



Discussion Paper

**Issues arising from the current Legislative
Framework for Marine Protected Areas in the
Northern Territory**

The Australian Marine Conservation Society (AMCS) wishes to thank the Environmental Defender's Office (Northern Territory) for preparing an analysis of the current legislative framework for Northern Territory (NT) Marine Protected Areas which has formed the basis for this discussion paper.

The Environmental Defender's Office has been in operation since 1996. It is located in Darwin and was created in response to a need identified in an Access to Justice Report for specialist public-interest environmental law community legal centres throughout Australia.

The Office provides a range of legal services, including free legal advice and information, representation, research into and comment on policy and law reform issues, and education about environmental law.

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1.0 Executive Summary

1.1 Purpose of the Discussion Paper

The Australian Marine Conservation Society (AMCS), with the assistance of the Environmental Defender's Office (Northern Territory), has undertaken a review of the current legislative mechanisms for the selection, declaration and management of Marine Protected Areas (MPAs) in the Northern Territory (NT), in light of the aspirations, goals and processes which underpin the current Draft NT MPA Strategy (the Strategy). The review focused on the application of the *Territory Parks and Wildlife Conservation Act* (TPWC Act) and the *Fisheries Act* (Fisheries Act), as the primary statutes governing the declaration, selection and management of MPAs in the NT.

This discussion paper seeks to promote consideration of the adequacy of the current framework to meet to the objectives sought by the Strategy. In particular, the report focuses on the following issues:

- The selection, declaration, and revocation of MPAs under the current framework;
- The extent to which goals and principles of ecologically sustainable development are incorporated into the current framework;
- The protection of biodiversity within an MPA, including threatened species;
- Principles for management of MPAs under the current framework; and,
- Mechanisms for regulating activities in MPAs under the *Territory Parks and Wildlife Conservation Act* and *Fisheries Act*.

1.2 Key Findings

1.2.1 Objectives for MPAs, and guidance for their selection and declaration

The TPWC Act contains mechanisms for the declaration (and revocation) parks, reserves, wilderness zones and sanctuaries.

However, perhaps reflecting its age, the Act does not specify what its overarching objectives are (it is common for modern environmental protection and natural resources legislation to do so – see Appendix 1 for an example). The TPWC Act does specify an objective for that portion of the Act which provides for the declaration and management of parks and reserves. The objective is merely to “make provision for the establishment and management of parks and reserves appropriate to be established by the Administrator”.

On this basis, the purpose and/or objectives of protected areas, in addition to principles to guide their selection, are not provided for by the TPWC Act, and are left solely within the realm of government policy.

Accordingly, the primary and secondary goals for MPAs identified in the draft Strategy and outlined in Section 3 of this paper are not reflected in the *TPWC Act*.

A balance needs to be struck between allowing for flexibility in the selection of MPAs (which policy provides) and firming policy commitments by giving them a legislative base. Consideration needs to be given to how the overall primary and secondary goals and principles of the NT representative system of MPAs, as well as operational planning rules (i.e. principles, criteria and guidelines) for MPA system planning, could be incorporated into legislation.

1.2.2 Ecologically Sustainable Development

The principle aim for NT multiple use marine parks, as envisaged by the draft Strategy, is to establish marine biodiversity conservation by managing all uses in the area (e.g. amateur and commercial fishing, recreation tourism and mining) on an **integrated ecosystem level** for **ecologically sustainable use**¹. In this respect the Strategy states the NT government is committed to the protection of marine biodiversity, and ecologically processes and the sustainable use of marine resources, through the goals and principles of Ecologically Sustainable Development (ESD)².

There is currently no legislated requirement for decision makers to take into account the principles of ESD when making decisions that directly or indirectly concern MPAs in the NT. For example:

- The principles of ESD, including the precautionary principle, are not expressly incorporated within the *TPWC Act*.
- While ESD is an objective of *Fisheries Act*, the Act as currently drafted, would not necessarily require decision makers to have regard to, or make decisions in accordance with, the principles of ESD.
- The current legislative framework is characterised by what is effectively the subservience of the *TPWC Act* to the *NT mining and petroleum acts*. The relationship between the NT mining and petroleum acts, the *Environmental Assessment Act* and the *TPWC Act*, has the effect of giving the ultimate decision making authority concerning the protection of MPAs from adverse impacts resulting from mining activities to the Minister for Mines who is not bound under the relevant legislation to adhere to or even consider the principles of ESD.

A true commitment to promoting the sustainable use of resources within multi-use MPAs will require legislative amendment imposing obligations on decision-makers to have regard to principles of ESD when making decisions concerning the management of resources within such areas.

1.2.3 Management of MPAs

The overarching objectives for management of MPAs identified in the draft Strategy are different to those objectives for management of protected areas specified by the *TPWC Act*. The current legislated objectives tend towards the management and protection of species of wildlife and habitats, in addition to the preservation of 'special features' of a park, including sites of biological, historical, paleontological, archaeological, geological and geographical interest. The *TPWC Act* does not provide for management of an ecosystem as a whole.

Bearing in mind that key decision makers are only obliged to comply with the requirements of *TPWC Act*, goals and objectives for the management of MPAs identified in the Strategy should be incorporated into the *TPWC Act* to ensure that the Strategy is appropriately supported by the Act.

1.2.4 Relationship between the *TPWC Act* and the *Fisheries Act* – overlaps, gaps and inconsistencies

Gaps - Threatened Species

The portions of the *TPWC Act* that provide for the listing and protection of threatened species; and provide the protection of *wildlife* by creating offences for the "taking and interfering" with wildlife in park or reserve do not apply to fish and some other species of aquatic life. The *Fisheries Act* does not currently contain any mechanism for the listing and protection of threatened species of fish³. While some species of fish have been listed as threatened in the NT, they are not actually protected by the *TPWC Act* or *Fisheries Acts*⁴.

Overlap

While species of fish are not protected under the *TPWC Act* (as is the case with other *wildlife*) the Act does allow the relevant managing authority for a particular park or reserve [either the Parks and Wildlife Commission or a Joint Management Authority] to restrict the possession of fishing equipment, the use of vessels and the act of fishing in the whole, or within certain areas, of a protected area. This power of the Commission/Joint Management Authority to regulate fishing, and fishing equipment in a park or reserve potentially overlaps with regulation under the *Fisheries Act*. While there is scope under the *TPWC Act* and By-Laws to prohibit fishing, it is likely that the taking of fish in accordance with a licence granted under *Fisheries Act* would serve as a defence to any prosecution for breach of the prohibition. Clearly, inter-agency co-operation will be essential to ensure the effective management of fishing activities within MPAs.

Inconsistencies

There are mechanisms under the *Fisheries Act* to declare “no take” MPAs or ‘no take’ zones within a broader multi-zoned MPA. However if the *Fisheries Act* is to be considered an appropriate vehicle for establishing ‘no take areas’ within the MPA framework the following issues will need to be addressed:

1. The current inconsistency between *TPWC Act* and *Fisheries Act* in regards to the level of public participation required for declaration of MPAs.

Unlike the *TPWC Act*, there is no mechanism under the *Fisheries Act* for public input at the stage of selection and declaration of a Fishery Management Area. Rather, public participation is provided for at the stage of drafting and considering the management plan for a Fishery Management Area.

The procedures under the *Fisheries Act* for public participation in, and the consideration and adoption of a draft plan of management differ from those under the *TPWC Act* in the following ways:

- the requirement to give public notice and receive submissions on a draft plan of management is mandatory under the *TPWC Act* and only discretionary under the *Fisheries Act*;
- final approval of a management plan for a fishery management area under the *Fisheries Act* rests with the Minister, while final approval of a management plan for a park or reserve rests with the Legislative assembly.

2. Unlike the *TPWC Act* there is no requirement under the *Fisheries Act* for the involvement of the Legislative Assembly in the revocation of a Fishery Management Area.

MOU between the Department of Primary Industry and Fisheries and the Parks and Wildlife Commission

A memorandum of understanding, which sets out administrative and working arrangements between the Department of Primary Industry and Fisheries which is responsible for administering the *Fisheries Act*, and the Parks and Wildlife Commission which is responsible for administering the *TPWC Act*, has been in place since 1999⁵.

The MOU goes in some way to address some of the concerns identified in this Section. However the obligations under the MOU tend to be weak, requiring agreement where possible, or consultation between agencies. The MOU does not go far enough to create the certainty, clarity or enforceable obligations required for successful management of MPAs, and achievement of the goals for MPAs identified in the draft Strategy.

1.3 Conclusions

MPAs present a unique challenge for protected area management based on their lack of clear borders, competing interests, and lack of clear scientific knowledge of all aspects of the marine environment. It does not appear that *Territory Parks and Wildlife Act* and the *Fisheries Act* were drafted with the specific challenges of MPAs in mind.

Current mechanisms for declaring and managing marine parks exist under this legislation, notwithstanding the overlaps and gaps identified in this paper. However the mechanisms do not exist within a broader framework which aims to achieve the conservation of biodiversity, the ecologically sustainable development of marine resources and management of protected areas at an ecosystem level. On this basis, the framework does not align with the aspirations goals and intended processes of the Strategy. Too much is left to policy and not enough is incorporated into a clear legal framework. Given the often competing interests associated with MPAs, clear legislative intent is required. Absent objectives, there are also no benchmarks for performance. What is the basis for a measurement of success? Once again this is clearly the realm of policy.

The issues raised in this discussion paper should not halt the progress of MPAs, but should rather encourage the government to proceed swiftly with its intended review of the *Territory Parks and Wildlife Act* and the *Fisheries Act*. Moreover these Acts should be reviewed together, firstly to address gaps and inconsistencies, and secondly with the specific goals and challenges of MPAs in mind.

Finally, any legislative framework is only as good as the commitment given and resources allocated to its enforcement. Current penalties, including the threat of imprisonment, for illegal activities that undermine the intent and effectiveness of MPAs will act as a deterrent only if there is a reasonable expectation within the broader community that the laws will be enforced.

2. The Northern Territory's globally significant marine environment

The NT marine environment is globally significant. It is one of the last remaining marine ecosystems in the world that has not been severely impacted on by humans, unlike neighbouring tropical marine ecosystems which have been severely impacted on by humans⁶. As a consequence, Northern Australia's marine environment is one of the last remaining tropical strongholds in the world.

The NT marine environment encompasses:

- extensive tidal estuaries and coastal wetlands;
- significant mangrove forests;
- Six of the seven turtle species found in the world;
- nationally and internationally significant nesting colonies of shorebirds and seabirds; and,
- habitat for nationally and internationally threatened species such as sharks, rays, sawfish, sea snakes, pipefish and seahorses.

The Northern Territory environment remains largely intact and free from the serious degradation that has occurred in other parts of Australia and the world. We have a unique opportunity to learn from mistakes made elsewhere and safeguard the health of the Territory's marine and coastal environments. Marine Protected Areas are one management tool which will help safeguard the health of our marine environment. The Northern Territory's draft Marine Protected Area Strategy's core purpose is to outline the strategic framework for the identification, selection, implementation and management of MPAs in the NT, which will provide for the long term conservation and sustainable use of the marine biodiversity and resources of the NT.

3. Northern Territory's obligations to establishing a representative system of Marine Protected Areas.

Globally, a representative system of MPAs has been identified as a key tool for effective marine biodiversity conservation. The primary goal for a representative system of MPAs is for the conservation of biodiversity⁷. There are many secondary goals for a representative system of MPAs. These include:

- Integrated ecosystem management;
- Scientific reference sites;
- The special needs of rare, threatened or depleted species and threatened ecological communities;
- The conservation of special groups of organisms (eg. Species with complex habitat requirements or mobile or migratory species, or species vulnerable to disturbance which may depend on reservation for their conservation);
- Protected areas of high conservation value (including those containing high species diversity, natural refugia for flora and fauna and centres of endemism); and,
- The recreational, aesthetic and cultural needs of indigenous and non-indigenous people.

Scientific evidence has proven that marine national parks (no take areas) are a core component to a representative system of Marine Protected Areas⁸. Marine national parks and varying level of protection in the MPA system should adequately *manage all uses on an ecosystem level for ecologically sustainable development*. A system of marine protected areas need to work in conjunction with other integrated coastal management tools to adequately protect our marine environment.

The NT government is committed to establishing a system of Marine Protected Areas on three tiers. Internationally, nationally, and territory level

- a) Internationally Australia is a signatory to the Convention on Biological Diversity (UNEP 1992) which the International Union for the Conservation of Nature (IUCN), Commission on National Parks and Protected Areas (CNPPA) acknowledging the committed to the protection of marine biodiversity and ecological processes through signatories of this convention establishing a representative system of MPAs by 2012.
- b) To achieve Australia's commitment to the Convention on Biological Diversity the Commonwealth established the National Strategy for Ecologically Sustainable Development (1992) and the National Strategy for the Conservation of Australia's Biological Diversity (1996). These two strategies provide the framework for waters managed under state and commonwealth jurisdiction by 2012.
- c) The Northern Territory has committed to the above conventions and strategies through the NT Parks and Conservation Masterplan, and the Integrated Natural Resource Management Plan of the NT and more specifically through the draft NT MPA strategy.

4. Introduction to the legislative review

The current draft NT MPA Strategy (the Strategy) specifies the primary and secondary goals of the Northern Territory Representative System of Marine Protected Areas (or NTRSMPA) to be as follows:

Primary Goal:

- to establish and manage a comprehensive, adequate and representative system of MPAs to contribute to the long-term ecological viability of marine and estuarine systems, to maintain ecological processes and systems, and to protect Australia's biological diversity at all levels.⁹

Secondary Goals:

- to provide for integrated, ecosystem based management
- to provide a formal management framework for the broad range of human activities (including recreation, tourism, shipping, resource use), the impacts of which are compatible with the primary goal
- to provide for scientific reference sites
- to provide for special needs of rare, vulnerable, threatened or depleted species and/or ecological communities
- to provide for the needs of special or ecologically significant species, i.e. mobile or migratory species, flagship species, umbrella or keystone species
- to provide for protection of areas of high conservation value, including areas of high biodiversity, productivity, natural refugia and centres of endemism
- to provide for the recreational, aesthetic and socio-cultural needs of indigenous and non-indigenous people and
- to provide for the protection of indigenous cultural sites, values, customary practices, traditions and the integrated management of 'sea country'¹⁰.

The draft Strategy recognises the central importance of highly protected 'no-take' MPAs to marine management, but notes these should be supported by a range of other types of MPAs, such as large scale, multiple-use MPAs which provide for ecosystem-based management and species and habitat-specific measures to achieve objectives for both nature conservation and sustainable use¹¹.

Multiple use MPAs, or marine parks, are conceptualised as providing for the managed use of a range of activities within a conservation framework. The draft Strategy notes the principle aim of marine parks is not to exclude use but to manage all uses in the area on an **integrated ecosystem level** for **ecologically sustainable use**¹². In this respect the Strategy states the NT government is committed to the protection of marine biodiversity, and ecologically processes and the sustainable use of marine resources, through the goals and principles of Ecologically Sustainable Development (ESD)¹³.

The Australian Marine Conservation Society (AMCS), with the assistance of the Environmental Defender's Office (Northern Territory), has undertaken a review of the current legislative mechanisms for the selection, declaration and management of Marine Protected Areas (MPAs) in the Northern Territory (NT), in light of aspirations, goals and processes which underpin the current Draft NT MPA Strategy. The review focused on the application of the *Territory Parks and Wildlife Conservation Act (TPWC Act)* and the *Fisheries Act* (Fisheries Act), as the primary statutes governing the declaration, selection and management of MPAs in the NT.

This discussion paper seeks to promote consideration of the adequacy of the current framework to meet to the objectives sought by the Strategy. In particular, the report focuses on the following issues:

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- The extent to which goals and principles of ecologically sustainable development are incorporated into the current framework;
- The protection of biodiversity within an MPA, including threatened species;
- Principles for management of MPAs under the current framework; and,
- Mechanisms for regulating activities in MPAs under the *Territory Parks and Wildlife Conservation Act* and *Fisheries Act*.

Governance and indigenous management issues in respect of MPAs are significant, and ought to be considered, however these issues were unable to be adequately addressed within the time constraints for preparing this paper. AMCS notes that, an analysis of options for indigenous involvement in management of MPAs, and the implications of the Federal Court's Blue Mud Bay decision, have been comprehensively addressed in Dr Dermot Smyth's and Patrick O'Leary's recent consultation paper "*Protecting Sea Country: Opportunities for Indigenous engagement in the Northern Territory Marine Protected Area Strategy*". We refer you to this paper.

5. Territory Parks and Wildlife Conservation Act (*TPWC Act*)

5.1 Declaration of MPAs under the *TPWC Act*

There are four different kinds of protected areas under the *TPWC Act*: parks, reserves, wilderness zones and sanctuaries. The *TPWC Act* does not clearly delineate the intended purpose for and objectives of each kind of protected area. Rather extrapolation from various provisions from the Act is required.

5.1.1 Parks and Reserves

A park or reserve is created when the Administrator publishes a notice in the gazette declaring an area of land and/or sea to be a park or reserve. Unless specifically exempted by the notice of declaration, the area forming the park or reserve will include the sea bed and subsoil¹⁴.

The notice declaring the area of land as a park or reserve may specify the purpose or purposes for which the park or reserve has been declared¹⁵.

The Act does not provide any clear distinction between a park or reserve, other than to specify the objects which are to be considered when preparing the necessary plan of management¹⁶. In the case of a park – the object to be considered when preparing the plan of management is the encouragement and regulation of the appropriate use, appreciation and enjoyment of the park by the public¹⁷. In the case of a reserve – the object to be considered is the regulation of the use of the reserve for the purpose for which it was declared¹⁸.

A Plan of Management must be prepared for a park or reserve¹⁹. The Plan of Management may:

- propose the use of a particular part of a park or reserve for a purpose which involves restricting public access to that part²⁰.
- Provide for the division of the park or reserve into zones and set out the conditions under which each zone shall be kept and maintained²¹.

A park or reserve declared under the *TPWC Act* is either managed by the Parks and Wildlife Commission, or if jointly managed with traditional owners, by the Joint Management Partners.²²

Activities in a park or reserve are regulated by the *TPWC Act* and relevant By-Laws [see section below].

5.1.2 Wilderness Zone

The Administrator may declare the whole of or a particular area within a park or reserve to be a wilderness zone²³.

The *TPWC Act* does not clarify the purpose for or objectives of a wilderness zone. However Section 17 of the Act, relating to mining works and forestry etc states:

- A wilderness zone must be maintained in its natural state and shall be used only for purposes specified in the plan of management relating to the wilderness zone²⁴.

Excavation, building, the carrying out of works, the felling of timber, creation of tracks, and the use of vehicles, aircrafts or vessels in a wilderness zone unless undertaken by the Parks and Wildlife Commission and for the purpose essential to the management of the park or reserve²⁵.

This however does not prevent the carrying out the exploration for, or recovery or processing of minerals in with the conditions of a mining interest or the carrying out of an activity permitted, or the exercising of a right under the *Mining Act*, *Petroleum Act* or the *Petroleum (Submerged Lands) Act* in relation to such a mining interest (see section 3.4.4 below)²⁶.

5.1.3 Sanctuary

The Administrator may declare certain land or sea to be a sanctuary²⁷. The *TPWC Act* does not specify the general purpose or objectives of a sanctuary. The Act does however prohibit access to a sanctuary by the general public. It does so by limiting who may lawfully access a sanctuary to the following class of people:

- a conservation officer or honorary conservation officer under the Act
- the holder of a mining interest or his workmen or agents
- a public sector employee of the Commonwealth or NT who is required in the course of his or her duty to enter a sanctuary
- a person authorised by the Director of Parks and Wildlife Commission to enter a sanctuary²⁸

The following activities are prohibited in a sanctuary:

- having possession of a firearm or trap
- taking, capturing or killing an animal (other than fish)
- taking plants of a certain class or description if the sanctuary has been declared for the purpose of protecting such plants²⁹.

5.1.4 Public Participation in declaration of protected areas and their management

Before declaring an area of land or sea to be a park, reserve, sanctuary, or wilderness zone, the Administrator must first consider a report from the NT Parks and Wildlife Commission about the proposed area of land or sea to be so declared.

Prior to giving the report to the Administrator, the Parks and Wildlife Commission must give public notice of the nature of the report and of any recommendations proposed to be made in the report and invite representations from the public within at least sixty days of the notice³⁰.

The Commission is required to give due consideration to any representations so made, and, when submitting the report to the Administrator, the Commission must attach any representations made, together with its comments on those representations³¹.

Public participation is also provided for in the *TPWC Act* to enable members of the public to make submissions on a draft plan of management after it has been prepared and before it is laid before the Legislative Assembly for final approval³². There is no requirement for public participation when an approved plan of management is amended, however the amended plan must go before the Legislative Assembly for final approval³³.

5.1.5 Revocation of a park, reserve or sanctuary

The procedure for revocation of a park, reserve or sanctuary under the *TPWC Act* requires:

- A resolution passed by the Legislative Assembly allowing for the MPA to cease to be a park, reserve or sanctuary and
- the publication by the Administrator of a notice in the gazette giving effect to that resolution³⁴.

This appears to satisfy the requirements of the MPA Strategy that an MPA declared under the *TPWC Act* have secure status that may only be revoked by resolution of the NT Legislative Assembly.

5.1.6 Discussion

While there are mechanisms to declare (and revoke) parks, reserves, wilderness zones and sanctuaries under the *TPWC Act*, the purpose and objectives of such areas, in addition to principles, to guide their selection is left solely to the realm of government policy*.

Perhaps reflecting its age, the *TPWC Act* does not specify what its overarching objectives are to be (it is common for modern environmental protection and natural resources legislation to do so – see Appendix 1

for an example). The *TPWC Act* does specify an objective for that portion of the Act which provides for the declaration and management of parks and reserves (discussed above). However the objective is merely to “make provision for the establishment and management of parks and reserves appropriate to be established by the Administrator”.

On this basis, while the primary goal of MPAs is expressed in the draft Strategy to be the conservation of biodiversity, this is not reflected in the *TPWC Act*.

A balance needs to be struck between allowing for flexibility in the selection of MPAs (which policy provides) and firming policy commitments by giving them a legislative base. Consideration should be given to how the overall primary and secondary goals and principles of the NT representative system of MPAs as well as operational planning rules (ie. principles, criteria and guidelines) for MPA system planning could be incorporated into legislation.

* Note the *TPWC Act* does list objectives for management of parks or reserves declared under the Act. - see section 5.4.

5.2 Ecologically sustainable development

5.2.1 Ecologically sustainable development and the *TPWC Act*

The principle aim for NT multiple use Marine parks, as envisaged by the draft Strategy, is to manage all uses in the area (e.g amateur and commercial fishing, recreation tourism and mining) on an **integrated ecosystem level** for **ecologically sustainable use**³⁵. In this respect the Strategy states the NT government is committed to the protection of marine biodiversity, and ecologically processes and the sustainable use of marine resources, through the goals and principles of Ecologically Sustainable Development (ESD)³⁶.

The question remaining then is, to what extent are the goals and principles of ecologically sustainable development (ESD) incorporated into relevant legislation? [Note that the incorporation of ESD into the objectives of the Fisheries Act is dealt with in section 4.1.2, while ESD and legislation governing mining activities in MPAs is addressed in section 3.4.4.]

Ecologically Sustainable Development is not referred to at all in the *TPWC Act* either as an intended outcome, or as part of the decision making process under the Act. The commitment to sustainable use referred to in the Strategy therefore, is currently a commitment contained in policy and not one that is given legislative force.

5.2.2 Discussion - Key Principles of ESD and their incorporation into Australian Law

Jurisdictions across Australia have fully embraced the concept of sustainable development through both policy initiatives and legislative reform. Statutory requirements to have regard to ESD when making decisions appear in both environmental legislation, as well as legislation conferring discretionary powers upon a wide range of government agencies to take or approve activities that might impact adversely upon environment and natural resources³⁷.

Legal definitions of ESD tend to differ between legislation, however most definitions are based upon the definition of ecologically sustainable development incorporated into the *National Strategy on Ecologically Sustainable Development* 1992 and the *Inter-Governmental Agreement on the Environment* 1992³⁸.

Key principles of ESD are:

- **The precautionary principle** – which states ‘where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation’
- **Intergenerational equity** – which states ‘the present generation should ensure the health, diversity and productivity of the environment is maintained or enhances for the benefit of future generations’
- **Conservation of biodiversity and ecological integrity** – expressed to be a fundamental consideration in decision-making
- **Improved valuation, pricing and incentive mechanisms** - this means environmental factors ought to be included in the valuation of assets and services. For instance, those who generate pollution and waste should bear the costs of containment, avoidance and abatement (polluter pays), and incentive structures should be established, such as market mechanisms to encourage compliance with environment protection objectives³⁹.

There are several examples where these principles have been incorporated into Australian legislation. For example, the objectives of the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999 (*EPBC Act*) include the following goals

- to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
- to promote the conservation of biodiversity⁴⁰

The *EPBC Act* incorporates the following principles of ecologically sustainable development:

- decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

- the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- improved valuation, pricing and incentive mechanisms should be promoted⁴¹.

While principles of ESD are usually incorporated into the objectives of legislation within Australia, there are certainly means of drafting legislation to require decision makers, to have regard to the principles of ecologically sustainable development when making decisions on matters such as the plans of management for protected areas, for example⁴².

A discussion of the technicalities of legal drafting is more appropriately directed at the bodies responsible for reviews of the *TPWC Act* and other relevant legislation.

However, the key point is that a true commitment to promoting the sustainable use of resources within a multi-use MPA will require legislative amendment through which decision-makers are required to have regard to principles of ESD when making decisions concerning the management of resources. Further accountability could be promoted by a legislated requirement that decision makers publish reasons for their decisions.

5.3 Legislated objectives for the management of MPAs under the *TPWC Act*

5.3.1 *Objectives for Management Plans under the Draft NT Marine Protected Areas Strategy*

The Draft Strategy identifies important objectives of a management plan for large MPAs as follows:

- the integrated management of the entire ecosystem/ ecosystem based management
- site specific management appropriate to various areas within the MPA

Achieving the first objective is said to require a broad strategic approach to sustainable use and management of natural resources and environments (such as fishing and pollution), on a scale which matches the scale of marine ecosystems. The second objective is said to require tactical site or habitat management to address specific objectives of biodiversity preservation, research, education and recreation.

5.3.2 *Objectives for Management Plans under the TPWC Act*

The *TPWC Act* specifies principles and/or objectives to be considered when drafting a plan of management for a park or reserve.

The objectives/principles differ in the Act, depending on whether the park or reserve is to be managed by the Parks and Wildlife Conservation Commission or whether it is to be Jointly Managed.

Where a park is to be managed by the Commission, the relevant objectives specified by the Act that must be taken into consideration when preparing a plan of management are:

- in the case of a park – the encouragement and regulation of the appropriate use, appreciation and enjoyment of the park by the public;
- in the case of a reserve – the regulation of the use of the reserve for the purpose for which it was declared;
- the preservation of the park or reserve in its natural condition and the protection of its special features, including objects and sites of biological, historical, palaeontological, archaeological, geological and geographical interest;
- the protection, conservation and management of **wildlife** (defined so as not to include fish see section 5.4.1) within the park or reserve; and
- the protection of the park or reserve against damage⁴³.

Where a park is to be managed by Joint Management Partners, the Act specifies that the objective of joint management is to jointly establish an equitable partnership to manage and maintain the park or reserve as part of a comprehensive and representative system of parks and reserves in the Territory and for the following purposes:

- benefiting both the traditional Aboriginal owners of the park or reserve and the wider community;
- protecting biological diversity;
- serving visitor and community needs for education and enjoyment⁴⁴.

The objective is to be achieved by managing the park or reserve in accordance with the following principles:

- recognising, valuing and incorporating Aboriginal culture, knowledge and decision making processes;
- utilising the combined land management skills and expertise of both joint management partners;
- recognising and addressing the need for institutional support and capacity building of the joint management partners;
- recognising that community living areas⁴⁵ in or in close proximity to parks and reserves are an integral part of the natural and cultural resource management of parks and reserves;

- involving continuing statutory responsibilities and functions of the Minister with respect to parks and reserves;
- managing parks and reserves may include cooperative management agreements for areas of land outside parks and reserves;
- establishing a process for the consideration of applications for mining and petroleum⁴⁶.

5.3.3 Discussion

The overarching objectives for management of MPAs identified in the draft Strategy are different to those legislated under *TPWC Act*. The current legislated objectives tend towards the management and protection of wildlife and habitat, in addition to the preservation of ‘special features’ of a park, including sites of biological, historical, paleontological, archaeological, geological and geographical interest. *TPWC Act* does not provide for management of an ecosystem as a whole

Key decision makers are only obliged to comply with the requirements of *TPWC Act*. The management goals and objectives of the Strategy should be incorporated into *TPWC Act* to ensure that the Strategy is appropriately supported by the Act.

Further, under the current framework, the management goals for parks or reserves appear to differ according to whether the park is to be jointly managed, or managed solely by the Parks and Wildlife Commission. This is a confusing situation and one which undermines consistent objective-based monitoring and reporting on park (or reserve) performance.

5.4 Protection of wildlife under the *TPWC Act*

5.4.1 Protection of wildlife and the status of Fish and other aquatic life

The *TPWC Act* contains mechanisms for:

- the listing, management and protection of threatened species of *wildlife*, including the declaration of areas of land or sea which are essential to the survival of wildlife as areas of essential habitat; and

- the protection of *wildlife* within parks and reserves.

Wildlife is defined to include both animals and plants that are indigenous to Australia, the Australian coastal sea or the sea-bed and subsoil beneath that sea (such as seagrass, corals, dugongs, sea snakes and invertebrates) and migratory animals that periodically or occasionally visit Australia or the Australian coastal sea (Such as turtles, whales and dolphins).

The *TPWC Act* specifically excludes fish from its definition of wildlife⁴⁷. This means the sections of the Act that:

- provide for the listing and protection of threatened species; and
- provide the protection of *wildlife* by creating offences for the “taking and interfering” with wildlife in park or reserve;

do not apply to fish.

In addition, these sections do not apply to species of animals and plants (other than birds and fish and referred to as aquatic life in the Act⁴⁸) that are:

- part of a managed fishery under the *Fisheries Act* ; or
- caught, taken and harvested in accordance with a licence granted under the *Fisheries Act*. For example, the Territory’s Aquarium Fishery targets fish, plant and coral species from marine and freshwater environments.

The management and conservation of fish and these species of aquatic life is dealt with by the *Fisheries Act*.

However, the *Fisheries Act* does not currently contain any mechanism for the listing and protection of threatened species of fish⁴⁹. On this basis, while some species of fish have been listed as threatened in the NT, there is currently no framework for the management and protection of threatened species of fish in the NT, unless those species are also listed under the EPBC Act⁵⁰ [in which case they would need to be nationally threatened].

We acknowledge that certain parties have advocated a counter argument for the interpretation of the *TPWC Act* which would see fish in protected areas covered by the threatened species provisions of the Act. However, in our view, on balance this is a weaker argument and we believe that *TPWC Act* clearly intends for fish to fall outside its field of operation.

While species of fish are not automatically protected under the *TPWC Act* by existing within a park or reserve (as is the case with other *wildlife*) the Act does allow the relevant managing authority for a particular park or reserve [either the Parks and Wildlife Commission or a Joint Management Authority] to restrict the possession of fishing equipment, the use of vessels and the act of fishing in the whole, or within certain areas, of a protected area [see section 5.6.2 below].

5.4.2 Broad powers for Minister to declare exemptions

One peculiar aspect of the *TPWC Act* is the broad powers it gives to the Minister for Parks to declare exemptions, without legislative or public scrutiny or input, which are able to effectively invalidate those provisions of Act which relate to the management and protection of both wildlife in parks and reserves and threatened species in the NT.

Specifically, section 27 of *TPWC Act* provides that the Minister may, by notice in the Gazette, declare that Part IV of the Act or a particular provision of that Part does not apply to–

- the whole or a specified part of the Territory;
- a specified species of animal or plant; or
- a specified activity in relation to an animal or plant,

Part IV of the Act is titled “Animals and Plants”, and includes provisions for the listing, protection and management of threatened species, the protection of wildlife within parks and reserves, the management and sustainable use of wildlife, among others.

5.5 Regulation of activities in park or reserve under the *TPWC Act* and By Laws

The *TPWC Act* and the *Territory Parks and Wildlife Conservation By-Laws* together regulate activities in a Park or Reserve (other than mining or activities under a mining interest - see Section 5.5.3 below).

5.5.1 Offences under the *TPWC Act*

Within the boundaries of a Park or Reserve, it is an offence under the *TPWC Act* to:

- hunt, catch, restrain or kill an animal;
- sever, remove, damage or destroy a plant;
- harm, disturb, alter the behaviour of or otherwise affect the capacity of the animal or plant to perform its natural processes; or
- damage or destroy the habitat of the animal or plant.

UNLESS:

- the animal is a fish (see section 4.5.1 above)
- the plant or animal is part of a managed fishery under the *Fisheries Act* (see section 3.5.1 above); or
- the plant or animal is caught, taken or harvested under a licence or a permit granted under the *Fisheries Act* (see section 4.5.1 above);
- the Director of Parks and Wildlife has issued a permit under the *TPWC Act* allowing the activity⁵¹
- the actions taken are a continuation of an Aboriginal traditional use of the particular area of land or sea by Aboriginals who have traditionally used an area of land or water for hunting, food gathering (otherwise than for the purpose of sale) and for ceremonial and religious purposes⁵².

Maximum penalties for non compliance are set at \$55,000 or 10 years imprisonment for individuals and \$275,000 for a body corporate. These penalties are significantly higher where the animal or plant is listed as threatened⁵³.

5.5.2 Regulation through By Laws

The *TPWC Act* authorises the Parks and Wildlife Commission to make By-Laws for Parks and Reserves⁵⁴. The Commission cannot make by laws in respect of mining but can make by laws regulating a range of activities. For example, the By-Laws can:

- provide for the prohibition or the regulation of fishing, the use of firearms, the setting of traps in parks or on reserves or part of parks or reserves;
- provide for the prohibition or the regulation of the carrying of fishing equipment, firearms, ammunition and traps in parks or on reserves or part of parks or reserves;
- regulate or prohibit the pollution of water in a manner harmful to wildlife in parks, reserves or wilderness areas;
- provide opening times and closing times for parks and reserves;
- regulate or prohibit access to the whole or part of a park or reserve by persons or classes of persons;
- regulate the conduct of persons in parks and reserves;
- regulate or prohibit the taking into parks and reserves, and the use in parks and reserves, of weapons, traps, nets, snares, fishing apparatus and other devices;
- provide for the collection of specimens and the pursuit of research in parks and reserves for scientific purposes⁵⁵.

Where a park or reserve is under joint management, the Joint Management Partners may make By Laws for the park or reserve⁵⁶.

Unless specific By-Laws are enacted by the Parks and Wildlife Commission, the current *Territory Parks and Wildlife Conservation By-Laws* (TPWC By-Laws) will apply to a park or reserve⁵⁷. The current TPWC By - Laws apply to all parks and reserves in the NT extent that they are inconsistent with specific By Laws made by the Commission.

These By Laws, among other things:

- enable the Commission to prohibit access to part of a park or reserve if it believes that access to that part of the park or reserve will interfere with its protection and preservation (Max. Penalty for non-compliance \$1000)⁵⁸.
- enable the Commission to prohibit the use power boats or a class of power boats on an area of water in a park or reserve. (Max. Penalty for non-compliance \$500)⁵⁹.
- prohibit a person from possessing a firearm, speargun or other weapon, or a net or other trap in a park or reserve (Max. Penalty for non-compliance \$1000)⁶⁰.
- prohibit a person from damaging, injuring, destroying or otherwise interfering with wildlife that is an animal in a park or reserve unless they have obtained a permit from the park and Wildlife Commission, issued under By-Law 52 (Max. Penalty for non-compliance \$2000)⁶¹.
- enable the Commission to, either by notice in the Gazette or a clearly marked sign prohibit fishing in an area of water in a park or reserve. The notice or sign may specify the type of equipment for, or method of, fishing that is prohibited and the kinds of fish that shall not be taken in or from the area of water (Max. Penalty for non-compliance \$1000)⁶².

Clearly, in the context of Marine Protected Areas, the power of Commission to regulate fishing, and fishing equipment in a park or reserve potentially overlaps with regulation under the Fisheries Act. While there is scope under the *TPWC Act* and By-Laws to prohibit fishing, it is likely that the taking of fish in accordance with a licence granted under Fisheries Act would serve as a defence to any prosecution for breach of the prohibition.

5.5.3 Mining in parks, reserves and wilderness zones

The declaration of an area of land or sea as a park or reserve under the *TPWC Act* does not prevent the carrying out of the exploration for, or recovery or processing of, minerals under and in accordance with the conditions of a mining interest or the carrying out of an activity permitted by or under the *Mining Act*, *Petroleum Act* or the *Petroleum (Submerged Lands) Act* in relation to such a mining interest⁶³.

Rather, these latter Acts require the Minister for Mines when considering whether to grant a mining or petroleum interest, to either consider the opinion of the Minister for Parks and Wildlife, or attach conditions specified by the Minister for Parks to the grant (depending on the type of mining or petroleum interest).⁶⁴

Where a park or reserve is under joint management⁶⁵, the *TPWC Act* requires the Minister for Mines to request that the Parks Minister obtain the opinion of the joint management partners for the park or reserve about the proposed grant of a mining or petroleum interest and forward the opinion to the Mines Minister for consideration. Any opinion given may include recommendations about conditions for the protection of the environment to which the grant of the interest should be subject. If the Minister for Mines decides to grant the interest he or she must attach those conditions to the grant, provided he or she is satisfied that the conditions are appropriate measures for the protection of the environment⁶⁶.

Significantly, the mining and petroleum legislation does not incorporate the principles of Ecologically Sustainable Development; including the Precautionary Principle [see section 4.2.2]. Depending on the nature of activity applied for under the legislation, an assessment under the *Environmental Assessment Act* may be triggered. However, while the Minister for Mines must consider the resulting assessment and recommendations, he or she is not bound by legislation to follow the recommendations⁶⁷.

6 Fisheries Act

6.1 The Fisheries Act and Regulations

6.1.1 Overview

The Fisheries Act provides for, among other things, licensing of commercial fishing operations, the management of fisheries, and registration of fishing vessels. The central prohibition is provided under s10 of the Act which establishes an offence to take fish or aquatic life and carry out aquaculture without a licence. This prohibition does not apply to amateur fishing provided that limits (if any) relating to numbers, quantity, size, weight, methods, types and amounts of fishing gear, and periods of time (including closed and open seasons), set out by the Regulations..

The regulation of the possession and use of fishing gear, amateur fishing possession limits, specific commercial fisheries, aquaculture and the processing and sale of fish is provided by the Fisheries Regulations.

6.1.2 Ecologically Sustainable Development and the Fisheries Act

The Objectives of the Fisheries Act are:

- to manage the aquatic resources of the Territory in accordance with the principles of **ecologically sustainable development**, whether managing a single fish species or an ecosystem, to ensure the promotion of appropriate protection of fish and fish habitats;

- to maintain a stewardship of aquatic resources that promotes fairness, equity and access to aquatic resources by all stakeholder groups, including -
- indigenous people;
- commercial operators and aquaculture farmers;
- amateur fishers; and
- others with an interest in the aquatic resources of the Territory; and
- by means of a flexible approach to the management of aquatic resources and their habitats, to promote the optimum utilisation of aquatic resources to the benefit of the community⁶⁸.

Ecologically sustainable development is defined by the *Fisheries Act* to mean using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained and the total quality of life, now and in the future, can be increased. Notably, the Act doesn't specifically incorporate the principles of ESD discussed in section 4.3 above, in particular the precautionary principle.

While ESD is incorporated into the objectives, there is nothing within the Act imposing an obligation on the Director or Minister of Fisheries to take into consideration the principles of ESD when making decisions concerning Fishery Management Areas, or other decisions concerning the allocation and use of marine resources.

6.1.3 Threatened species of fish and aquatic life

Interestingly, the Fisheries Regulations specifically prohibit a person from taking, fish or aquatic life which is a protected species under the *TPWC Act*⁶⁹. As discussed in Section 4.5.2 above, all species of fish and certain aquatic life are excluded from the operation of the *TPWC Act*. There is a clear gap therefore between the *TPWC Act* and the Fisheries Act resulting in a dearth of legal mechanisms for the protection of threatened species of fish in the NT.

6.2 Fishery Management Areas

6.2.1 Declaration and Management of Fishery Management Areas

Existing aquatic reserves such as the Doctors Gully Aquatic reserve and the East Point Aquatic Reserve have been established under the Fisheries Act as Fishery Management Areas.

A Fishery Management Area is created when the Minister for Primary Industry and Fisheries publishes a notice in a Gazette declaring an area, place, or any waters to be a fishery management area⁷⁰.

After a Fishery Management Area is declared, it is a statutory requirement for the Director of Fisheries to prepare a draft plan for the whole or part of the management area⁷¹. The plan must be for the purpose of

conserving, enhancing, protecting, utilizing, and **managing** the fish and aquatic life resources of the Territory to -

- promote, develop and maintain commercial and amateur fishing;
- provide for optimum yields from a fishery and maintain the quality of the yield;
- ensure that the fisheries of the Territory are not endangered or overexploited;
- encourage tourist and scientific interest in fish and aquatic life; and/or
- ensure that the habitats of fish or aquatic life and the general environment is not detrimentally affected⁷².

The Act makes clear that the reference here to "managing" of fish and aquatic life resources allows for the relevant decision maker to declare a total prohibition against the taking of fish or aquatic life in all or part of a Fishery Management Area⁷³. A "no take" Fishery Management Area may therefore be created under the Fisheries Act, as envisaged by the Draft Strategy.

The Act lists a number of matters which the Director may include in the management plan⁷⁴. For example, the plan may:

- designate areas, within the fishery management area where, and the periods when, fishing for certain species of fish or aquatic life shall be prohibited or restricted, or permitted only by specified types of vessels or by specified methods or persons, or with specified types or quantities of fishing gear, or subject to such other conditions as may be specified;
- specify the species of fish that may or shall not be taken and/or the restrictions (if any) that apply in relation to the taking of any species of fish;
- provide for offences in respect of contravention of or non-compliance with a provision of the plan or a notice, requirement or direction given under the plan and provide for penalties as follows:
 - a penalty not exceeding \$20 000 for an offence;
 - a penalty not exceeding \$50 for each fish or item of aquatic life in excess of a specified limit;
 - a penalty not exceeding \$500 for each item of gear by which a specified limit in respect of the gear is exceeded.

A provision of a management plan for a Fisheries Management Area has the force of a regulation under the Act⁷⁵. This effectively means that activities in a Fishery Management Area are regulated by the Management Plan in much the same way as activities in a park or reserve under the TPWC Act are regulated by relevant By Laws.

6.2.2 Public participation in declaration of fishery management areas and their management

There is no mechanism under the Fisheries Act for public input at the stage of selection and declaration of a Fishery Management Area.

Public participation is provided for at the stage of drafting and considering the management plan for a Fishery Management Area in the following ways.

First, it is open to the Minister for Primary Industry and Fisheries to appoint an advisory committee for each management area to assist the Director in preparing a proposed management plan. The Committee may include members representing commercial, wholesaling, retailing, consumer, recreational and other interests in the area relating to fishing, fish or aquatic life⁷⁶. Presumably the reference “other interests” in the Act, allows the potential members of the Committee to include people representing scientific and conservation interests. Otherwise, the potential involvement in the Committee is narrow considering the intended use of fishery management areas as part of a system of MPAs in the NT.

Second, a draft plan must be submitted to the Minister, and, if the Minister agrees in principle with the proposed plan, the Minister **may** give public notice of the proposed plan and invite submissions on the plan within at least a month of the notice⁷⁷.

After considering any submissions received, the Minister may make such amendments to the plan as the Minister thinks fit, and, after advising any relevant advisory committee of any amendments and the reasons for them, may then approve it⁷⁸.

The procedures under the Fisheries Act for public participation in, and the consideration and adoption of a draft plan of management differ from those under the *TPWC Act* in the following ways:

- the requirement to give public notice and receive submissions on a draft plan of management is mandatory under the *TPWC Act* and only discretionary under the Fisheries Act;
- final approval of a management plan for a fishery management area under the Fisheries Act rests with the Minister, while final approval of a management plan for a park or reserve rests with the Legislative assembly⁷⁹.

6.2.3 Revocation of a Fishery Management Area and Amendments to a Fishery Management Plan

Unlike the *TPWC Act* [see section 4.2.4 above], there is no requirement under the *Fisheries Act* for the involvement of the Legislative Assembly in the revocation of a Fishery Management Area.

In order to amend a management plan for a Fishery Management Area, the Director of Fisheries must submit the proposed amendment to the Minister. If the Minister agrees in principle with the proposed amendment, the Minister may either approve the amendment, if it is a minor amendment, or give public notice of, and invite submissions on the proposed amendment. After considering submissions and advising the advisory committee referred to in section 5.2.2 above, the Minister may approve the amendment to the fishery management plan.

If an emergency occurs that the Minister believes has or will endanger stocks/species of fish or aquatic life in the management area The Minister can amend the fishery management plan without following these procedures. The amendment will last for a maximum of 180 days, after which it is automatically revoked⁸⁰.

6.2.4 Discussion

There are mechanisms under the *Fisheries Act* to declare “no take” MPAs or ‘no take’ zones within a broader multi-zoned MPA. However if the *Fisheries Act* is to be considered an appropriate vehicle for establishing ‘no take areas’ within the MPAs framework (which would be concerning to conservationists) the following issues will need to be addressed:

- (a) Inconsistency between *TPWC Act* and *Fisheries Act* in regards to the level of public participation required for declaration of MPAs as provision for public participation under the *TPWC Act* and *Fisheries Act* is inconsistent.
- (b) The revocation of a Fisheries Management Area does not require input of the legislative assembly as responsibility rests solely with the minister.

There is nothing within the *Fisheries Act* imposing an obligation on the Director or Minister of Fisheries to take into consideration the principles of ESD when making decisions concerning Fishery Management Areas, or other decisions concerning the allocation and use of marine resources.

7. Conclusion

MPAs present a unique challenge for protected area management based on their lack of clear borders, competing interests, and lack of clear scientific knowledge of all aspects of the marine environment. It does not appear that *Territory Parks and Wildlife Act* and the *Fisheries Act* were drafted with the specific challenges of MPAs in mind.

Current mechanisms for declaring and managing marine parks exist under this legislation, notwithstanding the overlaps and gaps identified in this paper. However the mechanisms do not exist within a broader framework which aims to achieve the conservation of biodiversity, the ecologically sustainable development of marine resources and management of protected areas at an ecosystem level. On this basis, the framework does not align with the aspirations goals and intended processes the Strategy. Too much is left to policy and not enough is incorporated into a clear legal framework. Given the often competing interests associated with MPAs, clear legislative intent is required. Absent objectives, there are also no benchmarks for performance. What is the basis for a measurement of success? Once again this is clearly the realm of policy.

Given the near pristine state of NT marine resources and increasing pressure of these resources and lack of scientific certainty is not a sufficient basis to lose momentum and establish a system of MPAs. The incorporation of the precautionary principle into governing legislation may be of assistance in this respect.

The issues raised in this discussion paper should not halt the progress of MPAs, but should rather encourage the government to proceed swiftly with its intended review of the *Territory Parks and Wildlife Act* and the *Fisheries Act*. Moreover these Acts should be reviewed together, firstly to address gaps and inconsistencies, and secondly with the specific goals, and challenges of MPAs in mind.

Finally, any legislative framework is only as good as the commitment given and resources allocated to its enforcement. Current penalties, including the threat of imprisonment, for illegal activities that undermine the intent and effectiveness of MPAs will act as a deterrent only if there is a reasonable expectation within the broader community that the laws will be enforced.

Appendix 1: Extract from NSW National Parks and Wildlife Act 1974

Section 2A Objects of Act

(1) The objects of this Act are as follows:

(a) the conservation of nature, including, but not limited to, the conservation of:

(i) habitat, ecosystems and ecosystem processes, and

(ii) biological diversity at the community, species and genetic levels, and

(iii) landforms of significance, including geological features and processes, and

(iv) landscapes and natural features of significance including wilderness and wild rivers,

(b) the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to:

(i) places, objects and features of significance to Aboriginal people, and

(ii) places of social value to the people of New South Wales, and

(iii) places of historic, architectural or scientific significance,

(c) fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation,

(d) providing for the management of land reserved under this Act in accordance with the management principles applicable for each type of reservation.

(2) The objects of this Act are to be achieved by applying the principles of ecologically sustainable development.

(3) In carrying out functions under this Act, the Minister, the Director-General and the Service are to give effect to the following:

(a) the objects of this Act,

(b) the public interest in the protection of the values for which land is reserved under this Act and the appropriate management of those lands.

8. References and Notations

¹ *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 20

² *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 10

³ Fisheries regulations could potentially be used to prohibit the taking of a particular species of fish, however this mechanism does not exist as part of a scheme whose objective is the management and protection of threatened species (as exists under the *TWPC Act*).

⁴ The MOU referred to in Note 6 below requires the Parks and Wildlife Commission and the Department of Primary Industry and Fisheries to jointly determine which species of fish/aquatic life are threatened. It goes on to provide that these species are to be declared and managed under the *TWPC Act*. However, refer to Section 4.4 of the report, there is no legal basis to declare threatened species of fish under the *TWPC Act*.

⁵ Document is entitled “Administrative and working arrangements between the Parks and Wildlife Commission of the Northern Territory and the Department of Primary Industry and Fisheries for the protection, management and sustainable use of Fish and Aquatic Wildlife” dated March 1999.

⁶ B.J. Haplen et al, *Science*, 319, 948 (2008)

⁷ ANZECC TFMPA, *Guidelines for Establishing the National Representative System of Marine Protected Areas* ANZECC Task Force on Marine Protected Areas (1998)

⁸ Ward et al, *Scientific Design and Implementation Principles for a Network of CAR marine Protected Areas in the Northern Territory* (2007)

⁹ *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 25

¹⁰ *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 25

¹¹ *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 7

¹² *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 20

¹³ *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 10

¹⁴ See section 12 *TWPC Act* See also definition of land in s9 and subsection 9(2). Note that the Territory legislative powers extend to “coastal waters” up to 3nm off shore – as a result of the *Commonwealth Coastal Settlement and the Commonwealth Coastal Waters (Northern Territory Title) Act 1980* *Coastal Waters (Northern Territory Powers) Act 1980*. This effectively defines the outer limits of a MPA declared under NT legislation.

¹⁵ s12(3) *TWPC Act*

¹⁶ s18(5) *TWPC Act*

¹⁷ s18(5)(a) *TWPC Act*

¹⁸ s18(5)(b) *TWPC Act*

¹⁹ S18(1) *TWPC Act*

²⁰ s18 (5) *TWPC Act*

²¹ (s18(s6)) *TWPC Act*

²² See s12(7) *TWPC Act*, s39 *Parks and Wildlife Conservation Act*, and s25AA(2) *TWPC Act*

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- ²³ (s12(b)) *TWPC Act*
- ²⁴ s17(6) *TWPC Act*
- ²⁵ s17(7) *TWPC Act*
- ²⁶ s17(7) *TWPC Act*
- ²⁷ s25 A *TWPC Act*
- ²⁸ s25 C *TWPC Act*
- ²⁹ s25F *TWPC Act*
- ³⁰ s14(1) *TWPC Act*
- ³¹ s14(2) *TWPC Act*
- ³² See sections 18 and 19 *TWPC Act*
- ³³ s20 *TWPC Act*
- ³⁴ s13 *TWPC Act*
- ³⁵ *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 20
- ³⁶ *DRAFT NT Marine Protected Areas Strategy_Working Draft (V.1.0)* – not for circulation outside NT MPA Advisory Committee pg 10
- ³⁷ Bates, G. *Environmental Law in Australia*, 2002 (5th Edition) pp 125-126
- ³⁸ Bates, G. *Environmental Law in Australia*, 2002 (5th Edition) p 127
- ³⁹ Bates, G. *Environmental Law in Australia*, 2002 (5th Edition) p 137
- ⁴⁰ s3 *Environment Protection and Biodiversity Conservation Act 1999*
- ⁴¹ s3A *Environment Protection and Biodiversity Conservation Act 1999*
- ⁴² A recent decision of the NSW Land and Environment Court explores the application of principles of ESD in different pieces of legislation, and circumstances where Courts have found consideration of such principles to be mandatory. See *Walker for the Minister for Planning [2007] NSWLEC 741*
- ⁴³ s18 *TWPC Act*
- ⁴⁴ s25AB *TWPC Act*
- ⁴⁵ This is a reference to Aboriginal community living areas. See the *Pastoral Land Act*
- ⁴⁶ s25AC *TWPC Act*
- ⁴⁷ The definitions of wildlife, animal and vertebrate under section 9 of the *TWPC Act* need to read together.
- ⁴⁸ Defined under the *Fisheries Act* to mean any species of plant or animal life (except species of birds) which, at any time of the life history of the species, must inhabit water, and includes the plant or *animal at any stage of its life history, and also includes any part of such plant or animal, but does not include fish*, or aquatic life declared by the Minister by notice in the Gazette to be aquatic life to which the Act does not apply (see section 4 *Fisheries Act*)
- ⁴⁹ Fisheries regulations could potentially be used to prohibit the taking of a particular species of fish, however this mechanism does not exist as part of a scheme whose objective is the management and protection of threatened species (as exists under the *TWPC Act*).
- ⁵⁰ See Garnett, Ainsworth and Carey; “Analysis of Northern Territory Legislation for the Protection of Threatened Species Report to WWF-Australia, Darwin, Northern Territory
- ⁵¹ S56 *TWPC Act*
- ⁵² s122. Note however that s 25AJ joint management plan for a joint management park or reserve may limit the right of Aboriginals to use the park or reserve (whether for hunting, food gathering or ceremonial or religious purposes) as properly recognised by section 122, but only to the extent necessary and reasonable for environmental or safety reasons.
- ⁵³ s66 *TWPC Act*
- ⁵⁴ s 71 *TWPC Act*
- ⁵⁵ s71 *TWPC Act*
- ⁵⁶ see s25AQ *TWPC Act*

⁵⁷ Note, based on drafting of By law 4 it appears that these will not apply to a joint management park or reserve unless the Joint Management Partners have adopted the By laws.

⁵⁸ By Law 6

⁵⁹ By Law 9

⁶⁰ By Law 14

⁶¹ By Law 17. The Power to make the TPWC By-Laws arises under s71 TWPC Act, which falls within Part VI of the Act (and not part IV of the Act This means that , strictly speaking, that while s27 has the effect of providing that it is not an offence against s66 of Act to catch, take or harvest *aquatic life* (as defined by the Fisheries Act) under a licence or a permit granted under the Fisheries Act, or to catch, take or harvest *aquatic life* that comprises a *managed fishery* under the Fisheries Act (see above) the same actions are likely to amount to a breach of By-Law 17.

⁶² By Law 21

⁶³ See section 17. There are also numerous references in the Act making clear regulation under the Act does not activities associated with mining and petroleum interests.

⁶⁴ see s176A Mining Act, s15 in Petroleum Act and s18A *Petroleum (Submerged Lands) Act*

⁶⁵ Sections 176A of the Mining Act and section 15 of the Petroleum Act do not apply in relation to the grant of a mining or petroleum interest in a joint management park or reserve (see s25AL TWPC Act)

⁶⁶ s25 AM TWPC Act

⁶⁷ See *Environment Assessment Act* and *Environmental Assessment Administrative Procedures*

⁶⁸ section 2A *Fisheries Act*

⁶⁹ Regulation 10 *Fisheries Regulations*

⁷⁰ s22 *Fisheries Act*

⁷¹ s23 *Fisheries Act*

⁷² s21 *Fisheries Act*

⁷³ ss21(2) *Fisheries Act*

⁷⁴ see s2five(2) and Schedule 2

⁷⁵ s27 *Fisheries Act*. Also note that, in the event of an inconsistency between a provision of an operative management plan (one that has been drafted by the Director and approved by the Minister) and the Regulations or a notice given under section 28, the provision of the plan shall prevail to the extent of the inconsistency.

⁷⁶ s24 *Fisheries Act*

⁷⁷ s25 *Fisheries Act*

⁷⁸ s25 *Fisheries Act*

⁷⁹ see s25 of *Fisheries Act* and section 18 and 19 of the *TWPC Act* Final approval for a plan for management under the TWPC Act rests with the legislative assembly in that the legislative assembly can disallow a plan of management, in which case the Parks and Wildlife Commission or Joint Management Partners must redraft the plan.

⁸⁰ s25A *Fisheries Act*