



Australian Government

Department of Sustainability, Environment, Water, Population and Communities

**Submission to the review of Commonwealth fisheries management legislation from the
Department of Sustainability, Environment, Water, Population and Communities**

November 2012

Contents

Executive Summary	i
Introduction	1
Review of Commonwealth fisheries management legislation	1
<i>A. Integrating Commonwealth fisheries policy with other strategic initiatives</i>	<i>2</i>
<i>B. Ecologically sustainable development</i>	<i>2</i>
<i>C. "New approaches" from Looking to the Future</i>	<i>5</i>
Appendix 1 - The Department of Sustainability, Environment, Water, Population and Communities' role in relation to fisheries, including the EPBC Act and regulatory reform	
Appendix 2 - The precautionary principle	

EXECUTIVE SUMMARY

1. The Department of Sustainability, Environment, Water, Population and Communities (the department) administers the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) which includes a number of provisions relating to the sustainable management of fisheries.

Under the **EPBC Act, assessments and decisions** are made about fisheries in relation to impacts on matters of national environmental significance (strategic assessments - Part 10), impacts on EPBC Act listed species (Part 13) and export of products derived from fisheries (Part 13A). Assessments are based on the Australian Government *Guidelines for the ecologically sustainable management of fisheries - 2nd Edition*.

The EPBC Act also provides for the **listing and recovery** of nationally threatened **species and ecological communities**. In line with publicly available threatened species listing guidelines, when considering listing thresholds for assessing commercially harvested marine fish species, reference is made to the *Commonwealth Fisheries Harvest Strategy Policy and Guidelines* (harvest strategy policy).

2. The 2009 Hawke **review of the EPBC Act** recommended that the Minister for Sustainability, Environment, Water, Population and Communities should continue to have a strong role in promoting continuous improvement in fisheries management. The review recommended that the EPBC Act be amended so that those provisions under Parts 10, 13 and 13A that relate to fisheries are streamlined into a single strategic assessment framework for Commonwealth and state and territory-managed fisheries to deliver a single assessment and approval process.

The Australian Government response to the Hawke Review specifically indicated that it would preserve the key provisions of the EPBC Act applying to Commonwealth fisheries – the strategic assessment provisions of Part 10 in relation to matters of national environmental significance (including Commonwealth marine areas); the protected species provisions of Part 13; and the export controls of Part 13A (including in relation to internationally protected threatened species listed under the Convention on the International Trade in Endangered Species (CITES). However, the government indicated a willingness to consider means by which it could reduce the administrative and regulatory process involved in fishery assessments, including through less frequent assessments of well managed fisheries.

3. The government response also supported in principle a progressive shift under an amended EPBC Act from individual assessments of fisheries towards **accreditation of sector wide** environmental management systems. In line with this approach, the department considers that there is an opportunity for the current review of fisheries legislation to consider how the foundations for system accreditation could be implemented through fisheries management policy and legislation.
4. The department understands that the implementation of the **precautionary principle** remains of concern to some stakeholders. The government has agreed to produce further guidelines on the application of the precautionary principle in the operation of an amended EPBC Act. The department recommends that the review of fisheries legislation consider developing similar guidance around the application of the precautionary principle in administering fisheries legislation.

5. The department welcomes AFMA's recently announced review of its **ecological risk management** system. The department understands that AFMA's review includes extension of the framework to **include habitats and communities** and to incorporate the cumulative effects of fishery level impacts when considered across fisheries.
6. Identifying and managing the **cumulative impacts** of fishing, including impacts related to **resource allocation** among industry sectors and **cross-jurisdictional management of shared fish stocks or fishing methods** with the potential to impact adversely on regionally distributed habitats remains a work in progress in demonstrating that Australia's fisheries are sustainably managed. Effective systems for dealing with these impacts would be an essential element of a higher order fishery management system seeking accreditation.
7. Noting that separate reviews of the harvest strategy policy and the *Commonwealth Fisheries Bycatch Policy* are being undertaken by the Department of Agriculture, Fisheries and Forestry, but with similar timeframes and the same primary stakeholders, the department sees opportunity through those reviews, along with AFMA's internal review of ecological risk management, to better **integrate operational policies** and to continue to move from a 'fishing-centric' to an 'ecosystem-centric' focus. For example, the government response to the Hawke Review noted that the harvest strategy policy focuses specifically on key commercial species and emphasised that harvest strategies form only one part of a more comprehensive approach to ecosystem-based fisheries management, and will not alone achieve sustainable fisheries.
8. The department does not see the *Fisheries Administration Act 1991* or the *Fisheries Management Act 1991* in their current form as significant barriers to the implementation of ecosystem based fisheries management or fisheries meeting the requirements of the EPBC Act. However, reviewing the policy framework, legislation and subsequent implementation policies and strategies provides an opportunity to consolidate and give additional momentum to the shift in focus from the target species centric approach to fisheries management of the late 1980's to an ecosystem based fishery management approach.
9. While acknowledging that the harvest strategy policy, bycatch policy and ecological risk management reviews represent the next step in evolution of AFMA's fisheries management approach, the department is of the view that these elements need to be brought together in a **unifying** framework. Such a framework would ensure that the separate policy elements work together in harmony and that the potential for unintended consequences from the application of one policy element in isolation can be identified and avoided.
10. The department notes that a number of submissions to the Hawke review indicated that the EPBC Act had played an important role in giving momentum to fisheries management reform, and in particular to the progression towards ecosystem based fisheries management. The impacts of fisheries on non-target species and the wider ecosystem effects of fishing have become an increasingly important focus of fisheries management. This shift in focus has been driven by greater transparency in fisheries management and changing community awareness and expectations. This transparency has been supported by the operation of the EPBC Act and the application of the Australian Government Guidelines for the ecologically sustainable management of fisheries (revised and issued as a second edition in 2007).

INTRODUCTION

In September 2012, the Minister for Agriculture, Fisheries and Forestry announced an independent review into the legislation governing the Commonwealth's fisheries management system. Key elements of the scope of the review relevant to the Department of Sustainability, Environment, Water, Population and Communities (the department) include interactions between fisheries legislation and the *Environment Protection and Biodiversity Conservation Amendment Act 1999* (EPBC Act) and the application of the precautionary principle in administering Commonwealth legislation which gives effect to Australia's commitment to ecologically sustainable development.

In administering the EPBC Act, which includes a number of provisions relating to the sustainable management of fisheries, the department conducts strategic assessments of all Commonwealth fisheries (Part 10). The department also assesses fisheries for accreditation of management arrangements for interactions with listed species in Commonwealth waters (Part 13) and for approval of harvest of fish for export (Part 13A). Assessments are based on the Australian Government *Guidelines for the ecologically sustainable management of fisheries* (revised and issued as second edition in 2007).

The department's Australian Antarctic Division is the lead agency in a whole-of-government approach to Australia's scientific and policy involvement in the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), including in relation to Southern Ocean fisheries. A comprehensive description of the department's role and legislative responsibilities as they relate to Australian fisheries, particularly Commonwealth managed fisheries, is provided at [Appendix 1](#).

REVIEW OF COMMONWEALTH FISHERIES MANAGEMENT LEGISLATION

The continuous improvement in the management of Commonwealth fisheries by the Australian Government was stimulated by the 1989 policy statement, *New Directions for Commonwealth Fisheries Management in the 1990s*. This statement resulted in the creation of the *Fisheries Management Act 1991* and the establishment of Australian Fisheries Management Authority (AFMA). The 2003 review of Commonwealth fisheries policy, *Looking to the Future - A review of Commonwealth Fisheries Policy* (Looking to the Future), affirmed the fundamentals of the policy and management framework adopted following the 1989 review. Looking to the Future identified 52 outcomes, grouped into 27 initiatives in four broad areas of focus:

- A. integrating Commonwealth fisheries policy with other strategic initiatives
- B. ecologically sustainable development
- C. "new" approaches, and
- D. "improved management" of Commonwealth fisheries.

The implementation of New Directions and associated governance structures and legislation has resulted in significant progress towards ecologically sustainable management of Commonwealth fisheries. Nonetheless, as discussed below, in some specific areas more is required to strengthen confidence in the effectiveness of the management framework in underpinning the sustainability of Commonwealth fisheries in the long term.

A. Integrating Commonwealth fisheries policy with other strategic initiatives

A key initiative of Looking to the Future was better integration of Commonwealth fisheries policy with other strategic initiatives. This initiative remains largely relevant today, although the relevant policy drivers have changed. Policy drivers today include:

- a heightened focus across the Australian Government on Australia's long term sustainability or "sustainable wellbeing"¹, including under future climate scenarios;
- *Australia's Biodiversity Conservation Strategy 2010-2030 - Australia's guiding framework for conserving terrestrial and marine biodiversity*. A key principle of the strategy is that "knowing that our knowledge is limited, we should apply the precautionary principle while employing adaptive management approaches using new science and practical experience". Priority for action 1 of the strategy includes "integrating biodiversity into decision making so that it becomes everyone's business and part of every relevant transaction, cost and decision". Priority for action 3 includes the sub-priority that "by 2015, all jurisdictions will review relevant legislation, policies and programs to maximise alignment with Australia's Biodiversity Conservation Strategy";
- implementation of the government's response to the Hawke review of the EPBC Act. Any amendments to Commonwealth fisheries management policy and legislation should take into account amendments to the EPBC Act that are proposed to be made as a result of the government's response to the Hawke review;
- the recent introduction of the first marine bioregional plans under the EPBC Act. Marine bioregional plans identify regional conservation priorities;
- the outcomes of parallel reviews (currently under way) of the *Commonwealth Policy on Fisheries Bycatch* and the *Commonwealth Fisheries Harvest Strategy Policy and Guidelines*;
- consumer/supply chain expectations regarding product traceability, third party certification, ecolabelling, etc; and
- industry interest in and practical development of environmental management systems (EMS), often funded by the Australian Government - for example, through Caring for our Country.

B. Ecologically sustainable development

In response to Looking to the Future, the *Fisheries Administration Act 1991* and the *Fisheries Management Act 1991* were amended to reflect the five principles of ecologically sustainable development (ESD) listed in the EPBC Act.²

¹ *Sustainable Wellbeing - An Economic Future for Australia - Speech by Dr Martin Parkinson*: <http://archive.treasury.gov.au/contentitem.asp?ContentID=2134> accessed 18 October 2012.

² An objective of the EPBC Act, which came into force in 2000, is "to promote ecologically sustainable development through the conservation and sustainable use of natural resources". The Act lists five principles of ecologically sustainable development. In summary, these five principles are:

- integration in decision making processes
- the precautionary principle
- intergenerational equity
- the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making, and
- that improved valuation, pricing and incentive mechanisms should be promoted.

The department does not consider that embedding the ESD principles in fisheries management legislation of itself provides sufficient direction to achieve full implementation of ecologically sustainable development. The current review could consider whether amending overarching policy settings, legislation and/or operational policies and internal guidance could strengthen AFMA's ability to demonstrate that its fishery management arrangements meet the requirements of the EPBC Act and/or other relevant legislation. More importantly, the department recommends that implementation policies and guidelines, which:

- reflect ecosystem based fisheries management, and
 - recognise the interplay between the principles of ecologically sustainable development,
- could be developed to guide decision making.

Ecosystem based fisheries management

Ecosystem based fisheries management is an important strategy towards realising full implementation of ecologically sustainable development. Some key steps have been taken towards ecosystem based management of Commonwealth fisheries - for example, the publication of the *Commonwealth Fisheries Harvest Strategy Policy and Guidelines* (harvest strategy policy), development of harvest strategies for key species and the development and implementation of an ecological risk assessment/ecological risk management framework.

The harvest strategy policy was developed in response to a December 2005 direction from the then Minister for Fisheries, Forestry and Conservation, under section 91 of the *Fisheries Administration Act 1991*. Among other things, the direction required the Australian Fisheries Management Authority (AFMA) to:

take a more strategic, science-based approach to total allowable catch and/or effort levels in Commonwealth fisheries, consistent with a world's best practice Commonwealth Harvest Strategy Policy that has the objectives of managing fish stocks sustainably and profitably, putting an end to overfishing and ensuring that currently overfished stocks are rebuilt within reasonable timeframes.

Also in response to the ministerial direction, AFMA's adoption of ecosystem based fisheries management has been supported by substantial investment (in partnership with CSIRO) in the development and application of an ecological risk assessment/ecological risk management framework.

Notwithstanding the progress to date, the department considers there is scope to build on these achievements with a view to providing regulators and other stakeholders with a high degree of confidence in the long term sustainability of the management system. Ideally, the higher level policy and legislative objectives would be more effectively linked via operational policy and guidance to AFMA's fishery management (and potentially articulated at the fishery level in the management regimes for individual fisheries).

A number of submissions to the 2009 Hawke Review of the EPBC Act indicated that the Act had played an important role in giving momentum to fisheries management reform, and in particular to the progression towards ecosystem based fisheries management. The impacts of fisheries on non-target species (bycatch) and the wider ecosystem effects of fishing have become an increasingly important focus of fisheries management.

Currently, harvest of target species and bycatch of non-target species are managed under separate policies. The separation of these policies continues to present challenges in providing for the effective integration of management of target and non-target species, for example, where increasing a total allowable catch of a target species may impact unacceptably on a non-target species caught incidentally. Increasingly, for some Commonwealth managed fisheries, the limiting factor is effective bycatch management for EPBC Act listed species, and restricting the catch of conservation dependent species such as eastern gemfish and school shark.

The development of the harvest strategy policy and bycatch policy reviews by the Department of Agriculture, Fisheries and Forestry has identified that the wider ecosystem effects of fishing need further consideration. However, the scope of these reviews does not presently extend to the incorporation of habitats and ecosystems into a comprehensive harvest management system. AFMA's ecological risk management framework does however include capability to include the identification, prioritisation and management of risks to the wider ecosystem generally.

AFMA has recently announced a project to review its ecological risk management framework. AFMA has advised that the review includes extension of the framework to include habitats and communities and incorporate the cumulative effects of fishery level impacts when considered across fisheries. Identifying and managing the cumulative impacts of fishing remains a substantial challenge, including in relation to impacts associated with resources shared among industry sectors and cross-jurisdictional management of shared fish stocks or fishing methods with the potential to impact adversely on regionally distributed habitats.

The department welcomes AFMA's review and considers that full implementation of the proposed enhancements would assist in demonstrating performance against Objective 3 of the *Guidelines for the Ecologically Sustainable Management of Fisheries - 2nd Edition*: "the fishery is conducted in a manner that minimises the impact of fishing operations on the ecosystem generally", including impacts on ecological communities, food chains and the physical environment.

While acknowledging that the harvest strategy policy, bycatch policy and ecological risk management reviews represent the next step in evolution of AFMA's fisheries management "system", the department has identified a need for a unifying framework. Such a framework would ensure that the separate policy elements work together in harmony and that the potential for unintended consequences from the application one policy element in isolation can be identified and avoided.

In line with the government's commitment to move towards accreditation of industry sector-wide environmental management systems, the department suggests that there is an opportunity for the current review of fisheries legislation to consider how such a system could be developed and given substance under fisheries management policy and legislation. The department notes that criteria for any such industry or jurisdiction wide accreditation would need to be developed and agreed by government. A fisheries management system would likely need to be subject to annual reporting, periodic review and possibly performance audit of the system or of individual fisheries within a system. Effective systems for dealing with cumulative impacts and total fishing-related mortality, including fishing-related mortality of non-target species, across all relevant sectors and jurisdictions issues would be an essential element of an accredited fishery management system.

Managing uncertainty

Uncertainty is a reality within complex systems such as marine ecosystems, including the likely response to a disturbance such as extraction of living resources and the use of methods employed in that extraction. Management approaches that offer ways of dealing with uncertainty include:

- i) the 'plan, do, review' approach, sometimes referred to as adaptive management, but more formally implemented as environmental management systems
- ii) ecosystem based fisheries management, which is by its nature adaptive, and
- iii) the use of the precautionary principle in decision making.

Precautionary principle

As noted previously, the application of the precautionary principle and various precautionary approaches creates a great deal of discussion among fishery management stakeholders. A discussion of the precautionary principle as defined in the principles of ecologically sustainable development and as applied in administering the EPBC Act is included at **Appendix 2**.

C. "New approaches" from Looking to the Future

While considered by *Looking to the Future* to be new approaches at the time of the review, the department considers the issues of resource allocation and cross-jurisdictional management to be critical factors in achieving ecosystem based management of fisheries.

Resource sharing

Looking to the Future recognised that five sectors - commercial, recreational, charter, aquaculture and Indigenous - all seek access to fishery resources. *Looking to the Future* also noted that *New Directions* did not explicitly address the issue of resource sharing.

The department recognises that measuring and managing all sources of fishing mortality remains an ongoing challenge for the management of some fish stocks. In some cases, different sectors fishing the same resource are managed by different jurisdictions. Where data for all sectors is available, it may not be easily amalgamated to inform management. Where the take by more than one sector is significant, mechanisms are needed to monitor and manage the total fishing related impact on the stock. The department continues to see a need for the development of policy frameworks, administrative arrangements and management solutions that identify and take account of all sources of fishing related mortality.

Improved management arrangements between jurisdictions

Looking to the Future detailed a number of issues for fisheries management arising from the Offshore Constitutional Settlement fisheries agreements. Haward and Vince (2008)³ also discuss in general terms the difficulties of establishing new policy settings which cut across existing management arrangements and legislative and administrative mandates.

Agreements made under the 1979 Offshore Constitutional Settlement (OCS) framework provide for Commonwealth, individual state or territory, or Joint Authority management of:

- specified fish stocks (for example, all finfish except tuna, all tuna) in a designated area, or

³ Haward, M G and Vince, J (2008) *Oceans Governance in the Twenty-First Century: Managing the Blue Planet*. Edward Elgar Publishing Limited. Cheltenham, UK.

- specified fishing methods (for example, all trawl fishing, all fishing other than trawl methods) in a designated area.

Outcome 50 of *Looking to the Future* was that the government would "progressively review OCS fisheries agreements" with a view to addressing the issues identified, including the achievement of an agreed management framework for recreational, charter and Indigenous fishing. The department recognises the challenges associated with renegotiating the agreements, but considers that resolving cases where, for example, management of a single stock is split across jurisdictions, and consolidating management on an ecosystem basis at appropriate spatial scales, to be an essential step in the achievement of ecosystem based fisheries management.

THE DEPARTMENT OF SUSTAINABILITY, ENVIRONMENT, WATER, POPULATION AND COMMUNITIES' INTERESTS IN COMMONWEALTH MANAGED FISHERIES

The EPBC Act

The enactment of Australia's national environmental law, the EPBC Act, in July 2000, introduced a requirement for Commonwealth managed fisheries to undergo strategic assessment of the impacts on 'matters of national environmental significance'. In January 2002, repeal of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (WP(REI) Act) and incorporation of an enhanced wildlife protection regime into the EPBC Act came into effect. Native wildlife specimens, including fish, were to be exported only if derived from an approved source, such as an operation declared to be an approved wildlife trade operation, or included in a 'list of exempt native specimens'. At the same time as the 2002 wildlife trade amendments, provisions to assess fishery management arrangements in relation to interactions with EPBC Act listed species in Commonwealth waters were introduced.

For Commonwealth managed fisheries, export and protected species assessments were combined with strategic assessments, using the first edition (2001) of the Australian Government *Guidelines for the ecologically sustainable management of fisheries* (revised in 2007). The guidelines outlined specific principles and objectives designed to ensure a strategic and transparent way of evaluating the ecological sustainability of fishery management arrangements.

Decisions relating to the operation of Commonwealth managed fisheries are most commonly made under:

- Part 13 - species and ecological communities - in relation to interactions with listed species and ecological communities in Commonwealth waters
- Part 13A - international wildlife trade
- Part 10 - which provides for endorsement of a plan, policy or program following a strategic assessment of the impacts of actions under the plan, policy or program on matters of national environmental significance. Where a Part 10 strategic assessment has been undertaken for a Commonwealth managed fishery or fisheries, the outcomes of the strategic assessment inform other decisions under the EPBC Act for the relevant fisheries, and
- Part 4 - cases in which environmental approvals (in relation to impacts on matters of national environmental significance) are not required.

Section 6 (Part 1) applies the Act to fishing activities managed under the *Fisheries Management Act 1991* outside the Australian jurisdiction.

Decisions relevant to commercial fisheries are in many cases limited by the Act to specified time periods and must be remade on a periodic basis. Following the completion of the first round of fishery assessments under the EPBC Act, the *Guidelines for the ecologically sustainable management of fisheries* were extensively reviewed in consultation with all jurisdictions to streamline the information requirements for subsequent decision making. The *Guidelines for the Ecologically Sustainable Management of Fisheries - 2nd Edition*, published in 2007, provide a common framework to inform both the provision of submissions for assessment and decision making under all relevant parts of the EPBC Act, in relation to commercial fisheries.

The following sections expand on the legislative requirements for decision making for each type of decision, the department's integrated assessment processes and the guidelines.

EPBC Act decisions about Commonwealth managed fisheries

Part 13 - Interactions with EPBC Act listed species, in Commonwealth waters

It is an offence to harm species listed under Part 13 of the EPBC Act, other than 'conservation dependent' species⁴, in Commonwealth waters unless fishers have a permit or the management arrangements for the fishery are accredited by the environment minister under Part 13 of the Act. A plan of management within the meaning of the *Fisheries Management Act 1991*, or a regime determined under the *Fisheries Administration Act 1991* (for a fishery for which a plan of management is not in force) can be accredited if the minister is satisfied that:

- the plan or regime requires individual fishers to take all reasonable steps to avoid harming protected species, and
- the fishery does not, or is not likely to, adversely affect the conservation status of protected species or affect the survival and recovery of listed threatened species.

In making this decision the minister considers the impact of fishery operations in Commonwealth waters on species protected under Part 13 of the EPBC Act, including cetaceans, listed threatened species and ecological communities, listed migratory species and listed marine species. Typically, Part 13 accreditation is considered in conjunction with either a strategic assessment or an application for export approval (Part 13A).

The assessment can have two possible outcomes:

- ***Part 13 accreditation***

The fishery management arrangements are found to require fishers to take all reasonable steps to avoid killing or injuring listed species and the fishery does not, or is not likely to, adversely affect the conservation status of listed migratory species, cetaceans or listed marine species or affect the survival and recovery of listed threatened species. The minister accredits the management arrangements and operators are thereby exempt from requiring permits under Part 13 for interactions with protected species. Accreditation can be restricted to apply only:

- during a particular period
- while certain circumstances exist, or
- while a certain condition is complied with.

- ***No Part 13 accreditation***

The management arrangements are found not to require fishers to take all reasonable steps to minimise impacts on protected species and/or the ability of the management arrangements to control unacceptable impacts on protected species is uncertain. In the absence of Part 13 accreditation, fishers are liable for prosecution under the EPBC Act should they interact with protected species in Commonwealth waters without a permit.

⁴ Refer to page 8 for a discussion of the conservation dependent listing category.

Part 13A - International movement of wildlife specimens

For product derived from commercial fisheries, it is an offence under the EPBC Act to export native specimens (such as fish) without a relevant permit, unless they are included in the list of exempt native specimens established under section 303DC (Part 13A) of the Act.

For specimens derived from a commercial fishery to be included in the list, the management arrangements for the fishery need to be consistent with the objects of Part 13A of the EPBC Act. Fisheries are not required to have Part 13A approval if they do not plan to export their product.

The objects of Part 13A are:

- a) to ensure that Australia complies with its obligations under CITES⁵ and the Biodiversity Convention⁶
- b) to protect wildlife that may be adversely affected by trade
- c) to promote the conservation of biodiversity in Australia and other countries
- d) to ensure that any commercial utilisation of Australian native wildlife for the purposes of export is managed in an ecologically sustainable way
- e) to promote the humane treatment of wildlife
- f) to ensure ethical conduct during any research associated with the utilisation of wildlife, and
- h) to ensure the precautionary principle is taken into account in making decisions relating to the utilisation of wildlife.

The minister may, by instrument published in the *Gazette*, declare a commercial fishery to be an 'approved wildlife trade operation' if satisfied about the matters listed in section 303FN of the EPBC Act, including that the fishery is consistent with the objects of Part 13A of the Act. The declaration takes effect upon gazettal.

The minister may amend the list of exempt native specimens under section 303DC of the EPBC Act to include product from the fishery while the fishery is subject to declaration as an approved wildlife trade operation, or impose other conditions or restrictions on the inclusion. The instrument to amend the list of exempt native specimens is a disallowable instrument.

The minister may decide to:

- include product sourced from the fishery in the list of exempt native specimens, thereby making the product exempt from the export controls prescribed by the EPBC Act
- declare the fishery to be an approved wildlife trade operation. A fishery can be declared an approved wildlife trade operation for up to three years⁷. A declaration may be made subject to conditions, as provided for in section 303FT of the Act, or
- prohibit export from the fishery by choosing not to agree to either of the above options.

⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora

⁶ Convention on Biological Diversity: <http://www.cbd.int/>

⁷ The EPBC Act stipulates that the maximum length of time for an approved wildlife trade operation is three years.

In deciding whether to declare a commercial fishery to be an approved wildlife trade operation or to amend the list of exempt native specimens, the Act provides that the minister must rely primarily on the outcomes of any strategic assessment of the fishery carried out under Part 10 (discussed in more detail on page 4).

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

Australia's obligations under CITES are met through the EPBC Act. Under the convention, export of CITES specimens⁸ may only occur where the CITES Scientific Authority of the country of export has found that the export will not be detrimental to the survival of the species (a non-detriment finding), and a CITES export permit has been issued by the exporting country's CITES Management Authority. The legislative basis for meeting Australia's responsibilities under CITES is provided by Part 13A of the EPBC Act. As such, specimens of species listed in Appendix II and Appendix III of CITES may be exported commercially, under an EPBC Act CITES export permit, if sourced from an approved wildlife trade operation.

The department's assessment process for Part 13A applications

Part 13A export decisions are made subject to time limits. If export is to continue beyond the stated limit, a fresh decision must be made. To seek export approval under Part 13A of the EPBC Act in the absence of a strategic assessment (see page 6 for a discussion of strategic assessments), a fishery management agency provides the department with an application that describes:

- the management arrangements for the fishery, and
- progress against conditions from any previous export approval and/or any recommendations made in association with a previous decision.

Using the *Guidelines for the Ecologically Sustainable Management of Fisheries - 2nd Edition* and any other relevant available information, the department prepares advice on matters about which the minister must be satisfied before making the required decisions about a fishery. The assessment process includes a public comment period to provide stakeholders with the opportunity to express their views on the proposed decision. When making a decision to declare a commercial fishery an approved wildlife trade operation, the minister must consider any written comments received in response to a published invitation to comment. The Act specifies that this public comment period must be at least 20 business days.

Part 10 - Strategic assessments

Under Part 10 of the EPBC Act, Commonwealth managed fisheries must be assessed for impacts of actions permitted under the fishery's plans or policies, on matters protected by a provision of Part 3 of the Act (matters of national environmental significance). A strategic assessment must be undertaken whenever a new management plan is developed:

- As a first step, AFMA must seek agreement under section 146 (Part 10) of the EPBC Act from the environment minister to undertake a strategic assessment of the impact of actions under the plan on matters of national environmental significance

⁸ A CITES specimen is a specimen of a species included in Appendix I, II or III to CITES.

- The Act requires that the agreement under section 146 must provide for:
 - the agreement to terms of reference for a report on the impacts to which the agreement relates, in accordance with paragraph 146(1B)(a). The standard terms of reference for strategic assessment of Commonwealth managed fisheries are drawn primarily from the *Guidelines for the Ecologically Sustainable Management of Fisheries - 2nd Edition*
 - the preparation by AFMA of a draft strategic assessment report addressing the terms of reference
 - the opportunity for public comment on the draft strategic assessment report for no less than 28 days, and
 - the provision of a final strategic assessment report, taking account of the comments received, from AFMA to the environment minister
- Following the provision of a strategic assessment report to the environment minister and in accordance with paragraph 148(2)(b) (Part 10) of the Act, AFMA is required to consider any recommendations, including recommendations for the modification of the plan or policy, made by the environment minister under the section 146 agreement, and
- Once the plan or policy is finalised, taking into account the recommended modifications, the environment minister may then endorse the plan or policy under the section 146 agreement - paragraph 146(2) (f) (Part 10), if the minister is satisfied that the management arrangements adequately address the impacts to which the agreement relates and that the recommended modifications of the plan or policy (if any) have been addressed.

Part 4 - Cases in which environmental approvals are not required (matters of national environmental significance)

Following on from a Part 10 strategic assessment, there is an option under Part 4 of the EPBC Act which allows for the environment minister to make declarations that a person may take an action described in a provision of Part 3 (matters of national environmental significance) without approval under Part 9 (approval of actions) if:

- it is taken in accordance with an accredited management arrangement in operation under a law of the Commonwealth, and
- certain specified criteria are satisfied.

Making such a declaration that actions do not need approval under Part 9 involves a number of decision and administrative steps, outlined below.

Subsection 33(3) of Part 4 of the EPBC Act provides that the minister may accredit a management arrangement for the purposes of a declaration (under subsection 33(1)), only if satisfied that:

- the management plan and the law under which the plan is to be in force, meet the criteria prescribed by the regulations⁹
- there has been adequate assessment of the impacts that actions approved in accordance with the plan have, or will have, or are likely to have, on each matter protected by a provision of Part 3 to which the declaration relates (a strategic assessment provides this level of assessment), and
- actions approved or taken in accordance with the plan will not have unacceptable or unsustainable impacts on the environment.

Therefore:

- If the environment minister endorses a plan of management in accordance with a strategic assessment (section 146, Part 10) agreement, the minister may then accredit the endorsed plan under subsection 33(3) (Part 4), and
- Should the environment minister accredit the management plan under subsection 33(3), in accordance with section 153 (Part 10) of the EPBC Act the minister must make a declaration under subsection 33(1) that actions taken in accordance with the plan do not need approval under Part 9 (Approval of actions).

A declaration under subsection 33(1) means that fishers operating in accordance with the plan are not required to seek individual approvals under Part 9 of the EPBC Act.

Guidelines for assessment

The *Guidelines for the Ecologically Sustainable Management of Fisheries - 2nd Edition*, introduced in 2007, include streamlined reporting and submission requirements for fishery assessments under the EPBC Act. The department assesses a fishery's management arrangements for consistency with the criteria for relevant decisions under the EPBC Act, using the principles and objectives for ecologically sustainable management arrangements listed in the guidelines.

The guidelines include the principles that:

- a fishery must be conducted in a manner that does not lead to over-fishing, or for those stocks that are over-fished, the fishery must be conducted such that there is a high degree of probability the stock(s) will recover, and
- fishing operations should be managed to minimise their impact on the structure, productivity, function and biological diversity of ecosystems.

⁹ Sub-regulation 2A.01(2) of the *Environment Protection and Biodiversity Conservation Regulations 2000* sets out the criteria that must be met:

- (a) the law under which the management arrangement is in force, or is to be in force, must be the *Fisheries Management Act 1991* or the *Torres Strait Fisheries Act 1984*;
- (b) the management arrangement must be endorsed by the Minister under an agreement made under section 146 of the Act;
- (c) the management arrangement must be in the form in which it was endorsed.

Objectives are set for:

- target and byproduct species
- bycatch (non-retained) species
- EPBC Act listed species and ecological communities, and
- the ecosystem generally.

Within each principle and objective, expectations are articulated in relation to:

- information requirements,
- assessment of status and risks, and
- criteria for management responses.

Other EPBC Act decisions relevant to Commonwealth fisheries

Listing species, ecological communities and key threatening processes under Part 13

Any person may nominate a native species, ecological community or threatening process for listing under the EPBC Act. An invitation to nominate is extended by the environment minister each year ahead of a new assessment cycle. Nominations submitted within the advertised invitation period and that satisfy the Environment Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations) are forwarded to the Threatened Species Scientific Committee. Nominations are considered by the committee and a recommendation made to the minister on annual priorities for assessment - the proposed priority assessment list (PPAL). The minister considers the list and may make changes. The finalised priority assessment list (FPAL) is published on the department's website and nominators are notified of the outcome.

Nominations included in the finalised priority assessment list are assessed by the committee within a timeframe set by the minister. The committee invites public comment on each nomination during the assessment period. The committee provides its recommendations to the minister, and the minister then decides whether the species, ecological community or threatening process is eligible for listing under the EPBC Act. In providing advice and decision making on a species nomination, respectively, both the committee and the minister are constrained by the EPBC Act, to consider only:

- matters relating to whether the species is eligible to be included in that category, and
- the effect that listing could have on the survival of the species.

In making its assessment, the committee uses its guidelines for assessment of nominations of:

- threatened species¹⁰
- threatened ecological communities¹¹, and
- key threatening processes¹².

¹⁰ <http://www.environment.gov.au/biodiversity/threatened/pubs/guidelines-species.pdf>

¹¹ <http://www.environment.gov.au/biodiversity/threatened/pubs/guidelines-ecological-communities.pdf>

¹² <http://www.environment.gov.au/biodiversity/threatened/pubs/ktp-guidelines.pdf>

Section 179 of the EPBC Act provides the categories to which threatened species may be assigned and the EPBC Regulations describe the criteria for eligibility for those categories. The committee is informed by, but not bound by, indicative thresholds in its assessment guidelines, which have been adapted from the International Union for Conservation of Nature (IUCN) *IUCN Red List Categories and Criteria*.

Assessing eligibility of fish species for listing

When considering whether to use the indicative thresholds, the Threatened Species Scientific Committee judges whether they are appropriate to the species in question. In relation to the eligibility of fish species for listing, the committee exercises judgement in determining the application of the criterion thresholds to take account of species specific biology, for example life history strategies (i.e. short life span, early maturation, high fecundity, versus long life span, late maturation, low fecundity). The committee's threatened species guidelines were revised in November 2010 to include specific guidance relevant to marine fish species and to provide a link between the threatened species listing assessments and the *Commonwealth Fisheries Harvest Strategy Policy and Guidelines* (harvest strategy policy). When considering thresholds for assessing commercially harvested marine fish for listing, the committee refers to the harvest strategy policy.

The harvest strategy policy allows that declines of up to 60 per cent (from pre-fishing biomass levels) are acceptable for commercially harvested fish species where depletion is a managed outcome. Variations in the extent of acceptable decline depend on the biology of the individual species. The committee is informed, but not bound, by the series of biological reference trigger points in the harvest strategy policy, for management intervention for species that decline below 60 per cent of their pre-fishing biomass.

The 'conservation dependent' listing category

Species that are subject to a specific conservation program may be considered for eligibility as "conservation dependent" under the EPBC Act.

A fish¹³ species can be listed under the conservation dependent category if:

- it is the subject of a plan of management that provides for management actions necessary to stop its decline and support its recovery,
- the plan of management is in force under law, and
- where not having this management plan would adversely affect the species' conservation.

Listing as conservation dependent means the species must always remain under a plan of management that includes actions to stop its decline and support its long term recovery. This listing does not further restrict or limit fishing for a species beyond that provided in the plan of management. There is a clear implication in the *Commonwealth Fisheries Harvest Strategy Policy and Guidelines* that the performance of that management will be regularly reviewed, with a view to either removing the species from the threatened list if rebuild has been achieved, or moving it to a higher threatened category if rebuilding does not occur.

¹³ In relation to eligibility for conservation dependent listing, 'fish' includes all species of bony fish, sharks, rays, crustaceans, molluscs, and other marine organisms except marine mammals or marine reptiles.

The conservation dependent category highlights the potential for a fishery to become unsustainable and a mechanism to arrest its decline if it does. Listing as conservation dependent allows for a fishery to continue, so long as it is managed such that the stock is allowed to rebuild. Species listed as conservation dependent are not matters of national environmental significance, so do not trigger the offence or civil penalty provisions under Part 3 of the EPBC Act.

Four species are currently listed as conservation dependent: orange roughy, school shark, eastern gemfish and southern bluefin tuna. No species with stock levels above the limit reference point in the *Commonwealth Fisheries Harvest Strategy Policy and Guidelines* ('B_{LM}') have been listed as conservation dependent.

Recovery plans and threat abatement plans

The environment minister may make or adopt and implement recovery plans for listed threatened species (other than conservation dependent species) and threatened ecological communities listed under the EPBC Act. Recovery plans set out the research and management actions necessary to stop the decline of, and support the recovery of, listed threatened species or threatened ecological communities. The aim of a recovery plan is to maximise the long term survival in the wild of a threatened species or ecological community.

Recovery plan guidelines have been developed to provide information on how to go about preparing a recovery plan and explaining the content requirements for a recovery plan. Before making a recovery plan for a listed threatened species or listed threatened ecological community, the minister must:

- consult with the appropriate minister of each state and territory in which the species or ecological community occurs
- consider advice from the Threatened Species Scientific Committee
- invite public comment on the proposed plan
- consider all comments received.

Within 90 days of listing a key threatening process, the environment minister must decide if a threat abatement plan should be made or adopted. This decision is based on whether having and implementing a plan is the most 'feasible, effective and efficient way to abate the process'. The minister consults with the Threatened Species Scientific Committee and interested government agencies before making this decision.

Threat abatement plans provide for the research, management, and any other actions necessary to reduce the impact of a listed key threatening process on native species and ecological communities. Implementing the plan should assist the long term survival in the wild of affected native species or ecological communities. Before making or adopting a plan the minister must consult widely. This includes advertising and inviting comment on the plan during a specified period.

The EPBC Act requires the Australian Government to implement a recovery plan or threat abatement plan to the extent that it applies in Commonwealth areas. This requirement applies to all Australian Government agencies.

Considerations for decision making

Marine bioregional plans

On 27 August 2012, marine bioregional plans for Australia's South-west, North-west, North and Temperate East marine regions came into force. Marine bioregional plans identify regional conservation values, pressures on those values, and regional conservation priorities.

Section 176 (Part 12) of the EPBC Act requires that the minister must have regard to a bioregional plan when making any decision under the Act to which the plan is relevant. For some, but not necessarily all, Commonwealth managed fisheries, a marine bioregional plan is likely to be a relevant consideration in decision making.

For example, the Australian sea lion is a regional conservation priority for the South-west marine region, due to its conservation status (listed as vulnerable under the EPBC Act), the significance of the South-west marine region to the recovery of the Australian sea lion and the pressures facing the Australian sea lion in the region.

The *Marine bioregional plan for the South-west Marine Region* ranks bycatch in commercial fisheries as a pressure "of concern" for the Australian sea lion in the region. Therefore, the *Marine bioregional plan for the South-west Marine Region* is relevant to decision making about commercial fisheries.

Precautionary principle

Part 16 of the EPBC Act sets out those decisions for which the minister is required to take account of the precautionary principle.

Among other decisions, the Act requires the minister to take account of the precautionary principle (to the extent that he can do so consistently with the other provisions of the Act) when making decisions to:

- issue a CITES export permit under Part 13A
- amend the list of exempt native specimens under Part 13A, and
- declare an operation to be an approved wildlife trade operation under Part 13A.

The precautionary principle is defined in subsection 391(2) of the Act as meaning that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

Reform of the EPBC Act

On 31 October 2008 the then Minister for the Environment, Heritage and the Arts commissioned an independent review of the EPBC Act (the Hawke review). Section 522A of the Act requires it to be reviewed every 10 years. The final report of the review, released on 21 December 2009, concluded that the Act had made a major contribution towards shifting fisheries management away from a target species based management approach towards a more ecosystem based approach.

The review discussed interactions between the EPBC Act and the *Fisheries Management Act 1991*. The review recommended that "the environment minister should continue to have a strong role in promoting continuous environmental improvement in fisheries management through assessment of whether management arrangements are ecologically sustainable".

However, the review noted concerns of some stakeholders that, in their view, the EPBC Act and fisheries management legislation duplicate regulation, in that despite management arrangements meeting sustainability objectives in the *Fisheries Management Act 1991*, those arrangements are further assessed under the EPBC Act.

The Minister for Sustainability, Environment, Water, Population and Communities released the *Government response to the independent review of the Environment Protection and Biodiversity Conservation Act 1999* on 24 August 2011 as part of a broad package of reforms for Australia's national environment law, designed to enable a shift to a more strategic and administratively streamlined, whole-of-ecosystem approach.

Decisions about commercial fisheries

The government response agreed in principle with two recommendations that relate to EPBC Act decisions about fisheries managed under the *Fisheries Management Act 1991*:

Recommendation 40 - which recommended that the Act be amended so that the fishery provisions under Part 10, 13 and 13A are streamlined into a single strategic assessment framework for Commonwealth and State and Territory-managed fisheries to deliver a single assessment and approval process:

- The government:
 - noted that different parts of the EPBC Act which may apply to commercial fisheries serve different purposes - for example:
 - : interactions with listed species in a Commonwealth area (Part 13)
 - : strategically assessing impacts of the operation of a fishery on matters of national environmental significance (Part 10), and
 - : ecologically sustainable management of commercial export fisheries (Part 13A), and
 - supported in principle a progressive shift under an amended Act from individual assessment of fisheries towards accreditation of fisheries management arrangements, and

Recommendation 42 – which relates to the wildlife trade provisions:

- The government agreed to:
 - remove duplication between the objects of Part 13A (relating to international wildlife trade) and the objects and provisions in an amended EPBC Act, and
 - move towards assessing and accrediting management arrangements for industry sectors
- The government noted that, in accordance with Australia's international obligations, specimens listed under CITES may only be exported pursuant to a permit, and

- The government confirmed that tests of sustainability and non-detriment to species will be retained as key criteria for determining an approved source of wildlife for export. (It is important to note that the government does not propose any change to current decision-making processes, as extensive decision-making practice under the Act, and legal interpretation of that practice, has developed over the past decade in line with Australia's international obligations.)

Other decisions relevant to fisheries

Recommendation 17 - which relates to the listing of migratory species:

The Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), to which Australia is a party, aims to conserve migratory species. The convention differentiates between two categories of listed species. Under the convention, Appendix I species are categorised as endangered. Appendix II species are categorised as having an unfavourable conservation status and require international agreements for their conservation and management, or species with a conservation status that would significantly benefit from international cooperation.

The EPBC Act currently does not differentiate between Appendix I and Appendix II species in its level of protection. Accordingly the level of protection provided to Appendix II species may be higher than appropriate in some cases.

- The government agreed to amend the provisions of Part 13 of the Act relating to migratory species listed on Appendix II of the Bonn Convention. The government agreed that:
 - all migratory species listed on Appendix I of the Bonn Convention should continue to be protected under an amended EPBC Act as a matter of national environmental significance. This category of protection would be renamed 'protected migratory species', under an amended Act, and
 - migratory species listed on Appendix II of the Bonn Convention would no longer be automatically listed under the EPBC Act. Instead, the government agreed to amend the EPBC Act so that within 12 months of a Bonn Convention Appendix II listing coming into effect, the minister must either:
 - a) list the species as a protected migratory species
 - b) list the species as a managed migratory species (which will not be protected as a matter of national environmental significance), or
 - c) decide that the species should not be listed. The take of species that are categorised as managed migratory species may also be allowed under approved management arrangements.

Further details regarding proposed EPBC Act procedures for new listings on Appendix II of the Bonn Convention are contained in the discussion of recommendation 17 in the *Government response to the independent review of the Environment Protection and Biodiversity Conservation Act 1999*.

Recommendation 41 - which relates to the threatened species listing process for marine fish:

The government noted that the Threatened Species Scientific Committee's public interpretive guidelines were updated in 2010 to explain how the Commonwealth fisheries harvest strategy policy framework is used during the listing process for commercially harvested marine fish species. The government agreed that there should continue to be a link between the harvest strategy policy framework and the listing process and that such a link should remain a policy matter and not be legislative.

Recommendation 18 - which relates to recovery planning and threat abatement planning:

The government agreed to introduce flexibility in the types of recovery or threat abatement plans that can be developed - for example, a single-species or multi-species recovery plan, a regional recovery plan, or a regional or national threat abatement plan. In its response to Recommendation 6, which deals with strategic approaches to protection of matters of national environmental significance at regionally appropriate scales, the government agreed to provide for regional environment plans to be developed collaboratively with stakeholders. Consistent with a strategic regional approach, regional environment plans would, within a defined geographical area, inform the prioritisation of recovery plans and actions, and the management of environmental threats by identifying and implementing threat abatement plans.

Other reforms

The government also agreed to produce more guidelines and policy statements on different aspects of the operation of an amended EPBC Act, including:

- guidelines on the application of the precautionary principle, and
- guidelines for strategic assessments, including guidelines for identifying matters that should be covered by strategic assessments.

The Antarctic Marine Living Resources Conservation Act 1981

The department is responsible through its Australian Antarctic Division for administering the Australian Antarctic Territory and the Territory of Heard Island and McDonald Islands, including the authorisation and management of Australian activities in accordance with relevant legislation and environmental protection measures.

The *Antarctic Marine Living Resources Conservation Act 1981* (AMLRC Act) implements Australia's obligations under the Convention on the Conservation of Antarctic Marine Living Resources and conservation measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The AMLRC Act provides for a system of permits for harvesting and research activities, enforcement action through the appointment of inspectors, and allows for the implementation of conservation measures adopted by CCAMLR.

The Commonwealth managed Heard Island and McDonald Islands Fishery operates in waters surrounding the Heard Island and McDonald Islands Marine Reserve, which is adjacent to the Territory of Heard Island and McDonald Islands, approximately 4100 kilometres southwest of Perth, in the Southern Ocean. The fishery is also located within the area of competence of CCAMLR. CCAMLR's objective is to ensure the conservation of living marine resources within the Conservation of Antarctic Marine Living Resources Convention Area, where conservation includes rational use.

CCAMLR applies several principles of conservation within its area of competence including science-based decision-making, the ecosystem approach (including for harvest rules) and precautionary approach. While the day-to-day management of the Heard Island and McDonald Islands Fishery is the responsibility of AFMA under the applicable management plan, the department, through its Australian Antarctic Division, is closely involved in the governance of this fishery. Complementary to its obligations as a contracting party and an active member of CCAMLR, Australia agrees to apply CCAMLR conservation measures to the fishery. This ensures that strict harvest rules apply to fishing, and best practice measures apply to fishing activities that are designed to avoid bycatch, and to minimise the incidental mortality of seabirds (particularly listed threatened albatross and petrel species) and mammals (particularly seals).

The Australian Antarctic Division, AFMA and the fishing industry have collaborated closely over the years in the management of the Heard Island and McDonald Islands Fishery. The Australian Antarctic Division scientists undertake annual stock assessments for the Heard Island and McDonald Islands toothfish and icefish fisheries, provide support to the scientific observer program, and undertake fishery dependent and independent research. Australian Antarctic Division officers and scientists participate on AFMA's Sub Antarctic Management Advisory Committee and its Sub Antarctic Resource Assessment Group. The Australian Antarctic Division provides advice on the stock assessments to CCAMLR for consideration and recommendations from CCAMLR are provided to AFMA for its endorsement.

New and exploratory fishing is allowed in adjacent high seas areas of the Conservation of Antarctic Marine Living Resources Convention Area. Where Australian operators participate in such fisheries the proposed activities are assessed by AFMA in conjunction with the Australian Antarctic Division and reviewed by CCAMLR. AFMA may then issue fishing permits under the *Fisheries Management Act 1991*. The conditions on these permits include the requirements of CCAMLR conservation measures.

Precautionary principle

The Rio Declaration on Environment and Development (Rio Declaration), which set out 27 principles of sustainable development, included the principle that in "order to protect the environment, the precautionary approach shall be ...applied by (member) states". The precautionary approach was described as "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

In Australia, this concept was embodied in Australia's *National Ecologically Sustainable Development Strategy* in 1992 and in national environmental law as the precautionary principle: "that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage".

The United Nations Food and Agriculture Organisation (FAO) *International Code of Conduct for Responsible Fisheries* adopted by the FAO Conference in 1995, prescribed a precautionary approach to fisheries somewhat similar to that in the Rio Declaration. The code provided some guidelines for member states, mainly in regard to measures for target fish stock. The United Nations *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* (Fish Stocks Agreement) adopted in 1995 and now referenced by the *Fisheries Management Act 1991*, also describes in some detail the measures that should be included in a precautionary approach.

In general usage, confusion arises from time to time as the terms 'being precautionary', 'precautionary approach' and 'precautionary principle' are often used interchangeably. In addition, the FAO and Fish Stocks Agreement wording refers to 'a lack of scientific information' as compared to 'a lack of full scientific certainty'. However, more information does not always equate to greater certainty. The department recognises a need for a better understanding of the precautionary principle and its use.

In decision making about ecologically sustainable development, the precautionary principle is assumed to provide a means of addressing uncertainty in regard to environmental threats or risks. The application of the precautionary principle in decision making is relevant to Commonwealth managed fisheries in two ways:

- in making certain decisions under the EPBC Act, the environment minister is required to take account of the precautionary principle, as expressed in the Act (in the case of commercial fisheries, the requirement to take account of the precautionary principle applies to making export decisions), and
- from the *Fisheries Administration Act 1991* and the *Fisheries Management Act 1991*, one of the objectives which AFMA must pursue in the performance of its functions and which the fisheries minister must pursue in the administration of the Act is:

ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development (which include the exercise of the precautionary principle), in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment."

In applying the EPBC Act, the precautionary principle is taken to be an operational principle about taking decisions where there is a lack of full scientific certainty.¹⁴ The principle is interpreted as being applicable to decision making where there is *both*:

- a threat of serious or irreversible environmental damage, and
- a lack of full scientific certainty.

The EPBC Act provides guidance in relation to decisions in which a decision maker is to take account of the precautionary principle. As part of regulatory reform the government has agreed to produce guidelines on the application of the precautionary principle in the operation of an amended EPBC Act.

While much of AFMA's fisheries management approach embodies a precautionary approach along the lines of that described in the Fish Stocks Agreement, there is room for clarification of the application of the precautionary principle in decision making under fisheries legislation. The department recommends that guidance be developed on the use of the precautionary principle in decision making under the *Fisheries Administration Act 1991* and the *Fisheries Management Act 1991*, as applicable, for:

- decision makers
- AFMA officers, and
- other stakeholders.

¹⁴ Australian Government response to the report of the independent review of the EPBC Act, page 79.