

## **Annex 5**

### **European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)**

#### **IMPEL Better Regulation Cluster Common Regulatory Framework Comparison Project**

#### **Literature Review of Common Regulatory Frameworks in non-IMPEL Member Countries**

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### Notes

References are footnoted following the Oxford Standard for the Citation Of Legal Authorities (OSCOLA). However, inconsistent with the conventions of OSCOLA, for ease of reference, authors are identified by their surname followed by their initial(s) and journals are cited using their full titles. Many references cite an online source, in such cases this source was available via the Internet at the date of completion of this literature review (23 June 2010).

### Disclaimer

This literature review has been prepared by the researchers with guidance from representatives of IMPEL. The information does not necessarily represent either the views of the researchers, IMPEL, the national administrations or the commission. Rather, the content reflects the sources available and the constrained time period.

## **Executive summary**

This research is a literature review to investigate common regulatory frameworks in non-IMPEL countries, namely, Australia, New Zealand, South Africa, and the United States of America (US). This focus on three English speaking developed, and one English speaking developing nation, reflected the availability of information in relation to the short timescale of this project (May-June 2010). Appropriate references were sourced from legal, social science and newspaper databases. The literature reviewed included references to legislation and parliamentary materials, academic journals and reports together with newspapers and opinion pieces.

Overall, the research found that Australia has a joint regulatory system, the National Water Initiative, overseen by a National Water Commission. New Zealand's Resource Management Act 1991 provides common permitting procedures for a range of environmental resources. South Africa has: a common (or alternative) framework to assess development applications; a common system for administration of water; a common set of principles to guide environmental decision making; has created a network of Environmental Management Inspectors; together with committees to facilitate co-operation in coastal management. No common regulatory frameworks, as defined by IMPEL, was found from reviewing literature relevant to the US.

The quantity and quality of the literature available varied with each nation studied. However, in all cases the common regulatory frameworks identified were formulated in response to existing environmental conditions and structures of governance. This leads to questions about the extent to which such frameworks can provide useful models for application within EU Member States. Literature searches revealed that the term 'common regulatory frameworks' was not being routinely used to refer to activities fitting the definition of this concept supplied by IMPEL. Therefore, it is likely that there are many activities, not listed in this review, which fit IMPEL's definition of a common regulatory framework. Future research could usefully employ a simple process of interviews to unearth the potential breadth of common regulatory frameworks in Australia, New Zealand, South Africa, and the US together with other non-IMPEL countries.

## Abbreviations

2003 Amendment	National Environmental Management (Amendment) Act, 46 of 2003 (South Africa)
COAG	Council of Australian Governments
DEAT	Department of the Environmental Affairs and Tourism (South Africa)
DFA	Development Facilitation Act (South Africa)
EEA	European Economic Area
EMI	Environmental Management Inspectors, also known as the ‘green scorpions’ (South Africa)
EU	European Union
ICM	National Environmental Management: Integrated Coastal Management Act (South Africa)
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
IMPEL Questionnaire	IMPEL Better Regulation Cluster Common Regulatory Framework Comparison Project Questionnaire
NEMA	National Environmental Management Act (South Africa)
NGO	Non-governmental organisation
NPA	National Prosecuting Authority (South Africa)
NWA	National Water Act (South Africa)
NWI	National Water Initiative (Australia)
NZEPA	Environmental Protection Authority (New Zealand)
OSCOLA	Oxford Standard for the Citation Of Legal Authorities
RMA	Resource Management Act (New Zealand)
RMA Amendment	Resource Management (Simplifying and Streamlining) Amendment Act 2009 (New Zealand)
RRB	Reducing the Regulatory Burden (initiative of Victoria, an Australian State)
SAPS	South African Police Service
SLIM	Simpler Regulation for the Internal Market
UK	United Kingdom
US	United States (of America)
USEPA	Environmental Protection Agency (US)

## 1. Purpose, objectives and structure

The purpose of this Literature Review of common regulatory frameworks within non-IMPEL member countries is to inform the Common Regulatory Framework Comparison Project. IMPEL is an international non-profit association of the environmental authorities of the European Union Member States, acceding and candidate countries of the European Union (EU) and European Economic Area (EEA) countries.<sup>1</sup> Therefore this literature review focuses on countries out with the EU and EEA. It intends to provide a broad, rather than an in-depth, overview of common regulatory frameworks in non-IMPEL countries.

The aim of the common regulatory framework Comparison Project is to look at environmental regulatory frameworks (legislative, regulatory and/or administrative) within and between Member States and wider. The specific objectives of the IMPEL Common Regulatory Framework Comparison Project, relevant to this Literature Review, are:

- To identify examples of common regulatory frameworks developed by countries outside of IMPEL and describe their history, the reasons why they were developed and why they took the form they did;
- To compare the examples and identify the perceived advantages and disadvantages of common regulatory frameworks for regulators and business/industry including administrative burdens;
- To identify barriers to integration/combining of environmental regulatory frameworks;
- To identify the benefits of common regulatory frameworks for Member States considering adopting such frameworks; and
- To provide recommendations for IMPEL and Member States on the creation of common regulatory frameworks and good practice.

This literature review is to be used by IMPEL in conjunction with information gained from the IMPEL Better Regulation Cluster Common Regulatory Framework Comparison Project Questionnaire, 'the IMPEL Questionnaire'. Therefore, questions from the IMPEL Questionnaire have been adapted and used to structure the results section of this report so that outcomes from the literature review can be compared with those from the IMPEL Questionnaire. Consequently, this report is structured as follows:

**Section 2 Scope and Research Methods**, explains how this review was undertaken, including how questions from the IMPEL Questionnaire have been adapted to reflect the activities in non-IMPEL member states;

**Section 3 The countries and their common regulatory frameworks**, provides a more detailed overview of the countries and the common regulatory frameworks focused on within this review;

**Section 4 Results**, sets out the result from the process described in Section 2 for each selected country and common regulatory framework therein; and

**Section 5 Conclusions** concludes the review by providing an overview of the common regulatory frameworks examined and recommendations for how this topic could be further explored.

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<sup>1</sup> IMPEL 'About IMPEL' [2010] <http://impel.eu/about>

## 2. Scope and Research Methods

This report is in essence a Literature Review. Section 2.1 explains the scope of this review and includes the working definition of common regulatory frameworks together with how this has been used to focus this review. Section 2.2 describes how literature was sourced, and Section 2.3 outlines the amendments made to the IMPEL Questionnaire so that it could be used to structure the results section (Section 4) of this report.

### 2.1 The scope of this review

This research investigates common regulatory frameworks in non-IMPEL countries, namely, Australia, New Zealand, South Africa, and the United States of America (US). This focus on three English speaking developed and one English speaking developing nation reflects the availability of information in relation to the short timescale of this project (May-June 2010). Box 1 provides the definition of common regulatory frameworks, derived from IMPEL, that has been used to guide this Literature Review.

The definition in Box 1 could be interpreted to apply to a large number of different types of activities and the inter-relationship between activities within different nations. For example non-IMPEL African countries have set up common regulatory frameworks for electronic communications networks.<sup>2</sup> This review focuses on common regulatory frameworks related to management of the environment within, rather than between, the specified countries.

#### **Box 1** Definition of common regulatory framework

The simplification and streamlining of regulatory activities and processes through the development of common legislative, regulatory and/or administrative systems (including Information Systems), procedures, guidance and/or language.

The word common can mean, for example, integrated, aligned, shared, combined or joint.

Reflecting the definition provided in Box 1, whilst undertaking this literature review, clarity was required about where the commonality arose in relation to particular regulatory activities or processes. That is, whether this commonality was in terms of the administrative, procedural (for example permitting, inspection and/or enforcement processes), guidance and /or language.

Simplifying and streamlining regulatory activities and processes through the development of common regulatory frameworks supports the EUs Better Regulation agenda. This agenda is advocated at the EU Level by the Lisbon Strategy<sup>3</sup> and has been directly promoted within domestic legislation (e.g. within the UK<sup>4</sup>). It has previously been noted that Better Regulation is just one of a number of other initiatives which have “sought reform to the law” in recognition of “problems with law making in the EC”.<sup>5</sup> Other initiatives include the Sutherland Report,<sup>6</sup> the Molitor Report,<sup>7</sup> and the Simpler Legislation for the Internal Market project or SLIM project.<sup>8</sup>

<sup>2</sup> ‘West African regulators agree on common regulatory framework: Creating an environment to nurture ICT’ International Telecommunications Union News (October 2005) 17-18.

<sup>3</sup> European Commission Enterprise and Industry ‘Better regulation under the Lisbon Strategy’ [2010] [http://ec.europa.eu/enterprise/policies/better-regulation/other-initiatives/lisbon-strategy/index\\_en.htm](http://ec.europa.eu/enterprise/policies/better-regulation/other-initiatives/lisbon-strategy/index_en.htm)

<sup>4</sup> See the Legislative and Regulatory Reform Act 2006, The Environmental Permitting (England and Wales) Regulations 2007, and the Regulatory Enforcement and Sanctions Act 2008.

<sup>5</sup> Blake, L., Pointing, J., and Sinnamon, T. ‘Over-Regulation and Suing the State for Negligent Legislation’ (2007) 28 Statute Law Review, 218.

<sup>6</sup> ‘The Internal Market after 1992: Meeting the Challenge. Report presented to the Commission by the High Level Group on the functioning of the Internal Market. (commonly called the Sutherland Report)’ EC COM (1992).

<sup>7</sup> ‘The Molitor Report, The Report of the Group of Independent Experts on Legislative and Administrative Simplification’ COM SEC(95) 1379.

Better Regulation, a different, risk-based, more proportionate approach to regulation, aims to provide the same or better outcomes as existing approaches to environmental protection and regulation, whilst potentially decreasing economic and other costs. However, it has been noted “A subjective concept like better regulation could involve more or less regulation, higher or lower standards, or the same standards delivered through more efficient means. Most stakeholders want better regulation – but perhaps only if it is defined their way.”<sup>9</sup>

This review provides an overview of common regulatory frameworks in non-IMPEL countries. Evidence of the documented advantages and disadvantages of these frameworks has been sought, largely from secondary sources. However, this literature review does not make overall judgements whether these initiatives support Better Regulation.<sup>10</sup> For example it does not assess them against any tests developed, such as within the UK’s Hampton Report<sup>11</sup> or by IMPEL.<sup>12</sup> Indeed, how a particular common regulatory framework performs relies on the governance frameworks in which it operates. However, “Regulatory tools and institutions can be improved based on learning from past approaches, and tailored to suit European governance.”<sup>13</sup> This literature review aims to inform this process.

## 2.2 How literature was sourced

The term Better Regulation is used within the EU English speaking member states. Therefore although extensive literature searches were initially undertaken of the terms ‘better regulation’ and ‘common regulatory frameworks’, a more flexible approach was required to identify common regulatory frameworks in non-IMPEL countries. There was a need to search under a number of different terms, for example what is referred to as a “permit” in Australia, the UK and US, is called a “resource consent” in New Zealand and an “environmental authorization” in South Africa. Therefore focussed searches by particular legislation by country were required, so that targeted information could be gained from each country.

Searches were undertaken of the legal databases Westlaw and Lexis Library, the geographic database, Geobase and Compendex (which contain a great deal of articles related to the environment). Information was also sourced from newspaper articles (via the database Nexis UK). The outputs from this initial review were then used to make targeted internet searches, enabling official reports, relevant to particular the common regulatory frameworks, to be identified. Therefore, the sources are primary literature (legislation and parliamentary materials), secondary (academic journals and report) and grey (newspapers and opinion pieces). This review is not exhaustive, but rather reflects what could be ascertained from the information reviewed in the restricted time period. Rather than impose a further layer of interpretation on

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<sup>8</sup> ‘The SLIM Initiative. Report of the Commission on the SLIM Pilot Project. Simpler Legislation for the Internal Market’ COM(96) 559 final.

<sup>9</sup> Kellet, P. ‘Is the better regulation agenda producing better regulation?’ (2008) 20 *Environmental Law & Management*, 221. At p221. Also Kellet, P. ‘Is the better regulation agenda producing better regulation?’ (2009) 1 *Journal of Planning Law* 1, 24.; and Kellet, P. ‘Better Regulation: What the Modernising Agenda Might Mean for UK Environmental Laws’ (2006) 18(4) *Environmental Law & Management*, 169.

<sup>10</sup> *Ibid.* Discussion of the merits of promoting the Better Regulation agenda can be found from other sources, both in relation to environmental, and other, regulation e.g. Weatherill, S. (Ed) ‘Better Regulation’ (2007) Oxford: Hart Publishing; Verbruggen, P. Does Co-Regulation Strengthen EU Legitimacy? (2009) 15(4) *European Law Journal*, 425.

<sup>11</sup> Hampton, P. ‘Reducing administrative burdens: effective inspection and enforcement’. (2005 March) HM Treasury.

<sup>12</sup> IMPEL ‘IMPEL Project: Practical Application of Better Regulation Principles in Improving the Efficiency and Effectiveness of Environmental Inspection Authorities’ (2009) Environment Agency and Institute for European Environmental Policy. At p7.

<sup>13</sup> Weiner, J.B. ‘Better Regulation in Europe’, in, Holder, J. and McGillivray, D. ‘Taking Stock of Environmental Assessment: Law, Policy and Practice’ (2007) Abingdon: Routledge-Cavendish. 65-130. At p129.

this material, in general information has been extracted from the sources, with due acknowledgement given to the authors. The quantity of the data varied with each nation studied

### 2.3 Structuring the results using the IMPEL Questionnaire

To allow comparisons with responses from IMPEL member states, the IMPEL Questionnaire was used to structure the information derived from the literature search described in Section 2.2. The results section of this Literature Review is set out for each country in alphabetical order using the format of Section A of the IMPEL Questionnaire in terms of the common regulatory frameworks which they had implemented, and Section B if any were planned. As the questionnaire refers to IMPEL member countries some of the questions, in particular those concerned with the EU, had to be adapted, as indicated by Table 1.

**Table 1** How specific questions from the IMPEL Questionnaire were adapted for this literature review of common regulatory frameworks in non-IMPEL Countries

Question from the IMPEL Questionnaire	How the question was adapted for this literature review
Who is the main contact for this?	What organisation or agency leads this common regulatory framework?
What European Directives does it cover?	What field of environmental regulation does it cover?
Has it involved any joint working between Member States? If so which countries and why?	Has it involved any joint working with other nations? If so which countries and why?
Could changes at a European level have helped its implementation? If so what and by whom?	[Question removed]

Table 1 illustrates the questions that were altered – all other questions are the same as those featured in the IMPEL Questionnaire. The question “Could changes at a European level have helped its implementation? If so what and by whom?” (Table 1) was removed because what would be a relevant equivalent question for non-IMPEL countries was not apparent.

### 3. The countries and their common regulatory frameworks

A previous IMPEL report concerning ‘Practical Application of Better Regulation Principles in Improving the Efficiency and Effectiveness of Environmental Inspection Authorities’ noted that “understanding the context of initiatives... requires a basic understanding of the environmental governance structures.”<sup>14</sup> Therefore this section provides a brief description of the countries that are the focus of the review, their governance arrangements, and the common regulatory frameworks to be examined in greater detail in the results section. The information is set out in alphabetical order by country, with Australia (Section 3.1) followed by New Zealand (Section 3.2), South Africa (Section 3.3) and finally the US (Section 3.4).

<sup>14</sup> IMPEL ‘IMPEL Project: Practical Application of Better Regulation Principles in Improving the Efficiency and Effectiveness of Environmental Inspection Authorities’ (2009) Environment Agency and Institute for European Environmental Policy. At p29.



### 3.1 Australia

The Australian Commonwealth Government<sup>15</sup> has legislative power over certain issues, and the six state governments retain other matters. There can be cases where “the commonwealth and the states claim authority to make laws over the same matter.”<sup>16</sup> During the 1990s, at commonwealth level, Australia engaged in meta-regulatory<sup>17</sup> initiatives to promote economic efficiency, the comprehensiveness of which has been described as “unprecedented”<sup>18</sup>. Over a seven-year period “the reforms required every state government and the [commonwealth] government to scrutinise every piece of legislation to determine whether it was subject to review. More than 1,700 pieces of legislation were actually listed for review.”<sup>19</sup>

Environmental concerns necessitate collaboration between the commonwealth and the state governments. This is exemplified by the analysis of the National Water Initiative provided in Section 4.1 of this review. Other co-operative systems related to the environment have been set up – such as the regime related to Integrated Coastal Area (or Zone) Management.<sup>20</sup> There may also be some activity at state level concerned with better regulation more generally, if not common regulatory frameworks. For example the State Government of Victoria, under its Reducing the Regulatory Burden (RRB) initiative, “has committed to a \$500 million reduction in regulatory burden by July 2012.”<sup>21</sup> Therefore future research could usefully examine activity at the level of Australian state government. The focus of this review is:

- National Water Commission Act 2004

### 3.2 New Zealand

The New Zealand system of government is based on the British Parliamentary system. Therefore national government gives local government its powers. There is a hierarchy of local government jurisdiction:

- territorial authorities (city or district councils)
- regional authorities (commonly known as regional councils)
- unitary authorities (combined regional and territorial authorities).

Much of the responsibility for resource consent (environmental permitting) takes place through the territorial, regional or unitary authorities, rather than at the national level. This stems from the Resource Management Act 1991 and its amendments. However, an independent Environmental Protection Authority (NZEPA) and an Environmental Court also have powers under this act and its amendments.

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<sup>15</sup> Australia has a federal system of government. There is a national government, known as the Commonwealth Government, together with six state governments. Australia was established by a British Act of Parliament, the Commonwealth of Australia Constitution Act 1900.

<sup>16</sup> Australian Government ‘Australia’s Federation’ [2010] <http://australia.gov.au/about-australia/our-government/australias-federation>

<sup>17</sup> Meta-regulation has been described as the “institutions and processes that embed regulatory review mechanisms into governmental policymaking.” Morgan, B. ‘Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification’ (2003) Aldershot: Ashgate Publishing Limited. At p17.

<sup>18</sup> Ibid. At p10.

<sup>19</sup> Ibid. At p10.

<sup>20</sup> Glazewski, J. and Haward, M. ‘Towards Integrated Coastal Area Management: A Case Study in Co-operative Governance in South Africa and Australia,’ 20 International Journal of Marine & Coastal Law (2005), 65.; Australian Government: Department of the Environment, Water, Heritage and the Arts ‘Integrated Coastal Zone Management’ [2008] <http://www.environment.gov.au/coasts/iczm/index.html>

<sup>21</sup> Government of Victoria, Department of Treasury and Finance ‘Reducing the Regulatory Burden’ [2010] <http://www.dtf.vic.gov.au/CA25713E0002EF43/pages/reducing-the-regulatory-burden>

NZEPA was established by the 2009 amendments to the Resource Management Act (1991) and “is a statutory office housed within the Ministry for the Environment under the Secretary for the Environment.”<sup>22</sup> It assists with “Streamlining the decision making process for nationally significant proposals, such as major infrastructure or public works projects.”<sup>23</sup>

Resource Management Amendment Act 1996 brought the Environmental Court into being, which was previously known as the Planning Tribunal. “Most of the Court's work involves issues arising under the Resource Management Act, largely dealing with appeals about the contents of regional and district statements and plans; and appeals arising out of applications for resource consents. The consents applied for may be for a land use, for a subdivision, a coastal permit, a water permit, or a discharge permit; or a combination of those.”<sup>24</sup> The focus of this review is the changes to the land-use planning and environmental permitting systems resulting from the:

- Resource Management Act 1991 and its amendments, focusing on the Resource Management (Simplifying and Streamlining) Amendment Act 2009

### 3.3 South Africa

South Africa is a constitutional democracy. South Africa’s post-apartheid constitution, in full effect in 1997, sets out the structures of government together with the rights and duties of citizens.<sup>25</sup> However, “all law that was in force when the Constitution took effect continues in force, subject to any amendment or repeal, and consistency with the Constitution.”<sup>26</sup> If a law is inconsistent with the Constitution it may be repealed, amended or struck down.<sup>27</sup>

Therefore, the constitution is required to govern over a “highly fragmented legal landscape of environmental management in South Africa” with a “host of different implementing agencies.”<sup>28</sup> This fragmentation results from the restructuring at the end of apartheid in 1994 but also the retention of many of the laws promulgated under apartheid. As Todes, Sim and Sutherland (2009) describe:

“With the end of apartheid in 1994, extensive institutional restructuring of the country took place. A system of cooperative governance, with three overlapping ‘spheres’ of government (national, provincial and municipal), was established. The old provinces and homelands were consolidated into nine new provinces. In 2000 the plethora of fragmented and racially divided local governments were reshaped into 258 municipalities, cross-cutting old racial boundaries. Although rationalization of government has occurred, strong institutional divides persist between planning and environmental management, with separate government departments responsible for both.<sup>29</sup> The country’s 1996 Constitution defines planning as a provincial and municipal affair, while environmental management is a national and provincial competency.”<sup>30</sup>

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<sup>22</sup> Environmental Protection Authority ‘Welcome to the Environmental Protection Authority of New Zealand: Te Mana Rauhi Taiao’ [2009] <http://www.epa.govt.nz/>

<sup>23</sup> Ibid.

<sup>24</sup> Environmental Court of New Zealand ‘Environmental Court’ [2010] <http://www.justice.govt.nz/courts/environment-court>

<sup>25</sup> The Constitution of the Republic of South Africa Act 200 of 1993.

<sup>26</sup> Bekink, B and Botha, C. ‘Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing)’ (2007) 28(1) Statute Law Review, 34.

<sup>27</sup> The mandate for this is provided by Constitution of the Republic of South Africa Act 200 of 1993, Section 102.

<sup>28</sup> Wynberg, R.P. and Sowman, M. ‘Environmental Sustainability and Land Reform in South Africa: A Neglected Dimension’ (2007) 50(6) Journal of Environmental Planning and Management, 783. At p788.

<sup>29</sup> The same separation also exists within the UK.

<sup>30</sup> Todes, A., Sim, V and Sutherland, C. ‘The Relationship between Planning and Environmental Management in South Africa: The Case of KwaZulu-Natal’ (2009) 24(4) Planning Practice and Research, 411. At pp418-419.

In advance of the Constitution coming into full effect, South Africa began to create frameworks to rationalise its planning and bureaucratic systems related to land development projects.<sup>31</sup> Subsequently it consolidated its legislation relating to water<sup>32</sup> and created an overall National Environmental Management regime.<sup>33</sup> Recently, South Africa has legislated to provide for integrated coastal management.<sup>34</sup> These frameworks have aspects that conform to the definition of common regulatory framework provided in Box 1. Therefore focus of the review is aspects of the implementation of these four different legal instruments:

- Development Facilitation Act, 67 of 1995;
- National Water Act, 36 of 1998;
- National Environmental Management Act, 107 of 1998; and
- National Environmental Management: Integrated Coastal Management Act, 2008.

However, Gibson (2007) cautions: “The implementation and enforcement of environmental law in South Africa has often been less impressive in practice than the appearance of legislation in the statute book.”<sup>35</sup> Further reference to the development of South African law and the first three of these regimes can be found in Jan Glazewski’s book ‘Environmental Law in South Africa’ (2005) Butterworths: Durban.

### 3.4 United States of America

As well as the Federal Government and 52 State Governments in the US, there are also Local Governments and Tribal Governments (Governments of particular Tribes native to the US that are federally recognised e.g. Native Americans). The European version of Better Regulation “emulates key concepts and tools of regulatory reform developed in the American administrative state over the past four decades.”<sup>36</sup> Although there are many legal instruments originating at federal level that influence the environment and its protection, this review found none that clearly conform with the definition of common regulatory frameworks provided by IMPEL, Box 1.

A large amount of US literature was reviewed and two acts in particular were investigated further: Clean Air Act (focussing on the 1990 Amendment); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (also known as the Superfund). Reference was made to “common elements”, particularly within the Comprehensive Environmental Response, Compensation, and Liability Act.<sup>37</sup> However, this provision did not clearly relate to the common regulatory framework as defined within Box 1 and is therefore not dealt with further in this review. State level integrated approaches to environmental regulation may exist; seeking these out requires further research work – as Section 5 of this report identifies.

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<sup>31</sup> Development Facilitation Act 1995; Also Rigby, S. and Diab, R. ‘Environmental sustainability and the Development Facilitation Act in South Africa’ (2003) 15(1) Journal of Environmental Law, 27.

<sup>32</sup> National Water Act, 36 of 1998.

<sup>33</sup> National Environmental Management Act, 107 of 1998.

<sup>34</sup> National Environmental Management: Integrated Coastal Management Act, 2008.

<sup>35</sup> Gibson, J. ‘The development of integrated coastal management legislation in South Africa’ (2007) 18(4) Water Law, 117. At p121.

<sup>36</sup> Weiner, J.B. ‘Better Regulation in Europe’, in, Holder, J. and McGillivray, D. ‘Taking Stock of Environmental Assessment: Law, Policy and Practice’ (2007) Abingdon: Routledge-Cavendish. 65-130. At p68.

<sup>37</sup> To achieve protection identified people who were liable for costs in accordance with a system of “common elements”. USEPA ‘Memorandum. Mar -6 2003’ [2003]

<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf> At p1.

## 4. Results

### 4.1 Australia

#### ***National Water Initiative***

<b>What is the name of the common regulatory framework?</b>
National Water Initiative
<b>What organisation or agency leads this common regulatory framework?</b>
Department of the Environment, Water, Heritage and the Arts (part of the federal Commonwealth Government) and the independent statutory body within the portfolio of that department, the National Water Commission
<b>When did it start and finish?</b>
“The Intergovernmental Agreement on a National Water Initiative was signed at the 25 June 2004 Council of Australian Governments (COAG) meeting. The Tasmanian Government joined the Agreement in June 2005 and the Western Australia Government joined in April 2006.” <sup>38</sup> The National Water Commission “advises the COAG and the Australian Government on national water issues and the progress of the National Water Initiative.” <sup>39</sup>
<b>Links to relevant information or documents</b>
National Water Initiative <a href="http://www.nwc.gov.au/www/html/117-national-water-initiative.asp">http://www.nwc.gov.au/www/html/117-national-water-initiative.asp</a>
Northern Australia Land and Water Taskforce ‘Sustainable development of northern Australia: A report to Government from the Northern Australia Land and Water Taskforce’ [2009] <a href="http://www.nalwt.gov.au/files/NLAW.pdf">http://www.nalwt.gov.au/files/NLAW.pdf</a>
Australian Government National Water Commission ‘Australian water reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative’ [2009] <a href="http://www.nwc.gov.au/www/html/147-introduction---2009-biennial-assessments.asp?intSiteID=1">http://www.nwc.gov.au/www/html/147-introduction---2009-biennial-assessments.asp?intSiteID=1</a>
Other publications are also available from the Australian Government National Water Commission <a href="http://www.nwc.gov.au/www/html/394-publications-by-topic.asp">http://www.nwc.gov.au/www/html/394-publications-by-topic.asp</a>
<b>Why was it put in place?</b>
Each Australian state and territory manages water via its own set of institutional arrangements. “A range of interconnected environmental problems associated with the lack of water sustainability have attracted serious attention over the past decade.” <sup>40</sup> The National Water Initiative is an attempt to address these problems in an integrated way.
<b>What field of environmental regulation does it cover?</b>
Water

<sup>38</sup> Australian Government: National Water Commission ‘National Water Initiative’ [2010]  
<http://www.nwc.gov.au/www/html/117-national-water-initiative.asp?intSiteID=1>

<sup>39</sup> Australian Government: National Water Commission ‘Role and functions’ [2010]  
<http://www.nwc.gov.au/www/html/93-roles-and-functions.asp>

<sup>40</sup> Godden, L. ‘Water Law reform in Australia and South Africa: sustainability, efficiency and social justice’ (2005) 17(2) Journal of Environmental Law, 181. At p183.

**What national/regional legislation/regulation does it cover?**

The National Water Commission, established under the National Water Commission Act 2004, “advises COAG and the Australian Government on national water issues and the progress of the National Water Initiative.”<sup>41</sup> “Under the Water Act 2007, the Commission [also] has a new, ongoing function to audit the effectiveness of implementation of the Murray-Darling Basin Plan and associated water resource plans.”<sup>42</sup> Further analysis of the institutional arrangements for governance of Australian water can be found in Colebatch (2006).<sup>43</sup>

**Has it involved any joint working with other nations? If so, which countries and why?**

The National Water Initiative and the National Water Commission encourage joint working between the Australian State Governments.

**Which stakeholders/organisations were involved in its implementation?**

Partners in the duties undertaken by the National Water Commission are:

- the Australian Government (as their only investor)
- state and territory governments and agencies
- Australian Government departments and agencies
- the water sector - agencies, utilities, authorities, industry peak bodies, local government, companies and consultants
- local, regional and national environment and conservation groups
- the science and research sector.<sup>44</sup>

**What were its objectives?**

“The overall objective of the National Water Initiative is to achieve a nationally compatible market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes.”<sup>45</sup>

**Description of the common regulatory framework****1. Overview**

Godden (2005) states that National Water Initiative has been set up because of “considerable variation in water regulation practices across the Australian states – particularly in water licence characteristics. Significant administrative discretion characterised decision-making. Continual pressure for more supply often resulted in an over allocation of water beyond capacity in many catchments. There were wider systemic failures as the bodies of governing legislation became fragmented. Legislative regimes did not address the environmental implications of water resource development in any coherent manner.”<sup>46</sup>

**2. Brief description of any stages in its development**

<sup>41</sup> Australian Government: National Water Commission ‘Role and functions’ [2010] <http://www.nwc.gov.au/www/html/93-roles-and-functions.asp>. The National Water Commission Act 2004 states that the date of Assent and Commencement was 17 Dec 2004 and that it ceases to be in force on 30 June 2012.

<sup>42</sup> Ibid.

<sup>43</sup> Colebatch, H.K. ‘Governing the use of water: The institutional context’ (2006) 187(1-3) *Desalination*, 17.

<sup>44</sup> This is not set out directly by statute but is indicated on the National Water Commission website. Australian Government: National Water Commission ‘Our partners’ [2010] <http://www.nwc.gov.au/www/html/138-working-with-partners---introduction.asp>

<sup>45</sup> Australian Government: National Water Commission ‘National Water Initiative’ [2010] <http://www.nwc.gov.au/www/html/117-national-water-initiative.asp?intSiteID=1>

<sup>46</sup> Godden, L. ‘Water Law reform in Australia and South Africa: sustainability, efficiency and social justice’ (2005) 17(2) *JEL*, 181. At p188.

The text of the National Water Initiative<sup>47</sup>, Godden (2005)<sup>48</sup> and Petrie and Knowler (2006)<sup>49</sup> provide an overview of the drivers for water reform and the historical context. Originally systems for water management stemmed from the 19<sup>th</sup> century European colonisation. This began to alter in the 1980s with the State Government of Victoria overhauling their existing water legislation via the Water Act 1989. More substantial changes to water policy and law followed in the 1990s with COAGs endorsement of the 1994 strategic framework for the efficient and sustainable reform of the Australian water industry – the National Water Initiative and the National Water Act 2007 build on this and other subsequent agreements.

### **3. Brief description of the *common* element**

The common element is the development of regulatory system overseen by National Water Commission. “The overall objective of the National Water Initiative is to achieve a nationally compatible market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use...”<sup>50</sup> The National Water Commission is “an independent statutory body, as required by the [intergovernmental agreement] the National Water Initiative.”<sup>51</sup>

The three main functions of the “National Water Commission are to:

- assess governments' progress in implementing the National Water Initiative (eg through biennial assessments of progress commencing in 2006-07)
- help governments to implement the National Water Initiative (eg by acting as lead facilitator on certain actions under the Initiative such as compatible registers of water entitlements and trades, and nationally consistent approaches to pricing)
- manage the Raising National Water Standards Program and National Groundwater Action Plan.”<sup>52</sup>

### **4. Brief description of whether existing legislation was amended or replaced and how was this done (e.g. part of pre-planned legislative change or a free standing action/activity)?**

Reforms of management of Australia’s water, in line with the National Water Initiative, are set out in the Water Act 2007, under which regulations can be made to prescribe for certain matters. The Water Act 2007 was amended by the Water Amendment Act 2008 which, amongst other things, altered governance structures relating to the Murray-Darling Basin.<sup>53</sup>

This influenced state level activity. For example as a result of Western Australia finally signing the NWI a “two-phased comprehensive reform of water management legislation [is taking place]: the first phase will modernize the institutional arrangements covering water governance while the second phase will streamline and modernize existing legislation dealing with the provision of water services in the state.”<sup>54</sup>

### **What were the costs and benefits of the common regulatory framework? Please provide**

<sup>47</sup> Intergovernmental Agreement on a National Water Initiative

<http://www.nwc.gov.au/resources/documents/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>

<sup>48</sup> Godden, L. ‘Water Law reform in Australia and South Africa: sustainability, efficiency and social justice’ (2005) 17(2) Journal of Environmental Law, 181.

<sup>49</sup> Petrie, L. and Knowler, J. ‘Current issues in Australian Water Law: Federal control versus states' rights - Power struggles in the pursuit of national water security’ (2006) 17(5) Journal of Water Law, 210.

<sup>50</sup> Australian Government: National Water Commission ‘National Water Initiative’ [2010]

<http://www.nwc.gov.au/www/html/117-national-water-initiative.asp?intSiteID=1>

<sup>51</sup> National Water Commission Act, No. 156 of 2004 as amended, Part 1 Section 3.

<sup>52</sup> Australian Government: National Water Commission ‘National arrangements: National Water Commission Act 2004’ [2009] <http://www.nwc.gov.au/www/html/2352-national-water-commission-act-2004.asp>

<sup>53</sup> Australian Government: Department of the Environment, Water, Heritage and the Arts ‘Water legislation’ [2010] <http://www.environment.gov.au/water/australia/water-act/index.html#regulations-2008>

<sup>54</sup> O’Hara, J. and Rossetto, L. ‘Water Law reform in Western Australia: Making decisions for the future’ (2007) 18(1) Journal of Water Law, 19. At p19.

**any data or assessments if available.**

Not ascertained from the information reviewed to date.

**Were big investments needed to implement it and by whom?**

Not ascertained from the information reviewed to date.

**Were there any barriers or hurdles to implementation? Were these expected or unforeseen?**

Not ascertained from the information reviewed to date.

**How successful was the common regulatory framework? Please provide any data or assessments if available.**

The website for the recent National Water Commission biennial report states: “In many areas, progress in the past two years has been good, but the Commission has identified some areas where reform has been slow or inadequate. Based on its findings, the Commission has made 68 recommendations for further action to refocus national reform efforts over the next two years.”<sup>55</sup>

In the Murray-Darling Basin permits were allocated for close to 100 percent of the average annual water resources. Permits last for ten years and there is an expectation they will be renewed.<sup>56</sup>

**Was there anything in particular that contributed to its success?**

Not ascertained from the information reviewed to date.

**Are there any other lessons that can be learned?**

Markets regulate agricultural water supply, but in certain areas, urban users are still subject to non-price regulation (which often restricts their water use). Byrnes, Crase and Dollery (2006) consider that more widespread use of water pricing could provide a more coherent approach to water allocation that is less open to abuse.<sup>57</sup> However, there are potentially social justice implications of this form of allocation because access to water will be influenced by comparative income.

<sup>55</sup> Australian Government National Water Commission ‘Australian water reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative’ [2009] <http://www.nwc.gov.au/www/html/147-introduction---2009-biennial-assessments.asp?intSiteID=1>

<sup>56</sup> Quiggin, J. ‘Repurchase of renewal rights: A policy option for the National Water Initiative’ (2006) 50(3) Australian Journal of Agricultural and Resource Economics, 425.

<sup>57</sup> Byrnes, J., Crase, L. and Dollery, B. ‘Regulation versus pricing in urban water policy: The case of the Australian National Water Initiative’ (2006) 50(3) Australian Journal of Agricultural and Resource Economics, 437.

## 4.2 New Zealand

### **Resource Management Act 1991**

<p><b>What is the name of the common regulatory framework?</b></p> <p>Resource Management Act 1991 ‘RMA’ (Full title: An Act to restate and reform the law relating to the use of land, air, and water)</p>
<p><b>What organisation or agency leads this common regulatory framework?</b></p> <p>The Ministry for the Environment</p>
<p><b>When did it start and finish?</b></p> <p>The RMA was passed in 22 July 1991 and came into force 1 October 1991 and it is still in force. It has since been amended several times, most recently by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 ‘the RMA Amendment’ which was passed 8 September 2009 and came into force 1 October 2009. The RMA Amendment is the main focus of this review.</p>
<p><b>Links to relevant information or documents</b></p> <p>The Act (as amended) <a href="http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html">http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html</a></p> <p>The Ministry for the Environment website – Resource Management Act <a href="http://www.mfe.govt.nz/rma/index.html">http://www.mfe.govt.nz/rma/index.html</a></p> <p>An Everyday Guide to the Resource Management Act Series <a href="http://www.mfe.govt.nz/publications/rma/everyday/">http://www.mfe.govt.nz/publications/rma/everyday/</a></p> <p>Daya-Winterbottom, T. ‘Evolving practice – the Environment Court of New Zealand’ (2005) 5 Environmental Liability, 119.</p> <p>New Zealand Parliament. Parliamentary business. Hansard and Journals (a large number of documents relating to the RMA can be sourced from this site). <a href="http://www.parliament.nz/en-NZ">http://www.parliament.nz/en-NZ</a></p>
<p><b>Why was it put in place?</b></p> <p>The RMA was put in place to consolidate and amend New Zealand’s environmental legislation providing a single framework for environmental protection. The amendment of the RMA by the RMA Amendment has, amongst other things, created a requirement to establish an Environmental Protection Authority (NZEPA) to centralise some of the regulatory roles under the Act. As Section 3.2 indicated the NZEPA assists with “Streamlining the decision making process for nationally significant proposals, such as major infrastructure or public works projects.”<sup>58</sup> This role is undertaken with knowledge of, and sometimes in collaboration with, the councils.<sup>59</sup> The amendment also sought to improve the existing process of resource consent (described in detail below).</p>
<p><b>What field of environmental regulation does it cover?</b></p> <p>Air, land and water. The RMA has sections referring to land, coastal marine areas, river and lake beds, water, discharges (including incineration waste and radioactive waste), noise, air and water.</p>
<p><b>What national/regional legislation/regulation does it cover?</b></p> <p>The Act is national legislation related to town planning and resource management. The term “resource management” is not defined within the RMA or its amendments. However, the RMA</p>

<sup>58</sup> Environmental Protection Authority ‘How the Environmental Protection Authority works with councils’ [2009]  
<http://www.epa.govt.nz/about-us/how-the-epa-works-with-councils.html>

<sup>59</sup> Ibid.



<p>does reflect the definition of this concept as “A broad multidisciplinary area or programme of study focusing on the management of natural resources.”<sup>60</sup></p>
<p><b>Has it involved any joint working with other nations? If so, which countries and why?</b></p> <p>No. The geographic location and island status of New Zealand means that direct transboundary issues, such as those relevant to many European Union Member States, do not arise.</p>
<p><b>Which stakeholders/organisations were involved in its implementation?</b></p> <p>Minister for the Environment, Local Authorities, Enforcement Officers, Environmental Protection Authority</p>
<p><b>What were its objectives?</b></p> <p>“The purpose of this Act is to promote the sustainable management of natural and physical resources”<sup>61</sup>.</p>
<p><b>Description of the common regulatory framework</b></p> <p><b>1. Overview</b></p> <p>“In the 1960s and 1970s, New Zealand followed the US approach of having separate legislation for land, air and water. However, intractable problems arose when the same legislation did not extend to all the media. In reaction to this, the RMA allows for an integrative approach to air, water and land which is coordinated between the levels of government. This integration, combined with an emphasis on the environmental effects, empowers decision makers to deal with environmental issues that frustrate traditional environmental management regimes.”<sup>62</sup></p> <p>The RMA set up a common administrative (authorisations) and enforcement regime in relation to processes influencing air, land and water. Authorisation is referred to as “resource consent”. Certain activities are already authorised by the RMA, there are also activities authorised by particular rules in plans.<sup>63</sup> Therefore “Resource consent is permission from the local council [in most cases, but certain cases the Environment Court or a board of inquiry]<sup>64</sup> for an activity that might affect the environment, and that isn’t allowed ‘as of right’ in the district or regional plan”.<sup>65</sup></p> <p>“A regional plan is created by a regional council. It concerns issues that affect the coast, air, water or land. Regional plan rules cover things such as the construction of jetties, and the discharge of wastewater from factories into waterways.</p> <p>A district plan is created by a city or district council. It concerns the management of land use and subdivision in a city or district. District plan rules cover things such as [ambient] noise, and the location and height of buildings.</p>

<sup>60</sup> resource management 1. (2000). In The Dictionary of Human Geography. Retrieved from [http://www.credoreference.com/entry/bkhumgeo/resource\\_management\\_1](http://www.credoreference.com/entry/bkhumgeo/resource_management_1)

<sup>61</sup> Resource Management Act 1991, Part 2, Section 5.

<sup>62</sup> Michaels, S. and Furuseth, O. J. ‘Innovation in environmental policy: The National Environmental Policy Act of the US and the Resource Management Act of New Zealand’ (1997) 17(3) Environmentalist, 181. At p182.

<sup>63</sup> As overview of the required content of the plans and the environmental standards that must be adhered to is provided by RMA, Part 5, Standards, policy statements, and plans.

<sup>64</sup> Ministry for the Environment. An Everyday Guide to the Resource Management Act Series 1.4: National Level Guidance and Processes. [2009] Government of New Zealand. <http://www.mfe.govt.nz/publications/rma/everyday/guidance-and-processes/national-level-guidance-processes.pdf>

<sup>65</sup> Plain English explanation of RMA terms, derived from RMA, Section 2. [2009] <http://www.mfe.govt.nz/rma/public/rma-terms.html>

Sometimes you'll need to apply for a resource consent from both the regional and district/city council.”<sup>66</sup>

## **2. Brief description of any stages in its development**

“The RMA came into force on 1 October 1991 after four years of intense work...and was the largest law reform exercise in New Zealand’s history...Until the law reform project began, a number of laws and administering agencies had been developed to address environmental problems as they arose. The result was a rather ad hoc collection of uncoordinated approaches, with considerable conflicts, gaps and overlaps... The RMA set out to create a more streamlined, integrated and comprehensive approach to environmental management. A review of local government at the same time provided legislators with an ideal opportunity to simplify the way the new legislation would be implemented.”<sup>67</sup>

Memon and Gleeson provide a critical overview of the development of the RMA from the New Zealand ‘town and country’ style planning systems and its replacement with the RMA.<sup>68</sup> In 1993 Robertson provided a comparatively more favourable overview of the RMA’s development.<sup>69</sup> Michaels and Furuseth (1997) give an overview of the formulation and promotion of the RMA in relation to its innovativeness.<sup>70</sup>

## **3. Brief description of the *common* element**

The RMA<sup>71</sup> sets out that a resource consent can mean any of the following:

- land use consent<sup>72</sup>
- subdivision consent<sup>73</sup> [a consent to subdivide land as defined under Section 218 of the RMA]
- coastal permit<sup>74</sup> providing consent to do something in a coastal marine area.
- water permit<sup>75</sup>
- discharge permit<sup>76</sup>

Resource consent is sought by a “person” and is usually managed by councils. In this role they are called ‘consent authorities’. There are three types of councils:

- territorial authorities (city or district councils)
- regional authorities (commonly known as regional councils)
- unitary authorities (combined regional and territorial authorities).<sup>77</sup>

<sup>66</sup> Ministry for the Environment. An Everyday Guide to the Resource Management Act Series 2.1: Applying for a Resource Consent. [2009] Government of New Zealand. <http://www.mfe.govt.nz/publications/rma/everyday/consent-apply/applying-resource-consent.pdf> At p5.

<sup>67</sup> Ministry for the Environment. Your Guide to the Resource Management Act. [2009] Government of New Zealand. <http://www.mfe.govt.nz/publications/rma/rma-guide-aug06/rma-guide-aug06.pdf> At p5.

<sup>68</sup> Memon, P.A. and Gleeson, B.J. ‘Towards a new planning paradigm? Reflections on New Zealand’s Resource Management Act’ (1995) 22(1) Environment & Planning B: Planning & Design, 109.

<sup>69</sup> Robertson, W.A. ‘New Zealand’s new legislation for sustainable resource management: the Resource Management Act 1991’ (1993) 10(4) Land Use Policy, 303.

<sup>70</sup> Michaels, S. and Furuseth, O. J. ‘Innovation in environmental policy: The National Environmental Policy Act of the US and the Resource Management Act of New Zealand’ (1997) 17(3) Environmentalist, 181.

<sup>71</sup> Resource Management Act 1991, Part 6, Section 87.

<sup>72</sup> Ibid, section 9 and 13.

<sup>73</sup> Ibid, section 11.

<sup>74</sup> Ibid, sections 12, 14, 15, 15A, and 15B.

<sup>75</sup> Ibid, section 14

<sup>76</sup> Ibid, section 15.

<sup>77</sup> Ministry for the Environment. An Everyday Guide to the Resource Management Act Series 2.2: Consultation for Resource Consent Applicants. [2009] Government of New Zealand.

Applications for particular types of consents are always to the same authority, except where applications are “directly referred to the Environment Court by the applicant (with the agreement of the council)”<sup>78</sup>, or proposals of national significance that have been referred to the Court or a board of inquiry by the Minister of the Environment (these are said to have been ‘called-in’).<sup>79</sup> As stated above, a resource consent may be needed both from the regional and district/city council or both in certain circumstances.<sup>80</sup> If a number of consents are sought for a one activity the council may decide “to consider all the applications as a single package”.<sup>81</sup>

There is a common application process.<sup>82</sup> This application process requires “an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment”.<sup>83</sup> If the application “does not include an adequate assessment of environmental effects”<sup>84</sup> it can be determined as incomplete and returned with comments to the applicant who must begin the application process again.

#### **4. Brief description of whether existing legislation was amended or replaced and how was this done (e.g. part of pre-planned legislative change or a free standing action/activity)?**

The RMA repealed 59 Acts or Amendment Acts<sup>85</sup> and revoked 19 Regulations, orders or Amendment Regulations.<sup>86</sup> It also amended 54 Acts or Amendment Acts and two Regulations.<sup>87</sup>

#### **What were the costs and benefits of the common regulatory framework? Please provide any data or assessments if available.**

Simplifying an existing complicated regime.

Delays in processing consents by local authorities (e.g. 69 per cent of resource consent applications were processed on time in the period 2007/2008,<sup>88</sup> whereas in 2005/2006 it was 79%<sup>89</sup>, and in 2003/2004 77%.<sup>90</sup>

#### **Were big investments needed to implement it and by whom?**

In relation to land use consent the RMA required a substantial restructuring of the activities at different levels of government. Therefore, although resources were required, it is difficult to determine how this influenced overall costs.<sup>91</sup>

<http://www.mfe.govt.nz/publications/rma/everyday/consent-consultation/consultation-for-resource-consent-applicants.pdf>

<sup>78</sup> Ministry for the Environment. An Everyday Guide to the Resource Management Act Series 2.1: Applying for a Resource Consent. [2009] Government of New Zealand. <http://www.mfe.govt.nz/publications/rma/everyday/consent-apply/applying-resource-consent.pdf> At p4.

<sup>79</sup> Further information about the functions of the Environmental Court can be found in Ministry for the Environment. An Everyday Guide to the Resource Management Act Series 6.1: Your Guide to the Environment Court. [2009] Government of New Zealand. <http://www.mfe.govt.nz/publications/rma/everyday/court-guide/your-guide-environment-court.pdf>

<sup>80</sup> Ministry for the Environment. An Everyday Guide to the Resource Management Act Series 2.1: Applying for a Resource Consent. [2009] Government of New Zealand. <http://www.mfe.govt.nz/publications/rma/everyday/consent-apply/applying-resource-consent.pdf> At p5.

<sup>81</sup> Ibid. At p14.

<sup>82</sup> Resource Management Act 1991, section 88.

<sup>83</sup> Ibid, section 88, (2)(b).

<sup>84</sup> Ibid, section 88, (3).

<sup>85</sup> Ibid, schedule 6.

<sup>86</sup> Ibid, schedule 7.

<sup>87</sup> Ibid, schedule 8.

<sup>88</sup> Ministry for the Environment ‘Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008’ [2008] Government of New Zealand. <http://www.mfe.govt.nz/publications/rma/annual-survey/2007-2008/rma-pamphlet.pdf>

‘Resource management act shake-up needed to fix late consents’ (2009) US State News, June 11.

<sup>89</sup> Ministry for the Environment. ‘Resource Management Act: Key Facts about Local Authorities & Resource Consents In 2005/2006’ [2006] <http://www.mfe.govt.nz/publications/rma/annual-survey/2005-2006/rma-survey-summary-2005-06.pdf>

<sup>90</sup> Ministry for the Environment. ‘Resource Management Act: Key Facts about Local Authorities & Resource Consents In 2003/2004’ [2004] <http://www.mfe.govt.nz/publications/rma/annual-survey/2003-04/rma-survey-summary-2003-04.pdf>

**Were there any barriers or hurdles to implementation? Were these expected or unforeseen?**

Planning officers continue to have “considerable leeway in determining whether an application should be subject to any public scrutiny.”<sup>92</sup> This can lead to inconsistency in how the RMA is applied. An up to date overview of caselaw can be found from Quality Planning: The RMA Planning Resource.<sup>93</sup>

**How successful was the common regulatory framework? Please provide any data or assessments if available.**

Morgan (1995) identified inconsistencies in how the requirements for environmental impact assessment within different councils have been carried out.<sup>94</sup> Arguably “regions with less well-developed EIA procedures will probably be less effective in protecting the environment from adverse effects. Second, those regions may attract a disproportionate number of environmentally degrading developments as a result of the less effective EIA procedures.”<sup>95</sup>

Michaels and Furuseth (1997) claim the RMA is perceived as a genuinely ‘innovative’ environmental policy.<sup>96</sup> Although they state: “It does not squarely address the social dimensions of environmental policy which are of great importance in the urban environment where most New Zealanders live.”<sup>97</sup>

In 1993 Memon and Gleeson<sup>98</sup> situate the RMA within what has subsequently come to be known as a process of ‘neoliberal reform’. Such reform is evident in the shift from the political economy of the welfare state, as represented by town and country planning, to a technocratic planning culture. This new system further prioritises private property rights leading Memon and Gleeson (1993) to state the RMA “may signal a dilution of social and economic equity considerations which, in our opinion, should be concerns for planning.”<sup>99</sup>

Resource consent can be fast-tracked in cases where directly affected parties make a formal approval of the activity being undertaken. In 2007 Jackson and Dixon<sup>100</sup> refer to other work by Gleeson<sup>101</sup> to highlight the potential “commodification of the consent approval process.”<sup>102</sup> Public notifications can be avoided if approvals are forthcoming from “anyone who may be adversely affected. It is claimed that “This provision has allowed developers to create an unofficial market in the purchase of approvals.”<sup>103</sup>

<sup>91</sup> Michaels, S. and Furuseth, O. J. ‘Innovation in environmental policy: The National Environmental Policy Act of the US and the Resource Management Act of New Zealand’ (1997) 17(3) Environmentalist, 181.

<sup>92</sup> Jackson, T. and Dixon, J. ‘The New Zealand Resource Management Act: An exercise in delivering sustainable development through an ecological modernisation agenda’ (2007) 34(1) Environment and Planning B: Planning and Design, 107. At p115.

<sup>93</sup> ‘To notify or not to notify? That is the question!’ (2010) <http://www.qualityplanning.org.nz/consents/notify.php>

<sup>94</sup> Morgan, R.K. ‘Progress with implementing the environmental assessment requirements of the Resource Management Act in New Zealand’ (1995) 38(3) Journal of Environmental Planning & Management, 333.

<sup>95</sup> Ibid. At p346.

<sup>96</sup> Michaels, S. and Furuseth, O. J. ‘Innovation in environmental policy: The National Environmental Policy Act of the US and the Resource Management Act of New Zealand’ (1997) 17(3) Environmentalist, 181.

<sup>97</sup> Ibid. At p182.

<sup>98</sup> Memon, P.A. and Gleeson, B.J. ‘Towards a new planning paradigm? Reflections on New Zealand’s Resource Management Act’ (1995) 22(1) Environment & Planning B: Planning & Design, 109.

<sup>99</sup> Ibid. At p109.

<sup>100</sup> Jackson, T. and Dixon, J. ‘The New Zealand Resource Management Act: An exercise in delivering sustainable development through an ecological modernisation agenda’ (2007) 34(1) Environment and Planning B: Planning and Design, 107.

<sup>101</sup> Gleeson, B. ‘The politics of consent notification’, in ‘Environmental Planning and Management in New Zealand’ (2000) Eds Memon, P.A. and Perkins, H.C. Palmerston North NZ; Dunmore Press, 115.

<sup>102</sup> Jackson, T. and Dixon, J. ‘The New Zealand Resource Management Act: An exercise in delivering sustainable development through an ecological modernisation agenda’ (2007) 34(1) Environment and Planning B: Planning and Design, 107. At p111.

<sup>103</sup> Ibid.

There has been debate about whether the RMA has been interpreted appropriately in relation to specific Matters of National Importance, that is, “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” (Part 2, Section 6)<sup>104</sup> Many “local authorities [have] processes and systems in place to facilitate iwi/hapū participation in RMA processes”.<sup>105</sup>

The Ministry for the Environment’s Two-yearly Survey of Local Authorities 2007/2008 provided a range of information about monitoring, compliance and enforcement. It states: “Monitoring of consents has improved: 79 per cent of consents that required monitoring were monitored, compared to 59 per cent in 2005/2006. Of the monitored consents, 84 per cent were compliant with their conditions. These are the highest results over the past nine years.

Complaints about alleged breaches of the RMA continue to increase, with 47 per cent more complaints received in 2007/2008 than in the last survey. Complaints and breaches are increasingly resolved by formal methods, with an associated drop in resolution by informal methods.”<sup>106</sup>

Two-yearly Survey of Local Authorities 2007/2008 also presented an overview of overall level of customer satisfaction with resource consent processing, 2003/2004–2007/2008. “In 2007/2008, 38 per cent (32 out of 84) of local authorities ran customer satisfaction surveys, up from 29 per cent (25 out of 85) in 2005/2006... Although there have been fluctuations in customer satisfaction ratings over the past three surveys, there are consistently more ‘satisfied’ and ‘very satisfied’ customers than any other grouping. No satisfaction surveys have found that the overall level of customer satisfaction was ‘very dissatisfied’.”<sup>107</sup>

**Was there anything in particular that contributed to its success?**

Not ascertained from the information reviewed to date.

**Are there any other lessons that can be learned?**

Morgan (1995) states “It is important that the Ministry for the Environment consider mechanisms for encouraging greater consistency in EIA approaches across the various consent authorities, and particularly between the regional councils.”<sup>108</sup>

<sup>104</sup> Ahdar, R. ‘Indigenous spiritual concerns and the secular state: some New Zealand developments’ (2003) 23(4) Oxford Journal of Legal Studies, 611.; Daya-Winterbottom, T. and Gould, T. ‘Blood, sweat and fears: resolving troubling cultural issues’ (1999) 7(6) Environmental Liability, 165.

<sup>105</sup> Ministry for the Environment. Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008. (2009) Wellington: Ministry for the Environment. <http://www.mfe.govt.nz/publications/rma/annual-survey/2007-2008/rma-resource-consents.pdf> At p xiii.

<sup>106</sup> Ibid. At p xii.

<sup>107</sup> Ibid. At p41.

<sup>108</sup> Morgan, R.K. ‘Progress with implementing the environmental assessment requirements of the Resource Management Act in New Zealand’ (1995) 38(3) Journal of Environmental Planning & Management, 333. At p346.

### 4.3 South Africa

#### ***Development Facilitation Act 1995***

**What is the name of the common regulatory framework?**

Development Facilitation Act, 67 of 1995, 'DFA'

**What organisation or agency leads this common regulatory framework?**

A number of national government departments led this common regulatory framework. The Department of Housing, the Department of Regional Affairs and the Department of Agriculture. It was also led by the Reconstruction and Development Programme (RDP).<sup>109</sup> However its implementation is overseen by Provincial environmental and conservation departments.

**When did it start and finish?**

The DFA's date of commencement was 22 December, 1995.<sup>110</sup> It has been claimed that the DFA has since been "repealed and replaced by other national legislation and a raft of provincial planning legislation."<sup>111</sup> However, the regulations that stemmed from the Act have been repealed<sup>112</sup> but the Act is still in place. A new Land Use Management Bill is in process.<sup>113</sup>

**Links to relevant information or documents**

Hansard and other reports can be found from the Parliament of the Republic of South Africa  
[http://www.parliament.gov.za/live/content.php?Category\\_ID=119](http://www.parliament.gov.za/live/content.php?Category_ID=119)

Text of the DFA (as amended)

<http://www.kznworks.gov.za/Portals/0/Docs/Legislation/DevelopmentFacilitationActRegulations.pdf>

Rhizome Management Services / Gemey Abrahams Consultants 'Assignment 2: Development Facilitation Act Review. Synthesis Report (Final)' [2010]  
[http://www.urbanlandmark.org.za/downloads/review\\_dfa\\_2010.pdf](http://www.urbanlandmark.org.za/downloads/review_dfa_2010.pdf)

G. Budlender, G., Latsky, J. and T. Roux, T. 'Juta's New Land Law' (2000) South Africa: Juta. Chapter 2: The Development Facilitation Act.

A criticism of a wide range of measures associated with land reform and their ability to integrate considerations linked to the environment and sustainability can be found in Todes, Sim and Sutherland (2009)<sup>114</sup>, and Wynberg and Sowman (2007).<sup>115</sup>

<sup>109</sup> Rigby, S. and Diab, R. 'Environmental sustainability and the Development Facilitation Act in South Africa' (2003) 15(1) *Journal of Environmental Law*, 27. At p27. Footnote 15 explains that "The RDP is an integrated socio-economic policy framework which seeks to mobilise South Africa's people and resources, linking reconstruction and development, toward the final eradication of apartheid and the promotion of democracy."

<sup>110</sup> The DFA as amended [2010]

<http://www.kznworks.gov.za/Portals/0/Docs/Legislation/DevelopmentFacilitationActRegulations.pdf>

<sup>111</sup> McAuslan, P. 'Publication Review: Environmental Law in South Africa, Jan Glazewski' (2002) 14(2) *Journal of Environmental Law*, 266. At p268.

<sup>112</sup> Development Facilitation Regulations

<sup>113</sup> Rhizome Management Services / Gemey Abrahams Consultants 'Assignment 2: Development Facilitation Act Review. Synthesis Report (Final)' [2010] [http://www.urbanlandmark.org.za/downloads/review\\_dfa\\_2010.pdf](http://www.urbanlandmark.org.za/downloads/review_dfa_2010.pdf)

<sup>114</sup> Todes, A., Sim, V and Sutherland, C. 'The Relationship between Planning and Environmental Management in South Africa: The Case of KwaZulu-Natal' (2009) 24(4) *Planning Practice and Research*, 411.

<sup>115</sup> Wynberg, R.P. and Sowman, M. 'Environmental Sustainability and Land Reform in South Africa: A Neglected Dimension' (2007) 50(6) *Journal of Environmental Planning and Management*, 783.

**Why was it put in place?**

The DFA “was introduced to provide a coherent and integrated legislative framework to facilitate and expedite land development projects in post-apartheid South Africa... The aim of the DFA was to overcome complex land use planning regulation, and to clarify institutional roles and responsibilities, in an attempt to circumvent the delays inherent in existing regulations, and thus ‘fast-track’ development”<sup>116</sup>

Section 3.3 of this report briefly explains the changes in governance with the end of apartheid in 1994. The DFA was thus “designed to bypass the sclerotic system of planning administration in the provinces and begin the process of breaking down urban apartheid.”<sup>117</sup>

**What field of environmental regulation does it cover?**

Land use

**What national/regional legislation/regulation does it cover?**

The DFA was national legislation. “...it does not preclude land development applications under any other laws, but was implemented to operate in conjunction with existing land development and planning legislation, such as the Physical Planning Act 125 of 1991, provincial town planning ordinances and municipal by-laws, thereby offering an alternatives procedure to facilitate and expedite land development projects.”<sup>118</sup>

**Has it involved any joint working with other nations? If so, which countries and why?**

No. Although there are potential transboundary issues with other African nations they are not tackled within this Act.

**Which stakeholders/organisations were involved in its implementation?**

The national, provincial and local governments co-ordinate “the interests of various sectors, such as environmental lobbies, agricultural unions, building materials suppliers, financiers, banks, the professions, etc.”<sup>119</sup> This is undertaken via the Development Planning Commission and the Development Tribunals at the provincial level.

**What were its objectives?**

Its full title indicates the DFAs primary objective: “To introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land.”<sup>120</sup>

**Description of the common regulatory framework****1. Overview**

“The DFA introduced a choice to developers between the existing (old order) legislation and the possibility of using the land development procedures as set out in the DFA as an alternative. [As the full title of the DFA indicates this was via “establishment in the provinces of development tribunals which have the power to make decisions and resolve conflicts in respect of land development projects]. The DFA was not promulgated only to cater for the fast tracking of land development, but also as a solution to an extremely complex legal situation that presented itself when the boundaries

<sup>116</sup> Rigby, S. and Diab, R. ‘Environmental sustainability and the Development Facilitation Act in South Africa’ (2003) 15(1) Journal of Environmental Law, 27. At p27.

<sup>117</sup> McAuslan, P. ‘Publication Review: Environmental Law in South Africa, Jan Glazewski’ (2002) 14(2) Journal of Environmental Law, 266. At p268.

<sup>118</sup> Rigby, S. and Diab, R. ‘Environmental sustainability and the Development Facilitation Act in South Africa’ (2003) 15(1) Journal of Environmental Law, 27. At p28.

<sup>119</sup> Budlender, G., Latsky, J. and T. Roux, T. ‘Juta’s New Land Law’ (2000) South Africa: Juta. At p2A-27.

<sup>120</sup> Development Facilitation Act, 67 of 1995 (as amended)

for the nine new Provinces were drawn in terms of the Interim Constitution [of South Africa as Section 3.3 explains].”<sup>121</sup>

Arguably this means that the system may be even more complex with a pre-existing system remaining together with a new fast-track alternative set up along side.

“The Act's primary implementation mechanisms are the provincial Development Tribunals, established to take responsibility for approvals of land development under the umbrella of the Act. The objective of these Tribunals, which comprise land development and public service experts, is to allow faster development decision-making, conflict resolution between the stakeholders, and also to provide a forum for greater community involvement and public participation within land development.”<sup>122</sup> The tribunals are made of government representative and non-government sector experts, rather than elected officials. Although the DFA requires that development is guided by principles, including ‘General principles for land development’<sup>123</sup> and ‘General principles for decision-making and conflict resolution’.<sup>124</sup> Other principles guiding development (which must be coherent with those set out in the DFA) could come from local government.<sup>125</sup>

## **2. Brief description of any stages in its development**

The land reform programme in South Africa was “implemented following decades of apartheid, which included racially-based land dispossessions.”<sup>126</sup> The land reform programme “following the election of a democratic government, is a major attempt at redress and transformation and aims to address land inequalities...”<sup>127</sup>

## **3. Brief description of the *common* element**

The Provincial Development Tribunals (briefly referred to at 1, above) provide a common framework to assess applications for development, “comprising Government officials and non-Government sector experts, charged with the responsibility to implement land development principles and policy in an objective manner.”<sup>128</sup> Budlender, Latsky and Roux (2000) provide a comprehensive overview of the structure of these Tribunals.<sup>129</sup>

## **4. Brief description of whether existing legislation was amended or replaced and how was this done (e.g. part of pre-planned legislative change or a free standing action/activity)?**

The DFA does not replace existing legislation. Rather the DFA, and in particular the forum provided by the Provincial Development Tribunals, intends to provide either an alternative means of legislation, or can be used to navigate the complexity of the existing legislation.

<sup>121</sup> Rhizome Management Services / Gemey Abrahams Consultants ‘Assignment 2: Development Facilitation Act Review. Synthesis Report (Final)’ [2010] [http://www.urbanlandmark.org.za/downloads/review\\_dfa\\_2010.pdf](http://www.urbanlandmark.org.za/downloads/review_dfa_2010.pdf) At p61, cites Ivan Pauw & Partners ‘Rapid review of the DFA’ (2009). An expanded analysis is also provided by: Emdon, E. ‘The Development Facilitation Act (DFA)’ (1994) 5(2) Urban Forum, 89; Budlender, G., Latsky, J. and T. Roux, T. ‘Juta's New Land Law’ (2000) South Africa: Juta. pp2A5-2A12.

<sup>122</sup> Rigby, S. and Diab, R. ‘Environmental sustainability and the Development Facilitation Act in South Africa’ (2003) 15(1) Journal of Environmental Law, 27. At p28.

<sup>123</sup> Development Facilitation Act 1995, section 3.

<sup>124</sup> Development Facilitation Act 1995, section 4.

<sup>125</sup> ‘Juta's New Land Law’ (2000) South Africa: Juta. At p2A-37

<sup>126</sup> Wynberg, R.P. and Sowman, M. ‘Environmental Sustainability and Land Reform in South Africa: A Neglected Dimension’ (2007) 50(6) Journal of Environmental Planning and Management, 783. At p784. Also see Todes, A., Sim, V and Sutherland, C. ‘The Relationship between Planning and Environmental Management in South Africa: The Case of KwaZulu-Natal’ (2009) 24(4) Planning Practice and Research, 411.

<sup>127</sup> Ibid.

<sup>128</sup> Budlender, G., Latsky, J. and T. Roux, T. ‘Juta's New Land Law’ (2000) South Africa: Juta. At p2A-37.

<sup>129</sup> Ibid. At pp2A-37–2A-45.



<p><b>What were the costs and benefits of the common regulatory framework? Please provide any data or assessments if available.</b></p> <p>See the discussion under ‘How successful was the common regulatory framework?’</p>
<p><b>Were big investments needed to implement it and by whom?</b></p> <p>Not ascertained from the information reviewed to date.</p>
<p><b>Were there any barriers or hurdles to implementation? Were these expected or unforeseen?</b></p> <p>Not ascertained from the information reviewed to date.</p>
<p><b>How successful was the common regulatory framework? Please provide any data or assessments if available.</b></p> <p>McAuslan (2002) put forward this opinion: “As often happens it did not quite work out as intended – it was used more by developers wanting to build out-of-town locations for the middle-classes than by those wanting to build for the urban proletariat and was, in addition, not fully in sync with the housing subsidies development by the housing ministry...”<sup>130</sup></p> <p>Rigby and Diab also undertook an analysis of “39 DFA applications in KwaZulu-Natal, one of the nine provinces of South Africa, over the period June 1998 to July 2001.”<sup>131</sup> Overall they found: “The DFA appears to be facilitating development in accordance with its intentions, in that the development application process is indeed being expedited. It provides the means to assess environmentally sensitive areas, to mitigate against possible negative impacts, and to ensure that the decision-making process is conducted in as transparent and democratic a way as possible.[This is via measures for ‘Participation With Regard To The Setting And Implementation Of Land Development Objectives’ set out within Part B, Regulation 6-8 of the DFA. These include measure for public participation in the tribunals]. However, the lack of monitoring and enforcement controls makes it difficult to determine whether the mitigatory measures recommended by the Tribunal are indeed being implemented. Until post-decision monitoring is put in place, the effectiveness of the DFA and the Tribunal decision-making process remains inconclusive.”<sup>132</sup></p> <p>Wynberg and Sowman (2007) state “Environmental factors are seldom integrated into planning and decision-making processes, and, in the face of intense political pressure, are given short shrift in the rush to settle claims and reach resolution.”<sup>133</sup></p>
<p><b>Was there anything in particular that contributed to its success?</b></p> <p>Not ascertained from the information reviewed to date.</p>
<p><b>Are there any other lessons that can be learned?</b></p> <p>The relationship between land use planning and environmental management in South Africa influences the effectiveness of the South African planning system.</p>

<sup>130</sup> McAuslan, P. ‘Publication Review: Environmental Law in South Africa, Jan Glazewski’ (2002) 14(2) Journal of Environmental Law, 266. At p268.

<sup>131</sup> Ibid. At p32.

<sup>132</sup> Ibid. At p37.

<sup>133</sup> Wynberg, R.P. and Sowman, M. ‘Environmental Sustainability and Land Reform in South Africa: A Neglected Dimension’ (2007) 50(6) Journal of Environmental Planning and Management, 783. At p785.

## **National Water Act, 36 of 1998**

<b>What is the name of the common regulatory framework?</b>
The National Water Act, 'NWA'
<b>What organisation or agency leads this common regulatory framework?</b>
Administered nationally by the Department of Water Affairs and Forestry
<b>When did it start and finish?</b>
The NWA was Assented to by the President of South Africa on 20 August 1998 and is still in force.
<b>Links to relevant information or documents</b>
Text of the NWA <a href="http://www.info.gov.za/view/DownloadFileAction?id=70693">http://www.info.gov.za/view/DownloadFileAction?id=70693</a>
Stein, R. 'South Africa's new democratic water legislation: national Government's role as public trustee in dam building and management activities' (2000) 18(3) Journal of Energy & Natural Resources Law, 284.
Godden, L. 'Water law reform in Australia and South Africa: sustainability, efficiency and social justice' (2005) 17(2) Journal of Environmental Law, 181.
Malzbender, D, Goldin, J., Turton, A. and Earle, A. 'Traditional Water Governance and South Africa's "National Water Act" – Tension or Cooperation?' [2005] International workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa', 26-28 January 2005, Johannesburg, South Africa. <a href="http://www.nri.org/projects/waterlaw/AWLworkshop/MALZBENDER-DB.pdf">http://www.nri.org/projects/waterlaw/AWLworkshop/MALZBENDER-DB.pdf</a>
The Parliament of the Republic of South Africa website contains Hansard and other parliamentary reports. <a href="http://www.parliament.gov.za/live/index.php">http://www.parliament.gov.za/live/index.php</a>
The Parliament of the Republic of South Africa website lists meetings of the Portfolio Committee on Water Affairs and Forestry – outcomes from these meetings are not readily available. <a href="http://www.parliament.gov.za/live/content.php?Item_ID=215&amp;CommitteeID=31">http://www.parliament.gov.za/live/content.php?Item_ID=215&amp;CommitteeID=31</a>
<b>Why was it put in place?</b>
To provide for fundamental reform of the law relating to water resources; to repeal certain laws; and to provide for matters connected therewith (Identified in NWA prior to the pre-amble).
The NWA "does away with the division of water into different categories, such as public water, private water, surplus water and normal flow." <sup>134</sup>
<b>What field of environmental regulation does it cover?</b>
Water
<b>What national/regional legislation/regulation does it cover?</b>
The NWA is national legislation. Aspects of the implementation of the NWA are overseen by the National Environmental Management Act (also featured in this review).

<sup>134</sup> Goolam, N. 'Recent environmental legislation in South Africa. (2000) 44(1) Journal of African Law, 124. At p125.

**Has it involved any joint working with other nations? If so, which countries and why?**

The Act is national legislation but “South Africa is seeking to develop treaty arrangements with neighbouring countries in an effort to address long-term water supply deficiencies.”<sup>135</sup>

**Which stakeholders/organisations were involved in its implementation?**

An example provided by Malzbender et al (2005) in Limpopo Province indicates that the Department of Water Affairs and Forestry “officials consult with a wide range of stakeholders...formally recognised institutionalised bodies such as irrigation boards, but importantly, the more loosely associated rural communities...”<sup>136</sup>

**What were its objectives?**

The full title of the Act indicates its objectives “To provide for fundamental reform of the law relating to water resources; to repeal certain laws; and to provide for matters connected therewith.

**Description of the common regulatory framework**

**1. Overview**

The NWA did “away with the division of water into different categories, such as public water, private water, surplus water and normal flow.”<sup>137</sup> All water now has the same legal status. It introduced a new concept “water use” which “includes, among other uses, taking water from a water resource, storing water, diverting the flow of water, discharging waste into a water course, disposing of waste in a manner which may have a detrimental impact on a water resource and altering the bed, banks, course or characteristics of a water course.”<sup>138</sup>

**2. Brief description of any stages in its development**

During the “apartheid regime, access to and distribution of water use rights were determined on a racially discriminatory basis. This is mainly because the distribution of water use rights was linked to land...distribution of water historically took no account of the basic needs of the nation’s people as a whole.”<sup>139</sup> The Water Act of 1956 did enable government control of some water sources but “the 1956 Act did not respond effectively to issues of environmental degradation, equity of distribution or the downstream effect of water allocations.”<sup>140</sup> The Water Services Act of 1997 began the process of more significant reform. Rather than private rights to water, it recognises that waters are held by Government in the public trust. “The public trust concept was inspired by the original Roman-Dutch law formulation as well as more recent US trust principles.”<sup>141</sup>

“Australian jurisdictions provided some of the models that South Africa looked to in drafting its National Water Act 1998.”<sup>142</sup> South Africa then provided a model for Australia

<sup>135</sup> Godden, L. ‘Water Law reform in Australia and South Africa: sustainability, efficiency and social justice’ (2005) 17(2) Journal of Environmental Law, 181. At p185.

<sup>136</sup> Malzbender, D, Goldin, J., Turton, A. and Earle, A. ‘Traditional Water Governance and South Africa’s “National Water Act” – Tension or Cooperation?’ [2005] International workshop on ‘African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa’, 26-28 January 2005, Johannesburg, South Africa. <http://www.nri.org/projects/waterlaw/AWLworkshop/MALZBENDER-DB.pdf> At p5.

<sup>137</sup> Goolam, N. ‘Recent environmental legislation in South Africa. (2000) 44(1) Journal of African Law, 124. At pp125-126.

<sup>138</sup> Ibid. At p126.

<sup>139</sup> Stein, R. ‘South Africa's new democratic water legislation: national Government's role as public trustee in dam building and management activities’ (2000) 18(3) Journal of Energy & Natural Resources Law, 284. At p285.

<sup>140</sup> Godden, L. ‘Water Law reform in Australia and South Africa: sustainability, efficiency and social justice’ (2005) 17(2) Journal of environmental Law, 181. At p196.

<sup>141</sup> Ibid. At p198.

<sup>142</sup> Ibid At p181. Described in detail in Stein (2000), supra note 137, and also Malzbender et al (2005) supra note 134.

Godden (2005) provides a succinct overview of both the context to its development and some of the stages in its development.<sup>143</sup>

### **3. Brief description of the *common element***

The common elements relate to the common administration of what were previously identified as different types of water categorisation (as set out above at '1.Overview'). To govern this system, in circumstances where any person was not otherwise entitled to use water, the NWA set up a joint system of licensing, governed by Part 7 of Chapter 4 of the Act. This appears to both runs alongside existing systems of licensing, but also introduces a need to license activities not previously licensed.

Licences are authorised by the licensing authority, "which could be a catchment management agency or the Minister".<sup>144</sup> The NWA indicates that the Minister may authorise licences where a catchment management agency has not been established or is not functional.<sup>145</sup> A catchment management agency or the Minister authorising licences is an important change. Malzbender et al (2005)<sup>146</sup> outline originally 1652-1795 the overall right of control of water was assumed by the Dutch East India Company. "after 1795, under British rule, water rights were linked to land tenure. Private (riparian) water rights had precedence over public water right."<sup>147</sup> In the early 20 Century there was still no government control over water, "The allocation of water between riparian owners was the responsibility of water courts."<sup>148</sup> This system continued with the "Water Act (54 of 1956) [which] upheld the distinction between "public water" and "private water" with the latter category "determined by the riparian principle."<sup>149</sup> As a result of the NWA appeals against the decisions of licensing authorities' can now be made to the Water Tribunal. The Water Tribunal is an independent body which replaced the existing Water Court and also extended its powers.

### **4. Brief description of whether existing legislation was amended or replaced and how was this done (e.g. part of pre-planned legislative change or a free standing action/activity)?**

Legislation was amended and replaced as part of a pre-planned change. The NWA replaced the Water Act 54 of 1956, and repealed "more than a hundred other Acts dealing with water."<sup>150</sup>

### **What were the costs and benefits of the common regulatory framework? Please provide any data or assessments if available.**

Godden (2005) states: "the [NWA] provides a strategic approach to achieving long-term sustainability although it is recognised as financially and institutionally demanding, particularly in the inception phase."<sup>151</sup>

Godden (2005) "On balance, the National Water Act ushered in a significant break with past practices. The reforms will affect society and economy at a national and local level within South Africa. An expanded understanding of 'water' is combined with an extensive, centralised forward

<sup>143</sup> Ibid.

<sup>144</sup> Goolam, N. 'Recent environmental legislation in South Africa. (2000) 44(1) Journal of African Law, 124. At p126.

<sup>145</sup> National Water Act 1998, part 3, section 72.

<sup>146</sup> Malzbender, D, Goldin, J., Turton, A. and Earle, A. 'Traditional Water Governance and South Africa's "National Water Act" – Tension or Cooperation?' [2005] International workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa', 26-28 January 2005, Johannesburg, South Africa. <http://www.nri.org/projects/waterlaw/AWLworkshop/MALZBENDER-DB.pdf> At 18-4.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Goolam, N. 'Recent environmental legislation in South Africa. (2000) 44(1) Journal of African Law, 124. At p126.

<sup>151</sup> Godden, L. 'Water Law reform in Australia and South Africa: sustainability, efficiency and social justice' (2005) 17(2) Journal of environmental Law, 181. At p198.

planning process. There is an open textured institutional structure with the potential for progressive devolution of certain functions to a catchment level. Social reform agendas are highlighted through the commitment to the human needs reserve and equity based pricing mechanisms. The incorporation of environmental protection measures is evident in the promotion of both water quality objectives and sustainable use of water.”<sup>152</sup>

**Were big investments needed to implement it and by whom?**

“To institute the wide reaching water reforms will require substantial capacity from within the institutional structure, particularly the Department of Water Affairs.”<sup>153</sup>

**Were there any barriers or hurdles to implementation? Were these expected or unforeseen?**

“The critical role of human capacity and effective governance structures in implementing water law reforms is exacerbated by the accompanying recognition of widespread shortages in technical and administrative expertise.”<sup>154</sup>

Goddens (2005) states “Given considerable variability in the availability of requisite resources and expertise, the successful implementation of water law reform is likely to be patchy across the country.”<sup>155</sup>

**How successful was the common regulatory framework? Please provide any data or assessments if available.**

Goddens (2005) states “South Africa has instituted broad reaching water law and policy reform in a comparatively short time. The process is remarkable for its articulation of principles designed to achieve a range of socio-economic and environmental protection goals.”<sup>156</sup>

Malzbender et al (2005) state “The ability of the state to effectively manage and control water resources by the state remains problematic... millions of South Africans are still dependent on water from open streams, boreholes or stagnant sources. In particular, water delivery to the former homelands as the poorest areas of the country remains inadequate. Despite strong government efforts to improve water supply to the rural poor and to implement a comprehensive formal water management..., the inability of the state to provide adequate water and sanitation to all South African in the near future, is cause for concern. Certainly, evidence suggests that the fledgling democracy faces very real institutional and financial constraints that challenge its ability to achieve integrated water resource management.”<sup>157</sup>

Malzbender et al (2005) argue “that traditional leaders have an important role to play in narrowing the gap between policy and its practice and that there is sufficient evidence on the ground to suggest integrating traditional systems of control and management of water into formal structures that are provided for by the NWA.”<sup>158</sup>

**Was there anything in particular that contributed to its success?**

Not ascertained from the information reviewed to date.

**Are there any other lessons that can be learned?**

Not ascertained from the information reviewed to date.

<sup>152</sup> Ibid. At p201

<sup>153</sup> Ibid. At p201 – Footnote 165 linking to Footnote 3 Judge A. Gildenehys, ‘A New Water Law Dispensation’, 10 Butterworths Property Law Digest 13 (1999). At 14.

<sup>154</sup> Ibid. At p201.

<sup>155</sup> Ibid. At p201.

<sup>156</sup> Ibid. At p202.

<sup>157</sup> Malzbender, D, Goldin, J., Turton, A. and Earle, A. ‘Traditional Water Governance and South Africa’s “National Water Act” – Tension or Cooperation?’ [2005] International workshop on ‘African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa’, 26-28 January 2005, Johannesburg, South Africa.

<http://www.nri.org/projects/waterlaw/AWLworkshop/MALZBENDER-DB.pdf> At p18-2.

<sup>158</sup> Ibid. At p18-11.

## **National Environmental Management Act, 107 of 1998**

### **What is the name of the common regulatory framework?**

National Environmental Management Act, 107 of 1998, 'NEMA'

### **What organisation or agency leads this common regulatory framework?**

Department of Environmental Affairs and Tourism (South African Government)

### **When did it start and finish?**

NEMA states that it “comes into operation on a date fixed by the President in the Gazette”.<sup>159</sup> It came into operation 29 January 1999 and is still in operation. It has since been updated or amended several times including by the National Environmental Management (Amendment) Act, 46 of 2003, ‘the 2003 Amendment,’ which came into effect on 1 May 2005. The 2003 Amendment provides for the appointment of Environmental Management Inspectors (EMIs) in a network known as the Environmental Management Inspectorate. This measure assists with enforcement of and compliance with NEMA (which includes other environmental regimes, such as the National Water Act also described in this section) and is therefore discussed in detail in this section.

### **Links to relevant information or documents**

Text of NEMA (as amended)

<http://www.info.gov.za/view/DownloadFileAction?id=70641>

Text of the 2003 Amendment

<http://www.info.gov.za/view/DownloadFileAction?id=68023>

Environmental Management Inspectorate

<http://emi.deat.gov.za/login/index.aspx?ReturnUrl=%2findex.aspx>

The Parliament of the Republic of South Africa website contains Hansard and other parliamentary reports.

<http://www.parliament.gov.za/live/index.php>

### **Why was it put in place?**

NEMA “seeks to promote co-operative governance between the different levels of government.”<sup>160</sup> NEMA “gives effects to the environmental clause in the Bill of Rights in South Africa’s new constitution by providing a framework for facilitating environmental management within the different spheres of government in their general decision-making and establishes principles and procedures for this purpose”<sup>161</sup>

The intention of the 2003 Amendment is that it will “improve enforcement and compliance with environmental legislation and provides for the appointment of national environmental management inspectors (EMIs).”<sup>162</sup>

<sup>159</sup> National Environmental Management Act 1998, section 53.

<sup>160</sup> Goolam, N. ‘Recent environmental legislation in South Africa. (2000) 44(1) Journal of African Law, 124. At p125.

<sup>161</sup> Glazewski, J.I. ‘South Africa: The national Environment [SIC] Management Act, 107 of 1998. (1999) 7(1) Environmental Liability, CS8-9. At pCS8.

<sup>162</sup> Paterson, A. Current Survey: South Africa (2005) 13(4) Environmental Liability, CS58. At pCS61.

**What field of environmental regulation does it cover?**

NEMA focuses on the “environment”, this:

“means the surroundings within which humans exist and that are made up of –

- i) the land, water and atmosphere of the earth;
- ii) micro-organisms, plant and animal life;
- iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.”<sup>163</sup>

**What national/regional legislation/regulation does it cover?**

The Act is national legislation related to the environment (as defined in ‘What field of environmental regulation does it cover?’)

**Has it involved any joint working with other nations? If so, which countries and why?**

The focus of NEMA is environmental management within South Africa.

However, reflecting the South African Constitution, NEMA is guided by a set of principles including that “Global and international responsibilities relating to the environment must be discharged in the national interest.”<sup>164</sup>

There are also measures for integrating International Obligations and Agreements into NEMA<sup>165</sup> and thus it is an important instrument in terms of South Africa satisfying its international environmental duties. However, there is no direct provision for joint working with other nations. Although other nations could presumably use consultation provisions where applicable in this and other South African Acts.

**Which stakeholders/organisations were involved in its implementation?**

Department of Environmental Affairs and Tourism, Director-General of Environmental Affairs and Tourism, Competent Authorities<sup>166</sup>, environmental assessment practitioner, Environmental Management Inspectors, and Industry.

**What were its objectives?**

“To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.”<sup>167</sup>

The 2003 Amendment defines “certain expressions; to provide for the administration and enforcement of certain national environmental management laws; and to provide for matters connected therewith.”<sup>168</sup>

<sup>163</sup> National Environmental Management Act 1998, section 1.

<sup>164</sup> Ibid, chapter 1, section 2n.

<sup>165</sup> Ibid, chapter 6, section 25.

<sup>166</sup> Ibid, section 1 – “the organ of state charged by this Act with evaluating the environmental impact of [specific listed activities] and, where appropriate, with granting or refusing an environmental authorization in respect of [those activities]”

<sup>167</sup> Ibid, Identified prior to the pre-amble. Also Poustie, M. ‘Environmental Justice in SEPA’s Environmental Protection Activities: A Report for the Scottish Environmental Protection Agency’ (2004) Glasgow: University of Strathclyde Law School. At p39.

<sup>168</sup> National Environmental Management (Amendment) Act 2003, Identified prior to the pre-amble.

## Description of the common regulatory framework

### 1. Overview

South Africa does not have a common permitting system. Rather, reflecting the Constitution, the NEMA provides a common system of principles and procedures, with different legislation that provides for different permitting systems. However, the principles themselves and a number of other measures resulting from NEMA and its amendments require shared or joint action. These are described in greater detail at '3. Brief description of the *common* element' below.

### 2. Brief description of any stages in its development

The Environmental Conservation Act 73 of 1989 "represented an earlier attempt at integrating environmental regulation in South Africa. The new Act is also a response to the shift from a system of national centralised powers, to one where powers and functions are divided between the three tiers, now terms 'spheres', of government under the new Constitution (Act 108 of 1996) which designates 'environment' as well as 'pollution' as areas of shared competency between the provincial and national governments."<sup>169</sup>

### 3. Brief description of the *common* element

Chapter 1 of NEMA sets out the National Environmental Management Principles which act as a guide to decision making including "the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment."<sup>170</sup> As Glazewski (1999) notes these principles "are underpinned by the principle of sustainable development which the Act defines and specifies as requiring the consideration of all relevant factors including the following: '(i) pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied... (vii) that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions' as well as a number of others (section 2(4)(a)(i) to (viii)). Other principles include the polluter pays principle (section 2(4)(p)), the doctrine of public trust (section 2(4)(o)) as well as environmental justice considerations (section 2(4)(c) and (d))."<sup>171</sup>

The Principles are put into action by Chapter 3 of NEMA is titled "Procedures for Co-Operative Governance". NEMA requires National government departments and provinces to prepare environmental management plans or environmental implementation plans or both.<sup>172</sup> Amongst other things "The purpose of environmental implementation and management plans is to:

- a) co-ordinate and harmonise the environmental policies, plans, programmes and decisions of the various national departments that exercise functions that may affect the environment or are entrusted with powers and duties aimed at the achievement, promotion, and protection of a sustainable environment, and of provincial and local spheres of government, in order to
  - i) minimise the duplication of procedures and functions; and
  - ii) promote consistency in the exercise of functions that may affect the environment;"<sup>173</sup>

Chapter 2 of the Act also originally established the Committee for Environmental Co-ordination which had aimed "to promote the integration and co-ordination of environmental functions by the relevant groups of the state..."<sup>174</sup> however this has since been repealed.<sup>175</sup>

<sup>169</sup> Glazewski, J.I. 'South Africa: The national Environment [SIC] Management Act, 107 of 1998. (1999) 7(1) Environmental Liability, CS8. At pCS8.

<sup>170</sup> National Environmental Management Act 1998, Section 2, 1)e).

<sup>171</sup> Glazewski, J.I. 'South Africa: The national Environment [SIC] Management Act, 107 of 1998. (1999) 7(1) Environmental Liability, CS8. At pCS8.

<sup>172</sup> Ibid. At pCS8.

<sup>173</sup> National Environmental Management Act 1998, chapter 3, section 12.



Section 33 of Chapter 7, Compliance, Enforcement and Protection, also provides for Private Prosecution; making “it easier for any person acting in the public interest or in the interest of the protection of the environment to institute and conduct a private prosecution *by cutting out certain bureaucratic procedures in such cases.*”<sup>176</sup>

The 2003 Amendment, providing for the appointment of EMIs, brings in a shared system for compliance and enforcement for NEMA and its associated legal instruments. This provision is described in greater detail below. The EMIs were discussed in a large number of newspaper articles.<sup>177</sup> However, there was limited academic information available about the operation of the Environmental Management Inspectorate of the EMIs. Therefore, the information below (including that in quotes) was largely derived from the Environmental Management Inspectorate web site.<sup>178</sup> Also referred to is a presentation that was prepared in 2005 by the Director: Enforcement, Department of the Environment, Tourism and Affairs.<sup>179</sup>

“The Environmental Management Inspectorate is a network of [EMIs] from different government departments (national, provincial and municipal).”<sup>180</sup> EMIs focus on criminal offences under environmental legislation and “also have administrative tools at their disposal, particularly by way of issuing a compliance notice to offenders...EMIs do not prosecute criminal cases in court.”<sup>181</sup>

“The following officials may be designated as EMIs:

- officials employed by the Department of Environmental Affairs and Tourism (DEAT);
- officials employed by provincial environment departments, or other provincial organs of state;
- municipal officials; and
- officials employed by “other organs of state”

The legislation does not provide for members of the public, volunteers or representatives of non-governmental organisations to be EMIs. Before designation, officials must successfully complete an EMI training course.”<sup>182</sup>

“At present, EMIs can be mandated to enforce a range of legislation depending on their particular functions, including:

- NEMA (including all regulations promulgated under NEMA, such as the 4x4 regulations and the new EIA regulations);
- the National Environmental Management: Biodiversity Act, 10 of 2004;
- the National Environmental Management: Protected Areas Act, 57 of 2004 and its regulations; and
- the National Environmental Management: Air Quality Act, 39 of 2004 (when Section 60 of this Act is brought into effect).”<sup>183</sup>

EMIs are informally known as “Green Scorpions” this reflects ‘the Scorpions’, that is, the

<sup>174</sup> Glazewski, J.I. ‘South Africa: The national Environment [SIC] Management Act, 107 of 1998. (1999) 7(1) Environmental Liability, CS8.

<sup>175</sup> by the National Environmental Laws Amendment Act, 2009 (Act No. 14 of 2009).

<sup>176</sup> Emphasis added. Glazewski, J.I. ‘South Africa: The national Environment [SIC] Management Act, 107 of 1998. (1999) 7(1) Environmental Liability, CS8. At pCS9.

<sup>177</sup> A NexisUK Search of “Environmental Management Inspector\*” on 19.05.2010 produced 128 different articles related to South Africa (141 including duplicates).

<sup>178</sup> Environmental Management Inspectorate [2010]

<http://emi.deat.gov.za/login/index.aspx?ReturnUrl=%2findex.aspx>

<sup>179</sup> Fourie, M. ‘The National Environmental Management Act (NEMA) and the Environmental Management

Inspectorate’. [2005] Presentation to Prosecutor Training Course. [http://www.inece.org/africa/prosecutors/d1\\_s2a.pdf](http://www.inece.org/africa/prosecutors/d1_s2a.pdf)

<sup>180</sup> Environmental Management Inspectorate [2010]

<http://emi.deat.gov.za/login/index.aspx?ReturnUrl=%2findex.aspx>

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

Directorate of Special Operations based within the National Prosecuting Authority, created by the South African Constitution (Section 179) and governed by the National Prosecuting Authority Act, No. 32 of 1998. However, the functions of the ‘Scorpions’ differ from the EMIs. The common element of the 2003 Amendment relates to the sharing of information – as described by the Environmental Management Inspectorate:

“With the establishment of the Environmental Management Inspectorate, environmental enforcement officials [are] part of a national network, sharing intelligence, experience, standardised training and procedures. For the first time, environmental enforcement will have a distinctive national identity with a national profile.

This national EMI network [breaks] through the traditional separation between the protection of different aspects of the environment, and will include park rangers and conservation officers, air quality officers, marine and coastal enforcement officers, pollution and waste enforcement officials and officials monitoring urban developments.”<sup>184</sup>

**4. Brief description of whether existing legislation was amended or replaced and how was this done (e.g. part of pre-planned legislative change or a free standing action/activity)?**

Rather than repeal existing legislation NEMA provides an overlay of common principles and procedures. However, procedural elements of other legislation were repealed. NEMA did repeal much of the Environment Conservation Act, 73 of 1989 (NEMA, Section 50). Certain aspects of the Environment Conservation Act, 73 of 1989, such as those related to environmental impact assessment, remain in force until new regulations are drafted.<sup>185</sup>

**What were the costs and benefits of the common regulatory framework? Please provide any data or assessments if available.**

Not ascertained from the information reviewed to date.

**Were big investments needed to implement it and by whom?**

Not ascertained from the information reviewed to date.

**Were there any barriers or hurdles to implementation? Were these expected or unforeseen?**

The presentation by Melissa Fourie<sup>186</sup> presents a list of current obstacles to effective compliance monitoring and enforcement in relation to EMIs set out below:

- Limited, localised publicity of enforcement actions, and no distinctive national profile;
- Legislation that is not geared for enforcement;
- Outdated, ineffective permitting systems;
- No functional separation and specialisation;
- No shared systems, procedures and resources;
- No sense of being part of enforcement community;
- Limited investigations experience among officials; and
- Limited experience of environmental crimes in SAPS [South African Police Service] and NPA [the National Prosecuting Authority]

<sup>184</sup> Ibid.

<sup>185</sup> Paterson, A. Current Survey: South Africa (2005) 13(4) Environmental Liability, CS58. At pCS59.

<sup>186</sup> Fourie, M. ‘The National Environmental Management Act (NEMA) and the Environmental Management Inspectorate’. [2005] Presentation to Prosecutor Training Course. [http://www.inece.org/africa/prosecutors/d1\\_s2a.pdf](http://www.inece.org/africa/prosecutors/d1_s2a.pdf)

**How successful was the common regulatory framework? Please provide any data or assessments if available.**

In relation to the use of environmental principles to guide decision making, Wynberg and Sowman (2007) state: “Despite supportive policy frameworks and increased environmental awareness, a growing body of evidence indicates that environmental sustainability is not central to planning and decision-making processes in land reform in South Africa.”<sup>187</sup> That “Environmental factors are seldom integrated into planning and decision-making processes, and, in the face of intense political pressure, are given short shrift in the rush to settle claims and reach resolution.”<sup>188</sup>

**Was there anything in particular that contributed to its success?**

Not ascertained from the information reviewed to date.

**Are there any other lessons that can be learned?**

Wynberg and Sowman (2007) suggest that “widespread adoption and implementation of [a specific] Environmental Sustainability Assessment Tool across the range of land reform processes could ensure that environmental opportunities and constraints are identified upfront and integrated into project planning and decision-making...”<sup>189</sup>

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<sup>187</sup> Wynberg, R.P. and Sowman, M. ‘Environmental Sustainability and Land Reform in South Africa: A Neglected Dimension’ (2007) 50(6) *Journal of Environmental Planning and Management*, 783. At p783.

<sup>188</sup> *Ibid.* At p785.

<sup>189</sup> *Ibid.* At p799.

### ***National Environmental Management: Integrated Coastal Management Act, 2008***

<b>What is the name of the common regulatory framework?</b>
National Environmental Management: Integrated Coastal Management Act, 2008, the 'ICM'. It is the key legislation in the South African to Integrated Coastal Area Management.
<b>What organisation or agency leads this common regulatory framework?</b>
"Leadership at the National Level [is] provided for by the Minister of Environmental Affairs and Tourism, who will be empowered to appoint a National Coastal Committee." <sup>190</sup>
<b>When did it start and finish?</b>
The ICM was Assented to on 9 February 2009 by the President of South Africa.
<b>Links to relevant information or documents</b>
Text of the ICM <a href="http://www.info.gov.za/view/DownloadFileAction?id=96260">http://www.info.gov.za/view/DownloadFileAction?id=96260</a>
Gibson, J. 'The development of integrated coastal management legislation in South Africa' (2007) 18(4) W.L., 117.
J. Glazewski and M. Haward, 'Towards Integrated Coastal Area Management: A Case Study in Co-operative Governance in South Africa and Australia,' 20 International Journal of Marine & Coastal Law (2005): 65-84 at 65-9, 72-80, 83-4. <sup>191</sup>
The Parliament of the Republic of South Africa website contains Hansard and other parliamentary reports. <a href="http://www.parliament.gov.za/live/index.php">http://www.parliament.gov.za/live/index.php</a>
<b>Why was it put in place?</b>
It was put in place in response to general recognition of the need for coastal management to protect what can often be sensitive areas that are also of economic importance. <sup>192</sup>
<b>What field of environmental regulation does it cover?</b>
Coastal Management (management of specific areas of land and water)
<b>What national/regional legislation/regulation does it cover?</b>
The ICM is national legislation.
<b>Has it involved any joint working with other nations? If so, which countries and why?</b>
Not ascertained from the information reviewed to date.
<b>Which stakeholders/organisations were involved in its implementation?</b>
As stated above (What organisation or agency leads this common regulatory framework?) the Minister of Environmental Affairs and Tourism, is empowered to appoint a National Coastal Committee. The membership of the National Coastal Committee "must include experts in coastal management and representatives of coastal provinces, municipalities and six national government

<sup>190</sup> Gibson, J. 'The development of integrated coastal management legislation in South Africa' (2007) 18(4) Water Law, 117. At p119.

<sup>191</sup> At pp149-150 South Africa is provided as a positive example in their development of legislation as a result of: Chircop, A., Dzidzornu, D., Guerreiro, J. and Grilo, C. 'The maritime zones of East African states in the law of the sea: benefits gained, opportunities missed' (2008) 16(2) African Journal of International and Comparative Law, 121.

<sup>192</sup> Gibson, J. 'The development of integrated coastal management legislation in South Africa' (2007) 18(4) Water Law, 117. At p117.

departments identified by their responsibilities, but overall the composition and individual appointments will be decided by the Minister.”<sup>193</sup> Therefore these stakeholders/organisations are involved in the ICMs implementation alongside interest groups such as non-governmental organisations (NGOs) and industry.

### **What were its objectives?**

The long title indicates the objectives of the Act:

- To establish a system of integrated coastal and estuarine management in the Republic, including norms, standards and policies, in order to promote the conservation of the coastal environment, and maintain the natural attributes of coastal landscapes and seascapes, and to ensure that development and the use of natural resources within the coastal zone is socially and economically justifiable and ecologically sustainable;
- to define rights and duties in relation to coastal areas; to determine the responsibilities of organs of state in relation to coastal areas;
- to prohibit incineration at sea;
- to control dumping at sea, pollution in the coastal zone, inappropriate development of the coastal environment and other adverse effects on the coastal environment;
- to give effect to South Africa's international obligations in relation to coastal matters; and
- to provide for matters connected therewith.

### **Description of the common regulatory framework**

#### **1. Overview**

See ‘2. Brief description of any stages in its development’ below.

#### **2. Brief description of any stages in its development**

A Coastal Management Policy Programme was first initiated by the South African Government in 1997. In 1998 a Green Paper was then put out to consultation. “This was followed in April 2000 by a White Paper containing the government’s conclusions and proposals for action.” This White Paper proposed the ICM. There was a significant delay and in December 2006 the proposed legislation was put out to public consultation, the revised draft followed July 2007 with the Bill being introduced to the National Assembly on 29 October 2007.<sup>194</sup>

#### **3. Brief description of the *common* element**

The ICM provides for committees to be set up at National<sup>195</sup>, Provincial<sup>196</sup> and Municipal level<sup>197</sup> of government but also provides for “Co-ordination of actions between provinces and municipalities”.<sup>198</sup> “Although the Committee must promote integrated coastal management and co-operative governance by co-ordinating the implementation of the Bill and the national coastal management programme, the legislation fails to prescribe any mechanisms or procedures of achieving this crucial objective.”<sup>199</sup> The nature of the co-operative governance and co-ordination is determined by the powers the Minister provides to the National Coastal Committee.<sup>200</sup>

#### **4. Brief description of whether existing legislation was amended or replaced and how was this done (e.g. part of pre-planned legislative change or a free standing action/activity)?**

<sup>193</sup> Ibid. At p119.

<sup>194</sup> Ibid. At 117.

<sup>195</sup> National Environmental Management: Integrated Coastal Management Act, 2008, part 1.

<sup>196</sup> Ibid, part 3.

<sup>197</sup> Ibid, part 4.

<sup>198</sup> Ibid, chapter 11, section 94.

<sup>199</sup> Gibson, J. ‘The development of integrated coastal management legislation in South Africa’ (2007) 18(4) Water Law, 117. At p119.

<sup>200</sup> National Environmental Management: Integrated Coastal Management Act, 2008, chapter 5, section 35.

Schedule 1 of the ICM states that this repeals the Sea-shore Act, 21 of 1935 (to the extent it has not been assigned to the provinces) and the Dumping at Sea Control Act, 73 of 1980. The SEA-Shore Act is of relevance to coastal management whereas “The Dumping at Sea Control Act would have been replaced anyway, in order to implement the 1996 Protocol to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972”<sup>201</sup> No other legislation is amended and the provisions of the Act will be “superimposed on the existing body of laws that currently affect the coast.”<sup>202</sup>

**What were the costs and benefits of the common regulatory framework? Please provide any data or assessments if available.**

The costs and benefits below are derived from Gibson (2007)<sup>203</sup>. Potential costs are also listed under ‘Were there any barriers or hurdles to implementation?’ below.

**Costs**

- Will add to the complexity of land-use planning procedures

**Benefits**

- Focus on the public ownership of coastal property
- Adopts an integrated approach to both land and sea
- Land use planning – offers some opportunities to combine different forms of planning [although this is not clear cut because separate procedures continue to exist]
- Should limit inappropriate coastal development (if properly enforced)

**Were big investments needed to implement it and by whom?**

Not ascertained from the information reviewed to date.

**Were there any barriers or hurdles to implementation? Were these expected or unforeseen?**

Gibson (2007)<sup>204</sup> foresaw a number of potential barriers in advance of its implementation:

- Difficulties in interpretation – for example offences are created for areas below or above the high-water mark, a concept which has not been clearly defined;
- National, provincial and municipal government have separate competences provided for by the South African Constitution. In relation to marine spatial planning these may clash;
- The legislation is long and complex;
- It does not contain a statement of goals and principles [arguably these may be supplied by NEMA and the Constitution of South Africa];
- Absence of funding mechanisms and other financial provisions to support the ICMs implementation in practice;
- Wide power to make legislation related to aspects of integrated coastal management leading to a lack of control.

Glazewski and Haward (2005) anticipated “a lack of capacity, particularly at local authority level to implement” administration of coastal management at the three levels of government.<sup>205</sup>

<sup>201</sup> Gibson, J. ‘The development of integrated coastal management legislation in South Africa’ (2007) 18(4) Water Law, 117. At p117.

<sup>202</sup> Ibid. At p118.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Glazewski, J. and Haward, M. ‘Towards Integrated Coastal Area Management: A Case Study in Co-operative Governance in South Africa and Australia,’ 20 International Journal of Marine & Coastal Law (2005), 65. At p83.

**How successful was the common regulatory framework? Please provide any data or assessments if available.**

This framework is in its early stages but Gibson (2007) stated in advance of it coming into effect: “While it is generally an ambitious text, and contains some imaginative elements, it suffers from political compromises that have been made during its preparation. Its implementation will also require considerable resources and expertise at all levels of government, and there is a danger that its effectiveness may be undermined in practice by a shortage of administrative capacity.”<sup>206</sup>

**Was there anything in particular that contributed to its success?**

Not ascertained from the information reviewed to date.

**Are there any other lessons that can be learned?**

Not ascertained from the information reviewed to date.

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<sup>206</sup> Gibson, J. ‘The development of integrated coastal management legislation in South Africa’ (2007) 18(4) Water Law, 117. At p117.

## 5. Conclusions

This literature review has identified examples of common regulatory frameworks relating to regulation of the environment in the non-IMPEL English speaking countries of Australia, New Zealand and South Africa. Despite the US being a pioneer of Better Regulation<sup>207</sup>, of which common regulatory framework are part, no common regulatory frameworks were identified in the US. Table 2 summarises the result by country, setting out the name of the common regulatory framework, the environmental media to which it relates, together with a brief description of the common element identified. In many cases the common regulatory frameworks listed contain a number of common elements – the focus of the ‘Common elements identified’ column in Table 2 are those discussed in greater detail in the results (Section 4) of this review.

**Table 2** The countries and common regulatory frameworks that were the focus of this review together with an overview of the environmental media covered and common element identified

Country	Common regulatory framework	Environmental media	Common element identified
Australia	National Water Initiative	Water	Development of regulatory system overseen by National Water Commission
New Zealand	Resource Management Act 1991	Air, land and water	Common permitting procedures for a range of environmental resources
South Africa	Development Facilitation Act 1995	Land use	Common (alternative) framework to assess development applications
	National Water Act, 36 of 1998	Water	Common administration of types of water categorisation previously identified as separate (or in some cases not identified at all)
	National Environmental Management Act, 107 of 1998	Environment	A common set of principles to govern environmental management  Establishment and networking of Environmental Management Inspectors to improve enforcement of environmental laws
	National Environmental Management: Integrated Coastal Management Act, 2008	Coastal Management (management of specific areas of land and water)	Committees to facilitate co-operative governance

The following conclusions are structured according to the IMPEL objectives listed in Section 1. However, the conclusions that can be drawn are limited by the reliance of this review on literature of varying quantity and quality in relation to each framework. Additionally, as Section 2.2 discussed, the term common regulatory framework was not routinely applied to regulatory or other activities that could conform to IMPELs definition of this concept, set out in Box 1. For example, in the US, the term “common element” was being used to refer to a legal provision within Comprehensive Environmental Response, Compensation, and Liability Act of 1980, unrelated to the concept of common regulatory frameworks as defined by Box 1. Such factors constrained the ability of this review to meet the IMPEL objectives set out in Section 1.

<sup>207</sup> Weiner, J.B. ‘Better Regulation in Europe’, in, Holder, J. and McGillivray, D. ‘Taking Stock of Environmental Assessment: Law, Policy and Practice’ (2007) Abingdon: Routledge-Cavendish. 65-130. At p68.



- To identify examples of common regulatory frameworks developed by countries outside of IMPEL and describe their history, the reasons why they were developed and why they took the form they did.

Section 4 of this Literature Review presented the information to meet this objective for the Countries and common regulatory frameworks set out in Table 2. This review highlighted that the New Zealand Resource Management Act 1991 is the only attempt to bring together both land use planning and environmental controls – but even this Act recognises limits to this joint process by requiring different permits for each of these in different circumstances (sometimes from different authorities). The South African National Environmental Management Act provides at minimum two broad common frameworks. The first is a set of principles to guide the application of all South African law concerned with the environment. The second established a network of Environmental Management Inspectors to provide a linked system of enforcement applying across different environmental statutes.

In contrast, the Australian National Water Initiative together with the South African Development Facilitation Act 1995 and Integrated Coastal Management Act, 2008 provide additional layers of administration which aim to generate progressive reform of existing governance. The South African National Water Act 1998 consolidated existing legislation to produce a common framework for the administration of water, similar to that of the EU Water Framework Directive.<sup>208</sup> Although these frameworks intend to promote integrated, aligned or shared action, they are largely across one environmental media, and may not be of such direct relevance to IMPEL.

- To compare the examples and identify the perceived advantages and disadvantages of common regulatory frameworks for regulators and business/industry including administrative burdens, and
- To identify barriers to integration/combining of environmental regulatory frameworks.

Overall the frameworks listed in Table 2 were influenced by the existing environmental conditions and structures of governance – and they can generate both opportunities for integrating environmental regulatory frameworks and barriers (together with advantages and disadvantages). Arguably, the massive restructuring of environmental and land use management in New Zealand, brought about by the Resource Management Act 1991, was achievable because of the unitary, rather than federal, system of government. In South Africa, often the common frameworks take the form of parallel systems, set up to work alongside existing laws. These systems in some cases replaced existing laws, in others complemented, but also perhaps confused the implementation of those laws already in place.

- To identify the benefits of common regulatory frameworks for Member States considering adopting such frameworks.

The environmental conditions and governance structures in each Member State will determine the form of common regulatory framework that is applicable in each circumstance. This in turn influences the benefits that will result from their adoption.

- To provide recommendations for IMPEL and Member States on the creation of common regulatory frameworks and good practice.

The outcomes from this Literature Review are to be assessed in relation to the information gained from the IMPEL Questionnaire. Further investigation is recommended to ascertain how

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<sup>208</sup> Directive 2000/60/EC of The European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

the information contained in this review could inform the creation of common regulatory frameworks and good practice. The existence of other common regulatory frameworks could be further explored. For example there were a large number of examples of processes to encourage Integrated Coastal Area (or Zone) Management, such as in Australia<sup>209</sup> and nations within Africa.<sup>210</sup> This is part of a wider drive towards integrated management of oceans motivated by the 1982 United Nations Convention on the Law of the Sea.<sup>211</sup> However, these were not discussed further in this review because of their complicated nature. Morgan (2003)<sup>212</sup> discussed meta-regulation in Australia, identifying that Canada and Mexico demonstrated an interest in these Australian reforms. Therefore, common regulatory frameworks in other non-IMPEL countries, such as Canada and Mexico, could be investigated alongside a more in-depth review of Australia, New Zealand, South Africa and the US.

Other methods could be used to inform a comparatively more targeted and in-depth review. For example, academics specialising in environmental law and policy, or the representatives of organisations likely to have a role in facilitating such frameworks, could be interviewed. Table 3 provides an overview of potential academic contacts together with the organisations likely to have a role in facilitating such frameworks in each country. Each participant would be provided with an explanation of the term ‘common regulatory framework’, examples of where such frameworks may have arisen would be discussed, and direction to appropriate literature requested. Information could be obtained via telephone interviews or emails or both.

**Table 3** Suggested academic contacts and organisation contacts in each country. Academics and appropriate representatives of the organisation could be contacted for interview.

Country	Potential academic contact(s)	Organisation(s)
Australia	Sharon Beder, University of Wollongong	Department of the Environment, Water, Heritage and the Arts
New Zealand	Ken Palmer or Tim McBride or both, The New Zealand Centre for Environmental Law, University of Auckland	The Ministry for the Environment
South Africa	Alexander Paterson, University of Cape Town  Jan Glazewski, University of Cape Town  Nazeem Goolam, Rhodes University	Department of Environmental Affairs  Department of Water Affairs and Forestry  Portfolio Committee on Water and Environmental Affairs, Parliament of the Republic of South Africa
United States of America		US Environmental Protection Agency  United States Department of Agriculture

<sup>209</sup> Glazewski, J. and Haward, M. ‘Towards Integrated Coastal Area Management: A Case Study in Co-operative Governance in South Africa and Australia,’ 20 *International Journal of Marine & Coastal Law* (2005), 65.; Australian Government: Department of the Environment, Water, Heritage and the Arts ‘Integrated Coastal Zone Management’ [2008] <http://www.environment.gov.au/coasts/iczm/index.html>

<sup>210</sup> Chircop, A., Dzidzornu, D., Guerreiro, J. and Grilo, C. ‘The maritime zones of East African states in the law of the sea: benefits gained, opportunities missed’ (2008) 16(2) *African Journal of International and Comparative Law*, 121.

<sup>211</sup> Barnes, R.A. ‘Editorial: Some cautions about integrated oceans and coastal management?’ (2006) 8(4) *Environmental Law Review*, 247.

<sup>212</sup> Morgan, B. ‘Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification’ (2003) Aldershot: Ashgate Publishing Limited.

**European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)**

**IMPEL Better Regulation Cluster  
Common Regulatory Framework Comparison Project**

**Literature Review of Common Regulatory Frameworks in non-IMPEL Member Countries: Consolidated List of References**

Researchers: Mark Poustie, Head of the Law School, University of Strathclyde

Anna McLauchlan, Post-Doctoral Researcher, David Livingstone Centre for Sustainability, University of Strathclyde

June 2010

## **Books, journal articles, newspaper articles, reports and web site homepages**

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### **New Zealand**

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### **South Africa**

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Development Facilitation Act, 67 of 1995 (as amended)

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National Environmental Management Act, 107 of 1998

National Environmental Management (Amendment) Act 2003

National Environmental Management: Integrated Coastal Management Act, 2008.

National Water Act, 36 of 1998

### **United Kingdom**

The Commonwealth of Australia Constitution Act 1900

Legislative and Regulatory Reform Act 2006

The Environmental Permitting (England and Wales) Regulations 2007

The Regulatory Enforcement and Sanctions Act 2008.

### **United States of America**

Clean Air Act (as amended)

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (also known as the Superfund).

