

INTEGRATED OCEANS MANAGEMENT IN AUSTRALIA



More than just fish and ships

The case for an Oceans Act



Policy and law reform advice to
Humane Society International Australia



**HUMANE SOCIETY
INTERNATIONAL**



Prepared by





About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law.

Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

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EDO NSW is part of the Environmental Defenders Offices of Australia, a national network of centres that help to protect the environment through law in their states.

About Humane Society International

Humane Society International (HSI) is a national and international conservation and animal protection NGO that specialises in the application of domestic and international environment law. Established in Australia in 1994, HSI works to change government conservation and animal protection policies and law for the better, while striving to enforce the effective implementation of those laws.

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Publisher's Note

This report, commissioned by Humane Society International (HSI) from the Environmental Defenders Office New South Wales (EDO NSW), makes the case for the introduction of an **Oceans Act** at the Commonwealth level in Australia. We set out a vision for nationally integrated marine management, with strong national, regional and global leadership through a new **Oceans Authority**, and clear framework legislation – an **Oceans Act**.

With negotiations underway at the UN for a new treaty to manage oceans in areas beyond national jurisdictions, and Australia set to play a lead role in that process, now is an opportune time to consider how we are governing the ocean within our jurisdiction. HSI and the EDO NSW contest that there is much to do to get our own house in order.

The work follows on from our recent joint policy publication with EDO NSW entitled, *'Next Generation Biodiversity Laws: Best practice for a new Commonwealth Environment Act'* (2018) HSI/EDO NSW.

HSI's 25 year concern for broad oceans protection began with a joint HSI/WWF policy publication by Dr Keith Suter, entitled, *'The History of the Development of Law of the Sea – The Importance for Global Marine Conservation and Recommendations for Australian Action'* (1994), which preceded our strong participation in the development of Australia's first National Oceans Policy, driven by Senator Robert Hill in the 90s. At the domestic level we have pursued marine conservation issues vigorously by promoting action for species and habitats under the *Environment Protection and Biodiversity Conservation Act, 1999* (EPBC Act), and on a number of occasions through the Federal Court and the Administrative Appeals Tribunal.

The establishment of the Australian Whale Sanctuary, protecting the great white shark, and the listing of the very first marine Threatened Ecological Communities under the EPBC Act are legislative successes that immediately come to mind.

Internationally, HSI has also been at the forefront of the UN pre-negotiations to see the development of a new global treaty to protect biodiversity on the high seas. HSI's Alistair Graham has been our extremely able representative at these talks for over a decade, all through the recent BBNJ (Biodiversity Beyond National Jurisdiction) sessions, and now into the negotiations proper under the auspices of the United Nations (advising the Australian Government Delegation).

The development of this policy has also been helped significantly through four HSI initiated oceans workshops, in co-operation with EDO NSW (and two with the Australian Committee for IUCN (ACIUCN)), focussing attention on legislative needs. They proved extremely valuable and essential forums for debate, as did our membership of the Commonwealth's National Oceans Advisory Committee.

This publication proposes the need for a national **Oceans Act**, both for the long-term conservation of our vast marine Exclusive Economic Zone, and to facilitate our ability to effectively contribute to the conservation of the global high seas commons.



Erica Martin
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Executive Summary

Marine plastics, bleached coral reefs, over fishing, bycatch, shark control programs, rapid coastal development, marine park zoning debates, invasive starfish, super trawlers, aquaculture issues, pollution and sedimentation, warming oceans, shipping, maritime security issues, coastal floods and storms, and damage from both natural and human induced disasters. These are issues that we see in the media every year. They are all issues that impact on our magnificent coasts and oceans.

Australia's marine environment is immense, constituting almost 4% of the world's oceans, the third largest maritime jurisdiction in the world. Different laws, different governments and different sectors manage the different issues and impacts, and this piecemeal and uncoordinated approach is putting at risk our unique marine environmental assets and natural resources. The threats are increasing in scale and complexity, and unfortunately our management regimes are too.

Ocean management is not just about fish and ships, but about security (global, food and economic), about social and cultural well-being and planetary health. Management by sector is failing to protect our marine assets, build resilience and ensure we all benefit from healthy coasts and oceans for generations to come.

The problems may be complex and interrelated, but there is a clear solution.

This report sets out a vision for nationally integrated marine management, with strong national, regional and global leadership through a new **Oceans Authority**, and clear framework legislation – an **Oceans Act**. The pathway set out in this report will enable us to overcome the barriers that have prevented us from realising the vision of integrated oceans management until now. These barriers include our failure to implement policy through clear laws, our domestic jurisdictional wrangling and lines on maps that are about historical negotiations rather than ecological systems, the failure to actively engage state and local governments in national marine policy, and the lack of coordination between different ocean users and sectors both within and beyond national jurisdiction.

From the coastal catchments to the high seas, Australians benefit from a healthy coastal and marine environment, managed sustainably. A new legal framework for ecosystem-based, integrated coastal and ocean management is needed to ensure we all benefit ecologically, economically and socially. We should not wait for another Montara oil spill disaster to pull our regulatory socks up.

The UN Sustainable Development Goals set targets for marine management with imminent deadlines. With a clear national vision, effectively coordinated, Australia can be a leader in marine management in our region and on the international stage.

Vision

Australia has a comprehensive, coordinated and effective system of integrated oceans management to ensure healthy and productive oceans, actively involving all relevant users, sectors and jurisdictions both within and beyond waters under Australian jurisdiction and control; to protect and preserve the marine environment, including by conserving and sustainably managing marine resources and by protecting and restoring their environmental, economic and social value, from the coastal catchments of Australia to the farthest reaches of the world's oceans.

Summary of recommendations

1. **Vision** - This report proposes a new shared national vision for integrated marine management, to be consulted upon and agreed in a new Intergovernmental Agreement (IGA) on oceans, and implemented through relevant legislation, policies and sectoral reform.
2. **Intergovernmental Agreement on Oceans** - Develop a new Intergovernmental Agreement on Oceans (**Oceans IGA**), to be given effect through national legislation, and related legislative reforms. The purpose of an Oceans IGA would be to develop a shared vision, invest a new Commonwealth Authority with an appropriate mandate for the management of our oceans and the powers to achieve it, clarify rights and responsibilities of all parties, and agree on funding arrangements.
3. **A new Oceans Act** - The Australian Government should use existing constitutional powers to make new framework legislation for ensuring the coordinated management of Australia's oceans. It is recommended that key provisions under the Oceans Act would include:
 - a. **Part 1 - Objects and principles** - Establish clear objectives and principles for integrated ecosystem-based planning and management for the marine environment, that expand upon elements of the overarching vision. The principles would guide the work of an Oceans Authority, as well as guiding implementation of relevant sectoral legislation.
 - b. **Part 2 - Oceans Strategic Plan, goals and targets** - A strategic plan for Australia's oceans be developed by an Oceans Authority, in consultation with states, territories, local government, sectoral interests, ocean users, Sea Country custodians and the public. The final plan would be signed off by Commonwealth and state and territory governments. The Oceans Act would require clear, measurable goals and targets to be set in the strategic plan, with mechanisms to facilitate monitoring and review. Measuring progress against targets would be assisted by establishing marine environmental accounts, and be subject to 5 yearly review.
 - c. **Part 3 – Australian Oceans Authority** - A primary function of the Oceans Act would be to establish a new Oceans Authority (see below).
 - d. **Part 4 - Marine regional planning** - An Oceans Act would require regional integrated spatial plans for the marine environment, to be developed, consulted upon, made and reviewed by the Oceans Authority. These plans are the crucial centre-piece for marine management, and would have a legislative basis under the new Act, to be signed off by the new Authority. These plans would be ecosystem-based and cross-sectoral, including ensuring Australia has a comprehensive, adequate and representative (**CAR**) system of marine reserves, sanctuaries and no-take zones; and set rigorous criteria and standards designed to achieve the vision of healthy marine environments now and into the future. The Authority would only be able to approve a plan that meets rigorous criteria as set out in the Act and associated regulations.
 - e. **Part 5 - Public participation** - The new legislation would include genuine and fulsome opportunities for public participation including that: (i) the community should be actively involved in the development of the Oceans Strategic Plan, with a consultation and engagement process established by the Oceans Authority; (ii) the community should be involved in the preparation and implementation of

marine regional spatial plans; and (ii) there should be extended standing for third parties to ensure accountability and that the new legislation is working effectively.

- f. **Part 6 - Compliance and enforcement** - A new Oceans Act would establish a general *duty* not to carry out any activity that causes or is likely to cause *environmental harm, unless authorised*. The Act would clearly define relevant offences, including an offence of causing 'harm' to the marine environment, with appropriate penalties. The standard for harm should be clear, and supported by explicit guidance on application of the standards/thresholds. The Act would have compliance and enforcement powers including tiered penalty regimes that reflect the degree of culpability, innovative Court and administrative orders that effectively deter unlawful conduct, extended third party rights for injunctions, and judicial and merits review would be explicit in the legislation. The regulatory arm of Government should be a part of the new Oceans Authority, or potentially a new Environment Protection Authority (EPA). Investigation powers of authorised officers would need to be included (and potentially strengthened) under relevant sectoral legislation.
- g. **Part 7 – Dispute resolution** - The Oceans Act would contain provisions setting out dispute resolution processes, between sectors and jurisdictions. Arrangements for disputes between jurisdictions may also be provided for the Oceans IGA. Further detail on available dispute resolution mechanisms would be included in regulations.
- h. **Part 8 – Review** - The Oceans Act and Oceans Strategic Plan would be independently reviewed within 5 years from the date of commencement. Individual marine regional plans would also be subject to clear independent review requirements every 5 years. The Act would require public engagement into review processes. All review reports and responses would be tabled in Parliament, and any submissions to reviews would be published.
- i. **Schedule** - For clarity, the Oceans Act would include a schedule listing activities and sectors that come under the umbrella of the Oceans Authority. This could be added to over time as new impacts or issues arise in ocean management. This could be done by listing operationally relevant legislation. There could also be a schedule listing international conventions, treaties and agreements relevant to marine management in Australia.

4. A new Oceans Authority - A key purpose of an Oceans Act would be to establish a new independent Authority to drive reform and implement a coordinated vision for the management of Australia's marine environment. The Act would provide for the following:

- a. **Independent statutory authority** - The new Oceans Authority would be an independent institution with standing in law that can represent the interests of a healthy and productive ocean, with a mandate to ensure reform of sectors and activities where needed. To ensure accountability and transparency, the Authority would **report to the Prime Minister**, and the Act would require annual progress reports of the Authority to be tabled in the Australian Parliament. As a statutory authority, it would also be auditable by the Audit Office.
- b. **Structure and composition** - The structure and composition of the new Authority would be set out in the Act. It is recommended that the Authority should have a **board**. Board membership would be a combination of skills-based and representative and include, for example, members representing the Commonwealth government; state and territory governments; local government; and Sea Country. The Act would require members to have expertise in relevant fields including: marine ecology, fisheries management, corporate governance, national maritime security etc. The criteria and process for appointment would be

set out in the Act. Appointments to the Board would be made by the Governor-General, to ensure whole-of-government/Cabinet scrutiny of the process, and the Act could also specify set tenure of board members. To ensure the new Authority has expertise to deliver core functions to implement the vision, the legislation may need to establish **technical expert and advisory groups** to assist the Authority. These could include: Key Stakeholder Advisory Group; Scientific and Technical Expert Advisory Panel; Sea Country Custodians Group; and an Inter-agency Panel.

c. **Powers and functions** - The new Authority would have specific powers and functions identified in the Act and regulations to:

- Consult upon and develop the **Oceans Strategic Plan** for Australia's oceans.
- Have **active oversight of sectoral activities** to ensure actions/activities are consistent with the objectives and principles of the Oceans Act and goals and targets of the Oceans Strategic Plan. There would be criteria for when the Authority would undertake a review. The Act would authorise the Authority to engage and coordinate with relevant sectors – as identified in the Schedule to the Act - and where necessary, direct sectors to amend their legislation or undertake specified actions. The Act would provide a call-in power for the Authority to review individual projects or activities to ensure they are consistent with the objectives, principles and requirements of the Oceans Act. Sectors identified in the Schedule to the Act would be required to report annually to the Authority on their progress in meeting applicable objectives and targets.
- Consult and develop **regional marine spatial plans** according to the process set out in the Act. Planning functions include: ensuring plans are based on best-available science, collecting comprehensive data and information to underpin evidence-based planning, coordinating sectoral collaboration and integration for planning, including data sharing; ensuring compliance with regional spatial plans under the Oceans Act; requiring plans to be made within specified timeframes; reviewing plans; and amending plans to ensure they are adaptive and build resilience. The Authority would have the power (for example, through issuing directives) to ensure other relevant legislation embeds requirements of the marine spatial plans.
- Have power to take **compliance and enforcement** action in relation to offences and breaches of the Act or marine spatial plans; and to issue Directives (for example to make/amend a regional plan or to direct a particular activity to mitigate its harm). The Authority would also be empowered to undertake an extended compliance role to assert responsibility for the protection and preservation of the marine environment and to have jurisdiction to pursue those causing harm wherever they might be.
- Provide **dispute resolution** processes when needed for disputes between jurisdictions and/or between sectors under the Act; and undertake facilitated negotiation processes between sectors and between agencies.
- Manage and administer a discrete and transparent **Oceans budget** and fund. This would include core government funding, but other sources such as levies from ocean users could go to some of the costs of marine spatial planning (applying the user pays principle). Annual reports on budget allocations and funds management would be published/tabled in Parliament. In terms of the Executive and staff, the Authority would need allocated **resources** for dedicated staff to undertake data collection and analysis, monitoring, innovative research, strategic and regional spatial planning, and dispute resolution.

- In terms of **domestic coordination** - actively coordinate relevant existing government departments and agencies; facilitate cooperation with states and local governments undertaking Integrated Coastal Zone Management (**ICZM**) relevant to addressing marine issues; and have a role in ensuring ports deliver on Oceans Act obligations.
- In terms of **international coordination** - The Oceans Authority would also play a crucial role linking Australia's integrated ocean management with international developments, such as progressing an agreement on biodiversity in areas beyond national jurisdiction (**BBNJ**) under the *United Nations Convention on the Law of the Sea*, and ensuring Australia's policy and legislation is consistent with international obligations within and beyond areas of national jurisdiction. This would be done by the new Authority consulting with relevant sectoral agencies and then providing expert advice to the Department of Foreign Affairs and Trade (**DFAT**) for relevant international meetings and negotiations. The Authority and DFAT would sign off on national positions for the marine environment globally. The Authority would have a mandate to engage with relevant competent bodies outside the Australian jurisdiction such as Regional Fisheries Management Organisations (**RFMOs**), the International Seabed Authority (**ISA**) and the International Maritime Organisation (**IMO**) when necessary, and on issues of trade law where relevant.
- **Report** annually and publically on implementation and sectoral reform (ie, the progress against the objectives of the Act and targets in the strategic plan) to be tabled in Parliament. To ensure transparency any advices or reports produced by the Authority, or reports of any advisory of stakeholder group to the Board, and any responses from the Government would also be published.
- Collect and analyse **data and monitor** trends and assessing progress against clear goals and targets for each sector and for the Oceans Act itself. There needs to be investment in the core function of information gathering, monitoring and reporting (ie, upfront and comprehensive, not just as an afterthought). Establishing and maintaining a set of marine environmental accounts. The Act would define how "commercial in confidence" information and data from sectors would be dealt with.

5. Associated reforms - The proposed framework would clarify and simplify the current complex and sometimes conflicting arrangements. The new Act would not duplicate existing processes in sectoral legislation, but provide an overarching coordinating framework, designed to ensure consistency and delivery of integrated oceans management. While the detail of the regulatory regime for every sector would not be in the new Act, there may need to be reform of existing legislation to ensure consistency, and ensure that objectives, directives, mechanisms and requirements in sectoral legislation are consistent and appropriate for delivering the vision of nationally integrated oceans management. There would also need to be requirements in sectoral legislation for example, that relevant Ministers could not make decisions that were inconsistent with marine spatial plans. If subject to a review by the Authority, a relevant sector will need to demonstrate that their regulatory regime is consistent with the objectives of the Oceans Act, or report on progress to making necessary reforms.

Introduction - State of the Oceans and Coasts

Australia possesses some of the most biodiverse marine environments in the world, ranging from tropical coral reefs in the north to giant kelp forests in the south. Australia also has incredibly high levels of endemism¹ including 85% of fish species, 95% of molluscs and 62% of temperate seaweeds.² A number of Australia's marine ecosystems are of international significance, with the Great Barrier Reef, Shark Bay, Macquarie Island, Heard and Macdonald Islands, Lord Howe Island and the Ningaloo Coast classified as World Heritage areas.

The Commonwealth State of Environment Report 2016 (SoE (2016)) estimates that the marine environment contributes approximately \$50 billion per year to Australia's overall economy, and that this contribution is expected to double to \$100 billion by 2025.³ It also acknowledges that oceans and coasts provide an estimated \$25 billion worth of ecosystem services such as carbon dioxide absorption, nutrient cycling and coastal protection.

However, our unique marine environment is threatened by a range of factors including marine plastics pollution, over-fishing, other extractive industries, tourism, and coastal development. Climate change looms as both a current pressure and emerging threat. Many of these pressures have intensified over the last two decades, and not only pose mounting threats to ocean biodiversity, but threaten the blue economy that we all depend upon and benefit from.

The legal and policy response to these pressures has been manifold and varied. Commonwealth, state and territory laws, policies and programs overlap in a complex mosaic.⁴ Australia has around **250 legal and policy instruments** addressing different aspects of management of the marine environment.⁵ Despite this plethora of laws, management frameworks are neither consistent nor coordinated and our marine assets remain at risk.

There are also key gaps in the management of the marine environment, especially where emerging threats are not yet adequately addressed. The key threats and challenges faced by the marine environment do not respect jurisdictional boundaries, and laws currently do not integrate management across the coastal catchment – beach – oceans - high seas continuum, collectively our marine estate. As the SoE (2016) concluded:

The outlook for the marine environment, given the current pressures and the management frameworks in place to mitigate these pressures, is clearly mixed. Many improvements to management frameworks across Australian Government and state and territory jurisdictions, including the implementation of new national regulators, have provided beneficial outcomes for the marine environment. However, efforts continue to be poorly coordinated across sectors and jurisdictions. The lack of recognition of multiple pressures on marine resources and coordinated approaches to managing these pressures has the potential to result in gradual declines, despite appropriate management of the individual pressure, sector or jurisdiction.⁶

¹ That is species that are found nowhere else in the world.

² Hobday AJ, Okey, TA, Poloczanska, ES, Kunz, TJ & Richardson, AJ (eds) (2006) Impacts of climate change on Australian marine life: Part B. Technical Report. Report to the Australian Greenhouse Office, Canberra, Australia. September 2006.

³ *Australia: State of the Environment* (2016), Chapter on Marine Environment at p vii.

⁴ SOE (2016), Chapter on Marine Environment at p 118.

⁵ In 2005, the *Marine Legislative Review* conducted by the Australian Conservation Foundation and National Environmental Law Association identified and analysed 250 Commonwealth and state laws and regulations relevant to the marine environment. While there have been legislative reforms in the subsequent decade, the key finding still applies: that statutes are inadequate in providing for integrated marine management, ecologically sustainable development, ecosystem-based management and multiple-user management. Australian Conservation Foundation (2005), *Marine Legislative Review*, ACF, Melbourne 2005.

⁶ SOE (2016), Chapter on Marine Environment.

There is an abiding need for a coordinated and integrated approach to the management of the marine environment, a finding that was identified by the Australian Government some two decades ago in *Australia's Oceans Policy*.⁷ Over a decade ago *Out of the Blue: An Act for Australia's Oceans* proposed that overarching legislation was needed.⁸ More recently there have been recommendations for new national oceans institutions⁹, as well as international negotiations for the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (**BBNJ**).¹⁰

There are also currently proposals for making a new generation of environmental laws to better protect and manage our unique environment and natural resources, with increased transparency and effectiveness.¹¹ While the scope of marine reform goes far beyond the creation of new environmental legislation, given the range of sectors involved, it is still vital to ensure that there are robust processes (for example for decision-making, planning and implementation processes) and effective institutions for marine management built in to next generation environment laws.

The challenge is to steer a path forward; to break the jurisdictional impasse and lessen the pressures faced by Australia's oceans so that they can thrive now and into the future.



⁷ *Australia's Oceans Policy* 1998, See <http://www.environment.gov.au/archive/coasts/oceans-policy/publications/pubs/policyv1.pdf>

⁸ Australian Conservation Foundation National Environmental Law Association, *Out of the Blue: An Act for Australia's Oceans* (March 2006).

⁹ For example, the Senate Committee inquiry into impacts of climate change on marine biodiversity and fisheries Final Report *In hot water: the impacts of climate change on marine fisheries and biodiversity*, December 2017, Recommendation 11 7.34 states: "The committee recommends that the Australian Government commission a feasibility study into the creation of a **National Oceans Commission** or consider establishing a dedicated oceans outcome as part of the Department of the Environment and Energy's responsibilities. See:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/ClimateChangeOceans/Report

¹⁰ See: <https://www.un.org/pga/72/2018/04/16/bbnj/>

¹¹ See: Places You Love Alliance www.placesyoulove.org.au and the work of the Australian Panel of Experts in Environmental Law (APEEL) - Waddell S and McDonald J (2017) *Marine and Coastal Issues Technical Discussion Paper 4* (part of a series of papers produced by APEEL), available at www.a Peel.org.au at www.a Peel.org.au.

Multiple complex threats and impacts – A snapshot

There are many complex existing, emerging and growing threats and issues affecting our marine estate. Some key examples are noted here.

Biodiversity is declining. At the species level, lists of threatened marine species grow each year;¹² and at the seascape level, we have not achieved targets for a comprehensive, adequate and representative marine protected area network.¹³

Invasive marine species are posing an increasing threat in some regions. Arrivals of invasive species are occurring through ships' ballast water and through natural migration of species due to climate change that is causing changes in habitat. Over 250 introduced marine plants and animals have 'hitch-hiked' to Australian waters on vessels of all types, from yachts to commercial ships.¹⁴

Marine pollution is a growing and pervasive problem, and much of it comes from land-based sources. Sources include litter, pesticides, toxins, herbicides; as well as dredging and dumping, discharge from shipping including recreational vessels, oil spills, and fishing gear.

An increasingly urgent challenge is posed by **marine plastics pollution**. The environmental harm caused by plastic pollution in the marine environment is well established, and is projected to grow significantly without systemic policy intervention and innovation at many levels. Coastal assessments have shown that 60–80% of marine debris consists of plastic, while recent research has demonstrated that "each square kilometre of Australian sea surface water is contaminated by around 4,000 pieces of tiny plastics."¹⁵

Different measures and approaches have been adopted around the country to manage marine and estuarine **water quality**. For example, near the Great Barrier Reef the control of sediment, nitrogen and pesticide runoff has taken the form of voluntary plans for farmers and this has led to only modest changes in agricultural management practices. Previous targets have not been met and current 2018 targets are unlikely to be met.¹⁶

Shipping can have a variety of impacts on oceans, for example pollution in terms of debris, ballast water, anchor scour, noise pollution, leaks/spills, crashes and vessel strike of marine mammals. As has been noted: "very few places in the Australian marine environment are not used by marine vessels."¹⁷ Controls on discharge of garbage at sea have been tightened, controls on greenhouse gas emissions from international ships have been introduced, and a national response to marine emergencies was also updated in late 2016. However, Australia is lagging behind on regulation of certain pollutants, for example, sulphur emissions.

¹² SOE (2016), Chapter on Marine Environment at p 86; and Commonwealth Department of Environment and Energy *Species Profile and Threats Database* at <http://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl>.

¹³ ANZECC (1998) *Guidelines for establishing the national representative system of marine protected areas* <http://www.scew.gov.au/system/files/resources/378b7018-8f2a-8174-3928-2056b44bf9b0/files/anzecc-gl-guidelines-establishing-national-representative-system-marine-protected-areas-199812.pdf>; Agardy T, di Sciara GN and Christie P (2011) 'Mind the gap: Addressing the shortcomings of marine protected areas through large scale marine spatial planning' 35 *Marine Policy*, 226–232. Barr L and Possingham H (2013) 'Are outcomes matching policy commitments in Australian marine conservation planning?' 42 *Marine Policy* 39 at p 43.

¹⁴ See also Australian Committee for IUCN (2013) *Conserving Australia's Marine Environment: Key Directions Statement* Key Direction 14 at <http://www.aciucn.org.au>.

¹⁵ Derraik JGB (2002) 'The pollution of the marine environment by plastic debris: a review'. *Marine Pollution Bulletin* 44, 842–852; Reisser J, Shaw J, Wilcox C, Hardesty BD, Proietti M et al (2013) 'Marine Plastic Pollution in Waters around Australia: Characteristics, Concentrations, and Pathways'. *PLoS ONE* 8(11): e80466; and see: www.csiro.au/marine-debris

¹⁶ Waddell and MacDonald *op cit*.

¹⁷ SOE (2016) at p49.

Offshore oil and gas extraction can be both a major contributor to climate change and a stressor in the marine environment. Improvements in technology are making extraction a viable option in many marine areas. Marine oil and gas exploration and production is significant and likely to increase.¹⁸

While improvements have been made by accrediting the environmental sustainability of Australian commercial **fisheries**, the impacts of recreational fishing remain largely unmonitored and a number of target species are considered over-fished or their status remains unknown.¹⁹ Bycatch of non-target species continues to include threatened and protected species. Seafood labelling is also inadequate, particularly of imported seafood. Commercial fish farm impacts include pollution and escapee fish.

In Australia, a significant percent of the population lives near the coast – 85% of us live within 50 km of the ocean. **Coastal development and recreational activities** in coastal areas can have impacts on coasts, estuaries, beaches and the ocean. Impacts include pollution, stormwater runoff, declining water quality and changes to the landscape and seascape (through, for example, engineering works and solutions which can in turn lead to destruction of fish breeding habitat amongst other impacts). Inappropriate coastal development also reduces resilience and adaptive capacity of coastal environment and increases risk and liability for coastal erosion and flood damage.

The SoE (2016) notes the complexities of **coastal management and the impacts of climate change** on the marine environment: *We...risk 'loving our coast to death', as its amenities and resources attract intensive human use...Current pressures on the coast are largely related to land use and climate change, and the state and trends of coastal biodiversity are tightly linked to these pressures...The outlook for the coast focuses on the escalating trajectory of climate-related pressures. These are expected to become increasingly prominent, and, unlike most other pressures, affect the entire coast. Since 2011, climate change has manifested as increased frequencies of marine heatwaves and severe storms, such as the Ningaloo heatwave and tropical cyclone Yasi of 2011, and the 2016 marine heatwave that caused severe bleaching in large sections of the northern Great Barrier Reef. Increases in extreme weather and natural disasters expose communities and governments to considerable economic risks and liabilities.*²⁰

While impacts of **climate change** are a key threat for marine environments and adaptation measures are already required, it has been suggested that innovative mitigation solutions may also be found in the oceans. This is as yet untested, and appropriate regulatory safeguards would need to be in place to assess emerging technologies. The SoE (2016) concludes: *Despite the breadth of reliable data concerning actual and projected impacts of global warming on our unique marine life, Australia is only in the very early stages of adapting to climate change.*

¹⁸ SOE (2016) at p 43.

¹⁹ SOE (2016) Chapter on the marine environment, at pp 34, 37, 39 and 40.

²⁰ These risks have been long recognised – see 2009 Australian Government Report: *Climate Change Risks to Australia's Coasts* available at: <https://www.environment.gov.au/system/files/resources/fa553e97-2ead-47bb-ac80-c12adffea944/files/cc-risks-full-report.pdf>

Part One: The problem – current approaches to marine management

Two decades ago, Australia identified a vision for *healthy oceans: cared for, understood and used wisely for the benefit of all, now and in the future*.²¹ There are many reasons why this vision remains important but still has not been achieved despite the increasing urgency to do so. Key barriers outlined in this report relate to policy failure; jurisdictional and sectoral wrangling over lines on maps; and the failure to effectively engage States and Territories in a national approach; and involve all sectors. This approach has left regulatory inconsistency – multiple managers with conflicting mandates - and regulatory gaps regarding emerging opportunities and risk management planning.

1. Policy failure

Twenty years ago, Australia became a global leader in marine management by establishing a forward-looking *Australian Oceans Policy*.²² The policy aimed to facilitate ecosystem-based oceans planning and management and stated:

Management of our oceans purely on an industry-by-industry basis will not be sustainable in the long run. Activities such as fishing, tourism, shipping, aquaculture, coastal development and petroleum production must be collectively managed to be compatible with each other and with the ecological health of the oceans.

In order to achieve the goals of the policy, the Commonwealth established a number of bodies and commenced a process of regional marine planning, seeking to integrate sectoral and conservation interests in plans for specified regional marine ecosystem areas.

While many aspects of the policy are commendable and remain relevant to the challenges faced two decades later, there are at least three key reasons why implementation of the policy has been limited:²³

- **institutional decay** – for example, many of the institutions that the policy relied on have been disbanded or devolved over the years, reducing the momentum for comprehensive implementation;²⁴
- **enforceability** – as the policy was not underpinned by comprehensive legislation it had a lack of “teeth”;²⁵ and
- failure to galvanise active **participation of all sectors and jurisdictions** (that is, the states, territories and local government, as well as the Commonwealth).

These critical limitations led to a shift of focus by the Commonwealth to implementing relevant *Environment Protection & Biodiversity Conservation Act 1999 (EPBC Act 1999)* provisions and processes such as marine bioregional planning. However, narrowing implementation of oceans policy

²¹ *Australia's Oceans Policy 1998*, See <http://www.environment.gov.au/archive/coasts/oceans-policy/publications/pubs/policyv1.pdf>

²² See <http://www.environment.gov.au/archive/coasts/oceans-policy/publications/pubs/policyv1.pdf>

²³ See SOE (2016) at p 118; Vince J (2015) *Integrated Policy approaches and policy failure: the case of Australia's Oceans Policy*. *Policy and science* 48:159-180; Vince J, Smith ADM, Sainsbury KJ, Cresswell ID, Smith DC and Haward M (2015) “Australia's oceans policy: past, present and future” *Marine Policy* 57 at pp. 1-8; Haward M and Vince J (2008) *Oceans Governance in the twenty-first century: managing the blue planet*, Edward Elgar, Cheltenham.

²⁴ For example, the National Oceans Office was eventually absorbed back into the Environment Department and the Natural Resource Management Ministerial Council (NRMMC) of COAG was disbanded.

²⁵ Although there are bioregional planning provisions in the *Environment Protection & Biodiversity Conservation Act 1999 (EPBC Act 1999)*, more broadly, “Uptake of integrated approaches to the management of marine natural resources has been slow, and, although approaches such as ecosystem-based management may have been adopted at a policy level, practical implementation has been limited”: see SOE (2016) at p 115.

to environment legislation administered by an environment department alone has failed to achieve the integrated ocean management initially envisaged by the policy.

2. Jurisdictional wrangling

Australia's marine environment²⁶ is immense, constituting almost 4% of the world's oceans and being the third largest maritime jurisdiction in the world.²⁷ Its jurisdiction covers local, state, territory and Commonwealth responsibilities across multiple sectors. This complexity is due to a range of factors, including Australia's federal system of government.

The High Court of Australia confirmed in 1975 that the Commonwealth has power over the territorial sea from the low water mark.²⁸ This was followed by negotiation of the *Offshore Constitutional Settlement (OCS)* to allow states to make laws for coastal waters (but not necessarily exclude the Commonwealth) and consequently, the marine environment is currently managed as follows:

- state and territory governments manage **coastal waters** (from the low water mark to 3 nautical miles);²⁹
- the Commonwealth government manages the **Territorial sea** (extending out to 12 nautical miles);
- the Commonwealth government also manages an **Exclusive Economic Zone** out to 200 nautical miles, and extended continental shelf zone.

To make laws for the marine environment, the Commonwealth government relies on fisheries and the external affairs' powers under the Australian Constitution to give effect to a range of international agreements relating to the marine environment.³⁰

These jurisdictional arrangements are summarised in Figure 1.

²⁶ The term "marine environment" has not been defined in legislation, but has been described as the area below the low-water mark along the coastline extending seaward into the high seas, including the water column, sea bed and subsoil and the surface of the ocean: see Rothwell DR and Baird R (2011) 'Australia's Coastal and Marine Environment' in R Baird R and Rothwell DR (eds) (2011) *Australian Coastal and Marine Law* Federation Press at p 6. See also Waddell S and McDonald J (2017) *Marine and Coastal Issues Technical Discussion Paper 4* (part of a series of papers produced by APEEL) at p 27, available at www.apeel.org.au.

²⁷ Australia's marine jurisdiction is 13.86 million square kilometres: see SOE (2016). See also: Gullett W, Schofield C and Vince J (2011) 'Girt by Sea: The Challenge of Managing Australia's Marine Resources', in Gullett W, Schofield C and Vince J (eds) (2014) *Marine Resources Management* (LexisNexis Butterworths Australia) 4; Australian Institute of Marine Science, *marine-nation* at <http://www.aims.gov.au/docs/featured-content/marine-nation.html>.

²⁸ *Seas and Submerged Lands Act 1973* (Cth); confirmed in the *Seas and Submerged Lands Case* High Court of Australia, 1975.

²⁹ See *Coastal Waters (State Powers) Act 1980* (Cth), and corresponding coastal waters and submerged lands legislation in each state and territory. In terms of the marine environment per se, state and territory governments regulate all activities: (i) along the shore to the low-water mark; (ii) within coastal waters (low water mark to 3 nm); and (iii) in the 'adjacent area' that has been allocated to them for sectoral activities such as mining, harbours, other shipping facilities and certain fisheries. See: See Baird and Rothwell (2011) at pp 51-52; and Commonwealth Government Geosciences Australia, *Maritime Boundary Definitions* at <http://www.ga.gov.au/scientific-topics/marine/jurisdiction/maritime-boundary-definitions>.

³⁰ The external affairs (section 51 (xxix)) and fisheries (section 51(x)) powers in the Australian Constitution give the Australian Government authority to make laws on marine issues. Relevant international agreements for management and protection of marine resources include: 1982 *United National Convention on the Law of the Sea (UNCLOS)* the 1978 MARPOL Protocol relating to the *International Convention for the Prevention of Pollution from Ships* and the 1972 *London Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter*; 1972 *Convention for the Protection of the World Cultural and Natural Heritage*; and 1992 *Convention on Biological Diversity*. See Rothwell DR 'The International Framework' in Baird and Rothwell (eds) (2011). See also McDonald and Waddell *op cit*.

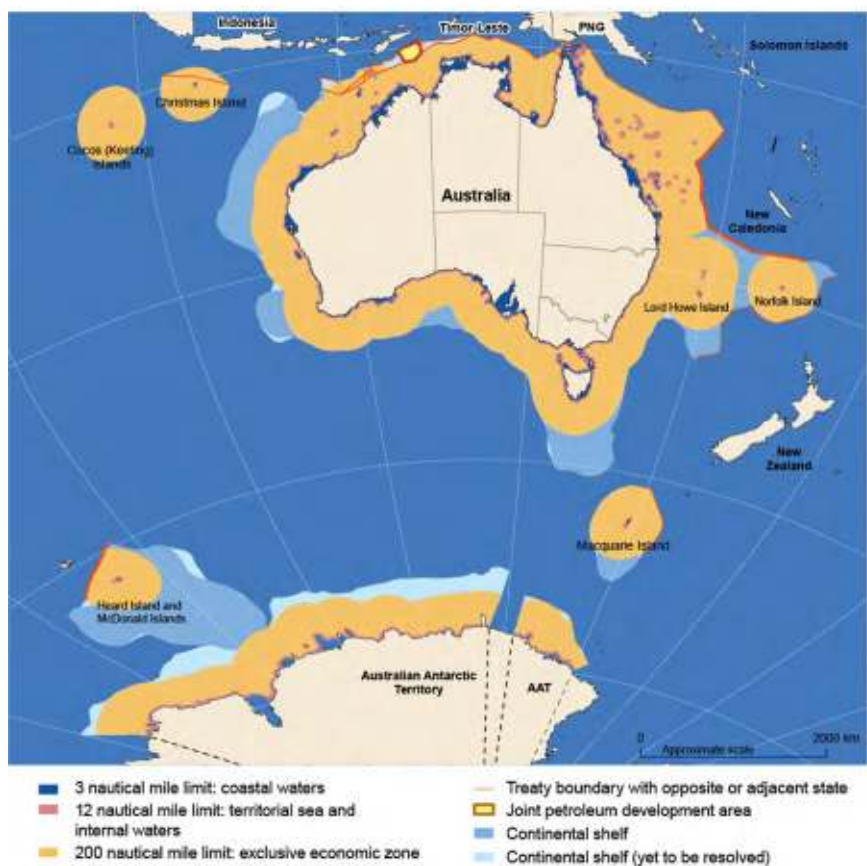


Figure 1: Zones that comprise Australia’s marine jurisdiction: SoE 2016

Commonwealth waters are managed through a bioregional planning approach which recognises six marine regions,³¹ with the Coral Sea region containing the Great Barrier Reef Marine Park (regulated by a separate Authority). Australian Antarctic waters also have separate legislation.

At the same time, states and territories have their own legislation for managing impacts and activities in coastal waters. These laws traverse fisheries, marine parks, pollution and natural resource management (including water and vegetation management in coastal catchments and certain extractive industries) and coastal planning. Local government is also actively involved in coastal management, as bodies that implement state and territory planning laws, policies and programs. For example, local government is usually responsible for issues such as beach management, coastal developments and stormwater out flows etc.

This jurisdictional carve up between the Commonwealth, state and territories, and local government is not based on ecological boundaries and many species, activities, sectors and impacts traverse the different jurisdictions.

A major flaw in achieving the objectives of the 1998 *Australian Oceans Policy* was that the states and territories were not actively engaged and involved. Without buy-in from the major managers of coastal waters, the implementation of objectives has not been consistent.

Similarly, local governments are at the front line of coastal management issues and have previously not been effectively integrated in a management framework, and often under-resourced.

³¹ The Commonwealth marine bioregions are: North, Coral Sea, Temperate East, South East, South West and North West.

Multiple managers, conflicting mandates

At the national level there are a number of agencies that are involved in regulating ocean users or impacts. These include government departments, agencies and regulators in charge of: home affairs, defence, fishing, agriculture, environment, shipping, industry, petroleum oil and gas (NOPSEMA), and specific areas such as the Great Barrier Reef Marine Park Authority (GBRMPA) and Antarctica.

In each state and territory level, there are government departments and agencies dealing with: fishing, shipping, marine parks, coastal planning, crown lands, roads and maritime, environment, and ports.

At the local level, there are **255** local government areas in Australia that have coastline or coastal catchments.

In the region, there are 5 neighbouring EEZs, and for example, at least 5 regional fisheries management organisations.

Internationally, there are rule-setting bodies such as International Maritime Organization (IMO), International Tribunal on the Law of the Sea (ITLOS), and International Seabed Authority (ISA); as well as different international bodies relating to hundreds of international agreements relevant to oceans.

This means there are literally hundreds of different managers for Australia's marine estate, all operating under different legislation, rules and management regimes.

A new regime needs to have clear requirements and incentives (including funding; consistency of regulatory objectives; certainty; and identified benefits of shared information, responsibility and resources for tackling existing and emerging issues and challenges) for active participation of all jurisdictions.

3. Sectoral silos

Not only is it important to actively involve all relevant jurisdictions in marine management, all relevant sectors must be engaged and coordinated under shared vision for healthy and productive oceans. As the Commonwealth State of the Environment Report (2016) stated:

Efforts continue to be poorly coordinated across jurisdictions, although improvements have occurred in some sectors, such as fisheries and shipping. Coordination between sectors sharing common resources or using common regions remains lacking, resulting in inadequate accounting for all pressures and, in particular, cumulative pressures on the marine environment. As a result, many management plans do not currently support the development of resilience within marine ecosystems.³²

As illustrated above different sectors are regulated and managed by different agencies and have different – sometimes conflicting - mandates (for example, resource extraction and conservation). There is currently no single body with authority to coordinate all relevant sectors.

³² SOE (2016) at <https://soe.environment.gov.au/theme/marine-environment/key-findings?year=96#key-finding-120601>.

Furthermore, the traditional list of relevant sectors may need to expand. It is clear that ocean users and industries such as shipping, fishing, and offshore petroleum are already directly regulated; but other actors who have impacts on the ocean need to be brought into an integrated management scheme where appropriate. A topical example, is producers of products and packaging that becomes marine plastic pollution. This does not mean duplicating regulatory requirements, rather it requires ensuring that all relevant players and impacts are recognised under the umbrella/watching brief of an effective coordinating authority.

4. Regulatory gaps and emerging opportunities

Addressing regulatory gaps and inconsistencies (such as directly conflicting mandates) is a fundamental part of integrated oceans management. This is something that has not yet been systematically done for Australia's oceans and is a key purpose a new Oceans Act, as gaps and conflicts create inefficiency and uncertainty.

In terms of gaps, despite having specific sectoral and issues-based regulations in place and multiple managers responsible for different areas, we do not for example, have laws effectively stemming the tide of marine plastic pollution. Nor do we have effective climate change laws in place for mitigation or comprehensive adaptation. The liability and risk exposure related to climate change impacts on our marine assets is significant. Similarly, we do not have laws in place to ensure that future activities in the ocean remain sustainable. Such activities could include climate mitigation projects (harnessing the ocean's role as a carbon sink), or the development of new techniques/technologies for extractive industries such as fishing and mining (including sea bed mining).

There are many more examples of inconsistencies, gaps and challenges that our current laws do not adequately address. For example:

- How do we protect and manage marine wildlife that is not managed through a commercial fishery or is not a threatened species?
- How do we address impacts to key fishing grounds and fish habitat from activities such as anchor scour?
- If a fishery does not export produce, should it have less assessment than an export fishery?
- Why does it take multiple agencies to address some marine and coastal issues – for example, removing a dead whale from a beach?
- Why are there not more systematic approaches to integrate coastal zone management and marine management consistently?
- What is the impact of seismic testing on the Tasmanian and Victorian fishing industries and both commercial and recreational fishers in New South Wales.
- Who is the ultimate arbiter between demand for conflicting uses – for example, using or establishing shipping lanes through protected areas like the Great Barrier Reef?
- How do we account for cumulative impacts of activities in unprotected but important or vulnerable marine areas, for example, intensive fishing on sea mounts?
- Who is responsible for ameliorating the impacts of sea level rise in the Torres Strait Islands?
- How do we analyse national or ecosystem-based trends and impacts when different marine data is collected in neighbouring jurisdictions?
- Who is actually responsible for cleaning up the huge floating islands of plastic pollution?

In addition to the regulatory gaps, there are significant data gaps and a lack of marine environmental accounts to show trends and cumulative impacts. Comprehensive data is needed to make evidence-based regulation and policy.

Designing clear regulation ahead of the game gives industry and ocean users certainty, i.e. – they know the overarching rules and ultimate authority and understand the goals that marine management are trying to achieve. A national framework that sets clear processes, but also provides for adaptive and nimble regulatory tools, will be needed to harness benefits of the ‘blue economy’ and ensure any development is sustainable. Improved and integrated oceans management presents opportunities for social and economic benefits, but the framework must ensure necessary safeguards are in place and address regulatory gaps to ensure sustainable development for healthy and productive oceans.

Part Two of this report sets out proposals for a new Act and Authority to coordinate this and overcome the barriers that are preventing Australia from realising a shared vision for integrated oceans management.



Part Two: The solution - Integrated ecosystem-based oceans management: Addressing the threats, managing the pressures, maximising the benefits.

So what are the options to overcome the barriers to achieving integrated oceans management? Who will deliver the new vision and how? This part of the report outlines how a new intergovernmental agreement, implemented by an Oceans Act and a new Oceans Authority can deliver a new national vision.

1. Vision

This report proposes a new shared national vision for integrated marine management, that:

Australia has a comprehensive, coordinated and effective system of integrated oceans management to ensure healthy and productive oceans, actively involving all relevant users, sectors and jurisdictions both within and beyond waters under Australian jurisdiction and control; to protect and preserve the marine environment, including by conserving and sustainably managing marine resources and by protecting and restoring their environmental, economic and social value, from the coastal catchments of Australia to the farthest reaches of the world's oceans.

Recommendation: This vision should be consulted upon and agreed in a new Intergovernmental Agreement (IGA) on oceans, and implemented through relevant legislation, policies and sectoral reform.

2. A new Intergovernmental Agreement on Oceans

While the Commonwealth does have the formal power to legislate for the protection of all of Australia's oceans, a deeper and more long-lasting cooperative system can only be provided through a multi-party agreement of the Commonwealth, states and territories through the Council of Australian Governments (COAG).³³ The purpose of an Intergovernmental Agreement on Oceans (Oceans IGA) would be to develop a shared vision, invest a new Commonwealth Authority with an appropriate mandate and the powers to achieve it, clarify rights and responsibilities of all parties, and agree on funding arrangements.

This process is supported by the Australian Panel of Experts in Environmental Law (APEEL), which has called for:

The Commonwealth to pursue agreement on a nationally-agreed vision for managing Australia's marine and coastal environment, with clearly-defined objectives and priorities, and measurable outcomes capable of supporting economic sectors reliant on the marine and coastal environment, ecosystem integrity and resilience, and ongoing enjoyment by the public (including anticipatory measures with respect to the impacts of climate change)³⁴.

The current jurisdictional arrangements – while not based on ecosystem boundaries - are not necessarily a fatal barrier to achieving integrated oceans management if ecosystem boundaries are appropriately recognised, and so a complete renegotiation of the *Offshore Constitutional Settlement*

³³ See for example, the principles and issues as set out in the *Intergovernmental Agreement on the Environment* 1992, available at: <http://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement>.

³⁴ Waddell and Macdonald (2017) *op cit*.

is not necessary if intergovernmental coordination and integrated cross boundary planning can be effectively improved through a new agreement.

Recommendation: Develop a new Oceans IGA, to be given effect through national legislation, and related legislative reforms.

3. A new Oceans Act

Over a decade ago it was suggested that protection of the marine environment should best be achieved through a new *Australian Oceans Act* that takes an ecosystem-based approach to marine management.³⁵ Since that time, two State of the Environment Reports and various Senate inquiries (such as those conducted into climate change impacts on the marine environment and fisheries, and impacts of marine plastics) have identified increasing impacts and challenges to our marine environment. It is timely to revisit the idea of an Oceans Act and ensure that oceans management is included in the next generation of best practice laws.

This report recommends that the Australian Government should use existing constitutional powers to make new framework legislation for ensuring the coordinated management of Australia's oceans.³⁶

A new Oceans Act would apply to the whole marine estate.³⁷ It would be framework legislation that would establish a new Authority and set objectives, principles, targets and standards for consistent legislation and implementation across Australia for integrated oceans management. Key tools would include regional marine planning, but the Act would empower a new Authority to ensure that all relevant legislation was working towards the shared vision.

The detail of the regulatory regime for every sector would *not* be in the new framework Act. For example, the Act would not include lengthy or detailed prescriptions for individual sectors, as the majority of relevant assessment and decision-making processes would remain on relevant sectoral legislation. As framework legislation, the new Act would establish the overarching elements, standards, governance and review powers. Once in place, there may need to be some reform of existing legislation to ensure that objectives, mechanisms and standards in sectoral legislation were consistent and appropriate for delivering the national vision.

It is **recommended** that key provisions under the *Oceans Act* would include 8 parts:

- Part 1 - Objects and principles
- Part 2 - Oceans strategic plan, goals and targets
- Part 3 – Oceans Authority and advisory bodies
- Part 4 - Regional marine spatial planning
- Part 5 - Public participation
- Part 6 - Compliance and enforcement
- Part 7 – Dispute resolution
- Part 8 – Review
- Schedules

³⁵ Australian Conservation Foundation National Environmental Law Association, *Out of the Blue: An Act for Australia's Oceans* (March 2006).

³⁶ An alternative title for legislation is the **Marine Estate Act** to more clearly involve all jurisdictions and waters.

³⁷ The Act would include a statement of scope – that the oversight powers of the Authority would cover activities across the coastal catchment, inshore coastal waters, territorial sea and out to the high seas; as well as a regulatory schedule of relevant activities and sectors. See Rothwell *et al op cit* for definitions of the marine estate.

These elements of the Act are outlined below, followed by a more detailed proposal for the role of the **Oceans Authority**.

Part 1 - Objects and principles

An Oceans Act would establish clear objectives and principles for ecosystem-based planning and management for the marine environment, that expand upon elements of the overarching vision. The principles would guide the work of the Oceans Authority, as well as guiding implementation of relevant sectoral legislation.

Recommendation: The objectives of an *Oceans Act* would include to:³⁸

1. Apply an ecosystem-based oceans planning and management approach to:
 - maintain ecological processes in all areas of Australia's oceans including, for example, community structures and food webs, ecosystem links, and water and nutrient flows.
 - protect marine biological diversity, including the capacity for evolutionary change and resilience to climate change and ensuring the maintenance of healthy populations of all native marine species in functioning biological communities.
 - protect the integrity of Australia's oceans ecosystems from human impact, including climate change.
 - manage human use within the natural capacity of Australia's oceans ecosystems.
 - ensure the assessment and appropriate management of cumulative impacts of actions across Australia's oceans ecosystems.
2. Recognise the importance of, and provide for, Aboriginal and Torres Strait Islander custodianship of Sea Country.
3. Ensure establishment of a comprehensive, adequate and representative system of protected areas for all marine ecosystem types across their natural range of variation, including a core network of strictly protected marine sanctuaries.
4. Recognise the need for national collaboration and inter-agency cooperation to address the pressures on Australia's oceans including land and marine-based sources of pollution, climate change, invasive species, coastal development and capacity building.
5. Ensure consultation with, and the active involvement of, users and the community in management and decision-making processes.
6. Contribute to the cooperative implementation of Australia's responsibilities for implementation of relevant international agreements (bilaterally, regionally and globally) that contribute to the protection and preservation of the marine environment and the conservation and sustainable use of marine resources.

These objectives should be developed in accordance with the principles of **Ecologically Sustainable Development (ESD)**, including the principles of intergenerational equity and the precautionary principle.³⁹

The principles should provide that decision-making is science-based.

³⁸ These objectives draw on the *National Cooperative Approach to Integrated Coastal Zone Management - Framework and Implementation Plan*, Commonwealth of Australia (2006); and ACF/NELA, *Out of the Blue*, p99.

³⁹ ESD principles as set out in the section 3A *EPBC Act 1999*: The following principles are **principles of ecologically sustainable development**: (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations; (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; (c) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations; (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; (e) improved valuation, pricing and incentive mechanisms should be promoted.

Crucially, the legislation should require that any actions done by relevant bodies or sectors must be consistent with those objectives and principles. This would involve incorporating relevant objectives and principles and provisions into relevant sectoral legislation, including adopting ecosystem-based management principles and facilitating the achievement of the principles of ESD. The principles set out in the Act would therefore be operationalised by provisions and regulations establishing clear mechanisms and decision-making processes to ensure implementation across sectors and jurisdictions.

Part 2 - Oceans Strategic Plan, goals and targets

The new legislation would require the development of a strategic plan for Australia's marine environment. The strategic plan would provide a roadmap for integrated marine management across all relevant jurisdictions and sectors. Australia's *Oceans Policy* (1998) provides a relevant starting point and model in this respect, however, in contrast to that policy, this strategic plan would have a clear legislative context and would direct implementation of the new regime.

Recommendation: A strategic plan for Australia's oceans be developed by an Oceans Authority, in consultation with states, territories, local government, sectoral interests, ocean users, Sea Country custodians and the public. The final plan would be signed off by Commonwealth and state and territory governments.

Recommendation: The Oceans Act would require clear goals and targets to be set in the strategic plan, with mechanisms to facilitate monitoring and review. These should be SMART⁴⁰ overarching targets that have to be delivered by each relevant sector. The new Act would require reporting of progress against targets by relevant sectors to the new Oceans Authority. Measuring progress against targets would be assisted by establishing marine environmental accounts.

Recommendation: The strategic plan be subject to 5 yearly review by the Oceans Authority to ensure the policy – including specific goals and targets - can be strengthened or modified to respond to changes in the marine environment if required.

Part 3 – Oceans Authority

A primary function of the Oceans Act would be to establish a new Oceans Authority. The details for how such a body would work are discussed separately below in section 4 (page 27).

Part 4 - Marine regional planning

Under the new framework, while the majority of processes would remain in sectoral legislation, a key mechanism that would be explicitly included to the Oceans Act is marine regional spatial planning. Marine regional plans have been consistently recognised as a key mechanism necessary for implementing integrated marine management, despite there being some limitations in how they have worked to date.⁴¹ Elevating the planning mechanism to the Oceans Act (rather than environmental legislation) is essential to improve coordination and integration of all the jurisdictions and sectors involved. As recently noted by APEEL, next generation marine regional plans will need to take:

A strategic approach that is ecosystem and place-based, participatory, adaptive, and that which integrates the needs of different sectors and agencies, and different levels of

⁴⁰ Targets that are: **S**pecific, **M**easurable, **A**chievable, **R**elevant, and **T**ime-bound.

⁴¹ Allison GW, Lubchenco J and Carr MH (1998) 'Marine Reserves are Necessary But Not Sufficient for Marine Conservation' (1998) 8(1) *Ecological Applications* S79-S92; Agardy T, di Sciara GN and Christie P (2011) 'Mind the gap: Addressing the shortcomings of marine protected areas through large scale marine spatial planning' 35 *Marine Policy*, 226–232. Barr L and Possingham H (2013) 'Are outcomes matching policy commitments in Australian marine conservation planning?' 42 *Marine Policy* 39 at p 43.

government. It will also need to address the land-sea divide and include coastal zone planning, noting the mechanisms for delivering coastal zone management may differ from those for the marine environment.

Significant resources are required to do regional spatial planning comprehensively. Plans that are not linked with adequate funding for implementation are in danger of being labelled ‘paper promises’⁴² and, more importantly, undermining the efficacy of the legislation.

Recommendation: An Oceans Act would require regional spatial plans for the marine environment, to be developed, consulted upon, made and reviewed by the Oceans Authority. They are the crucial centre-piece for marine management, and would have a legislative basis under the new Act, to be signed off by the new Authority. These plans would be ecosystem-based and cross-sectoral, including ensuring Australia has a CAR system of marine reserves, sanctuaries and no-take zones and set rigorous criteria designed to achieve the vision of health marine environments now and into the future. It is also necessary to ensure that other mechanisms such as threatened species listing and recovery planning feed into the regional planning process. The Authority would only be able to approve a plan that meets rigorous criteria as set out in the Act and regulations.

Recommendation: In terms of the detailed content of plans, a new Act would set out the process of plan making (including both initial plan making and a process for amendment to facilitate adaptive management); objectives; scope and contents; mapping and data requirements; consultation and engagement requirements; and regular independent review provisions etc.⁴³

Recommendation: Accountability and transparency mechanisms would also be legislated – for example, there would be a requirement that plans are disallowable instruments to ensure parliamentary scrutiny. Further detail would be prescribed in regulations.

Recommendation: There would also need to be requirements in sectoral legislation, that relevant Ministers could not make decisions that were inconsistent with marine spatial plans. There would be clear provisions on circumstances when the making of a plan could be challenged (including by a third party) and when an activity/action could be challenged as being inconsistent with a plan. The Act would include open standing provisions to ensure accountability.

Part 5 - Public participation

The new legislation would include genuine and fulsome opportunities for public participation. There are a range of ways that the public can contribute to the objectives, goals and targets of the Oceans Act – for example, harnessing citizen science from recreational marine users, migratory bird watchers, whale watchers and coastal residents to complement data gaps about our changing coastlines and oceans; and supporting communities who do beach clean ups to reduce plastic pollution or revegetation of dunes. Education about impacts on the marine environment is also essential.

⁴² Hutchings JA, Stephens T and Vander Zwaag DL (2016) “Marine Species at Risk Protection in Australia and Canada: Paper Promises, Paltry Progressions” *Ocean Development and International Law* 47(3).

⁴³ We note that Smyth et al (2003) *Oceans Eleven*, identifies 11 necessary steps in the development of ecosystem-based regional marine plans: 1. Engaging stakeholders and educating the community 2. Gathering necessary baseline data 3. Identifying operational objectives, indicators and targets 4. Considering the selection of habitat for protection 5. Assessing the risks to ecosystem values, operational objectives and system and species indicators 6. Achieving the operational objectives and indicator targets (this would include implementation processes to realise the designs, plans, objectives and targets) 7. Designing research, information and monitoring systems 8. Designing performance assessment and review 9. Designing a compliance strategy 10. Finalising the regional marine plan 11. Reviewing the regional marine plan to ensure adaptive management.

In terms of what elements of participation should be specifically set out in the Act, there are at least three **recommended** avenues and opportunities for involvement:

- the community should be actively involved in the development of the strategic plan developed under an Oceans Act, with a consultation and engagement process established by the Oceans Authority.
- the community should be involved in the preparation and implementation of marine regional spatial plans.
- there should be extended standing for third parties to ensure accountability and that the new legislation is working effectively. Consultation should be genuine and iterative, with opportunities for participation at the regular review stages of the Act, strategic plan and regional plans.

Specific consultation arrangements may be needed in relation to technical or international matters and in relation to custodianship of Sea Country by Aboriginal and Torres Strait Island peoples.

Part 6 - Compliance and enforcement

Recommendation: A new Oceans Act would establish a general duty not to carry out any activity that causes or is likely to cause environmental harm, unless authorised.

The Act would clearly define relevant offences, including an offence of causing ‘harm’ to the marine environment. To be effective, offence provisions in the new Act need to be clear in scope and practical to implement (noting this can be a challenge with issues such as the impacts of diffuse source marine pollution). How a new Authority should approach this is discussed further below.

There needs to be a clear standard for harm. Thresholds such as “risk of extinction”, “serious and irreversible impact” and “significant impact” can be difficult to apply consistently where applying the standard involves a subjective opinion of a decision maker. Such thresholds may also ignore the risk from cumulative impacts until significant harm has already been done. Clear objective standards for defining harm need to be set out in legislation and regulations. Clear procedural requirements must be followed by decision makers. Noting that setting standards can be difficult in the ocean due to lack of information, a key role of the Oceans Authority would be to garner scientific expertise to define harm and identify scientifically appropriate thresholds for harm. Setting thresholds would also involve applying the precautionary principle. Once clarified, these thresholds and standards should be given regulatory force and underpinned by clear guidelines on how criteria will be applied. Standards and definition for harm offences will need to appropriately consider cumulative impacts.

Recommendation: In addition to the offence provisions, an Oceans Act would have compliance and enforcement powers appropriate to modern regulatory legislation. This includes a number of key elements. First, an Oceans Act should set out tiered penalty regimes that reflect the degree of culpability (for example, intentional and reckless conduct, strict liability and absolute liability). Second, the Act should include innovative Court and administrative orders that effectively deter unlawful conduct.⁴⁴ Third, extended third party rights for injunctions, judicial and merits review would be explicit in the legislation.⁴⁵ The regulatory arm should be a part of the new Authority, or potentially a new Environment Protection Authority (**EPA**).⁴⁶ Investigation powers of authorised officers would need to be included (and potentially strengthened) under relevant sectoral legislation.

⁴⁴ For examples of innovative orders, see: *Protection of the Environment Operations Act 1997* (NSW).

⁴⁵ For example, see *EPBC Act 1999* sections 475 and 487.

⁴⁶ Other suggestions to improve compliance and enforcement at the national level have included calls for independent bodies such as a national Environment Protection Authority (EPA). See: www.placesyoulove.org.au.

This part of the Act would contain provisions relevant to enforcement and international issues, for example, it would stipulate that the burden of proof is on flag states to prove their fishing activities are lawful. International issues are discussed further below.

Part 7 – Dispute resolution

Recommendation: The Oceans Act would contain provisions setting out dispute resolution processes, between sectors and jurisdictions. Arrangements for disputes between jurisdictions may also be provided for the Oceans IGA. Further detail on available dispute resolution mechanisms would be included in regulations.

Part 8 - Review

Recommendation: The *Oceans Act* and strategic plan would be independently reviewed within 5 years from the date of commencement.⁴⁷ Individual marine regional plans would also be subject to clear independent review requirements every 5 years. The Act would require public engagement into review processes. All review reports and responses would be tabled in Parliament, and any submissions to reviews would be published.

Schedule

For clarity, the Oceans Act would include a schedule listing activities and sectors that come under the umbrella of the Oceans Authority. This could be added to over time as new impacts or issues arise in ocean management. This could be done by listing operationally relevant legislation.⁴⁸

There could also be a schedule listing international conventions, treaties and agreements relevant to marine management in Australia.



⁴⁷ See *EPBC Act 1999* s 522A as a model. This legislation is reviewed every ten years. However, given the complexity and the parties involved five years is considered appropriate.

⁴⁸ See also ACF/NELA *op cit* – proposed schedule 1: Operationally Related Legislation, and Schedule 3 “List of actions that are to be referred for assessment and approval.”

4. A new Oceans Authority

There is little use in having a bold new vision for integrated oceans management if there is no body that is charged with driving and implementing the vision. A key purpose of an Oceans Act would therefore be to establish a new independent Authority to drive reform and implement a coordinated vision for the management of Australia's marine environment.⁴⁹ A new Oceans Authority would be the custodian of the vision and of Australia's marine ambition in the region and globally. The Act would state a clear mission for the Authority - with which all relevant sectors must comply and coordinate. The mission would be the national policy driver and would also inform international positions. This part of the report proposes key features and functions of a new Oceans Authority.

Independent statutory authority

Recommendation: The new Oceans Authority must be an independent institution with standing in law that can represent the interests of a healthy and productive ocean, with a mandate to ensure reform of sectors and activities where needed.

To ensure accountability and transparency, the Authority would report to the Prime Minister (discussed below), and the Act would require annual progress reports of the Authority to be tabled in the Australian Parliament. As a statutory authority, it would also be auditable by the Audit Office.

Structure and composition

Recommendation: The structure and composition of the new Authority would be set out in the Act.

It is recommended that the Authority should have a **board**. Board membership would be a combination of skills-based and representative and for example, include members representing the Commonwealth government; state and territory governments; local government; and Sea Country. The Act would require members to have expertise in relevant fields including: marine ecology, fisheries management, corporate governance, national maritime security etc. The criteria for appointment must be set out in the Act, and the process must be transparent. Appointments to the Board would be made by the Governor-General, to ensure whole-of-government/Cabinet scrutiny of the process. The Act could also specify set tenure of board members.

Recommendation: To ensure the new Authority has expertise to deliver core functions to implement the vision, the legislation may need to establish **technical expert and advisory groups** to assist the Authority. These could include:

- Key Stakeholder Advisory Group
- Scientific and Technical Expert Advisory Panel;
- Sea Country Custodians Group
- Inter-agency Panel

In terms of the Executive and staff, the Authority would need allocated resources for dedicated staff to undertake data collection and analysis, monitoring, innovative research, strategic and regional spatial planning, and dispute resolution.

⁴⁹ There is no entity within the Council of Australian Governments (COAG) currently focusing on issues related to collaborative management of Australia's coastal and marine environment.

Report to Prime Minister

Recommendation: The new Authority would report to the Prime Minister (or a Minister Assisting the Prime Minister on Oceans). While good oceans management is fundamental to marine environmental protection, there is a need to ensure collaboration across issues and jurisdictions, and across the range of industries and stakeholders involved. Collaboration and coordination of this magnitude, combined with the imperative of meeting Australia's international obligations, requires oversight by a new Authority reporting to the Prime Minister.⁵⁰ It has previously been suggested that an Oceans Authority should report to a COAG Council, specifically the Natural Resources Management Ministerial Council, however this has been disbanded. Given the importance of oceans management and the multiple sectors and sectors involved, an Oceans Minister would report to the Prime Minister (and the parliament) to ensure the Authority and vision weather institutional and departmental vicissitudes over time. A similar model of an independent statutory authority with a coordinating function that reports to the Prime Minister is the Office of National Assessments (**ONA**).

Powers and functions

The new Authority would have specific powers and functions identified in the Act and regulations. Key functions are **recommended** as follows.

Oceans Strategic plan

- Consult upon and develop the strategic plan for Australia's oceans.

Active oversight of sectoral activities

- A core function of the Authority would be to have active oversight of relevant regimes to ensure actions/activities are consistent with the objectives and principles of the Oceans Act and goals and targets of the strategic plan.
- In practice this would mean that the Oceans Authority would have a legislated purpose to maintain oversight of the functioning of relevant legislation/regulations, institutional arrangements, administrative procedures, policy settings, and processes; to ensure domestic policy coherence and compatibility with the objectives of the Oceans Act, and ensure alignment to give effect to international obligations (provisions of binding international agreements) and commitments (for example, relevant decisions of international bodies).
- There would be criteria for when the Authority would undertake a review. Any relevant new obligation/commitment entered into by the Commonwealth (including COAG agreements and decisions) would automatically trigger an 'authority' review and initiation of dialogue with any/all relevant agencies to ensure that appropriate changes are made to align with the new framework. There would also be provision for sectoral or jurisdictional inconsistencies to be brought to the attention of the Oceans Authority by any person.
- The new Act would therefore make clear that the Authority has a remit to review and ensure sectoral legislation aligns with the mission of the Oceans Act and effectively integrates the principles and legal requirements of the new Act/Authority model into each sector. The Act would authorise the Authority to engage and coordinate with relevant sectors – as identified

⁵⁰ It has been argued that an office of oceans and maritime affairs should be established in the Department of Prime Minister and Cabinet: see *Bateman S and Bergin A Sea Change: Advancing Australia's Ocean Interests, Australian Strategic Policy Institute, available at: www.aspi.org.au*. Such a move would not be unusual as the issue of marine parks was elevated to the Premier's department in NSW at one point. Other organisations, such as the Australian Committee for IUCN have proposed bodies such as an Oceans Commission: see *ACIUCN Key Directions Statement, Biodiversity in areas Beyond National Jurisdiction Forum, March 2017*.

in the Schedule to the Act - and where necessary/appropriate, direct sectors to amend their legislation or undertake specified actions.

- The Act would provide a call-in power for the Authority to review individual projects or activities to ensure they are consistent with the objectives, principles and requirements of the Oceans Act. In this regard, the Authority would *not* have a direct role in impact assessment of all individual projects as this would be done under the relevant sectoral legislation, but would have authority to assess certain high impact projects or sectors. The Authority would have the power to override sectoral arrangements where they are not consistent with objectives, principles and requirements of the Act, and to work with the sector to undertake necessary reform.
- Sectors identified in the Schedule to the Act would be required to report annually to the Authority on their progress in meeting applicable objectives and targets.

Marine spatial plans

- Consult and develop regional marine spatial plans according to the process set out in the Act.
- Ensure plans are based on best-available science. This involves collecting comprehensive data and information to underpin evidence-based planning.
- Coordinate sectoral collaboration and integration for planning, including data sharing.
- Ensure compliance with regional spatial plans under the Oceans Act (discussed below).
- Exercise a power to require plans to be made within specified timeframes.
- Undertake reviews of plans.
- Amend plans to ensure they are adaptive and build resilience. For example, this would include ensuring that threatened species recovery is incorporated into plans.
- The Authority would have the power (for example, through issuing directives) to ensure other relevant legislation embeds requirements of the marine spatial plans.

Compliance and enforcement

- The Authority would have power to take action in relation to breaches of the Act or marine spatial plans.
- Issue Threat Mitigation Directives (with follow up powers to ensure implementation of directives). The Authority would have the power to issue directives (for example to make/amend a regional plan or to direct a particular activity to mitigate its harm).
- A compliance role in the event of certain 'harm' to the marine environment occurring. The new Authority would have power to step in on a number of issues, including marine plastics. Cognisant of the compliance role already undertaken by state and territory EPAs, there should be a clear and specific, not duplicative, role for the Oceans Authority. Sectors/states may address pollution well (under sectoral legislation), but there should be a call in power for Authority to step in if not.
- An offence for harm would be set out in legislation with appropriate penalties. The standard for harm should be clear, and supported by explicit guidance on application of the standards/thresholds.⁵¹ The Authority would garner scientific expertise to develop regulatory detail about how this would be applied – for example, if it is possible to set receiving thresholds for the ocean in relation to specific impacts.
- Undertaking an extended compliance role to assert responsibility for the protection and preservation of the marine environment and to have jurisdiction to pursue those causing harm wherever they might be. This could range from land-based sources of pollution, to foreign flagged ships, to activities by Australian citizens or corporations in areas beyond

⁵¹ A comparable precedent is the Significant Impact Guidelines under the *EPBC Act 1999*, however, we note these are not as clear as they could be, and the significant impact threshold can be difficult to apply.

national jurisdiction. The external affairs power of the Australian Constitution would provide power for an Ocean Authority to embed United Nations Convention on the Law of the Sea (UNCLOS) responsibilities into its mandate and mission.⁵²

Dispute resolution

- Provide dispute resolution processes when needed for disputes between jurisdictions and/or between sectors under part 7 of the Act. Arrangements for dispute resolution between jurisdictions may also be provided for the Oceans IGA. Further detail on available dispute resolution mechanisms would be included in regulations.
- Undertake facilitated negotiation processes between sectors and between agencies. This process would involve published outcomes and improve transparency of current 'black box' interagency negotiations, with the Authority as the final arbiter.

Managing and administering an Oceans budget

- When established as an independent statutory authority, there would be a discrete and transparent funding source identified and allocated. This would include core government funding, but other sources such as levies from ocean users could go to some of the costs of marine spatial planning (applying the user pays principle).⁵³
- As part of negotiations for a new Oceans IGA, there may be incentives and arrangements for states and territories to access funds for oceans management activities. For example, co-funded solutions to put in place measures to address marine plastics pollution would provide an incentive for state and local government engagement. This is likely to be an important incentive to participation.
- Annual reports on budget allocations and funds management would be published/tabled in parliament.

Coordination role – domestic

- The relationship between the new Authority, existing Commonwealth Departments (for example, environment, fisheries, defence, home affairs) and any new institutions (such as a national EPA) would need to be clarified. The process of marine spatial planning set out in the Act should also assist in coordinating agencies.
- There have previously been calls for a national Coastal Act or at least stronger national leadership on **coastal management**.⁵⁴ A new Oceans Authority would have a mandate to facilitate cooperation with states and local governments undertaking Integrated Coastal Zone Management (ICZM). Given the many impacts and threats to the ocean that originate on land, an integrated regime must include ways to address the interface between oceans management and ICZM.

⁵² This would be consistent with responsibilities under Article 117 of UNCLOS.

⁵³ There are existing licence fees and levies that differ depending on the activity and jurisdiction (for example, state recreational fishing and Commonwealth commercial fishing licenses). Assessment of existing licences is needed as well as analysis of existing subsidies for marine activities to ensure most effective use of funds. As noted in relation to the UN Sustainable Development Goals, Goal 14 fact and Figures: *Subsidies for fishing are contributing to the rapid depletion of many fish species and are preventing efforts to save and restore global fisheries and related jobs, causing ocean fisheries to generate US\$ 50 billion less per year than they could*. See: <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-14-life-below-water/targets/>

⁵⁴ See Parliamentary Inquiry by the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Managing our coastal zone in a changing climate*, which reported in October 2009.

- Regulation of **ports** is currently a complex arrangement between the Commonwealth, states and private management. The Authority would have a role in ensuring ports deliver on Oceans Act obligations.

Coordination role - international

- The Oceans Authority would also play a crucial role linking Australia’s integrated ocean management with international developments, such as progressing an agreement on biodiversity in areas beyond national jurisdiction (**BBNJ**) under UNCLOS, and ensuring Australia’s policy and legislation is consistent with international obligations within and beyond areas of national jurisdiction (discussed further below).
- Engage with relevant competent bodies outside the Australian jurisdiction such as Regional Fisheries management organisations (**RFMOs**), the International Seabed Authority (**ISA**) and the International Maritime organisation (**IMO**) when necessary.
- Engage in issues of trade law reform and advise on trade agreements where relevant.
- Implementation of *SDG Goal 14: Life below water*.⁵⁵

Reporting and transparency

- The Act would require annual progress reports on implementation and sectoral reform (ie, the progress against the objectives of the Act and targets in the strategic plan) to be tabled in parliament.
- It would also require that any advices or reports produced by the Authority be published, and any responses from the Government to be published. Reports of any advisory of stakeholder group to the Board should also be published.

Data and monitoring

- Monitoring, reporting and analysing trends and assessing progress against clear goals and targets for each sector and for the *Oceans Act* itself. There needs to be investment in the core function of information gathering, monitoring and reporting (ie, upfront and comprehensive, not just as an afterthought).
- Establishing and maintaining a set of marine environmental accounts.
- The Act would define how “commercial in confidence” information and data from sectors would be dealt with.
- The Authority is to utilise best available technology and provide accessible data layers for strategic and regional planning.

Existing agencies such as the National Oceanic and Atmospheric Administration (**NOAA**) in the United States – with longevity and a broad remit for scientific research, analysis and information sharing, as well as conservation and management of both coastal and marine ecosystem and resources - provides a useful model for contemplating roles for an Australian Oceans authority.⁵⁶

The functions and role of the Oceans Authority is illustrated in Figure 2⁵⁷.

⁵⁵ See: <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-14-life-below-water/targets/>

⁵⁶ The NOAA mission is: *To understand and predict changes in climate, weather, oceans, and coasts, to share that knowledge and information with others, and to conserve and manage coastal and marine ecosystems and resources*. See: <http://www.noaa.gov/about-our-agency>

⁵⁷ The ‘Other New Bodies’ referred to in this diagram refer to those recommended as part of broader environmental law reforms HSI is calling for as part of the Places You Love alliance. For further detail see: Humane Society International and EDO NSW (2018) *Next Generation Biodiversity Laws – Best Practice Elements for a new Commonwealth Environment Act* http://www.hsi.org.au/assets/publications/608_next-generation-biodiversity-laws-hsi-and-edo-nsw.PDF

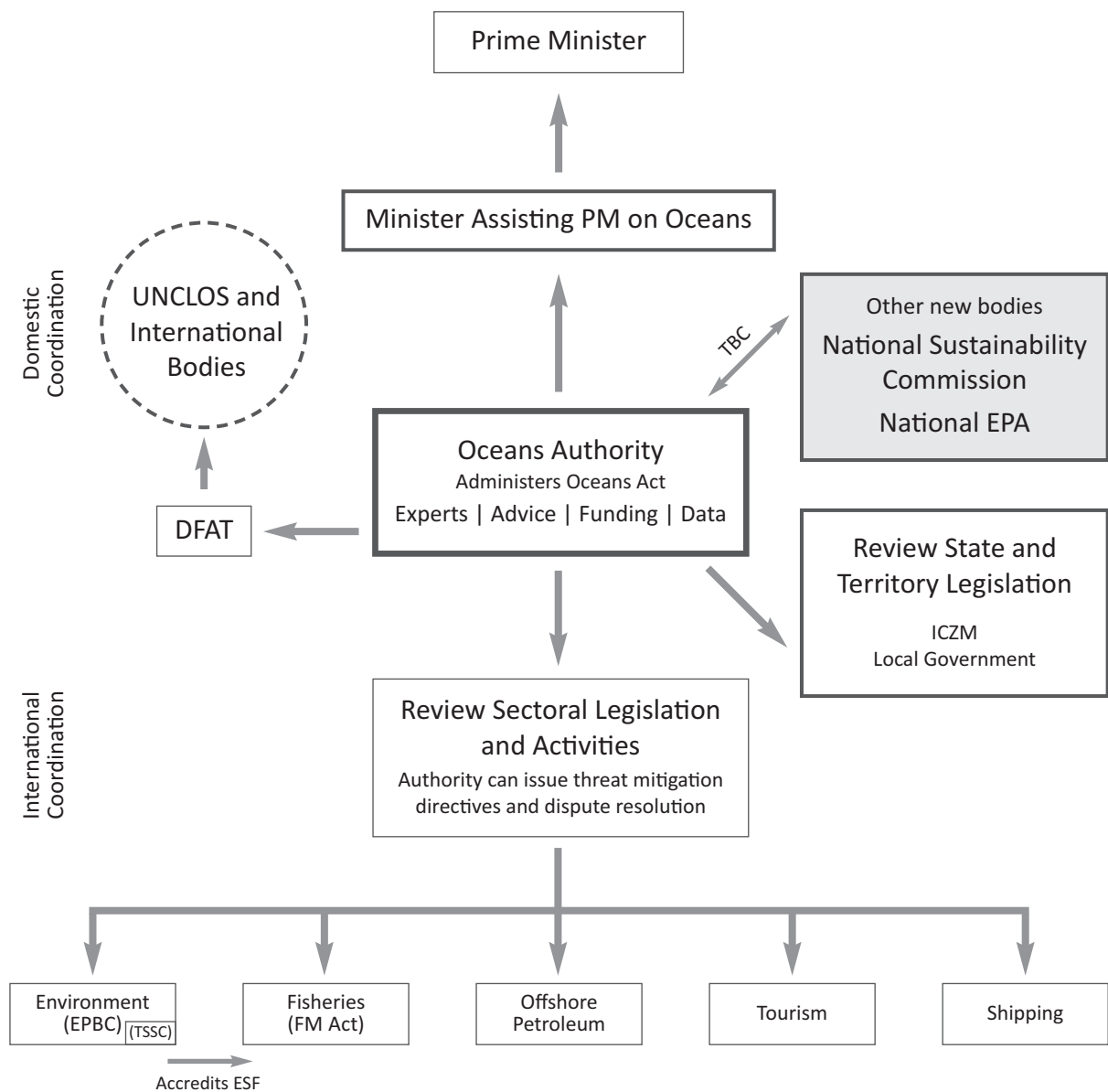


Figure 2: Functions and role of the Oceans Authority

5. Associated reforms

The new Act would not duplicate existing processes in sectoral legislation, but provide an overarching coordinating framework, designed to ensure consistency and delivery of integrated oceans management. This report is not proposing duplicative legislation, but rather a scheme to clarify and distil the key regulatory elements for all ocean users and impacting sectors necessary to ensure healthy, sustainable, productive oceans. The proposed framework is intended to clarify and simplify the current complex and sometimes conflicting arrangements.

While the detail of the regulatory regime for every sector would not be in the new Act, there may need to be reform of existing legislation to ensure consistency, and ensure that objectives, directives, mechanisms and requirements in sectoral legislation are consistent and appropriate for delivering the vision of nationally integrated oceans management. There would also need to be requirements in sectoral legislation, that relevant Ministers could not make decisions that were inconsistent with marine spatial plans.

This part notes some of necessary areas of reform, and provides a case study of sectoral reform in relation to the *EPBC Act 1999* (see page 36). The case study identifies reforms, but it is important to note that containing or ‘silo-ing’ all conservation actions for the marine environment in discrete environment legislation as has been historically suggested, does not engender industry responsibility or awareness, and risks marginalising environmental issues as “green tape”, rather than as issues fundamental to the health and sustainability of the ecosystem supporting the industry. Sectoral reform is required across a range of legislation.

As SoE (2016) notes:⁵⁸

The diversity of anthropogenic pressures on marine habitats and communities by different industry and public sectors is a challenge for managers. Some pressures are increasing, others have declined following the implementation of active management frameworks, and new pressures and new industry sectors are developing. Managing the marine environment increasingly requires an understanding of how different pressures interact and how management frameworks might interact across different sectors, and sufficient monitoring to fill gaps in knowledge and provide an early warning of unexpected or infrequent disruptive events.

For these reasons, strengthening (and coordinating) sectoral legislation is recommended as a key means of addressing the current weaknesses, under the umbrella framework of the Oceans Authority. This broader legislative reform program would be a necessary component of the legal regime required to implement a new vision for integrated marine management, and is essential for comprehensive implementation of the Oceans Act with oversight by the Oceans Authority.

If subject to a review by the Authority, a relevant sector will need to demonstrate that their regulatory regime is consistent with the objectives of the Oceans Act, or report on progress to making necessary reforms.

In terms of sectoral reform, there is an almost limitless range of reform options - from enacting effective emissions reduction legislation to address long-term impacts of climate change on the marine environment, to making product-specific consumer laws to curb marine plastics pollution. However, the starting point and key **recommendation** is to vest the Oceans Authority with the power to review sectoral legislation and activities and require reform where necessary as part of a coordinated overarching regime for integrated marine management.

In some cases, law reform may not be needed where legislation already includes appropriate mechanisms or processes, it is actually just a matter of improved implementation – for example, actually listing more fish species and marine ecosystems when vulnerable or endangered, and making the marine reserve system truly comprehensive, adequate and representative under existing environment and marine park laws. We do not propose unnecessary or duplicative laws when we can make current laws work better.

Examples of where legislation should be strengthened include:

- *Pollution laws*: implementing nationwide container deposit legislation, bans on plastic bags, straws and microbeads.
- *Consumer laws*: improving seafood labelling.
- *Fisheries laws*: ensuring stronger integration between customary, commercial and recreational fisheries impacts and the need for stronger integration between state/territory and Commonwealth jurisdictions.

⁵⁸ SOE (2016), Chapter on Marine Environment at p 116.

- *Mining laws*: embedding environmental considerations in decision-making, including for both short- and long-term stages of projects.
- *Trade laws*: ensuring provisions of any trade agreements do not undermine the objectives and targets for Australian oceans management; ensure the impacts of imported items (such as seafood) are fully considered in light of the objectives of the Oceans Act.

Examples of specific mechanisms that would remain in sectoral legislation are set out in the following table. All sectoral legislation would be required to include accountability and reporting provisions that make the sector accountable to the new Oceans Authority and to overcome the problem of the current “silo-ed” approach to oceans management. As discussed above, a new Oceans Authority should have powers to issue Threat Mitigation Directives to sectors and undertake dispute resolution processes to ensure all sectors are actively engaged in implementing the vision.

Sectoral reform matrix

Current legal approach across impacts and sectors	Mechanisms required to manage impact/threat in sectoral legislation
Environmental impact	
Biodiversity	
<i>Species-level protection</i>	
<ul style="list-style-type: none"> • <i>Fisheries Management Act 1991</i> • State & territory fisheries legislation • State & territory threatened species legislation • <i>EPBC Act 1999</i> • Potentially state & territory pollution legislation for noise impacts 	<ul style="list-style-type: none"> • EIA • Listing threatened species (including commercial) • No take zones • Ecosystem based management • Fisheries regulations • Oil and gas regulations • <i>EPBC Act 1999</i> amendments regarding: objects, scope of the Act (new MNES triggers), environmental impact assessment, strategic assessment, threatened ecological communities and critical habitat, key threatening process and threat abatement planning, marine bioregional planning and marine protected areas, and governance.
Biodiversity	
<i>Seascape-level protection</i>	
<ul style="list-style-type: none"> • <i>EPBC Act 1999</i> • State & Territory marine protected areas legislation • State & Territory fisheries legislation (including for example, closures) • GBRMP Act 	<ul style="list-style-type: none"> • Ecosystem-based management • Complete bioregional planning to ensure a comprehensive, adequate and representative network of MPAs, including no-take zones • Improved enforcement, compliance and monitoring • Climate resilience amendments
Invasive species	
<ul style="list-style-type: none"> • Biosecurity Act • State & Territory fisheries legislation 	<ul style="list-style-type: none"> • Prevention focus • Management of outbreaks, including rapid response and coordination for existing pests • Funding, such as biosecurity levy on shipping
Marine pollution	
<ul style="list-style-type: none"> • State & Territory & local planning legislation • State & Territory pollution laws • State & territory container deposit legislation • Consumer law • National water quality standards • MARPOL 	<ul style="list-style-type: none"> • Storm water measures • Point source regulation • Ballast water controls • Extended producer responsibility • Container deposit legislation • Mandatory reuse/recycling • Bans on specific products – plastic bags, straws, microbeads • Fines and enforcement

Current legal approach across impacts and sectors

Mechanisms required to manage impact/threat in sectoral legislation

Climate change

- | | |
|--|---|
| <ul style="list-style-type: none"> • Commonwealth – Emissions Reduction Fund (mitigation) • State & Territory energy and planning legislation • Commonwealth, State & Territory marine protected areas legislation • State coastal and planning policies | <ul style="list-style-type: none"> • Mitigation – emissions reduction • <i>EPBC Act 1999</i> greenhouse emissions trigger • Adaptation measures – marine and terrestrial (eg coastal planned retreat) • Ensure appropriate regulatory processes are in place to assess innovative and emerging marine solutions • No take marine protected areas/climate refugia |
|--|---|

Industry sectors

Fisheries

- | | |
|--|--|
| <ul style="list-style-type: none"> • <i>Fisheries Management Act</i> • State & Territory fisheries legislation • State & Territory threatened species legislation • <i>EPBC Act 1999</i> | <ul style="list-style-type: none"> • Quotas and licensing • Regulation and enforcement • Prohibition of certain methods • Listing threatened species (incl. commercial) • Closures • Stock assessments • Ecosystem based management • Retain mandatory accreditation by Environment Department (or as part of accreditation by the new Oceans Authority) • Integration across jurisdictions for widespread species • Improve seafood labelling |
|--|--|

Shipping

- | | |
|--|--|
| <ul style="list-style-type: none"> • Shipping and ports legislation • Border security and biosecurity • Fisheries legislation (Commonwealth, State & Territory) | <ul style="list-style-type: none"> • Prohibition on sea dumping • Improved coordination of Ballast water regulations • Disaster/emergency response procedures |
|--|--|

Offshore oil and gas

- | | |
|---|---|
| <ul style="list-style-type: none"> • Offshore Petroleum Act • NOPSEMA/<i>EPBC Act 1999</i> • State & Territory extractive industries legislation • Threatened species legislation | <ul style="list-style-type: none"> • Improved EIA, including cumulative impact assessment and Climate Impact Assessment • No go areas • Threatened species protections • Regulations regarding noise impacts (eg seismic testing and cetaceans) |
|---|---|

Coastal development, tourism and recreation

- | | |
|---|---|
| <ul style="list-style-type: none"> • Fisheries legislation • Threatened species legislation (eg. cetacean provisions) • Native vegetation legislation • State and Territory planning legislation • Marine protected areas legislation • State & Territory pollution legislation • State coastal management legislation and plans • Local government planning policies | <ul style="list-style-type: none"> • Marine spatial planning • No take areas • Integrated coastal management (including coastal planning and beach management, and for inter-tidal areas) • Licensing recreational activities (eg: tourism and recreational fishing) • Riparian and coastal vegetation protection • Threatened species protection • Strengthen regulation of recreational boating and fishing impacts • Stormwater management |
|---|---|

To illustrate the detail involved in sectoral reform that could be done, see the following case study for the *EPBC Act 1999*.

Sectoral reform case study: *EPBC Act 1999*

The *EPBC Act 1999* is the key environmental legislation at the Commonwealth level, and seeks to protect certain matters of national environmental significance (**MNES**). Many of these matters reflect Australia's international obligations⁵⁹ and are relevant to the marine environment. There are nine matters or triggers.⁶⁰ The *EPBC Act 1999* also makes provision for marine bioregional planning, fisheries accreditation requirements, and protection of cetaceans. The *EPBC Act 1999* is therefore vital for the protection of the marine environment.

To a degree, the *EPBC Act 1999* has achieved some of the integration desired by *Australia's Oceans Policy*, for example through the marine bioregional planning process and sectoral accreditation such as for fisheries. Moreover, the Hawke Review in 2009 acknowledged the contribution of the *EPBC Act 1999* in shifting from a target species-based management approach towards ecologically sustainable fishing management practices.⁶¹

However, problems remain: the reserve system is incomplete; few commercial species have been listed as endangered; bilateral agreement processes between the Commonwealth and states and territories has been flawed; and the focus on assessment of individual projects is also limiting.⁶² The SoE (2016) concludes:

Outcomes of environmental protection for marine species and communities under the Environment Protection and Biodiversity Conservation Act 1999 are mixed. Since the State of the Environment 2011 report, no species have been removed from the list, and further species have been added to the list. Some species have been reclassified because of increasing threats, and ineffective management and mitigation of pressures and associated identified threats. There is a clear gap between identification of pressures and issues associated with threats in recovery plans, and implementation of activities that might mitigate pressures and assist the recovery of species or communities that are the focus of plans.

The Hawke Review also recommended the *EPBC Act 1999* be strengthened. These and other recommendations for reform are listed below. To better implement the vision of integrated marine management, it is recommended that new national environmental legislation be introduced – or the *EPBC Act 1999* be amended - to do the following:

- Include a new object on strengthening ecosystem resilience and adaptive capacity of ecosystems, and facilitating adaptation.
- Include new triggers requiring federal approval for the following:

⁵⁹ See, for example, the *Convention on Biological Diversity* (1992), *Convention concerning the Protection of the World Cultural and Natural Heritage* (1972), the *Convention on Wetlands of International Importance* (1971), and the *Convention on the Conservation of Migratory Species of Wild Animals* (1979).

⁶⁰ These are: world heritage properties, national heritage places, Ramsar wetlands, listed threatened species and ecological communities, migratory species protected under international agreements, Commonwealth marine parks, the Great Barrier Reef Marine Park, nuclear actions, and water resource around CSG and large coal mines.

⁶¹ Hawke A (2009) *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*. Available at <https://www.environment.gov.au/system/files/resources/5f3fdad6-30ba-48f7-ab17-c99e8bcc8d78/files/final-report.pdf>

⁶² For example, the 'significant impact' threshold is often not met by individual projects so the *EPBC Act 1999* does not apply, and cumulative impacts are not fully considered.

- projects with major greenhouse pollution footprints (for example, over 250,000 to 500,000t CO₂-e);
- projects that may have significant impacts on ecosystems of national importance;
- projects that may have significant impacts on areas under the marine National Reserve System and other listed protected areas.
- Require the mandatory consideration of climate change throughout its various decision-making processes and incorporated into assessments and management plans, including strategic assessments, marine bioregional planning, critical habitat listings, and threat abatement planning.
- Constrain the currently broad and ill-defined exemption for the ‘national interest’ to ensure it is for genuine national emergencies.
- Repeal provisions allowing federal approval powers to be handed to the States.
- Improve efficiency by:
 - accrediting equivalent impact *assessment* laws that meet or exceed clear national standards, whilst retaining Commonwealth approval;
 - reducing unnecessary project referrals by providing better guidance to proponents up front at the early stages of project design and development.
- Ensure robust strategic environmental assessment by:
 - improving information requirements;
 - requiring activities to achieve objective environmental outcomes such as ‘maintain or improve’ biodiversity (such a test should be underpinned by a requirement to apply an objective scientific assessment methodology);⁶³
 - requiring the mandatory assessment and consideration of possible future climate change scenarios;
 - requiring cumulative impacts of past, present and future activities to be considered;
 - revoking the accreditation of NOPSEMA to approve significant impacts on MNES (or, in the alternative, providing a ministerial “call-in” assessment and decision-making power);
 - improving community confidence and public engagement;
 - ensuring robust oversight and responsiveness through performance audit, review and “call-in” powers;
 - promoting responsiveness and adaptive management through regular reviews.
- Require the Commonwealth Government undertake a comprehensive national ecosystems assessment for Australia.
- Promote the increased use of critical habitat provisions by:
 - requiring that critical habitat be identified at the time of listing a threatened species;
 - identifying critical habitat for species already listed as threatened;
 - enabling buffer zones of critical habitat to be identified and protected;
 - ensuring that projected future habitat, including climate refugia, can be identified and protected.
- Include a range of amendments regarding threatened species including to:
 - introduce a trigger for vulnerable ecological communities;
 - simplify the nomination process for threatened species and ecological communities; and
 - enhance and resource the development of threat abatement and recovery plans.
- Require the Commonwealth Government to produce more strategic outlook reports including the identification of emerging threats.
- Improve bioregional planning by:

⁶³ A precedent for this is the Environmental Assessment Outcomes Methodology under the *Native Vegetation Act 2003* (NSW).

- adopting standards across Australia which are consistent, high quality and ecologically-based;
- requiring the mandatory consideration of climate change impacts.
- Expand the use of MPAs, particularly no-take or sanctuary zones, to include larger areas covering a greater range of habitats.
- Identify, and declare as MPAs, areas that may become vulnerable under climate change or important for species as they migrate and change in range.
- Establish an independent statutory National Environment Commission with advisory and oversight functions, and an independent Environment Protection Authority (EPA).
- Formally recognise Sea Country in coastal and marine areas that are of cultural significance to indigenous communities, and adopt arrangements for indigenous management.

Clearly there is some overlap between these potential amendments to strengthen the *EPBC Act 1999*, and what should be covered in a new Oceans Act – for example, the provisions around marine regional planning and how a new National Environment Commission would interact with a new Oceans Authority.

However, there are some functions that should remain with the Commonwealth Environment Department. These include that the Threatened Species Scientific Committee does all the listing of marine species, and the Department of Environment still does fisheries accreditation – with strengthened criteria for ecologically sustainable fisheries.

6. Linking the local to the global

This final part of this report considers nationally integrated marine management reform in the context of Australia’s international role and responsibilities.

Currently, the limits on Commonwealth authority differ depending on what sector is involved, for example fishing and shipping; or if a specific species is involved. However, the issues and impacts cross different boundaries from coastal waters to neighbouring seas and adjacent EEZs in the region, and out to the high seas. An effective Authority needs to be able to apply consistent objectives, principles, targets and plans across the seascape.

A new Oceans Act would rely in part on the Commonwealth’s responsibility to implement international agreements for its Constitutional validity. The relevant objectives, principles and concepts deriving from international agreements would therefore need to be clear in the legislation. This could be assisted by adding a Schedule of relevant international Conventions and agreements to the Act.⁶⁴ The Authority would have oversight over agencies implementing international agreements such as CITES and CMS, with an option to step in or require reform if objectives were not being achieved.

A new Oceans Authority would also play a crucial role linking Australia’s integrated ocean management with international developments, such as progressing an agreement on BBNJ, and ensuring Australia’s policy and legislation is consistent with international obligations within and beyond areas of national jurisdiction. This would be done by the new Authority consulting with relevant sectoral agencies in a process jointly led by Department of Foreign Affairs and Trade (**DFAT**)

⁶⁴ See ACF/NELA (2006), p126.

and the Authority.⁶⁵ The Authority and DFAT would sign off on national positions for the marine environment globally. In practice this would mean for example, the Authority would have a role in informing and approving the Australian positions put forward at IMO, ISA, RFMOs, UNEA and UNCLOS etc. There would also need to be detail on the process for embedding international issues into regional planning (for example, shipping channels, international fisheries etc).

The new Authority must have the mandate to deal with relevant organisations such as RFMOs and IMO. The Authority should have oversight of the policy agenda internationally, for example, providing input into FOA guidelines. The Authority should have a role advising the treaty committee concerning implications of signing international agreements and the implementation of international agreements.

This link between coordinated domestic policy and international developments is critical for comprehensive management of the catchment-coast-marine-high seas continuum.

The Oceans Act and regulations should also include provisions and transparent processes to: ensure Australian companies are responsible environmental citizens; create stronger obligations to implement treaties and agreement (this could include requirements such as EIA and Compatibility Statements for new agreements); and require associated reforms, for example to ensure consumer and supply chain safeguards are in place for global marine biodiversity.⁶⁶

Getting our own house in order is a crucial part of being globally responsible, and progressing the recommendations in this report would help Australia regain its status as a global leader in integrated oceans management, and help us meet our sustainable development goals.

Sustainable Development Goal 14: Life Under Water

The world's oceans – their temperature, chemistry, currents and life – drive global systems that make the Earth habitable for humankind. How we manage this vital resource is essential for humanity as a whole, and to counter balance the effects of climate change.

Over three billion people depend on marine and coastal biodiversity for their livelihoods. However, today we are seeing 30 percent of the world's fish stocks overexploited, reaching below the level at which they can produce sustainable yields.

Oceans also absorb about 30 percent of the carbon dioxide produced by humans, and we are seeing a 26 percent rise in ocean acidification since the beginning of the industrial revolution. Marine pollution, an overwhelming majority of which comes from land-based sources, is reaching alarming levels, with an average of 13,000 pieces of plastic litter to be found on every square kilometre of ocean.

The SDGs aim to sustainably manage and protect marine and coastal ecosystems from pollution, as well as address the impacts of ocean acidification. Enhancing conservation and the sustainable use of ocean-based resources through international law will also help mitigate some of the challenges facing our oceans.

GOAL 14 TARGETS

- By 2025, prevent and significantly reduce marine pollution of all kinds, in particular from land-based activities, including marine debris and nutrient pollution
- By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans

⁶⁵ In relation to certain multi-lateral environmental agreements it may be appropriate to delegate this authority to the specialist department/agency to retain carriage of the issue in cooperation with the Oceans Authority – for example, regarding whaling and migratory species.

⁶⁶ For further detail see: Humane Society International and EDO NSW (2018) *Next Generation Biodiversity Laws – Best Practice Elements for a new Commonwealth Environment Act*, Part J, p85.

- Minimize and address the impacts of ocean acidification, including through enhanced scientific cooperation at all levels
- By 2020, effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics
- By 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on the best available scientific information
- By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation
- By 2030, increase the economic benefits to Small Island developing States and least developed countries from the sustainable use of marine resources, including through sustainable management of fisheries, aquaculture and tourism
- Increase scientific knowledge, develop research capacity and transfer marine technology, taking into account the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology, in order to improve ocean health and to enhance the contribution of marine biodiversity to the development of developing countries, in particular small island developing States and least developed countries
- Provide access for small-scale artisanal fishers to marine resources and markets
- Enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in UNCLOS, which provides the legal framework for the conservation and sustainable use of oceans and their resources, as recalled in paragraph 158 of The Future We Want .

Acknowledgement of Experts consulted for this report

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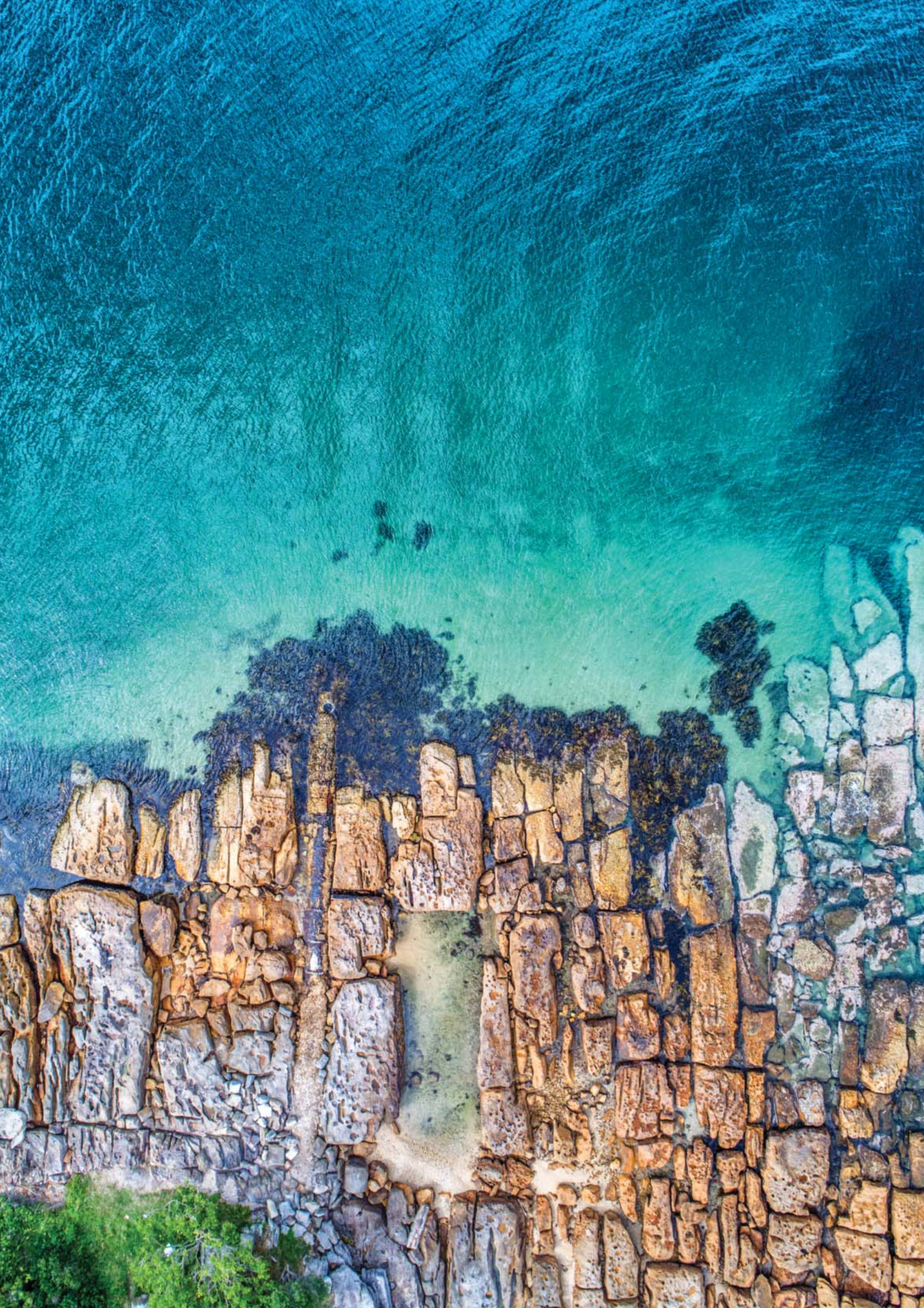
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