Environmental Defenders Office

2 December 2019

Mr Stuart Wright
Inquiry Secretary
Parliament House
HOBART TAS 7000

By email: *finfish@parliament.tas.gov.au*

Dear Mr Wright

Submission to Legislative Council Inquiry into Finfish Farming in Tasmania

The Environmental Defenders Office (Tasmania) Inc* (EDO) is a non-profit, community based legal service specialising in using the law to protect the environment. We have a long-standing interest in best practice assessment and regulation of finfish aquaculture and welcome this Inquiry.

I refer to my letter of 29 November 2019, in which I requested an extension of time for the making of a late submission to the Inquiry. I repeat the request that this submission be considered and an extension granted for the reasons set out in that correspondence.

This submission to the Inquiry relates to all three terms of reference, and the overarching question of the "planning, assessment, operation and regulation of finfish farming". Given our expertise, this submission will focus on the assessment and regulation of finfish farming principally referencing those matters in the terms of reference at 2(a), 2(c) and 3. We do so broadly, rather than explicitly responding to the terms of reference as drafted and trust this is acceptable to the Committee.

To assist the Committee, our submission provides an outline of the current regulatory framework for marine farming, identified a model of best practice aquaculture regulation and a detailed analysis of the regulation of the finfish farming industry against best practice environmental regulation.

While the 2017 reforms allocating some responsibility for environmental regulation of finfish farming to the Tasmanian Environment Protection Authority (EPA) have improved some aspects of finfish farming regulation, there remain substantive concerns about the transparency and consistency of decision-making, with consequences for environmental and community outcomes.

The key issues that we have identified in this submission

1. The lack of clear legislative criteria for decision-makers, in particular, under the legislation under which approvals are granted, being the *Marine Farming Planning Act 1995* and the *Environmental Management and Pollution Control Act 1994*;

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2. Governance issues, in particular, the perceived overlap of regulatory and industry development functions of decision-makers;
3. The limits of spatial planning in identifying both suitable environmental locations for marine farming and "no go" areas, particularly the lack of baseline data to underpin such decisions;
4. The need for integrated assessment processes to reduce duplication and complexity, and facilitate comprehensive and integrated assessments;
5. The need for a focus on evidence-based environmental assessment and avoiding an over-reliance on adaptive management;
6. The need for greater access to information, through routine disclosure, publication of scientific studies, baseline and monitoring data and ability to access decision-makers to facilitate independent scrutiny of this data;
7. The limits to meaningful public participation of marine-farming decision-making, including the lack of access to independent review of decisions;
8. The need for rigorous, consistent and transparent monitoring and enforcement.

There are numerous practical steps that could and should be taken now to improve the transparency and scientific rigour of finfish farming planning, assessment and regulatory processes. To this end, we make a series of substantive recommendations at the end of this submission.

The implementation of our recommendations are aimed at enabling Tasmania to better achieve a truly sustainable finfish farming industry, in a transparent and open manner, with better environmental outcomes for our waterways and marine areas, and consequential improved community (and consumer) confidence that environmental and social impacts are being appropriately managed.

EDO has made a number of previous, detailed submissions to similar inquiries at a Commonwealth level focussing on regulation of aquaculture operations in Tasmania. We attach a copy of our submissions to:

- the Senate Committee Inquiry into the Regulation of Fin Fish Aquaculture in Tasmania (2015);
- the draft *Finfish Farming Environmental Regulation Bill 2017 (Tas)* (2017);
- the draft Salmon Growth Plan (2017);
- the draft *Environmental Legislation (Miscellaneous Amendments) Bill 2019*.

Despite there being some reform of State marine farming laws since the Senate Inquiry submissions was made, and the 2017 Bill has now been enacted, these submissions provide a detailed overview of our approach to the regulation of finfish farming in Tasmania, and its continued inadequacies.

Thank you for the opportunity to make this submission and we trust that this submission lends weight to our requested extension of time. We welcome the opportunity to appear at any public hearing held by Committee in relation to this Inquiry.

Yours sincerely
Environmental Defenders Office*
Per:

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CEO and Principal Lawyer

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Tasmania's salmon industry

Tasmania's salmon farming industry has rapidly expanded since it was first established in the mid-1990s. In the ten years to 2013-14, production of farmed salmon in Tasmania increased by 151 per cent in volume terms and 194 per cent in value terms.[i] The industry now supplies more than 55,000 tonnes of salmon, largely to the domestic market[ii], and has an estimated gross annual value of over $620 million dollars.

Despite the salmon industry's economic success, its expansion has not been without controversy. Concerns have been raised about habitat modification (including for listed threatened species), marine floor degradation, reduced water quality, pests and disease, and algal blooms. Communities and landholders adjacent to marine farming leases report reduced amenity resulting from noise, light, and marine debris from the fish farms, while yacht clubs are concerned about marine farm debris and infrastructure causing navigation hazards. Onshore, concerns are being raised about the impacts of salmon hatcheries on adjacent waterways, odours from fish processing plants, and the use of precious freshwater resources for salmon disease prevention.

The Tasmanian government often claims that regulation of salmon farming in Tasmania is "world's best practice". However, the scientific reports demonstrating the adverse impacts of salmon operations in Macquarie Harbour challenge the view that the industry is meeting community expectations and satisfying the sustainability objectives of the managing legislation.

The proposed expansion of salmon farming along both the east and north coasts, together with the promotion of the relocation of leases offshore through the *Sustainable Industry Growth Plan for the Salmon Industry*, highlights the need to review the current planning and assessment framework to ensure the impacts of proposed salmon farming activities can be identified early, avoided and managed.

Best practice regulation

There is no single approach to regulating salmon farming – each of the jurisdictions in which the industry operates adopts a different approach, making it difficult to identify what "best practice" requires. In its 2004 report, *Assessing Environmental Regulatory Arrangements for Aquaculture*, the Productivity Commission identified the following key features of an effective regulatory framework:

- clear legislative objectives to promote certainty and consistency in setting the parameters of the legislation and in guiding ministers, government agencies and others in interpreting and applying the legislation;
- separate agencies for industry development and regulation to remove potential conflicts of interest and improve public confidence in environmental protection, resource planning, allocation, approvals and enforcement;[iii]
- the use of a spatial planning regime for marine aquaculture to designate aquaculture development zones in suitable environmental locations;
- a land use planning system that recognises and provides for land-based aquaculture and provides guidance to local government planning arrangements;
- the effective provision of tenure to public waters and land to provide adequate security to meet the needs of different lease categories and uses;
- the use of environmental risk assessment processes to guide decision-making based on the species, production system, site location, management practices and the condition of the local environment (such as the quality and assimilative capacity of the receiving waters);
- a limited approvals process to minimise the number of different individual approvals required for an aquaculture development, ideally by having one approval for aquaculture operations and one for environmental management.[iv]

The Senate Environment and Communications References Committee 2015 Inquiry into Tasmania's finfish regulation also recommended that transparency was important to community confidence, including by recommending that there be a "greater provision of environmental information and access to data" by DPIPWE.[v] Finally, the objectives of the *Marine Farming Planning Act 1995* include taking account of "the community's right to have an interest" in marine farming activities.

Having regard to these findings and objectives, this submission assesses Tasmania's current marine farming laws against the following criteria:

1. Clear legislative criteria for decision-makers;
2. Independence of decision-makers responsible for industry regulation and separation from industry promotion and development;
3. Identification and security of suitable environmental locations for salmon farms;
4. Integrated assessments – reducing duplication and facilitating comprehensive and integrated assessments;
5. Evidence-based environmental assessment;
6. Access to information;
7. Meaningful public participation including access to independent review of decisions;
8. Rigorous, consistent and transparent monitoring and enforcement

This submission highlights key areas for reform to ensure that the laws governing salmon farming are effective in securing a well-planned and sustainable industry.

How are salmon farms currently regulated?

Marine farming in Tasmania's state waters is principally[vi] regulated under the following Acts:

- *Marine Farming Planning Act 1995* (***MFP Act***);
- *Living Marine Resources Management Act 1995* (***LMRM Act***); and
- *Environmental Management and Pollution Control Act 1994* (***EMPC Act***).

The procedures for planning and approving activities are explained briefly below.

Land-based marine farming aquaculture facilities, including jetties, landing and loading areas, hatcheries, storage and processing facilities, are subject to the *Land Use Planning and Approvals Act 1993* (***LUPA Act***). Applications are determined by local councils, following an assessment against the relevant planning scheme. Depending on the size and location of a proposed development, this process will generally involve public notification and representation rights. The grant of any discretionary permit by a Council may be subject to merits appeal to the Resource Management and Planning Appeal Tribunal.

In contrast, marine farms in State waters are explicitly excluded from the operation of planning schemes. Such proposals and assessed primarily under the MFP Act, LMRM Act and EMPC Act.[vii]

There are now two different licences that marine salmon farms require before they can operate: a marine farming licence issued by the Minister under the LMRM Act, and an environmental licence issued under the EMPC Act. Applications for licences under the LMRM Act are assessed by the Marine Farming Branch of Department of Primary Industries Parks, Water and the Environment (***DPIPWE***). They are not subject to any transparent or public assessment process. They

In terms of regulation and enforcement, the Secretary and Marine Farming Branch of DPIPWE was historically responsible for both planning for and regulating the salmon farming industry. Since July 2016, the EPA has had responsibility for the environmental regulation of the industry – first through delegation, and then through the implementations of amendments to the EMPC Act. The EPA now is responsible for monitoring and enforcing the environmental performance of salmon farms against conditions of their environmental licences, marine farming licences, and the management controls of Marine Farming Development Plans (***MFD Plans***).

Where non-compliances with the requirements are detected, the EPA has powers to take enforcement action against the operator, for example by issuing fines or taking prosecution.

Player	Description of Role	Planning	Permitting	Monitoring	Regulation & Enforcement	Research & development
Minister for Primary Industries	The Minister is currently responsible for both the promotion and regulation of the salmon farming industry. After considering the advice of the Panel on a draft MFD Plan, it is up to the Minister to decide where salmon farms should be located and how they should be regulated. The Minister also decides applications for leases and licences by salmon farm operators.	x	x		x	
Marine Farming Development Panel	The Panel consists of eight members with marine farming, fishing, planning and local government experience, appointed by the Governor for a period of five years. The Panel is responsible for assessing draft MFD Plans, and making recommendations to the Minister about whether they should be made. The Panel also provides advice to the Minister if requested.	x				
Board of Advice and Reference (MFP Act)	The Board of Advice and Reference consists of three persons (including a lawyer, a business person and a person with experience in marine farming) appointed by the Minister who are responsible for providing advice to the Minister on such matters as the criteria for and assessment of applications for the allocation of leases.		x			
DPIPWE, Marine Farming Branch	The Marine Farming Branch has the widest responsibilities of any player. It is responsible for the preparation of draft MFD Plans, preparing information for the Minister, the regulation of non-environmental aspects of salmon farming, and the promotion and development of the industry.	x		x	x	x
EPA Director	The EPA Director provides direction to the Panel and has responsibility for the environmental regulation and enforcement for salmon farms under the *Environmental Management and Pollution Control Act 1994* (EMPCA). The Director is also responsible for undertaking the assessment of some (but not all) finfish marine farms, hatcheries and fish-processing plants that are 'environmental licence' activities.	x	x	x	x	
EPA Board	The EPA Board is responsible for assessing some (but not all) finfish marine farms, hatcheries and fish-processing plants that are 'environmental licence' activities under EMPCA.		x	x		
EPA Salmon Farming Unit	Responsible for environmental regulation and enforcement for salmon farms and hatcheries.			x	x	
Local Councils	Responsible for planning for and permitting land-based marine farming activities, including onshore facilities, hatcheries and fish processing plants.	x			x	
Leaseholders	Responsible for applying for MFD Plans (including preparation of EIS), monitoring of compliance with conditions and contributing towards research and development.	x		x		x

IMAS & CSIRO	Principally responsible for research and development. May also be engaged to assist with monitoring of compliance and providing advice to DPIPWE and EPA.			**x**		**x**

Marine Farming Development Plans

Areas of Tasmania's coastal waters are set aside as zones under Marine Farming Development Plans (***MFD Plans***). In each designated zone, marine farming activities are permitted and regulated in accordance with management controls specific to the plan area.

Draft MFD Plans (or draft amendments) for salmon farms are prepared by either DPIPWE or the salmon farming company itself. Draft plans, or amendments[viii], must be accompanied by an environmental impact statement (***EIS***), appropriate to the scale of the likely impacts and public interest in the proposed activities. Unless there is "a reason for confidentiality", the EIS must disclose the information that it has relied upon.

Management controls in draft MFD Plans may include a range of rules to minimise and manage adverse effects of the marine farming activities, such as:

- restrictions on the types of marine farming activities that may take place in the area (for example, the types of fish that may be farmed, or the year classes that will be permitted);
- environmental baseline studies that must be undertaken by a lease holder;
- maximum nutrient output and biomass;
- water quality indicators and thresholds;
- restrictions on noise and light emissions; or
- size and location of structures within a marine farming zone.

It is noteworthy that, currently, no MFD Plans actually impose restrictions on maximum nutrient output (referred to as Total Permissible Dissolved Nitrogen Output), or total biomass (total quantity of fish that may be stocked). This is despite the fact that the EISs for the MFD Plans assess/model impacts based on an identified maximum nutrient output and biomass.

Draft MFD Plans, and most amendments to MFD Plans, will be publicly notified, and submissions to the Marine Farming Planning Review Panel (***Panel***) will be invited. The Panel may, but is not required to, hold hearings in relation to a draft MFD Plan or amendment. These hearings may or may not be open to the public.[ix]

While the Panel has the power to reject a draft MFD Plan, once it has determined that a MFD Plan is "acceptable" and contains any matters relating to environmental management required by the EPA Director, the Panel must make a recommendation to the Minister that the draft MFD Plan be approved. The Minister then has the power to either approve or refuse a draft MFD Plan. The Minister has the power to approve amendments to existing MFD Plans irrespective of whether the Panel has recommended that the amendment be rejected.

MFD Plans are required to be reviewed at least once every 10 years.

Marine farm leases and allocations

Once a MFD Plan has been approved, the Minister consults with the Board about how lease areas designated in the plan are to be allocated. Applications for marine farming leases are referred to the Board, who will advise Minister if the applicant has the necessary technical and financial resources, and if the proposed lease allocation is consistent with the approved plan. After considering the Board's advice, the Minister may grant a lease on any conditions or restrictions the Minister determines.

There is no public notification of the allocation, grant, renewal or variation of leases under the Act and rights of appeal are extremely limited.

Temporary, emergency leases may be granted for up to 12 months where the original lease area becomes unavailable due to "a situation affecting water quality" or where fish are "substantially affected" by pollution, pests or diseases.[x]

Marine farming licences

The LMRM Act regulates marine farming, and fisheries more generally, in Tasmania.

Once a lease has been granted, the lessee can apply to the Minister for a marine farming licence to carry out marine farming in State waters, or to operate a hatchery for release of fish into State waters. The licence can include specific conditions relating to environmental management. There is no requirement for licence applications to be publicly advertised, and appeal rights are limited.

Salmon farming cannot occur unless both a lease and a licence have been granted for the activity. A marine farming licence is automatically terminated if the licensee ceases to hold a marine farming lease.[xi]

Environmental licences

All proposals involving "finfish farming" (which is presently broadly defined as "the farming, culturing, hatching, rearing, ranching, enhancement, or breeding, of finfish" or any activities associated with, and for the purposes of, those activities), require an environmental licence issued by the Environment Protection Authority (**EPA**).

Unlike all other "level 2" activities regulated by the EPA under the EMPC Act, there is no guarantee that a finfish farming activity will be subject to a transparent and public assessment process conducted by the EPA Board.

As the EMPC Act is presently drafted, the EPA Director has some discretion as to whether to refer an application for an environmental licence to the EPA Board. Before determining whether a particular application must be referred by the EPA Director to the EPA Board for assessment, the following questions must be answered:

- Is the application is an emergency application?
- Is the hatchery/farm on land?
- If the farm in state waters, will it operate under a MFD Plan?
- If there is a MFD Plan, was the Plan assessed by the Panel over 2 years ago, and were there considerations that the Panel failed to have regard to?
- If there is a MFD Plan, is it greater than 10 years old?
- Is there a lot of public interest in relation to the proposal?
- Is it likely that the proposal will require an EPBC approval?
- Is the proposal to increase the biomass or nitrogen by more that 10% than the caps imposed under the MFDP?

The public is not able to make a formal representation in relation an application assessed by the EPA Director, instead of the EPA Board. There are no third-party appeal rights relating to any environmental licence granted to finfish farm by the EPA Director.

There are no criteria for a decision by either the EPA Board or EPA Director to grant an environmental licence.

How does the current system measure up?

1. Need for clear criteria for decision makers

Across the board, the legislation governing decision-making lacks clear and specific criteria to guide decision-making – whether this be decisions made by the MFD Panel, the Resources Minister, the EPA Director or the EPA Board.

The lack of criteria means that decisions made in respect of fin-fish farming are entirely discretionary. The consequence of this is that decision-making is opaque, there lacks the transparency and certainty needed to give the community confidence about how decision-making weighs economic, environmental and social considerations.

(a) MFP Act

There are no criteria legislated in the MFP Act on when the impacts identified in an Environmental Impact Statement (**EIS**) will be acceptable, what level of scientific certainty is required about potential adverse environmental impacts, or the extent to which economic, social or amenity issues will be considered.[xii]

There are criteria about what a draft MFD Plan must do (s21(1) of the MFP Act) and must contain draft "management controls" to "satisfactorily manage and mitigate negative effect of the draft plan" (s24(1) & (2) of the MFP Act). A draft Plan must be prepared with an EIS which:

- Discloses any available information relating to the environmental impact of the draft plan, except if there is a reason for confidentiality;
- Contains any matter relating to environmental management required by a s17A(1) notice issued by the EPA Director;
- Contain any information appropriate to the significance of the draft plan…to the environment and likely public interest.

However, the Panel is not required to take into account or be satisfied that a draft plan in fact complies with s21(1) or s24 of the MFP Act. It is not required to assess whether the draft Plan against any statutory criteria.

Section 31 of the MFP Act merely requires the Panel to recommend to the Minister that a draft MFD Plan be approved if satisfied it is "acceptable":

> *The Panel must recommend to the Minister that the draft plan be approved if satisfied that –*
>
> *(a) the draft plan including any modification to the plan is acceptable; and*
>
> *(b) the draft plan contains any matter relating to environmental management of finfish farming that the Director, EPA, in a notice under section 17A(1), requires the Panel to include in the draft plan or any draft plan.*

We note that the Director's power to issue a s17A(1) notice is discretionary, and we are not aware of any such notices being issued. If it is the intention of the legislation to delegate the assessment of environmental management to the EPA Director, the better approach would be to mandate the issue of a s17A(1) notice.

This would ensure that any MFD Plan contained environmental management controls required by the EPA Director, and would be beneficial for industry consistency, proper spatial planning

The preparation of a marine farming development plan is a spatial planning tool for marine areas, much like a planning scheme for land areas. The process for approval of a draft plan in some ways mirrors that of a planning scheme or amendment to a planning scheme in that the Minister approves the initiation of a MFD plan, the draft plan has criteria it must meet, the draft plan is approved by the Panel for public exhibition, the Panel's role is to consider representations made, hold hearings and recommend any modifications to a draft plan.

However, in approving a planning scheme amendment, there are legislated criteria in the *Land Use Planning and Approvals Act 1993* (LUPA Act) that guide the Planning Commission's decision-making. The Planning Commission must be of the opinion that the amendment:

- must, as far as practicable, avoid the potential for land use conflicts with use and development permissible under the planning scheme applying to the adjacent area;[xiii] and
- must have regard to the impact that the use and development permissible under the amendment will have on the use and development of the region as an entity in environmental, economic and social terms.[xiv]
- That the amendment is as far as is practicable, consistent with the regional land use strategy, if any, for the regional area in which is situated the land to which the scheme applies.[xv]

In addition, the Commission, in giving approval to an amendment, must in its opinion:

> *(a) seek to further the objectives set out in Schedule 1 within the area covered by the scheme; and*
>
> *(b) prepare the scheme in accordance with State Policies made under section 11 of the State Policies and Projects Act 1993; and*

...

(d) have regard to the strategic plan of a council referred to in Division 2 of Part 7 of the Local Government Act 1993 as adopted by the council at the time the planning scheme is prepared; and

(e) have regard to the safety requirements set out in the standards prescribed under the Gas Pipelines Act 2000.

By contrast, the MFP Act is unclear as to what it requires. While there are criteria for the preparation of a draft plan[xvi] and a broad statement that "any person performing a function or power under the Act" must do so "in a manner which furthers the resource management objectives", neither the Panel nor Minister are explicitly required to assess a draft plan or amendment against any criteria.

Each is only required to consider whether the draft plan is "acceptable" and whether it contains the matters prescribed in a s17A(1) notice issued by the EPA Director, if any. In practice, the Panel has assessed a draft plan against the criteria in section 21 of the Act.[xvii] However, it is not clearly stated as a legislative requirement on the Panel, and the Minister who ultimately approves a MFD Plan is under no such obligation.

This means that the decisions made by the Minister under the MFP Act are entirely discretionary, and there is uncertainty about how decision are made by the Panel. The lack of objective criteria can result in a lack in consistency in how the Panel approaches its decision-making function, and may change over time, depending on the constitution of the Panel instead of than legislative criteria. In the case of the Minister, there is no transparency over how decisions are made in the absence of such criteria.

This is particularly important when there is no right to review these decisions through appeal rights to an independent decision-maker such as the Resource Management and Planning Appeal Tribunal, and where spatial planning sets the expectation of approving salmon farming leases and licences in these areas and has implications for what environmental licences are publicly advertised.

Further, the MFP Act provides no guidance about how to balancing competing economic, social and environmental considerations, which can lead to economic considerations being weighed against environmental ones. Clear criteria for decision-making, for instance, about whether marine farming development plans in an area should be approved should be legislated and should reflect the environmental values of an area, and the impacts or potential impacts on those values.

(b) Environmental licences under the EMPC Act

The same criticisms can be made about when the EPA Board or Director may issue an environmental licence or variation under the EMPC Act. The Director or Board can "grant to a person an environmental licence in relation to an activity if ... satisfied that it is appropriate to do so".[xviii]

There are no legislative criteria about when it will be "appropriate" to issue a licence. While there are general environmental duties under the Act, those duties are not explicitly called up by the legislation. Discretion is "at large", with resulting consequences for consistent and transparent decision-making.

Further, the lack of legislative criteria defeats the purposes of public participation, including effective options for legal redress.

We recommend that the legislation include clear criteria for decision-making as to whether an environmental licence should be issued, including any relevant MFD Plan and its management controls, an environment impact assessment submitted with the application, water quality objectives, and the precautionary principle to scientific uncertainty.

(c) Lack of scientific certainty and adaptive management

Decision-making under the MFP Act is underpinned by the objectives of the resource management and planning system, specified in Schedule 1 to the MFP Act. Those objects are:

(a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and

(b) to provide for the fair, orderly and sustainable use and development of air, land and water; and

(c) to encourage public involvement in resource management and planning; and

(d) to facilitate economic development in accordance with the objectives set out in paragraphs (a), (b) and (c); and

(e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.

Sustainable development is defined in Schedule 1 as:

***sustainable development** 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 well-being 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.

Part of the function of sustainable development is to take a precautionary approach in the face of scientific uncertainty. It has been observed that 'the precautionary principle has its origins in the "common folk wisdom that 'it is better to be safe than sorry' and 'an ounce of prevention is worth a pound of cure"".[xix]

The precautionary principle is explicitly adopted in the EMPC Act and the MFP Act, as one of the Part 2 objectives of the RMP System which underpin that legislation.[xx]

In an article on the application of the precautionary principle in Tasmania, His Honour Justice Estcourt of the Tasmanian Supreme Court cites the judicial decision about a mobile phone tower in *Telstra Corporation Ltd v Hornsby Shire Council* as the leading case on this principle, observing that it is "widely regarded as containing the most extensive judicial analysis of the principle of ESD and the precautionary principle in Australia".[xxi] He identifies the following as the "fundamental conclusion" from that case:[xxii]

> *The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.*

The application of the precautionary principle has much relevance in the planning, assessment and operation of the marine farming industry.

The Panel has adopted what it describes as an "adaptive management" approach to assessments of MFD Plans and EIS, in place of regulatory controls. For example, adaptive management was explicitly endorsed in the Panel's assessment of the draft MFD Plan for Macquarie Harbour (see Box 2).

This concept is not derived from marine farming legislation, nor is it otherwise defined. "Adaptive management" broadly is an environmental management tool that derives from academic literature, however what it means and how it is implemented can vary and is complex. It has been described as an "intuitive" approach, one that is "not always fully understood" and that "remains an ideal".[xxiii]

Adaptive management is therefore only as good as its implementation. It is generally acknowledged that effective environmental management through an adaptive management process must involve each of the following:[xxiv]

- Setting of clear objectives and measurable performance indicators for management;
- Specifying multiple management options
- Hypothesising how the system under management will respond to management interventions;
- Implementing management action(s);
- Monitoring the system response to see if it supports the hypothesis of otherwise;
- Based on the analysis results, refining and adjusting management practice.

Baseline data and monitoring of the system's change under management is critical to good adaptive management. "And without ongoing processes of monitoring and evaluation, there is no adaptive management."

Key environmental indicators must be identified up-front, baseline data of those indicators gathered, and monitoring against the system under management undertaken. In our opinion, this requires explicit triggers at which point management actions must be taken. For instance, once thresholds set in performance indicators are met or exceeded, this triggers identified management options to be introduced, action taken to enforce identified management responses, and monitoring to see if the management response is producing the desired effect. It also requires the flexibility to refine and adjust the management practice.

Simply adopting a practice of "adaptive management" without each of these steps is not sufficient. "Adaptive management" should not be used to compensate for a lack of baseline data or regulatory controls through MFD Plans or environmental licences.

We are concerned that "adaptive management" has been relied on to such an extent in salmon farming regulation, that it has justified decisions that have the potential to cause serious or irreversible damage to environmental values in the absence of scientific uncertainty.

In practice in Tasmania, the term "adaptive management" has been relied upon in the absence of scientific information, as a justification for proceeding with marine farming, but without the rigour ordinarily applied in adaptive management. For instance, there is a lack of scientific certainty as to the impacts of marine farming to threatened species such as the critically endangered Spotted Hand Fish *Brachionichthys hirsutus* and the Maugean Skate *Zearaja maugeana*, however a precautionary approach has not been adopted in favour of "adaptive management". Further, there is a connection between repeated failures to set biomass and nitrogen caps and the reliance on adaptive management. This is discussed in more detail in "Evidence-based Decisions" below.

The problem with reliance on adaptive management as an assessment tool is that, once approvals are issued, operators have a real and genuine expectation of being able to act in reliance on those approvals. It is only at the early stages of planning and assessment that an assessment of environmental impacts can be undertaken and, with respect to MFD Plans, decisions about whether an area should be subject to marine farming occurs or, with respect to the EMPCA, whether an environmental licence ought to be issued for that activity.

Once a Plan is approved or approvals issued, it is hard to "turn back". The evidence of this can be seen in our Macquarie Harbour case study below, where biomass limits were set too high, resulting in untenable environmental conditions and conditions for other leaseholders in the area. While the EPA Director reduced the biomass limit, it had to be in a staged way and with special ad hoc approval of waste management measures, in order to accommodate Tassal's planned expansion. This only evidences the need to get it right at the assessment stage.

The approach taken to adaptive management specifically eschews the precautionary approach. We recommend that the legislation require decision-makers to adopt a precautionary approach to scientific uncertainty particularly in the planning and assessment stages, consistent with the objectives of the RMP System.

(d) Biomass and nitrogen caps

While the MFP Act states that MFD Plans may provide for total nitrogen output and biomass caps, there is no clear guidance of how this is to be implemented. Currently, MFD Plans include provisions providing the EPA Director with complete discretion to set such limits.

For instance, in the *Storm Bay Off Trumpter Bay North Bruny Island Marine Farming Development Plan 2018* (Storm Bay North MFD Plan), the controls for dissolved nitrogen include:

> *3.2.1* *The Director, EPA may, from time to time, determine the total permissible dissolved nitrogen output, within specified periods, attributable to marine farming operations within a specified area covered by this Plan.*
>
> ...
>
> *3.2.3* *For the purpose of assessing quantities of dissolved nitrogen output attributable to Licenced finfish farming, the Director, EPA may use any method that the Director, EPA is satisfied delivers a proper measure of total dissolved nitrogen output from finfish farming.*

And similarly for biomass:

3.3.5 *The Director, EPA may from time to time, using whatever information the Director, EPA considers appropriate, determine the maximum permissible biomass (tonnes per hectare) of finfish that may be stocked within the area covered by this plan or any other specified area within the plan area.*

There is no guidance on, or limits for the exercise of these powers by the Director, EPA, notwithstanding that the decisions are critically important when it comes to the management of environmental impacts of salmon farming on the environment. It was biomass limits that played the key role in the environmental catastrophe that occurred in Macquarie Harbour in 2015, and yet, the most recent MFD Plan leaves a complete discretion to the EPA Director as to how biomass limits are to be imposed.

These two factors should be mandatory in all MFD Plans, as they have consequences for the licencing of marine farming and are the two factors that will most influence environmental outcomes from marine farming footprints.

(e) Compensation payable

Section 22(1) of the MFP Act states that a draft plan "prevent the use of any water within a lease" unless compensation is paid or an alternative lease area is agreed upon between the lessee and the Minister. Section 22(1) states:

(1) A draft marine farming development plan must not prevent the use of any water within a lease area unless the lessee and the Minister agree –
(a) to compensation; or

(b) to an alternative lease area.

This provision means in effect that a lessee has an expectation to farm a leased area to the limits of that area and that, if any contrary decision is made through a MFD Plan then there will be financial implications for the government. From a regulatory perspective, our opinion is that this must have a chilling effect on regulation of the salmon farming. It may in fact be the reason why MFD Plans do not set biomass limits.

A similar provision is found in the *Nature Conservation Act 2002* for compensation in the forest practices regulation. That is, if a forest practices plan is refused or modified under the *Forest Practices Act 1985* due to environmental considerations, compensation will be payable by the government. The logical consequence of this provision is that the Forest Practices Authority must hesitate before prioritising environmental considerations in forest practices plan decision-making, conscious of the compensation consequences that might flow from such a decision. The same can be said of s22(1) of the MFP Act in relation to marine farming.

2. Separation of governance arrangements for industry development and regulation

Strong decision-making requires independence as between the regulator and promoter of an industry. That is one reason why we support the role of the Tasmanian EPA as regulator of finfish farming, with some caveats outlined below.

However, in relation to spatial planning and issuing of leases, these functions are both performed by the Minister for Primary Industries. It is true that in relation to spatial assessment, the Minister is advised by the MFD Panel, albeit with no obligation to act on the advice and recommendations of the Panel.

Further, the composition of the MFD Panel is cause for concern, with no requirement to represent the community or expertise in ecological disciplines.

(a) MFD Panel

The Panel responsible for assessing salmon farm proposals and setting the management controls for marine farming activities. Section 8(2) of the Act requires the Panel comprise eight people, constituted as follows:

(a) one is the chairperson of the Panel; and
(b) one is a person nominated by the chairperson of the Tasmanian Planning Commission with ability and experience in planning issues; and
(c) one is a person, other than the Director, EPA, with ability and experience in environmental management; and

(ca) one is a person, other than the Director, EPA, with ability and expertise in fish health and biosecurity; and

(d) one is a person with ability in marine resource management; and

(e) one is a person with ability to assess boating, recreational and navigational issues; and

(f) one is a person with experience in marine farming; and
(fa) one is a person with expertise in local government issues; and
(g) one is a person nominated by the Minister.

Notably, while nominees under s.8(a), (c), (ca), (d), (f) and (g) could have relevant scientific expertise, there is no explicit requirement for the Panel to include a member with qualifications in relation to marine ecology, hydrology, marine sediments or conservation management. Other than s.8(g), there is also no capacity for community concerns to be represented (e.g. residents concerned regarding nuisance impacts from marine farming).

It would also seem sensible, given the responsibility for regulation and consequences for enforcement, that one member is a legal member, which would better ensure that management measures specified in MFD Plans are the controls are enforceable, meet the requirements of s22 of the Act and are consistent with the objectives of the MFP Act, and who would have a greater capacity to recognise issues of conflict of interest and good governance. However, this is of lesser importance that the community and ecological membership.

We recommend that the membership include:

- One or more members with qualifications in marine ecology, hydrology and marine sediments and conservation management;
- A community representative; and
- A legal member.

The current composition means that the quorum has the potential to be weighted towards industry members rather than community or scientific expert members. For instance, there is no requirement that, in the absence of members "with ability and experience in environmental management" or "expertise in fish health and biosecurity", decisions should not continue to be made, or for any such members to be part of the quorum that makes a decision on whether or not to recommend approval of a MFD Plan or an amendment to a MFD Plan. However, these are the critical decisions that are being made by the Panel and it is only these members that have the expertise and experience to properly understand the consequences of environmental impacts and effectiveness of any proposed management controls. The reported resignation of panel members with expertise in environmental management and biosecurity in response to the Storm Bay North MFD Plan decision, highlights the need for balance.[xxv]

If our recommendations were adopted as to membership composition, this would restore the balance to scientific and expert membership, with community and industry members being legitimate voices, but without the balance of power. This would go some way to restoring community confidence in the decisions of the Panel.

(b) Role of the Minister

The Minister for Primary Industries and Water is responsible for approval of MFD Plans and amendments to Plans under the MFP Act.

While the Panel's role is to assess a draft plan or amendment to a plan, and hear representations made by members of the public, the Panel's role is only to make a recommendation to the Minister. The Minister is not obliged to follow that recommendation.[xxvi] There is no apparent reason for this "at large" discretion.

The lack of criteria for the Minister's decision is important in the context of the Minister's portfolio role. While the Minister is the regulator of marine farming under the MFP Act, he is also responsible for the promotion and development of the industry. There is an inherent conflict in the Minister's responsibilities in this respect. Recall that the MFD Plan is the key document that identifies where marine farming can be located and on what terms. It is legislatively a reason that an application for environmental licence is not publicly notified. It is therefore important that there is transparency and community confidence in how decisions are made.

In this context, the Minister should not be the decision-maker on MFP Plans or Amendments.

We recommend that:

- The Panel be the decision-maker for MFD Plans; or
- There be a clear set of prescribed criteria identifying on what basis a Minister can disagree with a recommendation of the Panel.

(c) Role of the EPA

The EDO is on the record as being supportive of the transfer of marine farming regulation to the EPA Director and Salmon Farming Unit, however with caveats.

First, neither the Unit or the Director are statutorily independent of the government, contrary to public statements by the government. The EPA Director and staff of the Unit are public sector employees, part of the Department of Primary Industries Water and the Environment, and thus under the direction and control of the Minister for Environment. Any employee of the government is not statutorily independent of that government. We note that the same conflict arguably exists for the current Minister for Environment, who as Treasurer promotes industry and development and as Minister for the Environment, oversees government employees who regulate that industry.

Second, the decision-making function under the EMPC Act for all other industries regulated as Level 2 activities sits with the EPA Board. The Act only carves out the regulation of finfish farming for special treatment. It is only for finfish farming that the Director has powers to make approval decisions without reference to the Board. This is important because it is only when the Board makes decisions that there are third party appeal rights, allowing independent scrutiny and oversight of such decisions.

We recommend that the Board be the decision-maker for all finfish farming decisions under the EMPC Act.

3. Identification and security of suitable locations

Spatial planning, by way of MFD Plans, is used in Tasmania to identify areas that are considered suitable for marine farming and provide some security to industry that those areas will be made available. A similar approach is applied in Scotland, where marine farming is permitted within designated farm management areas.

In contrast, New Zealand has abandoned its approach of restricting fish farms to designated Aquaculture Management Areas, as the process for establishing the areas was considered "lengthy, complex and costly".[xxvii] Instead, all new aquaculture proposals require a resource consent, assessed and administered by the local council in the same manner as all other uses and developments.

Spatial planning which identifies locations in which salmon farming can occur and, equally importantly, those areas where it cannot occur, provides certainty to all industry, government, local councils and the community. However, it is critical that the spatial planning exercise is undertaken comprehensively, informed by the best available science and subject to periodic review to determine whether areas remain suitable (see Box 1 – Okehampton Bay).

In reforms to the MFD Act in 2017, the Government introduced a power for the Governor to declare "finfish marine farming exclusion zones" where finfish farming is not able to be authorised by the Panel. At the time of the reforms, an exclusion zone was declared for Mercury Passage (except for the Okehampton Bay salmon farm site). The amendments to the Act did not provide any framework around the identification of other exclusion zones, however it was understood at the time that it was the Government's intention that the foreshadowed *Sustainable Industry Growth Plan for the Salmon Industry* would identify areas that are suitable and unsuitable for finfish farming. While the *Sustainable Industry Growth Plan for the Salmon Industry* did indicate that large areas of Tasmania's coast would be in "no grow" zones, these are yet to be implemented through declared exclusion zones. We note that "no grow" areas identified to date are unlikely to be suitable for finfish marine farming in any event, and consequently there

may be some doubt as to whether this is based on spatial planning weighing all economic, environmental and social considerations.

There is room for improvement in the process of spatial planning where salmon farming cannot occur in Tasmania.

In terms of security of tenure for salmon farms, when a lease is granted within a MFD Plan zone, it provides exclusive possession over the lease area for the duration of the lease. This provides significant security of tenure and management control to the lease holder.

Having regard to the compensation provisions in s22 of the MFP Act and their consequences for the approval of MFD Plans, we recommend that the legislation make clear that leases can only be granted in areas to which a MFD Plan applies.

While the integration marine farming planning with other elements of Tasmania's planning framework remains poor (see below), and subject to our comments above, the current framework for spatial planning and tenure security is reasonably strong. Improvements to the practical implementation of spatial planning are discussed under "Integrated Assessments" and "Science-Based Decisions" below.

4. Integrated assessments

Most coastal ecosystems are subjected to a range of population and development pressures. Marine farming operations in State waters also involve an allocation of public space for a private, commercial purpose, with potential impacts on recreational and tourist users and the amenity of neighbouring landowners. As Warwick Gullet has observed, this has meant that:

> *a regulatory framework for aquaculture must, in addition to assessing environmental impacts, aim to achieve a balance between aquaculture needs and other legitimate uses of the marine environment (this is commonly referred to as 'Integrated Coastal Zone Management)'.*[xxviii]

As outlined above, Tasmania's system maintains separate assessment frameworks for marine farming and for other use and development, including land-based aquaculture. Proponents are able to propose new or expanded marine farming operations with little regard to existing or potential uses of adjoining land. As the Okehampton Bay example highlights (Box 1), this often results in salmon farming companies needing to obtain a series of permits or approvals, with each application assessed without regard for the outcome of related applications. That is, a failure to consider the cumulative impacts of marine farming on the marine environment and communities.

In our work, it is apparent to us that there is substantial concern in the community about the lack of integrated and cumulative assessment. The impacts of marine farms on communities is, in our experience, much greater than is currently assessed by the Panel under the MFP Act. Communities are concerns about amenity impacts directly from marine farms themselves - noise, odour, visual impact – but also the related and necessary consequential impacts from supporting infrastructure, including smolt breeding, land-based processing, freshwater dams and pipes, access to transport routes and waste management facilities. There are impacts not only to residents in the affected areas, but also to tourism and recreation activities, none of which are adequately assessed through existing processes.

True spatial planning would assess both the direct and indirect impacts of new proposed industry hubs - including the network impacts, supply chain and infrastructure impacts, and cumulative impacts of those facilities.

While the Panel has the power to incorporate management controls in a MFD Plan to mitigate noise, odour and visual amenity impacts, the Panel's consideration of wider issues relating to supporting infrastructure (such as land-based processing and support facilities, freshwater dams and pipes), access to transport routes or waste facilities, impacts on other industries such as tourism or recreation activities is very limited.[xxix] The inclusion of a Panel member with experience in local government is not sufficient to overcome the lack of integration.

In fact, the Panel may direct a local council to amend its planning schemes to ensure that future land use and development adjacent to marine farming zones does not adversely affect marine farms.[xxx] This fragmented approach to planning for marine farming hinders effective strategic planning at local and regional levels and appears to prioritise marine farming over other land uses and developments.

The pressure this places on local governments, including managing complaints from affected residents and maintaining infrastructure, is further compounded by current government efforts to prevent local councils from levying rates on marine farm lease areas.[xxxi]

Other jurisdictions with intensive salmon farming, such as Scotland, New Zealand and Norway, have adopted a more integrated approach to marine farming planning.[xxxii] These jurisdictions require a range of authorities to be consulted in relation to marine farming approvals, but generally provide for a coordinated process for undertaking the consultation. Each of these jurisdictions emphasises environmental protection in the coordinated assessment process.

This integrated approach to marine farming planning means that these jurisdictions are better placed to provide "well-planned, sustainable development" than Tasmania.

If marine farming planning was better integrated with land use planning under the LUPA Act, it would ensure that communities would be better informed about areas that are within or outside of marine farming zones. It would also ensure that areas where marine farms are clearly incompatible with existing land uses or the natural values of a marine area could be identified and marine farms prohibited.

Spatial planning should also assess the cumulative impacts of proximal marine farming areas and other industry. For instance, where there are impacts from mining tailings (as in Macquarie Harbour) or from sewage outfall or heavy metal contamination (as in the Derwent), or other proximal marine farms and hatcheries. The Panel's function should be to ensure spatial planning adequately accounts for marine health, and that marine farming development areas adequately account for existing and proposed conditions.

BOX 1

CASE STUDY – OKEHAMPTON BAY

In 2015, Tassal announced plans to expand its salmon farming operations to Okehampton Bay, near Triabunna on Tasmania's East Coast. As outlined below, the impacts of the salmon farm in this location, and necessary supporting infrastructure, was assessed under numerous distinct approval processes, each with its own unique criteria, and varying levels of public involvement. There was no one strategic assessment process to assess whether the proposed farm was in the best location, with the least adverse environmental, social or economic impacts.

Marine farming sublease and licence

The *Great Oyster Bay and Mercury Passage MFD Plan*, which was approved in October 1998,[xxxiii] allows finfish farming in Okehampton Bay. Consequently, there was no requirement to publicly advertise any details relating to the proposed marine farm within Okehampton Bay, and there was no opportunity for public input before the Minister decided to grant the necessary approvals for the farm. Subsequent to the sublease and licence being granted the Minister for Primary Industries and Water directed the Panel to provide advice on three terms of reference (TOR) relating to whether there was adequate environmental science and data to enable salmon farming to be regulated on the site. The Minister stated that the purpose of the advice was to improve community confidence in marine farming, however the TOR did not enable the Panel to reconsider the fundamental question of whether Okehampton Bay was a suitable location for salmon farming.

The Panel invited representations from the community in relation to the TOR. Community representations were hamstrung by a lack of access to information. Much of the information necessary to inform submissions, including the complete baseline monitoring data and conditions imposed on Tassal's marine farming licence (being the key element of the environmental management regime for the activity) were not publicly available. Public submissions were made, which included the issue of whether salmon farming should occur in Okehampton Bay and about the need for access to further information.

The Panel acknowledged the lack of available information, however decided not to hold any public hearings as it "considered it unlikely that presenters would confine their representations to address the ToR and thus there would be minimal benefit to the Panel in the preparation of its Report."

The Panel advised the Minister that the MFD Plan and scientific information available was sufficient to support the salmon farm in Okehampton Bay. In response to a submission made by IMAS, the Panel acknowledged that further baseline studies for threatened species and reef communities would need to be undertaken by Tassal before the commencement of salmon farming. The Panel was satisfied that this requirement for baseline monitoring could be incorporated as a condition of Tassal's marine farming licence, rather than requiring it to inform its decision and allowing scrutiny of that data through the public participation processes prescribed under the Act.

Planning approval for the onshore marine farming facility

In February 2016, Spring Bay Seafoods applied (on behalf of Tassal) to the Glamorgan Spring Bay Council (***Council***) for a combined permit application and to rezone land in Triabunna to allow for Tassal's onshore facilities to support its Okehampton Bay salmon farm. The onshore development included a 196 metre long wharf. The Council initated the amendment and approved the permit application, referred it to the Tasmanian Planning Commission (***Commission***) for assessment under LUPA Act. It was publicly exhibited in October 2016, with over 6000 representations from the public and surrounding land users in response.

In March 2017, the Commission decided that the public notice had been incorrectly given and found the request and permit application would need to be readvertised by Tassal and Spring Bay Seafoods.

The application was readvertised, with over 5,900 submissions made opposing the proposal. Public hearings were held. The Commission ultimately approved the rezoning and permit application in March 2018. The Commission's assessment necessarily had regard to the approved marine farm, and the need for the onshore works in that context. The Commission could not reconsider whether the marine farm should be approved in that location.

Many of the representations expressed concern at the approval of the salmon farm within Okehampton Bay and the potential environmental impacts on coastal waters. Other issues raised by representations related to the impacts of the development on the region's water supply, the expanding tourism industry, public access to the foreshore and amenity, and the recreational and commercial fishing industries, which were either not relevant to the Commission's decision or outweighed by the need for the facility to support the approved marine farm.

This is an example of the need for integrated assessment at the marine farming planning stage to ensure all works are considered together, rather than the piecemeal approach in the current regulatory framework.

Federal environmental referral for salmon farm

Questions were raised through the Commission hearings about impacts of marine farming boats and nets on the endangered southern right whale. On 29 May 2017, Tassal was referred its proposed fish farm to the Federal Environment Minister for assessment under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (***EPBC Act***).

A delegate of the Federal Environment Minister ultimately decided that the farm could proceed without a detailed environmental impact assessment being undertaken, provided the action was undertaken in accordance with identified "particular manner" requirements outlined in the decision notice. This decision was subject to legal challenge by an environmental group and a private landholder. The Full Court of the Federal Court ultimately found in favour of the legal challenge on 15 April 2019, however, by that stage the fish farm had been operating for nearly two years. The Full Court's decision turned on a technical legal point and did not require the farm to cease or be subject to a rigorous impact assessment.

Water licence

As another part of this development, in February 2016, Tassal, in conjunction with the Council and a private landholder applied to the Minister for Primary Industries and Water for approval of a water licence to secure up to 1,795 mega litres of freshwater per year from the upper Prosser River catchment. The water was to be used to bath salmon from the Okehampton Bay marine farm as a treatment for amoebic gill disease. This water allocation was part of what the Council called the Prosser Plains Raw Water Scheme.

At the time the water licence application was advertised, there was limited public awareness of the proposed development of Okehampton Bay for salmon farming and how the water licence would fit into the greater development. This included for instance the precise location of the proposed dam to store the water if allocated (see "Dam Permit" below). For this reason, there was limited public comment on the water allocation. We understand that only one public representation was received by DPIPWE in relation to the proposed allocation.

As far as the EDO is aware, this water licence was granted in the absence of approval for the development of the associated necessary dam infrastructure on a private property near Buckland (the ***Twamley dam***) (discussed further below).[xxxiv]

Pipeline permits

In June 2017, as part of its Prosser Plains Raw Water Scheme, the Council lodged a planning permit application to itself for the approval of the construction of the pipeline to carry water from the Lower Prosser Dam, along the Prosser River, through the Raspins Beach Conservation Area and public land to the proposed Solis golf course at Louisville Point.

The pipeline was proposed, in part, to connect to Tassal's undersea planned pipeline from Louisville Point to Freestone Point and from there to its salmon farm lease at Okehampton Bay. Tassal separately made a permit application for its sections of the pipeline in July 2017.

Numerous representations were made in response to public notice of both pipeline applications. Concerns included the allocation of such large quantities of freshwater to private developers, the provision of public funds by the Council and State Government towards infrastructure for the benefit of private developers, and the impacts of the pipeline construction on the habitats of numerous threatened species.

As planning authority, due to the operation of the Glamorgan Spring Bay Interim Planning Scheme 2015, the Council took the view that it was not entitled to consider the broader issues around the use that the water would be put, the security of access to freshwater from the Prosser River for other uses including drinking water, or whether the development was the best use of the Council's limited financial resources. [xxxv] The Council's consideration of impacts on threatened species was similarly limited by the operation of the planning scheme. The Council issued permits for both pipelines.

It is our understanding that both pipelines have now been constructed and are delivering water to the Okehampton Bay salmon farm, notwithstanding that the associated Twamley Dam is yet to be approved and constructed.

Dam Permit

The Council proposed a 4,000 ML water storage for the Prosser Plains Raw Water Scheme, the Twamley Dam. It was referred for assessment by the Federal Government under the EPBC Act because it involves the proposed removal of 52ha of native vegetation, over 20ha of which is *Eucalyptus ovata forest and woodland.* This vegetation type is a critically endangered ecological community listed under the EPBC Act and provides feeding and breeding habitat for the critically endangered Swift Parrot *Lathamus discolor*, as well as other listed threatened species.

On ##. the Federal Government decided it is a controlled action that requires assessment under the EPBC Act including due to the impact on the *E. ovata* community and the potential impact on the Swift Parrot.

The controlled action is still being assessed by the Federal Government. There are very broad criteria for the Federal Minister's decision on whether to grant an approval, and very limited options for independent scrutiny of decisions made under the EPBC Act, with no rights of merits appeal.

If the dam is approved under the EPBC Act, approval will need to be sought under the *Water Management Act 1999* (Tas). This will involve public notice and public representations. While there is potential to appeal any dam permit granted to the Resource Management and Planning Appeal Tribunal, appeals do not afford independent scrutiny or transparency in decision-making because the WM Act prevents appeals being brought against the critical scientific or economic determinations.

Environmental Licence

Upon the commencement of amendments to the EMPC Act in late 2017, Tassal was required to obtain an environmental licence for its Okehampton Bay salmon farm from the EPA. Consistent with the polic position taken by the EPA to marine farms that were already operational, the EPA Director issued an environmental licence for the activity without referring it to the Board, thereby precluding any opportunity for public input or requirement for detailed environmental impact assessment.

Conclusion

This case study demonstrates the lack of integration between the assessment of the different components of the Okehampton Bay farm. Similarly complex regulatory processes would apply to just about every marine salmon farm now operating in Tasmania. This demonstrates the failure of the current regulatory framework to provide for detailed scientific assessment of a proposed project prior to the granting of leases, licences, permits and approvals for salmon farms and their related infrastructure.

An integrated approach to marine farm planning, with real opportunities for community input and public participation, and evidence-based decision-making informed by science would enable informed decision-making and greater community confidence in the regulatory processes surrounding salmon farming.

5. Evidence-based environmental assessments

The University of Tasmania's Institute of Marine and Antarctic Science (*IMAS*) enormously contributes to the understanding of marine ecosystems, fisheries and aquaculture through its scientific work around marine farming, in particular in Macquarie Harbour. However, we consider that there is still considerable scope to ensure that this scientific research is targeted to the better regulation of the marine farming industry, and thereby, better environmental and community outcomes.

Despite the opportunities presented by having world-class scientific researchers based in Tasmania, there are a number of areas in which the current laws fail to ensure that regulatory decisions are supported by scientific data regarding environmental impacts, biosecurity, carrying capacity or future risks to productivity.

(a) Expertise on the Panel

We refer to our recommendations above regarding governance and membership of the Panel under the MFP Act.

We repeat that while there is a requirement for a person with an "ability and expertise" in fish health and biosecurity to be appointed to the Panel, currently, there is no similar requirement for any of the appointed Panel members to hold specific qualifications in environmental and marine resource management (rather than demonstrating "an ability" or "experience"). Further, there is no requirement for Panel members with expertise in marine ecology or hydrology. The Minister is able to nominate a Chairperson and another member, and has previously used these nominations to empanel scientists. However, there is no explicit requirement for this to occur.

The Panel is also able (but not required) to seek external expert advice regarding proposed environmental controls, technical farming questions or biological demands of farmed species. It is unclear how regularly such advice is sought, although we understand that the Panel has previously been briefed by IMAS experts.

As highlighted by the resignations of Louise Cherie and Professor Barbara Nowak during the assessments of the Storm Bay MFD Plans, there is no requirement that the quorum of the Panel that ultimately recommends the approval of a MFD Plan, or any amendment to a MFD Plan, includes those with scientific qualifications in relevant fields.

(b) Minister not bound by Panel recommendations

Even where the Panel includes members with relevant scientific expertise, the MFP Act does not require the Panel's recommendations to be followed. Since amendments in 2011 removed the Panel's power to refuse an application for an amendment to a MFD Plan, the Minister has not been bound by the Panel's advice and can make a decision contrary to the recommendation of the Panel, including where the Panel recommends that a proposed activity should be refused due to unacceptable environmental impacts.

This discretion has Where an amendment to an MFD Plan is proposed, the Minister may also make any alterations she or he considers "necessary or expedient" before approving the amendment.[xxxvi]

The Minister is required to table reasons in Parliament where his decision is contrary to the recommendations of the Panel.[xxxvii] While this provides some transparency regarding the decision-making process, it fails to ensure that decisions with the potential to cause significant environmental impacts are guided by science.

(c) Assessment of individual salmon farms

Where an approved MFD Plan allows marine farming in a designated zone, no further detailed scientific assessment is required before the Minister can issue a marine farming licence under the LMRM Act for a salmon farm to operate in that area.[xxxviii]

However, before the marine farm can operate, it will also require an environmental licence issued under the EMPC Act. An environmental licence may be issued by the EPA Director or by the EPA Board if referred to it by the EPA

Director. The EPA Director is to refer an environmental licence application to the EPA Board in the circumstances prescribed by clause 8 of the *Environmental Management and Pollution Control (Environmental Licences) Regulations 2019*. This is critical because public notice is only required for an EL where referred by the EPA Director to the EPA Board.

The criteria in clause 8 of the Regulations are complex. In summary, a referral must be made where:

- There is "likely to be a very high level of public interest in the application"; or
- It is reasonably likely that an EPBC Act approval will be required for the activity; or
- There is no MFD Plan or emergency plan in force for the relevant waters, unless a permit has been issued under the LMRM Act; or
- A MFD Plan has been in force for the waters for 10 years but no finfish have been kept in that area or, if they have been kept, they have been kept in accordance with a LMRM Act permit, emergency order or emergency plan; or
- A MFD Plan has been in force for the waters for the last 2 years but the Director considers the information provided to the Panel about environmental impacts of finfish farming did not adequately take into account the likely effects of the activity.

A referral does not need to be made where the application is for an emergency order.

These criteria provide broad discretion to the Director as to whether to refer the activity where there is a MFD Plan in force for the area of State waters to which the application relates.

For instance, for the Storm Bay marine farming development area, a MFD Plan was in force and environmental licences were assessed by the Director and not made available to the public. This decision not to refer the EL applications was taken by the Director despite the arguably "very high level of public interest in the application". As a result, there was no capacity for public scrutiny of the application or independent oversight through an appeal mechanism.

The lack of transparency means the public is not to know whether the approval was made on the best available science, nor did the public have the opportunity to test the science upon which the approval was based. This is important where the relevant MFD Plan leaves to the Director the dissolved nitrogen and biomass limits for each activity:[xxxix]

> *The Director, EPA, may, from time to time, determine the total permissible dissolved nitrogen output (TPDNO), within specified periods, attributable to licenced finfish farming for a specified area.*
>
> *The Director, EPA may from time to time, using whatever information the Director, EPA considers appropriate, determine the maximum permissible biomass of finfish that may be stocked within the area covered by this plan or any other specified area within the plan area.*

Further, the EMPC Act does not prescribe criteria to guide a decision on whether an environmental licence should be granted. The Director and the Board may "grant to a person an environmental licence in relation to an activity if ... satisfied that it is appropriate to do so".[xl]

The EPA Board and Director are bound the apply any Water Quality Objectives (***WQO***) in making a decision under the EMPC Act, including to grant an environmental licence.[xli] However, in the 22 years since the commencement of the *State Policy on Water Quality Management 1997* , there are no published WQO for either marine or freshwater anywhere in the State. The EPA has advised the EDO that WQO for a particular waterway are developed by EPA Board (or the Director as the case may be) on a "case by case" basis in consideration of the "Default Guidelines Values for Aquatic Ecosystems" and/or a proponent's own water quality monitoring data.[xlii]

Water Quality Objectives should be State-wide, published and enforcement. WQOs should set clear objectives waterways (riverine and estuarine) or marine area, so that the EPA when exercising powers and functions under the EMPC Act, is required to manage that environment to achieve the WQOs. In this respect, it is like spatial planning for air emissions from industrial pollution, where a threshold maximum emissions concentration is identified for an airshed and individual emissions licences are matched to and monitored so that the aggregate of emissions from all point sources does not exceed the limit.

To date no environmental licence applications have been assessed by the EPA Board. The EPA Director's assessments of environmental licence applications have not been made publicly available. It is therefore unknown

what the WQO are for a particular activity or area, whether the WQO identified and applied in an assessment of proposed marine farm are based on the best available science and would withstand scientific scrutiny, or how those WQO account for cumulative impacts (discussed above).

Further, given the EPA Director's broad discretion to vary the total biomass and nitrogen output of marine farms, it is necessary to know how such determinations are made consistent with the achievement of the WQO for a waterway in which the marine farm operates.

(d) Adaptive management / nitrogen and biomass caps

Adaptive management can be a useful tool to allow for flexibility in management responses to unexpected environmental conditions.[xliii] However, adaptive management is only appropriate in circumstances where sufficient baseline data is available to accurately set thresholds and predict environmental responses to proposed management controls. It does not lend itself to scenarios where the environmental impacts of the activities are potentially serious or irreversible (such as loss of critically endangered species) or where too little is known to reliably anticipate risks.

As outlined under the heading "Clear Guidance" above, adaptive management of Tasmania's salmon farms sets management controls without comprehensive or even adequate baseline data.

Effective implementation of adaptive management also requires rigorous monitoring and reporting to identify when triggers are activated, and to measure the effectiveness of management responses.

One example of an adaptive management approach is the inclusion of a power to set biomass caps for marine farming zones or leases in MFD Plans. A biomass cap is a limit on the amount of salmon farmed in a particular area with the aim of limiting environmental impacts. Environmental indicators (such as the presence of opportunistic indicator species) and compliance with physical or chemical thresholds should inform any decision on whether a biomass limit should be increased or decreased. However, decisions by the Secretary of DPIPWE and the EPA Director setting the biomass cap in Macquarie Harbour have not accorded with this principle, with economic and social considerations appearing to outweigh environmental considerations in these decisions (see discussion in Box 2 below).

Litigation taken by Huon Aquaculture in relation to the biomass determination and carrying capacity of Macquarie Harbour highlighted the concern about regulatory failure in determination of biomass limits for environmental and fish health.

(e) Review of MFD Plans

The MFP Act requires MFD Plans to be reviewed at least once every 10 years to "ensure that the objectives of resource management, having regard to any relevant changing circumstances, are achieved to the maximum extent possible."[xliv] This is critical where waters within designated marine farming zones have warmed significantly and can no longer support salmon farming, where evidence coastal development adjacent to marine farming zones has intensified since the MFD Plan commenced, or where new data is available regarding impacts of nutrients on biodiversity.

The process for a review of a MFD Plan starts with a preliminary review conducted by DPIPWE. Public comment is only invited if DPIPWE considers that modifications to the MFD Plan are required. There are no requirements for DPIPWE to consult with the Panel, IMAS or the public in deciding whether modifications are required. As acknowledged by the Panel when it was tasked with looking at the Okehampton Bay salmon farm proposal, after the expiry of 10 years, further data will be needed to assess the suitability of salmon farming at a particular location. It is unclear why opportunities for the input of this data are not given to public (including scientific bodies such as IMAS) in the MFD Plan review process.

If a 10-yearly review of MFD Plan does reveal that a zone or area is not suitable for salmon farming due to unforeseen or changing environmental impacts, this does not give rise to any right alter the terms or lengths of leases issued to salmon farms in these areas. Should the leases be cancelled, or the MFD Plan amended to reduce number or remove salmon farms from the MFD Plan area, salmon farm operators would have an entitlement to compensation from the Government. This highlights the problem with the granting of leases potentially for 30 years with renewal options from 15 years, being timeframes that potentially exceed the length of time that a particular location can sustain salmon farming.

6. Access to information

The 2015 Senate Committee Report into Tasmania's Regulation of Finfish Farming recommended that the "Tasmanian Government support the greater provision of environmental information and data relating to the fin-fish industry by the [DPIPWE]".[xlv]

As demonstrated in the Okehampton Bay case study (Box 1), historically it has been very difficult for interested parties to obtain information about specific salmon farms and related infrastructure. However, since 2017, there have been steady improvements in the release of information by regulators.

Access to all environmental licences and licences issued under the LMRM Act for finfish farms through the Land Information System Tasmania (LIST) Map website.[xlvi] The EPA website provides aggregated compliance monitoring results for salmon farms in Macquarie Harbour, annual environmental reports and/or broad scale environmental monitoring for some salmon farming locations, and also previously published IMAS reports relating to the health of Macquarie Harbour (the latest reports are otherwise available through the IMAS website).

DPIPWE has recently created the Salmon Farming Data Portal.[xlvii] This portal provides aggregated data about salmon farms operating within a MFD Plan area. While the information is helpful for generally understanding an operator's level of compliance with certain management controls within a MFD Plan, the lack of the underlying scientific data and reports makes it difficult to assess the seriousness of any non-compliances, and the consequences of non-compliances or of "business as usual" in terms of environmental impacts that are occurring or have occurred. It is also difficult to ascertain what enforcement action has been undertaken in response to particular non-compliances, and whether that action is proportionate in all the circumstances.

Tassal, Huon and Petuna are each variously engaged in voluntary, third-party certification programmes that encourage proactive release of information, and all release selected, often aggregated, data on their websites. As outlined above, aggregated data can be difficult to interrogate.

However, despite all of these data sources, timely environmental monitoring data (particularly raw data) and compliance audits remains very difficult to obtain.[xlviii]

In the absence of consistent, proactive release of data, members of the public must rely on Right to Information requests to access information. It is our experience that such requests are excessively time consuming (one has taken over 3 years to resolve), with such requests being regularly refused by the EPA and DPIPWE on the basis of commercial confidentiality, unreasonable diversion of resources, or a reluctance to discourage future voluntary disclosures by industry. This is particularly critical when there are reported delays in the Ombudsman's office of an average of 318 days in the 2017-2018 financial year.[xlix]

We recommendation that regulators must make all environmental information available to the public in a timely manner, including real-time reporting of monitoring data including the underlying scientific data and reports and compliance action. This will reduce the need to rely on RTI requests to obtain access to this information and improve community confidence in the actions of regulators and science upon which decisions are based.

7. Opportunities for meaningful public participation

Public participation in environmental decision-making is foundational to the Tasmanian resource management and planning system, of which the MFP Act and the EMPC Act form part.[l]

It is generally acknowledged that the elements of public participation are:[li]

- Full public disclosure of information by government about environmental decision-making in a timely way, including access to applications, monitoring data and all scientific information;
- Early involvement in and ability to make representations to authorities making environmental decisions, and be entitled to have that representation properly considered by the relevant decision-maker;
- Notice from decision-makers to people affected by the decision, including those that made representations;
- Recourse to legal review mechanisms, including both substantive review and judicial review, and access to justice to take such review.

The benefits of public participation have been described thus:[lii]

For many policy-makers and environmental advocates, public participation is an intrinsic good, regardless of outcome. Allowing impacted communities and other stakeholders to take part in decision-making is a basic component of democracy (Rosenbaum 1978; Thomas 1990)

...

Public participation can also improve policy implementation by increasing the legitimacy of the decision-making process and, in so doing, reducing conflict. Multiple studies have demonstrated that whether or not the public accepts a decision hinges on whether or not the public sees the decision-making process as fair (Bulkeley and Mol 2003; Lind and Tyler 1988; Newig 2007; Murphy 2004; Tyler 1990). Engaging the public in decision-making can help overcome deficits in democracy, such as distrust of political leaders, declining faith in public agencies, and low voter turnout (Dalton 2008; Newig 2007; Nye et al. 1997; Welp et al. 2009).

That meaningful public participation increases transparency and aids legitimacy of the decision-making process and public confidence is widely acknowledged.[liii]

(a) Public participation in marine farming decisions

The only guaranteed formal opportunity for public participation in marine farming decisions are provided in relation to the development and amendment of MFD Plans. That is, provided the Panel does not consider an amendment is not of a substantial nature, to correct an error or to remove an anomaly to clarify or simplify the Plan.[liv]

Where an MFD Plan or an amendment to one is prepared, the Minister is required to give approval to the public exhibition of a draft amendment, and the planning authority must then advertise it. Any person may make a representation during the exhibition period, and any representation made must be considered. The Panel is not obliged to hold public hearings.[lv] The Act entitles a person making a representation to request that a hearing be held, and the Panel has done so on some previous occasions.

There is no opportunity to appeal against a decision to approve a MFD Plan, or an amendment to a plan, other than for existing marine farm operators where it adversely impacts their existing marine farming activities.

There are no opportunities for public comment or third party appeals in relation to allocations, grants, renewals or variations of leases under the MFP Act. The granting of a new lease or variation of an existing lease can only be challenged if the quality of water in another marine farming lease will be unreasonably affected.[lvi]

In relation to environmental licence applications, only those applications assessed by the EPA Board will be open to public comment and, potentially, appeal, and not any licence applications or amendment applications for which the EPA Director is the decision-maker.

Where an application is assessed by the EPA Board, it is required to take any representations it receives into account in its decision to grant an Environmental Licence. Provided a person a can demonstrate that they are a "person aggrieved" of the Board's decision, they may appeal that the grant of an Environmental Licence to the Resource Management and Planning Appeals Tribunal. However, for those applications that are decided solely by the EPA Director, there are presently no opportunities for public participation through notice and rights of review.

Based on the criteria currently in the EMPC Act, the vast majority of environmental licence applications relating to marine salmon farms will be assessed by the EPA Director without any opportunity for public participation or scrutiny. The way the regulations are drafted, it effectively makes an application "permitted" (in a planning scheme sense) where there is a MFD Plan approved within the last 10 years. However, the impacts of a particular activity fall to be assessed at the environmental licence stage, and it is usually that particular activity and its impacts which are of greatest public concern.

By way of analogy, if we look at the planning scheme and permit processes under the LUPA Act, a planning scheme or amendment is the spatial tool that identifies what land uses can go where. Agricultural land might be rezoned for residential use, and the decision about whether that should be approved is undertaken by the Tasmanian Planning Commission, with rights of public notice and hearings. However, this rezoning only allows a planning permit application to be made for a particular use and development, if it meets the requirements of the planning scheme. The public still receive notice of that planning permit application, and have the right to make a representation to the planning authority and to take an appeal in the Tribunal.

The marine farming process, however, assumes that if a MFD Plan exists, there is no need to involve the public in decision-making by the EPA. This assumption does not withstand scrutiny. For instance, as is clear from the Storm Bay North MFD Plan, the operator is only required to do the baseline environmental surveys after the Plan is approved. This data is critical to understanding the basis of decision-making. The first opportunity a member of the public will have to test the scientific data will be at the environmental licence stage. If there are no rights of public notice and review, the science underpinning decision-making cannot be tested by the public or an independent court or tribunal.

Further, the fact that this decision rests upon the discretion of the EPA Director leads to uncertainty for the community and for the regulated as to when an application will be referred to the Board. For instance, one of the prescribed criteria for referral is whether there will be a high level of public interest. The Storm Bay North environmental licence application was not referred to the EPA Board and, in the context of that application, it is not clear how that application would not have met the threshold "public interest" test.

We recommend that all environmental licence applications be assessed by the Board. We recommend that the criteria be refined to reverse the onus – all applications for environmental licence must be referred to the Board, except in clearly defined (and limited) circumstances, and being circumstances that require a quantitative assessment rather than exercise of discretion.

(b) Access to justice in marine farming decisions – merits review

Part of a transparent and robust regulatory system is the ability to apply to an independent umpire for a review of an administrative (government) decision on the merits. The ability to substantively (not just legally) review environmental decisions is a recognised component of public participation.

The regulation of marine farming is unique in industrial regulation in Tasmania, in that neither the proponent of a marine farm nor a third party has rights to bring a merits review of a MFD Plan, an amendment to the plan. There are also no rights of appeal in relation to decisions of the EPA Director to issue environmental licences where not referred to the EPA Board or approve emergency applications. Likewise, there is no right to appeal biomass or management determinations by the EPA Director under MFD Plans.

This places marine farming in a unique position. All other industrial activity in Tasmania regulated by the EPA as a Level 2 activity under the EMPC Act and is subject to rights of appeal to an independent third party, in that case, the Resource Management and Planning Appeals Tribunal or to be assessed by an independent expert body – the Tasmanian Planning Commission – in the case of combined planning scheme amendments and permit application.

This is to be contrasted to marine farming, where:

- the spatial planning exercise – and existence of a MFD Plan – effectively excludes public notice at the environmental licence stage because it precludes referral by the EPA Director to the Board;
- MFD Plans are prepared and assessed by the MFPR Panel:
    - the constitution of which under s8(1) of the MFP Act is weighted against scientific expertise, does not require expertise in marine ecology, hydrogeology or conservation, and no community or legal member in contrast to the Tasmanian Planning Commission;[lvii] and
    - the decisions are made by the Panel, in contrast to the Commission, where decisions are made by delegates who are appointed Commissioners with expert planning or scientific members.
- MFD Plans routinely give the EPA Director a discretion over biomass and nitrogen limits.

The reason this is important became was demonstrated in February 2017, when Huon Aquaculture – one of three marine farming operators in Macquarie Harbour - commenced legal proceedings to challenge biomass determinations made in relation to Macquarie Harbour. However, those proceedings were taken through the narrow and costly process of judicial review in the Tasmanian Supreme Court, rather than through merits based appeal on the substance of the biomass determination.

Huon Aquaculture brought judicial review proceedings against the Secretary of DPIPWE, the EPA Director and the Minister in the Tasmanian Supreme Court, and also commenced proceedings in the Federal Court against the same parties and Commonwealth Minister for Environment and Energy.

The biomass determination under challenge was that made by the EPA Director which limited biomass in Macquarie Harbour to 14,000 tonnes. Huon Aquaculture alleged that this decision failed to give adequate weight to the scientific evidence which showed that salmon farming was adversely impacting on the dissolved oxygen levels

in the harbour and causing widespread adverse biological impacts on the harbour floor, and potentially, the endangered Maugean Skate. Huon Aquaculture alleged that the EPA Director placed undue weight on short-term economic factors in his decision, and that the biomass limit ought to have been 10,000 tonnes so as to ensure the long-term environmental and economic viability of salmon farming in the harbour.

After the Federal Court found against Huon Aquaculture in July 2018, it withdrew its judicial review applications in the Supreme Court prior to hearing.

The lack of any internal or merits review processes force interested parties to commence judicial review proceedings, which are more focussed on whether the decisions are legally supported rather than a transparent and independent review of the science. Judicial review proceedings can be both costly and time consuming, meaning that the key issues will not be resolved and a cloud will hang over any management decisions made in the meantime.

While changes to the law in 2017 means that there may be an opportunity for third parties to challenge the merits of a decision by the EPA Board to grant an environmental licence to the Resource Management and Planning Appeals Tribunal, this is only where the EPA Director refers such applications to the Board. No such referral has yet been made, and the criteria on which that decision are made are weighted toward the EPA Director making those decisions.

There will be very limited circumstances in which the EPA Board will make decisions, and therefore the public is effectively shut out of decision making under the EMPC Act. This is contrary to the objectives of the EMPC Act, which are to promote public participation in environmental decision-making, including through review processes in the Tribunal.

8. Rigorous, consistent monitoring and enforcement

The EMPC Act and the MFP Act contain offences that apply to finfish farming, however, in our submission the penalties for these provisions are inadequate and do not provide sufficient deterrent. Further, there is little public reporting on enforcement action taken, which means there is no transparency about the outcomes of complaints, consistent application of regulatory tools or how breaches are treated by regulators.

(a) MFP Act

The MFP Act creates offences for marine farm operators who fail to comply with MFD Plans, with penalties up to $33,600 plus daily penalties. The LMRM Act provides penalties of $84,000 or 2 years imprisonment who fail to comply with conditions of their licence plus daily penalties of up to $8,400 for marine farm operators for continuing breaches.

The MFD Plans contain "management controls" under s24 of the MFP Act, which would be the control capable of enforcement. However, the drafting of these controls is such that – other than limits to the marine farming area authorised by the Plan – would be difficult to see how they are enforced or defer to directions made by the Secretary to DPIPWE or the EPA Director. Any directions issued by either person are not publicly reported on as far as we are aware, and certainly there is no requirement for such reporting.

For instance, the Storm Bay North MDP, the EPA Director may impose caps on total permissible dissolved nitrogen output and biomass for the relevant area, with these caps to be apportioned to each leasehold area.[lviii] These controls would be enforceable under the Act, if there was any such cap in force, however this is unknown and not reported.

There is also a requirement to provide baseline environmental surveys to the satisfaction of the EPA Director, and record-keeping requirements imposed on lessees.[lix] Again, whether such conditions have been complied with is unknown, and baseline environmental surveys are not required to be made publicly available. The Storm Bay North Plan acknowledges that baseline environmental surveys are required to regulate the marine farming activity allowed for in the Plan:

> *The Director, EPA will use the information from the baseline environmental survey to assess whether the area to be farmed contains any rare or endangered species or any unusual habitat and to determine conditions and requirements relating to environmental management.*

Compliance with these provisions is therefore critical to the subsequent regulation of the marine farming activity. It is relevant to the setting of licence conditions under the EMPC Act and to the subsequent enforcement of that licence and of the general environmental duties under the Act in relation to environmental harm.

(b) EMPC Act

The primary enforcement tools exist in the EMPC Act. While there are offences under the EMPC Act for breaches of general environmental offences of causing serious or material environmental harm,[lx] with penalties up to ##, there are statutory defences to these offences which in practice will enable an operator to rely on the existence of an environmental licence.[lxi] For instance:

- That the emission of a pollutant does not exceed a maximum quantity, concentration, emission rate, discharge rate or overall volume set in an environmental licence.[lxii] This defence applies expect to environmental licence conditions that limiting the biomass, production, raw material or water and energy use for a finfish farm.
- That an environmental licence states that compliance with specified provisions of it will satisfy the general environmental duty and those provisions were complied with[lxiii]

In addition, any such prosecution needs to prove that the person causing the pollution did so "intentionally or recklessly and with the knowledge that serious [or material] environmental harm will or might result".[lxiv] Further, the proof of "serious or material" environmental harm was caused by a marine farm operator necessarily depends on the veracity of baseline environmental surveys and monitoring undertaken and the EPA's standards, for instance, to prove that there has been environmental harm, and that harm has occurred as a direct result of a particular marine farm or its stocking density.

Such a prosecution will therefore necessarily be complex, in particular, as proving intent or knowledge to the standard of proof is necessarily difficult and potentially prohibitive of successfully relying on these offences. These provisions have, anecdotally, rarely been used. In determining whether enforcement powers are sufficient, it is appropriate to look at the practicalities of using various enforcement tools.

For these reasons, it is likely that any prosecution, if taken, would be for breach of conditions of environmental licences.

The penalties for such a breach of a licence are considerably lower than the general environmental offences. The EMPC Act prescribes penalties of up to a $168,000 fine for companies or an $84,000 fine or 2 years imprisonment for individuals found by a court to be contravening conditions of an environmental licence.

Our quoted penalties above are for the environmental licence breach. These are comparably low penalties for corporate and individual breaches in other jurisdictions. Penalties for breach of conditions are commensurate with the higher range of offences of the general environmental offences. For instance, penalties for breach of an EPA licence condition in NSW are:[lxv]

- For a corporation - $1,000,000, and $120,000 for each day it continues; and
- For an individual - $250,000, and $60,000 for each day the offence continues.

The EMPC Act also empowers a court to impose a "special penalty" on an operator in relation to any contravention of a condition of an environmental licence regulating the amount of dissolved nitrogen produced or emitted. Currently this special penalty is set at $168,000 per each extra tonne of nitrogen released over the cap. This is a welcome additional penalty. However, as currently no environmental licences impose any clear, enforceable caps on nitrogen, this special penalty is effectively redundant.[lxvi]

(c) Demerit points

Both the MFP Act and LMRM Act provide for the imposition of demerit points for each penalty unit imposed upon the conviction of a person for these offences by a court. The LMRM Act provides for additional demerit points where a person receives a term of imprisonment or suspended sentence, while the MFD Act was amended so that demerit points would be allocated to a marine farm operator for each penalty unit of an infringement notice for failing to comply with the MFD Plan, an emergency order or plan.

The existence of a "big stick" will only serve as a deterrent where the regulator is willing to wield it.

While we support the reforms to penalties imposed on marine farm operators who do not comply with MFD Plans or licence conditions, the likelihood a marine farm operator would accrue the 200 demerit points required to be disqualified from holding a licence (either permanently or temporarily) are low. This is because of the approach regulators take to enforcement.

Data released to the EDO in 2017 indicated that observed breaches of marine farm plans and licence conditions are generally not punished by way of fine or prosecution, with the typical regulatory response being to issue a management direction to the operator to rectify the issue.[lxvii]

Therefore the demerit points (or existence of other penalties) are unlikely to provide any real deterrent to breaches of the law.

As suggested by the Macquarie Harbour case study below, the economic benefits derived by marine farm operators in breaching MFD Plan or licence requirements may far exceed the fines that might be imposed by the EPA or the court.

(d) Civil enforcement

There is no capacity for third parties to take legal action where regulators fail to Act. For instance, communities seeking to prevent serious or material environmental harm, where there is evidence of breach of environmental licences, or to seek access to monitoring data to establish whether there are breaches.

Civil enforcement in an administrative tribunal is one of the components of public participation, enabling effective redress for environmental harm. The Tasmanian Resource Management and Planning Appeals Tribunal has jurisdiction in respect to civil enforcement of planning breaches where the planning authority fails to act, but there is no like jurisdiction in respect of marine farming where no permit may be required, and where the MFD Plan and environmental licence set the regulatory conditions.

If there were the capacity to bring such proceedings, the complex proceedings taken by Huon Aquaculture in the Federal Court and Tasmanian Supreme Court might not have been necessary to obtain redress for the inadequate environmental controls in Macquarie Harbour (see Box 2 below).

Further, the legal proceedings taken could not argue for different controls to be imposed or allow for an order of either Court to be made setting, for instance, a different biomass limit. The only orders that could be made through judicial review were that the decision was invalid and ought to be remade according to law.

BOX2

CASE STUDY - MACQUARIE HARBOUR

When the Macquarie Harbour MFD Plan was amended in 2012 to allow for a large expansion of salmon farming, the Panel recommended that the MFD Plan include a biomass cap which was only to be increased where environmental indicators demonstrated environmental impacts, such as the presence of opportunistic species such as benthic worms and bacteria, were under control. Conditions imposed by the Commonwealth Environment Minister on the Macquarie Harbour salmon farms to protect to the endangered Maugean Skate and the Tasmanian Wilderness World Heritage Area (TWWHA) also required that the biomass of salmon in the harbour not exceed 52.5% of the "maximum sustainable biomass" being approximately 15,500 tonnes. Under these conditions the biomass cap was to be reviewed by the Tasmanian Government in 2013.

In late 2014, Macquarie Harbour salmon farm operators were advised that the biomass cap had lapsed and that DPIPWE would be undertaking a review of conditions in the harbour before setting a new cap. In the meantime, management directions issued to each of the companies resulted in an effective biomass cap of 19,000 tonnes.[lxviii] In April 2015, DPIPWE advised operators that it was intending to increase the biomass cap to approximately 20,150 tonnes, [lxix] despite the fact there was evidence of a trend of decreasing benthic dissolved oxygen levels in the harbour since the intensification of salmon farming, and widespread presence of opportunistic worms in the harbour (including within the TWWHA).[lxx] At this time DPIPWE also indicated that it would not to rely on the presence of worms as one of the key indicators of adverse impacts of the farms, as the worms were not behaving as they had in other salmon farming regions.

The Secretary of DPIPWE formally increased the biomass cap to 20,150 tonnes in October 2015, and subsequently increased it again in April 2016 to 21,500 tonnes. There was no public release of the reasons for the decisions to increase the caps.

In July 2016, the responsibility for setting the biomass cap was delegated by the Secretary of DPIPWE to the EPA Director. By September 2016, environmental monitoring data had revealed very low dissolved oxygen levels on the harbour floor (reaching a record low in some locations), and a large increase in the presence of bacterial mats at some lease sites.[lxxi] In November 2016, IMAS advised the EPA and salmon farm operators that the floor of Tassal's Franklin lease and surrounding seafloor was virtually devoid of life due to extremely low dissolved oxygen levels, and it was unknown what impact this would have on the Maugean Skate or the TWWHA.

Following the IMAS briefing, the EPA Director gave management directions to the operators in respect of their non-compliant leases, and in particular, directed Tassal to destock its Franklin lease by 28 February 2017. Following a number of submissions by Tassal citing the "logistical, staffing and safety" impacts of this direction, the EPA Director decided to allow Tassal until 15 April 2017 to destock the lease. In his decision granting this extension, the EPA Director stated that "[a]t this point I do not have an adequate level of information to indicate that the delay in harvesting will cause any significant variation in the underlying impacts on a harbour wide or neighbouring lease basis."[lxxii]

It was not until January 2017 that the EPA Director formally decided to reduce the biomass for harbour to 14,000 tonnes. However by that stage, some of the operators had already stocked their leases with smolt in accordance with the previous biomass limit of 21,500 tonnes. In late April 2017, Tassal announced that it would not be able to comply with the 14,000 tonne biomass limit if it was extended past 1 May 2017. The EPA Director responded by announcing that he would delay of his decision on next biomass cap while he assessed the submissions of the operators and latest compliance surveys.

After considering the salmon farm companies' submission and preliminary IMAS reports, on 31 May 2017, the EPA Director decided to set a year-long biomass limit for the harbour at 12,000 tonnes.[lxxiii] However, the EPA Director's determination allowed Tassal to farm an extra 4,000 tonnes of additional salmon until January 2018 provided that implemented an experimental "waste capture system". The determination was made after Tassal requested approval to grow out its 2016-year class fish through to market size.[lxxiv] The trial waste capture system was approved by management determination of the EPA Director on 6 June 2017, and the final system was approved by Environment Protection Notice No. 9702/1 issued by the EPA Director on 30 June 2017.[lxxv]

Tassal was authorised by the EPA Director to exceed the cap because it was implementing a novel and untested technology to capture solid fish farm waste underneath its pens and pump it to a boat. This technique did not capture or address the increased levels of dissolved waste from the fish pens. The solid waste was concentrated on board the boat, transported to land and transferred to tanks. While Tassal originally proposed to dispose of the waste at the mouth of the Macquarie Harbour,[lxxvi] it eventually settled on transporting the waste from Macquarie Habour to a fish processing facility in George Town. It was then pumped into the trade waste of that plant, ultimately to be treated by TasWater's wastewater treatment plant at Pardoe. Each of these steps was approved by the EPA Director through the issue of environment protection notices. No referral was made to the Federal Environment Minister for an assessment of the experimental waste capture system under the EPBC Act. There was no opportunity for public comment in relation to these activities, or independent review of the science presented by Tassal in support of them by the EPA Board.

In June 2017, Huon Aquaculture commenced a number of legal proceedings seeking to challenge the validity of the EPA Director's determinations, and the validity of the EPBC Act decision that authorised all three salmon farms to operate in Macquarie Harbour. Huon maintained that the harbour could not safely sustain the level of fish allowed by the EPA Director.

By late November 2017, the EPA confirmed that significant fish mortalities had been reported by all three companies operating in the harbour. Petuna Seafoods lost approximately 3 per cent of smolt stock, Huon Aquaculture lost fish from one trout pen. Tassal did not confirm the extent of its losses.[lxxvii]

Two days after the State election, and during the Federal Court's hearing of Huon Aquaculture's legal case, the EPA Director cut the biomass limit to 9,000 tonnes on 23 March 2018. In discussing his decision, the EPA Director admitted that science and modelling used as the basis for the expansion of salmon farming in Macquarie Harbour in 2012 was "flat wrong".[lxxviii] This was confirmed by the IMAS report on the health of Macquarie Harbour released

on 21 March 2017, which had shown that despite the measure taken to reduce biomass in the harbour, very low levels of dissolved oxygen in mid-bottom waters continued during Spring 2017 and there had been a decline in benthic faunal abundance, including within the Tasmanian Wilderness World Heritage Area.[lxxix]

By 2017, there had been a failure by regulators to set biomass caps in Macquarie Harbour in an effective or timely manner in response to declining environmental conditions. The EPA Director's 2017 decisions to reduce the cap and issue the associated management directions that allowed for waste capture technology, placed excessive weight on short-term economic considerations in the absence of scientific certainty on the precise impacts and likely recovery of the environment.[lxxx] The delay in the setting of biomass cap also resulted in excessive stocking of leases by at least one operator, which in turn makes future decisions on sustainable stocking density and biomass caps more challenging.

Huon Aquaculture's Federal Court challenge was ultimately unsuccessful. Given the length of time since the EPBC Act approval have been granted in 2012, Huon Aquaculture's failure to avail itself of other opportunities to challenge the decision, and the economic impacts likely to result on the other salmon farm companies in the harbour, the Court decided on 6 July 2018 that the balance of convenience weighed against it exercising its discretion to grant the declaratory relief that Huon was seeking. The Court therefore found that it did not need to consider Huon Aquaculture's substantive arguments.

By May 2018, the EPA Director had confirmed that at least 1.35 million salmon had died in Macquarie Harbour since October 2017.[lxxxi] The fish deaths resulted from an outbreak of Pilchard Orthomyxovirus (***POMV***). Following that revelation, in July 2018, the EPA Director set the biomass cap in Macquarie Harbour to 9,500 tonnes until 2020. While, this time, no additional biomass was allocated based on the use of waste capture systems, Huon Aquaculture still argued that the limit simply reflected the current stocking levels in the harbour, rather that the conservative stocking levels necessary to respond to the poor environmental conditions recorded in the IMAS February 2018 report.[lxxxii] Huon Aquaculture linked the numerous large mass fish kills in the harbour from POMV to the high stocking rates facilitated by the waste capture systems and declining environmental health of the harbour. It called for a biomass cap in the vicinity of 6000 tonnes to be imposed. That calls has been ignored.

While Macquarie Harbour floor may be slowly recovering,[lxxxiii] it remains unclear whether the endangered Maugean Skate population has escaped the worst effects of the nutrient loading and reduced dissolved oxygen levels resulting from the salmon farming expansion. Being a long-lived and cryptic fish, the skate is difficult to study. It may be some years before the science can tell us whether the skate has effectively been studied to extinction.[lxxxiv]

The absence of any strong enforcement response by DPIPWE, and subsequently the EPA, to repeated breaches of licence and MFD Plan requirements raises the question whether any of the operators will be deterred from future breaches. Indeed, it appears that there is now a strong market incentive working against compliance with future biomass caps.

Even where formal biomass caps have been reduced, it appears the caps have been imposed as more of a reflection current stocking levels, rather than a real reduction in fish numbers. Without some mandatory, science-based criteria for biomass determinations, and a legal pathway for those decisions to be reviewed by an independent expert tribunal, it is possible that the situation in Macquarie Harbour could be repeated in waterways around Tasmania.

Recommendations for reform

(a) Clear criteria for decision-making

If the MFP Act is not repealed, it should be amended to ensure that a clear hierarchy of objectives is set out to guide decision-making under that Act with priority given to the maintenance of natural values. The MFP Act should also be amended to introduce a formal consultation period between the Panel and local councils for areas where marine farming is proposed or expanding, with the aim of identifying potential conflicts between land and marine farming uses.

(b) Separation of regulatory and development roles

The 2017 reforms introducing the EPA as part regulator of marine farming in part addressed these concerns, however there are remaining conflicts.

To improve governance and independence of those responsible for making decisions in respect of marine farming, we recommend:

- The constitution of the MFD Panel be weighted towards scientific expertise and provide for community input by amending the MFP Act to ensure Panel membership includes:
    - One or more members with qualifications in marine ecology, hydrology and marine sediments and conservation management;
    - A community representative; and
    - A legal member.
- Removing the potential conflict of interest by:
    - removing the Minister as decision-maker under the MFP Act for MFD Plans; or
    - at a minimum legislating a prescribed a clear set of criteria as to the circumstances in which the Minister can disagree with a recommendation of the Panel.
- Making the EPA Board the decision-maker for all environmental licence applications and variations, rather than the EPA Director.

(c) Integrated assessments

Having regard to the totality of our analysis above, and to ensure better integration between marine farming and land use planning, we recommend:

- Marine farming planning be brought under the LUPA Act. This should be implemented through the development of State Planning Provisions (**SPP**) in consultation with councils, the public and interested stakeholders. The SPP should outline objectives for the sustainable management of coastal waters and provide clear criteria for marine farming and any other use or development within the coastal waters zone, with the overarching principle being to maintain the natural values of the coast. Under this proposal, councils would be responsible for the development of Local Provisions Schedules (**LPS**) to identify areas appropriate for marine farming and those that are not. These SPP and LPS should be subject to review by the Tasmanian Planning Commission, which should be entitled to consult with the Panel for expert advice.
- Integrate MFD Plan and EPA assessments into these decisions, for instance, by:
    - Ensuring that marine farming is assessed by the planning authority in the usual course;
    - Making the EPA a referral authority for assessment of Level 2 activities; and
    - Integrating the functions of the MFD Panel and planning authority in respect of the spatial planning exercise, for instance, by re-positioning the MFD Panel's role to an advisory role.
    - Enabling all cumulative, downstream and supply chain impacts to be considered in spatial planning.

(d) Evidence-based decision-making

To ensure that there is sufficient scientific information to allow the Panel to assess a proposed MFD Plan, we recommend:

- The MFP Act be amended to include clear criteria against which the Panel should assess EISs and MFD Plans, with overarching priority given to the maintenance of the biodiversity and ecological processes (sometimes described as the natural values) of the marine environment.
- The Panel have the ability to request more information before making its assessment if it considers it necessary.
- Guidance be provided to the Panel on when adaptive management is an appropriate management strategy, and a clear indication that it is not to be used to accommodate a lack of baseline monitoring or where the impacts of salmon farming may be serious or irreversible.
- To ensure that decisions about MFD Plans are based upon the science, the removal of the Minister's discretion to approve Plans or amendments that are not supported by the Panel.

- Where biomass limits are considered by the Panel to be an appropriate method of mitigating or preventing impacts of finfish farming on a marine farming zone or lease:
    - the upper biomass threshold should be clearly stated in the MFD Plan, and clear science-based triggers should be articulated in the MFD Plan for decisions to amend the biomass limit up to the threshold. Any proposal to increase the upper biomass threshold should be treated as an amendment to the MFD Plan.

We further recommend that the Panel be required to undertake a full scientific review of all approved MFD Plans at least once every 10 years, so as to ensure that its assessments remain valid. The reviews must be subject to public participation.

(e) Public participation and merits review

The 2017 amendments to the EMPC Act introduced a further assessment process for salmon farms. Unlike other Level 2 Activities, the EPA Director has a discretion about whether or not an application for an environmental licence for a salmon farm are referred to the EPA Board for assessment.

If the application is referred to the Board for assessment, it will be given a class of assessment and assessed in the same way as other Level 2 activities.

While EDO Tasmania is generally supportive regulating salmon farms as Level 2 activities under EMPC Act, the Act should be amended such that:

- All applications for environmental licences and variations are assessed by the EPA Board, to ensure that public participation rights are preserved, including notice and third-party review;
- the MFP Act and LMRM Act be amended to incorporate broad standing allowing third parties to appeal the grant or leases and licences to salmon farms;
- the EMPC Act be amended to allow for civil enforcement of environmental licences and general duties to prevent environmental harm;
- amend the EMPC Act to ensure that "a person aggrieved of a decision" is defined to include those persons who make representations to the EPA Board or Director in relation to the assessment of any Level 2 or Level 3 activities;
- EPA Board's decision-making powers under the EMPC Act are to be upon the application of clear criteria which prioritises the preservation or maintenance of the natural values of the marine environment, including meeting water quality objectives.

Further, the EPA must prioritise the making and publication of Water Quality Objectives in accordance with the *State Policy on Water Quality Management 1997*, that apply throughout the State in riverine, estuarine and marine environments and to be applied in decision-making on marine farming.

(f) Access to information

In order to improve transparency, and ensure the streamlined and efficient regulation of marine farming activities we recommended the active public release (or availability) in a central location of information affecting marine farming, of the following:

- The baseline environmental data that forms the basis of MFD Plans and amendments, or is submitted by a proponent in response to management controls in a MFD Plan.
- All baseline data and monitoring and/or environmental impact assessments for proposed leases where salmon have not previously been farmed and for leases where salmon farming is being re-established following a prolonged interval.
- All licences, leases and associated management plans for salmon farms..
- All monitoring of environmental parameters on the perimeter and outside of marine farming leases.
- All enforcement actions taken by regulators under the MFP Act, LMRM Act, EMPC Act or any MFD Plan, including measures or directions issued to marine farm operators, statutory notices or fines issued and prosecutions commenced.

We note that environmental licences are now available through TheList and this disclosure should continue. However, many community members may not be aware of this access, and steps should be taken by regulators to ensure that information is provided in one location in order to enhance transparency.

Finally, we make the above suggestions as to what should be actively disclosed by regulators, but do not purport to make an exhaustive statement of public disclosure as this warrants closer investigation by the regulator(s), who is/are the holders of such information.[lxxxv] Other jurisdictions prescribe what information must be available. This is certainly an approach we would recommend, but does not prevent active disclosure by government authorities.

(g) Enforcement, monitoring and compliance

To ensure that a transparent and consistent approach is taken to enforcement of marine farming, and with the aim of increasing community confidence in the regulation of this sector, having a deterrent effect and ensuring that threshold levels of environmental health are maintained, we recommend:

- MPD Plans and environmental licences should be drafted such that the conditions or management controls therein are clear, certain and enforcement, including specifying quantifiable limits capable of enforcement in respect to nitrogen and biomass;
- The EPA develop and publish an enforcement policy relating to marine farms which clearly sets out its expectations and the types of situations where it may use the enforcement tools it has available to it;
- In addition to imposing management controls such as environmental monitoring or fallowing for breaches of licence conditions, operators should be fined or prosecuted in order to have a deterrent effect;
- All enforcement actions should be reported by the EPA through real time reporting in a central record published online, and access to enforcement instruments and management directions;
- Penalties for breach of a MFD Plan and licence conditions should be increased, commensurate with other jurisdictions and the offences for serious and material environmental harm prescribed in the EMPC Act;
- In addition to the accrual of demerit points, the EPA and courts should have the power to make publication orders where there have been breaches of marine farming laws and regulatory instruments;
- The MFP Act should be amended to include executive officer liability for breaches of that Act by aquaculture companies;
- The MFP Regulations should prescribe the method for the calculation of "special penalties" to be imposed by Courts upon the conviction of an operator for contravening a MFD Plan. The calculation of the special penalty should account for any profits derived by the operator from the non-compliance.
- The MFP Act and EMPC Act should be amended to enable third parties to seek redress for environmental harm through civil enforcement proceedings to the Resource Management and Planning Appeals Tribunal.

ENDNOTES

[i] Savage and Hobsbawn 2015

[ii] Exports accounted for around 2 per cent of the value of Tasmanian salmon production in 2013-14 (DoSG Tas 2015)

[iii] This was repeated in the Productivity Commission's 2016 report *Marine Fisheries and Aquaculture: Productivity Commission Inquiry Report Overview & Recommendations* [accessed: https.www.pc.gov.au/inquiries/completed/fisheries-aquaculture-overview.pdf at Finding 8.3, p41: "Concerns about the environmental and amenity impacts of aquaculture developments are prominent in some states, highlighting tensions for governments in both regulating and promoting industry growth. These concerns could be minimised by having separate agencies responsible for regulatory and industry development functions."

[iv] INSERT REF

[v] Senate Environment and Communications References Committee, Parliament of Australia, *Regulation of the fin-fish aquaculture industry in Tasmania* (2015) at 3.91 &3.92.

[vi] There are a number of other Acts with which the industry must comply, however these two Acts set out the main planning and assessment rules. Some inland hatcheries are also regulated by the *Inland Fisheries Act 1995.*

[vii] Section 11(3)(d) LUPA Act.

[viii] An environmental impact statement is not required for a modification to a draft plan if the Panel is satisfied that there is not likely to be any significant effect on the environment as a result of the modification (s.23(3), MFP Act).

[ix] While the Panel has the power to hold "public hearings" under s12(1) of the MFP Act, the Panel hearings in relation to the Storm Bay MFD Plans were not generally open to the public. Rather, the Panel restricted attendance to those who had made submissions and were actually giving evidence. The Panel's hearing guidelines suggest such a practice is in line with the Panel's powers, however that interpretation is arguably incorrect.

[x] Section 62, MFP Act

[xi] Section 66, MFP Act

[xii] After considering a draft MFD Plan, Environmental Impact Statement (EIS) and report on representations received, the Panel must make an assessment of whether the draft MFD Plan "is acceptable" and make recommendation to the Minister about whether to approve or refuse to approve it – section 31(1)(a) MFP Act.

[xiii] Section 32(1)(e) of the LUPA Act.
[xiv] Section 32(1)(f) of the LUPA Act.
[xv] Section 30O(1) of the LUPA Act.
[xvi] Section 21(1) of the MFP Act.
[xvii]
[xviii] Sections 42J(2) and 42K(4) of the EMPC Act.
[xix] Justice Preston, 'The Judicial Development of the Precautionary Principle', presentation to the Queensland Government Environmental Management of Firefighting Foam Policy Implementation Seminar, 21 February 2017, Brisbane [accessed: http://www.lec.justice.nsw.gov.au/Documents/Speeches%20and%20Papers/PrestonCJ/Justice%20Brian%20J%20Preston%20SC%20Keynote%20Address%20-%20Precautionary%20Principle%20%20delivered%2021.02.17.pdf]
[xx] See Clause 3(h) of Schedule 1 to the MFP Act and the EMPC Act.
[xxi] Hon. Justice Stephen Estcourt, 'The precautionary principle, the coast and Temwood Holdings' (2014) 31 *Environment and Planning Law Journal* 288 at 290. [accessed: https://www.supremecourt.tas.gov.au/wp-content/uploads/2018/01/LAWREP-31-EPL-JL-288.pdf]
[xxii] Hon. Justice Stephen Estcourt, ibid; *Preston CJ in Telstra Corporation Limited v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA at [128], cited in *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [188].
[xxiii] Worboys et al (2015). *Protected Areas Governance and Management*, ANU Press, p222.

[xxiv] From Worboys et al (2015). *Protected Areas Governance and Management*, ANU Press, p222

[xxv] Report accessed https://www.abc.net.au/news/2018-11-20/storm-bay-salmon-farm-approvals-prompt-scientists-to-quit/10491042

[xxvi] Section 42 of the MFP Act. If the Minister makes a decision to amend a MFD Plan that does not accord with the Panel's recommendation, then the Minister must provide a notice of that decision and reasons for it to Parliament – see section 42A of the MFP Act.

[xxvii] Sim-Smith and Forsythe (2013)

[xxviii] Gullet, W. 2006. 'Contesting the Merits of *Aquaculture* Development: *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426', 11 *Australasian Journal of Natural Resources Law and Policy* 109-117

[xxix] Section 21(1) of the MFP Act states that the draft plan must "(d) have regard for the use and development of the region as an entity in environmental, economic, recreational and social terms; and (e) seek a co-ordinated approach with respect to any matter affecting adjacent land under the jurisdiction of the Marine and Safety Authority or council;..."

[xxx] Section 20(3) of the MFP Act.

[xxxi] In case of *Coverdale v West Coast Council* [2016] HCA 15, the High Court found that the waters and seabed of Macquarie Harbour were "Crown land", which being within the West Coast Council's municipal area, could be subjected to council rates. It is an unusual situation for marine farms to be within a council's municipal area.

[xxxii] In NSW, current reforms seek to move towards more integrated coastal management. The current *State Environment Planning Policy 71 – Coastal Management* does not apply to land subject to the *State Environment Planning Policy 62 - Sustainable Aquaculture*. However, the advertised draft of a new Coastal Management Policy removes the exclusion for aquaculture.

[xxxiii] Section 48 of the MFP Act requires the MFD Plan to be reviewed by the Planning Authority at least every "10 years to ensure that the objectives of resource management, having regard to any relevant changing circumstances, are achieved to the maximum extent possible." The last review of the MFD Plan by DPIPWE was in 2007, and it is due for another review in May 2017. It must be noted that the review of the MFD Plan in 2007 did not consider whether Okehampton Bay continued to be a suitable location for finfish farming.

[xxxiv] GSBC Prosser Plans Raw Water Scheme status report of 17 February 2019, accessed at https://gsbc.tas.gov.au/wp-content/uploads/2019/02/PPRWS-Status-Report.pdf on 27 November 2019

[xxxv] The GSBC has since revealed that it has run out of money to complete the Prosser Plains Raw Water Scheme: see https://www.abc.net.au/news/2019-09-09/council-cries-poor-and-asks-salmon-giant-tassal-to-pay-for-dam/11488814

[xxxvi] Section 42(1)(b), MFP Act.

[xxxvii] Section 42A, MFP Act.

[xxxviii] Section 77 and 78 of the LMRM Act govern applications and grants of marine farming licences.

[xxxix] Clauses 3.2.1 and 3.3.5 of the *Storm Bay off Trumpeter Bay North Bruny Island Marine Farming Development Plan August 2018*

[xl] Sections 42J(2) and 42K(4) of the EMPC Act respectively.

[xli] See clauses 16.2, 20.1 of the *State Policy on Water Quality Management 1997*, and section 13C of the *State Policies and Projects Act 1993*.

[xlii] Personal communication with Ms Bookless. While there is no explicit requirement in the *State Policy on Water Quality Management 1997* for WQO to be published, it would be in line with the EMPC Act's objective of encouraging public involvement in resource management and planning for them to be made publicly available. The EPA's *Fact Sheet on Setting Water Quality Objectives in Tasmania* dated February 2015, suggests that the EPA Board would be seeking public comment on the WQOs. To the EDO's knowledge this has not occurred.

[xliii] As much was acknowledged by the Panel in its May 2012 report on its assessment of *Draft Amendment No. 1 of the Macquarie Harbour MFD Plan* where it said (at section 1.5) "An adaptive management approach provides a framework within which the farming operations may occur while more is learnt about its effects. In order for the

Panel to support such an approach it needs to be satisfied that any environmental effects caused by marine farming operations undertaken in accordance with the development plan can be effectively detected and mitigated without irreversible impacts."

[xliv] Section 48, MFP Act.

[xlv] Australia. Parliament. Senate. Environment and Communications References Committee &Urquhart, Anne (2015). *Regulation of the fin-fish aquaculture industry in Tasmania*. Canberra, ACT Environment and Communications References Committee, at [3.92]. In his evidence to the Senate Committee, the Secretary of DPIPWE John Whittington indicated that "DPIPWE would like to further investigate the provision of online reporting of some of the environmental data that it receives and this will be considered over the coming year." To date there has been no online reporting of this environmental data.

[xlvi] Accessible at https://maps.thelist.tas.gov.au/listmap/app/list/map

[xlvii] Accessed at https://dpipwe.tas.gov.au/sea-fishing-aquaculture/salmon-farming-data-portal.

[xlviii] While most specific environmental compliance information is difficult to obtain, these companies are now involved in the Sense-T project (a collaboration between UTAS, the Commonwealth and Tasmania Governments) involving real-time reporting of certain environmental parameters within their fish farming leases (although the public does not have access to this information).

[xlix] The Guardian, 'Tasmania's FOI regime crippled by 'outrageous delays', academic says', 13 January 2019. [accessed: https://www.theguardian.com/australia-news/2019/jan/14/tasmanias-foi-regime-crippled-by-outrageous-delays-academics-say]

[i] Clause 1(c) of Schedule 1 to both the EMPC Act and MFP Act.
[li] The Rio Declaration on Environment and Development, 1992 [Accessed: http://www.unesco.org/education/pdf/RIO_E.PDF]; United Nations Environment Programme 2010. *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, adopted by the Governing Council of the UNEP in decision SS.XI/5, part A of 26 February 2010. [Accessed: https://www.unenvironment.org/resources/publication/guidelines-development-national-legislation-access-information-public]

[lii] Berry et al, January 2019. 'Making space: how public participation shapes environmental decision-making', *SEI Discussion Brief*, Stockholm Environment Institute [Accessed: https://www.sei.org/wp-content/uploads/2019/01/making-space-how-public-participation-shapes-environmental-decision-making.pdf

[liii] See also van Bekhoven 2016. 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' *National Taiwan University Law Review* 220 [11] 2: 230; Cooper T, Bryer T & Meek J 2006. 'Citizen-Centred Collaborative Public Management' 66 *Public Administrative Review* 76-88 at [79-80]
[liv] Section 37(1) of the MFP Act.
[lv] Sections 8 and 12 of the MFP Act.
[lvi] Section 95, MFP Act.

[lvii] See section 5 of the *Tasmanian Planning Commission Act 1997.*
[lviii] Clauses 3.2 and 3.3 of the *Storm Bay North Marine Farming Development Plan November 2017.*
[lix] Clauses 3.4.1 and 3.4.2 of the *Storm Bay North Marine Farming Development Plan November 2017.*
[lx] Section 50(1) of the EMPC Act.
[lxi] Sections 55 and 55A of the EMPC Act.
[lxii] Section 55A(1)(a) of the EMPC Act.
[lxiii] Section 55A(1)(b)(i) of the EMPC Act.
[lxiv] See sections 50(1) and 51(1) of the EMPC Act.
[lxv] Section 64 of the *Protection of the Environment Operations Act 1997 (NSW).*
[lxvi] Environmental licences have a condition regulating the "rolling annual median indicator values" at certain compliance sites. The condition requires that the indicator values, including for ammonia (which contains nitrogen), must not exceed a certain threshold (being a rate per L as measured at surface and bottom waters). However, this condition is only enforceable where the EPA can prove that the nitrogen levels at the compliance site "are directly attributable to marine farming operations". Where there are multiple marine farms operating in an area and a compliance site is showing higher levels of ammonia that is allowed under the condition, it is difficult to imagine

how the EPA could take and enforcement action against the responsible marine farm operator. Likewise, if there were other potential sources of nitrogen, such as land-based agriculture nearby, a salmon farm operator might easily raise reasonable doubt as to whether they have breached the condition.

[lxvii] EDO Tasmania's 2012 submission to the Standing Committee on Agriculture, Resources, Fisheries and Forestry inquiry into the Role of Science in Fisheries and Aquaculture provides a summary of enforcement measures undertaken in response to observed breaches of marine farm plan and licence conditions. Compliance data released by DPIWE in response to EDO's request confirm that regulators are far more likely to issue a direction than issue any fine or take any other enforcement action in response to a non-compliance; see https://dpipwe.tas.gov.au/Documents/GM_Memo_Active%20Disclosure%20(Salmon%20Farming)%20-EDO.pdf

[lxviii] *Huon Aquaculture Company Pty Ltd, Macquarie Harbour Submission to EPA (January 2017)* accessed at https://www.huonaqua.com.au/wp-content/uploads/2017/03/Huon-Aquaculture-response-to-EPA-draft-biomass-determination-REDACTED-for-public-release-NEW-1.pdf

[lxix] *Huon Aquaculture Company Pty Ltd, Macquarie Harbour Submission to EPA (January 2017)* accessed at https://www.huonaqua.com.au/wp-content/uploads/2017/03/Huon-Aquaculture-response-to-EPA-draft-biomass-determination-REDACTED-for-public-release-NEW-1.pdf

[lxx] *DPIPWE Macquarie Harbour Status Report Update April 2016*, accessed at http://dpipwe.tas.gov.au/Documents/2016%20Update%20to%20the%20Macquarie%20Harbour%20Status%20Report.pdf

[lxxi] *EPA Compliance Summary, Macquarie Harbour, September 2016* accessed at http://epa.tas.gov.au/regulation/salmon-aquaculture/macquarie-harbour-management

[lxxii] *Letter from EPA Director Wes Ford to Tassal CEO Mark Ryan dated 20 February 2017* accessed at http://epa.tas.gov.au/Documents/EPA%2020%20Feb%202017%20Letter%20to%20Tassal%20CEO%20-%20Macquarie%20Harbour%20Lease%20266.pdf

[lxxiii] *EPA responds to media regarding Macquarie Harbour salmon farming** 28 April 2017 accessed at http://epa.tas.gov.au/pages/news.aspx?newsstory=3696

[lxxiv] All the EPA's determinations and correspondence with salmon farm operators about the Macquarie Harbour biomass caps can be viewed here: https://epa.tas.gov.au/regulation/salmon-aquaculture/macquarie-harbour/management-determinations#tassal

[lxxv] See under heading 'Waste Capture System Trial' and 'Waste Capture System Approval, June 2017' at https://epa.tas.gov.au/regulation/salmon-aquaculture/macquarie-harbour/management-determinations#waste-capture-approval

[lxxvi] *Tassal backs away from dumping treated wastewater from salmon pens back into Macquarie Harbour*, ABC News dated 13 November 2017 accessed at https://www.abc.net.au/news/2017-11-13/tassal-backs-away-from-dumping-waste-back-into-macquarie-harbour/9145722

[lxxvii] *Spate of finfish deaths in Macquarie Harbour after warm spell,* The Mercury dated 27 November 2017, accessed at: https://www.themercury.com.au/business/spate-of-finfish-deaths-in-macquarie-harbour-after-warm-spell/news-story/1439dc6bae2c09c24d1dec29baf5dd01

[lxxviii] *Macquarie Harbour salmon expansion science 'wrong'*, ABC News on 23 March 2018, accessed at: https://www.abc.net.au/news/2018-03-23/macquarie-harbour-salmon-expansion-science-wrong-admits-epa/9579140

[lxxix] Ross and Macleod (2018) *Environmental Research in Macquarie Harbour FRDC 2016/067:Understanding oxygen dynamics and the importance for benthic recovery in Macquarie Harbour PROGRESS REPORT Approved by the Project Steering Committee and FRDC on 8/02/2018* IMAS.

[lxxx] To read a copy of the EPA Director's reasons, click here: https://epa.tas.gov.au/regulation/salmon-aquaculture/macquarie-harbour/management-determinations#biomass-limit-set

[lxxxi] *Macquarie Harbour salmon: 1.35 million fish deaths prompt call to 'empty' waterway of farms*, ABC News, dated 29 may 2019, accessed at: https://www.abc.net.au/news/2018-05-29/salmon-deaths-in-macquarie-harbour-top-one-million-epa-says/9810720

[lxxxii] To read a copy of the Huon Aquaculture's 6 April 2018 submission reasons, click here: https://epa.tas.gov.au/regulation/salmon-aquaculture/macquarie-harbour/management-determinations#biomass-limit-set

[lxxxiii] On the 20 July 2019, the IMAS released the latest progress report of the environmental health of Macquarie Harbour: Ross *et al* (2019) *Environmental Research in Macquarie Harbour FRDC 2016/067: Understanding oxygen dynamics and the importance for benthic recovery in Macquarie Harbour PROGRESS REPORT Approved by the Project Steering Committee and FRDC on 11/07/2019,* IMAS. The results indicate that middle- to bottom-level water oxygen levels in Macquarie Harbour dipped again to very low levels in spring 2018, but have since improved due to oceanic recharge of the harbour. While no benthic (sediment) faunal surveys were undertaken in spring 2018, the IMAS report concludes that benthic faunal conditions have improved compared to previous years. The report also shows a reduction in bacterial mats in the harbour compared to the same period in 2016 and 2017. EDO contacted IMAS researcher Jeff Ross to find out why benthic monitoring had not been undertaken in spring 2018, being the time mostly likely to show poor benthic conditions. Mr Ross explained that when research project was extended by the EPA, the number of benthic fauna surveys were reduced based on a "balance of logistics, costs and information gained." Mr Ross said that he considered that the level of benthic monitoring would still provide a good indication of environmental conditions.

[lxxxiv] *Scientists urge action to protect habitat of Tasmania's endangered ancient skate* ABC News dated 2 December 2018 accessed at: https://www.abc.net.au/news/2018-12-02/skate-study-endangered-fish-waters-tasmania/10572918

[lxxxv] By way of example, under s.80 of the *Aquaculture Act 2001* (SA), the Minister must maintain a register of applicants for aquaculture leases, the terms and conditions of aquaculture leases and licences, and a summary of each environmental monitoring report furnished to the Minister in accordance with regulations or lease or licence conditions. This register is to be kept available for free public inspection. Under s.154 of *Fisheries Management Act 1994* (NSW), a register of aquaculture permits are required to be kept, including any details of suspension or cancellation of a permit, and under r.44(3) of the *Fisheries Management (Aquaculture) Regulation 2012* (NSW).

We further note that in most other Australian jurisdictions, similar information relating to activities that have the potential to cause environmental harm is required to be kept on a public register (see Part 4, Chapter 11 *Environmental Protection Act 1994* (Qld); Part 9.5 of *Protection of the Environment Operations Act 1997* (NSW); ss23, 31D, and 67G *Environment Protection Act 1970* (Vic); s.109 *Environment Protection Act 1993* (SA)). Tasmania's EMPC Act, does have a form of a public register for environmental management and enforcement instruments, however under the proposed reform of the Act, this register will be unlikely to capture the full breadth of information relating to the approval and regulation of salmon farms, even where they are granted an Environmental Licence.

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1 June 2015

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Ms McDonald

Inquiry into the Regulation of Fin-Fish Aquaculture in Tasmania

The Environmental Defenders Office (Tas) Inc (***EDO Tasmania***) is a non-profit, community based legal service specialising in environmental and planning law. We have a long-standing interest in best practice assessment and regulation of aquaculture. Our activities in pursuit of that objective include:

- In 2012, we hosted a multi-stakeholder conference, "*Managing Marine Farming: Have We Achieved Best Practice?*", looking at the experience of marine farming planning and operation in Tasmania and internationally[1]
- Making representations to the 2012 House of Representatives Inquiry into the Role of Science in Fisheries and Aquaculture (see **Attachment 2**)
- Publishing a paper outlining regulatory regimes in a range of international jurisdictions and recommending changes to improve the Tasmanian framework (see **Attachment 3**)
- Participating in a range of constructive consultation forums with industry representatives.

The attached submission builds on those activities, focussing on the following terms of reference:

(c) the adequacy of current environmental planning and regulatory mechanisms

(d) the interaction of state and federal laws and regulation

Getting the regulatory framework right is the most effective way to ensure that the marine farming industry can continue in a sustainable manner and with community (and consumer) confidence that environmental impacts are being appropriately managed.

We would welcome the opportunity to appear at a hearing to respond to any questions or provide clarification in relation to the issues raised in this submission.

Yours sincerely,
Environmental Defenders Office

Jess Feehely
Principal Lawyer

[1] Conference papers for the *Managing Marine Farming* forum are available at www.edotas.org.au/resources/conferences/

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ATTACHMENT 1: Submission to Senate Inquiry into the Regulation of Fin-Fish Aquaculture in Tasmania

Summary of key recommendations

- Marine farming should be brought within the *Land Use Planning and Approvals Act 1993* by:

  Requiring regional coastal and marine plans to be developed through consultation with all affected stakeholders. The plans could identify appropriate zones for marine farming, set limits on intensity of development and performance based standards that must be achieved. Regional plans could be reviewed by the Tasmanian Planning Commission and implemented through planning schemes

  Introducing Statewide guidance for marine farming provisions in planning schemes

  Establishing the Marine Farming Planning Review Panel as a referral agency to consider applications for individual lease developments / expansions

  Providing resources to planning authorities to adequately assess applications for marine farming operations

- Implement a clear hierarchy of objectives to guide decision making and prioritise maintenance of natural values
- Require applications for marine farming activities to be assessed by the EPA (as Level 2 activities)
- Authorise the EPA to monitor and enforce environmental conditions attached to any authority to conduct marine farming, and require monitoring data to be published on the EPA website
- Require the Marine Farming Planning Review Panel to include members with expertise in relation to marine ecology and hydrology and a member representing community issues
- Re-authorise the Panel to refuse applications for marine farming proposals that cannot meet sustainability objectives. To ensure that natural justice is achieved, allow any person affected by the decision to appeal against a refusal
- Require sufficient scientific data to be provided in order to assess the potential impacts of aquaculture proposals and identify clear impact thresholds *before* approvals are given
- Encourage the proactive release of information including monitoring reports, number of complaints received, enforcement action taken and follow up reports
- Amend lease and licence conditions to require monitoring data to be provided regularly, rather than relying on voluntary contribution of information by regulated operators
- Allow appeals to the Resource Management and Planning Appeal Tribunal against decisions to amend a marine farming development plan
- Direct the Auditor-General to undertake a review of monitoring and compliance activities under the MFPA and *Living Marine Resources Management Act 1995*
- Allow any interested person to commence civil enforcement proceedings under the MFPA
- Introduce innovative enforcement techniques, such as remediation orders and 'name and shame' provisions, to increase deterrent value
- Develop a clear Enforcement Policy to guide marine farming enforcement activity
- Encourage the Federal Environment Minister to review the decision that the Macquarie Harbour expansion was not a controlled action

These recommendations are discussed in greater detail below.

Adequacy of current environmental planning regulation

Problems with the current framework

Unlike most other use and development in Tasmania, marine farming in State waters is explicitly excluded from the operation of the *Land Use Planning and Approvals Act 1993* (***LUPAA***).[2] Instead, the principal pieces of legislation governing fin-fish aquaculture in Tasmania are the *Marine Farming Planning Act 1995* and the *Living Marine Resources Management Act 1995*.

The key deficiencies in the current regulatory regime for aquaculture are:

- Lack of integration with other planning regimes
- Conflicting management objectives for the regulator
- Lack of independent, scientific assessment in relation to aquaculture proposals
- Restrictions on public review of resource allocation decisions
- Lack of transparency in relation to monitoring, enforcement and environmental outcomes
- Limited enforcement actions

These issues are discussed in detail in the EDO Tasmania Issues Paper at **Attachment 3**, but are summarised below.

Lack of integration

In its 2004 assessment of environmental regulatory arrangements for aquaculture, the Productivity Commission noted:

> *The fisheries or aquaculture legislation may also have multiple, and sometimes conflicting, objectives. The objects of the fisheries legislation in New South Wales, Victoria, Western Australia and Tasmania, for example, all recognise explicitly that there are alternative uses of fishery resources — for example, commercial fishing, aquaculture, recreational fishing, tourism and 'non-consumptive uses'... However, there is little guidance on the appropriate weights to be assigned to competing uses or how conflicts between uses are to be resolved.*[3]

In particular, s.4(1) of the *Marine Farming Planning Act 1995* (***MFPA***) seeks to achieve "well-planned sustainable development of marine farming activities" having regard to the need to:

> *(a) integrate marine farming activities with other marine uses; and*
>
> *(b) minimise any adverse impact of marine farming activities; and*
>
> *(c) set aside areas for activities other than for marine farming activities; and*
>
> *(d) take account of land uses; and*
>
> *(e) take account of the community's right to have an interest in those activities.*

The Department of Primary Industries, Parks, Water and Environment (***DPIPWE***) and the Marine Farming Planning Review Panel (see below) are required to take these objectives, and the general sustainable development objectives set out in Schedule 1 of the MFPA, into account in their decisions.[4] However, the separation of marine farming planning from coastal and land use planning frameworks can make it difficult to balance these objectives. In practice, DPIPWE, the agency responsible for both planning and regulation of marine farming, has a clear interest in favouring development of marine leases over other uses.

Planning authorities (i.e local councils) have jurisdiction over land use and development but generally have no jurisdiction over the marine farming planning process or decisions in relation to activities below high water mark.[5] As a result, planning schemes under LUPAA cannot regulate marine farming activities (other than land-based operations or land-based components of marine-

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[2] LUPAA, s.20(7)
[3] Productivity Commission. 2004, *Assessing Environmental Regulatory Arrangements for Aquaculture*, Canberra, p31
[4] MFPA, s. 9(1)
[5] *Living Marine Resources Management Act 1995*, s. 5

based operations).[6] In contrast, the Minister can require a planning scheme to be amended to ensure that land based activities do not affect marine farming.[7] This provides an unfair priority for marine farming activities, and confounds consideration of the other criteria outlined in s.4(1) above.

The impacts of marine farming are not restricted to the water: marine farming introduces noise and odour issues, impacts on visual amenity, requires infrastructure and access to transport routes and processing facilities, and can interfere with tourism and recreation activities. The inability of councils to plan for, or be involved in the assessment of, marine farming continues to hinder effective strategic planning at a municipal or regional level. While Marine Farming Development Plans currently provide some guidance regarding the planned location of marine farms, the regularity of applications to amend such plans to expand or relocate marine farms means that the public has little confidence regarding the limits on growth and councils cannot make strategic decisions regarding infrastructure.

EDO Tasmania is a strong advocate for the inclusion of marine farming within the standard land use planning process under LUPAA, with responsibility for strategic planning, assessment and approval of development applications and enforcement of permit conditions falling to local government. The Productivity Commission has noted some concerns with this approach, stating that:

> *[T]he Marine Farming Planning Act 1995 provides for a common approach to marine farming across state waters, and DPIWE appears to have the capacity and experience to manage the process and address environmental impacts. If individual Tasmanian local councils were responsible for marine aquaculture planning and decision-making, there could be potential capacity and consistency issues that could affect both aquaculture, and marine management.*[8]

We consider that these risks could be overcome by:

- Introducing a Planning Directive to provide statewide guidance on planning scheme provisions relating to marine farming to improve consistency[9]
- Requiring planning schemes dealing with marine farming to be reviewed by the Tasmanian Planning Commission to ensure that the Planning Directive is implemented
- Requiring the planning authority to refer development applications for marine farms, or which may affect existing marine farms, to the Marine Farming Planning Review Panel (or another body within DPIPWE) for comment prior to assessment by the planning authority[10]
- Providing resources (financial and technical) to planning authorities required to take on additional responsibilities in relation to marine farming activities.

The benefit of greater integration to achieving the sustainable development objectives of the Tasmania's Resource Management and Planning System justifies the initial costs involved in restricting the marine farming planning system to accommodate these changes. Over time, the integration of the assessment and approval process is likely to result in reduced costs and social broad benefits.

The Productivity Commission has also noted the consequences of poorly integrated coastal and marine planning:

> *State marine and coastal planning instruments are in some cases outdated, lack implementation plans for on-ground action, and fail to adequately consider adjoining land uses. These problems can constrain aquaculture development, and affect existing aquaculture operations through poor coastal water*

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[6] See, for example, MFPA, s.19(3)(c)

[7] MFPA, s. 20(3) provides that the relevant Minister may 'require the Tasmanian Planning Commission to prepare an amendment to a planning scheme under that Act in respect of land which adjoins State waters to reduce the negative impact or likely negative impact of activities or future development on the land upon marine farming or other activities in State waters'.

[8] Above n3, p61

[9] Note, current planning reforms seek to implement a Statewide Planning Scheme. This could facilitate the introduction of Statewide provisions relating to aquaculture

[10] This is consistent with the approach taken in relation to Level 2 development, developments affecting heritage places or developments which may impact on sewerage or water infrastructure.

management, with further implications for environmental management. There may also be a lack of integration between marine / coastal and natural resource management plans.[11]

The Tasmanian *State Coastal Policy 1996* provides limited guidance in relation to aquaculture planning or coastal developments causing diffuse pollution discharges that may compromise off-shore aquaculture operations. This inhibits integrated resource planning which balances all competing uses having regard to the ecological capacity of the region. A revised draft Coastal Policy released for comment in 2013 attempted to address this, but has not been progressed by the current government. Again, greater Statewide direction on coastal and marine planning matters can be delivered through a Planning Directive or the proposed Statewide Planning Scheme currently under development.

Approaches in other jurisdictions

The approaches adopted in other jurisdictions in which fin-fish aquaculture operations are common, including New Zealand and Scotland, recognise:

- the importance of an explicit hierarchy of objectives to guide decision-making; and
- that separate planning for marine farming does not deal adequately with complex interrelationships, ecosystem impacts and diverse stakeholder priorities.

For example, prior to 1991, marine farming in New Zealand was subject to sector-specific legislation[12] which identified aquaculture zones where marine farming was permitted. However, the *Resource Management Act 1991* (**RMA**) incorporated marine farming into a general "effects based management" regime for all use and development. The RMA required "rigorous analysis the effects of the proposed activity can be adequately avoided, remedied or mitigated and are otherwise consistent with sustainable management".[13] Further changes to the legislation were introduced in 2011 to give effect to policies, including the *New Zealand Coastal Policy Statement*.

All regional councils have adopted regional coastal plans that are consistent with this Coastal Policy Statement. Many regional coastal plans identify areas where marine farming cannot occur as well as specifying limits on the character, intensity, or scale of acceptable activities.

In 2014, the Environmental Defence Society Inc successfully challenged an amendment to a regional coastal plan to allow an aquaculture operation. In making its initial decision, the Board of Inquiry noted that allowing aquaculture would have "high" to "very high" effects on the landscape and natural values, but the compelling economic and biosecurity benefits of the proposal outweighed those concerns. On appeal, the Supreme Court held that the Board had erred in performing that "balancing act" – the terms of the Coastal Policy Statement clearly required that the objectives of protecting natural values be implemented, irrespective of economic or other considerations.[14] This did not mandate that no environmental harm could occur, but required the Board to be satisfied that sustainable management could be achieved.

This decision illustrates the need for legislation to provide explicit guidance on the factors to be balanced in resource management decisions and the appropriate weights assigned in the event of conflict. The decision also highlights the value of opportunities for third party review of resource management decisions (see below).

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[11] Above n.3, p50

[12] *Marine Farming Act 1971*

[13] Bret Birdsong, Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act, October 1998. As found at http://www.fulbright.org.nz/news/1998-birdsong/.

[14] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38

RECOMMENDATIONS

- Update *State Coastal Policy 1996* to more effectively address use and development in catchments, coastal areas and marine areas
- Bring marine farming within the *Land Use Planning and Approvals Act 1993* by:

  Requiring regional coastal and marine plans to be developed through consultation with all affected stakeholders (including the public). The plans could identify appropriate zones for marine farming, set limits on intensity of development and performance based standards that must be achieved. Regional plans could be reviewed by the Tasmanian Planning Commission and implemented through planning schemes;

  Introducing Statewide guidance for marine farming provisions in planning schemes;

  Establishing the Marine Farming Planning Review Panel (subject to the changes discussed below) as a referral agency to consider applications for individual lease developments / expansions;

  Providing resources to planning authorities to adequately assess applications for marine farming operations
- If the *Marine Farming Planning Act 1995* remains, ensure that a clear hierarchy of objectives is set out to guide decision making. The hierarchy should prioritise maintenance of natural values.

Regulatory independence

Effective regulatory frameworks rely on the independence of the regulators. The Productivity Commission identified the risks associated with lack of independence (or the perception of lack of independence):

> *State government departments that are primarily responsible for the aquaculture regulatory arrangements often have potentially conflicting functions of policy development, implementation of regulation, industry promotion and development, and aquaculture research. There may be some size and efficiency advantages from the grouping of certain functions, but the conflict between regulatory and development roles may lead to public and industry mistrust over resource planning and allocation, regulatory approvals, monitoring and enforcement.*[15]

In Tasmania, the Marine Farming Branch within DPIPWE is responsible both for promoting and regulating the marine farming industry; potentially conflicting roles. For example, although the marine farming expansion at Macquarie Harbour was carried out by three private companies, Tassal Operations Pty Ltd, Huon Aquaculture Group Pty Ltd and Petuna Aquaculture Pty Ltd, DPIPWE was listed as the proponent for the action in the referral to the Federal Environment Minister. The referral documentation was prepared by DPIPWE and submitted only two days after the decision of the Tasmanian Minister to allow amendments to the *Macquarie Harbour Marine Farming Development Plan 2005* to facilitate the expansion, making it likely that the documentation was being prepared in advance of the Minister's decision.

The close relationship between the three companies and the regulator, a history of under-regulation and enforcement (see below), and explicit support expressed by DPIPWE for aquaculture projects all affect public trust in the rigour of the regulatory framework.

In other jurisdictions, marine farming impacts are regulated by agencies with direct responsibility for environmental management, such as Scotland's Environment Protection Agency. In contrast, the legislative role of Tasmania's Environment Protection Authority (***EPA***) is limited to the Director of the EPA being a member of the Marine Farming Planning Review Panel. While the EPA may provide advice to the Marine Farming Branch within DPIPWE, assessment, monitoring and enforcement activities remain the responsibility of DPIPWE.

[15] Productivity Commission 2004, *Assessing Environmental Regulatory Arrangements for Aquaculture*, Canberra, p168

The perceived lack of independence in the assessment, approval and regulation of marine farming operations also strengthens the case introducing third party review and enforcement options (see below).

RECOMMENDATIONS

- Update *State Coastal Policy 1996* to more effectively address use and development in Require applications in relation to marine farming operations to be assessed by the EPA (either as a Level 2 activity under the Environmental Management and Pollution Control Act 1994, or by way of amendment to the MFPA to provide for the assessment. The EPA can require an operation to be refused, or allow it to be approved subject to environmental management conditions.
- Authorise the EPA to monitor and enforce environmental conditions attached to any authority to conduct marine farming

Science-based decision making

Resource management decisions must be made on the basis of scientific evidence. In Tasmania, there are three major issues in relation to this:

- Research priorities to secure baseline data
- Access to timely, objective scientific input to guide decision-making
- Public access to data

Research priorities

In his paper examining the role of science in the aquaculture debate in British Columbia, Professor Stephen Bocking notes:

> *Effective science is also a matter of genuine, two way communication between scientists and those who use scientific information: a true dialogue, ensuring that research is not only relevant, but that its results are communicated in ways consistent with public concerns and perspectives on nature and the world. Only through such dialogue are scientific assessments likely to be sensitive to political realities, and political decisions likely to be scientifically realistic.*[16]

The Tasmanian and Commonwealth governments continue to show clear support for the aquaculture industry and to provide funding (matched or otherwise) for research institutions such as IMAS and the Fisheries Research and Development Corporation. These research organisations continue to provide excellent research outcomes and direction on improved sustainability. However, the need for industry funding to sustain these research programmes risks a level of capture in terms of the research agenda, outcomes of such research and availability of research data.

To the greatest extent possible, research agendas should be developed with input from a broader range of stakeholders to improve the practical application and ensure the greatest public benefit from research initiatives.

Science in decision making

Decisions in relation to aquaculture proposals (developments or expansions) are referred to the Marine Farming Planning Review Panel (the ***Panel***) for assessment. The Panel is established under the *Marine Farming Planning Act 1995* as an independent body comprised of eight individuals with expertise in a range of disciplines relevant to marine farming, as set out in s.8(2) of the MFPA:

> ***(2)*** *The Panel consists of 8 persons appointed by the Governor of whom–*
>
> ***(a)*** *one is the chairperson of the Panel; and*

[16] Bocking, S. 2007. "Wild or Farmed? Seeking Effective Science in a Controversial Environment". Conference papers published in *Spontaneous Generations* 1:1 (2007). ISSN 1913-0465. University of Toronto, p55

(b) *one is a person nominated by the chairperson of the Tasmanian Planning Commission with ability and experience in planning issues; and*

(c) *one is the Director, Environment Protection Authority; and*

(d) *one is a person with ability in marine resource management; and*

(e) *one is a person with ability to assess boating, recreational and navigational issues; and*

(f) *one is a person with experience in marine farming; and*

(fa) *one is a person with expertise in local government issues; and*

(g) *one is a person nominated by the Minister.*

Notably, while nominees under s.8(a),(c),(d), (f) and (g) could have relevant scientific expertise, there is no explicit requirement for the Panel to include a member with qualifications in relation to marine ecology, hydrology, marine sediments or conservation management. Other than s.8(g), there is also no capacity for community concerns to be represented (e.g. residents concerned regarding nuisance impacts from marine farming).

Prior to 2011, the Panel was able to determine that unacceptable proposals could not proceed. The Panel was required to take into account public submissions, the recommendations of the Marine Farming Branch and the sustainable development objectives of the MFPA in making such a determination. However, in November 2011 the MFPA was amended to remove the power of the Panel to refuse a draft amendment to a Marine Farming Development Plan. Instead, the Panel could make a recommendation to the Minister only - the Minister would have the final decision in relation to the proposal and could also make any changes to the proposal without further consultation. The history of that amendment is discussed in more detail in **Attachment 2**.

The Panel has an explicit mandate when assessing a proposed aquaculture development to consider whether the proposal can satisfy sustainability objectives. There may be good reasons why the Minister, having responsibility for a range of portfolios, would not accept a recommendation from an expert Panel to approve a proposed aquaculture development, even though the proposal, when considered in isolation, is considered to be sustainable. For example, the Minister may consider that the proposal will have unacceptable visual or amenity impacts on nearby residents, may interfere with views from key tourist spots or may place an undue burden on local government infrastructure.

In contrast, there can be no good reason to allow proposed marine farming activities where the independent, scientific expert Panel has determined that the amendments are not sustainable and recommended refusal. Decisions made by the Panel to refuse a proposal should be final (subject to a right of review – see below).

Adaptive management

Generally, assessment and regulation of marine farming in Tasmania adopts an adaptive management approach. While we recognise that there are benefits to adaptive management which responds to unanticipated problems, adaptive management should not be used to overcome shortcomings in scientific evidence presented with an application.

If sufficient data is not provided to clearly identify risks and satisfy the decision maker that impacts on environmental values can be avoided, minimised or appropriately managed, further information should be requested from the proponent or the proposal should be refused. Reliance on adaptive management to overcome data shortfalls (rather than to deal with new information) is inappropriate, particularly in relation to impacts on endangered species.

For example, one significant concern in relation to the Macquarie Harbour expansion was the potential impact on the Maugean skate, *Zearaja maugeana*, an endangered species with a

restricted habitat range and an estimated population of only 2,500.[17] One of the identified threats to the species is increased nutrient levels, an outcome that was predicted to occur as a result of the proposed expansion. Environmental organisations raised concern that not enough was known about the ecology or biology of the Maugean skate, or the likely movement of nutrients within Macquarie Harbour, to ensure the species would not be significantly impacted.

The Marine Farming Branch within DPIPWE recommended that the expansion be approved, despite noting that IMAS advice confirmed that there was "*currently no information about the potential effects of salmon farming in Macquarie Harbour on the Maugean skate*" and a dedicated survey to identify trigger values would not be completed until September 2012 (after the anticipated commencement of operations in Macquarie Harbour).

The Panel also acknowledged the lack of data regarding nutrient enrichment, the nature or effect of that enrichment and the potential effects of the expansion on the Maugean skate. Despite this, the Panel's recommendation, and the subsequent documentation supporting the referral to the Federal Environment Minister, made a number of broad statements such as:

- "It is possible that skates will continue to be able to utilise the lease area";
- "It therefore could be concluded that solid wastes are unlikely to have a significant impact on the Skate, based on the currently available information on the biology and ecology of the species."

Those statements were not supported by the limited information available regarding the extent (and depth) of habitat of the threatened species, its grazing and breeding habits and its susceptibility to nutrient changes, as well as limited data regarding nutrient movement in the Harbour. Subsequent nutrient and dissolved oxygen levels experienced in Macquarie Harbour, and the impact of those levels on fish health and farm productivity[18] raise concerns that more rigorous baseline data should have been required as part of the assessment process rather than post-approval.

At the very least, data provided with a proposal must be sufficient to enable appropriate performance triggers to be set. In relation to the Maugean skate, this was not done.

RECOMMENDATIONS

- Require the Panel to include a member with qualifications and expertise in relation to marine ecology and hydrology.
- Require the Panel to include a member representing community issues.
- The MFPA should be amended to reverse the 2011 amendments and re-authorise the Panel to refuse applications for marine farming proposals that cannot meet sustainability objectives. To ensure that natural justice is achieved, any person affected by the decision, including third parties who made representations, should be entitled to appeal against a refusal.
- Decision-making frameworks must require sufficient scientific data to be provided in order to assess the potential impacts of aquaculture proposals *before* approvals are given. The MFPA must require the Panel and the Minister to be satisfied as to the likely impacts of a proposal and to identify clear thresholds which, if exceeded, will require operations to cease.

[17] Parsons, K. 2011. *Nowhere Else on Earth: Tasmania's Marine Natural Values*. Report prepared for Environment Tasmania, Aqenal. Available at oceanplanet.org.au/resources/nowhere-else-on-earth-tasmanias-marine-natural-values/.
[18] See, for example, "Salmon Farmers Fear for Water in Macquarie Harbour" http://www.themercury.com.au/news/politics/salmon-farmers-fear-for-water-in-macquarie-harbour/story-fnpp9w4j-1227247445832, the submission to this Inquiry by Environment Tasmania and Senate Hansard, 2 March 2015, regarding leaked industry documents.

Transparency and review options

In order to secure public support and confidence, regulatory frameworks must be transparent and subject to scrutiny. This requires public involvement in decision-making, access to information on which decisions are based, and opportunities to challenge decisions on the basis that they will not achieve stated sustainable outcomes.

> *Firstly, determining what is sustainable for a community will depend on accurately ascertaining the community's preferences, which is best done by incorporating them into the decision making process. Second, it is generally accepted that better environmental decisions will result from a greater flow of information, including information that is held or developed by the members of local communities. Finally, open public participation is encouraged on fairness grounds; if decisions are to be made that will broadly affect the community, then it is fair to provide members of the community the opportunity to participate.*[19]

Access to information - assessments

The MFPA currently provides for applications for amendments to Marine Farming Development Plans to facilitate expansion or relocation of marine lease areas to be publicly advertised. Supporting material in relation to the expansion (including Environmental Impact Statements) is also required to be published. Any person may make a representation in respect of the proposal and request to appear at the Panel hearing to outline their concerns. While there are variations in the quality of data presented with an application, the statutory obligation to provide access to information and to involve the public in the decision making process must be commended.

It is consistent with other land use processes, and with international marine farming practices, to facilitate public involvement in decisions regarding marine farming operations.

Access to information – regulatory actions

In contrast, the same level of transparency has not been achieved in relation to ongoing regulation of marine farming operations. In 2004, the Productivity Commission noted in relation to all aquaculture jurisdictions:

> *At present, there appears to be limited reporting by, and auditing of, the main agencies responsible for aquaculture and environmental regulatory arrangements in each state... Within confidentiality restrictions, aspects of regulatory and approval processes that could be reported on include: the number of applications; the number approved/rejected; discretionary approvals; exemptions; processing times; appeals; monitoring and enforcement actions. As well as potentially improving accountability and transparency, reporting such information may help to improve the application of regulation by identifying potential regulatory constraints and opportunities for improvements with approval processes.*[20]

This observation remains true a decade later. It is our experience that obtaining access to information regarding monitoring, compliance and enforcement action can be extremely difficult. The information is rarely accessible without a Right to Information request (which may take many months to be resolved), and such applications are often refused on the basis of commercial in confidence exemptions or the volume of material that would need to be supplied.

In contrast, while monitoring requirements in Canada are largely discretionary, the law requires all information regarding environmental assessments that are undertaken to be made publicly available. This assists with the transparency of monitoring and encourages performance improvements.

Another justification given for the refusal to release monitoring data voluntarily submitted by industry is that its release would discourage future voluntary data submissions. This is not a valid justification, given DPIPWE's powers to compel the submission of relevant data. While there are clear advantages to maintaining good regulatory relationships with industry, where data is in the public interest (particularly where it relates to public or environmental health), the information should be both required to be submitted and readily available to any interested person.

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[19] Bret Birdsong, "Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act", October 1998. As found at http://www.fulbright.org.nz/news/1998-birdsong/

[20] Above n3, pp134-135

Merits review

In controversial resource management issues, including aquaculture, debate centres around scientific information (including the lack of information, or difficulty of accessing information). As a result, rigour and transparency in the assessment process is critically important. However, it is not uncommon for different stakeholders to point to conflicting scientific information to support their views, as Professor Stephen Bocking points out:

> *Science has been used by all parties, not just as a source of information about risks and benefits,but as a source of authority. Both those who favour [marine]farming and those who oppose it invoke science to support their arguments, their framing of the issue (as a question of managing an economically valuable, environmentally sound activity, or conversely, of protecting wild salmon stocks from a hazardous industry), and their claims to be presenting an objective, impartial perspective.*[21]

Recognising the ability to use evidence selectively (and politically) to further different objectives, it is critical for evidence used in decision making to be independently tested through merits review. Unfortunately, there are limited opportunities for such review under the current Tasmanian regulatory framework.

For most significant land use and development decisions under LUPAA, any person who made a representation can appeal to the Resource Management and Planning Appeal Tribunal. The appeal will be heard *de novo*, meaning that the Tribunal effectively re-hears the evidence and makes its own determination as to whether the use or development should proceed. This is also the case in New Zealand[22] and Scotland.

In contrast, there is no right to appeal against a decision under the *Marine Farming Planning Act 1995* to amend a Marine Farming Development Plan to facilitate an aquaculture proposal. Particularly given concerns regarding the independence of the decision-making structure under the MFPA (see above), a right of appeal is important and should be open to any person who made a representation in respect of the proposal (including affected residents, NGOs, other industries, tourism operators and the local government).

Allowing a right of appeal to the Resource Management and Planning Appeal Tribunal would provide appropriate scrutiny from a body with experience in resource management and procedural fairness that is required to further the sustainable development objectives of the Resource Management and Planning System. The Tribunal has powers to dismiss frivolous appeals and to awards costs in appropriate situations, which is sufficient to deter appeals which lack merit.

RECOMMENDATIONS

- Encourage the proactive release of information including monitoring reports, number of complaints received, enforcement action taken and follow up reports
- DPIPWE should amend lease and licence conditions to require monitoring data to be provided regularly, rather than relying on voluntary contribution of information by regulated operators
- Allow all parties (including the proponent and any person who made a representation) to appeal to the Resource Management and Planning Appeal Tribunal against a decision to amend a marine farming development plan to facilitate a new marine farming operation

  ***Note**: bringing marine farming planning and approvals under LUPAA would generally mean that such decisions would be subject to merits review by the Tribunal*

[21] Bocking, S. 2007. "Wild or Farmed? Seeking Effective Science in a Controversial Environment". Conference papers published in *Spontaneous Generations* 1:1 (2007). ISSN 1913-0465. University of Toronto, p55

[22] *Resource Management Act 1991*, s.120 (resource contents; First Schedule, s.14(1) (policy statements and plans)

Monitoring and enforcement

Even subject to the reservations outlined above, adaptive management will not be effective without appropriate monitoring and enforcement activities to facilitate adaptation. Encouraging improved performance will only be successful if there is a credible threat that stronger action will be taken if no improvement is demonstrated.

For example, the Marine Farming Development Plan for Tasmania's D'Entrecasteaux Channel imposes a plan-wide nitrogen cap to control nutrient impacts. However, there is currently limited monitoring to determine whether the cumulative contribution of each lease area to the nitrogen load exceeds the cap, and no ongoing assessment to determine whether the existing cap is set at a sustainable level (particularly having regard to other land0based nutrient sources contributing to the nitrogen load in the Channel.

The Productivity Commission noted in 2004 that, while critical for regulatory effectiveness, monitoring and enforcement activity often "appears to suffer from a lack resources."[23] This remains the case, and is generally used to justify the reliance on self-monitoring. In New Zealand, the costs of monitoring activities carried out by the Ministry of Conservation or the local planning authority are paid for by marine farm operators.[24] At the time of the Productivity Commission report, a similar position existed in Tasmania.[25]

The Productivity Commission also noted that regular auditing and review of monitoring and enforcement systems can have benefits for all stakeholders by improving the effectiveness and efficiency of operations.[26]

Monitoring

There is currently limited independent monitoring of marine farming operations – the Marine Farming Branch relies largely on reports and video surveillance submitted by the operators themselves every 6 or 12 months. A recent review by Hugh Kirkman[27] questioned whether this monitoring regime is adequate to identify and respond to risks. In particular, Kirkman stated that the frequency of video samples "seems inadequate for a meaningful assessment of impacts" and recommended that surveillance be conducted more regularly.[28]

The Broadscale Environmental Monitoring Program provides data on water quality across the south-east, but is collated only every three years. There are concerns that the monitoring sites selected as for that program are not representative and do not provide relevant data for modelling or managing the impacts of marine farming in the south east. Lack of pre-marine farming baseline data relating to environmental health also limits the capacity of the monitoring programme to identify the extent and impact of changes in nutrients.[29]

As outlined above, it has been our experience that it is difficult for the public to obtain access to monitoring data.

Enforcement

There are a number of enforcement options under the MFPA and *Living Marine Resources Management Act 1995*, including

- Fines up to $6,500 for marine farming equipment being located outside a lease area[30];

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[23] Above n3, p.135
[24] *Resource Management Act 1991*, s. 36(1)(c)
[25] Above n3, p.131
[26] Above n3, p134-135
[27] Kirkman, H. 2014. *Review of Monitoring the Environmental Effects of Salmon Farming in Tasmania.* Available at www.et.org.au
[28] Above n23, p4
[29] Ross, D and C. MacLeod. 2013. *Evaluation of Broadscale Environmental Monitoring Program.* Available at www.dpipwe.tas.gov.au
[30] MFPA, s.94

- Fines up to $65,000, or up to 2 years in prison, for contravening marine farming licence conditions[31];
- Issuing infringement notices (fines up to $650) for minor breaches;
- Allocation of demerit points for offences – accumulation of 200 demerit points over 5 years may lead to temporary disqualification from obtaining a marine farming licence;
- Cancellation or suspension of licence for 5 years if the licence holder contravenes the licence conditions[32].

Despite this range of options, a review of reported enforcement activities indicates that many observed breaches are unpunished and fines, if imposed, rarely exceed $500 (see **Attachment 2**). Without more consistent and effective enforcement activity, there is little incentive for marine farming operations to achieve, much less exceed, their obligations.

The objective of any enforcement activity is improved performance, rather than simply penalising the offender. However, it is clear from Attachment 2 that the approach being taken has little deterrent value and has failed to prevent ongoing environmental impacts. Similarly, while the Productivity Commission commended Tasmania's 'demerit system' for marine farming, the requirement to accumulate 200 demerit points before any serious consequences occur significantly reduces the efficacy of the system as a deterrent against breaches.

Given the 'clean, green' branding of Tasmania's marine farming companies, and their susceptibility to reputational damage, introducing penalties that require publication of transgressions may provide an appropriate deterrent.

To ensure that enforcement actions are effective, and consistently applied, DPIPWE and the EPA should adopt clear enforcement guidelines setting scientifically-based performance indicators, identifying a scale of enforcement actions, and indicating which actions will be taken in response to failure to meet those indicators (including graded increases in enforcement activity for repeat offenders).

Civil enforcement

Both LUPAA and the *Environmental Management and Pollution Control Act 1994* provide opportunities for any person with a 'proper interest' to take action in the Tribunal where the provisions of the Act are being breached (e.g. a permit is not being complied with or unlawful environmental harm is being caused). The opportunity for a third party to take action where the regulator has failed to do so is significant to public confidence and acts as a further deterrent against contraventions by proponents.

Similar opportunities are provided by the legislation in New Zealand[33] and Canada.[34] The introduction of wide civil enforcement powers such as those in place in New Zealand or under LUPAA would significantly improve enforcement outcomes in Tasmania.

RECOMMENDATIONS

- Direct the Auditor-General to undertake a review of monitoring and compliance activities undertaken under the MFPA and *Living Marine Resources Management Act 1995*
- Request advice from IMAS regarding the desired frequency of monitoring at marine farming sites, and implement any advice received
- Monitoring activities should be conducted by the EPA, with costs recovered from proponents through higher licensing fees and all data published on the EPA website

[31] *Living Marine Resource Management Act 1995*, s.86A
[32] *Living Marine Resource Management Act 1995*, s.90
[33] *Resource Management Act 1991*, ss.316(5) and 338(4)
[34] *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131

- Allow any interested person to commence civil enforcement proceedings where lease or licence conditions are not being met
- Develop a clear Enforcement Policy (similar to the one currently in place for the *Environmental Management and Pollution Control Act 1994*) to guide enforcement activity, including thresholds for action, innovative enforcement techniques (such as remediation orders or 'name and shame' provisions) and escalating penalty scales.

Relationship between Commonwealth and State regulations

The Commonwealth Government has limited involvement in relation to marine farming operations, unless those operations are likely to have a significant impact on matters of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (***EPBC Act***).

Significantly, the Macquarie Harbour expansion was referred to the Federal Minister under the EPBC Act but the Minister determined that the action was not a controlled action provided it was carried out in accordance with the *Macquarie Harbour Marine Farming Development Plan 2005* (as amended). For the reasons outlined above, we have concerns about whether compliance with that plan is sufficient to avoid significant impacts on the listed Maugean skate or the values of the adjacent Tasmanian Wilderness World Heritage Area.

The risk in determining that the action is not controlled is that the Federal Minister is now unable to intervene to address significant impacts, unless the Minister is satisfied that the action is not being carried out in the manner described. This unduly restricts the Minister's ability to take action to protect threatened species and World heritage values.

However, pursuant to s.78 of the EPBC Act, the Minister may revoke the decision that the action is not a controlled action and replace it with a decision that the matter IS a controlled action that requires assessment, IF satisfied that is warranted because:

- Substantial new information about the impacts of the action is available;
- A substantial change in circumstances has occurred that was not foreseen at the time of the decision

In light of recent evidence of nutrient issues, low dissolved oxygen levels and concerns regarding expected water flows, the Federal Minister should consider revoking his original decision and requiring an assessment of the Macquarie Harbour expansion under the EPBC Act. Such an assessment would allow appropriate stocking caps to be set to ensure that nutrient levels do not impact on matters of national environmental significance. Recognising the operation as a controlled action would also allow for the Federal Minister to take enforcement action where the Tasmanian government regulators have failed to do so.

RECOMMENDATION

- The Federal Environment Minister should exercise his power under s.78 of the EPBC Act to review the decision that the Macquarie Harbour expansion was not a controlled action.

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using the law to protect the natural and built environment

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11 May 2012

Secretary
Standing Committee on Agriculture, Resources, Fisheries and Forestry
House of Representatives
PO Box 6021
Canberra ACT 2601

By email: arff.reps@aph.gov.au

Dear Sir / Madam

Inquiry into the Role of Science for Fisheries and Aquaculture

The Environmental Defenders Office (Tas) Inc (***EDO Tasmania***) is a non-profit, community based legal service specialising in environmental and planning law. As a legal centre, our submission concentrates on the issue of governance arrangements, and the role of science in guiding regulatory decision-making in relation to fisheries and aquaculture.

In March 2012, EDO Tasmania hosted a multi-stakeholder conference, "*Managing Marine Farming: Have We Achieved Best Practice?*", which looked at the experience of marine farming planning and operation in Tasmania and internationally[1]. Our comments to this inquiry arise largely from discussion generated by that conference.

Summary of comments

- Readily available access to credible science is essential to regulatory decision making as a mechanism to achieve sustainable development. In the fisheries and aquaculture context, scientific information must form the basis for decisions regarding strategic planning, assessment of proposals, monitoring programmes, enforcement activities and, where necessary, law reform.
- Fisheries and aquaculture management should explicitly adopt holistic, ecosystem-based management strategies and a precautionary approach.
- Decision-making frameworks must require sufficient scientific data to be provided in order to assess the potential impacts of aquaculture proposals *before* approvals are given. Reliance on adaptive management to overcome data shortfalls (rather than to deal with new information) is inappropriate, particularly in relation to impacts on endangered species.
- Opportunities should be provided for merits review of decisions in relation to fisheries and aquaculture proposals, to ensure evidence is subject to rigorous, objective assessment.
- While recognising resource pressures on government agencies, environmental monitoring should be conducted (or at least audited) by independent organisations, rather than relying on industry self-monitoring.

[1] Conference papers for the *Managing Marine Farming* forum are available at www.edo.org.au/edotas

- Government agencies need to adopt rigorous compliance guidelines and develop a culture of consistent, incremental enforcement activity in response to breaches of licence conditions. Enforcement guidelines should establish clear, scientifically-based performance indicators and triggers for enforcement action.
- Regulatory agencies should also look to gaps in available science to guide an objective research agenda. While contributions from affected industries should not be discouraged, such contributions should not influence assessment decisions or divert the general scientific agenda away from public interest sustainability research and towards research into commercial innovations. To manage this risk, multi-stakeholder panels (including community, ENGO, academic and industry representatives) should be appointed to set scientific research priorities, monitor and disseminate research, and oversee the evaluation and application of the results of scientific research.
- EDO Tasmania supports development of accreditation programmes (such as the proposed Aquaculture Stewardship Council certification), provided the certification criteria are rigorous and transparent. Criteria must consider environmental outcomes, not just processes - having an environmental management plan should not be sufficient to satisfy the requirements, the applicant must demonstrate that the plan has been successfully implemented, is responsive, and is achieving sustainability outcomes.
- Once a rigorous certification programme is established, government funding for aquaculture projects should be contingent upon the recipient achieving certification.

Role of science

Having access to timely, relevant, evidence-based science is essential to regulatory decision making. Regulatory agencies must be guided by available science to provide the basis for planning and assessment decisions, and look to gaps in available science to guide the research agenda.

In his paper examining the role of science in the aquaculture debate in British Columbia, Professor Stephen Bocking notes:

> *Science must also be effective, which means solving problems and advancing the policy agenda. This entails fulfilling a diversity of roles, from anticipating emerging issues, to addressing those with which we are already familiar. And this, in turn, requires a very broad definition of relevance, to be achieved, as philosophers of science such as James Brown have argued, through a pluralistic research strategy. Such a strategy would draw on a diversity of participants in setting research priorities acknowledging , in particular, the essential role that independent scientists like Alexandra Morton have played in broadening the salmon farming research agenda. Effective science is also a matter of genuine, two way communication between scientists and those who use scientific information: a true dialogue, ensuring that research is not only relevant, but that its results are communicated in ways consistent with public concerns and perspectives on nature and the world. Only through such dialogue are scientific assessments likely to be sensitive to political realities, and political decisions likely to be scientifically realistic.*[2]

The challenges experienced in British Columbia are replicated in a range of environmental controversies, and certainly risk being replicated in relation to Tasmania's aquaculture management arrangements. Given this, there are clear benefits for the government in:

- articulating a clear policy position and the strategic research agenda necessary to achieve that position;

[2] Bocking, S. 2007. "Wild or Farmed? Seeking Effective Science in a Controversial Environment". Conference papers published in *Spontaneous Generations* 1:1 (2007). ISSN 1913-0465. University of Toronto, p55

- involving a range of interest groups in setting the research agenda; and
- ensuring public access to the research results.

Equally, as discussed below, the public needs to be given an opportunity to comment on scientific assessment submitted in support of proposals, and to seek review of the assessment in appropriate circumstances.

A range of research organisations, including the Fisheries Research and Development Corporation and IMAS, provide excellent research outcomes and direction on improved sustainability. However, we believe that allowing future research agendas to be developed with input from a broader range of stakeholders will improve practical application and ensure the greatest public benefit from research initiatives.

Strategic, precautionary approaches

At a minimum, broad scientific knowledge should be implemented through holistic management frameworks, and strategic approaches to planning for fisheries and aquaculture projects. In this regard, we strongly endorse the recognition in the 2007 Commonwealth *Guidelines for the Ecologically Sustainable Management of Fisheries* that:

> ***Those who depend on our oceans for their social, economic and cultural requirements recognise the need for ecosystem based fisheries management, particularly the need for precautionary management of fisheries.***

Strategic and precautionary approaches are particularly important in respect of appropriate management of, and adaptation to, predicted impacts of climate change on the fishing and aquaculture industries, and the ecosystems on which they rely. However, in practice, these approaches are often inadequately implemented.

Example 1: Tasmanian Rock Lobster Fishery

In February 2012, the Tasmanian Rock Lobster Fishery received export approval under s.303DC of the *Environment Protection and Biodiversity Conservation Act 1999*. The decision to give export approval (by amending the list of exempt native specimens) must be made having regard to the precautionary principle. However, despite overwhelming scientific evidence that declining populations of large Rock Lobsters within the fishery has resulted in proliferation of urchin barrens that threaten biodiversity generally, and the commercial viability of Tasmania's abalone industry, the Minister's delegate was satisfied that export could continue for a further five years.

His statement of reasons notes that he was satisfied that the Tasmanian government would continue to work on localised management areas, annual reviews of catch limits and continued research into urchin control to address the issue. However, an IMAS report submitted with the application for accreditation noted that the most efficient way to allow stocks to recover to levels where predation on urchins would address sustainability concerns was to close the fishery for a significant period.

Given the strength of evidence regarding the ecological and economic impacts of urchins, and the essential role of increased rock lobster populations in addressing those impacts, the extension of export approval for a further five years cannot be seen as precautionary.[3]

Example 2: Impacts on Maugean Skate in Macquarie Harbour

Tasmania's three largest aquaculture companies, Tassal Operations Pty Ltd, Huon Aquaculture Group Pty Ltd and Petuna Aquaculture Pty Ltd, are currently seeking approval to expand their operations in Macquarie Harbour (see www.dpipwe.tas.gov.au). The

[3] The Tasmanian Conservation Trust submission to this Inquiry provides more details in relation to the Tasmanian Rock Lobster situation.

proposed expansion will increase the area under marine farming leases from 564 hectares to 926 hectares (an increase of approximately 60%).

One significant concern in relation to the proposal is the potential impact on the Maugean skate, *Zearaja maugeana*. The Maugean skate, "*a Gondwanan relic that is the oldest lineage of skate in the world*", has an estimated population of only 2,500 and its habitat range is restricted to Bathurst Harbour – Port Davey and Macquarie Harbour.[4] Given low population numbers and highly limited distribution, any reduction or fragmentation of habitat or disruption of breeding cycles may lead to a significant impact on the species.

One of the identified threats to the species is increased nutrient levels, an outcome predicted to occur as a result of the proposed expansion.

In response to concerns raised by environmental organisations that not enough was known about the ecology or biology of the Maugean skate, or the likely movement of nutrients within Macquarie Harbour, to ensure the species would not be significantly impacted, the Marine Farming Branch of the Department of Primary Industries, Parks, Water and Environment recommended that the expansion be approved. Significantly, the Marine Farming Branch report noted:

- Updated IMAS advice confirmed that "There is currently no information about the potential effects of salmon farming in Macquarie Harbour on the *Maugean skate*"
- A dedicated harbour-wide sampling program is currently underway involving collection of data on a monthly basis from October 2011 to September 2012 at representative sites across Macquarie Harbour, which would be used to identify trigger values to be "built into the regulatory adaptive management framework and used to manage marine farming in Macquarie Harbour."
- "Should the proposed amendment be approved, it is anticipated that fish would be introduced into new lease sites in August 2012."
- "It is proposed that if marine farming activities were having a significant impact on the Maugean skate then this would likely be observed in video footage undertaken in the monitoring of industry."

Given the scientific advice that it was not currently possible to predict the impact of salmon farming on the Maugean skate, and the fact that even the preliminary sampling and monitoring work would not be completed until September 2012, seeking approval to get fish in pens by August 2012 (before appropriate trigger limits have been set) is not precautionary. Similarly, relying on video footage submitted every 12 months to determine whether there is any material impact on a highly localised endangered species is not precautionary, and may not be responsive enough to adequately protect the species.

This proposal is currently being assessed by the Marine Farming Planning Review Panel. The Panel is expected to make a recommendation to the Minister regarding the proposal by the end of May 2012.

Science-based decision making

As discussed above, it is critical that resource management decisions be made on the basis of scientific evidence. Recent amendments to Tasmania's *Marine Farming Planning Act 1995* have moved decision-making in relation to aquaculture proposals away from a scientific basis and allowed the decisions to be more politically motivated.

The Marine Farming Planning Review Panel (the ***Panel***) is established under the *Marine Farming Planning Act 1995* as an independent panel comprised of eight individuals with expertise in a range of disciplines relevant to marine farming. Prior to the recent

[4] Parsons, K. 2011. *Nowhere Else on Earth: Tasmania's Marine Natural Values*. Report prepared for Environment Tasmania, Aqenal. Available at oceanplanet.org.au/resources/nowhere-else-on-earth-tasmanias-marine-natural-values/ (***'Nowhere Else on Earth'***). A hard copy of the report can be provided on request.

amendments, the Panel was responsible for assessing proposed amendments to marine farming development plans to allow expansion, relocation or other changes to marine farming activities and able to refuse inappropriate proposals. The Panel was required to take into account public submissions, the recommendations of the Marine Farming Branch and the sustainable development objectives of the legislation.

In March 2011, the Panel exercised its powers to refuse a proposed amendment which would have allowed an expansion of Tassal's operations at Soldiers Point in the D'Entrecasteaux Channel (the ***Soldiers Point decision***). Having regard to all the evidence, the Panel considered that the projected economic benefits of the proposed expansion did not outweigh the adverse impacts of the proposal on a fragile reef system near the site.

Referring to this decision in parliament on 17 May 2011, the Premier stated:

> *This is the first instance of the panel rejecting a draft amendment according to section 41(2)(b) of the Marine Farming Planning Act 1995. This development would have allowed eight more stocked cages at the farm, which would have enabled better fish health management practices and more investment.* ***It is disappointing that it did not go ahead but there is a planning system in place. It has gone through the planning system and that independent expert panel has brought down its deliberations on this matter****. (emphasis added)*

Despite this apparent faith in the established planning process, in November 2011 the government enacted the *Marine Farming Planning Amendment Act 2011*. Significantly, the amending legislation removed the power of the Marine Farming Planning Review Panel to refuse a draft amendment to a Marine Farming Development Plan. Instead, that decision now rests with the Minister for Primary Industries, who has also been given power to make any changes to the proposed amendments he considers appropriate without further consultation.

In his second reading speech when introducing the *Marine Farming Planning Amendment Bill 2011*, Primary Industries Minister, Bryan Green, made it clear that the amendments were made in direct response to the Soldiers Point decision – an explicit indication the amendments were intended to allow decisions regarding aquaculture development to be determined on the basis of politics rather than science. Furthermore, the amendments were introduced one week after the application to allow expansion of aquaculture in Macquarie Harbour was released for public comment. The Minister, and the government generally, have been explicit in their support of that proposal.

The Panel has an explicit mandate to consider whether a proposed aquaculture development can satisfy sustainability objectives. There may be good reasons why the Minister, having responsibility for a range of portfolios, would not accept a recommendation from an expert Panel to approve a proposed aquaculture development, even though the proposal, when considered in isolation, is considered to be sustainable. For example, the Minister may consider that the proposal will have unacceptable visual or amenity impacts on nearby residents, may interfere with views from key tourist spots or may place an undue burden on local government infrastructure.

In contrast, there can be no good reason to allow proposed marine farming activities where the independent, scientific expert Panel has determined that the amendments are <u>not</u> sustainable and recommended refusal.

We urge the Committee to recommend that the amendments to the *Marine Farming Planning Act 1995* be repealed, and the Minister be required to adopt the recommendations of the Panel (subject to merits review, discussed below).

Adaptive management

Minimum data requirements

The EIS and government response in respect of Macquarie Harbour emphasise the role of adaptive management in aquaculture, to respond to new issues as they arise. While we recognise that there are definite benefits to adaptive management which responds to unanticipated problems, adaptive management should not be used to overcome shortcomings in scientific evidence presented with an application.

That is, if sufficient data is not provided to satisfy the decision maker that impacts will be avoided, minimised or appropriately managed, the proposal should be refused, or further information sought from the proponent. The application should not be approved, subject to conditions requiring information to be submitted later which could indicate that the proposal was inappropriate.

Furthermore, adaptive management requires triggers for adaptation to be identified. The information provided at the outside must be sufficient to enable appropriate triggers to be set.

Responsive management

Adaptive management will also not be effective without appropriate monitoring and enforcement activities to facilitate adaptation. Encouraging improved performance will only be successful if there is a credible threat that stronger action will be taken if no improvement is demonstrated.

There are a number of enforcement options under the relevant legislation, including:

- Fines up to $6,500 (or $650 per day for a continuing offence) for marine farming equipment being located outside a lease area (s.94 of the *Marine Farming Planning Act 1995*);
- Fines up to $65,000 (or $6,500 per day for a continuing offence), or up to 2 years in prison, for contravening marine farming licence conditions (s.86A, *Living Marine Resource Management Act 1995*);
- Issuing infringement notices (fines up to $650);
- Allocation of demerit points for offences – accumulation of 200 demerit points over 5 years may lead to temporary disqualification from obtaining a marine farming licence;
- Fines up to $650,000 or up to 2 years in prison for contravening Fisheries Rules; or
- Cancellation or suspension of licence for 5 years if the licence holder contravenes the licence conditions (s.90, *Living Marine Resource Management Act 1995*).

There appears to be a relatively active enforcement culture in relation to fisheries management, where people are regularly fined or prosecuted for taken in excess of quotas, taking species out of season or fishing without a licence.

In contrast, the table in **Attachment 1** was compiled from a review of Departmental correspondence regarding non-compliance in respect of marine farming licences from January 2006 – January 2012. Despite the range of enforcement options available, many observed breaches are unpunished and fines of only $400-$520 have been issued in respect of repeated, and what should be regarded as reasonably significant, breaches. For example:

- **Pillings Bay, Lease No 176** – In 2008, spontaneous out-gassing is observed. In 2009, out-gassing was evident at one bay and "thin to feint" patches of *Beggiatoa* were observed. In 2010, the *Beggiatoa* was described as extensive and observed in "thick mats". Despite three years of apparently worsening conditions, no penalty was imposed. The value of the adaptive management approach is questionable if the result was a spread of *Beggiatoa*.

- **Liberty Point, Lease No 217** – despite observations that "the level of organic enrichment has resulted in significant impacts and breaches of licence conditions", no fine was imposed.
- **Great Taylors Bay, Lease No 203** - complaints regarding equipment outside the lease area was made for four months without change, before a fine of only $400 + 4 demerit points was imposed (NB: 200 demerit points are required before any serious consequences flow from their accumulation).
- **Hideaway Bay, Lease No 93** – DPIPWE officers identified equipment outside the lease area, inadequate marking of the lease area and dead and dying birds entangled in nets. The officer observed that Huon Aquaculture had made no effort to remove the birds. A fine of $500 was imposed.

While the objective of any enforcement activity is improved performance, rather than penalising the offender, the repeated offences shown in the table do not suggest that the small fines imposed have much deterrent value.

We recommend that DPIPWE adopt clear enforcement guidelines setting scientifically-based performance indicators, identifying a scale of enforcement actions, and indicating which actions will be taken in response to failure to meet those indicators (including graded increases in enforcement activity for repeat offenders). Importantly, DPIPWE must take consistent action in accordance with its guidelines where monitoring reveals that performance indicators are not met.

Monitoring

It is self-evident that adaptive management approaches, and sustainable management generally, will not succeed without rigorous scientific monitoring against key performance indicators.

While we recognise the limited resources available to government agencies for monitoring activities, particularly where marine farming and fishing operations occur in regional areas, regular monitoring should be undertaken by the regulator, rather than relying on monitoring submitted by the industry itself. At a minimum, regular, random and unannounced audits of monitoring results must be undertaken to provide some assurance that the results submitted are accurate and representative of the impacts being caused by operations.

The value of merits review

Science often fuels debate on controversial environmental management issues, such as fisheries and aquaculture, with all sides of the debate drawing on scientific information to support their views. As discussed above, it is critical that resource management decisions be made on the basis of rigorous and transparent scientific evidence, however, as Professor Bocking points out:

> *In all these debates environmental knowledge is strongly evident. Science has been used by all parties, not just as a source of information about risks and benefits, but as a source of authority. Both those who favour farming and those who are oppose invoke science to support their arguments, their framing of the issue (as a question of managing an economically valuable, environmentally sound activity, or conversely, of protecting wild salmon stocks from a hazardous industry), and their claims to be presenting an objective, impartial perspective.*

Recognising the ability to use evidence selectively (and politically), it is critical that the evidence used in decision making be able to be independently tested through merits review. Unfortunately, such opportunities are limited in respect of fisheries and aquaculture management.

Following the challenge by the Humane Society International to the decision to declare the Southern Bluefin Tuna fishery as an approved wildlife trade operation in 2006[5], the EPBC Act was amended to remove the right to appeal against Ministerial decisions on wildlife trade operations. Similarly, no right of appeal exists for decisions to accredit fisheries management plans or to amend the list of exempt native specimens for export purposes. There is also no right to appeal against a decision under the *Marine Farming Planning Act 1995* to approve an amendment to a Marine Farming Development Plan to facilitate an aquaculture proposal.

Particularly where, as in Tasmania, the agency responsible for assessing and monitoring marine farming activities is also responsible for active promotion of the industry, a right of appeal is important and should be open to any person who made a representation in respect of the proposal (including affected residents, NGOs, other industries, tourism operators, the local government).

In Tasmania, a right of appeal would allow the decision to be reviewed by the Resource Management and Planning Appeal Tribunal. The Tribunal has powers to dismiss frivolous appeals and to awards costs in appropriate situations, which is sufficient to deter appeals lacking in merit.

We urge the Committee to advocate for appeal rights in respect of relevant fisheries and aquaculture decisions to ensure that science-based decisions are subject to appropriately rigorous review.

Accreditation

EDO Tasmania supports the development of programmes under which companies who can demonstrate compliance with rigorous and transparent criteria achieve certification. For example, the work currently being done by the Salmon Aquaculture Dialogue to develop standards for responsible aquaculture is worthwhile and will be useful to set sustainability benchmarks. However, any certification programme aimed at demonstrating sustainability must:

- Be based on clear, defensible indicators;
- Incorporate both inputs and outputs for industry (e.g. energy use, feed source, chemical use, light emissions) and direct and indirect impacts (e.g. loss of opportunity for recreational fisheries, downstream impacts);
- Require implementation of procedures, rather than just having procedures;
- Require regular, independent review of certified companies, and continue to encourage improvement even where indicators are met.

When appropriate certification programmes are established for fisheries and aquaculture, government agencies should give priority to certified companies in terms of funding opportunities or offer other incentives such as research assistance or reduced licence fees.

Thank you for the opportunity to make these comments. If you would like to discuss anything in this submission, please do not hesitate to contact me.

Yours sincerely,

Environmental Defenders Office

Jess Feehely, Principal Lawyer

Enc: Table of enforcement activities – marine farming breaches, Tasmania.

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[5] *Humane Society International and Minister for the Environment and Heritage* [2006] AATA 298

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LOCATION / LEASE #	DATE	ISSUE/OFFENCES	REQUIREMENTS OR PENALTIES IMPOSED
Billey Blue, No. 194	July 2009	Annual video assessment showed out gassing on disturbance	Sediment recovery required, pens should be left to fallow before being re-stocked.
Brabazon Point, No. 186	July 2009	Annual video assessment showed spontaneous out gassing at one pen pay. Tassal advised Dept. that this pen bay had been re-surveyed and there were no signs of spontaneous out gassing although there was significant *Beggiatoa*.	Dept. is satisfied that the site can continue to be stocked on the condition that it has a long fallow period and that subsequent footage from the 2010 video survey shows this site has recovered.
Creeses Mistake, No 190	July 2009	Annual video assessment showed out gassing on disturbance	Sediment recovery required, pens should be left to fallow before being re-stocked.
Great Taylors Bay, D'Ent Channel , No. 185	July 2009	Annual video assessment showed out gassing on disturbance	Sediment recovery required, pens should be left to fallow before being re-stocked.
Great Taylors Bay, D'Ent Channel , No. 203	28/06/2006	Marine Farming Equipment outside lease area	
	3/10/2006	Marine Farming Equipment outside lease area – following a complaint from Marine and Safety Tasmania.	
	24/10/2006	Re-inspection as a result of previously observed breaches of s94 MFPA. Marine Farming Equipment outside lease area. Cages had also been found outside lease area in June 2006 and Oct 2006.	$400 + 4 demerit points
	22/05/2008	Video footage showed spontaneous gas bubbling from two pen bays and gas bubbling on disturbance from one pen bay.	Resurvey required before restocking.
	July 2009	Annual video assessment showed out gassing on disturbance	Sediment recovery required, pens should be left to fallow before being re-stocked.
Killara, No. 189	22/05/2008	Video footage showed spontaneous gas bubbling from 2 pen bays and gas bubbling on disturbance from one pen bay.	Resurvey required prior to restocking.
Liberty Point Central , No. 214	22/05/2008	Video footage showed pen bays with gas bubbling on disturbance	No requirements mentioned
	July 2009	Annual video assessment showed spontaneous out gassing at one pen bay.	Tassal advised the Dept. this pen has been fallowed and will not be restocked until after the next video survey in early 2010 and therefore no requirement for a follow up survey.

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LOCATION / LEASE #	DATE	ISSUE/OFFENCES	REQUIREMENTS OR PENALTIES IMPOSED
Long Bay, No. 55	9/08/2005	Annual video assessment – presence of fine bubbles spontaneously rising from the sediment in fallowed pen. Breach of licence conditions.	Must provide Dept. with video footage of seabed prior to restocking.
Macquarie Harbour West Coast, No. 214	11/05/2005	Having Marine Farming Equipment outside lease area. Lease 214 was noted as having a history of marine farming equipment being found outside the lease area, e.g. May 2004, and again during the follow up inspection in July 2004 (2 out of 10 trip lines remained outside area).	$400 fine + 4 demerit points
Macquarie Harbour West Coast, No. 219	11/05/2005	Having Marine Farming Equipment outside lease area. In addition, the navigation mark prescribed for the southern most point of the lease area was not in position. However, the Dept. was advised that this has broken off the day before (replacement ordered).	$400 fine + 4 demerit points
Meads Creak, No. 77	22/05/2008	Video footage showed pen bays with gas bubbling on disturbance	No requirements mentioned
	July 2009	Annual video assessment showed spontaneous out gassing at one pen bay with out gassing on disturbance at two pen bays.	Tassal advised Dept. that the moorings at this site are being relocated and therefore there is no requirement for a follow up survey.
Parsons Cove , No. 193	22/05/2008	Video footage showed spontaneous gas bubbling from one pen bay and gas bubbling on disturbance from one pen bay.	Site requires resurvey before restocked.
	July 2009	Annual video assessment showed out gassing on disturbance	Sediment recovery required, pens should be left to fallow before being re-stocked.
Port Esperance Dover, No. 77	1/06/2004	Cages found outside lease area.	No reference made to requirements
	1/10/2005	Cages found outside lease area	
	10/10/2005	Sea cages outside the western boundary of the lease area.	Doesn't appear that an infringement notice was issued.
	19/09/2006	Cages found outside lease area	Infringement notice issued.
	24/10/2006	Re-inspection as a result of previously observed breaches of s94 MFPA. Marine Farming Equipment outside lease area. Cages had also been found outside lease area in September 2006, October 2003 and June 2004 – all amounted to a breach of s94 MFPA.	$400 + 4 demerit points
	7/10/2007	Several of the temporary marks did not comply with the IALA requirements as determined by the Marine and Safety Tasmania.	Cautionary infringement notice issued in respect of observed marking inadequacies.
	6/12/2007	Re-inspection subsequent to previously observed inadequacies in the marking of the lease areas. Marine Farming Equipment outside lease area.	$400.00 fine

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LOCATION / LEASE #	DATE	ISSUE/OFFENCES	REQUIREMENTS OR PENALTIES IMPOSED
		Compliance with marking advice from 7/10/07.	
Redcliffs, No. 201	22/05/2008	Video footage showed spontaneous gas bubbling from two pens.	Site requires resurvey prior to being restocked.
Roberts Point, No 142	July 2009	Annual video assessment showed spontaneous out gassing at one pen.	Tassal advised the Dept. that the moorings at this site are being relocated to another location within the lease area and therefore there is no requirement for a follow up survey.
	22/05/2008	Video footage showed pen bays with gas bubbling on disturbance	No requirements mentioned
South Central Harbour , No. 219	22/05/2008	Video footage showed spontaneous gas bubbling from two pen bays and gas bubbling on disturbance from two pen bays. One compliance spot dive outside the lease area showed signs of organic enrichment that may be attributable to finfish culture. 2006 inspections found cages located outside the lease area in the vicinity of this area.	Resurvey of the impacted pen bays on this lease is required prior to restocking.
Stringers Cove, 209	7/10/2007	One prescribed mark was not deployed at the southern boundary of lease no. 209.	Cautionary infringement notice issued in respect of observed marking inadequacies.
	6/12/2007	Having Marine Farming Equipment outside lease area. Marking advice had not been restored as per MAST requirements 7/10/07.	$400.00 fine
	22/05/2008	Video footage submitted showed the seabed to be spontaneously gas bubbling from one pen bay and gas bubbling on disturbance from one pen bay. One seabed also showed significant quantities of uneaten feed.	Resurvey required prior to restocking.
Tinderbox, No 90	4/07/2007	Follow up video- survey footage indicated the presence of unacceptable impacts within pen bays with spontaneous outgassing from sediments within two pen bays and gas bubbling on disturbance at two other pen bays.	Pens can only be restocked following the submission of video footage showing sufficient recovery. Dept. will undertake random inspections in the near future.
	6/08/2007	Follow up video footage from January 2007. Survey showed the fallowed pens have recovered sufficiently to allow restocking.	
	July 2009	Annual video assessment showed spontaneous outgassing at 3 pen bays with outgassing on disturbance at 2 pen bays.	Tassal advised the Dept. that the moorings at this site are being relocated to another location within the lease are and therefore there is no requirement for a follow survey.
	9/08/2005	Annual video assessment – high density of *Mytilus edilus* (alive and dead). Density of these mussels is of concern given that such numbers may affect change in sediment characteristics and attract significant numbers of *Asterias amurends*. Breach of licence condition 3 (1.4).	Dept. will conduct a site visit

TASSAL PTY LTD

LOCATION / LEASE #	DATE	ISSUE/OFFENCES	REQUIREMENTS OR PENALTIES IMPOSED
	22/05/2008	Video footage submitted showed the seabed to be spontaneously gas bubbling from one pen bay and gas bubbling on disturbance from two other pen bays.	Resurvey required prior to restocking.
Tinderbox, No. 91	24/10/2006	Letter stating that video footage and survey were inadequate, pursuant to s1, Schedule 3V of marine farming licences, Dept. upgraded the procedural requirements for any video surveys. Survey footage indicated spontaneous out gassing from sediments with 2 pen bays and gas bubbling on disturbance at two other pen bays.	$400 + 4 demerit points

HUON AQUACULTURE

LOCATION	DATE	ISSUE/OFFENCE	REQUIREMENTS
Deep Bay, Port Cygnet, Lease No. 200	27/08/2008	Trip lines outside the northern boundary of the lease.	
	10/09/2009	The northern IALA lit special marks were up to 60 meters from their correct position as well as two mooring lines outside the south-west section of the lease area.	Reference was made to this in another letter, so there were no requirements listed.
	7/09/2010	Two unstocked cages were located outside the lease area and the northern IALA lit special marks were located up to 30 meters from their correct position.	Caution issued.
	16/09/2008	Annual video assessment showed spontaneous out gassing, constituting a breach of licence conditions	$480.00 Extend the fallowing of 3 specific pens for as long as possible.
	17/02/2011	Having Marine Farming Equipment outside lease area. It was noted in the letter that lease no.200 has a history of having equipment outside the lease area.	$520 fine
	5/02/2009	Two mooring lines and 80 metre polar circle cage were located outside the lease area	Reference was made to this in another letter, so there were no requirements listed.
East of Redcliff's, Lease No. 221	16/09/2008	Annual video assessment identified a number of instances where sediments on various lease areas were heavily impacted with out gassing on disturbance and spontaneous out gassing was evident.	Dept. required data reports in respect to bird netting trials conducted on a number of lease sites.
	29/09/2010	Annual video assessment showed debris occurring at the fishrace, harvest race and water fill station, as well as at 2 pen bays.	The lease area must be kept tidy. Following the 2009 survey HAC made an undertaking to remove the excess debris.
	6/06/2007	Annual video assessment showed outgassing and disturbance of sediments was apparent, this constitutes a breach of licence conditions	HAC is required to keep the bay fallow until such time as there is clear visible evidence of recovery in sediment condition.
	27/08/2009	Annual video assessment showed a significant number of feed pellets at pen bay RB21. This is significant and concerning given the potential for adverse impacts to the benthos associated with this unnecessary organic enrichment.	No requirements listed.
Flathead Bay, Huon River, Lease No. 87	26/08/2005	MAST Mooring by-laws - inadequate marks	$500.00 penalty
	6/06/2007	Annual video assessment showed outgassing and disturbance of sediments was apparent, this constitutes a breach of licence conditions	HAC is required to keep the bay fallow until such time as there is clear visible evidence of recovery in sediment condition.
	16/09/2008	Annual video assessment identified a number of instances where sediments on various lease areas were heavily impacted with out gassing on disturbance and spontaneous out gossiping was evident.	
	8/12/2008	Failing to comply with Marine Farming Development Plan – failure to adequately mark marine farming lease.	$480.00 penalty

HUON AQUACULTURE

LOCATION	DATE	ISSUE/OFFENCE	REQUIREMENTS
Flathead Bay, Huon River, Lease No.93	26/08/2005	MAST Mooring by-laws - inadequate marks	$500.00 penalty
Hideaway Bay, Huon River, Lease No. 93	16/09/2008	Annual video assessment showed high copper levels are an ongoing issue.	The pens will now be subject to non-antifoulant licence conditions when the licence is renewed.
	27/08/2009	Annual video assessment showed excess debris identified	HAC said it would be removed. Lease area must be kept neat and tidy.
	29/09/2010	Annual video assessment showed debris occurring at the fishrace, harvest race and water fill station, as well as at 2 pen bays.	The lease area must be kept tidy. Following the 2009 survey HAC made an undertaking to remove the excess debris.
	24/08/2005	Equipment outside lease area - 2 floats with lines attached were observed outside lease area, MAST Mooring by-laws - inadequate marks, dying birds observed entangled in nets - HAC has made no effort to remove dead or entangled birds.	$500.00 penalty
Lease No. 141	16/09/2008	Annual video assessment identified a number of instances where sediments on various lease areas were heavily impacted with out-gassing on disturbance and spontaneous out gassing was evident.	
Lease No. 151	6/06/2007	Annual video assessment showed outgassing and disturbance of sediments was apparent, this constitutes a breach of licence conditions	HAC required to keep the bay fallow until there is clear visible evidence of recovery in sediment condition.
	16/09/2008	Annual video assessment showed spontaneous out gassing, constituting a breach of licence conditions.	HAC will be required to keep these bays fallowed until such time as there is clear visible evidence of recovery in sediment condition.
Lease No. 167	16/09/2008	Annual video assessment identified a number of instances where sediments on various lease areas were heavily impacted without gassing on disturbance and spontaneous out gassing was evident.	
Pillings Bay, Lease No. 24	6/06/2007	Annual video assessment showed outgassing and disturbance of sediments was apparent, this constitutes a breach of licence conditions	HAC is required to keep the bay fallow until such time as there is clear visible evidence of recovery in sediment condition.

HUON AQUACULTURE

LOCATION	DATE	ISSUE/OFFENCE	REQUIREMENTS
Pillings Bay, Lease No. 176	16/09/2008	Annual video assessment showed spontaneous out gassing, constituting a breach of licence conditions.	HAC will be required to keep these bays fallowed until such time as there is clear visible evidence of recovery in sediment condition.
	27/08/2009	Annual video assessment showed thin to feint patches of *Beggiatoa* at 4 pen bays, small patches of grey sediment and black-grey organic matter. Evidence of an unacceptable impact at or extending beyond 35 metres from the boundary of the lease area. Spontaneous out gassing was evident at one pen bay.	Approval must be granted before re-stocking. HAC to undertake follow up survey work as a priority. Following the submission and assessment of the follow up survey, the Dept. will determine if any additional benthic assessment needed.
	29/09/2010	Annual video assessment showed thick mats of Beggiatoa and evidence of spontaneous outgassing from the sediment observed during the 2009 survey.	The pen bay must be left to fallow for the remainder of the year.

SEVRAP FISHERIES

LOCATION	DATE	ISSUE/OFFENCE	REQUIREMENTS
Table Head, Lease No. 215.	2/6/2007	Video footage showed organic enrichment in the form of dark sediments, *Dorvellid sp* and *Beggiatoa sp*. Pens should be left to fallow for sufficiently long enough to allow sediment recovery at the pens site.	Fallow periods must be sufficiently long to ensure sediment recovery.
Liberty Point, Lease No. 217.	2/6/2007	Video footage showed the level of organic enrichment has resulted in significant impacts and breaches of licence conditions	Immediate fallowing of these pens was required to allow for recovery. If pens need to be occupied a follow up survey of the pen bays is required prior to restocking.

It smells Fishy!

Tasmania's Marine Farming Regulatory Framework, and how to improve it

*An assessment prepared by Environmental Defenders Office (Tas) Inc**

The marine farming industry in Tasmania was recently trumpeted as 'the number one economic development success story over the past 20 years' with the industry projected in the 2011-2012 financial year to achieve a gross value of $450 million. The extraordinary strength of the industry is even more remarkable when you consider that it is relatively new - pacific oyster farming in the State is less than fifty years old and commercial salmon farming commenced only 20 years ago.[1] Whilst the economic attraction of the industry is clear, particularly in remote, regional and rural communities, increasing concern is been raised about the lack of a robust regulatory framework.

This article outlines some of the criticisms of the current Tasmanian system, reviews the regulatory frameworks in other marine farming countries, and recommends changes to move Tasmania towards a best practice model.

Tasmania

Marine Farming Planning Act 1995

The *Marine Farming Planning Act 1995* (Tas) (the Act) regulates the marine farming industry in Tasmania, including both the planning process and the allocation of marine farming leases.[2] The Act sets out a number of purposes and objectives which it seeks to achieve:[3]

> *(1) The purpose of this Act is to achieve well-planned sustainable development of marine farming activities having regard to the need to –*
>
> *(a) integrate marine farming activities with other marine uses; and*
>
> *(b) minimise any adverse impact of marine farming activities; and*
>
> *(c) set aside areas for activities other than for marine farming activities; and*
>
> *(d) take account of land uses; and*
>
> *(e) take account of the community's right to have an interest in those activities.*
>
> *(2) A person must perform any function or exercise any power under this Act in a manner which furthers the objectives of resource management.*

In seeking to assure that these important aims and objectives are achieved, the Act establishes an 8 member Marine Farming Planning Review Panel (the Panel) comprised of experts from a variety of backgrounds including local government, marine farming, recreational boating, planning,

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* Prepared July 2012. EDO Tasmania wishes to thank Ben Bartl for all his work on this paper. EDO Tasmania also blames him entirely for the title!

[1] Bryan Green, Minister for Primary Industries and Water, Hansard, Thursday 17 November 2011. As found at http://www.parliament.tas.gov.au/HansardHouse/isysquery/b5fe3677-a26b-464e-9ac7-11ece8e651ab/1/doc (Accessed 4/3/2012).

[2] Long title of the *Marine Farming Planning Act 1995* (Tas).

[3] Section 4 of the *Marine Farming Planning Act 1995* (Tas).

marine resource management and the environment.[4] The Panel is responsible for assessing marine farming development plans, including amendments to allow expansion, relocation or other changes to marine farming activities. In making its assessment, the Panel is required to take into account public submissions, the recommendations of the Marine Farming Branch and the sustainable development objectives of the legislation.[5]

The Act, and the government agency responsible for its implementation, claims that the legislation establishes a framework under which marine farming is integrated with other marine uses, adverse impacts are minimised and community concerns are adequately addressed. However a number of criticisms are apparent.

Limited Integration of Water and Land-Based Marine Farming Activities

Most land use and development in Tasmania is subject to the *Land Use Planning and Approvals Act 1993* (***LUPAA***)[6]. However, planning and development in relation to marine farming in State waters is explicitly excluded from the operation of LUPAA.[7] Whilst local councils have jurisdiction over some land based activities associated with marine farming,[8] they possess no jurisdiction over the marine farming planning process or decisions in relation to activities below high water mark.[9]

Though nothing in a planning scheme can regulate marine farming activities (other than land-based components), the Minister can require a planning scheme to be amended to ensure that land based activities do not affect marine farming.[10] This provides an unfair priority for marine farming activities. The impacts of marine farming are not restricted to the water: marine farming introduces noise and odour issues, impacts on visual amenity, requires infrastructure and access to transport routes and processing facilities, and can interfere with tourism and recreation activities. The inability of councils to plan for, or be involved in the assessment of, marine farming continues to hinder effective strategic planning at a municipal or regional level.

Experience around the globe (see, for example, the discussion regarding New Zealand below) has demonstrated that sectoral approaches are generally insufficient to deal with real world complex interrelationships and diverse stakeholder priorities. Sustainable development requires ecosystem based strategic planning.

The creation of a separate resource management system for the marine farming sector, and the restrictiveness of this system in terms of third party / community input, is contrary to the goal of sustainable development espoused in Tasmanian legislation.

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[4] Section 8 of the *Marine Farming Planning Act 1995* (Tas).

[5] Section 9(1) of the *Marine Farming Planning Act 1995* (Tas).

[6] Other than forestry and mining

[7] Section 20(7)(d) of the *Land Use Planning and Approvals Act 1993* (Tas).

[8] See for example section 19(3)(c) of the *Marine Farming Planning Act 1995* (Tas).

[9] Below the high water mark: see section 5 of Tasmania's *Living Marine Resources Management Act 1995* (Tas).

[10] Section 20(3) of the *Marine Farming Planning Act 1995* (Tas) providing that the relevant Minister may 'require the Tasmanian Planning Commission to prepare an amendment to a planning scheme under that Act in respect of land which adjoins State waters to reduce the negative impact or likely negative impact of activities or future development on the land upon marine farming or other activities in State waters'.

Limited rights of appeal

The objectives of Tasmania's Resource Management and Planning System (***RMPS***), which both LUPAA and the *Marine Farming Planning Act 1995* are subject to, include encouraging public participation in resource management decisions.

Presently, draft marine farming development plans and amendments to plans are exhibited and any member of the public may make representations. This level of participation is similar to the situation with draft planning schemes and discretionary use and development.[11] However, once a marine farming development plan has been certified, there is no further public involvement in the lease allocation, licensing or development process.

In contrast to applications assessed under LUPAA, where any person who made a representation in relation to a proposed development has a right to appeal to the Resource Management and Planning Appeal Tribunal (***RMPAT***), appeals under the Act are limited to appeals against a *refusal* to consider an amendment or to grant a lease, or appeals on the grounds that the proposal will adversely affect other marine farming operations.[12] Expressed in another way, there are no general rights to appeal against a decision to approve an amendment on grounds relating to the environment, sustainability or social issues.

Science-based decision-making

Recent changes to the Act mean that the Panel is now only able to make *recommendations* to the Minister, rather than having power to refuse applications for amendments allowing new/expanded lease areas. The Minister is not required to follow the Panel's recommendation (although they are required to table in Parliament their reasons for any decision contrary to a recommendation[13]). This change was made after the Panel, for the first time ever, refused an application for a lease expansion at Soldiers Point in the D'Entrecasteaux Channel, noting that the projected economic benefits of the proposed expansion did not outweigh the adverse impacts of the proposal on a fragile reef system.

The power for the Minister to override the independent, expert Panel's advice appears to make the assessment process more political than scientific. The Panel has an explicit mandate to consider whether a proposed aquaculture development can satisfy sustainability objectives.

There may be good reasons why the Minister, having responsibility for a range of portfolios, would not accept a recommendation from an expert Panel to approve a proposed aquaculture development, even though the proposal, when considered in isolation, is considered to be sustainable. For example, the Minister may consider that the proposal will have unacceptable visual or amenity impacts on nearby residents, may interfere with views from key tourist spots or may place an undue burden on local government infrastructure.

In contrast, there can be no good reason to allow proposed marine farming activities where the independent, scientific expert Panel has determined that the amendments are <u>not</u> sustainable and recommended refusal. This is particularly true where no rights of appeal exist to challenge the decision.

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[11] Sections 25-27 of the *Marine Farming Planning Act 1995* (Tas).

[12] Section 75(1) of the *Marine Farming Planning Act 1995* (Tas).

[13] See sections 9(1)(c) and 42A of the *Marine Farming Planning Act 1995* (Tas).

Codes of practice

Many industries and activities in Tasmania, such as forestry, mining and quarrying and the dairy industry, are subject to a code of practice providing detailed guidance on how activities should be conducted. Some codes, such as the Forest Practices Code, have statutory force while others are not independently enforceable but may be included as permit conditions.

In contrast, marine farming in Tasmania is not currently subject to any industry code, whether voluntary or enforceable. A draft Code of Practice was developed by industry in the early 2000s, but was never progressed and is no longer applied.

Monitoring and enforcement

Reliance on adaptive management (that is, changing management systems in response to new information or observed problems) will not be effective without appropriate monitoring and enforcement activities to facilitate adaptation. Encouraging improved performance will only be successful if there is a credible threat that stronger action will be taken if no improvement is demonstrated. For example, the Marine Farming Development Plan for Tasmania's D'Entrecasteaux Channel imposes a plan-wide nitrogen cap to control nutrient impacts. However, there is currently limited monitoring to determine whether the cumulative contribution of each lease areas to the nitrogen load exceeds the cap, and no ongoing assessment to determine the impacts of emissions to establish whether the existing cap is set at a sustainable level.

There is currently limited independent monitoring of marine farming operations – the Marine Farming Branch relies largely on reports and video surveillance submitted by the operators themselves, and there are few coordinated/holistic monitoring efforts.

There are a number of enforcement options under Tasmanian legislation, including

- Fines up to $6,500 for marine farming equipment being located outside a lease area[14];
- Fines up to $65,000, or up to 2 years in prison, for contravening marine farming licence conditions[15];
- Issuing infringement notices (fines up to $650) for minor breaches;
- Allocation of demerit points for offences – accumulation of 200 demerit points over 5 years may lead to temporary disqualification from obtaining a marine farming licence;
- Cancellation or suspension of licence for 5 years if the licence holder contravenes the licence conditions[16].

Despite this range of options, a review of reported enforcement activities from 2006-2012 indicates that many observed breaches are unpunished. Fines are rarely imposed and even more rarely exceed $500. Without more consistent and effective enforcement activity, there is little incentive for marine farming operations to achieve, much less exceed, their obligations.

Both the *Land Use Planning and Approvals Act 1993* and *Environmental Management and Pollution Control Act 1994* provide opportunities for any person with a 'proper interest' to take action in

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[14] s.94 of the *Marine Farming Planning Act 1995*
[15] s.86A, *Living Marine Resource Management Act 1995*
[16] s.90, *Living Marine Resource Management Act 1995*

RMPAT where the provisions of the Act are being breached (e.g. a permit is not being complied with or unlawful environmental harm is being caused). The opportunity for a third party to take action where the regulator has failed to do so is significant to public confidence and acts as a further deterrent against contraventions by proponents. The absence of any civil enforcement opportunity in relation to marine farming activities further weakens the enforcement regime.

Scotland

Scotland is the largest producer of farmed Atlantic Salmon in the European Union with an estimated farm gate value in 2008 of £367 million.[17] Whilst marine farming is dominated by farmed salmon, the Scottish industry also comprises rainbow trout, brown trout, sea trout, halibut, Arctic charr, mussels and Pacific oysters.[18]

Integrated planning

In contrast to the situation in Tasmania, marine farming is not exempt from the principal piece of planning legislation in Scotland, the *Town and Country Planning (Scotland) Act 1997* (***the Scottish Act***).[19] Instead, the *Scottish Planning Policy*[20] sets out the Government's policy regarding marine farming, indicating how the planning system can seek to accommodate marine farming developments whilst safeguarding the environment and other uses. For example:

> ***105.*** *Development plans should identify areas which are potentially suitable for new or modified fish farm development and sensitive areas which are unlikely to be appropriate for such development. In potential development areas fish farm development may be appropriate, subject to locational and environmental considerations. Sensitive areas are unlikely to be suitable for fish farm development unless adverse impacts can be adequately mitigated. When designating potential development areas and sensitive areas, planning authorities should take into account carrying capacity, landscape, natural heritage and historic environment interests, potential conflict with other users and other regulatory controlled areas...*[21]
>
> ***106.*** *Fish farms are likely to require land based facilities and where possible these facilities should be considered as part of or simultaneously with the application for the fish farm...*
>
> ***109.*** *There is potential for conflict between fish farming and local fishing interests, including commercial inshore fishing and recreational fishing. The effects of fish farm development on traditional fishing grounds, salmon netting stations and angling interests should be considered....*

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[17] *Delivering Planning Reform for Aquaculture.* As found at http://www.scotland.gov.uk/Resource/Doc/304025/0095384.pdf (Accessed 4/3/2012).

[18] Marine Scotland, *A Fresh Start – The Renewed Strategic Framework for Scottish Aquaculture* at 6. As found at http://www.scotland.gov.uk/Publications/2009/05/14160104/0 (Accessed 4/3/2012).

[19] The *Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007* which came into force on 1 April 2007 extended the planning system to include marine fish farming. Section 26 of the Act now specifically includes marine farming within the definition of development,

[20] 'Scottish Planning Policy' (February 2010) As found at http://www.scotland.gov.uk/Resource/Doc/300760/0093908.pdf (Accessed 4/3/2012).

[21] *Locational Guidelines for the Authorisation of Marine Fish Farms in Scottish Waters* was published by Marine Scotland in 2009. Each planning authority can also publish supplementary guidance for fish farming in specific areas, including advice on how to design fish farms and associated development to minimise landscape and visual impact

Code of Practice

In addition to its integrated planning regime, Scotland has implemented a Code of Practice for marine farming, dealing with a range of issues such as cage and equipment design, security, management and operational practices. The *Code of Good Practice for Scottish Finfish Aquaculture* (***the Code*** or ***CoGP***)[22] has been operational since 2006 and was recently reviewed and updated, taking account of the best available evidence and of changes in legislation and policy.

The code is currently voluntary, however companies who choose to sign up are independently audited against the Code provisions. Companies are increasingly seeking to obtain market advantage by demonstrating compliance with the Code. The *Scottish Planning Policy* also points out that compliance with the Code will provide support for planning applications.[23]

The Code does not replace legislation obligations for marine farming activities. Instead, it seeks to "achieve balanced and proportionate regulation of the industry's activities, without overwhelming preoccupation with regulatory detail or bureaucracy."[24] The Code also aims to continuously improve the standards of all operators and, through wider adoption and independent auditing, to provide assurances to all stakeholders, consumers and the general public that Scottish finfish aquaculture is a responsible sector producing sustainable products.

Science-based decision-making

Before planning permission can be given, section 40 of the Scottish Act makes clear that that 'the likely environmental effects of the proposed development' must be assessed, including the effect on the 'water environment'.[25]

The *Scottish Planning Policy* provides that a planning authority determining a marine farming application should:

> 107....take into account the direct and cumulative effects of the proposed development on the environment, including carrying capacity, visual impact and the effects on the landscape, marine historic environment and the sea or loch bed. The needs of local communities and other interests should also be taken into account alongside the economic benefits of the sustainable development of the fish farming industry and the operational needs of fish farms.... Where adverse cumulative impacts are significant and cannot be mitigated, planning permission should not be granted...

Once environmental and social effects have been assessed, the planning authority is responsible for determining marine farming applications (and related development) and has the same power to grant or refuse the application as for any other developments.

Monitoring and enforcement

Scottish aquaculture operations, like all other industries that discharge into the marine environment, are regulated under the *Water Environment (Controlled Activities) (Scotland) Regulations 2011*. These regulations allow for independent monitoring of marine farms and provides for enforcement where breaches are identified (see Part V of the *Water Environment (Controlled Activities) (Scotland) Regulations 2011*). Monitoring and enforcement of the Regulations is carried out in Scotland by the Scottish Environment Protect Agency.

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[22] As found at http://www.thecodeofgoodpractice.co.uk/publish (Accessed 4/3/2012).

[23] Scottish Planning Policy, clause 108

[24] As found at http://www.thecodeofgoodpractice.co.uk/publish (Accessed 4/3/2012).

[25] Section 3(2) of the *Water Environment and Water Services (Scotland) Act 2003*.

New Zealand

The New Zealand marine farming industry established itself in the latter-half of the twentieth century and is today dominated by shellfish -namely mussels and oysters- as well as salmon. In 2009, according to information provided by *Aquaculture New Zealand*, marine farming was comprised primarily of mussels (72% of total value) followed by salmon (22%) and oysters (6%).[26]

Integrated Planning and science-based decision making

New Zealand's marine farming industry is primarily managed through the *Resource Management Act 1991* (the ***New Zealand Act***), the same Act under which any other land use or coastal activity is assessed and managed. Similar to Tasmania's RMPS, the goal of the New Zealand Act is 'promoting the sustainable management of natural and physical resources'.[27]

Prior to the introduction of the *Resource Management Act 1991*, marine farming in NZ was subject to sector-specific legislation[28] which identified specified aquaculture zones where marine farming was permitted. With the introduction of the *Resource Management Act 1991*, marine farming became subject to an "effects based management" regime which required "rigorous analysis the effects of the proposed activity can be adequately avoided, remedied or mitigated and are otherwise consistent with sustainable management".[29] Proposals were assessed individually for each location, rather than having specified areas were aquaculture was presumed to be acceptable. For each proposed location, it is now up to the proponent to demonstrate that marine farming will satisfy the requirements of the zone that have been developed having regard to scientifically determined thresholds.[30]

The Ministry of Conservation has produced a *New Zealand Coastal Policy Statement*, and all regional councils have adopted regional coastal plans that are consistent with this Statement. The regional coastal plans may identify areas where marine farming cannot occur as well as specifying limits on the character, intensity, or scale of acceptable activities.[31]

The New Zealand Act also explicitly requires proponents for any proposal with the potential to cause significant adverse impacts to describe potential alternative locations or methods for undertaking marine farming activities, and a justification for why the alternatives have not been adopted.[32]

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[26] Aquaculture New Zealand, 'New Zealand Aquaculture Exports' as found at http://aquaculture.org.nz/industry/overview/ (Accessed 8 May 2012).

[27] Section 5(2) of the *Resource Management Act 1991*.

[28] *Marine Farming Act 1971*

[29] Bret Birdsong, Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act, October 1998. As found at http://www.fulbright.org.nz/news/1998-birdsong/ (Accessed 7 May 2012).

[30] Hamish Rennie. 'New Zealand mariculture – Unfairly challenged?' in Aquaculture Law and Policy – Towards principled access and operations, edited by David VanderZwaag and Gloria Chao (Routledge: New York 2006) at 513.

[31] Regional coastal plans include mean high water at spring tides to the 12-nautical mile limit.

[32] See s88(4) and Schedule 4 of the *Resource Management Act 1991*.

Public Participation

The New Zealand Act also promotes broad public participation in environmental decision-making, including marine farming. As an author noted, encouraging public participation through the *Resource Management Act 1991* was considered an essential principle of sustainability for several reasons:[33]

> *First, determining what is sustainable for a community will depend on accurately ascertaining the community's preferences, which is best done by incorporating them into the decision making process. Second, it is generally accepted that better environmental decisions will result from a greater flow of information, including information that is held or developed by the members of local communities. Finally, open public participation is encouraged on fairness grounds; if decisions are to be made that will broadly affect the community, then it is fair to provide members of the community the opportunity to participate.*

There is a presumption in favor of public notification of applications for resource consents under the *Resource Management Act 1991*,[34] allowing interested parties to make submissions and thereby secure a right of appeal to the Environment Court.[35]

Like Tasmania's RMPAT, the Environment Court is a specialist body conducting *de novo* ('new trial') merits review of resource management decisions. The court is able to hear a large number of matters concerned with planning applications including marine farming, thereby providing both accountability and transparency of decision-making.

Monitoring and enforcement

Under the New Zealand Act, the Minister of Conservation is responsible for preparing coastal policy statements, approving regional coastal plans and permits for restricted coastal activities and monitoring activities.[36]

Interestingly, the costs of monitoring activities carried out by the Ministry of Conservation or the local planning authority are paid for by the proponent, including marine farm operators.[37]

In New Zealand 'any person' may apply to the Environment Court for an enforcement order where they allege that laws or permit conditions are not being complied with.[38] In addition, any person may request the Court to initiate proceedings regarding a criminal offence committed under the Act.[39] These broad rights to bring third party action ensure that 'any person' can commence proceedings where a marine farming operation contravenes the provisions of the New Zealand Act.

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[33] Bret Birdsong, Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act, October 1998. As found at http://www.fulbright.org.nz/news/1998-birdsong/ (Accessed 7 May 2012).

[34] Section 87 of the *Resource Management Act 1991* provides a 'resource consent' definition.

[35] Section 120 (resource contents; First Schedule, section 14(1) (policy statements and plans) of the *Resource Management Act 1991*.

[36] Section 28 of the *Resource Management Act 1991*.

[37] Section 36(1)(c) of the *Resource Management Act 1991*.

[38] Section 316(5) of the *Resource Management Act 1991*.

[39] Section 338(4) of the *Resource Management Act 1991*.

Canada

Canada boasts the world's longest coastline, largest freshwater system and largest tidal range. Given its environmental advantages, it is unsurprising that both the *Canadian Aquaculture Industry Alliance* and *Statistics Canada* highlight the significant financial contribution the marine farming industry provides, particularly the production of Atlantic salmon in British Columbia. Currently, British Columbia ranks as the fourth largest producer of farmed salmon in the world behind Chile, Norway and Scotland.[40] In 1986, Canadian aquaculture production amounted to only 10,488 tonnes, valued at $35 million; by 2010, production had grown to 160,924 tonnes with a value of over $919 million.[41]

Integrated planning

Regulatory responsibility for marine farming in Canada is split between the federal and provincial governments.[42]

The *Oceans Act* is the most important federal statute for the marine farming industry, providing for the development and implementation of plans for the integrated management of all activities affecting Canadian estuaries, coastal waters and marine waters. The plans are developed by the Minister in collaboration with other Ministers and agencies, local governments, indigenous organisations, coastal communities and "other persons".[43]

As was noted by one commentator, Canada's use of 'integrated management' is intended 'to bring together interested parties, stakeholders and regulators to reach general agreement on the best mix of conservation, sustainable use and economic development of coastal and marine areas for the benefit of all Canadians'.[44]

Science- based decision making

Marine farming operations involving the construction of facilities are treated as 'projects' to be assessed under the *Canadian Environmental Assessment Act* (***CEAA***)[45]. Projects involving work that will interfere with navigable waters[46], cause harmful alteration, disruption or destruction of

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[40] David VanderZwaag. 'Canadian aquaculture and the principles of sustainable development – Gauging the law and policy tides and charting a course' in Aquaculture Law and Policy – Towards principled access and operations, edited by David VanderZwaag and Gloria Chao (Routledge: New York 2006) at 53.

[41] 'Aquaculture Statistics', as found on the Statistics Canada website at www.statcan.gc.ca (Accessed 12 May 2012).

[42] Sections 91(12), (13) and (16) of the *Constitution Act, 1867* (UK), 30 and 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[43] *Oceans Act*, S.C. 1996, c. 31.

[44] David VanderZwaag. 'Canadian aquaculture and the principles of sustainable development – Gauging the law and policy tides and charting a course' in Aquaculture Law and Policy – Towards principled access and operations, edited by David VanderZwaag and Gloria Chao (Routledge: New York 2006) at 52.

[45] There are 4 'triggers' that will initiate the CEAA assessment process: (1) the project proposal trigger; (2) the financial trigger; (3) the land interest trigger; and (4) the law list trigger: subsections 5(1)(a)-(d) of the *Canadian Environmental Assessment Act*, S.C. 1992 c. 37. See also Fisheries and Oceans Canada, Interim Guide to Information Requirements for Environmental Assessment of Marine Finfish Aquaculture Projects at 1.5 As found at http://www.dfo-mpo.gc.ca/aquaculture/ref/AAPceaafin-eng.htm (Accessed 12 May 2012).

[46] Section 5(1) of the *Navigable Waters Protection Act*. S.C. 1985, c. N-22.

fish habitat[47] or may cause 'significant adverse environmental effects' in another province (transboundary effects)[48] will also require assessment under the CEAA.

Once it is determined that the CEAA process applies to a given marine farming project, the process outlined in the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* is then followed.[49] There are 4 types of environmental assessment that may be undertaken:

- Screening;
- Comprehensive study;
- Mediation; or
- Panel review.[50]

The level of assessment performed with respect to marine farming projects has consistently been screening.[51] Screenings are self-directed processes in which the responsible agency has discretion to decide how the assessment is to be conducted, including the extent to which public participation, if any, will be required.[52]

Generally, the proponent's environmental impact statement will serve as the screening document. Where the responsible agency believes that the information provided by a proponent is not adequate to enable them to assess the proposal, they have powers to ensure that necessary further studies are undertaken.[53] In practice, screenings for marine farming have almost always required significantly more detail beyond the environmental impact statement before a decision is made.

In general, marine farming is not subject to additional assessment requirements at a provincial level. For example, in British Columbia, marine farming development applications are not required to obtain a project approval certificate under the *BC Environment Assessment Act* and are therefore not subject to any assessment under that Act.[54]

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[47] Section 35(2) of the *Fisheries Act* S.C. 1985, c. F-14.

[48] Section 48(1) of the *Canadian Environmental Assessment Act* providing that where there is no significant trigger, the minister has the discretionary power to refer the project to a mediator or review panel where the project may cause significant adverse environmental effects in another province or outside Canada, or on aboriginal lands.

[49] S.O.R./97-181. As found at http://laws-lois.justice.gc.ca/eng/regulations/SOR-97-181/index.html (Accessed 12 May 2012).

[50] See Fisheries and Oceans Canada, Interim Guide to Information Requirements for Environmental Assessment of Marine Finfish Aquaculture Projects at 1.5 As found at http://www.dfo-mpo.gc.ca/aquaculture/ref/AAPceaafin-eng.htm (Accessed 12 May 2012).

[51] David VanderZwaag. 'Canadian aquaculure and the principles of sustainable development – Gauging the law and policy tides and charting a course' in Aquaculture Law and Policy – Towards principled access and operations, edited by David VanderZwaag and Gloria Chao (Routledge: New York 2006) at 68.

[52] Section 18(3) of the *Canadian Environmental Assessment Act*, S.C. 1992 c. 37.

[53] Section 18(2) of the *Canadian Environmental Assessment Act*, S.C. 1992 c. 37.

[54] David VanderZwaag. 'Canadian aquaculure and the principles of sustainable development – Gauging the law and policy tides and charting a course' in Aquaculture Law and Policy – Towards principled access and operations, edited by David VanderZwaag and Gloria Chao (Routledge: New York 2006) at 70.

However, marine farming operations may be subject to assessment under the *Species at Risk Act*[55] if the project is likely to affect a listed wildlife species or its critical habitat.[56] The proponent is required to identify any adverse effects and measures that will be taken to avoid, minimise and monitor impacts.

While the preamble to the *Oceans Act* and the CEAA both explicitly refer to a precautionary approach to the conservation, management and exploitation of marine resources, the precautionary principle has not yet been incorporated into any provincial marine farming legislation.[57]

Public Participation

At a federal level, public input is always sought where comprehensive studies, mediation or panel enquiries are required for a marine farming proposal. For comprehensive studies, members of the public have the right to make written comments on the study report;[58] for review panels, public hearings are required.[59] However, public participation is limited where the proposal is assessed by way of screening, the most common assessment technique for marine farming proposals.

There are also no rights of appeal in respect of decisions made under the screening assessment process. VanderZwaag has argued that assessment rigour should be improved by making public participation mandatory (rather than discretionary), requiring written governmental responses to public comments and providing a right of appeal 'to ensure decision-makers have considered all critical questions, including cumulative effects and potential impacts on endangered or threatened species'.[60]

A number of opportunities for public participation in marine farming decisions exist in British Columbia. In particular:

- applications for all new marine farming lease will be required to undertake public consultation.[61] The *Finfish Aquaculture Licensing Policies and Procedures for Applications* states that 'reasonable efforts will be made to notify affected parties and provide them with an opportunity to comment on the application'.[62]

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[55] S.C. 2002, c. 29.

[56] Atlantic salmon for example is listed in schedule 1 of the *Species at Risk Act* as endangered in the Inner Bay of Fundy.

[57] David VanderZwaag. 'Canadian aquaculture and the principles of sustainable development – Gauging the law and policy tides and charting a course' in Aquaculture Law and Policy – Towards principled access and operations, edited by David VanderZwaag and Gloria Chao (Routledge: New York 2006) at 83.

[58] Section 21.1 of the *Canadian Environmental Assessment Act*, S.C. 1992 c. 37.

[59] Section 34(b) of the *Canadian Environmental Assessment Act*, S.C. 1992 c. 37.

[60] David VanderZwaag. 'Canadian aquaculture and the principles of sustainable development – Gauging the law and policy tides and charting a course' in Aquaculture Law and Policy – Towards principled access and operations, edited by David VanderZwaag and Gloria Chao (Routledge: New York 2006) at 82.

[61] *Aquaculture Land Use Policy* at paragraph 8.1.7.

[62] The section also provides that the Minister of Agriculture and Lands may require the applicant to provide public notice of the proposed application in a manner that is acceptable. As found at www.agf.gov.bc.ca/fisheries/aqua_report/2004-5/Appendix2.pdf (Accessed 12 May 2012).

- Under section 63 of the *Land Act* (which extends to marine areas), any individual may make a formal objection on a land tenure application (such as an application for a lease over marine farm). If an objection is filed, the minister has the absolute discretion to appoint an individual to hold a hearing and make recommendations regarding the issue(s) raised. The Minister making a final order will consider this recommendation.
- Under the *Farm Practices Protection (Right to Farm) Act*[63] any person who is 'aggrieved by any odor, noise, dust or other disturbance arising from a farm operation' is entitled to make a complaint to the Farm Practices Board. If the chair of the Board is satisfied that a settlement of the complaint is unlikely, a panel of the board will be established to hear the complaint.[64]

Monitoring and enforcement

Pursuant to section 38(1) of the *Canadian Environmental Assessment Act,* all forms of environmental assessment **may** also be subject to monitoring and a follow-up program where appropriate. It has been pointed out by some commentators that this monitoring and mitigation discretion is a weakness of the Act and could be strengthened through an enforceable permit condition requiring monitoring. [65]

Options for Improving Tasmania's System

Examining the regulatory regimes for marine farming in other jurisdictions highlights some of the improvements that could be made to Tasmania's system.

Most significantly, the experience in Scotland and New Zealand confirm the strategic and ecosystem management benefits of developing an integrated planning system in which marine farming is treated no differently from other uses and developments. In Tasmania, this could be achieved by:

- Making the Tasmanian Planning Commission responsible for reviewing marine farming development plans, and incorporating these as amendments to existing planning schemes. Though there would be no further right of appeal for any party (including the marine farm operator) against a decision of the Commission, the Commission is generally considered to be a more independent, open and comprehensive assessment panel than the Marine Farming Review Panel and is explicitly required to further the objectives of the RMPS.
- The Tasmanian Planning Commission could also develop a statewide planning directive on marine farming to ensure consistency between planning schemes. Where necessary, regional plans could also be developed, similar to the regional coastal plans adopted in New Zealand and the regional land use strategies already in place in Tasmania.

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[63] R.S.B.C. 1996, c. 131.

[64] Section 5 of the *Farm Practices Protection (Right to Farm) Act* R.S.B.C. 1996, c. 131.

[65] David VanderZwaag. 'Canadian aquaculture and the principles of sustainable development – Gauging the law and policy tides and charting a course' in Aquaculture Law and Policy – Towards principled access and operations, edited by David VanderZwaag and Gloria Chao (Routledge: New York 2006) at 83.

- Applications for any marine farming development to be made to the local planning authority in the first instance, and can be referred to the Marine Farming Planning Review Panel, or the Marine Farming Branch for comment where appropriate.[66] The Panel could then make recommendations to the council regarding the application, and require particular conditions to be imposed if the application is approved, but the council would retain ultimate power to approve or refuse the application.

A Tasmanian planning system that includes marine farming will better reconcile concerns for the environment and other interests affected by development by engaging with relevant stakeholders and protecting environmental interests.

Science-based decision making could be immediately improved by repealing the recent amendments to the *Marine Farming Planning Act 1995* giving the Minister discretion to ignore the recommendations of the Panel. Any statewide planning directive should require all applications for marine farming development to include, at a minimum, information regarding cumulative impacts to the water environment, any threatened species or ecological communities likely to be affected, details of nutrient release from the proposal, details of anticipated antibiotic use, measures to contain impacts within the lease area, monitoring and adaptive management provisions, and any alternative locations for the proposed marine farm.

The introduction of merits review through appeals to the RMPAT from any decision to amendment a marine farming development plan or lease expansion will also allow the scientific basis for decisions to be challenged, leading to more rigorous and objective decisions. As in Canada, all information regarding completed environmental assessments should also be made publicly available to facilitate ongoing monitoring and review of performance.

Ideally, Tasmanian would follow the approach adopted in Scotland and adopt a detailed Code of Practice to provide guidance on how individual marine farming operations can achieve sustainability. Compliance with the Code should be mandatory, as it is for the Forest Practices Code.

Finally, monitoring and enforcement should be improved by the introduction of a clear Departmental Enforcement Policy (similar to the one currently in place for the *Environmental Management and Pollution Control Act 1994*) to guide enforcement activity, including thresholds for action, innovative enforcement techniques (such as remediation orders or 'name and shame' provisions) and escalating penalty scales. Monitoring activities should be conducted by an independent agency such as Scotland's EPA (rather than the Marine Farming Branch, which has an interest in supporting the aquaculture industry) and all costs should be recovered from proponents through higher licensing fees.

The introduction of wide civil enforcement powers such as those in place in New Zealand would also significantly improve enforcement action by allowing concerned third parties to step in where the regulator has failed to act.

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[66] In the same way that all development applications that affect sewerage must be referred to a Regional Water Authority and all development applications which involve Level 2 activities must be referred to the EPA.

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28 July 2017

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Dear Madam / Sir,

Draft Finfish Farming Environmental Regulation Bill 2017

EDO Tasmania is a non-profit, community legal service specialising in environmental and planning law. We have a long-standing interest in the assessment and regulation of aquaculture and welcome the opportunity to comment on the draft Finfish Farming Environmental Regulation Bill 2017 (***the Bill***).

Recent marine developments on both the East and West Coast of Tasmania have raised serious concerns about the transparency of Tasmania's marine farming planning and assessment processes, the lack of integration with other Resource Management and Planning System processes,[1] and the rigour of, and responsibility for, environmental compliance and enforcement. In response to growing community concern, the government announced reforms to this system to improve "the transparency and accountability of regulatory functions".[2]

The steps the government is taking to separate the functions of the promotion of the industry from its regulation and strengthen environmental controls for finfish farm operators through new environmental licences are to be applauded. While we generally support the amendments proposed in the Bill as an interim measure, we consider that a more comprehensive review of the regime is warranted to ensure that marine farming is fully integrated into Resource Management and Planning System in Tasmania.

Our comments on the detail of the proposed amendments to the *Environmental Management and Pollution Control Act 1994* (***EMPCA***), *Living Marine Resources Management Act 1995* (***LMRMA***) and the *Marine Farming Planning Act 1995* (***MFPA***) are set out below.

Environmental licences

Subject to the following comments, EDO Tasmania is generally supportive of the proposal to regulate finfish farms as level 2 activities and require that all finfish farms to hold an environmental licence issued under EMPCA.

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[1] For example, to facilitate the Okehampton Bay finfish farm, separate applications were required for the onshore facility development permit and rezoning, the freshwater pipeline development permits, the water licence, the dam permit and marine farming sub-lease and licence. Referral was also made to the Commonwealth Minister for Environment and Energy under the EPBC Act.

[2] "Salmon Industry FAQ" on the DPIPWE website http://dpipwe.tas.gov.au/sea-fishing-aquaculture/marine-farming-aquaculture/changes-to-salmon-industry-regulation/salmon-industry-changes-faqs accessed on 27 July 2017.

Assessment of new finfish farms

Different assessment processes are proposed for the granting of environmental licences for new finfish farms depending on the type of finfish activity being undertaken.

While we are supportive of applications for new finfish farm operations in inland waters involving mandatory referral to the EPA Board for assessment in accordance with the ordinary process under EMPCA, it is unclear why the Bill proposes to give the EPA Director the discretion not to refer applications for new finfish farms in State waters to the EPA Board for assessment.

We understand that the intent of providing this discretion to the EPA Director is to avoid new farms for which an environmental impact statement has been prepared and assessed by the Marine Farming Planning Review Panel (***the Panel***) under the process set out in the MFPA being subjected to further round of detailed assessment under EMPCA. However, as currently drafted, the Bill provides no criteria against which the EPA Director is to decide which projects are to be referred to the EPA Board for assessment or which projects will be subjected solely to the EPA Director's assessment. The criteria in Schedule 5 of EMPCA will guide decision in relation to assessment classification by the Board, but does not appear to guide the decision about *whether* an application is referred to the Board under s.42I(2).

The EPA Director's decision on whether to refer a proposal to the EPA Board is significant as the public will have no rights to make representations or appeal environmental licences issued for finfish farms assessed by the EPA Director alone.

In order to improve the efficiency, consistency, and transparency of finfish farm assessments, we suggest the Bill be amended so that:

- all applications for environmental licences for new finfish farms are referred to the EPA Board for assessment, irrespective of whether they are land-based or marine;
- new marine finfish farms are assessed by the EPA Board (as per the usual process provided in EMPCA for level 2 activities) concurrently with any Panel assessment under the provisions of MFPA;
- if the EPA Board considers that an environmental licence should not be issued for the finfish farm, it should have the power to direct the refusal of a new Marine Farming Development Plan (***MFD Plan***) or amendment to a MFD Plan (in much the same way as the EPA Board may direct a planning authority to refuse to grant development permit for any other level 2 activity).

Such an integrated assessment would achieve an additional streamlining of the environmental approval processes, as only minor amendments would be required to the *Environment Protection and Biodiversity Conservation Act 1999* bilateral assessment agreement with the Commonwealth in order to cover assessments by the EPA Board for finfish farms.

Alternatively, if there must be a distinction between assessment processes for new marine finfish farms, we suggest that clear criteria be inserted into the Bill to outline how the EPA Director is to decide the limited circumstances where an EPA Board referral is unnecessary.

Criteria for decisions to grant environmental licences

The Bill and the current provisions of EMPCA provide that the EPA Director and Board may grant an environmental licence only if they are "satisfied that it is appropriate to do so". While the EPA Board must assess an application in accordance with the Environmental Impact Assessment Principles outlined in section 74 of EMPCA, these Principles do not provide clear criteria against which projects should be assessed.

To ensure consistency and transparency of decision-making for all level 2 activities, any decision to grant or amend an environmental licence or environment protection notice under EMPCA should not only be required to further the objectives of the Resource Management and Planning System in Tasmania, but also be required to consider prescribed assessment criteria such as:

- whether the activity complies with any applicable Environment Protection Policies or State Policies;

- any relevant environmental impact study, assessment or report;
- the pollution or impact caused or likely to be caused by carrying out the activity;
- all viable alternatives to the activity;
- whether the likely impact of the activity on the character, resilience and values of the receiving environment is acceptable;
- all submissions made by the applicant and any representors;
- whether the activity accords with best practice environmental management for the proposed activities; and
- the public interest.

Historically, "adaptive management" has been used by the Panel to overcome deficiencies in baseline assessments for proposed finfish farms (including regarding potential impacts of farms on critically endangered species). The current situation in Macquarie Harbour, where dangerously low benthic dissolved oxygen levels resulting from salmon farming may be having a significant impact on the endangered Maugean Skate, suggests that such an approach is not always satisfactory for the environment or the industry.

To prevent a repeat of such a situation, we recommend that the EPA publish strict guidelines outlining how adaptive management will be considered in the environmental licence assessment process and applied in practice. At a minimum, the guidelines should provide that:

- adaptive management should not be used to compensate for a lack of baseline data, or where a proposed finfish farming activity has the potential to cause serious or irreversible damage to the environment;
- adaptive management may only be appropriate and effective where identification and monitoring of key environmental indicators occurs; explicit thresholds for management responses are set; and once thresholds are triggered, consistent actions are taken to enforce appropriate management responses.

Process for variations to environmental licences

The Bill provides that, if requested by a finfish operator, the EPA Director may agree to vary the environmental licence, refuse to vary the environmental licence, or refer the application to the Board for assessment. Referral of such applications to the EPA Board is only mandated where:

- the proposed change is not associated with an application for a variation to a MFD Plan to be assessed by the Panel; and
- EPA Director is satisfied that the proposed variation to the environmental licence is a major variation (for example, where the variation will significantly increase the environmental impacts).

The Bill also proposes to give the EPA Director broad power to amend environmental licences for finfish farms at the Director's initiative if he or she is "satisfied that it is appropriate to do so", even where the application for an environmental licence was originally assessed by the EPA Board.

We suggest that the Bill be changed so that:

- the EPA Director only has to power to vary an environmental licence where the Director is satisfied that the proposed amendment is not a major variation;
- any decision to vary an environmental licence takes into account the prescribed assessment criteria we have suggested above; and
- where the Director approves a variation on the basis that it is a "minor" variation, any person who made a representation in relation to the original environmental licence should be notified (as for modifications of planning permits under LUPAA).

Expiry date for environmental licences for new finfish farms

The Bill provides the EPA Director and the Board discretion to impose an expiry date on environmental licences for new finfish farms, however they are under no obligation to ensure that it matches either the marine farming lease or licence expiry dates. Under the MFPA, MFD Plans are to be reviewed every 10 years to ensure "the objectives of resource management, having regard to any relevant changing circumstances, are achieved to the maximum extent possible". Further, under section 65 of the MFPA, a lease may only be granted for a period not exceeding 30 years, and section 80 of the LMRMA states that a marine farming licence may only be granted for a period not exceeding 10 years.

In order to maintain consistency, we suggest that the proposed sections 42J(6) and 42K(8)of EMPCA be changed so that an environmental licence may only be granted for a period not exceeding 10 years or the period of the marine farming licence issued under the LMRMA (whichever is shorter). Such an expiry date would ensure that salmon farm operators factor rehabilitation and remediation into their plans of operations for the farms.

Conditions of environmental licences

The Bill provides the EPA Director with discretion to impose conditions on environmental licences (providing they are not inconsistent with any existing LMRMA licence conditions). The Bill also provides that any conditions imposed on an environmental licence override management controls or conditions of MFD Plans to the extent of any inconsistency. Given the management controls in MFD Plans are the minimum standards that the Panel sets to ensure the management and mitigation of the negative impacts of the MFD Plan, we suggest that the proposed section 42Z(5) be amended as follows:

> *(a) A condition or restriction imposed on an environmental licence in relation to an activity may only be inconsistent with –*
>
> *(i) the conditions and restrictions, if any, included in a marine farming development plan that applies in relation to the activity under the Marine Farming Planning Act 1995; or*
>
> *(ii) a management control, if any, included in a marine farming development plan that applies in relation to the activity under the Marine Farming Planning Act 1995 –*
>
> *to the extent that it strengthens the management of the activity or improves the mitigation of the negative impacts of the activity.*
>
> *(b) Where a condition has been imposed on an environmental licence in accordance with subsection (a), the condition or restriction, or management control, included in the marine farming development plan is of no effect to the extent of the inconsistency.*

Compliance and enforcement

Maximum penalties

We support the proposed maximum penalties for the offences of failing to hold an environmental licence or contravention of a condition of an environmental licence being equal to the penalties relating to breaches of marine farming licence conditions under the LMRMA.

We consider that in order to provide a clear deterrent, the penalties for non-compliance with marine farming laws must exceed the likely profits that can be made by the marine farming operators arising from the non-compliances. For this reason, EDO Tasmania also strongly supports the introduction of "special penalties" that may be imposed by Courts upon conviction of an operator that may take account of such profits. EDO Tasmania looks forward to the release of regulations prescribing the method for the calculation of the "special penalties".

Currently, EMPCA distinguishes between the penalties for individuals and penalties for corporate office-holders for offences. While corporate office-holders may be prosecuted for offences committed by the corporation and be exposed to the maximum fine for individuals for the offence, they cannot be imprisoned for the offence. As the vast majority of environmental licence holders will be bodies corporate acting through their employees, we suggest that sections 58 and 60 of EMPCA be amended so that it is clarified that a person who is an officer of the body corporate is liable to

the same punishment as an individual, including where the punishment may include imprisonment. Such an approach would be consistent with the corporate liability provisions in the LMRMA.

We understand that since the EPA Division has held delegated responsibility for the regulation of finfish farming, no prosecutions have been commenced or fines issued for breaches of any of the 45 marine farming licences issued under the LMRMA, notwithstanding that there were apparently numerous contraventions of marine farming licences for finfish farms in Macquarie Harbour. EDO Tasmania notes that stronger penalties will not provide a deterrent when there is limited risk of enforcement. We therefore urge the government to commit adequate resources to the EPA's investigation and enforcement activities.

Civil enforcement

EDO Tasmania welcomes the opportunity for third parties to commence civil enforcement proceedings under EMPCA where a finfish farm operator is causing environmental harm or not complying with EL conditions. However, we note that such proceedings may be seriously hampered without access to relevant environmental monitoring data required under the environmental licence. We therefore suggest that the EPA explore moving towards an online environmental monitoring and reporting system similar to that already developed by Sense-T for Macquarie Harbour. Even if it is not practical to publish this information in real-time, such a system may reduce the burden on EPA staff responding to information requests under the *Right to Information Act 2009*. Increasing access to environmental monitoring data and transparency around government responses to non-compliances is also likely to have the effect of encouraging better environmental performance of finfish farms.

Other comments

The Marine Farming Planning Review Panel

Currently, the Panel is dominated by members who represent the marine farming or fishing industries. The Bill proposes to amend the MFPA to remove the EPA Director as a member of the Panel and replace him with a person "with ability and experience in environmental management". While we support such a change, in order to improve community confidence in the Panel, we also suggest that section 8 of the MFPA be amended to allow for the appointment to the Panel of a person to represent the interests of the community.

The Bill also proposes changes that will require that the Panel to:

- consult the EPA Director on draft MFD Plans, and ensure any environmental management issues specified by the Director are addressed in environmental impact statements and considered by the Panel; and
- notify the EPA Director before approving an amendment to MFD Plans or issuing any emergency orders or emergency plans for finfish farms.

We note that while such provisions will ensure that the EPA Director may provide input into the Panel's decision-making, ultimately the Panel is not bound by the EPA Director's views and the Minister's decision on proposed amendments to MFD Plans is not constrained by the recommendations of the Panel. In our view, this does not accord with the government's stated objectives of enhancing assessment processes for finfish farming and supporting community and market confidence and expectations. To better achieve these objectives, we suggest amendments be made to the MFPA to ensure that where the Panel recommends the rejection of an amendment to an MFD Plan, the Minister may not otherwise approve it.

Exclusion zones

EDO Tasmania supports the introduction of the power for the Governor to proclaim finfish farming exclusion zones in State waters. While the Bill does not provide any framework around the identification of exclusion zones, we understand that it is the government's intention that the Sustainable Growth Plan for the Tasmanian salmon industry will identify areas that are suitable and unsuitable for marine finfish farming.

We encourage the government to consult widely with the community, industry, local governments, and throughout relevant government departments before finalising the Sustainable Growth Plan. The Minister should also consider directing the Panel to review all current MFD Plans to determine whether they allow finfish farming in areas where it is unlikely to be sustainable in the future (taking into account such issues as climate and land use changes).

The Sustainable Growth Plan should make provision for the transition of finfish farming from those areas where it will be unsuitable in the future, and where appropriate, empower DPIPWE and the EPA to refuse applications for renewals of leases and licences for these areas.

We also suggest that the Bill should provide that the EPA Director, Board and the Panel must have regard to the Sustainable Growth Plan when making statutory decisions in relation to both existing and proposed finfish farms.

Thank you for the opportunity to make these comments. Please do not hesitate to contact me if you would like to discuss any issues raised in this submission.

Yours sincerely

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Dear Madam / Sir,

Draft Salmon Growth Plan

Thank you for the opportunity to comment on the *Draft Sustainable Industry Growth Plan for the Salmon Industry* (***Draft Growth Plan***). EDO Tasmania is committed to good environmental governance and has a long-standing interest in the regulation of marine farming. We commend the government for current efforts to provide longer term guidance regarding this industry, but have some concerns regarding implementation.

As the online questionnaire did not provide scope to expand on answers, we provide the following brief responses to the issues raised in the Draft Growth Plan.

The Draft Growth Plan states that industry has been "tracking well ahead of the growth required to achieve" the expansion target set by industry in 2009. As a general comment, it is important to recognise that this growth has not been without incident. The environmental issues currently under investigation in Macquarie Harbour highlight the importance of a precautionary approach to industry expansion. This is not to say that industry should not expand, but that the parameters of growth should be dictated by environmental capacity, rather than simple economic aspirations.

We acknowledge that the Draft Growth Plan is an initial step towards setting parameters for sustainable growth. That commitment must be supported by a robust assessment and enforcement framework.

Grow and no-grow zones

EDO Tasmania supported the introduction of powers under the new *Finfish Farming Environmental Regulation Bill 2017* allowing the Governor to proclaim finfish farming exclusion zones in State waters, and preventing the application of marine farming development plans in such zones. In line with previous Productivity Commission findings, we have consistently advocated for use of integrated spatial planning to identify suitable, potentially suitable, and inherently unsuitable locations for marine farming activities. Such an approach provides certainty to industry, regulators and the community.

However, it is critical that any such plan be developed having regard to a broad range of environmental, social, planning, infrastructure, regulatory, biosecurity, safety, and economic issues.

The Draft Growth Plan states that it was developed with regard to government and industry data and expansion plans, and to "concerns of the community". The evidence of industry consultation is clear in the inclusion of exploration areas, yet there is no indication as to whether local governments, recreational fishers, tourism operators or other users in areas identified for exploration or future release have been consulted. There are no criteria set out for determining whether areas currently under exploration should be converted to priority areas.

There is no strong evidence of community consultation on the draft zones prior to release, although we commend the government for the opportunity for comment on the draft plan following its release.

To provide for an integrated, transparent and evidence-based allocation of zones, we recommend the government follow a robust process similar to that used by the Tasmanian Planning Commission for marine bioregional planning.

Any planning decisions should also review current Marine Farming Development Plans, particularly in relation to Inactive Finfish Zones, to determine whether they allow finfish farming in areas where it is unlikely to be sustainable in the future (taking into account such issues as climate, biosecurity, and land use changes). The Sustainable Growth Plan could identify "transition zones" where existing leases are likely to become unsuitable, and provide for finfish activities in those zones to be phased out (for example, by not renewing leases and licences, or allowing exchange for leases in identified grow zones).

Committing to future industry expansion being largely oceanic, rather than estuarine

EDO Tasmania is generally supportive of moving industry to more dynamic oceanic environments, but notes the current lack of definition regarding "offshore" and "inshore" operations. Transition to offshore sites should be actively facilitated and encouraged through legislative / policy timeframes, rather than relying on market forces alone.

As part of the bioregional planning process, a time limit could be imposed for transferring inshore leases within identified "transition zones" to leases in identified offshore grow zones.

In the interim, inshore leases in lower-flow environments must be managed to ensure nutrients are appropriately controlled through enforced nitrogen caps (TPDNO).

A competitive tender process for access to any new farming areas

The *Marine Farming Planning Act 1995* currently provides for a Board of Advice and Reference to advise the Minister on lease allocation issues. Board membership is limited, and the Board has not been active in recent years. We support the establishment of a broader-based Advisory Committee to advise on water available for tender, assessment criteria, lease and licence fees, and to make recommendations on applications.

The Draft Growth Plan notes that the government will develop criteria for tenderers, including commitments to "research; environmental performance; biosecurity improvements; employment; associated investments (such as transport hubs, hatcheries or processing capacity); and financial benefit to Tasmania." The Draft also provides for consideration of "payments additional to standard lease rental / licence fees". It is important that tenderers' willingness to pay additional amounts does not trump considerations such as environmental performance or general suitability of the lease area.

The Draft Growth Plan does not specify the composition of the Committee. Given the broad criteria against which suitability of lease areas and applicants will be assessed, it will be critical for the Committee to include a range of independent experts and a community representative.

Adoption of a new "zero tolerance" approach to marine debris

We strongly support efforts to improve compliance regarding marine debris, and encourage working with research agencies to implement best practice tracking technologies.

Development of a "Tasmanian Salmon Industry Scorecard" that will benchmark the industry against international good practice

We support benchmarking, subject to rigorous independent analysis, and recommend that the government review the Global Aquaculture Performance Index findings in determining which benchmark to adopt. Although not updated since 2014, the GAPI findings highlight important considerations in selecting appropriate, meaningful benchmarks.

Finfish Farming (Compliance and Monitoring) Unit

We strongly support increasing monitoring and compliance capabilities within the regulator, and recognise the need for "user-pays" approaches to securing revenue. However, it is essential that any funding arrangements which rely on industry contributions are designed to ensure that the integrity and independence of compliance efforts are not compromised.

Increased range and improved transparency of environmental information

We strongly support increasing the range and timeliness of publicly available environmental information. Arrangements for the maintenance of data by IMAS will need to be reviewed to ensure that all data submitted remains subject to the *Right to Information Act 2009*.

In our experience, where monitoring data has been voluntarily submitted by industry, government and industry subsequently seek to rely on the "information provided in confidence" exemption under the *Right to Information Act 2009* to avoid disclosure of the material, even where the data could have been compelled under a licence condition. It is important that arrangements for the collection and release of environmental data be designed to ensure:

- the widest possible volume of data is available without the need for active or assessed disclosure (in a form that allows for independent analysis); and
- only data that is genuinely "commercial in confidence" requires assessed disclosure.

In addition to requiring ongoing monitoring data to be released, we encourage the government to upload historic monitoring data to the portal to allow the public to assess changes over time.

Leases, licences and information regarding enforcement actions should also be available on a publicly searchable register.

Representative industry body

We support the establishment of a broad-based reference group to advise the Minister on implementation of the Plan. Given the wide-ranging implications of the Plan, any assessment of its effectiveness must also be informed by community and local government experience. Therefore, we recommend that the reference body include community and council representatives from affected areas.

If you would like to discuss any of these comments, please contact me on 6223 2770.

Yours sincerely,

Environmental Defenders Office (Tas) Inc.

Jess Feehely
Principal Lawyer

Note: *EDO Tasmania's suite of submissions in relation to marine farming regulations are available on our website at www.edotas.org.au/resources/submissions/*

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4 October 2019

Mr Wes Ford
Deputy Secretary
EPA Tasmania
Department of Primary Industries, Parks, Water and Environment
GPO Box 1550
Hobart TAS 7001

By email: Enquiries@epa.tas.gov.au

Dear Mr Ford

Draft Environmental Legislation (Miscellaneous Amendments) Bill 2019

We welcome the opportunity to comment on the draft *Environmental Legislation (Miscellaneous Amendments) Bill 2019* (**the draft Bill**).

EDO Tasmania is a non-profit, community legal service specialising in environmental and planning law.

This letter contains a summary of our comments on the draft Bill. Our more detailed submissions on the draft Bill, including the proposed amendments to the *Environmental Management and Pollution Control Act 1994* (**the EMPC Act**), and the *Marine Farming Planning Act 1995* (**the MFP Act**) are attached.

We first feel obliged to comment on the timeframe and form of public involvement in relation to this draft Bill. The timeframe for comment has been insufficient. While described as "minor improvements" to Tasmania's environmental laws, the changes are complex. Through Nicole Sommer, we requested an extension of time to consider the draft Bill, on the basis it is 99 pages of complex amendments. This request was refused by the EPA.

As can be seen by the length of this submission there are multiple complex questions raised by the draft Bill. EDO Tasmania has had multiple requests for advice as a result of the draft Bill and the timeframe has unfairly impacted upon the allocation of our resources.

We acknowledge that the draft Bill was released with an explanatory memorandum. However, we expect that legislative reform of this complexity has been the subject of an internal review and some level of stakeholder consultation within the EPA. The results of any review and that stakeholder consultation should be released by the EPA, so that those not consulted – including EDO Tasmania – can understand what is intended by the reform proposed and what positions were considered and adopted or rejected by the EPA and DPIPWE in determining the scope and contents of the draft Bill.

We ask that EDO Tasmania be consulted on any reform proposals in future. At the very least, such consultation would avoid the need for us to make this form of submission, not knowing what the purpose of the amendments are, allowing us to engage constructively with submission processes. More importantly, we work with EMPC Act on a daily basis, and provide advice to people affected by decision-making under the legislation administered by the EPA. We have expert and practical knowledge about the legislative processes of the EMPC Act, which would be of value to the EPA in understanding the scope of reform. Our request in those circumstances is not unreasonable.

Where the EPA proposes to amend the legislation it administers, we recommend that it be done together with the community affected. It is well established that environmental regulation is better if

the people affected are involved in decision-making. Indeed, the principle that public participation in environmental decision-making should be encouraged forms the basis of the RMPS objectives in Schedule 1 to the EMPC Act. If the EPA and DPIPWE are interested in increasing transparency, the processes adopted for the drafting of this regulatory reform are not consistent with such an approach.

Our comments are necessarily limited by the approach taken by the EPA and DPIPWE, including the timeframe in which we have been given to comment.

Moving now to our substantive comments on the draft Bill, the EPA's website has described the amendments proposed in this draft Bill as being "a range of minor improvements" to Tasmania's environmental laws.[1]

We support changes which give the EPA better ability to enforce the EMPC Act and clarify obligations, for instance, amendments that provide for:

- The provision of new definitions of clean fill to encourage the proper recycling, processing or disposal of waste;
- The creation of an offence for conducting a level 2 activity without authorisation; and
- The provision of new authorised officer emergency powers to assist with the prevention or mitigation of environmental harm.

However, these are not the only changes provided for in the draft Bill. Indeed, there are some substantive amendments to the regulation of finfish farming, changes to obligations to release monitoring data and regulation of amendments to EPA regulated activities.

Finally, in our submission, the draft Bill represents a lost opportunity to review the EMPC Act and complementary environmental laws. We question whether this draft Bill achieves its objective of clarifying existing environmental laws. The proposed amendments, particularly concerning finfish farming and environmental licences, adding a further layer of complexity to increasingly complex environmental laws, while at the same time failing to look more closely at the existing failures within the EMPC Act.

We have previously expressed support for the transfer of responsibility for the environmental regulation of finfish farming to the EPA: see our submission on the draft *Finfish Farming Environmental Regulation Bill 2017*.[2] However, the support expressed was always qualified. We had understood that the processes provided for in the 2017 Bill were of an interim nature and would be subject to review and replacement.

There are considerable concerns in the manner in which finfish farming is regulated in the State and the draft Bill has missed the opportunity to alter those provisions.

The current regulation carves out public participation and appeal rights in relation to the granting of environmental licences for marine finfish farming. The special provisions introduced for marine finfish farming introduce an unwarranted level of complexity to the EMPC Act and have substantially reduced the level of transparency in the regulation of this industry relative to all other polluting industries in Tasmania.

Consistent with our submission on the 2017 Bill, we consider that the draft Bill should include an amendment to the EMPC Act so that finfish farming is regulated in the same way as other level 2 activities, with the same third-party notice and review rights. While we recognise there may still be a need for some specific provisions to deal with the unique nature of finfish farming, our suggested approach would greatly reduce the complexity of the Act, while at the same time, improve the transparency and, consequently, public confidence in the regulation of this industry.

More generally, we observe that Tasmania is facing a time of unprecedented environmental challenges, including human-induced climate change, increasing threats of species extinctions, and

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[1] https://epa.tas.gov.au/epa/news/public-comment-invited-on-minor-changes-to-state-environmental-legislation

[2] Which can be accessed here: http://www.edotas.org.au/wp-content/uploads/2013/10/170728-EDO-Submission-on-Finfish-Farming-Environmental-Regulation-Bill-2017.pdf

pollution from new and emerging industries. As such, we are disappointed that the Tasmanian Government has failed to take this opportunity to undertake a more comprehensive review of the EMPC Act 25 years after it commenced. [3]

Given these environmental challenges are unlikely to diminish, we recommend that the Tasmanian Government urgently commission a comprehensive and independent review of the EMPC Act by a panel of independent environmental regulatory experts. The review should be informed by comprehensive community and industry consultation, updated State of the Environment reporting,[4] and the latest science. EDO Tasmania would be pleased to play an active role in the community consultation around such a review.

We have made some preliminary recommendations in the attached submission to address the regulation of finfish farming and provide clarity around the matters relevant to decision-making under the EMPC Act. These recommendations can and should be acted on now and adopted into the amendments proposed in the draft Bill, in advance of any broader review.

Thank you for the opportunity to comment on the draft Bill. Please do not hesitate to contact either Nicole Sommer or Claire Bookless to discuss any issues raised in this submission.

Yours sincerely
EDO Tasmania

Nicole Sommer
CEO / Principal Lawyer

Claire Bookless
Lawyer

[3] We note that Victoria has recently completed the wholescale review of environmental regulation in that State to determine whether the *Environmental Protection Act 1970* (Vic) is achieving its stated objectives. Refer to the report of the *Independent Inquiry into the Environment Protection Authority* dated 31 March 2016, and the Victorian Government's response to that Inquiry dated 17 January 2017 (both accessible at http://epa-inquiry.vic.gov.au/epa-inquiry-report).

[4] Under section 29 of the *State Policies and Projects Act 1993*, a State of the Environment report is to be published by the Tasmanian Planning Commission every 5 years. However, the last published State of the Environment Report is dated October 2009.

Submission on draft *Environmental Legislation (Miscellaneous Amendments) Bill 2019*

Access to environmental monitoring data

We support the release of environmental monitoring information provided by industry to the EPA. However, we do not support the release of such data be at the discretion of the Director of the EPA, as proposed in the draft Bill.

We question why the decision as to what monitoring information is made available to the public should be discretionary.

The EPA Director has said that We agree that it increases transparency to require data to be released. However, the draft Bill does not require data release – it remains at the discretion of the Director.

Currently, all monitoring information held by the EPA is subject to the *Right to Information Act 2009* (**RTI Act**). Therefore, unless it is exempt from disclosure under that Act, members of the public already have a right to access it as an assessed disclosure under that Act.

It is already at the discretion of the Director to release information under the RTI Act by "routine" or "active" disclosure. The Director can already simply adopt a practice of publishing monitoring data at his discretion, for instance, as is done in respect of environmental monitoring of salmon farming in Macquarie Harbour.

We assume the data referred to in clause 8 is data required to be provided to the EPA either:

- as requirement of a condition on a permit, EPN or licence or other "environmental management and enforcement instrument" within the meaning of s22 of the EMPC Act; or
- because of another requirement of the EMPC Act, such as the obligation to notify of environmental harm.

Any such information should necessarily be on a public register and be freely available to the public.

There are multiple reasons for this:

1. It allows people affected by an activity regulated by the EPA to know whether there is compliance with conditions regulating that activity. By way of example, where a quarry is next to residential premises and noise compliance testing is undertaken, that person should have access to the testing.
2. If a condition is imposed as a result of public representations made or an appeal, the person making that representation should have access to the information provided in compliance with the condition without needing to request it;
3. There are public interest reasons why environmental monitoring data should be publicly disclosed, not least of which is that it increases transparency with respect to the regulation of industrial activity in Tasmania;
4. Public disclosure of this material is consistent with objective 1(c) of the Resource Management and Planning System in Schedule 1 of the EMPC Act to encourage public involvement in resource management.
5. There can be no reason for a discretion to exist. Trade secrets and privacy are adequately protected by section 23 of EMPC Act and the *Personal Information Protection Act 2004*.

For this reason, we recommend that:

- the phrase "...that is dealt with by the Director under section 23AA(2);" be deleted from the proposed section 22(1)(ea);
- the definition of "relevant information" provided in the proposed section 23AA be inserted as a new section 22(3); and
- the proposed section 23AA be amended to prescribe how the relevant information is to be published.

We do not consider that the information should only be searchable on payment of a fee as s22 of the EMPC Act, rather the information should be published or available free of charge.

If any discretion should exist, the proposed section 23AA should be limited to deciding the most appropriate form for the release of information. For example, deciding whether the information should be released on the web, electronically, or in hardcopy format to be inspected.

Criteria for non-assessment of changes to existing level 2 activities by EPA Board

The draft Bill proposes to amend section 25 of EMPCA to require the EPA Board to consider "prescribed criteria" when determining if it needs to assess an application relating to a development proposed on the same land as an existing level 2 activity. The explanatory paper for the draft Bill indicates that this proposed amendment is aimed at empowering the EPA Board to decide not to undertake an assessment for certain "low-risk" changes to existing level 2 activities.

We have no objection to limiting the EPA Board's assessment of proposed changes to existing level 2 activities to proposals that will have environmental consequences. However, as the proposed prescribed criteria have not been outlined in the explanatory paper, it is not possible to comment on whether an appropriate balance will be achieved between process efficiency and the appropriate level of scrutiny of changes by both the EPA Board and the public.

We are concerned that any regulation will limit public participation and scrutiny of proposed amendments to environmentally damaging activities.

We recommend that criteria be prescribed in the legislation rather than in regulation and that such criteria be released for public comment. Such criteria for the purposes of the new section 25(1AA) should require the Board to undertake an assessment of proposed changes to an existing level 2 activity where:

- there is a change to the manner or the location where pollutants are emitted to the environment by the level 2 activity;
- there is a substantial intensification in the level 2 activity, with "substantial intensification" defined as the increase of more than 10% in intensity or scale of the level 2 activity; and/or
- the proposal necessitates any amendments to existing permit conditions previously imposed by the EPA Board on the level 2 activity.

Amendments relating to Environment Protection Policy processes

The draft Bill proposes to amend way the Environment Protection Policies (***EPP***) are formulated and amended:

- Currently, there is a requirement for the Minister to publicly notify the community of an intention to prepare an EPP. The purpose of this notification is to allow the community to be involved in the scope and form of EPPs before they are drafted. There is a further requirement for public consultation on the draft EPP after it has been prepared.

  The draft Bill proposes to remove the requirement for the Minister to give public notice prior to the drafting of an EPP. There are only two EPPs in force in Tasmania, with the last one published in 2009. We do not see how the removal of the notification requirement is warranted, for instance, we do not see that the requirement appears to have created a significant regulatory burden on the Minister or the Department.

  We object to the removal of public notice on the scope of draft EPPs. We consider that allowing public and interested stakeholders to have input in framing the scope of an EPP before it is drafted is likely to be of significant assistance in the drafting of the document. It ensures that the scope of the EPP takes into account the issues that members of the community and business consider ought to be within the scope of the draft EPP.

  We are not aware of the justification for this move. If the Government considers that the notice of intention to draft an EPP is not warranted because, in the past, the notices have failed to elicit any response from affected stakeholders or the community, we would simply say that this is no justification for not including such an opportunity in future. The objects of the RMP System are to encourage public participation – this move limits it.

At the minimum, EDO Tasmania recommends that the public consultation period on a draft EPP provided under section 96I(2)(e) of EMPCA be extended from not less than 30 days to not less than 60 days. We do not see this as in any way offsetting the loss of consultation on the scope of a draft EPP. However, it will provide for greater opportunity for public participation in the formulation of EPPs.

- Currently, the EPP Panel can determine if a proposed amendment to an existing EPP is "significant". If it determines a proposed change is not significant, then the Minister does not need to undertake public consultation before making the change.

  The amendments in the draft Bill propose to give the function of determining what is a significant change to an EPP to the Chairperson of the EPP Panel alone. The proposed new section 96M(5A)) prescribes certain criteria which the Chairperson must consider in making determination as to what is a significant change to an EPP.

  The explanatory paper does not provide any information as to why the responsibility for determining what is a significant change to an EPP is proposed to be given to the Chairperson alone instead of the EPP Panel. We do not see any justification for the change.

  This change simply moves discretion to a single decision-maker, rather than operating on a scientific basis. We object to it.

  EDO Tasmania recommends that this function be left with the EPP Panel to ensure an appropriate level of independent oversight of proposed amendments. Furthermore, as the criteria listed in subsections (c), (d) and (e) of section 96M(5A) may not be consistent with the definition of "significant change" currently found in section 96M(1), EDO Tasmania recommends that these proposed subsections be omitted from the draft Bill.

Amendments to list of level 2 activities

The draft Bill proposes amendments to the list of level 2 activities in Schedule 2 of EMPCA.

While most of the proposed changes appear reasonable, we object to the proposed amendment to the definition of Item 3(b) to allow for the prescription of exceptions to the Waste Depot activity.

The explanatory paper states that this amendment will allow certain prescribed activities, "particularly once-off and temporary activities", to avoid assessment and regulation as a level 2 Waste Depot activity. As the waste disposal activities which are proposed to be excluded from the definition of Waste Depot under Schedule 2 have not been outlined in the explanatory paper, it is not possible to comment on whether an appropriate balance will be achieved between assessment efficiency and an adequate level scrutiny of potentially environmentally polluting activities.

Again, this concern would have been alleviated if the EPA/DPIPWE had either released better information to provide detail on the intention of amendments or properly consulted on the proposed amendments before release of the draft Bill.

Our concern about this proposed amendment arises because we are aware of examples where a "temporary" Waste Depot activity has already not been subject to appropriate assessment by the EPA Board.

For example, in 2017, the EPA purportedly authorised, through the issue of an Environment Protection Notice (***EPN***), the disposal of up to 60,000L/day of salmon farm waste from underneath Tassal's Macquarie Harbour finfish farm pens to the trade waste of George Town Seafoods. Given the volume of waste, and the potential risks to biosecurity and environmental nuisance posed, the proposal should have been subject to a proper assessment by the EPA Board with associated rights for public notice and review rather than be authorised through the grant of an EPN with no oversight or scrutiny.

At the time, it was said that the need for the waste disposal arose as a result of an emergency (i.e. the benthic "dead zone" under Tassal's pens in Macquarie Harbour). However, this is not the appropriate approach to the use of an EPN. Rather than authorise an activity with potential for serious or material environmental harm or environmental nuisance through an EPN, it was open to the EPA to require that Tassal destock its salmon pens to a more sustainable level rather than authorise disposal contrary to

the existing processes under the EMPC Act. Best practice environmental regulation would suggest that disposal of waste in such volumes and with consequential risks to the environment be subject to proper environmental assessment, including with public notice and review.

"Once-off and temporary activities", such as the disposal of Tassal's salmon farm pen waste, are precisely the sort of activities that should be assessed by the EPA Board. These activities can pose a a significant risk to the community and the environment, and be of public concern, in some circumstances more so than activities otherwise assessed as Level 2 activities.

As a matter of fairness and transparency, all proposals with the potential for environmental harm should be subject to a level regulatory playing field.

This is another example of the need for more than an explanatory paper, as no justification is given as to why this change is necessary or what mischief it is intended to address.

The proposed amendment to Clause 3(b) should be deleted from the draft Bill.

Amendments to relating to finfish farming

Definition of finfish farming

Section 5C of the EMPC Act defines finfish farming. The draft Bill proposes to amend section 5C(2)(b) of the EMPC Act to allow the EPA to prescribe "associated activities" that are captured in the definition of finfish farming.

While we would agree that, as presently drafted, the definition of finfish farming might be considered broad, there is no detail given in the explanatory paper. We would expect to see some clarity as to what might ultimately be prescribed as an associated activity to a finfish farm activity, or where the EPA is presently "drawing the line" for associated activities.

We do not object to the proposed amendment to section 5C of EMPCA on the basis that:

- Detail of what will be prescribed as an associated activity be released prior to the introduction of the draft Bill to Parliament, with an opportunity for public comment;
- At a minimum, any prescribed finfish farm "associated activities" should have a nexus with the primary location of the finfish farm activity. For example, in order to be part of a finfish farm, an associated activity should be located within the marine farming lease or be involved in travel to or from the lease by boat, whereas for hatcheries, associated activities should be located on the same site.
- Activities like the disposal of fish carcasses or fish farm waste outside of the marine lease or hatchery site should not be captured within the definition of a finfish farm. These activities should continue to be separately regulated in accordance with the relevant provisions of EMPCA and LUPAA.

Amendments to environmental licence provisions

The explanatory paper states that the proposed amendments to environmental licence (***EL***) provisions in the draft Bill are primarily directed at "drafting, legal doubt and administrative efficiency issues".

While most of the proposed amendments to the EL provisions appear logical given the context of the existing provisions for finfish farming in the Act, we consider that this is a missed opportunity to provide for better regulation of the finfish farming industry and inclusion of public participation in the granting of ELs or variations to existing ELs for marine finfish farms.

As an example, the EMPC Act provides for a broad discretion the EPA Director's to:

- assess applications for ELs for new marine finfish farms without referral to the EPA Board;
- assess applications for variations to ELs for existing marine finfish farms without referral to the EPA Board.

If EL applications are not referred to the EPA Board by the EPA Director, public participation and appeal rights in relation to those activities are effectively excluded.

The draft Bill should, at a minimum, prescribe criteria as to when ELs or variations must be referred by the Director to the Board.

While regulations 8 and 9 of the *Environmental Management and Pollution Control (Environmental Licences) Regulations 2019* (***EL Regulations***) do prescribe the circumstances where the Director must refer EL applications to the EPA Board for assessment, there are problems with the practical operatyion of these provisions.

Take, for example, the proposed expansion of finfish farming in Storm Bay.

Tassal's and Huon Aquaculture's recent application for ELs for new/expanded finfish farms in Storm Bay were not referred to the EPA Board for assessment by the EPA Director. It was said at the time that the proposals had recently been assessed by the Marine Farming Planning Review Panel. While it is unclear whether the EL Regulations were in effect at the time of the companies' EL applications, even the draft EL Regulations stated that a very high level of public interest about a proposal would warrant the EPA Director's referral of EL applications to the EPA Board for assessment. Arguably this criterion was satisfied in these cases.

And yet, in those circumstances, the EPA Director did not refer these EL application to the EPA Board. There was consequently no public notice or appeal over the grant of the ELs including any conditions that ought to have been imposed on the grant of any EL.

Noting section 8 of the EMPC Act requires that a person exercising a function or power conferred by the Act is required to exercise that power in accordance with the Schedule 1 objectives, including to encourage public participation, we would expect such proposals to be referred to the Board.

We would be concerned if any future proposal for new or intensified operations were not referred to the EPA Board for assessment.

Yet, in the Storm Bay example:

- the ELs issued do not impose any limits on biomass or total dissolved nitrogen. It may be that any intensification of the activity may not give rise to any need for an EL variation application to be made;
- If a proposal for intensification did necessitate a variation to an EL and the EPA Director determines that variation is not a "major variation",[5] the EL Regulations presently require the EPA Director to refer applications for the variation of ELs to the EPA Board where *inter alia* there is a proposal to exceed by 10% either the biomass or dissolved nitrogen caps imposed by a person under a Marine Farming Development Plans (***MFDPs***).[6]
- The Storm Bay MFDPs do not explicitly impose a biomass or total permissible dissolved nitrogen caps either. Rather, the MFDPs allow the EPA Director to set these caps "from time to time". The exercise of this power by the EPA Director is not subject to any public comment or third-party appeal rights.
- A situation could easily arise where the assessment of proposed substantial intensification of Storm Bay finfish farms by the EPA Board is avoided, simply by the EPA Director increasing the caps under the MFDPs.
- Further, there is nothing to stop the companies from simply applying for increases in biomass/nitrogen caps amounting to less than 10% on multiple occasions in order to avoid the EPA Board's assessment (and thereby public participation and appeal rights).

Finally, we note that a full assessment by the EPA Board, as the EMPC Act is currently drafted, there is no requirement for representors involved in that process to be notified of later variations to EL conditions made by either the EPA Board or EPA Director. This is out of step with other provisions in EMPCA and LUPAA which require representors to be notified of changes to conditions.[7]

This is one of the foremost reasons that we consider that the draft Bill represents a missed opportunity. The draft Bill has failed to grapple with existing deficiencies in the regulation of finfish farming under

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[5] In accordance with subsection (3) to (5) of section 420 of the EMPC Act.
[6] See subregulations 9(5), (6), (7) and (8) of the EL Regulations.
[7] Refer to section 44(8) of the EMPC Act and section 56(3) of the LUPA Act.

both the EPBC Act and the MFP Act. This failure entrenches the lack of transparency over the regulation of finfish farming, to the detriment of both the industry and community affected.

For the reasons we have stated, we recommend that there be a review of the EMPC Act. We further ask that EDO Tasmania be involved in setting the scope of the review.

However, pending that review, we recommend that the draft Bill be amended such that finfish farming is regulated like every other industry in Tasmania, as a Level 2 activity, with the same public notice and review rights. We recognise there may still be a need for some specific provisions to deal with the unique nature of finfish farming, our suggested approach would greatly reduce the complexity of the Act, while at the same time, improve the transparency and, consequently, public confidence in the regulation of this industry.

We have made recommendations on the changes needed to the law in order to address the deficiencies in regulation of the finfish farming industry and ensure consistency and transparency in its regulation. We have made at least 10 submissions on the regulation of the finfish farming industry, with recommendations for reform, and produced a paper prior to the transfer of powers to the EPA *Tasmania's Marine Farming Regulatory Framework, and how to improve it* (2014).

Our past submissions have called for reform in order that the efficiency, consistency, and transparency of finfish farm regulation is improved. We attach our submissions:

- Draft *Finfish Farming Environmental Regulation Bill 2017;*
- Draft *Environmental Management and Pollution Control (Environmental Licences) Regulations 2018.*

As we have previously recommended in our detailed submissions on this subject, we make the following recommendations:

- the EMPC Act be amended to require that all EL applications or applications for variations to ELs be referred to the EPA Board for assessment, irrespective of whether the finfish farms are land-based or marine;
- the EMPC Act and MFP Act be amended to require that any EL application relating to a new marine finfish farm or substantial intensification to existing marine finfish farms be assessed by the EPA Board concurrently with any Marine Farming Planning Review Panel assessment under the provisions of the MFP Act;
- the EMPC Act and MFP Act be amended to empower the EPA Board to direct the refusal of a new MFDP, or amendment to a MFDP, if it considers that an EL should not be issued for the finfish farm (in much the same way as the EPA Board presently may direct a planning authority to refuse to grant development permit for any level 2 activity);
- the EMPC Act and MFP Act be amended to require that MFDPs impose maximum biomass and dissolved nitrogen caps as environmental controls, and that these caps be reflected in EL conditions;
- the MFP Act be amended to require that MFDP include strict criteria for changes to biomass and dissolved nitrogen levels set under the MFDP; and
- the EMPC Act ensure that any person who has made a representation in relation to an EL application be notified of later applications for variations to the EL conditions and be given an opportunity to appeal against any changes that are made, as is the case for LUPA Act applications.

We invite the EPA and DPIPWE to work with us on amendments required to implement these recommendations and improve the regulation of finfish farming in the State.

Criteria for decisions to grant environmental licences and other approvals

The draft Bill proposes a minor consequential amendment to section 74(3) of EMPCA. While that amendment is uncontroversial, we submit that the draft Bill presents an ideal opportunity to strengthen the criteria against which the EPA Board is required to assess all level 2 activities.

The EMPC Act currently provides that the EPA Director and Board may grant an EL or a variation to an EL only if they are "satisfied that it is appropriate to do so". There is no similar provision in relation to the assessment of other level 2 activities, however, the EPA Board is required to assess any application in accordance with the Environmental Impact Assessment Principles outlined in section 74 of the EMPC Act.

The Environmental Impact Assessment Principles do not provide clear criteria against which projects should be assessed.

To ensure consistency and transparency of decision-making for all level 2 activities, any decision to grant or amend an environmental licence, planning permit or environment protection notice that requires assessment under the EMPC Act should have clearly prescribed criteria. This is consistent with the position in other environmental assessment legislation. It provides a level playing field for proponents, transparency for members of the public engaging with the EMPC Act and clear obligations for decision-makers.

We recommend that criteria be prescribed could include that the following must be met or considered:

- that the decision further the objectives of the Resource Management and Planning System in Tasmania as set out in Schedule 1 of the EMPC Act;
- that the activity complies with any applicable Environment Protection Policies and State Policies;
- the environmental impact likely to be caused by the activity;
- any relevant environmental impact study, assessment or report;
- whether the proponents have considered all viable alternatives to the proposed activity;
- whether the likely impacts of the activity on the character, resilience and values of the receiving environment are acceptable;
- all submissions made by the applicant and any representors;
- whether the activity accords with best practice environmental management for the proposed activities; and
- the public interest.

We recommend that section 74 of EMPCA be amended to incorporate these criteria accordingly.

Further, we recommend that new regulations be made which prescribe the quality and requirements of environmental impact studies, assessments or reports for the purposes of the criterion above, including a requirement that the level of scientific uncertainty be explicitly stated in the documents.

The Marine Farming Planning Review Panel

Currently, the Marine Farming Planning Review Panel (the ***Panel***) is dominated by members who represent the marine farming or fishing industries. While there is now a requirement for a person "with ability and experience in environmental management" to be appointed to the Panel, there is no requirement that they be involved in the quorum that makes a decision on whether or not to recommend approval of a MFDP or an amendment to a MFDP (as has been demonstrated with the Panel's recent decisions on the industry's expansion into Storm Bay where the panel members with expertise in environmental management and biosecurity resigned). This is a serious shortcoming in the process.

We therefore recommend that Item 3(1) in Schedule 3 be amended as follows:

3. Procedure at meetings

(1) The quorum at any duly convened meeting of the Panel is 5 members but must include the appointed panel members with ability and experience in environmental management and ability and expertise in fish health and biosecurity.

In addition to our recommendations about the assessment processes for finfish farms outlined on page 9 of our submission, we further recommend that:

- section 8 of the MFPA be amended to allow for the appointment to the Panel of a person to represent the interests of the community; and
- amendments be made to sections 31 and 42 the MFPA to ensure that where the Panel recommends the rejection of a MFDP or an amendment to an MFD Plan, the Minister may not otherwise approve it.

Other general comments

- The proposed amendments to section 27A of EMPCA are reasonable, however, the new subsection (1A)(b) should clarify that the EPA Board may only allow for upgrade of assessment level for a proposal currently under assessment. This is because the determination of the assessment level has an impact on the length of public consultation required to be undertaken by the EPA Board under section 27G of EMPCA. If a proposal is so complex that further information is required for the Board to determine the appropriate assessment level, then it follows that the level of public consultation on such a proposal should only increase, not decrease.
- The proposed amendment to section 44(3)(ca) of EMPCA is unnecessary. This section already makes it plain that EPNs can vary conditions of a permit (see section 44(1)(d)). The current drafting of the section makes it clear that the variation of conditions of a permit is <u>not</u> the overarching purpose of an EPN. It is not appropriate that EPNs are used as a quasi-permit amendment process. Substantial changes to a permit should always be subject to appropriate assessment by the EPA Board and transparent public notice and review rights.
- The draft Bill proposes amendments to section 42Z(8) to clarify that a condition imposed on an EL overrides any conditions of a planning permit in relation to that activity to the extent of any inconsistency. This change emphasises the need to get the scope of "associated activities" for finfish farms right. Our recommended limits on "associated activities" on page 7 of this submission have considered the fact that the grant of an EL should not override permits for other land-based uses like onshore aquaculture bases, and waste disposals or landfills issued by local councils.
- The proposed amendments to sections 42Z(2A) and (2B) are reasonable, however they should make it clear that any marine farming equipment, such as nets etc, need to be contained within lease boundaries.
- We recommend that sections 42S(3A) and 42ZF(2A) be amended so that the phrase "The Director may ..." be amended to "The Director must ...".