Harmonising Australian environmental law: An Australian Oceans Act for Australia's oceans

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Environmental Law Harmonisation Program

The National Environmental Law Association's principal mission, set out in its articles of association, is to obtain and exchange information on issues relevant to environmental law and policy". At its annual general meeting in Broken Hill in October 2003, a program of work was adopted within this mission, to promote discussion of inter-governmental harmonisation of environmental law at the national level. Such harmonisation is desirable, not simply to level the playing field, but to lift the level of play by highlighting and adopting best practice. This approach has supported dramatic advances in environmental law in the European Union, and has been attempted in Australia through the national Criminal Code.

NELA is in a position of unique relevance to promote the progressive development of environmental law at the truly national level in Australian, i.e. across the nine jurisdictions that make Australian environmental law. Harmonisation is feasible within a cooperative federal framework in some generic and some sectoral areas. For example, in a generic area of environmental law, such as 'environmental democracy', NELA might seek to promote harmonised rules for public access to information, consultation, standing, and costs. Other generic areas for attention include guiding principles, directors' liability, criminal penalties and compliance systems. Current examples of sectoral harmonisation in Australia are the National Environment Protection Measures adopted through the National Environment Protection Council (NEPC), on matters such as air quality and transboundary movements of wastes. NELA might promote their extension to environmental sectors such as coastal water quality, threatened species criteria and wetlands management.

To progress the program for harmonisation of environmental law, the Environmental Law Roundtable of Australia and New Zealand (ELRANZ) was established at the NELA annual general meeting, held in July 2005 in Canberra, and then extended to include New Zealand at the Natural Resources Management Law Association in Wellington in October 2005. Its purpose is to facilitate structured and informed dialogue across jurisdictions on environmental law standards, procedures and institutions with a view to promoting their harmonisation.

A comparative analysis of environmental penalties was the topic tackled by ELRANZ at a well-attended meeting held in Sydney in November. The presentation of a survey paper by Matthew Baird produced discussion among practitioners and built upon a conference paper on a related topic delivered by Rosemary Martin at the 2005 NELA Annual Conference. Both are now available on the NELA website at www.nela.org.au.

Fish, amphibians and marine mammals are notorious for their common inability to read maps accurately. To ensure that they are treated the same way on both sides of jurisdictional boundaries, in March 2006 the harmonisation of marine management became the second topic for discussion of national harmonisation of environmental laws. Together with the Australian Conservation Foundation, which has led work on this project, NELA has prepared and launched a discussion paper about the future of Australia's laws for its oceans. It canvasses an adventurous new national approach to marine management: an Australian Oceans Act and an Australian Oceans Authority. It is one view among what are likely to be many on this issue. Some may argue that there is no need for change, or that existing legislation, such as the *Environment Protection and Biodiversity Conservation Act 1999*, could be made use of in its current or a strengthened form, or they may see an Australian Oceans Act needing to be very different from that described. We expect that these views will be a part of the public discussion process and we welcome them. The following pages set out a synopsis of the Australian Oceans Act discussion paper. To facilitate your feedback and consultation, details on access to the full discussion paper together with the project coordinator's contact details are set out at the end of this article.

Australian Oceans Act Discussion Paper Synopsis

The Australian Oceans Act discussion paper is organised into seven chapters, concerning: (1) The use and management of Australia's oceans; (2) The limitations of current administrative and legislative arrangements in our oceans; (3) Australia's Oceans Policy development and implementation; (4) An Australian Oceans Act, Agreement and Fund; (5) The Australian Oceans Act and regional marine planning; and (6) The Australian Oceans Act and the Commonwealth Environment Planning and Biodiversity Conservation Act. The seventh and last chapter contains a detailed draft of the proposed Act itself. The chapters are outlined here:

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

As the twenty-first century begins, Australia has a complex statutory and regulatory framework for oceans management based on multiple jurisdictions and sector-based management. The implementation of Australia's Oceans Policy, adopted by the Commonwealth Government at the close of 1998, could force changes to that framework. So too might the responses to the current marine environmental issues – such as global warming and climate change, habitat destruction and species loss, overfishing, land-based and marine-based pollution and introduced marine pests. These are discussed in this introductory chapter.

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

This chapter reports on the findings of the ACF Marine legislative review, a comprehensive review of 250 existing Commonwealth and state marine-related environmental laws and regulations that apply to the conservation, fisheries, petroleum, shipping and tourism sectors. The Review concluded that the statutes inadequately provide for integrated marine management, ecologically sustainable development, ecosystem-based management and multiple-user management. Two case studies are considered, one on Australia's fisheries, and the other on the implementation of the National Representative System of Marine Protected Areas (NRSMPA), to analyse their current arrangements and implementation.

The first case study reveals that, although ecologically sustainable development is now a goal of fisheries statutes and there has been progress in sustainable fisheries assessment, fisheries legislation in general includes barriers to ecosystem-based management and multiple-user management and the number of overfished species is growing. The second case, on the NRSMPA, indicates that there is a diversity of processes and outcomes for marine protection, with different timetables, targets, consultation processes, zonings and commitments to high levels of protection across the Commonwealth, states and territories. These tend to produce inconsistent processes and outcomes across a multi-jurisdictional framework.

Chapter 2 outlines how the proposed Australian Oceans Act would help overcome the general limitations to coordination, and those revealed by the case studies, by giving legislative force to regional marine planning processes and integrated ecosystem-based management with measurable operational objectives, indicators and targets. Under the Australian Oceans Act, regional marine plans would also provide multiple-user and cross-sectoral management frameworks that allocate resources, effectively engage stakeholders and the community, work to resolve conflict, and provide greater transparency and certainty in fewer but more consistent and effective processes, including those for marine national parks across Commonwealth, state and territory waters.

Chapter 3 discusses the development of Australia's Oceans Policy and issues associated with its ongoing implementation, including the lack of effective intergovernmental arrangements.

The ultimate success or failure of Australia's Oceans Policy will be strongly influenced by the institutional arrangements established for its implementation. The paper considers whether Australia's Oceans Policy is 'comprehensive and integrated', and whether the administrative and institutional arrangements and processes for regional marine planning are sufficient to achieve the policy's ecosystem-based vision for oceans planning, protection and management. It concludes that although the policy is comprehensive it is not integrated, that the institutional arrangements are insufficient, and that the regional marine planning process has failed to establish integrated, inter-sectoral and ecosystem-based planning and management.

Key to the successful implementation of Australia's Oceans Policy is the effective engagement of the states and territories. However, the institutional arrangements established by the Commonwealth Government to

implement Australia's Oceans Policy have been largely intra-governmental in nature, due to the states and territories refusal of involvement. This chapter draws on the analysis of various commentators on these issues to conclude that stronger inter-governmental arrangements are needed to ensure state and territory engagement in Australia's Oceans Policy implementation and regional marine planning.

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

The creation of an Australian Oceans Act and an Australian Oceans Authority, with strong and clear directive and enforcement powers, would pilot Australia's oceans planning and management, and industry and government agencies, on a course that is new but one that is implicit in Australia's Oceans Policy. The success of Australia's Oceans Policy will be judged by how well we 'protect and preserve our marine environment' while providing progress certainty, a sustainable resource base and efficient regulatory framework or marine-based industries whose futures depend on integrated and effective management.

An Australian Oceans Act would enable the coordination of existing legislation within a nationally consistent legislative regime using the proposed Australian Oceans Authority to oversee the implementation of Australia's Oceans Policy and to provide certainty, equity and security for stakeholders. Similar national frameworks have been established under Commonwealth legislation for the regulation of corporations, trade practices, certain transactional crimes and the National Competition Policy. Further, national approaches can be achieved through agreement between the Commonwealth and the states to legislate in a nationally consistent manner.

This chapter summarises the contents of the proposed Australian Oceans Act, which is divided into four parts: Preliminary; Australian Oceans Authority; Regional Marine Plans; Management and enforcement. The Act includes five schedules that cover operationally related acts, international conventions relating to ocean protection and management, proposed activities that require advice or direction from the Australian Oceans Authority in assessments and approvals process, and criteria for the identification and selection of marine national parks.

Across Australian governmental jurisdictions, complex and occasionally conflicting or disputed administrative arrangements could undermine future oceans management and planning and the operation of an Oceans Act. To overcome this, the discussion paper proposes an Inter-governmental Agreement on the Oceans (IGAAO). Through the Council of Australian Governments, the Commonwealth and each of the states and territories would sign on to the IGAAO, with the Commonwealth passing the Australian Oceans Act and each State agreeing to pass a complementary Australian Oceans Authority Act (eg. Australian Oceans Authority (New South Wales) Act). This would create nationally consistent legislative protection, planning and management provisions across state, territory and Commonwealth waters, thus driving forward integrated management and a breakdown of the historic but dysfunctional three-nautical-mile maritime jurisdictional and administrative barrier.

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

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

The moneys available in the Australian Oceans Fund would be an incentive for the states and territories to sign the IGAAO. Such funding was lacking in the process for the development and implementation of Australia's Ocean Policy, with the states and territories coming to view that if they were to become involved

they would be giving up authority with no financial return. The Australian Oceans Fund would include financial assistance for such matters as:

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

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

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

In the proposed Australian Oceans Act, the Australian Oceans Authority would coordinate the preparation, review, monitoring and auditing processes of regional marine planning, as well as the identification and selection processes for marine national parks.

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

It is essential that Indigenous communities be allowed to play a vital role in the preparation and implementation of ecosystem-based regional marine plans to ensure socially, culturally and environmentally sustainable use and management of 'Sea Country'. Indigenous communities have developed a deep and profound knowledge of their environment, a strong sense of ownership and stewardship, and effective and sustainable management strategies to sustain their lives and the environment of coastal and marine regions and mechanisms should be established within regional marine planning to incorporate their knowledge, rights, responsibilities, perspectives and participation.

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

The preparation process of a regional marine plan under the Australian Oceans Act would assess existing and proposed uses. During the period between the proclamation of the plan and its nine-year review, the Authority would report annually on the performance assessment of the plan and would review triennially

the plan's resource-use and compliance levels, allocations and activities. These annual and triennial reviews would underpin the adaptive planning approach implicit in ecosystem-based management.

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

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

This chapter considers key provisions of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*: bioregional planning and bilateral agreements: listing of threatened species, ecological communities and key threatening processes; approvals and assessments; Matters of National Environmental Significance; and the significance of impact test. Its purpose is to determine whether the *EPBC Act* could be used to complement the comprehensive and integrated ecosystem-based regional marine planning and management provided by the proposed Australian Oceans Act or obviate the need for it at all. It concludes that, although the *EPBC Act* does not provide a platform for integrated national marine management, it does provide many useful tools that could complement an Australian Oceans Act if they were applied to the ocean realm.

Under Section 176 of the *EPBC Act* the Minister may prepare a bioregional plan for a region that includes provisions and strategies relating to the components of biodiversity, their distribution and conservation status, important economic and social values, heritage values of places, objectives relating to biodiversity and other values, and priorities, strategies and actions to achieve the objectives, as well as mechanisms for community involvement in implementing the plan and measures for monitoring and reviewing the plan. The discussion paper concludes that the recently announced Commonwealth intention to apply Section 176 to the marine environment recognises the need for a legislative basis to regional marine planning and provides a useful tool for marine planners. However, although it will highlight the natural values and limits of an area, it will not provide a framework for integrated ecosystem-based regional marine planning.

The use, to date, of the listing of key threatening processes under the *EPBC Act* has been very limited when it comes to protecting Australia's ocean life. It could become a useful adjunct to an Australian Oceans Act if threatening processes, such as overfishing, beach netting for sharks, seabed trawling, land-based pollution, habitat conversion associated with nearshore reclamation and invasive marine pests, were listed. The same can be said of the need for an expansion of the lists for threatened species and ecological communities. Currently, there are no marine ecological communities listed as threatened, and the list of species does not include any marine invertebrates or commercial fish species.

Bilateral agreements under the EPBC Act between the Commonwealth and the states and territories currently add limited value in the marine environment, but that it is more a function of their content than the concept. Environmental approvals based on national standards in a federal system could reduce the complexity, increase the efficiency and improve the environmental protection of oceans planning and management processes. It could also provide improved integration and very useful performance incentives for the states and territories. The processes for referral of actions for assessment and approval under the Act have had limited value for oceans protection also due to the limited coverage of Matters of National Environmental Significance in state waters. A listing of the activities that require assessment in a schedule of the EPBC Act would provide greater certainty and integrate well with spatial management of the zoning process (there is listing of this type in the proposed Australian Oceans Act).

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

The current *EPBC Act* lacks the holistic nature of the proposed Australian Oceans Act. Thus, limitations within the structure and purpose of the *EPBC Act* preclude it from being used as an alternative to the proposed Act. In essence, proactive integrated oceans planning and management are not part of its design or operation. Through a number of amendments, broad interpretation of provisions, expansion of lists, and a strengthening of the assessment and approvals processes, the EPBC Act could be used to complement oceans planning, protection and management under the proposed Australian Oceans Act.

Chapter 7 sets out a draft of the proposed Australian Oceans Act

The detailed draft of the full Australian Oceans Act in this chapter sets out the functions, powers and procedures of the Authority and subsidiary organs, together with provisions on interpretation, marine planning, compliance and enforcement and the Oceans Fund. It is supplemented by five schedules that set out: (1) operationally related Commonwealth, state and territory legislation; (2) international, treaties influencing marine management in Australia; (3) a list of actions that are to be referred to the Australian Oceans Authority for advice; (4) a list of actions that are to be referred to the Australian Oceans Authority for direction; and (5) criteria for the identification and selection of marine national parks.

Credits and Feedback

The Australian Oceans Act discussion paper was prepared by Chris Smyth, the Australian Conservation Foundation's (ACF's) Marine Campaign Coordinator, in collaboration with Megan Lee, of NELA's Victorian branch, with the advice and assistance of a steering committee comprising Professor Rob Fowler (University of South Australia) and Associate Professors Greg Rose (University of Wollongong) and Marcus Haward (University of Tasmania). Useful feedback on drafts of the discussion paper was also provided by Professor Richard Hildreth (University of Oregon), Richard Kenchington, Paddy O'Leary and others.

We are now seeking feedback on the discussion paper and those wishing to make comments could forward them to Chris Smyth at the Australian Conservation Foundation, Level 1, 60 Leicester Street, Carlton VIC 3053 or c.smyth@acfonline.org.au. The full text of the discussion paper, together with background information, can be downloaded through the websites of NELA (www.nela.org.au) and ACF (www.acf.org.au).