



Environmental  
Defenders Office

**Submission to the five-year statutory review on the *Marine Estate Management Act 2014***

**10 September 2020**

## About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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## Introduction

Environmental Defenders Office (**EDO**) welcomes the opportunity to participate in the five-year statutory review on the *Marine Estate Management Act 2014* (**MEM Act**).

As noted in the Discussion Paper provided to key stakeholders, section 84 of the MEM Act requires the relevant Ministers to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The policy objectives of the Act are set out in section 3 of the MEM Act as 'objects'.

### **3 Objects of Act**

*The objects of this Act are as follows:*

- a) *to provide for the management of the marine estate of New South Wales consistent with the principles of ecologically sustainable development in a manner that:*
  - (i) *promotes a biologically diverse, healthy and productive marine estate, and*
  - (ii) *facilitates:*
    - *economic opportunities for the people of New South Wales, including opportunities for regional communities, and*
    - *the cultural, social and recreational use of the marine estate, and*
    - *the maintenance of ecosystem integrity, and*
    - *the use of the marine estate for scientific research and education,*
- b) *to promote the co-ordination of the exercise, by public authorities, of functions in relation to the marine estate,*
- c) *to provide for the declaration and management of a comprehensive system of marine parks and aquatic reserves.*

In considering the policy objectives of the MEM Act, and whether the terms of the Act remain appropriate for securing those objects, our submission addresses the following:

1. Object 3 a) - Management of the marine estate of New South Wales consistent with the principles of ecologically sustainable development
2. Object 3 b)- Co-ordination of the exercise, by public authorities, of functions in relation to the marine estate
3. Object 3 c) - Declaration and management of a comprehensive system of marine parks in accordance with the provisions of the Act
4. Poor implementation undermining the policy objectives of the Act, including:
  - 4.1 Sidestepping proper processes
  - 4.2 Lack of enforcement
  - 4.3 Flawed development and implementation of the state-wide TARA and MEM strategy
  - 4.4 Impacts of political decisions

EDO is concerned that the objects of the MEM Act as drafted hinder the effective and consistent implementation of the MEM Act. For example, there is no clear overarching object of the MEM Act, there is potential confusion about how the principles of ecologically sustainable development (**ESD**) should be applied, and there is potential for conflict to arise between different objects.

Further, of significant concern is the poor implementation of the MEM Act, discussed in Part 4 of our submission. It is difficult to provide any comprehensive or valid assessment of whether the policy

objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives, when poor implementation means that the Act is not operating as intended.

In considering these key issues, we make a number of recommendations, summarised below.

### **Summary of Recommendations**

**Recommendation 1:** Amend the objects of the MEM Act to provide that the primary object of the MEM Act is the management of the marine estate of New South Wales consistent with the principles of ecologically sustainable development.

**Recommendation 2:** To avoid any conflict, confusion or duplication remove from the objects of the MEM Act those elements in subsections 3(a)(i) and (ii), or clarify that these objects are secondary to the primary objective of managing the marine estate consistent with the principles of ecologically sustainable development.

**Recommendation 3:** Strengthen the objects of the MEM Act to require management of the marine estate to take into account the impacts of a changing climate.

**Recommendation 4:** Strengthen the status and functions of advisory bodies established under the MEM Act framework to ensure that they are able to effectively support the management of the marine estate consistent with the policy objectives of the MEM Act, and are consulted on all key decisions relating to the implementation of the MEM Act and management of the marine estate.

**Recommendation 5:** The five-year statutory review of the MEM Act should examine and report on why processes commenced under the Act relating to the declaration and management of marine parks (including the proposal for a new Hawkesbury shelf marine bioregion marine park and the pilot for new management planning approach) have stalled or been delayed and whether this is an outcome of the provisions of the MEM Act or due to external factors.

**Recommendation 6:** Require the MEM Act to provide for declaration and management of a comprehensive, adequate and representative system of marine parks and aquatic reserves.

**Recommendation 7:** The decision to allow catch and release recreational line fishing in sanctuary zones in the Batemans Marine Park, implemented by not issuing penalty notices under the MEM Act 2014, should be reversed.

**Recommendation 8:** All decisions relating to the management of the NSW marine estate should be made in accordance with the legal framework of the MEM Act, in consultation with the relevant advisory committees established under the MEM Act, and absent of any inappropriate, external influences.

**Recommendation 9:** Provisions of the MEM Act should be appropriately enforced (including the issuing of penalty notices for fishing offences in sanctuary zones in Batemans Marine Park).

**Recommendation 10:** Both the state-wide TARA and MEM Strategy 2018-2028 should be revised to bring them in line with the best-available science, and to ensure that priority management initiatives are appropriately identified.

## Key Issues:

### 1. Object 3 a) - Management of the marine estate of New South Wales consistent with the principles of ecologically sustainable development

Object 3a) of the MEM Act provides that the management of the marine estate of New South Wales is to be consistent with the principles of ESD. However this is qualified by following subsections which provide the principles of ESD are to be implemented in a manner that:

“(i) *promotes a biologically diverse, healthy and productive marine estate, and*  
(ii) *facilitates:*

- *economic opportunities for the people of New South Wales, including opportunities for regional communities, and*
- *the cultural, social and recreational use of the marine estate, and*
- *the maintenance of ecosystem integrity, and*
- *the use of the marine estate for scientific research and education,”*

At the same time, section 4(2) of the MEM Act provides “*that the principles of ESD require the effective integration of economic, social and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following: (a) the precautionary principle, (b) inter-generational equity, (c) conservation of biological diversity and ecological integrity, (d) improved valuation, pricing and incentive mechanisms*”. Interestingly, the MEM Act does not rely on the definition of the principles of ESD contained in s6(2) of the *Protection of the Environment Administration Act 1991* which is more comprehensive, and has been adopted as the definition for principles of ESD in other NSW legislation.<sup>1</sup>

It is unclear how, in circumstances where there may be an inherent conflict, section 4(2), which sets out the recognised principles of ESD, is to be reconciled with the objects set out on subsections 3(a)(i) and (ii). There is also some overlap between these sections.

Without a clear overarching objective, there is a risk that some components of the objects will be given greater weight by decision makers than others. In our experience, across various areas of environmental and natural resource management law, this often leads to environmental considerations being overridden by economic considerations. This risk is very real in the case of the MEM Act.

When introduced, the MEM Act sought to bring together the management of the marine estate for both biological conservation and resources management purposes. EDO has previously raised concerns about these potentially conflicting goals being dealt with under a single piece of legislation.<sup>2</sup> Unfortunately, during its first five years of operation, we have seen management decisions made under the MEM Act framework that have favoured economic and social interests at the expense of the environmental values of the marine estate (specific examples are discussed in Part 4 of this submission).

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<sup>1</sup> See, for examples, section 1.4 of the *Environmental Planning and Assessment Act 1979* which provides that *ecologically sustainable development* has the same meaning it has in section 6(2) of the *Protection of the Environment Administration Act 1991*; see also section 1.3 of the *Biodiversity Conservation Act 2016* and section 4 of the *Coastal Management Act 2016*.

<sup>2</sup> See Environmental Defenders Officer, *Submission to the NSW Department of Primary Industries – Report on the Independent Scientific Audit of Marine Parks in New South Wales*, June 2012, available at <https://www.edo.org.au/publication/submission-to-the-nsw-department-of-primary-industries-report-on-the-independent-scientific-audit-of-marine-parks-in-new-south-wales/>

EDO is of the view that the management of the NSW marine estate requires an ecosystem-based approach underpinned by the principles of ESD. The ecosystem-based approach to biodiversity conservation and resource management has been formally endorsed by the Conference of the Parties for both the Convention on Biological Diversity<sup>3</sup> and Convention on Wetlands of International Importance (Ramsar Convention).<sup>4</sup> The ecosystem-based approach has also been supported by peer-reviewed science emphasising its importance, including in building resilience under climate change.<sup>5</sup> Proper implementation of ESD is of vital importance if the estate's unique biodiversity is to be protected into the future, particularly given the prevalence of commercial and recreational fishing activities both within and outside marine parks.

To achieve this and to address the concerns raised above, EDO recommends that the objects of the MEM Act be revised to provide a clear primary objective, namely that management of the marine estate of New South Wales consistent with the principles of ecologically sustainable development. This could be achieved by amending section 3 of the MEM Act to provide that the primary objective of the MEM Act is the management of the marine estate of New South Wales consistent with the principles of ESD. Subsections 3(a)(i) and (ii) of the current objects could be removed to avoid any conflict, confusion or duplication with the principles of ESD as defined in section 4(2). Alternatively the objects in 3(a)(i) and (ii) could be retained as secondary objects. This approach would be consistent with the objects of the *Great Barrier Reef Marine Park Act 1975* (Cth) (**GBRMP Act**) which provides that the main object of the GBRMP Act is “to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region”.<sup>6</sup> The GBRMP lists other, subsequent objects as well.

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<sup>3</sup> Convention on Biological Diversity, COP 5, Decision V/6, available at <https://www.cbd.int/decision/cop/?id=7148>. The Decision described an ecosystem approach as “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Thus, the application of the ecosystem approach will help to reach a balance of the three objectives of the Convention: conservation; sustainable use; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”

<sup>4</sup> Ramsar Convention, COP 9, Resolution IX.1 Annex A, available at [https://www.ramsar.org/sites/default/files/documents/pdf/res/key\\_res\\_ix\\_01\\_annexa\\_e.pdf](https://www.ramsar.org/sites/default/files/documents/pdf/res/key_res_ix_01_annexa_e.pdf)

<sup>5</sup> See for example: United Nations Environment Programme, *The Role of Ecosystem Management in Climate Change Adaptation and Disaster Risk Reduction*, Copenhagen Discussion Series, June 2009. Available online at [http://www.unep.org/climatechange/Portals/5/documents/UNEP-DiscussionSeries\\_2.pdf](http://www.unep.org/climatechange/Portals/5/documents/UNEP-DiscussionSeries_2.pdf).

<sup>6</sup> See *Great Barrier Reef Marine Park Act 1975*, section 2(a) which provides:

- (1) The main object of this Act is to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region.
- (2) The other objects of this Act are to do the following, so far as is consistent with the main object:
  - (a) allow ecologically sustainable use of the Great Barrier Reef Region for purposes including the following:
    - (i) public enjoyment and appreciation;
    - (ii) public education about and understanding of the Region;
    - (iii) recreational, economic and cultural activities;
    - (iv) research in relation to the natural, social, economic and cultural systems and value of the Great Barrier Reef Region;
  - (b) encourage engagement in the protection and management of the Great Barrier Reef Region by interested persons and groups, including Queensland and local governments, communities, Indigenous persons, business and industry;
  - (c) assist in meeting Australia's international responsibilities in relation to the environment and protection of world heritage (especially Australia's responsibilities under the World Heritage Convention).
- (3) In order to achieve its objects, this Act:
  - (a) provides for the establishment, control, care and development of the Great Barrier Reef Marine Park; and
  - (b) establishes the Great Barrier Reef Marine Park Authority; and
  - (c) provides for zoning plans and plans of management; and

The objects of the MEM Act also fail to acknowledge that management of the marine estate must take into account the impacts of a changing climate. Comparably, the objects of the Victorian *Marine and Coastal Act 2018* include (b) to promote the resilience of marine and coastal ecosystems, communities and assets to climate change; and (c) to respect natural processes in planning for and managing current and future risks to people and assets from coastal hazards and climate change. The objects of terrestrial biodiversity laws in NSW recognise the changing climate, for example, one of the objects of the *Biodiversity Conservation Act 2016 (BC Act)* is to support biodiversity conservation in the context of a changing climate (section 1.3(d)). The laws relating to our marine estate should do the same.

### Recommendations:

- **Recommendation 1:** Amend the objects of the MEM Act to provide that the primary object of the MEM Act is the management of the marine estate of New South Wales consistent with the principles of ecologically sustainable development.
- **Recommendation 2:** To avoid any conflict, confusion or duplication remove from the objects of the MEM Act those elements in subsections 3(a)(i) and (ii), or clarify that these objects are secondary to the primary objective of managing the marine estate consistent with the principles of ecologically sustainable development.
- **Recommendation 3:** Strengthen the objects of the MEM Act to require management of the marine estate to take into account the impacts of a changing climate.

## 2. Object 3(b) - Co-ordination of the exercise, by public authorities, of functions in relation to the marine estate

The MEM Act establishes a number of advisory bodies, namely the Marine Estate Management Authority (**MEMA**), the Marine Estate Expert Knowledge Panel (**MEEKP**) and Marine Park Advisory Committees (**MPACs**). Our brief comments on each of these bodies, and how they contribute to the implementation of the MEM Act and management of the marine estate are outlined below.

- **MEMA:** MEMA consists of an independent Chair, Authority member (the Chair of MEEKP) and four exofficio members - the four NSW government agencies with responsibility for managing the marine estate and providing advice to the NSW Government (NSW Department of Primary Industries (sitting in Department of Regional NSW), Energy, Environment and Science and Planning and Assessments (sitting in Department of Planning, Industry and Environment) and Department of Transport). While MEMA has been able to deliver key programs and projects,<sup>7</sup> EDO is aware of community concern regarding the failure of MEMA to effectively consult with the community or with on-ground staff. There are also concerns that MEMA has not been consulted on key Ministerial decisions regarding the marine estate (see 4.1 below).

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(d) regulates, including by a system of permissions, use of the Great Barrier Reef Marine Park in ways consistent with ecosystem-based management and the principles of ecologically sustainable use; and  
(e) facilitates partnership with traditional owners in management of marine resources; and  
(f) facilitates a collaborative approach to management of the Great Barrier Reef World Heritage area with the Queensland government.

<sup>7</sup> See, Marine Estate Management Authority, *Marine Estate Management Authority Performance Report 2018-19*, available at [https://www.marine.nsw.gov.au/data/assets/pdf\\_file/0004/1192954/MEMA-performance-report-2019.pdf](https://www.marine.nsw.gov.au/data/assets/pdf_file/0004/1192954/MEMA-performance-report-2019.pdf)

- **MEEKP:** One of the two overarching recommendations of the Report of the Independent Scientific Audit of Marine Park (**Scientific Audit**) was that science for the NSW Marine Estate be reorganised under an independent Scientific Committee that would oversee strategic research.<sup>8</sup> However the MEEKP does not operate as recommended by the Scientific Audit. Additionally, the role of MEEKP is limited to matters referred to it by MEMA (see section 9 of the MEM Act). Section 9 of the MEM Act also provides that regulations may make provision for the constitution and procedures of the MEEKP, however this has not been done; instead the MEEKP operates in accordance with published terms of reference.<sup>9</sup> It is our understanding that the MEEKP has not been consulted in relation to announcements made by the Minister in relation to the management of the marine estate (see 4.1 below).
- **MPACs:** Under the former marine park management framework MPACs were statutory bodies established under the legal provisions of Part 6 of the now repealed *Marine Park Act 1997 (MP Act)*. Under the MP Act ministers were required to consider the advice of marine park advisory committees when making, reviewing and amending zoning plans for marine parks (per section 17C(5)(b), section 17D(4), 17E(3) of the MP Act). MPACs are no longer statutory bodies established under legislation. MPACs remain in operation but are governed by a non-statutory *Marine Park Advisory Committee Handbook*.<sup>10</sup>

Overall, the bodies established under the MEM Act framework have less authority than similar predecessors, are not tasked with undertaking scientific research as recommended and have not been consulted in key decisions regarding the management of the marine estate.

### Recommendations:

**Recommendation 4:** Strengthen the status and functions of advisory bodies established under the MEM Act framework to ensure that they are able to effectively support the management of the marine estate consistent with the policy objectives of the MEM Act, and are consulted on all key decisions relating to the implementation of the MEM Act and management of the marine estate.

### 3. Object 3(c) - Declaration and management of a comprehensive system of marine parks in accordance with the provisions of the Act

The MEM Act has failed to deliver any new achievements under object c) - provide for the declaration and management of a comprehensive system of marine parks and aquatic reserves.

While marine parks that were in existence prior to the commencement of the MEM Act continue to exist, no new marine parks have been declared. Disappointingly, the proposal to establish a marine park for

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<sup>8</sup> NSW Marine Parks Independent Scientific Audit Panel, *Report of the Independent Scientific Audit of Marine Parks in New South Wales*, 2012, available at [https://www.marine.nsw.gov.au/\\_data/assets/pdf\\_file/0003/739434/Report-of-the-Independent-Scientific-Audit-of-Marine-Parks-in-New-South-Wales-2012.PDF](https://www.marine.nsw.gov.au/_data/assets/pdf_file/0003/739434/Report-of-the-Independent-Scientific-Audit-of-Marine-Parks-in-New-South-Wales-2012.PDF)

<sup>9</sup> See *Terms of Reference - Marine Estate Expert Knowledge Panel*, June 2016, available at [https://www.marine.nsw.gov.au/\\_data/assets/pdf\\_file/0006/701574/MEEKP-terms-of-reference.pdf](https://www.marine.nsw.gov.au/_data/assets/pdf_file/0006/701574/MEEKP-terms-of-reference.pdf)

<sup>10</sup> NSW Department of Primary Industries, *Marine Park Advisory Committee Handbook*, Updated 2019, available at [https://www.marine.nsw.gov.au/\\_data/assets/pdf\\_file/0005/1154804/Marine-Park-Advisory-Committee-Handbook-August-2019.pdf](https://www.marine.nsw.gov.au/_data/assets/pdf_file/0005/1154804/Marine-Park-Advisory-Committee-Handbook-August-2019.pdf)



the Hawkesbury shelf marine bioregion, the culmination of substantial assessment, including threat and risk assessment under the MEM Act, and community engagement, has stalled.

Additionally, the management of existing marine parks has not been brought into line with the provisions of the new Act (as was intended<sup>11</sup>), with all marine parks continuing to operate under operational plans created under the former MP Act.

We also note that this object is not consistent with the CAR reserve system,<sup>12</sup> which provides that protected areas should be comprehensive, adequate and representative. This object should be revised to require that the MEM Act provides for declaration and management of a comprehensive, adequate and representative system of marine parks and aquatic reserves.

## Recommendations

- **Recommendation 5:** The five-year statutory review of the MEM Act should examine and report on why processes commenced under the Act relating to the declaration and management of marine parks (including the proposal for a new Hawkesbury shelf marine bioregion marine park and the pilot for new management planning approach) have stalled or been delayed and whether this is an outcome of the provisions of the MEM Act or due to external factors.
- **Recommendation 6:** Require the MEM Act to provide for declaration and management of a comprehensive, adequate and representative system of marine parks and aquatic reserves.

## 4. Poor implementation undermining of the objectives of the Act

Poor implementation continues to undermine the objects of the Act. It is difficult to provide any comprehensive or valid assessment of whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives, when poor implementation means that the Act is not operating as intended. Below we provide some examples demonstrating our concerns.

### 4.1 Sidestepping proper processes

On 12 December 2019 the Minister for Agriculture announced that “*five new fishing zones would be created in the [Batemans] Marine Park*” to open up new areas for fishing ahead of the school holidays.<sup>13</sup> Rather than going through the appropriate process for making changes to existing plans, zones and management rules in the MEM Act, the ‘new zones’ were given effect by information on the Government’s website indicating that the Department of Primary Industries

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<sup>11</sup> In introducing the Marine Estate Management Bill 2014 to the NSW Parliament, then Minister for Primary Industries, the Hon. Katrina Hodgkinson, said that “*piloting new management planning approaches at the Batemans Marine Park and Solitary Islands Marine Park will be done within the new management framework provided in the bill*” (see New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 October 2014, (the Hon. Katrina Hodgkinson)). To date, this pilot is still not underway – see <https://www.dpi.nsw.gov.au/fishing/marine-protected-areas/marine-parks/batemans-marine-park/park-management/operational-plan>

<sup>12</sup> As set out in *Australia’s Strategy for the National Reserve System 2009–2030*, the CAR reserve system seeks to develop and effectively manage a comprehensive, adequate and representative national system of protected areas, as the primary means for securing long-term protection for Australia’s terrestrial biodiversity, see <https://www.environment.gov.au/system/files/resources/643fb071-77c0-49e4-ab2f-220733beb30d/files/nrsstrat.pdf>

<sup>13</sup> Marshall, Adam, Minister for Agriculture and Minister for Western NSW, *Media Release – More fishing option on the South Coast this summer*, 12 December 2019

would not issue penalty notices under the MEM Act to people for certain recreational fishing methods and equipment in certain areas (as set out in the FAQs available on the Government's website<sup>14</sup>). It is our understanding that neither MEMA nor MEEKP were consulted prior to the decision being announced and there was no community consultation.<sup>15</sup> It is our understanding that the changes to fishing rules in the Batemans Marine Park are intended to be made formal in a new Management Plan for the marine park.

This announcement essentially sidesteps the legislative process for making changes to zoning and pre-empts the outcomes of the pilot process for developing a new management plan for the Batemans Marine Park.

#### **4.2 Lack of enforcement**

The above decision also demonstrates that the MEM Act is not being properly enforced. To create 'new fishing zones' as announced, the Government has simply made a policy decision not to take compliance and enforcement action for identified activities within identified sanctuary zones. There have been no changes to legislation, regulations, plans, maps or management rules in relation to the Batemans Marine Park. The Government's policy decision not to issue penalty notices for certain activities within certain zones is essentially an 'amnesty' that has been communicated to the public via the information on the Government's website. This decision undermines not only the MEM Act, including the framework for managing marine parks, but also the rule of law.

#### **4.3 Flawed development and implementation of the *NSW Marine Estate Threat and Risk Assessment Final Report (TARA) and Marine Estate Management Strategy (MEM Strategy)***

The MEM Act requires:

- MEMA to develop a draft MEM Strategy for approval by the Ministers (see Part 3 of the MEM Act).
- MEMA to undertake periodic assessments of threats and risks to the marine estate (see Part 4 of the MEM Act).

A state-wide threats and risks assessment (**TARA**) was finalised in 2017 and a MEM Strategy 2018-2028 was finalised in 2018 (a threat and risk assessment for the Hawkesbury Shelf Bioregion was also undertaken in 2015).

EDO has a number of concerns with the process in developing these documents, including the failure of the documents to reflect best-available science, and the ongoing implementation of the MEM Strategy. For example:

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<sup>14</sup> See <https://www.dpi.nsw.gov.au/fishing/marine-protected-areas/marine-parks/batemans-marine-park/faq>

<sup>15</sup> See New South Wales Legislative Council, *Questions and Answers No. 166*, Thursday 9 January, Question 970, available at [https://www.parliament.nsw.gov.au/lc/papers/Documents/2020/9-january-2020-questions-and-answers/QA\\_166\\_09\\_JANUARY\\_2020.pdf](https://www.parliament.nsw.gov.au/lc/papers/Documents/2020/9-january-2020-questions-and-answers/QA_166_09_JANUARY_2020.pdf)

- EDO is concerned that the final state-wide TARA is not based on the best-available science. The final state-wide TARA included a number of changes from the exhibited draft TARA. The changes were not made based on the best available science, but instead reflected a reprioritisation required to justify the proposed management actions initially discussed in the *Hawkesbury Shelf Marine Bioregion Assessment Suggested Management Initiatives Discussion Paper* and subsequently included in the MEM Strategy 2018-2028. Because of this reprioritisation, the importance of a number of key management initiatives that would enhance protection of marine biodiversity were understated. For example, we maintain that the highest priority management initiative for Hawkesbury Shelf Marine Bioregion should be the implementation of a large-scale, multi-use marine park that provides comprehensive, adequate and representative protection of the marine estate.<sup>16</sup> Such a marine park would address a large number of high and moderate risks and threats, and is the suggested management initiative that is most consistent with the objects of the MEM Act. Yet, establishing a marine park Hawkesbury Shelf Marine Bioregion is not one of the nine key management initiatives of the MEM Strategy 2018-2028. We note that a separate Hawkesbury Shelf Marine Bioregion assessment process has also occurred, culminating in a proposal for declaring a new marine park for the Hawkesbury shelf marine bioregion (discussed further below), yet this is not reflected in the MEM Strategy, which simply includes amongst its marine protected area and bioregional assessment commitments a commitment to “*explore and implement mechanisms to enhance conservation of marine biodiversity while balancing community outcomes in the Hawkesbury Shelf marine bioregion (Newcastle – Sydney – Wollongong)*”.<sup>17</sup>
- The selection process for identifying and prioritising management options relied on the *Guidelines for Assessing Management Options for the NSW Marine Estate (Guidelines)*.<sup>18</sup> The Guidelines attempt to apply traditional economic theory, which it acknowledges does not adequately account for externalities, in a situation where the majority of impacts are externalities, and where there has been significant market failure in previous economic-based management actions (as seen by the ongoing need for Government financial intervention in commercial fisheries management).<sup>19</sup> Applying these guidelines in assessment leads to a significant under-valuing of marine biodiversity and intrinsic natural benefits, both of which have been identified as a high priority for protection through the scientific assessment process and the community consultation processes undertaken.

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<sup>16</sup> See for example, EDO’s *Submission on the Hawkesbury Shelf Marine Bioregion Assessment – Suggested Management Initiatives*, 2016, available at <https://www.edo.org.au/publication/submission-on-the-hawkesbury-shelf-marine-bioregion-assessment-suggested-management-initiatives/>

<sup>17</sup> *NSW Marine Estate Management Strategy 2018-2028*, p 17 available at [https://www.marine.nsw.gov.au/\\_data/assets/pdf\\_file/0007/815596/Marine-Estate-Management-Strategy-2018-2028.pdf](https://www.marine.nsw.gov.au/_data/assets/pdf_file/0007/815596/Marine-Estate-Management-Strategy-2018-2028.pdf),

<sup>18</sup> Marine Estate Management Authority, *Guidelines for assessing management options for the NSW marine estate*, 2017, available at [https://www.marine.nsw.gov.au/\\_data/assets/pdf\\_file/0009/721737/Guidelines-for-Assessing-Management-Options-for-the-NSW-Marine-Estate.pdf](https://www.marine.nsw.gov.au/_data/assets/pdf_file/0009/721737/Guidelines-for-Assessing-Management-Options-for-the-NSW-Marine-Estate.pdf)

<sup>19</sup> See for example the Commercial Fisheries Business Adjustment Program: <https://www.dpi.nsw.gov.au/fishing/commercial/reform>

- Funding for implementation of the MEM Strategy has only been secured for stage 1 (2018-2020).<sup>20</sup>

#### 4.4 Impacts of political decisions

Decisions on the management of the marine estate appear to be being made in the political sphere, sidestepping legislative processes and not based on the best-available science. The decision relating to fishing zones in the Batemans Marine Park, discussed above at 4.1 and 4.2 is one example. Another is the decision to halt the proposal for declaring a new marine park for the Hawkesbury shelf marine bioregion. The Government announced the proposal in 2018 following two earlier phases of consultation and assessment involving initial community engagement in 2014-15, a formal threat and risk assessment in October 2015, Discussion Paper in early 2016, and further community engagement.<sup>21</sup> Yet the process stalled after political pressure from various interests and a decision by the government to remove sanctuary zones from the proposal, despite this being contrary to scientific understanding that no-take areas (sanctuary zones) are important for biodiversity conservation and ecosystem health and resilience.<sup>22</sup> Such decisions, based on political whim rather than legislative processes or robust scientific assessment undermine the MEM Act and threaten the ability of the Act to reach its objects including the management of the marine estate consistent with the principles of ESD.

The decisions and process outlined above undermine the legislative framework of the MEM Act including the policy objectives set out in section 3 of the MEM Act, are not based on best-available science, and are likely to lead to poor environmental outcomes for the NSW marine estate. Decisions relating the management of the marine estate should not be influenced by external factors, but should be made consistent with scientific evidence and the law.

#### Recommendations:

**Recommendation 7:** The decision to allow catch and release recreational line fishing in sanctuary zones in the Batemans Marine Park, implemented by not issuing penalty notices under the MEM Act 2014, should be reversed.

**Recommendation 8:** All decisions relating to the management of the NSW marine estate should be made in accordance with the legal framework of the MEM Act, in consultation with the relevant advisory committees established under the MEM Act, and absent of any inappropriate, external influences.

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<sup>20</sup> See Marine Estate Management Authority, *Marine Estate Management Strategy - Implementation Plan*, September 2019, p 2, op.cit.

<sup>21</sup> A background explanation of the steps that led to the proposal for declaring a new marine park for the Hawkesbury shelf marine bioregion is set out in detail on the NSW Government's website: [https://www.marine.nsw.gov.au/marine-estate-programs/hawkesbury-shelf-marine-assessment/background-phase-1-and-2?SQ\\_VARIATION\\_826138=0](https://www.marine.nsw.gov.au/marine-estate-programs/hawkesbury-shelf-marine-assessment/background-phase-1-and-2?SQ_VARIATION_826138=0)

<sup>22</sup> See, for example, Sala E. and Giakoumi, S. *No-take marine reserves are the most effective protected areas in the ocean*, *ICES Journal of Marine Science*, Volume 75, Issue 3, May-June 2018, available at <https://doi.org/10.1093/icesjms/fsx059>; see also Malcolm et. al., 2018. *Targeted fishes are larger and more abundant in 'no-take' areas in a subtropical marine park*. *Estuarine, Coastal and Shelf Science*, available at: <https://www.sciencedirect.com/science/article/pii/S0272771417310582>

**Recommendation 9:** Provisions of the MEM Act should be appropriately enforced (including the issuing of penalty notices for fishing offences in sanctuary zones in Batemans Marine Park).

**Recommendation 10:** Both the state-wide TARA and MEM Strategy 2018-2028 should be revised to bring them in line with the best-available science, and to ensure that priority management initiatives are appropriately identified.