



Government of Niue

GOVERNMENT OF NIUE

**REVIEW AND ANALYSIS
OF LEGISLATION**

INTERNATIONAL WATERS PROGRAMME

(Phase 2 Part 1)



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TABLE OF ABBREVIATIONS

CBD	Convention on Biological Diversity
DAFF	Department of Agriculture, Forestry, and Fisheries
ED	Environment Department
GEF	Global Environment Facility
IWP	International Waters Programme
NCSD	National Council for Sustainable Development
OEA	Office of External Affairs (Niue)
SPREP	South Pacific Regional Environment Programme

1. BACKGROUND

1.1 The International Waters Programme (IWP)

In October 1995 the 8th SPREP meeting endorsed a proposal to prepare a Strategic Action Programme for International Waters (IWP). At the request of the South Pacific Forum the development of the proposal has been coordinated by SPREP. Throughout 1997 the IWP was formulated with funding assistance provided by the Global Environment Facility (GEF).

1.2 The Activities of the IWP

The IWP has sought to combine the following activity areas –

- Integrated conservation and management of coastal resources, including fresh water resources
- Integrated conservation and sustainable management of oceanic resources
- Prevention of pollution through the integrated management of land based or marine based wastes
- Monitoring and analysis of shore and near-shore environments to determine vulnerability to environmental degradation

These activities reflect the National Environment Management Strategies prepared for Pacific Island countries between 1990 and 1996 which describe strategies for achieving environmental objectives relating to –

- The integration of environmental consideration in economic development
- Improved environmental awareness and education
- The management and protection of natural resources
- Improved waste management and pollution control

1.3 Advancing the IWP in Niue

It is sought to advance the IWP in Niue and to facilitate the achievement of the above objectives by –

- (a) Undertaking a review of natural resource and environment related laws in Niue.

This has been completed and is the subject of a separate Report. The relevant features of this Review have been re-produced in this Report

- (b) An analysis of Niue's legislation to determine gaps, overlaps and conflicts. This analysis involves –

- An analysis of the strengths and weaknesses of existing legislation and proposed laws (Bills)
- An assessment of the effectiveness of the legislation in supporting the government to responsibly manage the environment and ensure the sustainable use and conservation of natural resources
- An assessment of the efficacy of the legislation as a means of pursuing responsible environmental management
- The identification of barriers to the effective implementation and enforcement of existing legislation
- The identification of how particular gaps and areas of overlap and conflict can be addressed (including amendments to existing legislation or the enactment of new laws).

These matters are the focus of this Report. They are considered in the context of 13 areas of relevance.

2. RELEVANT LEGISLATIVE AREAS

2.1 Community involvement in coastal fisheries management

Relevance to this Review

The IWP focuses on the involvement of the community in the formulation and implementation of laws relating to the conservation and protection of marine areas, and also on the recognition of traditions, culture and traditional authority.

Current state of Niue's laws

The Niue Village Councils Act is out dated and its effectiveness is affected by references to former offices and the previous colonial authority and administration. There are concerns about the means by which by-laws can be brought into force. Other aspects of this law mitigate against making use of it to provide for the effective management of marine protected areas in villages.

The Domestic Fishing Act makes clear provision for the declaration of marine reserves but little or no provision for the management of reserves after their establishment. The concept of a reserve under section 7 of the Act seems to be based upon the declaration of a "no-go" zone, rather than the establishment of an area within a village in which a flexible and effective management regime may be applied. There are aspects of the enforcement of such regimes that need to be addressed. There is some doubt about the application of aspects of a management regime to parts of the coastal zone in aid of the protection of the marine environment.

Legislative Reform Options

There is merit in considering the addition of provisions to the Domestic Fishing Act to address the deficiencies that are noted above. These could facilitate –

- The retention of the concept of a marine reserve
- The addition of a concept of village based marine protected areas where management regimes are applied under village by-laws
- The inclusion of aspects of the management of the coastal zone to ensure the proper management of the adjoining marine environment
- The clarification of enforcement procedures
- Clear procedures for the formulation of management plans and the making and ratification of by-laws
- Access to protected areas for research and conservation purposes

2.2 Marine Pollution

Relevance to this Review

Applying criminal sanctions to persons and vessels responsible for causing pollution from oil spills and discharge is a critical feature of a nation's environment protection regime. Many international conventions applying in the fields of shipping and environment protection require adequate legislation in this regard. The capacity of government agencies to respond to pollution emergencies arising from oil spills is also an important obligation.

Proposed amendments to the Protocol to the SPREP Convention dealing with responses to marine pollution incidents would necessitate the inclusion of a number of matters in relevant domestic laws in Niue. The SPREP Protocol states the need for co-operation in combating pollution in cases of emergency and requires Parties to take all necessary measures to prevent, reduce and control marine pollution, or the threat of pollution.

Issues raised in consultations

- There is an expectation that the number of fishing vessels operating near – shore shall increase dramatically following the commissioning of the fish processing plant. The possibility of significant pollution emergencies is seen as requiring this area of the law to be treated as a priority.
- The model Marine Pollution Prevention Bill has been considered but is regarded as being too cumbersome and unlikely to be easily applied in Niue. Significant re-working of the draft has been requested to make it applicable to the circumstances in Niue.

Current state of Niue's laws

No adequate laws relating to marine pollution, and the responses to it, seem to exist in Niue.

Legislative Reform Options

The model Marine Prevention Bill can form the basis of effective legislation in this area and thereby fill a significant gap in Niue's laws. It must be comprehensively reviewed and revised to be made applicable to Niue's circumstances.

2.3 Transboundary movements of hazardous wastes

Relevance to this Review

The *Basel Convention* regulates the movement of hazardous wastes and other wastes on a global basis. The Convention specifies the criteria for assessing hazardous wastes in its annexes. The Parties are obliged to prohibit the export of hazardous wastes or other wastes if the State of import does not consent to the specific import, or has prohibited the import of such wastes. The Convention prescribes measures to apply to the proposed import or export of wastes. Parties are required to implement their own national legislation regulating hazardous wastes and to inform the Basel Secretariat of such information. A competent authority and a focal point must be designated.

Under the *Waigani Convention* each Party must ban the importation of all hazardous wastes and radioactive wastes from outside the Convention area. They must also prohibit the dumping of hazardous wastes and radioactive wastes at sea. The Parties are to co-operate to ensure that no illegal import of hazardous wastes and radioactive wastes from a non-Party enters areas under the jurisdiction of a Party.

The scope of the *Waigani Convention* includes radioactive wastes and domestically prohibited goods. It prohibits the import of hazardous wastes into its Convention Area.

Current state of Niue's laws

There are no laws in Niue which effectively deal with the issue of transboundary movements of hazardous wastes into Niue or through Niue's maritime zones.

Legislative Reform Options

This deficiency should be addressed by appropriate amendments to the Territorial Seas legislation. As noted in this Report these changes could also deal with the issues of dumping and incinerating wastes at sea.

A draft amending Bill is suggested in Annex 2.

The movement of wastes into and through Niue could otherwise be dealt with by prescribing wastes to be prohibited substances under the proposed Biosecurity law and the Customs Act.

2.4 Dumping of wastes at sea (including ballast and wastes from vessels)

Relevance to this Review

Proposed amendments to the Protocol to the SPREP Convention dealing with the dumping of wastes at sea may necessitate the inclusion of the following matters in relevant domestic laws in Niue -

- Adoption of the Precautionary Principle
- Reverse listing approach – having a “White List” of relatively inert materials that may be considered for dumping, rather than a “Black List” of prohibited materials
- Standardisation of Annexes and their contents
- Adoption of the Polluter Pays Principle
- Standardisation of definitions
- Provision for prohibition of incineration of wastes at sea

Issues raised during consultations

- Again it was noted that the increase in the number of fishing vessels likely to be operating in Niue’s waters makes this a priority area for law reform.

Current state of Niue’s laws

There are no laws in Niue which deal effectively with the issues of dumping and incinerating wastes at sea. The draft Biosecurity Act would prohibit the dumping of wastes and discharge of ballast waters by vessels. This is seen as important due to the anticipated increase in the number of fishing vessels operating in Niue’s coastal waters to serve the fish processing plant.

Legislative Reform Options

The issue of dumping and incineration of wastes at sea might be best dealt by amendments to the Territorial Seas legislation. This could be done in conjunction with amendments needed to regulate the transboundary movements of hazardous wastes.

2.5 Dumping of wastes and littering (on-shore)

Relevance to this Review

Controls over the dumping of wastes on land and in relation to littering are important features of an environmental protection regime. The effect on coastal waters is evident in very many countries where such activities are not effectively controlled.

Current state of Niue's laws

It is difficult to find any effective provisions in Niue's laws which deal with controls over littering and the dumping of wastes on land. Such matters are an appropriate function for the newly created Environment Department to address and regulate.

Legislative Reform Options

Comprehensive littering and anti-dumping Regulations could be made under the Environment Act. Some key features of these are identified in Annex 3.

2.6 Climate Change/Protection of the Ozone Layer

Relevance to this Review

There is a clear obligation under the Montreal Protocol to enact legislation to impose a regulatory regime in relation to ozone depleting substances. The following are matters about which legislative provision is required to give effect to Niue's obligations in relation to ozone depleting substances -

1. Prohibitions on Importation
2. Prohibitions on the Importation of Certain Goods
3. Exemptions in relation to imports
4. Prohibitions on Exportation
5. Prohibitions on Manufacture
6. Prohibitions on Sales
7. Exemptions in relation to sales
8. General Principles to be applied in relation to permits

9. Quarantine and pre-shipment permits
10. Medical permits
11. Base year permits
12. General provisions in relation to permits
13. Goods for which no permit may apply
14. Environment Officers
15. Powers of Environment Officers
16. Seizure of substances and goods
17. Forfeiture of seized substances and goods
18. Call-up of substances and goods
19. Offences and penalties

Issues raised during consultations

- Niue has recently assumed the obligations under the Protocol.
- Some confusion has arisen concerning the application of New Zealand's laws in this context. It is now appreciated that those laws would have little relevance to Niue in the context of the Protocol, and that appropriate regulations are needed.

Current state of Niue's laws

There is no law in Niue currently giving effect to these matters.

Legislative Reform Options

The deadlines for making appropriate legislative arrangements in this area require that these matters be given a degree of priority

2.7 Environment Impact Assessments

Relevance to this Review

The effective assessment of environmental impacts from development activities is a key feature of an environmental protection regime.

Issues raised during consultations

- It was noted that the new Environment Act does not make substantive provision in relation to EIA's. This is to be left to Regulations.
- It was also noted that the newly established fish processing plant has proceeded with no formal environmental assessment.

Current state of Niue's laws

As noted above the new Environment Act envisages that EIA Regulations will be made to provide a legal foundation to such a regime. Interestingly the Tourist Authority Act makes reference to the need for all tourist developments to be assessed in this way, but no substantive provision is made.

At one time an environmental planning law was proposed, and in fact drafted for Niue. This did not find favour with its principal agency and is not proceeding. Some appropriate provision could instead be made in EIA Regulations.

Legislative Reform Options

Formulating appropriate EIA Regulations should be a priority. Such laws exist in other jurisdictions. Interestingly however few Pacific island countries can boast the enactment and effective application and enforcement of such laws. Whilst their drafting may be relatively easy, the difficulties in getting them promulgated and then applied when necessary should not be underestimated.

2.8 Protection of whales

Relevance to this Review

Niue shares the privilege of visits by migratory whale species with other places in the region. It is important that laws guarantee the safety of whales and provide an environment that is conducive to their periodic migration through Niue's waters.

Current state of Niue's laws

The only law sighted that has application in this context is the prohibition on the export of whales under regulation 3 of the Domestic Fishing Regulations.

Legislative Reform Options

Guidance might be taken from other jurisdictions as to the most appropriate regulatory regime to be applied to the protection of whales in Niue waters. The Kingdom of Tonga may have relevant laws, and regard may be had to the laws of the Australian States of Victoria and Queensland. Consultations with commercial and community representatives in Niue should be undertaken. Annex 4 and Annex 5 contained relevant information taken from Australian Government websites.

2.9 Protection of migratory species

Relevance to this Review

The protection of migratory fish species is an area that is becoming increasingly important in the region. Niue shall need to have the capacity to meet its obligations and to conserve its resources.

Current state of Niue's laws

Regulations may be made under the Territorial Seas and EEZ Act on a broad range of issues, including matters for the implementation of UNCLOS, the UN Fish Stocks Agreement and the WCPT Convention. Regulations may apply to Niuean nationals and Niuean registered vessels fishing on the high seas or in the waters of other nations. They may also implement any decisions of international and regional fisheries management bodies.

Legislative Reform Options

With the assistance of regional bodies, consideration should be given to meeting Niue's obligations to conserve migratory fish species, and to otherwise implement international and regional fish management agreements. Regulations made under the territorial seas legislation would be the most appropriate means for achieving these objects.

2.10 Extraction of sand, corals etc

Relevance to this Review

The extraction of sand and corals from coastal areas can have a clear adverse effect on the environment. Controls can be effectively exercised by an agency empowered to grant permits for such activities and to require the reinstatement of affected areas.

Current state of Niue's laws

No law in Niue has been sighted which makes provision in this regard. It is clear from the out-dated Mining Act that "minerals" does not include sand, coral, gravel, stone or earth for the purposes of that law.

Legislative Reform Options

Regulations could be made under the Environment Act to deal with these matters.

2.11 Regulation of aquaculture, fish processing etc.

Relevance to this Review

In most jurisdictions the commercial exploitation of the fisheries resource is the subject of detailed statutory regulation. This is aimed at conserving the resource and maximizing returns from its exploitation.

Current state of Niue's laws

No laws have been sighted in Niue that would facilitate the regulation of matters relating to the exploitation of its fishery resources.

Legislative Reform Options

Amendments could be made to the Domestic Fishing Act 1995, or Regulations could be made under it, to require a permit for the following activities –

- Aquaculture operations
- The export and import of fish
- Fish processing establishments
- Authorisations for transshipment
- The requirement that fish processed in Niue meet the standards applying in the countries where it is to be marketed.

2.12 The Continental Shelf

Relevance to this Review

The right to control the continental shelf is an important aspect of a nation's sovereignty. It has considerable environmental implications particularly in relation to the exploitation of resources. In this case however its effectiveness may be questioned due its foundation in the New Zealand jurisdiction.

Current state of Niue's laws

The Continental Shelf Act 1964 (NZ) is both out-dated and inappropriate. Its object is to protect the continental shelf of New Zealand.

Legislative Reform Options

Consideration should be applying a new law to the continental shelf of Niue.

2.13 Obligations under international treaties generally

Relevance to this Review

Protection of Niue's environment can be greatly facilitated by the making of appropriate laws and applying effective regulatory regimes in many areas covered by a wide range of international conventions and regional agreements.

Issues raised during consultations

- It is proposed that the Office of External Affairs shall be the designated focal point for the purposes of the Cartagena Protocol.
- The OEA is seen as the appropriate agency for overseeing compliance with Niue's international obligations.

Current state of Niue's laws

No law has been sighted which formally gives responsibility in relation to the implementation of treaty obligations. A number of laws however do make provision for the making of Regulations to give effect to such obligations. These are –

- Environment Act (multilateral agreements)
- Territorial Seas and EEZ Act (On a broad range of issues, including matters for the implementation of UNCLOS, the UN Fish Stocks Agreement and the WCPT Convention. Regulations may apply to Niuean nationals and Niuean registered vessels fishing on the high seas or in the waters of other nations. They may also implement any decisions of international and regional fisheries management bodies.)
- Niue Island General Laws (Amendment) Act 2003 (For the implementation of the International Convention for the Safety of Life at Sea 1974 and the International Shipping and Port Security Code)

Legislative Reform Options

Consideration might be given to formally allocating and vesting responsibilities in relation to Niue's international obligations in the OEA and the ED. These might relate to matters such as–

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OTHER MATTERS

Other important issues have been raised that do not have a direct link to the areas of focus under the IWP. They are nonetheless noted here due to the emphasis that has been placed on them during consultations and to highlight the need to consider the enactment of appropriate laws in these contexts.

A. Protection of traditional knowledge and intellectual property

Issues raised during consultations

- There is a call from the community for the effective protection of Niuean heritage and the enforcement of intellectual property rights arising from its culture and creations.
- It is acknowledged that the current laws of New Zealand origin have little or no relevant or effectiveness in this regard.

Current state of Niue's laws

Laws relating to the recognition and protection of intellectual property rights in Niue include the Copyright Act 1962 (NZ), the Designs Act 1953 (NZ), the Merchandise Marks Act 1954 (NZ), the Patents Act 1953 (NZ) and the Trademarks Act 1953 (NZ). These are all out-dated laws of New Zealand origin. They apply the provisions of the New Zealand laws that were in force as at the 19th October 1974. The registration of intellectual property in New Zealand does operate to accord protection for that right in Niue. But it is questionable whether they meaningfully contribute to the protection of Niuean intellectual property and so they have not been reviewed here. It is acknowledged by the Government of Niue that an appropriate legislative framework for the protection of such rights is needed.

Legislative Reform Options

The expertise that is available in the region on these matters should be drawn upon to formulate, draft and enact appropriate legislation to protect the rights of Niueans in this context and to given effect to the relevant rights stated in the CBD. These include the important areas of access to Niue's genetic resources and to an equitable sharing arrangement for any benefits arising from the development of its resources.

B. Safety of small vessels

Issues raised during the consultations

- As noted elsewhere, there is an expectation of a dramatic increase in the number of fishing vessels operating in Niue's coastal waters after commencement of operations at the fish processing facility.
- The safety of fishing canoes in the vicinity of powered vessels was a particular matter of concern amongst Niue's canoe fishermen.

Current state of Niue's laws

No laws have been sighted in Niue which impose safety requirements applying to small vessels operating in its waters.

Legislative Reform Options

A law might be drafted to impose appropriate safety requirements on small fishing vessels. It has been suggested that power boats should not approach closer than 100 metres to a Niuean canoe.

3. SUMMARY AND RECOMMENDATIONS

3.1 Summary of gaps, overlaps and conflicts

The Terms of Reference require an identification of areas of gaps, overlap and conflict in Niue's laws applying to the areas relevant to the IWP.

Summary of the identified gaps

It is the gaps in Niue's laws that are the clearest outcome of the legislative review and analysis. The gaps have been primarily identified in the following areas –

- Marine pollution prevention
- Controls over the transboundary movement of hazardous wastes and the implementation of the Basel and Waigani Conventions
- Regulating the dumping and incineration of wastes at sea
- Anti-littering and disposal of wastes on land
- Ozone layer protection
- EIA Regulations
- Protection of whales in Niue's waters
- Regulating the extraction of sand and corals
- Licensing of aquaculture and fish processing establishments, the enforcement of processing standards and controls over transshipments
- Niue's continental shelf
- Implementation of Niue's international obligations

Summary of the identified overlaps and conflicts

As noted above the principal outcome has been the aspect of the gap analysis. However the following areas of overlap and potential conflict are identified –

- (a) The declaration of marine reserves under the Domestic Fishing Act but providing for their management in some cases using by-laws made under the Niue Village Councils Act.
- (b) The prospect of prescribing prohibited wastes under the Biosecurity Bill, the Customs Act and new laws regulating the transboundary movements of wastes. (This should not be seen as problematic).
- (c) The implementation of laws relating to the protection of migratory fish species may create areas of overlap between the responsibilities of the Fisheries Division of DAFF and of the ED. There are other areas where this has to be addressed also.
- (d) The regulation of the continental shelf as if it is part of New Zealand's jurisdiction would seem to give rise to a sovereignty issue.
- (e) The roles of the OEA, DAFF and the ED in the context of implementing Niue's international obligations gives rise to some potential for conflict. This may be addressed by formally vesting these roles in the respective agency under a law.
- (f) Overlaps arise in the enforcement context. Consideration might be given to some rationalization and harmonisation of the powers of the police, environment officers, wildlife officers, quarantine officers etc.

3.2 Prioritising the legislative reforms

The areas of village involvement in coastal fisheries protection, the prevention of marine pollution and the regulation of transboundary movements of hazardous wastes through Niue's waters have been identified as the areas of priority for legislative action.

The other areas to be prioritised include –

1. Marine pollution prevention
2. Controls over the transboundary movement of hazardous wastes and the implementation of the Basel and Waigani Conventions
3. Regulating the dumping and incineration of wastes at sea
4. EIA Regulations
5. Anti-littering and disposal of wastes on land
6. Ozone layer protection

7. Protection of whales in Niue's waters
8. Regulating the extraction of sand and corals
9. Licensing of aquaculture and fish processing establishments, the enforcement of processing standards and controls over transshipments
10. Niue's continental shelf
11. Implementation of Niue's international obligations
12. Harmonisation of the enforcement powers and the role of "officers"

(This is a preliminary prioritization only and should be carefully considered so as to reflect Niue's priorities for legislative reform in this general area.)

**ANNEX 1
AMENDMENTS RELATING TO VILLAGE BY-LAWS IN AID OF THE
MANAGEMENT OF COASTAL FISHERIES RESOURCES**

**ANNEX 2
AMENDMENTS TO REGULATE TRANSBOUNDARY MOVEMENTS OF
HAZARDOUS WASTES**

**ANNEX 3
FEATURES OF ANTI-DUMPING AND LITTERING LAWS**

**ANNEX 4
AUSTRALIAN WHALE WATCHING GUIDELINES**

Commonwealth and states of Australia Whale Watching guidelines.

	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania
Legislation Status	Administrative precursors to regulations under the Whale Protection Act 1980	Nature Conservation Act (1992) and Nature Conservation Regulation (1994) Nature Conservation (Whales and Dolphins) Plan 1997	National Parks and Wildlife Act 1974, Sections 98 and 112G. Fauna Protection regulation	Wildlife Act 1975 Wildlife (whales) Regulations 1997 Regulations Expire on 30 th November 1998	National Parks and Wildlife Act 1972, Section (68)	Marine Mammal Interaction (whale Watch) Licence, Issued under Wildlife Conservation regulations	
Species Coverage	While these guidelines apply primarily to	Whales and dolphins (note	Watching provisions apply to all members of these families:	Whales and Dolphins	All cetaceans	Applicable to Humpback and	While these guidelines apply

	species of large Whales, they do have application to other cetaceans such as dolphins and porpoises	differences in approach)	Balaenopteridae; Balacnidae (including Neobalaenidae), Physeteridae(including Kogiidae); and ziphiidae, and the following species of the family Delphinidae; false killer whale; killer whale; long-finned pilot whale; short-finned pilot whale; melon headed whale. Other dolphins species are not covered, except at port Stephens where operators have set up codes of ethics (see "other")			Southern right whales. Can be applied to other cetaceans, however, no others approved at this stage.	primarily to species of large Whales, they do have application to other cetaceans such as dolphins and porpoises
	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania
Relationship to other Permits Licences				Permits can be obtained for tours involving dolphin swims or dolphin sightseeing which allows under certain conditions approach to 50 metres for dolphins, fees, for dolphin swims, \$650.00, for dolphin sightseeing , \$350.00	People who have permits for scientific research on whales can approach whales according to permit conditions	Different regulations may apply under different licences. To study fauna for scientific purposes allows closer approaches and restricts research in vicinity of whale watches.	
Penalty for breach of regulation	Maximum penalty \$100,000	Maximum - \$225,000 or two years imprisonment	Maximum penalty \$100,000???	Maximum of 1000 penalty units	Maximum \$30,000 or 2 years imprisonment	Maximum penalty \$100,000	Maximum penalty \$100,000
Powered and non powered vessels			A vessel includes: boats, surfboards, boogie boards, windsurfers, wave jumpers and sailboats	Motorised vessels including personal watercraft, motorised swimming aids and all other watercraft powered and unpowered			
	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania

Direction of approach	Vessels should approach whales from a direction parallel and slightly to the rear. Alternatively, position vessel 300 metres ahead, well clear of the path of the whales and allow them to approach	A person in charge of a vessel shall not bring the boat to a position that would cause the whale to come closer than 100m to the boat if the whale continued on its direction of travel		A vessel must not approach a whale on or be in the path of a whale.	<p>Zone B: Vessels should approach whales from a direction parallel and slightly to the rear. Alternatively position the vessel well clear of the path of the whales and allow them to approach.</p> <p>Zone B: If a whale approaches within 100m of your vessel, either slowly steer a straight course away from the whale(s) or remain stationary and place engines in neutral. Do Not engage propellers while whales are within 100m and do not chase whale(s)</p>	Do not approach marine mammals head on under power. Approach from a direction parallel and slightly to the rear, or 300 metres ahead and allow whales to approach.	Vessels should approach whales from a direction parallel and slightly to the rear. Alternatively, position vessel 300 metres ahead, well clear of the path of the whales and allow them to approach
Speed of approach	Within 300m of a whale, move at a constant slow speed no faster than the slowest whale or at an idle 'no wake' speed. Avoid sudden or repeated changes in direction	Within 300m of a whale move at a maximum of 4 knots for a whale		<p>A vessel within 300m of a whale must only move at a constant speed not exceeding 5 knots; avoid sudden direction changes.</p> <p>Manoeuvre to a distance of at least 200m from the whale in any signs of disturbance by the whale</p>	<p>Zone A: If you unintentionally approach a whale, slowly steer a straight course away from them at a constant 'no wake' speed at least 300m away from the closest whale. Avoid sudden changes at it may alarm the whales.</p> <p>Zone B: Within 300m of a whale, move at a constant speed no faster than the slowest 'idle 'no wake' speed. Avoid sudden or repeated</p>	When within 300m of a marine mammal, move at a slow speed and avoid sudden changes in direction and load noise.	Within 300m of a whale, move at a constant slow speed no faster than the slowest whale or at an idle 'no wake' speed. Avoid sudden or repeated changes in direction

					changes in direction.		
	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania
Limit of approach	All Cetaceans 0 100m	For a whale: 100m: three boats only within 300m. Minimum is 300m if the vessel is moving faster than 4 knots or travelling in a similar direction as and behind the whale - Townsville/ Whitsunday Marine park 0 300m - for special interest cetaceans - 500m. e.g.: morphological or colour-variant , a calf separated or a sick or injured lost in the upper area of an estuary or lagoon. If the whale is in a place readily accessible to members of the public. - dolphins - there are no restrictions to approach (bar jetskis and swimmers)	For the species covered above if a slow 'no wake' approach is 200m if the animal is a calf 100m for any other animal otherwise 300m Other (usually smaller) Delphinidae: no limits apply.	Whales and Dolphins - 100m for any watercraft - holders of permit 50m (conditions apply)	Zone A: No vessel should approach closer than 300m to a whale. Zone B: 100m	All cetaceans 0 100m If a whale approaches closer than this, either place the engine(s) in neutral or steer a course away from the whale.	100m
	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania
Observation	Either place your engine(s) in neutral or allow motor to idle for 1 minute before turning off. No more than 3 vessels watching	Do not bring boat between members of a pod of whales. Do not cause a whale to alter its	Do not heard or otherwise chase any whales or marine mammals	Do Not: - Separate a group of whales; - come between a mother and	Zone B: When stopping to watch whales, either place engines in neutral or allow motor to idle for a short period (1 minute)	When within 300m of a whale, move at slow 'no wake' speed. Allow motors to idle for a minute before	When stopping to watch whales, either place engines in neutral or allow motor to idle for a short period (1 minute)

	<p>a whale or group of whales at one time.</p> <p>Do not box whales in, cut off their path or prevent them from leaving</p>	direction or speed of travel or its behaviour.		<p>calf;</p> <p>- Allow an anchor or to be dropped or lowered overboard within 300m of any whale.</p> <p>If a whale is disturbed, move away 200m.</p>	<p>before turning off.</p> <p>Zone B: No More than 3 vessels should attempt to watch a whale or group of whales at one time.</p> <p>Zone B: When attempting to watch whales, do not box them in, cut off their path or prevent them from leaving.</p>	<p>switching off.</p> <p>Do not box whales in or cut off their path</p>	<p>before turning off.</p> <p>No More than 3 vessels should attempt to watch a whale or group of whales at one time.</p> <p>When attempting to watch whales, do not box them in, cut off their path or prevent them from leaving. Particularly when more than 1 vessel is present.</p>
Departure	<p>When leaving whales, move off slowly at an idle Īno wakeā speed until at least 300m from the closest whale before picking up speed.</p> <p>Abandon contact with the whales at any sign of them becoming disturbed or alarmed</p>	Do not move vessel faster than 4 knots when less than 300m from the whale		<p>Move away at a maximum of 5 knots within 300m of a whale, before picking up speed.</p> <p>Zone B: Abandon contact with the whales at any sign of them becoming disturbed or alarmed</p>	<p>Zone B: When leaving the whales , move off slowly at an idle Īno wakeā speed until at least 300m from the closest whale before picking up speed.</p> <p>Zone B: Abandon contact with the whale(s) at any sign of a whale(s) becoming disturbed or alarmed, particularly if the whale(s) slap their tails on the water surface</p>	<p>When leaving, move away slowly to 300m from the closest whale before picking up speed.</p> <p>Abandon contact with the whale(s) at any sign of a whale(s) becoming disturbed or alarmed, particularly if the whale(s) slap their tails on the water surface</p>	<p>When leaving whales, move off slowly at an idle Īno wakeā speed until at least 300m from the closest whale before picking up speed.</p> <p>Abandon contact with the whales at any sign of them becoming disturbed or alarmed</p>
	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania
Jetskis		No closer than 300m to a whale or dolphin	300m if slow Īno wakeā approach, otherwise 400m	As for a vessel	A jetski is considered a vessel		
Aircraft	<p>Do not operate any aircraft including helicopters, less than 300m above or near a whale.</p> <p>The use of helicopters</p>	For whales: Fixed wing aircraft to no closer than 300m at an altitude of 1000ft; for special interest cetaceans	<p>Minimum approach distance for aircraft (including hang gliders and gliders but not including helicopters) is 300m</p> <p>Minimum approach distance for helicopters is 400m</p>	Aircraft must not be flown lower than 300m above a whale in an area 300m from a whale.	Zone A&B: Do not operate any aircraft including helicopters within 300m (1000ft) of a whale. Do not use helicopters to watch whales	Aircraft are not to fly lower than 300m when within a horizontal distance of 300m of any whale. Helicopters are not to be	Do not operate any aircraft including helicopters, less than 300m above or near a whale.

	<p>should be avoided as it causes stress due to loud noise and down draught.</p> <p>If using a helicopter, under no circumstances fly directly above a whale</p>	<p>2000ft.</p> <p>Helicopters to no closer than 1km at an altitude of 2000ft. No restrictions for dolphins</p>			<p>as they cause considerable distress to whales. Under no circumstances should you fly directly over a whale.</p> <p>Head of Bight Whales Sanctuary: Fly Neighbourly Agreement to operate 1 May to 31st of October, to cover direction of flight E-W , not below 300m, no circling but may make 2 nautical miles circuit inland</p>	<p>used for whale observation under this licence</p>	<p>The use of helicopters should be avoided as it causes stress due to loud noise and down draught.</p> <p>If using a helicopter, under no circumstances fly directly above a whale</p>
	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania
Swimmers and divers	<p>It is recommended that swimmers and divers do not enter the water near whales because of the possibility of being injured. However if in the water near a whale, minimum approach distance is 30m</p>	<p>A person swimming or diving must not enter the water or approach closer than 300m to a whale or 100m to a dolphin</p>	<p>Minimum approach distance is 30m</p>	<p>A person must not swim or dive or use a surfboard or surf ski within 30m of a whale.</p> <p>Motorised diving or swimming aids cannot be operated closer than 100m from a cetacean</p>	<p>Zone A: if you are diving or swimming, you should not enter the water within 300m of whales because of you may be injured or may disturb the whales natural behaviour</p> <p>Zone B: It is recommended that swimmers and divers do not enter the water near whales because of the possibility of being injured. However if in the water near a whale, minimum approach distance is 30m</p>	<p>Swimmers and divers do not enter the water when near whales because of the possibility of being injured. No persons are to swim in the vicinity of any whales</p>	<p>It is recommended that swimmers and divers do not enter the water near whales because of the possibility of being injured. However if in the water near a whale, minimum approach distance is 30m</p>
On land	<p>If whales come close to shore, remain quiet and do not disturb them.</p>						<p>If whales come close to shore, remain quiet and do not disturb them.</p>

	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania
Approaching Mothers and calves	Do not attempt to approach mothers with their calves. Do not separate or scatter a group of whales	General restriction apply unless under special notice, or by direction from a Conservation Officer			Zone B: Do not attempt to approach mothers with young calves	Do not separate a group of whales or come between mother and calf	Do not attempt to approach mothers with their calves. Do not separate or scatter a group of whales
Feeding	Do not attempt to feed whales or throw rubbish into the water in the vicinity of a whale(s)	A person must not feed, discard rubbish into the water or touch cetaceans		A person must not feed or attempt to feed any whale(s)		Do not attempt to feed whales or throw rubbish into the water near whales	Do not attempt to feed whales or throw rubbish into the water in the vicinity of a whale(s)
	Commonwealth	Queensland	New South Wales	Victoria	South Australia	Western Australia	Tasmania
Noise	Avoid loud disturbing noises near whales	A Person shall not make noises likely to attract/ disturb whale(s)		A person who is within 300m of a whale must not make or cause to be made any loud or sudden, or cause to be played back, any underwater sound or recording of any kind.		Avoid making loud noises when within 300m of a whale	Avoid loud disturbing noises near whales
Other			Whale Watching : No commercial whale watching operators to be licensed. Port Stephens Commercial Dolphins Watch Association draft code of ethics. No more than two vessels in contact with a dolphin pod, maximum time with pod 30mins No more than two cruises per operator per day Closest approach distance 30m Dolphins approached		Operate vessel or aircraft so it does not disrupt the normal movement or behaviour of the whale(s) Observe general boating and Aircraft regulations and restrictions	Do not restrict the normal movement or behaviour of whale(s) Any Vessel use must be undertaken in compliance with all standard legal requirements and safety guidelines pertaining to this activity. The licensee will cooperate with the Dept of CALM in	

			from side, not from behind or by waiting ahead			gathering and providing any data, which may be required for research and management purposes.	

ANNEX 5

SUMMARY OF AUSTRALIAN WHALE RELATED LEGISLATION

Item 2.2 has already referred to the need for international cooperation in relation to threats to which cetaceans are likely to be vulnerable because of their relatively high positions in the food web and generally widespread distribution. Australia has played a leading role in the major international forum regulating human impact on cetaceans-the International Whaling Commission-and is active in conservation initiatives on other relevant bodies, particularly CITES, CMA and CCAMLR, and in regional agreements such as the South Pacific Regional Environment Program (SPREP) and the Torres Strait Treaty. Nationally, including within its territories, its legislative role in respect of cetaceans is discharged primarily through the *Whale Protection Act 1980*, with additional controls under aspects of the *Endangered Species Act 1992*. Under the *National Parks and Wildlife Conservation Act 1975*, there is a general basis for the establishment of marine protected areas, including those of particular conservation significance for cetaceans. The *Wildlife Protection (Regulation of Exports and Imports Act) 1982* controls import or export of cetaceans or parts and products; commercial international trade is prohibited but there are provisions for bona fide scientific and educational exchange.

The Commonwealth *Whale Protection Act 1980* came into effect in 1981. It followed government adoption of the recommendations of the 1978 Independent Inquiry into Whales and Whaling (the Frost Report), which included recommendations that whaling be banned in Australian waters and that the existing Whaling Act be replaced with legislation providing for the conservation and protection of cetaceans in areas under Australian control. The 1980 Act prohibits killing, injuring, taking, capturing or interfering with cetaceans, and applies to all persons, vessels and aircraft in Australian waters, including those of the External Territories. Under the Offshore Constitutional Settlement of 1979, Commonwealth jurisdiction includes all those waters seawards of the outer limit of the 3 nautical mile territorial sea out to the limit of the 200 nautical mile Australian Fishing Zone. From 1 August 1994, Australia has established an Exclusive Economic Zone around continental Australia and all its External Territories, including the Australian Antarctic Territory. Amending legislation now provides that the Whale Protection Act applies within that zone. Beyond the EEZ, the Act applies to Australian vessels and to all Australian citizens normally domiciled in Australia, an extra-territorial application of domestic legislation

unusual at the time when the Act was passed but which had been a feature of the US Marine Mammal Act passed in 1972.

Australia was an initial signatory to the International Convention for the Regulation of Whaling 1946, which established the IWC. It has been active not only within the commission itself but also on its scientific committee, providing chairs and vice-chairs of both in recent years and convenors of subcommittees of the latter. Most recently, Australian scientists have been closely involved in the development of the Revised Management Procedure, which has been regarded as a major advance in the management of marine living resources subject to exploitation. Although since 1979 it has been Australian policy to seek an end to commercial whaling, it has been Australia's view that formal adoption of the procedure was important in ensuring that, were commercial whaling to be considered at some future time, the most conservative management measures achievable should be in place, but without necessarily linking that adoption to the reintroduction of commercial whaling. Most recently, Australia has been at the forefront in seeking the adoption of the Southern Ocean Sanctuary, within which all species subject to the convention's provisions are protected from commercial whaling indefinitely but with review after 10 years (see Item 5.4.6). For waters of direct concern to Australia and within the area covered by this report, the sanctuary provisions apply to waters south of 40°S, except as already covered by the Indian Ocean Sanctuary. The latter, declared by the IWC in 1979, protects cetaceans subject to its jurisdiction in the ocean area east to 130°E and south to 55°S. The boundaries of both sanctuaries are shown in Figure 8 (p. 216).

An unresolved difficulty within the IWC has been the question of its responsibility towards those 'small' cetaceans (generally dolphins and porpoises) not subject to commercial whaling. There has been a lack of agreement on that matter within the commission, particularly in the context of the provisions of the United Nations Law of the Sea and the sovereign rights of nations to regulate exploitation of living resources within their exclusive economic zones; currently the IWC restricts itself to providing advice on those species' status to the governments concerned. Australia's position has been that the commission's charter is for the conservation of all cetaceans and not solely those that were regarded as of commercial importance when the IWC came into being in 1946. Its policy has been to ensure that however the discussions proceed, the IWC's existing role in the conservation of small cetaceans is not eroded.

The Whale Protection Act provides for some activities, that would otherwise be an offence, to occur if they do so in the course of licensed fishing activities, but reports are required to be submitted on any cetaceans taken or injured. Nevertheless, a potentially powerful provision is that fisheries may be prescribed—for example, by notice in the *Government Gazette*. Permits are then required for any cetaceans taken in the course of such a fishery. In conjunction with the requirements for reporting of cetacean by-catch or accidental capture, this provision makes it possible in principle to regulate catch levels in any fishery in which there may be a significant impact on cetacean populations. So far the only potential candidate for fisheries under Commonwealth control has been the Arafura Sea gill-net fishery, primarily Taiwanese, in which an estimated 14 000

small cetaceans were taken, as described in Item 2.2. Reports and direct observation were followed by a joint experimental program in which methods to reduce the by-catch rate were tested. Restrictions on net length, to 2.5 km, led to the closure of the fishery in 1986.

Capture or interference for scientific or educational purposes is also permitted. In the case of capture for display, the provision remains in the Act, but following the 1985 Senate Select Committee on Animal Welfare's review of cetaceans in captivity (the Georges Report) the government decided not to grant any further permits. None have in fact been issued under the Commonwealth Act, and permits to import live cetaceans for display under the Wildlife Protection (Regulation of Imports and Exports) Act have only been considered in exceptional circumstances.

In addition to surveillance and enforcement, the Commonwealth Act provides for research and monitoring related to cetacean conservation. Where research involves interference, which is otherwise prohibited, and is defined to include chasing, harassing, marking or tagging, a permit is required. Applications for permits, for example for photo-identification or biopsy sampling for genetic studies-both involving close approaches to animals at sea-require public notification in all states, with the opportunity for public comment within a 30-day period. By delegated powers from the minister, the Director of National Parks and Wildlife then considers the request in the light of the public comment and the applicant's response. Where there are concerns that some research may be intrusive (e.g. close approach for photo-identification) or invasive (e.g. biopsy sampling, attachment of telemetry devices) and therefore may conflict with animal welfare considerations, such research must receive the prior approval of an appropriate animal welfare ethics committee.

A general provision-section 30 of the Act-authorises the development of a range of research and other programs, including on stranded animals. Under the provision, long-term monitoring of humpback and [Southern Right Whales](#) has been funded, a National Strandings Contingency Plan was developed, and whale watching guidelines were introduced. Expenditure levels have however been small, and not maintained overall, with a severe decline in real terms in such Commonwealth-funded research in recent years.

State and territory legislation relating to cetacean conservation and protection in general mirrors the major provisions of the Commonwealth Act, either under specific Acts (Victoria, Tasmania), under specific regulations within existing wildlife protection or fisheries legislation (New South Wales, Western Australia) or under revised general wildlife protection legislation that incorporates specific provisions on cetaceans (Queensland). The differences in machinery reflect differences in coverage between the states. In fact, at least 14 different Acts of Parliament, including Fisheries Acts, are involved. The major elements can be summarised as follows:*

- 'take' of cetaceans, without a permit, is prohibited in all state waters
- 'interfering/harassment' is not prohibited in some states (Queensland, South Australia, Western Australia, Northern Territory) although guidelines on whale watching are generally in place

- 'treatment' and possession of whale carcasses are not permitted in some states (Victoria, Queensland, South Australia, Western Australia, Tasmania), but are permitted in others
- export/import permits for whale products and parts are required by all states
- incidental capture is not an offence, but some states (Victoria, South Australia, Western Australia) require that such captures are reported.

Taken from the web site of the Australian Department of the Environment and Heritage