

Public Consultation Manager  
Great Barrier Reef Strategic Assessment

Dear Sir/Madam,

### **Great Barrier Reef Coastal Zone Strategic Assessment 2013**

#### **Introduction**

The National Environmental Law Association (NELA) welcomes the opportunity to comment on the draft Great Barrier Reef Coastal Zone Strategic Assessment 2013 Strategic Assessment Report ('the Strategic Assessment Report') and the draft Great Barrier Reef Coastal Zone Strategic Assessment 2013 Program Report ('the Program').

NELA is Australia's leading national environmental law organisation with a membership base that includes legal practitioners, law firms, academics, consultants, judges and policy makers. One of our three policy priorities is the protection of Australia's marine and coastal environment.

NELA's primary focus in this submission is on the legal framework and environmental governance. We examine the extent to which the content of the reports address legal aspects of seeking to protect matters of national environment significance (MNES) associated with the Great Barrier Reef (GBR), including its outstanding universal values (OUV). Our submission focuses on the following issues:

- (a) inadequate explanation of the legal context of the strategic assessment within the *Environment Protection Biodiversity Conservation Act 1999* (C'th) ('the EPBC Act');
- (b) lack of detail on the law reform requirements of Recommended Changes and Forward Commitments;
- (c) lack of explanation of environmental governance issues, particularly regarding the role of local government and port authorities;
- (d) lack of detail on the management of environmental impacts from port development and associated activity; and
- (e) the considerable amount of policy formulation that remains to be completed regarding offsets.

#### **Legal context of the strategic assessment**

As explained in the Executive Summary of the Program, the purpose of the Queensland Government's proposed Program is to 'ensure that any development in the GBR coastal zone occurs in a sustainable manner and that unacceptable impacts on matters of national environmental significance do not occur.' It goes on to say that, '[by] considering matters of national environmental significance (MNES) early in the planning and development process it is the aspiration of both the Queensland and Australian governments that this Program will result in further removal of administrative burden by removing the need for project by project assessment and approval by the Australian Government.'<sup>1</sup>

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<sup>1</sup> Program, Executive Summary, i-4.

### *Endorsement*

NELA is of the view that this expression of aspiration does not fully reflect the requirements of the EPBC Act regarding endorsement by the Minister, which should be fully set out in either the Strategic Assessment Report or the Program.

The strategic assessment is being carried out pursuant to s 146, Part 10, EPBC Act. Section 146(2)(f) provides that the agreement between the Queensland and Australian governments to carry out the strategic assessment must provide for the endorsement of the policy, plan or program by the Minister if he or she is satisfied that:

- (i) the report adequately addresses the impacts to which the agreement relates; and
- (ii) either the recommended modifications of the policy, plan or program (if any) have been made or any modifications having the same effect have been made.

The two Agreements the Commonwealth made with the State of Queensland and with GBRMPA to undertake the strategic assessment for the Reef under Part 10 EPBC Act ('the Agreements') make this provision at 7.3 in each Agreement.<sup>2</sup> Hence, the question of whether the Program *adequately addresses the impacts to which the agreement relates* is fundamental to the decision by the Federal Minister to provide endorsement. The endorsement criteria are set out in Attachment C of each Agreement.

NELA submits that many of the Queensland government's recommended modifications to existing arrangements as set out in the Program and in Chapter 10 of the Strategic Assessment Report may take a considerable amount of time to implement and that this is not fully acknowledged in either report. Overall, our impression is that it is too early to assess whether the Program will adequately address the impacts to which the Agreements relate.

### *Removal of the need for project by project assessment and approval by the Australian government*

Neither the Strategic Assessment Report nor the Program elaborate on what is intended by 'removing the need for project by project assessment and approval by the Australian Government' and this needs to be rectified.

In the Strategic Assessment Report, accreditation is described at 1.6 as 'stage two' of the strategic assessment process. It should be expressly stated whether it is the intention of the Queensland government to enter into a bilateral agreement pursuant to s 45 as a result of the strategic assessment. NELA notes that this would require a management arrangement or authorisation process that is a bilaterally accredited management arrangement or a bilaterally accredited authorisation process (s 29(b)). Furthermore, the management arrangement would have to be in force under Queensland law (s 46(2)) and the authorisation process would have to be set out under Queensland law (s 46(2A)).

Alternatively, if it is the intention of the Queensland government to seek approval for the 'taking of an action or class of actions' pursuant to s 146B, this should also be spelt out in the Strategic Assessment report and Program. NELA notes that clause 4.5 of the Agreements provides as follows:

If the Minister endorses the Program, the Minister may then approve the taking of an action, or a class of actions, in accordance with the Program and the EPBC Act. The effect of this approval decision is that any actions or class of actions approved under section 146B would not need further approval by the Minister under the EPBC Act if taken in accordance with the endorsed Program. This may be iterative with different classes of action approved over time as science and/or management evolves.

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<sup>2</sup> For the Queensland Agreement, see: *Section 146 Agreement - Commonwealth of Australia and State of Queensland*, dated 16 February 2012, available here: <http://www.environment.gov.au/system/files/pages/e166e5b7-bd7f-4bc5-9807-ba263e248632/files/s146-gbr-strategic-assessment-qld.pdf> (accessed 30 January 2014). For the GBRMPA Agreement, see: *Section 146 Agreement - Minister for Sustainability, Environment, Water, Population and Communities and Great Barrier Reef Marine Park Authority*, dated 16 February 2012, available here: <http://www.environment.gov.au/system/files/pages/e166e5b7-bd7f-4bc5-9807-ba263e248632/files/s146-gbr-strategic-assessment-gbrmpa.pdf> (accessed 30 January 2014)

Furthermore, clause 8 of the Agreements clearly envisages that at a later date the Minister may approve the taking of an action or class of actions in accordance with the Program, once it has been endorsed. NELA urges that this part of the report should be revised to clarify the ultimate goals of the strategic assessment and the range of activities that could be regarded as ‘an action or class of actions’.

### **Clarify the law reform requirements of Recommended Changes and Forward Commitments**

Chapter 10 of the Strategic Assessment Report contains proposed measures as ‘forward commitments’ to strengthen management of the GBR. Clearly, the strategic assessment process has been very useful in identifying improvements to be made, particularly the alignment between actions to be taken by GBRMPA and the Queensland government as set out in Table 10 6-1 of the Strategic Assessment Report.

However, many of these recommendations will require legislative reform, which should be explicitly acknowledged. For example the following recommendations listed in Table 10. 6-1 are likely to require amendment to existing legislation:

REC1: More explicitly incorporate consideration of MNES into the planning and development assessment system and provide clearer guidance on how MNES should be considered.

REC6: Work closely with the Department of the Environment and GBRMPA to improve understanding of cumulative impacts within and adjacent to the Great Barrier Reef and provide clearer guidance on how proponents and decision makers should address cumulative impacts in impact assessments.

REC7: Streamline assessment processes across jurisdictions and seek to have a more coordinated approach to community consultation.

REC9: Implement arrangements to concentrate port development around long-established major ports in Queensland, and encourage port master planning which includes community engagement.

REC11: Improve compliance through increased coordination across jurisdictions to prevent repeat offending.

REC13: Work closely with the Australian Government to establish standard MNES conditions that should be applied to certain types of development that give confidence that impacts will be mitigated as far as possible.

REC14: Review Queensland’s approach to offsets to ensure more strategic outcomes that help deliver a net benefit overall. Seek to align a new offsets approach to the Commonwealth offsets policy and proposed Reef Trust where possible.

REC18: Work with GBRMPA and the Australian Government to identify agreed outcomes for MNES that can be monitored over time to assess the effectiveness of management.

REC20: More explicitly report on the condition and trend of MNES.

REC 21: Consider improved governance arrangements for the management and coordination of coastal development issues in the GBR coastal zone, using the Reef Plan governance framework as a benchmark.

### **Elaborate on governance issues**

The discussion of governance issues in the Strategic Assessment Report (at 9.4) is quite brief and is not proportionate to the first sentence stating that coastal management is a ‘highly complex jurisdictional issue, with all levels of government involved, as well as a wide variety of stakeholders including industry, conservation groups

and landcare, and regional NRM bodies.<sup>3</sup> The reference to the research by Dale et al is unclear and would benefit from further explanation, particularly the areas that Dale identified as in risk of 'governance failure', that is, 'reef protection regulations, agricultural property planning and Indigenous governance'.<sup>4</sup>

Many of the recommendations listed in Chapter 10 have a governance aspect and, hence, should be covered with a clear explanation of the role of the each level of government and government department and an explanation of where legislative reform will be needed. Chapter 6 in the Program on Implementation and Governance lists the Queensland Government agencies responsible for various aspects of implementation. It mentions establishing a new intergovernmental steering committee,<sup>5</sup> however, more detail should be provided in this regard. Table 6.4-1 on Program implementation arrangements includes a column on 'key program linkages', which lists relevant legislation. It is not clear whether or not this legislation already provides for the recommended action or will require amendment. If amendment is required, this may exceed the estimated timeframe for implementation.

Two examples of recommendation with a governance dimension are provided below:

*Incorporating consideration of MNES into the planning and development assessment system*

This recommendation will require amendment of state legislation and implementation by local governments and port authorities, in their local planning schemes, land use plans and development approval processes. How this will occur should be made more explicit and the support that will be given to strengthen their capacity should be elaborated. As pointed out by Sinclair Knight Merz ('SKM'), this is 'likely to require a higher level of funding and ecological, water quality and marine science expertise within local governments and port authorities than previously required'.<sup>6</sup> SKM also made the points that first, this will require updating of local planning schemes, which is likely to take time and, second, the new Single State Planning Policy does not provide detail in relation to how MNES are to be protected through development assessment other than to identify, consider, avoid, mitigate or offsets potential impacts'.<sup>7</sup>

*Assessment of cumulative impacts*

Another example of a recommendation that has governance implications as noted by SKM<sup>8</sup> is the assessment of cumulative impacts. The temporal dimension of cumulative impacts will require a firm governance arrangement. The spatial dimension requires cross jurisdictional cooperation between local governments as well as vertical integration between local government and state level agencies, which has not been explained in either report.

**More detail on the management of port development**

NELA is surprised that issues related to port development have not been given more detailed coverage given that they were raised by UNESCO's World Heritage Committee.<sup>9</sup> As was noted in the SKM report, the spatial scale of shipping activities and the cumulative impacts of multiple ports along the coast are not discussed.<sup>10</sup> NELA welcomes the Independent Review of the Port of Gladstone<sup>11</sup> and expects that its findings will inform the development of future law and policy development and implementation in this outstanding region.

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<sup>3</sup> Strategic Assessment Report, 9-307.

<sup>4</sup> Ibid.

<sup>5</sup> Program, 6-82.

<sup>6</sup> SKM, *Great Barrier Reef Coastal Zone Strategic Assessment - Independent Review Report*, 25 October 2013, 38.

<sup>7</sup> Ibid, 38.

<sup>8</sup> Ibid, 38.

<sup>9</sup> Decisions adopted by the World Heritage Committee at its 37th Session (Phnom Penh, 2013) WHC-13/37.COM/20, Decision 37COM 7b.10, <http://whc.unesco.org/archive/2013/whc13-37com-20-en.pdf>.

<sup>10</sup> SKM, Note 6, 20.

<sup>11</sup> <http://www.environment.gov.au/topics/marine/great-barrier-reef/port-gladstone-review/review-panel>.

### *Draft Queensland Ports Strategy*

It is stated that the Queensland Government will develop and implement the Queensland Ports Strategy which 'builds on and further strengthen the government's commitment to consolidate existing port capacity and strengthen port-related management of the GBR coastal zone' (FC8 and REC9).<sup>12</sup> However, references to the Queensland Ports Strategy do not provide detail as to the content of the strategy and how it will 'provide the blueprint for managing and improving the efficiency and environmental management of the state's port network over the next decade'.<sup>13</sup>

There is mention in the Program of constraining development to existing ports<sup>14</sup> but this commitment is not elaborated. There is no explanation of whether significant expansion of port capacity within the existing port limits may still occur (as part of consolidating port capacity) or any implications for the period after 2022 during the 25 year span of the Program life.

NELA has reviewed the draft Queensland Ports Strategy and notes that it has only a ten year time frame. Within the five Priority Port Development Areas (PPDAs) there will be significant expansion of port and terminal capacity. The success of the strategy will be largely determined by the effectiveness of the proposed master planning process and the environmental management frameworks that will be required in accordance with the guideline for mandatory master plans for PPDAs.

Whilst it is apparent that the Queensland government intends that the 'statutory port master planning guideline' will be an 'integral operational component of new Queensland ports legislation',<sup>15</sup> for the purpose of this strategic assessment, it is apparent that there remains much work to be done before such legislation and the guideline is operational. It can be expected that there will be public debate about the content of the guideline. NELA notes that the draft Queensland Port Strategy states that 'rather than being prescriptive it will outline principles and frameworks'.<sup>16</sup>

From a legal perspective, the reliance on a strategy and a non prescriptive guideline has less certainty than a legislative requirement. As stated at 7.7.7 in the Strategic Assessment Report, the designation of new or extended port areas under the *Transport Infrastructure Act 1994* (Qld) does not specifically require consideration of environment impacts or involve a public process. NELA recommends that this be rectified as a matter of urgency.

### *Strengthened management measures to more explicitly incorporate MNES*

Exactly how the proposed guideline for MNES will be relevant to port development<sup>17</sup> should be elaborated. The administration of strengthened management measures requires an explanation of the capacity and capability of port authorities within the Great Barrier Reef Coastal Zone to effectively implement this responsibility including elaboration of funding requirements.<sup>18</sup>

### *Shipping*

Detail as to the inevitable increase in shipping activity that will occur over the next 25 years as a result of port development and associated activities should be explicitly set out alongside anticipated environmental impacts.<sup>19</sup>

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<sup>12</sup> Program, Table 5.7-1 Summary of Forward Commitments; Strategic Assessment Report, Table 4.9-3 Summary of Queensland Government's Forward Commitments.

<sup>13</sup> Program, 4.2.2.2.

<sup>14</sup> Ibid, Table 6.4-1.

<sup>15</sup> Draft Queensland Ports Strategy, 32.

<sup>16</sup> Ibid, 34.

<sup>17</sup> Program, 4.2.2.3.

<sup>18</sup> SKM, Note 6, 38.

<sup>19</sup> The case study on shipping at 7-280 states that 'To maintain preparedness, the North East Shipping Management Group is developing the North East Shipping Management Plan which is assessing whether the current safety and management measures will be effective in 10-20

Each report describes existing shipping management arrangements referring to the fact that shipping management within the GBR Marine Park is primarily the responsibility of the Australian Maritime Safety Authority and the GBRMPA, who work in close collaboration with Maritime Safety Queensland.<sup>20</sup> The Strategic Assessment Report refers to the North East Shipping Management Plan that ‘will set strategies, including additional or enhanced measures that may be needed in the future, for managing shipping in the GBR’<sup>21</sup> but there is little further explanation in this regard.

#### *Dredging and dredge spoil disposal*

Whilst it is stated in the Strategic Assessment Report that the draft Queensland Ports Strategy ‘prohibits capital dredging for the development of deep water port facilities outside Queensland’s long-established major port areas’,<sup>22</sup> the prohibition leaves scope for other dredging activities (such as maintenance dredging or dredging requires as a result of an increase in the size of vessels) and there is little discussion as to how this will be addressed in the legal framework.

Furthermore, NELA understands that the proposed prohibition will not apply to projects currently the subject of an active EIS or that are currently declared ‘coordinated projects’ (major projects) by the Queensland Government. For example, the prohibition would not affect the capital dredging program for the expansion of Abbot Point port (approved on 10 December 2013, EPBC 2011/6213) and a suite of other major projects on the coast involving dredging.

Detail on the legal arrangements for managing the environmental issues related to dredging should be provided. The Strategic Assessment Report only briefly mentions the research completed by SKM (2013) on *Improved dredge material management for the Great Barrier Reef Region*.<sup>23</sup> The Program does not mention concerns that can arise from dredging activity but simply notes that ‘the Australian Government has direct responsibility for dredge spoil disposal and shipping through the GBR’<sup>24</sup> and that the state has an interest in ensuring that development does not result in the disposal of dredge material in coastal waters.<sup>25</sup>

It is notable that there is no reference to the *National Assessment Guidelines for Dredging 2009*, which are the basis upon which applications for dredging and material placement are generally assessed (although this is mentioned in the draft Queensland Port Strategy). The ‘Demonstration Case Snapshot: Offsets In Gladstone Harbour’,<sup>26</sup> which describes the Western Basin Dredging and Disposal Project that is being undertaken by Gladstone Ports Corporation does not detail the dredging issues but focuses on offsets. Overall, it is ranked as only ‘partially effective’.

#### **Offsets**

The Program states that the Queensland government is currently reviewing its environmental offsets policies and developing a new biodiversity offsets policy that promises to provide for a more strategic approach. As part of the review, the government is seeking to remain consistent with the Federal Government’s offsets policy and the Reef

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years’ time *if* shipping activity significantly increases’ (emphasis added). This downplays the certainty of the resultant increase in shipping activity from expanding port activity and other associated development.

<sup>20</sup> Program, 3.5.3.2.

<sup>21</sup> Strategic Assessment Report, 7.11.2.

<sup>22</sup> Strategic Assessment Report, 7.7.7. This will only be for the next ten years according to the draft Queensland Ports Strategy.

<sup>23</sup> Ibid, 5.2.4.3.

<sup>24</sup> Program, i-5.

<sup>25</sup> Ibid, 4-63.

<sup>26</sup> Strategic Assessment Report, 7-263.

Trust. In undertaking the review, the government acknowledges that the current approach to offsets in Queensland often delivers 'piecemeal outcomes'.<sup>27</sup>

The Strategic Assessment Report and Program (at 4.2.4) provide insufficient detail about what is proposed for the new policy. NELA supports in principle the commitment to a more 'strategic approach'<sup>28</sup> with strategic investment corridors for particular values, where offset delivery is prioritised 'to benefit impacted matters and to provide strategic landscape scale benefits.'<sup>29</sup> NELA also supports the commitment to develop a publicly-accessible Queensland Government offset register to spatially identify sites that are the subject of an offset. The register will be a critical element in providing certainty to the public and business about the security of offsets.

NELA believes a number of crucial issues need to be addressed. These include the criteria for and circumstances in which 'monetised and land based offsets' will be available, and how up front mitigation and avoidance requirements will be strengthened to avoid detrimental impacts on MNES. There should be explicit provisions setting out how the government will improve monitoring and reporting of offsets. NELA is concerned that there will not be an adequate level of staff resources within the Queensland environment agency to oversee the offset provisions, including ongoing monitoring and compliance. Clearly, a considerable amount of detailed work remains to be done in this area.

#### **Reference to the development of a long term sustainability plan**

The Strategic Assessment Report refers to the future development of a long term sustainability plan for the Great Barrier Reef, as part of improved joint management by the State and Commonwealth. The Program provides an indication of its content at 5.2.2. We note that it is proposed that the long term sustainability plan may become a schedule to the Great Barrier Reef Intergovernmental Agreement and be modelled on the Reef Water Quality Protection Plan and that the content will cover the following:

1. a vision for the GBRWHA that reflects diversity of use, protects OUV, sustains its integrity and integrates environmental, social and economic concerns;
2. an outcomes framework - desired outcomes and targets for protection of OUV;
3. adaptive management actions to deliver outcomes and targets; and
4. integrated monitoring and reporting programs to measure the success of the plan.

NELA would expect that the formulation of this plan is transparent and participatory, utilizing the same processes as the strategic assessment. There needs to be further clarification regarding the process that will be adopted in preparing the plan. We note that the proposed intergovernmental steering committee mentioned at 6.3 and 6.4 of the Program will be primarily responsible. NELA is of the view that there should be scope for community engagement in formulating the plan. We recommend that that the proposed steering committee should include representatives of environmental NGOs and representatives of Indigenous or other local communities

If you have any questions please do not hesitate to contact me on 0438 409 266 or [secretariat@nela.org.au](mailto:secretariat@nela.org.au).

Yours faithfully



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<sup>27</sup> Ibid, Executive Summary.

<sup>28</sup> Ibid, 6-202 also Table 6.31.

<sup>29</sup> Ibid, 7.7.3.6.