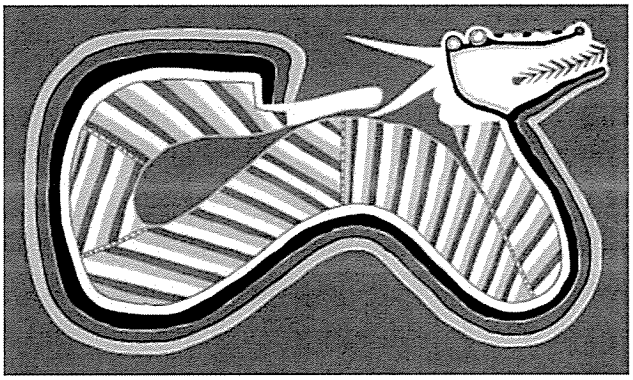

# Northern Land Council

## Submission to Australian Government Productivity Commission on Inquiry into the Regulation of Australian Marine Fisheries and Aquaculture

15 April 2016

Submissions to fisheries.inquiry@pc.gov.au

## Terms of Reference

The Productivity Commission is to undertake an inquiry into the regulatory burden imposed on the Australian marine fisheries and aquaculture sectors.

In undertaking the inquiry, the Commission is to have particular regard to impediments to increasing productivity and market competitiveness of the Australian fishing and aquaculture industries, including:

1. The extent to which enhanced and improved use of cross jurisdiction and multi-jurisdictional regulatory regimes, information and service sharing can improve the economic efficiency and the ecologically sustainable use and management of fisheries resources.
2. The extent to which harmonisation or integration of environmental, management and compliance arrangements could improve the effective and efficient operation of the fishing industry and delivery of fisheries policy and environmental outcomes.
3. The extent to which accreditation schemes or recognition of equivalency could reduce the regulatory burden and increase productivity.
4. The extent to which greater use of cost recovery arrangements is applicable and informs the cost of delivering fishery production, conservation and other community service obligations.
5. The extent to which fisheries management regimes align with and protect the interests of the wider community (in particular, the balance between commercial, recreational, indigenous fishing and conservation interests, and consumers' interests).
6. The extent to which fisheries management regimes support greater participation of Indigenous Australians, provide incentives to Indigenous communities to manage their fisheries, and incorporate their traditional management practices in the fishing industry.
7. The degree to which cross jurisdictional regulatory arrangements are transparent, accountable, proportionate, consistent, effective and targeted.
8. The degree to which cost effective and practical non-regulatory mechanisms could be expanded to achieve fisheries management outcomes.

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## Recommendations

The overarching standard in all marine fishery and aquaculture regulatory frameworks must be the accountability of the significant property and customary rights of Aboriginal people.

Recommendations include:

**Recommendation 1**: Australian marine fisheries meet international standards for recognising Aboriginal interests in the use and management of marine resources and associated marine environments.

**Recommendation 2**: Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Aboriginal Land Rights Act

**Recommendation 3**: Commonwealth and Territory agree to resolution of intertidal access over Aboriginal land as a key policy commitment and milestone to progress Aboriginal participation in marine fisheries.

**Recommendation 4**: A moratorium on legislative changes to the Northern Territory Fisheries Act specific to fishing access and activity in intertidal areas over Aboriginal Land until access arrangements have been agreed to by the estate owners through an informed engagement process.

**Recommendation 5**: Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Aboriginal Land Act.

**Recommendation 6**: Territory expedites and finalise outstanding land claims relevant to 'Beds and Banks'.

**Recommendation 7**: Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Native Title Act.

**Recommendation 8**: Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Northern Territory Aboriginal Sacred Sites Act.

**Recommendation 9:** Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Aboriginal and Torres Strait Islander Heritage Protection Act.

**Recommendation 10**: Review of marine fisheries management principles/policies to recognise Environment Protection and Biodiversity Conservation Act relevant to the recognition and protection of Aboriginal cultural practices.

**Recommendation 11**: Setting national standards for recognition and integration of Traditional Knowledge in fisheries management frameworks.

**Recommendation 12:** Enable participatory research and development to recognise the values of Aboriginal interests in engaging customary practices in marine fisheries management.

**Recommendation 13:** Integrative cross-jurisdictional and multi-sector approach to fisheries management.

**Recommendation 14:** IPAs are appropriated under a statutory framework.

**Recommendation 15:** The role of Sea Country Indigenous Protected Areas are recognised and examined in fishery management and administration processes.

**Recommendation 16:** The Territory is responsible for setting policy and procedures in its administration measures of fisheries regulations including raising awareness of all marine fishery sectors in complying with fisheries regulations and the broader public on marine fisheries relevant to the Aboriginal rights and multi stakeholder interests.

**Recommendation 17:** A construct/body is established to provide independent expert advice and regulatory oversight to the Territory on delivery of national and other standards for sustainable marine fisheries.

**Recommendation 18:** The construct/body regulates and measures Territory administration of fisheries regulations and marine fishery sector compliance specific to Aboriginal land rights and interests.

**Recommendation 19:** The establishment and resourcing of a community engagement framework to enable Aboriginal people to be actively involved in development, implementation, evaluation of policy and legislation or administrative measures that effect their land and marine estates.

**Recommendation 20:** Commonwealth and Territory work with the Northern Land Council under an arrangement that includes appropriate resourcing, to progress a comprehensive framework for Aboriginal people to control access, engage in fishery management decisions and participate in fishery activities for economic benefit.

**Recommendation 21:** Provision Management Advisory Committees under Northern Territory Fisheries Act to recognise Traditional Owners in decision making processes.

**Recommendation 22:** Fisheries Advisory Committees (or equivalent relevant to Indigenous Protected Area construct) are reinstated across the Northern Territory to inform Management Advisory Committees and are managed independent of Government.

**Recommendation 23:** Fisheries management is inclusive of impacts from development such as biosecurity threats; changes in land management practices through increased agricultural and offshore petroleum development and waste water discharge; water security and quality; and climate adaptation.

**Recommendation 24**: Independent expert body (similar to Australian Fisheries Management Authority model) is installed in the north to provide regulatory oversight of policy, research and development advice to Management Advisory Committees and Northern Territory Government that is informed by community engagement processes and regional advisory bodies such as Indigenous Protected Areas (refer to recommendations 16 & 21).

**Recommendation 25**: Commonwealth regulates implementation of National Guidelines – Fishery Harvest Strategies in State and Territory equivalent regulatory frameworks.

**Recommendation 26**: Provisions under 5.5.3 of the National Guidelines be dealt with in all Northern Territory fishery sector sharing frameworks.

**Recommendation 27**: Investment into research to qualify and quantify customary fishing values relevant to setting triggers and quotas in harvest strategies.

**Recommendation 28**: Customary fishing rights are recognised and managed separately to environmental triggers for fishery allocation of resources.

**Recommendation 29:** Adequate resourcing to regulate the performance and any impacts to the customary fishing sector.

**Recommendation 30:** Territory review the commercial fishery licence scheme and examine the role of Quota Management System in managing resources sustainably and equitably.

**Recommendation 31:** Territory investment in sound and transparent research to inform equity sharing decisions with regard to resource quota management systems.

**Recommendation 32**: (following recommendation 20) A resourced community engagement strategy is implemented to define Aboriginal interests in participating in commercial fisheries and to set targets for programs and policy for governments and associated agencies.

**Recommendation 33**: (following recommendation 20) Commonwealth and Territory commits to develop a strategic policy framework to overcome both the conflict in legislation relevant to Aboriginal rights and the barrier to Aboriginal economic participation in marine fisheries as a key policy agenda.

**Recommendation 34**: Support education and funding programs to assist Aboriginal people to enter into commercial enterprises in marine fisheries and marine fisheries management.

**Recommendation 35:** Recognise and support through a strategic framework the role of Rangers in providing services in marine fisheries management.

**Recommendation 36:** Empower Aboriginal Land and Sea Rangers through legislative changes, to manage fisheries compliance and other administrative measures.

## Chairman's Statement

The Northern Land Council welcomes the opportunity to inform the inquiry and is encouraged that the terms of reference to the inquiry are relevant and inclusive of Indigenous perspectives. The inquiry is well timed to inform Governments positions, at both National and Territory levels, ahead of respective elections. Additionally, it has provided opportunity for the Northern Land Council to reflect on progress of Aboriginal participation in marine fisheries in the north subsequent significant milestones in Indigenous land and sea country management. Most notable is the High Court's decision on the Blue Mud Bay case, which is central to this submission, and should be regulated collectively with other rights that are meant to enable us to manage our land and waters along with our recognised proprietary, cultural and native title rights.

Eight years after the final decision on the Blue Mud Bay case, the Northern Land Council would summarise our outcomes to date as falling well short of securing any of our interests and potential opportunities from this entitlement. Aboriginal Territorians are no further toward participating in neither fisheries management nor fishery economic activities. Foremost, our rights are still not recognised in fisheries legislation and our responsibility to control access remains allusive and vulnerable without proper regulation. Further, frameworks for community engagement toward consent and decision making processes remain strikingly absent. From this view point, the Northern Land Council is extremely disappointed by Governments' inability to formulate a program to support our interests in fisheries management that is premised on our recognised rights, protects our cultural practices and economies and is informed and led by our communities.

We need to plan properly for our sea country, for our future generations. As Chairman of the Northern Land Council, I present this submission to assist in informing the process of the Productivity Commission in providing leadership and advice to the Commonwealth and Territory Governments on our participation in the economical and sustainable use and management of fisheries resources.

**Samuel Bush-Blanasi**
**Chairman Northern Land Council**

## Overview

The Northern Land Council (NLC) is an independent statutory authority established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) and a Native Title representative body for the purposes of the *Native Title Act 1993* (NTA).

NLC's vision is for a territory in which the rights and responsibilities of every Traditional Aboriginal Owner (TO) are recognised and in which Aboriginal people benefit economically, socially and culturally from the secure possession of their lands, seas and intellectual property. Our mission is to assist Aboriginal people in the northern region of the Northern Territory (NT) to acquire and manage their traditional lands and seas, through strong leadership, advocacy, industry engagement and management.

The NLC construct constitutes of 82 members representative of seven regions in the Top End of the NT. Its regions cover inclusively land, freshwater and sea estates, including offshore. Aboriginal people have property rights to greater than 55% of land in the Top End with vested interests in well over 80%. Access to approximately, 84% of culturally, environmentally and economically rich

intertidal waters is controlled by Aboriginal people as affirmed by the High Court's decision (2008) on the 'Blue Mud Bay' case. The proportion of Aboriginal people living and occupying the Top End of the NT is around 50% and growing, with greater percentages living in remote areas, mostly coastal (Altman, 2014 & Altman & Markham, 2014).

The significant land and waters asset base and demographics well positions Aboriginal people as owners, managers and major investors in policy and programs relevant to our cultural, economic, social and environmental interests (NAILSMA, 2014). However, current legislative and institutional frameworks are yet to realise the fishing sector as a key prospectus[1] for Aboriginal advancement even though it has been a consistent message in policy platforms of Indigenous forums, such as the North Australian Indigenous Experts Forum (NAILSMA 2013a).

Aboriginal people's participation is fundamental in not only the commercial operations of fisheries, but also the management and development of fishing sector interests and our land and water assets. Additionally, the role of Aboriginal Land and Sea Rangers as managers is essential for culturally appropriate delivery of environmental and biosecurity services that enable both built markets and management of resources through diverse associated services and cultural practices.

Any advancement must embrace culturally appropriate engagement to the extent that mainstream economies are framed around the fundamental principle of a culture based economy. This approach will value peoples existing customary economies, their connection and responsibility to country and their unique cultural imperatives toward achieving prosperity and resilience; well suited to bridging mainstream economies with remote community aspirations for sea country management (NAILSMA 2013b).

Recognised in various covenants and policies, Aboriginal people have the right to own, use, develop and control their territories and resources that they possess by reason of traditional ownership (UNDRIP, 2007). This fundamental principle is broadly supported in the national approach to further Aboriginal participation in marine fisheries, as led by the Australian Fisheries Marine Authority (AFMA). However, its translation into tangible management practices is yet to be qualified. A further challenge is enabling consistent management frameworks across States and Territories. This is highly relevant in the Top End where fisheries regulations in the NT are industry led and little research considers holistic management of resources based on community defined criteria for local economies that integrate a range of interests and issues, particularly cultural practices and customary economies.

A key need and challenge is the protection of Aboriginal people's property rights in fisheries legislative frameworks. Complementary to this must be a tangible and pragmatic approach to policy and program development that supports community capacity to provide services and delivers jobs, resilience and sustainability in remote communities.

[1] 'Prospectus' is inferred as setting out the benefits that Indigenous investors seek from their lands and waters, the ways that co-investors can also benefit, the conditions under which investments will be sought and accepted, the role that government should play in framing supportive policy in all its areas of responsibility, and the strategies and plans needed to realise national benefits from full Indigenous participation in northern development.

In the NT Aboriginal rights are not adequately recognised in relevant legislative frameworks administered by the Northern Territory Government (Territory) and thus effectually diminished from fishery management regimes. In the absence of any supportive regulations:

- Aboriginal people are disengaged in fisheries management and associated policy and decision making processes;
- no process for proper informed consent of TO's relevant to changes in fisheries rules and regulations;
- no responsibility is held by the Territory to consult with TO's or allow cost-recovery of services from the NLC to manage fishery commercial interests that directly impact Aboriginal people's property rights;
- Aboriginal people have limited pathways or access to programs to support their participation in fishing sectors, including access to independent expert advice and technical support;
- Aboriginal people are not properly considered in terms of benefits and equitable distribution of resources for both cultural purposes and commercial aspirations;
- compliance measures, rules and responsibilities lack any integrity to uphold Aboriginal peoples cultural values and property rights;
- the role of Aboriginal Land and Sea Rangers in fisheries management as a cultural appropriate industry model is unfulfilled;
- Traditional Knowledge is not recognised or integrated into fisheries management, planning, policy directions and research and development;
- Territory administration processes, frameworks and transparency are lacking with respect to engaging Aboriginal people in all aspects of marine fisheries and recognising rights.

NLC's submission to the Productivity Commission Inquiry into the regulation of Australian Marine Fisheries and Aquaculture (Inquiry) considers the rights, gaps and needs of Aboriginal people to participate. While some attention is given to interjurisdictional and Commonwealth regulatory frameworks, focus is directed on the Territory. NLC also notes that the breadth of Aboriginal interests in this Inquiry is vigorous and we have been challenged to provide a succinct account of every need and therefore have concentrated only on the key needs and challenges to set the precedence.

### United Nations Declaration on the Rights of Indigenous Peoples

**Recommendation 1**: Australian marine fisheries meet international standards for recognising Aboriginal interests in the use and management of marine resources and associated marine environments.

The NLC upholds the principles of the United Nations Declaration on the Rights of Indigenous People 2007 (UNDRIP); endorsed by Australia in 2009. Principles are intended to guide Governments in recognising the rights of Indigenous people on any issue affecting them. Australia's Indigenous people have the right to:

- practise, protect and revitalise cultural traditions and customs, and maintain, protect and develop the past, present and future manifestations of their cultures ... (Article 11)
- have the dignity of cultures, traditions, histories and aspirations reflected in education and public information (Article 15);

- participate in decision-making in matters which would affect rights, through representatives chosen by themselves (Article 18);
- being consulted and cooperating in good faith Aboriginal peoples own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (Article 19)
- be provided effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions (Article 21);
- determine and develop priorities and strategies for exercising their right to development. In particular, Aboriginal people have the right to be actively involved in developing and determining economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions (Articles 23);
- maintain and strengthen distinctive spiritual relationships with traditionally owned or otherwise occupied and used lands and waters, and to uphold responsibilities to future generations (Article 25);
- maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions (Article 31);
- be provided effective mechanisms for just and fair redress for any such activities, and appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impact (Article 32); and
- promote, develop and maintain institutional structures and distinctive customs, spirituality, traditions, procedures, practices and ... juridical systems or customs, in accordance with international human rights standards (Article 34).

These key principles of the UNDRIP underpin this submission to the Inquiry.

# Legislative Frameworks

## Aboriginal Land Rights Act

**Recommendation 2**: Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Aboriginal Land Rights Act

**Recommendation 3**: Commonwealth and Territory agree to resolution of intertidal access over Aboriginal land as a key policy commitment and milestone to progress Aboriginal participation in marine fisheries.

**Recommendation 4**: A moratorium on legislative changes to the Northern Territory Fisheries Act specific to fishing access and activity in intertidal areas over Aboriginal Land until access arrangements have been agreed to by the estate owners through an informed engagement process.

Any activity and access to tidal waters over Aboriginal Land is controlled by Traditional Owners (TOs) as provided under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), which accounts for 84% of the intertidal area. The intertidal area is defined as the waters from the highest astronomical water mark to the lowest astronomical water mark. Relevant to the geographical

landscape of the Top End, the intertidal area can be up to eight metres deep and range from several meters to several kilometres seaward from the highest water mark.

**History**

In 1979, when the *Fish and Fisheries (NT) Act 1979* took effect, the Director of Fisheries issued commercial licences (at low premiums) without consideration of provisions under the ALRA in terms of restricting access to the intertidal waters over Aboriginal land.

This administration oversight led to contestation of who controls access to the intertidal area. The case that brought resolution to the issue was the *Gawirrin Gumana & Ors v Northern Territory* (Blue Mud Bay case), which was lodged in 2002. In 2007 the Federal Court determined that TOs control access under the ALRA and in 2008, the High Court decision on the *Northern Territory of Australia v Arnhem Aboriginal Land Trust* case upheld the Federal Court's assessment.

The legal case gave clarity and weight to the interpretation of the ALRA. Any activity, including licences issued under the current *Fisheries (NT) Act* 1988 (NTFA), is excluded from the intertidal waters over Aboriginal land. Access requires permission or licence granted by the relevant Aboriginal Land Trust (ALT).

Since this determination, the NLC has been working with both the Commonwealth and Territory Governments to resolve and accommodate the consistent interest of recreational, commercial and tour operators for permit free fishing access to intertidal waters over Aboriginal land. In March 2007, ahead of the High Court determination, interim commercial and recreational fishing licences and permits were granted in good-faith to the Territory by the NLC and relevant ALT until September 2009. The arrangement was agreed on the basis of extensive consultations with TOs and stakeholders to develop a comprehensive agreement arrangement. The interim arrangement has since been extended 12 times and due to expire 31 December 2016.

In 2010 the Territory proposed a settlement package in exchange for enduring and certain access to all waters on a no-fee no-permit basis. The proposal included the principle provision to resource an Aboriginal Fishing Corporation. In 2011 after considerable background research by the NLC to comprehend the extent of the intertidal entitlement and to deliver community consultation, the 102nd NLC Full Council moved to reject the settlement offered for enduring fishing access.

The 2010 settlement offer is the closet attempt to secure Aboriginal participation in both management and economic participation in marine fisheries. Unfortunately, the proposal was immature. Limited time and capacity was afforded to effectively determine the extent of an appropriate proposal and to raise community awareness and interests about this extremely complex issue. As a result, TOs did not support providing enduring access because of the multiple and still outstanding unknowns. Critical to this process is detailed economic assessments and business planning for an Aboriginal structure to support community participation in commercial fisheries, in the management of fisheries and to manage derived benefits for a very large group of beneficiaries. The Territory settlement essentially offered a list of provisions without the necessary detail of frameworks and policies required to strategically implement them and without an appropriate program to engage community perspectives.

The notion of continuing to negotiate a comprehensive arrangement ceased in 2012 subsequent to a change in the Territory leadership. Under the current government the approach has been to secure short term access arrangements in small coastal areas where it was promoted that any benefits would immediately go back to community.

**Current Position**

Currently, intertidal fishing access arrangements to Aboriginal intertidal waters is as follows:

- 20 year agreements are in place in five coastal areas.
- One 3 year area agreement, due to expire 30 June 2016.
- Two areas rejected any offer made by the Territory therefore permits are required for Upper Finniss and Cape Ford.
- The recent Kenbi settlement allows enduring permit free fishing access (announced on 6 April 2016 as part of Kenbi Land Claim).
- For all other intertidal areas over Aboriginal land an interim fishing access arrangement with the Territory is in place until 31 December 2016.

**Issues**

Overall, existing arrangements (interim and settled areas) currently offer no opportunity for TOs to secure their interests from their intertidal right, which is to engage in management decisions, control access and to secure economic development through fisheries and broader sea country management.

To date for the period 2008 – 2014, NLC has invested well over a million dollars of non-recovered funds to commission assessments of the value of commercial fisheries relevant to intertidal waters; to examine the structure and role of an Aboriginal fisheries authority to manage community benefits derived from fisheries; to deliver extensive negotiations with TOs on the 2010 Territory settlement offer and to execute six short term agreements.

NLC continues to manage in good-faith the six current agreements that have no administration costs included. The responsibility of costs associated with resolving an arrangement for the remaining intertidal area is unresolved and obstructs any progress. NLC views that any costs must be the responsibility of the Territory and or the Commonwealth if the Territory seeks to access intertidal waters over Aboriginal land for commercial or other purposes.

The original intent of the interim arrangement is not being fulfilled by the Territory. In the absence of any commitment by the Territory for community engagement or supporting the capacity of NLC to support Aboriginal interests, TOs are questioning the notion of any extension of the interim arrangement beyond December 2016. Removing the interim arrangement will have significant negative impacts on all sectors of marine fisheries, the NLC and Territory without having necessary frameworks and polices in place, such as s19 commercial land use agreements, permit systems and necessary access regulatory requirements.

Without extension, the Territory would be unprepared to regulate fishing activity under its current legislative frameworks. Critical is recognition of ALRA relevant to intertidal access under the NTFA, which remains unregulated.

The capacity of the NLC to manage several thousands of permits and hundreds of commercial lease agreements alternate to the interim arrangement is not plausible under its current administration systems. To put this in perspective, each of the ten affected ALTs in the NLC's region collectively granted a single interim licence and permit for all intertidal waters over Aboriginal land as being the most practical application. Alternatively, over 5000 agreements would have required execution by the ALTs, with respect to individual commercial licensees, for which there were over 500 at the time. As for recreational applications there would be tens of 1000's.

Central to these issues is the obvious opportunity arising from having a significant intertidal right in terms of securing economic benefit and protecting cultural values in marine fisheries, which is repeated throughout this submission. Moving to resolve the intertidal access interest first will clear a path to establish necessary regulatory frameworks from which to build our interest. Critical is commitment and resourcing from both the Commonwealth and Territory Governments to move forward under a concerted program. The intertidal right of Aboriginal people is unique to the NT and therefore requires a pragmatic approach and must be identified as a priority policy interest by both the Commonwealth and Territory Governments.

## Aboriginal Land Act

**Recommendation 5**: Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Aboriginal Land Act.

The *Aboriginal Land NT (1978) Act* (ALA) provides for control of access to Aboriginal land, certain roads bordered by Aboriginal land and the seas adjacent to Aboriginal land.

By notice in the Gazette, the Administrator can close seas adjoining and within two kilometres of Aboriginal land (from the lowest tide mark) for any purpose other than to Aboriginals who are entitled by Aboriginal tradition to enter and use those seas (Section 12 (1). A person shall not enter onto or remain on closed seas unless they have been issued with a permit by the NLC or permission granted directly from TOs (Section 14 (1).

Relevant to Section 18, access by fishers is only valid if they hold a permit/permission or a licence issued under the NTFA before a notice of a closed sea was gazetted. The licence can be renewed under this provision, but cannot be transferred.

Additionally, before entering and fishing any closed seas, the NLC should be notified. This is currently not enacted as there is no requirement under the NTFA that recognises rights under ALA or associated rules.

Two sea closures are gazetted under ALA to *'provide for the quiet enjoyment of those seas by Aboriginals who are entitled by Aboriginal tradition to enter and use those seas'*:

1. Milingimbi, Crocodile Islands and Glyde River, gazetted in 1981
2. Castlereagh Bay and Howard Island, gazetted in 1988

Both of these sea closures neighbour each other and adjacent to Aboriginal land. The area, including both sea closures and intertidal access rights, provides a significant opportunity for TOs to engage in

marine fisheries, but remains unsupported in any government programs. Additionally is the need for these legislated rights to be recognised in Territory management of marine fisheries.

The Territory should be responsible for setting policy and procedures in its administration that does not conflict with sea closures and for raising awareness of fishing sectors to mitigate compliance issues and in setting appropriate compliance measures. Notice to transit waters and for permission to access areas; how rules are administered and monitored including under the Vessel Monitoring System (VMS); responsibility of associated parties in managing and defending compliance issues requires serious consideration by the Territory and in its fishery regulations.

## Native title

**Recommendation 6**: Territory expedites and finalise outstanding land claims relevant to 'Beds and Banks'.

**Recommendation 7**: Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Native Title Act.

The *Native Title Act (1993)* (NTA) provides recognition that Indigenous people have rights and interests to their lands and waters that come from their traditional laws and customs. It strongly aligns with principles of the UNDRIP. The NTA has enabled the use of voluntary Indigenous Land Use Agreements (ILUAs) to determine agreed arrangements that enable access to lands and waters.

The two types of Native Title rights are 'exclusive', which allows Native Title holders to control access to land and waters and 'non-exclusive', which does not allow Native Title holders to control access.

Native Title rights and interests may include rights to:

- live on the area
- access the area for traditional purposes, like camping or to do ceremonies
- visit and protect important places and sites
- hunt, fish and gather food or use traditional resources like water, wood and ochre
- teach and practice law and custom on country

In the NT, coastal Native Title determinations and outstanding claims exist in the Victoria River District, Darwin and Borroloola Barkly Regions that are either non-exclusive or exclusive. The remainder of the coast is mostly Aboriginal land (relevant to ALRA).

Two Native Title determinations in the NLC region are over sea country and both are 'non-exclusive' given the inconsistencies with public rights to navigate and fish and the international rite of passage.

Croker Island is a small island (43km x 14.5km) 225km north east of Darwin, 6.5km by boat from the Cobourg Peninsula in West Arnhem Land. The waters surrounding Croker Island and adjoining Cobourg Peninsula and part of Arnhem Land ALT are the subject of the first Australian claim of Native Title over an area of sea county. The Federal Court handed down its determination on the *Yarmirr v Northern Territory* in 1998, pursuant to s 193 of the NTA giving non-exclusive Native Title rights over the sea to the claimants.

In 2005 the Federal Court handed down determination on the *Gumana v Northern Territory* Native Title claim which accounts for the lands and water in the northern section of Blue Mud Bay in East Arnhem Land ALT; the area to which TOs initiated contestation of rights to access intertidal waters over Aboriginal land.

These determinations, in accordance with and subject to traditional laws and customs as recognised rights under common law, provide for Aboriginal people the ability to hunt and gather within the claim area for the purpose of satisfying their personal, domestic or non-commercial communal needs including observing traditional, cultural, ritual and spiritual laws and customs. This includes access to the sea and sea-bed within the claim area, where the sea-bed ends at the mean low water mark and where the sea includes the waters above the sea bed within the intertidal area.

Native Title enables unobstructed access from other competing interests including commercial, recreational and fishing tour operators. However, how this is accounted in Territory administration of marine fisheries is yet to be realised. Without proper provisioning of protective measures, the benefits of Native Title will be diminished as fishing interests progressively become more competitive and marine fisheries intensify in the north.

Yet to be tested in the NT, the Akiba case (*Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013)*) provides a landmark decision on the native title right to commercial fishing. The establishment of Torres Strait Islander community engagement in marine fisheries was essentially initiated earlier in 1984 through the Torres Strait Treaty, which set out a framework to guide Australia and Papua New Guinea in providing for the management, conservation and sharing of fisheries resources in and around the Torres Strait Protected Zone. Over time participation in marine fisheries has steadily increased

- in 2008, 100% community ownership of the finfish fishery;
- in 2010, Indigenous Advisory Committee established; and
- in 2013, the Torres Strait Regional Authority agrees to pursue 100% community ownership of all fisheries.

The Akiba case represents Indigenous people's determination in taking back control of their land and sea estates and actively participating in the modern economy and clearly shows a pragmatic progressive participatory approach. In contrast, Aboriginal people in the NT have fought for recognised sea country rights, but a vast disparity continues to exist between using these interests to secure economic development through marine fisheries. Little has been achieved since the Blue Mud Bay case.

## Sacred sites

**Recommendation 8**: Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Northern Territory Aboriginal Sacred Sites Act.

The NT is unique in not only having the ALRA, but also the *Northern Territory Aboriginal Sacred Sites Act 1989* (NTASSA). In the conduct of all of its functions the NLC regards the protection of sacred sites and areas as fundamentally important and is critical in proving Aboriginal tradition and spiritual affiliation. Also in the content of the agreements it enters into on behalf of the Traditional Owners, including ILUAs made by ALTs, and in development approvals and sacred site clearances conducted

pursuant to those agreements. The ALRA (Section 69) recognises it is an offence to enter or remain on land that is a sacred site relevant to the NTASSA. Sacred sites and dreaming tracks are common in both coastal and marine environments of the NT.

The notion of sacred site includes areas of significance and that the word 'site' includes larger areas and dreaming tracks. Section 3 of the ALRA contains the definition of "sacred site"- a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, .... Further, 'Aboriginal tradition' is defined in the same section to mean – "the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships."

The purpose of the NTASSA may be deduced from the long title - "An Act to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the NT and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister, and for related purposes."

NLC recently made a submission to the Territory Chief Minister in his review on, in general, investigating the extent to which the NTASSA supports economic development in the NT and to review the scope and operation of the NTASSA and the strategic and day-to-day operations of the Aboriginal Areas Protection Authority (AAPA). The Annexure attached to this submission includes an excerpt of the notes provided in that submission to diminish any obscurity that the rights of Aboriginal people have any less significance to economic prosperity and can in fact work in tandem with development.

The Territory's review suggested that there is an 'either/or' element with sacred site protection portrayed as competing in some way with economic development. The notion of sacred sites being an impediment is evident in some commercial marine fisheries raising issues 'for the management of fisheries regarding the loss of productive fishing area to sacred sites'.

Relevant to NLC function under provisions of the ALRA is our responsibility under section 23(1)(b) - "to assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council". This includes advocating for the protection of sacred sites relevant to fishing activity.

In its submission to the Territory, the NLC recommended for legislative amendments and administrative changes to ensure requirements for 'informed consent' in issuing Authority Certificates to enable access and accordingly remove the power of the Minister to issue a certificate and any associated bias.

As a fundamental principle the NLC does not accept any proposition that may diminish or detract from present levels of sacred site protection. The NLC submission to the Territory highlighted the need to amend legislation to improve deterrence and improve process to defend compliance

measures as well as incorporate the requirement for a mandatory sacred site clearance into all relevant land use planning approvals.

The protection and regulation of sacred sites remains markedly absent in marine fisheries, including the requirement to police fishing activity in areas of significance. Under the NTFA in force November 2011, no provisions are provided relating to sacred sites.

Recently the VMS was introduced (January 2016) into the NT Barramundi fishery. NLC has requested the Territory seek a data sharing arrangement with AAPA to include spatial data of registered sacred sites to attempt improved compliance measures. Further needs are to include spatial data for closed seas under ALA and all areas of Aboriginal land inclusive of the intertidal area (irrespective of pending extension on the interim arrangement) need to be accounted.

Under the current fishing access regimes (settlements, agreements, closed seas, interim) and relevant to Aboriginal rights, licences and permits do not extinguish or otherwise affect any customary or native title interest. Fishers are required to comply with provisions of the NTASSA, ALRA, other Territory and Commonwealth laws and the NTFA and Fisheries Officers may exercise enforcement powers as specified under the NTFA. However, Aboriginal rights are not instilled in any Territory fishing legislation nor are they communicated to the wider community in context of marine fisheries.

The only mechanism for legislative change seems to be through the agreement/settlement process, which is at odds to 'normal' legislative responsibilities. Proposed amendments defined in six intertidal access agreements only consider sacred sites and no other recognised rights. The creation of transparent, fair and accountable processes by which the NLC and Territory may suspend or terminate or revoke the rights granted to an individual licensee (recreational, commercial and tour operators) on the basis of the conviction of that licensee should be enabled relevant to ALRA, ALA and NTASSA and enabled regardless of access settlement/agreement.

## Aboriginal and Torres Strait Islander Heritage Protection Act

**Recommendation 9:** Territory legislative review of Northern Territory Fisheries Act and subordinate legislative frameworks to recognise and comply with the Aboriginal and Torres Strait Islander Heritage Protection Act.

NLC recommended in its submission to the Territory on its review of the NTASSA, that measures should also be consistent with the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (HPA). Refer to the annexure of this submission on notes that highlight the significance of protecting Australia's unique Aboriginal heritage.

The HPA relates to the protection of significant Aboriginal objects and areas, including sites that have been declared in the Gazette. Significant Aboriginal area means:

- an area of land in Australia or in or beneath Australian waters;
- an area of water in Australia; or
- an area of Australian waters;
- being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

Australian waters means:

- the territorial sea of Australia and any sea on the landward side of that territorial sea;
- the territorial sea of an external Territory and any sea on the landward side of that territorial sea; or
- the sea over the continental shelf of Australia.

Offences against the Act face penalties, but its recognition and any responsibility associated to fishing activity is not reflected in the NTFA.

## Environmental Protection and Biodiversity Conservation Act

**Recommendation 10**: Review of marine fisheries management principles/policies to recognise Environment Protection and Biodiversity Conservation Act relevant to the recognition and protection of Aboriginal cultural practices.

**Recommendation 11**: Setting national standards for recognition and integration of Traditional Knowledge in fisheries management frameworks.

**Recommendation 12:** Enable participatory research and development to recognise the values of Aboriginal interests in engaging customary practices in marine fisheries management.

The following excerpt is taken from the National Indigenous Sea Country Statement (May 2012).

'As a signatory to the Convention on Biological Diversity (CBD) through the Environmental Protection and Biodiversity Conservation Act (EPBC Act) we urge Governments to acknowledge and give full account of the following:

In accordance with the CBD, Indigenous peoples must have a central role in development, implementation, evaluation of policy and legislation or administrative measures that may affect our Estate. Of key importance is Article 8 'In-Situ Conservation' and in particular Article 8(j) which states:

*Subject to National legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*

We also draw your attention to Article 10 'Sustainable Use of Components of Biological Diversity' in particular Article 10(c) which states:

*Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.'*

Relevant to the NT, Territory fisheries management and administration of relevant legislation provides no avenues for Aboriginal people to have any role in development, implementation, evaluation of policy and legislation or administrative measures that effect our estate. This

precedence should be set by the Commonwealth in adopting standards for a national approach to all marine fisheries.

## Conservation

*Northern Territory*

Under the *Territory Parks and Wildlife Conservation Act*, the Parks and Wildlife Commission develops Plans of Management and Joint Management Plans to set out how the values of parks will be managed. These include biological and natural values, cultural values, recreational and tourism values.

Plans of Management are developed in consultation with the community and are available for public comment before being tabled in the Legislative Assembly of the NT. Joint Management Plans are drafted in consultation with Aboriginal Joint Management partners. Relevant to ALRA and sea country are Territory parks: Kakadu, Channel Point Coastal Reserve, Barranyi (North Is) National Park and Limmen Bight Marine Park.

Garig Gunak Barlu National Park incorporates a Marine Park which is jointly managed with TOs, but currently undergoing a land claim which will enable transitioning full management of the Park to TOs. Given the range of interests in this park, a multi-interest stakeholder group is used to provide expertise and technical support to local interests. As such, fishing activity is allowed subject to a zoning scheme in the park and any exclusion areas are managed by Parks & Wildlife Rangers.

Engagement of environmental and Aboriginal interests in marine fisheries is limited under the current governance frameworks in the NT. Significantly lacking in the NT is a body that can facilitate and provide politically unbiased independent advice to government relevant to fishing sectors that is inclusive of a range of interests and has the ability to empower research programs to better regulate government administrative processes and manage resources.

*Commonwealth*

**Recommendation 13**: Integrative cross-jurisdictional and multi-sector approach to fisheries management.

The Commonwealth Government committed to establish a national representative system of marine protected areas in 1998, and confirmed that commitment at the 2002 World Summit for Sustainable Development. In November 2012, six new Commonwealth Marine Reserves (CMRs) were proclaimed in NT waters: Joseph Bonaparte Gulf, Oceanic Shoals, Arafura, Wessel and Limmen.

CMRs are proclaimed and managed under the EPBC Act, which requires that statutory management plans be developed and implemented by the Director of National Parks. Their management is intended to support sustainable fishery sectors.

In its submission, and similar to this one, NLC advocated for:

- Enabling Aboriginal community engagement.
- Enabling the right of free, prior and informed consent of owners and managers.
- Recognition of the inherent custodial rights and interests of Indigenous people to their sea estates.

- Aboriginal people are central to planning and management decisions and consistently throughout implementation, monitoring and evaluation of the management framework.
- Demonstrate how Indigenous rights are protected.
- Sacred sites, sites of significance and heritage are recognised and protected in the management Plans.
- Management plans are transparent and consultative with Aboriginal groups.
- The role of Indigenous Rangers is enabled.
- Joint management with Aboriginal groups and associated Ranger groups to provision in management
    - Traditional Knowledge
    - Traditional practices
    - Cultural management of sites
- Recognising the value of Traditional Knowledge of sea country.
- Enabling research and development that recognises the values of Indigenous interests to improve management regimes and key interests in their estate.

The NLC called on the Commonwealth to partner with the Territory to maintain an independent Advisory Group of key interests, inclusive of Aboriginal interests, to regulate delivery of management plans and inform necessary policy directions.

*'Governments need to adopt best practice approaches by full and effective participation of Aboriginal and Torres Strait Islander peoples ... to enhance existing processes. With this, we require Governments to review current legislation, policies, practices, and new and emerging initiatives to identify obstacles, and remove impediments, with the view of fully involving Aboriginal and Torres Strait Islander people in the control and management of the marine environment and associated biological resources and systems. In accordance with the Convention on Biological Diversity, Indigenous peoples must have a central role in development, implementation, evaluation of policy and legislation or administrative measures that may affect our Estate'*, National Indigenous Sea Country Statement, 2012.

## Indigenous Protected Areas

**Recommendation 14:** IPAs are appropriated under a statutory framework.

**Recommendation 15**: The role of Sea Country Indigenous Protected Areas are recognised and examined in fishery management and administration processes.

Indigenous Protected Areas (IPAs) are administrated through the Australian Government's Department of Environment (DOE). DOE describes an IPA as an area of Indigenous-owned land or sea where TOs have entered into an agreement with the Australian Government to promote biodiversity and cultural resource conservation relevant to the EPBC Act and meet international conservation standards. IPAs are recognised by Governments in making a significant contribution to Australian biodiversity conservation - making up over a third of Australia's National Reserve System.

Only recently have IPAs extended to sea country. IPAs involve Indigenous people managing activities within a defined boundary of marine environment; provide a framework for Indigenous communities to work with other groups who have interests in and actively use the marine environment, including

fishing sectors; and allow all stakeholders to work together towards the effective conservation and management in these areas for multiple sustainability outcomes.

IPAs have no legislative basis. That is, they are not established or managed under any Commonwealth, State or Territory law. Relevant to fisheries management, existing laws, regulations and responsibilities continue to apply in any sea country IPA - including existing bag limits and fisheries management arrangements.

An IPA is a voluntary arrangement and therefore cannot impact the activities of any non-Indigenous group. The establishment of an advisory group under this charter ensures a clear process for multi-stakeholder interests to discuss issues and recommend any course of action. Similar to many Commonwealth and Territory statutory frameworks they support the development of management plans.

Only one IPA in the NT currently extends to sea country; Dhimurru IPA. However IPAs over sea country areas are in the process of being developed for South East Arnhem Land, Marthakal, Crocodile Islands and Maningrida, which account for a significant area of east Arnhem Land coastal waters inclusive of both Territory and Commonwealth waters.

The IPA framework is exemplary of Aboriginal community participation toward achieving provisions under the EPBC Act relevant to inclusivity of Aboriginal aspirations, culture and heritage and multi-stakeholder interests comprising marine fisheries. The IPA area and criteria for management is determined by Aboriginal people, which make them culturally appropriate frameworks for implementing management regimes. IPAs employ local people in remote areas and utilise the services of Rangers, which over the years have been positioned by TOs to be the caretakers of country through an employed work force.

The role of conservation and construct of IPAs provides a robust framework from which to engage Aboriginal people and a range of stakeholders in marine fishery management.

## Territory Fisheries Management

**Recommendation 16**: The Territory is responsible for setting policy and procedures in its administration measures of fisheries regulations including raising awareness of all marine fishery sectors in complying with fisheries regulations and the broader public on marine fisheries relevant to the Aboriginal rights and multi stakeholder interests.

**Recommendation 17**: A construct/body is established to provide independent expert advice and regulatory oversight to the Territory on delivery of national and other standards for sustainable marine fisheries.

**Recommendation 18**: The construct/body regulates and measures Territory administration of fisheries regulations and marine fishery sector compliance specific to Aboriginal land rights and interests.

**Recommendation 19**: The establishment and resourcing of a community engagement framework to enable Aboriginal people to be actively involved in development,

implementation, evaluation of policy and legislation or administrative measures that effect their land and marine estates.

**Recommendation 20**: Commonwealth and Territory work with the Northern Land Council under an arrangement that includes appropriate resourcing, to progress a comprehensive framework for Aboriginal people to control access, engage in fishery management decisions and participate in fishery activities for economic benefit.

## Northern Territory Fisheries Act

The only reference to 'Aboriginal' in the NTFA is in reference to maintaining a 'stewardship of aquatic resources'.

Under the NTFA Regulations, the only reference to 'Aboriginal' applies to rules for an Aboriginal Coastal Licence (ACL), which came into effect May 2015. ACLs were previously referred to as Community Coastal Licences up until that time.

As stated in the 2009 Realfish report, as well as recognising that legislation is essentially out of step with current trends in effective fisheries management, specifically, there are no requirements:

- for management decisions to be based on scientific or economic advice
- for consultation with stakeholders
- for a strategy to guide management decisions, such as a harvest strategy.

Even with legislated recognition of Aboriginal ownership to much of the NT coast, Aboriginal people have neither secured any prospect to commercial fishing rights nor secured surety in their ability to maintain customary practices. Further, other than the role of the NLC in advocating Aboriginal rights, no community engagement framework exists to enable Aboriginal people to fully participate in any fishing sectors in terms of participating in management decision making processes and accessing markets.

### Management Advisory Committees

**Recommendation 21**: Provision Management Advisory Committees under Northern Territory Fisheries Act to recognise Traditional Owners in decision making processes.

**Recommendation 22**: Fisheries Advisory Committees (or equivalent relevant to Indigenous Protected Area construct) are reinstated across the Northern Territory to inform Management Advisory Committees and are managed independent of Government.

**Recommendation 23**: Fisheries management is inclusive of impacts from development such as biosecurity threats; changes in land management practices through increased agricultural and offshore petroleum development and waste water discharge; water security and quality; and climate adaptation.

**Recommendation 24**: Independent expert body (similar to Australian Fisheries Management Authority model) is installed in the north to provide regulatory oversight of policy, research and development advice to Management Advisory Committees and Northern Territory Government that is informed by

community engagement processes and regional advisory bodies such as Indigenous Protected Areas (refer to recommendations 17 & 22).

The Territory through its Department for Primary Industry and Fisheries (DPIF) is responsible for regulating managed fisheries under NTFA: Aquarium; Barramundi; Bait Net; Coastal Line; Coastal Net; Demersal; Development; Jigging; Mollusc; Mud Crab; Off-shore Net and Line; Pearl Oyster; Spanish Mackerel; Timor Reef and Trepang.

This is done through Management Advisory Committees (MACs) made up of key industry and stakeholder interests in giving advice to the Fisheries Director. Relevant to the NTFA Section 24, for the purposes of assisting the Director in preparing proposed fishery management plans and giving advice in relation to operative plans, the Minister may establish an advisory committee for each management area or managed fishery. At the discretion of the Minister, MACs may include members representing commercial, processing, wholesaling, retailing, recreational, consumer, or other interests in the area relating to fishing, fish, or aquatic life. NLC assumes the significant rights and interests of Aboriginal people are subsumed in 'other interest'.

Given our 'other interest' status, NLC recently became a member of MACs for Mud Crab, Offshore Snapper (Off-shore Net and Line) and Barramundi Fisheries, which presently are the only functioning committees relevant to managed species in the NT. This is an extremely challenging role for NLC with regard to appropriate technical expertise and consultative processes to enable effective informed community decision making processes.

Firstly, NLC expertise is relevant to its role as a statutory authority. Fishery expertise and resource management is not part of its NLC's remit and without an appropriate in-house and resourced program, NLC is limited in its ability to provide appropriate technical support to communities about marine fisheries. Secondly, NLC normally only advocates Aboriginal rights and interests relevant to its statutory role. Specifically, NLC is limited in its ability to make decisions unless it has gained informed consent (refer to UNDRIP and all preceding legislative frameworks that assert this right) from the affected TOs, which neither the Commonwealth, Territory nor the current MAC construct provide. MACs, and indeed legislative processes, in the NT do not deliver any community engagement process to enable free, prior and informed consent, which subsequently diminishes Aboriginal rights and interests.

Formulating and resourcing an appropriate community engagement framework (refer to recommendation 19 above) is imperative to informing the role of MAC in providing advice to the Minister that directly relates to Aboriginal rights, interests and knowledge relevant to marine fisheries.

In 1995, DPIF established and resourced regionally based Fisheries Advisory Committees to better engage Aboriginal interests. Over time these have diminished to only three committees reported to be operating. In a brief on Customary Fishery Management (2011), DPIF recognises that processes were not living up to the expectations of TOs under the committees, but in the same brief states that 'one of government commitments is increasing Aboriginal participation in the fishing industry and fisheries management.' There is little evidence of this happening five years later and of any effort to meet TOs expectations.

Similar to the model of IPAs, as presented above, the nature of the committees was to bring a range of stakeholder interests together. While these committees no longer function, their construct would significantly improve the role of existing MACs in providing more constructive and localised expertise and advice. Central, as repeated throughout this submission, is the clear need to better engage with Aboriginal communities. NLC argues however, that these committees must be managed independent of the Territory under a structured mandate for delivery, as defined by TOs and stakeholders.

Additionally, MAC interests should be broadened to consider relevant government agendas, such as Northern Development, water resource management, environment, climate change and other industry interests, i.e. tourism, biosecurity and mining (sea bed and offshore). The scope of the existing construct of MACs is partial to generally just recreational and commercial fishing sector interests, which effectually narrows the policy view and effective sustainable management practices.

Northern Development is a Commonwealth economic development priority targeting agriculture. However, marine fisheries as contributing to agricultural development, is only vaguely mentioned, even though marine fishery revenue is comparable to land based agriculture ($160M annual revenue from agriculture and horticulture combine compared to $100M from fisheries in 2009) and not yet fully developed as an industry (Realfish, 2009). The Northern Development agenda provides a significant opportunity to grow the potential of the industry and reduce the gap in Indigenous social and economic interests and cannot remain siloed from marine fishery discussions under existing Territory frameworks.

Water resource management and climate change programs must also be linked to fisheries management given that the ecology of certain species is dependent on environmental water flows and water temperature. For example, DPIF reported that fish stocks for Mud Crab and Barramundi show positive correlations with environmental factors such as rainfall and surface temperature (DPIF, 2013). The Mud Crab harvest in 2014 during average seasonal rainfall was almost double (219 tonne) that for 2015 (120 tonne), which had below average seasonal rainfall (DPIF, 2015). Fisheries management needs to factor water allocation planning processes and vice versa in determining catch quota limits and water extraction licences respectively, as well as, taking an innovative climate change adaptation approaches to managing fisheries.

AFMA, established as the Commonwealth Statutory Authority in 1992, is regarded as a successful model for fishery management relevant to setting national policy standards and research agendas. Lacking however is regulatory oversight of how these national standards are being implemented by the Territory.

AFMA's success is based on its independence and flexibility (more than normal government departments); inclusion of conservation issues; justification of management actions and expenditure; reports to stakeholders; supplies checks and balances to the Minister; maintains real partnerships with industry through the MACs; and Commissioners are selected on expertise, which minimises conflicts of interest and bias.

As submitted in recommendation 17, a construct similar to AFMA that is based on expertise is needed to better regulate policy, research and development in marine fisheries consistent with national guidelines and policy frameworks; a construct focussed on either the whole of northern Australia (relevant to commonwealth Northern Development agenda) or, preferably, the NT, given

the unique Aboriginal rights to this region. An independent expert body, informed by regional community driven advisory committees would better inform the role of MACs in providing advice to the Minister on marine fisheries. Realfish stated in its 2009 report that a properly constituted statutory authority in the NT would very likely provide improved fisheries management outcomes than the current inadequate arrangements.

### Management Plans

DPIF manages wild catch fisheries under management plans for barramundi, mud crab, trepang, coastal net, coastal line, Spanish mackerel, aquarium, demersal, Timor Reef, offshore net and line and fin fish trawls.

These fishery management plans subordinate to NTFA recognise interests of Aboriginal people in context:

'to maintain a stewardship of the fishery resource that promotes fairness, equity and access to the resource by all stakeholder groups, including:

i. indigenous people; and
ii. commercial operators; and
iii. amateur fishers; and
iv. others with an interest in the fishery resource of the Territory; and

to promote the optimum utilisation of the resource to the benefit of the community by a flexible approach to the management of the fishery resource and its habitats.'

### *Harvest strategies and customary fishing rights*

**Recommendation 25**: Commonwealth regulates implementation of National Guidelines – Fishery Harvest Strategies in State and Territory equivalent regulatory frameworks.

**Recommendation 26**: Provisions under 5.5.3 of the National Guidelines be dealt with in all Northern Territory fishery sector sharing frameworks.

**Recommendation 27**: Investment into research to qualify and quantify customary fishing values relevant to setting triggers and quotas in harvest strategies.

**Recommendation 28**: Customary fishing rights are recognised and managed separately to environmental triggers and sets the base line to other fishery sectors fishery allocation of resources.

**Recommendation 29:** Adequate resourcing to regulate the performance and any impacts to the customary fishing sector.

Balancing equity among environmental, cultural, social and commercial values is a long way from being understood in NT fisheries management and would benefit significant investment in research to determine cultural values in terms of harvest and practice. Harvest strategies are important to ensure sustainable equitable resource sharing of fisheries. The National Guidelines to develop Fishery Harvest Strategies (2014) (National Guidelines) provides a robust policy framework inclusive of Indigenous interests.

Relevant to the Territory, a further concern from a NLC perspective is that customary practices and traditional economies are unsubstantiated. Although the NTFA recognises Indigenous people as having equity and access to fisheries, how this is interpreted in subordinate policy frameworks remains abstract. NLC strongly regards that the customary practice of Aboriginal people to traditionally harvest fish is critical to all fishery harvest strategy frameworks to mitigate the potential of other fishing sectors impacting both fish stocks and customary fishing practices. This principle should be consistent across all fishery harvest strategies. Marine fisheries must recognise and include management regimes for customary fishing rights.

Definition of customary practices is hidden within terms for 'biological, economic and/or social' performance of the fishery. Qualifying and quantifying this interest will provide assurance that the perceived performance of each fishery acknowledges and supports customary fishing practices as a requisite of harvesting. NLC asserts that customary fishing practice is recognised as an independent variable in managing stocks. I.e. a harvest strategy should protect biological and customary/cultural/traditional fishing practices in the first instance and then enable or set the harvest parameters for secondary economic and social performance of the fishery (assuming commercial and recreational fishing).

Core policy principles should include a set of clear and concise objectives for customary/cultural/traditional fishing harvest that is viewed in addition to ecological objectives. Both cultural and ecological parameters should guide setting harvest reference points. Ideally, cultural limit-indicators should be viewed in addition to or on top of ecological sustainable limits or trigger reference points. That is they are identified separately and measured and monitored independently. The outcomes from this approach will better account for sustainability of the species and traditional livelihoods, and provide more robust measures to determine stock quotas for social and economic performance, which in turn will set necessary regulations.

This is highly relevant in coastal fisheries in the NT where Aboriginal people's harvest of managed species as a customary practice is significant; notably mud crab and barramundi, which are both high value fisheries in terms of economic, social and cultural values (Realfish, 2009).

Allocation/quota of traditional harvest separate to ecological parameters to define trigger points in NT fisheries management is easily justified by overarching drivers such as international obligations, fisheries and environmental legislation, which all infer Aboriginal interests and customary practice, as stated throughout this submission.

*Harvest Strategies and quota management*

**Recommendation 30:** Territory review the commercial fishery licence scheme and examine the role of Quota Management System in managing resources sustainably and equitably.

**Recommendation 31:** Territory investment in sound and transparent research to inform equity sharing decisions with regard to resource quota management systems.

Currently, the Territory manages fisheries by setting the number of licences held in each managed commercial fishery rather than using quota management system (QMS). The Territory is out of step with national and international approaches to sustainable fisheries management and equity sharing

of resources. Licences limit the number of licensees in the fishery, and therefore access into the market and doesn't account for limitations on the resource, which risks overharvesting.

### Aboriginal Coastal Licence

**Recommendation 32**: (following recommendation 20) A resourced community engagement strategy is implemented to define Aboriginal interests in participating in commercial fisheries and to set targets for programs and policy for governments and associated agencies.

The Aboriginal Coastal Licence (ACL) was introduced by the Territory to allow people the ability to participate in small scale fishing enterprises and replaces the Community Coastal Licences. However, the licence wasn't taken up because of its limitations in the type of fishing gear used, the number of catch allowed and the ability to sell only within the local community and not to retail outlets. Following the Blue Mud Bay decision and negotiations, the Community Coastal Licence was renamed ACL and changes to rules applying to the ACL came into legislation in July 2015.

In general, an ACL licensee

- is not allowed to target managed species for sale, including barramundi, king threadfin salmon, Spanish mackerel and mud crab;
- must not catch managed species within a defined area;
- must not hold a commercial licence in addition to an ACL even though different species to managed species are being targeted;
- but does allow catch to be sold to retail outlets.

Further to the limitations presented above, no programs are available to support communities to develop business entrepreneurship in marine fisheries. ACLs are managed by the Territory even though the activity of the ACL holders will mostly occur in tidal waters over Aboriginal land, relevant to the ALRA. ACL applications are not clear on terms relevant to the ALRA for informed consent of TOs. The Territory provides no indication on how harvest of resources under an ACL will be accounted and managed for future sustainability.

Although there are still a number of concerns about the Territory's approach to developing and administrating ACLs, it is the only program to encourage Aboriginal participation in 'commercial' type fishing.

## Indigenous Fisheries Management

Aboriginal people's participation in the leadership and governance around fishing sectors in the development of policy and programs is currently negligible even though this submission clearly shows it should be a prominent feature. The present perception is that government is guided only by large-scale economic gains rather than supporting small scale innovative business enterprise and holistic management practices given the Territory's lack of interest (programs, policy and practice) in engaging community aspirations.

### Commercialisation

**Recommendation 33**: (following recommendation 20) Commonwealth and Territory commits to develop a strategic policy framework to overcome both the conflict in

legislation relevant to Aboriginal rights and the barrier to Aboriginal economic participation in marine fisheries as a key policy agenda.

As iterated earlier, Aboriginal communities have property rights for 85% of the NT coastline. This significant asset that is unique to the rest of Australia provides an important opportunity for communities to create markets and build their capacity around providing services to and engaging directly in marine fisheries. However, these mostly remote Aboriginal communities have limited infrastructure or no access to programs or services and expertise that is needed to assist them in their planning and development of commercial interests.

The ideal outcome for coastal landowners is an arrangement that provides both control and income: control over all fishing sectors in waters over or adjacent to their land, and an income stream generated by all fishing interests.

The fact that Aboriginal coastal land owners do not have recognised economic rights in commercial fishing is at odds with developments in other Commonwealth countries. In both Canada and New Zealand, governments have recognised Indigenous rights in marine fisheries, leading to Indigenous people both acquiring a substantial stake in commercial fishing, and playing leading roles in fisheries and marine management.

The Indigenous owned Aotearoa Fisheries Limited (AFL) is the biggest fishing company in New Zealand owning half the country's seafood industry assets. The New Zealand case is based on the legislated statutory authority. This fisheries management model provides clear guidelines to operations and distribution of benefits to stakeholders. Though a complicated structure and decision making processes, it is a successful model for Indigenous participation reporting in 2009 to hold close to $NZ1B in assets and generating annual profits of $20M going to community benefit. A similar model is used by the Torres Strait Regional Authority which is working towards owning 100% of fishing interests in the Torres Straits.

In context of the Territory, of the four main commercial fisheries that rely of the intertidal area (mud crab, barramundi, trepang, coastal net line) about 70-75% of fishing activity occurs in tidal waters over Aboriginal land (except trepang, about 40%). The total commercial value of these four fisheries was estimated in 2009 around $19.4M, of which $12.7M was the estimated value in the intertidal area. The recreational fishing sector boasts a contribution of $100M a year through visitors and local activity in the NT, not including commercial fishing tour operator interests.

*'A $100M industry operates on the doorstep of NT Traditional Owners of sea country, yet there is very little ownership of or participation in that industry,'* RealFish, 2009.

Realfish (2009) estimated that these fisheries create about 1000 jobs of which only about 30-40 jobs were held at that time by Aboriginal people. Similarly, of the 274 commercial licences, only 4 were owned by Aboriginal people or entities.

A significant opportunity for Aboriginal people to leverage their sea country rights to alleviate poverty and support community development and improve social and culturally appropriate outcomes in remote Aboriginal communities remains devoid. The Territory remains interested in continued fishing access to intertidal waters but not forthcoming with a resourced strategic

framework to resolve this interest that continues to be in conflict with other legislated rights and interests of Aboriginal people.

One way to overcome both the conflict in legislation and the barrier to economic participation is to allocate all existing and future commercial fishing rights for inshore fisheries to the TOs. The benefits of owning commercial fishing rights fit both categories of control and economic gain. Licences/quotas could be leased to commercial fishers and generate a modest income stream and allow time for Aboriginal people to build their capacity in commercial interests, but importantly, provides the ability to control fishing access and participate in fisheries management decisions and policy directions.

Irrespective of the current legislative paradox, any proposal for Aboriginal participation in marine fishery management and commercialisation must provide, relevant to recommendation 19:

- A comprehensive community engagement strategy;
- Free, prior and informed consent of TOs;
- Leadership and sound governance systems;
- Expertise from research, industry, government and other agencies;
- All major stakeholders being genuinely engaged in any future management structure or arrangements;
- A strategic policy framework that
    - builds on existing knowledge and national and international experiences and policy standards,
    - identifies and considers gaps and impediments,
    - incorporates customary values,
    - provides sound economic assessment and business planning approach,
    - clearly defines decision making processes to manage distribution of benefits to beneficiaries, and
    - includes fair and agreed methods to allocate and reallocate resources amongst stakeholders;
- Legislative review and development of a single/seamless/simple regulatory and compliance framework;
- An effective mechanism for compensation, or industry adjustment, in cases where there are commercial losses or disadvantages associated with the resolution of intertidal access;
- Commitments from Commonwealth and Territory Governments to resourcing both strategic planning and policy implementation;
- Appropriate resourcing for the effective and efficient operation of all management, monitoring, compliance agencies, organisations and groups;
- Certainty into the future for stakeholders associated with the NT fishing and seafood industry.
- Cost efficiency considerations built into any management reforms;
- The rights, aspirations and values of stakeholders utilising the fisheries resource, particularly that of TOs are understood and recognised;
- Transparency and clarity in any process surrounding development or changes to the NT's fisheries management regime;

- Recognition and understanding of differences between recreational and customary fishing by stakeholders and the public; and
- Management frameworks implemented through a regional and/or a staged approach.

## Managing Compliance

**Recommendation 34**: Support education and funding programs to assist Aboriginal people to enter into commercial enterprises in marine fisheries and marine fisheries management.

**Recommendation 35:** Recognise and support through a strategic framework the role of Rangers in providing services in marine fisheries management.

**Recommendation 36:** Empower Aboriginal Land and Sea Rangers through legislative changes, to manage fisheries compliance and other administrative measures.

The management of fisheries compliance relevant to sacred sites and significant Aboriginal areas and objects, including incursions to the ALRA, ALA and NTSSA should be enabled through amendments to NTFA as provided in preceding recommendations.

An amendment to NTFA to empower enforcement rights of certified Rangers is provisioned under intertidal agreements. DPIF provides some resourcing to train and use the services of Rangers in fisheries patrols and surveillance. Developing a strategic framework that mobilises Rangers as a workforce in delivering services should instead be a prominent feature of fisheries and resource management and the conditions and design should be set at the discretion of Aboriginal communities.

Over 30 Ranger groups operate across the Top End delivering services such as monitoring, surveillance, compliance and research (NAILSMA 2012). Ranger activities in providing a range of services toward land and sea management is slowly advancing seaward under the construct of IPAs and meet both international conservation standards and localised cultural values and interests, as presented earlier in this submission. However, many remote areas are still without services of dedicated Rangers, a concern consistently raised by TOs. The role of Rangers is integral to fisheries management well beyond just 'train and involve' and is consistent with other current Government policies toward Closing the Gap. A strategic national approach is required to set this benchmark in fisheries and sea country management more broadly.

A fishery management strategy should be clear on its delivery of a framework that leverages existing infrastructure in remote areas and fill gaps to enable delivery of marine fishery management consistently across the north but with built in flexibility to meet localised needs. Investing in these assets will bring multiple outcomes for communities – jobs, health and wellbeing and connection to country. Improving the well-being of Aboriginal communities, as measured by those communities, would be an obvious measure of the any strategic management plan.

## Conclusions

Administration of marine fisheries regulatory frameworks in Australia must account for the recognised rights of Aboriginal people and the clear need to consult properly about their interests to participate.

*'...present structures and processes, which attempt to fit Indigenous interests to frameworks developed by and for other interests, are not working and arguably cannot work.....**Indigenous people must take a much stronger position'*** (NAILSMA 020/2013 – An Indigenous Prospectus for Northern Development: setting the agenda).

Any activity and access to intertidal waters over Aboriginal land in the NT is controlled by TOs. This must be set as the precursor in marine fisheries legislation in the NT the same as recognising Native Title rights and other policy protecting Australia's Aboriginal cultural heritage and Aboriginal people's ability to uphold their customary values, practices and economies.

Fisheries management regimes in the NT do not account for customary fishing rights and do not enable Aboriginal community participation in management and economic development. Critically, under existing arrangements, TOs are no further in securing their interests to benefit from their intertidal right to control access, engage in management decisions, and to secure economic development. Ultimately, this creates uncertainty for all major sectors in maintaining their interests. The absence of any community engagement or willingness from the Territory to resolve the ongoing intertidal access arrangement puts sector interests in a precarious position should TOs determine to disengage from an interim arrangement and deny further access in areas without a settlement or agreement.

Needed is for the Commonwealth and Territory Governments to commit to resolving the 9-year interim arrangement as a key policy priority for fisheries management in the Territory. The benefit of setting this as a strategic policy agenda will not only provide security to all fishing sectors, but establish a meaningful framework to further Aboriginal participation in marine fisheries and contribute to northern development and closing the gap strategies. Importantly, it will work to improve legislative frameworks, which currently contravene and are dissociated from Aboriginal rights and continue to exacerbate compliance issues. This requires a dedicated program with sufficient resources to support NLC engage communities and provide them with the necessary expertise to develop an appropriate access arrangement.

Aboriginal people must be fully engaged in the directives of marine fisheries relevant to the management of our marine estates. An independent expert body, similar to the construct of AFMA, but specific to the NT should regulate Territory administrative process to ensure international standards and a nationally consistent approach to fisheries management. Investment is made so management decisions are based on sound and transparent research, informed and inclusive of Traditional Knowledge and support customary practices and rights.

Regional community advisory groups made up of multiple interests should be established and resourced. Their role must be to provide advice to the independent regulatory body which develops collective positions for MACs in providing policy directives to the Minister on a range of marine fishery related matters, including environmental, climate adaptation, mining and water planning issues.

Fisheries management must be administrated through the role of Rangers as the most culturally appropriate model as designed by communities through sea country planning empowered through IPA processes.

Fundamental to providing these aspirations is resolving the intertidal access arrangement, as a necessary first step, and to properly recognise the rights and interests of Aboriginal people in fishery regulatory frameworks. Delivering these two milestones will guide the process for Aboriginal people to begin to realise social, environmental, economic, political and cultural benefits from marine fisheries.

*'a future where our custodial responsibilities are distinguished as a national asset, and our associated rights are central to all decisions affecting north Australian communities' lands, waters and resources, for the greater benefit of all Australians. Our unique and enduring values are allowed to enhance the entire Australian society and create a prosperous future built upon our own self-determined economic development strategies',* North Australian Indigenous Experts Forum, 2012.

The NLC hopes our recommendations contribute to the purposes of this Inquiry.

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*Acronyms*

| | |
|---|---|
| AAPA | Aboriginal Areas Protection Authority |
| ACL | Aboriginal Coastal Licence |
| AFMA | Australian Fisheries Management Authority |
| ALRA | *Aboriginal Land Rights (Northern Territory) Act 1976* |
| ALA | *Aboriginal Land NT (1978) Act* |
| ALT | Aboriginal Land Trust |
| CBD | Conservation Biological Diversity |
| CMR | Commonwealth Marine Reserves |
| DOE | Commonwealth Department of Environment |
| DPIF | Northern Territory Department of Primary Industry and Fisheries |
| EPBC Act | *Environment Protection and Biodiversity Conservation Act* |
| HPA | *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* |
| ILUA | Indigenous Land Use Agreement |
| Inquiry | Productivity Commission Inquiry into the regulation of Australian Marine Fisheries and Aquaculture |
| IPA | Indigenous Protected Area |
| IUCN | International Union for Conservation of Nature |
| MAC | Northern Territory Government Fishery Management Advisory Committee |
| NAILSMA | North Australian Indigenous Land and Sea Management Alliance |
| National Guidelines | National Guidelines – Fishery Harvest Strategies (2014) |
| NLC | Northern Land Council |
| NT | Northern Territory |
| NTA | *Native Title Act 1993* |
| NTASSA | *Aboriginal Sacred Sites (Northern Territory) Act 1989* |
| NTFA | *Fisheries (Northern Territory) Act* 1988 |
| Territory | Northern Territory Government |
| TK | Traditional Knowledge |
| TO | Traditional Aboriginal Owner as defined by section 3 of the *Aboriginal Land Rights Act* ALRA is the requirement that a local descent group of Aboriginals have –"...common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land" |
| UNDRIP | United Nations Declaration on the Rights of Indigenous People |
| VMS | Vehicle Monitoring System |

## Annexure

This annexure is an excerpt from the NLC submission on the Territory Review of NTSSA. The following notes are on international law and Australian commitments relevant to Aboriginal cultural rights.

The United Nations Declaration on the Rights of Indigenous People (UNDRIP)[1], endorsed by Australia in 2009, sets standards for protecting the rights of the nation's Indigenous people on any issue affecting them.

In honouring national commitments to these and other rights, governments are also obliged to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Other international instruments also set out relevant principles and practice: the World Heritage Convention (WHC)[2] and the Intangible Heritage Convention (IHC)[3] are obviously directly relevant. Guidance for management of such sites has been issued by various UN bodies or their associates under these and other conventions. The IUCN has produced guidelines and commentaries for protection of sacred natural sites that recognise the well-established contribution that they make to the conservation of landscapes and biodiversity, within protected areas and outside them[4,5]. The CBD Secretariat has issued voluntary guidelines for treatment of sacred sites and other Indigenous lands in environmental assessment[6].

*Key principles for identification protection and management of sacred sites*

Collectively, the conventions and their guidelines establish a number of robust principles for identification, protection and management of cultural heritage especially relevant to sacred sites. We summarise our view of the most important as follows:

(1) All heritage and conservation management should aim to sustain the relationships between Aboriginal people and their heritage places so that they are maintained for present and future generations[1,3].

(2) Aboriginal people must control access to information about their cultural heritage[4].

(3) Aboriginal people must themselves identify and assign significance to cultural sites and assess the seriousness of development or other impacts on them[1].

(4) Obligations to protect cultural sites extend beyond the physical sites themselves to include the maintenance of associated aspects of intangible heritage including oral traditions, application of traditional knowledge and practices, and related ceremony[4,6].

(5) Given the critical roles of sacred sites, custodians and landowners must offer free prior and informed consent before any action is taken affecting management of such sites[1,2]: and hence to refuse consent where they consider it warranted by the seriousness of the potential impacts[1,5].

(6) Proper management of sacred sites will often require sympathetic management of their surrounds, including the connections among individual sites[4].

(7) Landholders and custodians must be involved in making any land or resource management plan affecting lands or waters supporting sacred sites, including plans designed to protect sacred sites and associated heritage[6].

(8) Sacred sites often make important contributions to maintenance of attributes, including biodiversity, valued by all cultures; these roles should be recognised in decision-making[4,5].

(9) Aboriginal people require access to the human, financial, technical and legal resources needed to negotiate effectively with developers and government authorities on all impact assessments, including effects on sacred sites and their connected heritage values[1].

(10) Landowners and communities should be encouraged and provided with the necessary support and capacity to formulate their own development plans[6].

These principles provide informative criteria for evaluating present Australian law for protecting Indigenous heritage in general and sacred sites in particular. Although not spelled out here as a separate principle, it is self-evident that their application must be underpinned by Indigenous access to effective mechanisms for protection covering any action or activity with the potential to damage places, objects or relationships of people to them, including monitoring of compliance and enforcement of protection.

*National law and guidelines*

Australia is signatory to the WHC and CBD, has endorsed UNDRIP but not the IHC. The Northern Territory WH sites (Kakadu and Uluru-Kata Tjuta) are listed for cultural as well as natural attributes of outstanding universal value[7], emphasising continuity of profound Aboriginal relationships with northern Australian lands and waters. These rigorous formal recognitions of such relationships at either end of the Territory's long climatic gradient reflect the ubiquity of tangible and intangible Aboriginal heritage in and applying to Territory landscapes. Australia's failure to sign the IHC may reflect, notwithstanding references to living culture in Australia's WHC nominations, a continuing unwillingness to recognise the inseparability of cultural practice (intangible heritage) from objects and sites (the tangible).

Federal laws giving effect to or influencing performance of national commitments in Aboriginal heritage protection include:

- Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)
- Environment Protection and Biodiversity Conservation Act 1999 (EPBCA)
- Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIP)
- Protection of Movable Cultural Heritage Act 1986

ALRA clearly has application only in the Northern Territory, but is especially significant as a federal law identifying protection of sacred sites as a fundamental obligation. However, this responsibility has not been fully incorporated in other federal law.

The EPBCA implements the CBD, making provisions for Indigenous peoples' roles in natural resource management and protecting use of traditional knowledge (intangible heritage) and the management of world heritage values (including cultural values), predominantly in protected area settings. Protection is also provided under the EPBCA for sites on national and Commonwealth heritage lists.

However, a law predominantly about management of plants and animals has proved a poor vehicle for dealing with the sensitivity and complexity of both tangible and intangible Aboriginal heritage. Processes for getting on the relevant formal lists are onerous and complex because they are designed to capture a few superlative examples rather than protect features of Aboriginal landscapes and lives of local people. Lists and processes also more or less duplicate state and territory listings[8].

The ATSIHP Act can be used to protect an area of particular significance to Aboriginal people from serious and immediate threats of injury or desecration. Declaration requires a request from an Indigenous person, where there is no State or Territory law to protect that site or object. ATSIP declaration can stop activities but cannot compel conservation or repairs to damaged areas. A departmental review concluded that the act has been ineffective, even in the restricted role of "safety net", as evidenced by its very limited use[9]. The 2009 Hawke review proposed shifting ATSIHP provisions into the already cumbersome EPBCA omnibus environmental law[10], an obviously unsatisfactory solution given the acknowledged problems with that law and its processes.

The Australian Heritage Commission has issued guidelines for protecting Indigenous heritage values, emphasising proper consultation[11] as a key part of the process. However, the guidelines pre-date UNDRIP and are arguably obsolete. As already noted, the collective performance of these laws and associated practice in protection of Aboriginal heritage sites has been shown to be poor, doing little or nothing to slow rate of loss of sites[12]. Among Australian guidance documents, the 2010 guide to interpretation of UNDRIP[14] by the Australian Human Rights Commission is arguably more relevant to interactions with Aboriginal people over any land management issue, including heritage conservation and sacred site protection.

In its recent (December 2015) heritage strategy the federal government has committed to "(f)ocus protection efforts on Indigenous heritage"[14]. Part of that focus is to "promote (by 2020) a consistent approach to the recognition, protection and management of Indigenous heritage sites across Australia" including "best practice standards and guidelines for heritage conservation and management". However, it is puzzling that a new strategy committing to improved practice invokes obsolete guidance like the 2002 AHC guidelines rather than post-UNDRIP alternatives, given the emphasis in international guidance and studies on the value of approaches to Indigenous heritage based on strict observance of Indigenous rights[7,15]. Apparent disinterest in UNDRIP - the Convention is not discussed in the strategy text despite appearing in a list of related documents - and its expert interpretation in the Australian context as sources of guidance for complementary national and state/territory law and practice, is deeply troubling. This gap repeats the Productivity Commission's[16] failure to examine seriously Australia's obligations to protect cultural heritage and related rights under international law.

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