options. The Groups report to MACs, who consider the advice before making recommendations to the AFMA Board. They also advise research sub-committees on the information required for stock assessment, driving the research agenda.

6.5.8 Fisheries Research and Development Corporation[359]

The FRDC is not a management agency but a rural research and development corporation within the AFFA portfolio. There is a significant policy influence through commissioned research and research priorities. It was formed in 1991 under the *Primary Industries and Energy Research and Development Act 1989* (Cth). The FRDC identifies research and development needs and the means of addressing them through a planning process. It does not undertake research itself, but contracts research providers. It is advised by State-based Fisheries Research Advisory Boards (FRAB).

[357] See above 5.6.

[358] See http://www.afma.gov.au/about%20afma/afma%20fishery%20assessment%20groups.htm.

[359] See http://www.frdc.com.au/about/index.htm.

6.6 Purpose of management

The *Fisheries Management Act 1991* (Cth) and *Fisheries Administration Act 1991* (Cth) both have lists of stated objectives for the management of fisheries in Australia. These objectives are:

Fisheries Management Act 1991 (Cth)

(a) implementing efficient and cost-effective fisheries management on behalf of the Commonwealth

(b) ensuring that the exploitation (sic) of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development 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

(c) maximising economic efficiency in the exploitation (sic) of fisheries resources

(d) ensuring accountability to the fishing industry and to the Australian community in AFMA's management of fisheries resources

(e) achieving government targets in relation to the recovery of the costs of AFMA.

In addition to the objectives mentioned in subsection (1), or in section 78 of this Act, the Minister, AFMA and Joint Authorities are to have regard to the objectives of:

(a) ensuring, through proper conservation and management measures, that the living resources of the AFZ are not endangered by over-exploitation (sic)

(b) achieving the optimum utilisation of the living resources of the AFZ, but must ensure, as far as practicable, that measures adopted in pursuit of those objectives must not be inconsistent with the preservation, conservation and protection of all species of whales

(c) ensuring that conservation and management measures in the AFZ and high seas implement Australia's obligations under international agreements that deal with fish stocks but must ensure, as far as practicable, that measures adopted in pursuit of those objectives must not be inconsistent with the preservation, conservation and protection of all species of whales.[360]

Fisheries Administration Act 1991 (Cth):

(a) implementing efficient and cost-effective fisheries management on behalf of the Commonwealth

(b) ensuring that the exploitation (sic) of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development 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

(c) ensuring that:

(i) the exploitation (sic) in the Australian Fishing Zone (as defined in the *Fisheries Management Act 1991*) and the high seas fish stocks in relation to which Australia has obligations under international agreements; and

(ii) related activities; are carried out consistently with those obligations

(d) maximising economic efficiency in the exploitation (sic) of fisheries resources

(e) ensuring accountability to the fishing industry and to the Australian community in the Authority's management of fisheries resources

(f) achieving government targets in relation to the recovery of the costs of the Authority.[361]

There is significant overlap between the objectives contained in the Acts, with three dominant themes:

- maximising economic efficiency
- environmental sustainability
- accountability for management to industry and the community.

[360] *Fisheries Management Act 1991* (Cth) s 3.

[361] *Fisheries Administration Act 1991* (Cth) s 6.

6.7 Management mechanisms

Management mechanisms for fisheries can be divided into two broad categories: input controls and output controls:

- input controls are designed to limit the amount of effort that can be utilised in a fishery, for example, by limiting the amount and type of gear that can be used; as such, they have only an indirect relationship to the quantity of fish that are extracted from a fishery
- output controls, in contrast, limit directly what is extracted from a fishery, for example, by limiting the quantity of fish extract.

The *Fisheries Management Act 1991* (Cth) serves as a 'toolbox' from which AFMA can draw various management mechanisms to manage fisheries within Commonwealth jurisdiction. These tools are used to implement input and output controls on the exploitation of marine living resources. These management mechanisms can be divided into three categories: framework mechanisms, concessions and other regulatory mechanisms.

6.7.1 Framework mechanisms

The two primary framework mechanisms under the *Fisheries Management Act 1991* (Cth) are fisheries and fisheries management plans.

6.7.1.1 Fisheries

A 'fishery' is the basic unit into which activities relating to the use of living marine resources are divided for the purpose of management. A fishery is defined as a class of activities identified by reference to any or all of:[362]

- a species or type of fish
- a description of fish by reference to sex or any other characteristic
- an area of waters or of seabed
- a method of fishing
- a class of boat
- a class of persons
- a purpose of activities.

6.7.1.2 Management plans

Management plans are a framework mechanism available under the *Fisheries Management Act 1991* (Cth) for the regulation of a fishery. They are drawn up by AFMA after consultation with persons engaged in fishing and allowing for public submissions on draft plans.[363] They set out objectives for the management of the fishery, measures for achieving these objectives and performance criteria for assessing performance.[364] Crucially, plans also provide the basic management arrangements for the fishery, including method of fishing; capacity of the fishery; and management in accordance with statutory fishing rights or other fishing concessions.[365]

They are currently only applied to four fisheries. All others are regulated through less formal mechanisms such as conditions on permits (see below).

6.7.2 Fishing concessions

The *Fisheries Management Act 1991* (Cth) imposes a blanket prohibition on commercial fishing unless an appropriate fishing concession or permit is held.[366] The *Fisheries Management Act 1991* (Cth) provides for several different types of concessions: statutory fishing rights, fishing permits, scientific permits and foreign fishing licences.

[362] *Fisheries Management Act 1991* (Cth) s 4.

[363] *Fisheries Management Act 1991* (Cth) s 17.

[364] *Fisheries Management Act 1991* (Cth) s 17.

[365] *Fisheries Management Act 1991* (Cth) s 17(6).

[366] *Fisheries Management Act 1991* (Cth) s 95.

All concessions are liable to suspension or cancellation by AFMA for various grounds, including:

- outstanding fees, levies and charges
- contravention of conditions
- conviction of an offence relating to fishing under a law of New Zealand, Papua New Guinea or a State or Territory.[367]

6.7.2.1 Statutory fishing rights [368]

Statutory fishing rights (SFRs) are intended to give fishers more secure rights of access and use than other fishing concessions. They also allow holders a greater capacity to deal with rights in a manner similar to property, eg to buy, lease or sell rights. SFRs grant to the holder an entitlement in relation to a fishery, eg to take fish or to use a particular type of fishing gear. As such, SFRs can be used to implement both input and output controls. A management plan must be established in order to manage a fishery in accordance with SFRs.[369] The *Fisheries Management Act 1991* (Cth) provides an illustrative list of forms that SFRs may take, including:[370]

- a right to take a particular quantity of fish or a particular quantity of a particular type of fish from a managed fishery or particular area thereof
- a right to a particular proportion of the fishing capacity that is permitted under a plan of management for a managed fishery or part thereof
- a right to engage in fishing in a managed fishery at a particular time, for a particular number of days, during a particular number of weeks or months or any combination of the above, during a particular period
- the right to use a boat, a particular type of boat, or a boat of a particular size and engine power in a managed fishery for purposes stated in a plan
- the right to use particular fishing equipment or equipment of a particular size, kind or quantity
- the right to use fishing equipment of a particular size, kind or quantity or combination of the aforesaid
- any other right in respect of fishing in a managed fishery.

SFRs can be granted conditionally.[371] They exist for the duration of a management plan, for which there is no set period of determination (although special provisions issue 'options' to SFR holders where a plan is revoked, enabling rights under the new plan to be issued to SFR holders under the revoked plan).[372] Importantly, a register is maintained of SFRs, and holders of SFRs can deal with them as if the 'absolute owner',[373] although the written approval of AFMA is required to transfer ownership,[374] and interests of third persons in the rights are listed in the Register. AFMA is obliged to register a dealing if procedural requirements have been complied with.[375] An annual levy is collected from SFR holders.

[367] *Fisheries Management Act 1991* (Cth) ss 38 (suspension) and 39 (cancellation).

[368] See http://www.afma.gov.au/licensing%20and%20entitlements/default.php#STATUTORY FISHING RIGHTS and *Fisheries Management Act 1991* (Cth) ss 21–2.

[369] See http://www.afma.gov.au/licensing%20and%20entitlements/default.php#STATUTORY FISHING RIGHTS.

[370] *Fisheries Management Act 1991* (Cth) s 21.

[371] *Fisheries Management Act 1991* (Cth) s 22(3).

[372] *Fisheries Management Act 1991* (Cth) Pt 3 Div 4A.

[373] *Fisheries Management Act 1991* (Cth) s 48

[374] *Fisheries Management Act 1991* (Cth) s 49: Such approval can only be withheld if a transfer of ownership is contrary to a management plan or a condition of the SFR.

[375] *Fisheries Management Act 1991* (Cth) ss 45–6.

6.7.2.2 Fishing permits [376]

Fishing permits authorise the holder to conduct specific fishing activities in a Commonwealth managed fishery.[377] Permits can also be used to implement input or output controls through the capacity of AFMA to impose conditions on the permits, such as limiting the amount of fish that a permit holder may take or the type of gear that may be used.[378] A management plan is not necessary to manage a fishery in accordance with a fishing permit.

Permits are transferable, unless stated otherwise,[379] although no third-party interests can be recognised in the permits. Permits can be for a maximum duration of five years.[380] In most fisheries they are granted for only one year at a time, although they may be renewed for a fee. An annual levy is also collected from permit holders.

6.7.2.3 Scientific permits

Scientific permits are granted for the purposes of scientific research in the AFZ or a specified fishery. They are not transferable and can be for a maximum duration of only six months.[381]

6.7.2.4 Foreign fishing licences [382]

Foreign fishing licences authorise commercial fishing by a foreign boat in a specified area or fishery.[383] These licences are only granted when special arrangements have been made between the Commonwealth and the foreign interest, usually pursuant to Government-to-Government negotiations. In addition to such a licence, the person in charge of the boat must also hold a foreign master fishing licence.[384] Foreign fishing licences are granted for a maximum term of 12 months.[385] Port permits may also be granted, allowing unlicensed foreign fishing vessels to access Australian ports.[386]

6.7.3 Other regulatory mechanisms

There are several other regulatory mechanisms that are available to AFMA under the auspices of the *Fisheries Management Act 1991* (Cth). These include fish receiver permits; monitoring, compliance and enforcement mechanisms and temporary orders.

6.7.3.1 Fish receiver permits [387]

Fish receiver permits are required in some South-east fisheries for receivers of fish from commercial fishers, eg wholesalers and processors. Permits are for a maximum term of 12 months and are not transferable.[388]

[376] See http://www.afma.gov.au/licensing%20and%20entitlements/default.php#FISHING PERMITS

[377] *Fisheries Management Act 1991* (Cth) s 32.

[378] *Fisheries management Act 1991* (Cth) s 32(5).

[379] *Fisheries Management Act 1991* (Cth) s 32(9).

[380] *Fisheries Management Act 1991* (Cth) s 32(10).

[381] *Fisheries Management Act 1991* (Cth) Pt 2 Div 6 and see: http://www.afma.gov.au/licensing%20and%20entitlements/default.php#SCIENTIFIC PERMITS.

[382] See http://www.afma.gov.au/licensing%20and%20entitlements/default.php#FOREIGN FISHING LICENCES.

[383] *Fisheries Management Act 1991* (Cth) s 34.

[384] Granted under *Fisheries Management Act 1991* (Cth) s 40.

[385] *Fisheries Management Act 1991* (Cth) s 34(5)(d).

[386] *Fisheries Management Act 1991* (Cth) s 94.

[387] See http://www.afma.gov.au/licensing%20and%20entitlements/default.php#FISH RECEIVER PERMITS.

[388] *Fisheries Management Act 1991* (Cth) s 91.

6.7.3.2 Monitoring, compliance and enforcement mechanisms [389]

Compliance, monitoring and enforcement mechanisms can be divided into three groups: reporting and record keeping, observer program and enforcement. Reporting and record keeping mechanisms are: [390]

- Vessel Monitoring System Reports: In some South-east fisheries, vessels are required to carry a Vessel Monitoring System (VMS) that reports the position of the vessel directly to AFMA
- Prior-to-landing Reports: A prior-to-landing report is required in some South-east fisheries to notify AFMA of the catch that is to be off-loaded, allowing AFMA to judge whether unloading must be checked
- Catch Disposal Records: All concession holders are required to keep catch disposal records, which are filled out after landing the catch recording the species caught and their weight
- Fish Receiver Records: a record of the weight and type of fish received
- Logbooks: a record of the location of the catch, the time taken and the weight by species of fish caught. Submitted to AFMA on a monthly basis, they assist data collection for assessing the status of stocks and for assessing compliance.

Observers are placed on boats for which verified catch information or detailed recorded data is required. Observers have the primary responsibility for data collection, but they also have an important subsidiary role in ensuring compliance with conditions imposed on concessions or stated in framework instruments.[391]

The *Fisheries Management Act 1991* (Cth) grants extensive enforcement powers to AFMA, including stopping, boarding and searching vessels, seizure and powers of arrest.[392] Unlike other regulatory mechanisms, the enforcement provisions apply generally, without the need to be imposed by a specific management regime.

6.7.3.3 Temporary orders

Temporary orders can be made by AFMA for up to three months with respect to any matter directly or indirectly connected with fishing. Such an order overrides any fishing concession or management plan. They are made in emergencies, circumstances requiring urgent action or to correct an anomaly in a plan. [393]

6.7.4 Management mechanisms in Commonwealth fisheries in the South-east Marine Region [394]

The following management mechanisms are utilised in fisheries managed in accordance with Commonwealth law in the South-east Marine Region:

- annual fishing permits
- limited entry
- closures
- size limits
- catch limits
- vessel monitoring systems
- vessel size restrictions
- area restrictions
- prior-to-landing reports
- statutory fishing rights (transferable quota)
- gear restrictions
- fish receiver permits
- bycatch limitations.

For more details see *Resources: using the ocean* and the BRS's *Marine Matters*.

[389] See http://www.afma.gov.au/data%20collection/default.htm.

[390] See http://www.afma.gov.au/fisheries/compliance/default.htm and http://www.afma.gov.au/data%20collection/default.htm.

[391] See http://www.afma.gov.au/data%20collection/default.htm and http://www.afma.gov.au/observer%20program/default.htm.

[392] See *Fisheries Management Act 1991* (Cth) Pt 6.

[393] *Fisheries Management Act 1991* (Cth) s 43.

[394] Sources: Bureau of Rural Sciences, *Fishery Status Reports 1999* (1999) 3; see also links to individual Commonwealth fisheries at: http://www.afma.gov.au/fisheries/default.php.

6.8 Non-legislative arrangements

There are several non-legislative arrangements or programs, agreed to by the Commonwealth and State and Territory Governments, that affect the use of living marine resources in the South-east Marine Region. It should also be recognised that industry self-regulation plays an important role in the regulation of the use of living marine resources.

6.8.1 Aquaculture Action Agenda

The Aquaculture Action Agenda is currently under development after being announced in 1999. It will identify the major impediments to industry growth and establish how to remove these. The objectives of the Agenda are to:[395]

- increase productive investment
- expand market access
- maximise the benefits of research and innovation
- improve the competitiveness of the Australian aquaculture businesses
- build long-term ecological sustainability
- deliver an efficient business environment
- build industry cohesion
- promote the aquaculture industry.

A National Aquaculture Development Committee prepares the agenda and advises the industry and Commonwealth Government.

6.8.2 AQUAPLAN[396]

AQUAPLAN is Australia's national strategic plan for aquatic animal health. It was developed jointly by State, Territory and Commonwealth Governments and private industry sectors. AQUAPLAN is implemented by the Fish Health Management Committee. AQUAPLAN consists of eight programs:

1. international linkages: promoting and defending Australia's international trade interests in aquatic animals and their products
2. quarantine: reviewing all quarantine policies for aquatic animals and aquatic animal products, reviewing and improving post-arrival quarantine procedures and operations, meeting documented international requirements relating to the export of aquatic animals and aquatic animal products
3. surveillance, monitoring and response: consolidating information on and protecting Australia's aquatic animal health status
4. preparedness and response: developing effective institutional arrangements to manage emergency aquatic animal diseases in Australia and developing a series of manuals and operational instruments outlining the methods and protocols to manage emergency aquatic disease outbreaks (includes AQUAVETPLAN – a veterinary emergency plan)
5. awareness: increasing awareness of aquatic animal health issues
6. research and development: identifying research priorities in the field of aquatic animal health and aquatic animal disease management and promoting research and development in these areas
7. legislation, policies and jurisdiction: facilitating the implementation of surveillance and control strategies and preparedness and response arrangements for aquatic animal diseases at the State and Territory level, ensuring that legislative and jurisdictional mechanisms are in place to manage effectively aquatic animal health in Australia and establishing the *National Policy Guidelines on the Translocation of Aquatic Organisms within Australia*
8. resources and funding: developing a cost-sharing arrangement between industry and government that underpins the funding of emergency response mechanisms and assessing the resources required to support the implementation of projects necessary to maintain the standards of aquatic animal health management.

[395] AFFA, National Aquaculture Development Committee, *Aquaculture Industry Action Agenda: Discussion Paper* (2001) 1.

[396] See http://www.affa.gov.au/corporate_docs/publications/pdf/animalplanthealth/aquatic/aquaplan.pdf.

6.8.3 Australian Marine Pest Plan[397]

The draft Australian Marine Pest Plan, expected to be finalised in 2002, was drafted by The Joint Standing Committee on Conservation (SCC)/Standing Committee on Fisheries and Aquaculture (SCFA) National Taskforce on the Prevention and Management of Marine Pest Incursions. It provides a detailed guide on how to conduct a staged response to marine pest incursions, based on existing programs such as AQUAVETPLAN. The draft Plan operates under a national consultative body called the Consultative Committee on Introduced Marine Pest Emergencies (CCIMPE). The Plan outlines four stages of response:

- investigation
- alert
- operation
- stand-down

The Plan elaborates the responsibilities of individual officers, State organisations and national bodies as well as providing for the establishment of operational control centres. Individual marine pest Action Plans are expected to be drafted for all States and the Northern Territory.

6.8.4 Australian Shellfish Sanitation Control Program[398]

The Australian Shellfish Sanitation Control Program formulates export management protocols. The principles and practices of the Program were developed by AQIS and the Tasmanian oyster industry a decade ago, and have since been implemented by Tasmania, South Australia and Victoria in the South-east Marine Region. The administration of the Program is a cooperative arrangement between AQIS and State fisheries and/or health authorities that have jurisdiction over shellfish production. AQIS acts predominantly as an annual auditor.

6.8.5 Fisheries Action Program [399]

The Fisheries Action Program was a component of the Natural Heritage Trust and aimed to help rebuild Australia's fisheries to more productive and sustainable levels. The key objectives of the Program were to: [400]

- increase awareness of the problems affecting fisheries and their habitat
- facilitate community participation in fish habitat restoration and protection
- increase the community's commitment to sustainable resource use and fisheries habitat protection
- promote participatory research and investigations into the problems caused by the community's use of fisheries
- integrate fisheries issues with regional planning.

The program aimed to achieve an 'appreciable difference' in four key areas:

- integration and institutions: integrated, cooperative and strategic approaches to investment in ecologically sustainable management of land, water and marine resources and environment
- environment: biodiversity conservation and improved long-term protection and management of environmental resources
- sustainable production: maintenance of and improvement to the sustainable productive capacity of the environmental and natural resource base of Australia
- people: empowering the community to invest in, and take responsibility for, the ecologically sustainable uses of its natural resources.

[397] See the Report available at: http://www.ea.gov.au/coasts/imps/report.html.

[398] http://www.google.com/search?q=cache:extY3r5z4moJ:www.affa.gov.au/docs/quarantine/bulletin/ab800_8.htm+shellfish+sanitation+control+program+Australian&hl=en: viewed through cache on http://www.google.com on 25–9–2001.

[399] See the AFFA Information Sheet available on line at: http://www.affa.gov.au/content/output.cfm?ObjectID=D2C48F86–BA1A–11A1–A2200060B0A01286. See also http://www.affa.gov.au/content/output.cfm?ObjectID=D2C48F86–BA1A–11A1–A2200060B0A01310.

[400] See http://www.affa.gov.au/content/output.cfm?ObjectID=D2C48F86–BA1A–11A1-A2200060B0A01310.

The Program was a cooperative Commonwealth, State and Territory initiative of the now-disbanded Ministerial Council on Forestry Fisheries and Aquaculture. The Program ran until 2000–2001 and was administered by AFFA in consultation with State and Territory Governments. Grants were made following an application and assessment process in accordance with partnership agreements between the States and Territories and the Commonwealth. National policy for the Program was administered by the Fisheries Action Steering Committee. The Committee included representatives of the community, those with Indigenous interests, recreational and commercial fishing, as well as Commonwealth, State and Territory Governments. State and Territory technical advisory panels were responsible for the initial advice on the allocation of Program funds. The Commonwealth provided matching funds for projects with the community and State and Territory Governments, although initiation and implementation were primarily the responsibility of the community. The National Heritage Trust was extended in May 2001 for a further five years, although the number of programs has been reduced to four. Projects for the marine environment fall under the Coast Care Program.

6.8.6 National Recreational Fishing Policy [401]

The National Recreational Fishing Policy was prepared by the National Recreational Fisheries Working Group in 1994. The now-disbanded Ministerial Council on Forestry, Fisheries and Aquaculture endorsed the policy. The policy consists of 16 guiding principles and five primary goals that flow from these principles. The primary goals are:

- to ensure quality fishing and to maintain or enhance fish stocks and their habitats, for present and future generations as part of the environmental endowment of all Australians
- to develop partnerships between governments, the recreational fishing community and associated industries to conserve, restore and enhance the values of recreational fisheries throughout Australia
- to allocate a fair and reasonable share of Australian fish resources to recreational fishers, taking into account the needs of other user groups
- to establish an information base at a national level to meet the needs of recreational fisheries management
- to establish a funding base to manage effectively the nation's recreational fisheries.

It has been left to the different levels of government to determine their own priorities for the implementation of actions.

6.8.7 Recfish Australia

Recfish Australia is the peak national body for recreational and sport fishing, representing 14 other recreational and sport fishing bodies. Recfish has the goal of representing recreational and sport fishers at a national level to ensure quality of fishing. Recfish Australia has developed a *National Environmental Strategy for Recfish Australia* [402] and *The National Code of Practice for Recreational and Sport Fishing* [403] that provide a degree of self regulation for the recreational and sport fishing sectors. For further details see the report *Resources: using the ocean*. As these sectors are largely left unregulated by Commonwealth law, these codes of practice assume special importance.

[401] See links off page: http://www.affa.gov.au/content/output.cfm?ObjectID=D2C48F86–BA1A–11A1–A2200060B0A01293.

[402] Available at: http://216.121.25.179/a_national_environmental_strateg.htm.

[403] Available at: http://216.121.25.179/CoP%20web%202001.htm.

6.8.8 Seafood industry

AFMA has a statutory obligation to report to the Australian Seafood Industry Council as the peak industry body. The Council also plays a role in industry self-regulation, having developed Codes of Practice such as *A Code of Conduct for a Responsible Seafood Industry*[404] and *A Code of Conduct for a Responsible Aquaculture Industry*.

Other codes of conduct are also in existence that apply a degree of self-regulation to both commercial aquaculture and fishing, such as the *Australian Aquaculture Code of Conduct*,[405] prepared by the Australian Aquaculture Forum, and various codes prepared by those participating in specific fisheries (see the report *Resources: using the ocean*).

6.8.9 National Bycatch Policy and Commonwealth Bycatch Policy

The National Bycatch Policy was endorsed by Australian fisheries Ministers in 1999. It provides a framework for coordinating efforts to assess and reduce the impacts of fishing on the marine environment. All jurisdictions are undertaking action to implement this policy and it includes the Commonwealth, States and Territories.

A Commonwealth Policy on Fisheries Bycatch exists in accordance with the National Policy. It has been drafted by a taskforce of representatives of government, science and industry convened by AFMA. The policy requires Bycatch Action Plans, developed in partnership with industry and other stakeholders, to be prepared for all the major Commonwealth fisheries, which will provide the strategies to be used to reduce bycatch in that fishery.

The overarching objective of the policy is to ensure that bycatch species and populations are maintained. Sub-objectives are to:

- reduce bycatch
- improve protection of vulnerable species
- arrive at decisions on the acceptable extent of ecological impacts by using the best available knowledge within the framework of the precautionary approach; using appropriate biological reference areas; using biological reference points or the precautionary principle for management of bycatch species; identifying gaps in knowledge and, where feasible, collecting appropriate data to reduce uncertainty; monitoring the impacts of fishing pressure on bycatch and emphasising the need for appropriate solutions to the bycatch issue.

Bycatch Action Plans have circulated for public comment by AFMA for several Commonwealth-managed fisheries in the South-east Marine Region:[406]

- South East Trawl Fishery
- Tuna Fisheries
- South East Non-Trawl and Southern Shark Fisheries
- Subantarctic Fisheries
- Great Australian Bight Trawl Fishery
- Bass Strait Central Zone Scallop Fishery
- Southern Squid Jig Fishery.

[404] Available at: www.seafoodsite.com.au/stats/PDF/code.pdf.

[405] Available at: http://www.pir.sa.gov.au/pages/aquaculture/farm_practice/comm72.pdf.

[406] See http://www.afma.gov.au/corporate%20publications/plans/bycatch%20action%20plans/bycatch%20action%20plans%20-%20availability.htm#Available_Bycatch_Action_Plans.

Chapter 7
The regulatory framework for seabed and subsoil activities

7.1 Introduction

At Federation little attention was given to the extent of Australia's offshore rights. However, as international law has come to recognise the rights of coastal States over the adjacent continental shelf, Australia has taken a more active interest in these areas. The discovery of valuable offshore oil and gas fields in areas such as Bass Strait, the Northwest Shelf and the Timor Sea required the development of an appropriate legislative regime for the regulation of oil and gas activities, much of which has occurred in the past 30 years. This chapter outlines the principal elements of the regulatory framework for activities in the seabed and subsoil. It describes the relevant provisions in the Offshore Constitutional Settlement and in legislation relating to the principal activities on the seabed or in the subsoil under the seabed–petroleum and mineral exploration and production; and the installation and maintenance of cables, pipelines and other structures. The regulatory framework for environmental protection of marine areas is discussed elsewhere, but this chapter notes the proposals to undertake a strategic assessment of offshore petroleum exploration under the provisions of the EPBC Act. Non-legislative components, such as Ministerial councils, are also discussed below. The regulatory framework reflects and is applied within an international context provided by the LOSC.

7.2 The Offshore Constitutional Settlement [407]

The OCS sets out agreed arrangements between the Commonwealth and the States for the ownership and management of marine resources, including offshore petroleum and seabed minerals. The OCS gives the States jurisdiction over activities from the low water mark to three nautical miles seaward of the territorial sea baseline (coastal waters) and the Commonwealth jurisdiction over activities from the three mile boundary to the outer limits of the continental shelf (adjacent areas).

For both offshore petroleum and minerals, the OCS provides for the sharing of royalties and cooperative management arrangements in coastal waters and adjacent areas.

In the case of petroleum, the Commonwealth receives production tax from outside three nautical miles and a share of petroleum royalties from coastal waters, while States and Territories receive royalties from production only within three nautical miles. Beyond three nautical miles, in those areas where petroleum royalties still apply (ie the NW shelf only) the adjacent State receives a share of the royalty. Similarly, under the *Offshore Minerals Act 1994*, the Commonwealth must pay each State 60% of royalties payable under the *Offshore Minerals (Royalty) Act 1981* in respect to minerals in the Commonwealth-State offshore area for that State.[408]

In implementing the OCS, the Commonwealth and the States and Northern Territory have passed broadly consistent legislation in relation to minerals and petroleum exploration (see below 7.3.1 and 7.3.2).[409] Joint management arrangements also include common mining codes and joint Commonwealth-State authorities for the adjacent areas.[410]

407 The Offshore Constitutional Settlement is discussed further in chapter 1.

408 *Offshore Minerals Act 1994* (Cth) s 425(1).

409 The State and Territory legislative components of this scheme are: *Offshore Minerals Act 1999* (NSW) and *Petroleum (Submerged Lands) Act 1982* (NSW); *Petroleum (Submerged Lands) Act 1982* (NT); *Offshore Minerals Act 1998* (Qld) and *Petroleum (Submerged Lands) Act 1982* (Qld); *Petroleum (Submerged Lands) Act 1982* (SA); *Petroleum (Submerged Lands) Act 1982* (Vic); *Petroleum (Submerged Lands) Act 1982* (Tas); *Petroleum (Submerged Lands) Act 1982* (WA).

410 Commonwealth of Australia, *Offshore Constitutional Settlement (1980)*.

7.3 Legislation

Four pieces of Commonwealth legislation regulate seabed and subsoil activities and are discussed below:

- *Petroleum (Submerged Lands) Act 1967*
- *Offshore Minerals Act 1994*
- *Sea Installations Act 1987*
- *Submarine Cables and Pipelines Protection Act 1963*.

7.3.1 Petroleum (Submerged Lands) Act 1967 (Cth)

The South-east Marine Region contains large deposits of oil and gas, which are of major importance to the national economy. In 2000, the Gippsland Basin at the eastern end of Bass Strait produced over 25 per cent of Australia's total crude oil and met nearly all of Victoria's natural gas needs.[411]

The lifecycle of petroleum resource exploitation associated activities in Commonwealth waters in the Region is regulated by the *Petroleum (Submerged Lands) Act 1967* (Cth) (PSLA) and associated legislation. In accordance with the OCS, the PSLA is the Commonwealth component of a unified national scheme for regulating the exploration for and exploitation of offshore petroleum resources, in which:

- the States have sole resource control in coastal areas (ie from the low water mark to three nautical miles offshore)
- administrative responsibility is shared between the Commonwealth and the States in relation to the 'adjacent area' for each State (ie seaward of the three nautical mile boundary)
- State Petroleum Submerged Lands Acts and the PSLA have broadly consistent provisions, which provide a common regulatory code for petroleum activities in coastal and Commonwealth waters.[412]

The PSLA establishes the licensing regime that applies to the exploration for, and recovery of, petroleum in Commonwealth waters. This includes provision for permits, licences and leases to control exploration and exploitation of offshore resources, and extends to associated actions such as pipeline construction and processing infrastructure placement. An extensive program is currently under way to develop a new body of Regulations to replace the current prescriptive 'Schedule of Specific Requirements', a body of detailed rules that all operators undertaking exploration and production are required to comply with under the Act. The three completed sets of Regulations are:

- *Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations 1996* (Cth)
- *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth)
- *Petroleum (Submerged Lands)(Pipelines) Regulations 2001* (Cth).

Further Regulations are under development in relation to offshore pipelines, management of well operations, resource management, diving and data management.

7.3.1.1 Petroleum (Submerged Lands) Act 1967 – Institutions

The management of petroleum activities in Commonwealth waters (adjacent areas) is conducted by a Joint Authority consisting of the Federal Minister responsible for petroleum resources and the relevant State or Territory counterpart for each adjacent area.[413] Joint Authorities exist for the adjacent areas for each of the four States within the South-east Marine Region. *The Petroleum (Submerged Lands) Act* confers responsibility for routine administration to the relevant State Minister (Designated Authority), who implements the Joint Authority's strategic decisions. Applicants and licence holders always deal with the Designated Authority, who issues licences, and do not deal directly with the Joint Authority, even where the Joint Authority is the ultimate decision-maker.

If there is conflict between a State and the Commonwealth on a matter within the powers of the Joint Authority, then the Commonwealth Minister's opinion prevails.[414] The Commonwealth Department of Industry, Tourism and Resources administers this Act.

[411] National Oceans Office, *A Snapshot of the South-east: A Description of the South-east Region (2001)* 33.

[412] References to the States include the Northern Territory.

[413] PSLA s 8A.

[414] PSLA s 8D(2).

7.3.1.2 Petroleum (Submerged Lands) Act 1996 – Management Mechanisms

Under the Act, management is based on regulation through various titles, including permits, leases and licences. A permit, lease or licence may be subject to conditions, but the Joint Authority has the power to vary, suspend, or grant exemptions from, any conditions.[415]

(a) **Exploration Permit:** Granted after a public advertisement inviting bids, an exploration permit authorises exploration for petroleum subject to specific approvals for individual operations. The initial term of the permit is six years, with five-year renewals available, with the requirement that each renewal is for an area only half that of the previous permit area.[416] The right to a renewal exists if the conditions of the prior grant have been complied with.[417] The permit can be sold and any petroleum recovered becomes the property of the permit holder.

(b) **Retention Leases:** Allows title to a discovery that is not commercially viable, but has a reasonable likelihood of becoming so in the next 15 years.[418] A retention lease must be granted to the holder of an exploration permit or production licence who establishes the requisite conditions in relation to delayed commercial viability.[419] The lease (or initial renewal) is granted for a period of five years and is tradeable. Any petroleum becomes the property of the lease holder once recovered. The Designated Authority may at any time order the holder of a Retention Lease to report on the current prospects of development, but must not make such an order more than twice during the term of a lease.[420]

(c) **Production Licence:** Grants an exclusive right to recover petroleum from the area, and is tradeable. A new production licence is now granted for an indefinite term (it may be terminated if there has been no production for five years) and any petroleum extracted becomes the property of the licence holder. Conditions can be included in the licence and further directions to the licence holder may be made by the Joint Authority.

(d) **Infrastructure Licence:** Authorises the licence holder to construct and operate infrastructure facilities for ancillary activities such as processing. It is not a prerequisite for activities that could be authorised by a permit, lease, licence or pipeline licence.[421] This licence is granted indefinitely, but can be terminated after five years of inactivity.[422]

(e) **Pipeline Licence:** Although a pipeline licence may be granted to a person who does not hold a production licence, the holder of a production licence has a preferential right to a pipeline licence for conveying petroleum recovered under that production licence.[423] A pipeline licence creates an easement over the area required to construct the pipeline and associated facilities such as pumping, tank and valve stations. A licence is granted indefinitely.[424] Licence transfers do not come into effect until they have been approved by the Designated Authority and registered.[425]

[415] PSLA s 103.

[416] PSLA s 29.

[417] PSLA s 32.

[418] PSLA ss 38B and 38BC.

[419] PSLA ss 38B and 38BC.

[420] PSLA s 38H.

[421] PSLA s 59F.

[422] PSLA ss 59G, 59H.

[423] PSLA s 65.

[424] PSLA s 67.

[425] PSLA s 78.

There are also two ancillary authorities:

(a) **Special Prospecting Authority:** This may be granted for a period up to six months and allows exploration by prospective applicants for an exploration permit or by geological survey companies which collect data for sale. It does not allow the drilling of wells[426] and is not transferable.

(b) **Access Authority:** This allows exploration of a designated area by the holders of either an exploration permit, a retention lease or a production licence. It does not allow the drilling of a well, and all conditions are at the discretion of the Designated Authority.[427]

Directions can be given by the Designated Authority. Directions of a standing or permanent nature must be given with the approval of the Joint Authority. These can cover any matter detailed in respect of which regulations could be made, and can include the removal of mining and extraction facilities, and the restoration of the environment in the area subject to the lease.[428] As noted above, a general direction is issued for operators to comply with the Schedule of Specific Requirements.

Environmental management is covered by the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth). These regulations require title holders to have an approved environmental management plan before commencing any petroleum related activity and create a strict liability offence for non-compliance with the contents and activities in the plan. [429] These plans are prepared by the title holder and assessed by the Designated Authority. The regulations require that actions be undertaken in a manner consistent with the principles of ecologically sustainable development.[430] Title holders are also required to report on any incident arising out of activities that are not within the parameters of the environmental performance standards in the environmental management plan.[431] The regulations are based on meeting performance goals, rather than imposing prescriptive standards. The environmental management plan must include an assessment of environmental risks and effects of all activities.[432] The plan must include:

- a description of the activity[433]
- a description of the environment[434]
- a description of environmental effects and risks[435]
- a statement of environmental performance objectives and standards[436]
- an implementation strategy for the environmental management plan[437]
- an outline of reporting arrangements[438]
- other information, including a statement of the applicant's corporate environmental policy.[439]

[426] PSLA s 111.

[427] PSLA s 112.

[428] PSLA s 101.

[429] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) regs 6 and 38.

[430] *Petroleum (Submerged Lands) (Management of Environment Regulations 1999* (Cth) reg 3.

[431] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) reg 26.

[432] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) regs 13(3)(a), 13(3)(b).

[433] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) reg 13(1).

[434] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) reg 13(2).

[435] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) reg 13(3).

[436] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) reg 13(4).

[437] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) reg 14.

[438] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) reg 15.

[439] *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) reg 16.

The States and Northern Territory have regulations, or have a commitment to introduce regulations applying in their waters that substantially mirror these regulations. This commitment flows from the overarching commitment in the OCS to a uniform national regulatory approach to the administration of the petroleum industry offshore. Pending the promulgation of regulations by the States, the environmental requirements set out in each jurisdiction's *Petroleum (Submerged Lands) Act* Schedule of Specific Requirements as to Offshore Petroleum Exploration and Production continue to apply in the coastal waters.

The interaction between petroleum activities and other users of marine space are dealt with by a prohibition on unreasonable interference and safety zones. Authorised petroleum-related activities may not interfere with fishing, the conservation of resources, other lawful petroleum or mineral extraction and native title rights, to a greater extent than is reasonably necessary under the proposed activity.[440] The Designated Authority may also declare a 500 m safety zone around a structure or installation (excluding pipelines), which limits access by vessels.[441]

Enforcement under the Act operates by creating offences,[442] allowing forfeiture orders,[443] granting access and testing powers to inspectors,[444] and by cancelling permits, leases and licences.[445]

Under the *Petroleum (Submerged Lands) (Royalty) Act 1967* (Cth), royalties are payable to the Designated Authority (and received on behalf of the Commonwealth) only for extractions from the North West Shelf (adjacent to Western Australia).[446] Yearly fees are payable by title-holders to the Designated Authority (and received on behalf of the Commonwealth) under the *Petroleum (Submerged Lands) Fees Act 1994* (Cth).

7.3.2 The Offshore Minerals Act 1994 (Cth)

Exploration for and production of offshore mineral resources in Commonwealth waters in the South-east Marine Region are regulated by the *Offshore Minerals Act 1994* (Cth) and associated legislation as part of a unified national scheme similar to that applying to offshore petroleum (see above). The scheme provides for shared Commonwealth-State administrative responsibilities in Commonwealth administered waters and a common mining code in State and Territory coastal waters and Commonwealth administered waters.

7.3.2.1 The Offshore Minerals Act – Institutions

The routine management of offshore mineral activities in Commonwealth waters (adjacent areas) is conducted by a Joint Authority consisting of the Federal Minister responsible for resources, and the relevant State or Territory counterpart.[447] Joint Authorities exist for the adjacent areas for each of the four States within the South-east Marine region. The *Offshore Minerals Act 1994* (Cth) confers responsibility for routine administration on the State Minister (Designated Authority), who implements the Joint Authority's strategic decisions.[448] Applicants and licence holders always deal with the Designated Authority and do not deal directly with the Joint Authority, even where the Joint Authority is the ultimate decision-maker.

In cases of conflict in the Joint Authority, the Commonwealth view prevails.[449] The Commonwealth Department of Industry, Tourism and Resources administer this Act.

[440] PSLA s 124.

[441] PSLA s 119.

[442] PSLA s 90.

[443] PSLA s 133.

[444] PSLA s 126

[445] PSLA s 105.

[446] *Petroleum (Submerged Lands) (Royalty) Act 1967* (Cth), s 4A.

[447] *Offshore Minerals Act 1994* (Cth) s 32.

[448] *Offshore Minerals Act 1994* (Cth) s 30(1).

[449] *Offshore Minerals Act 1994* (Cth) s 409.

7.3.2.2 The Offshore Minerals Act – Management Mechanisms

Under the Act, management is substantially based on regulation through licences. The Act prohibits all recovery or exploration for offshore minerals unless authorised by a special consent or licence.[450] All minerals recovered become the property of the licence or consent holder.[451] The grant of a licence may be subject to conditions, but the Joint Authority has the power to vary, suspend, or grant exemptions from any conditions.[452] All licences are transferable but transfers only come into effect upon registration:[453]

(a) **Exploratory Licence:** Grants a right to exploration and recovery of mineral test samples in the designated area, but includes only the type of mineral specified in the licence.[454] The initial term is four years and may be renewed no more than three times, with the requirement that each renewal is for an area only half that of the previous permitted area.[455]

(b) **Retention Licence:** Allows exploration and recovery of minerals not for commercial use.[456] This protects exploration of sites that are not yet commercially viable. The lease (or renewal) is granted for five years.[457]

(c) **Mining Licence:** Grants an exclusive right for exploration and commercial recovery of mineral deposits.[458] The initial grant is for 21 years and may be renewed for the same period.[459]

(a) There are also two ancillary authorities:

(a) **Works Licence:** Authorises activities that are necessary or desirable to enable the licence holder to exercise their licence rights and perform their obligations in an area outside that for which an exploration, retention or mining licence is held by the applicant.[460] A works licence can be granted over a block in another licence area, or on a block where there is more than one works licence.[461] The initial term and renewal can each be for a period up to five years.[462]

(b) **Special Purpose Consent:** Authorises scientific investigation, a reconnaissance survey and the collection of small amounts of minerals, but does not create a preference in the granting of a licence.[463] Under some circumstances the applicant must obtain the agreement of affected holders of exploration, retention and mining leases.[464] The grant is for a period up to 12 months.[465]

[450] *Offshore Minerals Act 1994* (Cth) s 38.

[451] *Offshore Minerals Act 1994* (Cth) s 42(1).

[452] *Offshore Minerals Act 1994* (Cth) ss 118, 177, 254, 304, 327.

[453] *Offshore Minerals Act 1994* (Cth) s 361.

[454] *Offshore Minerals Act 1994* (Cth) s 46.

[455] *Offshore Minerals Act 1994* (Cth) s 89(4).

[456] *Offshore Minerals Act 1994* (Cth) s 133.

[457] *Offshore Minerals Act 1994* (Cth) ss 146(2), 169(3).

[458] *Offshore Minerals Act 1994* (Cth) s 193.

[459] *Offshore Minerals Act 1994* (Cth) s 209.

[460] *Offshore Minerals Act 1994* (Cth) s 267(2).

[461] *Offshore Minerals Act 1994* (Cth) ss 267(3), 267(4).

[462] *Offshore Minerals Act 1994* (Cth) ss 278, 296(3).

[463] *Offshore Minerals Act 1994* (Cth) ss 15(4), s316 (2)(b).

[464] *Offshore Minerals Act 1994* (Cth) s 320.

[465] *Offshore Minerals Act 1994* (Cth) s 325(3).

Compliance directions may be made by the Designated Authority.[466]

There is no provision in this Act requiring environment management plans. However, there is a set of standard conditions on exploration activities that can require the holder to take steps to protect the environment. These include protecting wildlife and minimising the effect of mining on the environment in the licence area and any surrounding areas.[467]

Interaction with other uses of marine spaces is dealt with by a prohibition on unreasonable interference and safety zones. Authorised activities may not interfere with other activities, including navigation, native title rights, fishing, the conservation of the sea and seabed resources, or any other lawful activity, to a greater extent than is reasonably necessary under the proposed activity.[468] However, the associated administrative procedures incorporate a range of consultative mechanisms that take into account the multiple-use management of a given offshore area. The views/rights/comments of the public, Commonwealth and State agencies (including the industry stakeholders they represent) and native titleholders are all taken into account when the Joint Authority considers the issuing of an offshore exploration or mining application and the conditions under which it will operate.

The Designated Authority may declare a 500 m safety zone around a structure or installation,[469] which limits access by vessels except in an emergency.

Enforcement under the Act operates by creating offences,[470] granting powers of access to compliance inspectors,[471] by the cancellation of licences without compensation,[472] and requiring security payments.[473]

Under the *Offshore Minerals (Registration Fees) Act 1981* (Cth) applicants are required to pay an application fee. Also, the *Offshore Minerals (Royalty) Act 1981* (Cth) requires that yearly royalties be paid to the Designated Authority. Other associated Acts require that yearly licence fees also be paid to the Designated Authority for each licence type.[474]

7.3.3 The Sea Installations Act 1987 (Cth)

The *Sea Installations Act 1987* (Cth) allows the Commonwealth to ensure that sea installations in Commonwealth waters are operated with regard to the safety of the people using them as well as the environment. A sea installation refers to any structure in physical contact with the seabed or, floating, that can be used for an environment-related activity, such as exploring, exploiting or using the living resources of the sea, seabed or subsoil of the seabed.[475] It does not include a submarine telecommunications cable or a pipeline for which a licence can be issued under the PSLA.[476] The Minister cannot grant, renew, vary, issue or revoke a permit, or give an exemption certificate without consultation with a representative chosen by the relevant State Premier.[477]

[466] *Offshore Minerals Act 1994* (Cth) s 385.

[467] *Offshore Minerals Act 1994* (Cth) s 118(g).

[468] *Offshore Minerals Act 1994* (Cth) s 44.

[469] *Offshore Minerals Act 1994* (Cth) s 403.

[470] *Offshore Minerals Act 1994* (Cth) s 405.

[471] *Offshore Minerals Act 1994* (Cth) s 378.

[472] *Offshore Minerals Act 1994* (Cth) ss 47, 134, 194, 269.

[473] *Offshore Minerals Act 1994* (Cth) s 398.

[474] *Offshore Minerals (Exploration Licence Fees) Act 1981* (Cth), *Offshore Minerals (Mining Licence Fees) Act 1981* (Cth), *Offshore Minerals (Retention Licence Fees) Act 1994* (Cth); *Offshore Minerals (Works Licence Fees) Act 1981* (Cth).

[475] *Sea Installations Act 1987* (Cth) s 4(1).

[476] *Sea Installations Act 1987* (Cth) s 4(1).

[477] *Sea Installations Act 1987* (Cth) s 10.

The Act makes it an offence to install or use sea installations that are not subject to a permit.[478] A permit can be granted by the Minister and can operate for up to 15 years.[479] Under this Act, applications for permits and exemption certificates are assessed for the environmental implications and the safety of the proposal, as part of the application assessment process.[480] Proposed installations or operations may also need to be assessed under the EPBC Act.[481] The Act also allows that exemption certificates may be granted for sea installations that will only be used for particular scientific activities or marine archaeology.[482] It is a condition of a permit to operate a sea installation that any activities in relation to the installation do not interfere to a greater extent than is reasonably necessary with navigation, fishing, the conservation of sea or seabed resources.[483]

The management regime under the Act creates offences for contravening the Act,[484] and requires that installations be kept in good condition and repair.[485] The Act grants powers of access and inspection to authorised inspectors,[486] and allows the Minister to require a security,[487] to direct that an unauthorised installation be removed,[488] to order repairs on an installation,[489] and to declare a safety zone.[490] The owner of a sea installation may also be required to pay an annual levy to the Commonwealth under the *Sea Installations Levy Act 1987* (Cth). The Commonwealth Department of the Environment and Heritage administers the Act.

7.3.4 The Submarine Cables and Pipelines Protection Act 1963 (Cth)

This Act fulfils Australia's obligations under the LOSC, and only applies to cables and pipelines beneath the high seas and the seas of the EEZ.[491] The Act makes it an offence to break or damage a submarine telegraph or telephone cable, pipeline or a submarine high-voltage power cable.[492] Anyone who, in the course of laying or repairing a submarine cable or pipeline, damages another cable or pipeline is liable to bear the cost of repairing the damage.[493] The Commonwealth Department of Transport and Regional Services administers this Act.

7.4 *Strategic assessments under the EPBC Act*

Strategic assessments have been dealt with above (see 5.5.2). The Federal Minister for the Environment and Heritage and the Federal Minister for Industry, Tourism and Resources have agreed to conduct a strategic assessment of the environmental impacts of offshore petroleum exploration activities in Commonwealth waters. The assessment is expected to make recommendations aimed at improving the

[478] *Sea Installations Act 1987* (Cth) ss 14–5.

[479] *Sea Installations Act 1987* (Cth) s 22.

[480] *Sea Installations Act 1987*: http://www.ea.gov.au.coasts/pollution/dumping/installation.htm (28 September 2001).

[481] Ibid. Under the *Environment Protection and Biodiversity Regulations 2000* (Cth) reg 6.01, an action authorised under the *Sea Installations Act 1987* (Cth) that has, will have or is likely to have a significant impact on the environment is prescribed for the purposes of s 160 of the EPBC Act and must be referred to Environment Australia for assessment.

[482] *Sea Installations Act 1987* (Cth) s 40.

[483] *Sea Installations Act 1987* (Cth) s 23.

[484] *Sea Installations Act 1987* (Cth) s 65.

[485] *Sea Installations Act 1987* (Cth) s 52.

[486] *Sea Installations Act 1987* (Cth) s 61(1).

[487] *Sea Installations Act 1987* (Cth) s 37.

[488] *Sea Installations Act 1987* (Cth) s 55.

[489] *Sea Installations Act 1987* (Cth) s 54.

[490] *Sea Installations Act 1987* (Cth) s 57.

[491] *Submarine Cables and Pipelines Protection Act 1963* (Cth) s 5.

[492] *Submarine Cables and Pipelines Protection Act 1963* (Cth) s 7.

[493] *Submarine Cables and Pipelines Protection Act 1963* (Cth) s 8.

knowledge base from which decisions relating to petroleum exploration activities are made. The assessment is also expected to clarify when a referral is required under Part 8 of the EPBC Act, and in determining appropriate assessment options and approval requirements under the EPBC Act.[494]

7.5 Industry co-regulation

The petroleum and offshore minerals industries themselves have in place various forms of self regulation, such as codes of conduct and compliance with ISO 14000 series standards, that form an important part of a co-regulatory regime. For example, the Australian Petroleum Production and Exploration Association Ltd has developed specific industry guidelines to underpin the co-regulatory regime on, amongst other things, the environment and health and safety. For further examples of self regulation refer to *Resources: using the oceans*.

7.6 Ministerial councils

Ministerial councils, especially those with responsibilities in relation to offshore petroleum and minerals, are a non-legislative component of the management and institutional arrangements for the seabed and subsoil. They provide a mechanism for ministerial consultation and seek to promote the general welfare and development of the industries for which they have responsibility, including by improving coordination and, where appropriate, the consistency of policy regimes. They deal with key issues of national significance, implement measures referred to them by the Council of Australian Governments (COAG), and interact with other ministerial councils and government agencies. Ministers and officials meet regularly with chief executives and representatives from industry associations.[495]

Until June 2001, offshore petroleum and minerals both came under the Australian and New Zealand Minerals and Energy Council (ANZMEC), which was made up of Commonwealth and State Ministers with responsibilities for minerals and energy and the New Zealand Minister for Energy.[496] A Standing Committee of Officials (SCO) and its working groups provided support to the Council. However, at its meeting in June 2001, COAG agreed to a restructuring of ministerial councils, including replacing ANZMEC with a Ministerial Council on Energy and a Ministerial Council on Minerals and Petroleum Resources (MCMPR).[497] The MCMPR is to consider all upstream matters related to mining and petroleum, and dealing with, among other issues, access to resources, tenure, operational issues of environment and safety, exploration and investment attraction.

7.7 Telecommunications

Submarine telecommunication cables carry a major part of international communications. These cables are laid on the seabed or in the subsoil.

7.7.1 International context

LOSC applies to submarine cables in international waters. In particular, existing submarine cables (those in place when LOSC came into operation) are safeguarded.[498] LOSC gives countries the right to lay cables on the continental shelf, EEZ and on the bed of the high seas, as long as these do not interfere with existing cables.[499] LOSC also mandates that States adopt laws and regulations that make it an offence to damage a cable wilfully or with culpable negligence so as to obstruct telephonic or telegraphic communications.[500] The International Telecommunications Union (ITU) (established by the *International Telecommunications Convention Constitution Convention 1942*) coordinates the operation of tele-communications networks and services. In particular, it sets international standards for telecommunications facilities and infrastructure.

[494] Based on information supplied by the National Oceans Office and confirmed with Environment Australia on 21 September 2001.

[495] Based on ANZMEC web-site: htttp://www.isr.gov.au/resources/anzmec/anzmec.htm (20 September 2001).

[496] ANZMEC web site: htttp://www.isr.gov.au/resources/anzmec/anzmec.htm (20 September 2001). The Papuan New Guinean Ministers for Mining and for Petroleum and Energy had observer status on ANZMEC.

[497] Council of Australian Governments Communique (8 June 2001) Canberra.

[498] LOSC art 51.

[499] LOCC arts 79 and 112.

[500] LOSC art 113.

7.7.2 Telecommunications Legislation

The primary piece of legislation is the *Telecommunications Act 1997*. It regulates telecommunication carriers through a licensing system and gives the Australian Communications Authority (ACA) the role of setting technical standards and ensuring carriers compliance. The Act extends to providing telecommunication services that use submarine cables.

The installation and maintenance of telecommunications cables is also affected to a limited extent by several other Acts, either because they permit and regulate other seabed and subsoil activities that could affect submarine cables, or because they impose limitations on matters such as the location of cables. These Acts demonstrate the multiple use issues that are found in use of the seabed and subsoil. These Acts are:

- The EPBC Act and the *Environment Protection (Sea Dumping) Act 1981* (Cth): these Acts regulate activities in the seabed and subsoil from an environment protection perspective and are discussed in chapter 5
- The PSLA and the *Offshore Minerals Act 1994* (Cth): these Acts regulate exploration for and production of petroleum and minerals in the seabed and subsoil, and are discussed above
- *Fisheries Management Act 1991* (Cth): this Act sets up a management regime for fisheries, and is discussed in Chapter 6
- *Submarine Cables and Pipelines Protection Act 1963* (Cth): see discussion above 7.3.4
- *Crimes Act 1914* (Cth): this Act makes it an offence to damage or interfere with a facility (including a submarine cable) belonging to a telecommunications carrier.[501]
- *Defence Act 1903* (Cth) and the *Control of Naval Waters Act 1918* (Cth): these Acts impose particular limitations on activities and are discussed in Chapter 4
- *Native Title Act 1993* (Cth): this Act deals with Indigenous use of the seabed and subsoil and is discussed in Chapter 3
- *Historic Shipwrecks Act 1976* (Cth): this Act limits activities that could interfere with wrecks that are historically significant. It is discussed in Chapter 5.

7.7.3 Institutions and management

The two main institutions that have a role in regulating telecommunications by submarine cables are the Department of Communications, Information Technology and the Arts (DOCITA) and the ACA. DOCITA administers the *Telecommunications Act* and has the major policy role. The ACA provides the detailed technical regime and monitors compliance with the Act. The departments that administer the other Acts mentioned here are relevant only to the extent that their legislation regulates activities that may impact on telecommunications cables.

Management of telecommunication activities in the seabed and subsoil seeks to balance the rights and responsibilities of multiple users of seabed and subsoil areas. The aim is to ensure that, while telecommunications facilities can be used effectively without being impeded by other activities, those other activities that are permitted under relevant legislation can take place.

[501] *Crimes Act 1914* (Cth) ss 85ZG and 85ZJ.

Chapter 8
The regulatory framework for tourism and recreation

8.1 Introduction

There is a notable absence of Commonwealth legislation specifically regulating tourism and recreation activities within Commonwealth waters. As such, this chapter focuses on those pieces of Commonwealth legislation that have a more immediate impact on the operation of tourism and recreational activities. The wider issue of such activities impacting on amenities is not covered.

It should be noted that there is also an absence of State and Territory legislation regulating tourism and recreation activities within State and Territory waters. Tourism and recreational activities taking place within State and Territory waters are regulated by a combination of State and Territory legislation and spatial zoning systems on issues such as health and safety, boating and marine activities and fisheries and living marine resources. However, discussion of State and Territory and local government regulation falls outside the scope of this Report.

8.2 Commonwealth legislation

Despite the fact that there is no Commonwealth legislation directly regulating tourism and recreational activities within Commonwealth waters, there are several pieces of Commonwealth legislation that have an impact on these activities. Some of these pieces of legislation require tourism operators and recreational users to comply with various provisions or regulations. Failure to comply may lead to penalties.

The main pieces of Commonwealth legislation regulating tourism and recreational activities in Commonwealth waters include:

- *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)
- *Australian Heritage Commission Act 1975*
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*
- *Environment Protection (Sea Dumping) Act 1981*
- *Historic Shipwrecks Act 1976*
- *Navigation Act 1912*
- *Sea Installation Act 1987*.

The extent of regulation for any specific Act depends upon the nature, scale and location of the tourism operation or recreational use. This list is by no means exhaustive.

8.2.1 Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act)

The EPBC Act may extend to any tourism or recreational activity that is likely to have significant adverse affects on the environment or on conservation, or is likely to have a significant impact on matters of national environmental significance.

Whether a particular activity is likely to have a significant impact on matters of national environmental significance will depend upon the nature and extent of the activity. Those matters of national environmental significance directly relevant to the marine environment are:

- World Heritage Properties
- Ramsar Wetlands
- nationally threatened species and ecological communities
- migratory species
- Commonwealth marine areas
- nuclear actions.

Commonwealth marine areas are defined as waters, seabed and airspace within Australian marine jurisdiction, other than those areas within State and Territory jurisdiction under the Offshore Constitutional Settlement.[502] The EPBC Act provides for the assessment and approval of activities to minimise the threat to the marine environment from pressures such as tourism and recreation. However, where activities elsewhere might have a significant impact on Commonwealth marine areas, the environmental assessment and approval regime also applies to those activities in areas under State and Territory jurisdiction. [503]

In general, the interaction between vessels, aircraft and cetaceans in Commonwealth water is governed by regulation 8 of the *Environment Protection and Biodiversity Conservation* Regulations 2000. The Regulations establish a caution zone around all cetaceans which means that a vessel must slow to a no-wake speed 300 metres away from a cetacean unless the cetacean approaches the vessel. They also establish an exclusion zone, prohibiting a vessel from approaching within 100 m of a whale and within 50 m of a dolphin (however the animal may approach the vessel).

Part 15 of the EPBC Act regulates the management of marine protected areas which may affect tourism and recreational activities, such as Blue Whale watching, within those zones.[504]

Other recreational or tourism activities within Commonwealth waters may be prohibited entirely by the EPBC Act. Part 13 of the Act provides for the listing of certain marine species for the purposes of conservation. This part makes recreational or charter fishing for listed species such as white sharks, an offence.[505]

8.2.2 *Australian Heritage Commission Act 1975*

The law relating to Australian Heritage is in a state of flux. Currently, the *Australian Heritage Commission Act 1975* regulates actions of the Commonwealth in order to preserve heritage values. There is legislation before the Senate, however, that may alter the current heritage protection regime substantially. If passed, the new heritage regime will affect tourism operations that have a significant affect on the heritage values of listed areas. Penalties under the EPBC Act may apply to those who contravene the requirements of the new regime.

The *Australian Heritage Commission Act 1975* (Cth) establishes the Australian Heritage Commission.[506] It is an independent body whose function is to advise the Minister for Environment on matters relating to the National Estate [507], including:

- identifying places to be included in the national estate and maintain a register
- actions to conserve, improve and present the National Estate
- granting financial or other assistance by the Commonwealth for the above.

The National Estate consists of those places, within the natural or cultural environment of Australia, which have aesthetic, historic, scientific or social significance.[508] It covers both natural and cultural heritage. The National Estate can extend to the territorial sea and continental shelf.[509]

[502] EPBC Act s 24.

[503] EPBC Act s 23(2); see also Chapter 5 above.

[504] See also Chapter 5 above.

[505] See also Chapter 5 above.

[506] *Australian Heritage Commission Act 1975* (Cth) s 6.

[507] *Australian Heritage Commission Act 1975* (Cth) s 7.

[508] *Australian Heritage Commission Act 1975* (Cth) s 4.

[509] *Australian Heritage Commission Act 1975* (Cth) s 4(2).

The Commonwealth government is constrained from taking any action that adversely affects a place in the Register or on the Interim List (ie places undergoing the registration process)[510] unless there is no feasible and prudent alternative to this action, in which case damage must be minimised.[511] Any Commonwealth action that might significantly affect a place in the Register must be referred to the Australian Heritage Commission for comment. An action is considered to have an adverse effect on a place in the Register if it diminishes or destroys any of the national estate values that led to its inclusion in the Register. However, this section does not place any direct legal constraints or controls over the actions of State or local government.

The Act is to be repealed with the passage of the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000 (Cth), which will replace the Commission with a Council to advise the Minister. It will also create a National Heritage List and a Commonwealth Heritage List to replace the Register of the National Estate. These Lists would operate under the EPBC Act, following amendments to it proposed under the Environment and Heritage Legislation Amendment Bill 2000 (Cth).

The National Heritage List, in particular, will affect tourism operations within places on the list. For example, a company proposing to build a lodge for tourists within an area listed for Indigenous values would need to refer the proposal to the Minister if it is likely to significantly affect those values. Failure to refer such a proposal may result in penalties for non-compliance under the EPBC Act.

The Commonwealth List, in its current form, will apply to actions of the Commonwealth only. The EPBC Act will impose legal obligations for the management of places on the list and for environmental impact assessments for proposed actions that might detrimentally affect their heritage values.

There is no provision for the automatic transfer of sites currently listed under the *Australian Heritage Commission Act 1975* (Cth) to the new Lists. The old Register would remain relevant as an indicative guide on what location, place or areas may count as part of the environment, due its cultural aspects, for the purposes of the EPBC Act.

8.2.3 Environment Protection (Sea Dumping) Act 1981 and Protection of the Sea (Prevention of Pollution from Ships) Act 1983

These Acts may apply to ship-based tourism and recreational activities in the same way that they apply to commercial and industrial ship based activities. For example, the disposal or discharge of oils (if the discharge is more than 15 parts per 1 000 000), noxious liquid substances, packaged material, sewage and garbage is prohibited by the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. [512] This includes fishing nets, buoys and plastics.

The *Environment Protection (Sea Dumping) Act 1981* regulates the dumping, incineration and loading of a restricted set of wastes (such as dredge material, fish waste/sewage sludges and other inert materials – Annex 1). It also prohibits the export of wastes and other matter for the purposes of dumping or incineration at sea, and regulates the construction of artificial reefs. Dredge material arising form port or marina developments and enhancements or maintenance is also subject to the Sea Dumping Act if the material is suitable for disposal at sea. The Act prohibits dumping at sea in all 'Australian waters' unless a permit has been obtained. Environment Australia administers the granting of permits for sea dumping operations. The ANZECC Interim Ocean Disposal Guidelines 1998 provide the framework for the assessment of permit applications. Assessment under the EPBC Act may also be required.

The *Environment Protection (Sea Dumping) Act 1981* and *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* implement Australia's obligations under the 1972 London Convention; the SPREP *Protocol for the Prevention of Pollution of the South Pacific Region by Dumping 1986* and MARPOL 73/78.

[510] *Australian Heritage Commission Act 1975* (Cth) s 26.

[511] *Australian Heritage Commission Act 1975* (Cth) s 30.

[512] *Protection of the Sea (Prevention of Pollution form Ships) Act 1983* (Cth) ss 10 and 11.

8.2.4 Historic Shipwrecks Act 1976

Any tourism or recreational activity interacting with or near shipwrecks may be regulated by this Act. For example, scuba diving in protected zones, declared by the Minister, may be prohibited within a certain radius from a shipwreck.

The *Historic Shipwrecks Act 1976* (Cth) provides a framework that automatically protects shipwrecks more than 75 years old and provides for the Minister to declare younger wrecks to be protected. In its 1976 form, the Act applied to waters adjacent to States' coasts upon Commonwealth proclamation and automatically to waters adjacent to a Territory's coast. In 1980 the Act was amended and now applies to waters adjacent to a State only with their consent.[513] Proclamations have been made applying the Act to the waters adjacent to each State and Territory. In the South-east Marine Region, specific provisions for the protection of historic shipwrecks in State waters not subject to the Commonwealth Act, such as waters within the limits of State waters, have been adopted in South Australia, Victoria and Tasmania,[514] although New South Wales can apply its general heritage legislation.[515] Some of the Minister's responsibilities under the Commonwealth Act have been delegated to agencies in each State and the Northern Territory and on Norfolk Island. These generally administer the Commonwealth Act on a day-to-day basis and are also responsible for the State/Territory legislation.

The Act aims to protect the heritage values of shipwrecks and relics. Any person who finds a wreck must inform the Environment Minister,[516] who maintains a register of them.[517] The Minister may declare a protected zone of a radius of up to 800 m around the site of shipwrecks.[518] Such protected zones have been declared adjacent to Queensland (7), New South Wales (2), Northern Territory (1), Victoria (1) and Western Australia (2). Actions that would damage, destroy, interfere with, dispose of, or remove a declared historic shipwreck or relic from Australian waters are prohibited.[519] Regulations can be made to prohibit: bringing into or use in the zone of equipment that will damage the wreck; passage of a ship carrying certain substances through the protected area; trawling, diving or other under water activities; and mooring or use of ships within the protected zone.[520] These measures all have a potential impact on tourism and recreational activities.

Further, under the *1972 Agreement between Australia and the Netherlands concerning Old Dutch Shipwrecks*, the Netherlands transferred to Australia all its rights and titles to wrecked vessels of the Dutch East India Company that are lying off the coast of Western Australia. The Agreement sets out guiding principles for disposing of relics from the shipwrecks, which have the prime purpose of preserving them. Article 303 of the LOSC grants further control over archaeological and historical objects to coastal States out to 24 nautical miles from their coasts, although sub-section 303(4) might arguably extend coastal control to wrecks located even further afield on the continental shelf. Assisting in the implementation of Article 303(4), the *Draft Convention on the Protection of Underwater Cultural Heritage* was adopted by UNESCO on the 2nd of November 2001. It protects underwater cultural heritage, including ships wrecked more than 100 years ago and situated in the territorial waters of States, on the continental shelf or on the deep seabed. The text stipulates that on site preservation, rather than recovery, is the first option.

[513] *Historic Shipwrecks Act 1976* (Cth) s 4A.

[514] *Heritage Act 1995* (Vic); *Historic Shipwrecks Act 1981* (SA); *Historic Cultural Heritage Act 1995* (Tas).

[515] *Heritage Act 1977* (NSW).

[516] *Historic Shipwrecks Act 1976* (Cth) s 10.

[517] *Historic Shipwrecks Act 1976* (Cth) s 12.

[518] *Historic Shipwrecks Act 1976* (Cth) s 6.

[519] *Historic Shipwrecks Act 1976* (Cth) s 13.

[520] *Historic Shipwrecks Act 1976* (Cth) s 14.

8.2.5 Navigation Act 1912

The *Navigation Act 1912* (Cth) applies to ships operating in the tourist industry in the same way as described in Chapter 2, paragraph 2.4.1.

Generally speaking, the Act affects tourism activities by providing the legislative basis for ship safety, the coasting trade, employment of seafarers, and shipboard aspects of the protection of the marine environment. It also regulates wrecks and salvage operations, tonnage measurement of ships and the survey, inspection and certification of ships.

The States and the Northern Territory are responsible for trading ships on intrastate voyages, pleasure craft and inland waterways vessels.

8.2.6 Sea Installation Act 1987

The *Sea Installation Act 1987* (Cth) allows the Commonwealth to ensure that sea installations in Commonwealth waters are operated with regard to the safety of the people using them as well as the environment. A sea installation refers to any structure in physical contact with the seabed or floating that can be used for an environment-related activity such as exploring, exploiting or using the living resources of the sea, seabed or subsoil of the seabed.[521] A floating hotel, for example, would fall within the jurisdiction of this Act.

The Act makes it an offence to install or use sea installations that are not subject to a permit. [522] A permit can be granted by the Minister and can operate for up to 15 years.[523] In applying for a permit for construction in Commonwealth waters, an environmental impact statement report may be required under the EPBC Act.[524] It is a condition of the permit that any activities in relation to the installation do not interfere to a greater extent than is reasonably necessary with navigation, fishing or the conservation of sea or seabed resources.[525]

The Act[526] requires that installations be kept in good condition and repair.[527] The Act grants powers of access and inspection to authorised inspectors,[528] and allows the Minister to require a security,[529] to direct that an unauthorised installation be removed,[530] to order repairs on an installation[531] and to declare a safety zone.[532] It is an offence to contravene the Act.

The owner of a sea installation may also be required to pay an annual levy to the Commonwealth under the *Sea Installations Levy Act 1987* (Cth). The Commonwealth Department of the Environment and Heritage administers the Act.

[521] *Sea Installations Act 1987* (Cth) s 4(1).

[522] *Sea Installations Act 1987* (Cth) ss 14–5.

[523] *Sea Installations Act 1987* (Cth) s 22.

[524] *Sea Installations Act 1987* (Cth) s 20.

[525] *Sea Installations Act 1987* (Cth) s 23.

[526] *Sea Installations Act 1987* (Cth) s 65.

[527] *Sea Installations Act 1987* (Cth) s 52.

[528] *Sea Installations Act 1987* (Cth) s 61(1).

[529] *Sea Installations Act 1987* (Cth) s 37.

[530] *Sea Installations Act 1987* (Cth) s 55.

[531] *Sea Installations Act 1987* (Cth) s 54.

[532] *Sea Installations Act 1987* (Cth) s 57.

Chapter 9
Stakeholder concerns with the current management regime in the living marine resources sector

As part of the Management and Institutional Arrangements Assessment, the National Oceans Office stakeholder consultation workshop was convened. The Management and Institutional Working Group (MIWG) met with sector representatives to note their views on current management and institutional arrangements within their sector. The Management and Institutional Working Group invited representatives of the petroleum, commercial and recreational fisheries, conservation, shipping, ports, tourism and Indigenous custodian sectors to attend a one day workshop. The following representatives were in attendance:

List of stakeholder representatives

Conservation

Serge Killingbeck,
Australian Conservation Foundation

Diane Tarte,
Marine & Coastal Community Network

Rebecca Brand,
Humane Society International (apologies)

Petroleum

Sally Larkings,
Esso Australia Pty Ltd

Malcolm Doig,
Woodside Petroleum (apologies)

Commercial Fishing

Andrew Levings,
Seafood Industry Victoria

Bob Lister,
Tasmanian Fishing Industry Council

Russ Neal,
Australian Seafood Industry Council

Indigenous

Joe Agius,
South-east Steering Committee

Ben Cruise,
Eden Local Aboriginal Land Council

Rodney Dillon,
ATSIC

Terri Janke,
TJC

Corrie Fullard,
SERMP Indigenous Working Group

Robbie Thorpe,
Lake Tyers Aboriginal Trust

Recreational Fishing

Graeme Creed,
Recfish Australia

Julian Pepperell,
Pepperell Research

Graham Pike,
Recfish Australia

Ports and Shipping

David Parmeter,
Australian Shipowners Association

Jane Reynolds,
Association of Australian Ports and Marine Authorities Inc

Management and institutional working group attendees

Martin Tsamenyi

Don Rothwell

Marcus Haward

Mark Zanker

Mary Wood
(Attorney General's Department)

The aims of the workshop were to build an understanding of the current management and institutional arrangements within sectors and to begin to understand stakeholder's views about the future implementation arrangements for a regional marine plan.

Prior to the workshop the representatives were asked to consider their concerns regarding gaps and duplications in the regulation of their sector, and to present their preferences for how regional marine planning and multiple-use management should be implemented.

On the day Professor Tsamenyi addressed the group to provide information on the process, parameters and opportunities of the work progressing under the Management and Institutional Arrangements Assessment. The group then split into sectoral representative groups and discussed concerns with the current framework and preferences for implementation of regional marine planning with members of the MIWG.

The workshop participants have agreed that the content of the following information is an accurate record of the issues they raised. The information is presented to provide a non-government perspective on a variety of issues. It does not represent a comprehensive study of stakeholder views but provides a useful lead on the range of issues. This work will be followed up in 2002 with more comprehensive stakeholder input on current management and institutional arrangements and the implementation process.

Commercial fishing sector

The commercial fishing sector is frustrated with the number of Commonwealth agencies (especially AFFA, AFMA and EA) that impact on fisheries and the inadequate coordination between them.

Recreational fishing sector

There is concern that, despite its size and value,[533] the recreational fishing sector is in limbo, with no one to manage it. The sector regards the current OCS arrangements as inadequate as they do not specifically address recreational fishing. Moreover, most fishing is done within three nautical miles, outside Commonwealth jurisdiction, and there are problems with fish stocks straddling jurisdictional boundaries. Of particular concern to the sector is that, although there are no specific OCS arrangements with regard to recreational fishing, the OCS still impacts on recreational fishing. The sector perceives that gaps in regulation can occur where a recreational fishery occurs in Commonwealth waters, and only the commercial fishery is regulated in those waters, such as the New South Wales Tuna/Billfish fishery or the Southern Bluefin Tuna fishery (where New Zealand has quota for both commercial and recreational fishers). In this regard, the sector feels that it is important to note that 57% of commercially significant species are targeted by recreational fishers.

Recreational game fishers wish to be managed by the Commonwealth, to ensure sustainability, and recreational fishers wish AFMA to set total allowable catches that take into account both recreational fishing and commercial fishing, even if recreational fishing is not regulated directly. Recreational fishers are disappointed that although AFMA can issue permits for recreational fishing under s 32 of the *Fisheries Management Act 1991* (Cth), there are no guidelines governing the issue of such permits. Recreational fishers would also like the Fisheries Industry Policy Council, provided for under the *Fisheries Administration Act 1991*, to be activated.

Recreational fishers, like commercial fishers, are also concerned at the institutional overlaps between AFFA, AFMA and EA. They think that although the delimitation appears clear on paper, in practice conflict occurs, especially between AFMA and AFFA.

[533] 33% of people fish (5.5 million recreational fishers nationally) in an industry worth $ 3 billion.

Recreational fishers also have concerns about AFMA's consultation process. If recreational fishers are on MACs, they are only observers. They are not funded to go to meetings and only have a small voice. Moreover, MACs themselves are regarded as unable to get messages through to the AFMA Board. Recreational fishers regard AFMA as selective in its consultation processes, and feel that it usually only consults commercial fishers in relation to management plans.

Petroleum sector

The offshore petroleum industry has concerns that some aspects of the existing legislation and regulations require clarification. Of particular concern is the interface between the *Navigation Act 1912* and the *Petroleum (Submerged Lands) Act 1967* and between State and Commonwealth legislation. The industry noted areas of overlap that raise the question of what law is applicable at a particular point in time. This complicates matters for the industry.

Indigenous custodians

Of concern to the Indigenous sector is the lack of legislation providing for Indigenous rights and interests with respect to ocean management. A discussion of this concern and the key issues arising from it are provided in the report *Sea Country – an Indigenous perspective*.

Conservation sector

Conservation groups are concerned at the lack of explicit spatial and temporal conservation measures in terrestrial waters. There is also concern at the quantity of fishing that is occurring and at the level of destructiveness involved in such fishing.

Conservation groups are also of the view that there is Commonwealth/State overlap that would need to be addressed in the implementation of the *Oceans Policy*.

Stakeholder preferences for future directions in regional marine planning and multiple-use management

Conservation

New Legislation

Conservation organisations see the current legislative regimes as disparate and believe there would be problems enforcing the South-east Regional Marine Plan within this regime. They see a need for enforcement on a national scale. They see the implementation of enabling legislation as the only way to enforce the goals of *Australia's Oceans Policy*. This new Act should be short and provide guidance – a management plan that sets out a series of objectives that could be translated into operational standards and set benchmarks for other pieces of legislation. In particular, the Act should take the goals of the *Oceans Policy* to another level, set standards and establish mechanisms for public consultation.

The Act should address the issue of Commonwealth/State relations. It is easier to achieve successful outcomes and benefits at just the Commonwealth level, but not dealing with the States creates an opening for criticism and rejection of the outcomes of the regional marine planning process. The Act should address overlap between the States and the Commonwealth and provide some insight into the interaction between the OCS and the Act. The Act should have the capacity to incorporate varying issues across all regions and the financial arrangements with the States should be considered to enable the inclusion of land-based pollution issues, currently largely within the jurisdiction of States, under the Act's framework.

The Act could draw on the current EPBC Act or could be similar to the current *Canadian Oceans Act*, where the Act is built from the policy and then 'fleshed out' through integration with other areas. Another suggestion is the creation of an authority with responsibility for enforcing overarching implementation.

Environment Protection and Biodiversity Conservation Act 1999

Conservation organisations questioned whether the South-east Regional Marine Plan (SERMP) would be developed as a Bioregional Plan under s 176 of the EPBC Act so as to be legally binding on the Commonwealth. It should be noted that the bioregions referred to in the Act are smaller than the South-east Marine Region. Furthermore, the EPBC Act was not drafted with regional marine planning in mind and therefore may prove limiting.

Great Barrier Reef Marine Park Act

In relation to the use of the *Great Barrier Reef Marine Park Act*, the Act is a useful model as it considers the State/Commonwealth nexus as well as international boundaries. However, it was felt that this type of Act would better serve for regional marine planning than the management of a World Heritage Area, partly because of land-based issues. It was also noted that the level of zoning in the Act was probably unnecessary for the SERMP.

Petroleum

The petroleum industry would accept multiple-use management and has not rejected any environmental plan mechanisms (the legal onus currently is on the operator to implement good oilfield practices, including environmental plans). However, the industry has a strong future investment and interest and therefore needs clear information and the resources to apply any new management developments. The industry would need a strong driver to accept any rules. The industry does not need more regulation and the SERMP should consider the impact of all new regulations on the industry. It was suggested one set of laws should cover everything, and that these laws should only prohibit unacceptable conduct, and not prescribe the conditions for ensuring that such conduct did not occur.

Multiple-use management could be implemented through a guidance note that required applications for permits to address the impact of the proposed activity on other users. If there were concerns regarding compliance, compliance enforcement could be placed into a regulation.

Conflict resolution mechanisms are already in place in the industry; cooperative arrangements through communication and the establishment of relationships are used to resolve conflict without legal processes.

The industry emphasised that it preferred a risk-based attitude to multiple-use decisions, with the examination of impacts performed from a whole of ecosystem approach.

Commercial fishing

Commercial fishing representatives saw the need to approach issues of implementation flexibly, with legislation as only one potential implementation mechanism. "Cooperative implementation arrangements" were seen to have advantages over regulatory arrangements, especially in terms of stakeholder acceptance, flexibility etc.

The commercial fishing sector is already highly structured and regulated and would oppose further restrictions (including restrictions on access), but the industry would consider specific proposals with strong justification based on sound information – win-win outcomes are both desirable and possible through arrangements that foster the coexistence of users. However, the implementation process should avoid "pronouncements from above" and it is essential that option and implementation details be developed by "practical people" and not in isolation by government. Any restrictions should be negotiated with AFFA and AFMA as part of fisheries management arrangements – stakeholder consultation is of great importance in the development of implementation arrangements. Furthermore, any restrictions on access resulting from the South-east Regional Marine Plan should be implemented in a way that reduces the capacity in

industry to the same extent as the harvest from the fishery and adequate compensation should be paid to fishers for such a loss. For example, if access were to be denied to 20% of a fishery, then 20% of the fishery capacity of the fishery should be removed through the buy-out of licences.

There is also some concern as to the effectiveness of South-east Regional Marine Plan if the States are not 'on board' – how would the States be brought on board if the outcomes from the Plan point to a need for change in State processes or legislation?

Indigenous custodians

Indigenous rights

There should be recognition and respect of Indigenous rights to the ocean and Indigenous people's position as custodians of the sea, which is "more than an interest". A statement or declaration of rights should be included in all material on the plan and in the plan itself. These rights should form the basis for both how policy and the plan are implemented and for discussions with Government and industry. There is also a need for a document outlining how implementation of the plan will impinge on Indigenous rights. The rights at issue include:

- rights to practice culture
- fishing rights, access and allocations
- hunting and gathering rights
- cultural use and management rights
- rights of access in policy
- rights of policing
- commercial/economic development.

It was suggested that the Indigenous Working Group should draft a list of rights, allowing for differences between communities. Moreover, existing rights and interfaces with industry should be respected (eg partnership models, cooperative management, representation, Indigenous Land Use Agreements and Memoranda of Understanding).

Legislation

Any legislation that implements regional marine plans should include recognition of Indigenous customary law and responsibilities and the obligations of Indigenous people. Consideration should also be given to the impact that the current legal framework has on the ability of Indigenous people to realise their rights. It is not so much about Indigenous people realising rights, as receiving formal recognition of rights. There is a concern that any legislative changes resulting from the South-east Regional Marine Planning process may have the potential to diminish the existing rights of Indigenous people. The legislation should be cohesive with respect to Indigenous activity and research. Attention should be given to the interface between European law and Indigenous law.

Fishing

The regional marine plan should include the re-allocation of fishing licences to Indigenous interests. In the event of communities acquiring licences, there would be a need for a binding agreement that communities held licences in perpetuity. The representatives believed that there is also a need, which the Government needs to support, to buy into a sustainable harvest without increasing the effort. Money from licences also needs to be earmarked for Indigenous communities (ie for capacity building, training, infrastructure). A possible model for the implementation of these points in relation to fishing would be to use an Indigenous Land Corporation-type buy-back of allocations and then utilise good fishers to enter into a training arrangement with Indigenous people. It was suggested that the New Zealand model should be examined.

The links between commercial fisheries and local Indigenous communities, including overfishing in deep water, ballast water and long-lining, should also be noted.

Croker Island

There is concern about the impacts of the High Court decision in the *Croker Island Case* on the ability of Indigenous people to undertake traditional fishery/use practices when Indigenous people do not have their rights recognised with respect to the management of resources. There is also concern in relation to the impact of the case on sharing rights (equity) to resources.

Consultation, participation and negotiation

There is a need for consultation processes before for example – geological survey work and for some examination of the flow-on effects of activities such as seismic testing on species such as cray, scallops and marine mammals. Communities should be provided with more information about issues that may be addressed in the South-east Regional Marine Plan.

Miscellaneous

There is a need to recognise and respect the validity of Indigenous customary knowledge systems, and recognise Indigenous community research priorities. There is a need for traditional knowledge to be given an equal weight in planning processes and decision making.

There is also concern about what process would be used for the return of sea country – whether it would be similar to Indigenous Land Corporation land purchases. Furthermore, there is a need for the Management and Institutional Working Group to examine and consider Indigenous culture, law, industry and native title. Another important consideration is the links between existing Commonwealth rights, including those enshrined in the *Native Title Act* and international law.

Recreational fishing

The recreational fishing sector is concerned that it is in limbo, with no one effectively managing it. It feels that the OCS is inadequate as it does not specifically provide for recreational fishing. In implementing regional marine plans, the best part of the OCS should be used, and the rest left behind. Recreational game fishers wish to be regulated by the Commonwealth in order to ensure that the resource is sustainable. They also think that total allowable catches should take into account the recreational catch. There is no desire for more 'red tape', although the recreational fishing sector is happy to change legislation to make things more workable. Furthermore, the EPBC Act definition for ecologically sustainable development should be utilised in the South-east Regional Marine Plan.

Ports and shipping

Ports

There is concern in the ports sector as to how the regional marine plan would be imposed on ports. The ports sector was also interested in how implementation would work with the States as most port stakeholder members are regulated by State laws, although they are still affected by Commonwealth environmental initiatives. There is a concern that the regional marine plan would overturn progress already made on issues like ballast water (especially in terms of the good relationships that have been built with stakeholders).

Representatives were asked to comment on the suggestion of an overarching Australian Oceans Act, with regional marine plans hanging underneath it, that would respect existing Commonwealth/State arrangements, but picking up on *Oceans Policy* principles, goals and interests in legislative terms. The industry would be concerned about consultation and has the view that any new legislation that is too loose would be open to constant reinterpretation from government. The industry also would want to know when the legislation would be drafted, as a few plans would need to be implemented in order to establish what the common elements for any regional marine planning were before drafting legislation. Nevertheless, Commonwealth legislation would be acceptable, provided that it would not impose requirements additional or inconsistent to State regulation. Although *Australia's Oceans Policy* has engendered support so far, this is because it is just a policy and people are prepared to compromise positions. However, once the

concept of legislation is an option, people will retreat to entrenched positions and often be less flexible and more adversarial.

The industry would support the proposition of a regime based wholly on the GBRMP Act model only if it had a 'whole of government approach'.

In relation to the EPBC Act, more information is required by the industry on how the Act works with other legislation, including the effect of other assessment processes under other Acts, and what the Act's impact would be on the ports industry.

If the regional marine plan's objective is solely the protection of the environment, then the States would not fully engage in the process. If the rationale for the plan was the sustainable management of a resource there would be wider acceptance for its implementation. There is scope for a national approach, but the success of such an approach would depend very much on the personalities involved. There should be consistency across State and Commonwealth waters, but that the worse case scenario is a SERMP only implemented in Commonwealth waters.

Shipping

The shipping industry representatives have an interest in the regional marine plan, but expect less of an impact in their industry. They are happy to have a national perspective as they are regulated almost exclusively by the Commonwealth. There is very little State impact on their activities. Consistency between the regions in terms of planning is required for the shipping industry. Ballast water is one area that requires national standards. The industry would not cooperate unless a national strategy is put forward; different expectations from each State are not desired. The industry could cope with different requirements in different environments, but a nationally consistent approach to regulation is still desired. The most important thing for the industry is consistency in terms of who is responsible for regulating and in what is regulated. There is concern, however, that there may be another level of interface that shipping would have to go through. Another concern is that there would be a change in the requirements for shipping operators. If such a change does occur, the industry would want a voice in moulding those changes. In relation to legislation, the industry would prefer to see a plan in operation before the drafting of legislation, preferring to see how regional marine plans shaped up to maximise consistency before hanging them below legislation. Any implementation model needs to take into account any international guidelines and regulation.

In relation to a proposal for an authority and regime based on the *Great Barrier Reef Marine Park Act* model, the industry could envisage such a model, provided that it would not introduce a new level of regulation and that it would make things more efficient.

It should also be noted that there are two types of shipping. The first is captive shipping, which includes dedicated services operating across Bass Strait and shipping from Weipa to Gladstone and Darwin to Dilli, eg passenger ferries and 'roll-on-roll-off' ships. The second is transient shipping, which does not operate exclusively in Bass Strait. There is a lot of shipping in and out of Melbourne and a large east-west flow of traffic through Bass Strait and shipping traffic is quite high in the South-east Marine Region.

Conclusion to the regulatory framework

This study has demonstrated the enormous complexity of the regulatory framework for the Australian marine environment, and in particular that of the South-east Marine Region. It has shown that much of that framework has developed in the past 30 years following the enactment of the *Seas and Submerged Lands Act 1973* (Cth), the conclusion of the OCS, and the opportunities presented by the 1982 LOSC for more extensive offshore jurisdiction, especially in the EEZ and continental shelf.

Any law or regulatory framework has the ability to address modern challenges in management and regulation with appropriate renewal and adjustment. However *Australia's Ocean Policy* has the potential to have such a significant impact on offshore management that the question of whether the existing legal and regulatory frameworks are capable of meeting that challenge remains. The preceding chapters in this study have sought to identify the ambit and extent of the current regulatory framework for Australia's offshore and the South-east Marine Region without focussing on how that framework may be used to implement a regional marine plan and if there are any gaps in the framework from that perspective.

The next step is to thoroughly analyse the legislative and administrative framework that is broadly discussed here, to determine what capacity it has to implement regional marine plans. This work has been commenced and will be available in the latter half of 2002. This is important information that will be used in the options phase of the South-east Regional Marine Plan.

Appendix 1: List of Commonwealth legislation relevant to the management of the marine environment and the administering agencies

Aboriginal and Torres Strait Islander Commission

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Native Title Act 1993 (NTA)	• Recognition and protection of native tile • Activities on areas subject to native title • Right to negotiate by native title claimants/holders • Native Title Representative Bodies • Native Title Bodies Corporate to hold title to any areas recognised through the NTA
Aboriginal Land Grant (Jervis Bay Territory) Act 1986	• Provides for grants of land and sea in Jervis Bay Territory to Indigenous owners • Administered by Wreck Bay Aboriginal Community Council (WBACC) • Transfer of rights only in accord with the Act • Penalties for breaches • Provisions for by-laws to regulate activities • Provision for leases and licences • Prohibition and regulation of access to registered sites • Regulation of fisheries and tourism activities

Attorney-General's Department

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Admiralty Act 1988	• Does not directly regulate any activities or industries • Governs admiralty and maritime jurisdiction
Coastal Waters (State Powers) Act 1980	• Does not directly regulate any activities or industries • Defines the jurisdictional boundaries in relation to marine areas between the Commonwealth and States
Coastal Waters (State Title) Act 1980	• Does not directly regulate any activities or industries • Vests proprietary rights and title in the States in respect of land beneath the waters adjacent to the State to three nautical miles from the coast giving the States rights and responsibilities with respect to the resources contained therein
Coastal Waters (Northern Territory Powers) Act 1980	• Does not directly regulate any activities or industries • Defines the jurisdictional boundaries in relation to marine areas between the Commonwealth and Territory
Coastal Waters (Northern Territory) Act 1980	• Vests proprietary rights and title in the Territory in respect of land beneath the waters adjacent to the Territory to three nautical miles from the coast giving the Territory rights and responsibilities with respect to the resources contained therein
Crimes (Ships and Fixed Platforms) Act 1992	• Does not directly regulate any activities or industries • Definition and enforcement of offences against the safety of ships and fixed platforms
Crimes at Sea Act 2000	• Does not directly regulate any activities or industries • Applies State and Territory criminal law to offences at sea within Australia's maritime jurisdictional zones adjacent to that State/Territory
Native Title Act 1993	• Recognition and protection of Native Title • Activities on areas subject to native title • Right to negotiate by native title claimants/holders • Native Title Representative Bodies • Native Title Bodies Corporate to hold title to areas recognised through the NTA

Defense Department

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Control of Naval Waters Act 1918 Control of Naval Waters Regulations	• Potentially many marine activities in a particular area • Provides for restricted access to marine areas declared to be naval waters
Defence Act 1903 Defence Force Regulations	• Naval and military defence of Australia • Defence Practice Areas
Naval Defence Act 1910-1973 Naval Establishment Regulations	• Power to regulate, amongst other things, good government of naval establishments, and shipping in time of war or for any naval operation or practice • Limited powers for Naval Police over persons in vicinity of naval establishments

Department of Agriculture, Fisheries and Forestry Australia

Legislative Instrument	**Activities/industries/natural or commercial industries regulated by instrument**
Agricultural and Veterinary Chemicals Act 1994	• Evaluation, regulation and control of agricultural and veterinary chemical products
Agricultural and Veterinary Chemicals Code Act 1994	• Evaluation, registration and control of the manufacture and supply of agricultural and veterinary chemicals
Agriculture and Veterinary Chemicals (Administration) Act 1994	• Agricultural and veterinary chemical product uses and industries • Establishes the National Registration Body for Agricultural and Veterinary Chemicals (NRA)
Ballast Water Research and Development Funding Collections Levy Act 1998	• Shipping operations • Collection of levy on shipping imposed by *Ballast Water Research and Development Funding Levy Act 1998* (Cth)
Ballast Water Research and Development Funding Levy Act 1998	• Shipping operations • Imposition of levy on shipping
Biological Control Act 1984	• The biological control of pests
Export Control Act 1982	• Export of certain goods
Fisheries Act 1952 (Pt IVA only)	• Fishing • Establishes Joint Authorities for fisheries management
Fisheries Administration Act 1991	• Fishing • Establishes the Australian Fisheries Management Authority (AFMA)
Fisheries Agreements (Payments) Act 1991	• Fishing • Collection of money under foreign fisheries agreements
Fisheries Legislation (Consequential Provisions) Act 1991	• Fishing
Fisheries Levy Act 1984	• Fishing • Imposition of levy on fishing licences
Fisheries Management Act 1991	• Fishing

Department of Agriculture, Fisheries and Forestry Australia continued...

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Fishing Levy Act 1991	• Fishing • Imposition of levy on fishing concessions
Foreign Fishing Boats Levy Act	• Fishing • Imposition of levy on fishing concessions
Foreign Fishing Licences Levy Act 1991	• Fishing • Imposition of levy on fishing concessions
Murray Darling Basin Act 1993	• Water, land and other environmental resources of the Murray-Darling Basin
Prawn Export Charge Act 1995	• Exports • Imposition of charge on prawn exports
Prawn Export Promotion Act 1995	• Prawn industry promotion • Collection of charge imposed by *Prawn Export Charge Act 1995* (Cth)
Primary Industries and Energy Research and Development Act 1989	• Undertaking research and development relating to primary industries, energy and natural resources or for related purposes
Quarantine (Validation of Fees) Act 1985	• Fees under the *Quarantine Act 1908* (Cth)
Quarantine Act 1908	• Inspection, exclusion, detention, observation, segregation, isolation, protection, treatment, sanitary regulation and disinfection of vessels, installations, persons, goods, things, animals or plants to prevent the introduction, establishment or spread of diseases or pests
Statutory Fishing Rights Charges Act 1991	• Fishing • Imposition of charges on statutory fishing rights under the *Fisheries Management Act 1991* (Cth)

Department of Communications, Information Technology and the Arts

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Protection of Movable Cultural Heritage Act 1986	• Protection of Australia's heritage of movable cultural objects • Supporting the protection by foreign countries of their heritage of movable cultural objects

Department of Foreign Affairs and Trade

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
South Pacific Nuclear Free Zone Treaty Act 1986	• Usage and transportation of nuclear weapons on land and in the oceans

Department of Immigration and Multicultural Affairs

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Migration Act 1958	• Entry into and presence in Australia of non-citizens and their deportation and departure

Department of Industry, Tourism and Resources

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Bounty (Ships) Act 1989	• Payment of bounty related to ship building
Liquid Fuel Emergency Act 1984	• Facilitate the management of liquid fuel that is, or is likely to be, in short supply
Offshore Minerals (Exploration Licence Fees) Act 1981	• Payment of fees for exploration licences for offshore minerals (other than petroleum)
Offshore Minerals (Mining Licence Fees) Act 1981	• Payment of fees for mining licences for offshore minerals (other than petroleum)
Offshore Minerals (Registration Fees) Act 1981	• Payment of fees for the lodgment for registration of certain documents for offshore mining (other than for petroleum)
Offshore Minerals (Retention Licence Fees) Act 1994	• Payment of fees for retention licences for offshore mining (other than for petroleum)

Department of Industry, Tourism and Resources *continued...*

Legislative Instrument	**Activities/industries/natural or commercial industries regulated by instrument**
Offshore Minerals (Royalty) Act 1981	• Imposes a royalty upon minerals other than petroleum recovered from the offshore area
Offshore Minerals (Work Licence Fees) Act 1981	• Payment of fees in respect to works licences for offshore mining (other than petroleum)
Offshore Minerals Act 1994	• Sets up a licensing system for mining and exploration in particular offshore areas and applies State mining and exploration laws to those offshore areas
Petroleum (Submerged Lands) Act 1967 (PSLA) Petroleum (Submerged Lands) Regulations Petroleum (Submerged Lands) (Management of Safety on Offshore Facilities) Regulations Petroleum (Submerged Lands) (Management of Environment) Regulations Petroleum (Submerged Lands) (Occupational Health and Safety) Regulations Petroleum (Submerged Lands) Act – Schedule of Specific Requirements, ie Directions (these directions are being phased out) Petroleum (Submerged Lands) (Offshore Petroleum Pipeline) Regulations [draft]	• The exploration for, and exploitation of, petroleum in Commonwealth waters
Petroleum (Submerged Lands) Fees Act 1994 Petroleum (Submerged Lands) Fees Regulations	• Payment of annual fees and other fees for certain acts
Petroleum (Submerged Lands) (Registration Fees) Act 1967 Petroleum (Submerged Lands) (Registration Fees) Regulations	• Payment of fees in respect of the Registration of certain Instruments
Pipeline Authority Act 1973	• This act establishes the Pipeline Authority
Petroleum Revenue Act 1985	• Relates to revenue from petroleum production

Department of Transport and Rural Services

Legislative Instrument	**Activities/industries/natural or commercial industries regulated by instrument**
Australian Maritime Safety Authority Act 1990	• Shipping operations • Establishes and regulates the Australian Maritime Safety Authority (AMSA)
Bass Strait Sea Passenger Service Agreement Act 1984	• Maritime transport • Provision of a grant for the Bass Strait sea transport service
Carriage of Goods by Sea Act 1991	• Liability for loss, damage or delay to goods carried by sea
Lighthouses Act 1911	• Shipping operations • Provision and maintenance of marine navigational aids
Limitation of Liability for Maritime Claims Act 1989	• Shipping operations • Limits liability for maritime claims in accordance with the *Convention on the Limitation of Liability for Maritime Claims 1976*
Marine Insurance Act 1909–1973	• Entering contracts for marine insurance
Marine Navigation (Regulatory Functions) Levy Act 1991	• Shipping operations • Imposition of levy on shipping to recover the costs of safety and regulatory functions
Marine Navigation (Regulatory Functions) Levy Collection Act 1991	• Shipping operations • Collection of levy imposed by *Marine Navigation (Regulatory Functions) Levy Act 1991* (Cth)
Marine Navigation Levy Act 1989	• Shipping operations • Imposition of levy on shipping to recover the costs of marine aids to navigation
Marine Navigation Levy Collection Act 1989	• Shipping operations • Collection of levy imposed by the *Marine Navigation Levy Collection Act 1989* (Cth)
Navigation Act 1912	• Shipping operations • Navigation, construction, safety and certification of ships, crew, cargoes and passengers • Marine environment protection standards for ships • Coastal pilotage • Incident investigation • Wreck and salvage operations

Department of Transport and Rural Services *continued...*

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Protection of the Sea (Civil Liability Act) 1981	• Shipping operations • Imposition of civil liability for oil pollution damage to the environment
Protection of the Sea (Oil Pollution Compensation Fund Act) 1993	• Shipping operations • Compensation for oil pollution damage
Protection of the Sea (Powers of Intervention) Act 1981	• Shipping operations • Actions by the Commonwealth to protect the sea for pollution by oil and other noxious substances discharged from ships
Protection of the Sea (Shipping Levy) Act 1981	• Shipping operations • Imposition of levy on ships carrying oil
Protection of the Sea (Prevention of Pollution from Ships) Act 1983	• Shipping operations • Imposition of measures to protect the sea from pollution by oil and other hazardous substances discharged from ships
Submarine Cables and Pipelines Protection Act 1963	• Protection of submarine cables and pipelines beneath the high seas and Economic Exclusion Zones from breakage or damage by Australian ships

Department of Education, Science and Training

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Australian Institute of Marine Science Act 1972	• Australian Institute of Marine Science

Environment Australia

Legislative Instrument	**Activities/industries/natural or commercial industries regulated by instrument**
Antarctic Marine Living Resources Conservation Act 1981	• Planning and management of harvesting of Antarctic marine living resources • Planning and management of scientific research on Antarctic marine living resources
Antarctic Treaty (Environment Protection Act) 1980	• Protection and conservation of the Antarctic environment through regulation of scientific and other activities
Australian Antarctic Territory Acceptance Act 1933	• Does not regulate any activities or industries directly • Accepts certain territory in the Antarctic seas as Territory under the Commonwealth's authority
Australian Antarctic Territory Act 1954	• Does not directly regulate any activities or industries directly • Provides international basis for recognition of Australian jurisdiction in the marine zones adjacent to the Australian Antarctic Territory
Australian Heritage Commission Act 1975	• Identification, registration and other matters pertaining to the national estate • Establishes the Australian Heritage Commission • Conservation advice to Commonwealth agencies
Environment (Financial Assistance) Act 1977	• Provision of financial assistance to the States in connection with projects related to the environment
Environment Protection (Sea Dumping) Act 1981	• Dumping and incineration of wastes and other matter at sea, construction of artificial reefs • Ports authorities (dredging and sea disposal); government agencies (vessel disposal); community groups (artificial reefs)
Environment Protection and Biodiversity Conservation Act 1999	• Environmental assessment of activities having a significant impact on matters of national environmental significance, including commonwealth marine areas, world heritage, Ramsar Wetlands, migratory species, nuclear actions and Commonwealth land • Protection of whales and other cetaceans • Protection of threatened species, listed migratory species and biodiversity • Commonwealth reserves • Biosphere reserves
Environmental Reform (Consequential Provisions) Act 1999	• Does not regulate activities/industries directly • Consequential reforms associated with *Environment Protection and Biodiveristy Conservation Act 1999*

Environment Australia *continued...*

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Hazardous Wastes (Regulation of Exports and Imports) Act 1989	• Implementation of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* • Importation and export of hazardous waste to ensure that such waste is disposed of safely so that humans and the environment, within and outside Australia, are protected
Heard Island and McDonald Islands Act 1953	• Activities in the Southern Ocean surrounding Heard Island and the McDonald Islands
Historic Shipwrecks Act 1976	• Protection of historic shipwrecks in Australian waters
Natural Heritage Trust of Australia Act 1987	• Conservation and management of Australian natural heritage, especially through funding
Sea Installations Act 1987	• Operation of sea installations, their interaction with other ocean users and the responsibilities of their operators
Sea Installations Levy Act 1987	• Sea installations • Imposition of levy on sea installations
State Grants (Nature Conservation) Act 1974	• Framework for funding by Commonwealth to States for nature conservation
Wildlife Protection (Regulation of Exports and Imports) Act 1982	• Importation, export of animals plants and goods • Possession of exotic birds

Prime Minister and Cabinet

Legislative Instrument	Activities/industries/natural or commercial industries regulated by instrument
Aboriginal and Torres Strait Islander Heritage Protection Act 1984	• Protection of areas and objects of particular significance to Aboriginals/Torres Strait Islanders in accordance with Aboriginal/Torres Strait Islander tradition
Resource Assessment Commission Act 1989	• No specific activities/industries • Establishes the Resource Assessment Commission to make determinations in respect of competing resource uses

Appendix 2: Major treaties/conventions and 'soft law' that may impact on Australia's management of the marine environment

1.1 Sources of international law

There are two sources of binding international law: conventions and treaties, and custom.

1.1.1 Conventions and treaties

International conventions and treaties are documents agreed or acceded to by parties that, once they come into force, give rise to obligations between the parties that have ratified the treaties. When a treaty/convention is not in force for a State, but that State has signed the treaty, there is an obligation on that State not to take any action that defeats the object and purpose of the treaty. Conventions or treaties do not give rise to obligations on non-parties, except to the extent that the treaty or convention contains customary international law (see 1.1.2 below).

1.1.2 Customary international law

Customary law arises from the practice of States, and is binding on all States, with the possible exception of those States that have consistently objected to the formation of a rule. The formation of customary law involves two elements: a widespread and generally accepted practice by States, and what is termed *opinio juris* – a belief by the State (or, more correctly, those that represent the State in the international arena, ie, governments) that such practice is the result of an obligation. Identifying principles of customary international law is very complex. It involves examining the activities of State organs (government departments, legislation etc) to determine the existence of a practice and the requisite *opinio juris*. It is often unclear whether or not a certain principle has 'crystalised' into binding international law. Conventions and treaties, and 'soft law' instruments (see 1.1.3) can represent both the practice and *opinio juris* of States, and can become customary law.

1.1.3 'Soft Law' instruments

'Soft Law' is a recent term that is used to describe international instruments that are non-binding. Such instruments are hortatory – ie, they are intended as guidelines for conduct and impose no binding obligations on the parties. Such instruments are a potentially rich sources for the formation of customary international law, where they are widely followed (representing State practice) and eventually accepted as obligatory (*opinio juris*).

1.2 List of major treaties ratified by Australia and applying to management of the marine environment

International Convention on the Regulation of Whaling 1946.

Antarctic Treaty 1959.

Protocol on Environmental Protection to the Antarctic Treaty 1991 (Madrid Protocol).

International Convention on Load Lines 1966.

International Convention for the Tonnage Measurement of Ships 1969.

International Convention on Civil Liability for Oil Pollution Damage 1992

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 and *Protocol Relating to Marine Pollution by Substances other than Oil 1973.*

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 and 1976 Protocol.

Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 ('Ramsar Convention').

Convention concerning the Protection of the World Cultural and Natural Heritage 1972.

Convention on the International Regulations for Preventing Collisions at Sea 1972.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 ('London Convention', previously known as the 'London Dumping Convention').

Convention for the Conservation of Antarctic Seals 1972.

Australia-Netherlands Agreement Concerning Old Dutch Shipwrecks 1972.

Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES).

International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/78 and Annexes I to VI.

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 1974 ('JAMBA').

USSR-Australia Migratory Birds Agreement.

International Convention for the Safety of Life at Sea 1974 ('SOLAS') and Protocol of 1988.

Convention on Conservation of Nature in the South Pacific 1976 ('Apia Convention').

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978.

Torres Strait Treaty 1978.

Convention on Conservation of Migratory Species of Wild Animals 1979 ('Bonn Convention').

Convention on the Conservation of Antarctic Marine Living Resources 1980.

United Nations Convention on the Law of the Sea 1982, the *Agreement relating to the Implementation of Part XI 1994* and the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 in relation to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995.*

Agreement for the Protection of Migratory Birds and their Environment between the Governments of Australia and the People's Republic of China 1986 ('CAMBA').

Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 ('SPREP') and related Protocols.

SPREP Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region 1986.

Protocol to the SPREP for the Prevention of Pollution of the South Pacific Region by Dumping 1986.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989.

International Convention on Oil Pollution Preparedness, Response and Cooperation 1991

Convention on Biological Diversity 1992.

Convention for the Conservation of Southern Blue Fin Tuna 1993.

1.3 A Brief description of the major treaties

The United Nations Convention on the Law of the Sea 1982 (LOSC): The LOSC came into force in November of 1994. It provides a comprehensive framework to regulate all marine sector activities. The LOSC has widespread acceptance as the primary framework instrument for regulating marine sector activities, with 157 signatories and 136 ratifications. The LOSC is divided into 17 parts and nine annexes, containing provisions governing, amongst other things, the limits of national jurisdiction over ocean space; access to the seas; navigation protection and preservation of the marine environment; sustainable management of marine living resources; non-living marine resources exploitation; marine scientific research; and the settlement of disputes.

Due to its broad nature, the LOSC is relevant to much of the Australian legislation in relating to offshore areas. It provides the basis in international law for Australia's jurisdiction to regulate many activities and exploit natural resources. Some legislation that implements Australia's rights and responsibilities under the LOSC in relation to the exploitation of natural resources includes:

- *Marine Legislation Amendment Act 1994*
- *Fisheries Management Act 1991*
- *Petroleum (Submerged Lands) Act 1967*
- *Submarine Cables and Pipelines Protection Act 1963*.

The *Agreement relating to the Implementation of Part XI of the United Nations Law of the Sea Convention 1996* modified the application of Part XI of the Convention, relating to deep seabed mining. This Agreement has 101 Parties. The provisions of the LOSC have been supplemented by the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 in relation to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, which Australia has ratified.

Convention for the Conservation of Southern Bluefin Tuna 1993: This Convention is aimed at ensuring the conservation and optimum utilisation of southern bluefin tuna. As the Convention has only three States Parties (Australia, Japan and New Zealand), the efficacy of its provisions is undermined by increasing fishing of southern bluefin tuna by non-States Parties. The Convention obliges States Parties to take all necessary action to ensure the enforcement of the Convention. Other obligations imposed by the Convention include:

- to provide the Commission for the Conservation of Southern Bluefin Tuna scientific information, fishing catch and effort statistics and other data relevant to the conservation of southern bluefin tuna, and as appropriate, ecologically related species
- to cooperate in the collection and direct exchange of fisheries data, biological samples and other information relevant for scientific research on southern bluefin tuna and ecological related species
- to cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents and vessels of any State or entity not party to the Convention.

The provisions of this Convention are implemented by a management plan under the *Fisheries Management Act 1991* (Cth).

The Convention on Biological Diversity 1992 : This Convention commits States Parties to conserve their biological diversity, promote the sustainable use of its components and ensure fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. States Parties are also committed to provide access to genetic resources and transfer relevant technologies. The Convention is one of the most widely ratified Conventions on the protection of the environment, with 181 States Parties. In Australia, the primary legislative instrument of implementation is the *Environment Protection and Biological Conservation Act 1999*. A Protocol to the Convention, the Cartagena Protocol on Biosafety, is not yet in force and has not been signed by Australia.

Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971 (Ramsar Convention): The Ramsar Convention was concluded in recognition of the ecological functions of wetland as habitats supporting flora and fauna. The Convention requires parties to it to designate suitable wetlands within their territories for inclusion in a list of 'Wetlands of International Importance' and to promote conservation of wetlands and water fowl by establishing nature reserves. The Ramsar Convention currently has 126 States Parties. The primary Act in Australia implementing the Ramsar Convention is the *Environment Protection and Biological Diversity Conservation Act 1999* (Cth).

Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific Region 1989 and Protocols (Driftnet Convention): The Driftnet Convention commits States Parties to prohibit their nationals and vessels from engaging in driftnet fishing within the 'Convention Area'. The 'Convention Area' is defined as the area lying within 10 degrees North latitude and 50 degrees South latitude and 130 degrees East longitude and 120 degrees West longitude and includes waters under the jurisdiction of Parties. This includes Australia's Exclusive Economic Zone and the majority of the South-east Marine Region, except for Macquarie Island. The Driftnet Convention currently has seven parties. It is implemented in Australia by the *Fisheries Management Act 1991* (Cth).

Convention on the Conservation of Migratory Species of Wild Animals 1979 (Bonn Convention): The aims of the Bonn Convention are to conserve terrestrial, marine and avian migratory species throughout their range. The Convention commits States Parties to "promote, cooperate in and support research relating to migratory species". The Convention currently has 74 States Parties. The Convention is implemented in Australia by the EPBC Act.

Convention concerning the Protection of the World Cultural and Natural Heritage 1972 (World Heritage Convention): The World Heritage Convention establishes a permanent arrangement to promote international cooperation in the identification and protection of what is defined as 'natural and cultural heritage' of the world. These are properties deemed to be of universal value from the scientific, conservation, cultural and aesthetic points of view. The Convention currently has 154 States Parties and is implemented in Australia by the EPBC Act.

The Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR): The objective of this Convention is to promote the conservation of Antarctic marine living resources between south of 60 degrees South latitude and the Antarctic Convergence. Only a small portion of the continental shelf off Macquarie Island extends beyond 60 degrees South latitude. This convention pre-dates the 1995 UN Agreement on Straddling Stocks. When that Agreement enters into force, the Parties' obligations under this convention will not be altered. Parties to the Agreement will have an obligation to strengthen this Convention as an existing regional fisheries management arrangement. Conservation is defined to include 'rational use'. The Convention currently has 31 States Parties. The Act is implemented in Australia by the *Antarctic Marine Living Resources Conservation Act 1981* (Cth).

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (Basel Convention): The Basel Convention creates an international regime to reduce to a minimum the generation of hazardous and other wastes; to control the transboundary movement of such wastes and their disposal; and to facilitate sound management to protect human health and the environment. The Basel Convention obliges the Parties not to allow "the export of hazardous wastes or other wastes for the disposal within the area south of 60 degrees South latitude, whether or not such wastes are the subject of transboundary movement". The Convention has 148 States Parties. There is a *Protocol on Liability and Compensation* to the Convention, but this has not been signed by Australia. The Convention is implemented in Australia by the *Hazardous Wastes (Regulation of Exports and Imports) Act 1989*.

International Convention for the Prevention of Pollution from Ships 1973, and Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) The aim of MARPOL 73/78 is to prevent pollution from disposal of oil, noxious liquids, harmful packaged substances and garbage from ships. This prohibition applies to all ships including recreational craft. MARPOL 73/78 has separate Annexes for different activities, with the number of States Parties varying between the different Annexes, Annexes I/II have 116 States Parties (95.69% of global shipping tonnage); Annex III: 97 Parties (81.45% shipping tonnage); Annex IV: 81 Parties (46.19% shipping tonnage); Annex V 101 Parties (87.64% shipping tonnage); Annex VI: 3 Parties (8.42%). Australia is yet to ratify Annexes IV and VI. In Australia, MARPOL 73/78 is implemented by two Acts:

- *Navigation Act 1912* (Ship constructions aspects)
- *Protection of the Seas (Prevention of Pollution from Ships) Act 1983* (Dumping, waste disposal and transport).

International Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention) and 1996 Protocol: The London Convention is a global Convention that prohibits the dumping of certain hazardous materials and establishes a permit regime, which requires special permits for the dumping of certain specified materials and a general permit for the dumping of other wastes and matter. The London Convention also has provisions promoting regional cooperation, especially in the areas of monitoring and scientific research. The Convention currently has 78 States Parties (69.06% of global shipping tonnage). A 1996 Protocol is intended to replace the 1972 Convention. One of the most important innovations that this Protocol will introduce is the application of the 'precautionary approach' to sea dumping covered by the Convention, as well as the 'polluter pays' principle and more restrictive conditions for approving dumping. Australia has ratified this Protocol, which is yet to secure sufficient ratifications to enter into force. The Protocol is implemented in Australia primarily by the *Environment Protection (Sea Dumping) Act 1981*.

Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 and Protocol (SPREP Convention and Protocol): The SPREP Convention requires States Parties, either jointly or in cooperation with other Parties, to adopt measures to protect the marine environment, and ensure the sound environmental management and development of the natural resources of the South Pacific region. The Convention encompasses the South-east Marine Region as it applies to the waters within 200 nautical miles of the coasts of the States Parties, including the waters of Macquarie Island. The Convention currently has 12 States Parties. The Convention has protocols dealing with combating pollution emergencies (which has 12 States Parties) and preventing pollution by dumping (which has 11 States Parties). The Australian Acts that implement the Convention and Dumping Protocol include the *Environment Protection (Sea Dumping) Act 1981*. Regulations to implement the convention can also be made under the *Environment Protection and Biodiversity Conservation Act 1999*.

Convention on Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES): This Convention regulates trade in species that are threatened with extinction or may become so as a result of international trade. The Convention provides for the inclusion in Appendix I of species threatened with extinction that are or may be affected by trade. Listing on Appendix I prohibits international trade in wild specimens. The Convention further provides for the inclusion in Appendix II of species that are not necessarily threatened but may become so unless trade is strictly controlled. Appendix II allows regulated trade to continue under a permit system, which allows for trade monitoring. CITES currently has 154 States Parties. This convention is implemented by the EPBC Act.

1.3 Non-binding instruments (soft law developments) relevant to Oceans Policy

Stockholm Declaration on the Human Environment 1972 (Stockholm Declaration): The Stockholm Declaration was produced by the United Nations Conference on the Human Environment in 1972. It states guiding principles for the preservation and enhancement of the human environment. Important principles relevant to oceans policy include: the sovereign right to exploit resources and concomitant obligation to prevent environmental harm; safeguarding natural resources for present and future generations; and taking all steps to prevent pollution of the sea.

Rio Declaration on Environment and Development 1992 (Rio Declaration): The United Nations Conference on Environment and Development (UNCED) held in Rio in June 1992 produced the non-binding Rio Declaration, which both affirms the Stockholm Declaration and states principles to be applied for the integration of environment protection and sustainable development. Key principles relevant to oceans policy include: the sovereign right to exploit natural resources and concomitant obligation to prevent environmental harm; ensuring public participation in decision making; enacting effective environmental legislation; adopting the 'precautionary approach' and 'polluter pays' principle and utilising environmental impact assessments.

Agenda 21 1992: UNCED also produced an action plan, *Agenda 21*. Chapters 14 and 17 deal with sustainable development and oceans management respectively. The preamble to Chapter 17 requires that approaches to oceans management be "precautionary and anticipatory in ambit". *Agenda 21* is to be reviewed in 2002.

Jakarta Mandate 1995: At the Second meeting of the conference of the Parties to the *Biodiversity Convention* (Jakarta) in 1995, States Parties to the *Biodiversity Convention* committed themselves to examining the conservation of coastal and marine biodiversity in general, and especially the need for integrated coastal and marine management.

Draft Declaration on the Rights of Indigenous Peoples: The draft recognises the "urgent need to respect and promote the rights and characteristics of indigenous (sic) peoples, especially their rights to their lands, territories and resources, which stem from their history, philosophy, cultures and spiritual and other traditions, as well as from their political, economic and social structures".

FAO Code of Conduct for Responsible Fishing: The Code is designed to promote the compatibility between the activities and economic interests of all those involved in fisheries, through enlightened fisheries management and ecological principles of conservation. It aims to ensure that the resources and the development opportunities are transferred intact to future generations of fishers. The Code contains six thematic areas or chapters for which guidelines should be developed: fishery management practices; fishing operations; aquaculture development; integrating of fisheries into coastal area management; post harvest practices and trade; and fishery research.

Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food Security 1995: The Kyoto Declaration was produced by the International Conference of Sustainable Contribution of Fisheries to Food Security, held in early December 1995 in Kyoto, Japan. While the emphasis of the conference and Declaration was on the sustainable use (exploitation) of fisheries resources, the Declaration makes explicit links to the major international treaties affecting ocean management, and to the softer law codes of conduct. The Declaration notes the *United Nations Convention on the Law of the Sea*, *Agenda 21*, *the UN Agreement on Straddling and Highly Migratory Fish Stocks*, *the FAO Code of Conduct for Responsible Fisheries*, the *Biodiversity Convention*. The Declaration emphasises the importance of fisheries as a food source for the world's population.

Malmö Ministerial Declaration 2000: Produced by the Global Ministerial Environment Forum, the Declaration includes principles such as polluter pays; the involvement of civil society in the making of decisions that can affect the environment and the integration of environmental considerations into all decision making.

References

Colombos, C J (1967). *The International Law of the Sea*. Longmans, London.

Crommelin, M (1991). 'Offshore Mining and Petroleum: Constitutional Issues'. *Australian Mining and Petroleum Law Journal* 3.

Cullen, R (1989). 'Canada and Australia: A Federal Parting of the Ways'. 18 *Federal Law Review* 53: 75–77.

Cullen, R (1990). 'The Encounter between Natural Resources and Federalism in Canada and Australia'. 24 *University of British Columbia Law Review* 275: 297–298.

Cullen, R (1979) 53 *Australian Law Journal* 605.

Cullen, R (1976) 50 *Australian Law Journal* 206.

Cullen, R (1980) 54 *Australian Law Journal* 517.

Cullen, R (1990). 'Case Note: *Port MacDonnell PFA Inc v South Australia*' 16. *Monash University Law Review* 128.

Cullen, R (1990). *Federalism in Action: The Australian and Canadian Offshore Disputes*, Federation Press in Association with Comparative Public Policy Research Unit, Public Sector Management Institute, Sydney.

Edeson, W R (1968–69). 'Australian Bays' 5. *Australian Yearbook of International Law* 5.

Haward, M (1989) 'The Australian Offshore Constitutional Settlement'. *Marine Policy* 13:334.

Lane, P (2001). 'A Quick Guide to ILUAs', in Keon-Cohen, B (Ed), *Native Title in the New Millenium*. Aboriginal Studies Press, Canberra.

Lumb, RD (1984). 'Australian Coastal Jurisdiction' in Ryan, KW (Ed), *International Law in Australia*.

Lumb, RD (1978). *The Law of the Sea and Australian Offshore Areas*.

O'Connell, DP (1958). 'Problems of Australian Coastal Jurisdiction' 35 *British Yearbook of International Law*.

O'Connell, DP (1965). 'Australian Coastal Jurisdiction' in *International Law in Australia*. Law Book Company, Sydney, 246 at 281–282.

O'Connell, DP & Riordan, A (1971). *Opinions on Imperial Constitutional Law*. Law Book Company, Sydney.

Opeskin, BR & Rothwell, DR (1991). 'Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles' 22. *Ocean Development and International Law* 395 at 408–410.

Smith, D (1998). 'Indigenous Land Use Agreements: New Opportunities and Challenges under the Amended Native Title Act.' *Land Rights Laws: Issues of Native Title Regional Agreements* Paper no. 7.

White (1994), *Marine Pollution Laws of the Australasian Region Section* 7.1

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

National Oceans Office

Level 1, 80 Elizabeth St, Hobart

GPO Box 2139, Hobart, Tas, Australia 7001

Tel: +61 3 6221 5000 Fax: +61 3 6221 5050

www.oceans.gov.au

The National Oceans Office is an Executive Agency of the Commonwealth Government of Australia