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# Legal framework and enforcement experience of marine protected areas in Tasmania, New South Wales and Commonwealth waters

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With the exception of the Great Barrier Reef Marine Park, there have been no prosecutions for specific offences within marine protected areas (MPAs) in Australia at the federal level or in Tasmania and New South Wales. However, it cannot be assumed that compliance is responsible for this lack of prosecutions. Rather, in some cases, enforcement officers prosecute offences under more general provisions found in fisheries legislation than under provisions for specific offences created in MPAs. In other cases, there has been a long lag time between the declaration of MPAs and the adoption of comprehensive and effective legislative arrangements creating offences for specific activities within them. Hence, there may be periods during which MPA regimes fail to give adequate legal support to the environmental objectives they seek to achieve, partly because of the need to 'phase out' existing fishing activities. Additionally, they may fail to prohibit inappropriate activities immediately adjacent to MPAs. This paper examines the legal regimes that exist to establish MPAs in Tasmania, New South Wales and areas under federal jurisdiction and the offences recognised to ensure the protection of ecological values. Those analysed are regimes set up under 'umbrella' MPA Acts, site-specific Acts and other legislative arrangements using existing fisheries legislation. It is concluded that a legislative system allowing the award of modest rather than severe penalties would increase the likelihood of prosecution and would complement educative measures aimed at ensuring compliance.

## **Keywords**

south, wales, enforcement, commonwealth, experience, framework, marine, legal, protected, areas, tasmania, waters

## **Disciplines**

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# LEGAL FRAMEWORK AND ENFORCEMENT EXPERIENCE OF MARINE PROTECTED AREAS IN TASMANIA, NEW SOUTH WALES AND COMMONWEALTH WATERS

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## *Abstract*

With the exception of the Great Barrier Reef Marine Park, there have been no prosecutions for specific offences within marine protected areas (MPAs) in Australia at the federal level or in Tasmania and New South Wales. However, it cannot be assumed that compliance is responsible for this lack of prosecutions. Rather, in some cases, enforcement officers prosecute offences under more general provisions found in fisheries legislation than under provisions for specific offences created in MPAs. In other cases, there has been a long lag time between the declaration of MPAs and the adoption of comprehensive and effective legislative arrangements creating offences for specific activities within them. Hence, there may be periods during which MPA regimes fail to give adequate legal support to the environmental objectives they seek to achieve, partly because of the need to 'phase out' existing fishing activities. Additionally, they may fail to prohibit inappropriate activities immediately adjacent to MPAs. This paper examines the legal regimes that exist to establish MPAs in Tasmania, New South Wales and areas under federal jurisdiction and the offences recognised to ensure the protection of ecological values. Those analysed are regimes set up under 'umbrella' MPA Acts, site-specific Acts and other legislative arrangements using existing fisheries legislation. It is concluded that a legislative system allowing the award of modest rather than severe penalties would increase the likelihood of prosecution and would complement educative measures aimed at ensuring compliance.

**Keywords:** Legislation, regulation, marine protected areas, prosecution, jurisdiction

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## INTRODUCTION

The use of marine protected areas (MPAs) as a tool for marine resource management has gained momentum in Australia since the early 1990s. Their development was accelerated in the late 1990s following their inclusion as a core component of Australia's premier policy document for offshore areas – the 1998 Oceans Policy. With the enactment of marine park legislation in Victoria in June 2002, all sub-national jurisdictions and the federal government now have the capacity to declare MPAs under legislation. The rapid development in recent years of legal and institutional measures to establish and manage MPAs is remarkable in the context of the typically piecemeal development of measures to advance environmental policy in Australia. However, Australia's MPA experience has not been without controversy. A number of marine stakeholders, most notably some commercial fishers, have expressed concerns about the rationale for MPAs, the methods by which they are established, their effectiveness in meeting their conservation objectives and the lack

of adequate measures to compensate existing users of areas within MPAs.

In large part, the establishment of MPA regimes in Australia reflects the high level of awareness among marine stakeholders and the community generally of the interlinked nature of human activities and their effects on marine ecosystems. The community has a broad expectation of ecosystem-based management approaches for marine areas rather than individual stock-maintenance approaches for commercial and threatened species. A corollary of this expectation is the need for demonstrable ecologically sustainable resource management practices (see Potts and Haward 2001). There is growing community interest – in particular among those marine stakeholders who are directly affected by the establishment of MPAs – in determining whether MPAs meet their multifaceted objectives. This paper responds to this need in small part with respect to Commonwealth (federal), New South Wales and Tasmanian MPAs. It examines the effectiveness of the legal regimes within those jurisdictions by focusing on the specific activities

prohibited within MPAs and the record of prosecutions for such offences.

## BACKGROUND TO MPAS IN AUSTRALIA

The impetus for the establishment of MPAs owes much to the recognised need to limit or mitigate the effects of commercial – and to a much lesser extent, recreational – fishing on marine and coastal ecosystems. MPAs have been promoted largely as a means of conserving resident fish stocks, with benefits of increased stock numbers and ecosystem integrity being expected to flow into adjacent areas. For example, the definition of MPAs adopted by the Australian Bureau of Rural Sciences underscores their perceived role primarily as a fisheries management tool: ‘Marine reserves are spatially defined areas of ocean or estuaries where natural populations of marine species are protected, either in part or completely, from exploitation or other detrimental anthropogenic pressures’ (Ward *et al.* 2001). To this end, fishers typically consider MPAs to be ‘no-take’ reserves in which the taking of any living marine resources is prohibited. However, it is common for MPA regimes to allow for the issue of research permits for the extraction of some natural resources as well as limited recreational and sometimes commercial fishing activity. Nevertheless, strict ‘no-take’ reserves may be declared for individual MPAs or for specific areas within larger MPAs.

There are countless differing definitions of MPAs. Some explicitly or implicitly emphasise their role in assisting in the management of exploitable resources. For example, the US National Academy of Sciences defines MPAs broadly as ‘areas designated for special protection to enhance the management of marine resources’ (National Academy of Sciences 2001). Other definitions emphasise their role in protecting representative areas of marine ecosystems. For example, MPAs have been defined in Victoria, Australia, as ‘areas established to protect a sample of Victoria’s marine plants and animals and their habitats’ (Department of Natural Resources and Environment 2002). Despite some concern about the utility of MPAs for fisheries management, their perceived primary role as a fisheries management tool has been expanded in most Australian jurisdictions in recent years to encompass the fulfilment of more general marine ecosystem management objectives. Article 8 of the 1992 UN Convention on Biological Diversity, which provided much of the impetus for the development of MPAs, provides that State parties ‘shall, as far as possible and as appropriate’, establish a system of protected areas ‘to conserve biological diversity’. Although the Convention is not specific with regard to terrestrial or marine

environments, it is important to note that the objectives of protected areas are to conserve biodiversity. This is a broader and more challenging objective than simply the conservation of exploitable renewable resources such as commercial fish species. In Article 8(e) the Convention also envisages that areas adjacent to protected areas should be managed in such a way that they further the protection of protected areas. The role of MPAs in the Australian context has come to be that of protecting specially identified areas of the marine environment for their intrinsic worth rather than more narrowly that of propagating commercially exploitable fish species.

In addition to the creation of specific offences for certain activities within MPAs, a number of general principles are used for their management. These stem from the ‘ecologically sustainable development’ (ESD) concept and its attendant principles. ESD has been established as the principal policy platform for all decisions relating to the environment at the national, State and local government level since the adoption of the Intergovernmental Agreement on the Environment in 1992. The Australian and New Zealand Environment and Conservation Council (ANZECC) Task Force on Marine Protected Areas reported in 1999 that the development of MPAs in Australia is an illustration of the application of ESD. The Task Force envisaged, in relation to whether activities could be allowed within MPAs, that such decisions should be based on not compromising biodiversity conservation values, and hence that principles of ecological sustainability must apply. In relation to the crucial issue of whether commercial fishing activities could be permitted within MPAs, the Task Force noted:

“The management arrangements developed for individual MPAs may require higher standards of management of resource use than may otherwise apply to the use or activity. This may be required so the activity does not compromise the primary goal of the MPA. A commercial fishery that is managed generally in accordance with ecologically sustainable development principles could be allowed within the MPA but may be subject to more comprehensive management arrangements; for example, arrangements relating to gear type or catch limits (ANZECC Task Force on Marine Protected Areas 1999: 32).”

Although MPAs are the most detailed and comprehensive measure available to protect areas of the marine environment, they are not the only management tools available. There is a complex array of federal and State legislative and

institutional measures to protect Australia's marine environment. In particular, there is a broader body of fisheries regulations that operate in all marine areas, including MPAs. At the federal level, the most significant piece of legislation is the 500+ page *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) administered by Environment Australia. In addition to this, there are the fisheries management activities of various government departments and agencies.

### **Process for the establishment of MPAs in Australia**

ANZECC established a National Advisory Committee on Marine Protected Areas in 1992 (The Natural Resource Management Ministerial Council has since replaced ANZECC). The Committee was charged with the responsibility of coordinating the development of a National Representative System of Marine Protected Areas (NRSMPA) to expand the existing system of marine parks and reserves. In 1997 the Committee became a Task Force on Marine Protected Areas, which developed a Strategic Plan of Action to establish the NRSMPA. In 1998 the federal government reaffirmed its commitment to establishing a representative system of MPAs by including a commitment to their creation in Australia's Oceans Policy and establishing it as a key task of regional marine planning (National Oceans Office 2002).

MPAs are identified and declared by federal and State governments in their jurisdictions independently from each other, although it has always been intended that management responsibilities would be determined after consultation between the federal agency and the State concerned. The States are able to declare MPAs up to three nautical miles offshore following the grant to them of legislative competence in this area in the Offshore Constitutional Settlement of 1979. The only exception is the Great Barrier Reef Marine Park, which was established earlier under the *Great Barrier Reef Marine Park Act 1975*. The federal government may declare MPAs outside three nautical miles but within federal waters (to a maximum of 200 nautical miles), subject to obligations under the United Nations Law of the Sea Convention respecting navigation, and possibly fishing, rights of foreign-flagged vessels. MPAs may also be established and managed jointly, as envisaged in the Offshore Constitutional Settlement documents:

“Where an area proposed as a marine park or reserve lies across the boundary of the territorial sea, the State concerned would

establish that portion within the outer limit of the territorial sea under State legislation and the Commonwealth [Australian federal government] would legislate for that portion seawards of the outer limit of the territorial sea. Such arrangements would be subject to agreement between the State concerned and the Commonwealth on policy, planning and management for the whole area (Attorney General's Department 1980: 12)”.

In this situation both governments use complementary legislation with cooperative management arrangements to establish MPAs (such as Ningaloo Marine Park, Solitary Islands Marine Park and Lord Howe Island Marine Park).

Of the seven sub-national jurisdictions in Australia that possess coastal areas, only New South Wales and Queensland have specific marine park legislation (see *Marine Parks Act 1997* (NSW) and *Marine Parks Act 1982* (Qld)). Other jurisdictions, such as Tasmania, Western Australia, the Northern Territory and Victoria, are able to establish MPAs under broader pieces of environmental legislation (see *Living Marine Resources Management Act 1995* (Tas), *Conservation and Land Management Act 1984* (WA), *Territory Parks and Wildlife Conservation Act 1979* (NT) and *National Parks Act 1975* (Vic)). A legal framework for the establishment of MPAs in South Australia will be based on a review of existing provisions under a number of pieces of legislation.

There has been much interest in expanding the establishment of MPAs in Australia, yet little attention has been devoted to evaluation of the effectiveness of MPA management (with the exception of their expected benefits for commercial fish species) (Hockings 2000; Houde 2001; Alder *et al.* 2002). In particular, the legal regimes for MPA creation have received scant attention. Notwithstanding this, determination of the effectiveness of MPA legislative models is not without its difficulties due to the great variance in regulations in protected zones, challenges for enforcement and the short history of MPAs.

### **LEGAL BASIS FOR MPAS IN FEDERAL WATERS, NEW SOUTH WALES, TASMANIA AND VICTORIA**

#### **Federal waters**

The landmark EPBC Act is the federal government's omnibus environmental legislation. It replaced five much older pieces of environmental legislation – including the *National Parks and Wildlife Conservation Act 1975* (under which Commonwealth MPAs were formerly established) – and covers numerous areas of environmental protection. Among other things, it

sets up different types of protected areas. These are World Heritage properties, Ramsar wetlands, biosphere reserves, federal reserves and conservation zones. It also provides additional protection of marine areas by means of its strategic assessment requirements for fisheries (ss.146–154), the creation of criminal and civil fisheries-related offences (e.g. ss.23, 24A and 254) and the establishment of the Australian Whale Sanctuary in virtually all Australian waters (s.225). Six World Heritage properties extend to marine areas. These are Heard and McDonald Islands, Macquarie Island, Lord Howe Island, Shark Bay, Fraser Island and, most notably, the Great Barrier Reef. Federal reserves are the main tool by which the federal government can declare protection measures for areas of the marine environment. They may apply only to areas of the marine environment under federal jurisdiction or areas outside Australia that the federal government has international obligations to protect with respect to biodiversity or heritage (s.344(b)(ii)). The surface of coral formations and the subsoil of seabed are specifically included within federal reserves in areas of sea (s.345).

Section 347 EPBC Act provides, among other things, that federal reserves should be managed in accordance with the Australian IUCN (World Conservation Union, formerly known as the International Union for the Conservation of Nature) reserve management principles. Section 346(1)(e) provides that federal reserves must be assigned to one of the following categories:

- strict nature reserve;
- wilderness area;
- national park;
- natural monument;
- habitat/species management area;
- protected landscape/seascape; or
- managed resource protected area.

Activities listed under s.354 are prohibited in a federal reserve except where they are in accordance with an operational management plan. For marine areas, prohibited activities relate principally to killing, injuring, taking, trading, keeping or moving a member of a native species (s.354(1)(a)) or undertaking commercial actions. The civil penalty for individuals is \$A550,000 and \$5,500,000 for corporations. Mining operations are generally prohibited within federal reserves (s.355(1)). Regulations may also be issued to regulate or prohibit a large range of other activities for specific federal reserves. These include the power to regulate or prohibit in a reserve the following:

- pollution of water that is likely to be harmful to biodiversity: s.356(1)(a)(i);
- tourism: s.356(1)(b);
- access by persons or classes of persons: s.356(1)(e);
- the carrying on of any trade or commerce: s.356(k);
- the use and passage of vessels: s.356(p);
- the landing, flying and use of aircraft: s.356(q);
- the taking into and use of fishing apparatus: s.356(u); and
- the laying of baits and the use of explosives and poisons: s.356(v).

There is also a more general power to regulate the conduct of persons in federal reserves (s.356(j)).

In addition to federal reserves, the EPBC Act provides for the declaration of conservation zones for areas outside federal reserves. The purpose is to protect biodiversity in the area while it is being assessed for inclusion in a federal reserve (s.390D). A wide range of activities may be regulated in conservation zones (s.390E). Although previous usage rights in relation to land and seabed are protected within federal reserves (s.359(1) and conservation zones (s.390H), usage rights (see s.350(7) and s.27) in marine waters are not protected. Hence, previously held fishing licences and permits would not be protected in federal reserves or conservation zones.

The EPBC Act also protects listed species and communities through the creation of punishable offences for persons who (without authorisation) recklessly or non-recklessly (i.e. strict liability) kill, injure, trade, take, keep or move a member of a listed threatened species or ecological community in a federal area (including a Commonwealth marine area) (ss.196–196E). Similar offences are created for listed migratory species (ss.211–211E), listed marine species (ss.254–254E) and whales and other cetaceans (ss.229–230). Wildlife conservation plans may be made for listed marine species (s.285). A number of marine species are listed for special protection under s.248 (seasnakes, seals, crocodiles, dugong, turtles, seahorses, sea-dragons, pipefish, penguins, albatross and other birds). It is an offence to take, trade, keep or move a member of a listed marine species without approval (ss.254B and 255). Further, Regulation 8 of the EPBC Regulations 2000 establishes a caution zone around all cetaceans which means that a vessel must slow to a no-wake speed 300 m away from a cetacean unless the cetacean approaches the vessel. Exclusion zones can also be established whereby vessels are prohibited from approaching

within 100 m of a whale and within 50 m of a dolphin.

### Great Barrier Reef Marine Park

The Great Barrier Reef Marine Park is managed under a system of management and zoning plans and a permit system for commercial activities. Marine sanctuaries (commonly called 'green zones') have been declared within the marine park, covering 4–5% of the park. Snorkelling, diving, sailing and swimming are allowed in green zones yet any taking of plants or animals is prohibited. The focus of surveillance by Parks and Wildlife Officers is on inshore closed-area trawling and netting and remote offshore areas when illegal fishing frequently occurs.

Regulations have been issued under the *Great Barrier Reef Marine Park Act 1975* (Cth) providing for penalties for offences. These range up to \$A22,000 for an individual who enters or uses a zone for a purpose other than that permitted in a zoning plan. Owners of vessels may be liable for penalties up to \$220,000 or \$1.1 million where the owner is a company (see s.38MC; GBRMPA 2002c). Penalties up to \$1,100 may be issued for breaches of the regulations. For example, s.13B(2) of the Great Barrier Reef Marine Park Regulations 1983 (as amended) provide that fishing (with the exception of fishing for research purposes) is prohibited in Habitat Protection Zones. Also, by way of example, a person who, in the absence of approval, uses an underwater breathing apparatus that is not a snorkel for non-scientific-research spearfishing in an unzoned area is liable to a penalty of \$1,100 (s.38). Further, s.40(1) provides for a penalty of \$1,100 for a person who takes, or has in possession, a fish of a listed species that is more than 1200 mm in length. At present, only three species are so listed: potato cod, estuary or greasy cod and giant groper (Schedule 5).

Where an inspector believes a prosecution to be in order, the matter is passed by way of a brief of evidence to the federal Director of Public Prosecutions (DPP) to determine whether the matter warrants prosecution. As with all criminal prosecutions, the decision of the DPP is made after consideration of matters such as the seriousness of the offence, the availability of sufficient evidence, whether a conviction is likely and whether prosecution is in the public interest. Inspectors may issue written warnings to alleged offenders in the event that the DPP does not prosecute. The GBRMPA prioritises matters for enforcement on three levels. High priority is assigned to matters arising from complaints from the public substantiated by evidence, or where large-scale environmental damage or depletion of

natural resources has occurred or is likely to occur. Medium priority is assigned to matters where 'significant environmental damage has occurred or may occur, where financial reward or gain from an offence may exist or where significant management principles are disregarded' (GBRMPA 2002a). Low priority is assigned to minor or technical offences or where environmental damage is not likely to occur. The enforcement process involves risk assessment of illegal activities and detailed guidelines for prosecution.

### Tasmanian Seamounts Marine Reserve

In 1999 a large reserve was declared under the *National Parks and Wildlife Conservation Act 1975* (Cth) approximately 170 km south of Hobart; its purpose was to add a representative sample of a seamount region to the NRSMPA and to protect the high biodiversity values of the seamount benthic communities from human-induced disturbance. On 26 June 2002 a management plan under the EPBC Act came into effect. The reserve provides a novel vertically zoned protected area. Access to the Highly Protected Zone below 500 m is prohibited, whereas the upper 500 m is classified as a Managed Resource Zone. Fishing can be permitted in this area such as for pelagic species (e.g. tuna longlining). It remains to be seen whether the boundary at 500 m below the surface can be enforced to protect the lower portion from weighted longline fishing, deep purse-seine fishing and deep trawl fishing. Onboard monitors appear to be the only feasible method for ensuring compliance.

### Tasmania

The first formal protection of a coastal area in Tasmania was in 1916 when Freycinet National Park was declared by government gazette. The first marine reserves were declared in the south and east of the State in 1991 in accordance with the Tasmanian Government's marine conservation strategy. These were the three small reserves of Tinderbox, Governor Island and Ninepin Point and the larger area near Maria Island. In addition to these MPAs, there is a Restricted Fishing Area at Crayfish Point in the Derwent River. There are also Ramsar listed sites including the 0.1 hectare Moulting Lagoon Game Reserve near Bicheno on the east coast.

The development of the policy process and legislative framework for Tasmanian MPAs has been complex (Kriwoken and Haward 1991). It has been only very recently that a transparent and integrated approach to the identification and selection of MPAs has been adopted. Kriwoken and Haward (1991) reported that the initial debate

in the late 1980s concerning proposals for MPAs in Tasmania was fuelled by increasing concern about declining marine quality due to overfishing, waste dumping and sewage outfalls. Significantly, the rapid development of the salmon aquaculture industry had the effect of galvanising support of diverse interest groups for MPAs. Some boating and fishing users of the coastal zone (who could have been expected to oppose MPAs) generally supported them in the face of a possibly larger threat posed by aquaculture operations – the threat of reduced access to marine areas in terms of boat anchorages and cruising waters. Hence, some of the initial support for MPAs in Tasmania may have owed more to ‘desire to restrict an alternative policy direction’ than ecological objectives (Kriwoken and Haward 1991).

A new comprehensive strategy for declaring MPAs was released in 2001. Under Tasmania’s Marine Protected Areas Strategy, the Resource Planning and Development Commission (a statutory authority established to oversee State planning and environmental issues) undertakes identification and selection of new MPAs. It may then recommend to the Minister for Primary Industries, Water and Environment the establishment of new MPAs that are then to be approved by Cabinet. The Commission is currently assessing Port Davey/Bathurst Harbour in the south-west of the State and the Kent Group of Islands in the north of the State. The primary goal under the Strategy of MPAs is, in addition to establishing and managing a representative system of MPAs, to ‘contribute to the long-term ecological viability of marine and estuarine systems, to maintain ecological processes and systems, and to protect Tasmania’s biological diversity’ (Department of Primary Industries, Water and Environment 2001). The Tasmanian definition of MPA is ‘an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means’ (Department of Primary Industries, Water and Environment 2001). Part of the significance of the new strategy lies in its emphasis on establishing a representative system of reserves rather than on protecting individual sites.

Tasmania’s MPAs are established through the joint application of the *Living Marine Resources Management Act* 1995 (Tas) (LMRM Act) and the *National Parks and Wildlife Act* 1970 (Tas) (NPW Act). The objectives of the LMRM Act 1995 include the promotion of the sustainable management of living marine resources and the protection of marine habitats (Preamble). Under this Act (Part 5), marine resources protected areas

can be established. Marine plants and animals can be protected and fishing activities such as netting can be regulated in restricted fishing areas and shark nursery waters. The purpose of the NPW Act is to establish and manage reserves with respect to the conservation and protection of the fauna and flora (Preamble). The NPW Act provides that ‘nature reserves’ or ‘private sanctuaries’ can be declared for ‘land’. However, there is an expansive definition of land that includes ‘land covered by the sea or other waters, and the part of the sea or those waters covering that land’ (s.3(1)). Notwithstanding this, the Act cannot be used to protect fish or control fishing activities; thus, MPAs need to be established in terms of both legislative tools (see Department of Primary Industries, Water and Environment 2001). Hence, MPAs are declared under the NPW Act yet the marine resources are protected under the LMRM Act.

The LMRM Act provides in s.113 that a person who contravenes or fails to comply with a provision of a marine resources protected area is liable to a penalty of up to \$550,000. Section 131 provides a penalty of up to \$110,000 for a person who, in a marine resources protected area, engages in an activity that is likely to have a detrimental effect on its environment – except with approval or in accordance with a management plan.

### New South Wales

NSW was the second State to enact specific marine park legislation. The *Marine Parks Act* 1997 (NSW) commenced operation on 1 August 1997. It established a specific authority to manage marine parks in the State – the Marine Parks Authority. The Marine Park Regulations 1999 came into effect on 1 March 1999. They provide for the development of zoning plans for ‘sanctuary zones’, ‘habitat protection zones’, ‘special purpose zones’ and ‘general use zones’. Sanctuary zones provide the highest level of protection ‘for biological diversity, habitat, ecological processes, natural features and cultural features (both Aboriginal and non-Aboriginal)’. It is intended that they provide opportunities for scientific research and ‘recreational, educational and other activities that do not involve harming any animal or plant, or cause any damage to or interference with natural or cultural features or any habitat’ (clause 6). The legislation provides that on-the-spot fines in the order of \$300 to \$500 may be issued for various offences. Alternatively, the offences may be prosecuted in court and attract a penalty of up to \$11,000. Examples include the penalty of \$500 for persons who without consent harm or attempt to harm any plant or animal or damage or attempt to damage



habitat within a sanctuary zone (clause 7/Schedule 2) and the penalty of \$500 for skippers who anchor or moor vessels in non-designated areas (clause 9/Schedule 2). Limited fishing is permitted in habitat protection zones (clause 12). Broader offences are created, including the penalty of \$500 for the following:

A person who, while in any part of a marine park, is in possession of any equipment (including fishing gear) that is used, or is designed to be used, for the purposes of taking an animal or plant is guilty of an offence if the taking of the animal or plant in that part of the park, at that time, is prohibited by or under this Regulation (clause 19(2)/Schedule 2).

A defence can be established by the defendant if he or she 'satisfies the court' that

the equipment...was being transported, in accordance with the written approval of the Authority, to any place where the person could lawfully use the equipment... to take animals or plants, or...the equipment concerned was in a state in which it could not have been used...(clause 19(3)).

It is also an offence (penalty \$300) to 'take any photograph, video, movie or television film for sale, hire or profit' in a marine park except with the consent of the Authority (clause 24/Schedule 2).

### Victoria

On 18 June 2002 Victoria enacted the *National Parks (Marine National Parks and Marine Sanctuaries) Act 2002* (Vic) to amend the *National Parks Act 1975*. The legislation established thirteen marine national parks and eleven marine sanctuaries on 16 November 2002, covering 5.3% of Victoria's marine waters. A number of offences are created in the Act such as taking or attempting to take 'fish or fishing bait for purposes other than for sale, unless that person does so under and in accordance with a permit' (penalty \$6,600 and/or 6 months' imprisonment: s.16). It is asserted that native title rights are not affected by the legislation (s.19). Prohibitions on further activities such as jet skiing and anchoring of boats may be declared following the development of individual management plans. The Victorian Government has stated that it will provide an annual compliance and enforcement budget of \$3.4 million (Department of Natural Resources and Environment 2002).

The legislation provides for compensation for 'eligible specified access-licence holders' determined by a Compensation Assessment Panel and reviewable by a Compensation Appeals Tribunal. The compensation package remains an

issue of concern for many commercial fishers, particularly in the rock lobster and abalone fisheries, and it remains to be seen whether there will be legal action in this area. The issue of appropriate compensation for previous commercial users prohibited from undertaking their pre-existing activities within MPAs is perhaps the most politically charged issue facing MPA creation in Australia. However, the debate about government 'appropriation' of public marine space is also experienced elsewhere. Fishers in the USA have also claimed that the creation of MPAs amounts to 'taking' of their traditional fishing grounds and should be subject to compensation (National Academy of Sciences 2001).

### ENFORCEMENT OF OFFENCES

#### Prosecution experience in Commonwealth MPAs

The EPBC Act created a number of severe civil and criminal offences that did not exist under previous legislation. Penalties for some offences include lengthy custodial sentences and, as mentioned above, fines for individuals up to \$550,000. The Act came into force on 16 July 2000 and at the time of writing (September 2002) there have been no prosecutions for any of the offences created under the Act. Hence, there is as yet no opportunity to analyse prosecution proceedings. However, it is clear that the severe nature of the penalties would strongly deter individuals who might, for example, be inclined to fish regardless of whether such fishing is likely to have a significant impact on the environment (penalty: imprisonment for up to seven years and/or a fine of up to \$46,200: s.24A(6)(7)). Even so, it is likely that only a flagrant breach of the Act would incur the maximum penalty. As with all offences, discretion on severe penalties depends on the nature of the offence and a possible due-diligence defence where, for example, appropriate environmental practices and management systems of the operator of commercial activities are in effect. Although it is only a matter of time before there is an attempt to prosecute an alleged offender under the EPBC Act, it is likely that this will occur only in circumstances where there is clear and convincing evidence that the offence has been committed. The award of a substantial penalty for the first successful prosecution under the Act would send a powerful message to would-be offenders in federal waters.

#### Prosecution experience in GBRMP

Around 70 convictions each year are recorded for offences in the Great Barrier Reef Marine Park. Illegal activity includes prawn trawling, for

example when trawls commence lawfully in areas adjacent to the park and then overrun into the park (Gribble and Robertson 1998). Other offences include commercial fishing and recreational take in Dugong Protected Areas. Although penalties for individuals (since July 2001) range up to \$220,000, most offenders receive penalties in the order of \$1,000 (GBRMPA 2002b). However, on 12 August 2002 two commercial fishers were successfully prosecuted in Rockhampton Magistrates Court for intentionally and negligently fishing in a green zone. The maximum penalty available was \$220,000 but the penalty issued was \$27,500 plus costs and \$6000 plus costs respectively (GBRMPA 2002d). There is also litigation concerning the owners and operators of the 225 m bulk carrier *Doric Chariot*, which ran aground and damaged a large area of reef in July 2002; prosecutors are seeking the maximum penalty available under the GBMP Act, i.e. \$1.1m.

#### **Prosecution experience in Tasmanian MPAs**

No prosecutions have been recorded for offences within Tasmania's MPAs even though the four MPAs have been in operation for twelve years. This is because Tasmania's MPAs are very small and are easy to avoid by recreational fishers, and they have limited impact on commercial fishers and other coastal zone users.

#### **Prosecution experience in New South Wales MPAs**

There have been no prosecutions for specific offences within NSW MPAs with the exception of a caution notice issued on 1 January 2002 under clause 7A of the Marine Park Regulations 1999 to a person in a sanctuary zone who was harming or attempting to harm an animal (Muldoon 2002). However, although the Marine Park Regulations 1999 are in force, they operate only in sanctuary zones for which management plans have been finalised. For example, the Jervis Bay Marine Park Regulations will enter into force on 1 October 2002. The Draft Zoning Plans for Lord Howe Island Marine Park are in the public-comment phase. The Solitary Islands Marine Park was declared in 2000. A new zoning plan, the Marine Parks Amendment (Solitary Islands) Regulation 2002, entered into force on 1 August 2002 and defines new offences of cleaning any fish or fishing gear within a sanctuary zone and carrying out dredging (schedule 1, clause 4 and 8A).

#### **Analysis**

The lack of a prosecution record for offences within MPAs in Australia (with the exception of

the Great Barrier Reef Marine Park) is due in part to the difficulty of securing convictions, due to weaknesses in the evidence such as the short duration of the offences and the difficulty of identifying the boundary zones where most illegal activity takes place. Conviction of a tourist for unlawful fishing from a tourist vessel may require that the tourist has been informed by the tour operator of the regulations pertaining to that area. As stated above, DPPs are reluctant to prosecute alleged offenders unless there is a reasonable prospect of securing a conviction. Likewise, where MPA offences provide for relatively modest penalties, there may be greater inclination on the part of inspectors to prosecute technical breaches. On this point it is likely that there will be more prosecution actions commenced for offences under NSW MPA regulations where on-the-spot penalties are in the order of \$300 to \$500 than under the Commonwealth EPBC Act where penalties range to \$550,000. Hence, there is merit in prescribing offences in the NSW manner, where lower penalties are listed in schedules that can be revised more easily than penalties embedded in provisions of Acts. Penalties may be increased quickly when the need arises, such as possibly providing for licence suspension and the confiscation of fishing gear for commercial fishers who commit offences. Areas of MPA management also requiring attention include the adequacy of measures to ensure that inappropriate activities, such as intensified fishing effort, do not take place in areas adjacent to MPAs. One consequence of MPAs is that fishing effort is displaced and fishers tend to 'fish the line' adjacent to MPAs.

The lack of prosecutions for MPAs also owes much to the use of education programs (including liaising with industry and other operational agencies) to promote compliance with MPA management plans (see Mascia 1999). Enforcement in MPAs is generally undertaken on a first level by education, which is seen as the most effective way of encouraging compliance. For example, the Great Barrier Reef Marine Park Authority states that enforcement action and prosecution 'are not necessarily the tools of first opportunity, nor are they always the tools of last resort' (GBRMPA 2002a). As a result, inspectors are encouraged to use their discretion in each case when determining the appropriate course of action. Increased public awareness about the purpose and benefits of MPAs helps to ensure greater community support for MPAs and willingness to comply with management plans. The need for community support for MPAs is apparent when one considers that it is a fairly radical – and recent – notion to prohibit a large range of traditional activities in marine areas,

which are often seen as common property allowing free access. Education is also important considering the different regulations declared for each MPA and the difficulty for marine users to ascertain such information.

## CONCLUSION

The Australian legislative experience with MPAs differs considerably from jurisdiction to jurisdiction, notwithstanding recent national attempts to clarify the selection and management processes for MPAs. Nevertheless, each legislative arrangement has the following characteristic: individual sites for MPAs must be selected and proclaimed under subordinate legislative instruments rather than entrenched in site-specific legislation. A consequence of MPA-specific management arrangements is that uniform enforcement policies cannot be created because different MPAs allow different human activities. This is particularly apparent when small MPAs are compared with large MPAs located in or near traditional commercial fishing grounds. Coastal zones with multiple uses tend to produce more complex management arrangements specifying numerous permitted uses. Strict no-take zones are likely to be easier to enforce than MPAs that permit a range of regulated activities, because incidents such as incidental by-catch simply cannot occur.

The prosecution experience for offences within MPAs in Australia is almost non-existent. The number of prosecutions in the Great Barrier Reef Marine Park can be explained by its long history and its vast size. Attention is now likely to focus on the effectiveness of the many newly created MPAs throughout Australia, including the adequacy of protection measures for areas adjacent to MPAs to ensure that prohibited activities do not take place within them, the willingness of inspectors to prosecute offenders, and the level of penalty the courts will order (especially for offences under the EPBC Act). It is likely that more offences will lead to the imposition of financial penalties by inspectors or will be prosecuted in the courts (and the protection of ecological values within MPAs ensured) if the penalties are relatively modest and reflect the severity of the offence. For fishing offences it is essential that the maximum penalty awardable exceed the commercial value of the catch. In particular, penalties that appropriately reflect the greater level of responsibility expected of commercial fishers would be likely to receive more public support than onerous penalties imposed on recreational fishers, such as may occur under the EPBC Act. Such an approach would also provide a rational base for

enforcement and would complement existing education campaigns.

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