Australia's Ocean Policy

International Agreements

Background Paper 2

Review of International Agreements, Conventions, Obligations and Other Instruments Influencing Use and Management of Australia's Marine Environment
A Report Commissioned by Environment Australia October 1997

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1. Introduction

The Australian Government is committed to the development of a comprehensive and integrated oceans policy for Australia under Coasts and Clean Seas of the National Heritage Trust. The oceans policy is intended to provide the strategic framework for, inter alia, the planning, management and ecologically sustainable development of Australia's fisheries, shipping, petroleum, gas and seabed resources while ensuring the conservation and protection of the marine environment. Environment Australia has the lead for development of the oceans policy.

The Centre for Maritime Policy (CMP), University of Wollongong was commissioned by the Portfolio Marine Group of Environment Australia to undertake a review of the international instruments influencing the use and management of Australia's marine environment. This report is the outcome of that project. The report is divided into two parts, the first lists those international instruments of relevance to an Australian oceans policy, provides a description of the instruments, and identifies some implications of the instruments for oceans policy development. The second part summarises the experiences of certain other nations in development of oceans policy.

2. Executive Summary

Australia is Party to many international treaties which influence the use and management of its marine environment. In general, Australia meets its obligations and actively pursues its rights and opportunities under international instruments. In many cases, Australia has moved beyond compliance to achieve standards that are second to none.

The main international convention guiding the development of an oceans policy is the United Nations Convention on the Law of the Sea 1982 (LOSC) which was ratified by Australia on 5 October 1994 and entered into force on 16 November 1994. The LOSC supports Australia's declaration of an exclusive economic zone out to 200 nautical miles, and an Australian continental shelf even beyond that distance in places.

Australia shares maritime boundaries with Indonesia, New Caledonia (France), New Zealand, Papua New Guinea, and the Solomon Islands. With the exception of the maritime boundary shared with New Zealand, and that section of sea-bed boundary which would lie in the region of the Timor Gap Zone of Cooperation, Australia's maritime boundaries have largely been settled through peaceful negotiation and formal treaty. Australia's shared boundaries with neighbouring countries dictates that there must be an international dimension to its oceans policy.

Also, there are obligations under a number of other bilateral and multilateral treaties to which Australia is a Party and which relate to the ocean, including those dealing with, inter alia, shipping, fishing, maritime crime, protection of the marine environment, and maritime boundaries. Moreover, Australia has supported certain declarations in order to progress the sustainable development and management of its oceans and their resources. These non-legally binding arrangements include, inter alia, Agenda 21 and the Jakarta Mandate on Marine and Coastal Biological Diversity 1996. All of these factors strengthen the need for the oceans policy to address directly the international dimension of marine management.

Some implications of the instruments for Australia's oceans policy are summarised as follows:

Antarctica

As an Antarctic Claimant State, Australia is very active in Antarctic affairs and has ratified several treaties related to the marine environment of the Antarctic. At issue is the extent to which the oceans policy will apply to the waters off the Australian Antarctic Territory.

Customs, Maritime Crime and Enforcement

The oceans policy will need to ensure that adequate arrangements are in place to satisfy the treaty requirements of these instruments.

Non-Living Resources

Hitherto, Australia has had little interest in deep sea-bed mining but the oceans policy may need to address this issue, including the environmental impacts of deep sea-bed mining.

Fishing

These instruments include bilateral arrangements and regional agreements, especially in the South Pacific, which provide basic elements of the framework within which the oceans policy must operate. Although it has not yet entered into force and has not been ratified by Australia, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (Straddling/Highly Migratory Stocks Agreement) has significant legislative, financial and institutional implications for Australia's oceans policy.

Framework Instruments

These instruments outline the general rules and principles for oceans management that underpin all of Australia's rights and obligations in marine and coastal areas. Although the instruments might be considered to emphasise aspects of resource-use or conservation in varying degrees, together they establish a clear regime for responsible State behaviour with regard to the oceans. They will, therefore, inevitably play a defining role for Australia's oceans policy.

Maritime Transport

Australia is a major international shipping nation and adopts a high profile in international forums dealing with aspects of maritime transport. Generally, Australia has adequate legislative and institutional arrangements in place to satisfy the requirements of the numerous international instruments to which it is a Party. However, this is an area where several regional countries are experiencing difficulties.

Maritime Safety and Salvage

The Australian Search and Rescue (SAR) Region is extremely large. The institutional implications of this responsibility should be comprehended in the oceans policy, including the low level of ratification of some key instruments - such as the SAR Convention - by neighbouring countries.

Preservation and Protection of the Environment

Australia has committed to many international instruments dealing with the preservation and protection of the ocean environment. Amongst these, the regional instruments are of special significance, especially the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 (SPREP), which together form a strong body of rules and obligations for which an Australian oceans policy must provide.

Boundary Agreements

The Treaty Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, including the Area known as the Torres Straight and Related Matters (Torres Strait

Treaty) 1978, the Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia (Timor Gap Treaty) 1989, and the Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries 1997 (Perth Treaty) are all novel methods for resolving jurisdictional problems encountered between opposite or adjacent countries. They are all good examples of the inescapable international dimension that must be considered in the national oceans policy.

Oceans affairs are very important in the regions around Australia and deserve to be a central part of our broader political and strategic relations within these regions. Most regional countries have extensive maritime interests, including some vast exclusive economic zones. They have an increasing and urgent need to build their capacity to manage these marine and coastal areas. At present, the level of regional ratification of the international instruments identified in this review is not high. In part, this is due to the problems experienced by developing countries in assessing the implications of the instruments and in effecting implementation.

An interesting, and vitally important, observation that can be made simply by looking through the contents list of this report, is that a good many policy-defining international instruments have only come into force within the last ten years or so. This explosion of international regulation of marine affairs shows no sign of slowing. Therefore, Australia's oceans policy will need to recognise the dynamic nature of the international framework within which it must operate and provide for continual, systematic and controlled evolution.

Another observation is that many of the instruments establish obligations and responsibilities for Australia in respect of the marine environment in its entirety. This includes estuarine areas in waters within the limits of States and the high seas. Furthermore, some of these instruments imply new requirements for the enforcement of Australian legislation and international law in offshore areas; for example, the Convention for the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR), the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, and the Straddling/Highly Migratory Stocks Agreement.

Marine areas were once understood to be largely lawless and few countries attempted to articulate an oceans policy; such is no longer the case. There is now an unprecedented level of interest, all around the world, in the development of strategies that will ensure maximum benefit from marine zones of jurisdiction. In part two of this report, various approaches to oceans policy development are examined. The countries reviewed were selected because they represent a good cross-sample of the different policy options available. Three broad categories are suggested into which these approaches can be grouped. First, is the `sectoral approach' where statessuch as Japan and Malaysiacontinue to address policy primarily towards individual marine sectors, such as shipping; fishing; offshore petroleum; tourism; etc. Second, is the `coordination approach' where statessuch as the Netherlands and Chinaattempt to foster cross-sectoral awareness and provide for multiple-use of marine and coastal areas while recognising the continued autonomy of the various policy sectors. Third, is the `centralisation approach' where statessuch as Korea and, perhaps to a lesser extent, Canadacreate a central institution to administer ocean affairs. The challenge for Australia is to decide which of these options is best suited for this country.

A brief discussion of the implications of international instruments for Australia's oceans policy follows in Section Three of this report. The general conclusion of this report is that, while the LOSC serves as a defining cornerstone for much of the current interest in oceans policy, both in Australia and elsewhere, the mix of other international instruments plays no less a role in defining the parameters within which an oceans policy must operate.

3. Implications of International Instruments for Australian Oceans Policy

A number of trends have emerged from this overview of international instruments that are relevant to Australia's oceans policy. First, a comprehensive oceans policy cannot be concerned purely with domestic issues. The oceans are interconnected and the problems of any one country are often only part of a larger regional or global concern. Maritime boundaries delineated in accordance with the LOSC are in some ways artificial, and do not readily cater for management of transboundary factors which might include marine ecosystems, traditional human cultures, and the physical properties of the ocean itself. Therefore, there are important regional and global aspects to Australia's marine management, and these are evidenced, for example, in arrangements for regional cooperation to achieve marine environmental protection and fisheries conservation through instruments such as the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP) 1986, the South Pacific Forum Fisheries Agency Convention 1979, the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific 1989, the Convention for the Conservation of Antarctic Marine Living Resources 1980, and others.

Second, many of Australia's neighbours are developing countries. The international instruments considered in this review require that developing countries have appropriate technical and financial resources to meet their treaty obligations and to enjoy their rights. Many developing countries have limited resources to contribute to the institutions associated with international instruments. Australia's commitments in a large range of bilateral and multilateral instruments of necessity require financial considerations which will need to be recognised in the oceans policy.

Australia has the skills and expertise to play a leading role in oceans management in the South Pacific, the Indian Ocean region, South East Asia, and in the Southern Ocean. To date, the marine environment has not been an area of high priority for Australia's international aid programs but perhaps the time has come when it should be. By comparison, the Canadian International Development Agency (CIDA) assigns a priority in its programs to assistance in marine and coastal fields, and as a consequence, Canada and the Canadians are more high profile in these fields in both South East Asia and the South Pacific, and Australia is probably not receiving due credit for the work it does. This project has revealed that there is scope for Australia's oceans policy to benefit from the inclusion of an objective along the lines of: `to promote Australia as a maritime nation at the global and regional levels'.

Third, the exercise of grouping the international instruments under the categories selected for this study showed the extent to which international instruments frequently address several issues. There is a trend towards adoption of an holistic approach to marine management in international instruments, and this suggests that Australia's oceans policy might need to consider the importance of establishing national regimes that can accommodate the multiple use of ocean space.

Some matters of specific interest for Australia's oceans policy that have arisen in the course of this review include:

- the need for enhanced enforcement capacity for Australian waters, particularly in the Southern Ocean;
- the desirability of establishing a unified maritime communication and reporting system;
- the benefits that accrue to Australia from improving the capacity of neighbouring developing countries in the fields of fisheries and crime enforcement, port state control, and search and rescue (SAR);
- a very high biodiversity of seagrasses (which are critical fish habitats) including 30 of the world's 58 species;
- the desirability of developing mechanisms to ensure that Australian legislation is kept up to date with treaty amendments; and
- the need to ensure that Australia is adequately represented with a mix of relevant expertise at international treaty committee meetings.

The above list of implications for oceans policy should not be seen as exhaustive or definitive. The implications for Australia's oceans policy of the myriad international instruments that relate to marine and coastal areas are numerous and subtle. More than one hundred instruments have been identified in this review as being relevant in some way to Australia's oceans policy. The immediacy of their significance varies and, as a general principle, this is reflected in the review by the amount of discussion devoted to them. Almost all of the instruments discussed do oblige Australia to conduct or refrain from certain activities, or perhaps declare principles which reasonably necessitate recognition in an oceans policy. Where this is felt to be the case, certain implications of that particular instrument are discussed in Part One immediately following a description of the instrument at issue.

Ultimately, the importance accorded to any international instrument for oceans policy development becomes a matter of judgment. The intention of this review is to equip stake-holders and decision-makers with information that will better allow them to exercise that judgment.

4. The Authors

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Martin Tsamenyi is Professor of Law at the University of Wollongong. His special interests in the law of the sea include maritime resources law and marine environmental law. Professor Tsamenyi has completed several commercial consultancies including a review of the international instruments of relevance to the Australian fishing industry. He is currently a Special Legal Consultant to the Forum Fisheries Agency in Honiara.

Juita Ramli is a visiting scholar attached to the Centre for Maritime Policy from the Maritime Institute of Malaysia (MIMA) where she works in the Centre for Ocean Law and Policy. She has a Bachelor of Law from Nottingham University, UK, and is presently studying for a Master of Arts in maritime policy at the University of Wollongong. In late 1996, Juita Ramli prepared a review of Malaysian laws in the context of international instruments to which Malaysia is a Party. Earlier in 1997, she also completed a report for MIMA outlining the implications for Malaysia of ratification of the London (Dumping) Convention 1972 and its 1996 Protocol.

Sam Bateman retired from the Royal Australian Navy (RAN) in 1993 with the rank of Commodore, and took up a position as Executive Director of the Centre for Maritime Policy at the University of Wollongong. He has written extensively on defence and maritime issues, including matters related to maritime surveillance and enforcement, in Australia, Asia Pacific and the Indian Ocean regions, and is a Joint Chairman of the Council for Security Cooperation in Asia Pacific (CSCAP) Working Group on Maritime Cooperation. He jointly convenes and lectures at the University of Wollongong in short courses in Law of the Sea and Maritime Regulation and Enforcement, and the Master of Arts (Maritime Policy) program.

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In particular, the guidance provided by Bill Campbell of the Attorney General's Department in his written reply to our request for information was singularly helpful. The authors have reproduced here a portion of his submission which is especially instructive, and which helps to establish a framework that might assist in understanding the complexity of the international dimensions of an oceans policy:

There are a number of factors in addition to the content of the relevant treaty obligation which may be taken into account in considering the method of implementation and the content of any implementing legislation. These include:

- the Commonwealth Government's responsibility for ensuring that Australia complies with its treaty obligations;
- the margin of appreciation involved in the interpretation and implementation of treaties. Australia, like other countries, has the discretion in the manner in which it interprets and implements many of the treaties to which it is a party. Similarly, as a matter of Australian constitutional law, there is a good deal of choice open to the Australian Government as to the manner in which it implements its treaty obligations;
- before Australia becomes a party to a treaty, consideration is given to the question of whether new legislation is required. If it is necessary, in order to give effect to a treaty, to impose obligations on individuals, or to invest those individuals with additional rights, or otherwise to affect the rights of individuals under Australian law, this can only be achieved by legislation. However, new legislation is not needed on all occasions. Given the range of existing Commonwealth, State and Territory legislation, there may be legislation already in place which, in combination with the common law, is sufficient to give effect to the obligations to be assumed under a treaty;
- the shape that Commonwealth legislation to implement a treaty takes is very much dependent on the Commonwealth's view of how far its constitutional powers extend; and
- many treaty obligations are implemented at the State and Territory level rather than the Commonwealth level. There are a number of sub-factors which influence whether Commonwealth and/or State and Territory legislation and practice is used to implement a treaty. The sub-factors include:

    - constitutional power;
    - cost and administration;
    - timeliness;
    - subject matter; (and)
    - Commonwealth/State arrangements relating to State participation in the negotiation and implementation of treaties. The main arrangement is the Principles and Procedures for Commonwealth/State Consultation on Treaties. However, there are particular arrangements in a number of areas. For example, the Intergovernmental Agreement on the Environment is relevant to the implementation of many of the treaties mentioned in your list.

6. Background

The Law of the Sea and Agenda 21 - An Evolving Regime Of State Rights and Duties For the Ocean

When ancient people looked out to sea they saw an inhospitable environment in which they could exercise no power. However, technological progress enabled groups of people slowly to extend their interests over and under the waves. The seas became a highway and a source of food, and the oceans were perceived to be so large and bountiful that rules were needed only

to prevent direct conflict through poor planning or misunderstanding. A doctrine of `freedom of the seas' prevailed - there was enough for all and everyone had a right to partake as they wanted.

Times change; the oceans have come now to be understood as a delicate environment of finite - indeed threatened - resources. Concomitant with this realisation has grown a body of rules and regulations that establish new rights and responsibilities for states at sea. The most recent and important attempt to codify a universal balanced set of rights and responsibilities is the United Nations Convention on the Law of the Sea, 1982 (LOSC).

However, LOSC was developed mainly during the 1970s and much of the Convention is concerned with the issue of wealth - primarily resource exploitation and navigational freedoms. Since the 1970s, environmental pressures have encouraged the world community to develop an increasingly complex array of rules and guidelines refining what states can do in ocean areas, where they can do it, and how they are to exercise their rights and duties at sea.

In 1992, the United Nations Conference on Environment and Development (UNCED) held at Rio de Janeiro adopted a declaration and a global agenda for management of the environment into the next century (Agenda 21). The UNCED process clarified several important concepts of environmental management that have immediate relevance to the marine environment. Indeed, Chapter 17 of Agenda 21 emphasises these general principles in its discussion of the oceans. Some important environmental concepts to be legitimised by UNCED are the ideas of ecologically sustainable development (ESD), the precautionary approach, and integrated oceans management. The Agenda 21 program was adopted only two years before LOSC came into force both generally and for Australia in 1994. The combined effect of these two instruments has proven to be a catalyst for an unprecedented level of activity around the world as various countries strive to develop and articulate their oceans policy.

In order to assist stake-holders and policy-makers to appreciate the parameters within which an Australian oceans policy must operate, this report briefly discusses the origin of the law of the sea, and introduces the LOSC. The report also describes a selection of international legal instruments that relate to Australia's marine and coastal areas, and considers some of their implications for the oceans policy. Each of the instruments selected either establishes specific rights and obligations for Australia, or contributes evidence that can help in the task of determining the collective, global understanding of how a state should behave at sea. However, as mentioned above, Australia is not alone as it plans the way forward in oceans policy. Lessons can be learnt from other nations, and the final part of the report reviews some overseas experiences in development of an oceans policy.

Early attempts at global codification of the Law of the Sea

After the Second World War, the increasing complexity and myriad interpretations of the global rules for ocean use encouraged efforts to standardise international law of the sea. The most important multilateral negotiations in this regard were:

- the First United Nations Conference on the Law of the Sea (UNCLOS I) from February 24 until April 29, 1958;
- the Second United Nations Conference on the Law of the Sea (UNCLOS II) from March 17 until April 26, 1960;
- the Committee to Study the Peaceful Uses of the Sea-bed and ocean Floor Beyond the Limits of National Jurisdiction (Seabed Committee) from 1968 to 1973;
- the Third United Nations Conference on the Law of the Sea (UNCLOS III) from 1973 to 1982; and
- the Preparatory Commission for the International Sea-bed Authority and the Tribunal for the Law of the Sea (Prepcom) from 1983 to 1995.

UNCLOS I adopted four Conventions which were based largely on draft texts prepared by the International Law Commission. The four Conventions are commonly known as the 1958 Geneva Conventions. Their actual titles are:

- the Convention on the Territorial Sea and Contiguous Zone;
- the Convention on the High Seas;
- the Convention on Fishing and Conservation of the Living Resources of the High Seas; and
- the Convention on the Continental Shelf.

However, these Conventions failed to clarify international law of the sea because states could pick and choose which Conventions they would ratify according to their perceived self-interest. Importantly, the Conventions also failed to address many important issues, the most pressing of which was the breadth of the territorial sea. UNCLOS II was convened largely to address this very issue but failed to achieve this or any other goal.

The United Nations Convention on the Law of the Sea 1982

The LOSC came into force on 16 November 1994, one year after the sixtieth state ratified the convention, twelve years after it was opened for signature in Montego Bay, Jamaica, and 21 years after the first meeting of UNCLOS III. Individuals, governments and international organisations devoted considerable energy and resources over an extended duration to shape the LOSC and bring it into existence. They did so for many reasons, not the least of which was the desire to address the uncertain nature of customary international law with regard to the sea. The first sixty ratifications were almost all developing states; however, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 which was adopted in 1994 did much to address the objections of some developed states concerning the LOSC, and as of July 1997, 119 instruments of ratification, accession or succession to the LOSC had been deposited with the Secretary-General of the United Nations including those of developed states such as Australia, France, Germany, Iceland, the United Kingdom and Italy. However, the United States has not yet acceded to the LOSC.

The LOSC clarifies many questions relating to state sovereignty, sovereign rights and responsibilities in various zones of the ocean. Importantly, the concept of the 200 nautical mile exclusive economic zone (EEZ) has focussed the attention of almost all coastal states on their adjacent seas, and has been an important factor encouraging those states to consider the form and function of their ocean policies.

UNCED Agenda 21 - Chapter 17

Just as states developed legitimacy for the idea that they enjoyed special interests in their nearby oceans, a growing body of global opinion on how such interests were to be managed began to unfold. These ideas were succinctly encapsulated in the programs for marine and coastal action described in Chapter 17 of Agenda 21.

Agenda 21 was one of the key outcomes of UNCED held at Rio de Janeiro in 1992. Agenda 21 is declaratory and is not a binding legal instrument. However, the principles espoused in Agenda 21 evolved over a period of at least two decades leading up to UNCED. In 1987, the World Commission on Environment and Development issued a report called Our Common Future which emphasised the importance of `sustainable development' and defined the term as: `development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. The concept provides a foundation for many of the environmental management ideas current today, several of which were discussed initially in the 1972 Stockholm Declaration of the United Nations Conference on the Human

Environment (UNCHE),and reinforced by the 1992 Rio Declaration on Environment and Development.

Chapter 17 of Agenda 21 declares that three important principles underpin ecologically sustainable development of ocean resources, they are that management for such development must be `integrated', `precautionary' and `anticipatory'. In developing policies for management of their ocean interests, states now are aware not only of global expectations relating to what those interests are and where they can be exercised (LOSC and other international instruments), but also of how they should be exercised (UNCED Agenda 21 and more recent international instruments).

Conclusion

States have recognised that dogmatic adherence to the principles of Mare Liberumfreedom of the seasis not sustainable in modern times. The oceans are now recognised as a delicate environment which must be managed in an integrated fashion through the cooperative efforts of all concerned.

The LOSC has been widely embraced by the community of states and has now entered into force as international law. It establishes a delicate balance of state rights and responsibilities at sea and attempts to prevent, or at least manage, conflict between dominant interests. Agenda 21 guides states on the most appropriate methods for responsible management of their marine interests. In this respect the two instruments work together to form an important foundation for state activities at sea. However, the rules that guide states in their conduct with regard to the oceans can only be derived from analysis of the full gamut of relevant international instruments and general international law.

The challenge that lies ahead is for states to acknowledge and provide fully for both the benefits and obligations incumbent in their participation as States Parties to the LOSC and other instruments, and as members of an international community that has articulated a set of standards for ecologically sustainable development in Agenda 21. A crucial step in meeting this challenge is to understand what needs to be done, by whom, where and when. Although the answers to such questions may not be as easy to determine as one might wish, they cannot begin to be addressed without first considering the subtle interaction of those international legal instruments which relate to the oceans.

7. Antarctic

7.1 The Antarctic Treaty 1959

Done at Washington, D.C.: 1 December 1959

Entry into force: 23 June 1961

Entry into force for Australia: 23 June 1961

The Antarctic Treaty applies to the area south of 60¡ south latitude (Article VI), and ensures that Antarctica is used exclusively for peaceful purposes (Article I). States Parties are prohibited from establishing military bases and fortifications, conducting military exercises, and testing weapons in the Antarctic Treaty area (Article I). The Treaty encourages freedom of scientific investigation, exchange of scientific personnel and the sharing of observations and results (Articles II & III). Although the Antarctic Treaty does curb the freedom of states in areas over which they may claim sovereignty, Article IV specifically provides that the Treaty does not amount to a renunciation of any claim to territorial sovereignty in Antarctica. Article IV further provides that:

no acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Each of the Contracting Parties named in the Preamble to the Treaty (including Australia) is entitled to designate observers to carry out inspections to ensure the observance of Treaty provisions. Observers are accorded `complete freedom of access at any time to any or all areas of Antarctica' (Article VII). Contracting Parties must also inform the other Parties of all expeditions to and within Antarctica on the part of its ships or nationals (Article VII[5]).

The Antarctic Treaty did not directly provide for environmental protection but the Antarctic Treaty Consultative Parties do have responsibilities with respect to the preservation and conservation of living resources in Antarctica (Article IX[1][f]).

Implications for Australian oceans policy

The Antarctic Treaty 1959 is a binding, international legal instrument to which Australia is a Party. The Treaty does not address the issue of sovereignty over Antarctica and therefore leaves unresolved conflicting claims by various nations. Australia claims sovereignty over a large portion of Antarctica and this gives rise to a significant marine area in which Australia would enjoy certain jurisdiction and sovereign rights. The Antarctic Treaty does not allow military, including naval, assertion of Australian sovereignty south of 60¡ S latitude. While this does not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose (Article I), it may render problematic the use of naval assets for enforcement of Australian territorial sea or exclusive economic zone laws. Therefore, given the status of the Australian Antarctic Territory, the Australian oceans policy framers might desirably consider the extent to which the policy will apply to the Antarctic region. If the oceans policy is to apply to the Australian Antarctic Territory without qualification, the policy might address the problem of law enforcement in the most southern reaches of Australia's maritime estate. Furthermore, in order to be fully comprehensive, the Australian oceans policy would need to reflect the principles and objectives of the Antarctic Treaty and provide for measures such as those identified in Article IX(1) of the Treaty.

7.2. Convention for the Conservation of Antarctic Seals 1972

Done at London: 1 June 1972

Entry into force: 11 March 1978

Entry into force for Australia: 31 July 1987

Establishes a system of protection, scientific study and rational use of Antarctic seals.

The Convention for the Conservation of Antarctic Seals, 1972 is an international agreement done in recognition of the general concern about the vulnerability of Antarctic seals to commercial exploitation and the consequent need for effective conservation measures. The provisions of the Convention applies to the seas south of 60¡ South Latitude, in respect of which the Contracting Parties affirm the provisions of Article IV of the Antarctic Treaty. Article 1 lists specific seal species covered by this Convention including, inter alia, Southern elephant seal Mirounga leonina, Leopard seal Hydrurga leptonyx and Weddell seal Leptonychotes weddelli.

Article 2 prohibits the killing and capturing of the said species by nationals or vessels flying the flags of Contracting Parties except in accordance with the provisions of the Convention which allows operation of such activities subject to a permit system. The issuance of permits is allowed for the purposes of providing indispensable food for men or dogs, for scientific research or for providing specimens for museums, educational or cultural institutions (Article

4). Additionally, specified measures are prescribed in the Annex with respect to the conservation, scientific study and rational and humane use of seal resources (Article 3).

The specified measures prescribed by the Annex include permissible catch, protected and unprotected species; open and closed seasons, open and closed areas, including the designation of reserves; the designation of special areas where there shall be no disturbance of seals; limits relating to sex, size, or age for each species; restrictions relating to time of day and duration, limitations of effort and methods of sealing; types and specifications of gear and apparatus, and appliances which may be used; catch returns and other statistical and biological records; and procedures for facilitating the review and assessment of scientific information.

Implications for Australian oceans policy

The Antarctic Seals Convention is a binding international instrument to which Australia is a Party. Given Australia's current leadership role in the effort to conserve marine mammals, such as whales, it is important that the Antarctic Seals Convention should be seen as part of the legal framework on Antarctica and marine nature conservation generally. Australia has the necessary legislative and institutional arrangements in place to meet its obligations under the Antarctic Seals Convention.

7.3. Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) 1980

Done at Canberra: 20 May 1980

Entry into force: 7 April 1982

Entry into force for Australia: 7 April 1982

In the late 1960s and into the early 1970s, both Japan and the USSR fished for krill in Antarctic waters. This activity worked as a catalyst for the establishment of the CCAMLR. The CCAMLR introduces an `eco-system' approach to the management of marine living resources and therefore extends its area of application from south of the line of 60¡ south latitude (as reflected in the Antarctic Treaty 1959 [q.v. above) to encompass also `the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem' (Article I). The purpose of CCAMLR is `the conservation of Antarctic marine living resources'. The term `conservation' includes rational use (Article II). Conservation of marine living resources and protection of the ecosystem, as opposed to exploitation are the core objectives of CCAMLR. This distinguishes CCAMLR from other regional agreements which are less specifically directed at conserving marine living resources. The Convention requires harvesting of marine living resources in the area covered by CCAMLR to be conducted in accordance with the provisions of the Convention (Article II). As with the Antarctic Treaty 1959, CCAMLR re-affirms that nothing in the Convention affects any claim to territorial sovereignty in the Antarctic Treaty area (Article III).

The Contracting Parties are enjoined to establish and maintain the Commission for the Conservation of Antarctic Marine Living Resources (Article VII). The function of the Commission is to give effect to the objective and principles of CCAMLR, and, inter alia, to facilitate research, compile data, analyse and disseminate catch and effort statistics, and identify conservation needs and measures (Article IX). The conservation measures the Commission can take include designation of: the quantity of any species which may be harvested; marine living resource regions and sub-regions; protected species; the size, age, and, as appropriate, the sex of species which may be harvested; open and closed seasons for harvesting; special areas for protection and scientific study; the effort to be employed and methods of harvesting; and other conservation measures as the Commission considers necessary (Article IX). The Contracting Parties are also enjoined to establish a Scientific Committee to be a consultative body to the Commission, and to provide a forum for

consultation and cooperation concerning the collection, study and exchange of information with respect to marine living resources (Articles XIV & XV).

The Commission's broad mandate has enabled it to adopt readily new global measures which can assist in achieving sustainable use. For example the Commission is succeeding in incorporating a precautionary approach in its decision-making framework and in developing specific measures which facilitate sustainable use. Current conservation measures in force which reflect this capacity include:

- notification by members when they are considering initiating a new fishery;
- a monthly catch andeffort reporting system;
- the application of conservation measures to scientific research;
- conservation controls over exploratory fisheries;
- payment of fines or exclusion from the fisheries for the failure to report monthly biological data for trawl and longline fisheries;
- setting of precautionary catch limitations, setting of total catch limits, restricting fishing seasons, creating protected areas, controlling fishing methods (such as the gear used), the setting of bycatch limits as a percentage of a targeted catch and reporting of all targeted and bycatch;
- prohibition on driftnet fishing in the Convention Area; and
- extending conservation measures to stocks occurring both within and outside the Convention area.

In order to promote the objective and ensure observation of the provisions of the Convention, CCAMLR provides for observation and inspection to be carried out on board vessels engaged in scientific research or harvesting of marine living resources, through observers and inspectors designated by Members of the Commission (Article XXIV).

Implications for Australian oceans policy

CCAMLR is a binding international treaty to which Australia is a Party. The headquarters for the Commission is in Hobart, Tasmania. CCAMLR is a mature regional instrument and, as such, provides evidence of the need for new instruments and their accompanying Commissions to be given time to develop institutional capacity. The extent to which CCAMLR will have implications for Australia's oceans policy will depend in part upon the effectiveness of the instrument itself.

The Convention is weak in terms of the discretionary language adopted and the ability of the Parties to side-step measures directed at regulating access to resources. The failure to define concepts, a lack of specificity and the discretion contained in the Convention, have the potential to lead to conflict among Commission members. For example, there is no indication of the level above which non-harvested species must be maintained. Protective measures are limited to those based on the `state of available knowledge' (Article II[3][c]) and an assumption is made that human-induced changes to the ecosystem could be reversible within a specific time frame. These factors also appear to run contrary to the need for a precautionary approach to fisheries management. Despite this, however, it is worth noting that CCAMLR has developed a capacity to facilitate sustainable use beyond that which exists in other international instruments.

CCAMLR's Scientific Committee is not independent as it relies primarily on the work of scientists employed by Commission members. On the face of it, the requirement for the collection and provision of information by Parties to the Commission is significant (Article XX). In practical terms, the obligation is limited by the provision that statistical, biological and other data need only be provided `to the greatest extent possible' (Article XX[1]). Despite mechanisms designed to ensure that scientific research presented to the Scientific Committee has integrity, such information cannot be expected to be completely independent of the self-

interest of the Parties. A high level of participation by non-government organisations may operate to counter-balance any gaps in the scientific research.

CCAMLR's observer program which monitors the activities of fishers, coupled with the system of inspection which is designed to ensure compliance, represent perhaps the most developed system for compliance in international fisheries management. CCAMLR is unique in placing responsibility for appointing observers and inspectors on the Commission rather than the Parties (Article XXIV). The Commission is also responsible for setting the terms and conditions under which the inspectors and observers operate. The observer program does not result in legal sanctions if fishers are found to be in breach of conservation measures. Observer reports are released in aggregate form and used to draw attention to the effectiveness of measures in force and to provide feedback for future decisions on conservation measures to be adopted by the Commission. While individual reports are not publicly available, the system has achieved a fair degree of transparency.

The inspection system is directed specifically at enforcing compliance with CCAMLR measures and clear guidelines have been established for determining when a breach has occurred. Provision is made for flag state prosecution and sanctions on the basis of evidence resulting from boardings and inspections (Article XXIV[2][a]). The system allows for high seas boarding and inspection by other CCAMLR members. When a breach is identified, a report is lodged with the flag state and the CCAMLR Commission. The report is also circulated to member states. The flag state has the opportunity to respond to the report and inform the Commission of action taken against the offender. This system has succeeded in achieving a relatively high level of transparency and flag states are becoming more vigilant in imposing sanctions on fishers found to be in breach of conservation measures. In recent years, fines for breach have reached six and even seven figures, reflecting the seriousness that member states attach to the conservation measures. This contrasts with earlier fines which were so small they could be considered as only token.

Improvements to the CCAMLR inspection system are currently being investigated. One major initiative is the proposal to introduce a compulsory vessel monitoring system. This system would allow remote interrogation of vessels in the Antarctic area at any time and would have the ability to monitor their exact location. Vessels whose transponders are not operational would be instructed to return to port. The intention of the scheme is to force a vessel to prove the legality of its catch or be penalised. CCAMLR is also pursuing ways to enforce measures on fishing vessels flagged by non-Parties but operated by the nationals of the Parties. However, the proposed vessel monitoring system cannot operate universally as many participating states do not exercise effective jurisdiction over their nationals outside their own territory.

Despite these measures, it is acknowledged that achieving compliance in the Southern Ocean is difficult because of the prohibitive costs involved in monitoring such a large area, the logistical difficulties of monitoring fishing practices on the high seas and the limited capacity to control fishing operations by States not Party to CCAMLR.

Australia's participation in CCAMLR might potentially restrict the exercise of its sovereign rights in that part of the Australian EEZ which lies to the south of 60¡ south latitude. For example, the right for Australia to establish the total allowable catch for marine living resources in its Antarctic EEZ may be forfeited in favour of the Commission for the Conservation of Antarctic Marine Living Resources. Clearly, therefore, the Australian oceans policy must respect this limitation and refrain from any program which might be at variance with the objective and provisions of CCAMLR. Australia is also required to participate as a member of both the CCAMLR Commission and Scientific Committee, and the oceans policy will need to reflect the obligations that such membership entails; for example, Article XX provides that `Members of the Commission shall, to the greatest extent possible, provide annually to the Commission and to the Scientific Committee such statistical, biological and other data and information as the Commission and Scientific Committee may require in the exercise of their functions'.

7.4 Protocol to the Antarctic Treaty on Environmental Protection (Madrid Protocol) 1991

Done at Madrid: 4 October 1991

Not yet in force

Signed for Australia: 4 October 1991

Instrument of ratification deposited for Australia: 6 April 1994

The Parties to the Madrid Protocol `commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems' and designate Antarctica as `a natural reserve, devoted to peace and science' (Article 2). To this end, the Parties adopted a set of environmental principles for the planning and conduct of all activities in the Antarctic area; including, inter alia, that:

- adverse impacts on the Antarctic environment and dependent and associated ecosystems are to be limited;
- adverse affects on weather patterns, air and water quality, and species abundance and distribution are to be avoided;
- activities must be conducted on the basis of sufficient scientific information to assess possible impact;
- regular and effective monitoring shall take place to verify predicted impacts and identify unforeseen effects;
- priority is to be accorded to scientific research, including research essential to understanding the global environment; and
- activities undertaken in the Antarctic Treaty area for which advance notice is required under the Antarctic Treaty 1959 Article VII (5) will be modified or cancelled if they cause impacts inconsistent with the Madrid Protocol environmental principles (Article 3).

Parties are required to cooperate with each other, and with the Contracting Parties to other instruments in force in the Antarctic, to achieve the objectives and principles of the Madrid Protocol (Articles 3 & 4). Environmental impact assessment is required prior to the conduct of any scientific research program, tourism and all other governmental and non-governmental activity in the Antarctic Treaty area which requires prior notification under the Antarctic Treaty (Article 8). The Antarctic Treaty Consultative Parties are also enjoined to arrange for inspections by observers in accordance with Article VII of the Antarctic Treaty (Article 14). Mineral resource activity which is not scientific research is prohibited (Article 7).

The Madrid Protocol has appended to it one Schedule, concerning the rules for establishment of an Arbitral Tribunal for dispute resolution, and five detailed Annexes covering:

- environmental impact assessment;
- conservation of Antarctic fauna and flora;
- waste disposal and waste management;
- prevention of marine pollution; and
- area protection and management.

The Madrid Protocol provides for the establishment of a Committee for Environmental Protection in order primarily to provide advice and recommendations to the Parties in connection with the implementation of the Protocol including the operation of its Annexes (Articles 11 & 12). The Parties are required to cooperate in the formulation and implementation of contingency plans of response to environmental emergencies, and to establish procedures for immediate notification and cooperation in the event of such an emergency (Article 15). Each Party is also required to report annually the steps it has taken to implement the Madrid Protocol (Articles 13, 15 and 17).

After 50 years from the date of Entry into force: of the Madrid Protocol, any of the Antarctic Treaty Consultative Parties can request a conference to review the operation of the Protocol, and any proposal to amend the instrument will require a majority of the Parties including three-fourths of the States which were Antarctic Treaty Consultative Parties at the time of adoption of the Madrid Protocol (Article 25).

Implications for Australian oceans policy

The Madrid Protocol is a binding international treaty which Australia has ratified, but which has not yet entered into force. Participation in the Protocol will entail specific obligations on the Parties, such as a duty to take appropriate action within a Party's competence, `including the adoption of laws and regulations, administrative actions and enforcement measures' to ensure compliance (Article 13), and to report annually on implementation progress.

On the one hand, the ban on mineral resource exploitation will limit Australia's scope for exploitation of non-living resources from marine areas, and will mean that Australia will not be able to exercise fully its sovereign rights as enunciated in the United Nations Convention on the Law of the Sea 1982. However, on the other hand, such a ban may well help to diffuse rivalry between claimant states in the Antarctic and avoid activities which might pose serious threat to the Antarctic environment. Although the Madrid Protocol has not yet entered into force, the oceans policy will still need to recognise the limitation on mineral resource exploitation and refrain from any program which might breach Australia's commitment in the act of ratification not to undermine the purpose of the treaty. The ban on mineral resource exploitation is enshrined in Australian legislation.

8. Communications

8.1 International Telecommunications Convention, Final Protocol, Additional Protocols I-VII, and Optional Additional Protocol 1982

Done at Nairobi: 6 November 1982

Entry into force: 1 January 1984

Entry into force for Australia: 12 January 1984

Entry into force of Optional Additional Protocol: 1 January 1984

Entry into force for Australia of Optional Additional Protocol: 25 April 1985

This is a very comprehensive treaty. It was done with the object of facilitating peaceful relations through telecommunications services and is the basic instrument of the International Communication Union (ITU). The treaty is not specifically marine-related except with regard to telecommunication services at sea in general. The International Convention on the Safety of Life at Sea, 1974 (SOLAS) refers to the International Telecommunications Convention (ITC) with regard to the use of radio. Chapter III - "Special Provisions for Radio of the ITC" - isgenerally applicable to radio regulations at sea. In particular, Article 143 provides that

absolute priority shall be given to all telecommunication concerning safety of life at sea, as well as epidemiological telecommunications of exceptional emergency of the World Health Organisation.

9. Cultural Heritage

9.1 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) 1972

Done at Paris: 23 November 1972

Entry into force: 17 December 1975

Entry into force for Australia: 17 December 1975

Establishes a scientific system for permanent protection of cultural and natural heritage of outstanding universal value.

The World Heritage Convention recognises two categories of world heritage: cultural, and natural. Cultural heritage includes, inter alia: monuments, archaeological sites, and buildings (Article 1). Natural heritage encompasses physical and biological formations of outstanding universal value for aesthetic or scientific reasons; geological and physiographical formations and the habitat of threatened species of animals and plants of outstanding value for scientific or conservation reasons; and natural sites of outstanding universal value from the point of view of science, conservation or natural beauty (Article 2). The Convention also recognises that `such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate' (Article 6).

State Parties are required to identify, delineate, protect, conserve, and present these different sites, and to transmit them to future generations (Article 4). To that end, the World Heritage Convention provides that Parties shall endeavour, inter alia, to develop scientific and technical studies on how to protect the sites, and take appropriate legal, scientific, technical, administrative and financial measures to meet their obligations with regard to the sites (Article 5). States Parties are also required to refrain from deliberately damaging the cultural and natural heritage situated on the territory of other Parties, and to assist other Parties to meet their obligations with regard to such heritage if requested by that Party to do so (Article 6).

The World Heritage Convention provides for the establishment within the United Nations Educational, Scientific and Cultural Organization (UNESCO) of an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Value, called `the World Heritage Committee' (Article 8). Every State Party to the Convention is required to submit an inventory of property forming the cultural and natural heritage to the World Heritage Committee, and the World Heritage Committee will use these inventories to establish, keep up to date and publish a `World Heritage List' of the properties it considers as having outstanding heritage value (Article 11).

The World Heritage Convention also establishes `the World Heritage Fund' which is made up from, inter alia, voluntary and compulsory contributions made by State Parties, contributions, gifts, bequests, and interest earnings (Article 15). The World Heritage Committee may use these funds to grant assistance to State Parties on behalf of listed properties. The form of such assistance may include: studies, the provision of experts, the training of staff and specialists, the supply of equipment, low-interest or interest-free loans, or the exceptional award of non-repayable subsidies (Article 22). State Parties to the World Heritage Convention are required to report to UNESCO on the legislative and administrative provisions which they have adopted, and other action which they have taken, for the application of the Convention (Article 29).

Implications for Australian oceans policy

The World Heritage Convention is a legally binding treaty to which Australia is a Party. At present, three areas of listed natural heritage are of immediate relevance to Australia's oceans policy, they are the Great Barrier Reef, Lord Howe Island, and Shark Bay. As a State Party to the World Heritage Convention, Australia has a responsibility to protect world heritage, and this responsibility is met fully with regard to these three existing sites. The Australian oceans policy would need to ensure that appropriate legal, institutional and financial arrangements are in place to enable Australia to continue to meet its treaty responsibilities with respect to World Heritage List marine sites.

In December 1997, Heard Island, Macdonald Islands, and Macquarie Island will be considered for addition to the World Heritage List. Management plans have already been developed for the three proposed new sites and in most respects there would be no concern about Australia's ability to meet its treaty obligations for these sites. However, the sites may be threatened by the presence of illegal fishers in the areas concerned. Therefore, the oceans policy may need to consider how Australia can best execute its responsibility to protect World Heritage List sites at great distances from the mainland.

9.2 Agreement between Australia and the Netherlands Concerning Old Dutch Shipwrecks 1972

Done at The Hague: 6 November 1972

Entry into force: 6 November 1972

This bilateral Agreement recognises the transferral to Australia of right, title and interest in old Dutch shipwrecks located off the coast of Western Australia (Article 1). In accepting such right, title and interest, Australia agreed that it shall make no claim on the Netherlands for reimbursement of any costs in searching for any of the wrecked vessels or in recovering articles from the vessels (Article 3). However, Australia recognises the continuing interest of the Netherlands in the articles recovered from the vessels, and agreed to establish a four-person Committee (two Australians, two Dutch) to determine the disposition and subsequent ownership of any recovered articles between the Netherlands, Australia and the State of Western Australia. If the Committee cannot come to an agreement on such questions, a consultant will be appointed to report on the matter in issue, and if agreement still cannot be reached, the matter will be referred to the Governments of the two countries (Articles 4 & 8). An arrangement is attached to the Agreement setting out the guiding principles for the Committee to determine the disposition of material from the shipwrecks.

The arrangement for disposition of recovered articles recognises that the cost of recovery (including treatment) is likely to exceed by far the intrinsic or antiquarian sale-value of any material recovered. Therefore, the Parties consider that the historical, educational, scientific and international considerations are such that the deposition of representative collections in the museums of Australia and the Netherlands is most desirable.

Implications for Australian oceans policy

Dutch vessels are not the only ships to be wrecked off the Australian coast. Australia has been negotiating with the Government of the United Kingdom for a treaty, similar to the one done at The Hague, concerning old British shipwrecks. A draft of the new treaty has been circulated to Australian State Governments for comment and the relevant Commonwealth Department is hopeful that the treaty with the Government of the United Kingdom will be ready for signature by mid-1998.

The World Heritage Convention provides for the establishment within the United Nations Educational, Scientific and Cultural Organization (UNESCO) of an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Value, called

`the World Heritage Committee' (Article 8). Every State Party to the Convention is required to submit an inventory of property forming the cultural and natural heritage to the World Heritage Committee, and the World Heritage Committee will use these inventories to establish, keep up to date and publish a `World Heritage List' of the properties it considers as having outstanding heritage value (Article 11).

10. Customs, Maritime Crime and Enforcement

10.1 Customs Convention on Containers 1972 and Protocol of Signature

Done at Geneva: 2 December 1972

Entry into force: 6 December 1975

Entry into force for Australia: 10 May 1976

In order to develop and facilitate international carriage by container, Parties to this Convention are required to grant `temporary admission' to containers whether loaded with goods or not (Article 3), where `temporary admission' means `temporary importation, free of import duties and taxes and free of import prohibitions and restrictions' (Article 1). Normally, containers granted temporary admission must be re-exported within three months but this period can be extended by the competent customs authorities (Article 4). In order to benefit from the facilities provided for in the Convention, containers must be marked in the manner prescribed in Annex I of the Convention (Article 2). Provision is also made for the transport of goods by container under customs seal (Article 12 and Annex 4).

Implications for Australian oceans policy

The Customs Convention on Containers 1972 and Protocol of Signature is a binding international instrument to which Australia is a Party. Australia has in place the necessary institutional and legislative arrangements to meet fully its obligations as a Party to this instrument.

10.2 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

Done at Vienna: 20 December 1988

Entry into force: 11 November 1990

Entry into force for Australia: 14 February 1993

The objective of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 is to promote cooperation amongst State Parties to address suppression and other aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. Article 17 of the Convention prescribes specific provisions relating to `Illicit Traffic by Sea' where State Parties are urged to cooperate in the suppression of illicit traffic by sea in conformity with international law of the sea. In this regard, Parties, on reasonable grounds, may seek assistance from each other for the suppression of vessels engaging in illicit traffic. In particular, a Party may take appropriate measures against a vessel exercising freedom of navigation in accordance with international law suspected to be engaged in illicit traffic upon confirmation of authorisation given by the flag state of the vessel (Article 17.3). The inspecting Party may then board, search and take appropriate action with respect to the detained vessel, persons and cargo on board.

Article 18 requires State Parties to apply measures to suppress illicit traffic in Free Trade Zones and Free Ports. States are also encouraged to establish and maintain surveillance systems in harbours and dock areas in such areas.

The Customs Convention on Containers 1972 and Protocol of Signature is a binding international instrument to which Australia is a Party. Australia has in place the necessary institutional and legislative arrangements to meet fully its obligations as a Party to this instrument.

Implications for Australian oceans policy

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 is a binding international instrument to which Australia is a Party. The Convention `seeks to establish a hostile environment for those who traffic in, and profit from, illicit drugs and psychotropic substances. The Convention builds on the obligations created by earlier international drugs treaties and focuses on issues such as the creation of new extra-territorial offences, control of chemicals used in the manufacture of illicit substances, extradition, mutual assistance mechanisms and measures to combat money laundering.'

`Article 17 of the Convention deals with international cooperation aimed at the interdiction of illicit narcotics traffic by sea. In essence, the Article reflects existing international law in that it allows a Party to consent to vessels flying its flag being intercepted by another state on the high seas where such vessels are suspected of being involved in illicit narcotics traffic.

Consideration is being given to putting Australia's implementation of Article 17 on a legislative footing.'

10.3 Convention for the Suppression of Unlawful Acts Against the Safety of Navigation 1988

Done at Rome: 10 March 1988

Entry into force for Australia: 20 May 1993

The Convention for the Suppression of Unlawful Acts Against the Safety of Navigation was done in response generally to a perceived world-wide escalation in acts of terrorism, and directly in response to Resolution 40/61 of the General Assembly of the United Nations of 9 December 1985. UNGA Resolution 40/61 specifically invited the International Maritime Organization to `study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures' (Preamble).

The Convention defines a `ship' as `a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft' (Article 1), and lists a number of acts which, if done, attempted, abetted, or threatened unlawfully and intentionally, constitute an offence. Such acts include seizing a ship by force, violence that is likely to endanger navigation, destroying or damaging a ship or its cargo, placing a destructive device on a ship, destroying or damaging navigational facilities, passing false information that endangers safe navigation, and injuring or killing any person in connection with the commission of any of these other offences (Article 3). State Parties are enjoined to establish jurisdiction over such offences committed against or on board a ship flying the flag of the state, in the territory of the state, or by a national of the state (Article 6). The Convention prescribes procedures for the arrest, acceptance from a ship, extradition, or prosecution without delay of any offender or alleged offender (Articles 7, 8, 10, and 11). The Convention also provides for cooperation, assistance, and information exchange between Parties in connection with preventing any of the described offences, or with regard to criminal proceedings arising from such offences (Articles 12, 13 and 14).

Implications for Australian oceans policy

The Convention for the Suppression of Unlawful Acts Against the Safety of Navigation 1988 is a binding instrument to which Australia is a Party. The Convention was implemented in Australia by the Crimes (Ships and Fixed Platforms) Act 1992 (Cth). This law satisfies the legislative dimension of Australia's participation in the instrument. The Australian oceans policy will need to ensure that adequate arrangements, both institutional and resource-related, are in place to satisfy the treaty requirements.

10.4 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988

Done at Rome: 10 March 1988

Entry into force for Australia: 20 May 1993

The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf reflects the essence of the Convention for the Suppression of Unlawful Acts Against the Safety of Navigation 1988 as would reasonably be expected with regard to unlawful acts directed against structures at sea. Indeed, Article 1 of the Protocol directs that `[t]he provisions of articles 5 and 7 and of articles 10 to 16 of the Convention for the Suppression of Unlawful Acts against the Safety of Navigation ... shall also apply mutatis mutandis to the offences set forth in article 2 of this Protocol where such offences are committed on board or against fixed platforms located on the continental shelf'. A `fixed platform' is defined as `an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes'.

Article 2 of the Protocol describes certain acts which constitute an offence if committed, attempted, abetted or threatened unlawfully and intentionally. The list differs from the Convention for the Suppression of Unlawful Acts Against the Safety of Navigation only in that no reference is made to cargo or navigational safety. Importantly, Article 4 of the Protocol provides that `[n]othing in this Protocol shall affect in any way the rules of international law pertaining to fixed platforms located on the continental shelf'. This provision is perhaps best understood in the context of the United Nations Convention on the Law of the Sea 1982 which directs that `[t]he coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations' (Articles 60 & 80).

Implications for Australian oceans policy

The Protocol is a legally binding instrument to which Australia is a Party. The Protocol was implemented in Australia by the Crimes (Ships and Fixed Platforms) Act 1992 (Cth) which satisfies the legislative requirements of Australia's acceptance of the instrument. The Australian oceans policy will need to ensure that adequate arrangements, both institutional and resource-related, are in place to satisfy the treaty requirements.

11. Exploration and Exploitation of Non-Living Resources

11.1 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994

Done at New York 28 July 1994

Provisional Entry into force for Australia and generally: 16 November 1994

Definitive Entry into force for Australia and generally: 28 July 1996

The new Part XI (Implementing Agreement) was negotiated from 1990-94. During the last leg of negotiations, the Partiesparticularly those having direct interest in the negotiations of Part XIwere anxious and aware of the imminent coming into force of the 1982 Convention. Thus, desiring universal participation in an acceptable umbrella Convention, with appropriate representation in the institutions established by it, negotiations on Part XI were promptly concluded shortly before the 1982 Convention came into force on 16 November 1994.

While noting that political and economic changes, including a market-oriented approach, affect the implementation of Part XI, the Implementing Agreement reaffirms the `common heritage of (hu)mankind' notion relating to the resources of the seabed and ocean floor and subsoil thereof (the Area). Article 2 holds that the provisions of the Implementing Agreement and Part XI of the United Nations Convention on the Law of the Sea, 1982 (LOSC) shall be interpreted and applied together as a single instrument. In the event of any inconsistency between the two, the provisions of the Implementing Agreement prevail.

The institutions established earlier in the 1982 Convention are given specific function and obligations under the new Part XI. The Implementing Agreement obliges the Enterprise to conduct its initial deep seabed mining operations through joint venturesSection 2(2) of the Annex. The International Seabed Authority (ISA) has the role to organise and control activities in the Area, particularly with a view to administering the resources of the Area.

Perhaps, the most significant difference between the new Part XI and its older version is that members do not have to fund the ISA. Other provisions in the Implementing Agreement include transfer of technology, production policy, economic assistance and financial terms of the contract.

The environmental provisions in the United Nations Convention on the Law of the Sea are enhanced by the Agreement which requires that all applications for approval of plans of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities and a program for oceanographic and baseline environmental studies (section 1(7) of the Annex to the Agreement). The Agreement also requires the International Seabed Authority to adopt rules, regulations and procedures on marine environmental protection as part of its early functions prior to the approval of the first plan of work for exploitation (section 1(5)(g) of Annex to the Agreement).

Implications for Australian oceans policy

At present, Part XI may not have any direct impact on matters relating to the Australian marine environment. Australia has yet to demonstrate a strong interest in activities relating to deep sea-bed mining as governed by the new Part XI. However, it is noteworthy that if future activities operating under Part XI were to result in an efficient, mature industry, such operations may have a detrimental effect on Australia's well-established land-based mining industry. In this regard, although Australia may not be `seriously affected' under the definition of section 5(e) of the Annex to the new Part XI, Australia might wish to consider any decision which may be effected through the requirements of this section. Section 5(e) obliges the ISA

`(t)o study the potential impact of mineral production from the Area on the economies of developing land-based producers of those minerals which are to be most seriously affected, with a view to minimising their difficulties and assisting them in their economic adjustment, taking into account the work done in this regard by the Preparatory Commission.'

While Australia is clearly not a developing country, this extract demonstrates that the international community is aware of the potential impact that deep sea mining may one day have on terrestrial mining operations. The Australian oceans policy might consider whether Australia should commence research on deep sea bed mining issues, such research could include also the environmental impacts of deep seabed mining.

11.2 Guidelines and standards for the removal of offshore installations and structures on the continental shelf and in the Exclusive Economic Zone

Resolution 11/8/2 of the Eleventh Consultative Meeting of the London Convention 1972

General removal requirement

Abandoned or disused offshore installations or structures in the EEZ or on the continental shelf are required to be removed unless they can be left or partially removed consistently with these guidelines and standards.

Coastal States have the responsibility to ensure that installations which are no longer in use are either removed or partially removed as soon as reasonably practicable.

Guidelines

A decision to allow all or part of an offshore structure to remain on the sea-bed will be made on a case-by-case basis, and will consider:

- navigational safety and other sea uses;
- the rate of deterioration of the material and its possible future effect on the marine environment;
- the environmental risk, including that posed to living resources;
- the risk of the structure moving;
- the costs, technical feasibility and risks of injury to personnel of removing the structure; and
- determination of a new use or other reasonable justification for allowing the structure to remain

The risks to navigation should consider: the number, type and draught of vessels using the area; the cargoes they carry; the tide, current, hydrographic conditions and potentially extreme climatic conditions; the proximity to sea lanes and port access routes; the aids to navigation in the vicinity; the location of commercial fishing areas; the width of the navigable fairway; and whether the area is near or in a strait or archipelagic navigation route.

The potential effects on the marine environment must be based upon scientific evidence. The process of allowing a structure to remain on the seabed will include, inter alia, specifying conditions, providing for monitoring and updating charts.

Standards

All abandoned or disused installations or structures standing in less than 75 metres of water and weighing less than 4 000 tonnes in air, excluding the deck and superstructure, should be entirely removed.

The removal process should not cause significant adverse effects on navigation or the marine environment, including living resources.

If the installation will serve as a fish aggregating device or will not interfere unjustifiably with other uses of the sea, it may be left in place. If complete removal would be extremely expensive or involve unacceptable high risk, the coastal state may resolve that it not be entirely removed.

Any part of a structure which is left above the water must be maintained to avoid structural failure, and if it does not project above the water surface, there must be sufficient water depth above it to ensure safety of navigation, and in any case there must be at least 55 metres of water above the unremoved structure.

Before approving partial removal, the coastal state must be satisfied that the structure will not be moved by winds and tides. The coastal state must also identify the juridical or physical person who will be responsible for maintaining any required navigation aids needed to mark obstructions, and conducting monitoring of the structure.

The coastal state must ensure that legal ownership and responsibility for maintenance is unambiguous, and that financial ability to assume liability for damages is clearly established.

Artificial reef creation should be well away from customary traffic lanes.

From 1 January 1998, all relevant structures must allow for entire removal in their design and construction.

Implications for Australian oceans policy

These guidelines were issued under the London Convention 1972 to which Australia is a Party. There are some new requirements in the guidelines which will come into effect in 1998, including requirement for complete removal out to a depth of 100 metres, and the need for structures to be designed with removal in mind. The oceans policy might consider involving the petroleum industry in devising the most appropriate measures to comply with these guidelines and standards.

12. Fishing

12.1 Agreement for the Establishment of the Indo-Pacific Fisheries Council (IOFC) 1948

Done at Baguio: 26 February 1948

Entry into force: 9 November 1948

Entry into force for Australia: 10 March 1949

The name of the organisation changed at IOFC Twenty Fourth Session 1993 to the `Asia-Pacific Fishery Commission' (APFC)

The objectives of APFC are `to promote the full and proper utilisation of living aquatic resources by the development and management of fishing and cultural operations and by the development of related processing and marketing activities in conformity with the objectives of the members' (Article IV). APFC met in Seoul, Korea from 11 to 20 June 1996 with the intention of amending its original objectives and redefining its role to include the management of fisheries. However, the Parties were unable to reach consensus.

The area of competence of APFC is broad. It includes all living aquatic resources (both marine and inland) contained within the `Indo-Pacific area'. This area has not been defined. In December 1990, an ad hoc committee determined that the area of competence of the Commission did not need be defined precisely on the understanding that, in practice, the Commission would give priority to marine fishery resources in the FAO Statistical Area 71. The lack of a clear definition of geographical area of competence has meant that it has been difficult for the Commission to act effectively as an organisation to facilitate the management of fisheries at the regional level.

The functions of the APFC include keeping the state of aquatic resources and related industries under review as well as instituting and managing programs which (i) create new fisheries and increase production efficiency and productivity of existing ones, (ii) conserve and manage resources and (iii) protect resources from pollution (Article IV).

In addition, the APFC has responsibility for (i) keeping the economic and social aspects of fishing and aquaculture industries under review, including the working conditions of those involved and methods by which the industries can contribute to improving social conditions and meeting economic goals; (ii) facilitating training; (iii) assembling and disseminating information on the fisheries and related industries; and (iv) carrying out such other activities necessary to achieve the objectives of the APFC (Article IV [a-g]).

The APFC is administered by a Council which has one representative from each member. The council meets periodically, usually biannually. The Council has the power to create subsidiary bodies and working Parties (Article III).

Implications for Australian oceans policy

Decisions by the APFC Council do not bind the Parties. Moreover, despite its power to make recommendations on measures with respect to conservation and management of high seas fisheries, since December 1990 it has made no such recommendations. In practice, the APFC does not greatly influence Australia's fishing policy, and will probably play a similarly minor role in Australia's oceans policy.

12.2 Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Economic Zone and Continental Shelf 1974

Signed at Jakarta on 7 November 1974

The relevant parts of the Memorandum of Understanding are:

- Indonesian traditional fishermen who may operate under the arrangements are those who have traditionally fished in Australian waters by methods which have been the tradition over decades of time;
- The areas in which fishing may be carried out are confined to the Australian Fishing Zone (AFZ) around Ashmore and Cartier Islands, Scott Reef, Browse Island and Seringapatam Reef;
- Indonesian traditional fishermen may land on East and Middle Islands on Ashmore Reef to obtain fresh water, and may shelter among the islands;
- Turtles may not be taken from anywhere in the Australian Fishing Zone;
- Trochus, beche de mer, abalone, green snail, sponges and molluscs may only be taken from the seabed adjacent to the islands and reefs mentioned above.

Implications for Australian oceans policy

By the mid 1980s, it became clear that the 1974 MOU was not operating successfully and that new guidelines were necessary in view of the continued violation of the Australian Fishing Zone by Indonesian citizens. Australia was particularly concerned with the wider environmental implications of the increased illegal fishing activities by Indonesian fishers in the AFZ. Australia was also concerned that the uncontrolled exploitation of the fisheries resources in Australian waters by Indonesian fishermen may have implications for Australia's obligations under international law environmental treaties. These concerns led to the 1989 Implementing Arrangements. (For further discussion of the implications of the 1974 MOU, see Section 12.9 of this report concerning the 1989 Implementing Arrangements.)

12.3 South Pacific Forum Fisheries Agency Convention (FFA Convention) 1979

Done at Honiara: 10 July 1979

Entry into force: 7 August 1979

Entry into force for Australia: 12 October 1979

The Forum Fisheries Agency (FFA), located in Honiara, Solomon Islands, was established by the South Pacific Forum Fisheries Agency Convention 1979. The members of the FFA include the members of the South Pacific Forum and other states. Other territories in the region may be admitted to membership on recommendation of the FFA Committee (Article II).

The objective of the FFA to is to promote intra-regional coordination and cooperation with respect to managing and conserving the fisheries resources in the exclusive economic zones of the parties. In particular, the Secretariat is charged with the following responsibilities:

- collect, analyse, evaluate and disseminate to Parties relevant statistical and biological information with respect to the living marine resources of the region and in particular the highly migratory species;
- collect and disseminate to Parties relevant information concerning management procedures, legislation and agreements adopted by other countries within and beyond the region;
- collect and disseminate to Parties relevant information on prices, shipping and marketing of fish and fish products;
- provide, on request, to any Party technical advice and information, assistance in the development of fisheries policies and negotiations, and assistance in the issue of licences, the collection of fees or in matters pertaining to surveillance and enforcement; and
- seek to establish working arrangements with relevant regional and international organisations, particularly the South Pacific Commission.

Implications for Australian oceans policy

The complex interaction between those South Pacific regional instruments to which Australia is a Party provides the framework within which its oceans policy must operate. However, the structure of this framework can not be determined through consideration of the various instruments in isolation from each other. For example, some of the activities of the FFA have implications for SPREP programs. These include, in particular, issues relating to marine biodiversity. Some of the processes that threaten marine biodiversity arise from fishing operations. With this in mind, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks provides that, in order to conserve straddling and highly migratory fish stocks, states must protect biodiversity in the marine environment (Article 5). This calls for cooperation and collaboration between the FFA and SPREP, and the Australian oceans policy might recognise a role for Australia to help facilitate such cooperation.

The member states of the FFA are almost all developing countries. Australia and New Zealand both contribute one third each towards the budget of the Agency (Article VI[6] & Annex). Therefore, the oceans policy might desirably recognise that Australia plays a key role in this forum and that such a role could well contribute favourably to Australia's wider foreign policy interests in the region.

12.4 Agreement on Fisheries between the Government of Australia and the Government of Japan, 1979 and Subsidiary Agreements between Government of Australia and the Government of Japan concerning Japanese Tuna Long-Line Fishing

Done at Canberra: 17 October 1979

Entry into force: 1 November 1979

The Agreement on Fisheries between the Government of Australia and the Government of Japan, 1979 or the `Head Agreement' as referred to by its various Subsidiary Agreements between Government of Australia and the Government of Japan concerning Japanese Tuna Long-Line Fishing (Subsidiary Agreements), is an agreement which allows Japanese vessels to fish in designated areas of the Australian Fishing Zone (AFZ) defined as a zone comprising 200 nautical miles off Australia's coasts (Article II). Only licensed Japanese vessels are permitted to fish in the designated AFZprescribed in the Subsidiary Agreements, and licences are granted by the Australian Government in accordance with Australian law (Article VI). For the purposes of compliance and enforcement, Japanese vessels engaged in fishing activities in the AFZ are required to conform to Australian laws applicable to foreign vessels fishing in the AFZ. Duly authorised Australian officials may board fishing vessels of Japan within the AFZ for inspection and enforcement purposes (Article IV).

To this end, both parties undertake to cooperate in the conduct of scientific research towards conservation and achieving optimum utilisation of the living resources within the AFZ with the view to fulfilling common fisheries objectives (Articles I & VII.1). In this regard, appropriate statistical and biological information shall be made available by the Japanese Government to the Australian Government for use by the latter for the purpose of managing and conserving the living resources within the AFZ (Article VII.2).

Pursuant to Article II.2 of the Head Agreement, Subsidiary Agreements have been established between the two Governments. Each Subsidiary Agreement has a specified period of validity. The respective Subsidiary Agreements establish detailed procedures for the conduct of tuna long-line fishing operations by Japanese fishing vessels within the AFZ. The Subsidiary Agreements also prescribe procedures for the issuance of licences by the Australian Government to specified numbers of Japanese vessels subject to an agreed fee.

The Subsidiary Agreements provide that the Japanese vessels are permitted to fish all species of tuna (including Southern Bluefin Tuna) and bill-fish, and all other species of finfish including incidentally caught oceanic sharks (Article II), subject to specific areas and times as specified in the Appendices of the respective Subsidiary Agreements. Such areas include the Tasmanian and the west coast tuna fisheries and specific areas of the east coast. Under the Agreement, Japanese fishing vessels are permitted to call at specified Australian ports.

Implications for Australia's oceans policy

As the description of the bilateral Agreement suggests, Japanese fishing access to the AFZ has been negotiated as an annual arrangement since 1979, pursuant to Article II.2 of the Head Agreement. Complementary to this treaty is the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) which establishes the Commission for the Conservation of Southern Bluefin Tuna (the Commission) to manage the species on a global basis. Both Australia and Japan are parties to the CCSBT.

The negotiation of the annual bilateral Agreement between Australia and Japan and the meetings of the Commission discuss issues of similar interests, particularly in relation to the determination of catch limit of the southern bluefin tuna (SBT). Australia maintains a policy of allowing Japanese catch of SBT in the AFZ subject to a global catch limit for the SBT fishery as determined by the CCSBT. The global catch limit for 1997 has yet to be determined. There have been delays for the last few years in settling an agreed global catch limit under the

CCSBT because the Parties have not agreed on the status of the stock and therefore on an appropriate total allowable catch (TAC).

The Agreement benefits Australia in that it receives a fee in return for Japanese access to tuna resources in the AFZ. In addition to this, the Japanese Government contributes to a fund for the management of tuna stocks. Australian industries, in particular benefit from the revenue generated under the Agreement, estimated to be in excess of $40 million per annum accruing from the provision of port facilities utilised by Japanese vessels calling at Australian ports.

However, the ability of the domestic fishery to harvest SBT has grown over the years and some domestic fishers now believe that there is no real surplus stock for which Japan should have access. This could be a deteriorating problem that the Australian oceans policy might need eventually to address.

12.5 Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America 1987

Done at Port Moresby: 2 April 1987

Entry into force: 15 June 1988

Entry into force for Australia: 15 June 1988

This treaty came into being largely because of US concerns about the increasing interest of the USSR in establishing a fishing presence in the South Pacific. It provides for the US to pay the Parties a sum of money which is divided amongst them in return for fishing access to a certain region of the South Pacific. The US fishing area extends into the North East Sector of the Australian EEZ, but the Americans have not concentrated their fishing effort in this region because they have access to richer grounds elsewhere.

12.6 Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the United States of America on Access to the Australia Fishing Zone 1987

Done at Port Moresby: 2 April 1987

Entry into force: 2 April 1987

This is a bilateral implementing instrument that supports the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America 1987.

12.7 Agreement Among Pacific Island States Concerning the Implementation and Administration of the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the USA of 2 April 1987

Done at Port Moresby: 2 April 1987

Entry into force: 15 June 1988

Entry into force for Australia: 15 June 1988

This is an implementing instrument that supports the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America 1987.

12.8 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Driftnet Convention) 1989

Done at Wellington 24 November 1989

Entry into force: 17 May 1991

Entry into force for Australia: 6 July 1992

The Driftnet Convention concluded in response to the rapid increase in the use of long driftnets by Asian fishing vessels in the late 1980s. The use of fine, small mesh size, nylon nets which could be stretched to distances up to 40 kilometres is generally believed to have devastating effects on the environment and marine living resources. As a result, environmental groups and Governments in the region became increasingly concerned about its effects on the ecological balance of the marine environment.

The issues which concerned environmental groups and Governments include bycatch especially of salmon, marine mammals and seabirds; illegal salmon fisheries; impacts of bycatch on directed fisheries; dropout losses (ie. of species caught in driftnets but lost before landing on board the fishing vessel); net damage to commercially valuable species caught in driftnets and subsequently escaping; the `ghost fishing' problem (ie mortalities from derelict nets); reduced catch ability of North Pacific and South Pacific albacore tuna by troll gear since contact with driftnets alters behaviour; hazards to vessels and fishermen; and overall impacts on a portion of the North Pacific and South Pacific ecosystem.

The Driftnet Convention commits States Parties to prohibit their nationals and vessels from engaging in driftnet fishing within the Convention Area (Article 2). The `Convention Area' is defined as the area lying within 10¡ North latitude and 50¡ South latitude and 130¡ East longitude and 120¡ West longitude and includes waters under the jurisdiction of Parties (Article 1). This includes Australia's internal waters, territorial sea and exclusive economic zone.

The Convention defines driftnet fishing activities broadly and includes `attempting' to use a driftnet. Driftnet fishing is defined as catching, taking or harvesting fish with the use of a driftnet; attempting to catch, take or harvest fish with the use of a driftnet; engaging in any activity which can reasonably be expected to result in the catching, taking or harvesting of fish with the use of a driftnet, including searching for and locating fish to be taken by that method. Support services which may not be directly related to fishing is also included in the definition (Article 1[c][i-vi]). Hence any operations at sea in support of, or in preparation for any activity described above including operations of placing, searching for or recovering fish aggravating devices or associated electronic equipment such as radio beacons is defined as driftnet fishing. In addition, the use of aircraft to support the activities described above, and transporting, transhipping and processing any driftnet catch and cooperation in the provision of food and other supplies for vessels equipped or used for driftnet fishing is included. A `driftnet' is defined as a gillnet or other net or a combination of nets which is more than 2.5 kilometres in length which enmesh, entrap or entangle fish by drifting on the surface or in the water (Article 1[b]).

Implications for Australian oceans policy

The main obligations of States Parties under the Driftnet Convention are found in Articles 2 and 3. Article 2 obliges Parties to prohibit its nationals and vessels registered under its laws from engaging in driftnet fishing activities within the Convention Area This means, no Australian national or vessel registered in Australia and flying the Australian flag may use driftnets any where within the Convention Area.

Article 3 is broad and contains far ranging measures which States Parties may take. In Article 3(1) States Parties are obliged not to `assist or encourage' the use of driftnets within the Area. In addition, States Parties are obliged to prohibit the use of driftnets in areas under its fisheries jurisdiction, and prohibit the transhipment of driftnet catches within its jurisdiction. More significantly, Article 3(2) allows States Parties to prohibit the landing of driftnet catches within its territory and prohibit the processing of catches in facilities under its jurisdiction. This means no vessel including those of non-Parties may land its catch nor tranship its catch in areas under the jurisdiction of Parties.

States Parties may prohibit the importation of fish or fish productswhether processed or notthat were caught using a driftnet, and restrict access and port servicing facilities for driftnet fishing vessels. Furthermore, they may prohibit the possession of driftnets on board any fishing vessels within their fisheries jurisdiction. The cumulative effect of these provisions is to render impossible the operation of a viable driftnet fishery within the Convention Area. Even if an operator were to driftnet illegally, the catch would not be able to be landed or processed because of the restrictions on landings, transhipment and port access. Australia's obligations under the Driftnet Convention have been implemented under the Fisheries Management Act 1991 (Cth).

Driftnet fishing in the Pacific is no longer the problem that it was in the 1980s. Consequently, there are few immediate implications for Australia's oceans policy arising from participation in the Driftnet Convention. However, the effectiveness of the combined efforts states which were united in common purpose to address the threat to marine living resources posed by driftnet fishing demonstrates that marine management at the national level can sometimes only be conducted effectively in partnership at the international level.

12.9 Agreed Minutes of Meeting between Officials of Indonesia and Australia on Fisheries 1989

Signed at Jakarta: 29 April 1989

In March 1989, following a meeting between the Foreign Ministers of Australia and Indonesia, the two countries agreed to introduce some practical guidelines for the implementation of the 1974 Memorandum of Understanding (MOU). The Implementing Arrangements re-confirmed the essential aspects of the 1974 MOU as follows:

- Access to the MOU area would continue to be limited to Indonesian traditional fishermen using traditional methods and traditional vessels consistent with the tradition over decades of time, which does not include fishing methods or vessels utilising motors or engines;
- The Indonesian traditional fishermen would continue to conduct traditional activities under the MOU in the area of the AFZ and the continental shelf adjacent to Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef and Browse Islet. In addition Indonesian traditional fishermen would be able to conduct traditional fishing activities in an expanded area;
- To cope with the depletion of certain stocks of fish and sedentary species in the Ashmore Reef area, the Australian Government had prohibited all fishing activities in the Ashmore Reef National Nature Reserve, but was expected soon to adopt a management plan for the Reserve which might allow some subsistence fishing by the traditional Indonesian fishermen. The Australian side indicated that Indonesia would be consulted on the draft plan. Because of the low level of stock, the taking of sedentary speciesparticularly Trochus Niloticusin the Reserve would be prohibited at

this stage to allow stocks to recover. The possibility of renewed Indonesian traditional fishing of the species would be considered in future reviews of the management plan; and

- Indonesian traditional fishermen would be permitted to land on West Islet for the purpose of obtaining supplies of fresh water. The Indonesian side indicated its willingness to discourage Indonesian traditional fishermen from landings on East and Middle Islets because of the lack of fresh water on the two islets.

Implications for Australian oceans policy

Evidently, the 1974 MOU and the 1989 arrangements have failed to resolve the issue of illegal fishing by Indonesian citizens in Australian waters. It is becoming increasingly clear that such illegal fishing activities are occurring outside the scope of the MOU and the Agreed Minutes. The issue continues to pose a challenge to the management of the living resources on the Australian side of the Timor and the Arafura Seas. Not only do the activities of the Indonesian fishermen constitute a breach of Australia's sovereign rights over the living resources in its EEZ, but also impact negatively on the conservation and protection of endangered species under the jurisdiction of Australia.

Some commentators have argued that the continuation of illegal fishing activities by Indonesian nationals in Australian waters may be explained in terms of the misplaced assumptions behind the MOU, particularly in its definition of what constitutes `traditional' fishing.

From an Australian perspective, the fishing activities of Indonesian nationals in its waters are in breach of its sovereignty in the territorial sea and sovereign rights in the EEZ and on the continental shelf under the LOSC to which both Australia and Indonesia are parties.

As custodian of the living resources in the EEZ, the coastal state is obliged to conserve the resources (LOSC Article 61[2]). Nationals of foreign states fishing in the EEZ of the coastal state are required to comply with the conservation and management measures instituted by the coastal state (LOSC Article 62[4]). The coastal state is given the power to take such measures as boarding, inspection, arrest and judicial proceedings to ensure compliance with its conservation and management laws (LOSC Article 73[1]).

It follows from the above that Australia is not obliged to grant access to Indonesian fishers in its territorial sea. In this respect, the fact that Indonesians have fished in the waters now constituting Australian territorial sea and EEZ from time immemorial is immaterial. The MOU and associated documents merely represented political goodwill on the part of Australia. This means that Indonesian fishers not covered by the MOU are illegal fishers; no special arrangements currently exist to deal with them. Accordingly, the normal fisheries laws of Australia, consistent with international law, applies equally to such people. In October 1997, certain Indonesian fishers claimed a form of `native title' as a defence to prosecution under Australian legislation. A decision from the courts is awaited.

However, although there is no legal basis for any automatic access by Indonesian fishermen to the fisheries resources of Australia in the Timor and Arafura seas (a fact not disputed by Indonesian authorities), political realities between the two countries and their shared interests and obligations under the LOSC to promote the effective management of the Timor and Arafura seas would suggest the need for a more comprehensive examination of the effectiveness of resource management regimes in the Timor and Arafura seas. This must be done as part and parcel of the development of an oceans policy by both countries. Whilst the continued violation of Australia's fisheries jurisdiction by Indonesian nationals has not become a significant diplomatic issue between the two countries, development of the Australian oceans policy may present an opportunity to address this issue.

12.10 Agreement between the Government of Australia and the Government of the Republic of Indonesia Relating to Cooperation in Fisheries 1992

Done at Jakarta: 22 April 1992

Entry into force: 29 May 1993

The Parties agree to cooperate in fisheries research relevant to the conservation and optimum utilisation of marine living resources (Article 1). To this end, they agree to exchange information related to fisheries of mutual interest, and establish channels of communication to facilitate the exchange of information (Article 2). This agreement supports other international efforts at the multilateral level in that it provides for the development of complementary regimes `for the conservation, management and optimum utilisation of shared stocks, straddling stocks and highly migratory fish stocks' (Article 3). The treaty also allows for the exchange of fisheries and marine conservation personnel (Article 4). The Parties agree to establish `Subsidiary Agreements' if one Party wishes to make its fisheries resources available to the other (Article 6). The treaty requires that the Parties take steps to ensure that their fishing boats do not fish in the other's waters (Article 7). This treaty is intended to be interpreted and implemented consistently with prior bilateral fishing agreements between the two Parties (Article 11).

12.11 Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region 1992

Done at Honiara: 9 July 1992

Entry into force: 20 May 1993

Entry into force for Australia: 3 September 1993

The Niue Treaty enjoins Parties to `cooperate in the enforcement of their fisheries laws and regulations', and `cooperate to develop regionally agreed procedures for the conduct of fisheries surveillance and law enforcement' (Article III). To this end, Article IV of the treaty provides for implementation of harmonised minimum terms and conditions (MTC) of fisheries access, restriction of foreign fishing vessel licensing only to those vessels that are in good standing on the Regional Register of Foreign Fishing Vessels maintained by the South Pacific Forum Fisheries Agency, the provision of foreign fishing vessel reports in accordance with the standard forms of reporting set out in MTCs, distinctive markings for licensed fishing vessels that are readily identifiable from the sea and the air, and a recognition of the responsibility of both flag states and Fishing Associations for the compliance of their vessels with fishing agreements and applicable laws.

Articles VI to VIII of the Niue Treaty address the core issues of cooperation in surveillance, law enforcement, prosecutions and enforcement of penalties. Notably, Article VI(1) provides that `[a] Party may, by way of provisions in a Subsidiary Agreement or otherwise, permit another Party to extend its fisheries surveillance and law enforcement activities to the territorial sea and archipelagic waters of that Party'. Such an arrangement is complemented by provision for the sharing of personnel and equipment, the free exchange of information, extradition of persons charged with fisheries offences, assistance in law enforcement against persons held in custody by another Party, and authorisation for advocates or expert witnesses to appear as such in the courts of other Parties.

Vessels operating pursuant to the Niue Treaty must fly the Regional Fisheries Surveillance and Law Enforcement Flag described at Annex 1 to the Treaty along with their national flag or ensign, and aircraft must be clearly marked and identifiable in a manner agreed between the Parties to Subsidiary Agreements. A Party may authorise its officers in writing to perform

fisheries surveillance and law enforcement functions on its behalf while on board a vessel or aircraft of another Party. Equally, a Party may authorise in writing officers of another Party to perform fisheries surveillance or law enforcement on its behalf while on board a vessel of that other Party. In either case, the personnel concerned must carry an identification card as described in Annex 2 to the treaty.

Implications for Australian oceans policy

The Niue Treaty is a binding instrument to which Australia is a Party. The ocean area that lies within national jurisdiction in the South Pacific is very large, but the States of the South Pacific are still developing and do not have the resources necessary for effective surveillance and enforcement. There is little doubt that undetected illegal fishing occurs in the South Pacific. The Niue Treaty is an attempt to help overcome this problem through the sharing of equipment and trained personnel.

To the extent that the treaty has encouraged cooperative efforts in surveillance and has reinforced the Regional Register of Foreign Fishing Vessels maintained by the South Pacific Forum Fisheries Agency, the instrument has proven useful. However, many of the provisions of this treaty address cooperative enforcement, and this aspect of the Niue Treaty has not generally been taken up by the Parties to the treaty. One reason for the absence of Subsidiary Agreements for cooperative law enforcement may be the complexity of the legal structure within which such arrangements would have to be implemented. The fisheries laws of South Pacific States differ from each other. Enforcement officers operating in the waters of another country would have to be familiar with the latter's fisheries laws, and this might well prove to be an overly burdensome requirement. Also, the treaty purports to alter the rules of hot pursuit as they might apply to States which are not Parties to the treaty, which may give rise to complications under international law.

The Niue Treaty operates together with the FFA Convention in the South Pacific region to establish a cooperative regime against illegal fishing. Australia contributes to this effort through the provision of patrol craft, conduct of surveillance flights, support for development of enforcement institutions and measures, training and allocation of personnel. The Australian oceans policy might recognise the importance of Australia's contribution to fisheries management in the region and provide for the continuation of such efforts.

12.12 Convention for the Conservation of Southern Blue Fin Tuna 1993

Done at Canberra: 10 May 1993

Entry into force: 20 May 1994

Entry into force for Australia: 20 May 1994

The objective of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) is `to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna' (Article 3; note: the Convention does not define `conservation' or `optimum utilisation'). These objectives are to be achieved by promoting cooperation among the Parties to the Convention and engaging non-members to join or at least cooperate in achieving the conservation and management measures adopted by the CCSBT Commission. At present, only Australia, New Zealand and Japan are Contracting Parties to the CCSBT.

13. Framework Instruments

13.1 Declaration of the UN Conference on the Human Environment 1972 61

The Final Report of the Working Group on the Declaration' UN Doc. A/CONF. 48/14/Rev. 1/Annex II.

Full Report of the Conference and Action Plan UN Doc. A/CONF. 48/14/Rev. 1 (1972)

This is an important instrument in the evolution of rules for the protection of the environment. It was the product of a UN Conference attended by 113 states that met in Stockholm from 5 to 16 June 1972 to consider ways of limiting or, where possible, eradicating impairment of the human environment.

Principle 7 of the Declaration is of particular relevance to marine and coastal policy, it provides that `States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea'. The essence of this Principle is reflected in the UN Convention on the Law of the Sea 1982 (LOSC), and in other international legal instruments that were developed subsequent to the Stockholm Declaration.

Other Principles of the Declaration that are particularly noteworthy include:

- Principle 5 which implies that the sustainable and equitable use of non-renewable resources is essential, but does so in language that does not mention the word `sustainable''sustainability' is a concept of environmental management that was still in its infancy at that time at the international level;
- Principle 12 which recognises the special needs of developing states;
- Principle 13 which offers an early recognition of the concept of an `integrated and coordinated' approach to development planning; and, importantly,
- Principle 21 which formed the basis of LOSC Article 193. Principle 21 affirms that `States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction'.

Implications for Australian oceans policy

The Declaration of the United Nations Conference on the Human Environment (UNCHE) is not a legally-binding instrument and there are therefore no direct obligations arising for Australia from it. Although the UNCHE Declaration is not binding, the timing of its formulation, just before development of such important instruments as LOSC and the International Convention for the Prevention of Pollution from Ships 1973 (later modified by the Protocol of 1978 relating thereto, now known commonly as MARPOL 73/78), ensured that it would play an important role in the process of creating new, more ambitious instruments, which it would seem to have done. The UNCHE Declaration provides a set of principles which have guided policy-makers around the world, and which reasonably will also require due consideration in the formulation of an Australian oceans policy.

13.2 United Nations Convention on the Law of the Sea (LOSC) 1982

Done at Montego: Bay

Entry into force: 16 November 1994

Entry into force for Australia: 16 November 1994

The United Nations Convention on the Law of the Sea (LOSC) was negotiated during the Third Law of the Sea Conference (UNCLOS III) from 1974 to 1982. As at July 1997 the

Convention had been ratified by 119 states. The United Nations Convention on the Law of the Sea is one of the most complex treaties in the history of international relations. It purports to devise a comprehensive legal framework for the conduct and regulation of all marine sector activities. It also provides a framework for the settlement of disputes arising from conflicting ocean activities and states' interests at sea.

The United Nations Convention on the Law of the Sea is divided into 17 Parts and nine Annexes, containing provisions governing, inter alia, the limits of national jurisdiction over ocean space; access to the seas; navigation protection and preservation of the marine environment; sustainable management of marine living resources; non-living marine resources exploitation; marine scientific research; and the settlement of disputes. The LOSC is an extra-ordinarily complex instrument that would require a prohibitively lengthy text to describe in complete detail. The following brief description will summarise the various Parts of the LOSC, and discuss the zones of jurisdiction and navigational regimes established by the LOSC.

Parts

Part IIVI of the LOSC deal with areas of national jurisdiction. These Parts identify the limits of the various maritime zones of jurisdiction and specify the legal rights of states within each. These different maritime areas include internal waters (Article 8[1]), territorial sea (Article 2), contiguous zone (Article 33), exclusive economic zone (EEZ) (Article 55), continental shelf (Article 76), the high seas (Article 86), and sea-bed beyond national jurisdiction (referred to as the `Area' in the Convention) (Article 1, & Article 137). The Convention does not specifically treat the airspace as a distinct zone, but provides that the sovereignty of states over their land territory, internal waters, and territorial sea extends to the airspace above these maritime zones.

Part VII of the Convention deals with the high seas. The particular jurisdictional feature of the high seas is a collection of rights known as the `freedom of the high seas.'

Part VIII of the Convention, comprising only one Article (Article 121) deals with islands. It defines an island as `a naturally formed area of land, surrounded by water, which is above water at high tide'. An island as defined allows the establishment of a territorial sea, contiguous zone, EEZ and continental shelf; except that `[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'.

Part IX of the Convention addresses enclosed and semi-enclosed seas. This part calls for cooperation among states bordering enclosed and semi-enclosed seas to cooperate in the management and conservation of the environment of such seas.

Part X of the Convention (Articles 124-132) creates conditions for access to the sea by land-locked states. The Convention requires that such states shall have the right of access to and from the sea for the purpose of exercising the rights granted to all states on the sea. It also calls for a more favourable treatment of such states in respect customs charges and other duties during their transit through the ports of coastal states.

Part XI of the Convention and Annexes III and IV to the Convention regulate the regime governing exploration and exploitation of mineral resources of the deep sea-bed beyond coastal state jurisdiction. These provisions were the more controversial aspects of the LOSC and prevented several industrial countries from ratifying the Convention. Part XI introduces environmental impact assessments and other systems of management which are both innovative, concrete, and necessary for the protection of the marine environment of the high seas from deep sea-bed mineral exploitation.

Part XII, consisting of 46 articles, is the first attempt in international law to provide a comprehensive framework of measures to protect the marine environment. This part imposes

an obligation on all states to protect and preserve the marine environment. It enjoins states to enact appropriate legislation to give effect to their obligations.

Part XIII introduces a separate and specific regime applicable for marine scientific research. This is complemented by the inclusion of Part XIV which encourages states to develop and transfer marine technology to other states.

Part XV establishes a regime for the resolution of disputes in relation to the use of the oceans. It provides several options for states to resolve their disputes. These options include:

- the International Tribunal on the Law of the Sea;
- the International Court of Justice;
- Arbitration in accordance with Annex VII to the LOSC; and
- Special Arbitration in accordance with Annex VIII to the LOSC.

Maritime zones of jurisdiction

For jurisdictional and regulatory purposes, the Law of the Sea divides the oceans into zones of jurisdiction. The major zones of jurisdiction are discussed below.

- Internal waters: The internal waters comprise all the waters on the landward side of the territorial sea baseline (Art 8). Such waters include rivers, bays, ports and other coastal waters lying landwards of the territorial sea baseline. States generally have complete sovereignty in internal waters, although Article 8 provides that `[w]here the establishment of a straight baseline in accordance with the method set forth in (LOSC) article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters'.
- Territorial sea: Under the LOSC, the territorial sea cannot extend beyond 12 nautical miles measured from the territorial sea baseline. The Convention gives to coastal states sovereignty in the territorial sea similar to that which they exercise on land (Article 2[1]). The sovereignty of the coastal state extends to the sea-bed and subsoil of the territorial sea (Article 2[2]). The coastal state's sovereignty in the territorial sea is subject to the right of innocent passage of foreign vessels (Article 17). The right of coastal states to adopt laws and regulations in the territorial sea for the prevention, reduction and control of marine pollution from vessels is affirmed in Article 21 and in Chapter XII (Article 211[4]).
- Archipelagic waters: One of the unique features of the LOSC relates to the special regime of archipelagic waters. Part IV of the Convention allows archipelagic states to claim archipelagic waters by drawing straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago `provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1' (Article 47[1]). The archipelagic state may also designate internal waters within the archipelagic waters. The other zones of jurisdiction, namely: the territorial sea, contiguous zone, EEZ and continental shelf, are measured from the archipelagic baseline.
- Principle 21 which formed the basis of LOSC Article 193. Principle 21 affirms that `States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction'.

As in the territorial sea, foreign vessels enjoy innocent passage through the archipelagic waters. The Convention also recognises the right of `archipelagic sea lanes passage' by all ships through the sea lanes designated by the archipelagic state through the archipelagic waters (Article 53). The archipelagic state has full sovereignty in its archipelagic waters,

subject to the rules on innocent passage and archipelagic sea lanes passage. The powers of the archipelagic state over environmental regulation are similar to those in the territorial sea.

- Contiguous zone: Under the Convention, the contiguous zone cannot extend more than 24 nautical miles from the territorial sea baseline (Article 33). The enforcement powers of the coastal state in the contiguous zone are limited to the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.
- Exclusive Economic Zone: The exclusive economic zone (EEZ) cannot extend more than 200 nautical miles seaward from the territorial sea baseline (Article 56). In the EEZ, a coastal state has sovereign rights to explore and exploit, conserve and manage the natural resources (Article 56[1][a]). Other states retain high seas freedoms of navigation and overflight, the laying of submarine cables and pipelines, and other internally lawful uses of the sea in the EEZ (Article 58). The coastal state has the exclusive right to construct and to authorise and regulate the construction, operation and use of artificial islands, and installations and structures in the EEZ. Coastal states determine the total allowable catch of the living resources in the EEZ and in doing so are obliged to ensure through proper conservation and management measures that such resources are not over-exploited (Article 61[2]). The coastal state must also consider species which are associated with or dependent on harvested species with a view to maintaining their population above levels that would leave them threatened (Article 61[4]). Where a coastal state cannot harvest the entire allowable catch it is required to give other states access to the surplus (Article 62).

The coastal state also has jurisdiction to protect and preserve the marine environment in the EEZ in limited circumstances (Article 56[1][b][iii]). The adoption of laws and regulations relating to pollution from foreign vessels in the EEZ of a coastal state is permitted only for the purposes of enforcement (Article 211[5]). Unlike the provisions in the territorial sea, coastal state requirements regarding pollution from foreign ships in the EEZ must conform to, and give effect to, generally accepted international rules and standards established through the competent international organisations or a general international conference (Article 211[5]). The LOSC also provides for circumstances in which coastal states may take special anti-pollution measures for foreign ships in particular areas of their respective EEZs. These measures may only be taken by coastal states with the approval of a competent international organisation (Article 211[6]). The International Maritime Organisation is generally recognised as the competent international organisation.

- Continental Shelf: The Convention defines the continental shelf of a coastal state as the `sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured, where the outer edge of the continental margin does not extend up to that distance' (Article 76 [1]). A coastal state cannot usually extend its continental shelf beyond 350 nautical miles from the territorial sea baseline; however, where the continental marginexcluding `submarine ridges', but including `submarine elevations that are natural components of the continental margin, such as plateaux, rises, caps, banks and spurs' (Article 76[6])continues beyond 350 nautical miles, the continental shelf may be extended to `100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres' (Article 76[5]).

The coastal state has sovereign rights over the continental shelf for the purpose of exploring it and exploiting its resources (Article 77). The coastal state does not need to declare a continental shelf, and if the state chooses not to explore it or exploit its resources, no other state can do so without the express consent of the coastal state (Article 77). The coastal state has the same sovereign rights and jurisdiction for artificial islands, installations and structures on the continental shelf as does an EEZ coastal state in an EEZ (Article 80). Only the coastal state can authorise and regulate drilling on the continental shelf (Article 81).

Under the LOSC, coastal states exercising their sovereign rights in the continental shelf must ensure that the marine environment is protected in accordance with the provisions outlined by the LOSC in Part XII. In connection with sea-bed activities, associated establishments and use of off-shore installations and man-made structures, the LOSC requires that states should adopt laws, regulations and any other measures that are necessary to prevent, reduce and control pollution of the marine environment (Article 208). The steps taken by states in this regard must not be any less effective than those provided by international rules, standards and recommended practices and procedures (Article 208). The rules and standards which states must implement are those of a competent international organisation and diplomatic conferences (Article 214). Coastal states are also required to establish, through competent international organisations and diplomatic conferences, additional rules, standards and recommended practices and procedures to ensure protection of the marine environment from sea-bed activities (Article 208[5]).

- High Seas: The concept of the high seas under the LOSC is quite complicated. For non-resource activities, the high seas begin after the territorial sea. For resource purposes, the high seas begin after the EEZ. The particular jurisdictional feature of the high seas is a series of rights known as the `freedom of the high seas'. The freedom of the high seas includes (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines; (d) freedom to construct artificial islands and other installations; (e) freedom of fishing; (f) freedom of scientific research. The Convention emphasises that the freedom of the high seas has to be exercised with due consideration for the rights of states in the enjoyment of their high seas freedom and with respect to activities on the deep sea bed (Article 87).
- The Area: Part XI of the LOSC and Annexes III and IV to the LOSC and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Agreement) establish the regime governing exploration and exploitation of mineral resources of the deep sea-bed beyond coastal state jurisdiction. Environmental protection in the `Area' is subject to the provisions of the LOSC and the Agreement. The Convention recognised that the Council will adopt rules, regulations and procedures to ensure the effective protection of the marine environment from harmful effects of deep sea-bed mining activities (Article 145, Annex II, Article 17). The regime established for the conduct of activities in the Area is outlined further in the section on the `Exploration and Exploitation of Non-Living Resources' above.

Navigation regimes

The LOSC establishes five types of passage that a ship might exercise, they are: high seas passage; innocent passage; non-suspendible innocent passage; transit passage and archipelagic sea-lanes passage. The nature of each of these different regimes is discussed below.

- High seas passage: The ships of all states are free to navigateand their aircraft to flyin the region of the high seas, but this freedom must be exercised `with due regard for the interests of other states in their exercise of the freedom of the high seas, and also with due regard for the rights under (the LOSC) with respect to activities in the Area' (Article 87). The high seas are reserved for peaceful purposes (Article 88). Ship must sail only under one flag and the flag state will normally have exclusive jurisdiction over its ships on the high seas (Article 92).
- Innocent passage: Section 3 of Part II deals extensively with the issue of innocent passage in the territorial sea. Article 17 provides that `ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea', and Article 18 specifies that such passage `shall be continuous and expeditious'. A right of innocent passage also applies where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such (Article 8). The right of innocent passage is, however, subject to the important qualification that a vessel cannot engage in any act that is `prejudicial to the peace, good order or security of the coastal State' (Article 19[1]). A vessel

exercising innocent passage may not undertake a course of action which does not have a direct bearing on passage (Art 19(2)(l)), and Article 19 describes a number of acts which would render passage to be prejudicial to the peace, good order or security of the coastal state.

Innocent passage in the territorial sea is also subject to the right of a coastal state to adopt laws and regulations relating to: maritime safety; navigation aids; the conservation of living resources; fisheries; preservation of the environment and pollution prevention; scientific research; customs; fiscal matters; immigration; and sanitary issues (Article 21). Although a coastal state may take necessary steps to prevent passage which is not innocent, and may temporarily suspend innocent passage in its territorial sea if such suspension is essential for the protection of its security (Article 25), the coastal state must not hamper the innocent passage of foreign ships in its territorial sea except as provided for in the LOSC (Article 24). Also, the coastal state must not impose requirements on foreign ships which has the practical effect of denying or impairing the right of innocent passage, or discriminating in form or in fact against the ships of any state or ships carrying the cargo of any state (Article 24).

Ships also enjoy a right of innocent passage in archipelagic waters wherever the right of archipelagic passage does not apply. The archipelagic state may `suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security' (Article 52).

- Non-suspendible innocent passage In straits used for international navigation which are excluded from the application of the transit passage regime, or which are between the high seas or an EEZ and the territorial sea of another state, a non-suspendible regime of innocent passage shall apply (Article 45).
- Transit passage LOSC Part III Section 2 describes the regime of `transit passage' which applies in straits which are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ (Article 37). Transit passage is defined as `the exercise in accordance with (LOSC Part III) ... of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait...', and such passage `shall not be impeded' (Article 38) or suspended (Article 44). Ships and aircraft are required to proceed without delay through the strait, and to refrain from the use or threat of force against a bordering state, or from `any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress' (Article 39). Ships are required to observe International Regulations for Preventing Collisions, at sea and must comply with generally accepted anti-shipping pollution rules (Article 39). Aircraft must abide by International Civil Aviation Organization Rules of the Air, and must monitor the radio frequency designated by the air traffic control authority or the appropriate international distress radio frequency (Article 39). Ships are prohibited from carrying out scientific research during transit passage unless they have permission from the states bordering the straits (Article 40).

States bordering straits may designate sea lanes and prescribe traffic separation schemes for the safe passage of ships, and these are to be respected by ships in transit passage (Article 41). Such states may also adopt laws and regulations for the safety of navigation, prevention of pollution, control of fishing activities, and the loading or unloading of any commodity, currency or person in contravention of their customs, fiscal, immigration or sanitary laws and regulations (Article 42). States bordering straits are encouraged to cooperate in the establishment of navigational or safety aids, and in the prevention, reduction or control of pollution (Article 44).

- Archipelagic sea-lanes passage

It would be difficult to overstate the effect that the coming into force of the LOSC has had on awakening states to their rights and responsibilities in the seas around them. However, the LOSC is primarily an instrument that is concerned with delimiting State jurisdiction at sea, and

providing a regime of rights and responsibilities associated primarily with issues related to wealth, i.e. resource exploitation and navigation. The LOSC does describe a set of rules for protection of the marine environment, promotion of marine scientific research, and principles of equity, but those rules are less distinctly binding than are the rules concerning access to wealth and the exercise of power.

The LOSC is an extensive document and it would take a sizeable book to describe fully the possible implications for a national oceans policy that could be drawn from it. However, some of the more obvious issues are discussed below.

Fisheries Implications

The LOSC imposes two important conservation and management obligations on every coastal state that declares an EEZ.

- Conservation The first obligation imposed on the coastal state with regard to the fisheries resources in its EEZ is the `conservation of the living resources' (Article 61). Under this Article, the coastal state, is required to take into account the best scientific evidence available to it, to ensure through proper conservation and management measures that the maintenance of living resources in the EEZ is not endangered by over-exploitation. To discharge this obligation, the coastal state is required to determine the total allowable catch (TAC) of the living resources in its EEZ. The TAC is `that catch which when taken in any one year will best enable the objectives of fisheries management (eg. optimum long-term yield) to be achieved' (See UNCLOS III, Geneva Session, Doc. GE 76.64093)
- Optimum Utilisation The second obligation imposed on the coastal state with regard to the fisheries resources in its EEZ is that of the optimum utilisation of the living resources in the EEZ (Article 62). To meet this obligation, the coastal state is required to determine its capacity to harvest the living resources of the EEZ. Where the coastal state does not have the capacity to harvest the entire allowable catch, it is required, through agreements or other arrangements to give other states access to the surplus of the allowable catch. It would be overly prescriptive in practice to say that a country has to set a TAC for all species and allow foreign fishers to take the balance of that which the state cannot harvest. This is not how countries have applied Article 62 in practice. Also, Article 297(3) of the LOSC expressly excludes these issues from submission to dispute settlement in accordance with the LOSC Part XV Section 2.

  To facilitate the conservation of the fisheries stock in the EEZ, the Convention empowers every coastal state to make laws and regulations to regulate the exploitation and conservation of the fisheries resources in the EEZ. The legislative powers of the coastal state in the EEZ include:

  - the licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration;
  - determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any state during a specified period;
  - regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used; fixing the age and size of fish and other species that may be caught;
  - specifying information required of fishing vessels, including catch and effort statistics and vessel position reports; requiring, under the authorisation and control of the coastal state;
  - the conduct of specified fisheries research programs and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data; the placing of observers or trainees on board such vessels by the coastal state; and

- the landing of all or any part of the catch by such vessels in the ports of the coastal state; terms and conditions relating to joint ventures or other cooperative arrangements.

These requirements are applicable only to foreigners fishing in the EEZ of another coastal state. In practice however, some the requirements, particularly those dealing with gear, size and seasons, have been applied to fishing by Australian domestic companies without distinction.

Maritime boundary implications

LOSC Articles 74 and 83 provide a loose set of rules for the delimitation of the exclusive economic zone boundary or continental shelf boundary respectively. These provisions require states to settle the issue `by agreement on the basis of international law'. In the event that no agreement can be reached within a reasonable period of time, the states are required to resort to the dispute resolution mechanisms provided for in LOSC Part XV. Articles 74 and 83 are identical except for the different names of the two regimes. Paragraph three in both Articles stipulates that:

[p]ending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements will be without prejudice to the final delimitation.

Australia shares maritime boundaries with Indonesia, New Caledonia (France), New Zealand, Papua New Guinea, and the Solomon Islands. With the exception of the maritime boundary shared with New Zealand, that section of sea-bed boundary which would lie in the region of the Timor Gap `Zone of Cooperation', and certain continental shelf boundaries that may require delimitation by reason of Australia's extended continental shelf, Australia's maritime boundaries have largely been settled through peaceful negotiation and formal treaty. Australia's shared boundaries with neighbouring countries dictates that there must be an international dimension to its oceans policy. For further discussion see `Maritime Boundaries' section below.

Implications beyond the zones of jurisdiction

The LOSC provides for states to enjoy certain rights and incur obligations beyond those areas in which they might exercise jurisdiction as a coastal state. A comprehensive Australian oceans policy would need to address these rights and obligations, a summary of which follows:

- search and rescue responsibilities (Article 98);
- the duty to cooperate in the repression of piracy, and the suppression of illicit traffic in narcotic drugs and psychotropic substances, and of unauthorised broadcasting from the high seas (Articles 100-109);
- the need to have laws against flag vessels breaking submarine cables (Articles 113-115);
- jurisdiction and control in administration, technical and social matters over ships flying the Australian flag (Article 94);
- conservation and management of living resources (Articles 117-119);
- flag state responsibilities with respect to pollution by dumping and compliance with international standards (Articles 216-217);
- certain additional responsibilities with regard to the conservation of species in the Southern Ocean and Antarctic waters; and
- the power to intervene under the Intervention Convention over marine casualties threatening the marine environment of the high seas.

Implications for environmental protection

Part XII of the LOSC is entitled `Protection and Preservation of the Marine Environment'. The opening Article of Part XII holds that `States have the obligation to protect and preserve the marine environment' (Article 192). This is an unequivocal obligation that Australia, as a State Party to the Convention, must respect and embrace as a guiding principle for its oceans policy.

In a manner that is consistent with the resource-use focus of the LOSC, and which reflects words used in the Stockholm Declaration of the UN Conference on the Human Environment (see above this section) this general obligation is immediately followed by a reminder that states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment' (Article 193).

States are given the authority to take measures either unilaterally or together with other states to prevent, reduce or control pollution of the marine environment from any source (Article 194). When a state becomes aware of imminent or actual damage, it must immediately notify other states which might be affected (Article 198). States are also required to cooperate both in the formulation of anti-pollution rules and procedures, and in the determination of suitable scientific criteria upon which to base such rules (Articles 197 & 201). States are also enjoined to develop jointly contingency plans to combat marine pollution (Article 199).

Section 5 of Part XII provides that states should adopt national, regional or global rules to combat pollution from land-based sources (Article 207); sea-based activities (Article 208); deep sea-bed activities beyond national jurisdiction (Article 209); dumping (Article 210); pollution from vessels (Article 211); and atmospheric pollution (Article 212). Section 6 provides rules of enforcement to combat each of the identified sources of pollution, and describes those rules and responsibilities that apply particularly to flag states (Article 217); port states (Article 218); and coastal states (Article 220). Section 7 details provisions which are designed to serve as `safeguards' to prevent the enforcement powers being abused (Articles 223-233).

In zones where states have various degrees of jurisdiction, their scope for taking measures to protect the sea from pollution is greater than it is elsewhere. Within the territorial sea, states have sovereignty (Article 2) and therefore considerable power to adopt regulations for the protection of the environment. In the EEZ, Article 56(1)(b) provides that the coastal state has jurisdictionconsistent with the LOSCwith regard to `the protection and preservation of the marine environment'. When this is combined with their obligation to `conserve and manage' marine living resources (Article 56 [1][a]), coastal states would seem to have strong powers to protect the marine environment.

States are limited in the extent to which the costs of providing special arrangements for protection of the marine environment can be defrayed by fees and charges levied against passing ships. Article 26 provides that `[n]o charge may be levied upon foreign ships by reason only of their passage through the territorial sea. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination'. As most services to ships with regard to marine environmental protection would be safety related (navigation, port state control, pilotage) or would concern pollution prevention (port state control, oil spill response, waste reception facilities) they are already charged in Australia by AMSA or by various state bodies, port agencies, or private service providers. There would seem therefore to be little if any scope for charges or taxes to be used as a tool to offset the establishment and management costs of marine protected areas.

However, the LOSC focuses most of its attention on protection of the marine environment from pollution and the protection of marine life at the species level. In order to support more sophisticated approaches such as eco-system protection and restoration, or genetic protection, states must look beyond the LOSC to other instruments such as Agenda 21 and the Convention on Biological Biodiversity 1992.

13.3 Declaration of the UN Conference on Environment and Development (Rio Declaration) 1992

Endorsed by UN General Assembly Resolution 47/190 (1992)

Note - UNGA Resolution 48/190 (1992) asks states to ensure that the principles of the Declaration are disseminated in both the public and private sectors, and directs the Secretary-General of the UN to ensure that the principles are incorporated into UN programs and processes.

The Declaration on Environment and Development reaffirms the Declaration of the United Nations Conference on the Human Environment 1972 (Preamble), but moves beyond the earlier instrument to introduce new principles such as the polluter pays principle (Principle 16), public participation (Principle 10), the precautionary principle (Principle 15), environmental impact assessment (Principle 17), and a `vital' role for indigenous people and women in environmental management (Principle 22 and 20 respectively). The Declaration represents a balance between the needs of developing nations and those of the developed states. For example, although many of the Principles address matters of concern for the protection and preservation of the environment, the first three Principles assert anthropocentric concern for development and state sovereignty, and concern for such issues is repeated throughout the instrument with regard to matters such as the eradication of poverty (Principle 5), the special needs of developing countries (Principle 6), transfer of technology (Principle 9), and trade policy (Principle 12).

Implications for Australian oceans policy

Although not legally binding, the Rio Declaration has been influential in environmental policy formulation at the national level since 1992. For example, concepts enunciated in the Rio Declaration such as `the polluter pays' principle, and `the precautionary approach' are reflected in Australia's Biodiversity Strategy, the Commonwealth Coastal Policy, and Australia's Strategy for Ecologically Sustainable Development. These concepts will also need to be considered in Australia's oceans policy.

13.4 Agenda 21

see Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF. 151/26/REV. 1, Vols. I-III (1992).

Chapter 17 of Agenda 21 (see q.v. Introduction) explains that `[i]nternational law, as reflected in the provisions of the United Nations Convention on the Law of the Sea, 1982 (LOSC) ... sets forth rights and obligations of states and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources'. However, Agenda 21 moves beyond the immediate obligations prescribed in the LOSC to assert that protection and sustainable development of the marine and coastal environment and its resources requires new approaches to management and development that are `integrated in content and are precautionary and anticipatory in ambit'. To that end, Chapter 17 lists seven program areas requiring action:

- integrated management and sustainable development of coastal areas, including exclusive economic zones;

- marine environmental protection;
- sustainable use and conservation of marine living resources of the high seas;
- sustainable use and conservation of marine living resources under national jurisdiction;
- addressing critical uncertainties for the management of marine environment and climate change;
- strengthening international, including regional cooperation and coordination; and
- sustainable development of islands

Each of these program areas is discussed below.

Program A: Integrated management and sustainable development of coastal areas, including exclusive economic zones

The significant impact of development activities on coastal areas has long been recognised. On a global basis, it is estimated that more then half of the world's population lives within 60 kilometres of the shoreline, and this figure could rise to three quarters by the year 2020 (para. 17.3). To address the impact of coastal zone activities on the health of the oceans, Chapter 17 commits states to integrated management and sustainable development of coastal areas and the marine environment under their sovereignty and in accordance with their sovereign rights. To achieve this objective, Agenda 21 recognises the need to integrate policy and decision making processes relating to coastal and marine areas (para. 17.5[a]), and to involve all concerned individuals, groups and organisations in planning and decision making steps (para. 17.5[f]). States must also ensure that all uses of the coastal areas and their interactions are identified (para. 17.5[b]), and that they have developed systems to reflect change in the value of coastal and marine areas (para. 17.5[e]. Well-defined coastal management related issues must also be considered by states. Planning and implementation must embrace preventative and precautionary approaches which can include prior assessment and systematic observation of the impact of major projects (para. 17.5[d]).

Specific management proposals for achieving the above objectives include establishment or further development of local and national coordinating mechanisms for integrated management and sustainable development (para. 17.6). The national body must undertake to develop and implement policies including those for water and land use (para. 17.6[a]); conservation and restoration of altered and critical habitats (para. 17.6[h]); infrastructure adaptation and alternative employment (para. 17.6[j]); human resource development and training (para. 17.6[k]); public education, awareness and information programs (para. 17.6[l]); and promoting environmentally sound technology and sustainable practices (para. 17.6[m]).

Program A also outlines specific plans which the national organisation must implement, including preparing coastal profiles that identify critical areas of patterns of behaviour that need to be addressed (para. 17.6[c]); ensuring that in relation to major projects there are prior environmental impact assessments made, as well as systematic observation, follow-up, and incorporation of results into decision-making (para 17.6[d]) contingency plans for human-induced and natural disasters (para. 17.6[e]); improving coastal human settlements (para 17.6[f]); periodic assessment of the impacts of external factors and phenomena (para 17.6[g]); and developing and simultaneously implementing environmental quality criteria (para. 17.6[n]). The broad criterion set out for the national body includes implementation of plans and programs that integrate coastal and marine management (para. 17.6[b]) while also ensuring that other sectoral programs for sustainable development are brought into such plans (para. 17.6[i]).

These initiatives must be complemented with specific activities aimed at collecting, analysing, assessing, and using information, in particular for management purposes

(para. 17.8 [a-e]17.9). States must also take specific actions to educate and train people across different sectors of society in integrated coastal and marine management and sustainable development techniques (para. 17.15). Coastal states must also initiate activities to ensure that capacity building is effectively promoted through all possible avenues (para. 17.17 [a-h]).

Agenda 21 establishes a direct linkage between national and international action. In this respect, special measures are outlined for developing countries in relation to accessing scientific and technological means for sustainable development (para. 17.14); ensuring that they have the means to collect, analyse, assess, and use data and information in relation to coastal and marine activities (para. 17.9); and making adequate provision for them to develop their human resources (para. 17.6). However, states must cooperate generally when developing their national guidelines for integrated coastal zone management (para. 17.11), and also in relation to the raising of funds to implement this program (para. 17.12).

Coastal zone management, and for that matter integrated marine resources management programs must also address the role of local governments. This is based on the recognition that many of the problems of and solutions to marine resource management have their roots in local authorities. As such, the participation and cooperation of local authorities is a crucial determining factor in achieving integrated management of the marine environment. Agenda 21 paragraph 28.1 explains that:

Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and sub-national environmental policies. As the level of governance closest to the people, they play a vital role in educating, mobilising and responding to the public to promote sustainable development.

Program B: Marine environmental protection

The life-support and productive capacities of the oceans depend on a healthy marine environment. However, over the years, unregulated human activity on land, on coastal areas, and at sea, have combined to threaten this productive capacity. In recognition of this, Program Area B recommends pro-active and anticipatory approaches for preventing degradation of the marine environment (para. 17.21). These are seen as necessary for maintaining and improving the life-support and productive capacities of marine areas. Initiatives suggested by the program include the application of preventative, precautionary, and anticipatory approaches to ocean management (para. 17.22[a]). Among the more practical objectives of the program are prior assessment of activities that may significantly impact on the marine environment (para. 17.22[b]); ensuring that there are economic incentives for people to avoid degradation of the marine environment (para 17.22[d]), and ensuring that environmental, social, and economic developmental policies have integrated measures for the protection of the marine environment (para. 17.22[c]).

Specific management strategies focus on land-based marine pollution and sea-based activities causing pollution damage. In relation to land-based marine pollution, initiatives which must be taken include the assessment, development and promotion of international rules, regulations and initiatives (para. 17.25[a-f]). The Program recommends that states should also include priority actions within national policies to combat concerns over land-based pollution. It suggests general priorities that may appropriately be considered in relation to non-point source and point source pollution (para. 17.28), in particular sewage (para. 17.27[a-f]). Program Area B also requires states to take initiatives for preventing land-based activities that cause direct physical destruction of coastal and marine areas (para. 17.29).

Sea-bed activities causing pollution are dealt with specifically in relation to shipping activities (para. 17.30[a][i-xii]), dumping (para. 17.30[b][i-ii]), offshore oil and gas platforms (para. 17.30[c]), ports (para. 17.30[d]), organotin compounds used in anti-fouling paints (para. 17.32), and the ability to respond effectively to oil pollution in the sea (paras 17.33-17.34). Additionally, Chapter 17 recognises the necessity to activate the International Maritime Organization more effectively to ensure that generally accepted international regulations are complied with by member states (para. 17.31).

Systematic observations by states of the marine environment is another important component of the strategy to address the health of the oceans. States are required to establish systems for data and information collection, with capabilities within states to assess the quality of the marine environment, and the causes and effects of marine degradation (para. 17.35[b]). States must establish a clearing-house on information relating to marine pollution control (para. 17.35[d]). Internationally, states must cooperate to exchange information (para. 17.35[b]); support and expand international programs (para. 17.35[c]); set up a global profile and database for information gathering and retrieval (para. 17.35[e]); and allocate adequate funds for capacity building and training programs, in particular for developing countries (para. 17.35[f]).

Program C: Sustainable use and conservation of marine living resources of the high seas

Program C is devoted to the use and conservation of the living resources of the high seas. Although high seas fisheries account for only 5% of total world fish catch (para. 17.44), it has attracted a lot of attention in recent times. This is because of the failure of the LOSC to deal adequately with the conservation of high seas fisheries, a problem deeply rooted in the age-old doctrine of high seas freedom of fishing. Agenda 21 Chapter 17 acknowledges this shortcoming:

... management of high seas fisheries, including the adoption, monitoring and enforcement of effective conservation measures, is inadequate in many areas and some resources are overused. There are problems of unregulated fishing, over capitalisation, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and a lack of sufficient cooperation between States (para. 17.45)

Chapter 17 postulates that the solution to the problem of managing high seas fisheries requires action by states whose nationals and vessels fish on the high seas, as well as cooperation at the bilateral, sub-regional, regional and global levels. Accordingly, the Chapter recommends that states must take action to `address inadequacies in fishing practices, as well as in biological knowledge, fisheries statistics and improvement of systems for handling data' (para. 17.45). States must also put emphasis `on multi-species management and other approaches which take into account the relationships among species, especially in addressing depleted species, but also in identifying the potential of underused or unused populations' (para. 17.45).

The remainder of Program Area C restates the broad principles under the high seas provisions of the LOSC dealing with high seas fisheries. The domestic actions which states are permitted to take to conserve high seas fisheries must be in accordance with the relevant provisions of the LOSC. In effect, Program Area C simply maintains the status quo as far as high seas fisheries management is concerned.

Program D: Sustainable use and conservation of marine living resources under national jurisdiction

Program Area D requires that marine living resources under national jurisdiction be managed with a view to achieving sustainable yields (para. 17.74[c]). At the same

time, the need to protect and restore endangered marine species, and to preserve `rare and fragile ecosystems as well as habitats and other ecologically sensitive areas' (para. 17.74[e-f]) is also recognised. Further, states are required to impose limitations on the use of critical habitat areas (para. 17.85). States must also ensure that destructive mechanisms used for fishing are prohibited within their national boundaries (para. 17.84).

The sustainable use and conservation of marine living resources under national jurisdiction must include developing and increasing the potential of marine species for nutritional, social, economic, and developmental goals (para. 17.74[a]). Local communities, indigenous people, and small-scale artisanal fisheries must be involved in the development of management programs (para. 17.74[b]). More specifically, where resources are potentially available, states must develop mariculture, aquaculture, and small-scale deep sea and oceanic fisheries (para. 17.79[c]). States must also ensure that marine resources are made available for human consumption (para. 17.79[e]), and that they become a good source for food and income (para. 17.79[g]). The potential for expanding recreational and tourist activities using marine living resources should also be examined (para. 17.80). States must provide small-scale artisanal fisheries with opportunities to remain sustainably viable (para. 17.81[a-c]). States are also required to take steps to ensure that they have up to date data and information relating to processes, programs and profiles for resources use and management (para 17.86).

Program E: Addressing critical uncertainties for the management of the marine environment and climate change

This Program Area recognises that the marine environment is vulnerable and sensitive to climate and atmospheric changes (para. 17.96). Chapter 17 acknowledges that there are many uncertainties about climate change and particularly about rises in sea level (para. 17.96). However, given the potentially devastating effects that such changes might bringespecially for small islands and low-lying coastal regionsstates are reminded that precautionary measures should be undertaken to address the problem and minimise risk (para. 17.97).

In order to predict the effects of global climate change on marine living resources and the marine environment, and to understand the role that oceans play in global climatic systems, Program Area E emphasises a necessity for the collection of data on marine environmental parameters (para. 17.96). States are required to promote scientific research and observation of the marine environment; promote the exchange of scientific data and information; ensure that marine scientific information is available to policy-makers and the general public; and cooperate to develop standard inter-calibrated procedures, measuring techniques, data storage and management capabilities (para. 17.99).

Program F: Strengthening international, including regional cooperation and coordination

International cooperation is recognised in Chapter 17 to play the role only of supporting and supplementing national efforts (para. 17.115). In this respect, Agenda 21 maintains its primary focus on the responsibility of states to address marine issues, and seeks to avoid any possibility that international organisations might be seen as carrying alone the burden of resolving marine management problems simply because such problems often have a transnational dimension. However, the importance of international cooperation is recognised in Program Area F, and states are exhorted to promote institutional arrangements at national, subregional, regional and global levels to support the implementation of the other Program Areas in Chapter 17 (para. 17.116). To that end, states are required to integrate relevant sectoral activities at each of the levels mentioned above; promote effective information exchange and institutional linkages at each of these levels; promote

regular inter-governmental review of marine and coastal environment and development issues within the United Nations system; and promote effective coordinating mechanisms for relevant United Nations bodies, along with links to other international organisations (para. 17.116).

Program G: Sustainable development of small islands

Program Area G provides for the special circumstances of small island developing states and islands supporting small communities. Such islands are recognised to be ecologically fragile and vulnerable, and at an economic disadvantage because of their small size, limited resources, geographic dispersion and isolation from markets (para 17.123). For small islands like these, `the ocean and coastal environment is of strategic importance and constitutes a valuable development resource' (para 17.123). States commit themselves in Chapter 17 to addressing the sustainable development of small island developing states (para 17.127). To this end, they resolved to adopt and implement plans and programs to support the sustainable development and utilisation of island marine and coastal resources (para. 17.127[a]); and adopt measures that will enable small island developing states `to cope effectively, creatively and sustainably with environmental change and to mitigate impacts and reduce the threats posed to marine and coastal resources' (para. 17.127[b]).

Implications for Australian oceans policy

Chapter 17 is a lengthy document. It is probably the most comprehensive chapter of Agenda 21. This is partly due to the fact that the LOSC provided the basic building block for the negotiation of the chapter. Agenda 21 was not designed to override the LOSC, but to supplement it. Chapter 17 makes it clear in several instances that the LOSC establishes the basic framework for the rights and obligations of states with regard to the oceans, and that it provides the basis upon which to pursue the protection and sustainable development and management of the marine environment and ocean resources. Chapter 17 serves to provide the policy content to the implementation of the LOSC at the domestic level. This was done, as we have seen above, by elaborating on mechanisms at the national level that will facilitate the implementation of the resources and environmental aspects of the LOSC.

Chapter 17 takes the resource framework under the LOSC further by suggesting necessary measures to be pursued in determining the meaning of: the idea of conservation and sustainable use of marine resources, the factors that must be considered in drawing up management plans, and the varying interests that must be accounted for. For example, in relation to the management of marine living resources under national jurisdiction, Chapter 17 requires that states must ensure that environmental and economic factors are taken into account when assessing the appropriate maximum sustainable yield for a nation (para. 17.74[c]). States must also ensure that methods of fishing are environmentally safe and that adequate technology is developed and made available to ensure that conservation measures and the use of resources can be sustainably maintained (para. 17.74[c] & 17.79[f]). The interests and needs of indigenous people, small scale artisanal fisheries, and local communities are also to be considered in the development of management plans (para. 17.74[b] & 17.79[b]). The adoption of preventative and precautionary approaches in project planning, as specified in Chapter 17, is also a major addition to the LOSC, which in many instances only requires states to adopt measures that are based purely on the best scientific data.

In relation to the protection of the marine environment from pollution, Chapter 17 again fills the policy vacuum of the LOSC. The LOSC outlines the regulatory and enforcement measures that states must take to protect the marine environment. This is seen in Chapter 17 as a reactive approach which does not address effectively the need to prevent degradation of the marine environment. Chapter 17 improves the process by requiring the adoption of precautionary and anticipatory measures such

as environmental impact assessments; clean production techniques; construction and/or improvement of sewage treatment facilities; quality management criteria for the proper handling of hazardous substances; and a comprehensive approach to damaging impacts from air, land, and water (para. 17.21).

In broad terms, Chapter 17 requires that states must recognise and deal with several limitations which hinder the full attainment of the potential benefits from the oceans and their resources by adopting an integrated system of management. Chapter 17 identifies these limitations and provides states with policy guidance to deal effectively with national deficiencies on a short-term and long-term basis. Agenda 21 also impliedly recognises that current limitations to marine resource management have arisen as a result of inadequacies in the LOSC framework; the piecemeal legislative mechanisms adopted by states to deal with marine environmental matters; and also the fact that states often lack resources and expertise to manage the marine environment adequately well.

A number of procedural problems in relation to the management of marine resources arise because most states are poorly equipped to deal with inter-agency issues that are related to the marine environment. The number of uses for marine resources is increasing, as are the number of resources that have potential uses. Each user has varying needs and expectations. Chapter 17 addresses this issue by requiring that management under national jurisdiction promotes compatibility and balances the needs of all users of marine and coastal resources (para 17.5[a]). The Chapter recommends that states must be aware of the philosophical and social interests of their constituencies. In particular, states must allow all concerned individuals, groups, and organisations the opportunity to participate in decision making and planning (para. 17.5[f]). By identifying projected uses of the coastal and marine areas and their interaction, the compatibility and balance of these uses can be achieved in the long term (para. 17.5[b]). Similarly, by taking preventative and precautionary approaches to major project planning and implementation, states can ensure that the expectations and demands of other users are also well accommodated (para. 17.5[d]).

Chapter 17 is not without its limitations. The LOSC provided the building block for the various programs under Chapter 17. As we have seen above, the LOSC framework itself has a number of shortcomings and Chapter 17 would seem to have inherited some of these problems. However, Chapter 17 remains a useful and important instrument for Australia as it engages in the process of developing a national oceans policy. One important contribution made by Chapter 17 is that it draws attention to the fact that marine management is a complex process. It is complex because of the interaction of different legal regimes for various areas and zones of ocean space, the diverse but often inter-dependent nature of marine resources and the overall paucity of knowledge about the marine environment.

The value of Chapter 17 is that it attempts to rationalise the process of marine management by identifying practical measures that can be implemented at the national level. The message from Chapter 17 is a caution that the management of marine resources should not be seen in isolation from the environment within which the resources are located, but that management of all marine activities must be integrated. It is in this respect that Chapter 17 of Agenda 21 holds the most promise of making a singularly important contribution to Australia's oceans policy.

14. Maritime Transport

14.1 Convention on the International Maritime Organisation 1948 as amended

Done at Geneva: 6 March 1948

Entry into force: 17 March 1948

Entry into force for Australia: 17 March 1948

The name of the organisation was changed from the `Inter-Governmental Maritime Consultative Organization' (IMCO) to `International Maritime Organization' (IMO) by an amendment done at London 14 November 1975, Entry into force for Australia: and generally 22 May 1982 (ATS 24 1982)

The IMCO was established under the auspices of the above Convention. The establishment of IMCO was necessary to provide a machinery for cooperation among Member States in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade. Additionally, the creation of IMCO was to encourage the general adoption of the highest practicable standards in matters concerning maritime safety. The functions of IMCO (IMO) are limited to those consistent with a consultative and advisory rolein itself, IMO has no enforcement capacity.

The 1948 Convention also established a `Council' and the `Maritime Safety Committee' (MSC) within the administrative umbrella of the Organisation. The Council has inter alia, responsibility to receive recommendations and reports from the MSC and transmit them to the Assembly or individually to members together with the Council's comments and recommendations. The MSC undertakes duties with regard to matters concerning navigational aids, construction and manning of vessels, handling of dangerous goods, collision prevention rules etc. Subsequently, in 1975 amendments were made to establish the Legal Committee and the Marine Environment Protection Committee (MEPC). Together, these Committees serve to support the international instruments for which IMO is the administrative body.

Implications for Australia's oceans policy

Often, Australian laws relating to maritime transport and marine pollution reflect almost the exact wording of the international instruments they implement. These instruments are occasionally amended by the Parties to the instrument in response to recommendations arising from the IMO Committees. Some instruments, such as the International Convention for the Safety of Life at Sea 1974 (SOLAS), are amended under the `tacit agreement' principle where a state becomes bound after a certain period of time unless it lodges a reservation to the amendment. Clearly, Australia's interests are best served by ensuring that adequately qualified professionals, in sufficient numbers, attend these meeting as often as is necessary to present Australia's views. At present, Australia would seem to enjoy a good reputation at IMO; an Australian Maritime Safety Authority (AMSA) representative was recently appointed to Chair the MEPC, and an Australian is Vice-Chair of the Legal Committee. However, such meetings usually take place in London, and attendance can be expensive. The oceans policy might need to anticipate that this expense may well rise as the Committees come to administer an increasing number of instruments that are also becoming more complex. Sufficient resources should be made available for Australia to continue to be well represented at IMO meetings.

14.2 Convention on Facilitation of International Maritime Traffic 1965

Done at London: 9 April 1965

Entry into force: 5 March 1967

Entry into force for Australia: 27 June 1986

The purpose of the Convention on Facilitation of International Maritime Traffic 1965 is to simplify and reduce to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international voyages (Preamble). The provisions of the Convention do not apply to warships or pleasure yachts (Article II). Contracting Parties undertake to cooperate to achieve the highest possible degree of uniformity in their treatment of ships to facilitate and improve international maritime traffic (Article III).

Implications for Australia's oceans policy

The Convention on Facilitation of International Maritime Traffic 1965 is a binding instrument to which Australia is a Party. Australia has in place the necessary legislative and institutional arrangements to meet fully its obligations under this instrument.

14.3 International Convention on Load Lines, 1966 and its Protocol of 1988

Done at London: 5 April 1966

Entry into force: 21 July 1968

Entry into force for Australia: 29 October 1968

The objectives of the International Convention on Load Lines, 1966 is the establishment of uniform principles and rules with respect to the limits to which ships on international voyages may be loaded having regard to the need for safeguarding life and property at sea. Article 4 holds that the provisions of the Convention apply inter alia, to ships registered in countries of the State Parties, and unregistered ships flying the flag of a State Party. In addition, the Convention applies to ships engaged on international voyages with the exceptions provided by Article 5 as follows:

- ships of war;
- new ships of less than 24 metres (79 feet) in length;
- existing ships of less than 150 tons gross;
- pleasure yachts not engaged in trade;
- fishing vessels

Article 16 requires Contracting Governments to issue of an International Load Line Certificate (1966) to every ship which has been surveyed and marked in accordance with the Convention. Under Article 17(1), a Contracting Government may, at the request of another Contracting Government, cause a ship to be surveyed and, if satisfied that the provisions of the present Convention are complied with, shall issue or authorise the issuance of an International Load Line Certificate (1966) to the ship in accordance with the Convention. However, Article 17(4) prohibits the issuance of an International Load Line Certificate (1966) to a ship which is flying the flag of a State the Government of which is not a State Party to the Convention.

Implications for Australia's oceans policy

The Load Lines Convention is a binding international instrument to which Australia is a Party. Australia has the necessary legislation and institutional arrangements in place to satisfy its obligations under the Convention.

14.4 International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992

Entry into force: 30 May 1996

Entry into force for Australia: 9 October 1996

(In order to avoid possible complications, an instrument denouncing the earlier CLC 1969 and Fund Convention 1971 was deposited by Australia on 7 April 1997 and will enter into force 15 May 1998.)

To ensure owners of oil tankers have appropriate levels of insurance to cover liability for pollution damage.

The CLC 1969, along with the Fund Convention 1971 and Intervention Convention 1969, came about as a result of rising concern over oil pollution damage following the Torrey Canyon disaster of 1967 (see Intervention Convention 1969 below). In 1992, the International Maritime Organization held a Conference which adopted Protocols to the CLC 1969 and the Fund Convention 1971. Pursuant to provisions in the 1992 Protocols, the amended 1969 and 1971 Conventions are to be referred to as the International Convention on Civil Liability for Oil Pollution Damage 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992. The purpose of the CLC is to: provide strict but limited liability against the owner of a vessel for oil pollution damage (Article III[1]); to detail rules for determining liability; and to provide compensation for victims of such damage.

Liability is restricted to damage caused by oil from a vessel `actually carrying oil in bulk as cargo', in other words to oil from loaded tankers (Article 1[1]). The definition of `oil' is also restricted in the Convention to `persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil' (Article 1[5]). The CLC 1969 further restricted claims for damages by the limitation that they relate only to damage or the expense of preventive measures from oil that has actually spilled from a vessel (Article 1[6]), and that the Convention provides `exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State' (Article II). However, the 1992 Protocol to the CLC 1969 refined the definitions of `pollution damage' and an `incident' to include the costs of preventive measures and to allow for damage caused by the ship rather than only by the spilled oil, extended the territory in which the Convention would apply out to the breadth of the exclusive economic zone (EEZ) (or 200 nautical miles in the absence of an EEZ), and raised the limit of liability of the owner.

Several conditions may excuse the owner from liability, such as if the damage can be proved to have been `wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function' (Article III). If the claimant is a Contracting State, claims can be made only under the provisions of the CLC and no common law action of recovery can be made. Also, no claim can be made against: a servant or agent of the owner or the members of the crew; the pilot; any charterer; a salvage operator working with the consent of the owner; a person taking preventive measures; or any agent working on behalf of the last three people mentioned in this list (Article III). Article V provides for the amount of the owner's liability to be limited in accordance with certain detailed rules.

From the perspective of coastal states, one of the most beneficial provisions of the CLC Convention may be that `[t]he owner of a ship registered in a Contracting State and carrying more than 2 000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security ... to cover his liability for pollution damage under this Convention' (Article VII[1]). Rights of compensation under CLC are extinguished unless action is commenced within three years from the date the damage occurred, and in no case can action be brought after six years from the date of the incident causing damage (Article VIII).

Implications for Australia's oceans policy

CLC 1992 is a binding treaty to which Australia is a Party. The main obligation falling on government agencies from CLC 1992 is to issue a appropriate certificates of insurance (Article VII) in the form of the model annexed to CLC 1992. Australia therefore has a responsibility to ensure that the necessary institutional structure and arrangements are in place to satisfy that requirement. The CLC also provides that the courts in Contracting States must possess the necessary jurisdiction to entertain actions for compensation (Article IX). Moreover, an owner's liability for pollution damage is excused if the incident concerned arose as a result of negligent maintenance of lights or other navigational aids, therefore, Australia's best interests are served by ensuring that such navigational infrastructure is adequate and well maintained. At present, there are no obligations arising from CLC 1992 that Australia is failing to meet.

14.5 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) 1992

Entry into force: 30 May 1996

Entry into force for Australia: 9 October 1996

(An instrument denouncing Fund Convention 1971 was deposited 7 April 1997 and will enter into force 15 May 1998)

To provide an insurance fund to cover additional liability to that available under the International Convention on Civil Liability for Oil Pollution Damage 1992.

In 1992, the International Maritime Organization held a Conference which adopted Protocols to the CLC Convention 1969 and the Fund Convention 1971. The Protocol to the Fund Convention adopted, inter alia, the amendments made to the CLC along with the definitions of the amended Convention (see q.v.section above). Importantly, as with the CLC 1992, the scope of the Fund Convention was widened by the 1992 Protocol to cover damage in the EEZ, and the total amount of compensation potentially available to victims of pollution damage increased.

Only States which are Parties to the CLC 1992 can become members of the International Oil Pollution Compensation Fund 1992 (IOPC Fund) which is established by the Fund Convention. The purpose of the IOPC Fund is to supplement the compensation amounts paid for oil pollution damage under the CLC 1992 in cases where the amount paid under the CLC 1992 prove to be inadequate (Articles 2 & 4). The IOPC Fund will not pay if the damage occurs as the result of war, from a warship oil spill, or if the claimant cannot prove that the damage was caused by one or more ships (Article 4[2]). Finances for the IOPC Fund come from a levy paid by the recipients of more than 150 000 tonnes per annum of crude and fuel oil in a Contracting State (Articles 1 & 10).

Implications for Australia's oceans policy

The Fund Convention is a binding treaty to which Australia is a Party. The effect of Australia's accession to the 1992 Protocol has been to extend coverage to the EEZ, and to increase available compensation from about $120 million to $220 million. In recent years, there has been an increase in litigation concerning IOPC Fund liabilities. Unnecessary litigation might be avoided through an improved understanding by potential claimants of the obligations of the IOPC Fund. In order to inform potential claimants of the matters for which the IOPC Fund will pay compensation, the Fund Convention Secretariat has published a `Claims Manual'. The Australian Maritime Safety Authority may be able to assist the Fund Secretariat with the task of disseminating information about the fund. To this end, Australia has proposed at a recent IOPC Fund meeting that consideration be given to using Internet technology to rapidly and widely communicate such information.

14.6 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (Intervention Convention) and Protocol Relating to Marine Pollution other than Oil 1973

Intervention Convention done at Brussels: 29 November 1969

Entry into force: 6 May 1975

Entry into force for Australia: 5 February 1984

Protocol done at London: 2 November 1973

30 March 1983

Entry into force for Australia: 5 February 1984

To provide powers to intervene on the high seas in respect of marine casualties resulting in or likely to result in major environmental damage, except for warships.

The Intervention Convention, along with the CLC Convention 1969 and Fund Convention 1971, came into being largely in response to increased concern over oil pollution damage that resulted from the grounding of the 118 000 ton, Liberian-registered oil tanker Torrey Canyon in international waters near England on 18 March 1967. The Intervention Convention provides for States Parties to `take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such casualty, which may reasonably be expected to result in major harmful consequences' (Article I). A state may intervene in the event of a collision of ships, a stranding, or any other navigational incident which results in material damage or the imminent threat of such damage to a ship or its cargo (Article II). Thus, states are empowered to take action to prevent pollution damage to their interests against ships for which they are not the flag state while the ships are outside the jurisdiction of the coastal state on the high seas. Except in the case of extreme urgency, states are required to notify the shipowner and other states that might be affected by any proposed action, and to establish liaison with the IMCO (IMO) and other experts before taking action (Article III). If a state takes action that exceeds that which was necessary, compensation may have to be paid (Article VI). Disputes over the justification for actions taken by a state and questions of compensation are to be resolved through conciliation or arbitration (Article VIII and Annex A).

In 1973, a Protocol to the Intervention Convention extended most of the provisions of the Convention to cover substances other than oil (Article II). Article 1 provides that for the purposes of the Protocol, `substances other than oil' shall be those substances listed in an annex to the Protocol and `those other substances which are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea'. In the event that a Party wishes to take action with regard to substances that are not listed in the annex to the Protocol, the state concerned must prove that `under the circumstances present at the time of the intervention' the substances concerned `could reasonably pose a grave and imminent danger analogous to that posed by any of the substances enumerated in the list' (Article I[3]).

Implications for Australian oceans policy

The Intervention Convention was implemented in Australia by the Protection of the Sea (Powers of Intervention) Act 1981 (Cth). This Act enables Australian authorities under certain circumstances to move a ship or part of a ship to another place, remove cargo from a ship, salvage a ship, sink or destroy a ship or its cargo, and take over control of a ship. In the main,

the Intervention Convention does not entail obligations for Australia; rather, it provides for certain rights that enable a State Party to act in protection of its maritime interests. In order to ensure that Australia can fully avail itself of these rights, the Australian oceans policy will need to provide for adequate infrastructure and resources to enable necessary actions to be identified and taken whenever they are deemed necessary and allowed under Commonwealth legislation.

14.7 International Convention on Tonnage Measurement of Ships 1969 82

Done at London: 23 June 1969

Entry into force: 18 July 1982

Entry into force for Australia: 21 August 1982

The purpose of the Tonnage Convention is to establish uniform principles and rules with respect to the determination of tonnage of ships engaged on international voyages (Preamble). The Convention does not apply to warships or ships of less than 24 metres in length (Article 4). The Convention requires that an International Tonnage Certificate be issued to every ship, the gross tonnages of which must be determined in accordance with the Convention (Article 7). Ships may be inspected when in the ports of other Contracting Governments to verify that the ship is provided with an International Tonnage Certificate and that the main characteristics of the ship correspond to the data given in the certificate (Article 12).

Implications for Australian oceans policy

The Tonnage Convention is a binding international instrument to which Australia is a Party. Australia has in place the necessary legislative and institutional arrangements to satisfy fully its obligations under this instrument.

14.8 Convention on Safe Containers 1972

Done at Geneva: 2 December 1972

Entry into force: 6 September 1977

Entry into force for Australia: 22 February 1981

A study in 1967 by the International Maritime Organization (IMO) identified that the most important safety issue associated with container transport was the container itself. Accordingly the Convention on Safe Containers was adopted in 1972. The convention has two objectives: the first is to ensure safety by establishing proven test procedures and related strength requirements for containers; the other is to facilitate the international transport of containers by providing uniform safety regulations for all modes of non-airborne transport. In this way, the inefficiencies that would arise from differing national standards can be avoided.

14.9 International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPDL 73/78)

Entry into force: 2 October 1983

Entry into force for Australia: 14 January 1988

Annex I (Oil) Entry into force: 2 October 1983; Entry into force for Australia: 14 January 1988

Annex II (Noxious liquid substances) Entry into force: 6 April 1987; Entry into force for Australia: 14 January 1988

Annex III (Harmful substances in packaged forms) Entry into force: 1 January 1992; Entry into force for Australia: 10 January 1995

Annex IV (Sewage) not yet in force

Annex V (Garbage) Entry into force: 31 December 1988; Entry into force for Australia: 14 November 1990

Annex VI (Air pollution) not yet in force

To prevent pollution from disposal of oil, noxious liquids, harmful packaged substances and garbage from ships of all sizes, including recreational craft.

MARPOL 73/78 is a combination of two treaties adopted in 1973 and 1978 respectively. The Protocol of 1978 provides that the Parties undertake to give effect to the provisions of the 1973 Convention as modified by the Protocol (Article 1[1][b]) and the full name of the instrument reflects its historical development. The main purpose of the 1978 Protocol was to defer the application of Annex II of the 1973 Convention `until certain technical problems have been satisfactorily resolved' (Preamble).

The MARPOL 73/78 Convention is a dynamic, comprehensive instrument. However, some provisions have been found to be ambiguous or difficult to implement and, in order to provide consistency of interpretation, the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) has developed unified interpretations of MARPOL provisions. The MEPC has also amended the Convention often and introduced new regulations to tighten the regime for control of operational and accidental ship-sourced marine pollution. The most significant recent amendment was the adoption in September 1997 of a new Annex concerning air pollution.

The purpose of the instrument is to `prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention', where `discharge' means `in relation to harmful substances, ... any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying' (Article 1). Although the Convention defines a `ship' broadly as `a vessel of any type whatsoever' and specifically includes `fixed or floating platforms', the word `discharge' is defined to exclude the `release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of sea-bed mineral resources' along with releases for the purpose scientific research into pollution control and sea dumping (as defined in the London Convention 1972) (Article 1). Regulations for the various forms of ship-sourced pollution are detailed in five Annexes to the Convention (listed above with dates of Entry into force: where applicable).

MARPOL 73/78 emphasises enforcement of its provisions and requires that violations of the requirements of the Convention be prohibited and sanctions established under the law of the flag state of the ship concerned wherever the violation occurs. Furthermore, violations of the requirements of MARPOL 73/78 within the jurisdiction of any Party to the Convention shall also be prohibited and sanctions established under the law of that Party (Article 4). Thus, the instrument provides for application through both flag state regulation and port state control. Provision for port state inspections, detention of ships and rectification of deficiencies is made in some detail in Article 5 of the Convention, which also requires that `[w]ith respect to the ship of non-Parties to the Convention, Parties shall apply the requirements of the present

Convention as may be necessary to ensure that no more favourable treatment is given to such ships'. This provision provides an important foundation for the operation of regional port state control memoranda of understanding (see below for Tokyo MOU on port state control).

Parties are also enjoined to cooperate in the detection of violations and in enforcement. MARPOL 73/78 provides for the inspection of a ship subject to the Convention at any port or offshore terminal for the purpose of verifying whether the ship has made an unlawful discharge (Article 6), but the Convention stresses that ships are not to be delayed unduly (Article 7). In the event that an incident involving harmful substances does occur, the Convention requires that the details of the incident be reported in accordance with procedures set out in Article 8 and Protocol I of the Convention. The Parties are also encouraged to assist states which request help with the training of scientific or technical personnel, the supply of equipment, the prevention or mitigation of ship-sourced pollution, and the encouragement of research (Article 17).

Detailed regulations to prevent ship-sourced pollution of the marine environment are laid down in the Annexes to MARPOL 73/78. Annexes I and II are mandatory for Parties to the Convention. Annex one, concerning the prevention of pollution by oil, is extensive. It prohibits the discharge of oil or oily mixtures except when certain conditions are satisfied (Annex I, Regulation 9). It also provides for recognition of `special areas' including the Mediterranean Sea, Baltic Sea, Black Sea area, Red Sea area, (Persian) Gulf area, Gulf of Aden area, and Antarctic area (south of latitude 60¡ S) (Annex I, Regulation 10). Oil tankers, and ships of 400 gross tonnage and above, are prohibited from discharging oil in special areas, and in the case of the Antarctic, all ships are prohibited from doing so. The Convention makes allowance for discharges that are necessary to secure the safety of the ship or to save lives, or that result from damage to the ship (Annex I, Regulation 11). MARPOL 73/78 also specifies that, at certain ports, waste reception facilities for oil residues and oily mixtures must be established that are adequate to meet the needs of the ships using them without causing undue delay (Annex I, Regulation 12). Regulations for the use of segregated ballast tanks, cargo tank cleaning systems using crude oil washing, oil discharge monitoring and control systems, slop and sludge tanks, and piping and pumping arrangements are also detailed in Annex I. New oil tankers are required to meet certain construction standards to improve their chances of surviving in tact in the event of a collision or stranding (Regulations 13 to 25). Certain ships are also required to keep an Oil Record Book and to have a shipboard oil pollution emergency plan (Annex I, Regulations 20 & 26).

Annex II provides regulations for the control of pollution by noxious liquid substances carried in bulk and operates similarly to Annex I. The substances concerned are separated into four categories: `A' is for those which if discharged into the sea from tank cleaning or deballasting operations would, inter alia, present a `major hazard' and which justify `stringent anti-pollution measures'discharge is strictly prohibited; category `B' substances would pose a `hazard' and warrant `special anti-pollution measures'; category `C' equates to those substances which would pose a `minor hazard' and which require `special operating conditions'; and category `D' are those which would pose a `recognisable hazard' and require `some attention in operational conditions' (Annex II, Regulation 3). The noxious liquid substances of the various categories are listed in the `Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk' (adopted by MEPC.19[22]) (Annex II, Appendix II). In no case may noxious liquid substances be discharged within 12 nautical miles from land (Annex II, Regulation 5).

The remaining Annexes are optional. Australia is a Party to Annexes III and V. Annex III provides regulations for the prevention of pollution by harmful substances carried by sea in packaged form. For the purposes of the Annex, `harmful substances' are those identified as marine pollutants in the `International Maritime Dangerous Goods Code' (IMDG Code adopted by IMO in resolution A.716[17]) (Annex III, Regulation 1). Annex III prohibits the carriage of harmful substances except in accordance with the provisions of the Annex (Regulation 1), and requires that `[p]ackages shall be adequate to minimise the hazard to the marine environment' (Regulation 2). Standards are also provided for marking and labelling, documentation, stowage, and quantity limitations (Annex III, Regulations 4 to 6).

Annex V provides regulations for prevention of pollution by garbage from all ships. The Annex details rules for the discharge of different types of wasteexcluding fresh fish and parts thereofgenerated during the normal operation of the ship (Regulation 1), and specifies the distances from land and methods by which it may disposed into the sea (Regulations 3 to 6). Vessels of 12 metres or more in length must post placards which notify the crew and passengers of garbage disposal rules. Ships of 400 tons gross tonnage and above, or which carry 15 or more people, must also carry and implement a garbage management plan and carry a `Garbage Record Book' (Annex V, Regulation 9).

Annex IV provides regulations for the prevention of pollution by sewage from ships, and a new Annex VI provides for prevention of air pollution from ships. Neither of these two Annexes have entered into force.

Implications for Australian oceans policy

MARPOL 73/78 is a binding international legal instrument to which Australia is a Party. Australia is also a Party to the mandatory Annexes I and II, and optional Annexes III and V. As both a flag state and port state, Australia has established the general legislative, institutional and infrastructural framework necessary to meet its obligations under the Convention. The Australian oceans policy will need to ensure that such arrangements remain in place and are adequately resourced.

Legislative amendments

MARPOL 73/78 is a dynamic instrument. From time to time, the MEPC adopts resolutions that amend the Convention or its Annexes. Delays in processing legislative amendments through the Commonwealth Parliament have resulted in domestic law failing to reflect MARPOL 73/78 amendments for periods of up to three years. For example, MEPC Resolution 57(33) designating the Antarctic as a special area entered into force on 1 July 1994, but a proposal to amend the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 was yet to be effected as of September 1997. In order to overcome such delays, the Australian Maritime Safety Authority (AMSA) has occasionally used Marine Orders to provide a legislative basis for Australia to satisfy its MARPOL 73/78 obligations. One such use of a Marine Order with regard to MARPOL 73/78 occurred in mid-1997 and related to amendments to MARPOL 73/78 Annex V (garbage disposal at sea). This is a technique which is employed commonly with regard to other complex, evolving instruments such as the International Convention for Safety of Life at Sea (SOLAS) 1974. A limitation of the use of Marine Orders is that provision for sanctions is restricted and might not enable penalties to reflect the seriousness of the violation or to be consistent with other penalties stipulated in the Act.

One difficulty with the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 is that the Convention is attached as a Schedule to the Act but, in reference to the Convention as a Schedule, the Act does not say words to the effect of `as amended from time to time'. Hence, whenever the Convention is amended, the Act must go before Parliament to be similarly updated. AMSA has recognised this problem and has proposed that the Act be amended to allow for periodic alteration of the Convention by the IMO MEPC without the need to update the Schedule of the Act. The Australian oceans policy might learn from this example and recognise that international legal instruments relating to the ocean are often dynamic, and provision must be made for timely alteration of Commonwealth law if Australia is to satisfy fully its duties under such instruments.

Waste reception facilities - sewage

Annex IV to MARPOL 73/78, detailing regulations for the prevention of pollution by sewage from ships, is not yet in force. The Annex will enter into force 12 months after it has been ratified by 15 states whose combined fleets of merchant shipping represent at least 50% of world tonnage. At present, 51 states have accepted the Annex representing about 41% of

world tonnage. In an effort to address aspects that might be slowing the Entry into force: of Annex IV, the text of the Annex is under review by IMO.

In the event that Annex IV comes into force, which it seems almost certain to do, and Australia accepts the Annex, there will be a requirement for Australia to establish facilities at ports and terminals for the reception of sewage adequate to meet the needs of the ships using them (Annex IV, Regulation 10). Twenty-nine out of a total of fifty-two Australian ports are not yet able to offer such a service to ships. Because of the time and resources needed to establish sewage waste reception facilities at ports, some countries have not waited for Annex IV to enter into force and have already begun to provide for collection of sewage from ships. However, if Australia is to observe the spirit of MARPOL 73/78 and accept the new Annex IV when it enters into force, the Australian oceans policy will need to reflect an intention to establish adequate sewage waste reception facilities at all ports where they might be needed and address the issue of how resources will be allocated to that end.

Waste reception facilities - quarantine

Ships that observe the requirements of MARPOL 73/78 Annex V may well arrive in Australian ports with garbage that necessitates quarantine handling. At present, not all Australian ports are able to accept such garbage. Some of these ports, such as Dampier in Western Australia, handle considerable tonnage each year (see AMSA, Waste Reception Facilities in Australian and New Zealand Ports. May 1997). Confronted with such a situation, ships might reasonably consider that they have little choice but to dump the garbage at sea. The Australian oceans policy might address this problem by providing for State Governments to be assisted where necessary in the task of establishing quarantine waste reception facilities at all major Australian ports.

14.10 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1978

Done at London: 7 July 1978

Entry into force: 28 April 1984

Entry into force for Australia: 28 April 1984

The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, (STCW) 1978 was promulgated with the mission to promote safety of life and property at sea and the protection of the marine environment through the establishment of commonly agreed international standards of training, certification and watchkeeping for seafarers. Parties undertake to give effect to necessary laws, orders and regulations in ensuring that safety of life and property at sea, and protection of the marine environment are maintained and that seafarers on board ships are qualified and fit for their dutiesArticle I(2).

The Convention applies to seafarers serving on board ships entitled to fly the flag of a State Party to the Convention with the exception of warships, naval auxiliaries or other non-commercial Government vessels, fishing vessels, pleasure yachts not engaged in trade, and wooden ships of primitive build. Article VI provides that the responsible administration of the State Party has a duty to certify any masters, officers or ratings who meet the requirements for service, age, medical fitness, training, qualification and examinations in accordance with the appropriate provisions as set out in the Annex to the Convention. The certificate issued should be prescribed as in Regulation I/2 of the Annex.

The 1978 Convention establishes general provisions in relation to the master-deck department, engine department, and radio department, along with special requirements for

tankers and for proficiency levels in survival craft. STCW 1978 has undergone several amendments since it was first adopted which are discussed below.

The 1991 amendments

Done at London 22 May 1991

Entry into force: generally 1 December 1992

The amendments introduce additional requirements made necessary by the implementation of the Global Maritime Distress and Safety System (GMDSS) (see entry for SOLAS). The phasing in period is from 1 February 1992 to 1 February 1999.

The 1994 amendments

Done at London 25 May 1994

Entry into force: generally 1 January 1996

Chapter V which deals with special training for crews on tankers is amended in the 1994 amendment.

The 1995 amendments - STCW 1995

Done at London: 7 July 1978

Entry into force: generally 1 February 1997

STCW 1995 is an attempt to revise the Convention particularly with the adoption of a new STCW Code which provides technical regulations relating to the Convention. STCW 1995 attempts to ensure that uniform standards are applied as far as practicable. Contracting States are required to deposit with the IMO detailed information concerning administrative measures taken to ensure compliance with the Convention. This step ensures that the Government concerned will need to establish national administrative, training and certification resources necessary to implement the Conventionthis was not a requirement in the 1978 Convention.

The STCW Code

Part A is mandatory. It contains, inter alia, enhanced procedures concerning the exercise of port state control (PSC) and allows intervention arising in the case of deficiencies that are deemed to pose danger to persons, property or the environment. Measures for watchkeeping personnel to prevent fatigue are also some of the new concepts introduced by the Code.

Part B contains recommended guidance intended to help Parties implement the Convention.

Implications for Australian oceans policy

The Australian Maritime Safety Authority (AMSA) conducts port state control inspections in Australian ports. Application of the mandatory provisions contained in Part A of the Code will ensure that Australia continues to apply steadfast and effective controls in an effort to ensure that foreign flag ships calling at Australian ports are seaworthy and impose neither a pollution risk nor risk to the safety of the crew on board.

The 1995 amendments to the STCW Convention have imposed strict new requirements for the training and certification of seafarers at an appreciably higher standard. Australia has

anticipated the new requirements well. Amended legislation to give effect to the amendments is scheduled to be tabled in November 1997, and Australian training colleges are in the process of undergoing audit. New training courses are being developed and are well under way. A national, standard curriculum is being developed for seafarers and will be in place by 1998.

Other countries are reportedly not doing as well. A problem that the oceans policy might need to address is how best should Australia respond if the crews of a large number of ships calling at Australian ports do not meet the new standards.

14.11 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) 1990

Done at London: 30 November 1990

Entry into force: 13 May 1995

Entry into force for Australia: 13 May 1995

The purpose of the OPRC Convention was to establish a global framework for international cooperation in response to pollution of marine areas by oil. State Parties are required to establish measures at either the national level or international level for dealing with oil pollution incidents. Ships must carry an oil pollution emergency plan in accordance with IMO guidelines. Offshore installations must also have an oil pollution emergency plan which must be coordinated with national systems for responding promptly and effectively to incidents of oil pollution.

In the event of an oil spill from a ship, the vessel concerned must report the incident to the relevant coastal authorities and response action must be taken in accordance with the provisions of the OPRC Convention. State Parties are to provide for stockpiles of oil spill combating equipment, and are to exercise their ability to respond to an oil spill. States are also to develop detailed plans for responding to oil pollution incidents. Parties are required to assist other Parties in their response to an oil pollution emergency, and the Convention provides a mechanism for reimbursement of any costs incurred. The OPRC Convention recognises an important coordinating role for the IMO.

Implications for Australian oceans policy

The requirements of the OPRC Convention are met well in Australia by an oil spill response strategy called the National Plan to Combat Pollution of the Sea by Oil (NATPLAN). NATPLAN was established formally in 1973 and is managed by the Australian Maritime Safety Authority (AMSA). NATPLAN is a national strategy to respond to and combat marine oil spills. NATPLAN maintains a national, integrated Government and industry organisational framework capable of effective response to oil pollution incidents in the marine environment. State and Northern Territory Governments and the shipping, oil and exploration industries work with AMSA to maximise marine pollution response capability when required see figure 1.

The NATPLAN provides a national framework for responding promptly and effectively to marine oil pollution incidents by designating competent and local authorities. The framework includes:

- `a national contingency plan for preparedness and response in which an organisational relationship between the public and private sector is involved;
- detailed State, local and industry contingency plans and communications arrangements for mobilising resources and responding to an oil pollution incident;

- an adequate level of strategically positioned oil spill combat equipment, commensurate with the risk involved, and programs for its use; and
- a comprehensive national training program to familiarise government and industry personnel with the requirements of planning for, and responding to, oil spills, including conducting frequent exercises.'

Responsible authority and area of responsibility

The National Plan Administrative Arrangements (NPAA) provide a clear definition of responsibilities to NATPLAN agencies, including access to equipment and dispersant stockpiles, equipment maintenance and storage, funding, and joint use of resources. In this regard, State and local contingency plans support the NATPLAN where oil spill incidents occur within their jurisdiction.

Tiered operations response arrangements

When responding to a spill, recognition of the size of the spill and its potential threat to the surrounding environment has to be appreciated immediately. This is to allow response operations to be deployed efficiently. NATPLAN operations are based on a three tiered system:

- tier 1, small local spills of less than 10 tonnes.
- tier 2, medium spills of 10 to 1000 tonnes.
- tier 3, large spills of greater than 1000 tonnes.

Stockpiles of response equipment

Stockpiles of oil spill control and recovery equipment are located in major ports. In the event of a major spill involving a tier 3 incident, stockpiles from other port authorities and oil companies will be deployed promptly under the management of AMSA. Management and planning for the usage of stockpiles in the local area would however necessarily require the approval of the National Plan State Committee.

Planning and methods of oil spill clean up

It is crucial for the responding agency to appreciate the nature of a spill before deploying any response equipment. Decision-making has to be prompt and effective and may be difficult at any one time as no single method of response can meet the various demands of a particular oil spill. Factors that need to be appreciated include the oil type, volume, location both immediate and surrounding, weather conditions and availability of human and physical resources.

The NATPLAN tables five options for a response:

- leave alone but monitor
- use dispersants
- containment and recovery
- bioremediation
- in situ burning

Application of any of the options may result in an immediate clean-up or may involve months of recovery of the natural state of the coastal/marine environment. Past experiences have shown that as a result of responding to public and media pressure, many responses to oil spills were not effective, sometimes resulting in severe damage to the environment.

The NATPLAN at work

The NATPLAN was put to the test when, in July 1995, the Iron Baron carrying a load of approximately 24 000 tonnes of manganese ore and laden with bunker fuel grounded on Hebe Reef off Bell Bay, Tasmania. The amount of spilled oil that landed onshore was estimated at 150-200 tonnes (tier 2 response). The NATPLAN was activated instantly, and salvage and clean-up operations responded accordingly. It took the response team approximately 20 days to coordinate salvage, clean-up, rescue and recovery operations. The operation was assisted considerably by extensive industry and community participation.

There is little doubt that the Australian NATPLAN scheme satisfies the requirements of OPRC 1990.

14.12 Tokyo MOU on Port State Control 1992

Signed at Tokyo: 1 December 1993

Entry into force: 1 April 1994

In recent years, a steady incidence of shipping accidents with consequent loss of life and marine pollution encouraged an interest in strengthening the enforcement of those international rules that might prevent such disasters. To that end, the International Maritime Organization (IMO) adopted Resolution A682(17) at its 17th Assembly encouraging regional cooperation in the control of ships and discharges. The Tokyo MOU, along with similar arrangements elsewhere in the worldsuch as the Paris MOU, Acuerdo de ViÐa del Mar, and othersare regional initiatives aimed at improving the level of ship safety by enforcing compliance with international standards. The Tokyo MOU is signed on behalf of the Parties by the Maritime Authority of each country; for Australia, the functional agency is the Australian Maritime Safety Authority (AMSA).

The Tokyo MOU provides that `[e]ach Authority will establish and maintain an effective system of port state control with a view to ensuring that, without discrimination, foreign merchant ships visiting its ports comply with the standards laid down in the relevant instruments as defined in section 2'. The instruments listed in section 2 are:

- the International Convention on Load Lines 1966;
- the International Convention for the Safety of Life at Sea, 1974 as amended
- the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974;
- the International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto;
- ithe International Convention on Standards for Training, Certification and Watchkeeping for Seafarers, 1978;
- the Convention on the International Regulations for Preventing Collisions at Sea, 1972; and
- the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147)

Maritime Authorities are enjoined to board ships in port in order to check certificates and documents. In the absence of valid certificates or documents, or if there are `clear grounds' for suspecting that some aspect of the ship does not meet international standards, a more detailed inspection will be conducted (MOU Section 3.1). The Memorandum provides guidelines on what constitutes `clear grounds' warranting further inspection of a ship (MOU Section 3.2). The Memorandum identifies an annual inspection rate target of 50% of the total number of ships operating in the region by the year 2000 (MOU Section 1.4).

Certain ships are identified as requiring special attention, including passenger ships, roll-on/roll-off ships, bulk carriers, ships which may present a special hazard, and ships which

have featured in recent inspections as having deficiencies or which have not been inspected within the previous six months. Authorities are required to endeavour to secure rectification of identified deficiencies before the ship proceeds to sea, and where a deficiency is `clearly hazardous to safety, health or the environment' to ensure that it is so rectified unless the ship needs to travel to another port for remedy and can do so safely. If necessary an Authority can detain a ship.

Authorities are required to report the results of inspections in accordance with the Memorandum, and to exchange information with other Authorities. The Authorities are also enjoined to endeavour to establish training programs and seminars for surveyors.

Implications for Australian oceans policy

In the Preamble to the Tokyo MOU, the Parties noted that `the Memorandum is not a legally binding document and is not intended to impose any legal obligation on any of the Authorities'. Also, Article 8.1 re-affirms that `[t]he Memorandum is without prejudice to rights and obligations under any international instrument'. Therefore, Australia has incurred no additional legal obligation by virtue of its participation in the Tokyo MOU.

However, the Tokyo MOU was established in order to promote the safety of life at sea and protection of the marine environment. Australia has been an active participant in this regional port state control organisation and a strong advocate of the ideals upon which it is founded. The MOU identifies certain specific obligations for the Authorities of participating states, such as, inter alia, the requirement to carry out inspections of ships with properly qualified persons, to avoid unduly detaining or delaying ships, and to report on its inspections and exchange information with the Authorities of other states. If the MOU is to succeed in achieving its purpose, all states must ensure that their Authorities fulfil the obligations identified in the Memorandum. Accordingly, the Australian oceans policy will need to recognise a suitable allocation of resources and appropriate measures to ensure that these duties are met. In particular, the oceans policy might recognise the need for the Australian Maritime Safety Authority (as the designated Australian Authority) to conduct port state control duties in accordance with IMO Resolution A.787 (19), and provide for active Australian participation in the further development of a computerised database system.

In the main, Australian trade is carried in foreign tonnage. Therefore, port state control is an important mechanism by which the standard of shipping coming to Australia can be improved. Although many of the Tokyo MOU partners have only recently established formal procedures and institutions for port state control, Australia has about 13 years experience in this field. Furthermore, some participants in the MOU do not enjoy the same levels of technology or wealth as does Australia. Consequently, several MOU partners do not yet have well developed port state control systems in place. Australia has frequently been called upon to send AMSA officers to participant countries in order to assist with training of inspection officers. Also, Australia has provided material assistance to some countries. However, Australia has had to decline some requests for assistance because personnel could not be spared. The designated MOU liaison officer in AMSA must balance this responsibility with other duties. In the week commencing October 5, 1997 an inaugural meeting to discuss the formation of an Indian Ocean port state control MOU was held in Bombay. If such an MOU comes into being, which seems likely, the demands for Australian assistance will almost certainly increase. The Australian oceans policy might consider whether Australia's best interests would be served by ensuring that every opportunity to improve the performance of MOU partners was taken to the fullest. In recent years, a steady incidence of shipping accidents with consequent loss of life and marine pollution encouraged an interest in strengthening the enforcement of those international rules that might prevent such disasters. To that end, the International Maritime Organization (IMO) adopted Resolution A682(17) at its 17th Assembly encouraging regional cooperation in the control of ships and discharges. The Tokyo MOU, along with similar arrangements elsewhere in the worldsuch as the Paris MOU, Acuerdo de ViÐa del Mar, and othersare regional initiatives aimed at improving the level of ship safety by enforcing compliance with international standards. The Tokyo MOU is signed

on behalf of the Parties by the Maritime Authority of each country; for Australia, the functional agency is the Australian Maritime Safety Authority (AMSA).

Australia contributes inspection reports to the MOU database in Canada, but the computer system used by AMSA in Australia was developed before the Canadian system and the information on both does not interface well. Australia does not rely overly on information drawn from the MOU database because several MOU participating countries fail to input data, and because AMSA is occasionally unsure about the accuracy of some of the information that is available through the MOU system. In order to make the Australian port state control information system more `user friendly', the system is presently under review. However, one difficulty of such an exercise is that AMSA is wary of moving too far ahead of the MOU system only to find that the two systems are incompatible. In short, Australia would do well either to follow the MOU information system established in Canada, or to encourage the Canadian system to follow the Australian model. AMSA executives understand that the Tokyo MOU information system is presently under review by a consulting firm, and consider that now might be an appropriate time to consider the issue of information-system compatibility.

14.13 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 1989

Done at Basel: 22 March 1989

Entered into force 5 May 1992

Entered into force for Australia 5 May 1992

The Basel Convention is a global instrument intended to minimise and control international trade in transboundary waste where the term `waste' is understood to be `substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law' (Article 2[1]). Hazardous wastes are those that belong to the categories listed in Annex I to the Convention, or those that are considered as hazardous by the domestic legislation of either the Party of export, import or transit (Article 1[1]). The Convention places a shared responsibility on exporting and importing states for environmentally sound management and disposal of such wastes. The term `environmentally sound management' is defined to mean `taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes' (Article 2[8]).

Article 4 of the Basel Convention outlines the general obligations of Contracting Parties. It provides, inter alia, that Parties must not export wastes to another Party which has declared a prohibition on the import of such waste; they must keep the generation of hazardous and other wastes to a minimum and ensure that they have adequate disposal facilities to cater for their wastes; and they must provide information (in accordance with Annex V of the Convention) to the states concerned of the effects of any proposed movement on human health and the environment. Parties are also prohibited from exporting wastes to a non-Party (Article 4[5]). Where waste is to be transported, the waste must be packaged and labelled in accordance with generally accepted and recognised international standards, must be accompanied by a movement document (Article 4[7]), and written notification from the export state must be given to the designated authority of the import state and any transit states in accordance with Annex VA of the Convention (Article 6[1&4]). The importing state and transit states must also give written permission before the movement can occur (Article 6[2&4]); however, transit states may waive their right to require their written permission (Articles 6[4] & 13).

The three occasions on which the transboundary movement of wastes is allowed are when:

- the state of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner; or
- the wastes in question are required as a raw material for recycling or recovery industries in the state of import; or
- the transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided that those criteria do not differ from the objectives of this Convention (Article 9[a-c]).

Parties to the Basel Convention hold that the `illegal traffic in hazardous wastes or other wastes is criminal' (Articles 4[3] & 9). The Parties are also required to cooperate `in order to improve and achieve environmentally sound management of hazardous wastes and other wastes' (Article 10).

Implications for Australian oceans policy

The Basel Convention is a legally binding international instrument to which Australia is a Party. Australia has the necessary institutional and legislative arrangements in place to satisfy its obligations under the Convention. Administration of the Basel Convention is resource intensive; personnel and facilities are required to enforce compliance and there are considerable reporting and communication tasks associated with the Convention. The Environment Protection Group of Environment Australia is Australia's Designated Authority for the Convention.

Although not specifically mentioned as an area of concern, one aim of the Basel Convention presumably is to reduce threats to the marine environment resulting from the entry of hazardous wastes and other wastes into the sea. However, the Basel Convention does not explicitly direct its concerns to ocean affairs. Rather, the instrument addresses the immediate issue of waste management and treatment near to where it is produced. The requirements for waste packaging and labelling, and the permit requirements are largely matters of concern for the producers or owners of the waste, not the shippers. Waste is not normally transported in vessels built specifically for the task. Therefore, while successful implementation of the Basel Convention is important in the overall effort to minimise the risk of marine environmental harm, the instrument itself has few if any direct implications for an Australian oceans policy.

14.14 International Convention on Liability and Compensation for Damage In Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS `96) 1996

Not yet in force.

The purpose of this Convention is to create a regime of liability for both the ship and cargo owners to provide compensation to victims in the event of pollution harm arising from the escape of hazardous or noxious substances carries at sea. The Convention mirrors the arrangements of the CLC and Fund Conventions, and establishes its own international fund from which victims may be able to supplement the amout they receive in damages.

15. Maritime Safety and Salvage

15.1 Convention on the International Regulations for Preventing Collisions at Sea (CDLREGS) 1972

Done at London 20 October 1972

Entry into force: 15 July 1977

Entry into force for Australia: 29 February 1980

The Convention on the International Regulations for Preventing Collisions at Sea, 1972 is a comprehensive and detailed treaty. It has IX articles, five parts (AE) with 38 rules and four annexes (I-IV). The Articles provide general obligations under the Convention eg. ratification, entry into force, denunciation, revision of conference etc. The Rules of the Convention apply to all vessels upon the high seas and in all waters connected to them which are navigable by seagoing vessels. The Convention defines `vessel' broadly as to include every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water. However, the Convention goes on to refine the definition of specific vessels such as `power-driven vessel', `sailing vessel', `vessel engaged in fishing', `seaplane', `vessel restricted in her ability to manoeuvre', `vessel constrained by the draught' and so on.

Part B of the Rules contain detailed provisions concerning steering and sailing rules covering matters regarding conduct of vessels in any condition of visibility (section I), conduct of vessels in sight of one another (section II) and conduct of vessels in restricted visibility (section III). Part C prescribes the detailed use of lights and shapes of lights as specified in Annex I to the Convention. Part D provides rules on sound and light signals which include prescription of the correct equipment for sound lights and sound signals in restricted visibility, and signals to attract attention. Rule 36 prescribes that a vessel in distress which requires assistance shall use or exhibit the signals detailed in Annex IV to the Convention. Part E covers exemptions allowed in certain conditions. The annexes are as follows: Annex IPositioning and Technical Details of Lights and Shapes; Annex IIAdditional Signals for Fishing Vessels Fishing in Close Proximity; Annex IIITechnical Details of Sound Signal Appliances and Annex IVDistress Signals.

Implications for Australian oceans policy

The COLREGS Convention is a legally binding instrument to which Australia is a Party. Australia has suitable legislative and institutional arrangements in place to satisfy all of its obligations under this instrument.

15.2 International Convention for the Safety of Life at Sea (SDLAS) 1974

Done at London 1 November 1974

Entry into force: 25 May 1980

Entry into force for Australia: 17 November 1983

The SOLAS Convention is a complex, substantial instrument that has evolved into its present form over many decades. Arguably, SOLAS is more important to merchant ship safety than any other international instrument. The 1974 version of SOLAS incorporated all of the amendments that had been made up to that time. However, it also introduced the `tacit approval' system of amendment which would allow for future changes to be made effectively and rapidly.

The main objective of SOLAS is to specify minimum standards for the construction, equipment and operation of ships compatible with safety. Flag states are required to issue certain certificates as prescribed in the Convention as proof that their ships comply with SOLAS standards. State Parties to SOLAS may also inspect the ships of other Parties if there are clear grounds for suspecting that such ships or their equipment do not comply with the requirements of the Convention.

Chapter I

Chapter one details general provisions and in particular, addresses the issue of ship surveys and the issue of documents certifying that a ship meets SOLAS requirements. This chapter also provides for Parties to control the ships of other Parties while such ships are in the former's port.

Chapter II

Chapter two specifies ship subdivision and stability requirements. Ships are required to be of a standard that will enable them to remain afloat after an assumed level of damage has occurred to the ship's hull. Passenger ships have special watertight integrity and bilge pump standards which are specified in this chapter. Chapter II-1 details specifications for machinery and electrical installations such that services which would be essential for the safety of the ship, its passengers or the crew will continue to function in various emergencies. Chapter II-2 provides detailed fire safety provisions relating to the protection, detection and extinction of fire. The chapter also specifies detailed fire safety requirementssuch as inert gasfor tankers and combination carriers.

Chapter III

Chapter three outlines the standards for life-saving appliances and procedures. The chapter is divided into three parts:

- Part A specifies the requirements, exemptions, definitions, evaluation, testing and approval of life-saving appliances and arrangements;
- Part B details requirements for the ship, and once again this part is separated into three sections dealing in turn with: common requirements for passenger and cargo ships; additional requirements for passenger ships; and additional requirements for cargo ships; and
- Part C describes, inter alia, life-saving appliance requirements including: personal life-saving appliances; visual signal requirements; survival craft; rescue boats; launching and embarkation appliances; and other appliances.

Chapter IV

Chapter four addresses radiotelegraphy and radiotelephony, detailing: the type of facility required; operational requirements for watchkeeping and listening; technical provisions, including those for direction-finders and lifeboat installations; and portable radio equipment for survival craft. Mandatory log-book entries are also specified for radio officers. This chapter is closely linked with the International Telecommunications Convention, Final Protocol, Additional Protocols I-VII, and Optional Additional Protocol 1982.

Chapter V

Chapter five deals with safety of navigation, both ship-board operational matters and navigation services which must be provided by states. Chapter five is unique in SOLAS in that it applies to all ships on all voyages, whereas other chapters apply only to certain classes of ship on international voyages. Chapter five details, inter alia, requirements for meteorological services; ship routeing; search and rescue services; ship manning; and the requirement for masters to proceed to the assistance of those in distress.

Regulation 4 of Chapter V covers meteorological services. It charges contracting Parties to provide a range of marine meteorological services, including the collection of meteorological data by ships at sea and the dissemination of marine meteorological bulletins, forecasts and warnings. It also provides that contracting Parties should, as far as is practicable, conform to the technical regulations and recommendations of the World Meteorological Organization.

Chapter VI

This chapter deals with the carriage of grain, and specifies requirements for stowing, trimming, and securing grain cargoes so that they do not shift and affect ship stability. Following an amendment in 1991, chapter six applies to all types of cargo except liquids in bulk.

Chapter VII

Chapter VII deals with the topic of the carriage of dangerous goods. It provides for the classification, packing, marking, labelling and placarding, documentation and stowage of dangerous goods, whether they be in packaged form, solid form in bulk, or liquid chemicals and liquefied gases in bulk. Contracting Parties are required to issue classification instructions at the national level for dangerous goods. In order to assist State Parties with this task, IMO has developed the International Maritime Dangerous Goods (IMDG) Code which is frequently updated.

Chapter VIII

Chapter eight addresses basic requirements for nuclear ships.

Chapter IX

The International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code) was adopted by IMO in 1994 as the new Chapter IX to SOLAS. The ISM Code will become mandatory from 1 July 1998 for passenger ships and tankers, and from 1 July 2002 for all ships and mobile drilling platforms of 500 gross tonnage and above. The new ISM Code requires the operator of a ship to establish a `safety management system' (SMS) that establishes and implements a policy to achieve the objectives of: providing for safe practices in ship operation; a safe working environment; safeguarding against all identified risks; and continuously improving the safety management skills of personnel, including their preparation for emergencies.

Chapter X

Chapter X is another new chapter that specifies safety measures for high speed craft.

Chapter XI

This is also a new chapter that deals with amendment procedures for SOLAS.

Implications for Australia's oceans policy

The SOLAS Convention is a binding legal instrument to which Australia is a Party. Although SOLAS is a highly technical instrument that is frequently amended in response to technological changes and new procedures, the use of Marine Orders enables Australian legislation to remain abreast of SOLAS amendments. AMSA has run courses on SOLAS codes and can use Marine Notices to keep industry informed of SOLAS amendments. Australia's efficient system of port state control serves well as an enforcement mechanism for SOLAS. Australia has in place the necessary legislative and institutional arrangements to meet its obligations under the SOLAS Convention. There is little concern that Australian flag shipping will have difficulty meeting the new ISM code requirements by the deadline date of July 1998; however, ships of other flags may not meet the new requirements in time and this may cause some difficulty for port state control inspections in the second half of 1998.

15.3 Convention and Operating Agreement on the International Maritime Satellite Organisation (INMARSAT) 1976

Done at London: 3 September 1976

Entry into force: 16 July 1979

Entry into force for Australia: 16 July 1979

The Convention on the International Maritime Satellite Organisation (INMARSAT) establishes the International Maritime Satellite Organisation which has the purpose of making provisions for the space segment necessary for improving maritime communications thereby assisting in improving: distress and safety of life at sea, communications, efficiency and management of ships, maritime public correspondence services, and radio determination capabilities. The Organisation seeks to serve all areas in need for maritime communications.

15.4 Convention on Maritime Search and Rescue (SAR) 1979

Done at Hamburg: 27 April 1979

Entry into force: 22 June 1985

Entry into force for Australia: 22 June 1985

The 1979 SAR Convention encourages cooperation between States Parties and search and rescue (SAR) organisations around the world with regard to search and rescue operations at sea. Search and rescue regions are established by the concerned Parties. The Convention obliges State Parties to provide adequate SAR services for persons in distress around their coasts. States are required to forward to the IMO relevant information relating to SAR administration in their respective countries. Such information should include details about the national maritime SAR services; the location of rescue coordination centres along with their telephone / fax numbers and areas of responsibility; and the principal available rescue units at their disposal. The IMO then forwards this information to other member states.

Within the structure of an amendment to SOLAS (The 1988 [GMDSS] Amendments) the International Maritime Organization (IMO) has provided for the staged introduction between 1993 and 1999 of the Global Maritime Distress and Safety System (GMDSS). The purpose of the system is to alert search and rescue authorities ashore rapidly in the event of an emergency. The GMDSS will rely mainly on satellite communications provided by INMARSAT but will also use terrestrial radio. Apart from distress communications, the GMDSS will also allow dissemination of general maritime safety information such as navigational and weather warnings.

Implications for Australian oceans policy

The agency responsible for providing SAR services in Australia is AusSAR under the Australian Maritime Safety Authority (AMSA). At present, Australia satisfies all of its treaty obligations and in some areas, such as with regard to ship reporting systems, it is ahead of compliance requirements.

The Australian SAR region is extremely large. Within this region, Australia has primary responsibility to respond to any distress call. However, under international rules, the Party that first detects a distress call must continue to respond to that call until such time as it can hand over the responsibility to another competent authority. In Australia's case, many of its near neighbours are developing countries with limited SAR capabilities. Therefore, there is a high probability that Australia might have to continue to respond to a call for assistance even if the call comes from outside of the designated Australian SAR region. The size of the potential area in which Australia might have to effect a rescue has immediate consequences

for the type of equipment needed. AMSA is reviewing regional SAR capabilities with a view to helping neighbouring countries improve their capacity to respond to SAR emergencies.

An amendment to the SAR Convention has been placed on the agenda for the next meeting of the IMO Maritime Safety Committee (MSC) to be held mid-1998. The amendment proposes to strengthen the responsibilities of Parties by removing some of the discretionary language presently used in the Convention, and to define areas of responsibility more clearly. The proposed amendment also encourages developing states to introduce GMDSS and seeks to strengthen the obligation for all states to embrace GMDSS post-1999.

The introduction of GMDSS technology has the potential to lower AusSAR costs and raise efficiency. At present, a network of five coastal terrestrial-communications stations (VHF, HF, MF) is used to provide ship communications facilities. After the introduction of GMDSS from 1 February 1998, which is based largely on satellite communications, only one station will be needed for each ocean region. As the present network of five communications stations costs around $A6m per annum, this would potentially reduce costs. However, small craft, such as recreational and fishing vessels, use the terrestrial-communications network and will probably not want to invest in expensive new communications equipment. This would cause a problem if AMSA, which has responsibility only to provide facilities for ships covered by SOLAS, were to close the terrestrial stations. State Governments are unlikely to want to pick up the cost of running terrestrial-communications stations. AMSA is developing a panel of experts to advise on the technical aspects of a switch to satellite communications, and there seems little doubt that such a change will be made.

Ideally, AMSA would prefer a uniform communications network and ship reporting system to be used in the Australian region. A satellite-based system using GMDSS technology would also have the advantage of allowing AusSAR to automate position reporting by the use of polling equipment which enables the SAR authority to interrogate ships' communications equipment for location details as frequently as necessary without the need for ships' crew to take any action.

15.5 International Convention on Salvage, 1989

Done at London: 28 April 1989

Entry into force: generally 14 July 1996

Not yet in force for Australia

Australia proposed accession to the International Convention on Salvage, 1989 on 20 December 1996. The Salvage Convention will come into force for Australia one year after the date of deposit of the instrument of accession by Australia.

The Salvage Convention aims to ensure that there are sufficient incentives for the maritime salvor to invest in modern salvage technology and to provide salvage services, to improve the efficiency of salvage operations, and to encourage salvors to protect the marine environment. With regard to the protection of the environment, financial incentives are provided for salvors in the course of salvaging a vessel and its cargo, and also for protecting the environment, even when the property itself cannot be salvaged. The salvor is guaranteed special compensation in such cases.

Implications for Australian oceans policy

There are no direct costs to Australia of compliance with the Convention. By becoming a Party to the Salvage Convention, Australia can enhance efforts to protect its marine environment by improving the effectiveness of salvage operations, particularly in coastal

waters and adjacent areas. The Convention imposes duties on masters of vessels, owners of vessels or other property in danger, and on salvors, including specification of the rights of salvors especially in the event of claiming rewards. Australia will have to meet relevant obligations in the event of a marine accident in relation to the safety of persons, vessels and other property in danger including the protection of the marine environment.

The necessary legislation for implementation of the obligations under the Convention is contained in the Transport Amendment Act 1995 (Cth), which amended Part VII of the Navigation Act 1912 (Cth).

16. Marine Scientific Research

16.1 Convention of the World Meteorological Organisation (WMO) 1947

Done at Washington: 11 October 1947

Entry into force: 23 March 1950

Entry into force for Australia: 23 March 1950

The purpose of the WMO Convention is to: facilitate worldwide cooperation in the establishment of networks of meteorological observation stations and centres; promote the establishment and maintenance of systems for the rapid exchange of weather information; promote standardisation and uniform publication of meteorological observations and statistics; further the application of meteorology to aviation, shipping, agriculture, and other human activities, and encourage meteorological research and training (Article 2). The `Organization' comprises: The World Meteorological Congress (the Congress); The Executive Committee; Regional Meteorological Associations; Technical Commissions; and The Secretariat (Article 4).

Article 8 of the WMO Convention requires that all Members do their utmost to implement the decisions of the Congress, and provides that if a Member finds it impracticable to give effect to some requirement in a technical resolution adopted by Congress, then reasons for its inability to implement the decision shall be given along with indication of whether the inability to comply is provisional or permanent.

The Technical Regulations, which are decisions of the Congress, include inter alia prescriptions for the provision of meteorological services for marine activities. These encompass marine meteorological services for the high seas (weather bulletins, forecasts and warnings, support for maritime search and rescue, and climatological summaries); marine meteorological services for coastal and off-shore areas and ports and harbours; and training in marine meteorology. Australia is assigned the seas south of 10¡ south latitude between 90¡ east longitude and 160¡ east longitude as the area over which it has responsibility for marine meteorological services for the high seas.

Implications for Australia's oceans policy

In participating in the WMO Convention, along with the International Convention for the Safety of Life at Sea 1974 (see Section 15.2 above), Australia has accepted responsibility for providing marine meteorological services over a wide area, one much greater than its EEZ. The Convention on Maritime Search and Rescue 1979, to which Australia is a Party, also gives Australia a very large area of responsibility. The oceans policy will need to recognise these responsibilities in its scope, and will clearly therefore apply to areas well beyond the EEZ.

16.2 Agreement establishing the South Pacific Applied Geoscience Commission (SOPAC) 1990

Done at Tarawa: 10 October 1990

Entry into force: 18 November 1990

Entry into force for Australia: 3 February 1991

The SOPAC Agreement reconstituted the 1972 Committee for Coordination of Joint Prospecting for Mineral Resources in South Pacific Offshore Areas as the `South Pacific Geoscience Commission' (the Commission) (Article 1). The purpose of the Commission is, inter alia, `to promote, facilitate, undertake, coordinate, advise on, and cooperate in, the prospecting of and research into, the non-living resources in the offshore, coastal and onshore areas of those countries whose Governments are Members of the Commission as well as in the other oceanic areas of the South Pacific region' (Article 2). The Commission comprises: the Governing Council; the Technical Secretariat; and the Technical Advisory Group (Article 5). The Commission has a work program which is adopted by the Governing Council and implemented by the Technical Secretariat under the direction and control of the Governing Council (Articles 6 & 7). The budget of the Commission is financed by contributions from Member States, voluntary contributions, investments, fees and grants (Article 9).

Implications for Australian oceans policy

The SOPAC Agreement is a binding international instrument to which Australia is a Party. Australia retains the right to determine the extent to which it wishes to participate in the activities undertaken by the Commission. Article 10 of the SOPAC Agreement provides that `[n]othing in this Agreement shall be interpreted as prejudicing the sovereignty of parties to this Agreement over their territory, territorial sea, internal waters or archipelagic waters, or their sovereign rights over the non-living resources of their exclusive economic zones or continental shelves in accordance with the relevant rules of international law, including the United Nations Convention on the Law of the Sea'. The oceans policy might consider how best Australia can contribute to and benefit from the SOPAC Agreement whilst recognising the need to preserve Australia's sovereign interests.

17. Military

17.1 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water 1963

Done at Moscow: 5 August 1963

Entry into force: 10 October 1963

Entry into force for Australia: 12 November 1963

The Parties to this Treaty are enjoined to refrain from and prohibit nuclear weapon test explosions: in the atmosphere; beyond its limits as a State; or underwater `including territorial waters or high seas' (Article I[1][a]), and in any other environment if such an explosion would cause radioactive debris to be present outside the territorial limits of the State conducting such an explosion.

Implications for Australian oceans policy

This Treaty is an important instrument that serves to protect the marine environment; however, although the treaty acknowledges that its provisions are `without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions' (Article I[1][b]), the Treaty does still allow for the conduct of nuclear test explosions within the territorial limits of a state. Australia does not possess nuclear weapons and has been a strong advocate against the testing of nuclear weapons.

17.2 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea Bed and the Ocean Floor and in the Subsoil Thereof 1971

Done at London, Moscow and Washington: 11 February 1971

Entry into force: 18 May 1972

Entry into force for Australia: 23 January 1973

States Parties undertake not to emplant or emplace on the sea bed or in the subsoil beyond their territorial sea any `nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons' (Article I[1]). The Treaty expressly recognises that coastal states retain the right to conduct such activities within their territorial sea (Article I[2]). In order to ensure compliance with the Treaty, Parties have the right to verify through observation the activities of other Parties on the sea-bed beyond the territorial sea, provided that observation does not interfere with such activities.

Implications for Australian oceans policy

Australia does not possess nuclear weapons, and there would seem to be little likelihood that Australia's neighbours would wish to conduct the type of activities addressed by this Treaty.

17.3 South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) 1985

Done at Rarotonga: 6 August 1985

Entry into force: 11 December 1986

Entry into force for Australia: 11 December 1986

The area of coverage of the South Pacific Nuclear Free Zone is described in Annex 1 of the Treaty but generally applies to territory seaward from eastern Australia as far as 115¡ west longitude, and between 60¡ south latitude and the equator, with some parts of the zone lying north of the equator. Parties undertake not to `manufacture or otherwise acquire, possess or have control over any nuclear explosive device by any means anywhere inside or outside the South Pacific Nuclear Free Zone' (Article 3), and to prevent the stationing of any nuclear explosive device within their territory (Article 5). The Parties are also required to refrain from providing fissionable material or associated equipment to other states in a manner that is inconsistent with the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) or applicable safeguards agreements with the International Atomic Energy Agency (IAEA) (Article 4). The dumping of radioactive wastes and other radioactive matter at sea anywhere within the South Pacific Nuclear Free Zone is also prohibited (Article 7). A `control system' is established by the Treaty to verify compliance, comprising: reports and information exchange, consultations, application of IAEA safeguards, and a complaints procedure (Articles 8, 9, & 10).

Implications for Australian oceans policy

The Rarotonga Treaty is a binding international instrument to which Australia is a Party. The Treaty lessens the likelihood of a threat to Australia's security involving nuclear weapons from developing in the South Pacific. The Treaty accommodates Australia's requirement for military cooperation with the United States and other countries which possess nuclear weapons. Article 2 of the Treaty provides that `[n]othing in this Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of a state under international law with regard to freedom of the seas'. Also, Article 5 expressly recognises that `[e]ach Party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits'.

18. Preservation and Protection of the Environment

18.1 International Convention for the Regulation of Whaling 1946

2 December 1946

Entry into force: 10 November 1948

The International Convention for the Regulation of Whaling (ICRW) 1946 established the International Whaling Commission (IWC) (Article III). The IWC was given powers to designate:

- protected and unprotected species;
- open and closed seasons;
- open and closed waters, including the designation of sanctuary areas;
- size limits for each species;
- time, methods, and intensity of whaling
- types and specifications of gear which may be used;
- methods of measurement;
- catch returns and other statistical and biological records; and
- methods of inspection.

As the IWC has, since 1982, set quotas for all commercially exploited stocks of whales at zero, much of the rest of the Convention which concerns the regulation of whaling will not be described; however, Article VIII(1) is important and is reproduced in full below.

Article VIII(1)

Not withstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorising that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treatment of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorisations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

Implications for Australia's oceans policy

Australia continues to work within the IWC in pursuit of a cessation of all commercial whaling and has strongly opposed the taking of whales under scientific permits, particularly where the

scale and nature of the catch is clearly an attempt to subvert the moratorium on commercial whaling. Australia has also be critical of continued allocations for aboriginal subsistence whaling in the absence of full justification of the level of take needed to meet traditional requirements.

More recently the IWC has begun to examine in more depth the impacts of environmental change on cetacean populations, including the accumulation of pollutants, the need for development of guidelines for whale watching and a range of issues that have extended the Commission's focus on commercial whaling activities. It continues to represent one of the few bodies with global responsibilities and provides an avenue for Australia to pursue its goal of protection for all species of whales, dolphins and porpoises, despite disagreement within the Commission on its legal competence for management of some species.

The Commonwealth Whale Protection Act 1980 provides a general protective regime for all cetaceans in waters under Australian jurisdiction, and applies to Australian citizens in all other waters. Despite the declaration of the Southern Ocean Sanctuary in 1994, Japan continues an annual take of minke whales in Southern Ocean waters, with some takes known to occur within the Australian 200 nautical mile EEZ which applies off the Australian Antarctic Territory. Non-recognition of Australian territorial claims to the Antarctic continent, and hence of the extension of that claim to offshore areas, has limited Australian action on the issue to repeated and strong diplomatic exchanges; it also highlights the issue of projection of an effective national presence in isolated and difficult distant waters in the extensive Australian EEZ.

18.2 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar) 1971

Done at Ramsar, Iran 2 February 1971

Entry into force: 21 December 1975

Entry into force for Australia: 21 December 1975

To promote conservation of wetlands and waterfowl, to establish nature reserves on wetlands, to provide adequately for their protection and management, and to train personnel competent in the field of wetlands research and management.

The Ramsar Convention requires each Contracting Party to designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance (the List) maintained at the International Union for the Conservation of Nature and Natural Resources (IUCN) (Article 2). For the purposes of the Convention, `wetlands' are defined as `areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres' (Article 1). Article 3 stipulates that `[w]etlands should be selected for inclusion on the List on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology' and emphasises the inclusion of those wetlands that are of international importance to waterfowl.

Contracting Parties are enjoined to promote the conservation of wetlands included in the List, and as far as possible the wise use of wetlands in their territory. The Parties are also required to `promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening' (Article 4). Article 5 holds that the Contracting Parties shall consult with each other in implementing their obligations especially with regard to wetlands that extend over the territories of more than one state or where a water system is shared by the Contracting Parties.

The Ramsar Convention provides also for the establishment of a Conference of the Parties which is required to meet at least once every three years (Article 6). The sixth Conference of the Parties was held in Brisbane in 1996.

Implications for Australia's oceans policy

Australia has designated more than 40 wetlands under the Ramsar Convention. Some of these Australian designated wetlands are very important fish habitats, for example the Kooragang Wetland in New South Wales. Therefore, one important implication for the Australian oceans policy might be the importance of this Convention to the fishing industry. The direct implications of the instrument on the fishing industry might be seen as negative, entailing restrictions placed on taking fish in the wetland itself; however, the oceans policy might emphasise the broad benefit of this Convention to fish stocks.

18.3 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (as amended), 1972 (London Convention)with consideration of the 1996 Protocol

Done in quadruplicate at London, Mexico City, Moscow and Washington

on 29 December 1972

Entry into force: 30 August 1975

Entry into force for Australia: 20 September 1985

The 1996 Protocol is not yet in force

The main objective of the London Convention is to discourage the dumping of wastes or matters which might adversely affect the marine environment. In an effort to promote the effective control of all sources of marine pollution, measures are set out to discourage the dumping of waste into the sea and for Parties to take all practicable steps to prevent pollution of the sea by such activities. However, the Convention does give some leeway to Contracting Parties in implementation of the measures according to the scientific, technical and economic capabilities of the state. In this respect, those Contracting States that enjoy a high level of scientific, technical and economic capability (in most instances, industrialised countries) are encouraged to render assistance to the less capable Parties (developing countries) in promoting the spirit of the Convention.

Administration of the Convention is undertaken by the Office of the London Convention 1972 under the auspices of the International Maritime Organization (IMO). Under the requirements of Article XIV of the Convention, the IMO convenes consultative meetings of Parties to the Convention at least once every two years. Special meetings are called at any time on request of two thirds of the Parties. Resolution and amendments to the Convention are normally adopted at such meetings.

Disposal of waste

The London Convention sets out a general prohibition against the dumping of any wastes or other matter in whatever form or condition. An absolute ban is only applied to wastes and other matter listed in the `Black List' of Annex I of the Convention. Other identified material set out in the `Grey List' at Annex II of the Convention may be dumped into the sea only in accordance with a special permit (licence) granted by the appropriate authority. Wastes not listed in either Annex I or II may be dumped under a general permit. Despite that, the dumping of waste is still subject to assessment in accordance with Annex III which establishes the criteria governing the issue of permits for the dumping of waste and other matter at sea.

- Permits for dumping wastes: The designated appropriate authority of the Contracting Party is responsible for the issuance of a special, general or emergency permit for the dumping of waste at sea. Permits are issued for the dumping of matter which is loaded in the territory of the issuing state, or which is loaded in a state that is not a Party to the Convention onto a vessel or aircraft registered in the territory of the issuing state or flying its flag. There is no provision specifying to whom the permit(s) should be issued. The recipient may be the operator of the ship, the producer of the waste or the organiser of the dumping operation.

Dumping permits can only be issued after satisfactory examination of all factors detailed in Annex III. The study must consider the characteristics of the proposed dumping site. The state may, in addition to the criteria set in Annex III, stipulate further standards and conditions considered relevant. The 1989 amendments to Annex III require that consideration be given to whether a permit should be issued for dumping at sea at all. In other words, if land-based facilities are available for the disposal of the identified wastes, provided that all environmental concerns have been taken into account, that should be the preferred method of disposal. The three criterion to be assessed are: i) the characteristics and composition of the matter; ii) the characteristics of the dumping site, and iii) the method of deposit with general considerations and conditions. In assessing these criteria, reference should be made to the Guidelines for the Implementation and Uniform Interpretation of Annex IIILDC Resolution 32(11).

- Exceptions to the permit requirements: Exemption of permits- No permit is required where life, vessels, or offshore platforms etc., are endangered by adverse weather conditions, or in any other circumstances where dumping appears to be the only way to avert danger and that the damage from dumping would be less than that caused to the ship if nothing was dumped. The dumping operation should be carried out so as to minimise damage to human or marine life and should be reported forthwith to the IMO.

An emergency permit may be issued by the Contracting State if in the opinion of the state it is exigent that the dumping of prohibited Annex I materials be allowed in order to avoid an unacceptable risk to human health. An `emergency' may include situations such as, inter alia: cargoes becoming spoilt, fishermen netting chemical munitions, or the need to dispose of rubble from an explosion in a chemical plant. The Interim Procedures and Criteria for Determining Emergency Situations as detailed in LDC V/12, Annex 5 (adopted in 1980) stipulates the nature of situations that warrant the issue of an emergency permit by a Contracting Party. Once dumping at sea of the identified materials is approved, the Contracting Party is obliged to consult neighbouring countries which may be affected by the dumping, and the IMO for recommendations on appropriate procedures. States must consider precautionary actions to minimise damage to the marine environment. The right to issue emergency permits may be waived by the IMO at any time.

- Exempted vessels: The London Convention does not apply to ships and vessels entitled to sovereign immunity under international law. Thus, any dumping from warships or ships operated by a state for non-commercial government service do not require prior permits. Nonetheless, the manner in which the military or state-operated vessel and aircraft act must be consistent with the provisions of the Convention and be notified to the IMO.

Enforcement by the Contracting Party

The Convention is enforceable on all vessels and aircraft registered in the territory of the Contracting Party or flying its flag, and on all vessels and aircraft loading in its territory matter to be dumped at sea. Additionally, the Contracting Party can enforce the Convention on all vessels, aircraft or offshore platforms under its jurisdiction that are believed to be engaged in dumping. This means that enforcement extends into the territorial seas and, possibly, into the EEZ and the continental shelf of that state.

Liability

The Convention provides an undertaking by the Contracting Parties to develop procedures for the assessment of liability arising from damage incurred due to dumping operations at sea. An international civil liability regime on dumping at sea has yet to be established.

Settlement of disputes

An amendment to the London Convention adopted on 12 October 1978 by the Third Consultative Meeting of Contracting Parties to the London Convention 1972 furnishes the procedures for the settlement of disputes. Article 1 of the Appendix to the 1978 amendment calls for the establishment of an Arbitral Tribunal upon the request of the aggrieved Parties. Such a request should be supplemented with a statement of the case together with any supporting documents. Reference to the IMO is required when arbitration is being considered.

The 1996 Protocol to The London Convention, 1972

In 1993, the Sixteenth Consultative Meeting of Contracting Parties to the London Convention 1972 adopted resolution LC.48(16) initiating an overall and thorough review of the existing provisions of the Convention and its amendments. It agreed that a Special Meeting or Conference be convened no later than 1996 with a view to amending the Convention through a single instrument. Between 1993 and 1995, the `London Convention 1972 Amendment Group' developed a draft text of the 1996 Protocol to the London Convention 1972. During this period, the Sixteenth, Seventeenth and Eighteenth Consultative Meetings debated the draft provisions. A final review of the text was carried out by the `London Convention 1972 Jurists and Linguists Group' for linguistic and legal accuracy and consistency with other existing international conventions on the protection of the marine environment. In autumn 1996, the `Special Meeting To Consider And Adopt The 1996 Protocol To The London Convention 1972' convened for two weeks. The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 was finally agreed and adopted in London on 8 November 1996.

Adoption of the 1996 Protocol recognised the achievements of the London Convention with respect to prevention and elimination of marine pollution arising from dumping at sea. In addition, acceptance of more stringent marine pollution measures than are otherwise provided for in international conventions appeared timely in light of the oncoming new millennium. This was especially so given the new approaches that have come into currency since the Convention was originally done in 1972, such as those based on the principles of `precaution' and `prevention' for the protection of the marine environment, along with the promotion of sustainable use and conservation of marine resources.

The 1996 Protocol encapsulates the desire of the participating states at the Special Meeting for further international action to prevent, reduce and, where practicable, eliminate pollution of the sea caused by dumping.

Annexes of the 1996 Protocol

There are 29 Articles and three annexes to the Protocol. The Annexes are:

- Annex 1 describes `Wastes or Other Matter That May Be Considered For Dumping';
- Annex 2 covers `Assessment of Wastes or Other Matter That May Be Considered For Dumping'; and
- Annex 3 lists nine articles on `Arbitral Procedure' for the establishment of an Arbitral Tribunal at the request of the Parties in dispute.

Relationship between the 1996 Protocol and the 1972 Convention

The 1996 Protocol retains the objective of the Convention and has captured essential measures propounded by the Convention to prohibit dumping at sea; however, it does so while taking into account developments in technology for waste management that have occurred over the years, along with those anticipated for the future. The 1996 Protocol is in itself a new international treaty on the prevention of dumping of wastes and other matter into the sea. There is no provision for a state ratifying the Protocol to denounce the London Convention, which if otherwise would encourage a state to transfer from the London Convention 1972 regime to the 1996 Protocol regime. Ratification of the Protocol, therefore, does not equate to a denunciation of the Convention, but the 1996 Protocol supersedes the London Convention 1972 as between a Contracting Party to the Protocol which is also Party to the Convention (Article 23). However, once the Protocol comes into force, there will be an indefinite parallel application of the London Convention 1972 and the 1996 Protocol regime by those states which are Parties to either regime respectively.

Unlike other protocols which are normally subsidiary instruments to conventions, the 1996 Protocol is a free-standing instrument. States which are not a Party to the London Convention may thus become Party to the 1996 Protocol without first becoming Party to the London Convention 1972. There is no requirement for non-Party States to the Convention to ratify the Protocol rather than the Convention.

New philosophy enshrined in the 1996 Protocol

The Protocol discourages as far as possible any dumping at sea. Incineration at sea for the deliberate disposal of waste or other matter via thermal destruction is prohibited. Environmentally preferable land-based alternatives are largely encouraged in order to avoid unwanted disposal of wastes or other matter at sea. However, the Protocol recognises that current technology does not permit the disposal of certain categories of waste or other matter on land, and that certain small island-states lack the land-mass for land disposal facilities. In this respect, dumping may be allowed but before such a decision is made, candidate waste or other matter must first undergo a thorough assessment including evaluation of a waste prevention audit, waste management options and identification of waste characteristics. The identified dump-site should also allow field monitoring to ensure that permit conditions are met. All assessments and evaluation should include screening for potential effects that the candidate waste might have on human health and the marine environment. A lengthy, detailed description of the assessment procedures for wastes or other matter that may be considered for dumping is provided at Annex 2 of the Protocol.

- Dumpable wastes or other matter: Annex 1 of the Protocol lists those wastes or other matter that may be considered for dumping. The list has been kept to a minimum taking into account the general philosophy against dumping at sea. The 1996 Protocol has removed the concept of the black, grey and white lists postulated in the London Convention 1972. The Protocol reiterates the Convention's provisions that all material dumped must not pose a serious obstacle to fishing or navigation. In addition, the Protocol urges Contracting Parties to apply the precautionary approach and the polluter-pays-principle when enforcing the provisions of the Protocol.
- Permits: The 1996 Protocol has done away with the issuance of either special or general permits. A Contracting Party may issue a permit to dump only with regard to the substances listed in Annex 1 of the Protocol. An exception is made in cases of force majeure or in circumstances where there is danger to human health or a real threat to vessels, aircraft, platforms or other man-made structures at sea. The Contracting Party may thus issue an emergency permit for the dumping of substances on the Annex 1 list, or for the incineration of wastes or other matter. Notwithstanding those provisions, the Contracting Party may waive its right to issue emergency permits at the time of, or subsequent to, becoming a Party to the Protocol.
- Open for signature: The 1996 Protocol to the Convention on the Prevention of Marine Pollution By Dumping of Wastes and Other Matter, 1972 is open for signature from 1 April 1997 until 31 March 1998. Article 24(2) of the Protocol provides that states may become Contracting Parties to the 1996 Protocol by:

- signature not subject to ratification, acceptance or approval;
- signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
- accession.

Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to such effect with the Secretary-General of the IMO (Article 24[3]).

- Entry into force: Article 25(1) states that the 1996 Protocol will enter into force on the thirtieth (30th.) day following the date on which:
- at least 26 states have expressed their consent to be bound by the Protocol in accordance with Article 24; and
- at least 15 Contracting Parties to the London Convention, 1972 are included in the number of states referred to in subparagraph a).

Under Article 25(2)following the date referred to in Article 25(1)the Protocol shall enter into force for a State Party on the thirtieth day after the date on which the state expresses its consent to be bound in accordance with Article 24.

Implications for Australian oceans policy

The London Convention is a binding legal treaty to which Australia is a Party. Australia has established the necessary legal and institutional framework to satisfy the provisions of the Convention.

However, at the 13th Consultative Meeting of the Contracting Parties to the London Convention, a resolution was adopted requiring the end of dumping of industrial wastes into the sea by the end of 1995. The dumping of industrial waste could not be ceased in Australia by the deadline date, and a new target date of 31 December 1997 was set for Australia. The difficulty with the original date was that Australia had an ongoing requirement to dump jarositea by-product from zinc smeltingin Tasmanian waters. The two-year extension period was needed to allow the company concerned with the smelting operation to develop an alternative to dumping jarosite at sea as it had done for many years. Australia is confident that the new deadline for ending the dumping of industrial waste at sea will be met.

Although the creation of artificial reefs is not a practice undertaken for the purpose of disposing of waste, and therefore not `dumping' as recognised in the Convention, artificial reefs are governed in Australia under the Environment Protection (Sea Dumping) Act 1981 (Cth). The creation of artificial reefs has been identified as an agenda item for the Consultative Meeting of Contracting Parties scheduled for late 1997. There is a possibility that dumping might be proposed under the guise of reef creation. This issue could be especially relevant for the practice of sinking old ships or petroleum platforms in order to encourage tourism through diving, or to create fish habitat. At present, such proposals are dealt with on a case-by-case basis, but the Australian oceans policy will need to recognise any resolution adopted by the Contracting Parties to the London Convention on this issue and ensure that Australian legislation remains consistent with the Convention.

Australian legislation has not always been amended rapidly to provide a complete legislative basis for compliance with the London Convention. Amendments to the Convention that were passed in 1993 were not incorporated into the Environment Protection (Sea Dumping) Act 1981 (Cth) until 1997. The delay of over three years resulted from the amendmentwhich was too small to warrant an amendment of the Act on its owngoing forward to Parliament as part of the departmental `Portfolio Bill'. Such a bill will sometimes need to be held while other, more urgent legislation is addressed. The Australian oceans policy might consider mechanisms to ensure that Australia's legislative framework keeps pace with the dynamic international instruments to which Australia is a Party and which relate to marine and coastal issues.

18.4 Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES Convention)

Done at Washington 3 March 1973

Entered into force 1 July 1975

Entry into force for Australia: 27 October 1976

Regulates trade in species threatened with extinction. The CITES Convention is a detailed instrument that imposes specific obligations upon States Parties.

The Convention has three Appendices each of which contains a list of species which are afforded certain protection from trade and are subject to varying degrees of regulation (Article II). Appendix I includes all species threatened with extinction which are or may be affected by trade. Appendix II includes species which although not now threatened with extinction may become so if trade is not strictly regulated, and other species that must be regulated in order to bring trade in the first category of species in the Appendix under effective control. Appendix III includes all species which any State Party identifies as being subject to regulation within its jurisdiction. Appendices I and II may be amended by the Conference of the Parties or by a vote administered by the Secretariat (Article XV), whereas Appendix III for any Party may be amended by notification to the Secretariat of the alteration by that Party. In such circumstances, the Party concerned is required to submit to the Secretariat all domestic laws and regulations applicable to the protection of the species concerned (Article XVI).

The export, import or re-export of those species listed in Appendix I requires the prior grant and presentation of a permit or certificate issued by the export, import and re-export state. Such permits or certificates must only be issued if certain conditions are met, including inter alia that the trade will not be detrimental to the survival of the species; that the risk of injury, damage to health or cruel treatment of the specimen is minimised; and thatin the case of importthe specimen is not to be used for primarily commercial purposes. The transportation into a state of specimens of any species included in Appendix I which were taken in the marine environment not under the jurisdiction of any state (introduction from the sea) requires the prior grant of a certificate from the state of introduction. Such a certificate can be granted only if the conditions that apply generally to the import of the species are satisfied.

The export of any specimen of a species included in Appendix II requires only an export or re-export permit or certificate respectively. The conditions for the issue of such a permit or certificate are generally the same as for species listed in Appendix I. A Scientific Authority in each Party is required to recommend when measures should be taken to limit the grant of export permits in order to preserve the species. The introduction from the sea of specimens of species listed in Appendix II requires the prior grant of a certificate from the state of introduction. Such a certificate shall only be granted when the activity is not detrimental to the survival of the species involved and when the Management Authority of the state concerned is satisfied that the risk of injury, damage to health or cruel treatment is minimised.

The export of any specimen of a species listed in Appendix III from a state which has included that species in Appendix III requires an export permit. Import states are required to ensure that there is a certificate of origin for species listed in Appendix III and, where the specimen has come from a state which has included the species in Appendix III, an export permit.

The CITES Convention does allow some qualifications with regard, inter alia, to household effects, specimens bred in captivity, and circuses, exhibitions or zoos (Article VII). The Parties are enjoined to take appropriate measures to prohibit trade in violation of the provisions of the Convention including penalisation for trade or possession, and confiscation or return to the state of export of specimens. Parties are required to transmit to the Secretariat periodic

reports on implementation (Article VIII). Parties are also required to designate one or more Management Authorities competent to grant permits or certificates, and one or more Scientific Authorities (Article IX).

Article XIV of the Convention preserves the obligations of Parties deriving from other treaties. In particular it provides that `[n]othing in the present Convention shall prejudice ... the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction'.

Implications for Australian oceans policy

The CITES Convention is a legally binding instrument that imposes specific obligations upon Australia as a State Party to the Convention. These obligations, such as the nomination of species for inclusion in the Appendices, issue of permits, establishment of an appropriate regulatory and enforcement regime, designation of Science and Management Authorities, and periodic reporting must, to the extent that they relate to marine and coastal species, be recognised in Australia's oceans policy.

There are indications that a number of large migratory fish, including southern bluefin tuna, albacore bigeye and a number of shark species including blacktip, dusky, sandbar, ganges, bluntnose sixgill, basking, great white, porbeagle, sand tiger and kitefin may meet the criteria for protection at least under Appendix II; however, as yet there have been no listings. This is because, as with the Bonn Convention, there are a number of practical problems associated with gaining protection for species under CITES. The requirement that a species be nominated by a State Party and accepted by the Conference of the Parties has meant that the species listed are mainly those which do not have major commercial value. There is considerable lobbying by industry for states not to nominate species which are commercially exploited. According to the CITES Secretariat:

Within the CITES forum, however, there has been very little discussion of fisheries matters. Some discussion was generated at the eighth meeting of the Conference of the Parties (Kyoto, March 1992), as a result of the submission of proposals to include populations of herring and bluefin tuna in the appendices. These proposals were withdrawn following brief discussions in the committee stage of the meeting.

Since then, conservation groups and some countries have continued to push for the inclusion of some marine species of commercial value, such as the southern bluefin tuna under Appendix II and the Atlantic bluefin tuna under Appendix I. The proposals have not been successful because of the pressure from states whose nationals commercially exploit the species. For example, there was an attempt by Sweden in 1992 to include Atlantic bluefin tuna on Appendix I of CITES. The proposal was not accepted due to opposition by members of the Commission for the Conservation of Atlantic Tunas. Similarly, an attempt by Kenya in 1994 to get northern and southern bluefin tuna listed on Appendix II of CITES was unsuccessful.

At the Ninth Conference of the Parties in 1994, the need to revise the criteria for listing under the Convention to make the process more objective was recognised. Consequently, Resolution 9.17 was adopted which called on Parties to the Convention and international fisheries organisations to provide available information regarding shark fisheries, management and trade to the CITES Secretariat. This information was to be compiled and presented to the 10th Conference of the Parties in Harare, Zimbabwe in June 1997. However, a resolution sponsored by the United States to establish a Working Group for Marine Species at the 10th Meeting of the Conference of the Parties was not endorsed.

Australia plays an active role in the CITES Conference of the Parties as the regional representative for Oceania on both the Plants and Animals Committees. Australia chairs the Animals Committee. The oceans policy might provide for Australia to use its standing in the institutions of this instrument to strengthen the CITES provisions on relevant marine species.

18.5 Agreement for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment between the Government of Australia and the Government of Japan 1974 (JAMBA)

Done at Tokyo: 6 February 1974

Entered into force 30 April 1981

Bilateral agreement that reinforces the Ramsar Convention as well as extending Australia's commitment to protect migratory birds other than waterfowl, birds in danger of extinction and their environment.

18.6 Convention on Conservation of Nature in the South Pacific 1976 (Apia Convention)

Done at Apia, Western Samoa: 12 June 1976

Entry into force: 26 June 1990

Entry into force for Australia: 26 June 1990

Establishes a broad framework for nature conservation in the South Pacific region, particularly in relation to migratory and endangered species or the preservation and management of wildlife habitat and terrestrial ecosystems. The Parties are required to `encourage the creation of protected areas which together with existing protected areas will safeguard representative samples of the natural ecosystems occurring therein (particular attention being given to endangered species), as well as superlative scenery, striking geological formations, and regions and objects of aesthetic interest or historic, cultural or scientific value' (Article II). The resources of such national parks are not to be exploited for commercial profit, but provision must be made for visitors to enter and use the parks for `inspirational, educative, cultural and recreative purposes' (Article III).

Contracting Parties are also required to maintain a list of species of indigenous flora and fauna that are threatened with extinction, and to protect `as completely as possible as a matter of special urgency and importance the species included in the list ...' (Article V). The Parties are required wherever practicable to conduct scientific research relating to the conservation of nature and are also to cooperate to this end (Article VII).

Implications for Australian oceans policy

The Apia Convention is a binding international instrument to which Australia is a Party. The Convention articulates broad principles for state conduct in the preservation of nature but does not set measurable targets or standards against which a Party's conduct might be measured; therefore, the extent to which Australia may or may not meet its obligations under the Convention remains largely a subjective assessment.

18.7 Convention on Conservation of Migratory Species of Wild Animals 1979 (Bonn Convention)

Done at Bonn: 23 June 1979

Entry into force for Australia: 1 September 1991

Text of the Convention at 19 ILM (1980) 15

Provides a framework for enhancing the conservation status of rare and threatened migratory species.

The Bonn Convention defines `migratory species' as `the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries' (Article I). The Convention establishes three degrees of status for migratory species, `endangered', `favourable', and `unfavourable'. For a migratory species to be considered `endangered' it must be in danger of extinction throughout all or a significant portion of its range. The conservation status of a migratory species is considered `favourable' if the population is maintaining itself on a long-term basis as a viable component of its ecosystems, its range is not being reduced, there is and will continue to be sufficient habitat for the species on a long-term basis, and the distribution and abundance of the species approaches historic coverage and levels as much as is allowed by extant suitable ecosystems and wise wildlife management. The status of a migratory species is `unfavourable' if any of the conditions for its status to be `favourable' is not met (Article I).

The Bonn Convention stipulates obligations that fall upon `range States'. Article I provides that for the purpose of the Convention a range State in relation to a particular migratory species means any State ... that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species'. Appendix I to the Bonn Convention lists migratory species which are endangered. Appendix II lists migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, or which would benefit from international cooperation that could be achieved by an international agreement. Parties are encouraged to conclude `Agreements' for migratory species (Article IV).

Range States of a migratory species listed at Appendix I are enjoined to endeavour to conserve and restore habitats of importance to the species, to take action against activities or obstacles that seriously impede or prevent the migration of the species, and to the extent feasible and appropriate to prevent, reduce and control factors endangering the species (Article III). In general the Convention calls upon Parties to `promote, cooperate in and support research relating to migratory species' (Article II).

The Bonn Convention provides for a Conference of the Parties which must meet at intervals no greater than three years to review the implementation of the Convention and, inter alia, to review and assess the conservation status of migratory species Article VII). The Convention also provides for the establishment of a Scientific Council whose duties may include the provision of scientific and research advice to the Conference of the Parties and in particular recommendations as to which species should be listed in Appendices I or II, together with information on the migratory range of the of such species.

The Convention establishes a Secretariat and provides that `[t]he Parties shall keep the Secretariat informed as to which of the migratory species listed in Appendices I and II they consider they are Range States, including provision of information on their flag vessels engaged outside national jurisdictional limits in taking the migratory species concerned and, where possible, future plans in respect of such taking' (Article VI[2]). However, Article VII provides also that `[n]othing in this Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750C(XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction

Implications for Australian oceans policy

The Bonn Convention is a binding instrument to which Australia is a Party. The Convention imposes few specific obligations upon State Parties. The Convention works mainly as an umbrella instrument that facilitates the establishment of regional Agreements for migratory

species. Although the Convention is a global instrument, there are no regional Agreements to which Australia is a Party. Very few countries outside of Europe and the Americas are Parties to the Bonn Convention.

A condition for favourable conservation status under the Bonn Convention is when a migratory species' `population dynamics data indicates that the migratory species is maintaining itself on a long-term basis as a viable component of its ecosystems'. The particular strength of the criteria for favourable or unfavourable status is that they are not qualified by economic objectives. Furthermore, although the Bonn Convention predates the articulation in international law of most of the principles identified as necessary for effective conservation, these principles are present in the Convention in an implied manner. Conditions three and four required for a favourable conservation status reflect the need for ecosystem conservation. The existence of Appendix II implies a precautionary approach to species protection; therefore the conservation framework under the Bonn Convention can be considered strong. However, despite its legal status and the commitment to it by 49 states, the Bonn Convention has not been used for certain important areas of marine conservation where it might have had some effect; for example, for the conservation of large migratory fish. States have not actively promoted the Bonn Convention. Its profile has been very low in the ranks of international conservation conventions and it is now in danger of being sidelined further by the Biodiversity Convention. Some of the reasons for this are discussed below.

19. Maritime Boundaries and Joint Development Areas

19.1 Treaty Concerning Sovereignty and Maritime Boundaries in the Area Between the two Countries, including the Area known as the Torres Strait and Related Matters (Torres Strait Treaty) 1978

Signed in Sydney: on 18 December 1978

Entered into force 15 February 1985

The Torres Strait Treaty is a definitive maritime boundary delimitation settlement. The Treaty settled the question of sovereignty for all of the islands in the Strait (Article 2), along with the issue of the breadth of the territorial sea (3 nautical miles) for Australian islands in the northern part of the Strait and for the territorial sea of a certain section of the southern coastline of Papua New Guinea (also 3 nautical miles) (Article 3). Although several Australian islands lie near the mainland of Papua New Guinea, the seabed boundary respects Papua New Guinea's concern to ensure its access to the natural resources of the Strait and therefore runs some considerable distance to the south of those Australian islands. However, the Torres Strait Treaty provides for Australian fisheries jurisdiction in an area encompassing the inhabited Australian islands in the north of the Strait. In doing so, the treaty establishes an area where Australian fisheries jurisdiction overlays Papua New Guinean seabed jurisdiction (Article 4). In the overlapping area, jurisdiction over matters other than that pertaining directly to the seabed or fisheries (defined at Article 1), such as marine scientific research or environmental protection, can only be exercised with the concurrence of both Parties. Freedom of navigation and overflight in the Torres Strait is preserved (Article 7), and the Parties are enjoined to cooperate in the provision and maintenance of navigational aids and in the preparation of charts and maps Article 8).

A Protected Zone is established by the Torres Strait Treaty in order principally `to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement' (Article 10). Each Party is enjoined not to prevent or hinder the free movement of the traditional inhabitants of the Protected Zone, but retains a right to apply immigration, customs, quarantine and health procedures. Parties may also discourage acts, that occur under the guise of freedom of movement or traditional practices, that are prejudicial to the effectiveness of immigration, customs, health and quarantine procedures or that are for the purpose of illegal entry or evasion of justice (Articles 11 & 16). The Parties are required to take legislative and other measures to protect the

marine environment in and in the vicinity of the Protected Zone to identify and protect indigenous flora and fauna. They must also consult with each other in order to harmonise their policies and ensure that the implementation of any environmental protection measures is effective and coordinated (Articles 13 & 14). The Treaty also provides for the designation by each Party of one representative to facilitate the implementation of the Treaty at the local level, and for the establishment of an advisory and consultative body known as the Torres Strait Joint Advisory Council (Articles 18 & 19).

The Protected Zone is also an area of joint development for commercial fishing in which the Parties are required to `cooperate in the conservation, management and optimum utilisation of Protected Zone commercial fisheries' (Article 21). The allowable catch of the Protected Zone is determined jointly and is shared between the Parties in accordance with a formula detailed in the Treaty (Article 23). The barramundi fishery near the Papua New Guinea coast is reserved for the sole entitlement of Papua New Guinea and is disregarded in determination of the total allowable catch. The Treaty provides for consistent commercial fisheries legislation and regulations between the Parties, and enjoins them to cooperate in enforcement (Article 28).

Implications for Australian oceans policy

The Torres Strait Treaty is a binding bilateral treaty to which Australia is a Party. The Treaty provisions were in some ways well ahead of their time when they were formulated in the 1970s. The Treaty is sensitive to the needs of indigenous people, provides for public participation, and accommodates traditional fishing. It also takes a cooperative approach to the management of marine areas of shared interest, and, in doing so, respects the spirit of the LOSC in its call for peaceful cooperation and understanding (LOSC, inter alia, Articles 74 & 83, and Part XV), and of Agenda 21. Consequently, the Torres Strait Treaty has faired well over the years.

Article 15 of the Treaty prohibited mining or drilling of the sea bed within the Protected Zone for a period of ten years from the date on which the treaty came into force. The moratorium on such activities was extended for a further three years in 1995 and will therefore expire in February 1998. Any sea-bed exploration or exploitation undertaken by Papua New Guinea in the Protected Zone would of necessity have impact on the overlaying Australian EEZ waters. The Parties will need to decide whether or not to extend the moratorium. If it is not extended, there would seem to be merit in developing a common understanding on how such operations should best be conducted.

The Torres Strait Regional Authority (TSRA) in partnership with the Island Co-ordinating Council (ICC)and with the support of Environment Australia Portfolio Marine Groupadministers a program in and around the Torres Strait Protected Zone called the Strategy for the Planning of Resource Integration in the Torres Strait (SPRITS). The purpose of SPRITS is to ensure that decisions concerning activities in the area support the sustainable use of the region's natural resources; that the delicate island environments, reefs and cays of the area are protected from harm; and that the traditional and cultural links of the Torres Strait Islanders with their environment are respected and maintained. Consultation measures have been taken to ensure public participation in SPRITS.

The Torres Strait Treaty is a good example of how Australia's participation in international instruments creates linkages for a national oceans policy that extend beyond zones of domestic jurisdiction to embrace obligations at the global, regional, andin this casesub-regional level. The Torres Strait Treaty is implemented in Australia by the Torres Strait Fisheries Act 1984 (Cth), and the Torres Strait Treaty (Miscellaneous Provisions) Act 1984 (Cth).

19.2 Memorandum of Understanding between the Government of the Republic of Indonesia

and the Government of Australia Concerning the Implementation of a Provisional Fisheries Surveillance Enforcement Arrangement

Signed in Jakarta: 29 October 1981

This Memorandum established a provisional fisheries surveillance and enforcement arrangement in the maritime areas lying between Australia and Indonesia outside of the territorial sea of each country where the economic or fishing zones of each country would overlap. The Parties agreed that neither would exercise fisheries surveillance or enforcement beyond a provisional fisheries line licensed against fishing vessels harvesting free-swimming species. Jurisdiction over sedentary species was to be in accordance with the agreed sea-bed boundary. The provisional arrangement does not affect arrangements made in 1974 concerning traditional Indonesian fishermen.

Implications for Australian oceans policy

This provisional arrangement will be made redundant when the Perth Treaty 1997 comes into force.

19.3 Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic 1982

Done at Melbourne: 4 January 1982

Entry into force: 10 January 1983

This treaty settles the continental shelf and exclusive economic zone boundary between France and Australia in two areas. The first is seaward of Australian islands in the Coral Sea, Norfolk Island, and other Australian islands on the one hand and of New Caledonia, the Chesterfield Islands and other French islands on the other. The second is seaward of Heard and Macdonald islands and of Kerguelen Islands.

Implications for Australian oceans policy

This legally binding, bilateral Treaty is one of several which if taken together serve to delimit almost all of Australia's maritime borders, and thus it contributes directly to Australia's security.

19.4 Agreement between the Government of Australia and the Government of Solomon Islands establishing Certain Sea and Seabed Boundaries 1988

Done at Honiara 13 September 1988

Entry into force: 14 April 1989

This Treaty settles the continental shelf and exclusive economic zone boundary between Australia and the Solomon Islands in the area seaward of Australian reefs in the Coral Sea on the one hand and Solomon Islands reefs on the other. Article 2 of the Treaty provides for the sharing of any hydrocarbon resources beneath the sea bed that extends across the line of delimitation.

Implications for Australian oceans policy

This legally binding, bilateral Treaty is one of several which if taken together serve to delimit almost all of Australia's maritime borders, and thus it contributes directly to Australia's security.

19.5 Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia (Timor Gap Treaty) 1989

Done over the Zone of Cooperation: 11 December 1989

Entry into force: 9 February 1991

The Timor Gap Treaty creates a zone of cooperation in an area of the Timor Sea to the south of the Indonesian Province of East Timor, and north of the Australian Northern Territory. The Treaty allows the Parties to explore and exploit cooperatively those hydrocarbon resources that exist in an area where the Parties have not yet agreed on the delimitation of a seabed boundary. The seabed boundary immediately to the east and west of the zone of cooperation was settled in agreements of 1971 and 1972. The remainder of the maritime boundaryincluding the EEZbetween Australia and the Republic of Indonesia is detailed in the Perth Treaty 1997 (see below this chapter).

The Timor Gap Treaty details a comprehensive set of rules and guidelines for the exploration and exploitation of petroleum resources. There are four Annexeswhich also form an integral part of the Treatyaddressing: the designation and description of three Areas called `A', `B' and `C'; a Petroleum Mining Code; a Model Production Sharing Contract; and a Taxation Code. The Timor Gap Treaty does not prejudice the position of either Party with respect to delimitation of a permanent continental shelf boundary, and the Parties shall continue to attempt to reach agreement on such a boundary (Article 2[3]).

The Treaty provides for three component Areas of the zone of cooperation. In Area A, the Parties enjoy joint control of exploration and exploitation of petroleum resources and an equal share of the benefits of such activity. In Area B, Australian law applies and Australia pays to Indonesia ten percent of its gross Resources Rent Tax. In Area C, Indonesian law applies and Indonesia pays to Australia ten percent of its Contractors' Income Tax (Article 4).

The rights and responsibilities of the Parties with regard to petroleum exploration and exploitation in the zone of cooperation are also detailed in Part 2 of the Treaty. A regime of notification and work sharing is established for Areas B and C. For Area A, a Ministerial Council has overall responsibility for the exploration and exploitation of hydrocarbon resources. Operational control for Area A is vested in a Joint Authority under the direction of the Ministerial Council. The Petroleum Mining Code details the rights and responsibilities of the Joint Authority and the contracting companies. The Joint Authority is financed from fees collected in accordance with the Petroleum Mining Code. The Treaty also provides for cooperation and coordination on the following matters relating to Area A: surveillance, security, search and rescue, air traffic services, hydrographic and seismic surveys, marine scientific research, protection of the marine environment, exploitation of transboundary resources, and the construction and operation of facilities for the exploration and exploitation of petroleum. Criminal jurisdiction for Indonesian workers in Area A rests with Indonesia, and for Australian workers with Australia (Article 27[1]). Foreign workers come under the jurisdiction of either one or the other of the Parties as decided through consultation. Vessels and aircraft operating in the zone come under the criminal jurisdiction of the flag state (Article 27[3]).

Implications for Australian oceans policy

The Timor Gap Treaty did not settle the sea-bed boundary delimitation between Australia and the Indonesian Province of East Timor. Therefore, the oceans policy might need to consider the future arrangements that will apply for this area. However, in doing so, consideration would likely be given to the general satisfaction of the petroleum industry with present arrangements, and to the fact that the Timor Gap Treaty will remain in force for 40 years and may be extended for successive 20 year periods.

The Timor Gap Treaty represents a novel and innovative approach to overcoming a potentially divisive impasse on maritime boundary delimitation, and gives form to the LOSC provision at Article 83(3) which holds that:

[p]ending agreement ... the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

The enacting Commonwealth legislation for Australia is the Petroleum (AustraliaIndonesia Zone of Cooperation) Act 1990 (Cth) and the Petroleum (AustraliaIndonesia Zone of Cooperation) (Consequential Provisions) Act 1990 (Cth).

19.6 Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries 1997 (Perth Treaty) and Seabed Boundary Agreements 1971 and 1972

Treaty signed in Perth: 14 March 1997

The treaty is subject to ratification and shall enter into force on the date of exchange of the instruments of ratification (Article 11).

Agreements signed: 18 May 1971 and 9 October 1972

The Perth Treaty finalises the EEZ boundary between the two countries and builds on the Agreements of 1971 and 1972 to complete the seabed boundary with the exception of that part of the boundary which would lie in the area covered by the Timor Gap Treaty. The Perth Treaty is especially noteworthy because it establishes an `[a]rea of overlapping jurisdiction' in which Indonesian EEZ (water column) overlays the Australian continental shelf. Article 7 of the Treaty refers specifically to the relationship of the Parties in the area of overlapping jurisdiction. Articles 5 and 6 of the Perth Treaty recognise that in areas of the continental shelf and EEZ respectively, the coastal states may exercise those sovereign rights and jurisdiction accorded coastal states in the LOSC; however, such rights and jurisdiction are subject to Articles 7 and 8 of the Perth Treaty.

Article 7 of the Perth Treaty re-affirms certain coastal state obligations such as, inter alia, the duty to provide `due notice' of the construction of installations and structures and to maintain a permanent means of giving warning of their presence (sub-paragraph 7[e]; LOSC Article 60(3) & applied also mutatis mutandis through Article 80), the general duty to prevent, reduce and control pollution of the marine environment, and the obligation to cooperate in relation to the exercise of their respective rights and jurisdiction (sub-paragraph 7[n]; LOSC Articles 98[2], 123, 197, 200, 201, 202, & 269[e]). However, Article 7 also modifies some of the rights and jurisdiction accorded coastal states in LOSC. Most importantly, Article 7 provides that where the EEZ of one Party overlays the continental shelf of the other, EEZ rights and jurisdiction are constrained to those relating to the water column (sub-paragraph 7[a]). Article 7 also stipulates that the Parties must agree before constructing an artificial island (sub-paragraph 7[c]), and that the continental-shelf coastal state must give three months notice of the grant of exploration rights (sub-paragraph 7[d]).

Article 8 of the Perth Treaty provides that the treaty does not affect the rights and obligations of either Party as a Contracting State to the Timor Gap Treaty. Article 9 of the Perth Treaty directs the Parties to seek agreement on the most effective means of exploiting and equitably sharing any hydrocarbon deposit that straddles the maritime boundaries described in the treaty.

Implications for Australian oceans policy

The unique combination of provisions in the Perth Treaty serves to establish a framework within which the two states can build on their continued goodwill to exercise sovereign rights and jurisdiction within clearly delimited maritime boundaries. The creation by this treaty of an area of overlapping EEZ / continental shelf jurisdiction establishes a zone in which the two states share certain responsibilities, such as for the protection and preservation of the marine environment. There are areas of coral reef in the overlapping zone and these may well require special consideration by both sides. This treaty is a good example of the inescapable international dimension that must be considered in a national oceans policy.

20. Miscellaneous Instruments of Less Immediate Relevance

(List Only)

20.1 International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910

20.2 Declaration recognising the Right to a Flag of States having no Sea-coast 1921

20.3 Convention and Statute on the International Regime of Maritime Ports 1923

20.4 Agreement concerning Maritime Signals 1930

20.5 Agreement concerning Manned Lightships not on their Stations 1930

20.6 Statute of the International Court of Justice 1945

20.7 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision and other incidents of Navigation 1952

20.8 International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships 1952

20.9 International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in Matters of Collision 1952

20.10 Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats 1956

20.11 Geneva Convention on the Continental Shelf 1958

20.12 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas 1958

20.13 Geneva Convention on the High Seas 1958

20.14 Geneva Convention on the Territorial Sea and Contiguous Zone 1958

20.15 Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes 1958

20.16 Convention on Third Party Liability in the Field of Nuclear Energy 1960 (Paris Convention)

20.17 International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers By Sea, and its Protocol 1961

20.18
Vienna Convention on the Law of Treaties 1969
20.19
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970
20.20
Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials 1971
20.21
Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 1974
20.22
Convention on Limitation of Liability for Maritime Claims (Limitation Convention) 1976
20.23
Agreement on the International Association of Lighthouse Authorities Maritime Buoyage System 1982
20.24
International Convention on Maritime Liens and Mortgages 1993
20.25
Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea 1997

21. Some Near Neighbours

21.1 Indonesia

Ratified the United Nations Convention on the Law of the Sea 3 February 1986

Indonesia is yet to issue a comprehensive national ocean policy.

There are certain special characteristics of Indonesia that serve to shape that country's view of ocean affairs. The first, and probably the most important, is that Indonesia is an archipelagic state. Other factors might include that: Indonesia straddles important sea lines of communication; the seas surrounding Indonesia are all semi-enclosed seas with delicate environments; Indonesia shares maritime boundaries with many other countries; and Indonesia has a high population with not much land area, consequently all of its people live near to the coast. It is perhaps surprising, thereforeespecially given Indonesia's ratification of the LOSC as early as 1986 to discover that Indonesia has yet to issue an integrated, comprehensive ocean policy.

However, Indonesia has suggested its priorities for the ocean sector in passing a series of marine-related laws. In 1982the same year that the LOSC was opened for signatureIndonesia promulgated `Law Number 4: Concerning the Basic Provisions for the Management of the Living Environment'. Law Number 4 requires that exploitation of natural resources must occur only in accordance with a comprehensive policy that considers the needs of future generations, and after completion of an environmental impact assessment. Ten years later, the Indonesian Government gazetted `Law Number 24: Concerning Spatial Planning' which supplemented earlier legislation and reflected other concepts enshrined in Agenda 21 and the Rio Declaration on Environment and Development, such as `eco-diversity', the need for `integration', and `sustainable development patterns'. The Basic Pattern of National Development (GBHN) forecasts that for the first Five-Year Development Plan of the Second Long-Term Development (i.e. from financial year 1999-2000 until 2003-2004) `development of marine affairs should focus on the diversification, exploration, exploitation and productivity of marine resources, and the preservation of the ecosystem with (appropriate) application of science and technology'.

21.2 France (New Caledonia)

Ratified the United Nations Convention on the Law of the Sea 11 April 1996

No public declaration of French ocean policy that would apply to new Caledonia was discovered.

The most notable aspect about ocean policy development in France is the experiment in centralisation that took place in 1981. The Government responded to developments in the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the imminent adoption of a new Convention, by forming the Ministry of the Sea (ministrŽ de la mer). The ministry was intended to be an integrated, centralised oceans department that would subsume the rolesand presumably fundsof other ministries. The new ministry encountered resistance from established bureaucratic departments. Ultimately, the experiment was discontinued and ocean responsibilities were once again administered sectorally.

21.3 New Zealand

Ratified the United Nations Convention on the Law of the Sea 19 July 1996

Although New Zealand has not developed an integrated, national ocean policy nor passed an oceans Act, there are certain aspects about the New Zealand Resource Management Act 1991 which might be of interest to those who advocate rationalisation of Australia's oceans legislative framework. Firstly, the Act includes specific programs with implementation timetables. For example, Section 57 required the preparation of a New Zealand Coastal Policy statement which was issued in 1994. The Act required that the first draft of the coastal policy statement be ready with one year of the Act coming into force. Section 58 of the Act details policy areas to be addressed, and a board of inquiry is established to review and report on policy development. These are innovative measures that suggest more chance of success than the rather more vague and discretionary oceans Act 1997 of Canada (see discussion below).

New Zealand's Resource Management Act 1991 was not extended to cover the important marine sector of fisheries, and therefore did not venture its agenda for comprehensive policy development beyond the coastal zone and territorial sea.44 New Zealand did pass specific implementing legislation for the LOSC and in 1996 also passed a new Fisheries Act.

21.4 Papua New Guinea

Ratified the United Nations Convention on the Law of the Sea 14 January 1997

Papua New Guinea is a developing country with strong traditional fishing ties. Australia has managed the Torres Strait area with Papua New Guinea as its partner for over a decade, and the relationship has been a notable success. The two countries developed innovative management and legal regimes that were ahead of their day in many ways. However, to date, Papua New Guinea has not expanded its experience in managing the Torres Strait to embrace the remainder of the marine areas under its jurisdiction. Whilst Papua New Guinea's traditional culture of cooperation and resource sharing undoubtedly holds many lessons for Australia, there would seem to be little at this stage at the level of formal public policy development in the oceans realm from which Australia might draw lessons.

22. Selected East Asian States

22.1 China

Ratified the United Nations Convention on the Law of the Sea 7 June 1996

In recent years, China has awakened to the need for effective marine management. Notably, in 1992, China passed a Territorial Sea and Contiguous Zone Law which recognised a 12 nautical mile territorial sea and adjacent 12 nautical mile contiguous zone measured from the territorial sea baselines. The 1992 law declared that a system of straight baselines would be used for all of China's coastline, and in June 1996, China issued the coordinates of those baselines for much of its coast. Although the 1992 law listed the Spratly Island group (Nansha Qundao) as Chinese territory to which the law would apply, no baseline coordinates were issued for those islands. However, coordinates were issued for the Paracel Islands (Xisha Qundao) and these are controversial both because the Paracel Islands are claimed also by Vietnam, and because the islands have been joined by lines that resemble straight archipelagic baselines rather than straight coastal baselines. China has reportedly developed a draft Exclusive Economic Zone Bill which has been accepted by State Council and which will be tabled in the National People's Congress (NPC) for consideration in about March 1998. Consideration of this Bill is a direct response to China's ratification of the LOSC in June 1996. If the Bill is presented to the NPC there is little doubt that it will pass into law.

Marine management in China is implemented by many agencies at both the central and provincial level. Two of the most important central agencies for marine affairs are the State oceanic Administration (SOA) and the National Environmental Protection Administration (NEPA). However, much of China's development activity is focused on the coastal zone, and marine use conflicts have become commonplace in coastal areas. A proposal for a national coastal zone management law, circulated for interagency review in the 1980s, was not adopted. There is wide belief that the law did not receive support from other Government departments and agencies because they felt that the law threatened their sectoral `mandates'. The SOA has issued regulations to control multiple sea use, but the regulations only have departmental authority and are sometimes disregarded by other Government departments or provincial authorities. In order to overcome this problem, the SOA intends submitting the Sea Use Regulations to State Council in late 1997 for consideration as national law. SOA officials are confident that the regulations enjoy wide enough support that they will not suffer the same fate as the earlier proposal for a coastal zone management law.

In 1996 China both ratified the LOSC and issued a policy statement called China ocean Agenda 21. As the name suggests, China ocean Agenda 21 is a direct response to UNCED and Agenda 21. It is comprehensive document that articulates much of that which would be expected in a national ocean policy, including: sustainable development considerations for marine industry, marine science and technology, ocean and coastal areas, and islands; the conservation and sustainable utilisation of marine living resources; integrated management of coastal waters and waters under national jurisdiction; marine environmental protection; the prevention and mitigation of marine natural disasters; international marine affairs; and public participation.

Since ratification of the LOSC, the Central Committee of the Communist Party of China and the State Council have attached considerable importance to `the maintenance of the country's oceanic rights and interests'. The following tasks have been identified for the Ninth Five Year Plan (1996-2000):

formulating a law on marine management, building up a force for the enforcement of marine legislation, perfecting the marine disaster forecasting and prewarning system, construction of demonstration zones for ocean development in a scientific way, launching a marine water colour satellite, and marking the 1998 international marine year (the 49th UN General Assembly designated 1998 as the `International Year of the ocean').

China confronts many marine problems not shared by Australia, such as those associated with, inter alia, pollution and resource demands stemming from rapid development; a large population; massive population drift into coastal zones; and limited financial resources. However, in other respects, the two countries share common concerns, for example: both confront problems arising from sectoral marine management; both are attempting to respond to LOSC and UNCED rights and responsibilities; both need to accommodate the requirements of State/Provincial authorities; and both have a desire to refine and develop

their national ocean policy. Therefore, China's ocean policy experience to date may well be worthy of further study by those charged with developing Australia's oceans policy.

22.2 Japan

Ratified the United Nations Convention on the Law of the Sea 20 June 1996

There is little evidence that Japan has embraced the UNCED call for integrated marine management. Stubborn adherence to management practices based on traditional fishing rights are anything but anticipatory of new ocean uses. For example, proposals for offshore petroleum exploration or production, marine recreational activities or breakwater construction for port development would all be likely entail compensation payments to fishing interests even if the new activity could be shown to have no adverse economic impact on fishing.

In the field of coastal management, there are four Japanese Government bodies responsible for coastal matters. In 1972, one of these bodiesthe Ministry of Constructionprepared some guidelines for drafting a coastal zone management law. At that time, the other ministries opposed the initiative because they considered that the existing laws were adequate to handle any anticipated problems. The fact that different national laws apply to certain sections of the coast depending on which government agency is designated as the responsible authority for any particular area, combined with the complicating involvement of prefectural law, city law, and laws for special areas, would seem to suggest a strong case for adopting a more integrated, streamlined approach. However, Japan has moved in the other direction and the Ministry of Communications now agrees with the other ministries that there is no need for streamlining the present complex arrangements. Such an attitude is consistent with Japanese ocean policy development since the 1940s which has generally been reactive and contained within agencies rather than coordinated across agencies responsible for different sectors of ocean activity.

22.3 Korea

Ratified the United Nations Convention on the Law of the Sea on 29 January 1996

In the field of ocean policy development, the Republic of Korea is an interesting and potentially instructive case study. Korea has moved through quite different, readily identifiable stages in its quest for the most suitable legislative and institutional arrangements for marine and coastal management. These arrangements anticipated approaches that are presently being taken by other countries, and they are of interest primarily because in Korea's case, each stage is understood to be part of an evolutionary cycle leading ultimately on 8 August 1996 to the creation of the integrated, central Ministry of Maritime Affairs and Fisheries (MOMAF).

In the last 50 years or so, Korea's ocean policy has evolved through three distinct stages:

- the `rudimentary stage' (1945-1961) which was an inward-looking era with priority on exploitation of coastal zone resources, maritime boundary delimitation disputes with Japan, and security concerns with respect to North Korea;
- the `formative stage' (1962-1981) during which time focus shifted to external issues. Korea expanded its marine scientific research capability, developed ocean industries, modernised the fishing industry, and established a legal regime for the continental shelf; and
- the `internationalisation stage' (1982 to the present) when perception of national interest grew from concentration on coastal areas to encompass pelagic oceans. Environmental issues became increasingly important, especially for the coastal zone, and governmental reforms embraced principles such as deregulation, liberalisation, and globalisation.

Korea's approach to marine management changed as perception of its interests evolved through each stage.

In the `rudimentary stage' Korea was concerned with matters close to home, particularly with the exploitation of marine living resources. In 1952, The Presidential Proclamation of Sovereignty over Adjacent Seas claimed a zone of Korean jurisdiction that was primarily directed at protecting marine living resources from being taken by Japanese fishers. An initial attempt to bring marine affairs largely under the administration of a single Government departmentinitially the Ministry of Maritime Affairs and then the Marine Administrationended after a military coup in 1961. Subsequently, marine affairs were administered sectorally.

During the `formative stage' policies to encourage ocean industries laid foundations that led to Korea becoming the second-largest shipbuilding country in the world. In 1973, the Korea ocean research and Development Institute was established, and this institute continues to lead Korea's efforts in marine scientific research and technology development. Modernisation of the fishing industry also resulted in Korea becoming the third-largest distant water fishing nation. In 1970, Korea, Japan and Taiwan all passed sea-bed laws, and altogether they established a total of 17 sea-bed mining zones. To the present, only four of these zones remain uncontested.

In the `internationalisation stage' Korea began to develop a legislative foundation for marine management. Sixty-six marine-related laws were passed in the decade of the 1980s. In the 1970s, two marine environmental lawsthe Environment Preservation Act (EPA) and the Marine Pollution Prevention Act (MPPA)were developed in response to pressures arising from public concern over the negative impacts of some coastal and marine uses, such as land reclamation and oil spills. The EPA was later developed into a series of other Acts in order to cater for Korea's commitments under the increasingly complex international legal order. The MPPA was amended in 1986 after Korea acceded to MARPOL 73/78, and again in 1991 to satisfy Annex V of MARPOL 73/78.

In 1987, the Marine Development Basic Act (MDBA) was passed in order to help provide policy direction for Korea's marine affairs, and to overcome inter-ministerial conflicts. The Act was administered by the Ministry of Science and Technology (MOST) and provided for the establishment of a Marine Development Committee (MDC) to be chaired by the Prime Minister. However, MDC was not successful because it was top-heavywith the direct participation of 12 ministers and only seven marine or administration specialistsand encountered turf protection from the various ministries; the MOST lacked an operational arm to support the MDC; and neither the President nor the Prime Minister recognised any need for a marine development plan.

Finally, in the 1990s, Korea shifted emphasis in public marine management from coordination to centralisation. On 8 August 1996, Korea established the Ministry of Maritime Affairs and Fisheries (MOMAF) which integrated ten marine-related Government organisations, including the Maritime and Ports Administration, the Fisheries Administration, the Maritime Police Administration, and the Hydrographic Affairs Office into the one `super agency'. The newly created ministry has a newly formed Office of Marine Policy with a policy agenda that includes tasks such as development of an ocean policy, restoration of fisheries productivity levels, to create and sustain vital, clean oceans for future generations, and introduction of an integrated coastal-zone management system.

Only one year has passed since the establishment of the MOMAF and there are still many unknowns about how successfully such a centralised marine policy structure might work. MOMAF is grappling with the task of integrating staff from the various agencies it has subsumed into a single ministry. However, since its formation the new ministry has overseen the introduction of a new law promoting port development, and has begun work on an integrated coastal-zone management law.

Korea has attempted three distinct approaches to marine policy implementation that are also generally representative of the approaches taken by other countries, namely the `sectoral

approach'; the `coordinated approach'; and now the `centralised approach'. In Korea's case, the institutional arrangements of each approach form a hierarchy of increasing centralisation. Whether the Korean experience will be repeated in other states as they awaken to the needs of effective marine management, may well depend on the success or otherwise of Korea's experimentation with a powerful, centralised oceans ministry.

22.4 Malaysia

Ratified the United Nations Convention on the Law of the Sea on 14 October 1996

Malaysia has not yet gone through the process of developing and articulating an integrated ocean policy. However, analysis of trends and developments in several marine-related sectors reveals that Malaysia is conscious of the importance of the oceans to its development plan `Vision 2020' and the need for such development to consider the issue of sustainability. The Maritime Institute of Malaysia (MIMA) and others have criticised Malaysia's present arrangements as being overly fragmented and requiring improved coordination and integration. However, developments in public policy formulation, such as the new National Environmental Policy, the Industrial Master Plan, and the National Agriculture Policy, together with comprehensive legislation such as the Environmental Quality Act 1974, and research and advocacy activity by organisations such as MIMAunder the Department of Transportsuggest that awareness of the importance of integrated policy is growing in Malaysia.

The fisheries sector in Malaysia is considered to have potential for expansion but the scope for development includes only the deep-sea fishery and aquaculture. The coastal fishery has already been significantly depleted through over-exploitation. At present, approximately 90% of Malaysia's fish production comes from the marine fishery, while aquaculture contributes less than 10%. However, the Malaysian Government has implemented incentives such as: according the aquaculture sector `pioneer status'; granting investment credits; and providing export incentives to help promote development of aquaculture.

In Malaysia, all oil and gas production comes from offshore. Malaysia is self-sufficient in crude oil, and is a net exporter of energy resources which contribute significantly to the country's economic output. Therefore, offshore petroleum interests would be important actors in the process of developing an ocean policy for Malaysia.

The Malaysian Government has encouraged development of shipping, ship building and port development, and has stated a desire for Malaysia to become a `major maritime hub for the Asia-Pacific region'. Although the lead agency for management of the maritime transport sector is the Ministry of Transport, more than nine other ministries are involved in administering the sector, and implementation of policies and regulations is fragmented. However, there is a discernible overall policy to encourage domestic shipping and this can be seen through such Government measures as: the establishment of a shipping fund to help finance local ship ownership and ship building; import tax exemptions; accelerated depreciation for ships; tax exemption for shipping business; and tax exemption for ships' crew. Planning and policy implementation for port development is the responsibility of three Ministries, the Ministry of Transport, the Ministry of Finance and the Prime Minister's Department (Economic Planning Unit). An important recent policy initiative has been the privatisation of principal ports such as Klang, Penang, Johor, and Bintulu in order to improve efficiency. The port of Klang has been identified as the main hub port for Malaysia and as a regional hub port for container traffic.

There is evidence that the Malaysian Government recognises protection of the environment to be important. The Seventh Malaysian Plan (for developmentfrom 1996 to the year 2000) provides for the development of a National Coastal Zone Management Policy (NCZMP) which is to detail principles and guidelines for the ecologically sustainable development of coastal areas. The NCZMP will complement the National Environmental Policy and associated Action Plan. In July 1997, the Government also adopted the ISO 14 000 standard for environmental management systems as the national standard which all corporations will be encouraged to

achieve. Further, marine parks and prohibited fisheries have already been establishedunder the Fisheries Act 1985around 38 islands (for a breadth of two nautical miles from the low-tide line). However, overlapping jurisdiction between the Federal and State Governments, combined with growing developmental pressures, inadequate monitoring, the lack of zoning to control use conflicts, and a lack of funding for conservation and education activities have all hampered the integrated management of the marine parks and threaten their ultimate success.

Malaysia has not yet recognised a need for the development of an integrated ocean policy. However, those policies and programs relating to the ocean which have been established have not been developed independently; rather, they contribute to the overall Malaysia Plan for development. The Malaysia Plan does provide a structure for coordination of sectoral policies, but the present arrangement has been criticised for failing to achieve the necessary level of integration for good ocean management.

22.5 Singapore

Ratified the United Nations Convention on the Law of the Sea 17 November 1994

Singapore has not developed an integrated ocean policy. One factor which may contribute to the absence of such a policy is the special geographical circumstances of Singapore. The surrounding waters of near neighbours constrains the extent to which the city-State can take advantage of the maritime zones of jurisdiction provided for in the LOSC. Thus, there is no large maritime estate beckoning the attention of policy-makers.

Singapore has generally embraced a regulatory approach to environmental management. The city-State has a complex set of laws and regulations based on the polluter-pays principle which is enforced rigidly and effectively. Singapore has had no major pollution incident, and regular monitoring of key pollution indicators has shown that Singapore enjoys impressive air and water quality standards. The unitary system of government and small size of the country may have helped Singapore to achieve a high degree of integration in environmental management that is consistent with Agenda 21. On the other hand, significant environmental policy and plansthat may entail the complete relocation or even closure of certain commercial activitiesare formulated and implemented by Government authorities without any public consultation or participation. Such an approach may be at variance with the consultative and inclusive methods advocated at UNCED but it seems to have been effective nonetheless.

23. Other Countries of Interest

23.1 Canada

Signed the United Nations Convention on the Law of the Sea 29 July 1994; not yet ratified, believed to be preparing for ratification

Although Canada is a long way from Australia, and confronts special marine circumstances not shared by Australia, in many ways Canada has experience in the realm of ocean policy formulation from which Australia might learn. Both countries have long coastlines and have expansive maritime zones in which they exercise certain sovereign rights and exclusive jurisdiction. Canada has attempted to articulate a national ocean policy on several occasions, but the promise of these policy statements did not materialise as convincingly as many had hoped. However, in January 1997almost ten years after the initiative was announced as part of an ocean policythe Canadian oceans Act was passed. On this occasion however, there is a conspicuous absence of any talk of a national ocean `policy'; rather the new Act provides for development of a new oceans `Strategy' for the 21st century.69 This brief discussion reviews Canada's efforts to develop a comprehensive ocean policy, and reflects on certain aspects of those efforts in order to identify possible lesson for Australia.

Canadian Governments have recognised the need for public policies relating to ocean resources for over two hundred years. In 1786, Nova Scotia and New Brunswick passed legislation to protect salmon stocks by regulating river fishing. In 1846, the New Brunswick Government received a report that overfishing and milldam construction had depleted salmon stocks, and further laws were passed in 1851 that authorised the appointment of fisheries officers. Awareness of sea resources increased around the world following the second world war and the Truman Proclamation of 1945. In Canada, the voyage of the United States vessel Manhattan through the North West passage in 1969 aroused awareness of the need to assert sovereignty over Arctic waters and, in 1970, `The Arctic Waters Pollution Prevention Act' was unilaterally declared and applied to ships within 100 nautical miles of the Arctic coast. Lee and Fraser suggest that `[i]n the 1970s, Canada looked to its ocean frontiers and, in a functional, assertive fashion, set out to redefine the limits of its sovereignty'. The oil crisis of the 1970s also encouraged government to address the potential for hydrocarbon extraction from northern regions.

Consequently, in 1973, the Minister of State for Science and Technology announced Canada's first national ocean policy.

The policy was based on two premises. First, Canada must develop and control within its own borders the essential elements needed to exploit offshore resources. Second, it must increase its knowledge to operate both on and below ice-covered waters, and in the process, assert sovereignty in Arctic waters'.

The articulated policy was formulated by government and reflected a concern with resource development and protection.

In 1986, the Federal Government sponsored an `oceans forum' at the Institute of ocean Sciences at Patricia Bay, British Columbia `to discuss opportunities and strategies for developing the nation's oceans economy'. `Representatives from industry, universities and government'reviewed the findings of a survey of government programs and activities related to the oceans. They were informed that there were `some seventy-five oceans-related programs implemented through fourteen departments and agencies with participation of more than 13 000 person years and with funding amounting to $1.3 billion annually'. They resolved that ocean activities in Canada should develop in accordance with a `comprehensive oceans Strategy'. In September 1987, the minister for Fisheries and oceans released the ocean policy for Canada: A Strategy to meet the Challenges and Opportunities on the oceans Frontier.

The 1987 Canadian ocean policy specified four main goals, they wer

- prosperous, dynamic ocean industries which offer secure, steady employment and economic development benefits, particularly for Canada's coastal regions;
- world-class expertise and capability in oceans-related science, technology and engineering, which together form the basis for future economic development of the oceans;
- ocean resources and an ocean environment soundly managed and protected for future generations of Canadians; and,
- assertion and protection of Canada's sovereignty and sovereign rights over its ocean resources.

Many institutional arrangements were established in the late 1980s to improve communication between policy actors, and the coordination of Canada's ocean policy. For example, the minister for Fisheries and oceans, who had a `legislative mandate to coordinate all programs and activities related to oceans' established an ad hoc Minister's oceans Group `to advise on the best mechanism for ongoing industry consultation'. The Interdepartmental Committee on oceans was established, chaired by the deputy minister of Fisheries and oceans, to `improve interdepartmental coordination and raise the profile of government's oceans-related efforts'. A National Marine Council was also created, `the membership of which will be drawn from the

major sectors and constituencies of the Canadian ocean economy'. The council was to be `a forum for `communicating and harmonising views' of various interests and `to inform and advise the Minister on marine issues and ocean policy, including economic development, science and technology, sovereignty, and the environment as they relate to Canada's oceans in the short and long term'. In 1989, the prime minister appointed Alan Beesley, QC as `ambassador of marine conservation', the Canadian Law's Offshore Application Act was passed, and a draft oceans Act created.

High expectations were engendered by the ocean policy articulated in 1987. In 1988, Crowley concluded that:

it is quite obvious that government has recognised the need to foster coordination of federally-sponsored oceans-related programs, as well as the need to involve the private sector in policy making ... As demonstrated by the various initiatives to be implemented, Canada also recognises the need to stimulate national awareness of its ocean frontiers, to establish a conducive legal framework, to foster policies favourable to industrial development and to ensure that both living and non-living ocean resources are managed and developed in an environmentally sound manner.

Lee and Fraser suggested that `[b]y adopting a coordinated and forward-looking approach to ocean issues, the (1987 ocean) policy recognises the maturity of the oceans sector and will promote even greater success in Canada's oceans-related endeavours'.

However, the National Marine Council ceased meeting in 1990 and was disbanded in the 1993 federal budget; the Interdepartmental Committee on oceans `has not met regularly since 1990'; the Canada oceans Act was not passed for another ten years; and, in 1991just four years after the policy was announcedthe Prospectus of the Canadian Marine Policy and Strategy Project argued that `[a] key challenge facing Canadians today is to find the means of formulating an integrated and comprehensive national marine policy'. In 1994, Crickard also contended that Canada needs `a comprehensive national ocean policy'.

Clearly, something had gone wrong. Australia might benefit from further study of Canada's experiences in ocean policy development during the 1980s. The absence of formal Government articulation of policy rarely equates to an absence of policy per se. Governments do not make policy decisions at random with no consideration of their overall effect. Public policy can be determined through analysis of legislation, Government rhetoric, the practice of relevant stakeholders, other associated policy statements, financial allocations, and other factors. Canada took a forward-looking, planning approach to policy development in the 1980s, and might well have benefited from further analysis of how its ocean policy had evolved into the form it took prior to articulation of the 1987 policy statement. In adopting such an approach, key policy actors would have recognised that public policy is dynamic, and no policy realm unfolds as neatly as might a `program' or a `plan'. Political decision-makers might also have determined the nature of the existing `policy culture'that web of expectations and values shared by stakeholdersthat works to determine the limits of what can be achieved in any policy realm at any given time. Such an approach might have helped to avoid that sense of disappointment felt by some Canadians over the failure of initiatives announced in the 1987 policy statement. Has Australia devoted enough time and resources to studying the nature of its existing oceans policy, its oceans policy culture and its oceans policy history?

In January 1997, the oceans Actfirst promised in 1987came into force. Such legislation is noteworthy because few countries have so boldly attempted to form an umbrella oceans law. The Department of Fisheries and oceans (DFO) contends that `[t]he Act entrenches an ecosystem approach to oceans activities, based on the principles of integrated resource management, sustainable development, and the precautionary approach. The Act also provides the Minister of Fisheries and oceans with a mandate to lead and facilitate Canada's oceans Strategy'. A 1996 amendment to the Canadian Auditor General Act requires that all federal departments must table a sustainable development strategy before Parliament by December 1997. The DFO is presently engaged in wide consultation as part of the process of formulating its new strategy. Other legislative changes of relevance to marine and coastal

management in Canada include: a planned overhaul of the Canada Shipping Act; planned amendments to the Navigable Waters Protection Act; and a proposed new Fisheries Act.

However, the 1997 oceans Act has been criticised for being to general and lacking firm commitments or deadlines;failing to embrace other important guiding principles such as pollution prevention, polluter pays, public participation, community-based management, intergenerational equity, and indigenous rights; failing to achieve the level of integration promised in the Act; and allowing too much political discretion too ensure effective implementation.

Canada has a long, rich history in ocean policy implementation, and continues to explore new directions in this field. Australia might benefit from further study of the lessons that Canada has learnt along the way.

23.2 The Netherlands

Ratified the United Nations Convention on the Law of the Sea 28 June 1996

During the initial phase of the Netherlands North Sea policy development (1982-1988) management problems relating to matters such as vessel traffic management and offshore oil and gas, were tackled individually and pragmatic solutions were sought for immediate problems. The Netherlands North sea policy realm during that phase was sectoral and decisions were made on a case-by-case basis.

A second phase in the Netherlands ocean policy began in 1988 when the Government announced a plan to `harmonise' decision making on marine matters. The following goals were set for each of the items listed:

- goal setting = `there is a need for a more goal-oriented approach';
- managing the various interests at sea = `a multi-resource approach is needed';
- future uses = `a greater anticipation on future uses is needed'; and
- implementation of policies = `operational coordination should increase'.

The Netherlands has adopted a three-tier coordinating framework for ocean management:

- the North Sea Committee of the Public Works Council;
- the Interdepartmental Coordinating Committee for North Sea Affairs (ICONA); and
- the Ministerial Coordinating Committee for North Sea Affairs (MICONA).

The Netherlands has also established an all-party Parliamentary Commission for the Seas, and a coordinating minister for North Sea Affairs (the Minister for Transport and Public Works).

All of the institutions established by the Netherlands Government for implementation of ocean policy at the strategic level emphasise coordination. The Government's policy articulation stresses `harmonisation' and `multiple-use' planning. However, this approach has been criticised by some who point to continuing oil slick problems, dead birds and seals, diminished sea grass beds, increased incidences of disease, and a decline in fish stocks as evidence that a new approach is needed for ocean management in the Netherlands.