
Indigenous Australians and Dugongs in the Southern Great Barrier Reef: Legal Remedies

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Introduction

An alarming decline in dugongs, a charismatic and internationally endangered sea mammal, in Australian waters over the last decade, has prompted the Commonwealth and Queensland Governments to undertake a series of conservation measures. The measures are commendable on their environmental merits, but the conservation effort arguably diminishes the rights of coastal Aboriginal peoples and Torres Strait Islanders, who have extensive interests in dugongs and their protection. Government recognition of these interests is gradually increasing, through the mediation of broader native title claims and the negotiation of agreements for collaborative management. The focus of this paper, however, is limited to conservation actions taken in the southern Great Barrier Reef, and whether selected domestic legal remedies can redress losses suffered by Indigenous peoples. This focus reflects the concerns of Aboriginal and Torres Strait Islander organisations in Queensland, about denial of access to dugong, inadequate management of dugong and the human impacts which threaten populations, and possible discrimination regarding compensation.

The situation of dugongs and Indigenous peoples in the southern Great Barrier Reef is first reviewed. The exact nature of government conservation actions is then ascertained by characterisation in administrative law. Remedies in this area are briefly discussed. The availability of redress under the *Native Title Act 1993* (Cth) (*NTA*) and the *Racial Discrimination Act 1975* (Cth) (*RDA*) are then considered. The particularly detailed consideration of the *NTA* is a response to grievances

* Student, ANU. I would like to acknowledge the work of Johanna Sutherland, from which this research paper developed.

expressed most strongly by traditional owners.¹ It is suggested that remedies are available, or may become available, under all three avenues, but that the *NTA* provides the strongest possibility of redress.

Analysis of other legal remedies is beyond the scope of this article. In particular, possible avenues available in international forums when domestic remedies are exhausted, are not considered.

1. Ecological Status of Dugong

Dugongs, *dugong dugon*, are long-lived, slow-breeding sea mammals that graze only on certain seagrass beds in shallow coastal waters. Suitable seagrass is found in the Great Barrier Reef region of northern Queensland, which supports one of the largest dugong populations in the world. The extensive dugong habitat in the area contributed to the region's World Heritage listing in 1981, imposing international obligations on Australia to protect the species.² The animals are particularly susceptible to anthropogenic impacts.³ They are extinct in most other parts of the world.

Internationally, dugongs are considered "vulnerable to extinction", or as facing a high risk of extinction in the wild, in the medium-term future.⁴ Aerial surveys show that dugong numbers decreased by 50% between 1988 and 1995 throughout the southern Great Barrier Reef, the region from Cooktown to Bundaberg.⁵ This decline is considered unsustainable.⁶ Researchers have classified dugongs in this region as coming under the most severe World Conservation Union (IUCN) threatened species category of "critically endangered",⁷ or facing an extremely high risk of extinction in the wild in the immediate future.⁸ This contrasts with dugong populations in the northern Great Barrier Reef and the Torres Strait, where dugong numbers have been at least maintained over the past decade.⁹

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- 1 Dugong Strategic Action Planning Group *Meeting minutes* Magnetic Island, 9-10 December 1997; J Sutherland, personal communication.
 - 2 J Slater "The Legal and Policy Issues Involved in Protecting a Population of Dugongs from Gill Netting in Shoalwater Bay of the Great Barrier Reef World Heritage Area" 1997(2) *AELN* 14 at 17.
 - 3 H Marsh and P Corkeron "The Status of the Dugong in the Great Barrier Reef Marine Park" in J Oliver and D Wachenfeld (eds) *State of the Great Barrier Reef World Heritage Area Workshop* Workshop No. 23, Great Barrier Reef Marine Park Authority, Townsville, 1997, p231.
 - 4 J Baillie and B Groombridge (eds) *1996 IUCN Red List of Threatened Animals* IUCN Species Survival Commission, Gland, Switzerland, 1996 at 19.
 - 5 Marsh and Corkeron *supra* n.3; Great Barrier Reef Marine Park Authority *Dugongs in Trouble* Fact sheet, undated.
 - 6 Great Barrier Reef Marine Park Authority "Facing Extinction: Dugongs in the Southern Great Barrier Reef World Heritage Area" in *Fragile, Handle with Care – Dugong Information Kit* (2nd ed) Threatened Species Unit, Townsville, February 1998 at 1.
 - 7 H Marsh, P Corkeron, I Lawler, J Lanyon and A Preen *The Status of the Dugong in the Southern Great Barrier Reef Marine Park* Research publication No 41, Great Barrier Reef Marine Park Authority, Townsville, October 1996 at 10.
 - 8 Baillie and Groombridge *supra* n4 at Annex 7.
 - 9 Queensland Government "Background Information on Dugong" in *Conservation and Management of Dugong in Queensland – Draft* Department of Environment, November 1997 at 5-6.

Many factors are implicated in the decline, including traditional hunting by Indigenous people. These factors, ameliorative steps, and the legislative status of dugong under Australian law, are discussed below. It is instructive first, however, to consider the nature of Indigenous peoples' interests in dugong.

2. Importance of Dugong to Aboriginal and Torres Strait Islander Communities

Torres Strait Islanders, and many, but not all, coastal Aboriginal communities of northern Australia, have traditionally regarded dugongs as having special cultural significance, though the exact nature of each community's relationship with dugong varies.¹⁰ Dugongs were the largest marine resource to be utilised. Marine resources generally were of primary importance for subsistence, and were considered the property of respective coastal groups.¹¹

In many communities today, dugong meat is among the most highly valued of foods, essential for ceremonial occasions and as a valuable addition to the diet. Dugong oil has various medicinal purposes. As well as fulfilling a dietary role, dugong helps maintain overall social cohesion within complex cultural systems. The most skillful dugong hunters attain high social status within a community, and distribution of dugong meat is important in meeting kinship obligations. Hunting and eating of dugong is culturally regulated, with limitations imposed on various sections of the community at specified times.¹² Certain seasons are preferred for hunting.¹³ Many coastal totemic sites are associated with the animal, and dugongs feature in the creation stories, myths and rituals of many communities.¹⁴ Different communities have varying degrees of ecological knowledge concerning the dugong's behavioral patterns and life history.¹⁵

Interests in dugong can be seen as part of a larger responsibility for, and ownership of, clan estates, or defined tracts of land and sea resting with identified language groups.¹⁶ Indeed, the analysis of rights in dugong separately from broader

10 R Johannes and W MacFarlane *Traditional Fishing in the Torres Strait Islands* CSIRO Division of Fisheries, Hobart, 1991; A Smith *Usage of Marine Resources by Aboriginal Communities on the East Coast of Cape York Peninsula* Great Barrier Reef Marine Park Authority, Townsville, 1987.

11 A Chase "Dugongs and Australian Indigenous Cultural Systems: Some Introductory Remarks" in H Marsh (ed) *The Dugong* James Cook University, Townsville, 1985 at 113.

12 D Benzaken, G Smith and R Williams "A Long Way Together: the Recognition of Indigenous Interests in the Management of the Great Barrier Reef World Heritage Area" *The Great Barrier Reef - Science, Use and Management* Conference proceedings, James Cook University, Townsville, 25-29 November 1996 <<http://gbrmpa.gov.au/~crcreef/6conference/conference1/sum.html>> (22 April 1998) at 3.

13 A Smith *supra*, n10.

14 *Ibid*; C Baldwin "Management of Dugong: An Endangered Marine Food Species of Traditional Significance" in F Gray and L Zann (eds) *Traditional Knowledge of the Marine Environment in Northern Australia* Workshop Series No. 8, Great Barrier Reef Marine Park Authority, Townsville, 1988.

15 Smith *supra*, n10.

16 Benzaken *et al supra*, n12.

custodianship interests and obligations towards local ecosystems is an arbitrary distinction.¹⁷ It is made purely for the research purposes of this paper.

Remote communities of the Great Barrier Reef region continue to hunt dugongs. Maintaining this tradition is considered important, as an expression of Indigenous identity.¹⁸ Many Indigenous peoples in more urban locations of the southern Great Barrier Reef also continue to regard dugong as of economic¹⁹ and cultural significance.²⁰ Substantially continuous use of dugong from pre-colonial times to the present can be demonstrated for Aboriginal communities in the Whitsunday region.²¹ This is significant in proving native title under the *NTA*, as discussed below. Contemporary interests in other communities, while not formally studied, are considered "considerable and widespread".²² Seventy permits to hunt 87 dugong in the southern Great Barrier Reef were issued between 1993 and 1995,²³ and concern about dugong decline in "traditional sea country" has frequently been voiced, based on local anecdotal evidence.²⁴

Continued interests in dugong have significant social and environmental implications. Indigenous people are increasingly migrating from remote areas to the urban centres of the southern Great Barrier Reef, bringing hunting traditions to areas where dugong populations are already the most vulnerable.²⁵ It is considered that Indigenous hunting pursuant to the permits issued probably did contribute to dugong decline in some areas.²⁶ A program of co-management with Indigenous communities has since greatly reduced the number of permits issued. Authority to issue and manage hunting permits is devolved from the Great Barrier Reef Marine Park Authority (GBRMPA) to Councils of Elders. Councils are traditionally-recognised decision makers in areas with significant interests in traditional hunting. Torres Strait Islanders resident in the Mackay region have a separate Council. Councils distribute permits within their communities having regard to cultural values, up to

17 Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* Report No 31, Vol 2, AGPS, Canberra 1986, at 125-6; D Smyth, personal communication.

18 Marsh and Corkeron *supra*, n3.

19 J Altman, H Bek and L Roach *Native Title and Indigenous Australian Utilisation of Wildlife: Policy Perspectives* Discussion paper 95/1995, CAEPR, ANU, Canberra, 1995 (on the economic value of subsistence foods); Australian Law Reform Commission *supra*, n17.

20 R Williams "Who's Listening and Who's Learning? Aboriginal and Torres Strait Islander Knowledge of Turtle and Dugong in the Great Barrier Reef Marine Park Regions" *Ecopolitics IX Conference – Perspectives on Indigenous Peoples' management of environmental resources: papers and resolutions* Northern Land Council, Casuarina, 1991 at 113.

21 B Barker "Use and Continuity in the Customary Marine Tenure of the Whitsunday Islands" in N Peterson and B Rigsby (eds) *Customary Marine Tenure in Australia* Oceania Monograph 48, University of Sydney, 1998 at 89.

22 Marsh and Corkeron *supra*, n3, at 234.

23 Queensland Government *supra*, n9, at para 6.4.

24 Benzaken *et al supra*, n12.

25 F Ponte, H Marsh and R Jackson "Indigenous Hunting Rights: Ecological Sustainability and the Reconciliation Process in Queensland" *Search* 25(9) October 1994 at 258.

26 Marsh *et al supra* n7 at 7.

a given quota issued by GBRMPA based on environmental considerations.²⁷

The contemporary significance of dugong to Indigenous communities is further illustrated by the recent formation and initial views of the Dugong Cooperative Management Working Group.²⁸ This body, comprising varied Indigenous representatives, was established to work with advisory groups and government authorities on cooperative management arrangements for dugong protection areas.²⁹

The importance of dugong to Indigenous peoples, and the ways this is demonstrated in the southern Great Barrier Reef, have implications for the availability of legal remedies, as discussed later in this article.

3. Factors Contributing to Decline of Dugongs

There are many and varied reasons for the decline in dugong numbers. One is the use of gill-nets in certain commercial fisheries such as barramundi and mullet. These mesh nets can fatally entangle dugongs as bycatch. Shark mesh nets, boat strikes and disturbance from coastal traffic are also relevant, and indirect impacts are equally implicated. These include seagrass dieback due to coastal development causing habitat loss, pollution and land-based runoff, and natural impacts like cyclones, floods and storms.³⁰ The hunting of dugongs by Indigenous people is also a factor.

This multiplicity of factors, and the nature of the species, means the relative importance of each factor cannot be accurately determined. Sound management should therefore apply the precautionary principle, which states that environmental measures should not be postponed merely for a lack of full scientific certainty.³¹ As such, all possible impacts should be addressed by decision makers.³²

4. Measures Taken to Address Dugong Decline

Dugong decline has been addressed in several ways. Both the Queensland

27 C Cook "Aboriginal and Torres Strait Islander Traditional Hunting and Native Title" *Reef Research* June 1994 at 6.

28 Great Barrier Reef Marine Park Authority *Draft Terms of Reference for Dugong Cooperative Management Working Group and Indigenous Consultation Forums* Indigenous Cultural Liaison Unit, undated; Dugong Cooperative Management Working Group *Meeting, Transcript of Proceedings* Cardwell, Queensland, 14 October 1997.

29 Great Barrier Reef Marine Park Authority *supra*, n28.

30 H Marsh, P Arnold, C Limpus, A Birtles, B Breen, J Robins and R Williams "Endangered and Charismatic Megafauna" *The Great Barrier Reef - Science, Use and Management supra* n12; Williams *supra*, n20.

31 Intergovernmental Agreement on the Environment s3.5.1 in Schedule, *Environment Protection Council Act 1994* (Cth).

32 Marsh *et al supra*, n30.

Government³³ and the Commonwealth, through GBRMPA,³⁴ have jurisdiction over dugong, dugong habitat and threatening processes. Legislation and policy between the governments is coordinated by the non-statutory³⁵ Great Barrier Reef Ministerial Council (GBRMC), a body comprising Queensland and Commonwealth Environment and Tourism Ministers.³⁶ This section reviews legislative regulation by both governments relating to dugongs, the executive and administrative conservation actions undertaken, and the initiatives of Indigenous communities.

(a) Legislative Framework

The legislation affecting dugong forms a large part of the government regulation of dugong decline. Both historic legislative regulation and current Queensland and Commonwealth laws are relevant to management of the decline, with implications for Indigenous peoples. Both are considered in turn.

(i) History of Regulation

The history of dugong management over time has particular significance for the current recognition of native title, as discussed below.

Regulation of dugong in Queensland began in 1915, when an Order in Council made under the *Fish and Oyster Act 1914 (Qld)*³⁷ restricted permitted net types and localities for taking dugong.³⁸ The *Fisheries Act 1957 (Qld)* repealed the *Fish and Oyster Act 1914 (Qld)*, and defined “fish” to include dugongs.³⁹ An Order in Council made under the Act⁴⁰ prohibited the taking of dugongs. The Act provided, however, for the Minister to allow taking under permit,⁴¹ and exempted Aboriginal and Torres Strait Islander residents of reserves from the regime.⁴²

The *Fisheries Act 1957 (Qld)* was replaced by the *Fisheries Act 1976 (Qld)*, under which dugong continued to be regulated as a “fish”.⁴³ Dugong was a protected species under the Act,⁴⁴ and its taking, possession or sale was

33 Through its territorial jurisdiction to low water, extraterritorial jurisdiction, and jurisdiction and title to three nautical miles from low water mark: *Coastal Waters (State Powers) Act 1980 (Cth)*, *Coastal Waters (State Title) Act 1980 (Cth)*. See *Jones v Qld* (1998) (3) AILR 19.

34 Established by *Great Barrier Reef Marine Park Act 1975 (Cth)*, s6. Jurisdiction extends seaward from low water mark: definition of “Great Barrier Reef Region”, *Great Barrier Reef Marine Park Act 1975 (Cth)*, s3.

35 Commonwealth of Australia *Commonwealth Government Directory* AGPS, Canberra, December 1997.

36 Great Barrier Reef Ministerial Council *Dugong Communiqué* Cairns, 14 June 1997; Great Barrier Reef Marine Park Authority *Day-to-Day Management Agreements* 27 May 1988.

37 Section 7.

38 Order in Council, 2 December 1915.

39 *Fisheries Act 1957 (Qld)*, s6.

40 *Ibid*, s70(1).

41 *Ibid*, s70(3).

42 *Ibid*, s3(1).

43 *Fisheries Act 1976 (Qld)* definition of “fish”, s6.

44 *Ibid*, s11, Sch 2.

prohibited.⁴⁵ An exemption continued for Indigenous residents of reserves,⁴⁶ and the prohibition was not absolute. The Minister could permit the taking of fish for research, stocking other waters or "such other purposes as the Minister in any particular case determines".⁴⁷ The *Fisheries Act* 1976 (Qld) was repealed by the current *Fisheries Act* 1994 (Qld), which now excludes dugongs from its regime.⁴⁸ Until its repeal in 1994, the *Fauna Conservation Act* 1974 (Qld) excluded dugongs from its regime, by defining "fauna" under the Act to exclude marine mammals.⁴⁹

(ii) *Current Legislative Framework*

A. *Nature Conservation Act* 1992 (Qld)

The current regulation of dugong in Queensland occurs primarily under the *Nature Conservation Act* 1992 (Qld) (*NCA*). Dugong under the *NCA* is "vulnerable",⁵⁰ "protected wildlife".⁵¹ Protected wildlife is to be managed to conserve the wildlife and its values,⁵² and to ensure that any use is ecologically sustainable, including traditional or customary use by Indigenous peoples.⁵³ Protected animals are the property of Queensland,⁵⁴ subject to property rights subsisting in wildlife immediately before the wildlife became "protected wildlife".⁵⁵ This is significant in preserving native title rights, as discussed below.

The *NCA* restricts the taking of protected wildlife, except under an applicable conservation plan, a licence, permit or other authority issued under a regulation, or an exemption made under a regulation.⁵⁶ A conservation plan⁵⁷ for dugong has been prepared, but is not expected to commence operation under the Act until December 1998.⁵⁸ Separate, but similar, restrictions apply to "protected areas", including World Heritage management areas.⁵⁹

Regulations made under the *NCA*⁶⁰ allow traditional or customary hunting of dugong by Indigenous peoples, if done under a permit granted under the *Marine Parks Act* 1982 (Qld) or the *Great Barrier Reef Marine Park Act* 1975 (Cth) (*GBRMP Act*).⁶¹

45 *Ibid*, s56.

46 *Ibid*, s5.

47 *Ibid*, s58(1).

48 "Fish" excludes animals protected under the *Nature Conservation Act* 1992, s5(3)(b) (see "Current legislative framework", below).

49 *Fauna Conservation Act* 1974 (Qld), s5.

50 *Nature Conservation (Wildlife) Regulation* 1994 (Qld), reg 6(1), Sch 3, cl 10.

51 *Nature Conservation Act* 1992 (Qld) (*NCA*), s71(iii), definition s7.

52 *Ibid*, s73(a).

53 *Ibid*, s73(b).

54 *Ibid*, s83(1).

55 *Ibid*, s86; 19 December 1994 (date of commencement of *NCA*).

56 *Ibid*, s88(1).

57 *Nature Conservation (Dugong) Conservation Plan* 1997 (Qld).

58 G Gordon, Principal Conservation Officer, Queensland Department of Environment, personal communication, 8 September 1998.

59 *NCA*, ss14, 62.

60 *Ibid*, s175.

61 *Nature Conservation Regulation* 1994 (Qld), reg 139A.

The regime for issuing traditional hunting authorities under the *NCA* is limited to those required under a conservation plan, in circumstances where a permit application meets the requirements imposed by the *GBRMP Act*.⁶² No such requirements are imposed by the proposed conservation plan.⁶³ While a provision in the Act creates an exemption from permit requirements for Indigenous peoples taking under tradition or custom outside protected areas, this has not yet commenced operation.⁶⁴ As such, while dugong hunting permits are not required under the *NCA* directly, the Act reinforces the permit requirements imposed by other Acts.

B. *Great Barrier Reef Marine Park Act* 1975 (Cth)

The *GBRMP Act* establishes the Great Barrier Reef Marine Park.⁶⁵ The Park is divided into sections, each regulated by a zoning plan made by GBRMPA under the Act.⁶⁶ Plans specify the purposes for which zones in each section may be used or entered.⁶⁷ Zoning plans are binding on park users⁶⁸ and GBRMPA.⁶⁹ Regulations may be made under the Act, if consistent with the zoning plans.⁷⁰ Dugong is an animal whose taking is regulated by the regulations and zoning plans.⁷¹ The zoning plans currently applicable to the southern Great Barrier Reef divide each section into zones with varying permitted uses.⁷² In the Cairns Section, for example, traditional hunting is allowed in all zones⁷³ except the Preservation zone, but only with a permit from GBRMPA.⁷⁴

GBRMPA may also prepare management plans for an area, a species or an ecological community within the Park.⁷⁵ A management plan for dugongs in Shoalwater Bay regulates Indigenous hunting, and provides that hunting may only be undertaken with a permit.⁷⁶ A breach of permit requirements in Shoalwater Bay is an offence.⁷⁷

Permits for traditional hunting may be issued by GBRMPA under the regulations.⁷⁸

62 *Ibid*, regs 123-128.

63 *Supra*, n57.

64 *NCA*, s93.

65 *GBRMP Act*, s30.

66 *Ibid*, s32.

67 *Ibid*, s32(6).

68 *Ibid*, ss38A, 38B.

69 *Ibid*, s36.

70 *Ibid*, s66.

71 *Great Barrier Reef Marine Park Regulation* 1983 (Cth) (*GBRMP Regs*), reg 13AB; Sch 1.

72 *Great Barrier Reef Marine Park Cairns Section Zoning Plan; Capricornia Section Zoning Plan; Central Section Zoning Plan*.

73 General Use, Habitat Protection, Conservation and Buffer zones.

74 *Great Barrier Reef Marine Park Cairns Section Zoning Plan* 1989 (Cth), cll 6.4(a)(iii), 7.4(a)(iii), 8.4(a), 9.4(a), 10.4(a), 11.

75 *GRMPA Act*, s39X.

76 *Shoalwater Bay (Dugong) Plan of Management* 1997 (Cth), cll 7, 5.2.

77 *GBRMP Regs* 1983 (Cth), reg 56.

78 *Ibid*, reg 13AF.

Relevant considerations in granting a permit are specified,⁷⁹ and include the need to protect cultural values held in relation to the Park by traditional inhabitants,⁸⁰ as well as environmental considerations.⁸¹

C. *Marine Parks Act* 1982 (Qld)

The *Marine Parks Act* 1982 (Qld) establishes a parallel regulatory regime on the landward side of the Great Barrier Reef Marine Park. The Cairns Marine Park has been declared adjacent to the Great Barrier Reef Marine Park Cairns Section,⁸² and the applicable zoning plan regulates use, including traditional hunting, in a similar way to regulation under *GBRMP Act*.⁸³ Permission for hunting may be given by Queensland authorities.⁸⁴

D. Commonwealth Endangered Species Legislation

Dugong has been unsuccessfully nominated for listing and protection as a threatened species under the *Endangered Species Protection Act* 1991 (Cth).⁸⁵ Passage of the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) will protect dugong as a "listed marine species",⁸⁶ making it an offence to take dugong in Commonwealth waters⁸⁷ unless authorised by permit under that Act or under the *GBRMP Act*.⁸⁸ The Bill preserves the *GBRMP Act*'s regulatory regime.⁸⁹

(b) Great Barrier Reef Ministerial Council

(i) *Addressing Gill-Netting: Dugong Protection Areas*

One recent government response to the dugong decline attempted to reduce the impact of commercial fishers. The GBRMC restricted gill-netting in certain areas in June 1997.⁹⁰ A chain of dugong sanctuaries in the southern Great Barrier Reef, known as Dugong Protection Areas (DPAs), was established in December 1997.⁹¹ The DPAs delineate areas where certain forms of gill-netting are banned or restricted.

79 *Ibid*, reg 13AC(4), (5).

80 *Ibid*, reg 13AC(4)(b).

81 *Ibid*, regs 13AC(4)(d), (5)(a).

82 *Marine Park (Cairns) Order* 1992 (Qld), cl 3.

83 *Marine Parks (Cairns Zoning Plan) Order* 1992 (Qld), cll 6-16.

84 *Ibid*.

85 K Maguire, Environment Manager, Australian Fisheries Management Authority *Environmental Management and Australian Fisheries* Environment Institute of Australia seminar, Canberra, 25 February 1998.

86 Environment Protection and Biodiversity Conservation Bill 1998 (Cth), cl 248.

87 *Ibid*, cl 254.

88 *Ibid*, cl 255.

89 *Ibid*, cl 43.

90 Great Barrier Reef Ministerial Council, *supra* n36.

91 Great Barrier Reef Marine Park Authority "Great Barrier Reef Ministerial Council" in *Fragile, Handle with Care supra* n6.

Regulations implementing the system commenced on 12 January 1998.⁹² The sanctuaries “impact significantly”⁹³ on current fishing practices, with lost employment and income to fishers operating in the DPAs. To compensate these losses, the GBRMC approved *ex gratia* payments of around \$2.4 million to about 55 commercial fishers, paid by the Commonwealth and Queensland Governments.⁹⁴ Furthermore, 38 active licences then operating in the DPAs were bought back with funds approved by the GBRMC, each at a cost of between \$38,500 and \$60,000.⁹⁵ Eminent scientists have criticised the DPAs as ineffective to address dugong decline, being too limited in scope.⁹⁶

(ii) Addressing Traditional Hunting

Also in June 1997, the GBRMC agreed “not to permit Indigenous hunting in the southern Great Barrier Reef”.⁹⁷ No compensation has been considered for affected groups. Some groups have expressed dissatisfaction about the absence of equivalent compensation for the loss of their traditional rights, considering this unacceptable and discriminatory.⁹⁸

(c) Great Barrier Reef Marine Park Authority

(i) GBRMPA Policy on Traditional Hunting

GBRMPA has a general conservation strategy for turtle and dugong, to complement Queensland Department of Environment conservation plans.⁹⁹ GBRMPA literature, issued subsequent to the GBRMC communiqués, declares that GBRMPA policy is “to not issue permits for hunting dugongs in the southern Great Barrier Reef”.¹⁰⁰ An interim policy on traditional dugong hunting in the region has been in place since June 1996.¹⁰¹ This policy acknowledges traditional rights and expresses a commitment to cooperative management, but also states that hunting permits can “no longer be recommended” on ecological sustainability grounds.¹⁰² Since the policy was adopted in 1996, no traditional hunting permits have *in fact* been issued

92 *Fisheries Regulation* 1995 (Qld), Sch 2, Pt 6, amended by *Fisheries Amendment Regulation (No. 11)* 1997 (Qld).

93 Great Barrier Reef Marine Park Authority, *supra* n91.

94 C Trinder, Acting Secretary to the GBRMC, personal communication, 3 April 1998.

95 T Stokes, Acting Manager, Threatened Species Unit, GBRMPA, personal communication, 20 May 1998.

96 “The Dugong War”, *Quantum* ABC television program, 21 May 1998.

97 Great Barrier Reef Ministerial Council, *supra* n36.

98 Dugong Cooperative Management Working Group *Meeting Minutes* Cardwell, Queensland, 14 October 1997; Dugong Strategic Action Planning Group *supra* n1.

99 N Ellis (ed) *Turtle and Dugong Conservation Strategy for the Great Barrier Reef Marine Park Issues Paper*, Great Barrier Reef Marine Park Authority, Townsville, 1994.

100 Great Barrier Reef Marine Park Authority “Threats to Dugongs” in *Fragile, Handle with Care*, *supra* n6.

101 Great Barrier Reef Marine Park Authority *Traditional Hunting of Dugongs: Interim Policy*, MPA 161, 27 June 1996.

102 *Ibid* at 2; *GBRMP Regs* 1983 regs 13AC(4)(d); 13AC(5)(a).

for the southern Great Barrier Reef.¹⁰³

(d) Indigenous Peoples' Groups

Many Indigenous communities have also responded to the dugong decline.

(i) Voluntary Agreements

The Darumbal-Noolar Murree Corporation, representing the traditional custodians of Shoalwater Bay, signed a formal Memorandum of Understanding with GBRMPA on 1 August 1996.¹⁰⁴ The Corporation agreed that hunting dugong in the Bay for the time being was inappropriate given the species' endangered status, and agreed to suspend the community's right to hunt until 1999, when the agreement is to be reviewed.¹⁰⁵

The Indigenous communities of Mossman, Wujal Wujal, Ayr, Bowen and the Whitsundays have also voluntarily agreed to moratoriums on hunting in their local areas.¹⁰⁶ Other Indigenous peoples have been critical of the restrictions and emphasise that they continue to reserve the right to hunt dugongs.¹⁰⁷ The decisions not to hunt may be seen as an aspect of self-management of a traditional resource,¹⁰⁸ as the very existence of hunting rights clearly depends on a sustainable resource base.

5. Remedies

A consideration of all possible avenues to challenge government action in the Great Barrier Reef is beyond the scope of this paper. Following a brief characterisation of executive actions in administrative law, the discussion is limited to a consideration of the availability of redress under two Acts. The workings of the *NTA* are examined for protection of native title interests. Whether the *RDA* protects broader cultural rights from impairment, where compensation has been differentially granted to affected groups, is then considered.

(a) Characterisation in Administrative Law

(i) GBRMC Communiqué

The Ministerial Council communiqué expressing agreement not to permit

103 D Versace, Permits Officer, Environmental Management Systems, GBRMPA, personal communications, 28 August 1998, 2 September 1998.

104 Pursuant *GBRMP Act* 1975 (Cth), s39ZA(1).

105 Great Barrier Reef Marine Park Authority "Preface" in *Shoalwater Bay (Dugong) Plan of Management*, Townsville, March 1997, pp iii, xi-xii.

106 Great Barrier Reef Marine Park Authority "Actions for Dugong Conservation" in *Fragile, Handle with Care*, *supra* n6.

107 Anon, in Dugong Cooperative Management Working Group, *supra* n98 at 9.

108 G Duell, Aboriginal and Torres Strait Islander Commission, Townsville, personal communication, 13 August 1998.

Indigenous hunting¹⁰⁹ has arguably been made under an essentially facultative¹¹⁰ executive power,¹¹¹ rather than under statute. By itself, it is not legally binding or enforceable.

Alternatively, the communiqué may be a “general direction” to GBRMPA guiding the Authority’s formulation of policy. Section 7(2) of the *GBRMP Act* requires the Authority to perform its functions in accordance with any general directions given by the Minister, not inconsistent with the Act. Such a provision impliedly confers power on the Minister to give such directions to GBRMPA.¹¹² A similar provision in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) was considered by the Full Federal Court in *Aboriginal Legal Service Ltd v Herron*.¹¹³ In that case, a Ministerial direction appointing a “special auditor” to the Aboriginal and Torres Strait Islander Commission (ATSIC) was considered to be beyond the scope of a “general direction” and invalid. To be binding, a direction must not be directed to a particular case or decision, but applicable generally.¹¹⁴ The direction must not require a decision-maker to determine the outcome of an application in a particular way.¹¹⁵

The direction to GBRMPA in this case is arguably beyond the power conferred by s7(2), as it decides that the outcome of *all* Indigenous hunting permit applications is that they will be refused. Being beyond power, the direction has no effect on GBRMPA’s decision-making discretion.

(ii) GBRMPA Policy

Section 65 of the *GBRMP Act* states that the Act has effect subject to Australia’s obligations “under international law, including obligations under any agreement between Australia and another country or countries”.¹¹⁶ “Agreements” include treaties and conventions.¹¹⁷ Various international agreements impose obligations on Australia regarding environmental protection of dugongs in the Great Barrier Reef.¹¹⁸

109 Described in “Great Barrier Reef Ministerial Council”, in “Measures Taken to Address Dugong Decline”, above.

110 *Davis v Commonwealth* (1988) 166 CLR 79 at 113 per Brennan J (on the nature of executive power in determining the scope of the Commonwealth Parliament’s nationhood power).

111 *Commonwealth of Australia Constitution Act 1900* (Imp), s61.

112 *Aboriginal Legal Service Ltd v Herron* [1996] 826 FCA 1 (18 September 1996) at 2 per Black CJ.

113 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s12(1); *Aboriginal Legal Service v Herron* [1996] 826 FCA 1 (18 September 1996). See J Sutherland in Dugong Strategic Action Planning Group *supra* n.1.

114 *Aboriginal Development Commission v Hand* (1988) 15 ALD 410 at 414-415 per Davies J.

115 *Aboriginal Legal Service Ltd v Herron* [1996] FCA (18 September 1996) at 23 per Tamberlin J.

116 *GBRMP Act*, s65.

117 *Ibid*, s3(1) definition of “agreement”.

118 *Convention for the Protection of the World Cultural and Natural Heritage 1972*, Arts 1, 2, 4; *Convention on International Trade in Endangered Species of Wild Fauna and Flora 1975*, Appendices 1, 11; *Convention on the Conservation of Migratory Species of Wild Animals 1979* (Bonn Convention), Appendix II; *Convention on Biological Diversity 1992*, Art 8, *Convention on Wetlands of International Importance 1971* (Ramsar Convention). See J Slater *supra*, n2.

Other agreements promote the protection of Indigenous peoples' cultural rights, encompassing interests in dugongs.¹¹⁹ International human rights obligations require States to take positive measures to ensure the protection and recognition of rights,¹²⁰ subject to "reasonable limitations"¹²¹ such as basic considerations of sustainability.¹²²

The performance of GBRMPA's functions under the Act, including the making of policy, is thus constrained by these obligations. A policy having the effect of curtailing traditional hunting may be in breach of these. Given the inadequacies of other conservation measures such as the DPAs,¹²³ the restrictions imposed on hunting arguably cannot be considered essential for ecological sustainability and therefore permissible "reasonable limitations" under international law.¹²⁴

The effect of a provision similar to s65,¹²⁵ requiring the performance of government functions in accordance with international obligations, was considered in *Project Blue Sky v Australian Broadcasting Authority*.¹²⁶ Construing the purpose and object of the *Broadcasting Services Act* 1992 (Cth), a majority of the High Court decided that decisions made contrary to the provision were a breach of the Act. Although the breach of international obligations did not cause the government action to be invalid, the action was nevertheless unlawful, as unauthorised by the statute. Any further action based on the unlawful action would also be unlawful, and could be restrained by an injunction. In accordance with this approach, it is arguably unlikely that Parliament intended that actions by GBRMPA be invalidated by a breach of treaty obligations: Australia is party to some 900 treaties imposing obligations.¹²⁷ As such, if the GBRMPA policy is in breach of international human rights obligations, the breach arguably would not affect the validity of the policy, but a refusal to issue permits on the basis of the policy may be unlawful. Stringent application of the policy should therefore be open to challenge.

An alternative avenue for challenge is judicial review. In *Minister for Immigration and Ethnic Affairs v Teoh*,¹²⁸ it was held that Australia's ratification of a treaty imposing international law obligations can give rise to a legitimate expectation, that

119 *Convention on Biological Diversity* 1992 (CBD), Arts 8(j), 10(c); *International Covenant on Civil and Political Rights* 1976 (ICCPR), Art 27; *International Convention on the Elimination of All Forms of Racial Discrimination* 1969. See J Sutherland *Fisheries, Aquaculture and Aboriginal and Torres Strait Islander Peoples* Department of Environment, Sport and Territories, Canberra, 1996 at 75-82.

120 ICCPR, Art 27, interpreted by United Nations Human Rights Committee *General Comment* No 23 (50) 1994 at paras 6.1-6.2.

121 *Lovelace v Canada* Communication No 24/1977, adopted 30 July 1981 (thirteenth session); on ICCPR Art 27.

122 For example, CBD, Art 10(c).

123 "The Dugong War" *supra*, n96.

124 *Lovelace v Canada* Communication No 24/1977, adopted 30 July 1981 (thirteenth session); on ICCPR, Art 27.

125 *Broadcasting Services Act* 1992 (Cth), s160(d).

126 (1998) 153 ALR 490.

127 *Ibid* at 518, citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 316.

128 (1995) 183 CLR 273.

an administrative decision-maker will act in accordance with the treaty. Indigenous peoples are therefore entitled to expect that their cultural rights will be recognised as far as possible when hunting permit applications are made. However, the existence of a legitimate expectation does not necessarily compel a decision-maker to follow treaty obligations. Procedural fairness merely requires that due notice be given to affected persons before acting inconsistently with a treaty, and adequate opportunities given to argue why the obligations should not be departed from.¹²⁹ The decision making a policy to refuse hunting permits¹³⁰ was made without the involvement of Indigenous peoples.¹³¹ As such, procedural fairness has arguably been breached.

Use of the policy may also be open to challenge. GBRMPA is responsible for the management of the Great Barrier Reef Marine Park,¹³² and has power to do all things “necessary or convenient to be done, for or in connection with the performance of its functions”.¹³³ Policy formulation as part of threatened species management by GBRMPA is clearly within power. A decision-maker such as GBRMPA may adopt a policy to guide the exercise of its statutory discretion to award hunting permits.¹³⁴ The adoption of the policy is not of itself amenable to judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). Decisions reviewable under this Act must be final or substantive determinations required by statute, which affect rights.¹³⁵

However, a policy must be compatible with the legislation it elucidates, inviting attention to all relevant matters.¹³⁶ In this case, the regulation concerning the issue of traditional hunting permits requires GBRMPA to have regard to cultural values relating to the park, held by traditional inhabitants.¹³⁷ This encompasses interests in hunting dugong. Endangered species conservation, which is necessary for preserving future hunting rights, is also a required consideration.¹³⁸ It appears that the latter is all the policy considers. Automatic application in refusing a request for a permit is a breach of the decision-maker’s duty not to exercise discretionary power in strict adherence to a policy, without regard to the merits of a particular case.¹³⁹ As such, if a permit application is refused on this basis, the decision may be amenable to judicial review.

129 *Ibid*; applied in *Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] 5 FCA (15 January 1998).

130 See “GBRMPA Policy on Traditional Hunting”, above.

131 J Sutherland and D Smyth, personal communications.

132 *GBRMP Act*, s7(1B).

133 *Ibid*, s8(1).

134 Under *GBRMP Regs* 1983 (Cth), reg 13AC(5).

135 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s3; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

136 *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640.

137 *GBRMP Regs* 1983 (Cth), regs 13AC(4)(b); 13AC(5).

138 *Ibid*, reg 13AC(5)(a).

139 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s5(2)(f).

(b) Native Title Act 1993 (Cth)

The *NTA* is the most directly relevant Act applicable to this case study, and arguably provides the strongest option for redress. The *NTA* provides compensation in certain circumstances where native title has been extinguished. Native title as defined in the Act must be proven to exist, and that native title must have been affected by recent actions which give rise to a right to compensation. Section 211 also creates a limited exemption for native title holders, from regulation of certain activities. The applicability of s211 in the current context is considered.

(i) The Existence of a Native Title Interest

Section 223(1) defines native title as the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders, in relation to land or waters. These may include hunting, gathering and fishing rights and interests.¹⁴⁰ They must:

- (a) be possessed under traditional laws and customs;¹⁴¹
- (b) which create a connection with the land or waters;¹⁴² and
- (c) be recognised by the common law of Australia.¹⁴³

The terms of s223 suggest that hunting rights are contemplated as rights creating a connection with, and arising from the use of, particular traditional land or waters. Conversely, hunting rights exercised independently of a traditional connection with land or waters (as defined in the Act) are not recognised as native title rights, notwithstanding that they may be *cultural* rights. However, the enumeration of hunting, fishing and gathering rights and interests in s223(2) suggests that these rights can exist as native title without a need to prove title to the underlying lands or seabed.

The section has the effect that the content of native title is a factual matter to be determined by reference to traditional laws and customs.¹⁴⁴ In the present case, the traditional laws and customs discussed earlier¹⁴⁵ suggest that a right to hunt dugong is central to a native title claim regarding dugongs. Further claims may include claims to a right to manage and control the use of the animal. Traditional laws also appear to contemplate proprietary rights to dugong,¹⁴⁶ suggesting that such rights may also be included in native title.

140 *Native Title Act 1993 (Cth) (NTA)*, s223(2).

141 *Ibid*, s223(1)(a).

142 *Ibid*, s223(1)(b).

143 *Ibid*, s223(1)(c).

144 *Mabo v Queensland [No. 2] (Mabo [No. 2])* at 58 per Brennan J; at 88, 110 per Deane and Gaudron JJ; at 187 per Toohey J.

145 See, "Importance of Dugong to Aboriginal and Torres Strait Islander Communities", above.

146 Chase *supra*, n11.

A. “Rights and interests possessed under traditional laws and customs”

For the purposes of this paper, it may be assumed that all interests in dugong hunting held by the Indigenous peoples of the southern Great Barrier Reef arise under traditional laws. However, the breadth of this view is limited by requirements imposed by the common law, discussed below.

B. “Creating a connection with the land or waters”

The exercise of hunting rights in certain waters, in accordance with traditional rules delineating the physical boundaries of clan estates, gives rise to a connection with that body of water. For present purposes, it may be assumed that all traditional hunting rights create a connection with the waters in which the right is exercised. Kirby P in *Mason v Tritton*¹⁴⁷ suggests that evidence of hunting rights can in itself be evidence of an Aboriginal community’s “connection with” land. The same reasoning should apply for interests in waters, subject to the availability of native title offshore, as discussed below.

C. “Rights recognised by the common law of Australia”

Recognition by the common law requires:

- conformity with common law interpretations of “traditional laws creating a connection with land or waters”; and
- an absence of acts validly extinguishing native title between Crown assertion of sovereignty and the date protection is accorded by the *NTA*.

The requirement of recognition by the common law further raises the issue of whether native title can exist in offshore waters.

Existence of Native Title at Common Law

The evidence required to prove native title at common law was discussed in *Mabo v Queensland [No 2]*.¹⁴⁸ The elements have been developed in later cases.¹⁴⁹ The principles described in interpretation of native title fishing rights¹⁵⁰ are arguably equally applicable to native title dugong hunting rights. Both involve the taking of animal resources from waters close to shore. The factual evidence required is substantial, and must demonstrate:

- that traditional hunting rights were exercised by an Aboriginal community immediately before the Crown asserted sovereignty over the territory.¹⁵¹ For the

147 (1994) 34 NSWLR 572 at 582.

148 (1992) 175 CLR 1.

149 *Pareroultja v Tickner* (1993) 42 FCR 32; *Mason v Tritton* (1994) 34 NSWLR 572 at 584 per Kirby P; at 598 per Priestley JA; *Derschaw v Sutton* (1997) 2(1) AILR 53; *Yarmirr v Northern Territory* [1998] 771 FCA (6 July 1998).

150 For example, *Mason v Tritton* (1994) 34 NSWLR 572; *Derschaw v Sutton* (1997) 2(1) AILR 53.

151 *Mabo [No. 2]* at 59 per Brennan J; at 110 per Deane and Gaudron JJ; at 189 per Toohey J.

land adjacent to the southern Great Barrier Reef in Queensland, sovereignty was asserted on 7 February 1788. For present purposes, it will be assumed that this element can be made out.

- that the claimant is an Indigenous person and a descendant of the original (pre-1788) Indigenous community.¹⁵² Individuals and community members will usually mutually recognise membership of the contemporary community.¹⁵³ Torres Strait Islanders resident in the southern Great Barrier Reef will generally fail to prove native title on this ground, as they are not descendants of the original community. A possible exception arising from permission under custom is discussed below. Further, intermarriage between Aboriginal and Torres Strait Islander peoples may mean that more emphasis is placed on the criteria of self-identification and communal recognition than the criterion of descent, in determining native title holders. These are the factors that are relevant in determining whether a person is “Aboriginal”.¹⁵⁴ Proof of this element depends on factual evidence.
- that the claimant and earlier descendants of the original group have continued, so far as practicable, to acknowledge and observe the traditional laws to the present time, such that a connection with the land or waters has been “substantially maintained”.¹⁵⁵

Depending on the strength of available evidence, successful proof of continued and current acknowledgment of traditional laws by individual communities may be aided by evidence of an enduring interest in applications for hunting permits, self-management through Councils of Elders, and involvement in the Dugong Cooperative Management Working Group.¹⁵⁶ It is immaterial that these are relatively recent initiatives: new means of acknowledging and observing traditional rights will not defeat a claim, if the general nature of the rights is characterisable as based in tradition.¹⁵⁷ If traditional laws and customs have been abandoned or lost by the “tide of history”, however, native title can no longer exist. Once extinguished it cannot be revived.¹⁵⁸

Voluntary agreements not to hunt dugong¹⁵⁹ made by Indigenous groups arguably cannot be characterised as an abandonment of native title. Instead, the agreements signify people’s concern for dugong preservation. Although the physical act of hunting may no longer be observed, rights to resume hunting when environmental conditions improve have been reserved, and arguably constitute a continued

152 *Ibid* at 59, 70 per Brennan J.

153 *Ibid* at 61, 70 per Brennan J.

154 *Gibbs v Capewell* (1995) 128 ALR 577; *Shaw v Wolf* [1998] 389 FCA (20 April 1998).

155 *Mabo [No. 2]* at 59 per Brennan J.

156 See, “Importance of Dugong to Aboriginal and Torres Strait Islander Communities”, above.

157 *Mabo [No. 2]* at 61, 70 per Brennan J; at 110 per Deane and Gaudron JJ; at 192 per Toohey J.

158 *Ibid* at 60 per Brennan J; at 110 per Deane and Gaudron JJ; *Fejo v Northern Territory* [1998] HCA 58 (10 September 1998) at para 56.

159 See, “Indigenous Peoples’ Groups” in “Measures Taken to Address Dugong Decline”, above.

acknowledgment of those interests. However, the agreements have possible implications under the future acts regime of the *NTA*, which is discussed below.

The need to have maintained connections with the particular waters used by a contemporary community's pre-1788 ancestors, through observation of traditional laws and customs, is likely to be problematic for many coastal urban Indigenous peoples. Widespread historical dislocation in Queensland since colonial settlement¹⁶⁰ has meant many people are no longer resident on traditional coastal lands, suggesting that their interests in dugong fall outside the scope of native title protected by the *NTA*. This provides a further reason for broadly interpreting criteria for membership of a native title-holding community.¹⁶¹

A possible argument allowing such people, including Torres Strait Islanders, to exercise hunting rights may be based on the New Zealand case of *Te Weehi v Regional Fisheries Officer*.¹⁶² If Aboriginal people resident on traditional lands have given permission to other Indigenous peoples to enjoy hunting rights in that area in accordance with the residents' customs, the visitors may be able to claim their right to hunt *through* the residents' right. Proof of such a right is dependent on evidence showing an Australian court that the acquisition of interests is consistent with, and occurred under, the laws and customs of both groups.

It may also be possible for people who have taken over the territory of an extinct clan group in accordance with tradition, to thereby become traditional inhabitants able to exercise hunting rights in that area recognisable by the common law.¹⁶³

No Valid Extinguishment

While native title survived the Crown's acquisition of radical title on the assertion of sovereignty,¹⁶⁴ native title at common law can be extinguished by valid Commonwealth or State legislative or executive action. Native title which has been extinguished is no longer recognised by the common law of Australia.

The relevant acts to be analysed here for extinguishment at common law are those unaffected by the *NTA*, being acts done before the *NTA*'s past, intermediate or future acts regimes became applicable. The *NTA* has modified the common law on extinguishment for certain acts done after this date. These acts, including the current conservation measures, are discussed separately below.

Extinguishment can occur by a legislative act manifesting a clear and plain intention to extinguish native title, or by Crown grant of rights or interests which are wholly or partly inconsistent with the enjoyment of native title.¹⁶⁵ Where Crown-

160 N Loos "A Chapter of Contact: Aboriginal-European relations in North Queensland 1606-1992" in H Reynolds (ed) *Race Relations in North Queensland* (2nd ed) James Cook University, Townsville, 1993 at 4.

161 *Supra*, n154.

162 [1986] 1 NZLR 680.

163 D Sweeney "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16(1) *UNSWLJ* 97 at 120.

164 *Mabo [No. 2]* at 69 per Brennan J; at 96, 110 per Deane and Gaudron JJ; at 184, 205 per Toohey J.

165 *Ibid* at 64 per Brennan J; at 110-111 per Deane and Gaudron JJ; at 195-6, 205 per Toohey J.

granted titles are partly inconsistent with native title, native title is extinguished to the extent of inconsistency.¹⁶⁶ The Crown may also validly appropriate land to itself, acquiring full beneficial ownership and thereby extinguishing native title.¹⁶⁷ Where land is reserved for a public purpose, native title is extinguished when such land is *used* in a manner inconsistent with native title.¹⁶⁸

It is unlikely in this case that Crown-granted rights and interests have entirely extinguished native title. Where leases have been granted for tourism development over waters, these may have extinguished native title where enjoyment of the lease necessitates exclusive use of the waters in question. However, these apply to limited areas only. Commercial fishing licences are capable of operating concurrently with the enjoyment of native title dugong hunting rights. The right claimed is neither a commercially valuable right nor one requiring exclusive use and control of the coastal waters in which commercial fishing licences are exercised. Native title is capable of enjoyment contemporaneously with other interests.¹⁶⁹

A law which regulates the enjoyment of native title or which creates a regime of control consistent with the continued existence of native title, does not demonstrate the clear and plain intention necessary for extinguishment.¹⁷⁰ Extinguishment depends on the practical effect of government acts on the enjoyment of native title, rather than the subjective intention of the Crown or Parliament.¹⁷¹ Regulatory legislative schemes which vest ownership of resources in the Crown have been considered to extinguish all native title, including rights of user.¹⁷²

The history of government regulation of dugong has been outlined above.¹⁷³ There is arguably no clear and plain intention to extinguish native title manifested by the statutory regime operating from the moment of assertion of sovereignty. While prohibitions on taking dugong existed, they were not absolute. While creating a strict regulatory regime, the laws were consistent with the continued existence of native title.

Native title can also be lost where a community voluntarily surrenders its title to the Crown.¹⁷⁴ Where native title is extinguished, the burden on the Crown's title is removed and its radical title elevated to full beneficial title.¹⁷⁵ The agreements not to hunt are not a voluntary surrender of title, as discussed further below.

166 *Ibid* at 69 per Brennan J.

167 *Ibid* at 50; 69-70 per Brennan J; at 110 per Deane and Gaudron JJ.

168 *Ibid* at 68 per Brennan J; at 110 per Deane and Gaudron JJ.

169 *Mabo [No. 2]* at 67 per Brennan J; at *Wik Peoples v Queensland* (1996) 187 CLR 1; *Yarmirr v Northern Territory* [1998] 771 FCA (6 July 1998).

170 *Ibid* at 64 per Brennan J, citing *R v Sparrow* (1990) 70 DLR (4th) 385 at 400-401.

171 *Ibid* at 68 per Brennan J; *Mason v Tritton* (1994) 34 NSWLR 572, 592.

172 *Wik Peoples v Queensland* (1996) 134 ALR 637 (Fed Ct) per Drummond J, considering minerals under mining legislation (not contested in the case on appeal); *Eaton v Yanner*; *Ex parte Eaton* unreported, Qld SC CA, 27 February 1998, per McPherson JA and Moynihan J, considering fauna under the *Fauna Conservation Act 1974* (Qld).

173 See, "Legislative Framework", in "Measures Taken to Address Dugong Decline", above.

174 *Mabo [No. 2]* at 70 per Brennan J; at 110 per Deane and Gaudron JJ.

175 *Ibid* at 70 per Brennan J.

Native Title to the Offshore

The above discussion assumes that the general principles stated in *Mabo [No 2]* regarding common law recognition of native title to land, apply equally to native title to the sea. The hunting rights in this case are situated in offshore waters.¹⁷⁶ As dugong habitat is primarily close to shore, the most significant interests claimed are likely to be within three nautical miles of the baselines delineating the territorial sea (mainly low water mark, with certain exceptions). The *NTA* clearly contemplates the possibility of native title existing in offshore waters.¹⁷⁷ The Act's definition of native title as a right or interest recognised by the common law, however, raises the question of whether the common law does in fact recognise native title interests in the sea.

The common law of England became the law of the Australian colonies with the acquisition of sovereignty by the Crown. The common law operated within the limits of those colonies, namely to low water mark. Under a common law which had not yet recognised native title, this boundary was held to delineate the territorial limits of Australia.¹⁷⁸ Sovereignty, and consequent jurisdiction and control, over the sea and seabed beyond low water, derive from legislative enactment recognised by international law, not the common law. Such legislative activity has validly vested sovereignty in the territorial sea in the Commonwealth.¹⁷⁹ By the Offshore Constitutional Settlement (OCS), the Commonwealth vested in each State, the same proprietary rights and title to the seabed, and the same rights over the sea, to three nautical miles, that the States have over waters within their limits.¹⁸⁰ The States were also given the same legislative powers over those waters as they have over waters within their limits.¹⁸¹

It is arguable that the OCS has extended the operation of the common law to three nautical miles from low water, allowing for the recognition of native title by the common law to this point. Although the OCS did not extend the limits of any State,¹⁸² it was held in *Jones v Queensland*¹⁸³ that the Queensland Supreme Court has jurisdiction to hear native title claims up to the three nautical mile limit, as a result of the OCS and the effect of the *Supreme Court Act 1991* (Qld) and the *Supreme Court Act 1995* (Qld).

It has been suggested that native title cannot exist offshore, because native title operates as a burden on the Crown's radical title. Brennan CJ in *Commonwealth v WMC Resources Ltd*,¹⁸⁴ quoting Stephen J in the *Seas and Submerged Lands*

176 *NTA*, s253 (definition of "offshore place").

177 Section 6 (Act's operation extends to the coastal sea); s17(2) (compensation for past acts affecting native title to offshore places); s24NA (future acts affecting native title to offshore places); s253 ("offshore place" defined).

178 *New South Wales v Commonwealth (Seas and Submerged Lands case)* (1975) 135 CLR 337.

179 *Ibid*; *Seas and Submerged Lands Act 1973* (Cth), ss6, 10.

180 *Coastal Waters (State Title) Act 1980* (Cth), s4.

181 *Coastal Waters (State Powers) Act 1980* (Cth), s5.

182 *Coastal Waters (State Title) Act 1980* (Cth), s8; *Coastal Waters (State Powers) Act 1980* (Cth), s7.

183 (1998) 3 AILR 19.

184 (1998) 152 ALR 1.

case, suggests a lack of radical title to territorial waters,¹⁸⁵ because the source of Crown interests in the offshore is statute, not the common law. A lack of radical title suggests there is nothing for native title in the offshore to burden.

In the first case directly considering the issue, however, Olney J in *Yarmirr v Northern Territory*¹⁸⁶ decided that native title can exist offshore, given that the *NTA* evinces an intention to provide for the recognition and protection of native title,¹⁸⁷ both onshore and offshore.¹⁸⁸ The Act creates a statutory basis for recognition of native title offshore. To construe s223(1)(c) as limiting recognition of native title under the Act to the common law limits of a State was considered inconsistent with the clear legislative intent of the Act, which was to protect native title where it could be shown by evidence to exist in relation to the coastal sea.¹⁸⁹ However, Olney J does not examine the applicability of the common law in territorial waters, deciding that statutory recognition is sufficient for protection under the *NTA* despite the s223(1)(c) requirement. Nor does he consider the effect of the OCS. His approach is one of interpretation of s223(1)(c) consistently with the broader objects of the whole Act.

The judgments in *Mason v Tritton*¹⁹⁰ treated fishing rights, which were asserted as part of native title to coastal waters, as if they were interests claimed over land, without making any particular distinction because the title concerned waters rather than land. Although he commented on State legislative power over the offshore,¹⁹¹ Kirby P seems to accept as a given, that native title can exist in the sea. He said:¹⁹²

At least where what is claimed by the description "right to fish" is dependent upon the Aboriginal native title to the communal use, possession and occupation of the submerged lands, there is, in the common law of Australia as now understood, no bar to the recognition of those rights.

Similarly, in *Derschaw v Sutton*,¹⁹³ where a native title fishing right was unsuccessfully claimed as a defence to a fishing prosecution, the existence of offshore native title does not appear to have been directly considered, but implicitly accepted.

As such, the requirement of recognition by the common law should be construed in the context of the entire Act, allowing protection of offshore native title by the *NTA*.

185 *Ibid* at 11.

186 [1998] 771 FCA (6 July 1998).

187 *NTA*, ss3(a), 10.

188 *Yarmirr v Northern Territory* [1998] 771 FCA (6 July 1998) at paras 32, 37.

189 *Ibid* at para 39.

190 (1994) 34 NSWLR 572.

191 *Ibid* at 593-594.

192 *Ibid* at 580.

193 (1997) 2(1) AILR 53.

(ii) Past Acts

Broadly, the effect of the past acts regime is to validate “past acts”¹⁹⁴ which were invalid, effectively for inconsistency with the *RDA*.¹⁹⁵ The only acts to which the regime applies, therefore, are those which had extinguished native title at common law, after the enactment of the *RDA* in 1975, but before 1 July 1993 (for legislative acts) and 1 January 1994 (for all other acts).

The only presently relevant act made within this time frame is the *Fisheries Act* 1976 (Qld). It has already been shown that this Act did not extinguish native title, merely continuing the regulatory scheme already existing under earlier legislation. As such, it is not a past act to which Part 2 Div 2 applies. The *NCA* was drafted within the time frame, but did not commence operation until 19 December 1994, and is not a past act.

(iii) An Act Affecting Native Title

If native title as defined can be shown to have continued at the date of commencement of the *NTA*,¹⁹⁶ that native title is recognised and protected in accordance with the Act.¹⁹⁷ It is unable to be extinguished contrary to the Act.¹⁹⁸

A. Definition of “act”, s226

Acts that may be open to challenge include the making, amendment or repeal of legislation¹⁹⁹ and the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation.²⁰⁰ As such, both of the GBRMC decisions,²⁰¹ the GBRMPA policy²⁰² and all Queensland legislation, including delegated legislation, come within the s226 definition of an “act”. Voluntary agreements may also come within the non-exhaustive definition in s226.

B. Definition of Act “affecting” Native Title, s227

An act thus defined “affects” native title if it extinguishes native title rights and interests, or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.²⁰³ An act which affects native title becomes subject to the regimes imposed by the Act to protect and recognise native title.²⁰⁴

Neither “extinguishment” nor “inconsistency” are defined in the Act, so common law understandings of these terms are likely to inform the interpretation of

194 Defined in *NTA*, s228.

195 *Western Australia v Commonwealth* (1995) 183 CLR 373 at 454.

196 1 January 1994.

197 *NTA*, s10.

198 *Ibid*, s11(1).

199 *Ibid*, s226(2)(a).

200 *Ibid*, s226(2)(e).

201 See “Measures Taken to Address Dugong Decline”, above.

202 *Ibid*.

203 *NTA*, s227.

204 *Ibid*, Div 3, s24AA(1) (future acts); Div 4, s45(1) (*Racial Discrimination Act* 1975).

s227. As such, extinguishment occurs in the circumstances discussed above.²⁰⁵ Acts which are wholly or partly “inconsistent” with native title also *extinguish* native title, to the extent of inconsistency,²⁰⁶ suggesting that the only acts regulated by the *NTA* are those that would extinguish native title at common law.²⁰⁷ Such acts give rise to a right to compensation. Acts which would merely regulate native title at common law but are consistent with its continued enjoyment, do not “affect” native title or create an entitlement to compensation under the Act.

Acts which affect native title may be “future acts” if they are not past acts.²⁰⁸ Whether any of the measures taken to address dugong decline as described above, are future acts, requires consideration of each act in turn.

Current Statutory Regime

The operation of the entire statutory regime regulating native title enjoyment of dugong²⁰⁹ falls outside the regulation of the *NTA*, as the regime evinces no intention to extinguish native title. It is merely regulatory.

However, the *NCA* vests property in dugong in the Crown.²¹⁰ Depending on the statutory framework, absolute beneficial Crown ownership of a resource may be considered inconsistent with the continuation of native title rights to hunt.²¹¹ In this case, though, the provision merely forms part of a larger regulatory scheme, which does not demonstrate a clear and plain intention to extinguish native title. This was the view adopted by the dissenting judge in *Eaton v Yanner*²¹² in interpreting provisions of the *Fauna Conservation Act 1974* (Qld). The case is subject to appeal.²¹³ Even if the majority in *Eaton v Yanner* is correct, the decision is not directly applicable to the situation of dugong, because s86 of the *NCA* preserves property rights subsisting in dugong before their protection under the *NCA*. This arguably includes all native title rights, including hunting rights, as native title is a property right.²¹⁴ As the legislation preserves these interests, it is not a future act affecting native title.

205 See, “No Valid Extinguishment”.

206 *Mabo [No 2]*.

207 cf *Western Australia v Commonwealth* (1995) 183 CLR 373 at 453; M Lavarch and A Riding *A New Way of Compensating: Maintenance of Culture through Agreement* Issues paper 21, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, April 1998 at 2.

208 *NTA* s233(1)(b). See “Past Acts”, above.

209 See “Current Legislative Framework”, in “Measures Taken to Address Dugong Decline”, above.

210 *Ibid*; *NCA*, s81(1).

211 *Eaton v Yanner*; *Ex parte Eaton* unreported, Qld SC CA, 27 February 1998.

212 *Ibid*, per Fitzgerald P.

213 G Hiley “Introduction” *Native Title News* (1998) 3(9) at 1.

214 *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 217-218 per Brennan, Toohey and Gaudron JJ; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 437; J Behrendt “So Long, and Thanks for All the Fish...” (1995) 3(72) *Aboriginal Law Bulletin* 11.

GBRMC Decisions

The GBRMC decision to compensate commercial fishers is unlikely to be seen as an act affecting native title, as, in itself, it does not impinge upon native title rights in any way. The decision “not to permit Indigenous hunting” also does not affect native title, as it is non-binding and unenforceable, as discussed above.²¹⁵

GBRMPA Policy

The GBRMPA policy is arguably “wholly or partly” inconsistent with the continued enjoyment of hunting rights. It effectively prevents traditional hunting with threatened criminal sanctions for non-compliance, despite purporting to acknowledge native title. The policy thus appears to impose such a degree of regulation on the enjoyment of native title rights, that these rights are in fact now unable to be enjoyed. The result at common law would be extinguishment.²¹⁶ As the policy was made in 1996 and it affects native title, it is a future act.

Voluntary Agreements

The formal Memorandum of Understanding signed by the Indigenous people of Shoalwater Bay²¹⁷ arguably does not constitute an extinguishment of native title by surrender. The agreement is expressed merely as a temporary suspension of hunting rights. As such, it is not a future act affecting native title.

(iv) Consequences of the Act Affecting Native Title

Future acts become subject to the regime created by *NTA* Pt 2, Div 3. The Division validates certain acts which affect native title and creates provisions for compensation where this has occurred, and invalidates other acts.²¹⁸

The GBRMPA policy is a future act relating to an offshore place²¹⁹ and is valid.²²⁰ The non-extinguishment principle applies²²¹ and compensation is payable²²² from the Commonwealth.²²³

Where the non-extinguishment principle applies, an act affecting native title does not extinguish it.²²⁴ However, to the extent that the act is inconsistent with the enjoyment of native title rights, those rights are of no effect²²⁵ while the act and its effects continue to operate.²²⁶ The effect of the principle in this instance is that native title hunting rights are suppressed for as long as the policy remains in place.

215 See earlier discussion of administrative law remedies, above.

216 *Mason v Tritton* (1994) 34 NSWLR 572 at 593.

217 See “Indigenous Peoples’ Groups” in “Measures Taken to Address Dugong Decline”, above.

218 *NTA*, s24AA(2).

219 *Ibid*, s24NA(1).

220 *Ibid*, s24NA(2).

221 *Ibid*, s24NA(4).

222 *Ibid*, s24NA(6).

223 *Ibid*, s24NA(7)(a)(ii).

224 *Ibid*, s238(2).

225 *Ibid*, s238(3), (4).

226 *Ibid*, s238(6).

Compensation must be paid in accordance with *NTA* Pt 2, Div 5.²²⁷ The procedure for making a compensation claim is regulated by Part 3.²²⁸ The entitlement to compensation is on just terms, to compensate native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.²²⁹ Compensation may be monetary²³⁰ or non-monetary (in certain circumstances).²³¹ Claims for compensation arising from the GBRMPA policy must be made to the Federal Court.²³² Applications must include a range of details specified in s62(3).

As the compensation sought here is for suppression, rather than permanent extinguishment,²³³ of native title, the amount recoverable is likely to be less than that available for full extinguishment. The amount payable for full extinguishment is limited to the amount payable if the extinguishing act were, instead, a compulsory acquisition of a freehold estate, subject to the requirement to pay just terms.²³⁴

Various methods for assessing compensation have been suggested. Whipple suggests that the amount payable should reflect both the market value of the interest, as well as non-material, or spiritual, values.²³⁵ Alternatively, and arguably more appropriately, Lavarch and Riding suggest that compensation cannot be based on non-Indigenous notions of monetary market value, but must attempt to provide redress in a more holistic way.²³⁶ Negotiation and agreement to ensure maintenance of cultural rights and responsibilities is suggested.²³⁷ These are goals being pursued in the broader regional agreement process in the Great Barrier Reef. However, the extent to which the *NTA* can accommodate remedies of unquantifiable value remains to be seen.

(v) *Applicability of s211*

A provision in the *NTA*, s211, allows native title holders to exercise their rights without compliance with permit requirements in certain circumstances. If it can be shown that native title has been preserved without extinguishment, the effect of s211 must be considered, although it is unlikely to apply in this context.

Section 211 suspends the operation of State laws by reason of s109 of the Constitution.²³⁸ The provision allows native title holders to exercise native title

227 *Ibid*, s48; s50(1).

228 *Ibid*, s50(2).

229 *Ibid*, s51(1).

230 *Ibid*, s51(5).

231 *Ibid*, s51(6).

232 *Ibid*, s50(2).

233 All extinguishment is deemed permanent: *ibid*, s237A.

234 *Ibid*, s51A.

235 R Whipple "Assessing Compensation under the Provisions of the *Native Title Act 1993*" (1997) 3(3) *Native Title News* 30; R Whipple "Assessing Compensation under the Provisions of the *Native Title Act 1993*, Part 2" (1997) 3(4) *Native Title News* 49.

236 Lavarch and Riding *supra*, n207.

237 *Ibid*.

238 *Commonwealth of Australia Constitution Act 1900* (Imp); *Western Australia v Commonwealth* (1995) 183 CLR 173.

interests, including hunting interests,²³⁹ for personal, domestic or non-commercial purposes,²⁴⁰ without needing to comply with Commonwealth, State or Territory laws requiring a licence or permit to carry on that activity.²⁴¹ The exclusion does not apply where licences or permits can only be granted for research, environmental protection, public health or public safety purposes.²⁴² As the exclusion extends only to laws requiring permits to carry on an activity, other regulatory laws of general application must still be complied with. Further, the law requiring the permit must not be one conferring rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.²⁴³

The operation of s211 in the case of traditional dugong hunting has arguably been circumvented by the regulatory regime operating in the GBR. Numerous laws allow traditional hunting by Indigenous peoples, but with the requirement of a permit.²⁴⁴ These provisions apply specifically to Indigenous peoples, and clearly confer “rights or interests only on, or for the benefit of, Indigenous peoples”, taking them outside the operation of s211.²⁴⁵ As such, native title holders in the GBR must comply with these requirements before they are lawfully able to exercise dugong hunting rights.

(c) Racial Discrimination Act 1975 (Cth)

The *NTA* protections are limited in their scope and applicable only to traditional inhabitants. Torres Strait Islanders will generally need to look to other legislation to protect their interests. It is arguable that some scope remains for protections under the *RDA*. The applicability of the *RDA* since enactment of the *NTA* is first considered, then the application of s9 of the Act to compensation decisions made by the GBRMC.²⁴⁶ It is suggested that the uneven compensation payments are a discriminatory implementation of dugong conservation measures. The legality of individual legislative provisions and GBRMPA policy affecting dugongs and hunting rights, under s10 of the *RDA*, is beyond the scope of this paper and is not considered.

(i) Interaction of *NTA* and *RDA*

Parliamentary sovereignty means the Commonwealth Parliament can always amend its own laws. It can pass later laws to override the *RDA*, both expressly and impliedly. General rules of statutory interpretation provide that a later Act overrides an earlier

239 *NTA*, s211(3)(a).

240 *Ibid*, s211(2).

241 *Ibid*, ss211(1)(b), 211(2).

242 *Ibid*, s211(1)(ba).

243 *Ibid*, s211(1)(c).

244 See “Legislative Framework” in “Measures Taken to Address Dugong Decline”, above.

245 *NTA*, s211(1)(c).

246 As discussed in “Great Barrier Reef Ministerial Council” in “Measures Taken to Address Dugong Decline”, above.

one to the extent of inconsistency, though there is a strong presumption against the implied repeal of one Act by another.²⁴⁷ As such, later Acts must be interpreted consistently with earlier Acts, where possible. Human rights legislation, in particular, should be interpreted broadly to give effect to its statutory purpose.²⁴⁸ Some overseas decisions further suggest that human rights statutes have a special nature and purpose, such that they can only be amended or repealed expressly, by clear legislative pronouncement.²⁴⁹

The *NTA* is a later, more specific Act dealing with recognition of traditional interests in land and waters. It would seem contrary to rules of interpretation, if such an Act were to have the effect of circumscribing the ambit of an earlier, general Act dealing with human rights, such as the *RDA*. However, if the later Act evinces an intention to cover its particular field (namely, protection of native title) to the exclusion of earlier legislation, the operation of the *RDA* may have been overtaken to this extent. In construing the 1994 version of the *NTA*, the Court in *Western Australia v Commonwealth* declared that “the general provisions of the *RDA* must yield to the specific provisions of the *NTA* in order to allow those provisions a scope for operation”.²⁵⁰

An object of the *NTA* is to provide for the recognition and protection of native title,²⁵¹ in accordance with the Act.²⁵² Native title is not to be extinguished contrary to the Act.²⁵³ The *NTA* is intended to be “read and construed” subject to the *RDA*,²⁵⁴ but this means only that the *RDA* applies to the performance of functions, and the exercise of powers, conferred by or authorised by the *NTA*,²⁵⁵ and that ambiguous terms in the *NTA* should be construed consistently with the *RDA* if possible.²⁵⁶ Further, if the *RDA* has the effect that compensation is payable for an act that validly affects native title to any extent, the compensation is to be determined in accordance with the provisions of the *NTA*.²⁵⁷

These provisions, and the complex statutory scheme established by the Act, suggest that the *NTA* has superseded the *RDA* in the field of native title. Pre-*NTA* cases dealing with native title under the *RDA* have broadly characterised native title as coming within the fundamental protection accorded to the right to own

247 *Austereo v Trade Practices Commission* (1994) 115 ALR 14 at 24.

248 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359; *Gerhardy v Brown* (1985) 159 CLR 70 at 83, 100-101, 107, 123-124, 134.

249 *Winnipeg School Division No 1 v Craton* [1985] 2 SCR 150 at 153, 156; *Ontario Human Rights Commission v Simpson-Sears Ltd* [1985] 2 SCR 536 at 547.

250 *Western Australia v Commonwealth* (1995) 183 CLR 373 at 484.

251 *NTA* 1993 (Cth), s3.

252 *Ibid*, s10.

253 *Ibid*, s11.

254 *Ibid*, s7(1).

255 *Ibid*, s7(2)(a).

256 *Ibid*, s7(2)(b).

257 *Ibid*, s45.

property.²⁵⁸ In *Mabo [No 1]*,²⁵⁹ native title interests were therefore given the same protection as that enjoyed by title holders deriving their property interests from Crown grant. It will be assumed that the *NTA* has largely overtaken the *RDA* in this protection of Indigenous peoples' property rights.

The remainder of this article will thus consider the extent of *RDA* protection of Indigenous cultural interests, outside the area of native title and protections of property. If the availability of the *RDA*'s protection of property was to be considered in this case, the issue would arise as to whether hunting rights, which have often been considered merely usufructuary, rather than proprietary, rights,²⁶⁰ are amenable to protection. If so, the compensation paid to commercial gill-netters for loss of their fishing licences becomes the comparator to assess whether hunting rights are being enjoyed equally. Dicta from recent cases on the Commonwealth's power to acquire "property" on just terms²⁶¹ suggest that commercial fishing licences will be considered "property".²⁶² The same broad approach to property would arguably apply in construing the *RDA*.

(ii) Overview of the *RDA*

The *RDA* deals generally and broadly with racial discrimination. It partly implements the *International Convention on the Elimination of All Forms of Racial Discrimination*²⁶³ (the Convention). The Convention propounds the principle of non-discrimination as to race in the observance of human rights and fundamental freedoms, and the notion of equality of all races before the law. This elaborates on the prohibition of racial discrimination contained in other international instruments.²⁶⁴

The *RDA* does not define racial discrimination. However, the major substantive provision, s9, mirrors the definition of racial discrimination in Art 1(1) of the Convention. Article 1(1) extends the protection from racial discrimination to human rights and fundamental freedoms from all sources.²⁶⁵ As the *RDA* is intended to implement the Convention, the use of international law interpretations of the Convention, as well as other sources of international law in interpreting the statute,

258 *Mabo v Queensland [No 1]* (1988) 166 CLR 186 (*Mabo [No 1]*); *Western Australia v Commonwealth* (1995) 183 CLR 373.

259 (1988) 166 CLR 186.

260 *Western Australia v Commonwealth* (1995) 183 CLR 173.

261 *Commonwealth of Australia Constitution Act* 1900 (Imp), s51(xxxi).

262 *Commonwealth v WMC Resources Ltd* (1998) 152 ALR 1 at 7, 9 per Brennan CJ; at 52, 55 per Gummow J; *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 160 per Black CJ and Gummow J; at 171-172 per Burchett J; *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 581 per Black CJ, Davies and Sackville JJ.

263 660 UNTS 195; set out in *Racial Discrimination Act* 1975 (Cth) *RDA*, Sch.

264 *Universal Declaration of Human Rights*; *International Covenant on Civil and Political Rights*; *International Covenant on Economic, Social and Cultural Rights*.

265 T Meron "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985) 79 *American Journal of International Law* 283 at 286.

is legitimate.²⁶⁶

Section 9(1) makes racial discrimination unlawful. It provides:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

The human rights and fundamental freedoms protected include those referred to in Art 5 of the Convention.²⁶⁷ Article 5 lists a range of rights, including civil rights such as the right to own property,²⁶⁸ and economic, social and cultural rights such as the right to equal participation in cultural activities.²⁶⁹ Article 5 is not an exhaustive list of the rights protected. Protection is not limited to legal rights recognised by domestic law, but is determined according to general human rights standards.²⁷⁰ The rights and freedoms protected are those “which every legal system *ought* to recognise and observe”.²⁷¹ In *Gerhardy v Brown*,²⁷² for example, the High Court held that the *RDA* protected the right to freedom of movement, which is not necessarily a legal right. The *RDA* has clearly been interpreted broadly to give effect to the objects of the Convention it implements.²⁷³ As such, the *RDA*'s protection is able to extend more broadly than to just the limited native title rights protected by the *NTA* in Australian law.

(iii) Protection of Cultural Rights

The *RDA* expressly protects human rights in the economic and cultural fields of public life.²⁷⁴ Human rights in Art 5 of the Convention were considered by Mason J in *Gerhardy v Brown* to include group rights, and the rights of individuals as members of a “racial” group, to “the protection and preservation of the cultural and spiritual heritage of that group”.²⁷⁵ More specifically, the right of minorities (including

266 *Gerhardy v Brown* (1985) 159 CLR 70 at 100-101 per Mason J; at 124, 134 per Brennan J; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J; at See generally, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288 per Mason CJ and Deane J; at 315 per McHugh J; *Dietrich v R* (1992) 177 CLR 292; at 321 per Brennan J; at 360 per Toohey J.

267 *RDA*, ss9(2); 10(2).

268 *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, *RDA*, Sch, Art 5(d)(v).

269 *Ibid*, Art 5(e)(vi).

270 *Mabo [No 1]* (1988) 166 CLR 186 at 217; *Gerhardy v Brown* (1985) 159 CLR 70 at 85-6 per Gibbs CJ; at 101 per Mason J; at 125-6, 133 per Brennan J.

271 *Gerhardy v Brown* (1985) 159 CLR 70 at 125-126 per Brennan J (emphasis added).

272 (1985) 159 CLR 70.

273 *Ibid* at 83 per Gibbs CJ; at 100-101 per Mason J; at 107 per Murphy J; at 123-124, 134 per Brennan J.

274 *RDA*, s9.

275 *Gerhardy v Brown* (1985) 159 CLR 70 at 101-2.

Indigenous peoples)²⁷⁶ to enjoy their own culture and maintain cultural traditions is a human right recognised in Art 27 of the *International Covenant on Civil and Political Rights* (ICCPR).²⁷⁷ Australia has ratified the ICCPR, and the rights it protects are arguably also protected in domestic law by the *RDA*, because of the broad range of rights listed in Art 5 and protected by the Act.

The rights protected by Art 27 include traditional activities such as hunting.²⁷⁸ So that such rights can be enjoyed, obligations are imposed on governments to ensure the participation of Indigenous peoples in decisions which affect them.²⁷⁹ Aboriginal and Torres Strait Islander peoples' interests in dugong are cultural rights. As well as hunting rights, their interests extend to the right to have such rights duly recognised by the broader community, and rights to participate in management of traditional resources such as dugong.²⁸⁰ Lack of participation by Indigenous peoples in developing the policy on traditional hunting, as discussed above, is arguably a breach of Art 27. Protection of the *RDA* arguably extends to these rights.

(iv) Losses/Grievances Sought to be Redressed

If it is accepted that the *RDA* protects cultural rights, the particular grievances of Indigenous peoples in the southern GBR must be articulated. The GBRMC method of compensating losses arising from dugong protection involves the payment of significant compensation to gill-netters, but none to Indigenous peoples. The result is arguably an impaired and unequal recognition of cultural rights, including hunting rights. While it may be argued that the primary causes of the loss of hunting rights are the declining ecological status of dugong²⁸¹ and the making of voluntary agreements not to hunt,²⁸² stringent governmental regulation of rights through legislation and policy has also contributed to the diminution of Indigenous peoples' interests. To the extent of this contribution, rights should be equally recognised and compensated by governments, to the same degree that commercial interests receive compensation.

(v) Elements of s9

A. An Act

Broadly, the "act" complained of may be characterised as *the compensating of private losses arising from the Government's dugong conservation measures*. This covers the

276 United Nations Human Rights Committee, General Comment No 23 (50) (Art 27) at paras 3.2, 7.

277 *Lovelace v Canada* Communication No 24/1977, adopted 30 July 1981 (thirteenth session); *Kitok v Sweden* Communication No 197/1985, adopted 27 July 1988 (thirty-third session); *Ominayak v Canada* Communication No 167/1984, adopted 26 March 1990 (thirty-eighth session); *Lansmann v Finland* Communication No 511/1992, adopted 26 October 1994.

278 United Nations Human Rights Committee, General Comment No 23 (50) (Art 27) at paras 3.2, 7.

279 *Ibid* at para 7.

280 See discussion of interests in "Importance of Dugong to Aboriginal and Torres Strait Islander Communities", above.

281 See "Ecological Status of Dugong", above.

282 See "Indigenous Peoples' Groups" in "Measures Taken to Address Dugong Decline", above.

compensatory payments made to commercial fishers, and the lack of payments made to Indigenous groups.

An argument that this is a series of disparate acts, *one* of which must be identified for the purposes of s9(1), can be anticipated by suggesting that acts should be construed broadly to bring them within s9(1), in line with general principles applying to the interpretation of statutes conferring or affecting individual rights. Further, the inherent difficulties of bringing particular acts within s9 except in the most obvious of cases, arising from the very nature of racial discrimination,²⁸³ should be recognised to allow composite acts such as this one to pass this threshold question. The “act” could alternatively be considered a *failure* to recognise the losses of Indigenous groups arising from dugong conservation measures, despite making significant payments to commercial fishers affected by DPAs. A refusal or failure to do an act is deemed to be the doing of an “act” for the purposes of the *RDA*,²⁸⁴ so such an omission would be covered by s9.

B. Done by a Person

The GBRMC, a part of the Commonwealth and Queensland government executive, made the decision authorising the payment of compensation to gill-netters. The *RDA* binds the Crown.²⁸⁵ Section 9(1) clearly applies to executive actions done under statute,²⁸⁶ unless the decision was made in accordance with a statute *requiring* the imposition of such a ban, even if discriminatory.²⁸⁷ In this case there is no statutory basis for the executive action,²⁸⁸ but s9(1) should apply to all executive action, irrespective of the source of its validity.

C. Act Involving a Distinction, Exclusion, Restriction or Preference Based on Race.

There is arguably a clear “distinction or preference”, in that compensation was paid to one affected group (commercial fishers), but not others. This could also be an “exclusion” of benefits from one group (Indigenous peoples), while awarding them to another.

Whether this distinction is “based on race” is a problematic question. The exact criteria adopted in assessing when compensation is payable have not been publicly disclosed.²⁸⁹ It is clear, though, that money was paid to commercial fishers affected by the DPAs for loss of income and employment, and through a licence buy-back scheme. It could be argued that the sole criterion for compensation was commercial loss arising from the implementation of DPAs. Within this category, there were arguably no distinctions between commercial fishers, as all were compensated. If

283 M Thornton “Revisiting Race” in Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* AGPS, Canberra, 1995 at 81.

284 *RDA*, s3(2).

285 *Ibid*, s6.

286 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Gerhardy v Brown* (1985) 159 CLR 70.

287 *Gerhardy v Brown* (1985) 159 CLR 70 at 82 per Gibbs CJ; at 93 per Mason J.

288 See “Characterisation in Administrative Law”. above.

289 C Trinder, secretariat to GBRMC, personal communication, 3 April 1998.

any Indigenous people held commercial gill-netting licences, they would be compensated equally under the same criteria. On this view, there cannot be a distinction or exclusion based on race.

A contrary argument is that the exclusion of compensation for Indigenous interests *is* based on race: it is a complete failure to recognise the value of Indigenous cultural rights, which, by their very nature, can only be enjoyed by Indigenous peoples. The GBRMC has excluded recognition (in the form of compensation) of traditional interests in dugong, preferentially making payments to compensate commercial interests. This preferential treatment is contrary to the view that where conservation measures must be implemented, cultural values, particularly traditions involving subsistence activities, be accorded priority over commercial and recreational interests.²⁹⁰ The preference can therefore arguably be construed as race-based, as this is the effect in fact, as discussed in (D) below.

D. Having the Purpose or Effect of Nullifying or Impairing the Recognition, Enjoyment or Exercise on an Equal Footing, of any Human Right or Fundamental Freedom in a Field of Public Life

To satisfy this criterion, the preferential treatment complained of must have the effect *in fact*, of nullifying or impairing a human right. The differential government compensation of interests lost in the Great Barrier Reef arguably effectively impairs the recognition of Indigenous cultural rights. The rights of Indigenous peoples to enjoy and maintain cultural traditions, including hunting, were shown earlier to be human rights protected by the *RDA*.²⁹¹ Governments cannot claim a lack of discriminatory purpose by way of defence: invidious intent is not necessary for liability.²⁹² The further requirement of recognition “on an equal footing” is discussed separately below.

(vi) Requirement of Equality

Section 9 *RDA* requires the recognition, enjoyment or exercise of human rights *on an equal footing*, without distinction as to race. The phrase suggests a need to make a comparative evaluation of the rights enjoyed by the claimant Indigenous peoples, and other groups. However, Indigenous peoples’ losses are cultural rights, with no comparable, equivalent losses to commercial fishers. Compliance with s9 requirements is therefore problematic whenever cultural interests form the basis for claim. The same issues arise when clearly discriminatory acts are absent, but the circumstances effectively exclude Indigenous peoples from benefits others enjoy as a matter of course.

290 Australian Law Reform Commission *supra*, n17 at 183-190; *R v Sparrow* (1990) 70 DLR (4th) 385 at 414.

291 See, “Protection of Cultural Rights”, above.

292 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 176; *Waters v Public Transport Corporation* 173 CLR 349 at 359.

There are varying views as to the meaning of equality. International jurisprudence gives substantive effect to the concepts of non-discrimination and equality. It is recognised that identical treatment of all people (as required by a “formal” approach to equality) may not always result in non-discrimination, if relevant differences are ignored. Substantive equality requires equal treatment of equal matters, but unequal treatment of different matters according to their differences.²⁹³ Although the High Court in *Gerhardy v Brown*²⁹⁴ applied a strictly formal view of equality in deciding whether legislation was racially discriminatory, there are suggestions that a more substantive approach may be adopted in future. In the context of constitutional protections from discriminatory laws in ss 92 and 117 of the Constitution, the concept of relevantly different treatment resulting in non-discrimination has been applied.²⁹⁵ In commenting on the application of the *RDA* to the *NTA*, the High Court in *Western Australia v Commonwealth* discussed the substantive inequality created by the challenged legislation and suggested that the *NTA* was not racially discriminatory so as to breach the *RDA*, despite making racial distinctions.²⁹⁶ Further, substantive equality is relevant in determining the legality of “special measures” under the *RDA*²⁹⁷ designed to redress discriminatory situations.²⁹⁸

An application of a formal standard of equality in this case suggests a lack of racial discrimination. The criterion for compensation was economic loss arising from diminution of commercial interests. All commercial fishers were compensated equally on this basis. This simplistic approach is arguably inadequate, however, and equality of result requires recognition of the comparable validity of Indigenous cultural rights, according them the same respect given to the commercial fishers who have similarly given up valuable rights. Such recognition would result if Australian Law Reform Commission recommendations as to prioritisation of competing resource users were to be followed.²⁹⁹

To provide full and equal respect for Indigenous peoples’ rights in the current context it is suggested that meaningful opportunities for collaborative management of dugongs be developed and implemented, as hunting may not be sustainable at present. Legal mechanisms to enable cooperative management are clearly available,³⁰⁰ but political will is equally necessary. This will ensure fulfillment of traditional cultural obligations regarding preservation of dugongs and provide for a

293 *South West Africa Case (Second Phase)* [1966] ICJ Rep 6; S Pritchard “Special Measures” in *Race Discrimination Commissioner supra*, n283 at 183.

294 (1985) 159 CLR 70.

295 *Commonwealth of Australia Constitution Act 1900 (Imp)*; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 513 per Brennan J; at 570 per Gaudron J; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 per Gaudron and McHugh JJ.

296 *Western Australia v Commonwealth* (1995) 183 CLR 373 at 483.

297 *Racial Discrimination Act 1975 (Cth)*, s8.

298 *Gerhardy v Brown* (1985) 159 CLR 70.

299 Australian Law Reform Commission *supra*, n17 at 183-190.

300 *NTA*, Pt 2 Div 3 Subdivs B, C, D (Indigenous land use agreements); *GBRMP Act*, Pt VB (plans of management), especially s39ZA (arrangements with community groups with special interests in the Park).

continuation of Indigenous peoples' interests in dugongs for the long term. Failing this, compensation ought to be payable. Compensation cannot replace the enjoyment of a human right, but it can recognise that an interest has been diminished and goes some way to correcting racially discriminatory action. Determining the quantum of monetary compensation gives rise to the same issues as discussed for compensation under the *NTA*. As far as dugongs were enjoyed for subsistence, economic values may be quantifiable, but cultural values require creative means of assessment. As such, genuine equality's differential treatment of different rights means that compensation cannot be determined in the same manner as for commercial interests.

(vii) Effect of Unlawful Action

An act infringing s9 of the *RDA* is unlawful. However, the infringement is neither a crime,³⁰¹ nor an actionable civil wrong.³⁰² Breaches instead allow complaints to be made to the Human Rights and Equal Opportunity Commission (HREOC),³⁰³ and investigation by the Race Discrimination Commissioner.³⁰⁴ If the complaint is substantiated, the *RDA* provides mechanisms for conciliation overseen by the Race Discrimination Commissioner.³⁰⁵ Failing this, a public hearing of the complaint may be referred to HREOC,³⁰⁶ which makes non-binding determinations.³⁰⁷ Determinations may be enforced by Federal Court proceedings.³⁰⁸

Conclusion

A characterisation of government actions has demonstrated that however the GBRMC communiqué is interpreted, it cannot affect the discretion given to GBRMPA to issue hunting permits. GBRMPA must therefore continue to give due regard to all relevant considerations, including the cultural significance of dugong for Indigenous peoples. Failure to do so will be unauthorised decision-making, open to challenge through judicial review. This requirement applies, notwithstanding GBRMPA policy, which states that permits will no longer be issued in the southern Great Barrier Reef. It is further suggested that this policy was made in breach of procedural fairness requirements.

The government actions give rise to further remedies under the *NTA*. As protection of native title is limited to traditional owners who can satisfy the onerous requirements imposed by the Act, mainland Torres Strait Islanders are immediately without remedy under this Act, unless they can show interests derived through

301 *RDA*, s26.

302 *Ibid*, s45(2).

303 *Ibid*, s20.

304 *Ibid*, s24.

305 *Ibid*, Pt 3 Div 2.

306 *Ibid*, Pt 3 Div 3.

307 *Ibid*, s25Z.

308 *Ibid*, s25ZC.

permission of native title holders. Where native title can be established, compensation may be payable if government actions such as restrictive policies are characterised as extinguishing native title rights and interests. Even if this can be established, the quantum of compensation payable is uncertain and may be fairly limited. The *NTA* provides no redress to native title holders for impairment of rights caused by the extensive statutory regime for dugong hunting, because the current regime is merely regulatory. Further, the limited exemption provided by s211 is of little effect in protecting the unregulated enjoyment of hunting rights. Nevertheless, the *NTA* remedy arguably has the greatest prospect of success, of the avenues considered here.

Although the application of the general *RDA* requirements to the current case study seems a somewhat artificial exercise, a broad construction of the elements of s9 provides some possibility of redress for Indigenous Australians in Queensland. Such a construction protects Indigenous hunting rights and classifies as racially discriminatory, the government compensation provided to commercial fishers. The availability of redress depends on a view of equality which aims to produce substantive equality of result. Whether the courts will adopt such a view remains to be seen.

The remedies discussed here may not be best pursued through formal litigation. However, it is hoped that this review of Indigenous Australians' rights and interests in dugongs in the southern Great Barrier Reef will provide a basis from which Indigenous peoples, government and stakeholder groups may negotiate for meaningful collaborative management.