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The legal regime for the protection and exploitation of fishes, with special reference to Australia

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The legal regime for the protection and exploitation of fishes, with special reference to Australia

Abstract
Australia has the third largest Exclusive Economic Zone (1° 648 250 km2) however overall commercial fisheries production is ranked relatively low in comparison with many other nations (240,000 metric tones per year, valued at $A2.2 billion). The reason underlying this relatively low level of fisheries production can be largely attributed to the low productivity of many marine waters surrounding the Australian coastline and a legal regime that is designed not only to manage fisheries, but to provide a significant degree of environmental protection to both fishes and their habitats.

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The Legal Regime for the Protection and Exploitation of Fishes, With Special Reference to Australia

by

Dr Ron West

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THE LEGAL REGIME FOR THE PROTECTION AND EXPLOITATION OF FISHES, WITH SPECIAL REFERENCE TO AUSTRALIA

Dr Ron West

Introduction

Australia has the third largest Exclusive Economic Zone (10,648,250 km\(^2\)) however overall commercial fisheries production is ranked relatively low in comparison with many other nations (240,000 metric tones per year, valued at $A2.2 billion). The reason underlying this relatively low level of fisheries production can be largely attributed to the low productivity of many marine waters surrounding the Australian coastline and a legal regime that is designed not only to manage fisheries, but to provide a significant degree of environmental protection to both fishes and their habitats.

In order to understand the current legal regime for fish and fisheries management in Australia, it is useful to consider some aspects of the historical developments of the nation. In this paper, some key historical factors that have had a lasting impact on the

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management of Australian fisheries are reviewed and the current legal regime within for the protection and exploitation of fishes is then examined, at the national and state (provincial) levels of government.

**A Brief History of Early Fisheries in Australia**

For at least the past 40,000 years, the continent of Australia has been occupied by aboriginal or indigenous peoples. Australian aborigines have a long history of use of the coastal fishery resources, particularly around the shallow inshore areas, such as bays, rivers and lakes. Mounds of shells known as middens, and some dating back thousands of years, are a common sight around the entire Australian coastline, and are evidence of the collection and consumption of bivalves (such as pipis and cockles) and other shallow water fisheries species. Many aboriginal communities have been reported to use spears, fish traps and nets to capture schooling fish, turtles, dugongs and larger prey. In some regions along southern NSW, there are reports of the indigenous communities training killer whales (orcas) to assist in locating and hunting whales.

One interesting aspect of the indigenous fisheries in northern Australia is that there is some evidence that there existed a trade in sea-cucumbers, and possibly other fish products, between some aboriginal communities and visiting sea-farers from the north. This trading is likely to have been going on for several centuries before European colonization of Australia, which occurred in 1788. These sea-cucumbers collected and dried by indigenous communities in northern Australia are thought to have been traded through a network of south-Asian countries, ending up as far away as China. The long history of indigenous fishing has led to the recognition of indigenous property rights that have been accepted in some parts of Australia. These indigenous rights are always difficult to establish in current law, as they often depend upon the ability of the indigenous people providing proof of
current fishes levels of Australia, such as dolphins and sea mammals, have been captured in regions of collection and trade. In northern Australia, a trade in whale meat and skins has led to rights being extinguished.

In many parts of Australia, these indigenous fishing rights are therefore considered to have been “extinguished”, as the original aboriginal communities in particular areas have been moved and their traditional practices halted, after European occupation.

**British Rule in Colonial Australia**

The colonization of Australia by the British was somewhat piecemeal in that a number of separate penal settlements were established around the coastline. The first of these was the colony of New South Wales, established at Sydney Cove (1788) under the supervision of a Governor who reported directly to the British Government. As further penal settlements were established, eventually separate Colonies were established and given some limited form of self-government, under various Acts of the British Parliament. In 1855, the first self-governing Colonial parliament was created by the New South Wales Constitution Act (1855) and this was quickly followed with governments forming in the other established colonies.

The Australian public has always had a particular interest in fish and fisheries, perhaps a result of the nature of those who emigrated from the harbours and coastal areas of England. Initially there were few laws and controls on fishing activities, but in 1880 there was sufficient public and government concern about the lack of control over fishing and the poor state of the fish stocks, that a Royal Commission was held into fisheries. The

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4. For example, the New South Wales Act 1823 which authorized the establishment of a Legislative Council and Supreme Court in New South Wales. The Legislative Council had the power to advise the Governor of NSW, overturn legislation and direct the flow of local revenue and taxes.
1880 Royal Commission was held in Sydney and had the aim of investigating "the actual state and prospects of the fisheries of the Colony". One of the major findings of the Commission was that fishing activities needed to be controlled much better by the government. As a result, a new fisheries act was drafted to replace earlier legislation. Interestingly, the objective of this proposed legislation was to stop commercial fishing in all the waters of the Colony and to only allow a resumption of fishing in particular areas after it had been shown to be sustainable. As you might expect, there was much argument about this proposed legislation and it proved to be so unpopular with sections of the public that it was changed dramatically before being enacted in 1881. In fact, when enacted, the new legislation allowed fishing in all waters of the Colony, unless fishing could be shown to be unsustainable. The 1881 Fisheries Act also allowed the government to establish a board of commissioners to assist in the management and development of fisheries. As a result, five "Commissioners of Fisheries" were appointed in 1882. Several of these new Commissioners were not happy with the state of the fisheries and considered that large areas should have been reserved and closed to fishing, to ensure the survival of the fish populations. Some of the Commissioners were so concerned about the poor state of the fish supplies in the Colony that they investigated other methods of enhancing the fisheries. For example, one Commissioner, the Honorable J.H. Want, considered that the Fisheries Commission: "should make some efforts to save the total disappearance of the finny tribe (that is, fish) ... but as the establishment of close(d) fisheries was not only difficult and unpopular, I thought we might try if something could be done to create an artificial supply by fish-breeding in salt water as well as fresh".

The aim of the fisheries commission was better by the fed to replace this proposed the waters of g in particular. As you might noted legislation the public that d in 1881. In fishing in all the government shown to be e management Commissioners of these new f the fisheries reserved and h populations. about the poor y investigated example, one dered that the ts to save the i) ... but as the v difficult and ill be done to t water as well

**Federation: Commonwealth of Australia**

The nation of Australia was created by a federation of six British colonies, when the British Parliament passed the Commonwealth of Australia Constitution Act in 1900. This created a federation of state governments, under a national system of governance, called the Commonwealth Government of Australia. As a result, some major characteristics of this British heritage remained incorporated into Australian fisheries legal regime, such as the concepts of common law and crown property. For example, all the lands and waters of the colonies of Australia were originally considered to be vested in the Crown, or in other words, managed by the government on behalf of their owners, the public. As a result, approximately 12.5% of the Australian land mass remains part of the Crown land reserve, and this includes most natural waterways and foreshores. In addition, by most interpretations, fish within Australian waters do not belong to anyone until they are captured or at least “under the control” of a fisher. Within most Australian jurisdictions fish are referred to as a “common property” resource. Once captured by a licensed fisher, fish can be bought and sold, essentially as private property. Fish on private lands within constructed waters, such as within an aquaculture farm, would not be considered as common property. In addition, there is considered to be a “public right” to fish in all Australian waters, however the actual activity of fishing has been highly regulated by all Australian governments.

One contentious issue that has arisen from time to time has been the jurisdictional powers of State and Commonwealth Governments over the sea, and hence the fish therein. Prior to Federation, the colonies enacted legislation that was enforced in their coastal waters which, on the basis of British precedent, was

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considered to be to 3 nautical miles from the shore. After Federation and despite this precedent being successfully challenged within Britain in 1876, state legislation in Australia continued to recognize the waters to 3 nautical miles as territorial waters belonging to the state. However, a number of contentious decisions of the Australian High Court led to confusion over the jurisdiction of the States and Commonwealth in respect to territorial waters. As a result, the Offshore Constitutional Settlement (OCS) was agreed to in 1979-80, which provided for the establishment of State jurisdiction over coastal waters, defined as the three-mile territorial sea and Commonwealth jurisdiction over the waters from 3 to 200 nm. As part of these arrangements, the Australian Fishing Zone (AFZ) was declared, which covers the area out to 200 nm.

The OCS is a complex set of legislation and regulations that allows for co-operative arrangements to be established between the Commonwealth of Australia and the various States and Territories. This means it is possible for co-operative management of trans-boundary stocks of fishes. As a result of the OCS, any fisheries in Australia can be managed by the Commonwealth, or by the State or by a “joint authority” made up of State and Commonwealth representatives. Where there is no arrangement put in place under the OCS, the States and Territories control fishing to 3 nm and the Commonwealth to 200nm. Importantly, under this arrangement, with the agreement of the Commonwealth, offshore fisheries to the 200 nm Economic Exclusive Zone (EEZ) can be managed by a State authority. In fact, the Commonwealth Government has limited its jurisdiction to commercial fisheries.

7. The Australian Fishing Zone (AFZ) is an area specifically established in 1979 for the purposes of managing and protecting Australia’s fisheries. Nowadays, the AFZ is considered exactly the same area as the Australian Exclusive Economic Zone (EEZ), which was declared in 1994. They both cover an area of approximately 10.6 million square kilometers.
The shore. After successfully challenged Australia continued as territorial waters contentious decisions over the jurisdiction to territorial waters.
Dover the jurisdiction to territorial waters. The establishment (OCS) was the establishment of as the three-mile on over the waters settlements, the Australian covers the area out to

and regulations that the OCS, any Commonwealth, or made up of State and there is no arrangement Territories control 200nm. Importantly, the Commonwealth, Exclusive Zone (EEZ) the Commonwealth commercial fisheries, specifically established in Australia’s fisheries. The area as the Australian area as the Australian EEZ and many commercial fisheries beyond the

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which essentially means that recreational fisheries within the Australian EEZ are managed by State and Territorial governments.

So several major concepts arise from this historical perspective on the development of the Australian legal regime and they remain extremely relevant today, namely that:

- Unless considered extinguished by European occupation or use, indigenous property rights remain throughout Australia. The extent of these property rights over fish, unless secured through targeted legislation, will often need to be determined on a case-by-case basis by Australian courts of law.

- Fish are considered to be a common property within the Australian legal regime and the right to fish is part of common law. However, the activity of fishing has been highly regulated by various governments within Australia, since the mid 1800s.

- Australia is a federation in which the various State (or provincial) governments have a considerable power, particularly in respect to the management of natural resources, such as fish and fisheries.

- An historical disagreement over jurisdiction of the Commonwealth and State Governments was largely resolved in 1979-80 through the Offshore Constitutional Settlement (OCS), which was designed to provide a legislative framework for State and Commonwealth jurisdiction within the Australian EEZ (<200 nm), particularly in respect to fisheries management. It allows for a flexible management regime to be implemented that is reflective of the requirements of management.

- Under the OCS, all recreational fisheries within the 200nm Australian EEZ and many commercial fisheries beyond the
3 nm “State” waters are managed by the State and Territorial Governments.

**Commonwealth Legal Regime**

*Introduction*

The current legal regime controlling fish and fisheries in Australia is complex and involves several Acts of parliament at the Commonwealth, State and Territorial levels of government. In this brief paper, a focus has been given to the legislative arrangements at the Commonwealth and NSW levels of government, but a comprehensive review of the legal regime throughout Australia has recently been compiled.

In general, the responsibility for Commonwealth and International fisheries currently lies with the Minister for Agriculture, Fisheries and Forestry and is implemented at agency level through the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF). DAFF is responsible for developing and implementing “policies and programs to ensure Australia’s fisheries are competitive, profitable and sustainable”, as well as for engaging “in international fisheries issues on a bilateral, regional and global level, in order to promote more sustainable fisheries management practices worldwide and to achieve long-term and commercially viable access to regional migratory and straddling stocks for Australian fishers”. DAFF is responsible for implementing the Commonwealth fisheries legislation, however that legislation devolves much of the day-to-day management activities to another body called the Australian Fisheries Management Authority (discussed below).

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One of the most striking features of the current legal regime for the protection and exploitation of fishes within Australian waters is the relationship between environmental and fisheries legislation which has developed over the past decade. To some extent, the basis of this relationship has been to delineate the government's role as both the "gamekeeper" (i.e., the protector of fishes) and "poacher" (i.e., the developer and manager of fisheries). The legal regime for fisheries within Australia tends to reflect the need to distinguish between these two fundamental roles ("fisheries management" versus "environmental management") and to keep them as independent of each other as possible. For example, until very recently, management of fisheries within Commonwealth jurisdiction was placed in the hands of a statutory body, known as the Australian Fisheries Management Authority (AFMA), which was considered a semi-independent body, not directly responsible to government.

**Fisheries Legislation**

The primary piece of legislation governing fisheries in the AFZ is the Commonwealth (Cwth) Fisheries Management Act 1991 and the associated regulations (Fisheries Management Regulations (Cwth) 1992), which set out the principles and mechanisms for management. There were three key principles promoted in the drafting of this legislation, namely that: "the objectives for fisheries management should ensure fisheries resources are not over-exploited, commercial fishing operations enhance economic efficiency in fisheries, fishers are able to make a payment to the community for the right to exploit a public resource for private gain without reducing the profitability of..."
fishing operations and Commonwealth fisheries are managed on the most efficient and effective basis."^{10}

As a means of implementing the Fisheries Management Act, a second Act known as the Fisheries Administration Act (Cwth) was passed in 1991, which established the Australian Fisheries Management Authority (AFMA) as the statutory body responsible for implementing fisheries management at the national level. In combination, and with associated regulations, these two Commonwealth Acts have resulted in:

- The identification of distinct fisheries as management "units". These are generally defined as a set of common activities for management purposes, and may relate, for example, to a particular fish species, fishing method or area of water, or a combination of these factors.

- The issuing of Fishing Permits and the collection of fees related to transactions dealing with Statutory Fishing Rights (see below). These application and license fees are used to offset the cost of AFMA in managing the commercial fisheries.

- The establishment of Management Advisory Committees (MACs) for each fishery, as the primary contact with fishers, to assist in the development and operation of management plans and to monitor and advise on the status of a fishery. The membership of the MACs is dependent on the particular fishery in question but generally has industry, government and NGO representatives.

- A transition from traditional input methods of fisheries

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management to output methods, through establishing the framework of a Statutory Fishing Rights (SFRs) and Individual Transferable Quotas (ITQs). SFRs were designed to provide security to fishers in terms of their right to fish in a particular fishery.

- The development and operation of management plans for all fisheries, unless deemed unnecessary by the management authority. Fisheries Management Plans must outline a set of objectives and performance criteria for the fishery, and provides the set of rules for governing the fishing activity.

In 2008, the Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and other Matters) Act (Cwth) made changes to the management of AFMA, bringing it more closely under the direction and scrutiny of government and the responsible minister. It allowed for the appointment of a Chief Executive Office (CEO) and of Commissioners of Fisheries, with the authority to implement the various Commonwealth fisheries acts and regulations. A major review of the internal operation and organizational framework of AFMA is currently underway and is expected to be completed during 2009.

**Commonwealth Managed Fisheries**

There are currently about 20 fisheries within Commonwealth jurisdiction that have been declared and that are managed by AFMA. These fisheries are defined on the basis of area, method and species captured, or a combination of these factors. For most of these fisheries, a Management Advisory Committee (MAC) has been established, and a Fishery Management Plan (FMP)

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For full current listing, please refer to:

is available. The Fisheries Management Act 1991 (Cwth) provides guidelines for the function and content of FMPs\textsuperscript{13}, as well as the three major objectives of the management process:

"A plan of management for a fishery is to set out:
(a) the objectives of the plan of management; and
(b) measures by which the objectives are to be attained; and
(c) performance criteria against which, and time frames within which, the measures taken under the plan of management may be assessed."

In addition, the FMP sets up the how the fishery will operate, including: issuing of Statutory Fishing Rights; rules within the fishery; fishing gears and areas fished; the entitlements and obligations of fishers; and, any specific environmental requirements that may apply. Once finalized and accepted by the responsible Minister, FMPs are gazetted by the Commonwealth Government and become part of the operation of the Fisheries Management Act 1991. FMPs can only be amended or revoked by AFMA or at the request of the responsible Minister.

As an example, commercially fishing for Southern Bluefin Tuna (SBT) either within the Australian Fishing Zone, or by an Australian vessel on the high seas, is managed under the Southern Bluefin Tuna Fishery Management Plan (1995)\textsuperscript{14}. This FMP includes provisions related to ESD and the Precautionary Principle: "In managing the SBT Fishery under this Plan, AFMA will pursue the objective of ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a

\textsuperscript{12} A review of the role and composition of most committees within the management framework of AFMA is currently being undertaken.

\textsuperscript{13} See: Division 2 - Plans of Management, Cwth Fisheries Management Act 1991

\textsuperscript{14} The current Southern Bluefin Management Plan is publicly available at:
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manner consistent with the principles of ecologically sustainable development and the exercise of the precautionary principle, in particular, the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment.”

In addition, the FMP sets up a research plan and data gathering strategy, which is aimed at meeting the need of the MAC in providing the essential information required for setting fishing quotas for SBT. The aim of this research is to:

“Develop and implement, within 12 months after the commencement of this clause, and review every 2 years, a data strategy to:

(i) collect, verify, analyse and manage data relevant to the management of the SBT Fishery, including data about catch and effort, and biological, ecological, economic and technical data; and,

(ii) obtain data from ‘at sea’ research activities, fishery observer programs (see subclauses 24.6, 25.2 and 26.2), bycatch monitoring programs, ecologically related species monitoring, ecosystem related monitoring, size monitoring, landing and farm monitoring and a catch certification scheme”.

These FMP are also subject to environmental assessment and approval by the appropriate Commonwealth environment agency (discussed below).

Commonwealth Fisheries Assessments

As outlined above, the vast majority of Commonwealth fisheries have an associated Fishery Management Plan, outlining the objectives of management and the performance criteria that will be adopted. One outcome of the setting of performance criteria
which must be reported against on a regular basis, is the necessity for fisheries research, data gathering and analyses. Funding for this research is derived from both industry and government allocations.

Fisheries research may be carried out by Commonwealth agencies such as the CSIRO\textsuperscript{15}, Bureau of Rural Sciences (BRS) or by State government fisheries research agencies. The outcome of this research is usually to produce Fishery Status Reports, which provide updated information on the current and historical status of the fisheries as a whole, as well as individual species (both target and non-target). In many cases, Commonwealth fisheries have also established Resource Assessment Groups (RAGs) that review the available research information about a fishery and make recommendations to the Management Advisory Committees. In this way, fisheries assessments are used to adjust quotas or indeed, if required, to alter the management operational arrangements of the fishery.

\textit{International fishing arrangements}

The Fisheries Management Act 1991 (Cwth) also gives AFMA a role to play in managing international fishing activities, including keeping a register of Australian fishing vessels that fish outside the Australian Fishing Zone (AFZ). For example, the Act applies to Australians and foreigners fishing on Australian licensed vessels, outside the AFZ. If this fishing activity is carried out as part of a declared fishery (such as the SBT Fishery) then the Fishery Management Plan can provide the rules, conditions and catch restrictions both inside and outside the AFZ. AFMA also controls access to AFZ by foreign fishing vessels. Although some foreign fishing vessels were licensed to fish in the AFZ in the 1980s and 1990s, the AFZ is now considered to be fully fished.
and no further licenses have recently been granted for large foreign commercial fishing vessels. Negotiations and bilateral agreements with Papua New Guinea and Indonesia have allowed some forms of traditional fishing in restricted areas within the AFZ to continue.

**International Agreements and Fisheries Management Organisations**

Australia has been a strong advocate for international action to control over-fishing and to address environmental impacts on the marine environment, and as a consequence is party to a multitude of international agreements that impact on fishes and the fisheries industries. Some of these international instruments, such as the United Nations Convention on the Law of the Sea (1982) and the FAO Compliance Agreement, impose legal obligations that relate to fisheries and fishing. Other international instruments, such as the FAO Code of Responsible Fishing (1995), are non-binding. In general, these international agreements are managed by the national government through the Commonwealth Department of Agriculture, Forestry and Fisheries (DAFF) with involvement of Australian Fisheries Management Authority (AFMA). International instruments that have legal obligations are implemented through domestic legislation and again are managed at an agency level by DAFF or AFMA. Australia also has representation on a number of international bodies responsible for managing migratory and trans-boundary fish stocks, such as:

- Commission for the Conservation of Southern Bluefin Tuna

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(CCSBT)
• Indian Ocean Tuna Commission (IOTC)
• Western and Central Pacific Fisheries Commission (WCPFC)
• Pacific Islands Forum Fisheries Agency (FFA).

Environmental Legislation Affecting Australian Fisheries

With the general adoption of the principles of Ecologically Sustainable Development\(^\text{17}\) (ESD) within the Australian fisheries industry in 1992 and the adoption of the Australian Oceans Policy\(^\text{18}\) in 1998, environmental legislation has become increasingly more important in the management of Australia’s fishes and fisheries. As a result of these and other environmental developments, the Principles of ESD have often been incorporated directly into fisheries legislation. For example, the Fisheries Management Act 1991, instructs AFMA to perform its functions in accordance with the principles of ESD (Section 3) and further, defines these principles in Section 3A:

• “Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equity considerations;”

• If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

• The principle of inter-generational equity—that the present


Australian Fisheries

Australian fisheries have become increasingly environmentally sensitive, incorporating directly into fisheries Management Act actions in accordance further, defines these

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The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; improved valuation, pricing and incentive mechanisms should be promoted.

Improved valuation, pricing and incentive mechanisms should be promoted.\(^9\)

The adoption of the principles of ESD within governments has led to the development of various guidelines for the application of these principles into fisheries management (for example, see: http://www.fisheries-esd.com). In addition to the adoption of environmental principles, such as ESD and ecosystem management, by fisheries managers and within the fisheries legislation itself, other arms of government and other forms of legislation, specifically environmental legislation, have added further protection to Australian fisheries and their habitats, and created a further complexity in the legal regime of governing fisheries.

The Environment Protection and Biodiversity Conservation (EPBC) Act\(^{10}\) (1999) is the major environmental legislation at the national level, and this Act has had a major impact on the management of fish and fisheries within Australia. As a result of the EPBC Act, commercial export of regulated wildlife and wildlife products may only occur if the specimens have been derived from an approved source (captive breeding program, artificial propagation program, aquaculture program, wildlife trade

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\(^{10}\) For further information on the EPBC Act (Commonwealth), refer to: http://www.environment.gov.au/epbc/index.htm
management operation, or wildlife management plan). In respect to fisheries, this means that:

• All State fisheries requiring an export license, and all Commonwealth Government managed fisheries, must be managed within an established management regime.

• An independent assessment of the management regime must be carried out and ensure that, over time, fisheries are managed in an ecologically sustainable way.

This independent assessment of the management regime is carried out on each “defined” fishery, using a set of guidelines\textsuperscript{21} which indicate that the management regime must:

• \textit{"Be documented, publicly available and transparent;}\n
• \textit{Be developed through a consultative process providing opportunity to all interested and affected parties, including the general public;}\n
• \textit{Ensure that a range of expertise and community interests are involved in individual fishery management committees and during the stock assessment process;}\n
• \textit{Be strategic, containing objectives and performance criteria by which the effectiveness of the management arrangements are measured;}\n
• \textit{Be capable of controlling the level of harvest in the fishery using input and/or output controls;}\n
ment plan). In respect of port license, and allied fisheries, must be a management regime. A management regime must ensure time, fisheries are able way. A management regime is a set of guidelines the management must: and transparent; andive process providing acted parties, including community interests management committees access; performance criteria management arrangements of harvest in the fishery by Sustainable Management of Environment and Water

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- Contain the means of enforcing critical aspects of the management arrangements;

- Provide for the periodic review of the performance of the fishery management arrangements and the management strategies, objectives and criteria;

- Be capable of assessing, monitoring and avoiding, remediying or mitigating any adverse impacts on the wider marine ecosystem in which the target species lives and the fishery operates; and

- Require compliance with relevant threat abatement plans, recovery plans, the National Policy on Fisheries Bycatch, and bycatch action strategies developed under that policy.”

A key issue considered in these independent assessments of fisheries is the compliance with all existing national legislation and international agreements that Australia has ratified. Other important aspects of the EPBC Act (Cwth) in regard to fisheries are:

- Part 13, Division 1 which deals with the listing of threatened species and ecological communities, including fish, as conservation dependent, vulnerable, endangered, critically endangered or extinct. Once listed, impacts on these fishes are subject to detailed impact assessments and recovery plans that may include the declaration of protected habitat considered critical to the species’ survival. At the Commonwealth level, there are currently 45 species of fish listed, including several previously important commercial species.

- Part 13, Division 3 which protects all cetaceans (whales, dolphins and porpoises) within all Commonwealth and State
waters and sets up offences for killing, injuring or possessing cetaceans.

- Part 13, Division 4 which specifically lists “marine species” within Commonwealth waters that are protected, including sea-snakes, seals, crocodiles, dugongs, turtles, Sygnathids (seahorses and pipe-fishes) and sea birds. These species can only be taken under a permit system.

- Part 15 which allows for the establishment and management of a range of “protected areas” including Commonwealth Marine Protected Areas (MPAs). There area currently 15 MPAs in Commonwealth waters\(^\text{22}\).

As a consequence of the EPBC Act (Cwth), the Minister for the Environment, Heritage and the Arts has the final approval for the operation of fisheries within Commonwealth waters and for the approval of the export of any wild fish products, whether captured from either State or Commonwealth waters. In other words, at the national level within Australia, the environmental agency has become the “gamekeeper” and been given the overriding authority to approve fishing activities, based on the sustainability of individual fisheries operations. This fundamental shift in the legislative regime governing fisheries, which began with the introduction of the EPBC Act (Cwth) in 1999, continues to develop and shape the long-term future of commercial and recreational fisheries in Australian waters.

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\(^{22}\) For current list of Commonwealth managed MPAs refer to: http://www.environment.gov.au/coasts/mpa/index.html
State Legal Regime: NSW as a Case Study

Introduction

As indicated above, each of the Australian States and Territories have some jurisdiction over fishes and fisheries management. This jurisdiction is subject to the Offshore Constitutional Settlement (OCS), which is designed to deal with significant issues such as authority to manage trans-boundary stocks. As a general principle, jurisdiction of the States is limited to commercial fishing inside 3 nm and recreational fishing to 200 nm. The example of the State of New South Wales (NSW) has been used here to provide a very brief overview of the current legal regime for fishes and fisheries at this “state” or provincial level of government.

NSW Commercial Fisheries Management

Management of fisheries in NSW waters has been in place for over a century and the first “area closures” to commercial fishing and the first restrictions on fishing gears were implemented in the late 19th century. It was clearly documented in the early fishing legislation and regulations that these early fishing rules were put in place for the protection of juvenile fish, to create closed reserves and to protect areas where fishing may have been unsustainable.

Over the past century, these objectives have been strengthened and the fisheries management has progressed from an open access system involving a general commercial fishing license to fish within any waters, to a closed and highly regulated system of management, where each license relates to a particular fishery or area that can be fished. In addition, recreational fishing in both NSW inland and coastal waters is now also subject to a fish licensing system. There are a number of broad principles in relation to the current management of commercial fisheries within...
NSW coastal waters, namely:

- Like the national fisheries management system, commercial fishing activities are defined and grouped into fisheries management “units” on the basis of area fished, fishing gear used or species taken, or a combination of these factors.

- These fisheries are subject to the NSW Fisheries Management Act (1994) which sets out the general principles of management, provides for property rights (called “shares”) within defined fisheries, allows for the preparation of management plans (or fisheries management strategies), provides for the setting up of fisheries management advisory committees and gives the basis for the preparation of specific fisheries regulations for individual fisheries.

- Since December 2000, all significant fisheries in NSW waters are subject to an environmental assessment process, under the NSW Environmental Planning and Assessment Act (1979). This is accomplished by preparing a fisheries management strategy which is assessed in terms of economic, environmental and social impacts.

- Since 1999, all fisheries that involve the export of fish products and therefore require a Commonwealth export

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23 Fishery management strategies are prepared to: provide a long term vision for management of a fishery or activity; clearly outline the strategies that are in place to achieve that vision; provide stakeholders with greater certainty by knowing the management programs that apply in the fishery or activity, and provide useful background information. The strategies allow the community to scrutinize the management arrangements for each fishery or activity and seek to ensure that the management arrangements in place provide sustainable fisheries and activities into the future. For further information about the environmental assessment of commercial fisheries in NSW waters, please refer to: http://www.dpi.nsw.gov.au/fisheries/commercial/ea
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license are subject to an additional environmental assessment under the EPBC Act (Cwth).

Case Study: NSW Ocean Trap and Line (Commercial) Fishery

There are about nine significant “declared” fisheries in NSW waters and each has undergone significant change over the past decade, as the new fisheries and environmental legislation are implemented fully. Commercial fisheries management in NSW is still in a transition phase, as various requirements under the NSW Fisheries Management Act (1994) and NSW Environmental Planning and Assessment Act (1979) are implemented. An example of the application of the current legal and management regime on a particular type of fishing activity can be seen in the case study of the trap and line fishery in NSW waters, outlined below.

Line and trap fishing is one of the earliest forms of commercial fishing and involves the use of hook and line fishing, and/or a range of different types of fish and crab traps. The fishery targets demersal and pelagic fish along the entire NSW coast, from coastal reefs to the continental shelf and slope waters. The catch composition of this fishery is very diverse, but several popular and commercially important species are taken, such as snapper and spanner crabs. The fishery extends beyond the 3 nm limit of State waters, and as part of the Offshore Constitutional Settlement (OCS, see above), the NSW government was given exclusive control over trap and line fishing along the entire NSW coast, over the area of its operation (to about 80 nm offshore).

Under the NSW Fisheries Management Act (1994), the “Ocean Trap and Line Fishery” was defined and declared a share managed fishery in 1997. This essentially resulted in the NSW Government placing various restrictions on the fishery in terms of the number of licenses available to operate in this fishery, as well as the fishing gear that can be used and the area that can be fished.
Under normal circumstances, no further licenses will be issued in the fishery, either by Commonwealth or State governments. However, existing licenses can be bought and sold by both the government and by the license holders. As a result of the issuing of "shares" in the fishery, management can be imposed on the fishery, but to close the fishery all existing license holders would need to be bought out. This provides a level of security to the fishers and a market value for licenses, as well as a mechanism to buy-out fishers and to close fisheries. Once declared as a share management fishery, the next steps are to create a Management Advisory Committee composed of shareholders and government representatives and to develop a fisheries management strategy (or plan), which undergoes normal environmental assessment processes that prevail on any major development. As a result, the NSW Ocean Trap and Line Fishery Management Strategy, an Environmental Impact Assessment (EIA) and an Environmental Impact Statement (EIS) were prepared during 2005-6. These documents were placed on public display, exposed to public scrutiny and then eventually approved by the Government, after adopting any recommended modifications.

**NSW Recreational Fishing**

Recreational fisheries are another example of a State Government managed fishery. It has long been recognized that in NSW coastal waters, large quantities of fish are captured for sport and for personal consumption, by the general public. A recent survey in 2000-01 found that about over one million people fish within NSW waters at least once a year and expend about $A550 million per year on equipment and activities related to NSW recreational fishing. Conflict between recreational and commercial fishing was identified as a major management problem, particularly since

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licenses will be issued by State governments. The system was designed to impose on license holders a level of security and management strategy. Once declared as a share of the Management Strategy, an Environmental Assessment was prepared during 2005-6. These documents, exposed to public scrutiny, resulted in the Government releasing licenses for commercial and recreational fishing in New South Wales. A recent survey involving people of a State Government found that in NSW coastal waters, over 27% of the State’s coastal waterways have now been closed to commercial fishing, through a buyout of commercial fishing licenses using the funds generated by the recreational license. This has created over 30 areas that are exclusively available to recreational fishers. In other words, the major impact of the introduction of a saltwater recreational fishing license in NSW has been to provide the funds to buy-out commercial fisheries licences and close areas to commercial fishing activities.

Protected and Threatened Fish Species within NSW waters

As well as a system of threatened species listings for the 1970s, and resulted from a situation in which commercial and recreational fishers targeted many of the same fish species, at many of the same locations. The size and importance of the recreational fishing activity, and the conflicts that had arisen, led to awareness that this sector of the fishing industry also needed to be carefully managed. In addition to the management of commercial fishing, the NSW Fisheries Management Act (1994) provides for the management and regulation of recreational fisheries.

Recreational fishing licenses have been required in NSW for fishing in “inland waters” for many years and was designed to supply funds to allow re-stocking of fish into freshwater reservoirs and dams. However, in 2001, recreational fishing licenses were introduced for coastal areas, called the Saltwater Recreational Fishing License. The introduction of property rights for commercial fishing, followed by creation of the recreational saltwater fishing license, has had a major impact on fisheries in NSW waters. The primary reason for the introduction of recreational fishing licenses was to generate revenue that could be used to directly manage and benefit the recreational fishing sector. As a direct result of the introduction of the recreational fishing license within NSW coastal waters, over 27% of the State’s coastal waterways have now been closed to commercial fishing, through a buyout of commercial fishing licenses using the funds generated by the recreational license. This has created over 30 areas that are exclusively available to recreational fishers. In other words, the major impact of the introduction of a saltwater recreational fishing license in NSW has been to provide the funds to buy-out commercial fisheries licences and close areas to commercial fishing activities.
Commonwealth waters (see above), the NSW Fisheries Management Act (1994) also contains provisions for the declaring protected fish species and for the listing of threatened fish species in NSW waters. The process of listing threatened fish species is carried out by an independent, expert committee (the Fisheries Scientific Committee), set up by the legislation and consisting of seven scientists covering the areas of marine and freshwater fish, aquatic invertebrates and marine vegetation, including algae. There is an opportunity for public comment on the proposed determination, through a public exhibition. Once a species, population or ecological community is listed as threatened, strategies must be adopted for promoting recovery and these are set out in a Priorities Action Statement. A recovery plan may also be prepared and the key threatening processes can also be listed. The Species Recovery Plan can identify habitat that is critical to the survival of the threatened fish species, and can recommend changes in fishing activity and in fisheries plans, such as fishing closures to protect the species.

Conclusions

The legal regime for the protection of fishes and the control of fishing activities has a long history in Australia with over a century of active fisheries management. This management has

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25. Under the NSW Fisheries Management Act, fish species can be protected from capture and fish habitats protected from damage. This type of protection may be afforded to species that are considered to be particularly important (e.g., fish habitats such as mangroves and seagrasses), iconic (e.g., sea horses, sea dragons and pipefishes) or perhaps rare in nature (e.g., rare aquaria fish). In addition, Part 7A of the NSW Fisheries Management Act allows for the listing of fish populations, species, or ecological communities as threatened or presumed extinct; and, for the listing of threatening processes that has led to a listing. These are species that are considered to be threatened with extinction due to anthropogenic activities.
Fisheries Management has always provided some protection to fish, particularly for the protection of juvenile fishes and habitats that were considered at risk. Ownership (property rights) and jurisdiction are still issues that sometimes need to be resolved by the courts, particularly in relation to indigenous rights issues.

The current legal regime for the management of fishes and fisheries in both Commonwealth and State waters provides a structured framework in which fishing controls and environmental assessments play an ever-increasing role. The general goal of management is to provide an efficient, cost effective industry operating with an ecosystem-based approach consistent with the principles of Ecological Sustainable Development (ESD) and the Precautionary Principle. Australia is also an active participant in many international fora dealing with fishing, fisheries and the marine environment, and continues to be a strong advocate for greater control and reductions in Illegal, Unreported and Unregulated Fishing.

Despite this long history of regulation, over-fishing has still occurred in some fisheries and at some locations and there have been cutbacks in allowable catches and in fishing capacity in several fisheries. Constant improvements and refinements to the Australia's fisheries legal regime will be necessary in the future in the attempt to achieve sustainable fisheries management and to protect stocks and populations of fishes for future generations.