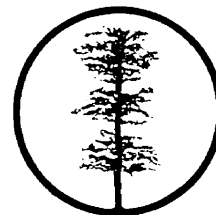




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ENVIRONMENTAL DEFENDERS OFFICES OF NORTH QUEENSLAND INC. AND QUEENSLAND INC.

26 September 2003

Ms Vanessa Coverdale
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Dear Vanessa

Review of the *Marine Parks Act 1982*

The EDO-NQ and the EDO-Qld (“the EDOS”) would like to thank the Environmental Protection Agency (“the EPA”) for providing the opportunity to our offices to participate in the review of the *Marine Parks Act*. The EDOS welcome the review of the Marine Parks Act.

Objects Provision

The EDOS are supportive of the inclusion of an objects provision and of the division of the objects provision into statements of principle and strategies for achieving the object.

The EDOS endorse the submissions of AMCS and WWF in relation to the proposed objects which commend the inclusion of an ecosystem based management objective and request that the ecosystem based management concept be expanded upon in the objects clause. The EDOS also endorse the submission of AMCS regarding the strategies for achieving the objects, namely that strategy (a) “declaring and providing for the management of a comprehensive system of marine parks” be amended to “declaring and providing for the management of a comprehensive, adequate and representative system of

marine parks.” The EDOs also endorse the submission of WWF that strategy (b) should read “declaring within marine parks a representative network of highly protected areas” rather than “declaring within marine parks some areas as highly protected areas”.

This is consistent with current policy and practice and is also consistent, in light of the recent Great Barrier Reef Marine Park Authority Representative Areas Program, with the intent of section 4 of the review, which proposes introducing changes to allow for complementary management of marine parks between the State and Commonwealth governments.

The EDOs are concerned at the inclusion of objective (c) “to promote the ecologically sustainable development of the marine environment.” No such object is present in the *Nature Conservation Act 1992*. Section 5(e) of the *Nature Conservation Act* does refer to ecologically sustainable use but then enunciates that this is to be achieved through conservation and management plans. There is no reference to development. Whilst the EDOs accept that it is inherent in the understanding of marine park management that marine parks will be multi use and that the public should not be excluded from using the parks, we note that the proposed objective (d) provides for this. For the Act to promote development, whether “ecologically sustainable” or not, is inappropriate.

Moreover, an analysis of the current long title of the Act reveals its implied object to be the conservation of marine park areas and that other purposes authorised under the Act must be related to that object of conservation. Further, the term “Park”, in absence of a statutory definition, must take its general meaning. The Maquarie dictionary definition is

Park 1. an area of land within a town, often with recreational and other facilities, which is set aside for public use; 2 a tract of land set apart, as by a city or a nation, to be preserved in its natural state for the benefit of the public.

The implication is that a marine park may be declared over an area where there are conservation and research needs, but that the enjoyment of the park by the public should be promoted and in some cases facilitated. There is nothing in the definition to suggest that private development, which often results in incredibly expensive residential or tourist accommodation that is inaccessible to the majority of the public and thus, if anything, restricts their enjoyment of the park, should be contemplated.

If the EPA does not accept the above submission, then the EDOs simply request clear provisions in the Act to ensure that any development that does occur in a marine park definitely does occur in an ecologically sustainable manner.

Increased Security of Highly Protected Areas in Marine Parks

The EDOs note the reference in the review to the inconsistent zone names, zone objectives and use and entry provisions across State marine parks and between State and Commonwealth marine parks. The EDOs would welcome the inclusion in the Act of a

power to the Governor in Council to make regulations for or about the naming and classifying of areas within marine parks for the purpose of zoning plans or otherwise, which would provide a head of power to the Governor in Council to include a standard set of zone names, objectives and prohibitions in the *Marine Parks Regulation 1990*. However, the EDOs would prefer that this provision be expressed as a duty and that there be a specific requirement that management and regulatory consistency across Queensland and Commonwealth marine parks be achieved.

The EDOs also note the reference in the review to the ability to downgrade the zoning of an area within a marine park by amending the zoning plan, which requires the approval of the Governor in Council but does not involve a resolution of Parliament. As stated in the review, this is contrary to the situation under the *Nature Conservation Act 1992* whereby a terrestrial national park cannot be revoked or downgraded without a resolution of Parliament.

The EDO is concerned that the proposed revision of requiring the Minister, when tabling a revised zoning plan in the Legislative Assembly, to also table a statement providing details of any zoning downgraded in their conservation status and providing the reasons for such downgrading, is inadequate. Whilst some security is provided in that members of Parliament may move a motion to disallow the amended zoning greater security would be provided by requiring that a marine park cannot be revoked or downgraded without a resolution of Parliament that a regulation being passed (as is the case with national parks under the *Nature Conservation Act 1992*). Marine parks are to all intents and purposes a species of national park, though more multi-use based. The establishment and extinguishment arrangements should be consistent across that sector.

The EDOs note the reference in the review to the creation of an indictable offence of wilfully threatening or causing damage or harm to marine parks without authority to increase the liability for such persons from 100 penalty units (\$7 500) to 3000 penalty units (\$225 000) or 2 years imprisonment. The EDOs ask that in introducing this offence, it include a definition of wilful that accords with the definition in schedule 3 of the *Environmental Protection Act 1994*. Under this definition:

- “wilfully” means –
- (a) intentionally;
 - (b) recklessly; or
 - (c) with gross negligence.

Revocation of a marine park as a result of reclamation

The EDOs welcome to decision to review and clarify the law as to reclamation. However, the EDOs have some concerns with proposed changes to the Act in this regard.

Firstly, the EDOs contest any assumption in this section of the review under the heading “current legislative environment” that major development works are acceptable in marine parks. The EDOs are of the view that major development works in any zone of a marine

park ought not be entertained by decision makers. The reasons for this view are expanded upon above by our submissions on the proposed objects provisions.

With respect to the two interpretations of the current legislation as to reclamation and revocation, the EDOs would support the first interpretation, namely that under the current Marine Parks Act all reclamation involves revocation of a portion of a marine park and therefore should be preceded by a resolution of parliament under section 22(2) of the Act, requesting the Governor in Council to make the revocation by regulation. It is spurious to state that a reclamation does not constitute a revocation simply because whilst it results in land previously below the HAT moving above the HAT, the boundaries of the marine park do not change in terms of a surveyed boundary. This is clearly contrary to the understanding of a marine park implicit in the section 15 and 16 requirements under the current Act that the only land to be included in a marine park is tidal land (below the HAT).

The EDOs suggest the inclusion of a provision specifically acknowledging that reclamation of an area does constitute a revocation except where this reclamation is the result of natural accretion.

The EDOs do not support any provision allowing for a simplified (non-Parliamentary) excision procedure outside highly protected areas. The EDOs are of the view that any reclamation works other than reclamation required to be undertaken by the State for environmental protection ought to require a resolution of parliament directing the passage of a regulation by the Governor in Council.

The EDOs would not support any significant development works involving reclamation to remain within a marine park. To allow such development to remain would have significant implications for the integrity of marine parks in Queensland.

The EDOs note that prohibiting any development involving reclamation from remaining within a marine park has implications for the EPA's ability to manage an area being reclaimed. The EDOs would suggest that to deal with this, the Act ought to create transitional powers enabling the Chief Executive to regulate the conduct of work in the reclaimed area up until completion and stabilisation of works to the satisfaction of the Chief Executive.

The EDOs note finally the suggested provision empowering the Chief Exec to include in a zoning plan a provision regulating reclamation works in marine parks. The EDOs do not support this. There is legal opinion to suggest that there is no power express or implied in the current Act that authorises the making of zoning plans that provide for reclamation. If this review is seeking to achieve better conservation outcomes for marine parks then it should not suggest the inclusion of a provision specifically allowing the regulation of reclamation by zoning plans.

Complementary State and Commonwealth Legislation

The EDOs recognise that there is administrative advantage in complementary State and Commonwealth legislation. The EDOs agree that there is a need for inclusion of a provision in the Marine Parks Act empowering the State to enter into cooperative arrangements with the Commonwealth government, similar to those provided in the *Great Barrier Reef Marine Parks Act 1975*. We would therefore in general support proposed changes 4.2(a) and (b) and (c) so far as they relate to relationships between the EPA and the Commonwealth. It might be useful in addition if a duty could be imposed to ensure the consistency of zoning and management plans in Queensland marine parks with those under the *Great Barrier Reef Marine Parks Act 1975* to ensure that relevant objectives of consistent management are achieved. The EDOs recognise that there are constitutional issues involved with respect to State and Commonwealth management but would still suggest that a safeguard provision be put in place preventing such zoning from resulting in a decrease in protection levels otherwise offered provided by the Marine Parks Act.

The EDOs are concerned about proposals to allow the Minister to accredit assessments and presumably approvals under other State legislation. Whilst the EDOs recognise utility in avoiding duplication of decision making processes there is a concern that accreditation of approval processes under other legislation not specifically focused on marine parks and/or without good conservation objectives, might lead to a decrease in the protection provided to marine parks by the Marine Parks Act. The EDOs would therefore only support the inclusion of such a provision upon certain preconditions being met.

Firstly, we would request that there be a requirement that the decision be accredited only if it would not result in an entry or use into the Marine Park that would not otherwise have been permitted under the Marine Parks Act. Secondly, we would also seek confirmation that judicial review rights equivalent to those provided under the EPBC Act (see further our suggestions below under the heading “Third Party Enforcement and Costs rules”) and the merits review rights proposed below under the heading “Dispute Resolution and Merits Review” be included in the Marine Park Act. We would seek to ensure that those rights of judicial review and merits review applied to any decision by the Minister to accredit and assessment, approval or management plan made under another Act. We would have the same requests in relation to any provision allowing joint development and publication of zoning plans and management plans under the Act with plans under other legislation.

Interests of Indigenous People

The EDOs are supportive of amendments that will facilitate greater involvement of Indigenous people in the management of Marine Parks and that will provide for a greater recognition of Aboriginal and Islander tradition and custom.

The EDOs assume that relevant Indigenous people and representative bodies have been appropriately consulted as part of this review and express strong support for the recognition and protection of their interests in any amendment Bill.

Community Participation

The EDOs also recommend the inclusion of a provision similar to the *Nature Conservation Act 1992* provision which reads:

6 Community participation and administration of Act.
This Act is to be administered, as far as practicable, in consultation with, and having regard to the views and interests of, land-holders and interested groups and persons, including Aboriginies and Torres Strait Islanders.

Components of a marine park – to include land contiguous with and connected to tidal lands

The EDOs support amendments to the Marine Parks Act to permit land contiguous with and connected with tidal lands to be included in a marine park, provided such land is only included where this would further the achievement of the objects of the Marine Parks Act.¹

Definitions provisions

Definition of conservation

The EDOs strongly recommend the reference to “ecologically sustainable development” be removed from the definition of conservation and replaced with the phrase “ecologically sustainable use”. The reasons for this recommendation are set out above in our comments under the heading “Objects Provision”. We note that the use of the phrase “ecologically sustainable use” is consistent with the definition of conservation in the *Nature Conservation Act 1992*. This definition would still allow for use and enjoyment of marine parks in an ecologically sustainable manner.

The EDOs also suggest that the definition of conservation be amended to recognise intrinsic and existence values of conservation, rather than just anthropomorphic notions of preservation for future human use. The EDOs note that these values are explicitly recognised under recommendation 42 regarding powers of the Court to order payment of compensation and the recommend that they be specifically included in the definition of conservation.

Definition of ecologically sustainable development

The EDOs are concerned at the reference in paragraph (g) of the definition of ecologically sustainable development to “community involvement on issues which affect

¹ The reference to the objects of the Act here is a reference to objects incorporating the EDO suggestions and in particular the suggestion that the proposed object of promotion of ecologically sustainable development be excluded.

them”. The EDOs are concerned that this reference could be interpreted to exclude community members with no specific material interest in the area in question. The rights of individuals and communities to seek protection of the environment irrespective of the existence of a legal interest in that environment and irrespective of their specific relationship to that environment is increasingly being recognised (refer for example to our comments under the heading “Third Party Enforcement and Costs Rules”). We would recommend that this aspect of the definition of ecologically sustainable development be reworded to read “community involvement in issues which affect them or the environment”.

Temporary Restricted Areas

The EDOs support removal of section 27 of the current *Marine Parks Regulation 1990* and replacement into the *Marine Parks Act*. However we suggest that the Regulation’s requirement of a serious threat to the environment not be required before the Chief Executive may exercise his power. We suggest an alternative wording be that where there has been will be or is likely to be a threat to the environment the Chief Executive may by public notice declare any area within a marine park to be a temporary restricted area.

Public Authorities to observe Act and subordinate legislation

The EDOs note proposed amendment 15 in Table 1 of 6.2 which would require public authorities to have regard to the Act and its subordinate legislation in discharging their functions and exercising their powers, including preparation of plans and approval of licences. The EDOs recommend this requirement apply not just within the boundaries of a marine park. The EDOs recommend that public authorities be required to have regard to the Act and its subordinate legislation where the activities they are licensing or approving or the plans they are preparing will have or are likely to have a significant impact on a marine park. This would be consistent with the proposed object in the review of providing for a coordinated and integrated approach to the conservation etc of the environment. It would also be consistent with provisions in the Environment Protection and Biodiversity Conservation Act that require assessment of proposed action by the Federal Environment Minister where those action will have or are likely to have a significant impact on a the world heritage values of a declared world heritage area or ramsar wetland, irrespective of whether the action itself is to occur within the boundaries of the world heritage area or ramsar wetland or not.

Dispute Resolution and Merits Review

The EDOs would support the inclusion of a provision allowing for merits review of administrative decisions made under the Marine Parks Act. The EDOs would suggest that for decisions as to entry or use made solely under the Marine Parks Act an applicant should always be required to publicly notify the application (as opposed to the current situation whereby notification is only required if the chief executive is of the view that the grant of an application for permission may restrict the reasonable use of part of a marine park by persons other than the applicant). Standing for commencement of a merits

review ought then be open to any member of the community who has made a submission within the submission period (similar to the *Integrated Planning Act* 1997 provisions for submission rights and merits reviews of assessment manager decisions on impact assessable development applications).

With respect to reviews of decisions on issues other than use and entry into marine parks, the EDOs would support a merits review system, with standing to be the equivalent to standing for judicial review proceedings under the EPBC Act.

The EDOs make the further suggestion in this regard that a process be introduced by the EPA similar to the process under the Environment Protection and Biodiversity Conservation Act 1999 whereby applications, assessments and approvals under the Marine Parks Act are placed on the EPA web site. This would facilitate community involvement in management of marine parks.

With respect to review of decisions regarding Marine Parks made under joint management arrangements, the EDOs would propose that the submission rights and standing rights suggested above, if accepted, apply rather than the more stringent standing provisions in other relevant legislation (such as the rights under the Fisheries Act 1994 and the Administrative Appeals Tribunal Act 1975).

Third Party Enforcement and Costs Rules

The EDOs strongly suggest that as part of the review, amendments in line with the amendments to the *Nature Conservation Act* 1992 (“NCA”) proposed by the *Environmental Legislation Amendment Bill* 2003 be made to the Marine Parks Act. These amendments to the *Nature Conservation Act* introduce third party enforcement rights with costs rules applicable in the Planning and Environment Court, and extended legal standing for environmentalists to seek judicial review of decisions, in line with the EPBC Act provisions. Such third party rights bring the *Nature Conservation Act* into line with the *Environmental Protection Act* 1994, the *Coastal Protection and Management Act* 1995, the *Integrated Planning Act* 1997 and the *Water Act* 2000. Inclusion of similar provisions as have been proposed for the *Nature Conservation Act* into the *Marine Parks Act* would be consistent with public statements made by the Environment Minister that he agrees as a matter of policy with third party enforcement.

Thank you for the opportunity to comment on the review of the Marine Parks Act. Should you wish to discuss any of the issues raised in this submission, please do not hesitate to contact Joanna Cull on EDO NQ on telephone (07) 40 314766 or by email at jcull@edo.org.au. We look forward to receipt of your response in relation to the issues raised above.

Yours faithfully

Joanna Cull
Solicitor

for EDO NQ and EDO Qld