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G. L. Rose
University of Wollongong, grose@uow.edu.au

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Legal Frameworks for Integrated Marine Environmental Management

Associate Professor Gregory Rose

University of Wollongong

Paper presented at the

2006 Fulbright Symposium

Maritime Governance and Security: Australian and American Perspectives

University of Tasmania, Hobart

28 – 29 June 2006

Abstract

The Australian federal government is rethinking its policy-based approach to integrated marine environmental management. Does effective coordination of oceans management activities require an overarching legislative framework? Should legislation operate to enforce cross-jurisdictional coordination? Can it also assure cross-sectoral integration? This paper explores possible answers to these questions, considering options for a legal framework for integrated marine environmental management in a federal context.

Introduction

Australia shares many common challenges in oceans governance with the United States. These challenges include large maritime domains, federally centralised responsibility for discharge of international maritime obligations, spatially fragmented jurisdictions, and of the division of management responsibilities across a wide range of disparate government portfolios.

The objective of this paper is to consider whether framework legislation is a useful tool to help meet the challenges of national integrated oceans management (IOM). The paper focuses on the Australian experience. In particular, it asks whether framework legislation is a necessary and appropriate tool for the implementation of IOM policies for in Australia and, if so, what might such legislation look like. While the primary experience drawn upon is that of Australia itself in implementing its Oceans Policy, lessons are drawn also from comparable national experiences in foreign jurisdictions. Due to their utilisation of framework legislation concerning IOM and their relative similarity to the Australian legal system, the jurisdictions selected are Canada, the UK and USA.

Concerning the use or design of IOM framework legislation, the purposes, contents and approaches of legislation in use across jurisdictions are compared. Aspects of the legislation relevant to the Australian context are identified and conclusions are drawn about models that might or might not be useful to Australia.

Oceans Policy

Integrated oceans management has become widely accepted around the world as a basis for marine resources utilisation planning. International bodies recognise and promote the value of IOM and a growing number of national administrations are adopting IOM approaches.

International Institutional Agenda

A leading move towards holistic oceans governance was taken by the United Nations in 1999. The Pacific Forum moved towards an integrated regional oceans policy in 2000, APEC (Asia Pacific Economic Cooperation) in 2000, and the European Union in 2006.

The United Nations Informal Open-Ended Consultative Process on Oceans and Law of the Sea (UNICOPOLOS) commenced in 1999 under General Assembly resolution 54/33. it meets annually to consider the Secretary-General's annual reports on oceans affairs and to consider developments in a coherently structured and holistic fashion. A Global Forum on Oceans, Coasts, and Islands was established at the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa in September 2002.[1] In 2005 a summit on 'Integrated Ocean Policy: National and Regional Experiences, Prospects and Emerging Practices' was held by the International Ocean Governance Network to discuss various aspects of integrated ocean policy.

The European Union's Green Paper 'Towards a Future Maritime Policy for the Union' (2006) was prepared by the Commission's Marine Affairs Taskforce in June

[1] *The Global Forum on Oceans Coasts and Islands* http://www.globaloceans.org/ (accessed 25 June 2006).

2006.[2] It seeks to launch debate on the adoption of an integrated and holistic maritime policy for the whole EU. Its chapter on governance (Chapter 5) focuses on shipping and the high seas. It suggests cooperative models, such as industry self-regulation and corporate social responsibility, as a basis for improved oceans governance. In addition, cooperative state efforts to improve flag-state performance, including through cooperation of port states and by international leadership in strengthening the monitoring of international rules governing activities on the high seas, are suggested.

Within the Asia-Pacific region, APEC has been holding biennial IOM forums since 2000 and promotes IOM among its membership.[3] The second APEC Ocean Related Ministerial Meeting (AOMM), held in Indonesia in 2005, endorsed a Bali Plan of Action, which details practical commitments to domestic and regional action for the sustainable development of oceans, seas and coasts. The Pacific Forum has also endorsed the notion of IOM annd is exploring a southwest Pacific regional approach.[4]

Integrated oceans management, in substantial part, concerns cross-institutional planning and implementation. It is essentially about whole-of-government policy coordination. Therefore, as a matter of internal management, or mid-level environmental governance, it has been articulated in policy instruments. The foregoing survey demonstrates that IOM has been widely accepted as a basis for marine resources planning. All the international bodies surveyed utilised policy instruments or advocated their uptake at the national level. The pre-eminent approach to implementation of IOM is policy-based.

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[2] Commission of the European Communities *Towards a Future Maritime Policy for the Union* 7.6.2006 COM(2006) 275 final; Volume II – ANNEX (Brussels) (accessed 25 June 2006).
[3] *APEC Marine Resource Conservation (MRC) Working Group: Integrated Oceans Management Site* http://www.apec-oceans.org/ (accessed 25 June 2006).
[4] *Pacific Islands Regional Ocean Policy* http://www.spc.org.nc/piocean/forum/New/forum.htm (accessed 25 June 2006).

National Framework Legislation

Integrated oceans management is predominantly about internal governmental coordination and governance, but it also concerns external national objectives, such as sustainability. Implementation can require specific performance indicators and targets as well as institutional restructuring and performance accountability through independent review. Are policy instruments the only appropriate approach to implementation? Might there also be a role for legislation in setting in place these objectives and implementation mechanisms?

Jurisdictions that utilise or are considering framework legislation for IOM include Canada, the UK and USA. Framework legislation for integrated oceans management was adopted in Canada in 1997 and is being considered in the United Kingdom in 2006. The USA adopted legislation in 2000 for the purpose of creating a temporary Oceans Commission. The current situation of legislative frameworks in these jurisdictions is incipient or very preliminary. Nevertheless, an overview of them is instructive and can inform the debate over Australia framework legislation in Australia.

Canada

Canada adopted a legislative framework that empowered the executive to develop and implement IOM policy within described parameters. This approach might be considered novel in the peculiar context of IOM, where policy instruments predominate.[5]

The Canadian *Oceans Act* seeks cross-sectoral integration. It assigns lead agency responsibility to Fisheries and Oceans Canada (DFO) while other departments

[5] Canada's *Oceans Act* 1997 did follow the adoption of an *Oceans Policy* in 1987, although that policy had stagnated.

maintain their lead roles in their respective sectors. This approach designated the Canadian federal agency with the broadest range of oceans interests and responsibilities to address cross-sectoral concerns and facilitate their integration.[6]

Part II of the Act called for the development of an Oceans Management Strategy and of Integrated Marine Plans.[7] Accordingly, Canada adopted an *Oceans Strategy* in 2002.[8] The development of Integrated Marine Plans is facilitated by guidelines for the process of integrated management, set out in a document called the *Policy and Operational Framework for Integrated Management of Estuarine, Coastal and marine Environments in Canada*.[9] The *Oceans Strategy* and its accompanying Policy and Operational Framework envisage the development of regional marine plans for all Canadian waters over the long term. The regions may be large scale ('large ocean management areas') or local (coastal management areas) and their respective plans are to be formulated in order of priority areas. The Integrated Marine Plans are to incorporate marine protected areas and marine environmental quality guidelines. The first among these is the Eastern Scotian Shelf Integrated Management (ESSIM) Initiative,[10] which is still in a process of development.

Although the Canadian mandate for IOM is set out in legislation, the *Oceans Act*, the actual development of IOM is a process set out in policy instruments. The framework for further development is the *Oceans Strategy* and its Policy and Operational Framework, while the actual regional Integrated Marine Plans are also policy

[6] Elizabeth Foster, Marcus Haward and Scott Coffen-Smout 'Implementing integrated oceans management: Australia's south wast regional marine plan(SERMP) and Canada's eastern Scotian shelf integrated management (ESSIM) initiative' *Marine Policy* 29 (2005) 391-405.
[7] *Oceans Act* s. 29 (Canada). See: Part II: Oceans Management Strategy (OMS) http://www.pac.dfo-mpo.gc.ca/oceans/OceansAct/OAPart2_e.htm (accessed 25 June 2006).
[8] *Canada's Oceans Strategy* http://www.cos-soc.gc.ca/dir/cos-soc_e.asp (accessed 25 June 2006). Its three broad policy objectives are: understanding and protecting the marine environment, supporting sustainable economic opportunities, and promoting Canadian international leadership in oceans management. Mandated activities to achieve these objectives are to be carried out over an initial four-year term.
[9] Policy and Operational Framework http://www.cos-soc.gc.ca/doc/im-gi/index_e.asp (accessed 25 June 2006).
[10] R.J. Rutherford, G.J. Herbert and S.S. Coffen-Smout 'Integrated ocean management and the collaborative planning process: the Eastern Scotian Shelf Integrated Management (ESSIM) initiative' *Marine Policy* 29 (2005) 75-83.

instruments nested within that framework. Thus, the essentials of the Canadian approach to IOM are based in policy instruments.

United Kingdom of Britain and Northern Ireland

Under current legal arrangements, responsibility for the management of British territorial waters falls within the jurisdiction of the countries that form the United Kingdom, i.e. England, Scotland, Wales and Northern Ireland. A diverse range of authorities are responsible for various aspects of marine management.

In 2002, the UK Department of Environment, Food and Regional Affairs (Defra) suggested that a new integrated approach to British marine management and supporting legislation was needed.[11] Its 5 year strategy, adopted in 2004, included plans for new marine legislation. Consultative Forums on the proposed legislation are being held in 2006, on five themes: marine fisheries, marine planning, licensing activities, nature conservation and institutional arrangements.

Under the new legislation, as currently proposed, the existing regional arrangements for the waters of the countries that form the United Kingdom would continue and responsibility for the territorial waters of Scotland, Wales and Northern Ireland would be devolved from London to those countries' regional capitals. They might choose to introduce integrated marine management legislation at their discretion.[12]

The proposed new Marine Bill would introduce spatial marine management at the national level for waters under English and national jurisdiction. One of the primary features of the legislation is the revision of marine consents, seeking to integrate processes for applying, considering and granting various consents to developments

[11] Defra (Department of Environment, Food and Rural Areas) *The Government's Response to the "Seas of Change" Consultation* http://www.defra.gov.uk/environment/consult/seas/gov_response.htm (accessed 25 June 2006).

in the marine environment into a one-stop-shop process. The Bill would also aim to improve marine nature conservation by means of flexible management of multiple use areas, the broadening of marine protected areas and by a focus on adaptive management. It is intended that coastal and estuary management would be a made the subject of a strategy for improved integration, particularly by means of spatial planning. Special focus is to be placed on the integration of fisheries management with other area of marine resources management. Pending the results of consultation on this and other matters, it has been suggested by the Government that a new marine management organisation might be created under the legislation to oversee the implementation of its objectives and the enforcement of its processes.[13]

The British approach to IOM clearly anticipates the traditional template of a legislative mandate for the Executive arm of government to implement. Current indications are that cross-jurisdictional coordination will not be imposed. On other hand, cross-sectoral integration will be highly prescribed though marine consents, integration of fisheries and other resources management, spatial planning for coasts and estuaries, broadening of marine protected areas and the adoption of multiple use areas under the Marine Bill suggests a relatively high degree of regulatory detail.

United States of America

The USA *Oceans Act* 2000[14] established a Commission on Ocean Policy. The Commission comprised 16 members tasked to report on the prospects for IOM under a national oceans policy within 5 years. The Commission submitted its report to the governor in each coastal state, who could make comments to be included in the

[12] Defra *The Marine Bill* http://www.defra.gov.uk/environment/water/marine/uk/policy/index.htm (accessed 25 June 2006).
[13] *Id.*
[14] *Oceans Act* s. 2327 (USA).

report.[15] Accordingly, it reported in 2004 and recommended a comprehensive, coordinated national oceans policy that would promote oceans values. A national policy has not yet been adopted. The Act also requires he President to make a biennial report, from September 2001, on federally funded programs on coastal and oceans activities.

In conclusion, the use of legislation to mandate IOM is at a very preliminary stage. In Canada, legislation provides a broad program for the development of IOM policy. The situation is similar in the USA, where legislation provides merely a platform for the exploration of policy options. While it is still too early to confidently predict outcomes in Britain, it seems likely that British IOM legislation will articulate detailed regulatory prescriptions for implementation.

Australian Framework Legislation

Australia's Oceans Policy – Overcoming Cross-Jurisdictional Fragmentation?

Australia's Oceans Policy (AOP) was adopted in December 1998, the International Year of the Oceans. As the name of the policy indicates, it was initially intended as an inclusive national policy for the governments of the Commonwealth with all Australian States and the Northern Territory. Negotiations between the governments commenced with the initiation of the AOP negotiation process in 1996 but broke down in mid-1998.[16] Indications were that the States would not cooperate in any integrated management program that compromised their crown controls over State coastal waters. Rumours suggested that the States, led by the Premier of Victoria, considered coordination to be conditional on revision the OCS to extend State coastal waters to the full 12 nm extent of the territorial sea. Ultimately, the Commonwealth

[15] U.S. Commission on Ocean Policy 'Review of U.S. Ocean and Coastal Law' Appendix 6 to the *An Ocean Blueprint for the 21st Century* Final Report Washington D.C. 2004 www.oceancommission.gov (accessed 25 June 2006).

adopted the AOP without State and Territory participation or endorsement, effectively reducing it to a policy for IOM in Commonwealth jurisdiction. The AOP as adopted says that the OCS

> 'remains the basis for the management of specific sectors across jurisdictional boundaries. However, consideration will be given to administrative changes that may be needed so that the full range of cross-jurisdictional issues can be addressed effectively…'.[17]

Only if Commonwealth-State and Territory coordination later emerged through joint inter-governmental ministerial arrangements, particularly the Australia and New Zealand Environment and Conservation Committee (ANZECC) could the federal government hope for integrated cross-jurisdictional management of State and Territory coastal waters.[18]

The AOP established the National Oceans Ministerial Board (NOMB) within the Commonwealth government, as Australia's highest institutional coordination mechanism,[19] comprising the five federal Ministers responsible for environment, fisheries, industry, transport and science. The Board was dissolved (in May 2006) in favour of flexible federal cabinet committee consultations. The National Oceans Office (NOO) was established as an executive agency to act as secretariat to the NOMB and its subordinate bodies.[20] NOO was housed in Environment Australia, although not responsible only to the Minister for Environment, but has since become exclusively answerable to the Minister. The integration aspects of the AOP are also supported by the Heads of Commonwealth Marine Agencies (HOMA). Notably, all these mechanisms are Commonwealth, rather than intergovernmental.

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[16] Joanna Vince 'The South Eastern Regional Marine Plan: Implementing Australia;s Oceans Policy' *Marine Policy* 30 (2006) 420-430, p. 420.
[17] AOP p. 17.
[18] AOP p. 17. Geoffrey Wescott 'The development and initial implementation of Australia's "integrated and comprehensive" ocean's policy' *Ocean and Coastal Management* 1999 14: 387-398
[19] AOP p. 15.
[20] AOP p. 16.

Coordination with the Australian States and Territories currently relies on cooperation facilitated through the Natural Resources Management Ministerial Council (NRMMC). The NRMMC was established in 2001, (in place of the ARMCANZ and some of the functions of ANZECC) and comprises ministers in all nine Australian jurisdictions and New Zealand with primary industries, natural resources, environment and Water policy portfolio responsibilities. The NRMMC Standing Committee, comprising heads of governmental agencies with relevant portfolio responsibilities, is chaired jointly by the heads of the Commonwealth Departments of Environment and Heritage (DEH) and Agriculture, Fisheries and Forests (DAFF). Most relevant to IOM is a Standing Committee sub-committee, the Marine and Coastal Committee (MACC). Its role includes providing a forum to consider an 'integrated and strategic approach which is capable of delivering outcomes' and liaising with other NRMMC Committees, such as the Land, Water and Biodiversity Committee.[21] To that end, the MACC has a Working Group on IOM.

A national intergovernmental commitment to a formal plan for cooperative IOM has not yet occurred. However, in February 2006, the NRMMC adopted a *Framework and Implementation Plan for a National Cooperative Approach to Integrated Coastal Zone Management* (the 'National Coastal Framework').[22] Development of the framework was led by the Commonwealth government but it enjoyed the participation of all State and the Northern Territory governments. The National Coastal Framework seeks to promote a national cooperative approach that will 'address cross-border and sectoral issues, [and] harmonise joint action towards management of common issues…'.[23] The Implementation Plan for the Framework sets out actions, timeframes and responsible agencies to implement the objectives set out in the Framework. The actions include efforts to address land and marine-based sources of pollution, climate

[21] Papua New Guinea and the Australian Local Government Association are observers at NRMMC meetings. *Natural Resources Management Ministerial Council* http://www.mincos.gov.au/about_nrm_sc.htm#terms (accessed 25 June 2006).
[22] *Framework and Implementation Plan for a National Cooperative Approach to Integrated Coastal Zone Management* p. 10. http://www.deh.gov.au/coasts/publications/framework/index.html (accessed 25 June 2006).
[23] National Coastal Framework p. 10.

change coastal impacts, introduced pests, and coastal immigration (or population 'sea change'). Outcomes will be achieved, in part, through the provision of funds as part of regional delivery of the Natural Heritage Trust.[24] The MACC is to report annually to the NRMMC on progress in implementing the plan, using the MRMMC National NRM Monitoring and Evaluation Framework.[25]

The National Coastal Framework clearly demonstrates the emergence of Australian intergovernmental consensus on the need for complementary arrangements on the issues addressed in the document. Its glossary defines the coastal zone as 'coastal waters and those areas landwards of the waters where there are processes or activities that affect the coast and its values'. The term 'coastal waters' is not defined but can be assumed to maintain its meaning in terms of the OCS, i.e. waters from the low water mark seawards to three nautical miles.

Unlike the OCS itself, which is supported by reciprocal Commonwealth, State and Northern Territory legislation, the National Coastal Framework is merely policy and is expressed in very general, open-ended language. However, the emergent policy consensus presented by the National Coastal Framework might offer a fresh ray of hope for Australian progress towards cross-jurisdictional coordination for IOM.

Australia's Oceans Policy – Overcoming Cross-Sectoral Fragmentation?

The AOP describes regional marine planning as the way forward to IOM. The regional marine plans (RMPs) are to integrate sectoral commercial interests and conservation requirements and are to be binding on Commonwealth agencies. The regions to be planned are to be based on large marine ecosystems.[26] To support the regional planning process, a national interim system for Australian marine and

[24] The Natural Heritage Trust is a fund established by the Commonwealth government in 1997 to conserve the natural environment. It has been progressively topped up to Aust$ 3 billion. *Natural Heritage Trust* http://www.nht.gov.au/ (accessed 25 June 2006).
[25] National Coastal Framework p. 49.

coastal regionalisation was developed in time for the adoption of the AOP in 1998. A National Representative System of Marine Protected Areas is to be developed in the context of the plans

The first region designated for planning was offshore of south-eastern Australia. Following a scoping phase in 2000-2001 and an assessment phase in 2001-2002, consultations took place in 2002-2003 to negotiate the contents of the plan. A draft plan was circulated in 2003 and the final South-east Regional Marine Plan was launched in May 2004.[27]

The South East Regional Marine Plan did not meet Commonwealth Government or stakeholder expectations. Nor did it settle on a representative system of marine protected areas, which were finally declared in June 2006.[28]

In October 2005 a new Commonwealth approach to marine regional planning was announced.[29] The plans would now have a legislative basis in the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act). Section 176 of the Act provides for the adoption and effect of 'Bioregional Plans' within a Commonwealth area.

> Section 176
>
> (1) The Minister may prepare a bioregional plan for a bioregion that is within a Commonwealth area. In preparing the plan, the Minister must carry out public consultation on a draft of the plan in accordance with the regulations.
>
> (2) The Minster may on behalf of the Commonwealth, cooperate with a State or self-governing Territory, or any other person in the preparation

[26] AOP pp. 11-13.
[27] South-east Regional Marine Planning Publications http://www.oceans.gov.au/publications_southeast.jsp (accessed 25 June 2006).
[28] Senator Ian Campbell *Australia leads world with new Marine Protected Areas* - Media Release 5 May 2006 http://www.deh.gov.au/coasts/mpa/southeast/index.html (accessed 25 June 2006).
[29] Senator Ian Campbell New focus for Australia's marine regional planning programme http://www.deh.gov.au/minister/env/2005/mr13oct305.html (accessed 25 June 2006).

of a bioregional plan for a bioregion that is not wholly within a Commonwealth area.

(3) The cooperation may include giving financial or other assistance.

Thus, regional marine planning under the AOP formally becomes a process confined to Commonwealth waters. However, a plan may extend into State and Northern Territory coastal waters if the latter cooperate, most likely as a result of Commonwealth financial inducements.

The significance of a bioregional plan under section 176 is that it imposes a legal obligation upon the Minister administering the EPBC Act to take the plan into account when making any decision to which the plan is relevant. A failure to do so would result in the decision being open to challenge and judicial review for procedural error. The Minister has a wide range of decision-making responsibilities under the EPBC Act. These include consideration of environmental approvals, disapprovals or conditions that can be imposed on proposed developments that affect Commonwealth waters or others matters of 'national environmental significance'.[30]

Section 176

(5) Subject to the Act, the Minister must have regard to a bioregional plan in making any decision under this Act to which the plan is relevant.

In administrative terms, the section 176 bioregional plans, as compared to AOP marine regional plans, will refocus the marine planning process and outcomes on matters of relevance to the Department of Environment and Heritage. In particular, the bioregional plans will provide for the conservation of marine biodiversity, by means of the National Representative System of marine protected areas. Regulations concerning the procedure for consultation and preparation of bioregional plans under section 176(1) have not yet been adopted.

[30] EPBC Act (Cth) Chapter 2, Part 3, Division 1.

The contents of bioregional plans are largely anticipated in section 176, which provides that:

> (4) A bioregional plan may include provisions on all or any of the following:
> (a) The components of biodiversity, their distribution and conservation status;
> (b) Important economic and social values;
> (c) Objectives relating to biodiversity and other values;
> (d) Priorities strategies and actions to achieve the objectives;
> (e) Mechanisms for community involvement in implementing the plan; and
> (f) Measures for monitoring and reviewing the plan.

It is anticipated that bioregional plans will contain three components: (1) a profile of the marine region; (2) an integrated conservation strategy; and (3) reporting and review requirements. The profile is a description of each marine region, setting out key conservation values (habitats, plants and animals, heritage and natural processes), the socio-economic context (current and anticipated human uses and benefits, and drivers of change); and threats to the long-term ecological sustainability of the region (including knowledge gaps). The conservation strategy is to set out actions and risk-based priorities. Reporting will take the form of state of the marine environment monitoring, while a review will consist of monitoring performance of the plans' action targets.[31]

Affirming the Government's ongoing commitment to the marine regional planning process, in May 2006 the Minister for Environment and Heritage announced the allocation of Aust $37.7m, as part of the federal forward budget, to be expended on bioregional planning over a period of four years, concluding in 2010. All five Australian bioregions are to be planned by that time. In 2006, planning work is to in the northern and south-western regions is being undertaken.[32]

[31] Barbara Musso, Department of Environment and Heritage Briefing, 27 June 2006 (on file).
[32] Senator Ian Campbell http://www.deh.gov.au/minister/env/2006/mr09may206.html (accessed 25 June 2006).

The federal government's decision to use the EPBC Act as a legislative framework for marine regional planning should be viewed in light of a recent discussion paper, released in March 2006, about the future of Australia's laws for oceans planning and management. The Australian Conservation Foundation (ACF) and the National Law Association (NELA) launched the paper, entitled *Out of the Blue*, to stimulate debate about a a national legislative framework for IOM.[33]

The discussion paper considers the nature of existing Australian administrative and legislative arrangements and their limitations for IOM. In relation to the use of section 176 of the EPBC Act, it concludes that this will not provide an adequate framework for integrated ecosystem-based regional marine planning although it is a useful tool to highlight the natural values and limits of an area in limited decision-making processes. In surveying other key provisions of the EPBC Act, the discussion paper similarly concludes that, although it provides useful tools, the EPBC Act does not provide an adequate platform for national IOM because the design and function of the Act is to react to ad hoc pressures, rather than to provide comprehensive cross-sectoral integration planning and management. Through a number of amendments, broad interpretation of provisions, expansion of actionable lists, and a strengthening of the environmental impact assessment and approvals processes, the EPBC Act could merely provide various supports for IOM. Thus, the discussion paper argues the case for a new, comprehensive Australian Oceans Act to promote integrated oceans planning and management.

Underpinning the suggested Act is a proposal for negotiation of an Intergovernmental Agreement on Australia's Oceans (IGAAO). Negotiated through the Council of Australian Governments, it is proposed that the Commonwealth, States and Northern Territory Governments might sign on to the IGAAO. In doing

[33] Australian Conservation Foundation and National Environmental Law Association *Out of the Blue* (Australian Conservation Foundation, Melbourne 2006).

so, they would agree to the establishment of nationally consistent planning processes, and nationally consistent development assessment and approvals processes for certain proposals in their waters. Although that proposition is utopian, the signing States and Northern Territory would obtain access to monies made available under a new Australian Oceans Fund, giving them an incentive to sign on. (Such specific funding was lacking in the process for the development and implementation of Australia's Ocean Policy.) The purposes of financial assistance would be to improve State and Territory oceans planning and management processes to achieve national benchmarks and milestones concerning matters such as marine and coastal mapping, consultation and planning processes; planned actions for marine, coastal and catchment areas; establishment of institutional liaison arrangements; nationally consistent assessment and approvals processes; structural adjustment where required; and public good marine research communications and education programs. Much of the Australian Oceans Fund could be drawn from existing federal marine management capacity building programs, which would then become conditional on participation in the IGAAO. Nevertheless, even given the inducements of an Oceans Fund, the culture of Australian federalism gives reason to doubt whether the States and Northern Territory would want to sign on to the proposed IGAAO. Therefore, the discussion paper also canvasses Commonwealth imposed measures (see below).

Central to the operation of the proposed Australian Oceans Act is the creation of an Australian Oceans Authority with directive and enforcement powers. Its powers would be enabled in participating jurisdictions by the enactment of Commonwealth legislation and by mirror legislation across participating coastal jurisdictions. The Authority would be answerable to IGAAO parties through the NRMMC, thus providing accountability to each and every participating government. A primary function of the Authority would be the development of marine regional plans through regional working groups. The regional plans would have statutory force and be implemented by the parties to the IGAAO in their own waters pursuant to their

own legislation. The Australian Oceans Authority would accredit agencies to conduct assessments and approvals required under the Act to implement the relevant regional marine plan. Thus, the participating States and Northern Territory would implement consistent measures under nationally accredited administrative processes.

Those States that have not signed on, or do not have nationally accredited administrative processes, would be required under the federal legislation to refer proposals for certain listed activities to the Oceans Authority for approval. Listed activities include changes in fishing gear or species, shipping lane traffic, or mining activities. The proposed Oceans Act would also make it an offence to fail to comply with a marine regional plan. The offence is punishable by a fine and it applies to the Crown. Injunctions to prevent anticipated or ongoing breaches may be applied for by any person. Thus, in relation to certain limited matters, IOM coordination could be imposed on State and Territory governments not party to the IGAAO. In this way, a national legislative framework could encompass IOM comprehensively in Commonwealth and participating State and Territory jurisdictions and operate in a reduced form in non-IGAAO State and Territory jurisdictions.

Analysis

Cross-Jurisdictional Coordination

The Australian regional marine planning process never had the capacity to deliver IOM across jurisdictional boundaries because the States and Northern Territory never bought into the AOP. The new National Coastal Framework provides hope of progress in the area of cooperation across the boundary between coastal and Commonwealth waters.

Financial inducements, in the form of a Commonwealth commitment to provide grants conditionally through the Natural Heritage Trust, might buy in the States and Northern Territory. This might be perceived to be part of a gradual process of national environmental cooption since the creation of the Natural Heritage Trust in 1997. In coopting the States and Northern Territory thorough financial inducements, an Australian Oceans Fund that consolidates existing funds for marine projects but imposes requirements for cross-jurisdictional coordination as conditions for access could stimulate coordination.

Concerning the proposed use of legislation to impose IOM across jurisdictional boundaries, Commonwealth legislation has been enacted for national coordination purposes in the fields of corporations, trade practices, transactional and transnational crimes and competition regulation. There is little doubt that the Commonwealth has constitutional bases of power to enact legislation for the sustainable management of coastal waters. In the field of ecologically sustainable development, precedents for consensual national coordination occur in the legislation establishing the Murray-Darling Basin Commission and the National Environment Protection Council.

The Murray-Darling Basin Agreement was signed by the governments of the Commonwealth, New South Wales, Victoria and South Australia in 1992, by Queensland in 1996 (subject to special terms) and by the Australian Capital Territory in 1998. [34] (One might imagine that an IGAAO might also be subjected to special regionalised terms for some jurisdictions.) In 1993, each Murray-Darling Basin Agreement party adopted mirror legislation to enact the Agreement within its jurisdiction. Comparable to the proposal for an Australian Oceans Authority, the Agreement and legislation established the Murray-Darling Basin Commission as an

[34] It replaced an earlier agreement of 1987, which itself replaced the longstanding River Murray Waters Agreement of 1915. It is complemented by earlier, ad hoc bilateral agreements between governments concerning transboundary waters. *The Murray-Darling Basin Agreement* http://www.mdbc.gov.au/about/the_mdbc_agreement (accessed 25 June 2006).

executive agency accountable to participating government ministers.[35] An intergovernmental Ministerial Council (comparable to an NRMMC Committee) provides direction and policy for the Commission's work and comprises Ministers responsible for land, water and environment management among the participating governments. Under the Agreement, the Murray-Darling Basin Initiative, which might be compared to a regional marine plan, seeks to promote Basin-wide planning and an integrated catchment management policy.

The other salient example for comparison is the National Environment Protection Council (NEPC). It was an outcome of the 1992 Inter-Governmental Agreement on the Environment. It comprises all State and Territory Ministers for Environment (since reconvened as the Environment Protection and Heritage Council). The NEPC adopts cross-jurisdictionally harmonised environmental quality standards, called 'national environment protection measures'. These might be compared, at least in a highly general way, to standards that could be included in marine plans. The harmonised adoption of national standards is given the force of law in each Australian jurisdiction by mirror legislation. The dedicated secretariat is the NEPC Service Corporation.[36]

It is noteworthy that the establishment of an independent executive agency to support an intergovernmental Ministerial Council is characteristic of cross-jurisdictional coordination arrangements, apparently to ensure that the secretariat is answerable to all and not captured by any of the participating Governments. An IGAAO and Australian Oceans Commission is a variation on this familiar theme, rather than strange and inconceivable. Its realisation is dependent on the exigencies of political will rather than a revolution in the federal balance of power between the Commonwealth and the States and Territories. An optimistic judgement of contemporary dynamics might suggest that an IGAAO is feasible at the current time.

[35] The Commission was established in 1986, under the previous Agreement.

A less optimistic assessment is that a forceful move towards an IGAAO would precipitate State and Territory withdrawal from cross-jurisdictional coordination arrangements that are incrementally improving at present.

Cross-Sectoral Integration

The AOP regional marine planning process lacked mechanisms for its implementation, including operational linkages to existing management frameworks. Its attempt to integrate cross-sectoral management issues was perceived as "threatening" by some stakeholders and as encroaching on the management responsibilities of some governmental institutions. The effort to locate the management of cross-sectoral issues in one place was perhaps over-ambitious for a fledgling process and its institutions. Nevertheless, the abandoned marine regional planning process was a learning experience that produced substantial information products in its marine regional profiles and relationships between marine information databases. In addition, liaison with stakeholders and an extended range of marine agencies generated knowledge about their interests, functional consultation processes and also enduring linkages.[37]

The use of section 176 of the EPBC Act is clearly a move forward in the framework for implementation. It will require that the Minister for Environment consider setting conditions for proposed activities across government that significantly impact on Commonwealth waters or other matters of national environmental significance. In this way, it strengthens liaison across portfolios engaged in marine activities. However, in its transition from AOP marine regional planning to EPBC bioregional planning, Australian marine planning has narrowed in scope. It is now refocused on biodiversity management issues, such as establishing and managing parks, for which

[36] National Environment Protection Council http://www.deh.gov.au/about/councils/nepc/index.html (accessed 25 June 2006).
[37] Ian Cresswell, National Oceans Office Briefing, 5 October 2005 (on file).

the Department of Environment and Heritage has institutional expertise and mechanisms and can deliver the goods.

Notionally, central administrative responsibility for cross-portfolio integration can be located in any governmental institution that has responsibilities with cross-sectoral implications. Thus, there is no problem, in principle, in locating a cross-sectoral marine regional planning process within the suite of responsibilities of the Department of Environment and Heritage. The process sits very well between the Department's existing responsibilities for marine national parks and for promoting sustainable development actions in government. Nevertheless, the planning process is no longer a broad, whole-of-government exercise in sustainability planning. Its goal of cross-sectoral marine planning and management is reduced to the far more modest objective of merely providing information products in the form of regional profiles for consideration by other agencies with a view to sustainable marine development. The abandonment of integrated cross-sectoral planning and centrally coordinated management is a marine governance watershed.

This is a humbling admission of the failure of the AOP integrated national oceans management model. It provokes big picture questions: Can sustainable development be reduced to the mainstreaming of environmental planning? Can any workable mechanisms and institutions can be designed for integrated cross-sectoral planning and management?

Skeptics might say that the notion of a centrally located cross-sectoral process and supporting institution is an oxymoron. That is, a cross-sectoral process is necessarily a power game engaged in by proponents of competing interests and cannot be vested in an institution without a sectoral interest and power base. It may well be so. In the field of IOM, the central issues revolve around the sustainability of marine environmental resources, rather than conflicts between consumptive uses. Looked at

in reverse, sustainable development cannot proceed without mainstreaming environmental resources conservation.

Nevertheless, the conclusion that a centralised process and agency cannot successfully perform cross-sectoral planning or management is simplistic. The failure of the AOP regional marine planning model to deliver a meaningful plan or management mechanism is not the final death knell in cross-sectoral environmental governance. There are other models, some of which might be successful. For example, responsibility for IOM could be entrusted to a sectoral minister or jointly to a ministerial committee embracing more than one portfolio. Alternatively, responsibility for the operation of an IOM mechanism could be delegated to an independent statutory authority. For each model, a legislative mandate that clearly prescribes the objectives, procedures and authorities for IOM is essential. In addition, a precondition to successful IOM is that sectoral legislation and its implementation procedures explicitly recognise the imperative of whole-of-government cooperation, most particularly to integrate environmental stewardship.[38]

Creation of an independent statutory agency might be advantageous if the regional planning model is to coordinate IOM across marine jurisdictions, rather than merely to integrate cross-sectoral concerns in one jurisdiction. Although, it could lack bureaucratic clout due to a lack of established stakeholders and of resources, it would be regarded as operating at arms length from each participating government. An independent agency might operate to facilitate cross-sectoral negotiations, much like a sports umpire. In such a game, it is critical that the rules are known and accepted by all the players. Mere policy is not enough to establish respected game rules because individual government portfolios are each responsible for their own sectoral policies, often competing with equal authority with those of other sectors

[38] In this respect, it is noteworthy that a 2004 review of Commonwealth, State and Territory marine legislation found that sustainable development objectives were, on the whole, poorly articulated albeit with various degrees of cogency across marine sectoral enactments. The ACF Marine Legislation review examined 250

and the umpire. Respected rules provide conditions of play more conducive to 'environmental governance', whereby mid-level governmental officials build cooperative working relationships across portfolios in order to achieve sustainable, mutually acceptable outcomes.[39] Cooperative cross-sectoral governance needs clear rules of play with the authority of law. Laws enacted directly by Parliament also provide a greater likelihood of external legal accountability for their breach. In the event of conflicting rules or a breach, an appeal to a judicial umpire can impose an independent interpretation of the rules or impose penalties for unfair play.

A criticism of dedicated IOM legislation is that any legislation focused exclusively on marine management will fail to recognise the continuum between land and water resources, ie. will fail to address the management of catchments that affect the marine environment, and will therefore further fragment natural resources management.[40] It is true that a holistic approach to the land-sea continuum in performing an environmental impact assessment is important, as was recognised in Australia's Nathan Dam case.[41] It is also true that, instead of a free standing Oceans Act, the Commonwealth might amend the EPBC Act might to incorporate IOM and an Australian Oceans Authority. However, despite the appeal of the possibility of having all environment-related legislation coherently codified in one omnibus enactment, the mainstreaming of sustainable development means that environmental provisions should be located in a diverse range of legislation. The special character of an enactment that is adopted in mirrored fashion in all Australian coastal jurisdictions might logically stand apart from the EPBC Act in order to conform to a cross-jurisdictional template.

Commonwealth and State marine-related environmental laws and regulations that apply to the conservation, fisheries, petroleum, shipping and tourism sectors for their utilisation of IOM principles.

[39] Jenny Stewart and Grant Jones *Renegotiating the Environment – The Power of Politics* The Federation Press 2003.

[40] Chris McGrath 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act'' (2006) 23 *EPLJ* 165-184.

[41] *Queensland Conservation Council* v *Minister for Environment and Heritage* [2003] FCA 1463; *Minister for Environment and Heritage* v *Queensland Conservation Council* (2004) 139 FCR 24; 134 LGERA 272; [2004] FCAFC 190.

Conclusion

The use of legislation for integrated oceans management is still at a preliminary and experimental stage. The Canadian *Oceans Act* provides merely a broadly described mandate for the development of policy instruments. In the USA, it provides only for the exploration of policy options. However, the Marine Bill being developed in Britain seems likely to offer more detailed policy prescription and regulatory substance for cross-sectoral integration (but not cross-jurisdictional coordination) in oceans management. Its features seem likely to include the integration of marine consents, integration of fisheries and other resources management, and spatial planning for coasts and estuaries, as well as the broadening of marine protected areas and the adoption of multiple use areas.

The legislative enactment of a detailed and carefully prescribed mandate for the Executive arm to implement is the traditional approach of the Westminster system of government. It promotes quality and accountability in administrative action. Yet, the Canadian and Australian approaches to integrated oceans management have relied instead on relatively weak policy formulations. The flexibility they allow suggests that governments are currently experimenting with regional marine planning to learn on the job the business of integrated oceans management and to progressively adapt the design of their measures. One of the lessons that should be learned from the difficulties in this approach is that coordination or integration of competing interests is facilitated by legislation that authoritatively sets out the rules of the game for competing institutional players. Those rules need to be set out in legislation that forms a central hub for the integration process and to be reflected in other enactments administered by the agencies concerned.

In Australia, cross-jurisdictional planning and management is a highly political matter. It is doubtful that the States and Northern Territory are ready to coordinate at the present time, or that the time is ripe for the Commonwealth to impose

coordination across State and Territory waters. Although there is constitutional power to legislate, the federal government could anticipate ongoing unpleasant confrontation to its efforts to implement its unilateral legislation in the coastal waters of any State or Territory that chose not to participate in the agreement. Such confrontation can carry a heavy political cost. It is significant that the United Kingdom anticipates excluding the coastal waters of Scotland, Wales and Northern Ireland from the operation of its proposed Marine Bill. A compromise solution could be not to impose coordination in the coastal waters of a non-participating State or Territory, but merely to withhold financial benefits in the absence of cross-jurisdictional coordination.

In the event that no intergovernmental agreement to coordinate across jurisdictions is adopted, it would still be worthwhile adopting framework legislation to integrate Commonwealth oceans management. Framework legislation for integrated ocean management brings authoritative rules to the game of cross-sectoral integration. It is likely to be conducive to fair play and to the achievement of mutually acceptable outcomes between interested agencies and their stakeholders. Clear and specific language in legislation also tends to bring higher levels of certainty to individual actors' rights and obligations and their performance accountability. Therefore, in principle, framework legislation could serve well to achieve the objectives of integrated oceans management through regional marine planning and implementation.