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# Environment Legislation Amendment Bill 2013 (Cth)

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## **The Senate Environment and Communications Legislation Committee**

**14 January 2014**

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## Executive summary

1. This submission identifies issues of concern to the Law Council of Australia in relation to the Environment Legislation Amendment Bill 2013 (the Bill).
2. The views expressed rely on the expertise and experience of senior lawyers practising in the field of environmental law who are members of the Law Council's Australian Environment and Planning Law Group.
3. The submission discusses key issues arising under the Bill including:
  - its retrospective and prospective validation of some decisions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) that lack statutory authority;
  - the disproportionate impact that the penalty provisions of the Bill may have on Aboriginal and Torres Strait Islander people;
  - 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
  - preferable policies and programs currently operating in Queensland.
4. The submission makes the following recommendations:
  - (a) The Inquiry should conclude that there are not clear and compelling reasons for the retrospective validation of –
    - (i) A decision of the Minister for the Environment under the EPBC Act on 18 December 2012 held by a Court not to comply with the law;
    - (ii) Any decision of the Minister for the Environment under the EPBC Act before 31 December 2013 which failed to have regard to relevant approved conservation advice.
  - (b) The Inquiry may wish to call the Chair of the Threatened Species Scientific Committee (TSSC) to give evidence about the impact of the retrospectively validated controlled action decision on the Tasmanian Devil population in Tasmania; whether the conditions attached to the approval should be regarded as an appropriate response to the approved conservation advice in view of Australia's obligations under international environmental law; and whether 'things' done pursuant to the approval before it was declared invalid had an adverse impact on the Tasmanian Devil population in Tasmania;
  - (c) The Inquiry could contribute to enhancing the integrity of Executive decision making processes and the accountability of the Executive to the Parliament by recommending that the Minister conduct a review of controlled actions approvals granted before 31 December 2013, and to report to the Senate on the number and details of those decisions where approved conservation advice had not been taken into account;
  - (d) If the Committee should conclude that there are compelling reasons for the retrospective validation of –
    - (i) A decision of the Minister for the Environment under the EPBC Act on 18 December 2012 held by a Court not to comply with the law; or

- (ii) Any decision of the Minister for the EPBC Act before 31 December 2013 which failed to have regard to any relevant approved conservation advice;

it may wish to recommend an amendment to Item 2 to clarify that it is only intended to apply to things, or anything related to things validated by Item 1, as follows:

- (1) *This item applies in respect of a thing under the Environment Protection and Biodiversity Conservation Act 1999, to the extent that the thing would, apart from this item, be or have been invalid because of a failure by a person, when doing the thing or anything related to the thing, to have regard to any relevant approved conservation advice at any time before 31 December 2013.*
  - (2) *The thing is as valid and effective, and is taken always to have been as valid and effective, as it would have been had the person, when doing the thing or anything related to the thing, had regard to any relevant approved conservation advice at any time before 31 December 2013.*
  - (3) *All persons are, and are taken always to have been, entitled to act on the basis that the thing is, and always has been, valid and effective as mentioned in sub item (2).*
- (e) A better policy approach would be for the Australian Government to increase and extend its support for 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; and
- (f) 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 proposed legislation.

## Environment Legislation Amendment Bill 2013 – submission

### Purpose

5. The Law Council of Australia writes to express concern about various provisions of the Environment Legislation Amendment Bill 2013 (the Bill), and related issues.
6. This submission was prepared for the Law Council by the Australian Environment and Planning Law Committee and Secretariat staff for the Law Council's Legal Practice Section. The contributors are senior lawyers with significant expertise and experience in environmental law.

### Background

7. The Bill proposes to operate retrospectively and prospectively in relation to the implications of the decision in [\*Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities\* \[2013\] FCA 694](#) so as to provide certainty for industry and projects approved under the EPBC Act.
8. On 18 December 2012 the then Minister for the Environment (the approving Minister) approved a proposal by Shree Minerals Ltd to develop and operate a mine in the Tarkine area of Tasmania. In July 2013 the Federal Court in *Tarkine* set aside that decision because the Minister had failed to have regard to 'approved conservation advice' concerning a listed threatened species, as required by [s 139\(2\)](#) of the EPBC Act before approving an action that could have a significant impact on the listed threatened species. The Minister had approved proposed mining activity that was likely to have a significant impact on the Tasmanian Devil population, a listed threatened species. The Court held that the Minister was obliged to give genuine consideration to the approved conservation advice, and that it was insufficient to say in a statement of reasons that 'any relevant conservation advice' had been taken into account, even though most of the information in the approved conservation advice had been before the Minister in other forms.
9. On 12 May 2009, a former Minister had approved a Conservation Advice for the Tasmanian devil that had identified the threats to the species and available means of supporting the species. While information was available to the approving Minister in other forms, that material did not include information about the risk of extinction facing the Tasmanian Devil, its diseases (such as the presently incurable Devil Facial Tumour Disease), and research priorities. The Federal Court was of the view that consideration of this advice may have resulted in different content in the decision made and so the decision was void for jurisdictional error.<sup>1</sup>
10. The normal process following such a Court decision is that the Ministerial decision-maker reconsiders the matter and makes a decision in compliance with the law, guided by the reasons for the decision of the Court. There is no compelling reason for departing from that process in the present instance.
11. There may be third parties who have conducted themselves prior to the Court decision on the basis that the Ministerial decision was valid. That conduct may not be in compliance with the law because of the lack of validity of the approval purported to

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<sup>1</sup> Samuel Volling, '[Federal Court overturns Commonwealth approval of Tarkine region iron ore mine](#)' (2013).

have been given. While, in theory, there may be the legal possibility of proceedings being taken against such persons for that lack of compliance, there could be no public interest in prosecuting a party in those circumstances, or in a Court penalising a party in those circumstances, and the prospect of the same occurring is in reality, non-existent.

12. The Bill provides:

***Schedule 1—Amendments relating to approved conservation advice***

***1 Non-compliance with requirement to have regard to any approved conservation advice before 31 December 2013***

*If a provision of the Environment Protection and Biodiversity Conservation Act 1999 requires the Minister to have regard to any approved conservation advice, then a thing is not invalid merely because the Minister failed, when doing the thing or anything related to the thing at any time before 31 December 2013, to have regard to any relevant approved conservation advice.*

***2 Validation of things under the Environment Protection and Biodiversity Conservation Act 1999***

*(1) This item applies in respect of a thing under the Environment Protection and Biodiversity Conservation Act 1999, to the extent that the thing would, apart from this item, be or have been invalid because of a failure by a person, when doing the thing or anything related to the thing, to have regard to any relevant approved conservation advice.*

*(2) The thing is as valid and effective, and is taken always to have been as valid and effective, as it would have been had the person, when doing the thing or anything related to the thing, had regard to any relevant approved conservation advice.*

*(3) All persons are, and are taken always to have been, entitled to act on the basis that the thing is, and always has been, valid and effective as mentioned in sub item (2).*

13. The Bill also amends the EPBC Act and the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act) by significantly increasing the financial penalties for various offences and civil penalty provisions relating to the illegal killing, injuring, taking, trading, keeping or moving of turtles and dugong, consistent with the Coalition's '[Dugong and Turtle Protection Plan](#)' announced in mid-August 2013 in the lead up to the September 2013 Federal election.

## **Key issues**

### **Amendments relating to approved conservation advice**

#### *Retrospective operation*

14. The provisions of the Bill in Schedule 1, Items 1 and 2, purport to validate retrospectively one or more Executive decisions that were not authorised by the EPBC Act when made. During the second reading debate on the Bill in the House of

Representatives a [Government amendment](#) had been agreed that replaced the heading and content of Schedule 1 Item 1 so that only Ministerial decisions made 'at any time before 31 December 2013' were not invalidated by non-compliance with a mandatory requirement 'to have regard to any relevant approved conservation advice'.

15. The Law Council's [Rule of Law Policy Statement on Rule of Law Principles](#) (2011) provides that 'the Executive should be subject to the rule of law and any action undertaken by the Executive should be authorised by law'. Executive powers should be carefully defined and the Executive should not determine for itself what powers it has and how they may be used. 'Meaningful parliamentary and judicial oversight of the exercise of Executive power' is fundamental to the rule of law, and '[w]here the Executive has acted unlawfully, anyone affected should have access to effective remedy and redress.'
16. The Rule of Law Principles also provide that Australian law should be clear, easily accessible, comprehensible, prospective rather than retrospective, and relatively stable.<sup>2</sup> Parliamentary Committees established to scrutinise Bills have also expressed concern when legislation has a retrospective operation, unless there are clear and compelling reasons for retrospectivity.<sup>3</sup>
17. The Tarkine National Coalition Incorporated is a community-based organisation that is entitled to enjoy the benefits of the rule of law, including an expectation that mandatory statutory requirements will be complied with.
18. The Threatened Species Scientific Committee (TSSC) is established as part of the governance arrangements under the EPBC Act to provide advice to the Minister on threatened species, ecological communities and key threatening processes. The TSSC is entitled to have confidence that their statutory role is respected, as are other stakeholders. Conservation advice provided by the TSSC provides guidance on recovery and threat abatement activities that can be undertaken to ensure the conservation of a listed threatened species or ecological community. The fact that the Minister's decision had imposed a number of conditions on the approved controlled action relevant to the Tasmanian Devil does not entirely alleviate the concern that the relevant approved conservation advice had not informed the approval of those conditions.
19. The Law Council has consistently maintained that legislation should only in exceptional circumstances be given retrospective effect. People, including businesses such as Shree Minerals Ltd, should be able to conduct their affairs on the assumption that legislation in place at the time decisions are taken will be complied with by decision-makers. Those impacted by a decision or instrument, including businesses, should not have to deal with the consequences of statutory non-compliance by the Executive, such as when a court declares invalid a decision that has been communicated and relied upon.
20. Similarly in this instance, listed threatened species, which were intended to be protected by the statutory provisions that had not been not complied with, are effectively not protected if decisions are validated that were made in the absence of genuine consideration of approved conservation advice, particularly since that advice

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<sup>2</sup> Law Council of Australia, *Policy Statement: Rule of Law Principles* (2011). See also: Melissa Castan and Sarah Joseph, *Federal Constitutional Law, a Contemporary View* (2nd ed, 2006) 5; J Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 198–202.

<sup>3</sup> See for example, [Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 11 of 2012, 19 September 2012](#), 17.

concerned matters regarded by the Court as a 'pivotal element' for the protection of the species.<sup>4</sup>

21. The retrospective validation of an unspecified number of decisions that may be invalid because approved conservation advice was not considered before a development decision was taken, casts doubt on the integrity of the implementation of Australia's primary national environment protection Act.

#### **Recommendation (a)**

22. The Inquiry should conclude that there are not clear and compelling reasons for the retrospective validation of –

- (i) A decision of the Minister for the Environment under the EPBC Act on 18 December 2012 held by a Court not to comply with the law;
- (ii) Any decision of the Minister for the Environment under the EPBC Act before 31 December 2013 which failed to have regard to relevant approved conservation advice.

#### **Recommendation (b)**

23. This Inquiry may also wish to call the Chair of the Threatened Species Scientific Committee (TSSC) to give evidence about the impact of the retrospectively-validated controlled action decision on the Tasmanian Devil population in Tasmania; whether the conditions attached to the approval would have been an appropriate response to the approved conservation advice; and whether 'things' done pursuant to the approval before it was declared invalid had an adverse impact on the Tasmanian Devil population in Tasmania.

#### **Recommendation (c)**

24. This Inquiry could contribute to enhancing the integrity of Executive decision making processes and the accountability of the Executive to the Parliament by recommending that the Minister conduct a review of controlled actions approved before 31 December 2013 and report to the Senate on the number and details of those controlled action decisions in relation to which approved conservation advice was not taken into account. The independent [Hawke review](#) of the EPBC Act<sup>5</sup> did not scrutinise decision-making processes in such detail.
25. The Committee would be aware that Australia has ratified the Convention on Biological Diversity<sup>6</sup> and has obligations under Articles 7 and 8 to reduce the impacts of activities that may be detrimental to biological diversity, and to promote the protection of ecosystems and natural and semi-natural habitats in order to maintain viable populations of species in natural surroundings.<sup>7</sup>

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<sup>4</sup> [2013] FCA 694 (17 July 2013) at [59].

<sup>5</sup> Department of the Environment, Water, Heritage and the Arts, [Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999](#), (Commonwealth of Australia, 2009)

<sup>6</sup> Convention on Biological Diversity, 'Chapter 2: The Convention on Biological Diversity', <<http://www.cbd.int/gbo1/chap-02.shtml>>.

<sup>7</sup> 1992 Convention on Biological Diversity, 5 June 1992, Rio de Janeiro, Brazil [1993] ATS 32 / 1760 UNTS 79/ 31 ILM 818 (1992).

### *Prospective operation*

26. As noted above, Item 2 of Schedule 1 of the Bill is intended to operate retrospectively to validate decisions taken before 31 December 2013 that would have been invalid because the Minister failed to have regard to any relevant approved conservation advice when making decisions under the Act. This intended retrospective operation is confirmed in the Revised Explanatory Memorandum to the Bill.<sup>8</sup>
27. The language used in Item 2 does not suggest such a limited operation however. It refers to things that 'would ... be or have been invalid because of a failure ... to have regard to any relevant approved conservation advice' as being 'as valid and effective' as if the advice had been taken into account. The words in subclause (3) that 'All persons are, and are taken always to have been entitled to act on the basis that the thing is, and always has been, valid...' are expressed in the present tense and would ordinarily be interpreted as applying to an event occurring during the currency of this legislation. This item is *not* expressed to be limited only to decisions or 'things' made before 31 December 2013.
28. Various provisions and principles of statutory construction are relevant. These include that the words in legislation are to be given their natural and ordinary meaning unless the context or purpose of the statute suggests otherwise. Another is that unless a statute reveals a contrary intention, a statute is to be interpreted as 'always speaking' and in the present tense.<sup>9</sup> Under the *Acts Interpretation Act 1901* (Cth) every section of an Act is read as being a substantive enactment (s 12) and a Schedule to the Act is regarded as part of the Act (s 13(1)(b)). This means that Item 2 can be interpreted independently of Item 1.
29. On the other hand, s 15AA of the Acts Interpretation Act provides that 'in interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.' Extrinsic material, such as Parliamentary documents including Hansard and explanatory memoranda, may also be taken into account to ascertain that purpose: s 15AB. The Parliamentary record shows that a Government amendment of the Bill was agreed to on 9 December 2013 that purported to restrict the operation of the legislation to decisions made before 31 December 2013, but only Item 1 was amended. The text of Item 2 was unaffected, and it needs to be read as 'always speaking'. It can be construed as operating to validate future decisions.
30. The Committee may wish to recommend an amendment to Item 2 to clarify that it is only intended to apply to things or anything related to things validated by Item 1 in Schedule 1.

### **Recommendation (d)**

31. If the Committee should conclude that there are compelling reasons for the retrospective validation of –
- (i) A decision of the Minister for the Environment under the EPBC Act on 18 December 2012 held by a Court not to comply with the law; or

<sup>8</sup> Parliament of the Commonwealth of Australia, Senate, Environment Legislation Amendment Bill 2013, [Revised Explanatory Memorandum](#).

<sup>9</sup> *Muin v Refugee Review Tribunal* [2002] HCA 30.

(ii) Any decision of the Minister for the EPBC Act before 31 December 2013 which failed to have regard to any relevant approved conservation advice;

it may wish to recommend an amendment to Item 2 to clarify that it is only intended to apply to things, or anything related to things validated by Item 1, as follows:

- (1) *This item applies in respect of a thing under the Environment Protection and Biodiversity Conservation Act 1999, to the extent that the thing would, apart from this item, be or have been invalid because of a failure by a person, when doing the thing or anything related to the thing, to have regard to any relevant approved conservation advice **at any time before 31 December 2013.***
- (2) *The thing is as valid and effective, and is taken always to have been as valid and effective, as it would have been had the person, when doing the thing or anything related to the thing, had regard to any relevant approved conservation advice **at any time before 31 December 2013***
- (3) *All persons are, and are taken always to have been, entitled to act on the basis that the thing is, and always has been, valid and effective as mentioned in sub item (2).*

#### **Amendments relating to protected marine species of dugong and turtle**

32. 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 1914* (Cth) for Commonwealth offences, effective from 28 December 2012, is \$170. This value is reviewable every three years.<sup>10</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>11</sup>
33. 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>12</sup> Of the possible 992 offences detected in 2012–3, most were for non-Indigenous recreational fishing.

<sup>10</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>11</sup> Clause 53 of the Bill

<sup>12</sup> GBRMPA, [Annual Report 2012–13](#), 34.

There were eight possible Indigenous hunting offences, three non-traditional take offences, and eight Indigenous offences involving unknown take type.<sup>13</sup>

34. 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.
35. 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 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>14</sup>
36. 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>15</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>16</sup>
37. 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

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<sup>13</sup> Ibid., 47.

<sup>14</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>15</sup> Australian Government. GBRMPA. *Great Barrier Reef Region Strategic Assessment: Traditional Owner and Stakeholder Engagement Report* (2013) A5–13.

<sup>16</sup> Ibid, A5–17.

sites<sup>17</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>18</sup> Other studies of the co-management of natural and cultural resources support this view.<sup>19</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.

38. 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>20</sup>

39. 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>21</sup>

40. 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>22</sup> In 2010–11 seven dugong deaths were reported in Bowling Green Bay caused by incidental capture in fishing nets.<sup>23</sup>

41. 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>24</sup> Attendees at a Traditional Owner workshop also highlighted jurisdictional boundaries as an impediment to effective management.<sup>25</sup> GBRMPA's Strategic Assessment Report, in contrast, highlights the effectiveness of the 'integrated governance and management model' in the region.<sup>26</sup>

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

<sup>17</sup> Australian Government. GBRMPA. *Great Barrier Reef Region Strategic Assessment: Strategic, Assessment Report: Draft for Public Comment* (2013), 6–62.

<sup>18</sup> *Ibid.*, 8–13.

<sup>19</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](#), (IUCN, 2013); Richard Conniff, 'People or Parks: The Human Factor in Protecting Wildlife', [Environment360](#), 7 Nov 2013.

<sup>20</sup> *Ibid.*, 6–46, 6–47 (see also 5–31).

<sup>21</sup> GBRMPA, *A Vulnerability Assessment for the Great Barrier Reef: Dugong*, GBRMPA, Townsville (in press).

<sup>22</sup> GBRMPA. *Great Barrier Reef Region Strategic Assessment: Strategic, Assessment Report: Draft for Public Comment* (2013), 9–7.

<sup>23</sup> *Ibid.*, 3–19.

<sup>24</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>25</sup> GBRMPA, *Appendix 5: Traditional Owner and Stakeholder Engagement Report*, A5–11, 5–17.

<sup>26</sup> Australian Government. GBRMPA. *Great Barrier Reef Region Strategic Assessment: Strategic, Assessment Report: Draft for Public Comment* (2013), 1–19.

43. 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>27</sup>
44. 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>28</sup>
45. 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 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>29</sup>
46. 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.
47. 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.
48. The collaborative approach embodied in TUMRAs is consistent with the recommendations of a National Sea Country Workshop held in 2012,<sup>30</sup> the

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<sup>27</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>28</sup> Dermot Smyth, Principal Consultant & Adjunct Research Fellow at Smyth and Bahrdt Consultants & Charles Darwin University.

<sup>29</sup> GBRMPA, *Annual Report 2012–13*, 39–44/.

<sup>30</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.

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.

### **Recommendation (e)**

49. A better policy approach would be for the Australian Government to increase and extend its support for 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.

### **Statement of Compatibility with Human Rights**

50. 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'.
51. 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.<sup>31</sup>
52. 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.
53. 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.

### **Recommendation (f)**

54. 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

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<sup>31</sup> See for example: Office of the High Commissioner for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61 (15 January 2009); General Assembly, *Report of the Human Rights Council on its Tenth Session*, [UN Doc A/HRC/10/L.11](#); Australia. Human Rights and Equal Opportunity Commission, *Background Paper: Human Rights and Climate Change* (2008) <<https://www.humanrights.gov.au/papers-human-rights-and-climate-change-background-paper>>. See generally: Sébastien Jodoin and Katherine Lofts (eds), *Economic, Social and Cultural Rights and Climate Change: A Legal Reference Guide* (New Haven, Ct.: CISDL, GEM & ASAP, 2013).

generally, and in Statements of Compatibility with Human Rights tabled with the legislation.

**Miscellaneous**

55. The Inquiry may also wish to note that the heading 'Item 54 – civil penalty provision' should rather be 'Item 53 – civil penalty provision'.

**VANESSA KLEINSCHMIDT  
A/G SECRETARY-GENERAL**

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

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.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- 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 Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia. It is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

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

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