

Malu Lamar (Torres Strait Islander) Corporation RNTBC

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Re: Exposure Draft – Torres Strait Fishery (Quotas for Tropical Rock Lobster (Kaiar)) Management Plan 2016

1. Background

- 1.1 Malu Lamar is a registered native title body corporate (“RNTBC”). It holds on trust for relevant Torres Strait Islanders (“Native Title Holders”) the native title in the determination area for Part A of the Torres Strait Regional Seas Claim (“Part A Sea Determination”).
- 1.2 Subject to the traditional laws and customs of the Native Title Holders and Commonwealth and State laws, the Part A Sea Determination recognises that the Native Title Holders possess native title in the areas covered by the determination (“native title areas”).
- 1.3 The native title includes the right of Native Title Holders under their traditional laws and customs, to take resources in the nature of fish for trading and commercial purposes (i.e fish commercially). The native title rights are protected by the *Native Title Act 1993* (Cth) (“NTA”).
- 1.4 The native title areas include Torres Strait seas where the proposed *Torres Strait Fisheries (Quotas for Tropical Rock Lobster (Kaiar) Management Plan 2016* (“Proposed TRL Management Plan”) will operate.
- 1.5 The Proposed TRL Management Plan relates to the fishing of tropical rock lobsters. All tropical rock lobsters in the native title areas are a resource. The whole of that resource is subject to native title rights, particularly the right of Native Title Holders to take that resource for all purposes, including any commercial purposes.
- 1.6 The Proposed TRL Management Plan is to be made under the *Torres Strait Fisheries Act 1984* (Cth) (“TSFA”) and relates to fishing for tropical rock lobsters. Fishing is defined in section 3 of the TSFA to include the taking of fish. Tropical rock lobsters fall within the TSFA definition of fish.

- 1.7 The Proposed TRL Management Plan contains arrangements which will render unlawful the taking of tropical rock lobsters for commercial purposes by Native Title Holders, despite their native title right to do so, unless they have both relevant fishing licences and quota units. Such arrangements are inconsistent with the exercise and enjoyment of the native title right.

2. Consultation and Input

- 2.1 Malu Lamar had an involvement in some aspects of the development of a draft tropical rock lobster management plan released in 2015. There are significant differences between the 2015 draft plan and the Proposed TRL Management Plan (released on 28 April 2016). Malu Lamar has not been afforded proper opportunities for consultation and input in relation to the current Proposed TRL Management Plan.

- 2.2 Malu Lamar's previous communications with AFMA and the former Parliamentary Secretary to the responsible Minister, included the following:-

- (a) **4 November 2014** - Representatives of Malu Lamar met with the former Parliamentary Secretary. Given impacts of existing TVH sector fishing licences on native title and on economic opportunity and livelihoods of Native Title Holders and other Traditional Inhabitants, Malu Lamar reiterated earlier requests for an interim tropical rock lobster catch limit on the TVH sector.

The Parliamentary Secretary indicated that he was reluctant to impose an interim catch limit at that time, but said the proposal would be considered in the proposed new management plan.

The Parliamentary Secretary requested that Malu Lamar submit a submission dealing with catch limit and other issues for inclusion in the plan. Malu Lamar indicated the need for resourcing to enable it to engage an independent fisheries expert to help prepare its technical input.

- (b) **30 January 2015** – Malu Lamar wrote to the former Parliamentary Secretary enclosing a preliminary submission. Malu Lamar had made separate application to the Australian Government for resourcing under the Indigenous Advancement Strategy ("IAS"), to develop a broader Torres Strait fisheries reform proposal as discussed between Malu Lamar and the Minister for Indigenous Affairs, Minister Scullion.

The letter sought to expedite the funding application to enable Malu Lamar to procure the independent expertise necessary to provide its technical input to the proposed plan.

The submission set out Malu Lamar's suggestions for the broad contents of the management plan. The submission was made subject to it receiving expert technical advice.

- (c) **5 March 2015** – The Parliamentary Secretary wrote to Malu Lamar including the following comments:-

"I have asked the Australian Fisheries Management Authority ("AFMA") as Manager of the Fishery, to ensure that you have a full understanding of the fundamental elements of the plan and why the PZJA has agreed on a certain approach for at least some of these fundamentals. AFMA can explain the detail of

these elements and discuss directly with you the broad range of matters raised in your submission”.

AFMA has not done this in relation to the Proposed TRL Management Plan currently on the table.

“You also asked about government resourcing for Malu Lamar to participate in the development of the draft plan and you mentioned that you have lodged an application for funding with the Department of Prime Minister and Cabinet under the government’s new Indigenous Advancement Strategy (“IAS”). I agree that properly resourcing Malu Lamar through the IAS would be a positive step and I look forward to hearing the outcome”.

Malu Lamar’s IAS application was for a sum of \$833,193.90 to cover the costs of developing a full Torres Strait fisheries reform proposal dealing with all aspects of Torres Strait fisheries, not just input into the proposed management plan. In the event, the government offered funding of \$30,000 for the entire process. The amount was completely inadequate. Malu Lamar has not received the necessary resourcing to enable it to engage independent fisheries expertise.

- (d) **28 April 2015** – Malu Lamar wrote directly to AFMA expressing its concern about the lack of adequate consultation with Malu Lamar in the ongoing development of the proposed management plan. It reiterated the request for resourcing to enable it to engage an independent fisheries expert in the process.
- (e) **6 May 2015** – Malu Lamar wrote to the Minister for Indigenous Affairs about the lack of adequate resourcing both in relation to the broader Torres Strait fisheries reform proposal and development of the proposed management plan. Malu Lamar sought a response from the government about how it proposed to meet the resourcing commitments previously made to Malu Lamar. There was no answer to the question.
- (f) **8 July 2015** – Malu Lamar representatives met with AFMA representatives to consider Malu Lamar’s submission to the 2015 draft of the management plan. Most of Malu Lamar’s specific requests and suggestions in relation to that draft plan were rejected (see further details in paragraph 8 of this submission). There has been no similar opportunity for consideration in respect of the current Proposed Management Plan.

3. Native Title Holders and Traditional Inhabitants

- 3.1 Tropical Rock Lobsters are a vital cultural, social and economic resource for Native Title Holders.
- 3.2 The traditional laws and customs of Native Title Holders place a cultural and social significance on tropical rock lobsters that differs from, and is additional to, their economic value.
- 3.3 The relationship between tropical rock lobsters and Native Title Holders has a spiritual and totemic dimension. The taking, sharing and trading of tropical rock lobsters is integral to dealings between Torres Strait Islander families, clans and

nations. The tropical rock lobster resource is also important to intra-community and inter-community relationships.

- 3.4 The traditional laws and customs of Native Title Holders include important provisions about the rights, interests and interactions between neighbouring Native Title Holder communities. Although the Part A Sea Determination recognises Torres Strait Islanders as a single native title holding group, the traditional laws and customs provide for separate areas of sea country belonging to particular Island communities and, in other places, shared sea use rights.
- 3.5 Important work has been commenced by Malu Lamar on mapping traditional sea boundaries in that regard. There should be close liaison between Malu Lamar and AFMA as that work unfolds. Outcomes from the work may help inform decisions about the identity of persons to be granted TIB licences and localised input into a variety of TRL Fishery management decisions.
- 3.6 From an economic perspective, tropical rock lobsters are a primary economic resource for Native Title Holders. Under traditional laws and customs, tropical rock lobsters have long been used by Native Title Holders in trade and commerce both within the region and in commercial dealings with others outside the region.
- 3.7 Although the exclusivity of any right to take marine resources, such as tropical rock lobsters, may have been eroded by past acts, the traditional laws and customs of Native Title Holders included the right to prevent non-native title holders from taking marine resources from their sea country without their permission.
- 3.8 Section 15A(2) of the TSFA requires that a management plan set out the objectives of the plan and the measures by which the objectives are to be attained.
- 3.9 Paragraph (6)(1) of the proposed TRL management plan contains no objective that involves avoiding or otherwise minimising the impacts of proposed management arrangements on native title. In fact native title is not referred to, or addressed by, the Proposed TRL Management Plan at all.
- 3.10 Although there is some overlap, Native Title Holders and Traditional Inhabitants are different groups of people. Native Title Holders are a group of Torres Strait Islanders defined specifically in the Part A Sea Determination. Traditional Inhabitants are a much broader group of people drawn from a definition contained in the Torres Strait Treaty that is imported into the TSFA.
- 3.11 All Native Title Holders will be Traditional Inhabitants, but not all Traditional Inhabitants will be Native Title Holders.
- 3.12 The rights and interests of Native Title Holders and Traditional Inhabitants are of different kinds and are protected in different ways. Native Title Holders have native title rights and interests derived from their traditional laws and customs and are protected by the NTA. Traditional Inhabitants have rights and interests, including in relation to the recognition and protection of their livelihoods. Those rights and interests are protected by the Torres Strait Treaty and the TSFA both in relation to Traditional Inhabitants and Native Title Holders as a sub-set.
- 3.13 The Proposed TRL Management Plan should separately make appropriate provision for *both* sets of rights and interests. However, it does not.
- 3.14 The objectives of the Proposed TRL Management Plan are said to include the following:

“to acknowledge and protect the traditional way of life and livelihood of Traditional Inhabitants.”

- 3.15 This does not equate to an acknowledgement or protection of native title.
- 3.16 The TSFA enacts Australia's obligations in relation to Torres Strait fisheries under the Torres Strait Treaty. Section 8 of the TSFA requires that, in the administration of the legislation, regard must be had to the rights and obligations conferred on Australia by the Torres Strait Treaty. That includes the provisions of the Torres Strait Treaty in relation to the Protected Zone which covers the native title areas and areas to which the proposed TRL Management Plan will apply.

- 3.17 Article 10(3) of the Torres Strait Treaty provides as follows:-

*“The principal purpose of the parties in establishing the Protected Zone, and in determining its Northern, Southern, Eastern and Western boundaries is to **acknowledge and protect** the traditional way of life and **livelihood of the Traditional Inhabitants** including their traditional fishing and free movement”.*

- 3.18 The measures in the Proposed TRL Management Plan for attaining this objective in the plan are not sufficient for that objective.

- 3.19 There are also important distinctions between Native Title Holders and those persons who may be eligible to hold a TIB licence. Not every TIB licence holder will be a Native Title Holder. For example, some TIB licence holders will be PNG citizens or non-native title holding Australian citizens. Under the Part A Sea Determination, only Torres Strait Islanders are currently determined Native Title Holders.

4. **Torres Strait Treaty**

- 4.1 Section 8 of the *Torres Strait Fisheries Act 1984* is as follows:-

“Section 8. In the administration of this Act, regard shall be had to the rights and obligations conferred on Australia by the Torres Strait Treaty and in particular to the following management priorities:-

a) to acknowledge and protect the traditional way of life and livelihood of Traditional Inhabitants, including their rights in relation to traditional fishing;

(b) to protect and preserve the marine environment and Indigenous fauna and flora in and in the vicinity of the protected zone;

(c) to adopt conservation measures necessary for the conservation of a species in such a way as to minimise any restrictive effects of the measures on traditional fishing;

(d) to administer the provisions of Part 5 of the Torres Strait Treaty (relating to commercial fisheries) so as not to prejudice the achievement of the purposes of Part 4 of the Torres Strait Treaty in regard to traditional fishing;

(e) to manage commercial fisheries for optimum utilisation;

(f) to show the allowable catch of relevant protected zone commercial fisheries with Papua New Guinea in accordance with the Torres Strait Treaty;

(g) to have regard, in developing and implementing licencing policy, to the desirability of promising economic development in the Torres Strait area and employment opportunities for Traditional Inhabitants”.

4.2 The references to Traditional Inhabitants incorporate the following definition in paragraph (m) in Article 1 of the Torres Strait Treaty:-

“Traditional Inhabitants” means, in relation to Australia, persons who:-

(i) are Torres Strait Islanders who live in the Protected Zone or the adjacent coastal area of Australia,

(ii) are citizens of Australia, and

(iii) maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities; and

in relation to Papua New Guinea, persons who:-

(i) live in the Protected Zone or the adjacent coastal area of Papua New Guinea,

(ii) are citizens of Papua New Guinea, and

(iii) maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities”.

4.3 Paragraph 3 in Article 10 of the Torres Strait Treaty, provides as follows:-

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

4.4 Article 22 of the Torres Strait Treaty is as follows:-

“1. The Parties shall, where appropriate, negotiate subsidiary conservation and management arrangements in respect of any individual Protected Zone commercial fishery.

2. If either party notifies the other in writing that it regards one of the Protected Zone commercial fisheries as one to which common conservation and management arrangements should apply, the Parties shall within ninety days from the date of the notification enter into consultations with a view to concluding arrangements specifying the measures to be applied by them with respect to that fishery.

3. The Parties shall, where appropriate, also negotiate supplementary conservation and management arrangements in respect of resources directly related to a fishery referred to in paragraph 1 of this Article,

including resources involving stocks occurring in the Protected Zone where such stocks are not otherwise subject to the provisions of this Treaty”.

4.5 The PZJA Annual Report for financial years 2012 to 2014 says as follows:-

“Only Traditional Inhabitants are eligible for Traditional Inhabitant Fishing Boat (TIB) licences.

.....

Papua New Guineans who are on the amnesty list under the Torres Strait Treaty are also eligible for a Traditional Inhabitant licence.

All capacity building in Torres Strait commercial fisheries is reserved for Traditional Inhabitants only and no new licences are issued to non-Traditional Inhabitants. Additionally, some fisheries only have Traditional Inhabitant fishers” (see page 27).

4.6 In applying for a TIB licence, a person claiming to be a Traditional Inhabitant completes a “Traditional Inhabitant identification form”. The form provides for applicants to submit evidence of their Traditional Inhabitant status to the Mayor and Councillor of the relevant Torres Strait local government. The Mayor and Councillor sign declarations within the form as first and second identifying persons regarding the applicant’s Traditional Inhabitant identity.

4.7 The Traditional Inhabitant identification form includes the following instructions:-

“This identification form is used to verify the “Traditional Inhabitant” status as defined in the Torres Strait Fisheries Act 1984 (the Act, the Torres Strait Treaty and decisions of the Protected Zone Joint Authority) of the individual named above in relation to application submitted in relation to authorities granted under the Act. Traditional inhabitants are eligible for authorities granted under the Act that are not available to, or have limited availability to, people who are not Traditional Inhabitants. Some of these authorities may provide access in fisheries that are reserved exclusively for Traditional Inhabitants.

By completing this identification form, you are verifying that you have ensured the applicant meets all of the criteria described beside the type of “Traditional Inhabitants” which you have ticked, and that any required attachments have been provided with the identification form.

The PZJA may also utilise other information (in addition to this identification form) to determine or review an applicant’s (Traditional Inhabitant) status”.

4.8 The form contains three options for persons identifying as, and qualifying for, Traditional Inhabitant status. They are as follows:-

- (a) *A Torres Strait Islander who lives in the Protected Zone or adjacent coastal area of Australia and is an Australian citizen who maintains traditional customary associations with the area in relation to subsistence or livelihood or social, cultural or religious activities. Only Torres Strait Islanders will be Native Title Holders under the Part A Sea Determination in relation to the sea determination area.*
- (b) *An Aboriginal Traditional Inhabitant of the Torres Strait or the Northern Peninsula area as defined under the Torres Strait Treaty and who is*

resident of that area. Such persons will not be Native Title Holders under the Part A Sea Determination for the determination area. Aboriginal Traditional Inhabitants may be recognised as native title holders for their own areas of sea country outside of the Part A Sea Determination area. Various sea claims by Aboriginal people of the Torres Strait and Northern Peninsula areas are ongoing.

- (c) *A Papua New Guinea Traditional Inhabitant from the PNG area of jurisdiction of the Protected Zone who is now an Australian citizen and resides in the Protected Zone or adjacent coastal area of Australia who was granted permanent residency status under the 1978/79 Immigration Taskforce Amnesty List or is a descendent of such a person.* Such persons will not be Native Title Holders under the Part A Sea Determination for the determination area. Indeed such persons, or their descendants, can never be Native Title Holders for any sea country – only Australian Aboriginal and Torres Strait Islanders will qualify as Native Title Holders for their own sea country anywhere around the Australian coastline.

- 4.9 AFMA's call for comment on the draft TRL Management Plan contains the following statement:-

“Growth in the Torres Strait TRL Fishery is limited to Traditional Inhabitants of the Torres Strait so as to maximise their economic development and employment opportunities. In support of this, PZJA has introduced licencing restrictions that prevent growth within the non-Islander sector, both in terms of fishing capacity (boat replacement policy) and the containment of licences numbers.....”.

- 4.10 More needs to be done to ensure that it is those Traditional Inhabitants who are Native Title Holders benefit from their native title rights and interests, particularly in the Part A Sea Determination area.

- 4.11 Provisions should be included in the TRL Management Plan, or in any other subsidiary management arrangements of the kind provided for in Article 22 of the Torres Strait Treaty, to ensure the following outcomes:-

- (a) Persons who are not Native Title Holders (Torres Strait Islanders) should not be granted TIB licences, particularly if their Traditional Inhabitant identity is derived from the amnesty list provisions, for areas subject to the Part A Sea Determination.
- (b) Growth in the TRL Fishery in the Part A Sea Determination area should be limited to Traditional Inhabitants who are recognised Native Title Holders to reflect the native title rights they hold, including the right to take the TRL and other resources of the sea for commercial purposes.
- (c) Malu Lamar is best placed to identify those Traditional Inhabitants who are Native Title Holders. It should be involved in the identification process at the application stage for TIB licences and in endorsing the grant of TIB licences.
- (d) The proposed TRL Management Plan should in all other respects embrace, facilitate and implement the position in relation to Native Title Holder identity set out in this paragraph.

5. Summary of deficiencies in Proposed TRL Management Plan

- 5.1 The Proposed TRL Management Plan is deficient in the following respects:-
- (a) It does not include adequate objectives.
 - (b) The measures in the Proposed TRL Management Plan are inadequate to achieve the currently stated plan objective and the principal Treaty purpose of protecting the traditional way of life and livelihood of Traditional Inhabitants.
 - (c) The measures in the Proposed TRL Management Plan create and entrench adverse effects on native title rights and interests.
 - (d) The Proposed TRL Management Plan fails to properly take account or address the submissions contained in Malu Lamar's preliminary response to the initial draft TRL management plan.
 - (e) All further management and regulation of the tropical rock lobster fishery should be undertaken as part of an overall resolution between the Australian Government, the Queensland Government and Malu Lamar about Torres Strait fisheries resources and native title. The resolution should address the compensation entitlements Native Title Holders have in relation to the past, current and future effects of fisheries legislation and regulation on native title. Government should properly communicate with Malu Lamar about its proposal for a Torres Strait Fisheries Indigenous land use agreement in which such a resolution could be recorded.
- 5.2 To emphasise, Malu Lamar cannot make a submission about the technical changes necessary to the Proposed TRL Management Plan without assistance from an independent fisheries expert. Fisheries management is a highly technical and specialised field. Malu Lamar has previously identified MRAG Asia Pacific as its preferred expert advisor, but requires the resourcing repeatedly requested, to be able to engage them.
- 5.3 Relevant agencies and the Australian Government have failed to provide the reasonable resourcing needed by Malu Lamar to enable it to engage an independent fisheries expert necessary to assist Malu Lamar with technical submissions about how the Proposed TRL Management Plan should be changed.
- 5.4 The content of this submission is without prejudice to Malu Lamar's right to make changes upon receiving expert fisheries advice.
- 5.5 This submission is also without prejudice to Malu Lamar's rights and remedies regarding the Proposed TRL Management Plan under the NTA and other laws.

6. **TRL Management Plan Objectives**

- 6.1 The TRL Management Plan should include the following objectives:
- (a) To avoid or otherwise minimise the direct and indirect effects of the plan on the exercise and enjoyment of native title rights and interests, particularly the right of Native Title Holders to access and to take tropical rock lobsters for any purpose, including commercial purposes.
 - (b) To help achieve 100% ownership of all fishing entitlements involving the TRL Fishery by Native Title Holders and other Traditional Inhabitants.

6.2 The 100% ownership aspiration was set by Malu Lamar as its strategic priority shortly after it became an RNTBC.

6.3 On 9 April 2014, the PZJA resolved to support the 100% ownership objective. The former Parliamentary Secretary, as then Chair of the PZJA, said in a media release on 9 April 2014:

"I am encouraged by the positive outcomes of this meeting, such as committing to more regular meetings of the PZJA and importantly, recognising and supporting the 100% ownership aspirations of Aboriginal and Torres Strait Islanders".

6.4 The TSRA has commenced the development of a road map for achieving the 100% ownership aspiration. In a media release on 10 August 2015, the Chair of the TSRA said:

"Consultation to date has shown there is strong community support for developing the road map to achieve 100% ownership of remaining Torres Strait fisheries as soon as possible.....we already have full ownership of the Finfish and Beche-de-Mer fisheries, but we need to keep working on Kaiar (tropical rock lobster) and the prawn fisheries".

6.5 The media release states that relevant agencies were to focus from August 2015 on finalising the roadmap to 100% ownership over the next 6 to 12 months. That is to say, the roadmap should have been completed by now.

6.6 The management plan does not sufficiently contribute to the objective of 100% ownership. The road map and the Proposed TRL Management Plan should be developed in conjunction with each other.

6.7 Contrary to advancing the objective of 100% ownership, the proposed TRL Management Plan arrangements for allocation of quota and the trading (selling and leasing) of quota units between TIB and TVH sectors, runs the risk of further entrenching and potentially even expanding TVH ownership. We explain why below.

6.8 In addition to the broadly stated plan objectives, the TRL Management Plan should specifically recognise Malu Lamar's functions and roles as an RNTBC. Having regard to that and the other points contained in this submission, the plan should operationally provide for the following:-

(a) A relationship framework between agencies responsible for TRL management (including AFMA) and Malu Lamar. This should extend to the following:-

i) The way in which agencies will address their obligations under Part 2 Division 3 of the *Native Title Act 1993* for purposes of any future acts constituted by, or done pursuant to, the TRL Management Plan.

ii) Provision for Malu Lamar to input a program of ongoing assessment of the operation of the TRL Management Plan once it commences.

iii) Specific Malu Lamar input into any implementation of the TRL Management Plan and associated decision making that is likely to have particular impacts on native title. For example, Malu Lamar

should input decisions about the granting of TIB licences to ensure that proposed licensees are appropriate having regard to the points made in paragraph 4 of this submission.

- (b) A protocol for the ongoing exchange of information between agencies responsible for TRL management (including AFMA) and Malu Lamar. This should extend not just to implementation of the TRL Management Plan but also include all other relevant aspects of Torres Strait fisheries management in the Part A Sea Determination area.

7. Adverse Affect on Native Title and Traditional Inhabitant Livelihoods

- 7.1 Tropical rock lobsters are a high value fisheries resource. It is a resource that provides the greatest scope for Native Title Holders to exercise and enjoy their native title right to take resources within their native title areas for commercial purposes.
- 7.2 Tropical rock lobsters are also a vital resource for Traditional Inhabitants in terms of meeting the principal purpose of the Torres Strait Treaty involving the protection of their livelihoods.
- 7.3 The primary management tool contained in the Proposed TRL Management Plan involves output controls using an allocation of quota units to the TIB and TVH sectors. A total allowable catch ("TAC") is to be determined for each fishing season and the allocated quota units will then determine the proportion of the TAC able to be taken by each licenced fisher who holds, or is covered by, quota units.
- 7.4 It is proposed that each quota unit entitle the holder, whether from the TVH sector or the TIB sector, to an equal share of the TAC. The Proposed TRL Management Plan allows for the selling and leasing of quota units. TIB fishers will be able to purchase or lease quota units from TVH unit holders, but TVH fishers will also be able to purchase or lease quota units from the TIB sector.
- 7.5 Without specific arrangements in place to help facilitate acquisition of quota units by the TIB sector, however, there is an unacceptable risk that the TVH sector will use its greater financial resources, business capabilities and market power to acquire quota units from TIB holders. This would lead to the very opposite of what the 100% ownership strategy aims to achieve and would entrench the dominance of the TVH sector.
- 7.6 The TVH sector's capacity and capability advantages over the TIB sector are summarised in the strategic assessment report for the tropical rock lobster fishery prepared by AFMA in July 2016. It states:

"The TVH sector generally uses primary boats in conjunction with smaller fishing tenders and fishes for lobster using hookah. The TVH sector normally undertakes trips to fishing grounds that last from a few days to several weeks.

The TIB sector typically uses smaller fishing tenders only with trips lasting for one or two days. However, recently an increasing number of TIB sector operators have started using larger primary boats in conjunction with fishing tenders and hookah dive equipment. Some TIB operators lamp fish the shallow reefs at night". [page 7].

- 7.7 Although there are considerably more TIB licenced fishers than TVH licenced fishers, catch records show that in the great majority of past years the TVH sector

catch substantially exceeded the TIB sector catch, often by hundreds of tonnes in live weight.

- 7.8 The reason for the disparity is that TVH fishers have greater financial resources, larger and more sophisticated fishing vessels, equipment and supply chain systems and greater business management experience and capabilities. This means that they simply out-compete the TIB sector. The TIB sector, with rare exceptions, does not have access to the larger and faster primary vessels that enable their TVH competitors to reach fishing grounds faster, stay longer and take larger catches.
- 7.9 Given these facts, the prospect of a purchase price or lease payments assisting the TIB sector through the trading of quota units does not ameliorate the risks to the TIB sector. There are no systems in place to ensure that trading transactions will result in fair and just terms for a TIB sector seller or lessor.
- 7.10 In AFMA's record of its meeting with Malu Lamar on 8 July 2015, it contended that the leasing of quota units by the TIB sector to the TVH sector may provide a source of revenue that could be used to purchase TVH licences and quota units over time. There are, however, no strategies or arrangements to help ensure that outcome or to provide for how it will be achieved. Given the competitive advantages of the TVH sector, there is a greater risk that the acquisition of quota units, over time, would flow the other way.
- 7.11 The Proposed TRL Management Plan is, from the perspective of Native Title Holders and other Traditional Inhabitants, retrograde when compared to the 2015 draft of the proposed plan. In the 2015 draft, "units of fishing capacity" were to be allocated to TIB fishers by any of the following:
- "1. Allocating pooled units of fishing capacity to an entity that represents Traditional Inhabitant fishers (e.g the Torres Strait Regional Authority ("TSRA")).*
 - 2. Allocating individual fisher units of fishing capacity via a formula agreed to by the PZJA.*
 - 3. A combination of 1 and 2 above.*
- In reaching an agreement on an allocation formula for units of fishing capacity the PZJA may request recommendations from an independent allocation advisory panel, TSFMAC or other sources as required".*
- 7.12 Under the Proposed TRL Management Plan, however, there is no way in which Native Title Holders and other Traditional Inhabitant fishers can be directly allocated quota units once the plan is made. Nor is there is any provision about how the TSRA will make its quota units available to individual Native Title Holders and other Traditional Inhabitant fishers. There is no oversight about how individual fishers are able to be covered by TSRA quota units. There are, moreover, no rights of appeal where the TSRA's decisions in that regard are challenged.
- 7.13 Quota unit transfers from the TIB sector to the TVH sector will further diminish the opportunities for economic development by Native Title Holders and other Traditional Inhabitants. Any loss of quota units will diminish the TIB sector's capacity to establish fishing businesses on the scale necessary to generate local jobs, value add through local processing and generate wealth in local communities.

7.14 This is not the only problem with the quota unit system in the Proposed TRL Management Plan. Others are these:

(a) *Additional restriction on the native title right to fish commercially for tropical rock lobsters:*

Section 7(2) will effectively make it unlawful for Native Title Holders and other Traditional Inhabitants to fish for tropical rock lobster unless they satisfy two regulatory requirements:

- i) they hold a commercial fishing licence under the TSFA authorising them to fish for tropical rock lobsters; and
- ii) they have available quota units or are covered by quota units held for them by the TSRA.

Native Title Holders already have a legally recognised and protected right to fish commercially for tropical rock lobsters under native title. The requirement in section 7(2), effectively denies Native Title Holders the right to exercise and enjoy their native title rights. The proposed regulatory limitations are additional to those that applied at the time the native title rights were recognised in the Part A Seas Determination.

Given the substantial detrimental effect of the proposed new limitation on the exercise and enjoyment of native title rights, appropriate compensation arrangements should have been negotiated in conjunction with the development of the proposed TRL Management Plan.

(b) *Government agency to hold quota units for Native Title Holders and other Traditional Inhabitants:*

Given the effect on native title, and the primary purpose under the Torres Strait Treaty of protecting the livelihood of Traditional Inhabitants, the proposed 438,000 quota units to be allocated to persons other than Traditional Inhabitants is unfair and unjust. The number (and proportion) of quota units proposed to be allocated to persons who are not Traditional Inhabitants is far too high.

Nor is it fair or just to Native Title Holders and other Traditional Inhabitants, that 562,000 quota units be allocated to the TIB sector in the way proposed.

The TSRA is a statutory authority of the Australian Government. It is discriminatory that, from the time the proposed TRL Management Plan is made, that proportion of quota units for the TVH sector will be provided directly to TVH sector fishers (in their own capacity), but all of the quota units for the TIB sector will be allocated to a government authority on behalf of Native Title Holders and other Traditional Inhabitant fishers.

Given the number of years already involved in developing the proposed TRL Management Plan, direct allocation arrangements to Native Title Holders and other Traditional Inhabitants or to an entity owned and operated by them should have been developed in conjunction with the proposed plan.

(c) *Lack of independent review mechanisms:*

Although Division 3 Subdivision C of the Proposed TRL Management Plan contains a system for independent (AAT) review of the allocation of quota units to persons in the TVH sector, there are no similar review provisions about who and how Native Title Holders and other Traditional Inhabitant fishers would be able to access quota units from the TSRA.

(d) *Inadequacies in quota unit trading arrangements:*

The arrangements in Division 5 for the trading of quota units raise several concerns:

- i) In relation to quota units allocated to the TSRA on behalf of Native Title Holders and other Traditional Inhabitants, there are no limitations on the TSRA selling or leasing some or all of the quota units it holds to the TVH sector. Given that the allocation of quota units substantially affects native title, Native Title Holders must always have direct involvement in any decisions about sale or lease.
- ii) The Proposed TRL Management Plan contains no arrangements about how the sale or leasing of quota units allocated for the benefit of Native Title Holders and other Traditional Inhabitants will be used in a way that protects and advances their livelihood.
- iii) The complete absence of controls about how quota units are sold or transferred combined with the points made in paragraphs 7.1 to 7.9 of this submission, creates a substantial risk that ownership or control of the tropical rock lobster resource will trend to the TVH sector over time rather than advance the objective of 100% ownership by Native Title Holders and other Traditional Inhabitants.

8. Need for Independent Fisheries Expert Advice

- 8.1 From its first contact with AFMA and the former Parliamentary Secretary about the proposed management plan, Malu Lamar has stressed that it needs access to independent expert fisheries advice.
- 8.2 At no time have government agencies or officials contested that need. In fact the Parliamentary Secretary acknowledged, as early as 5 March 2015, that proper resourcing for Malu Lamar was a positive and appropriate step.
- 8.3 The resourcing sought by Malu Lamar has, however, never been provided. After being advised by the Minister for Indigenous Affairs to apply for funding under the IAS, the ultimate funding offer involved a substantial "short-changing". After pointing this out to AFMA, Malu Lamar was advised that the necessary resourcing could only be considered after the (2015/16) federal budget was handed down. Two federal budgets later the resourcing has still not been provided.
- 8.4 Malu Lamar can not put forward the technical changes to the Proposed Management Plan necessary to address the current deficiencies, until it has assistance from a suitable independent technical fisheries expert.

9. Previous Submission

- 9.1 At the request of the former Parliamentary Secretary, Malu Lamar went to great lengths early in 2015, to prepare a submission on management of the tropical

rock lobster fishery, albeit without the assistance of a technical expert. Malu Lamar made numerous suggestions about how a plan should manage the fishery from the perspective of Native Title Holders.

9.2 The following is a summary of the issues raised by Malu Lamar, AFMA's response and Malu Lamar's position regarding that response:

Summary of issues raised in Malu Lamar's submission	AFMA Response	Malu Lamar's Position
Management plan objectives		
Must address 100% ownership objective	As stated by Sen. Colbeck when he met with the Torres Strait Regional Authority Board Executive, Malu Lamar representatives and industry on Thursday Island, the management plan may be a tool through which the aspiration for 100 percent ownership of commercial access rights may be achieved. Specifically the management plan is designed to provide for the leasing of quota units. The leasing of quota units held by the Traditional Inhabitant Boat (TIB) sector to the Transferable Vessel Holder (TVH) sector may provide a source of revenue that could be used to purchase TVH licenses and quota units overtime.	The plan does not contain adequate means for achieving the objective. The quota unit system runs the risk of entrenching and expanding the TVH sector as set out in this submission.
Objective 5 as drafted is not specific enough.	Further clarification is required regarding specific changes recommended for objective 5.	Refer to paragraph 5 in this submission.
Include a specific reference to the need for commercial fishing structure and infrastructure needed to realize TRL – related economic development.	It is beyond the scope of the management plan to direct infrastructure investment or commercial fishing structures. It is relevant, however, to ensure the management plan does not introduce regulations that unnecessarily impede industry developing necessary commercial structures and infrastructure.	If it is beyond the scope of the plan, this issue should have been addressed through a separate process in conjunction with development of the plan. It is not acceptable for the plan to be finalised <i>before</i> this issue is resolved using whatever means are appropriate. Some two years have passed since Malu

Summary of issues raised in Malu Lamar's submission	AFMA Response	Malu Lamar's Position
		Lamar first raised the issue.
Subject to wording being developed, an objective relating to TVH sector catch limits under the entitlements they currently hold.	The quota system proposed under the management plan will limit TVH licence holders to their quota allocations (or catch limits).	TVH sector catch limits and the proposed quota system are not the same thing. There has not been any detailed assessment of TVH catch limits (interim or otherwise), despite the former Parliamentary Secretary's assurance that TVH catch limits would be addressed in the final management plan.
Suggested measures to achieve the 100% ownership objective		
Buy back of TVH licenses overtime. For example by accessing the Indigenous Land Account.	It is beyond the scope of the management plan to direct a government-funded buyout of TVH licenses. As noted above, the management plan may facilitate the transfer of ownership through quota trading. The TSRA is developing a 'Roadmap to 100 percent Ownership of the Torres Strait Commercial Fisheries by Torres Strait Communities' which aims to assist in achieving the 100% ownership objective.	It is not clear why this issue should be beyond the scope of the plan. If not addressed through the plan, it should have been addressed through the roadmap in conjunction with the plan. The TSRA's media release of 10 August 2015 said the roadmap was being developed towards the objective of full ownership of the tropical rock lobster fishery. It was to have been completed in the next 6 to 12 months (i.e by August 2016).
All new licenses (including fishing licences) be only granted to Native Title holders	Under the proposed management plan the number of quota units available to the fishery will be fixed. It is currently proposed for all quota units available to the TIB sector to be granted at the sector level and for access to the TIB sector to remain open to all Traditional Inhabitants. A Traditional Inhabitant is defined by the <i>Torres</i>	For the TIB sector, the proposed plan involves all quota units being initially granted to the TSRA. It is an Australian Government agency. This clearly does not involve quota units being granted to Native Title

Summary of issues raised in Malu Lamar's submission	AFMA Response	Malu Lamar's Position
	<p><i>Strait Fisheries Act 1984</i>. Quota units available to the TIB sector to be granted at the sector level and for access to the TIB sector to remain open to all Traditional Inhabitants. A Traditional Inhabitant is defined by the <i>Torres Strait Fisheries Act 1984</i>.</p>	<p>Holders or other Traditional Inhabitants.</p> <p>The TRL Management Plan should require Malu Lamar to endorse the grant of all new TIB licences that are granted.</p>
<p>Provide practical measures under which potential vendors of current TVH licenses can be matched with potential native title buyers.</p>	<p>It is beyond the scope of the management plan to match vendors and buyers of fishing licences.</p>	<p>If this issue is beyond the scope of the plan, it should be addressed by the roadmap or through other appropriate arrangements in conjunction with the plan.</p>
<p>Commercial arrangements involving such things as initial joint ventures between TVH license holders and native title holders with buy-out of the TVH interest over time should be explored.</p>	<p>It is beyond the scope of the management plan to direct private-sector commercial agreements.</p>	<p>If this issue is beyond the scope of the plan, it should be addressed by the roadmap or through other appropriate arrangements in conjunction with the plan.</p>
Other measures		
<p>Provisions for monitoring catch records at regular intervals and strengthen measures around the submission of catch records.</p>	<p>The PZJA has the power to monitor catch records. Monitoring of catch records is an important aspect of fisheries management and AFMA is regularly, often in consultation with industry, assessing options to improve the effectiveness of such programs. As a result approaches may change or evolve over time. AFMA encourages this process to continue.</p>	<p>If a quota unit system is to be introduced in the plan, it is absolutely vital that there be effective monitoring of catch records. The quota unit system will be abused without effective monitoring.</p>
<p>TVH catch in particular is not currently being accurately recorded. Measures are required for a central landing point required for all TVH catch (Horn Island or Thursday).</p>	<p>AFMA supports developing a catch monitoring system to support the proposed quota management system. These systems, including those proposed by Malu Lamar, should be developed in consultation with the TRL Working Group. One option under consideration by the TRL Working</p>	<p>Any form of quota unit system or other catch limits must be developed in conjunction with an effective catch monitoring system. It is inappropriate and counter-productive for</p>

Summary of issues raised in Malu Lamar's submission	AFMA Response	Malu Lamar's Position
	Group is to introduce a Fish Receiver system. Catch monitoring systems can be developed and continually improved overtime independent of the management plan.	catch monitoring systems to be developed independent of the management plan.
Include measures to monitor catch shifting between Torres Strait and East Coast fishery.	AFMA supports working with the Queensland Government to develop strategies to monitor potential catch shifting as necessary. If necessary, management measures can be introduced by instruments outside of the management plan.	Management of the tropical rock lobster fishery should be holistic. However the issue of catch shifting is addressed, it should be done in conjunction with the management plan.
Where appropriate, catch records and buying records should be cross referenced and appropriately audited.	Cross referencing catch records where possible with buying records is a standard practice for monitoring quota managed fisheries and where appropriate will be applied in the TRL Fishery. As stated above, the introduction of a Fish Receiver system which will further strengthen monitoring arrangements for the fishery is under consideration.	This should be integral to the development of the management plan.
Introduce exclusion zones for TVH operators around prescribed islands and reefs which are of particular significance to native title holders.	These types of measures require further consultation across industry and if appropriate, may be introduced by instruments outside of the management plan	This should be integral to development of the management plan.
Introduce measures to address issues around TVH operators accessing inhabited and uninhabited islands and certain reefs.	Noted there is existing legislation that regulates the access of inhabited and uninhabited Islands where native title has been determined.	This should be integral to development of the management plan.
Rubbish disposal on both islands and in seas should be addressed.	Noted there is existing legislation that regulates pollution at sea.	If there is existing legislation, it is not being properly enforced. This issue should be addressed in conjunction with the development of the management plan.

Summary of issues raised in Malu Lamar's submission	AFMA Response	Malu Lamar's Position
<p>Maybe in the plan or elsewhere – measures to improve compliance.</p> <ul style="list-style-type: none"> - Better arrangements for surveillance and enforcement action in respect to illegal fishing of TRL and other species; - More effective policing by AFMA; it must make much better use of native title holders; - Measures to ensure PNG Traditional Inhabitants properly comply with their entitlements. 	<p>Compliance programs will be developed outside of the management plan. Advice from industry on native title holders will remain important for informing compliance risk assessments.</p>	<p>Compliance programs should be developed in conjunction with development of the management plan.</p>

10. Torres Strait Fisheries Reform

- 10.1 Since its appointment as an RNTBC, Malu Lamar has argued strongly for holistic reform of Torres Strait fisheries with a view to addressing the full range of native title implications arising from the Part A Sea Determination. Malu Lamar's continuous emphasis is on the objective of 100% ownership.
- 10.2 Malu Lamar does not support piecemeal reforms which are likely to be ineffective, and, as outlined in this submission, have the potential to actually be counter-productive.
- 10.3 Malu Lamar has taken the reform proposal as far as it can including the following steps:
- (a) Detailed briefings to the Minister for Indigenous Affairs and the former Parliamentary Secretary. The Minister for Indigenous Affairs encouraged Malu Lamar to apply for an IAS grant to further develop the proposal. The grant was then not forthcoming.
 - (b) Developed and circulated synopsis for fisheries reform.
 - (c) Obtained an indication from the National Native Title Tribunal that it will help facilitate development of a Torres Strait Fisheries Indigenous land use agreement under which negotiated reform outcomes with the Australian Government and the Queensland Government can be recorded.

- (d) Taken as far forward as it can, through its own very limited resources, ideas for fisheries reform outcomes.
- 10.4 There has been a lack of engagement in furthering the proposal from either the Australian Government or the Queensland Government. By declining Malu Lamar's resourcing requests, government has effectively frustrated this initiative.
- 10.5 In conclusion, Malu Lamar reiterates its particular disappointment that the draft TRL Management Plan does not refer to, or in any other way acknowledge, the fundamentally important native title rights and interests that Native Title Holders have in relation to the TRL resource. Given the immense struggle undertaken by Native Title Holders over many decades to achieve recognition of those rights, it is deeply concerning that there is no mention of them, or effective engagement with the holders of those rights, when it comes to the formulation of critical regulatory measures impacting the rights such as the proposed TRL Management Plan.