

TSRA Torres Strait Dugong & Marine Turtle Project

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DESK TOP REVIEW:

**CURRENT LEGISLATION AND POLICY CONDUCIVE TO
SUSTAINABLE COMMUNITY MANAGEMENT OF DUGONG AND
TURTLE TRADITIONAL FISHERIES IN THE TORRES STRAIT**

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Introduction

Dugong and marine turtles are iconic species in northern Australian waters to both Torres Strait Islander people and the wider community. They are of immense social, spiritual and economic importance to Torres Strait Islanders.¹ Population levels of dugong and marine turtles may continue to experience a long slow decline due in part to unsustainable hunting practices. The extent of such a decline is problematic as estimating population levels is complex and subject to considerable scientific uncertainty. In such a context law indicates precautionary measures and these could include a community based management scheme. Along with the intrinsic value of dugong and marine turtles, any further decline in these animals' populations has grave implications for the continuity of the living cultural traditions of Torres Strait Islanders.

While there is an apparent dichotomy between traditional hunting of dugong and marine turtles and threatened species conservation, it is recognized that local Indigenous people such as Torres Strait Islanders are best placed to be stewards for these animals' conservation. By adopting a sustainable use approach, Torres Strait Islanders can be in the forefront of maintaining their traditions, and at the same time ensure future generations can participate in the same traditions Torres Strait Islanders enjoy today. The importance of long-term maintenance of dugong and turtle populations is recognized in the Regional Activity Plan for Torres Strait as being 'central to the cultures and economies of the indigenous people of the region'.²

Map is courtesy of PZJA. The Marine Turtle Fishery almost identical to the dugong fishery area except that it extends past Ashmore Reef to the East 144 degrees 40 minutes and South 10 degrees 41 minutes and 17 seconds

¹Helene Marsh, Torres Strait Dugong Fishery Assessment Report. Torres Strait Fisheries Assessment Group, AFM, Canberra (1998); Donna Kwan, *Towards a sustainable indigenous fishery for dugongs in Torres Strait: a contribution of empirical data and process* (Ph D Thesis, unpublished, James Cook University, Townsville, 2002).

² Revised Final Draft Torres Strait Turtle and Dugong Fisheries Assessment Report, November 2006

In 1978 the Australian and Papuan New Guinea governments signed the Treaty that protects the traditional way of life and livelihoods of traditional inhabitants by allowing free movement and fishing rights unimpeded by sovereignty issues between the two nations. The Treaty covers the area from Latitude 10°28' (above Waibene (Thursday Island) and Muralag (Prince of Wales Islands)) to the PNG border. The protected area established by the Treaty is the Torres Strait Protected Zone. The Protected Zone has its own set of laws and regulations applying to dugong and turtle management, derived from the Treaty and enacted through *the Torres Strait Fisheries Act 1984* (Cth). The boundaries of the Torres Strait Dugong and Turtle Fisheries exceed that of the Treaty Protected Zone, and are found in the Torres Strait Fisheries Regulations.

Communities south of the Torres Strait Dugong and Turtle Fishery area are bound by Australian Native Title and Environment laws. Importantly, in some island communities on the Papuan New Guinea side outside of the Treaty there are considerable dugong and turtle fisheries and markets, for instance the Daru market. While Australian law has no application to these areas, there may be legal implications relating to commercial trade in threatened species.

There are 19 Torres Strait Islander communities located within six island/community clusters. All but the Kaiwalalgal region (Inner Island group of Kirriri (Hammond Island), Ngurupai (Horn Island), Waibene and Muralag are located in the Torres Strait Protected Zone. At the time of the 2006 census, the population of the Torres Strait was just over 8,573, with around 7,106 of either Islander or Aboriginal origin. Approximately 37,000 Torres Strait Islanders live outside the Torres Strait.³

³ Ibid

Most Torres Strait Islander communities are hybrid economies of commercial, state (welfare) and subsistence (cultural) economies.⁴ Historically dugong and turtle have been an important source of protein, and in many communities still are. A conservative estimate of the worth of dugong and turtle meat based on the price of minced meat is close to \$2 million a year.⁵ Dugong hunting is a traditional rite of passage for men, and successful hunters are highly regarded in their communities.⁶

The International, Commonwealth and Queensland Law Concerning Recognition of Indigenous and Torres Strait Islander Traditions and Community Based Sustainable Management of Dugongs and Marine Fisheries

The applicable law to the issue of dugong and marine turtle traditional hunting and conservation is formally Australian Federal law and Queensland State law. These laws reflect norms in international environmental law that are highly supportive of empowering local Indigenous communities to become significant actors in community based sustainable management and biospheres.

Customary law is outside the scope of this paper, except in so far that it is incorporated into state sanctioned community based management plans.

International Law

International law is the rules and principles that govern relationships between sovereign nations. The primary sources of international law are customary international law and convention law. Customary international law derives from long established customs and rules that by their international recognition have now

⁴ Jon Altman 'The Indigenous hybrid economy, realistic sustainable option for remote communities: Radical approach or plain common sense?' Address to Australian Fabian Society 26.10.05 www.fabian.org.au/files/051026JonAltman.pdf at 26.10.07

⁵ Ibid, 32 This figure is based upon the cost of the mince per kilo in Torres Strait in December 2005. An average size dugong has about 150 Kg of edible meat, and if 600 were killed per year, the alternative meat price would be between \$720, 000 – \$950, 000 per year. Similarly, an average turtle has 50 kg of meat, and if 1500 are killed annually, the turtle fishery is worth between \$600,000 and \$800,000 per year.

⁶ Ibid, 28

become accepted as international law. Convention and Treaty law is binding upon its signatories and is the source of international human rights and environment law. A Convention or Treaty comes into force a number of ways, the most common being ratification by a prescribed number of States, and then it is applicable only to those States.

International law in Australia is not binding unless it has been incorporated into domestic legislation. As an example, the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBCA*) incorporates provisions from the *United Nations Convention on Biological Diversity* (1992) and the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972) (the ‘World Heritage Convention’). The provisions from the Conventions in the Acts are explicitly part of Australian law.

The international law applicable to preservation of Indigenous peoples’ rights is found in International Human Rights Instruments including the *International Covenant on Civil and Political Rights* (1966) (*ICCPR*), the *International Covenant on Economic, Social and Cultural Rights* (1966) (*ICESR*), the United Nations Convention on Biological Diversity (1992) (*CBD*). The ICCPR and ICESR outline civil, political, social and cultural rights. Australia has ratified both but has not explicitly incorporated them into domestic law. Parts of the CBD have been incorporated into the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), and therefore the incorporated articles are explicitly part of Australian law.

International environmental law relating to sustainability started to be articulated at the United Nations Conference on the Human Environment in 1972, which produced the “An Action Plan For a Sustainable Future”. This plan was called the Stockholm Declaration and consisted of 26 principles relating to the preservation

and enhancement of the human environment.⁷ The principles linked human rights and environmental sustainability for the first time.⁸

In 1980 the International Union for the Conservation of Nature (IUCN) put forward the World Conservation Strategy that asserted any sound sustainable legislative strategy should include specific legislation aimed at achieving the objectives of conservation by providing for both the sustainable utilization and protection of living resources and their habitats.⁹ Based upon this strategy, Australia drew up a National Conservation Strategy in 1983, which had as its objectives the maintenance of ecological systems and genetic diversity, and the sustainable use of ecosystems.¹⁰

In the international arena, sustainable development issues were outlined by the 1987 Report of the World Commission on Environment and Development (WCED), *Our Common Future* (the Brundtland report). This report was commissioned by the United Nations to propose long-term environmental strategies for achieving sustainable development. The Brundtland Report defined 'sustainable development' as development that meets the needs of present generations while not compromising the ability of future generations to meet their needs.¹¹

In 1992, the urgent need to develop policies and principles for effecting sustainable development was revisited at the United Nations Conference on Environment and Development (UNCED), the 'Earth Summit' at Rio in June 1992. This summit brought together 170 governments and thousands of delegates. NGOs were excluded, so held their own conference on the outskirts of Rio, at Kari-oca. The

⁷ Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, 11 *Int'l Leg. Mat.* 1416 (1972)

⁸ Havemann, P and Whall, H, *The Miner's Canary: Indigenous Peoples and Sustainable Development in the Commonwealth*, Memorandum to Commonwealth Heads of Government attending the World Summit on Sustainable Development from the Commonwealth Policy Studies Unit, Institute of Commonwealth Studies, University of London 2002

⁹ IUCN, UNEP and WWF, *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, Gland, Switzerland, International Union for Conservation of Nature and Natural Resources, 1980.

¹⁰ *National Conservation Strategy for Australia: Living Resource Conservation for Sustainable Development*, AGPS, Canberra, 1983

¹¹ Gro Brundtland, *Our Common Future: The World Commission on Environment and Development* (1987)

formal documents emerging from the Earth Summit were the Rio Declaration (statement of general principles)¹², Agenda 21¹³ (an action plan), the United Nations Framework on Climate Change¹⁴, and the Convention on Biological Diversity.¹⁵

The Rio Declaration sets out 27 principles to guide the international community in achieving sustainable development. Principle 22 is of special importance and supports the case for community based management for species conservation.

Principle 22 states:

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.¹⁶

Other principles include those of intergenerational equity (Principle 3), the reduction of unsustainable patterns of production and consumption (Principle 8) and the ‘precautionary principle’ (Principle 15).

The overwhelming international acceptance of the Rio Declaration paves the way for its eventual inclusion into international customary law.

Two important concepts from Rio have been incorporated into domestic law. These are Ecologically Sustainable Development (ESD), and the Precautionary Principle.

Section 3A of the *EPBC* sets out the principles of ESD:

Principles of ecologically sustainable development

¹² Report of the UN Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992) (Earth Summit), Annex 1 *Rio Declaration on Environment and Development*, URL www.un.org/documents/ga/conf151/aconf15126-1annex1.htm viewed 11 May 2007;

¹³ *Ibid*

¹⁴ Opened for signature 4 June 1992, 1771 UNTS 164 (entered into force 21 March 1994)

¹⁵ Opened for signature 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993)

¹⁶ Report of the United Nations Conference on Environment and Development; A/CONF.151/26 (Vol. I) (1992)

The following principles are *principles of ecologically sustainable development*:

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

Subsection 3A (b) imports the *precautionary principle* into law.

The precautionary principle is defined in the *EPBCA* in s391 (2):

- (2) The *precautionary principle* is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

Ten years after Rio, the international community held the World Conference on Sustainable Development at Johannesburg in 2002. Its main objective was to measure progress made by States and the international community since Rio.

At the same time international environmental law was being developed, the United Nations was hosting conferences on the Law of the Sea. The third conference led to the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS).¹⁷ UNCLOS is an expansive document, and includes, amongst other things, an obligation on member states to conserve living marine resources¹⁸, taking into account 'the best

¹⁷ UN Doc A/Conf 62/122, (1982) 21 ILM 1261; in force 16 November 1994

¹⁸ UNCLOS article 61

scientific evidence available' to produce the maximum sustainable yield.¹⁹ Article 64 obliges State parties to conserve marine mammals and allows for prohibition, regulation or limitation of their exploitation. Australia ratified UNCLOS in 1994, while PNG has not signed the Convention.

Article 64

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

Status of International Law in Australia

Until 2003, the case of *Minister for Immigration and Ethnic Affairs v Teoh*²⁰ allowed for a *de facto* recognition of international agreements into domestic law on the grounds that if a Convention was ratified by Australia, there would be a 'legitimate expectation' that a decision-maker would act in accordance with that convention unless domestic legislation explicitly contradicted the convention.

While the High Court decision *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*²¹ dispenses with the notion of 'legitimate expectation' expounded in *Teoh*, in as much as a party can no longer have a 'legitimate expectation' that a decision-maker will take into account the contents of a convention signed or ratified by Australia, unincorporated international instruments still have relevance to Australian law. Where a statute is ambiguous, the courts

¹⁹ UNCLOS article 61(1)

²⁰ (1995) 183 CLR 273

²¹ [2003] HCA 6

should favour an interpretation that accords with Australia's obligations under a treaty or international convention.²²

Treaties

A treaty is an agreement whereby two or more states establish or seek to establish a relationship between them governed by international law.²³ The purpose of a treaty is to impose binding obligations on the States that are parties to it.²⁴ Where States are party to a Treaty that is inconsistent with a later treaty or convention, the later Treaty prevails to the extent of the inconsistency with the former treaty.²⁵ This Convention may have implications for the Torres Strait Treaty 1978 and international threatened species conventions²⁶, notwithstanding Articles in those conventions purporting to recognize Indigenous people's rights to traditional activities.

The Torres Strait Treaty

The *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters* (the Treaty) was signed by Australia and Papua New Guinea on 18 December 1978 and was ratified on 15 February 1985.

As stated in its title, the Treaty concerns maritime and sovereignty boundaries and between the two countries; these boundaries became an issue in need of clarification after PNG's independence in 1973. The Treaty also establishes a fisheries jurisdiction, which extends in some areas north of the sovereignty sea-bed jurisdiction line.

²² *Minister of State for Immigration and Ethnic Affairs v ah Hin Teoh* (1995) 128 ALR 353 at 26; *Re Minister for Immigration and Multicultural Affairs; ex Parte Lam* at 100

²³ *Vienna Convention on the Law on Treaties 1969*, Article 2(1)

²⁴ *Vienna Convention on the Law on Treaties 1969*, Article 2(1)(a)

²⁵ *Vienna Convention on the Law on Treaties 1969*, Art 30(2)

²⁶ For example, the *Convention on Biological Diversity 1992*

The Torres Strait region has been inhabited in some manner for between 2500 and 4000 years²⁷, and there is a long history of traditional movement, trade and subsistence fishing between Torres Strait Islanders and people from PNG. In acknowledgement of this history, the governments of Australia and PNG established a Protected Zone, where traditional inhabitants can move freely between borders without the need for passports or visas in pursuit of activities designated as ‘traditional’ under the Treaty.

The Treaty established the Torres Strait Joint Advisory Council to make recommendations to the parties concerning, among other things, the preservation of flora and fauna (Article 19).

The Treaty has been fully incorporated into Australian law by the *Torres Strait Fisheries Act 1984* (Cth) and the *Torres Strait Fisheries Act 1984* (Qld). The Australian Government has established the Torres Strait Protected Zone Joint Authority to manage the Protected Zone.

The Treaty protects traditional customary rights (Article 12) and also imposes obligations on both States to protect flora and fauna in, and in the vicinity of, the Protected Zone (Article.14). In 1978 when the Treaty was signed and ratified, dugong and turtle populations were not designated vulnerable and endangered they are today. There is uncertainty concerning the level of population decline between the 1970s and the 1990s²⁸ up to the present. A review of the international predicament of dugongs in 2003 summarized the situation in as follows:

“On the basis of the largely anecdotal information supplied to us..., we have evaluated the prospects of the dugong [‘]s surviving throughout its range and tentatively conclude that:

²⁷ Ian Niven and Garrick Hitchcock, Torres Strait marine subsistence specialization and terrestrial animal translocation, (2004) 3 (1) *Memoirs of the Queensland Museum, Cultural Heritage Series* 105 at 108

²⁸ Robert Johannes and W MacFarlane *Traditional fishing in the Torres Strait Islands*. CSIRO Division of Fisheries, Hobart, Australia (1991); Helene Marsh, A. N. M. Harris, Ivan Lawler ,The Sustainability of the Indigenous Dugong Fishery in Torres Strait, Australia / Papua New Guinea, (1997) *Conservation Biology* 11 (6).

- it is at risk of extinction in East Africa, India and Sri Lanka, Japan and Palau;
- its prospects are uncertain in the Arabian Gulf, East and South-east Asia and the Pacific Islands;
- its prospects are probably reasonable in the Red Sea;
- *it is probably secure in Australia, except in the urban coastal waters of Queensland, and regions close to major Indigenous hunting communities.*²⁹

The Treaty’s relevance to Dugong and Marine Turtles and Traditional Activities

Despite being in the Classes Mammalia and Reptilia respectively, dugongs and marine turtles are deemed “fisheries resources” under Article 1(c).

Article 1

(c) “fisheries resources” means all living natural resources of the sea and seabed, including all swimming and sedentary species.

Traditional fishing specifically includes dugong and turtles:

Article 1

(l) “traditional fishing” means the taking, by traditional inhabitants for their dependant’s consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle.

Only ‘traditional inhabitants’ can avail themselves to the ‘traditional fishing’ protection of the Treaty. Traditional inhabitants are defined under Article 1(m) to be Torres Strait Islanders who are Australian citizens who live in the Protected Zone or the adjacent coastal area of Australia and Papua New Guinea citizens who live in the Protected Zone or adjacent coastal area of PNG who maintain traditional customary associations with areas or features in the Protected Zone in relation to their subsistence, livelihood, social, cultural or religious activities.

²⁹ Marsh, H., H. Penrose, and C. Eros ‘A future for the dugong?’ in N. Gales, M. Hindell, and R. Kirkwood (eds.), *Marine mammals: fisheries, tourism and management issues* 2003, 383-399

Article 10 establishes and gives the purpose of the Protected Zone. Both parties have applied measures in relation to the Protected Zone in accordance with the Treaty Article 10.2 by way of the *Fisheries (Torres Strait Protected Zone) Act 1984* (PNG) and the *Torres Strait Fisheries Act 1984* (Cth).

The purpose of the Protected Zone is found at Article 10.3 and 10.4

Article 10

3. The principal purpose of the Parties in establishing the Protected Zone, and in determining its northern, southern, eastern and western boundaries, is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.

4. A further purpose of the Parties in establishing the Protected Zone is to protect and preserve the marine environment and indigenous fauna and flora in the vicinity of the Protected Zone.

Article 1(d) defines ‘free movement’ as movement by the traditional inhabitants for or in the course of traditional activities.

Migratory fauna are included in the definition of ‘indigenous fauna and flora at Article 1(e).

The Treaty imposes an obligation on State parties to protect and *preserve* dugongs and turtles. Without protection and preservation of these animals, the State parties cannot protect the traditional and cultural use of dugong and turtle.

Article 11 sets parameters to traditional fishing and clearly provides that all provisions in the Treaty concerning traditional fishing are subject to Article 14 concerning protection of fauna and flora, especially those threatened with extinction, and Article 20.2, which allows for Parties to apply conservation measures for threatened species. Article 11 further restricts traditional fishing

Free movement and traditional activities including traditional fishing

1. Subject to the other provisions in this Treaty, each party shall continue to permit free movement and the performance of lawful traditional activities in and in the vicinity of the Protected Zone by the traditional inhabitants of the other Party.
2. Paragraph 1 of this Article shall not be interpreted as sanctioning the expansion of traditional fishing by the traditional inhabitants of one Party into areas outside the Protected Zone under the jurisdiction of the Party not traditionally fished by them prior to the date of entry into force of this Treaty.
3. The provisions of this Article and other provisions of this Treaty concerning traditional fishing are subject to Article 14 and paragraph 2 of Article 20 of this Treaty.

The parameters set by Article 11 confirm that traditional activities and fishing are limited by conservation measures to protect threatened species. The use of the phrase *lawful traditional activities* presupposes that the Parties can declare some traditional activities *unlawful*. The limitations in Article 11.3 explicitly concerned with protection of threatened species is juxtaposed with the Article 11.1's provision of 'lawful traditional activities', and contemplates the Parties' intention for traditional activities to be subordinate with conservation interests of threatened and endangered species.

Traditional inhabitants from both Papua New Guinea (PNG) and Australia have the same traditional customary rights in each other's national territory if those rights are acknowledged by that Nation's traditional inhabitants (Article 12):

Article 12 Traditional customary rights

Where the traditional inhabitants of one Party enjoy traditional customary rights of access to and usage of areas of land, seabed, seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the Party, and those rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall

permit the continued exercise of those rights on conditions not less favourable than those applying to those rights of its own traditional inhabitants.

Article 12 allows traditional people from PNG who are recognized as such by traditional people from Australia to participate in the same customary activities, essentially removing the artificial delineation of PNG and Australia for traditional peoples who have always lived and traversed the region without regard for national borders. Article 12 allows Australian traditional inhabitant nationals the same rights when on the PNG side as the PNG traditional inhabitants. Article 12 does not provide for all PNG nationals to traditionally fish in Australian waters, only those PNG Torres Strait Islanders acknowledged as traditional by Australian Torres Strait Islanders in the vicinity of the PNG nationals. The Article allows Australian national traditional inhabitants to practice their customs in PNG waters where they are recognized as being traditional inhabitants by the PNG nationals. Article 12 does not prevent the Australian government from imposing obligations on Torres Strait Islanders to protect dugong and turtle stocks from over-exploitation because the PNG government has no such regulations, but it does allow the Australian government and its agencies (which may delegate to community-based management groups) to impose the same obligations on PNG national traditional inhabitants in the Protected Zone as it does Australian nationals.

Article 14 Protection of fauna and flora

1. Each Party shall, in and in the vicinity of the Protected Zone, use its best endeavours to-

- (a) identify and protect species of indigenous fauna and flora that are or may become threatened with extinction;

.....

2. Notwithstanding any other provision of this Treaty except paragraph 4 of this Article, a Party may implement within its area of jurisdiction measures to protect species of indigenous fauna and flora which are or may become threatened with extinction or which either Party has an obligation to protect under international law.....

4. In giving effect to the provisions of this Article, each party shall use its best endeavours to minimize any restrictive effects on the traditional activities of the traditional inhabitants.

Article 20 Priority of traditional fishing and application of measures to traditional fishing

...2. A Party may adopt a conservation measure consistent with the provisions of this Part which, if necessary for the conservation of a species, may be applied to traditional fishing, provided that the Party shall use its best endeavours to minimize any restrictive effects of that measure on traditional fishing.

The continued existence, enjoyment or exercise of traditional activities is impossible if the targeted species experiences a severe population decline. That regulation of an Aboriginal right does not constitute the abrogation of that right is now a well-established legal principle.³⁰ Any genuine measure to prevent dugong and turtle over-exploitation *will* affect traditional fishing.³¹ The Treaty allows for conservation measures that may be restrictive, but requires Parties to use their ‘best endeavours’ to ‘minimise any restrictive effects on the traditional activities’. Community based management is potentially a key to ensuring sustainability. Even temporary restriction that results in an increase in animal populations that is targeted by sustainable fishing in the future is far preferable than no or poor restriction that ultimately results in the collapse of the fishery. Community based management building a consensus around the need for restrictions is probably the only approach likely to succeed.

The Torres Strait Joint Advisory Council was established by Article 19 to consider:

a) issues not resolved by the liaison representatives in Article 18; b) the impact of any developments or proposals that might affect traditional inhabitants and their customary rights; and c) review and make recommendations on matters relating to effective implementation of the Treaty, including the protection and preservation of flora and fauna.

³⁰ See, for example *R. v. Sparrow*, 1986 CanLII 172 (BC C.A.), *Yanner v Eaton* (1999) 201 CLR 351 at 372, *The Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2004] FCA 298

³¹ Unsustainable traditional hunting of dugong is recognized by scientists to be the leading threatening process to the animals in the Torres Strait. See Marsh et al, n 1, 34, 44, Heinsohn et al n 43 and Johannes et al, n 27

Applicable International Law Ratified by Australia

The Convention on the International Trade in Endangered Species of Wild Fauna and Flora (1976) (CITES)

Both Papua New Guinea and Australia ratified CITES in 1976. CITES has been incorporated into the Part 13A of the *EPBC Act* is part of Australian law. Dugongs and all marine turtle species are covered by this convention. While commercial trade in these species is prohibited, there are anecdotal stories of black-market trade in dugong as far south as Mackay and Alice Springs³² and there is evidence that turtle from the Protected Zone are being sold in commercial markets of the PNG island of Daru through to Port Moresby.³³ Contracting States are bound to prevent the commercial trade in species listed in the Appendix I, and limit and license commercial trade in species in Appendix II. The Australian Customs Service is responsible for detecting breaches of CITES.

Convention on the Conservation of Migratory Species of Wild Animals 1979 (CMS)

The Convention on the Conservation of Migratory Species of Wild Animals (also known as CMS or Bonn Convention) aims to conserve terrestrial, marine and avian migratory species throughout their range on a global scale. Australia ratified the CMS on 1 September 1991. The CMS has been incorporated into the *EPBC Act*. PNG signed CMS in 1975, entering into force in 1976.

Marine Turtles are listed in Appendix I of the CMS as species that have been categorized as being in danger of extinction throughout all or a significant proportion of their range. States strive towards strictly protecting these animals, conserving or restoring the habitats in which they live, mitigating obstacles to migration and controlling other factors that might endanger them³⁴. Dugongs are listed in Appendix II as species with an unfavourable conservation status that would

³² Personal communication with Indigenous leaders. The place where the dugong was taken from was not specified.

³³ *Draft Torres Strait Turtle and Fisheries Assessment Report*, November 2006, p 18..

³⁴ *Convention on the Conservation of Migratory Species of Wild Animals* URL www.cms.int/documents/appendix/cms_app1_2.htm at 29 April 2007

benefit significantly from international co-operation organized by tailored agreements. In October 2007 it is anticipated that an international Memorandum of Understanding (MOU) concerning dugong conservation under the CMS will be signed. Signatories are expected to include both PNG and Australia.

CITES protects endangered species by focusing on threats arising out of international trade in the listed species, rather than in protection of habitat. Mindful that migratory species would be unprotected once they left the boundaries of contracting States, the international community negotiated the CMS. The CMS imposes obligations on contracting States to protect the species that migrate across national boundaries, and includes marine turtles and dugongs.³⁵

The United Nation Convention on Biological Diversity (1992) (CBD)

The CBD arose from the Earth Summit of 1992. A continuing theme through this convention is that of sustainable use of resources. ‘Sustainable use’ is defined at Article 2 to mean;

the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

The obligation under international law for PNG, Australia (working through the Protected Zone Joint Authority) to minimize human induced dugong and turtle mortality is found at Article 6:

Article 6 General Measures for Conservation and Sustainable Use

Each Contracting Party shall, in accordance with its particular conditions and capabilities:

- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the

³⁵ Ibid

Contracting Party concerned; and

(b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 8 outlines a set of obligations in the form of a policy framework for each contracting party to engage in biodiversity conservation:

Article 8 In-situ Conservation

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

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

(b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;

(c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;.....

(i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;

The obligation under Articles 8(j) and (k) are of special relevance to this discussion paper. A State party is obliged:

(j) Subject to its 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; (*our emphasis*)

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

Article 8(j) above links biodiversity conservation, participation in conservation by Indigenous and local communities, and sustainable use as principles of good governance. This sub-article is explicitly subject to national legislation, and anticipates State regulatory legislation that may override traditional rights of use in favour of protecting endangered species. The sub-article is also explicit in which traditional lifestyles shall be preserved and promoted if they are traditional lifestyles and practices relevant for the conservation and sustainable use of biodiversity. The sub-article does not deem all traditional practices as conservatory. Only those traditional lifestyles and practices relevant for the conservation and sustainable use of biodiversity are to be promoted.

Sub-article 8(j) would preclude practices such as contemporary (traditional) hunting of dugong and turtle in the Torres Strait, if it is conducted at unsustainable levels³⁶ leading to potentially serious population decline of these species.³⁷

Article 10 also provides that each contracting party shall:

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

³⁶ Helene Marsh, Ivan Lawler, Donna Kwan, Steve Delean, Kenneth Pollock, Matthew Alldredge, *The status of the dugong in Torres Strait in November 2003*. Project final report AFMA/JCU Final Report, Canberra. The Potential Biological Removal Method estimating the sustainable take of dugong in the Torres Strait based on 2003 aerial surveys is 82 dugong per year. The current take is estimated as in excess of 1000 per year. This shows a decline in the sustainable kill of 200 dugong per year using the substantially greater dugong population surveyed in 1996.

³⁷ Helene Marsh, *An Integrated Framework for the Conservation of dugongs and dugong hunting cultures in Northern Australia, Draft Final Report to Great Barrier Reef Marine Park Authority*, March 2003.

The CBD recognizes the importance of indigenous traditions and culture inasmuch as they are conservatory of biodiversity. The Convention imposes an obligation for contracting parties to ‘adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity’ (Article 10(b)). These articles provide the international legal mandate for protection/management of dugong and turtle by the Australian government in conjunction with the PZJA.

One key to good environmental governance based on community stewardship is public education and awareness. Public education and awareness is mandated by Article 13. This imposes an obligation for the Australian Government to provide resources for dugong and turtle conservation education programs.

Article 13. Public Education and Awareness

The Contracting Parties shall:

(a) Promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and

(b) Cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.

A far reaching public education campaign with real participatory input from Torres Strait Islanders, as mandated for in the CBD, must continue to be a requirement in implementing community based governance for dugong and turtle conservation.

Paris Convention Concerning the Protection of the World Natural and Cultural Heritage (1972) (World Heritage Convention)

The Torres Strait is not a part of Australian World Heritage properties, however, the adjacent Great Barrier Reef Marine Park was nominated for listing on the World Heritage Register for a whole host of ‘values’, both natural and cultural. Dugongs

and marine turtles are specifically listed values of the Great Barrier Reef Marine Park World Heritage Area.³⁸ They are migratory species dependent upon Torres Strait and the Great Barrier Reef Marine Park World Heritage Area as their habitat. Activities in the Torres Strait that negatively impact upon the values protected in the World Heritage Area constitute a threat to those values and require intervention by the State Party (Australia). The case of *Booth v Bosworth*³⁹ conclusively confirms the duty to protect values extends to activities conducted outside the World Heritage Area. *Booth* is discussed below.

Article 2 of the Convention for the Protection of the World Cultural and National Heritage done in Paris on 23 November 1972, which came into force for Australia and generally on 17 December 1975 ("the World Heritage Convention"), provides:

Article 2 Natural Heritage

For the purposes of this Convention, the following shall be considered as 'natural heritage': natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view

As the largest population of dugong in the world is found in the Torres Strait, and the Queensland government recognizes that as long as the Torres Strait dugong population remains healthy, the animals' future is secure,⁴⁰ it appears the Commonwealth also has a duty to protect any dugong and turtle that migrate to the GBR. This is discussed below under the *EPBC Act*.

³⁸ *Nomination of The Great Barrier Reef by the Commonwealth of Australia for inclusion in the World Heritage List*. Prepared by the Great Barrier Reef Marine Park Authority, Townsville, January 1981.

³⁹ [2001] FCA 1453

⁴⁰ Conservation and Management of the Dugong in Queensland 1999-2004, Environmental Protection Agency, State of Queensland <http://www.epa.qld.gov.publications/p00523aa.pdf/Conservation_and_management_of_the_dugong_in_Queensland_19992004.pdf>

Convention on Conservation of Nature in the South Pacific (1976) (Apia Convention)

The Apia Convention was open for signature for all South Pacific nations in 1977. It was not ratified by Australia until 1990, and entered into force in Australia and generally on 26 June 1990. PNG has also signed the Convention. The Convention was borne out of the Stockholm Declaration in 1972. The contracting State parties acknowledge the importance of maintaining natural resources and their ecosystems and the special importance in the South Pacific of Indigenous peoples' customs and traditional cultural practices, and the need to give due consideration to such matters.⁴¹

Articles V and VI are relevant to conservation and tradition:

Article V

1. The Contracting Parties shall, in addition to the protection given to indigenous fauna and flora in protected areas, use their best endeavours to protect such fauna and flora (special attention being given to migratory species) so as to safeguard them from unwise exploitation and other threats that may lead to their extinction.
2. Each Contracting Party shall establish and maintain a list of species of its indigenous fauna and flora that are threatened with extinction. Such lists shall be prepared as soon as possible after this Convention has come into force and shall be communicated to the body charged with the continuing bureau duties under this Convention.
3. Each Contracting Party shall protect as completely as possible as a matter of special urgency and importance the species included in the list it has established in accordance with the provisions of the last preceding paragraph. The hunting, killing, capture or collection of specimens (including eggs and shells) of such species shall be allowed only with the permission of the appropriate authority. Such permission shall be granted only under special circumstances, in order to further scientific purposes or when essential for the maintenance of the equilibrium

⁴¹ Preamble - *Convention on Conservation of Nature in the South Pacific (1976)*

of the ecosystem or for the administration of the area in which the animal or plant is found.

4. Each Contracting Party shall carefully consider the consequences of the deliberate introduction into ecosystems of species which have not previously occurred therein.

Article VI

Notwithstanding the provisions of Articles III, IV and V, a Contracting Party may make appropriate provision for customary use of areas and species in accordance with traditional cultural practices.

[Article III pertains to protected areas such as national parks]

Article VII outlines how the contracting parties will promote the Convention's objectives, especially through research, cooperation between States and public education campaigns.

Australia has ratified the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, the Bonn Convention (CMS), and the Convention on Biological Diversity, the World Heritage Convention and Apia Convention, which creates general obligations. These become enforceable only when Australia has introduced legislative provisions in domestic law.

In ratifying the above Conventions, Australia accepted obligations to adhere to their provisions. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) incorporates many Articles from the ratified environmental Conventions. The Conventions and documents arising from Rio include respect for indigenous people and their knowledge in the context of 'ecologically sustainable use'⁴². The Australian government has defined 'ecologically sustainable use in the National Strategy for the Conservation of Australia's Biodiversity' as 'the use of a species or

⁴² Article 8(j) CBD

ecosystem within the capacity of the species, ecosystem and bioregion for renewal or regeneration’.⁴³

In 2004 the sustainability of current dugong catch levels in the Torres Strait was assessed by two modeling techniques: the Potential Biological Removal (PBR)⁴⁴ approach, and the Population Viability Analysis (PVA)⁴⁵ approach. Both approaches rely on estimates the population size from aerial surveys. The aerial surveys attempt to factor in non-observance of dugong due to water turbidity and depth, the maximum rate of population increase (based on age at first calving and calving intervals).⁴⁶ Both techniques found that the level of dugong hunting in the Torres Strait is currently too high to be sustainable.⁴⁷ Nonetheless the most recent review found that no decline in dugong abundance has been detected in the 19 year time series of aerial surveys.⁴⁸ Thus the results of the science are equivocal. Several explanations for this are possible. Some of these are listed below:

1. Any decline is too slow to be detected by aerial surveys. It is notoriously difficult to detect trends in population of marine wildlife.⁴⁹
2. The aerial surveys significantly underestimate absolute dugong population size because of the difficulties of correcting for dugongs which cannot be seen due to water turbidity.

⁴³Glossary, National Strategy for the Conservation of Australia's Biological Diversity, Department of Environment, Sports and Territories, 1996 (Now Department of Environment and Water) <<http://www.environment.gov.au/biodiversity/publications/strategy/cover.html>>

⁴⁴ See Helene Marsh, Ivan Lawler, Donna Kwan, Steve Delean, Kenneth Pollock, Matthew Alldrege, Aerial surveys and the potential biological removal technique indicate that the Torres Strait dugong fishery is unsustainable, (2004) 7 *Animal Conservation* 435-443

⁴⁵ Robert Heinsohn, Robert Lacey, David Lindermayer, Helene Marsh, Donna Kwan, Ivan Lawler, Unsustainable harvest of dugong in Torres Strait and Cape York (Australia) waters: two case studies using population viability analysis, (2004) 7 *Animal Conservation* 417-425

⁴⁶ Marsh et al, above n 28

⁴⁷ Marsh et al, above n 28

⁴⁸ Helene Marsh, Amanda Hodgson, Ivan Lawler, Alana Grech, Steve Delan ‘Condition, status and trends and projected futures of the dugong in the Northern Great Barrier Reef and Torres Strait : including identification and evaluation of the key threats and evaluation of the available management options to improve its status’ Unpublished Report (August 2007) for MTSRF (Marine and Topical Research Science Facility).

⁴⁹ Barbara Taylor, M. Matinex, Tim Gerrodotte, Jay Barlow “Lessons from monitoring trends in abundance of marine mammals” (2007) 23 *Marine Mammal Science* 157-175

3. Dugongs are moving into the Torres Strait from the west in response to a decline in the population in the main hunting areas around the western and North Western Islands. Changes in conditions can result in distributional shifts with a declining population trend.
4. The (largely anecdotal) estimates of the Torres Strait dugong take are too high.
5. Dugongs are breeding faster than assumed by some of the population growth models. Recent research has recorded dugongs in the Torres Strait breeding at exceptionally small sizes which increases the likelihood that these animals are also breeding at a young ages. While this may result in population increase breeding at a young age and small size can also indicate over-exploitation.⁵⁰

Nonetheless despite uncertainty expert opinion suggests that dugong population levels are still high enough that carefully managed intervention to prevent species decline reaching a point of no return and ultimately extinction is possible. Community based management would be an integral part of this.⁵¹

The analogy between the extinction processes involving terrestrial fauna and aquatic mammals deserves attention. Studies by ecologists on extinction of mega fauna in Australia show that extinction occurs even when the rate of hunting is very low.⁵² It is very easy to overexploit large, slow reproducing animals, leading to ever-smaller populations, without ever killing large numbers of animals within a short period.⁵³ In studying the characteristics of the mega fauna that made them susceptible to extinction over species such as the red kangaroo, research has identified medium-large size, long-lived, species with late onset of sexual maturity, and low reproductive rate as those destined for extinction at even very low rates of hunting.⁵⁴ The dugongs fitting the same biological characteristics as the mega fauna is at risk

⁵⁰ Personal communication with Professor Helene Marsh 5.10.07

⁵¹ Marsh et al , above n 47

⁵² Chris Johnson, "Australian Mammals: 50,000 years of Human Impact" public lecture delivered at Raffles Function Room, Southbank Hotel and Convention Centre, 19 April 2007

⁵³ Chris Johnson, *Australia's Mammal Extinctions – A 50 000 year history* 2006, p 110.

⁵⁴ *Ibid*

of extinction too ⁵⁵ in most parts of the world with the exception currently of the Torres Strait. These findings should be a warning bell even though dugongs have been taken in Torres Strait for at least 4000 years. ⁵⁶The risk is greatest if:

1. the animals are exposed to anthropogenic mortality in all habitats in which they live,
2. human populations depend on access to mega fauna , and or
3. the animals in low density populations are still exposed to the risk of being killed.

The first condition does not apply in the Torres Strait since significant numbers of dugong occur on remote areas to the west where Indigenous hunting does not occur. The second of these conditions may apply off the coast of Papua New Guinea where food security is an issue. Condition three (3) also applies in the Torres strait where dugongs are hunted opportunistically by cray fishers and turtle hunters.⁵⁷

There is scientific uncertainty about marine turtle population sizes. The life cycle of marine turtles makes populations sizes very difficult to accurately assess and so assessment relies on interpreting results from ongoing monitoring of index nesting beaches. Data collected on Green turtles in the Northern Great Barrier Reef (a major nesting area for turtles that inhabit the Torres Strait) indicate unsustainable hunting and the probability of a severe population crash of near-adult and adult turtles within a generation.⁵⁸ Threats to marine turtles are from many factors, traditional hunting being one of many including drowning in commercial fishing nets and ghost nets, physical deterioration of the largest green turtle rookery in the

⁵⁵ Johnson, above n 47

⁵⁶ Crouch, J, McNiven I J, David , B, Rowe, C, and Holley, D 'Berberass : marine resource specialization and environmental change in the Torres Strait during the past 4000 years' (2007) 42 *Archaeology in Oceania* 49-46

⁵⁷ Personal communication with Professor Helene Marsh 5.10.07

⁵⁸ *Draft Torres Strait Turtle and Dugong Fisheries Assessment Report*, 2006, p vii

world at Raine Island and egg predation by introduced species.⁵⁹ Of concern is the nearly 100% take of eggs of all species of turtle at some nesting sites.⁶⁰

The 2006 *Draft Torres Strait Turtle and Dugong Fisheries Assessment Report* notes that there appears to be an underlying level of mistrust/distrust between indigenous groups and researchers/management agencies involved in the dugong and turtle fisheries, as evidenced by community concerns that any data collected/provided may ultimately be used in ways that are not in the communities' best interests.⁶¹ It is presumed that the communities' best interests include the continued exploitation of dugong and turtle. If these species become locally extinct there will be a permanent impairment of all interests, culture and tradition pertaining to dugong and turtle, of greater detriment than a long temporal closure of the fisheries, hence the need for communities and authorities to work in partnership. Community based sustainable management is the clear expression of that partnership. Both international law obligations as well as Commonwealth and Queensland legislation can readily accommodate a partnership approach.

Federal Legislation – Commonwealth Law

Australia has ratified the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, the Bonn Convention (CMS), the Convention on Biological Diversity, the World Heritage Convention and Apia Convention, which creates general obligations. These become enforceable only when Australia has introduced legislative provisions in domestic law

Commonwealth powers to legislate are set out in s 51 of the Constitution, and in the event that Commonwealth legislation made under one of these 'heads of power' conflicts with State legislation, s 109 of the Constitution provides that the Commonwealth legislation will prevail to the extent of the inconsistency.

⁵⁹ Colin Limpus, Jeffrey Millar, John Parmenter, Duncan Limpus, *The Green Turtle (Chelonia mydas), population of Raine Island and the Northern Great Barrier Reef: 1843-2001* (2003) 49(1) *Memoirs of the Queensland Museum*, 349

⁶⁰ *Draft Torres Strait Turtle and Dugong Fisheries Assessment Report 2006*, p vii

⁶¹ *ibid* p vi

The Torres Strait Treaty's provisions are reflected in the *Torres Strait Fisheries Act 1984* (Cth) and the *Torres Strait Fisheries Act 1984* (Qld). These complimentary Acts were enacted as part of the cooperative federalist approach to Federal-State government relations. Both Acts allow the agents of the other party to carry out functions of the other. The twin enactment of Torres Strait Fisheries legislation provides certainty for continuation of cooperative federalism in this area.

The *Torres Strait Fisheries Act 1984* (Cth)

The *Torres Strait Fisheries Act 1984* (Cth) implements the Australian government's obligations arising from the Torres Strait Treaty. The Act enables the Treaty. The Treaty dates back to 1978, at a time when the human population of the Torres Strait was smaller (5011 compared with 7,106 of either Islander or Aboriginal origin in 2006), and much less reliant on technological advances as dinghies with outboard motors. In 1970s dugong and marine turtles may also have been greater numbers⁶² and less vulnerable to anthropogenic threats.

The 1984 Act originally did not specifically state an objective, but instead, in administering the Act:

Regard shall be had to the rights and obligations conferred on Australia by the Torres Strait Treaty and in particular to the traditional way of life and livelihood of the traditional inhabitants, including their rights in relation to traditional fishing'⁶³

The Act as amended in 2007 states objectives that are much more explicit and conducive of the exercise of ministerial discretion to authorize and fund a scheme of community based management of the dugong and turtle fisheries. The new section 8 states:

Objectives to be pursued

In the administration of this Act, regard shall be had to the rights and obligations conferred on Australia by the Torres Strait Treaty and in particular to the following management priorities:

⁶² Robert Johannes et al, above n 27

⁶³ *Torres Strait Fisheries Act 1984* (Cth) s 8

- (a) to acknowledge and protect the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing;
- (b) to protect and preserve the marine environment and indigenous fauna and flora in and in the vicinity of the Protected Zone;
- (c) to adopt conservation measures necessary for the conservation of a species in such a way as to minimise any restrictive effects of the measures on traditional fishing;
- (d) to administer the provisions of Part 5 of the Torres Strait Treaty (relating to commercial fisheries) so as not to prejudice the achievement of the purposes of Part 4 of the Torres Strait Treaty in regard to traditional fishing;
- (e) to manage commercial fisheries for optimum utilisation;
- (f) to share the allowable catch of relevant Protected Zone commercial fisheries with Papua New Guinea in accordance with the Torres Strait Treaty;
- (g) to have regard, in developing and implementing licensing policy, to the desirability of promoting economic development in the Torres Strait area and employment opportunities for traditional inhabitants.

The 1984 Act originally and as amended links the twin goals of conservation and protection of traditional life and livelihoods.

Dugongs and marine turtles are still considered primarily as a fisheries resource under the Act. This classification is inconsistent with their status the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) where the animals are classed as protected migratory species and in the case of 6 species of turtles, threatened species, as well as being elements of the World Heritage values of the Great Barrier Reef World Heritage Area. Likewise under the *Nature Conservation Act 1992* (Qld) these animals are classed as threatened and protected wild life species. At recent MTSRF funded workshops convened at JCU in 2007 Torres Strait islander project officers indicated that they preferred the term ‘indigenous cultural food’ to fisheries.⁶⁴

Amendments to the *TSFA* increasingly point in the direction of Torres Strait Islander participation by requiring both the PZJA and the Minister to seek the views of traditional inhabitants in performing their duties. The Act was amended in 1996 by section 39 requires the:

⁶⁴ Personal communication from JCU Professor Helene Marsh 23.10.07

Protected Zone Joint Authority to seek views of traditional inhabitants

The Protected Zone Joint Authority shall, where it considers it appropriate to do so, seek the views of members of the Joint Advisory Council established under Article 19 of the Torres Strait Treaty who are traditional inhabitants and Australian citizens on any matter relating to a Protected Zone Joint Authority fishery where that matter may affect the interests of traditional inhabitants who are Australian citizens.

In 2007 the *TSFA* with was amended under section 13 to require the:

Minister to seek views of traditional inhabitants

The Minister shall, when he or she considers it appropriate to do so, seek the views of the members of the Joint Advisory Council established under Article 19 of the Torres Strait Treaty who are traditional inhabitants and Australian citizens on any matter relating to the administration of this Act that may affect the interests of traditional inhabitants who are Australian citizens.'

Dugongs and marine turtles are embraced in the very general definition of 'fish' under the Act even as recently amended. Under s 3(1) of the 1984 Act, 'fish' means all the natural resources of the sea and seabed, including all swimming species and sedentary organisms, but does not include cetaceans or minerals. 'Fishing' means 'the taking of fish', which includes dugong and turtles.

Traditional inhabitants, who are conferred the right to traditionally hunt and fish, are given the same meaning as in the Treaty.⁶⁵

The Act defines the limits of the Protected Zone in relation to traditional fishing. This is important because dugong and turtle are to be managed as a fishery in and in the vicinity of the Protected Zone and as a threatened species outside this area. The Protected Zone includes the area adjacent and to the north of the Treaty boundaries, in Papua New Guinea territory.⁶⁶

Importantly a statutory basis for community-managed sustainable fisheries in the Torres Strait may be found in s 3(4). Such an approach was probably not contemplated at the time of enactment in 1984. Under this section the Minister has the power under the Act to authorize certain persons or groups of persons to perform duties under the Act. Community based management groups could hypothetically be

⁶⁵ *Torres Strait Fisheries Act 1984* (Cth) s 3(1) per Article 1(m) of the Treaty

⁶⁶ *Torres Strait Fisheries Act 1984* (Cth) s 3(1) definition of Protected Zone, (b)

constituted under this power. Two of the duties included in the Act are determining management plans for fisheries (s 15A) and regulating fishing through various means (s 16). The person or groups must be officers, employees of the Commonwealth or Queensland. The Torres Strait Regional Authority (TSRA), the elected governing body for the Torres Strait, is a relevant authority under s 3(4). Delegates of the TSRA would presumably be such persons if the Minister was disposed to appoint them. Other than this useful hypothetical option inferred from s 3(4), there is *no* explicit basis for community-based management under the *Torres Strait Fisheries Act 1984*(Cth) per se. It is unlikely this was contemplated in drafting the 1984 Act.

Tradition and Traditional fishing

In the *TSFA* ‘traditional fishing’ has the same meaning as in the Torres Strait Treaty, but in the Act, the Australian Fisheries Minister may declare a method of fishing as ‘not traditional’(s 3(2)). The provision states:

The Minister may, by notice published in the *Gazette*, declare that the taking by traditional inhabitants of fish by a method, or with the use of equipment or a boat, of a kind specified in the notice is not traditional fishing.

Gazette notices are simple instruments requiring no more than a ministerial signature for them to take effect. This provision allows for a Ministerial determination on what hunting methods are deemed to be not traditional, and can be utilized as an important tool in conservation and sustainable use of dugong and turtle. There is no legislative requirement that the Minister consults with or otherwise confers with traditional hunters as to what he or she may gazette. At the same time, the Minister may take advice from traditional fishers, and it is in the Minister’s discretion to accept that advice.

What is traditional fishing? There are two views of tradition – one, the static, frozen-in-time view; and two, the dynamic, changing with the circumstances view. The Australian Law Reform Commission (ALRC), in its comprehensive report *The*

Recognition of Aboriginal Customary Law (1986) considered the tension between traditional hunting and fishing rights, conservation in depth and comparatively with other jurisdictions, notably Canada.⁶⁷ ALRC took the view that the focus should be on the purpose of the activity, not the technological method.⁶⁸ ALRC also made the presumption that traditional hunting is sustainable, and *ergo* unsustainable hunting is not traditional⁶⁹ (see however, n48-50) The ALRC's presumption about the sustainability of hunting if conducted in a traditional manner for traditional purposes is problematic in that paleontological records show this presumption is of not of universal applicability.

Judicial understandings of the nature of what is 'traditional' have been addressed by courts in Canada, the USA and New Zealand. Decisions from higher courts in such common law jurisdictions notably Canada may be of persuasive value to Australian courts and policy makers. Since the ALRC report, the Canadian Supreme Court has investigated the notion of what constitutes 'traditional' in *R v Van der Peet*.⁷⁰ In deciding if a provision of the Canadian Constitution protecting indigenous practices, the Court held that the practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society.⁷¹ Lamer CJ agreed with Wallace J.A's judgment at the British Columbian Appeal Court, in which he emphasized the interpretation of practices protected by aboriginal rights

'should not be interpreted as having the purpose of enlarging the pre-1982 concept of aboriginal rights; instead it should be seen as having the purpose of protecting from legislative encroachment those aboriginal rights that existed in 1982..... [the provision] was not enacted so as to facilitate the current objectives of the aboriginal community but was

⁶⁷Paul Havemann, Dominique Thiriet, Helene Marsh, Craig Jones, Traditional Use of Marine Resources Agreements and dugong hunting in the Great Barrier Reef World Heritage Area (2005) 22(4) *Environmental and Planning Law Journal* 258.

⁶⁸ ALRC, *The Recognition of Aboriginal Customary Law*, Vol II (1986) at 977.

⁶⁹ Ibid, cited in Havemann et al, above n 54.

⁷⁰ [1996] S.C.R 507.

⁷¹ *R v Van der Peet*, 1996 *CanLII* 216 (S.C.C) p 3.

rather enacted so as to protect “traditional aboriginal practices integral to the culture and traditional way of life of the native community.”⁷²

The Commonwealth *Torres Strait Fisheries Act* reflects the Treaty, and from the tenor of the Treaty it appears that ‘traditional fishing’ is understood to be as it was practiced when the Treaty and the Act were passed (1978 – 1984). The Minister’s ability to issue Gazette notices that restrict the implements used to kill dugongs (Ministerial Notices 41 of 1995, Notices 65 and 66 of 2004) to *waps* (spears) and boats under 6 meters long allows the Minister to perpetuate this notion of tradition to a particular point in time. The Act intends to provide for a notion of traditional fishing that is consistent with it being sustainable. Hence if current practices are unsustainable the Minister is empowered to regulate them, for instance by specifying the technology used, to render them sustainable.

Arthur⁷³ points out that the population of the Torres Strait has increased, with a corresponding change in people’s approach to food. On the mainland where the Torres Strait Islander population is now around 37,000 if dugong are now considered table food as well as feast food then demand will increase. Presumably some feasts are now larger and more frequent than in the past. Hence the need for a well-funded community based management approach is imperative to ensure a broad based understanding of the need for measures to ensure sustainability. Furthermore Torres Strait Islanders are relatively affluent compared to in the 1980s. More affluence means better dinghies and motors and hence improved hunting technology. The changes in culture and technology have been combined to potentially lead to more animals to be killed now.⁷⁴

Torres in the 1600’s and Haddon in the 1800’s both reported that they observed dugong and turtle being used as primary food supply by Islanders this use of these animals appears to be integral to Torres Strait custom. However, the apparently continuing widespread use of dugong for general consumption by a larger

⁷² *R v Van der Peet*, 1996 *CanLII* 216 (S.C.C) at [10].

⁷³ Bill Arthur, *Tradition and Legislation: Analysis of Torres Strait Treaty and Fisheries Act Terms*, Centre for Aboriginal Economic Policy Research, Australian National University, June 2004.

⁷⁴ *Ibid*

population base suggests these species may at risk of being overexploited for traditional food. Further use their meat for fund raising and changes in the technology of hunting method, allowing larger scale harvest, are incidental to custom and therefore not protected as 'traditional use'. Thus if the use of turtle and dugong expands from use in special feasts to 'table food' due to (a) increased ease of capture due to technological advances (dinghies, four wheel drives and outboard motors)⁷⁵, and/or (b) young men seeking prestige while ignoring the traditional laws and teachings of elders the fishery ceases to be traditional. This resignation may arise if the traditional laws and customs upon which dugong and turtle fisheries previously operated have been abandoned. The practice is likely to be deemed unsustainable and therefore not traditional. 'Traditional practices' are coupled to sustainability. Once these are uncoupled, unsustainable practices cease to be protected as traditional.

Further, the law makes it clear that the regulation of such traditional practices which people have a right to engage in, does not constitute abrogation of these rights.⁷⁶ Community based management is probably the only way to ensure fidelity to the practice tradition and hence to sustainability.

Fisheries research in the Torres Strait is now carried out under the auspices of AFMA and now the Marine and Tropical Sciences Research Facility (MTSRF) (as from 2007). Section 11(1) (b) of the 1984 Act empowers the Minister to undertake operations for the development of any class of activities by way of fishing in areas of Australian jurisdiction. The Minister may cause an investigation to be made into economic matters relating to any class of activity or into the fish stocks in any Australian jurisdiction.⁷⁷ The economic value to Torres Strait Islanders of the combined dugong and marine turtle fisheries is conservatively estimated to be between \$1,350,000 and \$1,750,000 per annum⁷⁸. This estimate does not include

⁷⁵ Robert Johannes and W. MacFarlane, above n 27

⁷⁶ See, for example, *Yanner v Eaton* (1999) 201 CLR 351 at 372

⁷⁷ *Torres Strait Fisheries Act 1984* (Cth) s11(2)

⁷⁸ See n 4

value of turtle eggs.⁷⁹ Pursuant to this provision, the Minister might plausibly cause an investigation to be made into the economic benefits of the dugong and turtle fishery, the costs and benefits (social, economic and environmental) of providing for an alternative of protein source to Torres Strait Islanders, and the economic costs in the event of a collapse of the two fisheries.

The 1984 Act empowers the Fisheries Minister to establish a management plan for a fishery.⁸⁰ Management plans should detail a species of fish (including dugong and turtle), a particular type of fish (male, female, juvenile etc), a spatial area, method of fishing, class of boat, class of persons and the purpose of the activities.⁸¹

A strategy for Dugong and Turtle hunting is being developed with Indigenous people in northern Australia (including Torres Strait), the *Indigenous Involvement in the Monitoring, Management and Sustainable Harvest of Marine Turtles and Dugongs in Australia – A National Partnership Approach* (the Approach). It may be a precursor to a community-based management plan under s 15A of the Act. The Approach was developed by the inter-governmental Marine and Coastal Committee Taskforce (MACC) in 2004. The Torres Strait Regional Authority was amongst the Agencies represented on the Taskforce. However, we note that the Act was legislated in 1984 and did not contemplate community-based management and subsequent amendments support this by clear inference though not directly.

While a management plan is in force, the Minister must perform his or her functions and exercise his or her powers under the Act and in relation to the fishery, in accordance with the management plan and not otherwise.⁸² In accordance with the Treaty, the Fisheries Minister may regulate fisheries for conservation measures by way of a notice published in the *Gazette*.

Section 16 of the Act empowers the Minister to prohibit the taking of marine fauna and flora and related activities, such as:

⁷⁹ *Draft Torres Strait Turtle and Dugong Fisheries Assessment Report*, November 2006

⁸⁰ *Torres Strait Fisheries Act 1984*(Cth) s 15A

⁸¹ *Torres Strait Fisheries Act 1984*(Cth) s 15A(11)

⁸² *Torres Strait Fisheries Act 1984*(Cth) s 15A(9)

- (a) prohibit the taking, processing or carrying of fish, or fish included in a class of fish specified in the notice;
- (b) prohibit the taking, processing or carrying of fish included in a class of fish specified in the notice that:
 - (i) are less than the size or weight specified in the notice
 - (ii) have a dimension less than a dimension specified in the notice
- (c) prohibit the taking, processing or carrying of fish, or a fish included in the class of fish specified in the notice, by a method, or with the use of equipment or a boat, of a kind specified in the notice.
- (h) prohibit the taking of eggs of reptiles included in a class of reptiles specified in the notice.

The Fisheries Management Notice No.65 was made in accordance with s 16. The *Torres Strait Dugong Fishery – Prohibitions on the Taking of Dugongs (Area, Gear and Method Restrictions)* prohibits the taking of dugong in the Torres Strait Dugong Fishery except by people taking dugong in the course of traditional fishing. The Notice restricts equipment to the use of a hand thrown spear on a Traditional Inhabitant Boat less than or equal to 6 metres long. Sections 15A and 16 provide scope for the Minister to regulate who conducts the dugong and turtle fisheries, and the conditions upon which they are to be conducted. It also establishes a Dugong Sanctuary in an area to the west of the Torres Strait.⁸³ There is some doubt that this is the ideal location for such a sanctuary. Evidence also suggests that the dugong sanctuary is largely ignored by Torres Strait Islanders, for both reasons of lack of knowledge that the sanctuary exists, and knowledge that the sanctuary is largely unenforced.⁸⁴ Community based management could address both dimensions of the problem with the sanctuary.

⁸³ *Fisheries Management Notice No. 65, Schedule*

⁸⁴ *Draft Torres Strait Turtle and Dugong Fisheries Assessment Report, November 2006*

Section 16(h) may be of benefit for turtle conservation. Research indicates that in many turtle hatcheries, 100% of eggs are taken from their clutches for human consumption.⁸⁵ Further, green turtles are targeted when they are fattest, as they congregate near land to lay their eggs.⁸⁶ The turtles are invariably female, and are killed before they have had a chance to lay their eggs. As green turtles do not reach sexual maturity for about thirty years, it could be decades until the impact of over fishing and collecting of eggs is witnessed as a severe and possibly irreversible population decline. Human impacts are not the sole threat to marine turtles. Of concern is the poor hatchling success in the last decade at Raine Island. Anthropogenically sourced mortality places more stress on populations already at risk of serious decline. Section 16 of the Act provides scope for immediate protection of vulnerable and endangered species in the form of prohibition of taking of the species. Prohibition though in the absence of community based stewardship may be ineffective or prohibitively expensive to enforce.

The Fisheries Management Act 1991 (Cth)

This Act does not apply to the Protected Zone (s 9), except sections 84 and 108 which pertain to powers of fisheries officers and the power to detain people contravening laws. The link between community based management groups and enforcement of the law needs exploration in detail. Small communities are often reluctant to police their own people. This is likely to mean that a partnership model involving communities and enforcement authorities empowered under State and Commonwealth laws must be forged.

⁸⁵ Ibid

⁸⁶ Ibid

The Native Title Act 1993(Cth)

The *Native Title Act 1993 (Cth) (NT Act)* was born after an intense period of backroom negotiations between the Keating government, Indigenous leaders and business leaders, primarily from the mining and pastoral sectors.⁸⁷

Section 223 of the NTA is the critical provision defining both ‘native title’ and ‘native title rights’ to hunting and fishing.

Common law rights and interests

(1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.

Native Title rights to recognition of sea country were examined in *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors*.⁸⁸ While the claimants were found to hold native title over the sea and sea-bed based on continuing observation of

⁸⁷ Ashley Lavelle, *The Mining Industry’s Campaign Against Native Title: Some explanations*, (2001) 36(1) *Australian Journal of Political Science*, 101

⁸⁸ (1998) 82 FCR 533

traditional laws and customs, the claimants had no native title rights to exclusive possession. The High Court upheld that decision, and that the public right to fish and prior fisheries legislation extinguished native title exclusive possession of fisheries. In the case of the Torres Strait, the *TSF Act* permits only traditional (and therefore exclusive to traditional inhabitants) access to dugong and marine turtle fisheries. Parliament's specific intention to control certain fisheries, including dugong and marine turtle fisheries, at the Minister's discretion (s 16 *TSF Act*), is not inconsistent with native title, and the very fact that the fisheries can be regulated presupposes the right exists.⁸⁹

As in other parts of Australia, the Indigenous population is stratified into categories by the application of Commonwealth and State laws. Laws formally bestow a variety of types of Indigenous status, depending on whether native title status has been determined. Each type of status confers distinctive rights for instance with respect to traditional uses of the marine resources such as hunting, fishing and gathering⁹⁰.

Under the *NT Act*, **native title holders** are defined as (1) the persons holding the group's native title rights or (2) the prescribed body corporate registered on the National Native Title Register as holding these rights on trust for this group.⁹¹ Native title holders hold native title rights and interests that non-native title holder Traditional Owners enjoy not "as of right" but only when these are conferred and regulated under statute. **Traditional Owners** are Aboriginal and Torres Strait Islander people who may have, but do not necessarily have a native title determination under the *NT Act*.⁹²

All traditional inhabitants of the Torres Strait Protected Zone are accorded the same rights to traditionally fish, irrespective of the *NT Act*. The *NT Act* provisions with

⁸⁹ *Yanner v Eaton* (1999) 201 CLR 351 at 372

⁹⁰ Havemann et al, above n 55.

⁹¹ *Native Title Act 1993* (Cth), s 224.

⁹² Havemann et al, above n 55.

respect to native title rights to hunting and fishing are relevant to those communities and fisheries outside the Protected Zone and its immediately adjacent area.

Section 211 of the *NT Act* confers rights on native title holders only. This section provides that native title holders can, “for the purpose of satisfying their personal, domestic or non-commercial communal needs” and “in exercise or enjoyment of their own native title rights and interests”, carry out certain activities such as hunting, fishing and gathering without holding any permit from government. Section 211 states as follows:

Preservation of certain native title rights and interests

Requirements for removal of prohibition etc on native title holders

(1) Subsection (2) applies if:

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

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

(c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc on native title holders

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

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

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

(ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and

(c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Definition of class of activity

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

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

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

The High Court looked at the effect of s 211 on hunting of species protected under State legislation in *Yanner v Eaton* [1999] HCA 53. Gummow J said that the right to hunt may be a component of native title, but individuals exercising the privilege to hunt may be defined by the distinctive customs of that community. Simply because members of a community hunted under native title did not afford protection to *all* members of that community or indigenous people in general⁹³. His Honour said:

The nature and scope of the privileges in question will vary with the traditional laws and customs of the particular community so as to accord with the distinct social structure and patterns of occupancy and use of the land of that indigenous community⁹⁴.

⁹³ at [74]

⁹⁴ *Mabo*, per Brennan J at p 61.

The Court made it clear that unless the legislature specifically extinguished the native title right to hunt, as the later amendments to the state *Fauna Conservation Act 1974* (Qld) purported to do, native title rights would prevail.⁹⁵ The act of regulating the enjoyment of rights, as mentioned above, presupposes a right to begin with. Also, there is nothing in the s 211 that exempts Native Title holders from prohibition of certain activities where prohibitions are absolute and apply to all persons.⁹⁶

The *Yanner* case began before the *Native Title Amendment Act 1998* (Cth), a legislative reaction to the High Court determination that native title could co-exist with some pastoral leases in *Wik Peoples v Queensland* (1996) 187 CLR 1. Section 211(2) (ba) is a part of the amending legislation. The amendment makes it explicit that native title exemptions from permits to hunt or fish do not apply where a law prohibits the activity absolutely except under a license or permit for a restricted set of activities specified as: research, environmental protection, public health or public safety.

Under sections 24HA⁹⁷ and 24NA⁹⁸ of the NT Act, any future act in the form of changes in legislation or the granting of permits, leases or licenses relating to the management of living aquatic resources or in relation to offshore areas in general are valid despite their likely impact on native title rights.⁹⁹ However the usual right to negotiate under s 25 of the NT Act does not apply to any future act that affects rights on the seaward side of the high water mark including in the inter-tidal zone.¹⁰⁰ This is an area of particular importance to dugongs and turtles and for dugong and turtle hunting.¹⁰¹ Native title holders can thus be excluded from negotiations concerning future acts which will affect their rights in the inter-tidal zone.¹⁰² Ultimately, government is empowered to set up permit regimes which could effectively regulate traditional hunting without negotiation with native title holders. Any future acts affecting native title rights *must* be made in accordance with Part 2, Division 3,

⁹⁵ *Yanner*, per Callinan J at [153].

⁹⁶ *Western Australia v Ward* (2002) 191 ALR at 265.

⁹⁷ Management or regulation of water and airspace. Includes living aquatic resources

⁹⁸ Acts affecting offshore places

⁹⁹ Subdivision N, Div 3 Part 2.

¹⁰⁰ *Native Title Act 1993* (Cth) s 26(3).

¹⁰¹ Perry M and Lloyd S, *Australian Native Title Law* (2003) p 302.

¹⁰² Bartlett, n 36, p 519.

Subdivision P of the NT Act or they will be invalid to the extent of inconsistency with native title.¹⁰³

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) is the Australian Government's principal piece of environmental legislation. The *EPBC Act* is applicable to Australian waters outside of the Protected Zone, and by agreement may be applicable to all waters in the Torres Strait.¹⁰⁴

The key objective is to promote Ecologically Sustainable Development (ESD), and along with promoting the conservation of biodiversity, promotes a co-operative approach with indigenous people in management of environment.

ESD is defined in s 3A (above). ESD includes applying the precautionary principle. S 391 obliges the Minister to consider the precautionary principle when making decisions. The **precautionary principle** is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.¹⁰⁵ This is especially relevant to marine turtles where full scientific certainty as to their life cycles and populations sizes is lacking.¹⁰⁶ Uncertainty is also the case with dugongs though their life cycle is relatively simpler.

The relevant principles under s 3 are:

- (1) The objects of this Act are:
 - (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national significance; and
 - (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

¹⁰³ *Native Title Act 1993*(Cth) s 25(4).

¹⁰⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 29.

¹⁰⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 391(2)

¹⁰⁶ *Draft Torres Strait Turtle and Dugong Fisheries Assessment Report*, November 2006.

- (c) to promote the conservation of biodiversity; and
- (ca) to provide for the protection and conservation of heritage; and
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
- (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
- (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- (g) to promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge.

(2) In order to achieve its objects, the Act:

- (a) recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas; and
- (b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and
- (c) provides for the intergovernmental accreditation of environmental assessment and approval processes; and
- (d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; ...
- (g) promotes a partnership approach to environmental protection and biodiversity conservation through:
 - ...
 - (iii) recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity; and
 - (iv) the involvement of the community in management planning.

As with Article 10 of the CBD, the Act does not protect and promote *all* indigenous practices; s 3 specifically recognizes the role of Indigenous people in the *conservation and sustainable use* of resources.

The *EPBC Act* regulates actions that have an impact on “matters of national environmental significance” (s 3(1) (a)). These matters include: world heritage values (dugong and marine turtle are listed as ‘world heritage values’ of the Great Barrier Reef Marine Park World Heritage Area;¹⁰⁷ Commonwealth Marine Areas (areas 3 nautical miles seaward of the Queensland coastline); listed and threatened species (dugong are listed under s 248(2) (f), all marine turtles under s 248(2) (g) and specifically leatherback turtles under s 248(2) (h)). Section 18A of the Act also contains offences to penalise the unauthorised injuring, killing, or taking of listed marine species.

The *EPBC Act* specifically recognizes native title rights of native title holders. This impacts on the application of the Act in relation to some protected species, such as dugongs and marine turtles. Under section 8 of the *EPBC Act*, rights of native title holders¹⁰⁸ are explicitly not affected by the Act. s 8 (1) of the *EPBC Act* states:

To avoid doubt, nothing in this Act affects the operation of section 211 of the *Native Title Act 1993* in relation to a provision of this Act.

The native title right to hunt was first recognised as part of the bundle of native title rights of Aboriginal and Torres Strait Islanders in *Yanner v Eaton* (1999) 201 CLR 351 and is now enshrined in the *Native Title Act 1993* (Cth) (the *NT Act*).¹⁰⁹ The *NT Act*, as discussed above, has provisions for the legislature and decision-makers to regulate, extinguish or suspend the right to fish or hunt on conservation grounds.¹¹⁰

¹⁰⁷ Lucas PHC, Webb T, Valentine PS and Marsh H, *The Outstanding Universal Value of the Great Barrier Reef World Heritage Area* (1997).

¹⁰⁸ As defined under s 211 of the *Native Title Act 1993*.

¹⁰⁹ *NT Act*, s 223(2).

¹¹⁰ *NT Act*, s 211(2)(ba)

The *EPBC Act* obliges the Commonwealth to species listed in its Annex. These are species that Australia has international obligations to protect by virtue of being signatories to the CBD, CITES and CMS. Dugongs and Marine Turtles are protected by all the conventions and the *EPBC Act*. Sections 18-20 are concerned with the protection of threatened and endangered species and migratory species. Liability is strict and penalties are heavy. Provisions exist for the Commonwealth to enter into agreements with the States to devise management plans for protected and migratory species.¹¹¹ These plans can restrict native title rights as contemplated by s 211(2) (ba) of the *NT Act*.

The Commonwealth's Marine Turtle Recovery Plan

Community based management schemes are consistent with the *EPBC Act*.

In line with the global and national threatened status of marine turtles, the federal government has implemented the Recovery Plan for Marine Turtles in Australia under Part 13, Division 5, Subdivision A. such recovery and threat abatement plans are subordinate legislation and have the force of law in Australia.¹¹² The aim of the Recovery Plan is to reduce the detrimental impacts on Australian populations of Marine Turtles and hence promote their recovery in the wild. Among the seven listed threats to turtles is 'unknown levels of harvest by Indigenous Australians'.

Specific Objective A of the Recovery Plan is:

Reduce the mortality of marine turtles and, where appropriate, increase natural survivorship, including through developing management strategies with Aboriginal and Torres Strait Islander communities for the sustainable use of marine turtles.

The Recovery Plan envisages community-based management with support from government to attain Specific Objective A. The agreements can be initiated,

¹¹¹ *EPBC Act* ss11(a), 29, 45 Also s 524 of the Act lists certain actions taken by inter alia, Commonwealth agencies, are not actions. From the non-exhaustive list, this appears to include action taken by the Commonwealth in its role in the PZJA.

¹¹² Federal Register of Legislative Instruments F2007B00180

monitored and implemented by the communities themselves, and should support humane methods of killing the turtles.¹¹³

The *EPBC Act* obliges the Minister administering the *Torres Strait Fisheries Act 1984* (Cth) to make an agreement regarding strategic assessment and policy with the Environment Minister and consider any recommendations by the Environment Minister made under the agreement.¹¹⁴

The Great Barrier Reef Marine Park World Heritage Area

The Southern section of the Torres Strait Protected Zone's *Dugong and Turtle Fisheries* are adjacent to the Great Barrier Reef World Heritage Area (GBRWHA). The GBRWHA is listed property under the international Convention for the Protection of World Cultural and Natural Heritage ("the World Heritage Convention"). The *EPBC Act* has been enacted by the Australian Parliament for the purpose, amongst other purposes, of implementing Australia's international obligations under the World Heritage Convention.

The Great Barrier Reef was nominated for inclusion on the World Heritage Register for its outstanding cultural and natural values. Specifically, dugong and marine turtle are listed as 'world heritage values' of the GBRWHA.¹¹⁵

The world's largest green turtle rookery is at Raine Island, located in the GBRWHA.¹¹⁶ While knowledge about the life cycle of marine turtles is incomplete, it is known that they have a very extensive range, and that turtles taken in the Torres Strait may well have frequented or otherwise lived in the GBRWHA and therefore be a component of the values.

¹¹³ *Recovery Plan for Marine Turtles in Australia*, pp 14-15

¹¹⁴ *EPBC Act* s 148

¹¹⁵ Above n 24

¹¹⁶ Limpus et al, above n 53

Research on dugong has uncovered their extensive range also. The Torres Strait supports the largest known dugong population in the world. These are the key populations for conservation if the status of dugong in Queensland is to be maintained.¹¹⁷ Dugongs in the Torres Strait are therefore very likely to be components of the values of the GBRMPWHA.

Section 12 of the EPBC Act imposes restrictions on the undertaking of activities which have, will have, or are likely to have, a significant impact on a declared World Heritage property. The section provides:

"(1) A person must not take an action that:

(a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or

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

An 'action'¹¹⁸ can include indigenous hunting outside of traditional rights, however a decision made by a Commonwealth or state agency is deemed 'not an action'.¹¹⁹

Action taken outside of a World Heritage area can affect the values of the World Heritage area. The cases *Booth v Bosworth*¹²⁰ and *Queensland Conservation Council Inc v Minister for the Environment and Heritage*¹²¹ are authority to show the Commonwealth has an obligation to prevent threats to World Heritage areas and their values and areas adjacent to these areas. In *Booth v Bosworth*, the question was if the electrocution of Spectacled Flying Foxes in an area adjacent to the Wet Tropics World Heritage Area (WTWHA) did, or was likely to have, a significant

¹¹⁷ *Conservation and Management of the Dugong in Queensland 1999-2004*, above n 36

¹¹⁸ 'an action' is defined by *EPBC Act* s 523.

¹¹⁹ *EPBC Act*, s 524.

¹²⁰ [2001] FCA 1453.

¹²¹ [2003] FCA 1463.

impact on the world heritage values of that area. One of the listed values of the WTWHA is the Spectacled Flying Fox. Branson J of the Federal Court said she was:

satisfied that the disappearance of the Spectacled Flying Fox from the Wet Tropics World Heritage Area, or an appreciable reduction in the numbers of Spectacled Flying Foxes within the Wet Tropics World Heritage Area, would impact on the world heritage values of the area. Either such event would tend to detract from the biological diversity of the area and from the importance and significance of the habitats contained within it for *in situ* conservation of biological diversity.

By analogy, dugong and marine turtle hunting in the Torres Strait might be construed as adverse to the Great Barrier Reef World Heritage Area and its values. Finally the Minister may issue a permit for hunting dugong and turtle if he or she is satisfied the specified action is of particular significance to indigenous tradition and will not adversely affect the survival or recovery in nature of the listed threatened species concerned.¹²² Conservation agreements may be made pursuant to Part 5, Chapter 13A if the Minister is satisfied that the agreement will result in a net benefit to the conservation of biodiversity and is not inconsistent with a recovery plan, threat abatement plan or wildlife conservation plan.¹²³

Indigenous Community Based Management under the *Great Barrier Reef Marine Park Act 1975 (Cth)*

Traditional Use of Marine Resources Agreements (TUMRAs)

TUMRAs are a Great Barrier Reef Marine Park Authority initiative to create a regulatory framework based in agreements to contribute to good governance.¹²⁴

Traditional Use of Marine Resources Agreements

¹²² *EPBC Act*, s 201.

¹²³ *EPBC Act*, s 305.

¹²⁴ Havemann et al, above n 55.

The Traditional Use of Marine Resources Agreements (TUMRA) scheme was developed by the Great Barrier Reef Marine Park Authority (GBRMPA) under the recently amended *Great Barrier Reef Marine Park Regulations 1983* and now the *GBRMP Zoning Plan 2003*.¹²⁵ TUMRAs are envisaged as the primary mechanism or management scheme for reconciling traditional uses of the marine environment, including hunting, with the conservation of biodiversity, including protected species such as the dugong, in the context of Indigenous culture and knowledge. TUMRAs aim to promote Indigenous stewardship as an aspect of co-management of the habitats of protected species through negotiation and agreement making. At present only two TUMRAs, have accredited status. One is with of the Giringun people of the Greater Hinchinbrook region.¹²⁶ The Giringun TUMRA was signed in mid-2006. In June 2007 the Dharumbal TUMRA-Woppaburra section was accredited

TUMRAs have the potential to play a constructive role in sustaining cultural survival and conservation.¹²⁷ At present they are a legislative provision of the Great Barrier Reef Marine Park Regulations, but if successful in achieving their joint objectives of conserving culture and nature, could be remodeled for the Torres Strait. One of the chief concerns with the viability of TUMRAs as well as other forms of ‘agreements’ concerns the absence of continuing commitment to long term funding for the infrastructure and Indigenous personnel to perform the conservatory stewardship functions envisaged by this model of management.¹²⁸

Queensland Legislation

State legislation is binding insofar as it does not conflict with Federal legislation. This is by virtue of s 109 of the Australian Constitution that makes state laws cede to Federal laws to the extent of any inconsistency. The State environmental legislation is applicable to waters in the Torres Strait under state jurisdiction.

¹²⁵ A parallel initiative was developed by the State of Queensland for the Queensland Barrier Reef Coastal Marine Park.

¹²⁶ Under the *GBRMP Regulations 1983* s 10.

¹²⁷ Havemann et al, above n 55.

¹²⁸ Ibid.

Queensland has jurisdiction for waters and areas below the low-water mark to 3nm in general circumstances,¹²⁹ but in the Torres Strait, fisheries jurisdiction includes dugong and turtle fisheries, which are under the control of the Joint Authority.¹³⁰

The Nature Conservation Act 1992 (Qld)

The *Nature Conservation Act 1992*(Qld) (the ‘*NC Act*’) is the principal piece of State legislation to conserve nature. The *NC Act* is applicable to waters under State jurisdiction and to turtle rookeries outside the Torres Strait Protected Zone’s jurisdiction. The Act’s objective is simply stated in section 4 to be “the conservation of nature”. The next section further states:

5. The conservation of nature is to be achieved by an integrated and comprehensive conservation strategy for the whole of Queensland that involves, among other things, the following—

...

(e) Use of protected wildlife and areas to be ecologically sustainable

- providing for the ecologically sustainable use of protected wildlife and areas by the preparation and implementation of management and conservation plans consistent with the values and needs of the wildlife or areas concerned...¹³¹

Section 5(f) stresses co-operative involvement with Torres Strait Islanders for the purposes of conservation.

5 (f) Recognition of interest of Aborigines and Torres Strait Islanders in nature and their cooperative involvement in its conservation

- the recognition of the interest of Aborigines and Torres Strait Islanders in protected areas and native wildlife;
- the cooperative involvement of Aborigines and Torres Strait Islanders in the conservation of nature

¹²⁹ *Constitutional Powers (Coastal Waters) Act 1980* (Qld) s 4(2)

¹³⁰ *Torres Strait Fisheries Act 1984* (Qld) s 13

¹³¹ See GBRMPA, *Shoalwater Bay (Dugong) Plan of Management 1997*; Queensland, *Nature Conservation (Dugong) Conservation Plan 1999*.

Section 6 provides for the Act to be administered as far as practicable in consultation with, and having regard to the views and interests of, land-holders and interested groups and persons, including Aborigines and Torres Strait Islanders. The *NC Act* places conservation as a priority, while recognizing indigenous viewpoints.

Dugongs are listed as vulnerable species under this Act, while species of marine turtles are variously listed as endangered¹³² and vulnerable.¹³³ The *NC Act* creates offences concerning the taking, keeping or using of vulnerable species without authority but permits the taking of dugongs and turtle for traditional purposes.¹³⁴ The killing of dugongs is regulated by a prohibition on the use of firearms for traditional hunting.¹³⁵

Section 93 of the *NC Act* provided for the right of native title holders subject to any applicable conservation plans. This is an example of State law imposing the sort of limitation envisaged in the new s 211(1)(ba) of the *NTA* as amended. To date, s 93 of the *NTA* remains un-proclaimed but its intent would be consistent Commonwealth *NT Act*.

The *Fisheries Act 1994 (Qld)*

The State *Fisheries Act* specifically identifies dugong and turtles as ‘protected animals under the *Nature Conservation Act 1992*’.¹³⁶ The Protected Zone area is exempt from this *Act*. The *Torres Strait Fisheries Act* (below) applies.¹³⁷

¹³² Loggerhead turtles, *Nature Conservation Regulation 1994 (Qld)* Schedule 2

¹³³ All other marine turtles, *Nature Conservation Regulation 1994 (Qld)* Schedule 3

¹³⁴ *Nature Conservation Regulation 1994 (Qld)* s 148.

¹³⁵ *Nature Conservation Regulation 1994 (Qld)* s 33(1)(d)(i).

¹³⁶ *Fisheries Act 1994 (Qld)* s 5(3)(b)

¹³⁷ *Torres Strait Fisheries Act 1984 (Qld)* s 5

The Torres Strait Fisheries Act 1984 (Qld)

The State *Torres Strait Fisheries Act* was enacted to implement the Torres Strait Treaty and protect and conserve fisheries resources.¹³⁸ It came into force at the same time as the 1984 Commonwealth *Torres Strait Fisheries Act*.¹³⁹ The *Fisheries Act 1994* (Qld) does not apply application in the Protected Zone jurisdiction or any area where there is a joint Commonwealth-State Management Plan.¹⁴⁰ For the purposes of this Act, coastal waters of Queensland are the parts of the territorial sea of Australia that are adjacent to Queensland and are in the Protected Zone or an area under proclamation by the Commonwealth Minister.¹⁴¹ ‘Traditional inhabitants’ under this Act are inclusive of people who reside above and below the delineation of the Protected Zone.¹⁴² ‘Traditional fishing’ has the same meaning as the Commonwealth Act, and is constrained by any declaration by the Federal Minister that a certain method or type of fishing is not traditional (s 3(2) of the *Torres Strait Fisheries Act 1984* (Cth)).¹⁴³

In administering this Act, the Queensland Fisheries Minister must have regard to the rights and obligations conferred on Australia by the Torres Strait Treaty and in particular to the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing.¹⁴⁴ ‘Fisheries’ are not defined solely on species, but are defined as activities identified in an arrangement, for instance, a management plan, and specified by reference to a species of fish, a type of fish (male, female), a spatial area, way of fishing, class of person or purpose of activities, amongst other descriptors.¹⁴⁵ Dugong and marine turtle fisheries are covered by this broad definition.

¹³⁸ *Torres Strait Fisheries Act 1984* (Qld) – long title of the Act

¹³⁹ *Torres Strait Fisheries Act 1984* (Qld) s 4

¹⁴⁰ *Torres Strait Fisheries Act 1984* (Qld) s 6(1)

¹⁴¹ *Torres Strait Fisheries Act 1984* (Qld) s 6(3)

¹⁴² *Torres Strait Fisheries Act 1984* (Qld), s 6(2)

¹⁴³ *Torres Strait Fisheries Act 1984* (Qld), s 6(1)

¹⁴⁴ *Torres Strait Fisheries Act 1984* (Qld), s 7, objectives to be pursued

¹⁴⁵ *Torres Strait Fisheries Act 1984* (Qld), s 10A

The Act also concurrently establishes the Joint Authority with the Commonwealth government. Sections 17, 19-20 provide for the Joint Authority to arrange to manage certain fisheries, formulate policy and coordinate with other authorities of matters of concern and implement management and action plans. Where the Joint Authority has made a fisheries management plan, s 23 provides that a Queensland officer may exercise powers and functions of the Commonwealth officer in waters adjacent to Queensland, as per Commonwealth Act.

One piece of State legislation relevant to the establishment of core funding and empowerment of Torres Strait Community based management scheme is potentially the:

The Community Services (Torres Strait) Act 1984 (Qld)

The long title of this Act is:

“An Act to provide for support, administrative services and assistance for communities resident in Torres Strait or deemed so to be and for management of lands for use by those communities and for related purposes.”

The *Community Services (Torres Strait) Act* is the enabling legislation for local government in the Torres Strait. There are presently 17 Island councils under the *Community Services (Torres Strait) Act*, and one council, the Torres Shire (includes Thursday Island, Horn Island, Prince of Wales Island, Friday Island) under the *Local Government Act 1994*.¹⁴⁶ The Island Councils have duties far greater than most other Queensland councils, for example, housing, policing and employment.¹⁴⁷ Section 45 of the Act describes the functions of Island Councils – to provide good rule and government in accordance with the customs and practices of Islanders (Ailan Kastom) and enforce their observance.¹⁴⁸ Under the Act, the councils have responsibility for natural resource management; however, the *NT Act* (Cth) gives

¹⁴⁶ *Torres Strait Community Government Review*, Green Paper, p 6

¹⁴⁷ *Ibid*

¹⁴⁸ *Ibid* 14

Prescribed Bodies Corporate (PCB) the responsibility for managing native title rights and interests.¹⁴⁹ This provision applies to dugong and turtle fisheries in the Torres Strait. PCB might be members of a community based management group but their function under the NTA is not consistent with that of a conservation agency.

As foreshadowed in the Queensland Government policy document *Local Government in the Torres Strait – a Way Forward* the recommendations of the *Local Government Reform Commission* (2007) will change the existing structure presently of local government. Presently this is based on 17 Community Councils. Recommendation 11 proposes the abolition of the existing Councils (excluding Bamaga and Seisia). A new regional local government called the Torres Strait Regional Council would replace the old structure. Some potential exists for administratively mandating the creation of community based sustainable management groups under the emerging arrangement.

The Act states unequivocally that subject to s 62 and s 93 (unproclaimed) of the *Nature Conservation Act 1992*, Torres Strait Islanders living in a council area will not be prosecuted for taking marine species by traditional means for consumption by members of their family.¹⁵⁰ The release from liability for prosecution for using the marine species does not extend to a selling, trading or bartering in these species.¹⁵¹ This release from liability provision is consistent with the Treaty and the Commonwealth *TSFA* (1984), though is inconsistent with the Queensland *NTA* (1992) as amended in 1998 as well as the Commonwealth *EPBC A*. Commonwealth legislation prevails over state legislation to the extent of any inconsistency.

Agencies and Their Roles and Policy in Community Management of Dugong and Turtle Conservation Regimes in the Torres Strait

¹⁴⁹ *Native Title Act 1993* (Cth), Part 2 Division 6

¹⁵⁰ *Community Services (Torres Strait) Act 1984*(Qld) s 184(1)

¹⁵¹ *Community Services (Torres Strait) Act 1984*(Qld) s 184(2)

Both the State and Commonwealth are extensively involved in Torres Strait environmental and fisheries governance. Further structures exist for continuous collaboration with the PNG Government under the Treaty. Thus the potential for considerable international, inter-governmental and intra-departmental cooperation and coordination concerning sustainable community based management programs for dugong and turtle conservation is clearly highly feasible and aspects of this are underway. A focused whole-of-government approach based on a permanently funded program of support for a regionally coordinated, though local community based, management scheme is an ideal outcome. No legislation inhibits this. Indeed most of the Federal and State legislation and international law implicitly and explicitly calls for such an approach.

The Torres Strait Regional Authority

The Torres Strait Regional Authority (TSRA) was established in 1994 to give Torres Strait Islanders increased control of their affairs. It is an independent agency within the Commonwealth Portfolio for Indigenous Affairs and reports directly to the Commonwealth Minister. Prior to the abolition of Aboriginal and Torres Strait Islander Commission (ATSIC), funds for the TSRA were handled by the Regional Commissioner. The TSRA now operates within the provisions of the *Aboriginal and Torres Strait Islander Act 2005 (Cth)*.¹⁵²

The TSRA aims to improve the lifestyle and well-being of Torres Strait Islander and Aboriginal people living in the region through the implementation of programs that address their poor socio-economic and health status. The vision is to empower Torres Strait Islanders to determine their own affairs based on ‘Ailan Kastom bilong Torres Strait’ and to work towards the following goals:

- gain recognition of our rights, customs and identity as indigenous peoples;

¹⁵² Torres Strait Regional Authority website
<<http://www.tsra.gov.au/www/index.cfm?ItemID=67>>

- achieve a better quality of life for all people living in Torres Strait;
- develop a sustainable economic base, provide better health and community services; and
- ensure protection of our environment.¹⁵³

Community based management of the turtle and dugong fisheries to ensure their sustainability clearly is consistent with the TSRA's chief aims. Hence the TSRA region is one of five regions across northern Australia participating in a Natural Heritage Trust-funded Dugong & Marine Turtle Management Project, coordinated through the North Australian Indigenous Land & Sea Management Alliance (NAILSMA). A Dugong & Turtle Project Facilitator is based within the TSRA Land & Sea Management Unit, and is responsible for coordinating the delivery of the project across the Torres Strait region.¹⁵⁴ A Regional Activity Plan for Torres Strait (RAPTS) was developed by TSRA in collaboration with the CRC Torres Strait to guide the implementation of activities under this project. The RAPTS includes four key components:

- community management plans,
- monitoring programs,
- catch sharing, and education, and
- awareness-raising.

Management plans generated by the Torres Strait component of the NAILSMA project will require a management vehicle e.g. community management groups to monitor the implementation of the plan and to educate the community about the purpose and rationale for such plans.

¹⁵³ Ibid

¹⁵⁴ Ibid

The Protected Zone Joint Authority

The Protected Zone Joint Authority was established by the *Torres Strait Fisheries Act 1984* (Cth) to manage fisheries in the Torres Strait Protected Zone. The PZJA consists of the Commonwealth Minister for Agriculture, Fisheries and Forestry (Chair), the Queensland Minister for Primary Industries and the Chair of the TSRA. Under agreement with Queensland, the PZJA administers fisheries beyond its southern boundary. The PZJA is advised by the Torres Strait Fisheries Management Advisory Committee consisting of representatives from Traditional inhabitants, commercial fisheries, fisheries managers and the Torres Strait Scientific Advisory Committee (TSSAC). The fisheries currently under management are prawn, tropical rock lobster, pearl shell, Spanish mackerel, beche-de-mer, trochus, finfish, barramundi and traditional fishing including turtle and dugong.

The prawn, tropical rock lobster, pearl shell, Spanish mackerel, and dugong and turtle fisheries are known as Article 22 fisheries and they are jointly managed by PNG and Australia. The two countries share the catches of the three Article 22 commercial fisheries according to formulae set out in the Torres Strait Treaty.¹⁵⁵ Australia does not permit commercial ‘fishing’ of dugong or turtle.

Community fisheries management groups, in conjunction with scientific committees, have been created for all the Article 22 fisheries *except* the dugong and turtle fisheries. Dugong and turtle fisheries scientific committees as well as community management groups could be modeled on the existing structure of the other Article 22 fisheries management groups. Dugong and turtle catch estimates for the Australian Torres Strait area have been calculated for years between 1976 and 2001 although sampling method and frequency varied.¹⁵² The estimated dugong catch during this period varied between 241 and 1226 individuals annually and turtle catch varied between 1097 and 5150 annually. There have been no quantitative estimates of turtle egg harvest made in Torres Strait. These data show

¹⁵⁵ Department of Agriculture, Forestry and Fisheries website <<http://www.daffa.gov.au>> viewed 29 April 2007.

¹⁵² Strategic Assessment Report

that the dugong and turtle fisheries are not trifling fisheries in conservation or economic and therefore cultural terms.

The Australian Fisheries Management Authority and Queensland Fisheries Service

AFMA is the statutory agency responsible for sustainable management of Australia's fisheries. It collects scientific data on Torres Strait fisheries to provide an understanding of their characteristics, and detects and investigates illegal foreign and domestic fishing in the Torres Strait.¹⁵⁶ The Queensland Fisheries Service, as delegated by the PZJA, undertakes day-to-day management of Torres Strait fisheries¹⁵⁷, including traditional fisheries.¹⁵⁸ AFMA employ staff in the Torres Strait whose brief involves the Agency's role in relation to the dugong and turtle fisheries.

The Australian Customs Service (Customs)

Customs operates under the Department of Foreign Affairs and Trade to prevent and deter movement of unlawful people and goods across the Australian border. Customs is responsible for detecting and enforcing breaches of CITES. There is anecdotal evidence that dugong and turtle meat from the Torres Strait is shipped to mainland Australia, in breach of the Torres Strait Treaty terms that hunting is allowed only for the consumption of traditional inhabitants and their descendants in and adjacent to the Protected Zone.

Environment Australia and the National Oceans Office

The Department of Environment and Water administers the *EPBC Act*, allowing for traditional hunting and fishing explicitly provided for in the Act. The Department has observer status at PZJA meetings. The Queensland Parks and Wildlife Service

¹⁵⁶ Peter Cain, *A practical guide to government management and regulation regimes over marine areas in Queensland*, Native Title Studies Centre, James Cook University, Cairns, 2004 pp 20-2

¹⁵⁷ Ibid

¹⁵⁸ Department of Primary Industries website
<<http://www.dpi.qld.gov.au/fishweb>> at 29 April 2007

(QPWS) enforces the *EPBC Act* and the *NCA Act* both of which permit lawful traditional hunting and fishing. The QPWS or else the Queensland Fisheries and Boating Patrol if appropriately funded, could serve as the enforcement arm for community-based sustainable management groups.

The National Oceans Office (NOO) is a recently constituted Commonwealth agency responsible for developing and implementing *Australia's Oceans Policy*. The Policy aims to achieve healthy oceans, ecosystems and biodiversity through regional marine planning with, amongst others, indigenous peoples in the use, conservation and management of oceans.¹⁵⁹ The NOO has begun pilot Sea Country Plans, of which five have been developed. The plans help Indigenous communities to manage their sea country along with others with an interest in that country, including government. They describe Communities' aspirations and objectives for use, conservation and management of Sea Country.¹⁶⁰ Plans that are unsupported by funds to finance management groups are likely to founder or have very low uptake from Indigenous communities such as happened with the TUMRAs in the Great Barrier Reef World Heritage Area.

The Australian Animal Welfare Strategy

Complicating the issue of sustainable community based management of traditional hunting and fishing is the question of animal welfare. The tension between metropolitan western values and traditional perspectives merits analysis and recognition as an emerging issue that is unlikely to recede in significance in the coming years.

In Queensland, traditional hunting is exempt from the cruelty provisions of the *Animal Care and Protection Act 2001* (Qld).¹⁶¹ Dugong conservation plans in

¹⁵⁹ Peter Cain, above n 145

¹⁶⁰ For example, Dhimurru Sea Country Plan, <<http://www.atns.net.au/agreement.asp?EntityID=198>>

¹⁶¹ *Animal Care and Protection Act 2001* (Qld) s 8(1).

Queensland prohibit the use of guns making humane killing difficult to achieve. Further Commonwealth legislation and regulation is currently silent on the humane killing issue.¹⁶² Indeed the requirement that dugong be hunted only by wap¹⁶³ while based on sustainability assumptions and being consistent with tradition prima facie, mandates an inhumane mode of killing¹⁶⁴ in contrast to a brain shot or decapitation. Traditional methods appear to be at odds at least with the Marine Turtle Recovery Plan that supports humane methods of killing the turtles,¹⁶⁵ as does the Australian Animal Welfare Strategy that was recently endorsed by the Primary Industries Ministerial Council.

The Federal Animals Welfare Advisory Committee is currently developing an Animal Welfare Strategy and a National Implementation Plan.¹⁶⁶ The Plan will probably become part of an animal welfare legislative framework.¹⁶⁷ Dugong and turtle management regimes may, ultimately, have to be consistent with animal welfare provisions enshrined in Commonwealth law.

Conclusion

The sustainability of dugong and marine turtles requires urgent, concerted and robust intervention; otherwise local extinction of these animals is likely. Dugong and marine turtle management strategies require *at minimum* a precautionary approach as is Australia's responsibility under the *EPBC Act*.

Torres Strait Islanders' take of these species is the major source of anthropogenic mortality in the region. Unmanaged, the continuation of the present situation carries a significant risk of contributing to extinction.

¹⁶² Dominique Thiriet, Out of the "too hard basket" – Traditional hunting and Animal Welfare, (2007) 24 *Environmental and Planning Law Journal*,

¹⁶³ Fisheries Management Notice No 65 (dugong) and Fisheries Management Notice No 66 (marine turtle).

¹⁶⁴ The *Animal Care and Protection Act 2001* (Qld), s 8, specifically exempts Aboriginal tradition and Island custom from application of the Act

¹⁶⁵ Recovery Plan for Marine Turtles in Australia, pp 14-15

¹⁶⁶ National Implementation Plan of the Animals Advisory Committee

< http://www.daffa.gov.au/__data/assets/pdf_file/146745/aaws_implementation_april06.pdf

¹⁶⁷ *ibid*

Torres Strait Islanders (in conjunction with the TSRA, Queensland and Commonwealth and PNG governments) are the key actors in the solution. Sustainable dugong and turtle populations depend on Torres Strait Islander conservatory stewardship of the resource.

Measures for Enhancing Of Indigenous Community-Based Management and Participation in the Governance Framework;

This section outlines elements of governance principles and approaches for consideration that we recommend ought to be taken into account in designing community based governance framework for Dugong and Turtle conservation in the Torres Strait.¹⁶⁸

The elements assume that the governance environment is one where government seeks to work in partnership with Indigenous communities to design mechanisms for sustainable community based management. The elements are outlined in general terms in this section from a ‘desk top’ perspective. The on the ground and place-specific application of these elements in the unique context of the peoples of Torres Strait Island communities and their culture will need local negotiation, between Island peoples and PZJA, TSRA and other stakeholders.

Dugong and turtle sustainable conservation community management groups (CMG) will need to be established wherever sustainability issues arise. The CMGs must have the capacity to implement Dugong and Turtle conservation plans which relate to national and regional fisheries and conservation bodies who can provide support, knowledge and infrastructure. CMGs are in part the vehicle for making the conservations plans and implementing these.

¹⁶⁸ The choice of elements draws in part on the CAEPR, ARC, Reconciliation Australia Indigenous Community Governance Project ‘s work Hunt, J and DE Smith *Ten Key Messages from the Preliminary Findings of the Indigenous Community Governance Project* , 2005 and their *Further Key Insights from the Indigenous Community Governance Project* , 2006” URL <<http://www.anu.edu.au/caepr/>> (10/04/07)

It will probably be necessary to establish a joint process involving Torres Strait Island and Aboriginal people and government officials to identify local priorities, traditional conservatory norms and indigenous knowledge (IK) as well as to explain and justify species management assumptions based upon western scientific knowledge (WSK). Such a joint knowledge and priority establishment process at the macro level could initiate the establishment of the entire CMG system. At the local (micro) level such a process could serve as the starting point for each CMG. MTSRF expertise could be brought to bear on the design and implementation of the macro and micro-level processes.

Guidelines for the Design of Indigenous Community Based Management

Recommended micro-level elements for the community based sustainable management of dugong and turtle fisheries focus on the CMGs as the management mechanism which will operationalize national, regional and even international plans in local terms on the local level. :

1. CMGs need to be **embedded in locally relevant familial and social relationships** and leadership structures as well as allowing **representation of a broad spectrum of stakeholders**. Thus representative of key hunters as well as the local community as a whole including women and children must be accommodated in order to ensure the inter-generational and educational dimensions of sustainability are accounted for;
2. Expectations of what CMGs can achieve must be realistic in terms of being **practically capable of implementation** reconciling local realities and resource constraints with their over-arching species sustainability mission. Basically the **greater the expectations the greater the resources** that need to be allocated for **management** as well as **law enforcement**. **Further preventive measures** to **incentivise**, motivate **and facilitate** local people to **comply** with hunting and fishing restrictions will be needed. Perhaps the provision of subsidies to buy or grow or cultivate substitute forms of protein ought to be considered.

3. There ought to be **‘cultural match’** with local and traditional norms and values and modes of social control, as far as is practicable, with the Federal, State and local laws that the CMGs must **enforce, regulate and promote and importantly educate** the community about;
4. CMGs ought to be embedded in the **local cultural geography** where there is the greatest measure of kin based homogeneity and shared Indigenous Knowledge and customs. Likewise their areas of responsibility must be compatible with optimal **bioregional fit and scale** . The scale of the operations and sphere of responsibility thus allows those most affected the most responsibility, voice and mutuality of local obligations to each other;
5. CMGs ought to have **clearly structured powers and formal discretion** in the application of law that can be externally checked and reviewed but they must also be allowed discretion to use **informal modes** of regulation and sanctioning reflecting culturally and locality specific relationships and customary norms;
6. CMGs may have to accommodate **ascribed (by tradition) as well as achieved (by success in the job) forms of leadership**. This may include identifying and acknowledging sites of leadership beyond the conventional forms.
7. CMGs will need to be ‘owned’ by and therefore accountable to the local community through **continuous consultation and information sharing** so that their mandated plans and their implementation processes earn resonance with the local culture;
8. CMGs will require **continuous capacity building** focused on individuals, the CMG itself and the larger entities coordinating CMG activities across the Torres Strait.

The dugong and turtle fisheries are in many ways analogous to the ‘Bushmeat Crisis’ in Africa, with a few salient distinctions – the most notable being Australia is a first world nation. Many local and international agencies are working together to implement community-based partnerships working for sustainable use of bushmeat animals. Specific lessons from these well established organizations can be usefully generalized to the Torres Strait.

Comparison the Bushmeat Crisis in Africa

'Bushmeat' is the term given to meat derived from wildlife from the forests of central and west Africa. It includes all species from elephants and chimpanzees to cane rats. Though habitat loss and deforestation are often cited as the primary drivers of animal extinctions, hunting for both local consumption and commercial markets is the most immediate threat to the future of wildlife in many parts of Africa.¹⁶⁹ The 'Crisis' is manifest in the dramatic defaunation of African forest species in the last decade as a result of increased hunting by local people for a variety of reasons including subsistence and trade. Some forest ecosystems are now completely devoid of large animals.¹⁷⁰

There are many parallels, along with important differences, with the Bushmeat crisis in Africa and dugong and turtle fishing in the Torres Strait. Importantly, many development and conservation agencies are working with local stakeholders in Africa to find a common ground for sustainable use of wildlife. Some models of Community Based Natural Resource Management have successfully halted the decline in target species. Other projects have failed, and reasons why are explored below. The lessons from the well established successful initiatives that can be transposed to Torres Strait communities.

Parallels between Bushmeat Hunting and Traditional Fisheries

The similarities (Table 1) and differences (Table 2) between the bushmeat situation in Africa and hunting for consumption of dugong and turtle in Torres Strait are set out in the tables below :

¹⁶⁹ Ott, A.,D. Pitassy, P. Uimonen, A. Villamanga. 2003 *Sustainable Use of Wildlife: The Search for Common Ground*. 67 pages in *Uncertain Future: The Bushmeat Crisis in Africa*. All reports prepared for the Bushmeat Crisis Task Force by the Problem Solving team of the Fall 2002 Conservation and Development Course (CONS 680). Sustainable Development and Conservation Biology Graduate Program, University of Maryland: College Park. Available at URL www.bushmeat.org/docs.html

¹⁷⁰ Archer, B., Beck, K. Douthwaite, and D. Ruppert. 2003. *Playing in the Counterpoint: Bushmeat Users and the Possibility of Alternatives*. 50 pages. in *Uncertain Future: The Bushmeat Crisis in Africa*. All reports prepared for the Bushmeat Crisis Task Force by the Problem Solving team of the Fall 2002 Conservation and Development Course (CONS 680). Sustainable Development and Conservation Biology Graduate Program, University of Maryland: College Park. Available at URL www.bushmeat.org/docs.html

Table 1 Similarities between Bushmeat Hunting and Traditional Fisheries

| Africa | Torres Strait |
|--|--|
| Open-access resource | Open-access resource |
| High proportion of protein derived from bushmeat | High proportion of protein derived from Dugongs & Turtles |
| Bushmeat much cheaper than domestic meat or 'free' (minus costs incurred in hunting) | Dugongs & Turtles are much cheaper than domestic meat when costs are internalized |
| Opportunistic hunting occurs while partaking in other activities (i.e. logging) – therefore hunting continues even when animals are scarce | Opportunistic hunting occurs while partaking in other activities (i.e. fishing) – therefore hunting continues even when animals are scarce. ¹⁷¹ |
| Modern hunting technologies/increase in hunting efficiency means more animals killed | Modern hunting technologies/increase in hunting efficiency means more animals killed |
| Widespread belief that forest is vast and its resources should be exploited/ belief that there is no problem | Widespread belief that sea is vast and have right to resources/belief that there is no problem |
| Widespread skepticism about outsiders who say bushmeat is being hunted unsustainably | Widespread skepticism about outsiders who say Dugongs & Turtles are being hunted unsustainably |
| Urban people eat bushmeat to 'connect to culture' | Widespread anecdotes of Torres Strait Island people on mainland eating Dugongs & Turtles 'to connect with culture'. |

Table 2 Differences between Bushmeat Hunting and Traditional Fisheries

| Africa | Torres Strait |
|---|---|
| Urban markets provide steady bushmeat demand for commercial hunters | Sale of Dugongs & Turtles meat prohibited |
| Important source of income for hunters, traders and transporters | Commercial hunting prohibited |
| Firearms and snares | Firearms prohibited |
| Subsistence hunters have no social welfare system | Traditional fishers have social welfare system |
| Governmental and police corruption rife | No official corruption |
| Millions of people involved (hunting through to consuming) | Thousands of people involved (hunting through to consuming) |

¹⁷¹ see Kwan D, Marsh H and Delean S “ Factors affecting the customary hunting of a threatened marine mammal by a remote Indigenous community” (2006) 33 *Environmental Conservation* 164-171 on the relationship between turtle hunting and the opportunistic take of dugongs.

The similarities between the Torres Strait dugong and turtle fisheries and the African bushmeat hunting make dugong and turtle fisheries amenable to similar successful models of community based resource management. Further, unsuccessful models (successful' being defined as 'sustainable hunting' and 'unsuccessful' being defined as 'continued species decline') can be avoided by Torres Strait resource managers and stakeholders in the interests of continued traditional fishing.

There are a number of important differences between Bushmeat hunting and dugong and turtle fisheries. Firstly, there is a large urban market for bushmeat. Urban consumers of average economic status eat bushmeat because it tastes better and is much cheaper than the poor quality domestic meat found in shops. While Australian laws prohibit the commercial hunting or sale of dugong and turtle, there is anecdotal evidence of a black market in dugong and turtle on mainland Australia.¹⁷²

Australian regulations prohibit traditional hunters from using any weapon other than a *wap* to kill dugong and turtle. The prohibition is imposed because Government believes that the number of animals killed will necessarily be fewer than if firearms are deployed.¹⁷³ No-one suggests that Australian governmental officials are corrupt, whereas in poverty-stricken central and West Africa corruption is rife.¹⁷⁴ In Australia, despite lack of government corruption, there appears to be government inaction and general respect of Indigenous practice by non-Indigenous people living in the Torres Strait.¹⁷⁵

The big differences between the bushmeat and dugong and turtle hunting are the scale (millions of people involved as opposed to thousands), limited capacity for

¹⁷² See above n 29, also NSW Young Lawyers Animal Rights Committee, A submission to the Marine and Coastal Committee Taskforce on Dugong and Marine Turtle Populations on the Draft Report titled "Sustainable and Legal Indigenous Harvest of Marine Turtles and Dugongs in Australia – A National Approach", NSW Young Lawyers, 2005

¹⁷³ See Havemann et al, above n 57, Revised Final Draft Torres Strait Turtle and Dugong Fisheries Assessment Report, above n 2

¹⁷⁴ Archer et al, above n 167

¹⁷⁵ NSW Young Lawyers, above n 168

African governmental intervention and no social welfare system thus *necessitating* bushmeat hunting and consumption by the very poor who live near the forests.

Research into community-based management of endangered wildlife has found that hunting is only sustainable if it is heavily regulated low-level hunting, with alternatives protein sources cheaply and readily available.¹⁷⁶ For example, Bowhead whale hunting has resumed in the eastern Canadian Arctic under a ‘co-operative’ regime with the Inuit and Canadian government. Scientific advice is developed by the Canadian Department of Fisheries and Oceans, and relied upon by the Inuit to measure sustainability. At present, one Bowhead killed every other year is considered sustainable for the Hudson Bay-Foxe Basin Bowhead whale stock.¹⁷⁷ State regulation of hunting of large species like whales is however much easier than for small medium sized species such as dugongs and turtles which is why a consensus based community management approach is necessary.

Community Based Management for Sustainable Use and Conservation

Sustainable Use

Sustainability must balance cultural, economic, ecological and sociopolitical factors. There is a consensus among experts that certain conditions must be met if hunting is to be sustainable. These conditions are:

- Hunted species must not show a consistent population decline;
- Species’ populations cannot be reduced to the extent that they are vulnerable to extinction or diminished in their ecological role;
- Wildlife population densities must remain high enough so that they continue to serve as a significant resource for people.¹⁷⁸

¹⁷⁶ Archer et al, above n 167

¹⁷⁷ Randall Reeves, The origins and character of ‘aboriginal subsistence’ whaling: a global review, *Mammal Review* 32(2), 71 at 91

¹⁷⁸ John Robinson and Elizabeth Bennett, ‘Hunting for Sustainability: The Start of a Synthesis’ in John Robinson and Elizabeth Bennett (eds) *Hunting for Sustainability in Tropical Forests* (2000) 499

Species amenable to sustainable hunting typically have high reproductive potential and can succeed in human-influenced habitats.¹⁷⁹ The previously critically endangered white-tailed deer is sustainably hunted in North America after being nearly driven to extinction by over-hunting. The success has been due to policies that have dramatically increased their population (elimination of predators, severe regulation of hunting, creation of pasturelands), combined with high reproductive rate, tight regulation of hunting and widespread availability of alternative forms of protein.¹⁸⁰ Similarly, cane rat farming in western Africa has taken some pressure off wild cane rat populations. Neither of these species has comparable biology nor human induced mortality as dugong and turtle.

Community based management

The central premise of community based management is that those affected by a decision should participate directly in the decision-making process.¹⁸¹ Decision making at the local level can lead to locally appropriate decisions and improves the incentive to consider long term benefits to sustainable management.¹⁸² Research in many natural resource sectors supports the above premise, indicating that the more complete the set of rights held by an individual or a group, the more likely they are to invest authority and develop rules that define how they exercise their rights of withdrawal (i.e. hunting, fishing or harvesting).¹⁸³ Ownership, however, does not guarantee that a resource will be managed sustainably. For example if one Torres Strait Island is sustainably managing dugong in their sea country and their neighbors are not, there may still be overall dugong sustainability issues. If the owner's discount rate is high - if they value short-term gains more than expected future gains - they may seriously degrade a resource through over-exploitation.¹⁸⁴ In these

¹⁷⁹ Ott et al, above n 166

¹⁸⁰ Ibid

¹⁸¹ D Duffey, M Roseland and T Gunton, 'A Preliminary Assessment of Shared Decision-Making in Land Use and Natural Resource Planning' (1996) 23(2) *Environments*,

¹⁸² Claudia Notzke, *Aboriginal People and Natural Resources in Canada*, 1994

¹⁸³ Edella Schalger and Elinor Ostrom Property rights, regimes and natural resources: A conceptual Analysis, (1992) 68(3) *Land Economics*

¹⁸⁴ Ibid

scenarios, public awareness campaigns and enforcement of hunting and fishing laws are required to halt over-exploitation.¹⁸⁵ The present system of sustainable governance of natural resources is handicapped by the mismatch between the scale of management techniques such as jurisdictional boundaries and zones and the scales of the ecological processes being managed.¹⁸⁶ Bioregional wide congruence between management techniques and ecological processes are essential to success.

Indigenous Communities and Conservation

Since at least 1992 (Rio) there has been consensus that Indigenous communities ought to have a key role in conservation. Community-based management groups (CMGs) (see below) are envisaged to be grounded in true public participation, where those individuals and groups take an active part in shaping decisions and policies that affect them.¹⁸⁷

In conclusion the importance of providing full information to the public and encouraging public participation is recognized in the Rio Declaration.

The Rio Declaration, Principle 10 states:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The Legislative Provisions Conducive to a sustainable Indigenous Community-Based Management of Dugong and Turtle Fisheries

¹⁸⁵ Archer et al, above n 167

¹⁸⁶ Graeme S Cumming, David H Cumming and Charles L Redman “Scale Mismatches in Social-Ecological Systems: Causes, Consequences and Solutions’ (2006) 11(1) *Ecology and Society* <http://www.ecologyandsociety.org/vol11/iss1/art14/> at 26.10.07

¹⁸⁷ Sharon Beder, *Environmental principles and policies, an interdisciplinary approach* (2006)

Current International, Commonwealth and Queensland legislation implicitly promotes Indigenous community based management of conservation measures in keeping with Article 10 or the Rio Declaration. Expressions of the principle of promoting Indigenous participation in conservation and planning measures can be found summarized in Table 3 in chart format:

Table 3 Summary chart of laws supportive of community based governance of the sustainable use and conservation of Torres Strait dugongs and turtles

| International Law Conventions | Principles & Articles Affirming Indigenous Stewardship –Conservation Link |
|--|---|
| <p><i>Rio Declaration</i></p> <p><i>Convention on Conservation of Nature in the South Pacific (1976)</i></p> <p><i>United Nation Convention on Biological Diversity (1992)</i></p> | <p>Principle 10, Principle 27</p> <p>Article V, Article VI</p> <p>Articles 8(j), 10, 13</p> |
| Federal Statutes | Sections |
| <p><i>Torres Strait Fisheries Act 1984 (Cth)</i></p> | <p>Ss 3(4), 8, 13, 15A, 39</p> |
| <p><i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i></p> | <p>Ss 3(1)(d), (f)&(g); 3(g)(iii)&(iv)</p> <p>Part 5, Chapter 13&13A</p> |
| Queensland Statutes | Sections |
| <p><i>Community Services (Torres Strait) Act 1984 (Qld)*</i></p> | <p>s 45</p> <p>Ss 5(f), 6</p> |
| <p><i>Nature Conservation Act 1994 (Qld)</i></p> | |
| Joint Federal-State Policy Statements | Provisions |
| <p><i>TSRA</i></p> | <p>Their mission is to empower Torres Strait Islanders to determine their own affairs based on ‘Ailan Custom bilong Torres Strait’</p> |
| <p><i>National Oceans Office</i> <i>(Australia’s Ocean’s Policy)</i></p> | <p>The Policy aims to achieve biodiversity through regional marine planning with, amongst others, Indigenous peoples in the use, conservation and management of oceans.</p> |

* an amended Local Government Act may amalgamate the 17 councils under a Torres Strait Regional Council

The Treaty commits State parties to conservation and the preservation of the traditional way of life and livelihood of the people of the Torres Strait. Community based sustainable management of traditional fishing is compatible with that duty.

Both *Torres Strait Fisheries Acts (1984)* (Cth and Qld) are silent as to community-based partnerships, however, a broad reading of sections 3(4) and 15A give limited scope for such partnerships. Section 3(4) enables the Minister to delegate an employee of the Commonwealth or Queensland government to perform his or her duties. The PZJA consists of a number of agencies from which the delegate may be drawn. One of these agencies could therefore employ Traditional Owners in community-based management under delegated authority from the Minister should s/he chose to delegate this.

Further Minister or Delegate may determine a management plan for a fishery (s 15A). Section 15A details how the management plans may be determined. Section 15A's scope appears to be wide enough to allow the Minister to approve community-based management as a part of the planning process and to implement such plans. Community-based management groups would have a duty to ensure plans were executed in keeping with the *TSF Acts* and the *EPBC Act*.

The objectives of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) are such that it is main legislative instrument conducive to community based partnerships. The EPBC Act explicitly provides as objectives

- to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples,¹⁸⁸
- to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity,¹⁸⁹ and
- to promote Indigenous knowledge of biodiversity.¹⁹⁰

¹⁸⁸ *EPBC Act* s 3(1)(d)

¹⁸⁹ *EPBC Act* s 3(1)(f)

To achieve such objectives, the Act promotes a partnership approach through utilizing and promoting Indigenous knowledge¹⁹¹ and *involvement of the community* in management planning.¹⁹² Further, the adoption of threat abatement and recovery plans under the *EPBC Act* can involve community-based partnerships.¹⁹³ The Marine Turtle Recovery Plan is a legislative instrument and includes developing strategies with community involvement as a specific objective. At present there is no equivalent Dugong Recovery Plan because dugongs are not listed as threatened under the *EBPCA*. This limits the mandatory element of establishing community based partnership model. Furthermore under the Act a National Conservation Plan ought to be in place for listed migratory species such as dugongs. The neglect of this signals a low priority for dugong conservation that is inconsistent with the Commonwealth's statutory obligations.

At present, *Community Services (Torres Strait) Act 1984 (Qld)* s 45 requires that Island Councils to provide good rule and government in accordance with *Ailan Kastom bilong Torres Strait* (the customs and practices of Islanders). Community-based management expresses and draws upon *Ailan Kastom bilong Torres Strait* hence community based management is fully consistent with *Community Services (Torres Strait) Act 1984 (Qld)* s 45. However the exemption from liability for hunting dugong and turtle under the *Community Services (Torres Strait) Act 1984* is subject to conservatory provisions in the *Nature Conservation Act 1992 (Qld)*, the *EPBC Act* and the *NAct*. The *Nature Conservation Act 1992* also promotes indigenous co-operative involvement in conservation processes.

All the relevant legislation outlined above has as a major tenet the preservation of culture and traditions of traditional owners most of whom are native title holders in relation to the Islands they inhabit or come from.

¹⁹⁰ *EPBC Act* s 3(1)(g)

¹⁹¹ *EPBC Act* s 3(2)(g)(iii)

¹⁹² *EPBC Act* s 3(2)(g)(iv)

¹⁹³ *EPBC Act* Part 5 Divisions 13 and 13A. The objective of the *Marine Turtle Recovery Plan* includes developing strategies with Aboriginal and Torres Strait Islander communities for the sustainable use of marine turtles.

Successful community based management involves the creation or perpetuation of effective local rules. Such rules may be derived from systems of customary law, newly formulated rules created in an ad hoc basis or a combination of both.

Successful community based management depends on how closely the rules and laws:

- are tuned to current ecological realities;
- can be implemented by the community based upon its capacity and strength; and
- can be insulated from external threats.¹⁹⁴

Finally, law as opposed to custom is needed to provide basic guidelines for protection of wider societal interests, such as protection of environment.¹⁹⁵ National and state laws provide a regulatory function by which it can act to protect the legitimate interests of outsiders, including future generations.¹⁹⁶ The *EPBC Act*, *Nature Conservation Act* and the *Torres Strait Fisheries Acts* all contain discretionary regulatory provisions that enable and encourage administrative agencies to engage Indigenous people in measures such as community based management schemes.

The local government system in Queensland is based on *Local Government Act* 1993 (Qld). Specific legislation concerning the Torres Strait are presently to be found in the *Community Services (Torres Strait) Act 1984(Qld)*. A governance framework incorporating Dugong and Turtle Community based management of these fisheries meshed with the existing fisheries and the conservation legislative regime could be articulated at the local level with revised regional local government

¹⁹⁴ Jon Lindsay, *Designing Legal Space: Law as an Enabling Tool in Community-Based Management* (1998) Food and Agriculture Organisation of the United Nations, paper presented at the International Workshop on Community-Based Natural Resource Management held from 10 to 14 May 1998 at the World Bank, Washington, DC. URL <<http://www.fao.org/docrep/x3030e/x3030e09.htm>> at 23 May 2007

¹⁹⁵ Ibid

¹⁹⁶ Jon Lindsay, *Law and Community in the Management of India's State Forests*. Working papers. Cambridge: Lincoln Institute of Land Policy, 1994

framework. Such a plan would be consistent with developing the *Partnerships Queensland* policy process such outlined in *Community Government in the Torres Strait - the Way Forward* (2007).

A new Torres Strait Regional Council as proposed by the 2007 Local Government Reform Commission will presumably have power to pass local laws of a generic nature that will be applicable to all Torres Strait Islands. Such generic Local Laws could provide a framework of rights, duties, powers and liabilities for the operation of the regional Management Plan and local community management groups working under its umbrella. Such local laws would empower Traditional Owner (TO) based CMGs (Community Management Groups) to implement and enforce community based Dugong and Turtle Management Plans specific to particular Islands. Care will be required to ensure that all stakeholders notably women have a voice and a seat at the table in making and implementing plans in accordance with Commonwealth and State anti-discrimination laws.

The regional Management plan is the product of Federal, State and local community cooperation. Following the model of fisheries management under the PZJA, administrative arrangements and funding for a permanent secretariat structure to support the regional Dugong and Turtle Community Management plan is needed. The regional Secretariat would need to reflect a partnership relationship between Traditional Owners reflecting the Islands and disparate regions of the Torres Strait, and state and federal agencies with a shared interest in the sustainable hunting of dugong and turtle. These would include the TSRA as well as agencies with a fisheries management focus such as Queensland Department of Primary Industries and Fisheries (QDPI&F) and the Commonwealth Department of Agriculture Fisheries and Forests (DAFF) and Australian Fisheries Management Authority (AFMA) whose ESD Policy defines:

A sustainable **fishery** as a fishery that is consistent with ecologically sustainable development (i.e. a fishery that uses, conserves and enhances the community's resources so

that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased).¹⁹⁷

Ecologically sustainable development has two pivotal tenets – the precautionary principle and intergenerational equity. These two tenets are especially important for the continuation of culture and traditional fishing for future generations. They are also found in the explicitly in the *EPBC Act* and inferentially in the Commonwealth's *Torres Strait Fisheries Act*.

The regional secretariat for the community-based management scheme will need continuing support from Commonwealth and State agencies with conservation obligations such as the Commonwealth Department of the Environment and Water Resources (DEW) with responsibilities under the *EPBCA* as well as Queensland Environment Protection Agency (QEPA) which has responsibility under the *Nature Conservation Act 1994*(Qld), e.g. for protected area management plans in Queensland and its coastal water.

In keeping with the tenets of community-based natural resource management, sustainable fishing and the *EPBC Act*, DEW must have an active role in the community management groups. In conjunction with AFMA, DEW must promote community awareness and understanding of dugong and marine turtle biology, and the reasons for these animals' listing on IUCN, Federal and State threatened species lists.

Jurisdictional Issues Potentially Impacting the Current Governance Framework

Fisheries and conservation measures in the Torres Strait region are administered by the PZJA and the TSRA. The relevant laws and regulations (State and Commonwealth) are enforced by agreement by the Queensland Boating and

¹⁹⁷ DAFF Ecologically Sustainable Development Criteria & Indicators
URL http://www.daffa.gov.au/__data/assets/word_doc/5811/eco_sust_dev_criteria.doc (17/05/07)

Fisheries Patrol. In this respect any jurisdictional conflict has been overcome by an approach reflecting cooperative federalism.

The current domestic governance framework under the Commonwealth *TSF Act* leaves considerable scope for community-based processes for the management of dugong and turtle fisheries in the Torres Strait. These processes are already anticipated in the *EPBC Act*. The PZJA currently has working groups to manage sustainable fishing of other fisheries in the Torres Strait. The lack of PZJA dugong and turtle fisheries working groups is likely due to their perceived unimportance in the commercial realm and classification instead as a conservation issue. Nonetheless the fact of the continuing hunting of dugong and turtle, their importance in ecological, cultural and economic terms points clearly in the direction of the need to create programmatic administrative, scientifically informed infrastructure to support community based involvement in the regulation of the fishery.

Papua New Guinea Traditional Inhabitants

Australia has no jurisdiction over Papua New Guinea (PNG). PNG Traditional inhabitants must be from one of thirteen villages in the coastal area adjacent to the Torres Strait to come under the Treaty. Former PNG citizens who were living in the Protected Zone at the time of the signing of the Torres Strait Treaty are covered by the Treaty (this status has also been extended to the descendants of these people). PNG citizens outside of the Treaty Villages cannot avail themselves to the rights conferred in the Treaty, despite being traditional in their own right. Likewise, Australian Torres Strait Islanders living outside of the Protected Zone are not covered by the Torres Strait Treaty.

Papua New Guinea citizens who are traditional inhabitants under the Treaty must have a pass to visit inhabited islands in the Torres Strait Protected Zone and are limited to a three week stay on most Torres Strait Islands (one day limit on Saibai).

Some PNG citizens from both within and outside of the Treaty area have been given standing to join the ongoing Torres Strait Regional Sea Claim.¹⁹⁸

Native Title Claims

The Torres Strait Regional Sea Claim is currently listed on the Register of Native Title Claims. The Badu Determination was a culmination of native title determinations in the Torres Strait, giving native title claimants recognized subject to, and in accordance to, Commonwealth and State laws. The recognized rights include the rights to hunt and fish in or on, and gather from, the water for the purpose of satisfying personal, domestic or non-commercial needs.¹⁹⁹ As already outlined this right is not absolute – the native title right to hunt or fish is not inconsistent with the right of government to pass laws for the conservation and management of wildlife.²⁰⁰ Neither the Badu Determination nor any final Torres Strait Regional Sea Claim will affect the governments’ powers to pass laws that regulate native title rights to hunt and fish.²⁰¹

Prescribed Bodies Corporate

Prescribed Bodies Corporate (PBC’s) are given the power under the *Native Title Act* to negotiate, plan and deliver native title rights and services.²⁰² Traditional hunting and fishing is a listed native title right under the Act.²⁰³ One of the PBCs in the Torres Strait is the Kaiwalagal Aboriginal Corporation which includes the Kaurareg Traditional Elder’s Aboriginal Corporation covering Traditional Owners in the islands and atolls around Thursday Island. The Kaurareg Corporation was established in 2005 – 06, and its vision is based on Aboriginal clan structures and

¹⁹⁸ *Akiba v Ors on behalf of the Torres Strait Regional Seas Claim People v State of Queensland* (No. 3) [2007] FCA 39

¹⁹⁹ National Native Title Tribunal, Torres Strait determinations – background information 8 December 2004, <http://www.nntt.gov.au/media/Torres_Strait.html>

²⁰⁰ *The Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland*, [2004] FCA 298 at [211], *Yanner v Eaton* (1999) 201 CLR 351 at [37].

²⁰¹ *Native Title Act 1993* (Cth) s 211(ba)

²⁰² *Native Title Act 1993* (Cth) s 58

²⁰³ *Native Title Act 1993* (Cth) s 223(2)

boundaries. Elders assert authority; however some are becoming frustrated with some members of younger generations, particularly those who disobey traditional hunting and fishing laws. The Elders feel that these younger generations disrespect the animal and hunt dugong illegally, outside of traditional law. The Corporation intends to combat illegal hunting by ‘Two Strikes and you’re out’ – i.e. Strike One – the CEO writes a letter of warning to the illegal hunter and excludes him from future hunting trips; and Strike Two – the letter of warning is forwarded to government enforcement agencies to act upon. As yet there is no formal community based management group implementing a management plan. Enforcement and monitoring are therefore add-ons to the Corporation’s workload.

Conservation or Fisheries?

Working groups already exist for fisheries under the administrative management of the PZJA, the body established by the *TSFA*. Community based management need only be an extension of existing arrangement to the Dugong and Turtle fisheries which are the fisheries left out of the PZJA fisheries management regime.

The *EPBCAct* recovery and threat abatement plans recognise indigenous knowledge (IK) and specifically seek the engagement of traditional owners. Dugong and turtle are ‘protected species’ under the EPBCAct requiring a focus on conservation. This focus needs to be reconciled with that of the traditional customs of Indigenous people who regard them as part of their traditional fisheries under the Treaty and *TSFA*. The *EPBCA* does, however, reflect contemporary governmental principles of sustainable use, intergenerational equity and inclusion of indigenous people in sustainable use and conservation management. There is scope within the *EPBCA* for dugong and turtle fisheries to be managed as sustainable fisheries, administered by the PZJA or its delegated bodies.

The *TSFA* fisheries management regime is based on a top-down approach with the Minister at the apex of decision-making at all times. However the Minister relies on

advice from the PZJA fisheries management groups which involve Indigenous fishers. The extension of such participation to community based management under the *TSFA* appears to be administratively possible under the Minister's extensive discretionary powers. The duty to extend such powers towards community based management under the *EPBCA* is already anticipated and seems to require no legislative change.

The Commonwealth Department of Environment and Water has a monitoring role in the Torres Strait. The State equivalent, the Environmental Protection Agency is absent due to lack of funds though *Nature Conservation Act* and Commonwealth fisheries laws are enforced by Queensland Boating and Fisheries officials who wear multiple hats of fisheries and conservation enforcers for both State and Commonwealth governments in the Torres Strait.

The Torres Strait Regional Authority's Land and Sea Management Unit is probably the agency best suited to work with communities and PZJA agencies to develop and support a community based management scheme. Such a scheme requires ongoing funding as a program rather than ad hoc funding as a project. Community management groups and the secretariat that supports them will require a team of salaried personnel to deliver the implementation of the Regional Turtle and Dugong Management Plan.

Other Vehicles for Community Based Management

Other vehicles for community based management include the:

- **Memorandum of Understanding (MOU)**
- **Statutory Agreement (e.g. ILUA)**
- **Non-Statutory Agreement (e.g. TUMRA)**
- **Shared Responsibility Agreement (SRAs)**

In our view these agreement based vehicles whilst appearing to be consensual have little to offer as the basis for community based management of sustainable hunting of dugong and turtle. All of these agreement based vehicles are ad hoc and community specific and thus do not provide the basis for a coordinated region wide scheme based on congruence between management scales and the scale of ecological processes. Thus none seem to offer a sound basis for implementing plans that give effect to National and International conservation obligations for species operating at very large biological scales as dugongs and turtles nor for honouring obligations to protect traditional culture in an area of the cultural complexity of the Torres Strait Protected Zone.

The Memorandum of Understanding

Memorandums of Understanding may or may not be legally binding agreements between traditional owner groups or Prescribed Bodies Corporate and governments and their agencies. There are several examples of these. No evaluation of the effectiveness of such agreements is presently available. The *Angumathimaree Thanaquith Aboriginal Corporation* north of Weipa has signed an MOU agreement²⁰⁴ with the Environmental Protection Agency which prohibits the taking of turtle and dugong, except by authorized Traditional Owners. The Corporation will issue hunting authorizations for recognized Traditional Owners to take no more than five turtles and five dugong a year for customary purposes. Unauthorised hunters will be charged under the *Nature Conservation Act*. The initiative reflects Traditional Owner concerns over unauthorized hunting in their traditional areas.

A Memorandum of Understanding has also been signed with *Juru, Gia and Ngaro Traditional Owners* to limit take of dugong and turtle in their sea country. The MOU concerns the suspension of dugong hunting in the North Queensland coastal waters of the Juru, Gia and Ngaro peoples (Ayr, Bowen and Proserpine),

²⁰⁴ As at 1 August 2007 Ministerial Media Statements, 'QPWS and Traditional Owners Re-sign Hunting Agreement'
URL<<http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=53238>> viewed 8 August 2007

formalising the groups' self-imposed ban on dugong hunting. It also introduces a self-managed permit system for marine turtle hunting and use, so that the practice is better controlled and monitored, in accordance with traditional practice as agreed to by the community. For example, turtles used in some cultural ceremonies will not be killed but will instead be tagged and released.²⁰⁵ Such MOUs can be readily incorporated into Recovery, Threat Abatement Plans and Wild life Conservation Plans under the *EPBCA*.

The Statutory Agreement - Indigenous Land Use Agreements (ILUAs)

Indigenous Land Use Agreements (ILUAs) are statutory agreements under the *Native Title Act* creating binding obligations binding PBCs and government, industry and other non-indigenous landowners to manage land use and now sea use (since the Croker Sea Claim). ILUAs are prescriptive and set out in subdivisions B, C, D and E of Part 2, Division 3 (ss 24BA – EC) the *Native Title Act* 1993 (Cth).

ILUAs may be useful in giving binding legal recognition to community-based management plans whether a successful sea claim²⁰⁶ determination eventuates or not. Being statutory, all rights and obligations of an ILUA are enforceable and protected by law and all native title holders are contractually bound by the agreement, as are the other signatory bodies. ILUAs often bring revenue to Indigenous communities in exchange for use and access. On the negative, ILUAs may take years to conclude; ILUAs are commercially sensitive agreements which the Federal Court does not supervise for fairness; finally they can also be very costly to conclude because all parties must be parties to the negotiation.

²⁰⁵ Agreements, Treaties and Negotiated Settlements Project 'Juru, Gia and Ngaro Turtle and Dugong Memorandum of Understanding' 5 July 2005, <<http://www.atns.net.au/agreement.asp?EntityID=3722>> accessed 8 August 2007.

²⁰⁶ Donna Kwan, Management Implications – Towards a sustainable indigenous fishery for dugongs in the Torres Strait: A contribution of empirical data and process, March 2002, p 7

The Non-Statutory Agreement

Traditional Use of Marine Resource Agreements (TUMRAs) are examples of such agreements designed by the GBRMPA. They are discussed at pp 49 – 50. Currently TUMRAs are voluntary agreements made under the Great Barrier Reef Marine Park Regulations. Unlike ILUAs, which are binding on non-signatory native title holders, TUMRAs are *not* legally binding on individual non-signatories which may make them ineffectual as the basis for enforcement in some communities. So far only two TUMRA have been accredited (by the Gurrigun and peoples). Their effectiveness is yet to be ascertained. The agreement -making process is quite onerous, Traditional Owners incur significant obligations and no guarantee of continuous adequate funding follows the conclusion of a TUMRA.

The Shared Responsibility Agreement

The *Dhimurru Land Management Aboriginal Corporation of the Yolgnu People* are entering into a Shared Responsibility Agreement with the Commonwealth and Territory Governments into community management of Yolnu Sea Country. Dhimurru have compiled a Yolgnu Sea Country Plan outlining rights and responsibilities for Yolgnu, placing caring for land and sea country at the heart of the People. The Plan is helping Indigenous people negotiate with other marine managers and users to develop policies and institutional arrangements that are respectful of Indigenous peoples' rights, interests and responsibilities in sea country.

The Sea Country Plan is the first stage towards implementation of Yolgnu priorities for sea country to ultimately reach partnering arrangements with the Nhulumbuy Indigenous Coordination Centre, the Department of Environment and Water and the Northern Land Council. The emergency *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007* may impact negatively upon the advance of the Sea Country Plan.

Shared Responsibility Agreements are legally binding, but are presently associated with paternalistic inducements for indigenous people in remote communities to conform to certain behaviour in return for accessing a basic service or services. Well publicized SRAs include petrol bowsers given to a community in return for washing children's faces, and swimming pool entry for children who bathe often. Again they do not represent a good model for a region wide scheme.

Regional Partnership Agreements

Regional Partnership Agreements are preludes to SRAs. They are policy statements of intention only, between PBCs, State and Federal Governments. They establish the rights, responsibilities and action plans of PBCs, and Governmental agencies in the Traditional Owners region.

Given the current relatively disparate and fragmented approach to dugong and turtle fisheries and conservation by Governmental agencies in the Torres Strait,²⁰⁷ a Regional Partnership Plan could somewhat assist in demarcating each agency's responsibilities to avoid duplication of services.

Our view is that administratively driven scheme funded as a long-term core program to implement the sustainable community based management of turtle and dugong fisheries is the ideal framework for such a scheme. This scheme would need coordination at the national level based on, for instance, EPBCA mandated National Wildlife Conservation Plans linked into adequately funded community based management scheme based on traditional owner participation.

²⁰⁷ Governance Partners Australia, 'Review of the Torres Strait Treaty Natural Resource Management Governance Arrangements' August 2005

Concluding Findings & Recommendations

Findings 1.

No legislative change need occur as there seems no legal impediment to the delegation by the Minister of powers under the Commonwealth's *TSFA* to a regional body such as the TSRA Land and Sea Management Unit to perform the task of creating a Dugong and Turtle hunting community based sustainable management scheme based around a secretariat supported by the TSRA Land and Sea Management Unit and including a Dugong and Turtle Fisheries community /scientific committee along the lines of all the other PZJA fisheries. Changing regulations and issuing new Gazette notices is much simpler than legislative amendment as the procedure only involves the Minister's discretion within his existing statutory powers. He or she can enable the scheme to implement aspects of the PZJA, Queensland and Commonwealth obligations through the vehicle of community based management through regulation and gazette notices.

This finding is fortified by the fact that the *Torres Strait Fisheries Act 1984* (Cth) was amended in July 2007 and gives even more scope to community based management. In the amended Act there has been no hierarchy of objectives developed. Therefore the pursuit of conservation measures should not usurp the protection of the traditional way of life of Torres Strait Islanders, inferring that the two must be tied together and resolved to achieve the best possible balance of the objectives. Three of the amended Act's objectives are highly relevant to the findings of this review. Under section 8 these are:

- (a) To acknowledge and protect the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing;
- (b) to protect and preserve the marine environment and indigenous fauna and flora in and in the vicinity of the Protected Zone;
- (c) to adopt conservation measures necessary for the conservation of a species in such a way as to minimise any restrictive effects of the measures on traditional fishing²⁰³.

EPBCA mandated National Wildlife Conservation Plans for both dugong and equivalent plans for turtle need to be linked into adequately funded community based management scheme based on traditional owner participation. This would form a key element in the community based management scheme. Such a synergistic combination of plans and management approaches is necessary to ensure appropriate local micro-management joined together at the macro regional level since this what is needed to provide the appropriate ecological scale for management and conservation partnerships for north Australia as a whole.²⁰⁸

Recommendation 1. :

That the Torres Strait Dugong and Turtle fisheries be managed by community-based management groups based on Ministerial delegation under the *TSF Act* (as amended in 2007) and in keeping with the objectives of the EPBC Act reflected in Wildlife Conservation Plans for Dugongs as well as Turtles .

Findings 2.

The Drafting Instructions to the *TSF (Amendment) Bill* noted that while s 15A of the *TSFA* allows the Minister to determine a plan of management for a fishery, to date no plans have been formulated under the provision.²⁰⁹ The Act now provides in S15 A that:

- (1) The Minister may, by legislative instrument, determine a plan of management for a fishery in an area of Australian jurisdiction.
- (2) A plan of management for a fishery must set out:
 - (a) the objectives of the plan of management; and
 - (b) measures by which the objectives are to be attained; and
 - (c) performance criteria against which, and time frames within which, the measures taken under the plan of management may be assessed.

²⁰⁸ Marsh et al , above note 48

²⁰³ *Torres Strait Fisheries Act* 1984 (Cth) amended as of 26th July 2007.

²⁰⁹ *Ibid* 8.21

Dugong and turtle fisheries are not *ejusdem generis* with other fisheries and the plan based upon the capacity of the fishery and the allocation of quota may not be appropriate to them as the degree of scientific uncertainty about the population sizes and sustainable levels of take is high. Instead the Wildlife Conservation Plans might be the best vehicle for signaling the sustainable levels of take and authorizing enforcement of these.

The amendments have given prime consideration to preserving fisheries stocks, which is imperative to continuation of culture and intergenerational equity.

At present the Act under ss 13 and 39 are permissive with respect to consultation with traditional inhabitants:

Section 13 Minister to seek views of traditional inhabitants

The Minister shall, when he or she considers it appropriate to do so, seek the views of the members of the Joint Advisory Council established under Article 19 of the Torres Strait Treaty who are traditional inhabitants and Australian citizens on any matter relating to the administration of this Act that may affect the interests of traditional inhabitants who are Australian citizens.

Section 39 Protected Zone Joint Authority to seek views of traditional inhabitants

The Protected Zone Joint Authority shall, where it considers it appropriate to do so, seek the views of members of the Joint Advisory Council established under Article 19 of the Torres Strait Treaty who are traditional inhabitants and Australian citizens on any matter relating to a Protected Zone Joint Authority fishery

Up grading the duty from permissive to mandatory Ministerial and PZJA consultation with traditional owners involved with community-based management

groups would contribute significantly Torres Strait Islander ‘ownership’ of any changes to fisheries governance systems.

Recommendation 2:

That the amendments be passed with a further sub-clause, that the Minister whenever authorizing activities such as plans that impact upon traditional fisheries shall take full account of Wildlife Conservation Plans under the EPBCA as well consult with and include community based management groups to assist in determining what social, cultural, ecological and economic factors that are relevant .

Findings 3.

The Drafting Instructions for Section 15A include reference to the effect that a management plan may cover: traditional fishing; commercial fishing, community fishing and treaty endorsements; or a specific fisheries.²¹⁰

It was also proposed that the Minister will have the power to enter into Indigenous Land Use Agreements (ILUA s) (as allowed by subdivision c of Division 3 of Part 2 of the *Native Title Act 1993*) with a native title group (with the meaning given by s 24CD of the NT Act who is a party to an ILUA) which will regulate the way in which traditional fishing is conducted in the Zone. A similar regime is contained in the *Fisheries Management Bill 2005 (SA)*.²¹¹ In particular, the Minister may enter into an agreement with a native title group under which it is agreed that traditional fishing will be undertaken in a fishery identified in the agreement in accordance with a management plan made under s 15A.²¹²

²¹⁰ Ibid 8.43

²¹¹ Ibid 8.49

²¹² Ibid 8.50

The ILUA route or legislative amendment should be avoided instead administrative action by the Minister should be the basis for the community based management scheme. . Sustainable management measures are urgently needed. The *TSFA Regulations* can be amended at the will of the Minister. The *Torres Strait Fisheries Act* as amended in 2007 is now premised on an approach giving more scope to community based management. Our recommendation is to have Community Management Groups working to plans embedded into the PZJA and TSRA infrastructure and funded on a program basis accordingly though the *TSFA Regulations*.

We find that the spirit of *TSFA*'s 2007 amendments forms the basis for community-based management groups capable of controlling sustainable hunting and conservation of dugong, turtle and culture.

Recommendation 3:

a) CMGs mandated under s 3(4) of the TSFA ought to set up as a TS region wide scheme with funded infrastructure and staff in the TSRA Land and Sea Management Unit and the PZJA to support CMGs operationally and scientifically. Such a scheme ought to be articulated with EPBCA mandated National Wildlife Conservation Plans linked into adequately funded community based management scheme based on traditional owner participation.

b) Further that CMGs are articulated with State backed enforcement mechanisms such as the Queensland Fisheries & Boating Patrol or possibly QPWS to assist with sanctioning breaches the community based management plans for sustainable turtle and dugong fisheries where local remedies prove futile or non-viable.