

APPENDIX B AN OVERVIEW OF THE LEGISLATIVE FRAMEWORK FOR ENVIRONMENTAL PROTECTION AND BIODIVERSITY CONSERVATION IN COMMONWEALTH WATERS

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) streamlines national environmental assessment and approvals processes, protects Australian biodiversity and integrates the management of important natural and cultural places. Alongside the EPBC Act, the *Environment Protection (Sea Dumping) Act 1981* (Sea Dumping Act) and the *Historic Shipwrecks Act 1976* are the main pieces of legislation that give effect to the Australian Government's responsibilities to protect and conserve the environmental and heritage assets that exist in Commonwealth waters. Like the EPBC Act, these Acts are also the responsibility of the Minister for the Environment, Heritage and the Arts.

Other key pieces of legislation and regulations that include provisions for the protection of the environment are the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999*, made under the *Petroleum (Submerged Lands) Act 1967*, the *Fisheries Management Act 1992*, the *Great Barrier Reef Marine Park Act 1975*, the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Sea Installations Act 1987*. In addition, the *Native Title Act 1993* interacts with the EPBC Act in areas of environmental protection.

Appendix B summarises the legislative context in which marine bioregional planning takes place.

The EPBC Act

Marine bioregional planning

Marine Bioregional Plans are being developed for the Commonwealth marine area under Section 176 of the EPBC Act. The Commonwealth marine area generally stretches from three nautical miles to 200 nautical miles from the coast. See Box B1 for more information on the Commonwealth marine area.

The States and the Northern Territory are responsible for managing the marine environment in State and Northern Territory coastal waters. Coastal waters are a belt of water between the territorial sea baseline (normally the low water mark along the coast) and a line three nautical miles seaward of the territorial sea baseline. As many ecological processes occur across

both State and Commonwealth waters, the Australian Government aims to work cooperatively with the States and the Northern Territory in developing and implementing Marine Bioregional Plans.

Marine Bioregional Plans will bring together comprehensive information and provide guidance to sectoral managers and industry in relation to decisions made under the EPBC Act about key conservation issues and priorities in each marine region. The EPBC Act requires the Minister for the Environment, Heritage and the Arts to have regard, where relevant, to Bioregional Plans when making decisions under the EPBC Act. Marine Bioregional Plans also aim to streamline conservation and environmental management, and to create marine protected areas (MPAs) in Commonwealth waters that will further the development of the National Representative System of MPAs.

The marine bioregional planning programme is being undertaken by the Department of the Environment, Water, Heritage and the Arts in consultation with all Commonwealth agencies responsible for marine-based activities, and with input from stakeholders.

Referral, assessment and approval

Central to the EPBC Act is the concept of matters of national environmental significance. Matters of national environmental significance 'trigger' the referral, assessment and approval of activities under the EPBC Act. The EPBC Act requires that proposals for actions that have, will have, or are likely to have a significant impact on a matter of national environmental significance must be referred to the Minister for the Environment, Heritage and the Arts for assessment and approval. This occurs unless some other provision of the EPBC Act allows the action to be taken without assessment and approval.



The EPBC Act identifies seven matters of national environmental significance:

- World Heritage properties;
- National Heritage places (from 1 January 2004);
- Ramsar wetlands of international significance;
- listed threatened species and ecological communities (excluding species listed as extinct or conservation dependent);
- listed migratory species;
- the marine environment; and
- nuclear actions (including uranium mining).

Of these, three are particularly relevant to marine bioregional planning: listed threatened species, listed migratory species and the marine environment.

A number of EPBC Act Policy Statements have been developed to provide guidance on when actions should be referred to the Minister for the Environment, Heritage and the Arts for a decision on whether assessment and approval is required under the EPBC Act. The following EPBC Act Policy Statements provide guidance about the types of actions that should be referred for assessment and approval:

- *EPBC Act Policy Statement 1.1 Significant Impact Guidelines – Matters of National Environmental Significance* (May 2006). These provide proponents of activities in the Commonwealth marine area with guidance about whether or not the actions they propose to take will require assessment and approval under the EPBC Act;
- *EPBC Act Policy Statement 1.2 Significant Impact Guidelines – Actions on, or Impacting upon, Commonwealth Land and Actions by Commonwealth Agencies* (May 2006). These provide guidance on land-based actions which should be referred for

approval under the EPBC Act and should be read in conjunction with the *EPBC Act Policy Statement 1.1 Significant Impact Guidelines – Matters of National Environmental Significance*;

- *Draft EPBC Act Policy Statement 2.1 – Interactions Between Offshore Seismic Exploration and Whales* (March 2007). This Draft EPBC Act Policy Statement updates the previous cetacean interaction guidelines, produced in 2001. The policy will be implemented immediately, with a view to refinement based on operational experience and public and expert comments. The policy statement will be available for public comment until 31 August 2007. It has been prepared to: 1) provide practical standards to minimise the risk of acoustic injuries to whales in the vicinity of seismic survey operations; 2) provide a framework that minimises the risk of biological consequences from acoustic disturbance from seismic surveys to whales in biologically important habitat areas or during critical behaviours; and 3) provide advice to proponents of offshore seismic operations on their legal responsibilities under the EPBC Act;
- *EPBC Act Policy Statement 2.2 Industry Guidelines – Offshore Aquaculture* (August 2006) These provide guidance to proponents of marine aquaculture activities to determine whether or not the actions they propose will require assessment and approval under the EPBC Act. These guidelines should be read in conjunction with the *EPBC Act Policy Statement 1.1 Significant Impact Guidelines – Matters of National Environmental Significance*; and
- Nationally threatened species and ecological community guidelines have been prepared for a number of land-based threatened species or ecological communities. To date no nationally threatened species or ecological community guidelines have been developed for marine species.

Box B1 The Commonwealth marine area

The Commonwealth marine area is defined in the EPBC Act as any part of the sea, including the waters, seabed, and airspace, within Australia’s EEZ and/or over the continental shelf of Australia, excluding State and Northern Territory coastal waters. Generally, the Commonwealth marine area stretches from three nautical miles from the territorial sea baseline (normally the low water mark) to the outer limit of the EEZ, 200 nautical miles from the baseline. It may extend further than 200 nautical miles, to the edge of the continental shelf if this extends beyond the outer limits of the EEZ.

A person must not take an action within the Commonwealth marine area that has, will have, or is likely to have a significant impact on the environment, without approval from the Commonwealth Minister for the Environment, Heritage and the Arts. A person must not take an action outside the Commonwealth marine area that has, will have, or is likely to have a significant impact on the Commonwealth marine area without approval.

Copies of the EPBC Act Policy Statements and Guidelines are available at <www.environment.gov.au/epbc/policy>.

Protecting marine biodiversity

A number of instruments, measures and programmes are in place under the EPBC Act for the protection, conservation and recovery of marine biodiversity. The EPBC Act contains provisions that protect members of listed threatened species, listed migratory species and listed marine species and cetaceans. Commonly, species listed under the EPBC Act are referred to as protected species as it is an offence to kill, injure, take, trade, keep or move a listed species without authorisation. These provisions apply generally in the Commonwealth marine area (as well as other Commonwealth areas), and to members of species taken in the Commonwealth marine area (as well as other Commonwealth areas) and subsequently moved from the area.

Species listed as threatened under the EPBC Act are those identified as facing serious threat of extinction in the wild (as determined in accordance with criteria specified in the regulations). Under the EPBC Act, listed threatened species must be classified into one of the following six categories: extinct, extinct in the wild, critically endangered, endangered, vulnerable, and conservation dependent. The EPBC Act also allows for the listing of threatened ecological communities. To date no ecological communities in the marine environment have been listed under the EPBC Act. The Commonwealth Minister for the Environment, Heritage and the Arts can also identify and list habitat critical to the survival of a listed threatened species or ecological community on the Register of Critical Habitat. In relation to threatened species and communities, the EPBC Act also provides for the identification and listing of key threatening processes and the preparation of threat abatement plans and species recovery plans.

All whales, dolphins and porpoises are protected as Cetaceans under the EPBC Act, as the Australian Government recognises that these species require protection to ensure their long-term conservation. The EPBC Act also established the Australian Whale Sanctuary, which includes all Commonwealth waters. Within the Australian Whale Sanctuary, and in waters beyond the outer limits of the Sanctuary, it is an offence to kill, injure or interfere with cetaceans. They are also protected in State and Territory waters.

Migratory species listed under the EPBC Act are species already listed under international agreements to which

Australia is a signatory, and have been identified as species that require or would significantly benefit from international cooperation. Such agreements are discussed in Appendix A.

Marine species listed under the EPBC Act are species occurring naturally in the Commonwealth marine area that the Australian Government recognises require protection to ensure their long-term conservation. Species listed as marine species are identified in Section 248 of the EPBC Act.

In Australia, the EPBC Act controls the international movement of wildlife, wildlife specimens and products made or derived from wildlife. These controls apply to all transactions undertaken by commercial and non-commercial organisations and individuals. In addition, controls under the *Quarantine Act 1908* may apply. Under the EPBC Act a permit is required to:

- import or export CITES listed specimens. CITES is the *Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973*;
- export specimens derived from native species not included in the list of exempt native specimens; or
- import live plants or animals included in part two of the list of plants and animals suitable for live import. See <www.environment.gov.au/biodiversity/trade-use/permits>.

Commonwealth marine reserves

Part 15 of the EPBC Act provides for the declaration of Commonwealth reserves over areas occurring in Commonwealth waters. It sets out the legal requirements for establishing and managing Commonwealth reserves, which include MPAs. The EPBC Act also provides for the preparation and enforcement of reserve management plans. Many activities are illegal in Commonwealth reserves unless carried out in accordance with relevant management plans, permits and determinations. Division 12 of the *Environment Protection and Biodiversity Conservation Regulations 2000* details the prohibitions or restrictions on many activities in Commonwealth reserves.



Fisheries assessments

Under the EPBC Act, the environmental performance of all fisheries managed under Commonwealth legislation and State-managed fisheries that have an export component, must be assessed. The purpose of the assessment is to ensure that, over time, fisheries are managed in an ecologically sustainable way. The *Guidelines for the Ecologically Sustainable Management of Fisheries* outlines specific principles and objectives that are used to assess fisheries management arrangements.

Historic Shipwrecks Act 1976

Australia's historic shipwrecks are an invaluable and irreplaceable heritage resource. The *Historic Shipwrecks Act 1976* protects historic wrecks and relics in the territorial sea, including State and Territory coastal waters and waters above the continental shelf. The Historic Shipwrecks Act does not apply to wrecks and relics in internal waters, such as rivers, lakes, bays, or harbours of a State. Each of the States has complementary legislation that protects historic shipwrecks in internal waters of the State.

The Historic Shipwrecks Act aims to ensure that historic shipwrecks are protected for their heritage values and maintained for recreational and educational purposes. It also seeks to regulate activities that may result in damage, interference, removal or destruction of an historic shipwreck or associated relic. Divers can use historic shipwreck sites for recreational purposes but relics must not be removed from the wreck site and the physical fabric of the wreck must not be disturbed, unless a permit has been obtained.

Under a declaration made under the Historic Shipwrecks Act, all wrecks, known and unknown, that are more than 75 years old are protected, together with their associated relics. The Minister for the Environment, Heritage and the Arts can also make a declaration to protect any historically significant wrecks or articles and relics that are less than 75 years old.

The Historic Shipwrecks Act requires anyone who finds the remains of a ship or articles associated with a ship to give notification of the location, as soon as practicable, to the Minister for the Environment, Heritage and the Arts.

Some historic shipwrecks lie within protected or no-entry zones. A protected zone can apply to an area of

sea and land not exceeding 200 hectares. These zones may cover an area up to a radius of 500 m around a wreck site, and may be declared where circumstances place it at particular threat from interference. This declaration prohibits all entry into this zone without a permit. Permits are also required to undertake any activities otherwise prohibited or restricted by the Historic Shipwrecks Act.

The Historic Shipwrecks Act is administered by the Australian Government in conjunction with delegates in each of the States, the Northern Territory and on Norfolk Island.

Environment Protection (Sea Dumping) Act 1981

The *Environment Protection (Sea Dumping) Act 1981* was enacted to fulfil Australia's international responsibilities under the London Convention of 1972 and has been amended to implement the 1996 *Protocol to the London Convention* (London Protocol), which entered into force internationally in 2006. The objective of the London Protocol is to prevent and reduce marine pollution resulting from dumping of wastes and other matter.

Under the Sea Dumping Act, Australia prohibits ocean disposal of waste materials considered too harmful to the marine environment, and regulates the deliberate loading and dumping of wastes at sea to ensure the environmental impact is minimised. In deciding whether to grant a permit, consideration is given to the type of material proposed to be dumped, the disposal site and the potential impacts on the marine environment.

If the sea dumping activity is likely to have a significant impact on the environment, the Department of the Environment, Water, Heritage and the Arts will also refer the proposal for assessment under the EPBC Act, in accordance with Part 11 of the EPBC Act. In such cases the Department seeks to undertake both assessments concurrently.

Permits are required for all sea dumping operations. Currently, about 30 permits are issued in Australia each year, mainly for the dumping of uncontaminated dredged material, disposal of vessels and for burials at sea. Another relatively uncommon activity that requires a permit under the Sea Dumping Act is the creation of artificial reefs. The *National Ocean Disposal Guidelines for Dredged Material* (2002) have been prepared to assist

proponents with the assessment and management of dredged material.

The Sea Dumping Act, the administration of which is the responsibility of the Minister for the Environment, Heritage and the Arts, applies to all Australian waters other than waters within the limits of a State or the Northern Territory, such as harbours and river estuaries, from the low water mark out to the edge of the EEZ.

The Sea Dumping Act applies to all vessels, aircraft or platforms in Australian waters, other than vessels or aircrafts belonging to the naval, military or air forces of a foreign country, and to all Australian vessels or aircraft in any part of the sea. The Sea Dumping Act does not cover operational discharges from ships, such as sewage and galley scraps. Those are regulated by the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, and the *Navigation Act 1912*.

Fisheries Management Act 1991

The *Fisheries Management Act 1991* establishes the Australian Fishing Zone (AFZ) and underpins the domestic compliance and enforcement powers that enable Australia to protect its valuable fishery resources. Under the *Fisheries Management Act* and *Fisheries Administration Act 1991* the Australian Fisheries Management Authority (AFMA) has an obligation to develop plans and implement policy to manage fisheries in the AFZ (waters within the outer limits of the EEZ, except for State and Territory coastal waters and waters within the limits of a State or Territory). The *Fisheries Management Act* also sets out the legislative basis for statutory fishing rights, licences and permits.

The *Fisheries Management Act* requires that management plans are prepared for all fisheries unless AFMA has determined that a management plan for a particular fishery is not warranted. Each management plan sets out the objectives of the plan, measures by which the objectives are to be attained, and performance criteria against which the measures taken may be assessed. These plans are prepared in consultation with participants in the fishery and all draft plans are made available for public comment before they are finalised.

Section 3(1) (b) of the *Fisheries Management Act* sets out the Australian Government's responsibilities regarding the pursuit of ecologically sustainable development (ESD). The *Fisheries Management Act* thus requires fisheries be managed for the long-term sustainability of fisheries resources, for the benefit of all

users and interest groups both now and in the future. This requires that stocks be maintained at a sustainable level and, where necessary, rebuilt to ensure maximum inter-generational equity. It also requires that fisheries management minimises the impact of fishing on biological diversity and ecosystem habitat.

The *Fisheries Management Act* interacts with the EPBC Act through the independent assessments required under the EPBC Act. Further information on these assessments is provided below.

Petroleum (Submerged Lands) Act 1967

The *Petroleum (Submerged Lands) Act 1967* regulates the exploration for and exploitation of offshore petroleum resources in Commonwealth waters.

These activities in State and Northern Territory coastal waters are regulated by relevant State and Territory legislation. Responsibility for petroleum operations in Australia's offshore areas beyond coastal waters rests with the Australian Government. The Australian Government and the governments of the States and the Northern Territory jointly administer and supervise industry activities in this area through Joint Authority arrangements.

Sea Installations Act 1987

The *Sea Installations Act 1987* provides the legislative basis for the Commonwealth to:

- ensure that sea installations installed in adjacent areas are operated with regard to the safety of the people using them, and the people, vessels and aircraft near them;
- apply appropriate laws in relation to such sea installations; and
- ensure that such sea installations are operated in a manner that is consistent with the protection of the environment.

A sea installation refers to any man-made structure that when in contact, or brought into physical contact with the seabed, or when floating, can be used for an environment-related activity.

An environment-related activity is defined as: any activity relating to tourism or recreation; the carrying on of a business; exploring, exploiting or using the



living resources of the sea, sea bed or subsoil of the sea bed; marine archaeology; or any other prescribed activity. Examples of structures that are defined as sea installations include floating hotels, tourism pontoons, artificial islands, oil or gas platforms and submarine power cables. There are also a number of exclusions that are set out under the Sea Installations Act.

The *Sea Installations Act 1987* applies to waters within the outer limits of the EEZ, or the continental shelf where this extends beyond the EEZ, excluding State and Territory coastal waters. It applies from the coast outwards in the case of external Territories.

Proponents wishing to install and/or operate a sea installation must apply for a permit or exemption certificate to the Department of the Environment, Water, Heritage and the Arts, or the Great Barrier Reef Marine Park Authority (GBRMPA).

Applications for permits and exemption certificates will be assessed for the environmental implications and the safety of the proposal. If the installation or operation of the installation is likely to have a significant impact on the environment, the Department of the Environment, Water, Heritage and the Arts or GBRMPA will also refer the proposal for assessment under the EPBC Act, in accordance with Division 4 of Part 11 of the EPBC Act. In such cases the Department seeks to undertake both assessments concurrently.

Native Title Act 1993

The *Native Title Act 1993* provides a framework for recognising and protecting native title in Australia. Native title rights and interests are the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters. The Native Title Act seeks to regulate acts that have an impact on the native title rights of Indigenous Australians.

The Native Title Act and the EPBC Act

The EPBC Act does not affect the operation of the Native Title Act, which provides for the recognition and protection of native title and establishes ways in which dealings affecting native title may proceed.

The Department of the Environment, Water, Heritage and the Arts, in administering the EPBC Act, has responsibilities to promote the involvement of Indigenous people and their knowledge of biodiversity

in developing strategies for ecologically sustainable development and biodiversity conservation, including through the means of Marine Bioregional Plans and their associated conservation measures. The Department also has responsibilities under the heritage provisions of the EPBC Act to assess and manage listed Indigenous heritage values, including in the marine environment.

The application of native title legislation to the offshore area

'Offshore' is defined under the Native Title Act as any land or waters other than those lands and waters within the limits of a State or Territory. Section six of the Native Title Act 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*. Under the Native Title Act, coastal sea is defined in accordance with Section 15B of the *Acts Interpretation Act 1901*.

The recognition of native title offshore was confirmed in the High Court case of *Yarmirr (The Commonwealth v Yarmirr; Yarmirr v Northern Territory)* [2001] HCA 56 11 October 2001). In this case, the majority of the High Court concluded that non-exclusive native title could exist in offshore areas. The native rights over areas of water may include the right to use and enjoy the reefs and associated water; the right to hunt and gather, including for dugong and turtle; and the right to use resources for food, trapping fish, religious, cultural and ceremonial purposes. Exclusive native title (which would allow the native title holders to control access to the area) was not found to exist because exclusivity of title would be inconsistent with the right of innocent passage under international law, and the common law rights to navigate and fish.

Preservation of Indigenous fishing rights

The Native Title Act recognises that there may be Commonwealth, State or Territory laws that could prohibit or restrict native title holders from hunting, fishing, gathering or carrying out cultural and spiritual activities offshore. Under Section 211, native title holders are not prohibited or restricted from carrying on such activities, or gaining access for those purposes, so long as they are carrying out these activities as an exercise of their native title rights, and only for the purpose of satisfying their personal, domestic or non-commercial communal needs. As a result, the relevant law's validity is unimpaired but its

operation will be suspended in relation to the exercise of native title rights and interests. This exemption does not apply in relation to legislation aimed at environmental protection, research or public health or safety.

Key references and further readings

Legislation

Available from the Commonwealth of Australia Law website <www.comlaw.gov.au>

Acts Interpretation Act 1901

Environment Protection and Biodiversity Conservation Act 1999

Environment Protection and Biodiversity Conservation Regulations 2000

Environment Protection (Sea Dumping) Act 1981

Fisheries Administration Act 1991

Fisheries Management Act 1991

Great Barrier Reef Marine Park Act 1975

Historic Shipwrecks Act 1976

Native Title Act 1993

Navigation Act 1912

Petroleum (Submerged Lands) Act 1967

Petroleum (Submerged Lands) (Management of Environment) Regulations 1999

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

Quarantine Act 1908

Sea Installations Act 1987

Seas and Submerged Lands Act 1973

Policies & Guidelines

The following EPBC Act policy statements are available from <www.environment.gov.au/epbc/policy>.

Department of the Environment and Heritage (DEH), 2006, *EPBC Act Policy Statement 1.1 Significant Impact Guidelines – Matters of National Environmental Significance*, Canberra.

Department of the Environment and Heritage (DEH), 2006, *EPBC Act Policy Statement 1.2 Significant Impact Guidelines – Actions on, or Impacting upon, Commonwealth Land and Actions by Commonwealth Agencies*, Canberra.

Department of the Environment and Heritage (DEH), 2006, *EPBC Act Policy Statement 2.2 Industry Guidelines – Offshore Aquaculture*, Canberra.

Department of the Environment, Water, Heritage and the Arts (DEW), 2007, *Draft EPBC Act Policy Statement 2.1 – Interactions Between Offshore Seismic Exploration and Whales*, Canberra.

Environment Australia (EA), 2001, *Guidelines for the Ecologically Sustainable Management of Fisheries*, Canberra <www.environment.gov.au/coasts/fisheries>, accessed 10/05/07.

Environment Australia (EA), 2002, *National Ocean Disposal Guidelines for Dredged Material*, Canberra <www.environment.gov.au/coasts/pollution/dumping/guidelines>, accessed 10/05/07.

International agreements

Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), <www.cites.org>, accessed 10/05/07.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention), <www.imo.org>, accessed 10/7/07.





Black-browed albatross. Photo: Robert Tomkins, Australian Government Antarctic Division.