Comments on the Ernst & Young 2006 report

Australia's Marine Protected Areas: Challenging Times Ahead

The Australian Fishing Tackle Association (AFTA) and the Boating Industry Association of New South Wales (BIANSW) have commissioned an independent report by the highly regarded international business services organization Ernst & Young. This valuable report examines the reasons for Marine Protected Areas (MPAs, the legislation and procedures employed to establish them and recommends a strategy for improving the process.

It is well researched and presented, non-judgmental and suggests improvements to the process that would be of great benefit not just to the establishment of MPAs but to environmental management in general. It is strongly recommend to anyone interested in such matters. The full report titled is available at http://www.bia.org.au/marine-parks

Some important points from the report (*in italics*) and my comments on them follow:

p.5
...the key distinguishing features of a 'Marine Protected Area', as defined by the IUCN, are that it:

- *is intended to protect biological diversity.*

There is no evidence or even reasonable grounds to suspect that biological diversity in Australian waters is under threat. Not a single species has ever been lost or is known to be threatened by fishing.

p.7
In practice, the types of activities that are permitted in a marine protected depend on the reasons for protecting that area. As noted by the Department of the Environment and Heritage, if the objective of setting up the MPA is to protect a representative sample of biodiversity, there may be no need to prohibit extractive activities that are well managed and do not affect that biodiversity.

This sounds reasonable but in practice MPAs are being used primarily to prohibit fishing.

p.15
Under Article 10 of the Convention (UN Convention on Biological Diversity), *Australia is also required to integrate consideration of the conservation and sustainable use of biological resources into national decision making and adopt measures to avoid or minimise adverse impacts on biological diversity:*

Article 10. Sustainable Use of Components of Biological Diversity

Each Contracting Party shall, as far as possible and as appropriate:

(a) Integrate consideration of the conservation and sustainable use of biological resources into national decision making;

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

Note that "*customary*" and "*traditional*" is not limited to indigenous peoples. Under this convention the obligation to protect and encourage the customary practice of recreational fishing by non-indigenous Australians is in no way different from the obligation to protect such practices by indigenous Australians.

p.21
In particular, section 3.5.1 states that the 'precautionary principle' should be applied 'to inform policy making and program implementation'.

It is important to note that this is a 'weak' rather than a 'strong' formational of the 'precautionary principle' since it requires there to be 'threats of serious or irreversible environmental damage' before precautionary measures to prevent environmental damage can be introduced in the absence of full scientific certainty. It is not a 'strong' formulation of the 'precautionary principle' which would reverse the burden of proof and require individuals to establish that their activities do not pose a threat to the environment.

Where the precautionary principle is applied, it also notes 'the need to avoid, were practicable, serious or irreversible damage to the environment' and to conduct ' an assessment of the risk-weighted consequences of various options':

Unfortunately the "weak" and "strong" distinction has in practice been ignored and a strong interpretation applied whenever desired to support further restrictions where there is no evidence of any need for them. Likewise, the requirement *to "conduct ' an assessment of the risk-weighted consequences of various options':"* has tended to be simply ignored, most especially so with regard to any consideration of the risks of precautionary measures themselves.

p.32
In particular, considerable uncertainty still surrounds:

- *the precise nature and extent of marine biodiversity in each area of Australia's extensive marine environment;*
- *the impact that commercial and recreational activities are having on marine biodiversity and productivity in each marine area;*
- *the value of marine resources to current users, including recreational anglers, dive and boating enthusiasts, ecotourism operators and the wider community; and*
- *the future value of marine resources.*

"Considerable uncertainty" is a polite and understated euphemism for "fuck all genuine analysis". The problem however is not so much that we don't have such information as it is that its importance has been accorded little value and management has been driven by theories, green ideology, political popularity, and bureaucratic empire building.

p.84
As noted by the Chairman of the Productivity Commission, there are two main reasons why there is so much bad regulation. The first reason is that good regulation is difficult to develop since it is informationally demanding:

....

The number of new regulations introduced each year is vast and growing. (The Commission's current inquiry into non-tax aspects of Superannuation has found itself dealing with over a thousand pages of legislation!)

....

Getting regulation right in the first place is therefore very important.

All true and all the more reason not to be introducing ever increasing amounts of new legislation where information is lacking and no problem is apparent.

p.85
As noted by the Chairman of the Productivity Commission, in many cases regulations have

been introduced in Australia without adequate consideration being given to identifying the nature of the problem the regulation is intended to address, other options for dealing with the problem, and the most cost effective solution to the problem. As a result, it is not surprising to find that much regulation fails the ultimate test – demonstrating a net benefit to the community:

This is a core problem. In terms of these four basic criteria, problem, options, cost effectiveness and benefit, much recent environmental legislation fails on all counts.

p.88

In order to assist Commonwealth Government agencies with the preparation of their RISs, the ORR has produced the following checklist, which provides an outline of the issues that should be addressed in a RIS:

Source: Office of Regulation Review (1998). Office of Regulatory Review: RIS Checklist

Problem

- *What is the problem being addressed?*
- *Why is government action needed to correct the problem?*

Checklist for the identification of problems and risks (see below)

Objectives

- *What are the objectives of government action?*
- *Is there a regulation/policy already in place? Who administers it?*

Options

Checklist for the assessment of regulatory forms for their suitability.

Impact analysis (costs and benefits) of each option

- *Who is affected by the problem and who is likely to be affected by its proposed solutions?*
- *How will each proposed option affect existing regulation and the roles of existing regulatory authorities?*
- *Identify and categories the expected impacts of the proposed options as likely benefits or likely costs.*
- *Determine which groups are likely to experience these benefits and costs and what the extent of their impacts are likely to be. Quantify these effects where possible.*
- *Identify distributional effects and attribute these to the group affected.*
- *Identify the data sources and assumptions used in making these assessments.*
- *Summarise outcomes for each option examined.*

Implementation & review

- *How will the preferred option be implemented?*
- *Is the preferred option clear, consistent, comprehensible and accessible to users? Is it sufficiently flexible to adapt to various situations and circumstances?*
- *What is the impact on businesses, including small businesses, and how will compliance and paper burden costs be minimized?*
- *How will the effectiveness of the preferred option be assessed? How frequently?*
- *If the preferred option takes the form of regulation, is there a built-in provision to review or revoke the regulation after it has been in place for a certain length of time?*

Again, sounds good but obviously ignored in regard to much environmental regulation.

p.89

Of central importance to the development of effective and efficient regulations is the identification of the nature and extent of the problems those regulations are intended to address. In the absence of a clear specification of the nature and extent of the problem, it is difficult to identify and evaluate the costs and benefits of alternative options for reform, and to monitor the extent to which the regulations are achieving their objectives.

As a result, the ORR has developed the following checklist to help government regulatory agencies to identify problems and risks, which involves identification of the reasons why the market is failing to operate efficiently (i.e. the nature of the problem) and the extent of the problem (i.e. the magnitude of the risks, including the risks arising from no action):

Source: Office of Regulation Review (1998), Box D.1: Checklist for the identification of problems and risks .

Office of Regulation Review: Checklist for the identification of problems and risks

STEP 1 - Identify the problem

....

STEP 2 – Assess the risk

What is the risk of the problem occurring?

How widespread is it – local, state, national, international?

Is it recurring?

Is it significant?

STEP 3 – Assess the consequences of no action

List the consequences of no action.

Still again, makes good sense but is generally not applied with environmental issues.

p.97

Processes and principles to guide the development of the National Representative System of Marine Protected Areas

The ANZECC Guidelines outline an agreed process for the establishment of the individual MPAs that comprise the NRSMPA. The proposed process, which is set out in the box below, is broadly consistent with the RIS guidelines to the extent that it involves:

§ identifying the nature and extent of the problem. In particular, it involves:

- determining the biodiversity that exists in each region using available data (steps 1 and 2);

- identifying activities that potentially threaten that biodiversity (step 3);

- identifying problems with existing regulations (i.e. step 4 involves identifying gaps in the coverage of existing MPAs);

§ identifying options for reform (steps 5 to 8); and

§ identifying, implementing the preferred option, as well as monitoring and reviewing its effectiveness

p.109
In particular, the IUCN Policy and Global Change Group noted the need for proportionality – that is, the need to ensure an appropriate relationship between the protective measures adopted and the level of security achieved. Trivial increases in environmental protection should not be pursued using highly restrictive and economically expensive measures. Rather, a balance must be struck between the threats, benefits and uncertainties across the environmental, economic and social realms. This involves taking into account the uncertainty surrounding threats, the seriousness and possible likelihood of threats, the likely economic, social and environmental costs and benefits of protective action, and the level of security that is desired:

The concept of proportionality is common to many definitions and understandings of the precautionary principle. Proportionality generally requires an appropriate relationship between the protective measures adopted and the level of security to be achieved (European Commission, 2002). A trivial, hypothetical increase in environmental security should not be pursued by highly restrictive and massively economically expensive measures; protective measures against clearly plausible (if uncertain) catastrophic and irreversible environmental harm should not be delayed due to a moderate economic cost. Proportionality involves a balancing act of threats, benefits, and uncertainties across environmental, economic and social realms. This is not necessarily a well-defined notion, as it involves a judgement which takes into account the uncertainty surrounding threats, the seriousness and possible likelihood of threats, the likely economic, social (and environmental) costs of the protective action, the environmental, economic and social benefits of the action, and the level of security that is desired. Where it is incorporated, proportionality limits the "absolutist" or extreme tendencies of the precautionary principle, limiting these to situations where proportionality requires them.

Makes eminent good sense as well. Needs only to be applied.

p.117
...there appear to be inconsistencies in the way the precautionary principle is being applied. In particular, it appears that a much stronger version of the precautionary principle is being applied at the State government level than required by environmental protection legislation.

p.126
(quoting from the Regulatory Impact Statement (RIS) that accompanied the Zoning Plan for the Great Barrier Reef Marine Park.): *In the last decade, the GBR ecosystem has experienced a marked increase in commercial fishing effort and harvest, including a five-fold increase in catch of sharks and a doubling of effort and catch in the reef line fishery, which predominantly targets coral trout.*

Although the report makes no comment on this particular claim by GBRMPA it is a particularly clear and serious example of their repeated misleading of Parliament. Queensland DPI catch statistics for the GBR fishery not only belie the claimed doubling of effort and catch but actually show a modest fall. The severe consequences of this particular misinformation is now too obvious to require comment. If ever there was a circumstance calling for investigation by the CMC this is it.

p.156
How can the efficiency and effectiveness of Marine Protected Areas be improved?

In the course of reviewing the processes Australian governments are using to establish Marine Protected Areas, we have sought to identify a range of initiatives that would help governments with the challenging task of developing a more efficient, effective and sustainable National Representative System of Marine Protected Areas.

In particular, we recommend the:

- *development of a National Marine Habitat Protection Strategy;*
- *development of a better understanding of marine biodiversity and the impact of recreational fishing on that biodiversity;*
- *development of guidelines to assist officials with the application of the 'precautionary principle'*
- *creation of new 'special habitat protection zones';*
- *consideration of protecting biodiversity in popular recreational fishing areas through the use of 'special habitat protection zones' as an alternative to 'sanctuary zones' in certain circumstances; and*
- *regular review of existing no-take 'sanctuary zones'.*

p.166
In particular, consideration should be given to:

- *re-zoning existing no-take sanctuary zones that have been established in popular recreational fishing areas as special habitat protection areas that would allow some recreational fishing subject to certain gear, catch and seasonal closure restrictions; or*
- *allowing 'no-take' recreational fishing (i.e. 'catch and release'), within 'sanctuary zones'.*

All of the recommendations in this report are well founded and based in established government guidelines. The common problem with so much environmental legislation is that good governance has been abandoned in favour of political pandering and high sounding but essentially undefined aims dressed up in techno-gibberish with little assessment of actual needs, methods or results.

The Australian Fishing Tackle Association (AFTA), Boating Industry Association of New South Wales (BIANSW) and Ernst & Young are to be commended for this effort. All interested parties should read it in full and most importantly bring it to the attention of politicians, government bodies and the wider public.

Some Key Points

- Recreational fishing is not inherently incompatible with the purpose of MPAs
- Customary utilization of resources should be protected and encouraged where compatible with conservation and sustainable use.
- Among the important procedural steps that should be observed in MPA (and indeed any) legislation.

    1. Determine the problem to be addressed.
    2. Define the objectives.
    3. Assess the possible solutions.
    4. Weigh the probable risks, costs and benefits.
    5. Monitor the actual outcome.
    6. Adjust measures in accord with results.

- The Regulatory Impact Statement by GBRMPA that accompanied the current Zoning Plan constitutes a serious misleading of Parliament that deserves legal attention.

Walter Starck

15 October 2006