

1/89 York Street
Sydney NSW 2000
Tel: (61 2) 9262 6989
Fax: (61 2) 9262 6998
email: edonsw@edo.org.au

12th November 2010

Principal Policy Officer
Legislation and Government Relations Unit
Policy, Governance and Communications Division
Industry and Investment NSW
PO Box K220
HAYMARKET NSW 1240

Office 1 Level 1
71 Molesworth Street
PO Box 868
Lismore NSW 2480
Tel: 1300 369 791
Fax: (61 2) 6621 3355
email: edonr@edo.org.au

web: www.nsw.edo.org.au

By email: fma.submissions@industry.nsw.gov.au

Dear Principal Policy Officer,

Statutory Review of the *Fisheries Management Act 1994*

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide brief comment on the statutory review of the *Fisheries Management Act 1994* (FM Act). The EDO is a community legal centre specialising in public interest environmental law.

Key recommendation

We make one overarching recommendation:

Provisions relating to threatened species under the *Fisheries Management Act 1995* should be repealed and included in the *Threatened Species Conservation Act 1995* (TSC Act). Existing resources including funding and staff should also be transferred.

The EDO has consistently argued that it is incompatible for resource use legislation to contain conservation provisions.¹ While the FM Act contains internally conflicting objectives – to “conserve threatened species, populations and ecological communities of fish and marine vegetation” while at the same time promoting “viable commercial fishing and aquaculture activities” and “provide social and economic benefits” – it can never fully achieve all its objects.

As noted in the Discussion Paper (p14) this legislative distinction means that the FM Act “regulates some activities which impact fish habitats, but not others” and has led to situations for example, where “riparian vegetation is not protected, even though ‘decline of native riparian vegetation’ is listed as a Key Threatening Process to a number of threatened fish species listed under Part 7A of the Act.”

The current legislative divide is preventing NSW from achieving an integrated ecosystem-based approach to marine conservation, meaning that best practice conservation of marine biodiversity may well fall between the departmental gaps. The legislative and institutional divide is illustrated by the fact that neither Industry & Investment nor the Department of Environment, Climate Change & Water was able to provide a relevant contact person to discuss this review when contacted by EDO.

¹ See "The Status of Biodiversity Conservation in NSW and recommendations for Reform" Report prepared by the Environmental Defender's Office of NSW for the Nature Conservation Council, November 2006 - Recommendation 15.



The EDO has undertaken analysis of terrestrial and marine threatened species laws in recent years to assess whether the laws are achieving their objectives and whether current biodiversity laws are ‘climate ready’. Our reports include: *Climate Change and the Legal Framework for Biodiversity Protection in NSW: a legal and scientific analysis*; and a report commissioned by the Nature Conservation Council - *The Status of Biodiversity Conservation in NSW and recommendations for Reform*.²

More recently we have drafted a report: *Climate Change and the Legal Framework for Marine Biodiversity: a legal and scientific analysis*. This report analyses current tools used to manage marine biodiversity, including protected areas, threatened species and critical habitat listing, recovery and threat abatement planning, as well as more strategic planning tools. A common finding was that although these mechanisms exist, they are often poorly resourced, underutilized, poorly implemented, and frequently undermined by resource-use legislation. Our recommendations included that marine biodiversity legislation must address a number of key principles³ and importantly, there must be improved integration across tools, across sectors and across jurisdictions; involving a review of current institutional requirements. This report is due to be published shortly.

In this context we make comment on the conservation related provisions and issues raised in the Discussion Paper. This submission does not directly address issues associated with recreational and commercial fishing.

Specific comments

Consistent with our key recommendation we make comment on the relevant issues regarding “Part F: Fisheries Conservation and Aquatic Habitat Protection” raised in the Discussion Paper.

Habitat protection plans – These plans should be made under the TSC Act and enforced by DECCW.

Aquatic reserves - The EDO strongly supports the establishment of aquatic reserves as this is a key conservation tool for protecting fish stocks and will become increasingly important in building resilience to threats on marine biodiversity of climate change. As the levels of protection are variable in reserves it is essential that protections and prohibitions are adequately communicated to local communities, and adequately monitored and enforced. Accordingly, aquatic reserve provisions may be more appropriately included in marine parks legislation to ensure better coordination of protected area objectives.

Listing of threatened species, populations and ecological communities and key threatening processes – The conservation objects of Part 7A cannot be fully met while the Part sits within resource-use legislation. There are acknowledged benefits of using listing as a conservation mechanism. Key strengths of the listing process under the TSC Act include: open nominations, public consultation, independence of the Scientific Committee, requirement to only consider scientific information when making listing decisions and the listing of endangered ecological communities and critical habitat in addition to single species. These elements must be retained in the TSC Act and apply to relevant fish and marine flora and fauna. Many other jurisdictions have a combined list for terrestrial, marine and

² Our reports are available at: <http://www.edo.org.au/edonsw/site/policy.php#2>.

³ Marine biodiversity legislation must: facilitate adaptation and enhance species and ecosystem resilience, ensure representation (diversity of habitat types), protect large patches of habitat, consider connectivity, improve management of the ‘matrix’, identify and protect climate refugia, increase the focus on protecting ecosystem functions, and recognize and manage for uncertainty.



freshwater biodiversity, including our federal jurisdiction.⁴ Furthermore, there is no compelling reason to maintain separate Scientific Committees for terrestrial and fish species as Committee members are not required to be expert in species or phyla, simply to assess the available information scientifically.

Listing KTPs is also a useful tool, however the effectiveness of KTP listings is also undermined by the disjuncture between legislation, whereby the FM Act can list riparian vegetation as a KTP but cannot protect it as noted above.

Critical habitat – Critical habitat provisions should also be declared under the TSC Act. Currently these provisions are underutilised (as noted on p16, critical habitat has only been declared for 1 of 21 eligible listings under the FM Act). They could be furthered strengthened in a number of ways. First, amend the Act to provide that where a critically endangered species is listed, then its corresponding habitat should be automatically identified as critical habitat. Second, amend the Act to provide for buffer zones around critical habitat. For example, a 1500m buffer zone around the 16 critical habitats identified for the grey nurse shark would greatly improve effectiveness of shark conservation. Third, impose a clear prohibition on activities/development in critical habitat. Fourth, direct adequate resources to the identification and declaration of critical habitat.

Recovery and threat abatement planning and the **Priority Action statement** - These provisions should be transferred over to the TSC Act, and that Act should be strengthened in the following ways:

- A framework for prioritisation between listed species should be developed under the TSC Act covering both terrestrial, freshwater and marine listings;
- Recovery plans under the TSC Act should be made shorter, simpler, and be more tightly focused on recovery actions and outcomes;
- A greater focus should be given operationally under the TSC Act to the more generic recovery strategies over recovery plans, as provided for in the Priorities Action Statement;
- Recovery plans under the TSC Act should facilitate adaptive management and be more flexible and responsive to change and uncertainty;
- A greater focus should be given operationally under the TSC Act to multi-species recovery plans over single-species plans only where species can be appropriately grouped based on threat similarity using robust approaches;
- A greater focus should be given operationally under the TSC Act to threat abatement planning over recovery planning ;
- Threat abatement efforts under the TSC Act should generally be focussed on sets of threats that overlap and interact to affect large numbers of species; and
- Threat abatement plans under the TSC Act should be made shorter, simpler, and be more tightly focused on threat abatement actions and outcomes.
- Conservation budgets for threatened species recovery and threat abatement actions should be increased to address the continued decline in biodiversity and deal with the challenges of climate change.

Ministerial orders – The EDO is aware of a situation where 6 monthly interim orders have been successively used in the Lowland Darling River Catchment since 2003 to permit commercial fishing in an EEC without a comprehensive SIS being prepared for 7 years. Interim orders should be issued only once on the condition that a mandatory comprehensive impact assessment is carried out.

⁴ See the *Environment Protection & Biodiversity Conservation Act 1999*.



Biocertification – The EDO has been involved in analysing biocertification for a number of years, and was involved in challenging earlier versions of the scheme, as noted in the Discussion Paper (p20). The EDO supports the development of a robust and objective assessment methodology to ensure that the legislative biocertification test of “maintaining or improving biodiversity values” has integrity and scientific credibility. As biocertification is currently voluntary, we have concerns that the methodology is being weakened to make it a more attractive (faster and cheaper) option for potential users. Such an outcome would be inconsistent with the objectives of the TSC Act.⁵ We would be extremely concerned about the application of biocertification under the FM Act in the absence of a proven objective and robust assessment methodology.

Other issues

Aboriginal cultural fishing - We support the legislative recognition of aboriginal cultural fishing practices, and support the establishment of the Aboriginal Fishing Ministerial Advisory Council.

Enforcement – We strongly support increased enforcement and compliance powers, as introduced by the 2009 amendments.

If you have any questions or queries please do not hesitate to contact me on 9262 6989.

Yours sincerely

Environmental Defender's Office (NSW) Ltd

Rachel Walmsley

Policy Director

⁵ For recent comment on the Draft Biocertification Methodology under the TSC Act, please see: EDO *Submission on the Draft Biodiversity Certification Methodology*, 30 July 2010, available at: http://www.edo.org.au/edonsw/site/pdf/subs10/100730draft_biodiversity_certification_methodology.pdf.

