

# International Law Protecting the Great Barrier Reef

Greg McIntyre SC, Barrister, John Toohey Chambers<sup>1</sup>



## Introduction

There has been much public comment about a decision by the Minister for the Environment, Greg Hunt and his delegate, to approve dredging and dumping on the Great Barrier Reef. Dr Christopher Ward, Chair of the Australian International Law Association is reported as saying that “it is strongly arguable that Australia is not in full compliance with its obligations” under the World Heritage Convention.<sup>2</sup> He adds that –

The failures have the potential to lead to the Great Barrier Reef being placed on the heritage in danger list.<sup>3</sup>

International law and Australian law enacted to implement Australia’s international law obligations have much to say about Australia’s obligations when making decisions which affect World Heritage areas.

## Port expansion approval

The Commonwealth Minister for the Environment on 10 December 2013 decided to permit expansion of the Coal Port at Abbot Point and on 20 December 2013 approved the Galilee Coal and Rail Project, allowing for six new mines and a railway from the mine sites 400 km inland from Abbott Point. The Minister’s decision to approve the expansion of the port mandated that the dumping of spoil occur offshore.

The Minister’s decision approving dredging and dumping of dredge spoil by North Queensland Bulk Ports Corporation Limited (NQBPC) for 3 terminals at the Abbot Point Port was made pursuant to the EPBC Act, sections 130(1) and 133. The Minister attached conditions to the approval in accordance with his power under section 134 to attach a condition “if satisfied that the condition is necessary or convenient for protecting ...or mitigating damage to a matter protected”, which, under s 34, includes “the world heritage values of a declared World Heritage property”.

The approval decision recites that it is an approval under the following provisions of the EPBC Act:

- World Heritage properties, sections 12 and 15A;
- National Heritage places, sections 15B and 15C;
- Listed threatened species and communities, sections 18 and 18A;
- Listed migratory species, sections 20 and 20A;
- Commonwealth marine areas, sections 23 and 24A; and
- Great Barrier Marine Park, section 24B and 24C.

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<sup>1</sup> Paper presented at NELA Conference 2014: *Transformation or Train Wreck? Environmental and Climate Change Law at the Crossroads*.

<sup>2</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*.

<sup>3</sup> <http://www.echo.net.au/2014/02/australia-failing-world-heritage-convention-obligations>.



## Pre-conditions

Among the conditions imposed by the Minister, when giving approval, were several conditions precedent to dredging and disposal activities:

1. Submission to the Minister for approval of a Dredging and Spoil Disposal Management Plan (**DSDMP**)(condition 7) which includes –
  - a. engineering and operational controls endorsed by a Technical Advice Panel (**TAP**) (condition 7(a));
  - b. adaptive management measures advised on by the TAP (condition 7(f) and 9); and
  - c. a methodology for taking into account the GBRMPA water quality guidelines (condition 7(c));
2. Submission to the Minister for approval of an Abbot Point Ecosystem Research and Monitoring Program (**APERMP**) after consultation and review by the TAP (conditions 14 to 18);
3. Submission to the Minister for approval of a Disposal Site Analysis Plan (**DSAP**) prior to the submission of the DSDMP and APERMP (condition 20);
4. Approval by the Australian Government Department responsible for administration of the EPBC Act of the membership of the TAP,<sup>4</sup> in consultation with the GBRMPA, and prior to the development and submission of the DSDMP, APERMP and Offsets Plan (conditions 23-24);
5. Provision to the Minister of all advice and recommendations of the TAP and explanations of the response to the advice and recommendations at the same time as the submission of the DSDMP, APERMP and Offsets Plan (condition 26);
6. Submission to the Minister for approval of an Offsets Plan addressing loss of seagrass from the dredge area and dredge plume extent and outlining “the process to undertake actions that will result in a net benefit outcome for the World Heritage Area”(condition 31(b); with an **obligatory** “target” of “150% of the total amount of fine sediments, potentially available for re-suspension into the marine environment...offset by a reduction in the load of the fine sediments entering into the marine environment from the Burdekin and Don catchments (conditions 31(d)).

Unless and until those pre-conditions are met, there is no approval of dredging and disposal activities. The conditions require a great deal of complex work to be done, much of which may be difficult or close to impossible to accomplish in strict compliance with the terms of the conditions.

What must be considered is whether the conditions attached to the proposal are sufficient to ensure compliance with Australia’s obligations under the World Heritage Convention and the Biodiversity Convention.

## Sea-dumping approval

Because the Minister had specified that the dumping was to occur at sea, rather than on land, a further permit was required under [s.19\(5\)\(b\) of the \*Environment Protection \(Sea Dumping\) Act 1981\*](#) (Cth) (**EPSD Act**) to dump the spoil at sea. A delegate of the Minister on 31 January 2014 granted an application by the North Queensland Bulk Ports Corporation to dump three million cubic metres of spoil into the waters of the Great Barrier Reef as part of the expansion of a coal terminal at Abbot Point, between Townsville and Bowen on the Queensland coast. The spoil will be dumped in the vicinity of seagrass meadows and the coral reefs of Camp Reef, Horseshoe Bay, Cape Upstart, Nares rock and Holbourne Island.

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<sup>4</sup> The TAP must include at least two independent scientific experts with expertise in water quality and marine ecology, and an independent dredging technical advisor (condition 24).

A condition of the permit granted is that “the dumping activities are managed in accordance with the approval granted under section 133 of the *Environment Protection and Biodiversity Conservation Act 1999*” (condition 4 – relating to composition of the TAP - NO).

In addition there are pre-conditions which require that, prior to any dumping activities, the NQBPC must–

- (a) submit to the GBRMPA an APERMP;
- (b) establish a TAP, membership of which is approved by GBRMPA; and
- (c) establish a Management Response Group (**MRG**).

### **World Heritage obligations and the Great Barrier Reef**

Australia ratified the World Heritage Convention on 22 August 1974. Under Article 11 of that Convention the World Heritage Committee maintains a list of World Heritage Properties. The Great Barrier Reef was placed on that list by the World Heritage Committee in 1981.

The Great Barrier Reef was listed because the World Heritage Committee found that it met the criteria for natural heritage under Article 2 of the Convention. Article 2 provides that –

For the purposes of this Convention, the following shall be considered as "natural heritage":

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

The World Heritage Committee assessed the Reef as meeting all four of the criteria which the Committee had established at the time of the listing, by its Operational Guidelines of October 1980, paragraph 21, being that it –

1. was an outstanding example representing the major stages of the earth’s evolutionary history;
2. was an outstanding example representing significant ongoing geological processes, biological evolution and man’s interaction with his natural environment;
3. contained superlative natural phenomena, formations or features or areas of exceptional natural beauty; and
4. contained the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value from the point of view of science or conservation survive.

The Minister in his Statement of Reasons for Approval under the EPBC Act, at [36], noted that –

The Great Barrier Reef is the world's most complex expanse of coral reefs, containing some 400 species of corals in 60 genera. There are also large ecologically important inter-reefal areas. The shallower marine areas support half the world's diversity of mangroves and many seagrass species. The waters also provide major feeding grounds for one of the world's largest populations of the listed migratory dugong. At least 30 species of whales and dolphins occur, and it is a significant area for humpback whale calving. Six of the world's seven species of marine turtle occur in the Great Barrier Reef.

## World Heritage Convention obligations

The World Heritage listing of the Great Barrier Reef imposed the following obligations on the Australian Government, as a signatory to the World Heritage Convention:

### Article 4

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

### Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country:

- (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

### Article 6

1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.
2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.

The GBRMPA is the Commonwealth government authority set up, pursuant to Australia's obligation under Article 5(b) of the World Heritage Convention with responsibility for the implementation of Australia's obligations under the World Heritage Convention in relation to the Great Barrier Reef.

## Biodiversity Convention

Australia on 5 May 1992 signed the *Convention on Biodiversity Conservation*. It was ratified by Australia on 18 June 1993 and came into force on 29 December 1993. It provides *inter alia*, as follows:

### Article 6. General Measures for Conservation and Sustainable Use

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

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

#### **Article 8. In-situ Conservation**

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

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

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

#### **EPBC Act**

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was enacted pursuant to Australia's obligations under the *Convention on Biodiversity Conservation*.

The EPBC Act prohibits action likely to have a "significant impact on the environment" in relation to:

- World Heritage properties, sections 12 and 15A;
- National Heritage places, sections 15B and 15C;
- Listed threatened species and communities, sections 18 and 18A;
- Listed migratory species, sections 20 and 20A;
- Commonwealth marine areas, sections 23 and 24A; and
- the Great Barrier Marine Park, section 24B and 24C.

Those prohibitions do not apply to actions approved under Part 9 of the EPBC Act. Part 9 includes section 137, which relates to World Heritage areas.

Under section 137(a) of the EPBC Act the Minister "must not act inconsistently with –

- (a) Australia's obligations under the World Heritage Convention; or
- (b) the Australian World Heritage management principles; or
- (c) a plan that has been prepared for the management of a declared World Heritage property under section 316 or as described in section 321."

#### **EPBC Regulations**

Pursuant to its obligations under World Heritage Convention, Australia has, under the EPBC Act, made the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) which, in Schedule 5, set out the Australian World Heritage Management Principles (**AWHMP**). Relevant principles are the following:

1.01 The primary purpose of management of natural heritage and cultural heritage of a declared World Heritage property must be, in accordance with Australia's obligations under the World Heritage Convention, to identify, protect, conserve, present, transmit to future generations and, if appropriate, rehabilitate the World Heritage values of the property.

3.04 An action should not be approved if it would be inconsistent with the protection, conservation, presentation or transmission to future generations of the World Heritage values of the property.

3.05 Approval of the action should be subject to conditions that are necessary to ensure protection, conservation, presentation or transmission to future generations of the World Heritage values of the property.

The Minister for the Environment and the GBRMPA are obliged to comply with those principles in making a decision approving dredging and dumping of spoil within the area of the Great Barrier Reef.

## Offsets

The EPBC Act Offsets Policy defines “environmental offsets” as “measures that compensate for the residual adverse impacts of an action on the environment”.<sup>5</sup> The Policy notes that –

Offsets provide environmental benefits to counterbalance the impacts that remain after avoidance and mitigation measures. These remaining, unavoidable impacts are termed ‘residual impacts’. For assessments under the EPBC Act, offsets are only required if residual impacts are significant.<sup>6</sup>

Condition 32 of the Minister’s approval of dredging and dumping obliges the NQBPC to implement the Offsets Plan. In relation to condition 31(b), requiring that offsets ensure a “net benefit” to the Great Barrier Reef, it will be difficult to identify or measure compliance where there is no clear meaning identified as attributable to the term “net benefit” or any method suggested as to how to measure a “net benefit”.

The measurement of “net benefit” must, by inference from the conditions, involve taking into account the compulsory offset at condition 31(d), i.e., the obligation to reduce the fine sediments entering the marine environment from the Burdekin and Don catchments by the equivalent of 150% of the total amount of the fine sediments potentially available for re-suspension into the marine environment from the dredging and disposal activities; whatever that condition means and however it could be implemented.

The Minister, in his Statement of Reasons for Approval under the EPBC Act, at [106], stated that he had found that the offsets proposed by the proponent met the requirements of the EPBC Offsets Policy and “that the offsets will provide an overall environmental gain to ... the world heritage values of [the Great Barrier Reef as] a declared World Heritage Property”. It is surprising that the Minister could reach that conclusion when the topic of offsets is discussed in very indefinite terms in the proponent’s ‘Appendix C – Offsets Discussion Paper’ and the size and nature of the offsets are incapable of being ascertained until after the Project is commenced.

The fact that there is a requirement for offsets is an effective admission by the Minister that there will be residual adverse impacts and a breach of the World Heritage Convention obligation not to deliberately cause damage to the World Heritage site.

## Sea Dumping Act and Protocol

The decision of the Delegate of the Minister to grant a sea dumping permit was made under the ESD Act s 19(5)(b). Section 19(5) provides that –

(5) Subject to subsection (7) [which relates to an emergency unacceptably risking human health, safety or marine life], a [permit](#) for dumping or loading for dumping:

(a) may only be granted for [controlled material](#) that is within Annex 1 to the [Protocol](#); and

(b) may only be granted in accordance with Annex 2 to the [Protocol](#).

Australia has ratified the 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter 1972 (London Protocol)*. The [London Protocol](#), is an international agreement which establishes an assessment regime for sea dumping permit applications.

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<sup>5</sup> <http://www.environment.gov.au/system/files/resources/12630bb4-2c10-4c8e-815f-2d7862bf87e7/files/offsets-policy.pdf>.

<sup>6</sup> As defined in Significant impact guidelines 1.1 – matters of national environmental significance and Significant impact guidelines 1.2 – actions on, or impacting upon, Commonwealth land and actions by Commonwealth agencies, available at [www.environment.gov.au/epbc/guidelines-policies.html](http://www.environment.gov.au/epbc/guidelines-policies.html).

Annex 2 to the London Protocol provides that -

- 14 An analysis of each disposal option should be considered in the light of a comparative assessment of the following concerns: human health risks, environmental costs, hazards (including accidents), economics and exclusion of future uses. If this assessment reveals that adequate information is not available to determine the likely effects of the proposed disposal option then this option should not be considered further. In addition, if the interpretation of the comparative assessment shows the dumping option to be less preferable, a permit for dumping should not be given.
- 17 A decision to issue a permit should only be made if all impact evaluations are completed and the monitoring requirements are determined. (emphasis added)

The Minister had an obligation to comply with these provisions of the London Protocol in deciding whether or not to grant a sea dumping permit.

It is difficult to imagine how these provisions of the London Protocol could have been complied with when making the decision, in circumstances where the DSDMP, APERMP and Offsets Plan, required as pre-conditions to the Ministers' consent to the dredging, have not yet been developed or submitted for approval to the Minister for the Environment; and the APERMP, the TPB approved by the GBRMPA and the MRG have not been established in compliance with the pre-conditions to the decision under the EPSD Act. The present state of circumstances is that adequate information is not available to determine the likely effects of the proposed disposal option. Given that situation, compliance with Annex 2 would result in the option not being considered further, but that is not what has occurred.

### **World Heritage in Danger**

Paragraph 80 of the Operational Guidelines of the World Heritage Committee provides that the World Heritage Committee may include a property on the list of World Heritage in Danger if a World Heritage listed property is threatened by 'serious and specific danger'.

Concerns have been expressed by scientists<sup>7</sup> that the Great Barrier Reef is in a degraded state due to various adverse effects and has a reduced resilience to new adverse effects.

Australia reported in February 2014 to the World Heritage Committee about what it is doing in response to these concerns.

On 25 June 2014 the World Heritage Committee considered whether to add the Great Barrier Reef to the list of "World Heritage in Danger" list because of the "cumulative" impacts of climate change, coastal urban development and port expansions such as the Abbott Point project, on the Outstanding Universal Value of the Property. The Committee added 3 areas to that list, but the Great Barrier Reef was not among them.

### **Conservation litigation**

The decisions of the Minister and his delegate have provoked legal challenges from community groups and tourism operators affected.

The Mackay Conservation Group Inc has commenced proceedings in the Federal Court against the Minister for the Environment challenging his decision pursuant to the *Administrative Decisions and Judicial Review Act 1977* (Cth), seeking declarations that the decision is inconsistent with Australia's obligations to protect world heritage for future generations under Articles 4 or 5 of the World Heritage Convention and clauses 1.01, 3.04.and.3.05 of the AWHMP, and is in breach of the prohibitions in sections 137(a) of (b) of the EPBC Act against acting inconsistently with obligations

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<sup>7</sup> For example Glenn De'ath, Katharina E. Fabricius, Hugh Sweatman and Marji Puotinen *The 27-year decline of coral cover on the Great Barrier Reef and its causes* PNAS, October 30, 2012, vol.109, no 44, 17995-17999.

under the World Heritage Convention, Australian World Heritage Management Principles and a plan of management.

In addition, the North Queensland Conservation Council Inc has made an application to the Administrative Appeals Tribunal seeking a review of the decision under the EPSD Act on the basis that it is not made in accordance with the London Protocol, because adequate information is not available to determine the likely effects of the proposed disposal option. The application also alleges that inadequate attention was paid to opportunities to avoid sea dumping in favour of environmentally preferable alternatives; and pollution impacts from the proposed sea dumping were not adequately assessed.

The Association of Marine Park Tourism Operators Limited has also commenced proceedings against the GBRMPA, focussing on the GBRMPA obligations under s 7(3) of the *Great Barrier Reef Marine Park Authority Act 1975* to perform its functions having regard to the values of the Great Barrier Reef World Heritage Area and its obligations under the GBRMP Regulations 88Q(a) and 88R(g), in granting any permit, to consider the impact on the heritage values of the Marine Park and the World Heritage Convention.

## Conclusion

There certainly appear to be arguments to support the view of Dr Ward that Australia may not be in compliance with its obligations under the World Heritage Convention to protect world heritage for future generations in relation to the Great Barrier Reef and by proceeding without adequate information of the effects of disposal, in circumstances where the Reef is already in a degraded state and has reduced resilience.

The legal proceedings commenced by conservation groups and the tourism industry in the Federal Court and AAT focussed on obtaining definitive rulings on whether or not that is so.

However, the current situation in relation to the litigation is that the EDO Qld raised the issue of uncertainty created by the possibility of land based disposal methods being considered.<sup>8</sup> Minister Hunt's 10 December 2013 [approval](#) of the dredging and dumping under the *Environmental Protection and Biodiversity Conservation Act 1999* required NQBP to investigate and report on any alternative dump site with equivalent or lesser environmental impacts than the site already approved. As a consequence of this, on 3 October 2014 the Queensland Government lodged fresh referrals for dredging and spoil management at Abbot Point. The litigation appears to have had the impact of causing a backward step in the approval process. EDO Queensland has pledged to scrutinise the new plans<sup>9</sup>, so it is a case of 'watch this space'.

**Note:** An alternative version of this paper setting out the current situation regarding the World Heritage Committees' consideration is available at

[www.linkedin.com/pulse/article/20141124015525-136812794-world-heritage-in-danger-international-law-and-the-barrier-reef?trk=prof-post](http://www.linkedin.com/pulse/article/20141124015525-136812794-world-heritage-in-danger-international-law-and-the-barrier-reef?trk=prof-post)

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<sup>8</sup> <http://www.edoqld.org.au/news/north-queensland-conservation-council-inc-v-minister-for-the-environment/>

<sup>9</sup> EDO Qld LawAlert! 8/10/14.