



Law Council  
OF AUSTRALIA

# Marine Fisheries and Aquaculture – Draft Report

Productivity Commission

14 October 2016

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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The Secretariat serves the Law Council nationally and is based in Canberra.

## Introduction

1. The following submission has been prepared by the Australian Environmental and Planning Law Group (**AEPLG**) from the Law Council's Legal Practice Section. The AEPLG's primary objectives are: to be a national focus group for environmental and planning law; to represent members of the profession working in the areas of environmental and planning law; to advise the Law Council on issues of environmental and planning law; and to lobby Federal and State Government to implement "best practice" in environmental and planning law.

## Marine Parks

2. The AEPLG supports the Productivity Commission's view that the statutory and administrative process for establishment of Marine Parks in all jurisdictions should include a requirement for prior community consultation, following the model applied by the Commonwealth in the *Great Barrier Reef Marine Park Act 1975* (Cth).

## Determining limits in fisheries

3. The AEPLG supports the Productivity Commission's view that all jurisdictions should continue to adopt harvest strategies as the primary tool for managing fishing stocks. Such strategies should prescribe, by regulation, specific methods for determining the target level of fish extraction, following the Commonwealth model, as a means of providing certainty to the regulatory process.

## Valuing access to fishing sectors

4. The AEPLG agrees with the Productivity Commission that the key guiding principle of fisheries regulation should be to allocate fishing resources to the highest value uses across multiple competing parties and that the value of fish resources is economic, social and cultural. Included within those values is the value to succeeding generations of maintaining fish resources and the ecological communities of which they form part.
5. The process for balancing those values, in order to be fair and reasonable, must be one which is the subject of clear regulation, so that affected parties and the public are able to be informed of, and able to participate in, the setting of entitlements to access to fish stocks. Legislative provisions determining the permitted levels of fish extraction should state clear objectives, and criteria for balancing competing interests. The decision-making process should be independent of vested interests, should provide a fair procedure for the expression of economic, social and cultural interests and should provide a procedure for the review of decisions, which takes into account the full range of the public interest in fisheries.
6. The legislation, in order to be effective in pursuing its objectives must include a process for decisions being informed by the optimum scientific, economic, social and cultural data concerning fish, the environments in which they exist and the benefits to special interest groups and the public of both exploiting and preserving fish and the environments in which they exist.

7. The legislation should provide for the creation of -

- scientific data and a scientific advisory body;
- economic data and an economic advisory body;
- social data, including data regarding recreational access to fish, and a social advisory body; and
- indigenous cultural data and an indigenous cultural advisory body

to inform the decisions to be made about access to fish stocks. Advisory bodies, to perform effectively, will be required to take into account regional and locational differences and will need to comprise several regionally-based bodies, particularly in relation to indigenous cultural data and advice. The data required to properly inform decision-making is best collected at a national or nationally co-ordinated level, as the Commission suggests (for the obvious reason that fish and its environs are not limited within state and territory borders). If the process is to be effective, that data must be updated regularly. The Commission's suggestion of at least every five years is supported by the AEPLG.

## Reducing regulatory costs and imposts

8. The AEPLG agrees with the Productivity Commission that there should be a process for regular review of fisheries laws, regulations, policies and strategies, to determine whether the specific controls and management arrangements applying to fisheries are appropriate for particular fisheries, or whether there is scope for streamlining and simplification.

## Licensing recreational fishing

9. The AEPLG's position on licensing recreational fishing, noting that licensing currently occurs in some jurisdictions in Australia, is that there is broad public interest in uniformity of regulation throughout the nation. That provides an argument in favour of regulation in all states and territories, ideally following a uniform model. A uniform model would also address the issue of cross-jurisdictional fishing and movement of fish.

## Enforcement & Indigenous participation in fisheries management

10. The AEPLG recognises that the diversity and expanse of recreational fishing activity makes enforcement difficult and the risk of being caught low. However, it points out that there is no empirical evidence that strong penalties are an effective way of achieving compliance, where the resources to impose them are lacking. The AEPLG's experience in relation to law enforcement generally is that the chance of being caught has more impact as a deterrent than the quantity of the penalty. That suggests the need for some resources to be devoted to enforcement. However, the importance of education as to the value of the resource to the broader community and future generations is likely to be more important in protecting fish and their environment; operating as a preventative, rather than penalising, measure.

11. The AEPLG advocates adoption of an approach comparable to that being used under the *Great Barrier Reef Marine Park Act 1975* (Cth) of Traditional Use of Marine

Resources Agreements and Indigenous Land Use Agreements for the management of traditional taking of dugong and turtle within the Great Barrier Reef Marine Park, and provides a paper discussing the same in detail at **Attachment A**.

## Indigenous customary fishing

12. The High Court of Australia in *Akiba v Commonwealth* (2013) HCA 33 (**Akiba**) concluded that native title may include the right to trade in fish, where that is consistent with traditional laws and customs. It upheld (per French CJ and Crennan J, at [1]) a native right framed as "the right to access resources and to take for any purpose resources in the native title areas" and noted that:

*The native title right so framed could be exercised in a variety of ways, including by taking fish for commercial or trading purposes. Like each of the native title rights and interests set out in the Determination, it was not exclusive. That is to say, it did not confer rights on the native title holders to the exclusion of others, nor any right to control the conduct of others. It was a right to be exercised in accordance with the traditional laws and customs of the native title holders, the laws of the State of Queensland and the Commonwealth of Australia and the common law.*

13. The High Court (at [27]) noted the distinction between the existence and exercise of a right appears in s 211 of the *Native Title Act 1993* (Cth) (**NTA**). Section 211 relevantly provides as follows:

*Requirements for removal of prohibition etc on native title holders*

*(1) Subsection (2) applies if:*

*(a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and*

*(b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and*

...

*Removal of prohibition etc on native title holders*

*(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:*

*(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and*

*(b) in exercise or enjoyment of their native title rights and interests.*

*Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.*

*Definition of class of activity*

(3) Each of the following is a separate **class of activity**:

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

(e) any other kind of activity prescribed for the purpose of this paragraph.

14. The High Court noted (at [28]):

*The distinction between native title rights and their exercise is made explicit in s 211 and was noted by the plurality in Yanner v Eaton (1999) 201 CLR 351 at 373 [39]. Their Honours said that:*

*"the section necessarily assumes that a conditional prohibition of the kind described in s 211(1)(b)] does not affect the existence of the native title rights and interests in relation to which the activity is pursued."*

15. The High Court in *Akiba* did not conclude anything other than that if a native title holder is engaged in an act of fishing pursuant to a native title right, it remains open for the Parliament to regulate that activity where it includes commercial fishing, so as to require a native title holder to comply with the requirement which applies to all other citizens in relation to obtaining a commercial fishing licence.
16. Customary fishing rights recognised at common law and under the NTA are not transferable, except in accordance with traditional law and custom (*Mabo v Queensland (No 2)* (1992) 175 CLR 1, 51 (Brennan J)). It follows that they are not transferrable beyond the traditional society who acknowledge those traditional laws and adhere to those traditional customs. Customary fishing rights which may be recognised beyond those which comprise an incident of native title are incapable of being recognised by the common law as transferable to any greater extent than as an incident of native title. It follows that it is reasonable for any statutory recognition of customary rights to be similarly limited.
17. If any state or territory, by statute or administrative act, was to do anything which infringed native title rights, then the same would be invalid; because of an inconsistency with the NTA, and proceedings would be likely to be taken to obtain a declaration to that effect, pursuant to s 109 of the *Constitution* (Cth).
18. The criteria for a claim to traditional fishing rights should be uniform throughout Australia. In the view of the AEPLG, the criteria for a person to make such a claim should be those which apply generally throughout the Commonwealth for identity as an Aboriginal person, i.e., that the person is of Aboriginal descent, identifies as Aboriginal and is recognised by the Aboriginal community as such. It is a reasonable requirement that, if challenged, the claimant to the rights is able to provide evidence of a right which has been held by the person's predecessors.



## The Tension between Biodiversity Conservation and Traditional Hunting in Protected Areas

GREG MCINTYRE, S.C.\*

*John Toohey Chambers*



27-29 St George's Tce  
PERTH WA 6000

Tele 61 (0) 408 097046

Fax 61 (0) 8 9228 2713

Email [mcintyre@internetexpress.net.au](mailto:mcintyre@internetexpress.net.au)



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### ABSTRACT

This presentation will examine the effect of the operation of Environmental regulation on the traditional hunting by Indigenous Peoples in Protected Areas. It will consider, in particular, current provisions and proposed amendments to Australia's *Environmental Protection Biodiversity Act* and *Great Barrier Reef Marine Park Act* which are intended to implement Australia's obligations under the 1992 United Nations *Convention on Biological Diversity* and the *World Heritage Convention*. The discussion will address the merits of imposing higher penalties in legislation versus a co-operative or educative approach to modifying practices which may put threatened species at risk. The significance of protected areas in protecting endangered species will be discussed in the context of opportunities for indigenous management of protected areas which identifies the synergy between, and balances, traditional practices and international biodiversity conservation objectives.

### ***Environmental Protection and Biodiversity Act***

The *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* is the principal piece of Australian legislation directed at protecting matters of national environmental significance. Significantly, the legislation provides the central mechanism by which the Australian government

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meets its international obligations to protect the outstanding universal values of World Heritage listing properties within Australia.

### **World heritage listing**

1. The World Heritage Convention was made on 23 November 1972 and entered into force for Australia and generally on 17 December 1975. Australia ratified the World Heritage Convention on 27 August 1974.<sup>1</sup> Under Article 11 of that Convention the World Heritage Committee maintains a list of World Heritage Properties. The convention is concerned with natural and cultural heritage of 'outstanding universal value', defined by articles 1 and 2 as follows:

#### **I. DEFINITIONS OF THE CULTURAL AND THE NATURAL HERITAGE**

##### *Article 1*

For the purposes of this Convention, the following shall be considered as "cultural heritage":

- monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

##### *Article 2*

For the purposes of this Convention, the following shall be considered as "natural heritage":

- natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
- geological and physiographical formations and precisely delineated areas

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<sup>1</sup> [1975] *Australian Treaty Series* 47, (1984) 1037 UNTS 151. Australia filed an instrument of ratification on 22 August 1974 and the date of entry into force is for the treaty at large in accordance with article 33: *ibid*.

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which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

- natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

### 2. The World Heritage Convention:

- (a) recognises the primary obligation of each state party to identify and delineate 'the different properties situated on its territory mentioned in articles 1 and 2';<sup>2</sup>
- (b) recognises the duty of each state party to identify, protect, conserve, present and transmit to future generations the cultural and natural heritage defined by the convention;<sup>3</sup>
- (c) established an 'Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value' called the World Heritage Committee;<sup>4</sup>
- (d) requires state parties to submit 'an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in' the World Heritage List maintained by the World Heritage Committee.<sup>5</sup>

### 3. The World Heritage Committee has adopted operational guidelines that give guidance to state parties in the nomination of properties to the World Heritage List.<sup>6</sup> Under the procedures of the committee,<sup>7</sup> an inscription is effective when it is made by the Committee.

## **EPBC Act & World Heritage**

### *Regulated activities*

### 4. The EPBC Act specifically regulates conduct on World Heritage listed areas. The EPBC Act uses the term 'declared world heritage property' to articulate the scope of protection and regulation for World Heritage areas. The term is defined by EPBC Act s.13 as follows:

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<sup>2</sup> World Heritage Convention, article 3. On the basis of this state party obligation, disputation about sovereignty of nominated properties has arisen during nominations of properties to the World Heritage List. Furthermore, a property cannot be nominated to the World Heritage List without the consent of the 'State concerned': World Heritage Convention, article 11, paragraph 3. See, for example, the United States' objection to the inscription of the Walls of the Old City of Jerusalem on the nomination of Jordan: World Heritage Commission, First Extraordinary Session, Paris, 10-11 September 1981 (UN Doc CC-81/CONF. 008/2 Rev.). At that time, Israel was not a party to the World Heritage Convention.

<sup>3</sup> World Heritage Convention, article 4. See also article 5, which requires state parties to take active policy and planning steps (including rehabilitation measures).

<sup>4</sup> World Heritage Convention, article 8.

<sup>5</sup> World Heritage Convention, article 11, paragraph 1.

<sup>6</sup> UN Doc WHC. 12/01.

<sup>7</sup> World Heritage Committee, Rules of Procedure, UN Doc WHC.2-2011/5.

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### 13 What is a *declared World Heritage property*?

#### *Properties on World Heritage List*

(1) A property included in the World Heritage List is a ***declared World Heritage property*** as long as the property is included in the List.

#### *Properties not yet on World Heritage List*

(2) A property specified in a declaration made under section 14 (with any amendments made under section 15) is a ***declared World Heritage property*** for the period for which the declaration is in force.

5. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.14 authorises the Minister to declare a 'specified property' to be a declared World Heritage property if it has been nominated to the world heritage list or if the Minister believes an area is likely to have World Heritage values and those values are at risk. The constitutionality of protections in advance of World Heritage listing was established in *Richardson v Forestry Commission*.<sup>8</sup>
6. Actions with significant impact on World Heritage properties require prior approval under the EPBC Act. The cornerstone of this regulatory scheme is a civil penalty provision, EPBC Act s.12(1),<sup>9</sup> which provides:

A person must not take an action that:

- (a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or
- (b) is likely to have a significant impact on the world heritage values of a declared World Heritage property.

Civil penalty:

- (a) for an individual—5,000 penalty units;
- (b) for a body corporate—50,000 penalty units.

7. The world heritage values referred to in this provision are the natural values and cultural

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<sup>8</sup> (1988) 164 CLR 261.

It is notable that the Minister may declare a property to be a 'declared World Heritage property' under *Environment and Biodiversity Conservation Act 1999* (Cth) s.14(1)(a) if the property has been 'submitted by the Commonwealth to the World Heritage Committee under Article 11 of the World Heritage Convention as suitable for inclusion in the World Heritage List'. This is a reference to the submission of properties under World Heritage Convention article 11, paragraph 1 and the inclusion of a property on the tentative list under para.[62] of the Operational Guidelines for the Implementation of the World Heritage Convention, UN doc WHC.12/01. Each State party has its own tentative list, and it is only that State party that may add properties to its tentative list.

<sup>9</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.15A(1)&(2) create offences related to actions which result, will result or are likely to result in significant impact on the world heritage values of a World Heritage property.

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values of the property within the meaning of the World Heritage Convention.<sup>10</sup> The penalty provision does not apply where an approval under the EPBC Act has been given, or an alternative approval procedure applies.<sup>11</sup>

8. The significant impact to which EPBC Act s.12(1) relates is defined in part by the term 'impact' which appears in EPBC Act s.527E as follows:

### **527E Meaning of *impact***

(1) For the purposes of this Act, an event or circumstance is an impact of an action taken by a person if:

- (a) the event or circumstance is a direct consequence of the action; or
- (b) for an event or circumstance that is an indirect consequence of the action—subject to subsection (2), the action is a substantial cause of that event or circumstance.

(2) For the purposes of paragraph (1)(b), if:

- (a) a person (the primary person) takes an action (the primary action); and
- (b) as a consequence of the primary action, another person (the secondary person) takes another action (the secondary action); and
- (c) the secondary action is not taken at the direction or request of the primary person; and
- (d) an event or circumstance is a consequence of the secondary action;

then that event or circumstance is an impact of the primary action only if:

- (e) the primary action facilitates, to a major extent, the secondary action; and
- (f) the secondary action is:
  - (i) within the contemplation of the primary person; or
  - (ii) a reasonably foreseeable consequence of the primary action; and

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<sup>10</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.12(3)&(4). Significantly, the civil penalty provision in s.12(1) is not confined to the values for which the property was listed but for all of the natural and cultural values extant in the property. Despite its somewhat obscure construction, article 12 of the World Heritage Convention has been construed as meaning that inclusion on the World Heritage List is not conclusive of the natural and cultural values of a property: see Goodwin E. J., 'The World Heritage Convention, the environment, and compliance' (2009) 20 *Colombia Journal of International Environmental Law and Policy* 157 at 192; Rao K., 'The World Heritage Convention: looking ahead', paper delivered at a conference on the 40th anniversary of the World Heritage Convention; Forrest C., *International Law and the Protection of Cultural Heritage* (Abingdon: Routledge, 2010), 261-2. For *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.12, this means that as long as a property is a declared World Heritage property, its natural and cultural values are protected regardless of the values for which it was listed.

<sup>11</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.12(2). The same is true of the offence provision in s.15A: see *Environment and biodiversity Conservation Act 1999* (Cth) s.15A(4).

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- (g) the event or circumstance is:
  - (i) within the contemplation of the primary person; or
  - (ii) a reasonably foreseeable consequence of the secondary action.
- 9. The Commonwealth has produced a policy statement on the determination of the significance of impacts.<sup>12</sup> For World Heritage properties, significant impact is said to be likely when it will cause the relevant world heritage values to be:<sup>13</sup>
  - (a) lost;
  - (b) degraded or damaged; or
  - (c) notably altered, modified, obscured or diminished.
- 10. The existence of a 'significant impact' is a jurisdictional fact to the exercise of the Minister's approval powers under the EPBC Act.<sup>14</sup>

### *Management of World Heritage areas*

- 11. In addition to its regulatory approval requirements, the EPBC Act provides for the management of World Heritage areas.
- 12. EPBC Act s.314(1) requires the Commonwealth to use its best endeavours to obtain the agreement of the owner or occupier of an area prior to its nomination for inclusion on the World Heritage List. The requirement is expressed as a condition on the power to nominate an area. The area may not be nominated unless the Minister is satisfied that the Commonwealth 'has used its best endeavours to reach agreement' with the owners and occupiers concerned. A failure to comply with the obligation does not affect a nomination, or the status of any property on the World Heritage List.<sup>15</sup>

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<sup>12</sup> Australian Government, *Matters of National Environmental Significance – significant impact guidelines 1.1* (Canberra: Department of Environment, Water, Heritage and the Arts, 2009). See *Western Australian Land Authority (Landcorp) v Minister for Sustainability, Environment, Water, Population and Communities* (2012) 291 ALR 52 at [32] per Gilmour J.

<sup>13</sup> *ibid.*, p.17.

<sup>14</sup> *Western Australian Land Authority (Landcorp) v Minister for Sustainability, Environment, Water, Population and Communities* (2012) 291 ALR 52 at [29] per Gilmour J. A proposal to take an action that would be prohibited by, amongst other provisions, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.15A is a 'controlled action': *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.67. After complying with the relevant decision making procedure, the Minister may approve the undertaking of a controlled action: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.133.

<sup>15</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.314(3).

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### **Great Barrier Reef Marine Park**

The Great Barrier Reef Marine Park (**GBRMP**) was added to the World Heritage List in 1981 in recognition of its outstanding natural values. These values include:

- representing the major stages of the earth's evolutionary history;
- representing significant ongoing geological processes, biological evolution and human interaction with the natural environment;
- containing unique, rare or superlative natural phenomena, formations or features or areas of exceptional natural beauty; and
- maintaining habitats where populations of rare or endangered species of plants and animals still survive.

In March 2012, a joint World Heritage Centre/IUCN reactive monitoring mission visited the Great Barrier Reef Marine Park to assess the conservation status of the listed property, following concerns raised by the World Heritage Committee regarding the expansion of coal and Liquefied Natural Gas projects in the region. The mission noted the “rapid and recent increase in proposals for coastal development with potential impacts on the [outstanding universal values] of the property” and concluded that the “unprecedented scale of development affecting or potentially affecting the property poses serious concerns over its long-term conservation.”<sup>16</sup>

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<sup>16</sup> UNESCO World Heritage Centre – IUCN. June 2012. *Mission Report Reactive Monitoring Mission to Great Barrier Reef (Australia)* 6th to 14th March 2012. Available at <http://whc.unesco.org/en/list/154/documents/>

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The World Heritage Committee has previously<sup>17</sup> urged the Australian government to undertake a comprehensive strategic assessment exercise to develop a long-term plan for sustainable development of the GBRMP, and submit this for consideration by the World Heritage Committee in 2015. The 2012 mission reiterated the importance of this strategic assessment, and of resolving concerns regarding existing impacts on water quality, traditional use, adequacy of offsets, monitoring and enforcement. The mission report stated:

*Until the results of the Strategic Assessment noted below are achieved, and a related plan for sustainable development has been put in place, a highly precautionary approach is required in relation to all developments that might impact the OUV of the property, together with effective and regular reporting to the World Heritage Committee. Without such a precautionary approach the outcomes of the Strategic Assessment may be compromised, and there are a number of developments that, were they to proceed, would provide the basis to consider the inscription of the property on the List of World Heritage in Danger.*

The Mission Report makes a number of recommendations in light of its identified concerns. Relevantly, these include:

*R2: Not permit any new port development or associated infrastructure outside of the existing and long established major port areas within and adjoining the property. ...This measure should take immediate effect and requires full application until the Strategic Assessment and the resulting long-term plan for the sustainable development of the property has been completed, and has been considered by the World Heritage Committee.*

*R7: Ensure that any determination made for applications under the EPBC Act...includes for each application:*

*a) A thorough assessment, supported by a detailed statement of reasons, and appropriate independent review input, on how the proposal will ensure conservation of each of the components that make up the OUV of the property, and avoid impacts upon it;*

*b) A thorough consideration of the combined, cumulative and possible consequential impacts of development, infrastructure and associated activities on the OUV as material considerations in determining all applications, benchmarked on the date of inscription of the property in 1981;*

*c) Detailed assessment of alternative options for all aspects of a development proposal, including supporting infrastructure and activities. This assessment should consider in detail the environmental, social and economic costs and benefits and lead to a clear indication of the net benefit of the development to the values and integrity of the property.*

*R8: Adopt the highest level of precaution in decision-making regarding development proposals with potential to impact the property, and to Prevent any approval of major projects that may compromise the outcomes of the Strategic Assessment, until the Strategic Assessment is completed and its resulting plan for the long-term sustainable development for the property has been considered by the World Heritage Committee. During this period, the State Party is requested to ensure no developments are permitted which create individual, cumulative or combined impacts on the OUV of the Great Barrier Reef World Heritage area and its long-term conservation.<sup>18</sup>*

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<sup>17</sup> World Heritage Committee. 35COM 7B.10. Available at <http://whc.unesco.org/en/decisions/4418>

<sup>18</sup> Mission Report, above n1, pp6-8.

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### ***Impact on Aboriginal and Torres Strait Islander people***

What the above discussion indicates is that the effect of traditional activity by Aboriginal and Torres Strait Islander people upon the Great Barrier Reef is only one of several factors affecting the Reef.

Attention, therefore, should be given to -

- (a) the disproportionate impact that the penalty provisions of the *Environmental Protection Biodiversity Act* may have on the human right to equality and non-discrimination in relation to the effects of climate change on the degradation of habitats of species used for cultural purposes; and
- (b) preferable policies and programs currently operating in Queensland.

The Bill substantially increases the penalties for harming protected species of dugong and turtles for Indigenous hunters and others. The value of a penalty unit under the *Crimes Act*

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1914 (Cth) for Commonwealth offences, effective from 28 December 2012, is \$170. This value is reviewable every three years.<sup>19</sup> Under the proposed amendments in the Bill, new penalties for aggravated offences under the EPBC Act range from 1,500 penalty units to 3,000 penalty units (\$510,000), and can include imprisonment for two years for some aggravated offences with or without the financial penalty. Penalties are also significantly increased in the GBRMP Act. For example, the maximum penalties under s 38BB of the GBRMP Act for aggravated offences have been increased to 15,000 penalty units (\$2,550,000) for an individual and tripled, to 150,000 penalty units for a body corporate (\$25,500,000), and apply to conduct prohibited under a zoning plan that involves the taking of, or injury to species of dugong, marine turtles and leatherback turtles that are protected under the Act.<sup>20</sup>

The magnitude of the increase in penalties is evident when compared with the value of fines imposed by the GBRMPA in 2012–13 under its Field Management Program run jointly with the Queensland Government. The GBRMPA *Annual Report 2012–13* states that 24 matters of 'higher environmental concern' were successfully prosecuted with fines of \$121,000, and the first custodial sentence was handed down for damage to the GBRMP in the case of the *Shen Neng* grounding.<sup>21</sup> Of the possible 992 offences detected in 2012–3, most were for non-Indigenous recreational fishing.

There were eight possible Indigenous hunting offences, three non-traditional take offences, and eight Indigenous offences involving unknown take type.<sup>22</sup>

A comprehensive strategic assessment of the Great Barrier Reef World Heritage Area (GBRWHA) and adjacent coastal zone, prepared in accordance with the EPBC Act, has been released, [for public comment](#) by 31 January 2014. The assessment responds to a recommendation by the UNESCO World Heritage Committee in July 2011 that the assessment be undertaken. The dugong population in the GBRWHA forms part of the 'outstanding universal value' of the area that warranted its World Heritage listing.

The [Queensland Government](#) has assessed the state's coastal management, planning and development framework and how it provides environmental protection along the coastal zone, adjacent to the Great Barrier Reef.

The Australian Government's [Great Barrier Reef Marine Park Authority](#) (GBRMPA) has assessed the arrangements in place to manage and protect the GBRMP and World Heritage Area, and has released [a demonstration case study](#) of dugongs.

An [independent review](#) of the Queensland Government's report has been released.

The GBRMPA is expected to release [vulnerability assessments](#) for dugongs and turtles in the near future.

These reports say that the combined and cumulative impacts of habitat loss and degradation currently pose the greatest threat to dugong populations. These impacts are

<sup>19</sup> [Crimes Act 1914 \(Cth\), s 4AA\(1\)](#), 4AA(1A) as amended by the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (Cth)*

<sup>20</sup> Clause 53 of the Bill

<sup>21</sup> GBRMPA, [Annual Report 2012–13](#), 34.

<sup>22</sup> *Ibid.*, 47.

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generated by cyclone activity; extreme weather events; nutrients, pesticides and sediment from catchment run-off; clearing and modifying of coastal habitats; coastal reclamation and increased coastal and marine development; port development involving dredging and soil disposal; disease; net entanglement and commercial fishing operations generating by-catch; marine debris, and boat strike.<sup>23</sup>

Traditional owner workshops and follow up surveys expressed similar views about the hierarchy of threats facing the Great Barrier Reef, and its natural and cultural values. The highest threat (rated out of 5) for 118 survey respondents was climate change (40) followed by water quality (27) followed by extreme weather such as cyclones (14). The threat rated second highest was water quality (33), then climate change (17), then ports (15). The third was ports (19), water quality (17) and crown-of-thorns starfish (16).<sup>24</sup> Traditional Owners at a Cairns workshop advocated the use of 'high-level co-operative management approaches ... through mechanisms such as Indigenous Land Use Agreements', while in Rockhampton land-sea connectivity was emphasised and the better control of the impact of development was advocated.<sup>25</sup>

In relation to illegal hunting and poaching of dugong and turtles, the GBRMPA assessment acknowledged that illegal take 'can have direct effects on Indigenous heritage values such as cultural practices, observances, lore, stories, songlines and sites'<sup>26</sup> but it also states that 'Traditional Use of Marine Resources Agreements' are the only management tool considered to be effective or most effective by a majority of respondents to a stakeholder survey.<sup>27</sup> Other studies of the co-management of natural and cultural resources support this view.<sup>28</sup> There is likely to be support for this Bill amongst some Aboriginal and Torres Strait Islander people as policy initiatives invariably generate a diversity of views, and the Minister for the Environment's Second Reading speech pays tribute to those working in this area. However, support for a very substantial increase in penalties is not a prioritised feature of the various reports compiled for the GBRMP Strategic Assessment.

The GBRMPA's Strategic Assessment Report states:

*Illegal hunting of dugongs and marine turtles (poaching) in the Region is known to occur, and all reports received are investigated. In recent years, most reports have been found to be legal hunting activities undertaken by Traditional Owners or by people from Indigenous communities hunting with Traditional Owners.*<sup>29</sup>

The GBRMPA's Vulnerability Assessment for Dugongs does acknowledge that dugongs within the World Heritage Area are under threat from Indigenous traditional harvest when left unmanaged and through non-traditional or illegal poaching.<sup>30</sup>

<sup>23</sup> See for example Australian Government. Great Barrier Reef Marine Park Authority (GBRMPA). [Great Barrier Reef Region Strategic Assessment: Strategic Assessment Report: Draft for Public Comment](#) (2013), Demonstration case studies: Dugongs, 9–7, 9–10.

<sup>24</sup> Australian Government. GBRMPA. *Great Barrier Reef Region Strategic Assessment: Traditional Owner and Stakeholder Engagement Report* (2013) A5–13.

<sup>25</sup> *Ibid.*, A5–17.

<sup>26</sup> Australian Government. GBRMPA. *Great Barrier Reef Region Strategic Assessment: Strategic, Assessment Report: Draft for Public Comment* (2013), 6–62

<sup>27</sup> *Ibid.*, 8–13.

<sup>28</sup> G. Borrini-Feyerabend, N. Dudley, T. Jaeger, B. Lassen, N. Pathak Broome, A. Phillips and T. Sandwith, [Governance of Protected Areas: From understanding to action. Best Practice Protected Area Guidelines Series No. 20](#), Gland, Switzerland: IUCN, (2013), 6–62; Richard Conniff, 'People or Parks: The Human Factor in Protecting Wildlife', [Environment360, 7 Nov 2013](#).

<sup>29</sup> *Ibid.*, 6–46, 6–47 (see also 5–31).

<sup>30</sup> GBRMPA, *A Vulnerability Assessment for the Great Barrier Reef: Dugong*, GBRMPA, Townsville (in press).

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The relatively low impact of illegal take is clear however, when compared with historic data about dugong deaths. Commercial harvesting of dugong between the 1800s and 1969 is reported to have caused up to 100 deaths a year, and between 1962 and 1999 about 837 dugongs were killed as incidental catch in the Queensland Shark Control Program.<sup>31</sup> In 2010–11 seven dugong deaths were reported in Bowling Green Bay caused by incidental capture in fishing nets.<sup>32</sup>

The report of the Independent Review of the Queensland Government's report notes a duplication of 'partially effective' effort in relation to dugong management by the Australian and Queensland Governments.<sup>33</sup> Attendees at a Traditional Owner workshop also highlighted jurisdictional boundaries as an impediment to effective management.<sup>34</sup> GBRMPA's Strategic Assessment Report, in contrast, highlights the effectiveness of the 'integrated governance and management model' in the region.<sup>35</sup>

The strategic assessment reports recommend a range of actions to improve the effectiveness of management in the area.

The proposed increase in penalties in the Bill is likely to impact most heavily upon Aboriginal and Torres Strait Islander persons engaged in hunting dugong and turtle for (non-native title) traditional purposes although they are also very significant for other fishers. The increase in penalties has the potential for Indigenous offenders, if prosecuted, to end up serving a term of imprisonment in default of payment of a financial penalty, due to inadequate means. This is inconsistent with the [Law Council's](#) previous call on the Council of Australian Governments to address the significant social problem of unacceptably high rates of Indigenous imprisonment. Numerous reports confirm disproportionate and worsening rates of imprisonment for Indigenous compared with non-Indigenous Australians, and this Bill has the potential to further contribute to this failure of public policy.<sup>36</sup>

A better policy approach for Aboriginal and Torres Strait Islander people, would be for the Australian Government to increase and extend its support for Country, and Sea Country-based, community-led planning at an appropriate scale and to extend the development of Traditional Use of Marine Resources Agreements (TUMRAs) around Australia as they are recognised as an effective management tool and are delivering outcomes in Queensland. Indigenous Protected Areas that include Sea Country are delivering similarly positive outcomes.<sup>37</sup>

The GBRMPA supports Traditional Owners in developing and implementing TUMRAs. According to the Agency's *Annual Report 2012–13*,

*In 2012–13, seven Traditional Use of Marine Resources Agreements and one Indigenous Land Use Agreement were*

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<sup>31</sup> GBRMPA. *Great Barrier Reef Region Strategic Assessment: Strategic, Assessment Report: Draft for Public Comment* (2013), 9–7

<sup>32</sup> *Ibid.*, 3–19.

<sup>33</sup> Miles Yeates, Susanne Cooper, Tracey Birt, Michael Huber, Hunter Brownscombe and Bob Tilbury, *Independent Review of the Great Barrier Reef Coastal Zone Strategic Assessment*, Sinclair Knight Merz, 2013, 47.

<sup>34</sup> GBRMPA, *Appendix 5: Traditional Owner and Stakeholder Engagement Report*, A5–11, 5–17.

<sup>35</sup> Australian Government. GBRMPA. *Great Barrier Reef Region Strategic Assessment: Strategic, Assessment Report: Draft for Public Comment* (2013), 1–19.

<sup>36</sup> Law Council of Australia, 'Law Council calls on COAG to deal with unacceptable Indigenous imprisonment rates', [MR1333](#), 26 July 2013. See for example reports of the Australian Parliament's Legal and Constitutional Affairs References Committee, Australian Institute of Criminology, Productivity Commission, Australian Human Rights Commission and Australian Bureau of Statistics.

<sup>37</sup> Dermot Smyth, Principal Consultant & Adjunct Research Fellow at Smyth and Bahrdt Consultants & Charles Darwin University.

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*recorded as being accredited by the agency. These agreements cover a total of 46,271 square kilometres of sea country or 24.20 per cent of the Queensland coastline within the Great Barrier Reef, and involve 16 Traditional Owner groups.*<sup>38</sup>

TUMRAs are developed by Traditional Owners to actively manage their Sea Country and maintain their 'living maritime culture'. They identify priorities and implementation plans for the protection and conservation of cultural heritage, identified species and habitats and compliance activities.

The GBRMPA also provides Indigenous community rangers and Indigenous community members, including Traditional Owners, with training under its Field Management Program and Sea Country Partnerships program, to enable 'compliance patrols' to be conducted to detect offences such as oil spills, illegal fishing, unattended commercial fishing nets and to promote better engagement in Sea Country management.

The collaborative approach embodied in TUMRAs is consistent with the recommendations of a National Sea Country Workshop held in 2012,<sup>39</sup> the recommendations of which included the establishment of a National Working Group on Indigenous Sea Country Management, and Australian Government funding to assist in developing and implementing a national framework for action.

### ***Traditional Use of Marine Resources Agreements (TUMRAs)***

A better policy approach for Aboriginal and Torres Strait Islander people, would be for the Australian Government to increase and extend its support for Country, and Sea Country-based, community-led planning at an appropriate scale and to extend the development of Traditional Use of Marine Resources Agreements (TUMRAs) around Australia as they are recognised as an effective management tool and are delivering outcomes in Queensland. Indigenous Protected Areas that include Sea Country are delivering similarly positive outcomes.

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*In 2012–13, seven Traditional Use of Marine Resources Agreements and one Indigenous Land Use Agreement were recorded as being accredited by the agency. These agreements cover a total of 46,271 square kilometres of sea country or 24.20 per cent of the Queensland coastline within the Great Barrier Reef, and involve 16 Traditional Owner groups.*

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<sup>38</sup> GBRMPA, *Annual Report 2012–13*, 39–44/

<sup>39</sup> North Australian Indigenous Land and Sea Management Alliance Ltd (NAILSMA), National Indigenous Sea Country Workshop Report, Mary River Park, Northern Territory Australia 8–10 May 2012, #014/2013 <<http://nailsma.org.au/hub/resources/publication/national-indigenous-Sea-Country-workshop-report-2012>>, 38.

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### Climate change

#### Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (the Statement) says that the Bill does not limit any absolute rights nor discriminate on the basis of race. It recognises an engagement with the right to the presumption of innocence, but says that rights are limited in a manner that is 'reasonable, necessary and proportionate'.

The Law Council is concerned that the Statement does not recognise the implications for human rights of climate change. United Nations bodies such as the Human Rights Council, and Australian human rights agencies and advocates are increasingly recognising the links between climate change and human rights, including for Indigenous peoples.

Aboriginal and Torres Strait Islander peoples and the broader community are facing potentially very harsh financial penalties and/or imprisonment for offences that have elevated importance because of anthropogenic impacts on the global environment that are leading to the climate-related degradation of habitats that are essential for cultural species of iconic and totemic value for Indigenous peoples. As noted above, climate change has impacts on Indigenous peoples' cultural practices including the harvesting of species for cultural purposes, compounding the impacts of domestic development activities.

The Bill has the potential to impose disproportionate burdens on Aboriginal and Torres Strait Islander peoples, possibly engaging the right to equality and non-discrimination under the United Nations Convention on the Elimination of All Forms of Discrimination and a range of other international instruments.

The human right to equality and non-discrimination should be taken into account when developing policy responses to environmental decline as evident in the Great Barrier Reef Marine Park (GBRMP), Queensland marine parks and the coastal zone more generally, and in Statements of Compatibility with Human Rights tabled with the legislation.

#### **Traditional Owner connections to sea country**

Aboriginal and Torres Strait Islander people are the [Traditional Owners](#) of the Great Barrier Reef Region and evidence of their sea country connections goes back over 60,000 years. Today there are approximately 70 Traditional Owner clan groups whose sea country includes the Great Barrier Reef Marine Park.

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The Great Barrier Reef Marine Park Authority (GBRMPA) works with Aboriginal and Torres Strait Islander Traditional Owners and acknowledges their continuing social, cultural, economic and spiritual connections to the Great Barrier Reef region.

GBRMPA also recognises that establishing an effective and meaningful partnership with Traditional Owners is essential to protect cultural and heritage values, conserve biodiversity and enhance the resilience of the Great Barrier Reef.

### ***Reef Rescue***<sup>40</sup>

In December 2008, the Australian Government under the Caring for our Country initiative, committed \$10 million over five years towards the [Reef Rescue Land and Sea Country Indigenous Partnerships Program](#). The program, administered by the GBRMPA, engages Indigenous communities located along the Great Barrier Reef in the management and sustainability of the Reef's marine resources.

The Reef Rescue Program provides an opportunity to enhance the existing work program that the GBRMPA has in place for sustainable traditional use of marine resources, Indigenous tourism, sea country research and education, cultural heritage initiatives, sea country planning and Marine Park compliance matters.

The GBRMPA is collaborating with Traditional Owner groups to develop a suite of sea country management arrangements including [Traditional Use of Marine Resources Agreements](#) (TUMRAs) and Marine Park Indigenous Land Use Agreements (ILUAs).

The GBRMPA fosters Indigenous community engagement through membership on the Authority Board and the [Indigenous Reef Advisory Committee](#) (IRAC), Science and Management Workshops for Traditional Owners, compliance training, monitoring and Traditional ecological knowledge projects.

The program actively engages Aboriginal and Torres Strait Islander communities in the management and protection of the reef's marine resources and cultural diversity through:

- The expansion of Traditional Use of Marine Resources Agreements (TUMRAs) across the Great Barrier Reef Catchment
- Strengthening communications and knowledge sharing
- Enhancing compliance
- Engaging with communities
- Building community capacity through Grants and sponsorship opportunities.

The Reef Rescue Land and Sea Country Indigenous Partnerships Program is closely coordinated with other Caring for our Country Indigenous Partnership initiatives which provide opportunities for longer term funding and employment such as Working on Country, while also contributing to broader Australian Government goals including Closing the Gap for Indigenous Australians.

### ***Traditional Use of Marine Resources Agreements***

Traditional Use of Marine Resources Agreements describe how [Great Barrier Reef Traditional Owner groups](#) work in partnership with the Australian and Queensland governments to manage traditional use activities on their sea country.

These formal agreements are developed by Traditional Owner groups and accredited by GBRMPA and the Department of National Parks, Recreation, Sport and Racing. Each agreement operates for a set time after which it is renegotiated.

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<sup>40</sup><http://www.gbrmpa.gov.au/our-partners/traditional-owners/reef-rescue>

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An agreement may describe how Traditional Owner groups wish to manage their take of natural resources (including protected species), their role in compliance and their role in monitoring the condition of plants and animals, and human activities, in the Great Barrier Reef Marine Park.

The Traditional Use of Marine Resources Agreement implementation plan may describe ways to educate the public about traditional connections to sea country areas, and ways to educate other members of a Traditional Owner group about the conditions of the agreement.

### ***Woppaburra agreement***

The Woppaburra people are implementing the third Traditional Use of Marine Resources Agreement for their traditional country, which includes the Keppel Islands and surrounding sea country. It covers 561 square kilometres of the Great Barrier Reef Marine Park and is the only offshore agreement of its kind.

The Woppaburra agreement took effect on 30 June 2014 and will run for 10 years, making it the longest such agreement to be accredited by the Australian and Queensland governments.

Under the agreement Woppaburra people will continue to develop and implement important sea country management initiatives in partnership with marine management agencies. This includes exchanging knowledge with scientists, managing traditional hunting protocols, doing seagrass monitoring and participating in compliance training.<sup>41</sup>

### ***Yirrganydji agreement***

Yirrganydji Traditional Owners are the saltwater people of the Yirrgay dialect, spoken along the coast from Cairns to Port Douglas in North Queensland. The Yirrganydji Traditional Use of Marine Resources Agreement was accredited in April 2014 for a five-year period. It covers an area of sea country between Cairns and Port Douglas that extends far offshore to include outer reefs and islands "to where the sun rises on the horizon".

The TUMRA provides the ability to isolate illegal activities that are occurring in the marine park from the care, traditional use and harvest of marine resources by the Yirrganydji people, the Traditional Owners of that area.<sup>42</sup>

### ***Lama Lama agreement***

The Lama Lama Traditional Use of Marine Resources Agreement covers sea country that extends through Princess Charlotte Bay to the Normanby River in the south.

The five-year agreement, accredited in August 2013, outlines compliance activities, research and education, and a junior rangers program. Illegal take of marine resources will also be minimised with the Lama Lama rangers receiving compliance training delivered by staff from the Great Barrier Reef Marine Park Authority.

Through the [Yintjingga Aboriginal Corporation](#), the Lama Lama Traditional Owners coordinate a ranger program and jointly manage the Lama Lama National Park and Marrpa

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<sup>41</sup> For more information about the Woppaburra agreement or their sea country culture visit the [We Are Woppaburra website](#)

<sup>42</sup> Visit the [Dawul Wuru website](#) for more information about the Yirrganydji agreement or their species monitoring, communication and education programs. View map of [Yirrganydji agreement region](#).

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Islands National Park with the Queensland Government. The Lama Lama Traditional Owners have developed an agreement that will meet their aspirations for managing sea country.

The agreement will result in opportunities to learn new skills and offer employment and economic development for people in the region.<sup>43</sup>

### ***Yuku-Baja-Muliku agreement***



The Archer Point area, the Traditional land of the Yuku-Baja-Muliku people, borders the Wet Tropics rainforests and the Great Barrier Reef World Heritage Area.

The Yuku-Baja-Muliku Traditional Owners operate a turtle rescue and rehabilitation centre at Archer Point and run a comprehensive ranger program that undertakes a wide range of land and sea management initiatives. Rangers are involved in identifying and monitoring seagrass beds, developing visitor infrastructure, and managing pests, weeds and fire.

The Yuku-Baja-Muliku people also carry out cultural heritage management of story places, sacred sites, rock shelters and fish traps.

The Yuku-Baja-Muliku Regional Traditional Use of Marine Resources Agreement was accredited in August 2013 and covers 1088 square kilometres stretching from Monkhouse Point south to Forsberg Point and extending east to just past the Ribbon Reefs. It's an environmentally significant region rich in biodiversity. The agreement stipulates that turtle and dugong cannot be hunted outside of the Traditional Owners' permit management system.<sup>44</sup>

Visit the [Yuku-Baja-Muliku website](#) or [Yuku-Baja-Muliku Landowners & Reserves Ltd Facebook Page](#) for more information about the traditional custodians of Archer Point.

### ***Girringun agreement***

The Girringun region Traditional Owners were the first Traditional Owners in the Great Barrier Reef Marine Park to develop an accredited Traditional Use of Marine Resources Agreement. The agreement was endorsed by the six Girringun Aboriginal Corporation sea country groups: Djiru, Gulnay, Girramay, Bandjin, Warragamay and Nywaigi.

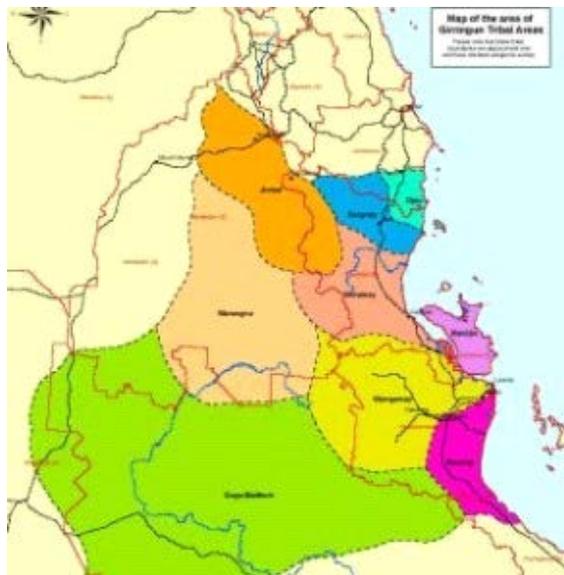
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<sup>43</sup> View map of [Lama Lama agreement region](#)

<sup>44</sup> View map of [Yuku-Baja-Muliku agreement region](#). Visit the [Yuku-Baja-Muliku website](#) or [Yuku-Baja-Muliku Landowners & Reserves Ltd Facebook Page](#) for more information about the traditional custodians of Archer Point.

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The [Girringun Aboriginal Corporation](#) has now developed its third agreement which was accredited by the Australian and Queensland governments in December 2010. This agreement builds upon their first (2005) and second (2008) agreements and applies to sea country between Rollingstone and Mission Beach.<sup>45</sup>



### ***Wuthathi agreement***

The Wuthathi people are the Traditional Owners for the Shelburne Bay area of Cape York and their Traditional Use of Marine Resources Agreement, accredited in June 2008, covers their traditional sea country area. The Wuthathi Traditional Owners have a clear vision for managing their sea country and their agreement forms an integral part of this.<sup>46</sup>

### ***Port Curtis Coral Coast agreement***

Accredited in August 2011, the Port Curtis Coral Coast Regional Traditional Use of Marine Resources Agreement is the fifth and largest agreement of its kind. It covers an area almost 10 times the size of Canberra and the Australian Capital Territory or 26,386 square kilometres. The agreement area extends from Burrum Heads, south of Bundaberg, to and including Curtis Island off Gladstone.

Under the agreement, Port Curtis Coral Coast Traditional Owner groups, which include Gooreng Gooreng, Gurang, Bailai and Tarebilang Bunda, are committed to initiating management strategies that will positively impact their sea country.<sup>47</sup>

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<sup>45</sup> View map of [Girringun region agreement](#)

<sup>46</sup> View map of [Wuthathi region agreement](#).

<sup>47</sup> View map of [Port Curtis Coral Coast agreement region](#). Visit the [Gidarjil Development Corporation](#) website for more information on the Port Curtis Coral Coast agreement.

# GIDARJIL DEVELOPMENT CORPORATION

## WHERE THE THREE RIVERS MEET

### TUMRA <sup>48</sup>

#### About

Port Curtis Coral Coast Regional TUMRA (Traditional Use of Marine Resources Agreement) was developed under the Reef Rescue Land and Sea Country Indigenous Partnerships Program

The PCCC Regional TUMRA is the fifth and largest agreement of its kind - it covers an area almost ten times the size of Canberra and the Australian Capital Territory or 26,386km<sup>2</sup>.

The TUMRA area extends from Burrum Heads, south of Bundaberg, north to the mouth of the Fitzroy River and includes Curtis Island off Gladstone

#### Background

- Discussions commenced in July 2004
- They involved Gooreng Gooreng, Gurang, Bailai and Tarebilang Bunda peoples
- Subsequent discussions were held between 2004 and 2009
- Science and Management Workshop held in October 2009
- Elders from the four PCCC (Port Curtis Coral Coast) Traditional Owner groups resolved to develop a TUMRA through the Gidarjil Development Corporation
- A contract between the GBRMPA (Great Barrier Reef Marine Park Authority) and Gidarjil was developed to manage the development process
- Many informal discussions took place

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<sup>48</sup> [TUMRA Newsletter February 2014.pdf](#)

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- 11 workshops were organised which were open to all 4 TO groups



An authorisation meeting in Bundaberg on 30 April 2011 confirmed the TUMRA and the role of the PCCC Traditional Owners' TUMRA Working Group and Steering Committee



## Launch of the TUMRA Accreditation

The TUMRA launched to the public at a Cultural Festival in Bundaberg on 30 September 2011 with an event that attracted well over 250 people throughout the day, and was widely covered by the local and Indigenous media.

## PCCC Traditional Hunting Permits

The permit system has been formally endorsed by the Gidarjil TURMA Steering Committee and the Great Barrier Marine Park Authority and are hereby adopted by the Steering Committee to implement and authorities permits to Hunt for one (1) Turtle (Green) per person.

Hunting of Dugong is not presently allowed in the PCCC Traditional Owner TURMA Region. This decision has been made by the Traditional Owners of land and sea country in the PCCC Traditional Owner. If you require any further information or wish to apply for a permit please contact the TUMRA Project Co-ordinator on (07) 41307700 or alternatively email [tumra@gidarjil.com.au](mailto:tumra@gidarjil.com.au)

### **Indigenous Land Use Agreements**

Indigenous Land Use Agreements are agreements about the use and management of land and waters that are made between one or more native title groups and other people or parties. The Australian Government through GBRMPA is a party to the [Kuuku Ya'u People's Indigenous Land Use Agreement](#), with implementation managed in the same way as a Traditional Use of Marine Resources Agreement. The Kuuku Ya'u agreement is the first such agreement in the Marine Park. It recognises Traditional Owner native title rights and interests in the management of nearly 2000 square kilometres of sea within the Great Barrier Reef Marine Park, in an area north of Lockhart River.

Climate change impacts on Indigenous communities<sup>49</sup>

Climate changes are not new to Indigenous communities, and many communities along the Queensland coast have assimilated stories about changing climates into their identity.

Users of the Marine Park may experience a reduction in recreational enjoyment as a result of climate change, which could lead to changes in the relationship between individuals and

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<sup>49</sup> <http://www.gbrmpa.gov.au/managing-the-reef/threats-to-the-reef/climate-change/what-does-this-mean-for-communities-and-industries/indigenous-communities>

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the Reef. This may affect traditional and Indigenous identity, culture and belonging, and recreational opportunities for both Indigenous and non-Indigenous Australians.

### Impacts

One of the key areas of concern for Traditional Owners is the impact of [increased sea temperatures](#) and potential changes in seasonal patterns on the availability of plant and animal life for traditional uses.

In addition, climate change may impact their totems. Totems are used to identify Traditional Owner groups and may be represented in a number of marine animals and plants. As totems are an important part of Traditional Owner cultural identity and are especially significant in song and dance, any loss of totem animals and plants would have significant impact on the cultural identity of Traditional Owners including their lore and kinship relationships.

Also several owners believe that climate change will have a significant impact on their communities, resulting in the displacement of people from coastal communities through an increase in sea level.

### Outlook

While several Traditional Owners have identified potential impacts from climate change on themselves and their culture, others accept that change is inevitable and essentially part of the natural order of their country and it has occurred in the past.

### Impacts of rising sea temperatures on the Reef<sup>50</sup>

Rising sea surface temperatures will affect every aspect of the Great Barrier Reef. Gradual overall increases in sea surface temperatures are expected as a result of climate change.

Temperature is a key environmental factor controlling the distribution and diversity of marine life. It is critical to reef building and controls the rate of coral reef growth.

All animals and plants have temperature limits and when these are reached, natural processes may break down. On coral reefs, temperature changes can affect the relationship of mutual dependence between some animals and the algae which live within their tissues.

Atmospheric temperatures, lack of cloud cover and freshwater run-off all contribute to rising sea surface temperatures.

The temperature gradient along the Great Barrier Reef has shifted markedly over the last century. When averaged across the last 30 years, sea surface temperature in the Great Barrier Reef has increased by about 0.4°C, compared to records averaged across 30 years in the late 1800s.

The two warmest five-year average sea surface temperatures have been recorded in the last decade. Analysis of coral cores in centuries-old corals suggests that current temperatures are warmer now than over the last three centuries. The summer of 2010 saw the highest recorded sea surface temperatures in Australia.

### Projections

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<sup>50</sup> <http://www.gbrmpa.gov.au/managing-the-reef/threats-to-the-reef/climate-change/how-climate-change-can-affect-the-reef/rising-sea-temperatures>

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The average annual sea surface temperature on the Great Barrier Reef is likely to continue to rise over the coming century and could be as much as 1°C to 3°C warmer than the present average temperatures by 2100.

Whatever climate scenario is used, it is predicted that by 2035, the average sea surface temperature will be warmer than any previously recorded.

It is likely that sea surface temperatures might warm more in winter and in the southern Great Barrier Reef. Projected increases in average sea surface temperatures indicate that by 2020 it could be 0.5°C warmer and greater than 1°C warmer by 2050.

### **Kuuku Ya'u People's Marine Park Indigenous Land Use Agreement (ILUA)<sup>51</sup>**

**Category:** Agreement

**Date:** 16 November 2009

**Sub Category:** [Indigenous Land Use Agreement \(ILUA\) \(Native Title Act\)](#)

**Location:** Cape York Peninsula, Queensland, Australia

[Click this link to search this location with google maps](#)

The ILUA area covers approximately 1,970 square kilometres of sea in the great Barrier Reef Marine Park, located off Cape York Peninsula, North of Lockhart River. The ILUA area is located within the jurisdiction of the Cook Shire Council.

**Legal Status:** Registered with the National Native Title Tribunal on the Register of Indigenous Land Use Agreements on 16 November 2009. This is an Area Agreement under the *Native Title Act 1993* (Cth).

**Legal Reference:** National Native Title Tribunal File No. Q12009/011.

**Subject Matter:** [Marine](#) | [Native Title](#)

**URL:** <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Qld->

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<sup>51</sup> <http://www.atns.net.au/agreement.asp?EntityID=5007>

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[Registered\\_ILUA-  
QI2009\\_011\\_Kuuku\\_Ya'u\\_People\\_Marine\\_Park\\_ILUA.  
aspx](#)

### **Summary Information:**

The Kuuku Ya'u People's Marine Park Indigenous Land Use Agreement (ILUA) was agreed between:

- the State of Queensland;
- Lorraine Clarmont, Deborah Hobson, Albert Doctor, Lucy Hobson, Ivy Hobson, Donald Hobson on their own behalf and on behalf of the Kuuku Ya'u People;
- Northern Kuuku Ya'u Kanthanampu Aboriginal Corporation; and
- the Great Barrier Reef Marine Park Authority on behalf of the Commonwealth of Australia.

The ILUA prescribes the native title rights and interests of the Kuuku Ya'u People so as to ensure good management of the ILUA area. Notably, it provides for the protection of Green Turtles, dugongs and prescribed fauna.

### **Detailed Information:**

#### **Restrictions on the exercise of native title**

In order to ensure 'the good management of the ILUA area', the native title parties agree:

- not to take more than 15 Green Turtles from the ILUA area in a calendar year (this number may vary, subject to determination procedures set out in the ILUA)
- not to take more than 15 dugongs from the ILUA area in a calendar year (this number may vary, subject to determination procedures set out in the ILUA)
- to carry out hunting practices consistently with the public safety and the conservation of the ILUA area
- not to use firearms without the agreement of the Department of Environment and Resource Management
- not to take or interfere with prescribed fauna
- to control and contain fires lit by the native title parties
- to remove rubbish and debris associated with the native title parties' use of the land

### **Background**

## ATTACHMENT A

The Kuuku Ya'u People's Marine Park ILUA was registered with the National Native Title Tribunal on 16 November 2009 following extensive negotiations between the Kuuku Ya'u People, the State of Queensland, the Commonwealth Government and the Great Barrier Reef Marine Park Authority. It provides for the implementation of a native title consent determination completed in the Federal Court in June 2009 (for further information on the consent determination follow the link below).

The consent determination recognises the native title rights and interests of the Kuuku Ya'u People to approximately 1,980 square kilometres of territory covering eastern Cape York Peninsula and adjacent coastal waters. The Kuuku Ya'u People's Marine Park ILUA was negotiated to accommodate recognition of those rights and interests in the management of the Great Barrier Reef Marine Park, which covers a substantial portion of the consent determination area.

The Kuuku Ya'u People's Marine Park ILUA is one of three ILUAs negotiated concurrently by the Kuuku Yu'a People with the Commonwealth Government, the Queensland Government and Cook Shire Council. Separate agreements were negotiated to provide for the ownership and management of Forbes Islands National Park, Quoin Island National Park and Piper Islands National Park (the Kuuku Ya'u Protected Areas Indigenous Land Use Agreement), as these national parks are managed by the Queensland Government (whereas the Great Barrier Reef Marine Park Authority is a Commonwealth agency), and to recognise the rights and interests of the Kuuku Ya'u People to a small parcel of land on Cape York Peninsula (the Portland Roads Indigenous Land Use Agreement), negotiated with Cook Shire Council.

Two of these ILUAs, the Kuuku Ya'u People's Protected Areas ILUA and the Kuuku Ya'u People's Marine Park ILUA, provide for the conservation of the determination area. Together the agreements cover approximately 197,000 hectares of the Great Barrier Reef Marine Park and 120 hectares of national park islands. In a Ministerial Statement, the Honourable Stephen Robertson indicated that the ILUAs would additionally provide training for a number of the Kuuku Ya'u People as conservation officers and marine park inspectors.

### BIOGRAPHY

I acknowledge that this paper borrows liberally from work done by David Yarrow in describing the operation of the EPBC Act in relation to World Heritage areas and from website postings of the GBRMPA in relation to TUMRA's.

## ATTACHMENT A

### Greg McIntyre SC

- Chair, Australian Environment and Planning Law Group, Legal Practice Section, Law Council of Australia, 2012-14
  - President, National Environmental Law Association, Australia 1993 to 1999
  - President, Cairns and Far North Environment Centre, Queensland, Australia 1981 to 1988
  - Executive Committee member, Rainforest Conservation Society of Queensland, Australia 1981-1988
  - Executive Committee member, Environmental Defenders Office (Western Australia), 1995
  - Solicitor for the Meriam People, 1981-1993 and Counsel for Eddie Mabo in High Court of Australia in *Mabo v Queensland (No 2)* (1992-1993)
  - Solicitor for John Koowarta in High Court of Australia in *Koowarta v Bjelke Petersen* (1982) re *Racial Discrimination Act*
  - Counsel for Robert Bropho in High Court of Australia in *Bropho v Western Australia* (1990) re *Aboriginal Heritage Act (WA)*
  - Appointed Senior Counsel 2002
  - Adjunct Professor of Law, University of Notre Dame Australia, 2001 to present
  - Australian Human Rights Commission Law Award 2009
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