IMPACT

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CASE UPDATE: EDO NORTH QUEENSLAND CLIMATE CHANGE CASE

Wildlife Preservation Society of Queensland v Minister for Environment and Heritage

CHRIS MCGRATH
BARRISTER AT LAW

In the last edition of Impact, we reported on EDO North Queensland's new climate change case concerning greenhouse gas emissions from coal mining. This case commenced before Justice Dowsett in the Federal Court in Brisbane on 20 October 2005 ("the Greenhouse Emissions Case").

The Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc (Wildlife Whitsunday) is challenging decisions by a delegate of the Federal Environment Minister over the consideration of greenhouse gas emissions contributing to global warming from the mining, transport and use of the coal from two proposed coal mines.

The decisions under challenge were made under the *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act"), which provides an overarching framework for environmental protection in Australia. The trigger for assessment under the EPBC Act is whether an action has, will have or is likely to have a significant impact on a matter protected by the Act (such as World Heritage properties and listed threatened species).

The case builds upon the principles from last year's Nathan Dam Case (*Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24), in which the Federal Court ruled the Minister is required to consider direct and indirect impacts of actions, including downstream impacts of a dam due to farmers using water from the dam.

The Greenhouse Emissions Case follows the same principle (the mines being assessed for the burning of the coal by others) but now with a twist. The Greenhouse Emissions Case began on the basis that the Minister's delegate simply failed to consider the greenhouse gas emissions from the mines (a straightforward error under the Nathan Dam Case principle).

The delegate made no mention of greenhouse gas emissions in his statement of reasons for the decisions that the mines did not require assessment and approval under the EPBC Act.

However, the case changed fundamentally when the delegate gave evidence to the Court that in fact he gave detailed consideration to greenhouse emissions from the mines. The delegate said he concluded that, when judged against the scale of past, present and future global emissions, the greenhouse emissions from the mines would not be measurable or identifiable and, therefore, would not be likely to cause a significant impact to matters of national environmental significance protected under the EPBC Act.

Wildlife Whitsunday responded to the delegate's claim that he considered the greenhouse gas emissions from the mines by attacking his reasoning process as "atomistic". It argued that global warming is an international problem but the EPBC Act can only regulate actions at a national level.

The question of significance should, therefore, be addressed by asking whether the contribution to global warming of the likely emissions from these mines are significant at a national level in comparison with other actions in Australia contributing to global warming?

By raising this argument the Greenhouse Emissions Case moves beyond the principles in the Nathan Dam Case and attacks the heart of the Federal Government's current approach of, in effect, not regulating large projects with major greenhouse emissions (when judged on a national scale).

For more information about this case, please contact Kirsty Ruddock, Coordinator, EDO North Queensland on 07 4031 4766.

HUMANE SOCIETY INTERNATIONAL V KYODO SENPAKU KAISHA

EDO Appeals Federal Court Decision on Japanese Whaling

Humane Society International (HSI), represented by EDO New South Wales, returned to the Federal Court in November to stop Japanese whalers killing approximately 300-450 whales in the Australian Whale Sanctuary in Antarctica this summer in breach of Australian law.

The whales killed in Australian waters will be part of an expanded "scientific" hunt announced by Japan in June which will kill a total of over 900 Antarctic minke whales and 10 fin whales this year.

Kyodo Senpaku Kaisha Ltd, a Japanese company, conducts the whaling and sells the whale meat for consumption in Japan. The company's ships are currently on their way to Antarctica for the whaling season.

HSI is seeking permission from the Federal Court to proceed with a case against Kyodo Senpaku Kaisha Ltd for multiple and repeated breaches of the Commonwealth *Environment Protection and Biodiversity Conservation Act*. HSI seeks a declaration that the hunt is in breach of Australian law and an order that it be restrained.

In May 2005, Justice Allsop refused permission to proceed with the case citing concerns about Australia's diplomatic relations raised by the Attorney General.

At the hearing, HSI appealed against Justice Allsop's decision to the Full Bench of the Federal Court. Stephen Gageler SC, and Chris McGrath argued that diplomatic concerns should not prevent the case being heard.

For more information and updates on the case, please visit: www.hsi.org.au.

NATURE CONSERVATION COUNCIL OF NSW V MINISTER FOR SUSTAINABLE NATURAL RESOURCES

NSW Government Legislates to Defeat High Court Water Management Challenge

EDO New South Wales is disappointed to report that the New South Wales government has passed legislation to retrospectively validate all water sharing plans made under the *Water Management Act 2000*, including plans that may have been invalidly made.

As a result, the NSW Nature Conservation Council (NCC) will be forced to abandon its High Court challenge to the Gwydir Water Sharing Plan. The NCC, represented by the EDO, was listed to appear in the High Court on 13 December 2005.

The amending legislation was passed on 1 December 2005, despite strong opposition from peak conservation groups. The EDO briefed conservationists and members of parliament on the environmental implications of the amending Bill.

By validating flawed water sharing plans, and changing the manner in which flows are allocated to the environment, the amendments undermine the original intention of the *Water Management Act 2000* to protect the state's freshwater ecosystems.

Peak conservation groups have been highly critical of the amending legislation. Professor Don White from the Nature Conservation Council said, 'The new laws undermine the intention of the original *Water Management Act 2000* that aimed to protect the integrity of our water sources for all users. … It is important to recognize that healthy rivers are in everyone's interest'.

Amy Hankinson from the Inland Rivers Network said, 'The Government is subverting the primary intention of the Act - to give the environment priority in order to protect the water source. By changing the definition of environmental water, this bill carves out the Act's priority from the inside.'

Arlene Buchan from the Australian Conservation Foundation said, 'This Bill is deeply disappointing, since it undermines the Act's aim of putting river health first,' she said. 'A good mix of laws, community action and market solutions are needed to secure the state's water supply and protect and restore our wetlands and rivers. The water market will only work if underpinned by sound legislation,' she concluded.

For relevant parliamentary debates, visit www.parliament.nsw.gov.au, click on 'Hansard and Papers' and use the search function to identify Hansard related to the Water Management Amendment Bill 2005.

Litigation Diary: A Blow-by-Blow Account

In the previous edition of Impact, we reported on the commencement of merits review proceedings in the Australian Administrative Appeals Tribunal (AAT) by EDO New South Wales to protect the endangered Southern Bluefin Tuna. In this edition, we present a blow-by-blow account of the hearing, based on contemporanous accounts published by the Humane Society International. For more information, including updates on this case, please contact Jessica Simpson, Solicitor, EDO New South Wales, on 02 9262 6989.

23 September 2005
Court debates future of fastest fish in the sea

Humane Society International (HSI) opened its case today against the Federal Environment Minister, Senator Ian Campbell, over the future of fishing for southern bluefin tuna.

Representing HSI, Barrister Patrick Larkin told the Tribunal that "*southern bluefin tuna is a top order predator of the ocean. If the great white shark is like the lion, southern bluefin tuna is the cheetah*."

Southern bluefin tuna is the fastest fish in the sea, reaching speeds of 70km/h. "*We are the only predator fast enough to catch it and we are catching far too many*," said HSI's Wildlife and Habitat Program Manager, Nicola Beynon.

Southern bluefin tuna is considered severely overfished and the Minister's Threatened Species Scientific Committee has advised him that it meets the criteria for protection as an endangered species.

HSI is challenging the Minister's decision to declare the Australian Southern Bluefin Tuna Fishery a Wildlife Trade Operation, which allowed exports and fishing to continue at current levels.

HSI is arguing that in reaching that decision the Minister should not have been satisfied that the Fishery is not having a detrimental impact on the survival and conservation status of the species.

In making the declaration the Minister needed to be satisfied that the Fishery does not have a detrimental impact on the survival and conservation status of the species. HSI will argue that this criterion was not met.

"*southern bluefin tuna spawning biomass is estimated to have declined between 3-14% of its average unexploited level*"

Southern Bluefin Tuna is severely overfished. It is estimated that the population has been crippled to 3-14% of the level it was in the 1960s and the prognosis for its recovery is poor. Yet the Government has not required the Australian fishing industry to reduce its catch for the species since 1989 and Australia is responsible for over a third of the global catch.

The Minister's Threatened Species Scientific Committee has recently advised the Minister that Southern Bluefin Tuna meets the criteria for listing and legal protection as an endangered species. HSI is asking the Tribunal to overturn the Minister's decision to declare the Southern Bluefin Tuna Fishery a Wildlife Trade Operation and replace it with a decision that would give the species a chance to recover.

26 September 2005
Controversy in court over confidential tuna documents

The hearing was held up today while lawyers for Humane Society International (HSI), the Government, and the Australian Broadcasting Corporation debated whether the proceedings should be conducted in private.

The Tribunal ordered that the hearing this week could be held in public, providing a suppression order over a number of confidential documents is upheld until those documents go to a meeting of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) in October.

HSI can therefore advise that the media is able to attend the hearing and hear the debate with the exception of particular debate concerning the information contained in the confidential documents.

27 September 2005
CSIRO Scientist agrees fishery could collapse

Dr Tom Polacheck from the CSIRO today gave evidence in Humane Society International's (HSI) case against Federal Environment Minister, Senator Ian Campbell's decision to allow Australia's Southern Bluefin Tuna Fishery to continue exporting the endangered fish to sashimi markets in Japan.

HSI is protesting the Australian Government's failure to protect the species or even reduce the fishing quotas despite the population being severely crippled by overfishing.

The quota allocated to the Australian

Southern Bluefin Tuna Fishery has remained the same since 1989. Last year under the quota Australia captured approximately 70% of all the fish caught worldwide.

Dr Polacheck told the Tribunal that southern bluefin tuna "*would appear to fall either in the endangered or the critically endangered category*".

Dr Polacheck reported that "*southern bluefin tuna spawning biomass is estimated to have declined between 3-14% of its average unexploited level*". He also said that fishing and no other factor is responsible for the decline and that fishing at current rates is also preventing its recovery.

When asked if he agreed that the status of the southern bluefin tuna breeding stock is cause for serious biological concern, Dr Polacheck replied "*yes*".

Dr Polacheck further reported that the CSIRO has estimated that there is a 72% probability of the stock further declining under current catches.

When asked if he agreed that thereis a risk of the Southern Bluefin Tuna Fishery collapsing if current catch levels continue, Dr Polacheck replied "*yes*".

When asked if he agreed that the further decline of southern bluefin tuna recruitment could be abrupt, Dr Polacheck replied "*yes*".

29 September 2005
International Law expert says Australia can cut quotas unilaterally

Professor Don Rothwell, Challis Professor of International Law at Sydney University, has told the Tribunal that Australia can reduce its catch of the species and retain its voice at the international Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

In his evidence Professor Rothwell explained that Australia can set aside the portion of its quota that it does not catch for conservation and veto proposals by other CCSBT countries to increase their quotas to access the uncaught fish. This is because the CCSBT reaches agreement on quotas by consensus.

Other witnesses in the case have explained that Japan, the principal importer of southern bluefin tuna, has agreed not to accept imports of the fish from countries that are not members of the CCSBT or cooperating with it.

They have also explained that Australia is currently responsible for catching approximately 70% of all the southern bluefin tuna fish caught worldwide each year. The Government did not seek to cross examine Professor Rothwell.

Professor Rothwell's full affidavit is available online at www.hsi.org.au.

29 September 2005
Scientist says 25-35 years needed for tuna to recover to 'safe' levels

Under questioning from Humane Society International's (HSI) Barrister, an expert witness for the Federal Environment Minister admitted today that it will probably take 25-35 years to recover southern bluefin tuna breeding stock to 1980 levels even if there is zero worldwide catch for the species.

The expert, Dr James Findlay from the Bureau of Rural Sciences, was testifying in the case HSI is bringing against the Minister, Senator Ian Campbell, over the future of fishing for the species.

"Australia has domestic legal obligations for ecologically responsible fishing. It is no longer acceptable for the Australian Government to allow Australian fishermen to continue grossly over-exploiting a species on its way to extinction just because an incompetent international body says it can"

The international Commission for the Conservation of Southern Bluefin Tuna (CCSBT) has had rebuilding the stock to 1980 levels by 2020 as its objective. At least 1980 levels are considered to be a biologically safe reference point for the fishery.

The CCSBT currently allows approximately 14,000 tonnes of southern bluefin tuna to be caught per year, even though it is acknowledged that the 1980 target may not be achieved by 2020 even with zero catch.

Australia catches 5,265 tonnes of the species every year, comprised mostly of juvenile fish. This represents approximately **70%** of all southern bluefin tuna individuals caught worldwide.

Doctor Findlay likened unsustainable fishing to driving 90km per hour in a school zone at 3.05pm. "In HSI's view, the Southern Bluefin Tuna Fishery is in the danger zone and the Federal Environment Minister has not insisted that the Australian Fishery slow down. Both the fish and the fishery are at risk." said Nicola Beynon, HSI's Wildlife and Habitat Protection Program Manager.

The tribunal finished hearing evidence today. The Tribunal will reconvene on 11 November.

10 November 2005
Southern bluefin tuna has final day in court

Lawyers for Humane Society International and the Federal Minister for Environment face each other in court tomorrow to present closing arguments in the legal battle over the future of southern bluefin tuna fishing.

A confidentiality order over the latest scientific information has been lifted so the Australian public can now hear full details of the shocking state of the stock.

The species is considered critically endangered. The latest scientific information shows there is a 50/50 chance the species will be extinct by 2030 if current fishing levels continue.

Southern bluefin tuna is caught in the wild and fattened up in pens in Port Lincoln. Almost all of it is exported to Japan for the lucrative sashimi markets.

HSI is asking the Administrative Appeals Tribunal to overturn Senator Ian Campbell's decision to allow exports to continue because we say the fishery is not ecologically sustainable.

The international body that sets global quotas for the fish, the *Commission for the Conservation* of *Southern Bluefin Tuna*, met last month and once again could not reach an agreement on quota reductions.

This is despite the Commission's Scientific Committee giving unprecedented advice that as an immediate measure the overall catch for the endangered species should be reduced by 30% in 2006 or by 50% in 2007.

The Government is set to allow the Australian Fishery to catch 5,265t of southern bluefin tuna again this year, a quota that has remained unchanged since 1989 and represents approximately 70% of all the southern bluefin tuna caught worldwide.

"Australia has domestic legal obligations for ecologically responsible fishing. It is no longer acceptable for the Australian Government to allow Australian fishermen to continue grossly over-exploiting a species on its way to extinction just because an incompetent international body says it can", said Nicola Beynon, HSI Wildlife and Habitats Program Manager.

To read more about HSI's work to protect marine biodiversity, visit: www.hsi.org.au.

POLLUTION VICTORY

EDO South Australia Secures Improved Restrictions on Foundry Pollution

MARK PARNELL
PRINCIPAL SOLICITOR
EDO SOUTH AUSTRALIA

For several years, EDO South Australia has assisted the residents of North Plympton in their efforts to obtain relief from odour and noise pollution from the Castalloy automotive parts foundry, one of South Australia's largest foundries. This has been a frustrating exercise for the residents, who have seen promise after promise broken by the company and every deadline for compliance passed with no improvement. Despite the fact that this one factory was the single-biggest generator of complaints to the South Australian EPA, attempts to force the company to improve its performance were unsuccessful over many years.

The matter came to a head in 2003 when the EPA finally took enforcement action in the form of Environment Protection Orders and a revised Licence. The new licence required the company to comply with specified odour and noise levels by 30 June 2004. Castalloy appealed against this licence and two third parties sought to join the appeal. This was EDO South Australia's second attempt at such an application, having previously tried to have a residents' group joined in the long-running Hensley Foundry case, at Torrensville in 2000. This time, we were more successful, with the ERD Court rejecting the application by the Residents' Association, but approving an 'alternative' application by Mr Ed Woltynski, one of the individual residents affected by the pollution.

Mr Woltynski (represented by EDO South Australia) then joined the company and the EPA in over a year of fruitless negotiations in the compulsory 'round table conference'. By the time it was apparent that a resolution was unlikely to be reached, Castalloy (part of the Ion Automotive group) was in voluntary administration having posted record losses and suffering major operational difficulties at many of its South Australian and interstate plants.

The Administrators of the company, McGrath Nicol & Partners, have now stepped into the shoes of the Directors and the Court conference was resumed with a greater sense of urgency. The Administrators were fairly quick to realise that selling the business to a new buyer would be difficult unless the environmental dispute was resolved first.

With the licence about to expire, negotiations moved to focussing on what the next EPA licence for Castalloy (or subsequent purchasers) would contain. Whilst this was outside the scope of the original appeal, it made sense to resolve it as part of the appeal, rather than go through the motions of reissuing the licence and forcing another appeal.

So, with the Court's consent, the matter was settled the day before the licence expired with all parties signing a Deed of Settlement which included a new 10 year licence. Key features of the licence include: (1) odour to be reduced to 'two odour units' by 30 June 2006, and (2) night time noise to be reduced to 54dB by 30 June 2006 and 50 dB by 30 June 2007.

Under the Deed, the EPA agrees not to alter the odour or noise standards during the 10 year term, however it can alter other parts of the licence. Mr Woltynski agrees not to take any legal action against the company in the period up to June 2006 in relation to pollution, except for 'excessive short term intrusive noise or odour' resulting from particular work practices. Importantly, because the Residents Association was not joined to the appeal, it is not part of the settlement, therefore it could bring legal action against the company at any time if it felt that pollution levels were unacceptable.

In the final analysis, most residents will be happy that the odour and noise standards are now legally enforceable, however there is still resentment at the fact that it took far too long.

EDO INTERNATIONAL PROGRAM

Defending Community Rights in Papua New Guinea

Local communities in Papua New Guinea are often dealing with major timber and mining companies, but sign away their resources without a full understanding of their economic rights or the future environmental impacts. But today, there's an increasing demand for information about legal rights from land owners facing logging, mining and fisheries corporations. A new breed of public interest lawyers are working with resource owners in Papua New Guinea.

ABC Radio recently interviewed Paula Bariamu-Nato, a lawyer from the Centre for Environmental Law and Community Rights (CELCOR) in Papua New Guinea. The interview is available online as a text transcript or streaming audio at: www.abc.net.au/ra/pacbeat/stories/s1512754.htm.

EDO New South Wales has worked with CELCOR for a number of years, supporting their work with communities affected by logging and mining developments.

For more information about the EDO International Program, please visit www.edo.org.au/edonsw/site/international.asp.

Legal Implications of the Impacts of Shark Meshing on Endangered Species

JESSICA SIMPSON
SOLICITOR
EDO NEW SOUTH WALES

The purpose of this paper is to give a brief introduction to some of the legal issues surrounding the operation of the New South Wales beach meshing program, in particular, the impacts of the program on marine species which are protected under Commonwealth and New South Wales law.

Introduction

Australia is recognised internationally as a world-leader in relation to the protection of marine species. At an international level, Australia is a party to a number of important conventions which aim to conserve and protect the marine environment. On national and State levels, Australia has strong laws recognising, protecting and assisting the recovery of threatened marine species. However, those laws and international obligations are potentially breached by the continued operation of the shark control programs on the beaches of NSW and Queensland.

Impacts on Threatened Species

Since the protective beach nets were first installed on NSW beaches in 1937 and in 1961 in Queensland, thousands of sharks and other species have been caught in the nets. One of the main problems with the NSW and Queensland beach meshing programs is the significant impact the nets have on non-target species or by-catch, several of which are listed threatened species and protected under State and federal laws. For every dangerous shark which is caught, potentially hundreds of harmless species are also killed.

By-catch in the beach nets includes sharks which are harmless to humans, such as the Grey Nurse shark and the Port Jackson shark, as well as other species including whales, dolphins, dugongs, rays, turtles and fin fish. When non-target sharks and marine mammals are found caught in the nets they will be released if they are alive, otherwise they will die in the nets and be dumped at sea.

In July last year, the death of a baby humpback whale which drowned in a Gold Coast shark net was well publicised[1]. Another baby humpback died in the Gold Coast nets in August this year[2].

"Death or injury to marine species following capture in shark control programs on NSW ocean beaches" has been listed under the *Fisheries Management Act 1994* (NSW) and the *Threatened Species Conservation Act 1995* (NSW) as a Key Threatening Process[3]. This means that the NSW Fisheries Scientific Committee has found that the NSW shark control program:

(a) adversely affects 2 or more threatened species, populations or ecological communities, or
(b) could cause species, populations or ecological communities that are not threatened to become threatened[4].

The listed threatened species identified by the Scientific Committee as being adversely affected by the shark nets are the Grey Nurse Shark and the Great White Shark. Both of which are protected species. The Scientific Committee has also found that the shark nets could cause species which are not threatened to become threatened.

The Grey Nurse shark is NSW's most endangered shark. It became the world's first protected shark in 1984 under NSW legislation[5]. In NSW it is listed as endangered and at the Commonwealth level, the east-coast population of the species, which is found in southern Queensland and along the NSW coast, is listed as critically endangered, facing extinction[6]. Estimates of the numbers of Grey Nurse shark vary, but there are thought to be between 200-500 left[7]. There are a number of critical habitat sites for Grey Nurse sharks in NSW, including one at Magic Point near Maroubra[8]. The NSW Fisheries Scientific Committee has noted that the shark nets are at times placed close to this designated critical habitat[9].
The Scientific Committee acknowledges that with such a small population, the loss of any individual of this species has a serious effect on the recovery of the population[10]. While an average of only one Grey Nurse shark is caught in the nets every year, with such few numbers left, this alone has a significant impact on the species. In September last year two adult female Grey Nurse sharks were killed in the shark nets[11].

Other threatened species which are caught in the nets include dugongs and loggerhead turtles, which are listed as endangered species, green turtles, leatherback turtles, humpback whales and Australian fur seals, which are listed as vulnerable under NSW law[12]. Loggerhead and green turtles are also protected under federal legislation[13].

As for the Great White Shark, whilst the species is recognised as being dangerous to humans, the species is protected both internationally and nationally[14]. It is listed as vulnerable under the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* and the *NSW Fisheries Management Act*[15]. The Great White shark is also listed as endangered on the Convention on Migratory Species to which Australia is a party. This listing obliges parties to the Convention:

a) to conserve and restore those habitats of the species in order to remove the species from the danger of extinction; and
b) to prevent or reduce factors that are endangering the species. One such factor is shark nets.

A Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals is being held in Nairobi this week and Australia has called for the development of a Global Agreement for the protection and recovery of the Basking, Great White and Whale Sharks[16]. Australia is also calling for the development of a memorandum of understanding in the Pacific Ocean for the protection of marine turtles, which are regularly caught in the shark nets.

Given that a number of marine species which are regularly caught in the shark nets are protected under federal law, the Humane Society International nominated death or injury to marine species due to the NSW and Queensland shark meshing programs as a key threatening process under federal legislation[17].

The Commonwealth Threatened Species Scientific Committee found that although any death or injury to a Grey Nurse Shark would be likely to have a significant impact on the population, the death of Grey Nurse Sharks in shark nets and drumlines is not likely to cause the species to be eligible to move up to the next category of threatened species listing, which is extinct in the wild[18]. Accordingly, the threshold which the Scientific Committee applies when considering nominations for threatening process listing is that a process such as shark netting, which has an adverse impact on a species listed as critically endangered, will not be listed as a Key Threatening Process unless it causes the species to become extinct. This threshold is dangerously high and has no regard for the precautionary principle[19].

The Commonwealth Recovery Plan for the Grey Nurse Shark[20], which was prepared in 2002, states that shark netting has a significant impact on the Grey Nurse Shark and recommends that alternative methods of shark control be trialed[21]. This has not yet occurred.

Liability Issues Arising from Removal of Shark Nets

I have also been asked to comment on whether the NSW Government, which is responsible for the beach meshing program in NSW, would be liable in the event that it ceases the beach meshing program and provides no alternative form of protection to swimmers and a person is injured by a shark.

It is the opinion of the Environmental Defender's Office (NSW) Ltd that it is unlikely that the NSW Government could be held liable for injury to a swimmer by a shark following removal of the shark nets. This is primarily due to the operation of provisions of the *Civil Liability Act 2002* (NSW) which relate to "inherent risks" of activities[22], recreational activities[23] and public authorities[24].

In our view, the NSW Government does not owe a duty of care to swimmers to protect them from shark attack. If any duty of care arises, it would be due to the reliance by a swimmer on the presence of shark nets at the beach. Such a duty could be fulfilled by erecting warning signs on beaches which are currently netted stating that the nets are no longer in place.

Conclusion

Although Australia has strong laws in place for the protection of threatened marine species, the beach meshing programs in NSW and Queensland have had an adverse impact on many marine species, a large number of which are threatened and protected under State and federal laws. Beach meshing has contributed to some of these species being listed as threatened.

The continuation of beach meshing both breaches laws protecting threatened species and could contribute to those species already listed being moved to higher levels of endangerment.

The NSW Government should act now to stop the continued killing of threatened species in the shark nets. The excuse of public liability can no longer be used to justify the continued operation of the beach meshing program.

ENDNOTES

1. See Australian Marine Conservation Society Media Release 17 July 2005, Juvenile whale sacrificed for peace of mind"; *Daily Telegraph* 20 July 2004, "Remove the nets expert call for change as baby whale dies; Australian Marine Conservation Society Media Release 7 September 2004 "When will the slaughter end?".
2. *The Age* 2 August 2005 "Whale mum mourns calf".
3. "The current shark meshing program in New South Wales waters" has been listed in Schedule 6 of the Fisheries Management Act 1994 (NSW); "Death or injury to marine species following capture in shark control programs on ocean beaches (as described in the final determination of the Scientific Committee to list the key threatening process)" has been listed in Schedule 3 of the *Threatened Species Conservation Act 1995*.
4. Section 13 *Threatened Species Conservation Act 1995*.
5. First listed as vulnerable in October 1999 pursuant to the specification in Division 1 of Schedule 4 to the *Fisheries Management Act 1994* (NSW), the status was upgraded to endangered in April 2000. The GNS was first listed as a protected fish in NSW in 1984 under the *Fisheries and Oyster Farms Act 1935* (NSW). This was the first time that a shark species had been protected anywhere in the world.
6. Pursuant to s 178 *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
7. Environment Australia., *Recovery Plan for the Grey Nurse Shark (Carcharias taurus) in Australia,* June 2002, p. 6.
8. See the register of critical habitat and buffer zones for the Grey Nurse Shark at http://www.fisheries.nsw.gov.au/threatened_species/general/species/gns_critical_habitat_and_buffer_zones
9. Fisheries Scientific Committee, *Final recommendation – current shark meshing program in New South Wales waters*. Viewed at http://www.fisheries.nsw.gov.au/__data/assets/pdf_file/5262/FR-24-Shark-Meshing.pdf
10. Ibid.
11. Humane Society International Inc, News Release, 29 September 2004: Shark death toll continues to rise: Shark nets claim two critically endangered Grey Nurse Sharks. Viewed at http://www.hsi.org.au
12. See the threatened species schedules of the *Fisheries Management Act 1994* (NSW). Viewed at http://www.fisheries.nsw.gov.au/__data/assets/pdf_file/11799/ts_schedules_1-05.pdf
13. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) List of Threatened Fauna. Viewed at http://www.deh.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=fauna
14. Listed as vulnerable under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth); listed on Appendix 1 of the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) as endangered.
15. See *Environment Protection and Biodiversity Conservation Act 1999* listing viewed at http://www.deh.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=64470; *Fisheries Management Act 1994* listing viewed at http://www.fisheries.nsw.gov.au/threatened_species/general/species/Grey_Nurse_Shark
16. Humane Society International Inc News Release, 21 November 2005 "HSI to help Australia broker deals for strengthened shark, turtle, dugong and whale protection".
17. See list of unsuccessful nominations viewed at http://www.deh.gov.au/biodiversity/threatened/nominations/shark-control-programs.html
18. Ibid.
19. As defined in Principle 15 of the Rio Declaration on Environment and Development (adopted in 1992 by the United Nations Conference on Environment and Development [UNCED] in Rio De Janeiro as "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".
20. Environment Australia, Recovery Plan for the Grey Nurse Shark (Carcharias taurus) in Australia, June 2002. Viewed at http://www.deh.gov.au/coasts/publications/grey-nurse-plan/index.html.
21. Ibid, p. 14.
22. Section 5I.
23. Section 5M.
24. Section 43A.

Sanctuaries, Protected Species and Politics

How Effective is Australia at Protecting its Marine Biodiversity?

ILONA MILLAR
PRINCIPAL SOLICITOR
EDO NEW SOUTH WALES

JESSICA SIMPSON
SOLICITOR
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This article was originally presented at the 2005 IUCN Academy for Environmental Law Colloquium – Biodiversity Conservation, Law and Livelihoods – held at Macquarie University, Sydney, from 10-15 July 2005. The article has been published in two instalments: Parts 1 and 2 have been published in this edition of Impact, and Parts 3 and 4 will be published in the March 2006 edition.

Introduction

Consistent with international obligations,[1] marine biodiversity protection in Australia is achieved primarily through the establishment of protected areas or sanctuaries, the sustainable management of fisheries and the protection of indigenous and endangered marine species. Australia has historically had a multiplicity of legislative regimes at a Federal and State level that addressed the protection for the marine environment. However, in recent years, with the adoption of Australia's *Oceans Policy*[2] in 1998 and the passing of the *Environment Protection and Biodiversity Conservation Act 1999 (C'th)* ("**EPBC Act**"), the Federal and State governments have begun to develop complementary management approaches for marine ecosystems and to put in place strong legal sanctions to enhance the protection of the marine environment.

This paper provides an overview of the current legal and policy framework for the protection of marine biodiversity in Australia, with special reference to the enforcement of that protection through the EPBC Act. Using the recent decisions of the Federal Court in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*[3] and the pending case before the Administrative Appeals Tribunal, *Humane Society International v Minister for Environment and Heritage,* as case studies, the paper explores the effectiveness of the protection afforded by Australian laws in circumstances where politics and complex international relations can undermine conservation objectives.

Part 1 - Background to Australia's commitment to marine biodiversity protection

At an international level, Australia has played a pivotal role in negotiating international agreements for the protection and sustainable management of oceans and marine species. Examples of this leadership include first, Australia's strong opposition to proposals to lift the ban on commercial whaling and the condemnation of the exploitation of loopholes in the *International Convention on the Regulation of Whaling 1948* ("**Whaling Convention**") relating to scientific whaling by Japan at the forum of the International Whaling Commission ("**IWC**"). Second, Australia's strong support for the establishment of high seas marine protected areas and the adoption of more effective high seas governance in relation to the regulation of fisheries and bioprospecting.[4] Third, Australian delegations have, for over 30 years, been actively involved in negotiations for all the major international agreements dealing with marine pollution promulgated by the International Maritime Organisation and have implemented domestic laws and policies to give effect to those agreements.[5]

Australia has also been closely involved in the development of regional approaches for the protection of the marine environment. In recent years, Australia has joined with States in the South Pacific to adopt the *Convention for the Protection of the Natural Resources and Environment of the South-West Pacific Region 1986* and has committed to cooperate with South Pacific States in the surveillance and enforcement of fisheries[6] and also the sustainable management of regional fisheries.[7] Importantly, Australia is also viewed as a strong supporter of the establishment of multi-jurisdictional protected areas, including the Southern Ocean Whale Sanctuary and the proposed South Pacific Whale Sanctuary.[8]

The reasons for Australia's strong engagement in marine biodiversity protection relate most obviously to the vested interest that Australia has in sustainable oceans management due to its vast marine territory. Australia has rights and responsibilities over approximately 16 million square kilometres of oceans,[9] making Australia the third largest fishing zone in the world. Over 97% of that jurisdiction[10] forms what is known as the exclusive economic zone ("**EEZ**") which surrounds mainland Australia and its external territories and extends to 200 nautical miles seaward of Australia's territorial sea baselines.[11] Pursuant to Article 56 of the *United Nations Convention on the Law of the Sea 1982* ("**UNCLOS**"), Australia has sovereign rights over its EEZ, which entitles it to explore, exploit, conserve and manage the natural resources within the area of the EEZ. Statistics from the National Oceans Office indicate that the use of ocean resources, predominantly commercial fishing, is Australia's fifth largest primary industry generating over $1.6 billion each year for the Australian economy.[12] Moreover the CSIRO have estimated that Australian oceans have over $200 billion of undiscovered oil and gas reserves.[13] Accordingly, the sustainable use and management of marine resources is critical to the maintenance of these sectors of the economy.

However, a further reason for Australia's international political stance on marine issues relates to the inherent social and cultural attachment that Australians have with oceans and marine species. Many Australians live in proximity to the coastline and take immense pride in the relatively pristine nature of the country's beaches and oceans. Additionally, there is widespread community awareness about the existence and significance of marine species such as sharks, dolphins and whales which live in or migrate through Australia's coastal waters. For example, in a public petition organised by the popular Sydney Daily Telegraph, the paper collected more than 300 emails from readers protesting against Japanese whaling in Australian waters. The emails were delivered to the Japanese Embassy.[14]

As a result of progressive environmental laws, conservation groups and members of the public who are concerned about actions relating to the marine environment can legally challenge decisions of the government and actions of third parties that may impact upon that environment. Therefore, the Australian government faces close scrutiny from the public about the decisions that it makes in relation to marine protection.

Within this context, the Australian *Oceans Policy* was adopted in 1998 and has as its vision the creation of "*healthy oceans cared for, understood and used for wisely for the benefit of all, now*

and in the future".[15] The goals for the care and wise use of Australia's oceans include:[16]

- *To exercise and protect Australia's rights and jurisdiction over offshore areas, including offshore resources.*
- *To meet Australia's international obligations under the United Nations Convention on the Law of the Sea and other international treaties.*
- *To understand and protect Australia's marine biological diversity, the ocean environment and its resources, and ensure ocean uses are ecologically sustainable.*
- *To promote ecologically sustainable economic development and job creation.*
- *To establish integrated oceans planning and management arrangements.*
- *To accommodate community needs and aspirations.*
- *To improve our expertise and capabilities in ocean-related management, science, technology and engineering.*
- *To identify and protect our natural and cultural marine heritage.*
- *To promote public awareness and understanding.*

In order to achieve the above goals, the Oceans Policy contains a number of principles which relate to decisions and actions affecting access to any use of Australia's marine jurisdiction and adjacent waters. These principles recognize that ocean ecosystem health and integrity are fundamental to ecologically sustainable development. In relation to biodiversity conservation, the principles state that:[17]

- Ocean planning and management decisions should be based on the best available science and other information, recognizing that information regarding ocean resources will often be limited.
- If the potential impact of an action is of concern, priority should be given to maintaining ecosystem health and integrity.
- Incomplete information should not be used as a reason for postponing precautionary measures intended to prevent serious or irreversible degradation of the oceans.

In order to implement the Policy, some of the initial steps taken by the Federal Government involved putting in place new institutional arrangements including the National Oceans Ministerial Board, the National Oceans Science Advisory Group and the National Oceans Office and Regional Marine Plan Steering Committee. In 2003 the Oceans Board of Management was established comprising representatives from seven Australian Government Departments and agencies which provides high-level, whole of government advice on operational aspects of the Policy and regional marine planning.[18] As a result of recent Departmental changes, the Minister for the Environment & Heritage ("**Minister**"), in conjunction with Ministerial consultation when required, now has lead responsibility for Australia's Ocean Policy.[19] The National Oceans Office continues to have lead responsibility for regional marine planning but has been incorporated into the marine division of the Department of the Environment and Heritage ("**DEH**").

In accordance with the Oceans Policy, the Government also made a number of commitments to accelerate the development of the national representative system of marine protected areas; to nominate, protect and implement recovery plans for threatened marine species; to develop a regulatory framework to identify criteria for the assessment of the conservation status of marine biota; to strengthen protection for whales through the continued pursuit of an international ban on commercial whaling and the establishment of whale sanctuaries; and to ensure that marine species are not over-fished beyond ecologically sustainable levels. At the heart of the Policy is the adoption of an integrated, ecosystem based approach to management of ocean resources to be given effect to through regional marine plans. Such an approach moves away from the previous sectoral approach to marine issues based on single issues or species.[20] These commitments have been give statutory force through the passing of the EPBC Act.

Part 2 - The *Environment Protection and Biodiversity Conservation Act 1999* and the management of marine biodiversity

2.1 Overview

As Rothwell and Kaye note, when the EPBC Act commenced in July 2000, it represented *"one of the most substantial adjustments to Australian environmental law in nearly 20 years*".[21] The Act sought to consolidate in a single piece of legislation, Australia's commitment to give effect to its obligations under international environmental conventions[22] and to establish a comprehensive regime for the environmental impact assessment of actions likely to impact upon matters of national environmental significance.[23] The EPBC Act was drafted with the 1992 Rio Declaration firmly in mind, with its objects including the promotion of ecologically sustainable development and the conservation of biodiversity.[24]

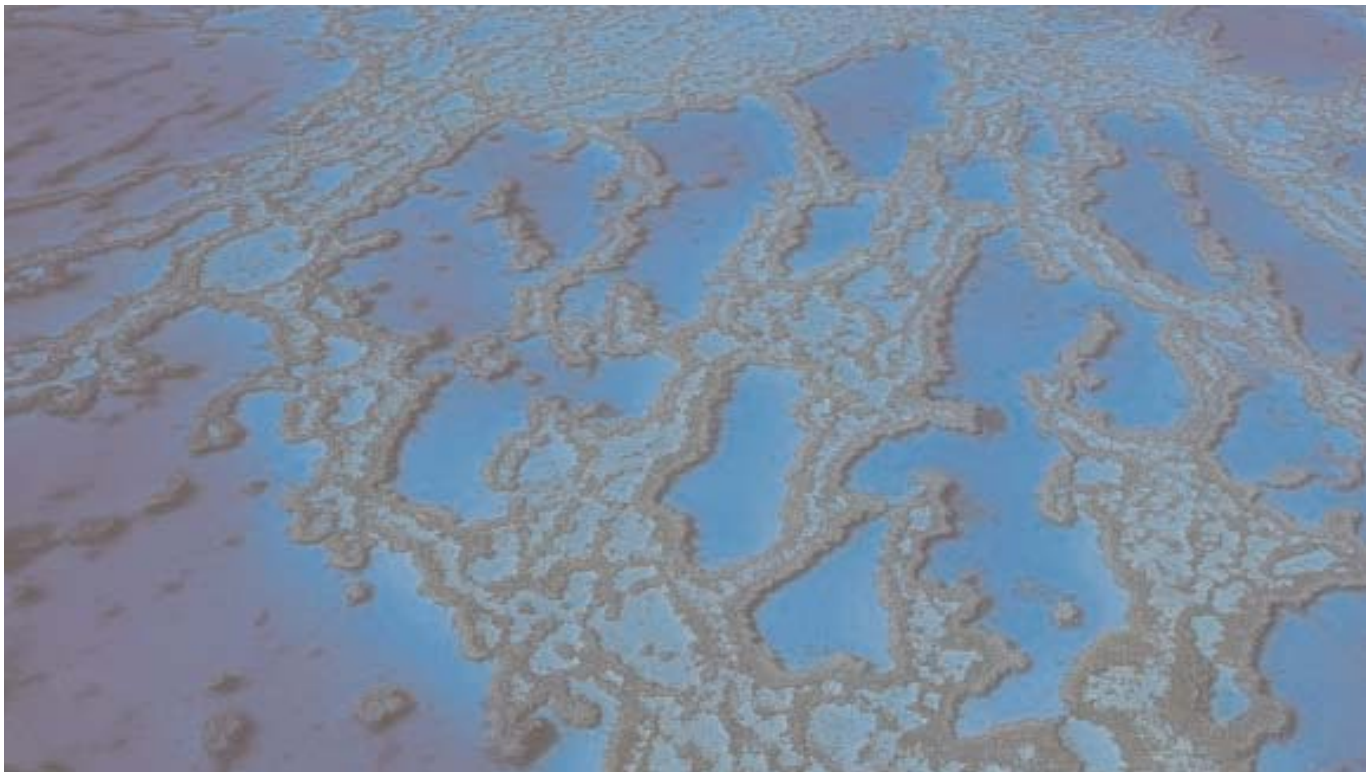
The EPBC Act applies to certain acts, omissions, matters and things in the Australian jurisdiction.[25] The Australian jurisdiction is defined to mean the land, waters, seabed and airspace in, under or above Australia; or an external territory; or the EEZ; or the continental shelf.[26] Australia's EEZ is defined in the EPBC Act,[27] the *Seas and Submerged Lands Act 1973* (Cth)[28] and the *UNCLOS*[29] as being the area of sea that stretches up to 200 nautical miles from the low water basemark of the territorial sea. However, pursuant to the *Offshore Constitutional Settlement* 1980 between the Commonwealth and the States, the States have jurisdiction over coastal waters within 3 nautical miles from the coastline of each State.[30]

The EPBC Act contains a range of provisions that are directly relevant to the management of Australia's marine environment. Those provisions include:

- the listing of threatened marine species and migratory species and the preparation; of recovery plans and threat abatement plans for those species;[31]
- requiring environmental impact assessment for actions that are likely to have a significant impact upon a matter of national environmental significance which may include, for example, the world heritage values of the Great Barrier Reef or Shark Bay;[32]
- the protection of cetaceans in the Australian Whale Sanctuary;[33]
- the declaration of Commonwealth reserves and create marine protected areas;[34]
- the permit requirements for actions in Commonwealth marine areas;[35]
- the implementation of wildlife conservation plans for listed marine species;[36]
- the strategic assessment of Commonwealth fisheries;[37] and
- the approval and accreditation of operations involving the international trade of marine species.[38]

For the purposes of this paper, we will focus on those provisions of the EPBC Act that deal with the assessment and approval regimes for the protection of marine species, in particular cetaceans, the establishment of marine protected areas and the management of fisheries.

Whilst the Minister is responsible for decisions that affect the marine environment under the EPBC Act, the Act also provides significant opportunities for



public involvement in marine protection. Members of the public have the opportunity to:

- nominate species for listing as threatened;[39]
- comment upon the content of draft recovery plans or threat abatement plans for threatened species;[40]
- nominate places for protection as Commonwealth heritage places[41] and comment upon proposals for such listing;[42]
- comment upon proposals to establish Commonwealth reserves[43] and upon the content of draft management plans for those reserves;[44] and
- comment upon the environmental impact assessment for actions that are likely to have a significant effect upon matters of national environmental significance (including listed threatened species and Commonwealth marine areas).[45]

In addition, certain members of the public are recognised as having standing to seek to review decisions of the Minister (for example to approve a wildlife trade operation) and to bring civil enforcement proceedings to remedy or restrain breaches of the Act.[46] The broad standing provisions provided for in the EPBC Act have enabled conservation groups to bring two of the cases referred to in Part 3 below.

2.2 Marine Protected areas

Marine Protected Areas ("**MPAs**") can be defined as:

'*An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means'*. [47]

MPAs play a vitally important role in the protection of marine biodiversity. In particular, they operate:

- to conserve biodiversity and habitat, especially the habitat of threatened species;
- to help maintain viable fisheries;
- to contribute to increased marine knowledge;
- to protect the genetic diversity of intensely exploited species; and
- to protect cultural heritage, such as shipwrecks.[48]

Part 15 of the EPBC Act deals with protected areas, including world heritage properties (such as the Great Barrier Reef and Shark Bay),[49] places listed as having national heritage value[50], Commonwealth heritage places[51] and Commonwealth Reserves.[52] Marine areas may be included for protection under any of these designations. However, the thirteen offshore MPAs and five terrestrial protected areas which have marine components have all been established as Commonwealth reserves on the basis of meeting characteristics of the categories for protected areas developed by the IUCN.[53] Those reserves include the Commonwealth waters of the Ningaloo Marine Park in Western Australia, the Solitary Island Marine Reserve in New South Wales and the Great Australian Bight Marine Park. The terrestrial protected areas include national parks such as Kakadu National Park and Christmas Island National Park and also the Heard and McDonald Islands Marine Reserve in the Southern Ocean.[54]

In addition, the Commonwealth manages two MPAs which are not Commonwealth reserves - the Great Barrier Reef Marine Park and the Antarctic Special Protection Area, and has adopted special legislation to protect shipwrecks.[55] Australia has also established an Australian Whale Sanctuary within its EEZ (which includes Australia's EEZ adjacent to its Antarctic territory), which provides for the protection of cetaceans in Australian waters[56] (see below).

Similar to other Commonwealth reserves, MPAs are managed in accordance with management plans that provide for the protection and conservation of the reserve and which identify how the reserve or zones of the reserve and its features are to be managed, the range of operations that may take place in the reserve and any limitations on those activities.[57] Where management plans are yet to be prepared, the reserve must be managed in a way that is consistent with the IUCN category it has been assigned.[58]

As noted above, under Australia's Ocean Policy, the Commonwealth Government aims to implement a whole-of-government approach to managing marine resources on a large scale through the establishment of Regional Marine Plans ("**RMPs**"). On 1 July 2004, a new Zoning Plan for the Great Barrier Reef Marine Park came into force which increased the level of high protection zones from 4.5 per cent to 33.3 per cent, making the Great Barrier Reef Marine Park the largest network of protected marine areas in the world.[59] This change was implemented in lieu of recognition that the previous low percentage of high protection zones was inadequate to maintain the function and integrity of the Great Barrier Reef ecosystem. The new zoning implemented the Representative Areas Program which involved rezoning the Park into bioregions based on distinct habitat types and ensuring that at least 20% of each bioregion was adequately protected in a network of Green or 'No-Take' Zones.[60] This will allow a much greater level of conservation and protection of ecosystems and species.

The Commonwealth, State and Territory governments have been working together since the early 1990s to establish the National Representative System of Marine Protected Areas ("**NRSMPA**"). The aim of establishing the NRSMPA is to protect representative examples of the full range of marine ecosystems and the communities of plants and animals they contain in order to ensure the conservation of marine biodiversity and ecological processes. As at 2002, the NRSMPA covered approximately 64,600,000 hectares (7% of Australia's marine jurisdiction) and 90 marine protected areas have been declared in the period 1992-2003. Whilst this is a start, a number of conservationists argue that there remains a long way to go. Australia is well behind the World Parks Congress recommendation that between 20-30% of each marine habitat in the world's oceans be protected and, as Smythe comments, it "has not drawn up any roadmap to get there"[61]. McIntosh similarly argues that despite over $50 million being invested in the program, only one regional plan has been produced and no new marine protected areas have been created.[62]

Whilst the EPBC Act provides a strong legislative framework for the creation and management of MPAs, there remain a number of major threats to the integrity of those areas even when they are designated as protected. Those threats include:

- the continuation of recreational and commercial fishing in multi-use zones and on the boundaries of MPAs;
- land-based diffuse-source pollution such as fertiliser runoff;
- climate change;
- invasive marine species;
- shipping and associated problems such as the introduction of exotic pests through ballast water;
- military activities involving Sonar which may adversely impact whales and dolphins;
- transportation of hazardous substances such as oil;
- gas and oil exploration; and
- bioprospecting.

Many of these threats have not been adequately addressed even where areas of high quality marine biodiversity has been protected through the creation of reserves. Importantly, the major threat that terrestrial activities pose on the marine environment must be recognised and laws relating to terrestrial activities should have regard to any adverse impacts those activities may have on the marine environment. Dr Karen Edyvane contrasts the approach taken by the Commonwealth in developing the South-east Regional Marine Plan based on options proposed by key stakeholders, with the science driven approach to marine zoning in the GBRMP.[63] In order to address the many threats facing the marine environment, she argues, and the authors agree, that independent, transparent, science driven approaches to planning are required that are consistent across State and Commonwealth jurisdictions.[64]

2.3 Species Protection

Pursuant to section 248 of the EPBC Act, the Federal Minister is required to maintain a list of endangered marine species. Species can be added to the list if the Minister is satisfied that the species occur naturally in the Commonwealth marine area and listing is necessary to ensure the long-term conservation of the species.[65] To date, over 100 marine species have been listed as endangered under the EPBC Act, including 32 snakes, 5 marine turtles and over 50 sea horses.[66] There are also 11 marine species nominations currently under consideration for listing, including the Southern Bluefin Tuna and the Southern Dogfish.[67] However, noticeably, none of the commercial species that have been nominated, which meet the listing criteria (such as Southern Bluefin Tuna) have been listed.[68]

Part 13, Division 5 of the EPBC Act allows the Minister to prepare and implement wildlife conservation plans for listed marine species and cetaceans. There is a requirement that these plans be prepared in consultation with the States and Territories unless the relevant species is only found in a Commonwealth marine area.[69] Wildlife conservation plans identify habitats important to the survival of the relevant species and set out a process to ensure the continued survival of the species and protection of its habitat.[70]

It is an offence to take an action that results in the death or injury of a listed marine species in or on a Commonwealth area. If the offence is reckless, then the offender may be guilty of up to 2 years imprisonment and fines of up to $110,000[71] otherwise, fines of up to $55,000 may apply.[72] Similarly, it is an offence to take, trade, keep or move a member of a listed marine species in or on a Commonwealth area.[73] The EPBC Act provides that certain actions involving the killing, injuring or taking listed marine species are not offences. Section 355 of the Act establishes statutory defences where, for example, the action is taken in accordance with a plan or approval; the action is taken in a humane manner and is reasonably necessary to relive or prevent suffering by an animal; the action is reasonably necessary to deal with a risk to human health or an emergency that involves a serious threat to human health or property; or the action occurs as a result of an unavoidable accident that is not reckless or negligent.

The Minister may issue permits for the taking of actions that may kill, injure, take, trade, keep or move a listed marine species in a Commonwealth area.[74] However, the Minister must be satisfied of a number of maters before a permit can be issued. Those matters include, but are not limited to being satisfied that the specified action will:

- significantly contribute to the conservation of the species; or
- that impact upon the species is only incidental to, and not the purpose of the action, and will not adversely affect the conservation of the species, be inconsistent with a wildlife conservation plan for the species, and that all reasonable steps will be taken to minimise impacts upon the species.[75]

The only reported decision of a prosecution for an offence against the provisions of the EPBC Act which protect marine species is the case of *Minister for the Environment and Heritage v Wilson* [2004] FCA 6. This case concerned a civil prosecution for a contravention of section 354(1)(a) of the EPBC Act. That provision prohibits a person from killing, injuring, taking, trading,

keeping or moving a member of a native species in a Commonwealth reserve unless permitted by a management plan. The proceedings were brought against a fisherman who caught a shark just inside the boundary of the Great Australian Bight Marine Park off the coast the South Australian mainland, which is a Commonwealth reserve proclaimed under section 344 of the EPBC Act. The fisherman admitted to committing the offence and was ordered to pay a civil penalty of $12,500, despite the availability of a maximum penalty of $55,000 for a breach of section 354 of the EPBC Act. The fisherman's breach of the EPBC Act was found by the Court to be negligent, if not reckless.[76] However, the Court took into account the following undisputed facts in imposing the penalty:

- the fisherman was an experienced shark fisherman with no prior convictions and he had co-operated with the DEH in relation to the breach;
- the fisherman's net was set for 3-4 hours close to the boundary of the Marine Park, during that time the fisherman was not able to look at the GPS system on the boat. When the net was set the fisherman's boat drifted into the Marine Park; and
- the total value of fish caught by the fisherman was $11,500. The fisherman suggested that the value of the fish taken from inside the park was about $200.[77]

The Court found that the fisherman had taken a risk in setting his net so close to the boundary of the Marine Park and the Court also considered the need to deter others from doing the same given the large area of the park.[78]

The provisions referred to above exclude cetaceans or listed threatened or migratory species, which are provided for separately under the Act. However, the regime that establishes offence provisions for the killing or injuring listed threatened species and listed migratory species and which exempt certain actions from those provisions are in almost identical terms.[79] These provisions have the potential to be relied upon in circumstances where endangered seabirds, such as albatrosses and petrels are killed or injured as a result of long line fishing in Australian waters.[80]

2.4 Protection of Cetaceans

Part 13, Division 3 of the EPBC Act[81] deals with the protection of whales and other cetaceans in Commonwealth marine areas. Section 225 of the EPBC Act establishes the Australian Whale Sanctuary ("**AWS**").[82] The purpose of the AWS is *"to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas and prescribed waters".*[83]

All cetaceans are protected in the AWS, and in addition to that protection, five species of cetaceans are listed as threatened species under the EPBC Act.[84]

The AWS covers all Commonwealth marine areas and Australia's external territories, including its sub-Antarctic territories of Heard and Macdonald islands and the Australian Antarctic Territory. The AWS does not include the coastal waters of each State and the Northern Territory unless those areas are declared by the *Environment Protection and Biodiversity Conservation Regulations 2000* ("**EPBC Regulations**") to be prescribed waters for the purposes of the Act.[85]

Similar to the offence provisions relating to marine species, the EPBC Act creates offences which relate to actions involving cetaceans both within and outside of the AWS. These provisions apply to the activities of all persons, aircraft and vessels within the AWS, including foreign nationals and foreign vessels and aircraft.[86] Those offences are as follows:

- recklessly killing a cetacean;[87]
- intentionally taking, trading, keeping, moving or interfering with a cetacean;[88]
- treating a cetacean that has been illegally killed or taken.[89] "Treating" means cutting up or taking any product from the cetacean;[90]
- possessing a cetacean or part of a cetacean or a product of a cetacean that has been illegally killed or taken.[91]

Breaches of these provisions are strict liability offences.[92] The maximum penalty for taking actions without a required permit are up to two years imprisonment or a fine of up to $110,000 for an individual or $550,000 for a corporation.[93] Fines of up to $33,000 can also be imposed if a person contravenes the condition of a permit.[94]

Pursuant to section 236 of the EPBC Act foreign whaling vessels which a brought into a port in Australia or an external Territory are guilty of an offence unless the master of the vessel has obtained the written permission of the Minister to bring the vessel into the port.

The same categories of exemptions as apply to offences relating to marine species apply to cetaceans.[95] Similarly, the Minister may authorise the issue of a permit to kill, injure, take, trade, keep, possess, move or interfere with a cetacean - but only where he is satisfied that the action will contribute significantly to the conservation of cetaceans and will not adversely affect the conservation status of or population of the species.[96]

2.5 Actions and Approvals

The Commonwealth marine environment is identified as a matter of national environmental significance under the EPBC Act.[97]

It is an offence to take an action that has, will have, or is likely to have a significant impact upon the Commonwealth marine environment unless the person taking the action has an approval, is the Commonwealth or a Commonwealth agency, or some other form of Ministerial authorisation has been granted.[98] As a result, actions and decisions that may have a significant impact on Commonwealth marine areas, or which take place within Commonwealth marine areas and may have a significant impact on the environment,[99] are subject to the environment protection procedures under the EPBC Act, which include requirements for environmental impact assessment to be carried out prior to the grant of any approval for the action.[100]

Examples of recent referrals triggering the protection of marine environment include on-shore commercial developments that may impact upon adjoining marine reserves such as the redevelopment of accommodation facilities at Horn Island referred by the Australian Fisheries Management Authority and the proposed development of a residential subdivision and golf course near Bowen on the Queensland coast by a company called Whitsunday Shores.[101] Additionally, offshore petroleum exploration and drilling may also trigger environmental impact assessment in accordance with Part 9 of the EPBC Act as was the case for the proposal by Roc Oil (WA) Pty Ltd to drill for oil and gas in the Commonwealth marine area between Kalbarri and Cliff Head in Western Australia.[102]

World Heritage properties and national heritage places (which may include marine areas) and listed threatened species and migratory species (which also may include marine species) are also identified as matters of national environmental significance.[103] Accordingly, similar offence provisions relating to the taking of actions that significantly affect those matters apply as do the requirements for environmental impact assessment prior to the grant of approval to take such actions.[104]

The extent of the Minister's inquiry in determining the impacts of an

action on a matter of national environmental significance was recently considered in *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463 and the subsequent appeal in *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190. In decisions of the Federal Court both at first instance and on appeal, the Court found that the likely impacts of the construction and operation of the proposed Nathan Dam on the Great Barrier Reef World Heritage Area was a matter which the Minister was required to consider when assessing the impacts of the proposal under section 75 of the EPBC Act. The issue in this case was whether the Minister was required to consider all adverse impacts of the construction and operation of a dam on the Dawson River, which flows into the Great Barrier Reef World Heritage Area. In determining whether the construction of the dam was a controlled action under section 75 of the EPBC Act he did not consider the impacts which the use of the dam for the irrigation of cotton farms would have on the World Heritage values of the Great Barrier Reef, in particular, the impacts of agricultural pollutants such as endosulfan. The Court found that when assessing the impacts of a referred action under section 75 of the EPBC Act, the Minister is required to consider the cumulative impacts of the action, including the impacts of third parties.

This case is important because it recognises the indirect impacts of land based activities upon the marine environment and requires those impacts to be considered as part of the environmental impact assessment process.

2.6 Strategic Assessment of Fisheries

Pursuant to the Oceans Policy, the Federal government committed to a number of steps in relation to the management of Australia's domestic fisheries. These steps included:

- adopting an ecosystem-based approach to fisheries management;
- implementation of a fisheries bi-catch policy in relation to environmental impact assessment of fisheries;
- undertaking strategic environmental impact assessment of all new management plans for Commonwealth fisheries; and
- the removal of the blanket exemption of marine species from wildlife export controls to ensure that exemptions are only available for marine species harvested in accordance with sustainable and ecologically-based management arrangements.[105]

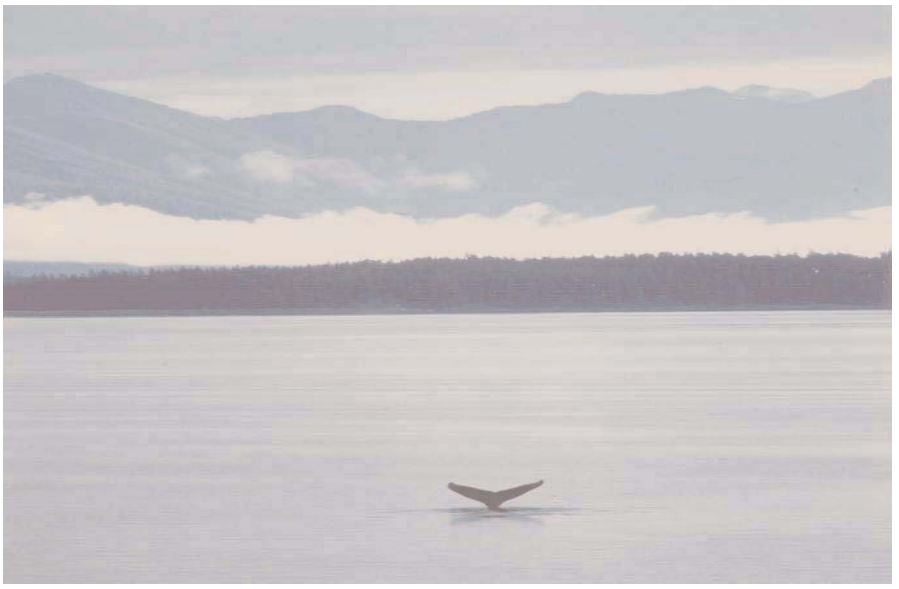
The *Fisheries Management Act 1994* (Cth) provides the statutory framework for the development of fisheries management plans and the licensing regime for fisheries. However, the EPBC Act also plays an important role in relation to the strategic assessment of Commonwealth managed fisheries[106] and the trade in native species.[107]

Part 10 of the EPBC Act deals with strategic assessments of the impact of an action taken under a policy, plan or programme on a matter protected under Part 3 of that Act. In this respect, if there is a policy, plan or programme that deals with Commonwealth marine areas or protected marine species, then the Minister may evaluate the content of the policy, plan or programme, pursuant to a strategic assessment to ensure that relevant environmental issues have been taken into account and appropriate mitigation measures are contained in the policy, plan or programme.

Specifically in relation to Australia's fisheries, the EPBC Act requires the Australian Fisheries Management Authority or the Minister for Agriculture, Fisheries and Forestry to enter into an agreement for the strategic assessment of all management plans and policies for Commonwealth managed fisheries.[108] The assessment of the fishery involves a review of a report assessing the impacts of the adoption of the management plan. The terms of reference for that report are determined by agreement and having regard to public consultation and the *EPBC Regulation 2000.*[109] DEH has prepared *Guidelines for the Ecologically Sustainable Management of Fisheries* ("**the Guidelines**") which outline specific principles and objectives designed to ensure a strategic and transparent way of evaluating the ecological sustainability of fishery management arrangements.[110] The two guiding principles for management are, first, that a fishery must be conducted in a manner that does not lead to over-fishing, or for those stocks that are over-fished, the fishery must be conducted such that there is a high degree of probability the stock(s) will recover. Second, fishing operations should be managed to minimise their impact on the structure, productivity, function and biological diversity of the ecosystem (for example, by avoiding bycatch). There are twenty one Commonwealth managed fisheries and a number of State and Territory fisheries that are undergoing strategic assessment under the EPBC Act with a view to their completion by December 2005.

2.7 Trade in Native Species

Part 13A of the EPBC Act regulates the international movement of wildlife specimens, including the exports of regulated native specimens that are listed pursuant to Appendix I, II and III of the *Convention on International Trade in Endangered Species*



("**CITES**") and native specimens. Native species are defined to include species that are indigenous to, or which periodically or occasionally visit Australia or an external territory, which includes the seabed of the coastal sea, the continental shelf and the EEZ. Species that are listed pursuant to CITES and which are therefore subject to Part 13A include the Southern Bluefin Tuna and the Australian Lung Fish. In addition CITES and EPBC listed marine mammals include, amongst many cetaceans, the Southern Minke Whale, the Blue Whale and the Humpback Dolphin.[111]

It is a very serious offence to export a CITES specimen or native specimen without lawful authority, attracting penalties of up to 10 years imprisonment and $1,100,000.[112] Before a species regulated by Part 13A may lawfully be exported, the Minister is required to make a series of decisions under the EPBC Act, for example whether to grant a permit for individual exports[113] or, in relation to commercial purpose exports, whether the export is in accordance with an approved wildlife trade operation or approved wildlife trade management plan.[114]

Relevant to fisheries, the Minister may declare a fishery to be an '*approved wildlife trade operation*' if the Minister is satisfied certain legislative criteria have been met that address the sustainability of the fishery. Before making such a declaration the Minister is required by the EPBC Act to be satisfied that the operation (among other things) will not be detrimental to the survival or conservation status of the species; will not be likely to threaten any relevant ecosystem including (but not limited to) any habitat or biodiversity; is consistent with certain objectives;[115] and there are effective management regimes in place for the operation.[116]

The effect of determining that a particular export activity is an approved wildlife trade operation is that the activity can take place without the need for further environmental impact assessment under Part 9 of the Act.

The Minister has recently determined that the export of Southern Bluefin Tuna ("**SBT**") is an approved wildlife trade operation. The SBT has been nominated for listing as a threatened species pursuant to the EPBC Act. The decision to approve the wildlife trade operation has attracted criticism from conservation groups on the grounds of the Minister's failure to consider the nomination of the species under the EPBC Act. The Humane Society International ("**HSI**") has applied to the Administrative Appeals Tribunal to review the merits of the Minister's decision. This case will be analysed in more detail in the next section of this article.

Parts 3 & 4 of this article will appear in the March 2006 edition.

ENDNOTES

1 Including the *Convention on Biological Diversity 1992, the Report of the United Nations Conference on Environment and Development – Agenda 21 1992, the United Nations Convention on the Law of the Sea 1982, the Convention concerning the Protection of the World Cultural and Natural Heritage 1972, and the Convention on Wetlands of International Importance, Especially for Waterfowl Habitat 1971, the International Convention for the Regulation of Whaling 1946, the Convention on the Conservation of Antarctic Marine Living Resources 1980, Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean,2000, and the United Nations Fish Stocks Agreement 1995*.

2 Commonwealth of Australia, *Australia's Oceans Policy,* (Commonwealth of Australia, 1998).

3 [2004] FCA 1510; [2005] FCA 664.

4 See for example, Kithell, M "Statement of Australian Delegation to United Nations Informal Consultative Process on Oceans and Law of the Sea – Fifth Meeting" New York, 9 June 2004.

5 Rothwell, D & Kaye, S "A Legal Framework for Integrated Oceans and Coastal Management in Australia" (2001) EPLJ 278 at 282.

6 *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific 1992*

7 For example, the *Convention for the Conservation of Southern Bluefin Tuna between Australia, New Zealand and Japan 1993* and the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 2000*.

8 Rothwell & Kaye, above n5, at 282.

9 *Oceans Policy*, above n2, p. 7.

10 *Oceans Policy*, above n2, p. 6.

11 *United Nations Convention On The Law of The Sea*, Article 67.

12 National Oceans Office (www.oceans.gov.au/background_paper_1/page_005.jsp)

13 CSIRO Wealth from Oceans (www.csiro.au/index.asp?type=balnk&id=Oceans_Home)

14 "The Japanese Embassy collects your whale mail – then insults our humpbacks: Stop your blubbering", *The Daily Telegraph*, (Sydney), 19 May 2005.

15 *Oceans Policy,* above n2, p.4

16 *Ibid.*

17 *Ibid.,* p.26

18 National Oceans Office website (www.oceans.gov.au)

19 In 2004 the National Oceans Ministerial Board was dissolved as a result of administrative changes made following announcement of the electoral victory of the fourth Howard Ministry

20 Burgess, P "Biodiversity Conservation and the Marine Environment (Plenary Session)" paper presented to Third Colloquium of the IUCN International Law Committee, 12 July 2005.

21 Rothwell & Kaye, above n5, at 288.

22 Refer to above n 1.

23 Including listed World Heritage properties, listed threatened species, Ramsar wetlands, places of national heritage significance, the marine environment and nuclear actions.

24 *Environment Protection and Biodiversity Conservation Act* s.3(1)

25 *Ibid.,* s.5(1).

26 *Ibid.,* s.5(5).

27 *Ibid.*, ss.24 and 528.

28 *Ibid*., s.3.

29 *United Nations Convention On The Law Of The Sea* Article 57.

30 *Coastal Waters (State Powers) Act* 1980.

31 *Environment Protection and Biodiversity Conservation Act*; Part 13 Division 1

32 *Ibid*, Part 3 Division 1.

33 *Ibid*, Part 13 Division 3.

34 *Ibid*, Part 15 Division 4.

35 *Ibid.,* ,s.23.

36 *Ibid.,* Part 13 Division 5.

37 *Ibid,*, Part 10, Division 2.

38 *Ibid.*, Part 13A.

39 *Ibid.,* s.191.

40 *Ibid..,* s.275.

41 *Ibid., s.*314E.

42 *Ibid..,* s.341M.

43 *Ibid..,* s.351.

44 *Ibid.,* s.368(2).

45 *Ibid.,* s74(3) and ss. 93,98,103, 110.

46 EPBC Act ss.487 and 475.

47 *Oceans Policy*, above n 2 p.45.

48 *Guidelines for Marine Protected Areas*, (IUCN – World Conservation Union, Gland, Switzerland, and Cambridge, UK, 1999), page xvii < http://iucn.org/themes/wcpa/pubs/pdfs/mpa_guidelines.pdf> (Copy on file with author).

49 *Environment Protection and Biodiversity Conservation Act* Part 15, Division 1.

50 *Ibid.,* Part 15, Division 1A.

51 *Ibid.,* Part 15, Division 3.

52 *Ibid.,* Part 15, Division 4.

53 *Ibid.,* ss.344-348.

54 The Department of Environment and Heritage website lists all the Commonwealth Marine Protected Areas. See http://www.deh.gov.au/coasts/mpa/commonwealth/manage/estate.html>

55 The Great Barrier Reef Marine Park, managed under the *Great Barrier Reef Marine Park Act* 1975 (Cth); the Antarctic Special Protection Area, managed under the *Antarctic Treaty (Environment Protection) Act* 1980 (Cth), and 14 historic shipwrecks, managed under the *Historic Shipwrecks Act* 1976 (Cth).

56 *Environment Protection and Biodiversity Conservation Act* s. 225.

57 *Ibid.,* s.367.

58 Commonwealth marine protected areas and any zones established within those areas must be assigned to one of seven internationally recognised management categories. The categories, established by the World Conservation Union (IUCN) and incorporated into the EPBC Act Part 15, provide a convenient means of describing the rationale for selecting a particular area for protection and the actions which are permissible in that area. In principle, the system is not aimed at establishing a hierarchy and one category is no more or less protected than another. An example of a category is a Strict Nature Reserve managed primarily for scientific research and environmental monitoring. Certain zones are commonly referred to as 'no-take zones' or green zones which is an area in which no flora or fauna is allowed to be taken. This is an effective means of conserving biodiversity by not allowing activities such as fishing in these areas at all.

59 Brigs, D "Great Barrier Reef – continuing to set benchmarks in marine conservation" *Waves* 11(2) Spring 2005 p.9.

60 *Great Barrier Reef Marine Park Authority* website < *http://www.gbrmpa.gov.au* >

61 Smythe, C "Missing the target on marine protection" Waves v.11(2) Spring 2005 p.11.

62 Quoted in Darby, A "Ocean Care Plan Sinks Without a Trace" Sydney Morning Herald 24 October 2005 <http://www.smh.com.au/text/articles/2005/10/23/1130006005938.html>

63 Edyvane, K "NRSMPA – policies, planning and science" *Waves* 11(2) Spring 2005 p.10.

64 *Ibid.*

65 *Environment Protection and Biodiversity Conservation Act* s.250.

66 For a full list of marine species declared under the EBPC Act refer to the Department of Environment and Heritage website at < www.deh.gov.au/coastal/species/marine-species-lit.html.>

67 Department of the Environment and Heritage website at < http://www.deh.gov.au/biodiversity/threatened>

68 Australia Institute "Environment Protection and Biodiversity Conservation Act A five year assessment" Discussion Paper 81 July 2005.

69 *Environment Protection and Biodiversity Conservation Act* s.285.

70 *Ibid.,* s.287.

71 *Environment Protection and Biodiversity Conservation Act* s.254.

72 *Ibid.* s.254A.

73 *Ibid.* ss.254B-E.

74 *Ibid* s.258.

75 *Environment Protection and Biodiversity Conservation Act* s.258(3).

76 [2004] FCA 6, para 7.

77 *Ibid*, para 6.

78 *Ibid*, para 7.

79 See *Environment Protection and Biodiversity Conservation Act* ss.196-207 for threatened species and ss.209-222 for migratory species.

80 In September-October 2004 a number of seabirds were killed as a result of longline fishing operations. In response to these events, the Department of Fisheries amended the Threat Abatement Plan for the Gillnet Hook and Trap Fishery requiring lines to be weighted in high risk areas to mitigate against further incidents (Nicola Beynon, campaign manager, Humane Society International; pers com 22 February 2005).

81 *Ibid.,* s 224-247.

82 Whales were previously protected in Australian waters under the *Whale Protection Act 1980* (Cth), which was repealed by the *Environment Protection and Biodiversity Conservation Act.*

83 *Environment Protection and Biodiversity Conservation Act* s.225(1).

84 *Environment Protection and Biodiversity Conservation Act* List of Threatened Species viewed at <http://www.deh.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=fauna#mammals%20that%20are%20Critically%20Endangered>

85 *Environment Protection and Biodiversity Conservation Act* ss. 225(2)(b), 226, 227 and 228.

86 *bid,* ss.5 and 224.

87 *Ibid.,* s. 229.

88 *Ibid.,* .s.229B

89 *Ibid.,* s.229D

90 *Ibid.,* s.229D(3)

91 *Ibid.,* s.230

92 *Ibid.,* s.229A, 229C(3), 229D(2), 230(2).

93 *Ibid.,* ss.229(2), 229B(3)

94 *Ibid.,* s.240

95 *Ibid.,* s.231

96 *Ibid.,* s.238(3).

97 *Ibid.,* ss23-24A.

98 *Ibid.,*s.23(4).

99 The term "significant" is not defined in the EPBC Act but has been held to mean "an impact that is important, notable or of consequence having regard to its context or intensity" the case of *Booth v Bosworth* (2001) FCR 39 at 64.

100 *Environment Protection and Biodiversity Conservation Act* Chapter 4.

101 Department of Environment and Heritage website at<http://www.deh.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2195>

102 Department of Environment and Heritage website at <http://www.deh.gov.au/cgiin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2185>

103 *Environment Protection and Biodiversity Conservation Act* ss. 12-15C.

104 *Ibid.,* ss.12-15A for world heritage; ss.15B for national heritage; ss18-19 for listed threatened species and ss.20-21 for listed migratory species.

105 *Oceans Policy*, above n2 p.26.

106 *Environment Protection and Biodiversity Conservation Act* Part 10.

107 *Ibid.,* Part 13A.

108 *Ibid.,* s.148.

109 *Ibid.,* s.146 (2).

110 Department of Environment and Heritage website <www.deh.gov.au/coasts/fisheries/guidelines.html>

111 List of CITES species is available on the Department of Environment and Heritage website at <www.deh.gov.au/biodiversity/trade-use/lists.cites/index.html>

112 *Environment Protection and Biodiversity Conservation Act* s.303CC & s.303DD.

113 *Ibid.,* s303FA-FI.

114 *Ibid.,* ss. 303FJ -303FT.

115 *Ibid.,s.303BA(1) Including (a) to protect wildlife that may be adversely affected by trade (that the precautionary principle; (c) to promote the conservation of biodiversity in Australia and other countries; (d) to ensure that any commercial utilisation of Australian native wildlife for the purposes of export is managed in an ecologically sustainable way (h) to ensure s taken into account in making decisions relating to the utilisation of wildlife.*

116 *Ibid., s.303FN(3) and (4).*

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