

Developing a Marine Conservation Strategy for South Australia's Marine and Coastal Environment

How Can the Community's Interest and Participation in that Process be Achieved?

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Introduction

South Australia supports a unique marine environment, with some of the most biologically diverse waters along the temperate Australian coastline. Nearly all South Australians live within 50 kilometres of the coast. The pressures and demands on the marine and coastal environment are many and varied. They include fisheries, aquaculture, tourism, marine pollution and coastal urban development.

In early May 1996 the Conservation Council of South Australia held a two day seminar aimed at developing principles for a marine conservation strategy for South Australia's marine and coastal environment while allowing and facilitating sustainable use. This paper is based on a presentation by the author in a session which considered the concerns and perceptions of various stakeholders. It focuses on the community's interests in the development of a marine conservation strategy and its ability to participate in that process.

Any marine conservation strategy will need to be reduced to a written form. To be at all effective it will require legislative recognition. Much angst and future disappointment can be avoided if the strategy is carefully planned and drafted at the outset. In this paper I propose to consider what is or should be a marine conservation strategy, what lessons may be learned from the experience of the planning strategy under the *Development Act 1993*, and what must any strategy do to adequately represent the community's interest.

"What is the Community?"

"Australia is today a complex, dynamic multicultural society of mainly coastal peoples. Over a quarter of Australians live within 3 kilometres of the sea, three-quarters live within 50 kilometres of the coast and Australians are increasingly moving to live along the sea shores. The coast and sea are very important to the culture, life style and social values and perceptions of Australians."¹

The 'community' must include the beach goers, the recreational users of the coastal environment, the fishing industry, the shipping industry, gas and oil extraction, aquaculture practitioners, indigenous people, waste disposal operators and tourism operators and anyone else who in some aspect of their day-to-day life interacts with the marine environment. In this presentation regarding community interest I have used the term in its broader sense.

1 Department of the Environment, Sport and Territories - Ocean Rescue 2000 Program. Our Sea Our Future - Major Findings of the State of the Marine Environment Report for Australia, Gt Barrier Reef Marine Park Authority 1995 at p29.

What is a Marine Conservation Strategy?

This seminar aims to develop principles for a marine conservation strategy for South Australia's marine and coastal environment. I have some misgivings about the use of the term 'strategy'² in relation to matters which I believe would be more appropriately described as policies. When one looks at the dictionary definition of "strategy" it appears to be very much related to a military system and the concept of planning and directing large military movements and operations during wartime. However, if by using the term strategy in relation to a marine conservation policy we are referring to a process which ideally recognises the various threats and competing demands on the marine environment and attempts to develop some policies by which those threats can be alleviated, then it may not be such an inappropriate term.

A marine conservation strategy may take one of two forms:

1. It may be a collection of desirable objectives expressed in a policy document which of itself cannot be used for administering and controlling activity within the marine and coastal environment. The Planning Strategy developed under the *Development Act 1993* is an example of this form.
2. It can be a much more comprehensive document which provides details on:
 - a Objectives for marine and coastal management.
 - b Guidelines for decision-making.
 - c Identification of appropriate controlling authorities, eg, local, state or federal government.
 - d Community consultation.
 - e Identification of key coastal areas and protection of those areas by existing legislation and protection plans under such legislation.
 - f The preparation of detailed coastal management plans covering all coastal regions within the state.
 - g Amendments to legislation affecting coastal management.³

My preference is for the latter form of strategy. It is also important that a State marine conservation strategy take into account the report and recommendations of the Resources Assessment Commission in its Final Report on the Coastal Zone Inquiry.⁴ That report recommended that a national approach to coastal zone management be adopted.⁵ It recognised that the three tiers of government all had legitimate roles to play in the management of coastal zones.⁶ The report found a range of problems occurring in the coastal zones and a co-operative Australia-wide approach was necessary to find effective solutions to these problems. The RAC recommended that a strategic approach to management was a critical element of the ecologically sustainable development of Australia's coastal zone resources. It noted that,

"...such an approach establishes clear objectives, identifies the means to achieve these objectives, and provides a means of dealing with the dynamic physical characteristics of the coastal zone as well as the many management issues arising from human activities".⁷

The Federal government has moved a considerable way down the path towards imposing coastal management with the release in May 1995 of its Coastal Policy called 'Living on the Coast'.⁸ That policy aims to promote ecologically sustainable use of Australia's coastal zone. It contains specific objectives for sustainable resource use, resource conservation, public participation and knowledge and understanding in the coastal zone. It is a Commonwealth policy and accordingly applies only to those activities for which the Commonwealth has responsibility. However, the policy envisages that the Commonwealth will share its experience in the coastal zone area with local and State governments. It wants to work cooperatively with those other spheres of government to achieve Commonwealth coastal management objectives.

² The Shorter Oxford defines strategy as: 'the art of projecting and directing the larger military movements and operations of a campaign'.

Macquarie dictionary defines strategy as not only the Oxford's military definition but also 'skilful management in getting the better of an adversary or attaining an end; the method of conducting operations, especially by the aid of manoeuvring or stratagem'.

³ Based on a list prepared by Hon Pat Comben, Qld Minister for Environment and Heritage at a symposium on Coastal Management and Law held 31.5.91, Law School, University of Queensland.

⁴ Resource Assessment Commission Coastal Zone Inquiry - Final Report, Nov 1993 AGPS.

⁵ Ibid p88.

⁶ 'Coastal Zone' for the purposes of that Inquiry was broadly defined. The definition was based on the 1991 approach of the OECD Environment Directorate which defined the zone according to the nature of the problem being examined, particularly the objectives of management, see p7 of Final Report.

⁷ Resource Assessment Commission op cit No 4, p92.

⁸ Department of the Environment, Sport and Territories Living on the Coast - A Commonwealth Coastal Policy, 1995.

‘Considerable benefit can be gained from governments working together to share solutions, approaches and resources for dealing with what are often common problems. Given that coastal management needs to take into account site specific needs and local community values, this shared experience should be used to develop, as far as is practical, management responses at the local and regional level.’⁹

The preferred format for a State Marine Conservation Strategy which has been outlined above would have the added benefit of meeting coastal management objectives outlined in the Commonwealth’s Coastal Policy, and earlier recommended to a great extent by the Final Report of the RAC following the Coastal Zone Inquiry.

The Planning Strategy under the *Development Act* can be useful for gaining a picture of a strategy in operation. Under the *Development Act* 1993 the Minister for Housing and Urban Development is required to prepare and maintain a Planning Strategy for development within the State.¹⁰ Development is broadly defined and includes a change in use of land, land division and the construction, alteration, or amendment of a building or structure.¹¹ A Planning Strategy in two parts (Volume 1, Metropolitan Adelaide) and (Volume 2, Rest of South Australia) was released in January 1994 soon after the current Liberal government came to power. The legislation makes it quite clear that the Planning Strategy is an expression of State government policy formed after consultation with government and the community. It is expressed not to affect rights or liabilities whether of a substantive, procedural or other nature,¹² and is not to be taken into account for the purpose of any development control assessment or decisions.¹³

The preface to the Planning Strategy¹⁴ states that the strategy provides

“..a basis for the integration of economic development and social development strategies so that future planning is directed towards a holistic and shared vision.”¹⁵

The Planning Strategy is not used in the assessment of applications for development approval. Assessment of all development proposals is made by reference to development plans prepared in accordance with s23 of the *Development Act* 1993. Development plans are supposed to seek to promote the provisions of the Planning Strategy.¹⁶ Somewhat inconsistently the Act also expressly states that no action may be brought on the basis that a development plan or amendment to the plan is inconsistent with the strategy or that an assessment or decision made under the Act is inconsistent with the Planning Strategy.

It might well be asked, why have the strategy? The Planning Strategy itself is full of general statements and objectives of a ‘motherhood’ nature. It would be difficult to use such a document for development control and assessment. The minister is required to consult with the community on alterations to the Planning Strategy. The community’s right is to inspect the draft strategy and make written representations on the proposal.¹⁷ *This is essentially a token gesture.* There is no requirement that the minister consider those submissions or communicate further with the community on the draft document. The minister must however, provide a yearly report to parliament on the strategy and its implementation including ‘community consultation on the content, implementation, revision or alteration of the Planning Strategy’.¹⁸ Political pressure may presumably be brought to bear in some circumstances.

Brian Hayes QC has noted the dilemma which arises when contemplating the extent to which there should be a rigorous statutory public participation process in relation to the Planning Strategy and whether that process should include the rights to challenge the failure to make changes.¹⁹ He notes that,

“If legislation were to provide for such a course there is a strong argument to suggest that government and government agencies would shy away from a commitment to the strategy in order to avoid finding themselves the subject of continual challenge.”

Many people have, since the inception of the *Development Act* and the Planning Strategy had misgivings about the fact that the Planning Strategy has no statutory force as a document, although it has recognition in the legislation. Those persons fear that there will not be the commitment by the government to maintain a strategy in the absence of any process by which the strategy can be publicly scrutinised and enforced. This fear is not without some foundation. Many in the community would not share the optimistic views of Hayes which were set out above. Hayes notes that one must accept that strategic planning is essentially political in nature. If the community embraces the strategic

9 Ibid at p14.

10 Development Act 1993 (SA) Section 22(2).

11 Ibid Section 4.

12 Ibid Section 22(8).

13 Ibid Section 22(9).

14 Strategic Planning Unit - SA Dept of the Premier and the Cabinet ‘Planning Strategy - Vol 1 Metropolitan Adelaide’, January 1994.

15 Ibid page (vi)..

16 Development Act 1993 (SA) Section 23(3).

17 Ibid Section 22(4)(b).

18 Ibid Section 22(6)(c).

19 Hayes BRM, ‘Strategic Planning and Development Controls’ (1993) (1) AELN 42.

planning process and feels very much a part of it then, he argues, there is no need for formal legislative approval.

At least the *Development Act* refers to the Planning Strategy and requires its preparation and review. At the present time no State legislation contemplates a marine conservation strategy. That situation must be remedied. A marine conservation strategy is required and should be recognised by amendments to existing State legislation (such as the *Fisheries Act 1982*) or by the enactment of a new piece of legislation to deal specifically with this and other marine issues.²⁰ While dealing with such changes parliament should also consider amending the *Fisheries Act 1982* to ensure that the various aquaculture management plans are accorded sufficient legal status. At present the only reference in the *Fisheries Act 1982* to the preparation of a plan of management is that in Section 48B which deals with plans of management in relation to a marine park. Many of the aquaculture management plans presently being prepared relate to areas outside marine parks.²¹ The *Fisheries Act 1982* does not contemplate their preparation. Management plans are not regulations (or certainly have not been drafted in that format) and thus could not be justified by reference to any of the regulation-making powers in the Act.²² At present, there appears to be no statutory basis for such management plans. Given that it is intended that such plans become part of a development plan under Section 29(1) of the *Development Act 1993* the fact that they cannot be said to have been prepared, adopted or applied under the *Fisheries Act*²³ creates a problem. The *Development Regulations* quite clearly state that the management plans for aquaculture which may be included in the development plan are those prepared or adopted under the *Fisheries Act 1982* or the *Crown Lands Act 1929*.²⁴ The only plans of that nature are those prepared in relation to marine parks. If a wider range of aquaculture management plans are meant to be incorporated into the development plan, then this anomaly in the existing legislation requires attention.

What Should a Marine Conservation Strategy do to Adequately Represent the Community's Interest?

The Resource Assessment Commission Report recognised that if the National Coastal Action Program is to be effective it requires systematic community and industry involvement in coastal zone management.²⁵ The Commonwealth's Coastal Policy accepts this recommendation.²⁶ If the objectives of the program were to be achieved it requires not only government action but also the involvement of all stakeholders. The same approach applies to the formulation of a Marine Conservation Strategy at the State level.

The Report of the World Commission on Environment and Development 'Our Common Future'²⁷ noted that progress towards sustainable development be facilitated by recognition of the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision-making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.²⁸

There are four issues which need to be addressed in order to meet community requirements:

- * There must be clear opportunities for community involvement in all stages of the policy-making process.
- * Community education is important.
- * Where regulatory systems are established requiring the authorisation of a range of activities in marine and coastal areas, any interested person must have the right to comment on proposed activity as part of the decision-making process.
- * Where authorisation procedures apply, merits review of all decisions should be available to all interested parties.

Community Involvement in Policy-Making Process

The RAC noted that,

"...when public policies affect communities, organised consultation with those communities can significantly improve the quality and effectiveness of management responses. Consultation helps community members

20 An example of a new piece of legislation dealing with some of these issues is the Victorian Coastal Management Act 1995. This is briefly discussed in Westcott G, 'Victoria's Major Review of Coastal Policy: The Establishment of a Coordinating Coastal Council', (1995) 12 EPLJ 288.

21 eg Coffin Bay Aquaculture Management Plan - Review July 1995 (PISA).

22 Fisheries Act 1982 (SA) Sections 50A, 51.

23 Development Act 1993 (SA) Section 29(1)(a).

24 Development Regulations 1993 (SA) Regulation 14(F).

25 Resources Assessment Commission, op cit No 4 p143.

26 Department of the Environment, Sport and Territories, Living on the Coast op cit at No 8 p24.

27 Oxford University Press Australia, 1990 Australian edition.

28 Ibid p374.

learn more about the issues in question and generally a higher degree of community confidence in and identification with management actions. The management agencies are better informed about the attitudes and interests of the community and about the impact of their policies on the communities.”

The community must be given the opportunity to have input to policy formulation at all stages of that process. I have already referred to the limited opportunity for public input on the Planning Strategy under the *Development Act*. That input occurs once a draft policy is in place. An ideal position would be one where some public input occurred prior to the drafting of the policy. Whilst I appreciate that such a process involves more time, administration and costs it is worthwhile in the long term if the draft policy document more accurately reflects the community's concerns and needs. It can be difficult to effect changes to a policy document once it is already in draft form. If pre-draft consultation does not occur the result may be a policy with which the community is not entirely happy. That unhappiness may be subsequently reflected in the community's approach to proposed activities in the policy area such as objections and protests about proposals. Community disquiet at that stage of a process can present enormous time, cost and administrative burdens.

The public consultation process which applies to the preparation of development plans or amendments to those plans under the *Development Act 1993* has some merits and warrants consideration as an example of an appropriate public consultation mechanism.²⁹ Of particular interest is the public hearing which must be conducted after all written submissions on the draft policy have been made. Such a process is more likely to leave the local community feeling as if it has had a fair input to the policy making process.

Adequate public consultation is especially necessary at the policy formulation stage if other approval systems may minimise or even exclude public participation.

At the present time, the regulations under the *Development Act 1993* provide that no public notification is required for any form of aquaculture development in an aquaculture zone delineated by a development plan or a management plan for aquaculture under the *Fisheries Act 1982* or the *Crown Lands Act 1929*.³⁰ Leaving to one side, the questions about the validity of such management plans, it has to be accepted that the community could feel justifiably aggrieved about such a provision, in circumstances where their opportunities for input to the earlier policy process which prepared the aquaculture management plan was inadequate.

The other component of community involvement which warrants mention is that played by community management structures. The RAC notes that in Australia responsibility for managing selected coast areas has been delegated to representative committees of local citizens. They are an important means of involving the community in the management of the coast. Furthermore the commission observed that, 'it is generally true that when people are given full responsibility for management, they will exercise that responsibility conscientiously'.³¹ Arguably, the experience to date of the Catchment Water Management Boards established under the *Catchment Water Management Act 1995* is an example of the usefulness of such community-based management authorities. In relation to coastal issues, the "Coast-care" program operated by the Metropolitan Seaside Councils Committee is an example of the good work done on a voluntary basis by local communities concerned about the coastal environment. The Commonwealth's Coastal Policy refers to this and a number of other initiatives designed to ensure that, with the cooperation of State and local governments the Commonwealth's commitment to ecologically sustainable coastal management is being met.³²

Community Education

Community involvement and community education are, as the RAC recognised, strongly complementary. The RAC advocated the importance of 'learning by doing' which is characterised by the successful community involvement in activity such as "landcare" and "waterwatch".³³

Any strategy should incorporate objectives designed to educate the whole community. Educational institutions should target the various interest groups within the community to ensure the desirable messages on marine and coastal conservation are conveyed to a wide cross section of our society.

“ It is important to focus on specific behaviour, for example, use of off road and four wheel drive vehicles, harvesting of intertidal species for bait and food, trampling of vegetation, anchor damage, littering, and recreational fishing limits. Educational programs can be a cost effective complement to more costly enforcement and surveillance activities.”³⁴

Obviously one area where educational initiatives will be most effective is in schools. Children will readily learn and

29 Development Act 1993 (SA) Section 25, Development Regulations 1993 Regs 11 & 12.

30 Development Regulations op cit No 22, Schedule 9 Part 1

31 Resources Assessment Commission op cit No 4, p147.

32 Department of Environment, Sport and Territories, Living on the Coast op cit at No 8 p24.

33 Ibid p155.

34 Ibid.

adopt appropriate behaviour if taught from an early age and given the opportunity to become involved in coastal zone issues through hands on monitoring and management projects.³⁵

Community Input to Decision-Making Process

If it is accepted that a strategy will contemplate authorisation procedures for activity within the marine and coastal area then comment is required on the community right to have an input to any decision-making processes that may be subsequently established in accordance with the strategy.

Wherever decisions are to be made that have the potential to impact upon the resources and environment within the marine and coastal area, the community should have an opportunity to comment on those decisions. Under present legislation the minister has the power to grant a licence or lease to any person for a term not exceeding ten years in respect of any area consisting of land or of waters, or of land and adjacent waters, conferring rights to occupy and use the area for fish farming or to take fish from the sea.³⁶ No public notification of the application for such a lease or licence is required although notice of the grant of the right must be published in the Government Gazette.³⁷ There is certainly no right given to the community to comment on such proposals despite the fact that it involves granting the right to take or use natural resources to individuals presumably for their own profit making ventures.

Land based activity within the coastal zone will be subject to the requirements of the *Development Act 1993*. The *Development Act 1993* does contain provisions for public notification of development proposals and the subsequent right for interested persons to make comments on them.³⁸ However, such rights are not universally applied to all development proposals. The exclusion of any form of aquaculture development in certain zones from any requirement for public notification has already been mentioned.

Merits Review of Decisions

Merits Review has very obvious connections with both community consultation and community input to decision-making processes. Systems which do not provide the opportunity for community input to decision-making processes invariably do not allow merits review of decisions.

However, if a marine conservation strategy requires a decision-making process then the community should have the opportunity to comment on applications under consideration and to seek a review of decisions made on those applications by an independent tribunal. An appropriate body for undertaking an independent review which is presently in existence in South Australia is the Environment Resources and Development Court. The argument that giving wide community access to the courts or tribunals for the purposes of reviewing decisions made by administrative bodies will open up the floodgates of litigation have been proven to be ill founded both within Australia and overseas.³⁹ (In particular in New South Wales there is a general provision in that State's *Environmental Planning and Assessment Act*⁴⁰ which allows any person to bring proceedings for an order to remedy or restrain a breach of that legislation. That open standing provision has not resulted in a flood of cases before the courts. There is no reason to believe that a similar provision in relation to marine and coastal matters in any South Australian legislation would operate in any different way. Indeed, the *Development Act 1993* empowers every person to apply to the Court for an order to remedy or restrain a breach of that Act whether or not any right of that person has been or may be infringed by or as a consequence of that breach.⁴¹ The *Development Act* has been in operation for over two years with the floodgates being open and yet no "flood" of agitated busy bodies seeking orders in respect of breaches of the Act have occurred in that time. I suggest the "flood" will never occur.

Conclusion

"The close connections between ecosystems, processes, resources, uses and issues in the coastal zone require that coastal zone management occur at an appropriate time and spatial scale and is closely integrated at all geographic and geopolitical levels. The goals of marine environmental management are to maintain biodiversity and ecologically sustainable development. The alternatives are continuing environmental degradation and ecological collapse."⁴²

35 Ibid p156.

36 Fisheries Act 1982 Section 53(1).

37 Ibid Section 53(4).

38 Development Act 1993 (SA) Section 33.

39 For a general discussion in this issue see Preston BJ, "Environmental Litigation", Law Book Company 1989 Chapter 4.

40 Section 123.

41 Section 85.

42 Department of the Environment, Sport and the Territories Our Sea, Our Future op cit at No 1

An essential prerequisite to the achievement of the goals referred to above is a comprehensive Marine Conservation Strategy. The strategy should not seek to follow the Planning Strategy format but rather be modelled on the National Coastal Action Program recommended by the RAC in its Coastal Inquiry - Final Report and subsequently expressed in a range of objectives and initiatives set out in the Commonwealth Coastal Policy, *Living on the Coast*. There should be recognition by those responsible for preparing the strategy that the community has an enormous amount to offer to that process. Community involvement and participation at all stages of the process is essential.