



SUBMISSION

To
Department of Fisheries
on
The Northern Territory Fisheries Act

By
The Environmental Defender's Office (NT)

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Executive Summary

This submission reviews the NT *Fisheries Act* (“the Act”) from the point of view of its effectiveness in promoting Ecologically Sustainable Development (“ESD”), ecosystem based management (“EBM”) and the precautionary principle. It is clear that the current Act is primarily focused on administration of commercial fishery. That is, the Act exists for a single purpose.

The *Fisheries Act*, in its current format, does not protect the marine or aquatic environments. The Act contains some 86 sections. Only two subsections directly address the concept of sustainability. A further two subsections can be read as dealing with environmental issues. There is no policy or procedural framework to support these scant references to environmental protection.

It is the EDO view that what is required is an Act that regulates the marine, coastal and aquatic environments as a whole for management purposes. ESD cannot be achieved and ESB management cannot be effective unless the whole environment is taken into consideration in management decisions. The commercial fishing industry and recreational fishing are just one aspect of resource use that needs to be considered in relation to management of the marine and coastal environment.

The EDO submits that the following ought to be considered:

- 1 An integrated marine, coastal and aquatic management statute;
 - The Act needs to be clear that it is regulating activity to improve ecological outcomes across all elements of the environment and for all users.
- 2 The development of science based principles of ESD and EBM
 - defined in the Act and included as Objects of the Act;
 - The Objects of the Act should include desired outcomes;
- 3 The establishment of a single independent agency (e.g. Marine and Coastal Resource Authority) - responsible for implementing the Act;
- 4 A separate Part of the Act that establishes the policy and procedural standards for administration of all resource use.
 - This Part would regulate all marine, aquatic and coastal resource users including the fishing industry (commercial and recreational), aquaculture, coastal development likely to impact on marine environment, offshore energy facilities and so forth.
 - A statement of environmental effects would be required for all applications for a licence to use the resources. The level of detail would depend on the scope and intensity of the proposed activity.
 - A distinction would be made between extractive and benign uses of the resources.
- 5 A Report provided by the Authority, on a regular basis, that includes:
 - Progress towards achieving the Objects of the Act, and performance of the Authority in fulfilling its responsibilities;
 - Report on the State of the Environment which includes -
 - Ecosystem Health Reports or updates, including assessment of the sustainability of use of resources.
 - Resource Use Reports;
- 6 The Act needs to be integrated with Commonwealth and neighbouring states’ legislation so that a comprehensive northern Australia response to marine issues is created;
- 7 The Act should promote transparent decision making with public participation;

If a new Act is not created then the current *Fisheries Act* needs a major overhaul to improve its performance in setting the principles and management strategies by which ESD can be achieved and for which ecosystem based management becomes a core process. A discussion of the parameters for an ideal Act follows our analysis of the *Fisheries Act*.

CONTENTS

| | |
|--|----|
| Summary..... | 2 |
| Introduction..... | 4 |
| What the legislation ought to do | 4 |
| <i>Fisheries Act</i> Analysis | 5 |
| Specific Issues in current <i>Fisheries Act</i> | 5 |
| Sample Environmental Principles | 6 |
| Bioregional Management Committees | 16 |
| The Ideal Aquatic, Marine and Coastal Resources Protection Act | 18 |
| Elements of the Ideal Act..... | 19 |
| Introduction – Objectives, sample Objectives section | 19 |
| Interpretation, method of definition | 19 |
| Resource Management..... | 20 |
| Ecology, general principles, specific principles | 21 |
| Marine Health Indicators | 21 |
| Coastal & Marine Resource Authority | 22 |
| Marine Protected Areas | 23 |
| Maintenance, water quality and other physical attributes | 23 |
| Coastal Protection | 23 |
| Management Plans | 24 |
| Aquaculture | 24 |
| Marine and Coastal Management Authority | 24 |
| Administration and Accountability | 25 |
| Reports | 25 |
| Resource Use – management and administration | 26 |
| Licensing | 26 |
| Remedies | 27 |
| Enforcement | 28 |
| Conclusion | 28 |

With thanks to Adele Pedder of the Australian Marine Conservation Society for contributing ideas and critiques.

SUBMISSION: *The Fisheries Act*

Introduction

This submission started life as a critical analysis of the NT *Fisheries Act* 1988. It soon became apparent that a more thorough going comprehensive analysis of the total marine regulatory environment was required. The *Fisheries Act* (the Act) itself was sectorally defined and limited. The regulatory regime for managing the fishing industry cannot exist in isolation, as the *Fisheries Act*, if ecological sustainability is a key objective of managing the marine environment. Despite recent amendments (in particular to the Objects) the Act essentially remains one concerned with the regulation of the fishing industry.

What the legislation ought to do

1. We need to establish an integrated aquatic, marine and coastal resource regulatory regime.
2. This statutory regime should be administered by a single independent agency, such as a Marine and Coastal Management Authority.
3. This regulatory regime needs to be integrated across the spectrum of marine, coastal and freshwater systems so that a comprehensive, efficient and effective approach is applied to this resource management.
4. The regulatory regime must be based on, promote and enforce the principles of ecological sustainability and enhancement. The regime needs to be designed so that protection of marine ecosystems is its core function. This is the ecological imperative. The EDO has the view that the principal Act for administering such a large area of diversified aquatic resources should incorporate the principles of ecological sustainability and ecosystem based management principles as core considerations in the management of these resources. The adoption and integration into management practices of ecosystem based management is fundamental to establishing sustainable use of aquatic resources. Coupled with this is the adoption of the precautionary principle, which will be examined in more detail below.
5. This regulatory regime should foster the creation of bioregional marine plans that do not bow to limiting sectoral, government or agency interests but which should be designed on well researched scientifically rigorous marine ecosystem management principles. These marine plans need to be innovative, adaptive and best practice that are enforceable and recognise the socio-economic needs of communities.
6. The regulatory regime needs to manage human interaction with marine environments so that ecosystem outcomes are improved. Competing uses of the oceans and coast and rivers should not compromise each other but should enhance the ecosystems they make use of.
7. This legislation needs to be grounded in the best scientific, economic and social knowledge available. It must be adaptive so that as new knowledge arises creative responses to improve ecosystem health are not hampered.
8. The legislative regime needs to be integrated with Commonwealth and neighbouring states' legislation so that a comprehensive northern Australia response to marine issues is created.
9. The legislative regime needs to favour transparent decision making.
10. The legislation should encourage, wherever appropriate, public participation in developing plans and making decisions about the use of what are public resources.

This submission will, firstly, examine the *Fisheries Act* identifying sections that regulate environmental impacts and secondly it will set out elements that ought to be included in an ideal marine resource protection statute (for example a *Marine and Coastal Management Act*).

The Fisheries Act 1988 NT

The *Fisheries Act*, in its current format, does not protect the marine or aquatic environments. Its main focus is to regulate the fishing industry. Moreover it fails to explicitly include principles to guide how the regulatory framework is to achieve the objects of the legislation in relation to ESD.

The Act contains some 86 sections. Only two subsections directly address the concept of sustainability. A further two subsections can be read as dealing with environmental issues. Part I of the Act deals with preliminary matters and includes section 2A, a recent amendment, that sets out the Objects of the Act.

The Objects include managing the aquatic resources of the Territory in accordance with the principles of ecologically sustainable development and to maintain a stewardship of aquatic resources. Section 11 subsection (4)(a) requires the Director of Fisheries to have primary regard for the sustainability of the fishery in considering an application for a licence. These are the only references to sustainability and to ecology in the whole Act. There is no supporting Part or Division that establishes the principles of how these Objects might be achieved.

Section 15 subsection (1)(e) prohibits any person from introducing any toxic substance into waters of the Territory without a permit where the substance might have a detrimental effect on aquatic life.

Section 21 subsection (1)(c) requires fishery management plans ensure that fisheries of the Territory are not endangered or overexploited.

The focus of the *Fisheries Act* is to regulate the administration of fishing licences and fishing practices. It is not a statute that has the protection of marine or freshwater ecosystems as its *raison d'être*. The principles of ecological sustainability, ecosystem management, marine environment protection and the precautionary principle are inadequately addressed by this Act.

What is addressed has the narrow focus of single fishery management. As has happened elsewhere in the world where fisheries are managed to sustain the commercial fish species there is a turnover of fish species and a reduction in overall marine life diversity. As one commercial species has been over-exploited it is replaced by another, often less desirable species, while at the same time the ecosystem loses other dependent or commensal species without notice. We need to know a lot more than we currently do about the ecology of the marine environment and use this scientific knowledge as the basis for fishery management. Good science, as a foundation for decision making about the way marine environments are managed, must be provided for in the Act. Moreover it is essential that the resources to ensure that good science is available for the decision makers must be provided.

Specific Issues in the Current Fisheries Act.

ISSUE 1

Should the existing reference to ecologically sustainable development, appearing under section 2A(a) of the Act, be expanded to also list the underlying principles of ESD used for the management of aquatic resources?

The precautionary principle, along with the other principles of ecological sustainability and ecosystem based management must be made the key focus of the act. We refer to our discussion of EBM and the ecological imperative below at page 20 .

The ecological sustainability objective should be overriding in any hierarchy and should be treated as a first principle in fisheries management. Other objectives, such as those relating to economic

efficiency objective and optimum use, should be subordinate to it. It is generally accepted that fisheries legislation, and the management systems developed to implement it, must promote ecologically sustainable development (ESD). The long-term economic sustainability of a fishery is dependent upon it being ecologically sustainable, and the ecological sustainability of a fishery is dependent upon fisheries legislation and policy.

The document "*Commonwealth Guidelines for Ecologically Sustainable Management of Fisheries*" (Environment Australia 2001) is an example of a set of principles for fisheries management that should be consulted.

The references to ESD should not be limited to the Objectives of the Act but the practical implementation principles for ESD need to be integrated into the Parts and sections of the Act that deal with management procedures in relation to resource use.

Sample Environment Principles from other jurisdictions

Purpose—

(1) The purpose of this Act is to provide for the utilisation of fisheries/marine and coastal resources while ensuring sustainability.

(2) In this Act—

“Ensuring sustainability” means—

- (a) Maintaining the potential of fisheries/marine resources to meet the reasonably foreseeable needs of future generations; and
- (b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:”

“Utilisation” means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

Environmental principles—

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles:

- (a) Associated or dependent species should be maintained above a level that ensures their long-term viability;
- (b) Biological diversity of the aquatic environment should be maintained;
- (c) Habitat of particular significance for fisheries management should be protected.

Sustainability measures—

(1) The Minister may, from time to time, set or vary any sustainability measure for one or more stocks or areas, after taking into account—

- (a) Any effects of fishing on any stock and the aquatic environment; and
- (b) Any existing controls under this Act that apply to the stock or area concerned; and
- (c) The natural variability of the stock concerned.

(2) Before setting or varying any sustainability measure under subsection (1) of this section, the Minister shall have regard to any provisions of—

- (a) Any regional policy statement, regional plan, or proposed regional plan ; and
- (b) Any management strategy or management plan under this Act or an Integrated Resource Management Act ; and

(c) Any Marine Park Act

that apply to the coastal marine area and are considered by the Minister to be relevant.

(2A) Before setting or varying any sustainability measure under this Part or making any decision or recommendation under this Act to regulate or control fishing, the Minister must take into account—

- (a) Any conservation services or fisheries services; and
- (b) Any relevant fisheries plan approved under this Part; and
- (c) Any decisions not to require conservation services or fisheries services.]

(3) Without limiting the generality of subsection (1) of this section, sustainability measures may relate to—

- (a) The catch limit (including a commercial catch limit) for any stock or, in the case of a quota management stock that is subject to section 13 or section 14 of this Act, any total allowable catch for that stock:

- (b) The size, sex, or biological state of any fish, aquatic life, or seaweed of any stock that may be taken:
- (c) The areas from which any fish, aquatic life, or seaweed of any stock may be taken:
- (d) The fishing methods by which any fish, aquatic life, or seaweed of any stock may be taken or that may be used in any area:
- (e) The fishing season for any stock, area, fishing method, or fishing vessels.

(4)The Minister may,—

- (a) By notice in the Gazette, set or vary the catch limit (including the commercial catch limit) for any stock not within the quota management system:
- (b) Implement any sustainability measure or the variation of any sustainability measure, as set or varied under subsection (1),—
 - (i) By notice in the Gazette; or
 - (ii) By recommending the making of regulations under section 298.]

(5) Without limiting subsection (4)(a) of this section, when setting or varying a catch limit (including a commercial catch limit) for any stock not within the quota management system, the Minister shall have regard to the matters referred to in section 13(2) or section 21(1) [or both those sections], as the case may require.

ISSUE 2

Should any new or amended fisheries legislation provide for an ecosystem-based approach with respect to the management of the NT aquatic resources?

Yes. It is vital, if there is a genuine desire to put marine resource on a sustainable footing, for ecosystem based management approaches to be made mandatory in the Act. The Act should impose comprehensive ecosystem management conditions on all users, total allowable catch is just one strategy available. These strategies should not be used in isolation and must be backed by good scientific research and data.

Licence conditions should include conditions pertaining to ESD and ecosystem based management procedures.

Further in considering the application of ESD an understanding and exposition of risk should be included in the Act and Regulations. The term “risk” conveys inherent uncertainty about the proposed activity. Therefore, the exercise of quantifying risk is contingent upon decisions relating to the probability of an adverse event occurring, the magnitude of the adverse effect if it occurred and the weight of public perception that a particular adverse effect will be unacceptable.¹ This is particularly true when the subject matter under consideration involves novel or new technology. Furthermore, a low risk does not have the same meaning or potential outcome, in terms of impact upon health, safety or the environment, as a zero risk. Fisheries Management Plans must incorporate risk management.

ISSUE 3

Are the current provisions within the Act broad enough to accommodate issues with respect to Indigenous fishing and sea management issues? If not, what changes could be considered?

The Act should approach indigenous knowledge of ecosystems from the position of how such knowledge and traditional use can fit into and assist the implementation of EBM. The Act should reflect the vast indigenous knowledge available and promote measures to ensure that it is not lost and is incorporated into management programs. The Act should provide for consultation with indigenous peoples on all aspects of EBM.

ISSUE 4

Are there any licensing or other specific measures, which could be included in new fisheries legislation that could facilitate greater Indigenous involvement in commercial fishing or aquaculture activities?

¹ Lawson *op cit* p.201.

As implied in 3 above indigenous knowledge is important in the overall management strategies. Licensing, as indicated earlier in the body of this submission, is just one part of the management toolkit and should be applied where appropriate to all activities involving resource use.

ISSUE 5

Should an object specifically referring to “aquaculture” activities be inserted into the Act?

As with any activity that utilises marine and aquatic resources aquaculture should be part of the managed milieu. Some activities will involve a more intense interaction with the ecosystem and resources. These activities would warrant special focus in any management strategy but do not necessarily need specific mention in an ideal Act. Within the *Fisheries Act*, if it remains sectorally focused and driven then aquaculture would need specific reference, but there is no need for aquaculture to be referred to in the Objectives section of the Act. To do this might elevate aquaculture to a status not warranted when the Objects should set out the key principles upon which the Act is based and which it is trying to achieve.

Aquaculture needs to be regulated in terms of the utilisation of public resources and the impact or potential impact the activity might have on the biota.

Consideration of fugitive species, nutrient loads and so on can be dealt with in regulatory instruments but the EBM principles should form the basis of licence approval and conditions.

Any aquaculture activity, as a commercial marine or aquatic resource user, should be licensed-

Restriction on fish farming or other aquaculture activity—

- (1) A person must not undertake fish farming or other aquaculture activity except in accordance with—
 - (a) the person's registration as an aquatic resource user; or
 - (b) a licence held under this Act for that purpose with appropriate conditions attached.
- (2) Every person who contravenes subsection (1) commits an offence and is liable to the penalty set out in section XYZ.

ISSUE 6

Are there any definitions in section 4 of the Act that you believe should be amended or removed, or any new definitions included? If so please provide details.

See our submission above Part 1 (2) Interpretation at page 3. Note that simple definitions are included in the Interpretation section but that reference could be made to more extensive scientific documents for clarity and completeness.

Some concepts should be aligned with the meaning in the Commonwealth legislation and the legislation of adjoining states.

Consideration should be given to including climate change in the Act: “**climate change**” means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods. Additionally, the effects or possible effects of climate.

ISSUE 7

Should a licence owner also be made accountable for illegal activities undertaken by a person who is conducting fishing operations under section 12A, 14 and 14A of the Act?

This should not apply in relation to section 12A but should apply for 14 and 14A. Vicarious strict liability for employees/nominated delegates of licence holders (in all sorts of activities not just fishing licences) is common in other jurisdictions. However if the licence holder can demonstrate that he or she has conducted the necessary training programs and maintained a compliance and supervisory system that should offer a defence. The burden of proof should lie with the person seeking to raise the defence.

ISSUE 8

Should the role of Assistants (crew) be more clearly defined under the Act and their appointment subject to the approval of the Director?

The ultimate responsibility for crew has to licence holder and/or skipper of craft. However in any management plan the proper training of crew to best practice standard must be a goal and there ought to be a range of management strategies put in place by the Director to ensure that this happens. Compliance provisions should be included in the Act.

ISSUE 9

In addition to any penalties under the Act, should there be provision for the compulsory cancellation or suspension of a licence or permit if a specified number of prescribed offences are committed under that licence or permit in a specified time period? If yes, what should the specified number of offences and time period be?

Compliance with the Act and management plans must be enforceable. Recidivists, who have demonstrated an inability or unwillingness to comply with the requirements of the Act ought not be allowed to continue making use of public resources.

ISSUE 10

Should the Fisheries Act contain provisions requiring an applicant for a licence or permit issued under the Act, and/or any other person engaged in operations conducted under that licence or permit, to provide photographic identification at the time of their application?

Yes. They should also provide evidence of good character in relation to the industry.

ISSUE 11

Should the scope of activities covered by special permits issued under section 17 of the Act be broadened to allow for all foreseeable activities including those pertaining to aquaculture?

No. In our view the use of special permits ought to be discouraged. Special Permits appear to be a way around sound ecosystem management plans and procedures.

Any activity that makes use of public resources should be licensed. Moreover an application that involves taking of resources or discharge of waste or has any impact on the environment should be accompanied by an environmental impact assessment. The degree of complexity of the assessment will be determined by the scope and intensity of the activity.

The Act could allow special permits to be granted when it pertains to activities that are going to assist practices to be innovative and improve the licensed activity performance in terms of better ESD outcomes. However there should not be a power to override due process. But we still want innovative application if it will provide for improved ecosystem management and health. To do this there needs to be developed guidelines/framework for the provision of Special Permits. This would ensure that certain environmental (and other) conditions are met for each permit granted. The guidelines/framework need to be developed with conservation, community and other stakeholders.

ISSUE 12

Should the Fisheries Act provide the capacity to allow for the recovery of costs associated with undertaking activities to effectively manage the NT's aquatic resources?

Yes. On the simple measure of economic sustainability if cost recovery is not possible then the industry is uneconomic anyway. However since the focus is shifting to ecologically sustainability it will be necessary for government to adequately resource the scientific and administrative divisions. Ecosystem management principles have a far broader reach and impact than just the fishing industry and so the industry itself cannot be expected to fund the entire costs of implementing the program.

The NT Fisheries Department should only be supporting fisheries that are economically viable and that can afford research, monitoring, management and development costs, that is participants that can afford to comply with conditions relating to ongoing environmental requirements (and other requirements). No costs should be borne by the environment.

Fisheries should be user pays – industry bears a large proportion of the costs of management.

How AFMA construct their cost recovery is a potential model to analyse and apply to NT where appropriate.

Consideration should be given to the introduction of broadly-based resource rent tax to reflect the use fisheries make of the community's resources and ensure that the fisheries component of EBM can be funded. This tax should be sufficient to eliminate life-style fisheries in which the cost of management outweighs the public benefit.

ISSUE 13

In addition to any penalties under the Act, should a person found guilty of an offence also face an additional penalty equal to 10 times the prescribed value of any fish or aquatic resources subject to that offence?

The penalty regime should be fair and effective in achieving the goals and objects of the Act. If the focus of the Act is to manage ecosystems then stiffer penalties for ecosystem damage should apply.

ISSUE 14

Should those found guilty of repeated offences under the Fisheries Act be excluded from working in any licensed fishing or other activity covered by the Act?

Potentially. Yes, but it depends on the nature of the offences. The Act should provide the possibility for certain repeated offences to result in the exclusion of the offender from the industry.

ISSUE 15

Should there be a statutory time limit placed on the confidentiality of non-personal information collected (eg. logbook return information from licensees working in a fishery with less than five active operators)? What other mechanisms could be put in place with respect to such issues?

The licensees are making profit from the use of a public resource. The best way to ensure accountability and compliance is to make most activities transparent. This need not involve delving into commercial in confidence information. However the type of data suggested and that which informs management decisions is essential if ecosystem sustainability is to be taken seriously. It must be available to the Authority for purposes of good planning and subsequently will become publicly available in the Reports that the Authority must produce.

There is a major problem with the current approach of aggregation and secrecy. According to the information from other jurisdictions there are "long-standing" agreements between government and industry that catch, effort and production data should only be used for research / stock assessment purposes and that all data is confidential. The situation is probably no different in the Territory. It has been suggested that without these assurances as to use and secrecy, fishers would not provide accurate information. In other words, "the only way we can make the industry tell the truth is by keeping all data secret"! This is an extraordinary approach for the managers of a public resource to take! If there is a genuine public policy rationale for secrecy, then this should be stated. Otherwise, this data should be publicly available.

There is a community right to know about activities that affect community assets and community wellbeing. Transparency and accountability in the regulation and management of State fisheries are a community expectation and right, and must be reflected in regulation. It is appropriate that the public has access to a meaningful amount of information about fishing activities.

While there are currently provisions in the Act for a public register of license information to be kept, the content of the register is limited.

information to competitors of fisheries they have visited, there is no justification for a blanket confidentiality clause. This clause should be altered to ensure that information relevant to the use of this public resource and impacts on marine environments are available for public scrutiny.

Information that should be included in the Public Register:

- Regular best estimates of the size of fish stocks for each fishery
- All scientific reports by the responsible agency, covering commercial and environmental impacts
- Access to the database of returns from licensees, detailing target fish catch, gear, areas fished, and bycatch.
- Register of exemptions (and, in future, permits) permitted under the Act
- Register of licence cancellations and suspensions.
- Licence copies, with contact details and provisions of each licence.

Other information that should be available includes:

Enforcement information, including identification of offences, breaches of the Act that resulted in suspension or cancellation or divestment or a licence, and/or which required a hearing in Court, actual prosecutions and other outcomes of enforcement activities.

All catch and effort data should be made available, upon formal request, to other government departments if required as background information for an assessment of activities that occur in each area of State waters, or for relevant decision-making.

Commercially fished organisms are not private property, and the current situation in which information about what are essentially public resources, is restricted from use within government, or can be accessed by other departments only in a highly aggregated form, for an exorbitant fee, is completely unacceptable.

There should be a system of checks for the quality of catch and effort data, by both fishers, processors, and the agency responsible for the data. Soon after it is collected, catch and effort data should be scrutinised by data experts within government, for errors and inconsistencies, because assessment of the data years later or when infrequent when stock assessments are due (as often occurs for some fisheries and fished species) makes it difficult for erroneous data to be corrected (for example, if the licence has changed hands, or the fisher no longer operates in the area in which the data were originally produced etc.)

There should also be periodic audits of data quality and content (from the source to the repository), conducted by independent experts in fisheries data collection and assessment.

Data should be regularly checked and then analysed both within government, and by independent expert fisheries data assessors. There is a serious and ongoing concern that catch and effort data which show long term serial depletions occurring in some fisheries, are being “masked” by amalgamating the data at larger scales for reporting in stock assessments, and, more seriously, omitting such data altogether in reports, to create the illusion that fish stocks are more abundant than they are at present, and that various fisheries are more sustainable than they are under current access and management arrangements.

It is vital that the trend towards privatising research and monitoring work does not result in data being withheld from the public. If monitoring is the responsibility of the proponent there should be a system for verifying the accuracy of the data provided with heavy penalties to deter mischief. Otherwise there are no guarantees that monitoring information relevant to the management of that fishery would be available for public scrutiny. All research required for management of fisheries and aquaculture must be available for expert and public scrutiny.

ISSUE 16

Should the Director of Fisheries be provided with powers in respect to the use and release of information obtained from using Vessel Monitoring System (VMS) technology?

Yes

ISSUE 17

Should the Act provide the Commissioner of Police with the power to access VMS information collected under the Act for the purpose of undertaking investigation and prosecution activities?

Yes, without the best information the police cannot do the inspection job required of them.

ISSUE 18

Under the Act, should the Director of Fisheries be able to provide information collected from logbook returns to the Police for the purpose of conducting investigations?

The police should be inspecting log book returns now as part of their duties as fisheries inspectors. How else can verification of catch loads and species be made? If this is not happening then the system is seriously flawed and corrective measures are imperative.

ISSUE 19

Should national arrangements with respect to undertaking management, surveillance, emergency response and cost-sharing arrangements for aquatic pests be specifically provided for in NT fisheries legislation? If so, how could this be achieved?

Aquatic pests should be defined in general terms in the Act's Interpretation section. This section could refer to a Schedule of aquatic pests contained in Commonwealth legislation though it should allow for identification of Territory specific pests in case a pest species gets under the Commonwealth radar. The Fisheries Division should be given the statutory power to identify pest species, have them listed and take measures to eradicate the problem. The foregoing makes the assumption that pest identification and control measures are based on good science.

ISSUE 20

Should NT fisheries legislation provide for more clear and concise definitions of aquatic species of concern?

Yes. This could be done through a Schedule process. Clear descriptions of ecological pests should be included.

ISSUE 21

In order to protect the NT's aquatic resources, should the Fisheries Act provide a more clear mechanism to enable for the declaration of prohibited species specific to the Northern Territory?

Yes see above at Issue 19

ISSUE 22

Should NT fisheries legislation provide a more streamlined mechanism to allow for those species of aquatic life, deemed to be noxious or of concern under nationally declared lists, to be incorporated within the Regulations?

Yes see above at Issue 19

ISSUE 23

Should a new position of Inspectors of Aquatic Life, with specific powers to assist in monitoring, protecting and limiting the impact of aquatic pest activity on the marine, estuarine and freshwater systems of the NT, be included in the Act?

The basis of our submission is that improved resourcing of the scientific division is provided. This would allow a better basis for all ecosystem management strategies. Pest identification is just one aspect of the

overall approach. The question arises - how is "pest" defined? To define pest narrowly in terms of commercial fishing viability would be to ignore one of the key principles of ecological sustainability which is maintenance of biodiversity. "Pest" needs to be defined in terms of the species role in the ecology of the area under consideration.

ISSUE 24

Should the Darwin Aquaculture Centre be specified as an entity under the Act?

No- See our comments in response to issue 5 above. This would entrench the centre and would mean at a later date an amendment to the Act would be required if the Centre failed or the focus changed. In what way is this suggestion made? Is the idea to make the DAC a statutory corporation? Or to give it some other status? What would this achieve? Do other stakeholder bodies have "entity" status under the Act? The arguments against such an idea are strong.

ISSUE 25

Should the Act specifically empower the Darwin Aquaculture Centre to undertake aquaculture research, development or commercial production activities in line with the objects of the Act?

We are not aware of the current status of the DAC? Is it a private organisation? Any body could be licensed to carry out research. The important point is that the research support the management strategies designed to achieve the Objects of the Act.

ISSUE 26

Should the emergency powers under section 29 of the Act be extended with specific provisions to cover the impacts on the public estate arising from the mismanagement of an aquaculture operation?

If aquatic life is defined to include aquaculture operations, and logically it should do, then the current section 29 would cover the hypothetical scenario as it now stands.

ISSUE 27

Should the Fisheries Act contain specific provisions to allow for determining compensation (under certain circumstances) if activities, arising from an emergency response to an incident (eg. a disease outbreak), resulted in adverse impacts on an aquaculture operation?

This issue raises the general questions of competence and liability. If an emergency situation arose the Authority should be empowered to carry out whatever action is required to bring the emergency to an end without fear of incurring a large compensation payout. This assumes that the response to the emergency is not negligently conducted. The question also arises as to who is responsible for the emergency arising the first place and what liability attaches to that? Taking th

ISSUE 29

Should aquaculture licences have their own specific constraints and provisions under the Act?

Yes. Conditions can be applied to any licensed activity. All activities that utilise public resources ought to be licensed. Conditions for all licences ought to be couched in terms of achieving the Objects of the Act and implementing ecosystem based management. Aquaculture is simply another use of aquatic resources and must fit into the overall management strategies for ecosystem health and sustainability.

ISSUE 30

Is section 15 of the current Fisheries Act broad enough to ensure that any environmental impacts that may arise from aquaculture or pearling activities are explicitly covered?

Section 15 introduces the concept of the licence to pollute. Certain activities should have an outright ban other activities would require a permit the conditions of which lead the operation to improved ecosystem management. Overall ecosystem based management plans must be required for any activity that might require a permit to cover part of its operation.

The NSW fisheries legislation states that there can be no interference with or damage of any habitat – eg mangroves, without a permit.

A licence to pollute must be able to be regulated and would require a pollution regulatory framework.

ISSUE 31

Should there be a capacity under the Fisheries Act for the Director of Fisheries to require those undertaking aquaculture or pearling activities to provide a financial bond to assist in dealing with any significant detrimental environmental outcomes that may arise from undertaking such activities?

Yes.. Bonds should be commensurate to size of potential to do harm and relative to cost of cleaning up.

Must be broad enough in scope to include ongoing monitoring and research of the extent of impacts and to compensate others affected.

This could be determined by an independent arbitrator. See our discussion of bonds below at p 24.

ISSUE 32

Should the Act be modified to allow for primary industry operators to consider using a range of alternate capital raising strategies with respect to financing their activities conducted under a fishery or aquaculture licence?

Capitalisation of activities are a matter for the industry and ought to be covered in Finance Acts.

ISSUE 33

If alternate capital raising arrangements (such as managed investment schemes) were allowed under the Act, what mechanisms could be put in place to ensure that sufficient control is maintained over a licence?

The concept of environmental bonds is one possibility. Licence activities would have conditions attached to the licence. Management plans should be in place and the Act itself has enforcement provisions and penalties for breach (including loss of licence). It is considered that these controls, if properly enforced ought to be sufficient to ensure control.

ISSUE 34

Should the Act contain specific provisions allowing for the setting of allowable catch rates and other types of resource allocation arrangements (eg. similar to those found under Regulations 5, 6 & 7 of the existing NT Spanish Mackerel Fishery Management Plan 2005)?

The Act currently provides for this through Management Plans. In our submission the entire marine resource

would have ecosystem based management plans and the sorts of conditions indicated above could be strategies adopted in the plan.

It is established under Australian law that 'fish' are a community resource, not a proprietary one. Legislation that regulates fishing activities exists to manage this marine resource in the public interest.

Fisheries management systems must retain these types of provisions and, where necessary, become increasingly flexible and adaptive if ecosystem maintenance goals are to be achieved. Increasing the level of property rights to industry (e.g. through fixed quotas) may threaten the ability of management to be adaptive and flexible in its approach, and reduces the equitable distribution of "common" marine resources. Further, increased property rights impose a non-productive management framework, by increasing the likelihood of legal challenges to management decisions. Within such a framework, it will not be the environment that will be considered first and foremost, but thoughts of making decisions that avoid litigation responses.

ISSUE 35

Should the Act contain provisions to allow for 'tradeable rights' under certain conditions with respect to the allocation and use of the NT's aquatic resources?

No, see notes under Issue 34. Generally tradeable rights is a blunt economic instrument that reduces the flexibility for the fisheries managers. Tradeable rights might be acceptable in limited circumstances so long as the incoming rights purchaser satisfies all the requirements and licence conditions. Where appropriate a fresh statement of environment impact and amelioration strategies could be required. A resource use rights purchaser will also acquire all liabilities of the vendor, including rectification of any environmental damage existing at the time of purchase.

ISSUE 36

Should the Act contain provisions setting out a process for determining entitlements for compensation, under certain circumstances, if decisions were taken to restrict fishing or other related activities in certain areas?

Compensation implies that fishers have a **right** of access. It is a public resource so it would be inappropriate for government to get into a framework of compensating to private enterprise. New entrants into the industry need to be aware of the risks that they take.

This is not available for other industries.

The Government and its fisheries managers need flexibility in their management. Water buy backs when environments begin to show signs of stress is an example of situation we do not want to get into with fisheries.

ISSUE 37

Should pearling provisions under the NT Fisheries Act provide flexibility for adopting complementary management arrangements with respect to existing or new Western Australian pearling legislation that may be enacted?

Overall management programs should be integrated with other jurisdictions as discussed in our submission above.

ISSUE 38

Should there be provision in the Fisheries Act requiring for it to be reviewed periodically? If yes, how often should the Act be opened up for review?

Yes. A four yearly review should be sufficient. But it is more important that the effectiveness of the responsible Department in achieving the Objects of the Act be reviewed on a regular basis.

ISSUE 39

Are there any other issues, with respect to the NT's aquatic resources, not raised in the discussion paper that you wish to comment on?

See our discussion below on the ideal *Marine and Coastal Management Act*.

All commercial use of marine and aquatic resources should be licensed.

A registrar should be kept by the Resource Registrar, or other suitable person, of all licenses and containing all relevant information. This registrar should be available for public inspection at no cost.

Bio-region Management Committees (MCs)

There is a need to subsume the current fisheries management regime into one component of ecosystem-based management, based on management within marine bioregions. There should be established management committees to manage each bioregion in an integrated resource use way. On these committees fisheries representatives should be one group of stakeholders on those committees.

While the establishment of MCs should improved levels of cooperation and understanding of management needs by involvement of industry, but the broader community has not been formally or effectively involved, and in practice, sustainability issues must be central to management strategies considered in the decisions made by these committees.

Domination of MCs by those with a vested economic interest in the resource being exploited is inappropriate. MCs are officially "co-management" committees with government, and must not operate along the lines of a "self-regulation" model.

Membership guidelines must be established for commercial and recreational fisheries committees to include conservation, indigenous or general community interests.

According to Shepherd (2001) "*there are some serious structural defects in co-management regimes in some Marine Advisory Committees in Australia that deprive the precautionary principle of teeth and give little assurance of sustainability.*" Specifically cited as problems are an "*absence of rigorous target or limit reference points for many fisheries*" and "*the absence of any watchdog*" over Fishery Management Committees.

This is a clear example of what can occur when a community resource is essentially managed by industry (under the guise of "co-management" with government) with little effective government oversight or enforcement of the charter.

Furthermore, the status of management committees as "advisory" can result in situations where recommendations by less powerful or influential fisheries sectors are not given weight against the demands of fisheries sectors with more economic and political influence.

The lack of is one aspect contributing to the inadequacy of FMCs. It is essential that the Act provide clear and adequate direction on management principles and content of plans and formal representation of community, conservation, scientific and indigenous communities on these committees, with voting rights.

Membership should be prescribed in the Act, not the Regulations.

Membership should include the following changes:

- Community conservation interests to be represented, for example, a community conservation representative to be nominated by the peak conservation organisation.
- Conservation representative from Government, e.g. an Office of Environment and Heritage and a Marine Group representative. Given the over-fished and 'fully fished' status of a number of fisheries, it would be

appropriate that an agency with experience in management and recovery of threatened marine species and habitats be included.

- Indigenous interests (e.g. sea rights) to be represented
- The limitation of commercial interests, by redistributing the number of representative with voting rights versus observers/advisors.

There is also a need to establish education and training programs for committee members in fisheries and ecosystem management, to ensure members have adequate skills and up-to-date knowledge of management practices.

For example, training should be provided to ensure the members and industry are abreast of new management practices; research methodologies and techniques; national/international marine policy directions and initiatives; the implications of new legislation; and relevant environmental issues such as trends in marine protected area research and management.

MC members need to have the background and adequate experience / training to address the wide range of issues confronting MC decision-making, including providing advice on management processes based on a longer-term vision and sense of 'the big picture', rather than concentrating on self-interested short term intra-sectoral needs. All stakeholder groups on MCs should have:

- i. the capacity to gauge and synthesis the thoughts and opinions of their constituents on matters relating to fisheries management;
- ii. the capacity to learn more about the complexities and specifics of fisheries and fisheries management processes; and,
- iii. the capacity to engage in fisheries processes through providing submissions, attending workshops and conferences and arranging face to face meetings and working collaboratively with fisheries managers and other stakeholder groups.

Improving the capacity within interest groups will increase the professionalism of involvement in fisheries management, and ultimately provide for more sustainable and durable outcomes.

Experience in other states and the Commonwealth has shown that the conservation movement can best collaborate in fisheries management processes via an adequately resourced and structured coordinating mechanism, which includes a funded position. Agency support is required to establish such a mechanism.

Recent experience in Australia has shown that agencies can benefit immensely by providing mechanisms to enable conservation groups to better coordinate and facilitate conservation input into fisheries management processes. Historically and practically it is the non-profit organisations which have the least capacity to engage in government process, so these should receive a higher level of government support than profit making organisations.

The Department of Fisheries should consider funding a position for a conservation sector officer to liaise with both Commonwealth and State fisheries on issues of joint importance to fisheries and conservation. For example, NSW Fisheries funds a part-time fisheries position based in the NCC of NSW.

The role of the NSW officer is to regularly liaise with NSW Fisheries; seek conservation representatives for management committees; liaise with and train management committee representatives in conservation policy; and to work with NSW Fisheries to coordinate specific training opportunities for management committee representatives. The Western Australian Department of Fisheries also announced substantial financial support for a similar position to be based within the Conservation Council of Western Australia. A similar position should be adopted in the Northern Territory.

The Fisheries Act should also provide for adequate consultation and co-operation with DEH on environmental matters relating to fisheries, and NTFISHERIES and DEH must engage in co-operative management in relation to these issues (examples include fisheries impacts on ecosystems, habitat protection measures, marine species of conservation concern, exotic and noxious species, escaped species (from aquaculture), amongst other relevant marine environmental issues).

THE IDEAL AQUATIC, MARINE AND COASTAL RESOURCES PROTECTION ACT

Having found that the current *Fisheries Act* lacks the capacity to implement the ecological imperative (see page 1) it is necessary to set out what an Act that has that capacity should contain.

Firstly, a few words generally about what our *Marine and Coastal Management Act* (to adopt a working title) is trying to achieve and what its scope should be.

The Act needs to be holistic in its approach. That is, it needs to take a big picture approach to the entire marine environment. What does this mean? This means that the marine environment has to be understood in terms of ecosystems, trophic or energy flows, physico-chemical flows as well as understanding biotic relationships at the micro level. This understanding has to be demonstrated in the Act. This understanding has to be supported by and form the basis of statute. This understanding has to be enhanced by the Act. This understanding must be the springboard for regulating activities that are connected with management of the marine, coastal and freshwater environment.

The Act must demonstrate that the above broad picture is the foundation of and justification for all activities regulated by the Act and also of paramount importance as goals to be achieved.

The Act needs to be clear that it is regulating activity to improve ecological outcomes, that is that it is not simply maintaining the status quo in terms of sustainability but that it is aiming to positively improve ecosystem health. To do this it must be clear about what it is regulating, how its regulations work to improve ecosystem health and why these are necessary. This needs to be expressed in clear plain language.

The establishment of performance standards and effects based planning is one way to achieve the desired outcomes described above. It may not be the only way and the Act must be flexible enough to allow for a variety of ways to implement the policy provisions.

The Elements of the Ideal Act.

Part 1- Introduction

1 Objectives

The ecological imperative must take front and centre stage in the Objects of any Act that purports to manage the marine environment. The ecological imperative can be adopted by endorsing in the Objects the principles of ecosystem based management.

The Act should explicitly state that the achievements of the Objects is paramount and that any action that detracts from this goal is a breach of the Act.

The Act should explicitly state that the Act prevails where there is a conflict between this Act and any other legislative instrument.

The Precautionary principle should be mandated. Later sections should define areas and potential areas of activity where the precautionary principle would be applied.

Best practice marine environment and coastal management principles should be included in the objects. They should be defined in such a way that as improved methodologies are developed these can be automatically incorporated into management practice.

The Objects should include integration with the Commonwealth and adjoining states marine protection and fisheries' legislation. It should also include integration with other NT resource management legislation.

Other objects related to fisheries and coastal management may also be included, but it must be kept in mind that the fishing industry (both commercial and recreational) and other marine resource users are only a part of the overall management objectives defined in this Part.

A sample Objective section

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
 - (a) Sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
 - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.
- (3) In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
 - (a) the ethic of stewardship;
 - (b) the efficient use and development of natural and physical resources, and the efficiency of the end use of energy;
 - (c) the maintenance and enhancement of amenity values;
 - (d) intrinsic values of ecosystems;
 - (e) Maintenance and enhancement of the quality of the environment;
 - (f) any finite characteristics of natural and physical resources;
 - (h) the protection of the habitat of trout and salmon;
 - (i) the effects of climate change;
 - (j) the benefits to be derived from the use and development of renewable energy;
 - (k) the exercise of guardianship by the indigenous owners of an area in accordance with traditional practices in relation to natural and physical resources.

2 Interpretation

The dictionary will define those terms that require a particular interpretation in relation to the Act. The following list is not exhaustive but focuses on some of the more important concepts that need defining.

The dictionary of the Act should include comprehensive definitions of **ecologically sustainable development** ("ESD"), including detailed science based explanations of how to do the practical implementation of ESD principles.

The dictionary should define the **precautionary principle** and canvass the types of situations where it would be applied. The absence of scientific certainty should not be a reason for postponing measures to

- prevent or minimise environmental degradation;
- prevent or minimise any reduction in biodiversity, or instituting measures to improve biodiversity;
- improve and rebuild fish populations, ecosystems etc. (not limited to commercial fisheries.)

Definitions of **management elements** such as "by-catch" need to be aligned with the Commonwealth and adjoining states statutory definitions.

The dictionary should define **ecosystem health**.

Climate change needs to be considered and defined. Example definition: "**climate change**" means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed

over comparable time periods.

Resource users should be defined to distinguish between those users who extract from or deposit into the marine and coastal environment and those users who do not. The former should be licensed.

The method of definition

The way in which concepts, particularly those that are complex and science based, are defined may need to be approached creatively and not limited to definitions within the Act itself. The dictionary might refer to other scientific documents where it is impractical to include a complete definition in the statute. Such referential defining of key concepts and implementation strategies should be flexible to allow for the incorporation of improved knowledge on the topic. These documents could be included as Schedules to the Act or Regulations. An example, given below, could be *Commonwealth Guidelines for Ecologically Sustainable Management of Fisheries*.

3 *Duties*

There ought to be a general duty placed on those performing functions or exercising powers under the Act and those using or seeking to use resources do so in a way that advances the purposes of the Act.

In relation to applications to use resources the legislation could be couched in terms of achieving performance standards. These performance standards would be defined in terms of how activities can be designed to achieve the Objects of the Act and comply with Part 2 - Resource Management.

There should be no need to distinguish between different categories of users other than extractive/depositional and non-extractive/non-depositional users.

Part 2 - Resource Management

Ecology

The Act should start by recognising the paramount importance of the ecological imperative.

It is the ecological imperative that should be the basis for all decisions taken in relation to marine and coastal resource management.

The ecological imperative recognises that ecosystems are the fundamental basis of all life and their health is paramount to the sustainable use of products derived from ecosystems.

An ecosystem based management (EBM) program must be developed by the Marine and Coastal Management Authority (this proposed agency will be discussed further below). EBM determines the scope and range, indeed all aspects of resource use and activities related to marine resource use. Ecosystem-based management is a science based approach to looking after coastal and marine environments. It integrates the management of human activities with the scientific understanding of how those activities affect the marine environment so as to protect and restore marine ecosystems. It supercedes the old management systems based on sectoral management strategies and boundaries drawn from politics, fishing practices or other lines of convenience. In their place it establishes management systems that address the issues of cumulative impacts, recognising, respecting and protecting biological diversity and the functions and dynamic processes of natural ecosystems.

There are two key differences between EBM and existing natural resource management systems. The first is that human use is managed to operate within the natural capacity of the ecosystem rather than allowing the exploitation of ecosystems at unsustainable levels. The second is recognition that the integrity of natural ecosystems requires protection from human impact, not active management intervention.

Ecosystem-based management is a step-by-step process that attempts to move us towards a sustainable future for our oceans.

The Act should begin by defining the concept of marine ecology, ecosystems and the interactions between marine coastal and freshwater ecosystems.

This part should set out key principles upon which actions are to be based -

General Principles:

Principles of ecologically sustainable development (ESD) – see other sections of this submission. Of particular importance is the Precautionary Principle, however all principles of ESD are relevant.

Related to the above, principles of ecosystem-based management (EBM) – see other sections of this submission

Specific Principles:

A fishery must be conducted in a manner that does not lead to over-fishing, or for those fish populations that are over-fished, the fishery must be conducted such that there is a high degree of probability the stock(s) will recover. Two major objectives of this principle:

The fishery shall be conducted at catch levels that maintain ecologically viable stock levels at an agreed point or range, with acceptable levels of probability;

Where the fished population(s) are below a defined reference point, the fishery will be managed to promote recovery to ecologically viable stock levels within nominated time-frames.

Fishing operations should be managed to minimise their impact on the structure, productivity, function and biological diversity of the ecosystem. Primary objectives of this principle include the following:

The fishery is conducted in a manner that does not threaten by-catch species.

The fishery is conducted in a manner that avoids mortality of, or injuries to, endangered, threatened or protected species and avoids or minimises impacts on threatened ecological communities.

The fishery is conducted, in a manner that minimises the impact of fishing operations on the ecosystem generally.

N.B. The document "*Commonwealth Guidelines for Ecologically Sustainable Management of Fisheries*" (Environment Australia 2001) is an example of a set of principles for fisheries management that might be incorporated as a Schedule of Scientific Documents to the Act.

The Act should mandate production of annual State of the Marine Environment Reports that, at the first instance, provide the base line data that provides quality essential information upon which management decisions are based. The statute should ensure that this data is scientifically rigorous.

The Act should create and provide for the adequate resourcing of a science division specialised in tropical marine ecology. The provision of research and development services should be one function of the science division defined in the Act.

Indicators

The Act should define the concept of ecosystem health indicators, which should be further refined and identified in regulations. Indicators of ecosystem performance, reserve performance, stock populations and measures of diversity and rates of replenishment are some that could be covered initially. Sample indicators include -

- resource stocks: populations and range
- fish population risks - vulnerability to overfishing
- data collection system reviews
- triggers for management responses

by-product and by-catch analysis
aged interactions with listed species
quality of information - establish standards for reporting - triggers action if standard not met
coastline length developed - various categories of developments
measures of marine and estuarine damage
industry compliance measures
potential horizon impacts - from, for example, proposed development
reports of regional variations in fishing practices and species mixes caught

Commercial fishery indicators would include production and regeneration activity.

Water quality indicators and habitat indicators would also be included.

The analysis and improvement of indicators would be the responsibility of the science division.

Marine biodiversity is a key component of ecosystem health and indicators of biodiversity need to be included.

The Act should include a mechanism for consideration of new indicators, for example a set of processes that have led to false assumptions about indicators of ecosystem decline across the planet are-

Odum's ratchet - the process of fishing out top predators, slow-growing and long-lived species so they become rare or locally extinct.

Pauly's ratchet – the setting of baselines in the recent past and measuring declines from then, often misrepresenting the magnitude of impacts over the longer term.

Ludwig's ratchet - the tendency of fishers to borrow (for boats and gear) on the strength of expected catch in the coming season. There is evidence from many countries that this practice, when combined with falls in fish stocks and closures, can result in an increase in illegal fishing to repay debt.

Recognition of these barriers to the accurate assessment of the health of ecosystems can lead to improved indicators. So with appropriate feedback mechanisms these or similar "ratchet" indicators could be incorporated as precautionary indicators of ecosystem performance and biodiversity where scientific justification warrants it.

Indicators which provide accurate information required for fisheries management must be included in any review of fisheries regulation. In addition requirements for reporting on these indicators that is publicly available should be a key component of the Act. Indicators used should be consistent with national guidelines.

As a matter of policy and practice, both Commonwealth and State/Territory Governments must ensure that sufficient and ongoing resources are available to gather fisheries and ecosystem data required for effective management and reporting. State of the Fisheries reports require significant resources to collect, collate, analyse and present the required information. Data should be collected and reported in a consistent, clear and unambiguous manner.

Coastal and Marine Management Authority

The Act should establish a Coastal and Marine Management Authority. The Authority should be structured and have powers to fulfil the Objectives of the Act. The Authority would be the peak authority for implementing the policy directives made under the Act. This will be dealt with in Part 3 below.

Marine Protected Areas

As one element of an array of strategies to enhance ecosystem protection the Act should establish a procedure for nominating and creating marine protected areas.

Areas of high conservation value should be identified and included in marine parks.

Areas that include sites for threatened species should be included in marine parks.

Marine park systems need to be designed and managed so that aquatic corridors link protection areas where scientifically justified.

Marine Protected Areas Design Principles should be included in the Regulations and referenced in the Act.

Maintenance of the quality of water (and other physical attributes)

The maintenance and enhancement of the quality of the physical attributes of the marine environment are part and parcel of ecosystem management for ecosystem maintenance.

The Act should establish that defined criteria, indicative of quality, apply to each identified physical attribute. The statute would direct that standards, which are defined in regulations, are to be met.

An offence should be created for any action that detracts from the standards being met.

Coastal Protection

The Act should establish a coastal management regime. Coastal management should be integrated with marine management.

Coastal protection incorporated into the Act needs to include considerations of cultural and historical issues.

Coastal protection should be included in the Act. Protection of the coast line ought to be mandated and any proposal for development must bear the responsibility of proving that the development will not adversely affect the coast, the coastal hinterland, coastal catchments or tidal zones. Ideally any development proposal ought to be required to demonstrate how it will improve ecosystem health before consideration is given to approving the development.

The Act might refer to other documents, such as a Coastal Management Policy document and give those documents the force of statute.

This regime should consist of principles of coastal management, grounded in good science, and management plans and be managed by the Marine and Coastal Resource Authority. Baseline data for the entire Territory coast should be brought together or developed as the first step in developing management plans. Cultural considerations must form part of the overall strategy.

Annual Reports on the health of the coastal regions of the Territory should be required as part of the environment report.

Science Resources

The Act must establish mechanisms for the proper resourcing of a marine science division within the Department.

Inter-jurisdiction co-operation should be provided for in the Act to ensure exchange of scientific data and personnel, as appropriate, between jurisdictions. This is particularly relevant to Commonwealth resources as there may be overlap in responsibilities and jurisdictions between the Commonwealth and the Territory.

Management Plans (Including Fisheries MP)

The planning protocols ought to involve the development of overarching plans which may be geographically-ecosystem based and cover extensive areas (bioregional plans). These plans would be the pre-eminent plans, the overall strategies and indicators of which would be reflected in all other plans falling under them.

Draft Management Plans should be available for public consultation for a minimum 60 days.

Resource utilisation management plans would incorporate the current concepts of fishery management plans but have wider scope by including all marine and coastal resource uses.

Fisheries Management Plans are a key tool in managing the fishery but they are not the only tool. The Act must recognise their importance but also ensure that management plans are integrated with other management strategies to achieve the goals of the Act. The over-riding approach is ecosystem based management and all management strategies must fit into EBM.

Aquaculture

Aquaculture is just one of a stream of resource users and should not require any special attention beyond what an increased intensity of resource use would require under the principles governing resource use outlined in the Act and Regulations.

Bonds

Bonds ought to be required for any use of public resources in event of resource users failure to comply with their duties under the Act and to clean up environmental problems.

Part 3 - Marine and Coastal Management Authority

Marine Resource Authority

The ideal Act would create a Marine Resource Authority. This would subsume the Fisheries Department and any other related bodies, so the costs need not be in addition to what is currently in place. Powers under the Act would vest in the Director of the Authority where the Minister has powers of delegation.

The primary function of the Authority is to develop marine and coastal management policy in an integrated way that achieves ecosystem sustainability.

The Authority should have the power and the responsibility to ensure that best practice management plans and procedures are put in place, that these are integrated across the spectrum of ecosystems and resource sources and that enforcement is applied.

The Authority would have the power to enforce the Act. The current situation where the police are the sole enforcers of the Fisheries Act is not effective. The Authority should establish a resource use inspectorate with powers to ensure all resource users comply with the act as well as powers to monitor, protect and limit the impact of aquatic pest activity on the marine, estuarine and freshwater systems.

If the Authority chose not to enforce a beach of the Act then the Act should allow for civil enforcement by any person.

The Act would include provisions for public interest civil actions where environmental damage results from a breach of the Act. This proposal will be further explored in Part 6 - Remedies, below.

The Marine Resource Authority should produce Annual Reports on the health of the ecosystems and the status of resources it manages.

The Authority should develop scientifically rigorous performance criteria and outcome and performance standards for each area of its responsibility. These criteria should be integrated across the range of areas.

Part 4 - Administration and Accountability

This Part of the Act would address the usual elements of administration that are common to many Acts. Note that within this Submission (as Part 3 above) there is a proposal to create a Marine Resource Authority that would have enhanced powers and responsibility for managing the marine and coastal resource environment and for the administration of this Act..

The question being addressed in this proposal is that of accountability. The Act must contain clear definitions of responsibility. Where different persons (for example the Minister and the Director) have different responsibilities these must be clearly laid out in the Act.

Decision makers must have clearly defined criteria upon which to base their decisions.

Reasons must be given and published for all decisions.

There ought to be clearly defined review mechanisms for people affected by decisions.

The utilisation of publicly owned resources should have rights of review of decisions affecting those resources open to the general public. Appeal and enforcement rights will be dealt with more fully in a later part of this submission.

Licence application procedures should follow the ideal procedures for any development application in inviting other government agencies to comment on the approval and the imposition of conditions.

Data on Licences, applications breaches and so forth should be tabled and published.

Reports

The Authority should produce reports (some of which have been suggested earlier in this submission) on a regular basis on the following-

- The Authority's performance in fulfilling its statutory duties, including the level of achievement in meeting the Objectives of the Act.
- A Report on the State of the Environment which includes -

Ecosystem Health Reports or updates, including assessment of the sustainability of use of resources.

Resource Use Reports -

A summary of progress in implementing the Fisheries Environmental Management Plans and Reviews, and summary of habitat protection measures in each bioregion (for example, progress in Habitat Protection Plans for each bioregion, including the ways in which fisheries management is co-operating with Marine Protected Area programs within the bioregion. Habitat Protection Plans should be a joint undertaking by government agencies responsible for decision-making that affects marine habitats, industry and other stakeholders.

As summary of progress in understanding the environmental effects of fishing, in each bioregion (e.g. trophic web research in relation to fisheries; assessment of effects of fishing methods on habitat, assessment of “ratchets” – see Part 2 - Resource Management for description)

A summary of progress in managing the environmental effects of fishing (e.g. Bycatch Action Plans; “green gear” innovations; seasonal and permanent closures for stock protection or replenishment – Marine Fishery Reserves; monitoring updates on the performance of MFRs

Annual update on compliance activities in each bioregion (such as number of Fisheries Officer

contacts with fishers, infringement warnings, infringement notices, prosecutions).

A review of other resource use and compliance with management plans.

Part 5 - Resource Use Management and Administration

This Part deals with the technical administration of the use of the range of resources found in the marine, coastal and catchment environments.

This Act attempts to integrate management of all aquatic and marine resources and the immediately adjacent land.

Elements of this Part must be subject to the Resource Management Principles introduced above and the Objects of the Act.

Ecosystem-based management (EBM) is a science based approach to looking after coastal and marine environments. It aims to integrate the management of human activities that affect the marine environment so as to protect and restore marine ecosystems. It supercedes the old management systems based on separate sectoral management strategies and boundaries drawn from politics, fishing practices or other lines of convenience. In their place it establishes management systems that attempt to address the issues of cumulative impacts, recognising, respecting and protecting biological diversity and the functions and dynamic processes of natural ecosystems.

There are two key differences between EBM and existing natural resource management systems. The first is that human use is managed to operate within the natural capacity of the ecosystem rather than allowing the exploitation of ecosystems at unsustainable levels. The second is recognition that the integrity of natural ecosystems requires protection from human impact, not active management intervention.

Ecosystem-based management is a step-by-step process that attempts to move us towards a sustainable future for our oceans and our use of the oceans' resources.

Resource Users and licensing

This Part would regulate licensing of people who wanted to use the resources. It must be stressed that the resources are public resources in most instances and so procedures for licensing users should be transparent and include accountability principles.

Resource users are to be distinguished in two ways:

- 1 Resource users who extract from the marine or coastal environment (and those who deposit into it) should be distinguished from those who do not;
- 2 Those users who fall into the category of extractors/depositors are to be licensed and the conditions that attach to those licences can distinguish between licence holders by the type and intensity of use of the resource.

In the *Fisheries Act* the Administration Part deals with Licensing, Permits and Registration of Vessels. In our proposal the Act is a much broader legislative instrument with integrated goals and objectives based on marine ecosystem and coastal management. The administration of the fishing industry, including recreational fishing would be a necessary part of the Act but one which did not dominate the Act. Rather the administration of these activities would be integrated into the overall strategies for achieving the Objects of the Act.

Any person seeking a licence would be required to demonstrate that they have appropriate management strategies, procedures and practices for the maintenance of ecosystem health. The Act would require that licence applicants show knowledge and attitudes or a proven record in relation to understanding ecosystems and the impact their operations would have on the ecosystem. Licence

holders must have in place training strategies for employees in these areas.

Applicants for licences would have to commit to implementing best practice regulations including a code of conduct and a habitat protection plan for the chosen fishery. Commercial licence applicants should also demonstrate a knowledge of the Act and the obligations they must fulfil that the Act creates.

Licence holders must be required to provide data on catch, effort and other identified data as part of their obligations to ecosystem management. This data should be publicly available. Management of a public resource must be transparent and accountable. One way to achieve this is to define required data and have it made public.

Conditions of licences can be outcome based. Such outcomes would be directed at achieving the Objects of the Act.

Proposals for resource Use

All proposals for resource use must address potential environmental impacts (including beneficial benign and harmful).

Permits or licences should not be issued for a resource use proposal unless ecosystem sustainability of the activity is demonstrated.

Where there is a potential for harmful environmental impacts an environmental bond should be required. The regulations should set out the criteria for determining the bond.

Resource use proposals must comply with the Management Plans. Conditions attaching to Licences and Permits may be couched in outcomes and effects.

Applications for resource use should follow a procedure similar to any development application with public notification and the provision for submissions to be made on the application.

Appeal rights should apply to participants in the Application process.

Part 6 - Remedies.

Appeal Rights

Comprehensive appeal rights should be included in the Act. Initially appeal procedures should be dealt with in a non-judicial setting. Court procedures would only apply as the last resort and then only in limited circumstances.

Where an appeal is related to the quality of environment performance for a resource use proposal the appellate jurisdiction should be able to consider all the evidence as well as new evidence that may be available. In matters where the maintenance of ecosystem health is in question the best possible decision is desired and this justifies *de novo* appeals.

Applicants and the *Authority* have automatic right of appeal.

Third party rights of appeal should apply conditionally to persons who have made submissions on a proposal. Conditions that could apply include with the leave of the Appeal body. Vexatious appeals could have cost penalties attached as a deterrent to such appeals.

Procedures - Internal Mechanisms before resort to Courts

The Authority should establish an independent appeals body to hear appeals in the first instance. The complexity of the appeal should determine the nature of the body hearing the appeal.

Offences

Offences must be clearly defined. Offences related to ecosystem health should be treated seriously and this should be reflected in the penalties that can be imposed.

Enforcement

The Authority should have all necessary powers to enforce the Act. Police officers should have automatic qualification as licence inspectors. Any other person ought to be able to apply to the appropriate Court, with leave of the Court, to ensure that either a suspected imminent breach of the Act is not committed or to require restitution if a breach of the Act has occurred.

A regime of on the spot fines for minor breaches of the Act (which would need to be carefully defined) should be introduced.

What for?

Actions to prevent potential breaches of the Act as well as actions for breaches that have already occurred should be provided for by the Act.

Time limits?

Prosecution for breaches should be able to be commenced within 2 years of the breach coming to the attention of the Authority, not when the breach took place.

Prosecutions should only be commenced where the evidence is sufficient to create grounds that there is a reasonable prospect of success.

Civil enforcement

The authors of this submission believe that the possibility of civil enforcement procedures being introduced would greatly enhance the compliance, accountability and transparency of activities regulated under this Act. The following provision is suggested as a sample -

Section 104 of the South Australian *Environment Protection Act 1993*.

CONCLUSION

In simple terms the current Fisheries Act does only one job, administer just one relative small part of the use of marine and aquatic resources. It is clear that if ESD is to be taken seriously an integrated approach to managing the whole marine and aquatic environments is necessary. This will be best achieved by a sea change in the legislative and administrative approaches to this essential management setting. This will require a new Act that takes a broader non-sectoral approach to management issues.

In the meantime the *Fisheries Act* can be improved to manage the impact of the utilisation of marine resources more effectively to achieve ecological sustainability in so far as fishing impacts is concerned.

In particular management plans need to incorporate ecosystem based management principles.

The participants in the fishing industry need to be trained in the practical implementation of these principles.

Impacts of non-commercial fishing must be taken into account in any strategies to achieve ESD.

The Environmental Defender's Office (NT) thanks you for the opportunity to present this submission.

Yours sincerely,



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