International marine conservation law and its implementation in Australia

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ABSTRACT

This article examines Australia's implementation of a variety of international conventions dealing with marine conservation. The Conventions selected for case study are the *Convention of International Trade in Endangered Species of Wild Fauna and Flora* (CITES) 1973, the *Convention on Wetlands of International importance especially as Waterfowl Habitat* (Ramsar Convention) 1971 and the *Convention on Biological Diversity* 1992.

The legislative and policy response to implement these Conventions at both the Commonwealth and State and Territories levels are examined. The analysis reveals a number of weaknesses in the legislative and policy framework. While the Commonwealth has comprehensive legislation and policy to implement and further develop most of the objectives of the Conventions, the State and Territory response has, in some instances, been piecemeal. A further weakness in the State and Territory legislative approach is that the focus on legislative development has, for the most part, been on land conservation rather than marine conservation.

The artificial jurisdictional division between the Commonwealth and the States and Territories means that marine conservation in Australia is inconsistent because most areas of the environment in need of protection cross the jurisdictional boundaries. The practical effect of this is that some areas in need of protection are covered by a strong legislative framework, while others are not. Particularly problematic is the fact that most marine biodiversity exists in State waters where the implementation of international conservation treaties is limited. Thus jurisdictional limitations reduce the ability of the Commonwealth to incorporate the majority of marine biodiversity into the Commonwealth's protective legislative framework.

The article concludes that a holistic approach to marine conservation is needed to provide effective protection to the marine environment. In order to achieve this there needs to be greater co-operation between all levels of Government to develop both legislation and policy that crosses the jurisdictional divide. There is also need for an ecosystem approach to marine conservation in Australia.

Introduction

Since the 1970s a number of international conventions (or treaties) dealing with the environment have been negotiated. These Conventions address diverse issues such as climate change, the protection of the oceans, biological resources and biological diversity, marine mammals, terrestrial animals, birds and their habitats, marine pollution and specific ecosystems like Antarctica. These Conventions represent the growing concern of the international community to provide coordinated protection for the environment. In broad term, the Conventions (a) prescribe frameworks for States to develop domestic policies to address different aspects of the environment; (b) emphasise State liability in respect of trans-boundary environmental damage; (c) encourage the sharing of scientific data among States; (d) make provision for financial assistance to enable less developed countries to participate in international efforts to address environmental problems; and (e) create institutional structures for monitoring and developing responses in respect of global environmental issues.

This article examines Australia's implementation of a three international conventions relevant to marine conservation. The Conventions selected for case study are the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) 1973, the *Convention on Wetlands of International importance especially as Waterfowl Habitat* (Ramsar Convention) 1971 and the *Convention on Biological Diversity* 1992. While they do not exclusively address marine conservation, they are more specific in their provisions relating to marine conservation than other global conventions, such as the UN Convention on the Law of the Sea, and are more directly relevant and broadly applicable than other global conventions, such as the Bonn Convention on Migratory Species.

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The legislative and policy response to implement these Conventions by both the Commonwealth and State and Territories Governments are examined. The analysis reveals a number of weaknesses in the legislative and policy framework. While the Commonwealth has comprehensive legislation and policy to implement and further develop most of the objectives of the Conventions, the State and Territory response has, in some instances, been piecemeal. They have often relied on pre-existing legislation, rather than implementing legislation specifically aimed at achieving the Conventions' objectives.

The division between the marine areas jurisdiction of the Commonwealth and of the States and Territories under the Offshore Constitutional Settlement results in a patchwork of marine conservation provisions in Australia. The practical effect of this is that some areas in need of protection are covered by a strong legislative framework, while others are not. Particularly problematic is the fact that most of the known marine biodiversity exists in State waters where the implementation of international conservation Conventions is more limited than in Commonwealth waters. This situation is made more grave by reason of the cross-jurisdictional dynamics of ecological systems, as mobile marine species cross jurisdictional boundaries and as human activities have impacts across boundaries. Thus jurisdictional limitations reduce the ability of the Commonwealth to incorporate the majority of marine biodiversity into the Commonwealth's protective legislative framework.

Convention on international trade in endangered species of wild fauna and flora 1973

The aim of the *Convention on International Trade in Endangered Species of Wild Flora and Fauna* (CITES) is to ensure that international trade in species (including specimen parts and products) of wild fauna and flora does not threaten the survival of those species. To achieve its objectives, the Convention establishes a framework for a system of import/export permits for controlling trade in endangered species. Parties may take stricter domestic measures than those provided for in the treaty, including complete prohibitions on trade (Art XIV.1). The Convention was adopted on 3 March 1973 and entered into force generally on 1 July 1975. The Convention entered into force in Australia on 27 October 1976. There are 154 parties to the Convention.

Under CITES, species considered able to withstand some level of exploitation can be exported, but only if an export permit is issued. A designated Scientific Authority in each State party issues permits if it is satisfied that export does not threaten the survival of the species; the specimen was obtained lawfully; that it will be shipped humanely; and that an import permit has been obtained by the importer (Arts III.2, III.3). In the country of import, the import certificate can be granted when the Scientific Authority there is satisfied that import will not be detrimental to the survival of the species, and that the specimen will not be used for commercial purposes. For species endangered by international trade, but not yet threatened with extinction, regulated commercial trade is allowed after an export permit has been granted. These are granted under strict conditions.

Article VIII outlines measures to enforce the provisions of the Convention and to prohibit trade in species that violates the Convention. These include measures to penalize trade in, or possession of, such specimens and to confiscate or return them to the State of export (Art.VIII.1). In addition, a Party may provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a specimen traded in violation of the measures taken in the application of the provisions of the Convention (Art.VIII.2).

The enforcement measures also provide that each Party shall maintain records of trade in specimens of species nominated in Appendices I, II and III which shall cover:

- the names and addresses of exporters and importers
- the number and type of permits and certificates granted
- the States with which such trade occurred
- the numbers or quantities and types of specimens
- names of species as included in Appendices I, II and III and, where applicable, the size and sex of the specimens in question (Art VIII.6).

Furthermore, each Party is required to prepare periodic reports on its implementation of the Convention and to transmit to the Secretariat an annual report containing a summary of the information specified in Article VIII.6. Parties are also required to submit a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the Convention (Art VIII. 7).

Although CITES purports to apply to every threatened species of flora and fauna, the treaty has been applied with little real consideration of the marine environment. There is little discussion of marine matters within CITES. Attempts to list marine species of commercial fishing value, such as the southern bluefin tuna and the Atlantic bluefin tuna have been unsuccessful, despite several attempts to have them listed, until 2000 when southern bluefin tuna was added to the protected list. This limited application of the treaty to the marine environment is, however, slowly changing. Marine species protected by CITES are primarily higher vertebrates, such as great whales, sea turtles and the salt-water crocodile. Five species of marine fish and six taxa of corals are listed under CITES.

The provisions of CITES that relate to introduction to land from the sea of listed species for the purposes of trade are perhaps the only substantive provisions of the Convention for which an agreed interpretation and implementation regime are yet to be realised. This is significant because there is a growing concern in the international community about the unsustainability of some commercial harvesting of marine species, particularly on the high seas. Illegal, unregulated and unreported fishing has become a serious issue for inter-governmental bodies responsible for the conservation and management of marine species. This increasing concern for the protection of the marine environment means that CITES is increasingly applied to the marine environment as the international community attempts to protect marine resources.

The language of CITES is unusual among environmental treaties for its prescriptive precision. This is attributable largely to its treatment of specific international trade rights and obligations, but also to its articulation during the 1970s generation of environmental negotiations, in which a smaller number of countries participated. The CITES obligations selected for this survey were chosen because they are normative obligations of substance, to be undertaken by the parties themselves, leading to readily identifiable implementation measures. Essentially these are the obligations that require specific trade control mechanisms to be set in place at the national level.

Implementation of CITES in Australia

Australian States and Territories have primary responsibility for management of wildlife within their geographic jurisdiction, as for other biodiversity, while the Commonwealth has responsibility for wildlife on federal lands and in Commonwealth waters. These responsibilities are distinct from those for management of movements of wildlife across Australian borders. As CITES is concerned with international trade of wildlife and wildlife products, its implementation rests primarily with the Commonwealth. Under the trade and commerce power of the Commonwealth Constitution (s51(1)), the Commonwealth has responsibility for control of imports and exports across international borders. However, the States and Commonwealth have agreed, in the Inter-governmental Agreement on the Environment to cooperate in the development of improved intergovernmental arrangements for regulating commercial use of native wildlife. This includes an agreement to set nationally sustainable harvesting levels, the establishment of national standards for the marketing of wildlife products, streamlining of permits and regulatory controls and enforcement.

Commonwealth responsibility in so far as CITES is concerned, is concurrent with State and Territory responsibility, but overrides it in cases of conflict. Several Australian State and Territory legislation make explicit references to CITES. State and Territory legislation often restricts inter-State movement of native wildlife within Australia, such restrictions on trade in native wildlife across borders within Australian is constrained, however, by the Constitution (s92), which guarantees freedom of trade between the States. Bates has suggested that interstate trade can be legitimately restricted for conservation purposes, if restrictions go no further than is necessary for conservation purposes (Bates 1987).

Commonwealth implementation of CITES

The Commonwealth legislation implementing CITES goes beyond the Convention's obligations to address, not only international trade in species listed in CITES, but also all exports of Australian native wildlife and imports of live exotic species. The Commonwealth government has used CITES to promote indirectly related domestic objectives. For example, to combat illegal fishing in Australia's sub-Antarctic waters, Australia nominated the Patagonian Toothfish for inclusion in CITES (Kemp 5.6.2002). Southern bluefin tuna had been unsuccessfully nominated in the past to combat irresponsible fishing of this stock as it migrates through Australian waters. Beyond the legislation, there is no specific Commonwealth policy on trade in endangered species, presumably because the legislation adequately implements obligations under the convention. State and Territory legislation similarly embraces native wildlife trade and is not complemented by policy.

The Commonwealth takes an assertive and thorough approach to the implementation of CITES, through the *Environment Protection and Biodiversity Conservation Act* 1999 EPBC Act). Part 13A of the Act broadly addresses, not just CITES listed species, but all exports and imports of wildlife. Thus it also implements aspects of the Convention on Biological Diversity concerning sustainable management of exported native wildlife and introduced pests.

Part 13A of the EPBC Act regulates international trade in CITES listed wildlife and also seeks to implement aspects of the Biodiversity Convention (s 303BA). It does this by regulating export of Australian native species other than those identified as exempt, and by regulating the import of live species that could adversely affect Australian native species or their habitats.

Under the EPBC Act, before a general permit for export or import is granted, the Act requires an assessment of the potential impact of the export or import on the survival of the species' taxon, or its recovery in nature of any relevant ecosystem (s 303CG(3)(a)). Assessments are also required before general permits for the live import of new species (s 303EF) and export of Australian native species (s 303DG(4)) are granted. Distinct from the CITES-related provisions are broader export controls on non-CITES listed native specimens (s 303DA), which include all native plants and animals other than those listed as exempt (s 303DB). The EPBC Act also provides for broader controls on import of non-CITES listed live exotic specimens, which are all prohibited other than those listed (s 303EA).

It is an offence punishable by up to 10 years imprisonment or 1,000 penalty units, or both, to export or import a CITES specimen without a permit or an applicable exemption (ss 303CC-CD). It is also an offence to import a specimen knowing that the export was contrary to the laws of a foreign country (s 303GQ). Other described offences include contravention of a permit condition (s 303GF), possession of illegally imported specimens (s 303GN) and subjecting an imported or exported specimen to cruel treatment (s 303GO). The Act also makes provision for the gathering of evidence, protection of witnesses (s 303GR-GT), questioning of witnesses (s 443A), and seizure and handling of specimens (444A-K).

Part XVII of the EPBC Act addresses further aspects of enforcement. All officers of the Australian Customs service are Inspectors *ex officio* under the Act, as are designated Australian Federal Police and Quarantine officers. They have wide powers to question and arrest suspects, board vessels, enter and search premises, search baggage and confiscate specimens and goods. The Australian Customs Service undertakes most investigations and border

enforcement. The EPBC Act seems comprehensive but purports to operate without affecting the continuing operation of *Customs Act* 1901 and *Quarantine Act* 1908 provisions concerning cross-border movements of wildlife (s 303GV). There is also State and Territory legislation relating to threatened species.

State and territory implementation

Australian Capital Territory

In the ACT there is no legislation regulating international trade in endangered species. The ACT has in place provisions concerned with the management of protected and endangered species and their protection, which include prohibitions on unlicensed trade of such species out of the ACT. The *Nature Conservation Act 1980* provides for Ministerial declarations of vulnerable or endangered species, endangered ecological communities and threatening processes. Where such a declaration is made, the Conservator of Flora and Fauna has to prepare an Action Plan to ensure the survival of the species or ecological community or to minimise the effect of any threatening process. Anyone can request the Flora and Fauna Committee, established under the Act, to recommend that the Minister make a declaration. The Conservator may also declare certain fish, invertebrates, other animals and plants to have protected or special protected status (Part II).

There are penalties for a number of offences under the Act for dealings with plants and animals. It is an offence under the Act to import or export from the Territory an animal other than an exempt animal or a protected native plant without a licence (ss 29 and 44). The penalties are double if the animal has special protection status. It is an offence under the Act to sell, import or export live fish from the Territory without a licence (s 30). Licences may be granted by the Conservator and his or her decisions in relation to licences may be reviewed by the ACT Administrative Appeals Tribunal (Parts III, IV & VIII).

New South Wales

The NSW *National Parks and Wildlife Act 1974* provides for the protection of threatened fauna and applies to all native fauna , other than those excluded by virtue of being included in Schedule 11 to the Act. The taking or killing of protected and endangered fauna is an offence unless a licence or authority has been obtained from the Director of National Parks (ss 98 and 99). It is also an offence to import or export protected fauna from NSW without a licence (s 106).

The penalty for harming or picking any endangered species, population or ecological community is 2000 penalty units or imprisonment for two years or both. The penalty in relation to vulnerable species is 500 penalty units or imprisonment or both. It is also an offence to damage critical habitats (section 118C). It is also an offence to damage the habitat of a threatened species, population or ecological community if the person knows that the land is habitat of that kind. (section 118D). The Land and Environment Court of NSW can order that actions be taken to mitigate the damage or restore the habitat. It can also order that offender to provide security for the performance of any obligations imposed by it (section 118E).

Northern Territory

The Northern Territory *Parks and Wildlife Commission Act* 1980 establishes the Parks and Wildlife Commission of the NT. The Commission is responsible for the conservation, protection and administration of parks, reserves and sanctuaries and of the natural environment of the Territory. The Act also establishes the Conservation Land Corporation which is able to hold land administered by the Commission. The Commission also promotes the sustainable use of wildlife and enforces protection and conservation.

The *Territory Parks and Wildlife Act* 1977, as extensively amended in 2000, provides that protected wildlife comprises all species that are Australian indigenous vertebrates, or located within a Northern Territory protected area, or prescribed as protected in regulations or by the Minister in the Gazette (s 43). They may not be brought into or taken out of the Territory without a permit or an applicable Ministerial notice in the Gazette (s 44). In addition, the formulation of wildlife management programs must take into account Commonwealth obligations under international treaties and agreements for the protection of wildlife (s 32(1)(f)).

Queensland

The Queensland *Nature Conservation Act* makes only one reference to CITES, where it is provided that, if the Governor in Council is of the opinion that wildlife included in Appendix I or II of the CITES is not indigenous to Australia, he or she may prescribe the wildlife as international wildlife (s 81). It is an offence to abandon, release into the wild, keep, use or introduce into Queensland any international wildlife except under a conservation plan applicable to the wildlife or an authority issued or given under a regulation (s 91). If someone applies for such an authority to release or introduce international wildlife the Minister may, before the authority is given, prepare a conservation plan or require the applicant to prepare such a plan (s 112(2)).

South Australia

The South Australian *National Parks and Wildlife Act* 1972 establishes the National Parks and Wildlife Service to administer the Act, which provides that the Governor may by proclamation constitute as a reserve any specified Crown land for the purpose of conserving wildlife or natural or historic features of the land, while at the same time permitting limited utilisation of natural resources of that land. The Act prohibits the export from, or import into, South Australia of protected animals or of native plant species prescribed by regulation, except in pursuance of a permit (s 59).

Tasmania

The Tasmanian *National Parks and Wildlife Act* 1970 prohibits trade in endangered species and makes the taking or movement of endangered species in or out of other States or Territories, an activity requiring a permit. It authorises the making of Regulations to prohibit or control the taking, hunting, buying, selling, keeping and exporting of fauna (s 32) and flora (s 33). Under the Wildlife Regulations, schedules of endangered species

are listed and it is an offence to 'take, buy or sell any endangered, wholly or partly protected wildlife.' It is also an offence to take or possess any form of wildlife in a conservation area or to disturb or interfere with any form of wildlife within a reserve.

The *Inland Fisheries Act* 1995 prohibits the sale of imported fish from unregistered premises (s65). A fish can be declared a protected species, thereby prohibiting the taking of such species (s131). Thislegislation is designed to protect the native species of fish in inland waters. It restricts the trade of fish species coming into the state and declares vulnerable species of fish protected.

The *Threatened Species Protection Act* 1995 (Tas) establishes the Threatened Species Protection System, to protect, study, promote and encourage the community to take responsibility for the native flora and fauna in Tasmania. The Act contains measures for the listing of threatened species and the protection of critical habitats. It also establishes the Scientific Advisory Council and Community Review Committee.

A species may be listed as threatened (s15). Once a species is listed as threatened, it is prohibited to knowingly "take, trade in, keep or process" that species without a permit (s 51). It is an offence to knowingly import or export any listed species. It is also an offence to take or harm a species or habitat if an interim protection order has been issued for that species or habitat.

Victoria

The *Flora and Fauna Guarantee Act* 1988 allows the responsible departmental Secretary to issue a permit or licence for, or publish an Order in the Government Gazette to authorise, a person to take, trade in, keep, move or process protected fauna. It is an offence to take, trade in or keep any listed fish without a licence or authorising Order. If a person is authorised by Order to take, trade in, or keep fish, it is an offence to deal with that fish contrary to the terms of the Order.

The *Wildlife Act* 1950 makes it is an offence to import into or export from Victoria without a permit, other than prescribed wildlife and wildlife products (s 50). The Secretary must grant the permit if satisfied, on the basis of information provided by the applicant, that each item of wildlife to which the application relates was lawfully obtained; is lawfully kept; and, in the case of the proposed import from another State or Territory Victoria, may be lawfully moved from that State or Territory.

Western Australia

It is an offence to bring any fauna into Western Australia, or to export it from the State, without first having obtained a licence to do so (ss 17(2)(d), 17(2)(c)). "Fauna" is defined to include "any animal indigenous to any State or Territory of the Commonwealth or the territorial waters of the Commonwealth" and "any animal that periodically migrates to and lives in any State or Territory of the Commonwealth or the territorial waters of the Commonwealth" (s 6). The *Fish Resources Management Act* 1994 prescribes a range of controls on the taking of aquatic organisms, including size restrictions, bag limits, area limits and limitations on the types of equipment that can be used to take fish.

Convention on wetlands of international importance especially as waterfowl habitat 1971 ('Ramsar convention')

The main objectives of the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention) are to promote the conservation of wetlands and waterfowl, establish nature reserves on wetlands, adequately provide for the protection and management of wetlands and develop the expertise of personnel in the management and research of wetlands. The Convention was adopted on 2 February 1971 by the UNESCO International Conference on Conservation of Wetlands of International Importance. It entered into force generally and for Australia on 21 December 1975. There are 133 Contracting Parties to the Convention and 1,229 listed wetlands.

The aims of the Convention are to be achieved through national action and international co-operation. Parties to the Convention must designate at least one wetland to be included in the "List of Wetlands of International Importance", which should be selected according to their international significance in terms of ecology, botany, zoology, limnology or hydrology (Article 2). When volunteering sites of interest for inclusion on the list, the Contracting party must keep in mind the international obligations applicable to the conservation, protection, management and wise use of migratory stocks surfacing within such a site (Art.2.6).

States that are Parties to the Convention have a duty to formulate and implement planning within their jurisdictions to promote the conservation and the "wise use of wetlands in their territory" (Art.3). Wise use is defined as sustainable utilisation of wetlands for the benefit of humankind and compatible with the maintenance of the natural properties of the ecosystem" (Ramsar Information Paper no. 7 www.ramsar.org). Parties are also under a general obligation to promote the conservation of wetlands and waterfowl, whether included on "The Ramsar List" or not Art.3) in particular, by establishing nature reserves on wetlands (Art.4).

Parties must encourage research and exchange of information and promote training regarding wetlands (Art.4). They must also consult with other Parties about the implementation of the Convention, especially with regard to transfrontier wetlands, shared water systems, shared species and development projects affecting wetlands (Art.5).

Australia was the first country to ratify the Ramsar Convention and currently has 57 sites listed, representing a surface area of 5.25 million hectares (Australia's National Report COP 8). The Ramsar Convention is important to Australia because of the many species of migratory birds reliant on wetland habitat. Australian implementation of the Convention on Wetlands is a complex mosaic for a simple convention. This is due to the multiplicity of politically sensitive water-related issues raised, including irrigation water allocation, integrated catchment management and coastal zone management. These are addressed under a plethora of laws and policies at Commonwealth, State and Territory levels but also, to an unusual extent, by specific intergovernmental arrangements due to the frequent occurrence of cross-border water basins.

Overview of domestic implementation mechanisms of Ramsar*

The management of wetlands in each Australian jurisdiction is carried out through a complex of legislation and policies setting out inter-related strategies. The following tables indicate which Australian jurisdictions have set in place legislation or policies to address the Ramsar obligations selected for survey. It does not suggest that the legislation or policies adopted completely fulfil the relevant Ramsar obligations but merely that one or more relevant instruments are in place that might substantially implement the obligations.

Ramsar Article 1: To designate wetlands

Jurisdiction	Implementing Legislation
Commonwealth	Environment Protection and Biodiversity Conservation Act 1999
NSW	Environment Planning and Assessment Act 1979
ACT	There is no specific legislation to designate wetlands
QLD	Nature Conservation Act 1992
Vic	There is no specific legislation to designate wetlands
NT	There is no specific legislation to designate wetlands
Tas	There is no specific legislation to designate wetlands. However, the Crown Lands Act 1976 can be used for the designation of Ramsar and other wetlands.
SA	There is no specific legislation to designate wetlands
WA	There is no specific legislation to designate wetlands

Ramsar Article 2: Promote conservation and wise use of wetlands

Jurisdiction	Implementing Legislation
Cth	Environment Protection and Biodiversity Conservation Act 1999
NSW	Water Management Act 2000, Catchment Management Act 1989, Coastal Protection Act 1979, Threatened Species Conservation Act 1995, Protection of the Environment Operations Act 1997, Native Vegetation Conservation Act 1997 and National Parks and Wildlife Act 1974
ACT	Land (Planning and Environment) Act 1991, Water Resources Act 1998 and Nature Conservation Act 1980
QLD	Water Resources Act 1989, Beach Protection Act 1968, Coastal Management and Protection Act 1995 and Integrated Planning Act 1997
Vic	Water Act 1989, Catchment and Land Protection Act 1994, Coastal Management Act 1995, and Flora and Fauna Guarantee Act 1988
NT	Water Act 1992
Tas	Water Management Act 1999
SA	Water Resources Act 1997 and Environmental Protection Act 1993
WA	Environment Protection Act 1986 and Water and River Commission Act 1995

Ramsar Article 4: Establish nature reserves on appropriate wetlands

Jurisdiction	**Implementing Legislation**
Cth	Environment Protection and Biodiversity Conservation Act 1999
NSW	National Parks and Wildlife Act 1974
ACT	Nature Conservation Act 1980
QLD	Nature Conservation Act 1992, Fisheries Act 1994, Marine Parks Act 1982 and Wet Tropics World Heritage Protection and Management Act 1993
Vic	National Parks Act 1975, Heritage Rivers Act 1992 and Wildlife Act 1975
NT	Coburg Peninsula Aboriginal Land and Sanctuary and Marine Park Act 1981 and Territory Parks and Wildlife Conservation Act 1977
Tas	National Parks and Wildlife Act 1970 and Threatened Species Protection Act 1995
SA	National Parks and Wildlife Act 1972
WA	Conservation and Land Management Act 1984

Key features of legislative framework

Commonwealth

The implementation of the Ramsar Wetlands Convention under the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act) strengthened the legal basis for national management. Prior to the development of this legislation, Ramsar Wetland management was carried out on an *ad hoc* basis exclusively under State and Territory legislation. This piecemeal approach led the World Wide Fund for Nature to suggest that Australian governments risk harsh international scrutiny unless they quickly fulfil promises to improve conservation of the country's wetlands (The Age 2.2.98).

The EPBC Act Part 15 (Protected Areas) Division 2 (Managing wetlands of international importance) is the primary legislative mechanism for Commonwealth implementation of the Ramsar Convention. Before this Act was adopted, there was no Commonwealth legislation directly addressing wetlands. Under the Act, the Commonwealth has statutory power to designate wetlands for inclusion in the Ramsar List (s 326).

If the wetland designated under the Ramsar Convention is in a Commonwealth area, the Minister must make a plan of management for the wetland (s 328). Commonwealth areas include external territories (other than Norfolk Island), areas owned by the Commonwealth and marine areas to the extent of Australian jurisdiction (s 525). Where a management plan is in place the Commonwealth and its agencies must comply with the plan (s 330).

Where the designated wetland is wholly or partly in an area controlled by a State or a self-governing Territory, then the Commonwealth must use its best endeavours to ensure that a management plan is prepared and implemented in cooperation with the relevant State or Territory (s 333). The Commonwealth and its agencies must ensure that the Commonwealth exercises its power in relation to such a wetland in accordance with the Convention and with any Australian Ramsar management principle made under s 335, as well as with any Australian management plan in place under s 333. The Commonwealth may also give financial or other assistance for the protection or conservation of Ramsar wetlands under the Act (s 336).

Actions that have, will have or are likely to have a significant impact on a "declared Ramsar wetland" are prohibited unless the approval of the Commonwealth is obtained or one of the various exemptions available under the Act is in place (s 16). Regulations can be made to assist in determining whether or not an impact is "significant" (s 524B).

A "declared Ramsar wetland" is a wetland designated under the Convention or a wetland of international importance which is under threat and which is declared by the Minister (ss 17-17A). A person who takes an action which has a significant effect on its ecological character without approval or exemption is liable to civil and criminal penalties (ss 16, 17B). The Minister may require an environmental impact assessment prior to granting approval for an action (ss 80-129). The exemptions available under the Act arise from bilateral agreements (ss 29-31), Regional Forest Agreements (ss 38-41), Ministerial declarations (ss 32-34), actions which do not require approval (s 160) and one-off exemptions granted in the national interest (s 158).

States and Territories

In the ACT, Northern Territory, Victoria, South Australia and Western Australia there is no specific legislation to designate wetlands in compliance with Ramsar's obligations. While no specific legislation exists for the designation of wetlands in Tasmania, the *Crown Lands Act* 1976 enables the Minister to set aside Crown lands for the purposes of another Act (s12). In Queensland the *Nature Conservation Act* 1992 provides for the declaration of protected areas. Among the types of protected areas that may be declared through this system are 'international agreement areas' (s59). Although an internationally listed Ramsar wetland would be an obvious candidate area, so far no Ramsar area has been specifically declared an international agreement area under the *Nature Conservation Act*.

Queensland has in place legislation that provides incidental protection for wetlands. The *Beach Protection Act* 1968, the *Coastal Management and Protection Act* 1995, and the *Integrated Planning Act* 1997 all provide protection for wildlife habitat in general and some wetland areas fall within their ambit. In NSW the *Environment Planning and Assessment Act* 1979 enables coastal wetlands to be designated under State Environmental Planning Policy 14 on Coastal Wetlands (SEPP 14) adopted pursuant to the Act.

Every State and Territory has existing legislation that promotes the conservation and wise use of wetlands. New South Wales, like the Commonwealth, has a relatively comprehensive legislative basis for wise use of wetlands, including integrated catchment management, coastal wetlands management and coastal zone management. There is also marine parks legislation and a specific strategy for wetlands nominations. This is an unusually comprehensive compared the legislative regimes of other States and Territories.

The level of protection offered to wetlands by this legislation varies markedly from state to state. The primary legislative tool for the conservation and wise use of wetlands in most states is legislation designed to promote the sustainable allocation of water to environmental and human uses. While the legislation varies from state to state, the Acts generally provide for Plans of Management for reserved areas. Management objectives for these are primarily oriented towards conservation with public use for recreation, education and research. In NSW the aim of the SEPP14 is to 'ensure that the coastal wetlands are preserved and protected in the environmental and economic interests of the State.' Within this framework, environmental assessment is required for proposed activities which may impact on identified coastal wetlands, including land clearing, land draining, land filling or the construction of levees. The consent of the Minister is required for high-risk development in these areas. SEPP 14 provides as well for restoration orders to ensure the rehabilitation of these wetlands where appropriate. NSW also has a number of other pieces of legislation aimed at the conservation and protection of certain environments and threatened species, which indirectly promote the conservation and wise use of wetlands.

In most states wetlands on the Ramsar list occur in National Parks. Thus the designated wetlands are managed and protected by the Parks and Wildlife Service under the *National Parks and Wildlife Acts* (or similar legislation) of the respective States. In Queensland, Ramsar sites are also protected as parts of declared fish habitats under the *Fisheries*

Act 1994. It is prohibited to perform works or other similar activities (s122) or to damage marine plants (s124) in a fish habitat area. The *Marine Parks Act* 1982 and the *Wet Tropics World Heritage Protection and Management Act* 1993 also provide some indirect protection for wetlands.

Ramsar listed sites by state

The following table lists the Ramsar designated wetlands in Australia by state:

Jurisdiction	Ramsar Site
New South Wales	Blue Lake, listed 17.3.96 (320ha) Gwydir Wetlands: Gingham and Lower Gwydir (Big Leather) Watercourses, listed 14.6.99 (823 ha) Kooragang Nature Reserve, listed 21.2.84 (2,926 ha) Lake Pinaroo, listed 17.3.96 (800 ha) Little Llangothlin Lagoon, listed 17.3.96 (258 ha) Macquarie Marshes, listed 1.8.86 (18,726 ha) Myall Lakes, listed 14.6.99 (44,612 ha) Narran Lake Nature Reserve, listed 14.6.99 (5,531 ha) Towra Point Nature Reserve, listed 21.2.84 (386 ha)
Queensland	Bowling Green Bay, listed 22.10.93 (35,500 ha) Currawinya Lakes, listed 11.3.96 (151,300 ha) Great Sandy Strait, listed 14.6.99 (93,160 ha) Moreton Bay, listed 22.10.93 (113,314 ha) Shoalwater and Corio Bays, listed 11.3.96 (239,100 ha)
Victoria	Barmah Forrest, listed 15.12.82 (28,515 ha) Corner Inlet, listed 15.12.82 (67,186 ha) Edithvale Seaford, listed 29.8.01 (1,245 ha) Gippsland Lakes, listed 15.12.82 (60,015 ha) Gunbower Forrest, listed 15.12.82 (19,931 ha) Hattah-Kulkyne Lakes, listed 15.12.82 (955 ha) Kerang Wetlands, listed 15.12.82 (9,419 ha) Lake Albacutya, listed 15.12.82 (5,731 ha) Port Phillip Bay and Bellarine Peninsula, listed 15.12.82 (22,897 ha) Western District Lakes, listed 15.12.82 (32 898 ha) Western Port, listed 15.12.82 (59,297 ha)
Northern Territory	Coburg Penisula, listed 8.5.74 Kakadu National Park (Stage I and components of Stage III) Kakadu National Park (Stage II), listed 15.9.89
Tasmania	Apsley Marshes, listed 16.11.82 (940 ha) Cape Barren Island- East Coast Lagoons, listed 16.11.82 (4,370 ha) Interlaken Lakeside Reserve, listed 16.11.82 (520 ha) Jocks Lagoon, listed 16.11.82 (18 ha) Lavinia Nature Reserve, listed 16.11.82 (7,020 ha) Little Waterhouse Lake, listed 16.11.82 (57 ha) Logan Lagoon, listed 16.11.82 (2,320 ha) Lower Ringarooma River, listed 16.11.82 (4,160 ha) Moulting Lagoon Nature Reserve, listed 16.11.82 (4,580) Pittwater-Orielton Lagoon, listed 16.11.82 (3,175 ha)
South Australia	Bool and Hacks Lagoons, listed 1.11.85 (3,200 ha) The Coorong, Lake Alexandrina and Lake Albert, listed 1.11.85 (140,500 ha) Coongie Lakes, listed 15.6.87 (1,980,000 ha) Riverland, listed 23.9.87 (30,600 ha)
Western Australia	Becher Point Wetlands, listed 5.1.01 (677 ha) Eighty-Mile Beach, listed 7.6.90 (125,000 ha) Forrestdale and Thomsons Lakes, listed 7.6.90 (754 ha) Lake Gore, listed 5.1.01 (4,017 ha) Lake Warden system, listed 7.6.90 (2,300 ha) Lakes Argyle and Kununurra, listed 7.6.90 (150,000 ha) Muir-Byenup System, listed 5.1.01 (10,631 ha) Ord River Floodplain, listed 7.6.90 (141,453 ha) Peel-Yalgorup system, listed 7.6.90 (26,530 ha) Roebuck Bay, listed 7.6.90 (55,000 ha) Toolobin Lake, listed 7.6.90 (493 ha) Vasse-Wonnerup system, listed 7.6.90 (1,115 ha)

Policy

The Commonwealth, NSW, NT, Queensland, Victoria and Western Australia have wetlands policies in place. The ACT, Tasmania and South Australia are currently preparing wetlands policies. The problem, as shown below, is that some State or Territory wetlands policies are not being actively implemented. This may be the case where the policies are not initiated by State or Territory political processes but are developed and funded under Commonwealth initiatives through the Natural Heritage Trust (NHT), as is the case for the ACT, NT, Queensland and South Australia.

The Commonwealth has a comprehensive wetlands policy framework to complement its legislative framework. The goal of the National Wetlands Policy is to conserve, repair and manage the use of wetlands wisely (Policy 2.3). It sets out a range of objectives, including meeting Australia's treaty commitments (Policy 2.4). The policy's six strategies are: managing wetlands on Commonwealth land and waters; implementing Commonwealth policies, legislation and programs; involving the Australian people in wetlands management; working in partnership with State/ Territory and local Governments; ensuring a sound scientific basis for policy and management; and international actions. Particular to the Australian context are emphases on integrated catchment management and the development of a shared vision between all spheres of Government to promote the application of best practice in relation to wetland management and conservation. http: //www.environment.gov.au/water/ wetlands/policy.htm

The main vehicle for implementation is the National Wetlands Program. It has provided $17 million so far to fund activities at three levels. Locally it supports relevant community projects. Nationally, it forms cooperative partnerships with State, Territory and Local Governments. Internationally it funds actions that promote the Ramsar Convention within the Asia-Pacific and Oceania region. The Program also supports implementation of international treaties such as the Japan-Australia and China-Australia Migratory Bird Agreements (JAMBA/CAMBA) and the Asia-Pacific Migratory Waterbird Strategy (1996-2000). It is now administered by the Wetlands Unit of Environment Australia under the National Heritage Trust. http:// www.environment.gov.au/water/wetlands/ nwp/index.htm

In conjunction with this Program, a number of other policy documents have been formulated to promote the protection and conservation of wetlands. The 'Environmental Water Requirements to Maintain Wetlands of National and International Importance' Report describes a framework for determining environmental water allocations for wetlands of international and national significance. the Report incorporates the determination of management objectives based on both the hydrological and ecological characteristics of the wetland and the uses, values and threats associated with it. http://www.ea.gov.au/water/ rivers/ nrhp/wetlands/index.html

Other policies which impact on wetlands include Waterwatch Australia, which coordinates and supports the monitoring of waterways http://www.waterwatch.org.au/. 'Revive our Wetlands' is a policy to address the degraded state of many Australia's wetlands. Over a period of three years $2.5 million will be provided. In 2001, the first year of the Revive partnership, 83 wetlands out of a target of 100 wetlands were selected across Australia. Of the 86 wetlands 19 are RAMSAR listed sites (www.reviveour wetlands.net/). The Asia Pacific Migratory Waterbird Conservation Strategy: 2001 - 2005 recognises threats to migratory waterbirds and their habitats. An international committee, the Asia- Pacific Migratory Waterbird Conservation Committee (MWCC) was established to monitor implementation of the Strategy.

The aim of the 1996 NSW Wetlands Management Policy is 'the ecologically sustainable use, management and conservation of wetlands in NSW for the benefit of present and future generations'. It seeks to encourage the management of NSW wetlands to halt and, where possible, reverse loss of wetland vegetation; declining water quality, declining natural productivity, loss of biological diversity, and declining natural flood mitigation. The Policy also aims to restore the quality of the State's wetlands, by promoting projects rehabilitating wetlands; re-establishing areas of buffer vegetation around wetlands; and ensuring adequate water to restore wetland habitats. In conjunction with this Wetlands Management Policy the NSW government is developing a draft Strategy for the Nomination of Ramsar sites on Private Land (www.dlwc.nsw.gov.au/care/wetlands).

Victoria has a strong wetlands policy framework. The Victorian Biodiversity Strategy seeks to retain and restore existing wetlands and wild populations of native wetland-dependent flora, fauna and ecological communities. It incorporates a representative selection of Victoria's wetland environments in the State's protected area network. The Strategy aims to forge partnerships between private owners of wetlands and government agencies to promote wise use of wetlands; and to increase community awareness and participation in wetland conservation.

The Strategy also aims to facilitate the investigation of potential new sites and to complete the process of identifying important and representative Victorian wetlands. Under the Strategy, the Government was to complete integrated management planning for the eleven Ramsar sites in Victoria. Incidental protection for wetlands is also provided by the Victorian Coastal Strategy 1997 which sets out principles and strategies for sustaining marine environments, as well as the protection of significant natural and cultural features, including wetlands. the Coastal Strategy is also intended to provide direction for the future use of the coast and identifying suitable development areas and opportunities.

In contrast to the relatively comprehensive publicly established policy frameworks of Victoria, NSW and the Commonwealth is the approach of Western Australia, Queensland, the ACT, South Australia, Tasmania and the Northern Territory. While these States and Territories have legislation to implement some of their obligations under Ramsar, they do not have a wetlands policy framework as at the time of writing. In each of the ACT, the Northern Territory, South Australia and

Tasmania, however, a Draft Policy on Wetlands is being developed with funding from the National Heritage Trust. The Western Australia *Wetlands Conservation Policy* 1997 makes specific reference to the objectives of the Ramsar Convention. It aims, inter alia, to prevent further loss or degradation of valuable wetlands to include viable representatives of all major wetland types, habitats and associated flora and fauna within a Statewide network. This policy, however, has not yet been implemented (www.environ.wa.gov.au).

In States and Territories lacking a coordinated wetlands policy, wetlands receive some indirect protection through other policies. In Queensland and Tasmania wetlands receive incidental protection through policies that focus on sustainable water use and land management practices. Similarly, in the ACT some wetlands issues are addressed in policies concerning freshwater resources quality and allocation, the Integrated Catchment Management framework and the Nature Conservation Strategy. In management plans for nature reserves or in action plans for threatened aquatic species, wetlands habitat may also be protected. A management plan is in place for the Ginni Flats Ramsar (ACT) site, which specifically addresses the protection of the Ramsar values of the site. South Australia has also implemented a draft management plan specifically for the wise use and protection of Ramsar listed wetlands (www.environment.sa.gov.au/herit_biodiv/ramsar).

Presuming that legislation and policy are indicative of actions taken pursuant to them, the implementation of Australia's obligations under Ramsar are inconsistent. The Commonwealth's *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act) substantially fulfills the Commonwealth's obligation as it provides a national legislative basis for the management of wetlands. State and Territory legislation, however, does not provide the same level of protection for wetlands as the EPBC Act. While NSW has a fairly thorough policy and legislative approach, other States and Territories such as the ACT, NT, Victoria, South Australia and Western Australia, have little or none.

The Commonwealth is attempting to remedy this situation by pushing for a more integrated approach and a lifting of performance by promoting policy development and implementation through the National Heritage Trust. However, while the Natural Heritage Trust provides financial incentives for States and Territories, it has no way of enforcing compliance and therefore is largely ineffective in States and Territories that do not want to develop or implement wetlands policy. In order to provide a more coordinated and effective approach to wetlands there needs to be greater cross-jurisdictional interaction between different levels of government.

Convention on the conservation of biological diversity 1992

The three objectives of the *Convention on the Conservation of Biological Diversity* (CBD) are the "conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources" (Article 1). The CBD was negotiated under the auspices of the United Nations Environment Programme (UNEP) and opened for signature on 5 June 1992 at the UN Conference on Environment and Development (UNCED). The CBD is open to all States and regional economic integration organisations. As at September 2001, there were 181 Parties. It entered into force generally and for Australia on 29 December 1993.

The CBD affirms the principle of national sovereignty over domestic natural resources and the responsibility of States to ensure that activities within their jurisdiction do not cause damage to the environment of other States or areas beyond their jurisdiction (Art.3). The promotion of inter-State cooperation for the conservation and sustainable use of biological diversity (Art.4), and especially of technical and scientific cooperation (A18), has facilitated many bilateral and multilateral projects.

Concerns about the over-exploitation of marine biodiversity resulted in the marine environment being one of the first substantive issues to be addressed by the Parties to the Biodiversity Convention. The "Jakarta Mandate on Marine and Coastal Biodiversity" (1995) addresses specifically the relationship between conservation, the use of biological diversity and fishing activities. The Jakarta mandate identified the over-exploitation of marine living and coastal resources as one of the five most important potential threats to marine and coastal biological diversity.

The mandate established a new global consensus on the importance of marine and biological diversity. The five areas of critical importance identified for action include:

- integrated marine and coastal area management;
- marine and coastal protected areas;
- sustainable use of marine and coastal living resources;
- mariculture; and
- alien species.

Following the Jakarta Mandate, the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) has addressed issues concerning marine and coastal biodiversity. SBSTTA has been responsible for a number of initiatives to promote the protection of marine and coastal biodiversity at an international level.

The first step in the CBD's mechanics for conservation and sustainable use of biological diversity is the identification and monitoring of the components of biological diversity and of the processes and activities that threaten those components (Art.7). Annex I provides a list of categories of habitats, species and communities for this purpose. These include ecosystems which are rich in biodiversity, contain large numbers of threatened species or have cultural or scientific importance, as well as individual species which are threatened or have medicinal, social or economic importance.

The second step is to provide for *in-situ* conservation (Art.8). For this purpose the Convention sets out rules

requiring the establishment and management of protected areas including buffer zones, the protection of threatened species, control of alien species and the control of living modified organisms. Article 8(j) provides for the preservation of indigenous and traditional community lifestyles and the utilization of knowledge of those communities relevant to the conservation and sustainable use of biological diversity. A third step, a complement to the *in-situ* measures, is *ex-situ* conservation, involving conservation measures for individual components of biological diversity collected in botanic gardens and seed banks (Art.9). A fourth step is the integration of conservation and sustainable use of biological resources into national decision making (Art.10). In implementing the fourth step, assessments are to be made of projects that are likely to have significant adverse impacts on conservation and sustainable use to minimise those impacts (A14). The CBD requires that each party should facilitate access by others to its genetic resources, to ensure fair and equitable sharing, on mutually agreed terms subject to prior informed consent (Art.15).

The language of the CBD aims to motivate Parties towards general objectives, rather than setting mandatory normative targets. The obligations are sometimes vague and repetitive. This makes it difficult to organise a non-arbitrary structure for analysis of the Convention obligations and to specify the steps necessary for their fulfillment (Johnston 1997). The CBD obligations selected for Australian implementation analysis concern, integrated management (Art.6(2)), identification and protection of biodiversity (As 7(a)-(c)), protected areas (As 8(a)-(c)), alien species (Art.8(h)), threatened species and populations (Art.8(k)), and environmental impact assessment (Art.14(1)(a)-(b)).

The open-ended nature of the obligations in the CBD ensures that any survey of their implementation must be broad, unwieldy and incomplete and is likely to some extent to be arbitrary in scope. The criteria used to limit the range of Australian tools for implementation of the CBD examined in this survey are: Measures implemented by the Commonwealth, State and Territory Parliaments and Governments, rather than local governments. The tools addressed are those formulated in legislation or in readily identifiable published policy instruments. The legislation or policy instruments examined are limited to those of major utility in meeting the CBD obligations.

Overview of domestic mechanisms

Under the Constitution of the Commonwealth of Australia, management for the conservation and sustainable use of biological diversity falls primarily within the powers of the Australian States and Territories. The Commonwealth has chosen not to disturb the current balance of power and intrude on State and Territory jurisdiction by enacting legislation to implement the CBD based on its external affairs power. Therefore, measures used to implement the CBD are not concentrated in the Commonwealth but are widely scattered across all Australian jurisdictions. The Commonwealth has sought to take a leadership role through the preparation of national policy and has revised and improved its legislation applicable within its own jurisdiction.

The primary national mechanism for Australian domestic implementation of the CBD is the *National Strategy for the Conservation of Australia's Biological Diversity*, signed by all State and Territory governments in 1996. The National Strategy is intended to drive coordination between the Australian jurisdictions, most of which have also adopted their own biodiversity policies.

The principal Commonwealth legislation is the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act). The Act will engage, for the most part, when a nationally important biodiversity concern is not addressed by the array of State and Territory legislation and policies. Most State and Territory legislation relevant to the obligations incumbent on Australia under the CBD tend focuses simply on protected areas and species, because this legislation preceded Australian ratification of the Convention. This legislation has not been formulated for the specific purpose of meeting CBD obligations. With some exceptions, it preceded the formulation of the CBD but can be used to implement the CBD. However, where State or Territory legislation was introduced or amended subsequent to the entry into force for Australia of the CBD, it often indicates a specific intention to conform to CBD obligations (e.g. New South Wales).

The following table indicates which Australian jurisdictions have in place legislation or policies which address the CBD obligations selected for survey. It does not suggest that the legislation or policies adopted completely fulfill the relevant CBD obligations but merely that one or more relevant instruments are in place that can be applied to substantially implement the obligations.

Australian Biological Diversity Legislation (L) and Policies(P):

CBD Implementation Obligations	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Integrated management (Art.6(2))					L				
Identification and protection of biodiversity (Art.s 7(a)-(c))	L/P	L/P	L	L/P	L			L	
Protected areas (Articles 8(a)-(c))	L/P	L/P	L/P	L/P	L	L	L/P	L	L
Alien species (Art.8(h))	L/P	P	L	L	L	L	L/P	L	
Threatened species and populations (Art.8(k))	L/P	L/P	L	L/P	L	L	L/P	L/P	L
Environmental impact assessment Art.14(1a-b)	L/P/	L	L		L			L	L

The table demonstrates that in almost all Australian jurisdictions legislation is the regulatory tool usually used for the management of protected areas, alien species and for threatened species and populations. In contrast, measures to integrate biodiversity with other management sectors are absent, other than in Queensland. Approximately half of Australia's jurisdictions, meet the obligations for identification and protection of biodiversity, and environmental impact assessment. Where these obligations are regulated, legislation is still more commonly employed than policy instruments.

Marine protected areas

The key management strategy used in Australia to protect marine biodiversity is the establishment of marine protected areas. The Marine parks are based on one or more of the World Conservation Union (IUCN) categories, namely strict nature reserve, wilderness area, national park, natural monument, habitat/species management area, protected land or seascape and managed resource protected area. The table below shows the list of marine parks by jurisdiction.

Australian Marine Parks by Jurisdiction:

Jurisdiction	Marine Park
Commonwealth	Ashmore Reef National Nature Reserve Cartier Island Marine Reserve Mermaid Reef Marine National Nature Reserve Ningaloo Marine Park Great Australian Bight Marine Park Tasmanian Seamounts Marine Reserve Macquarie Island Marine Park Solitary Islands Marine Reserve Lord Howe Island Marine Park Elizabeth and Middleton Reefs Marine National Nature Reserve Lihou Reef National Nature Reserve Coringa-Herald National Nature Reserve Great Barrier Reef Marine Park
New South Wales	Cape Byron Marine Park Jervis Bay Marine Park Lord Howe Island Marine Park Solitary Islands Marine Park
Tasmania	Crayfish Point Restricted Fishing Area Governor Island Marine Reserve Maria Island Marine Reserve Ninepin Point Marine Reserve Tinderbox Marine Reserve
Western Australia	Lancelin Island Lagoon Fish Habitat Protected Area Abrolhos Islands Reef Obersvation Areas Marmison Marine Park Ningaloo Marine Park Point Quobba Rowley Shoals South Murion Island Waterman's Reef
Victoria	Barwon Bluff Marine Sanctuary Beware Reef Marine Sanctuary Bunurong Marine National Park Cape Howe Marine National Park Churchill Marine National Park Corner Inlet Marine National Park Discovery Bay Marine National Park Eagle Rock Marine Sanctuary French Island Marine National Park Marengo Reefs Marine Sanctuary Merri Marine Sanctuary Mushroom Reef Marine Sanctuary Ninety Mile Beach Marine National Park Point Addis Marine National Park Point Cooke Marine Sanctuary Point Danger Marine Sanctuary Point Hick Marine National Park Ricketts Point Marine Sanctuary Twelve Apsotles Marine National Park Western Port Marine National Parks Wilsons Promontory Marine National Park The Archers Marine Sanctuary Yaringa Marine National Park

Legislative framework

Commonwealth

The principal Commonwealth legislation to implement the CBD is the EPBC Act. One of the intentions in drafting that Act was fulfillment of some of Australia's commitments under the CBD. The primary object of the Act is the promotion of 'conservation of biodiversity' (s 3(1)). The Act is more comprehensive than the legislative regimes of the States and Territories, although it has not yet been supplemented by regulations to adequately address access to genetic resources.

Thus biodiversity conservation is among its key objectives and it employs a range of means to that end, including protected areas, threatened species and endangered ecological community protection, environmental impact assessment of proposals, and the use of conservation agreements with private parties. The legislation operates primarily in Commonwealth areas and other specified areas, such as World Heritage listed areas, for which there is an identified international legal responsibility and national interest. Its threatened species and endangered ecological communities provisions, although not without their own shortcomings, complement State and Territory measures where the latter are inadequate. Thus, it can be used in limited circumstances, for example, where species or ecological communities are threatened but a State or Territory is unwilling or unable to take conservation action. It also provides for delegation of Commonwealth responsibilities to State and Territory administrations.

Under the Act, the identification of biodiversity for protection is promoted through broad-based community advice. In Commonwealth areas biodiversity inventories and bioregional plans are formed. The Minister is obliged to prepare inventories of listed threatened species, including cetaceans, that are either on Commonwealth land (s 27) or in Commonwealth marine areas (s 24) and to maintain those inventories in an up to date condition (ss 172-175). None have yet been prepared for marine areas. The Minister also has the power to prepare a bioregional plan for a bioregion in a Commonwealth area. The Minister may co-operate with, or provide assistance to, a State or self-governing Territory to prepare a plan for a bioregion that includes areas within that State or Territory (s 176(2)). Where a bioregional plan is in place, the Minister must take it into account in making decisions under the Act (s 176(5)).

Threats to biodiversity may be identified under the Act if they threaten the survival, abundance or evolutionary development of a native species or an ecological community (s 188(3)). Such key threatening processes may be the subject of a threat abatement plan under s 270B. The Commonwealth has responsibility for implementing such plans and the Commonwealth and its agencies must comply with them (ss 268-269).

The Act provides for the listing of protected areas on Commonwealth land. The five different types of protected area provided for in Part 15 of the Act (ss 313 - 390J) are World Heritage properties, Ramsar wetlands, Biosphere reserves, Commonwealth reserves, and Conservation zones. These areas must be regulated through Plans of Management established by the Minister, which must promote the conservation and protection of the area.

Alien species are regulated by s301A of the Act, which provides for a list of non-native species that do or may threaten biodiversity in Australia or would threaten biodiversity if they were brought into Australia. Where a species is on the list, the regulations can control import of and trade in the species and provide for the making of plans to reduce or eliminate the impacts of such species on biodiversity. Control of alien species under the Act may also be achieved through recovery plans for threatened species or communities made under the Act (s 269A). Control on the import of alien species is also achieved by the regulations under the *Customs Act* 1901 and the *Quarantine Act* 1908.

The Act provides for the listing and protection of Australian threatened species and ecological communities in Commonwealth areas (ss 178-194). Migratory species (ss 209-223) whales and cetaceans (ss 224-247) and certain marine species (ss 248-266A) may also be listed (Part 13). A spectrum of punishable offences for non-permitted taking, killing, injuring, moving, trading or keeping of a member of a listed threatened species of ecological community are set out in ss 196-196E). The Minister must ensure that a recovery plan is in place for each species (s 269A). Proposed actions that might have a significant impact upon listed native species are subject to environmental impact assessment (ss 18, 19).

Biodiversity threatening processes, such as pesticide application or invasion by alien species, can also be listed (s 183). There are 12 listed key threatening processes, as of October 2002, including competition and land degradation by feral goats and rabbits, and dieback caused by root-rot fungus. A threat abatement plan must be adopted, if the Environment Minister considers that such a plan is feasible, effective and efficient to abate the threat (s 270A). If the plan applies beyond Commonwealth areas, the Commonwealth is to cooperate in its implementation with the State or Territory concerned (s 269). In the latter case, the plan should be made jointly with a State or Territory (s 269A(2)) or by the Commonwealth adopting an applicable State or Territory plan (s 269A(7)).

The Act does not directly require matters having significant adverse effects on biodiversity to be assessed. However, it does provide the power to require environmental impact assessment for a range of different matters which may impact upon biodiversity. Part of the process of gaining that approval may involve one of a variety of forms of environmental impact assessment (ss 75, 87). The exceptions to the requirement for assessment operate when a 'management plan' is in place that has either been authorised by the Environment Minister under a bilateral agreement with an Australian state or territory, or has been approved by the Environment Minister and the proposed action approved by another Commonwealth official (ss 29, 32).

State and Territory

The State and Territory legislative regimes to implement the obligations of the CBD are piecemeal. All States and Territories have legislation that implements some of the obligations of CBD, but no State or Territory has a legislative regime that covers every obligation under the Convention. Every State and Territory has a legislative framework to protect threatened species and populations and to create protected areas to achieve this aim.

New South Wales

New South Wales has not developed a legislative regime to promote the protection of marine biodiversity. The focus instead, is on the protection of biodiversity on the land. There exists substantial legislation that addresses the protection of threatened species of flora and fauna and their habitat. Parts of the NSW legislation were enacted prior to the adoption of the CBD but in effect implement certain CBD obligations. Other parts, enacted subsequent to the CBD, do reflect the broader conceptual approach of sustainable development found in the CBD. The NSW legislation addresses, inter alia, integration of biodiversity conservation considerations into other management sectors, going beyond the traditional approach limited to protected areas and species.

Australian Capital Territory

The *Nature Conservation Act* 1980 is the principal legislative instrument for the conservation and sustainable use of the Territory's biological diversity. Adopted prior to the adoption of the CBD, it does not reflect a biodiversity oriented approach and its essential tools are protection of areas and threatened species and populations. Being a land-locked territory, it is not necessary for the ACT to develop a legislative regime to protect marine biodiversity.

Northern Territory

The Northern Territory's principal legislation on biological diversity is the *Territory Parks and Wildlife Conservation Act* 1977. The main techniques employed in the legislation are protection of habitat areas and of species. Although parts of the legislation reflect the approach to conservation and sustainable use employed in the CBD, such as by addressing threatening processes, the legislation is not holistic and is not integrated with other instruments.

Queensland

In Queensland, implementation of the obligations under the CBD are fulfilled primarily by legislative instruments. These adopt the traditional approaches for protection of areas and of species. Legislation designed specifically to protect marine biodiversity is the *Fisheries Act*, the *Marine Parks Act*, and the *Coastal Protection and Management Act* (even though the latter statute really is designed to protect the physical integrity of the coastal zone and not biodiversity as such). However, the Queensland legislation is unusual for its promotion of integration of biodiversity conservation objectives across management sectors. The *Integrated Planning Act* 1997, which addresses local government environmental planning, requires that "ecological sustainability" be taken into account when making decisions for new developments. The wide range of obligations implemented through legislation is also unusual. Legislative provisions address, for example, identification of biodiversity, alien species, indigenous concerns and access to genetic resources.

South Australia

The focus of the South Australian legislative regime is predominantly directed towards the protection of biodiversity on land, rather than marine biodiversity. The principal legislation is the *National Parks and Wildlife Act* 1972, which employs the twin tools of protection of areas and of species. This legislation regulates key processes affecting biodiversity, although much of its application is subject to ministerial discretion. Other land management legislation also integrates biodiversity concerns indirectly.

Western Australia

Western Australia has few measures in place to meet commitments under the CBD. Almost all its relevant legislation predates the CBD and there is no State policy designed to address conservation and sustainable use of biological diversity. It was the last State to agree to sign on to the National Strategy for the Conservation of Australia's Biological Diversity. Legislation that has significance for the management of marine biodiversity is the *Fish Resources Management Act* 1994.

Tasmania

Tasmania is in the relatively early stages of adopting legislative and policy instruments to implement the Convention on Biological Diversity. Tasmanian legislation concerning biodiversity has been partially updated, but implementation of CBD obligations remains patchy.

Victoria

Victoria took a national lead in innovating measures for the conservation and sustainable use of biodiversity in Australia. Its measures predate the adoption of the CBD and anticipate many of its requirements. The *Flora and Fauna Guarantee Act* 1988 is the principal instrument for biodiversity conservation in Victoria. This Act and the *Fisheries Act* 1995 provide a framework for the management of the protection of biodiversity and sustainable use of flora and fauna in a manner well suited to implementation of the Convention.

Policy framework

The principal policy mechanism to implement the CBD at Commonwealth level is the *National Strategy for the Conservation of Australia's Biological Diversity* (www.environment.gov.au/prtfolio/esd/biodiv/ strategy/ chapt7.html). Its stated aim is to 'bridge the gap between current activities and those necessary to ensure the effective identification, conservation and ecologically sustainable use of Australia's biological diversity'. The Strategy calls upon State and Territory Governments to develop complementary biodiversity strategies.

Among the objectives of the Strategy is the full implementation of the provisions of international agreements relating to the conservation and sustainable use of biological diversity to which Australia is a party. The National Strategy sets out a range of objectives, together with priority activities to be completed by 2000 and a second tier of priorities for 2005. It is complemented by previous policies and by some subsequent, more specific policies referred to below.

A Review of the National Strategy completed in 2001 concluded that significant advances had been made in mainstreaming biodiversity conservation (www.ea.gov.au/biodiversity/publications/review/index.html). In particular, the National Strategy had contributed to identifying threatening processes, managing for conservation and to implementing sustainable forestry. However, a number of the Strategy's specific objectives for achievement in 2000 were not fully met. This was due to incomplete knowledge of the dynamics of Australia's biological diversity, the short time available to achieve them since the adoption of the National Strategy, and the indeterminate nature of many of the National Strategy's objectives.

The National Strategy is complemented by numerous previous and subsequent national or Commonwealth policies. Important for its current usefulness among these is the *Natural Heritage Trust* (NHT), which funds a range of government and community biodiversity conservation programs under its umbrella. The NHT focuses on five key environmental themes - land (public and private), vegetation, rivers, coasts and marine, and biodiversity. However, concerns have been expressed, such as in the formal mid-term review in 1999, that the resources of the NHT are not allocated in accordance with a coherent strategy.

Another major policy framework for the protection of marine biodiversity at the Commonwealth level is the National Oceans Policy, released in 1999. The Policy, which sets out the framework for integrated and ecosystem-based planning and management, has a number of objectives which include the maintenance of Australia's marine biodiversity and viable populations of all native marine species. The implementation of the National Oceans Policy is to be achieved through regional Marine Plans. The Plans divide Australia into thirteen large marine domains.

The Policy offers a unique opportunity for the holistic and ecosystem-based management of Australia's marine jurisdiction. At present, the key factor affecting the effective implementation of the policy is the fact that the policy applies only to Commonwealth marine areas. The State and Territory governments have shown a reluctance to embrace the policy.

States and Territories

Australian Capital Territory

The ACT Nature Conservation Strategy addresses in detail the management of ecological threats to biodiversity. It aims to complement and refine the ACT's obligations under a number of national strategies related to biological conservation, such as the Intergovernmental Agreement on the Environment, the National Strategy for Ecologically Sustainable Development and the National Strategy for the Conservation of Australia's Biological Diversity. Community participation in conservation is treated as a necessary complement to the role of the government. The Strategy seeks to secure such participation via an open and consultative approach to policy development and management planning, and the encouragement of activities at the level of both the individual citizen, and volunteer organisation.

The Strategy deals only briefly with the issue of implementation of recommendations. The treatment of each thematic issue includes suggested objectives, action, performance indicators and targets. Yet these are not supported by specified time-frames and in many cases they lack a substantive commitment, relying almost solely on existing policy initiatives, or references to broad community support. The Strategy explains this lack of concrete implementation policy by referring to the statutorily mandated nature of the document, biological and administrative variables and resource uncertainties. It envisages 5 to 10 years of operation in its current form, with many of its implementation commitments being integrated into broader management and planning programs undertaken by government agencies. The Strategy provides for the review and reporting of the operation of the strategy in an attempt to ensure that biodiversity conservation in the ACT is a continuing process.

New South Wales

The NSW Biodiversity Strategy is the key policy instrument to implement the CBD obligations in NSW. The Strategy aims to promote coordination and the integration of government and community efforts. Its foci include community consultation, the management of threats to biodiversity, and improving knowledge. In particular, it aims to increase understanding of the ecological processes required to conserve biodiversity through scientific research survey and monitoring, taking into account the knowledge and values of Aboriginal and local communities. The NSW National Parks and Wildlife Service is responsible for overall coordination but other government agencies are to undertake projects, including State Forests of NSW, the Department of Land and Water Conservation, the Royal Botanic Gardens, the Zoological Parks Board, the Australian Museum and NSW Fisheries http://www.npws.nsw.gov.au/wildlife/biodiversity.html.

The NSW Biodiversity Strategy seeks to build on existing initiatives to develop a coordinated and cost-effective biodiversity conservation program involving the community, industry and all levels of government, ensuring that the rights, knowledge and values of local and Aboriginal communities are reflected. It also seeks to strengthen actions to inform, motivate and achieve the support of the community including local and Aboriginal communities, industry, State Government agencies, Local Government, in conserving biodiversity.

Northern Territory

The principal Northern Territory policy instrument is the *Strategy for the Conservation of Threatened Species and Ecological Communities* 1998. Its aim is to "enable those species and ecological communities threatened with extinction to survive and prosper in their natural habitat, and to minimise the chance of more species and communities becoming threatened." Its objectives loosely correspond with implementation obligations under the CBD. If these aims were achieved the Strategy would implement many of the obligations in the CBD. The policy is not, however, supported by a coherent plan and mechanism for achievement of its aims.

Queensland

A State Nature Conservation Policy was to be adopted under the *Nature Conservation Act* 1992, ten years later, however, that has still not happened. A move to bioregional, rather than State-wide biodiversity policies is emerging, with the draft Nature Conservation Plan for the South East Queensland bioregion having been released for public consultation in 2001. The process is slow moving and it is one of 19 terrestrial bioregions in Queensland (www.env.qld.gov.au/cgi-bin/w3-msql/environment/park/establishing/msqlwelcome.html?page=cb.html).

South Australia

There is no comprehensive biodiversity or nature conservation policy in South Australia. The National Parks and Wildlife Service provides relevant scientific programs and park management (www.dehaa.sa. gov.au/biodiversity/legislation.html). The South Australian government has adopted policies and programs corresponding with the National Strategy for Conserving Australia's Biological Diversity. There is no overriding or integrating policy concerning biodiversity for all government departments, such as the one that exists in NSW.

Tasmania

Tasmania's Draft Nature Conservation Strategy meets the obligations of the National Strategy and has strong links with the Australian Natural Heritage Charter and the Tasmanian State of the Environment process. It aims to ensure best-practice environmental management to maintain healthy ecosystems; conserve species and ecosystem diversity for their intrinsic worth and their value to current and future generations; recognize the importance of natural diversity for scientific, educational, aesthetic and recreational/ tourism purposes; build on, improve and co-ordinate conservation measures; and achieve community ownership of nature conservation programs in Tasmania (www.parks.tas.gov.au/publicat/tech/natconstrat/draftnatconstrat.pdf).

Victoria

Victoria adopted a Biodiversity Strategy in 1997 to fulfill its commitment under the National Strategy for the Conservation of Biodiversity. The focus of the Strategy is on conservation at the bioregional level rather than at individual species level. One of its goals is to ensure that useful information on biodiversity conditions and threats specific to local areas are available for use under local planning schemes. The Strategy highlights Victorian biodiversity conservation priorities and the intended processes for addressing them. More specific goals for biodiversity management in the Strategy are to ensure that ecological processes are restored within Victoria, that threatened species and communities are made more viable, and that there is a reversal of the decline in native vegetation leading to a net no loss target by 2000.

The aims of the Strategy are to increase public awareness of the need to conserve biodiversity and to foster partnerships between the community, industry and government in this effort. Thus, it seeks to promote, in both the public and private sectors, the adoption of standards embodied in Action Statements and recovery programs through environmental management systems (www.nre.vic.gov.au/plntanml/biodiversity/ strategy.html).

Western Australia

Western Australia was the last State in Australia to become a signatory to the *National Strategy for the Conservation of Australia's Biological Diversity*. The Western Australian State of the Environment Report 1998 recommended that the *National Strategy* as it pertains to WA be implemented and that a complementary strategy be developed for WA. The inference to be drawn from this is that the *National Strategy* was not being implemented in WA in any systematic manner. However, an inter-agency Memorandum of Understanding has been developed to coordinate the assessment of private land clearing in agricultural areas of the State and to incorporate biodiversity principles. The draft Memorandum provides that for local government districts containing less than 20% remnant vegetation, approval for clearing will only be granted after an assessment by the EPA.

Conclusion

The legislative and policy frameworks in most Australian jurisdictions to implement obligations relevant to marine conservation under the *Convention of International Trade in Endangered Species of Wild Fauna and Flora* (CITES) 1973, the *Convention on Wetlands of International importance especially as Waterfowl Habitat* (Ramsar Convention) 1971 and the *Convention on Biological Diversity* 1992 (CBD). are for the most part, adequate. The Commonwealth has led the way in implementing strategies to promote its international obligations. The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) meets many of Australia's obligations under Ramsar, CITES and the CBD. The Commonwealth has also developed a strong policy framework with the National Wetlands Policy and the National Strategy for the Conservation of Australia's Biological Diversity.

The EPBC Act, however, does not cover all Australia's international obligations under the Conventions. The Act provides a comprehensive framework for CITES but not for Ramsar or the CBD. The Commonwealth can effectively fulfill its obligations under CITES because CITES deals with the international trade of endangered species of flora and fauna. This is the exclusive jurisdiction of the

Commonwealth and therefore Commonwealth legislation can apply to all trade in these species. Commonwealth protection of biodiversity and wetlands under the CBD and Ramsar, however, is limited because the subject matter of these conventions are Constitutionally designated to be the concern of the States and Territories. This means that Commonwealth legislation can apply only to wetlands and address biodiversity issues within Commonwealth waters. The Commonwealth protection of these areas are fairly comprehensive, but the problem is that the majority of these wetlands and species are found in State and Territory jurisdictions.

Despite its faults, the framework developed by the Commonwealth can be contrasted to the response of most State and Territory Governments. Although all the State and Territory Governments address some of their obligations in legislation, the approach is piecemeal and the focus is on land conservation rather than marine conservation. In addition, there are many gaps that can mean that some threatened species and habitats are unprotected. Alternatively, they may be protected in some States and Territories, but not in others, which is problematic for three reasons: First, because flora and fauna can cross jurisdictional boundaries, receiving protection in one jurisdiction but not in the other. Second, because flora and fauna can be harmed by actions in one jurisdiction, such as alteration of water allocations, that impact on another jurisdiction .Third is the fact that most marine biodiversity exists in State waters.

Australian Constitutional arrangements, as articulated through the Offshore Constitutional Settlement are an impediment to a more coherent national approach to these environmental issues. The CBD illustrates these problems. Under the Offshore Constitutional Settlement, primary management responsibility for the conservation and sustainable use of biological diversity falls to the States and Territories. Even though the Commonwealth has a Constitutional power and a legislative and policy framework to implement its obligations under the Convention, it is the States and Territories that have the real responsibility for biodiversity management, despite their often piecemeal legislative framework.

These problems highlight the need for greater inter-State and Commonwealth-State cooperation. There needs to be greater co-operation between all levels of Government to develop both legislation and policy that crosses jurisdictional divides. The Commonwealth has to rely on the States for the planning, implementation and administration of the measures needed to ensure that the policy to implement treaty obligations can be successfully implemented on the ground and in the water. The Commonwealth does not have the staff or the local knowledge to take account of the huge diversity of Australian flora and fauna. A range of options may be considered to promote such cooperation. They include Commonwealth legislation to override State and Territory legislation under the current Offshore Constitutional Settlement. However, this is an unlikely prospect and unattractive as it does not constructively engage the States and Territories. More likely and useful would be the adoption of cross-jurisdictional regimes by the Commonwealth, States and Territories, based on large marine ecosystem areas. These could take the form of a mix of complementary legislative and policy instruments that variously address threatened species, marine parks and mechanisms for policy coordination that could be added to over time.

A holistic approach to marine conservation is needed to provide effective protection to the marine environment. Until jurisdictional gaps and inconsistencies are addressed, it is not possible to argue that Australia has fully implemented its international obligations under the CITES, Ramsar and Biological Diversity Conventions. A cooperative ecosystem management approach that bridges jurisdictional boundaries is needed to enable implementation of Australia's obligations under the Conventions and to provide effective protection for Australia's wetlands and biodiversity.

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