



National
Native Title
Council

18 December 2012

*spirit of
Change*

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Director of National Parks
Marine Reserves Management Planning Comments
Department of Sustainability, Environment, Water
Population and Communities
Reply Paid 787
Canberra ACT 2601

Via Email: managementplanning@environment.gov.au

Dear Director

Commonwealth Marine Park Reserve Network

Please find attached the submission of the National Native Title Council (NNTC) to the recent declaration of the Commonwealth Marine Park Reserve Network.

The NNTC is the peak body of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) from around Australia being formally incorporated in November 2006. The objects of the NNTC are, amongst other things, to provide a national voice for NTRBs/NTSPs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

The NNTC would be happy to provide further information about its submission should this be required.

Yours sincerely

Brian Wyatt
Chief Executive Officer



Submission

Commonwealth Marine Park Reserve Network

PURPOSE

This Submission is being provided in response to the declaration of the Commonwealth Marine Park Reserve Network (the 'Reserve Network') open for public consultation until 18 December 2012.

SUBMISSION

The NNTC understands that a number of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) provided comments on the proposal to declare new Commonwealth marine reserves, through a consultation process between July and September 2012. A number of representatives from NTRBs/NTSPs more recently attended a forum hosted by the Department of Sustainability, Environment, Water Population and Communities (SEWPaC) and held in Darwin on 5 December 2012. The NNTC generally supports the sentiments reflected by meeting participants at that forum, and in that regard provides the following comments in relation to specific aspects of the Reserve Network.

The NNTC understands that SEWPaC has invited comment on the Reserve Network pursuant to section 368(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the Act). This section provides for the Director of National Parks to give notice of the proposal to prepare a draft management plan and invite comment. On this legislation, we provide the following comments:

- It is our understanding that relevant management plans have already been drafted, and accordingly query the value of providing this submission and the notice of the proposal to prepare a draft management plan – the NNTC seeks clarification on the status of those management plans that have already been drafted.
- The legislation provides a *minimum* obligation of *at least* thirty days to invite comment. The NNTC therefore understands that you are able to extend the consultation period.
- The NNTC considers that there may be inherent flaws in the Act that may warrant careful consideration by your Department. This includes, for example, the lack of an express obligation to invite comment from NTRBs/NTSPs.¹

Comments on timeframes for consultation

¹ See, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 368(2)(iii) in relation to land councils and the definition of land councils in s 363(2).

The NNTC considers that the initial 30 day timeframe to comment on the declaration of the Reserve Network is unacceptable for NTRBs/NTSPs. Not only are the cultural values and aspirations of Traditional Owners extremely complex and varied, but some communities are very remote and not easily accessible. In order to receive community comments.

NTRBs/NTSPs also have statutory responsibilities and professional duties to their clients as legal representatives.² Meetings held with such short notice would not encourage high community participation and NTRBs/NTSPs would therefore be unable to provide a comprehensive response. The NNTC believes that any consultation with Traditional Owners should be undertaken with the principles of the United Nations Declaration on the Rights of Indigenous Peoples³, particularly the obligation to obtain free, prior and informed consent.

Native Title rights and interests:

The NNTC notes the views of the Director of National Parks that:

proposed marine reserves will not affect the exercise of Native Title rights or conduct of Native Title claims in accordance with the Native Title Act 1993. All government agencies are required to comply with the Future Acts regime established by the Native Title Act 1993. Relevant Traditional Owners will need to be consulted in developing management plans and arrangements for the delivery of management plans.⁴

The NNTC notes that the issue of commercial native title rights over waters will be heard by the High Court in February 2013⁵, which could impact the views of the Director of National Parks that the proposed marine reserves will not affect the exercise of native title rights. The NNTC would therefore recommend that SEWPaC revisit this view following the High Court action.

Funding:

NTRBs/NTSPs are not sufficiently funded to conduct meaningful consultation to obtain the free, prior and informed consent of their clients for activities that fall outside of their statutory obligations under the Native Title Act. The NNTC therefore seeks the assurances of SEWPaC that the consultation, drafting, implementation, and management of the Reserve Network as relevant to affected Traditional Owners will be met by SEWPaC.

Objectives:

It is our view that a principle objective of the Marine Park must be as identified and endorsed by the relevant Traditional Owners. Without doubt, Traditional Owners are more than just stakeholders and deserve to work in partnership with SEWPaC to acknowledge their unique and invaluable knowledge of Country.

Those objectives may differ between and within Traditional Owners, but could include:

[[The protection of Country;

² See, for example, *Australian Solicitors Conduct Rules*, rule 4.1.3, for the duty to, *inter alia*, provide diligent legal services, available at http://www.lawsocietysa.asn.au/PDF/rules_of_professional_conduct.pdf.

³ See *United Nations*, 'Declaration on the Rights of Indigenous Peoples', March 2008, available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁴ See the Report of the Director of National Parks, October 2012, p. 63 at

<http://www.environment.gov.au/marinereserves/publications/pubs/dnp-report.pdf>

⁵ See *Akiba and Mye on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia & Ors* [2012] HCATrans 245 (5 October 2012), for the High Court transcript of the Special Leave application. This matter has been listed for hearing by the Full Bench of the High Court in February 2013, likely to be heard jointly with the matter of *Karpany and Anor v. Dietman* (A18/2012) on the issue of native title rights to fish in South Australia.

- [[The acknowledgment and protection of native title rights and interests, and traditional rights and interests;
- [[Proper planning of the management by Traditional Owners of the Reserve Network, including the setting of realistic goals; and,
- [[Where identified as necessary by Traditional Owners, capacity building and preferential support to help develop any relevant industries.

The specific objectives for Traditional Owners, as they relate to possible compliance, education and monitoring roles, will be dependent on a number of factors. The NNTC seeks your commitment to tangible outcomes for Traditional Owners in the Reserve Network, rather than broad aspirational statements. Those commitments could be made by setting minimum benchmarks.

The NNTC notes that the sustainable management of the Reserve Network by Traditional Owners, and any related wealth creation measures is consistent with the Closing the Gap strategy⁶ and makes sound economic sense in creating a self-sufficient system of management.

Relationship with other regimes:

The declaration of the Commonwealth Reserve Network adds a layer of complexity for Traditional Owners to monitor and manage given their responsibilities to State and Territory marine areas. That complexity must be taken into account by SEWPaC.

The boundaries:

While expressing no particular view on the boundaries of the Reserve Network, we query the suitability of having one broad Management Plan over a specific Reserve Network on the basis of the breadth of cultural interests and values in that area.

The Management Plans:

We note SEWPaC’s comments that the Management Plans are likely to be a framework only, with further detail, including zoning, to be included at a later date.

The NNTC seeks your acknowledgment that the consultation to date is inconsistent with the obligation to obtain free, prior and informed consent and your confirmation of the funding and process your Department is committed to finalising that detail. It is our view that all affected Traditional Owners be given the right to be engaged on the Reserve Network.

On that process, the NNTC would strongly recommend that you consult with the relevant NTRBs/NTSPs throughout all consultation phases.

CONCLUSION

Traditional Owners have strong connections to their Country, both land and waters, and have cultural and community responsibilities to protect that Country. The views, knowledge and concerns of Traditional Owners are primary considerations in managing the Reserve Network. NTRBs/NTSPs would generally be supportive of measures that, based on sufficient scientific research, will promote a more

⁶ See, generally, ‘Closing the Gap’, *Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs*, available at <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap>.

sustainable environment while protecting the rights and interests of Traditional Owners and at the same time promoting wealth creation.

The NNTC is however concerned about the short timeframe in which to respond fully to the broad network of marine reserves given that NTRBs/NTSPs would have been unable to gauge the views of Traditional Owners within their respective jurisdictions. The NNTC strongly recommends that SEWPaC on behalf of the Director of National Parks enters into a process of engagement with NTRBs/NTSPs across the country to ensure the principle of free, prior and informed consent has been fully achieved.