

SECTION 1: RECOGNISING INDIGENOUS AUSTRALIANS' INTERESTS IN FISHERIES

There are many considerations which can be seen to justify the development of an Aboriginal and Torres Strait Islander Fisheries Strategy. Probably of foremost importance are the continuing representations from Aboriginal and Torres Strait Islander peoples in Australia that their 'sea country' is important to them and that their needs and aspirations should be accommodated in its management. Such views have been recorded in many public inquiries and submissions by indigenous peoples' organisations in recent years.⁵ Some commonly voiced aspirations include:

- to have important cultural heritage places protected;
- to limit commercial and recreational fishers' access to customary fishing grounds where fish stocks are being depleted or the habitat is being damaged;
- to protect fishing areas from development impacts;
- to be exempt from licensing requirements for non-commercial fishing activities and to be able to discharge cultural obligations without risk of prosecution;
- to receive appropriate training for commercial activities;
- to have women's interests better recognised;
- to have royalties and other benefit-sharing arrangements in place where customary marine tenure areas are commercially exploited;
- to have customary marine tenure recognised;
- to participate in fisheries management structures (including co-management structures, fisheries patrols and enforcement activities);
- to be recognised as the customary custodians of traditional 'sea country' and to apply customary law management;
- to have support for entry into commercial fishing and aquaculture activities;
- to be compensated for past extinguishment of native title rights with commercial fishing licences and boats/nets etc.; and
- to have traditional knowledge respected, and included in management regimes.

Peter Yu, the Director of the Kimberley Land Council, eloquently articulated his association with his 'sea country' when speaking at a fisheries managers conference in 1995. He said:

Ironically, when I drop a line in a creek near Broome, many of those involved in fisheries resource management would probably say I am just another recreational fisherman. The reality is that, unlike

⁵ See for example: ATSIIC, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures*, Canberra, 1995; Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians: A Submission to the Commonwealth Government*. Canberra, Australian Government Publishing Service, 1995; Australia, Parliament, House of Representatives Standing Committee on Environment, Recreation and the Arts, Inquiry into the Role of Protected Areas in the Maintenance of Biodiversity, *Submissions — Vols. 1-4*, 1992; Australia, Parliament, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Culture and Heritage Inquiry, *Submissions — Vols. 1-3*, 1994, 1995, D. Smyth, *A Voice in All Places: Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone*, Revised Edition, Consultancy report commissioned by the Resource Assessment Commission, 1993; Council for Aboriginal Reconciliation, ATSIIC and Office of the Social Justice Commission, *Towards Social Justice: Compilation Report of First-Round Consultations*, Australian Government Publishing Service, Canberra, 1994; Australia, Parliament, House of Representatives. Standing Committee on Environment, Recreation and the Arts, *Biodiversity: the Role of Protected Areas*, Australian Government Publishing Service, Canberra, 1993; Australia, The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No. 31, Vol. 2, Australian Government Publishing Service, Canberra, 1986.

recreational fishers, I fish on my traditional country for a subsistence food source which has always formed a significant part of my diet, and that of my extended family. I know about the fishing spot and others like it because they form part of my cultural and traditional knowledge. I didn't read about them in a 'Welcome to Broome' handout.

The fishing in Broome has, historically, been good. But our plentiful food supply is increasingly threatened as tourism, residential, pastoral and other development pressures in the region escalate. My community has watched its traditional fishing areas being polluted, fenced off, over-fished, widely publicised, and irrevocably changed.

We are not recreational fishers. We are traditional owners of the country and its waters. We have fundamental, inherent indigenous rights to manage, use and protect our traditional country, including marine and inland waters. These rights arise out of our particular relationship to our country, our Native Title to our lands and waters.

We take seriously our responsibility to manage our country, including our waters and the resources within them. We do not view fish and other water dwelling creatures simply as 'resources'. As with all living things, fish and the places where they live and breed, play an important part in the relationship we enjoy with the environment.

This relationship affects our views of 'management' of sea resources — views which do not always accord with non-Aboriginal resource managers who evaluate fish stocks in terms which they think are shared by all users of the 'resource'. We are currently faced with a management model which allocates rights to use resources from the sea and waters in a way which takes no heed of the particular relationship Aboriginal people have with their country, and all the living things within it. We are not just another 'user group' of a limited resource.⁶

Such cultural associations with the sea were brought before the Seaman inquiry into Aboriginal land rights in Western Australia, more than a decade ago. The inquiry reported in September 1984. It examined customary marine tenure and fishing rights. Amongst other things, it inquired into the need for the protection of waters adjacent to lands granted to Aboriginal people, and significant research and documentation on Aboriginal maritime culture was produced as a result — both by the Inquiry and in submissions to it.⁷ But the inquiry's terms of reference did not extend to an assessment of the effect on Aboriginal people of fishing and maritime laws. Commissioner Seaman did not accept a submission from the Kimberley Land Council that the seas should be closed for 200 nautical miles out from low water mark — describing it as constitutionally untenable, and an 'unreasonable aspiration'.⁸ Seaman recommended:

Waters should only be protected for Aboriginal people for uses which are still part of traditional life. Traditional use should be defined to include access to and traditional activities connected with significant areas in or associated with the sea, or customary modes of foraging or fishing in or near the sea. An activity should not be treated as outside tradition merely because it is pursued with the latest technology.⁹

The commission heard evidence of traditional relationships to the sea from the Bardi, Mowanjum, Drysdale River, Beagle Bay, Kalumburu and Lombadina communities. Seaman reported:

Aboriginal people with coastal traditions at Kalumburu, Drysdale River and One Arm Point looked to their 'country' in the sea and to the resources of the sea to sustain them spiritually and substantially to sustain them bodily. We saw evidence that traditional knowledge was being handed down to the Bardi children of today...

⁶ P. Yu, 'Native Title and its Potential Impacts on Fisheries Management', *Paper Presented at the 3rd Australasian Fisheries Managers Conference, 1-4 August 1995*, p.2.

⁷ Bardi Aboriginal Association Inc., Lombadina Community Inc. and Beagle Bay Aboriginal Council Inc., *A Submission of Oral Evidence to the Aboriginal Land Inquiry, 1984, Regarding Traditional Aboriginal Rights and Use of the Sea. Unpublished.*, 1984, and Bardi Aboriginal Association Inc., Lombadina Community Inc. and Beagle Bay Aboriginal Council Inc., *Aboriginal Rights to the Sea in the Dampierland Peninsula — King Sound — Buccaneer Archipelago Area of Western Australia, A Joint Submission for Sea Closure to the Aboriginal Land Inquiry* (compiled by N. Green and J. Turner), unpublished: cited in B.C. Campbell and B.V.E. Wilson, *The Politics of Exclusion: Indonesian Fishing in the Australian Fishing Zone*, Indian Ocean Centre for Peace Studies Monograph No.5, 1993, p.210.

⁸ P. Seaman, *The Aboriginal Land Inquiry: Vol.1*, Government Printer, Perth, 1984, pp.219, 221.

⁹ Seaman, *The Aboriginal Land Inquiry*, p.222.

From Beagle Bay to Kalumburu there was evidence that in and around particular islands in the Archipelagos there were sacred and often dangerous places. The Dampierland women said that there were whirlpool sites in the sea and the women were concerned that people would become sick if they were not kept away.¹⁰

Seaman recommended that 'any incorporated Aboriginal land holder, or alternatively the regional Aboriginal organisation, should be able to apply to the Tribunal for an order for protection of waters adjacent to Aboriginal land. He considered that an order should follow where an applicant could show that others' use of waters was interfering with members' traditional use; that commercial, environmental and recreational interests should also be taken into account, and that the order need not amount to a sea closure.¹¹ The *Aboriginal Land Bill 1985 (WA)* which was developed in response to the Seaman recommendations did not secure passage through the Western Australian Parliament.¹²

Inquiry reports such as the Seaman inquiry (and the Woodward Aboriginal Land Rights Commission report, discussed below) are just one type of literature on Aboriginal and Torres Strait Islander peoples' maritime cultures. Palmer¹³ has identified four distinct types of research on indigenous Australians' maritime cultures: the comments and observations of early explorers and settlers; writers on Aboriginal material culture who tended not to address socio-economic or economic analysis; professional anthropological writings on maritime culture; and research commissioned by or on behalf of indigenous Australians in support of legal and political claims and developments. Palmer's work,¹⁴ and that of other researchers including Chase,¹⁵ Davis,¹⁶ Johannes and McFarlane,¹⁷ and Smyth¹⁸ has been described as 'seminal' by Cordell. Cordell has also noted that

¹⁰ Seaman, *The Aboriginal Land Inquiry*, pp.227, 228. See also: N. Green, 'Aboriginal Affiliations with the Sea in Western Australia', in F. Gray and L. Zann (ed.), *Traditional Knowledge of the Marine Environment in Northern Australia: Proceedings of a Workshop held in Townsville, Australia, 29 and 30 July 1985*, Great Barrier Reef Marine Park Authority, Townsville, 1988, pp.19-29.

¹¹ Seaman, *The Aboriginal Land Inquiry*, pp.229-231.

¹² H. McRae, G. Netheim and L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials*, The Law Book Company Limited, Sydney, 1991, p.157.

¹³ K. Palmer, 'Status of Documentary Information on Aboriginal and Islander Fishing and Marine Hunting in Northern Australia', in Gray and Zann (eds), *Traditional Knowledge ...*, pp.4-18.

¹⁴ See for example: K. Palmer, *Report prepared in support of an application to control entry onto seas adjoining Aboriginal land North Groote Eylandt ... on behalf of the Umbakumba and Angurugu Aboriginal Communities and other traditional owners*, unpub. Northern Land Council, Darwin, 1983; K. Palmer and M. Brady, *Report prepared in support of an application to control entry onto seas adjoining Aboriginal land. .. on behalf of the Minjilang Aboriginal Community and other traditional owners*, Northern Land Council, unpub. Darwin, 1984.

¹⁵ See: A. Chase, *Which Way Now? Tradition, Continuity, and Change in a North Queensland Aboriginal Community*, PhD thesis, University of Queensland, 1980; A. Chase and P. Sutton, 'Hunters and Gatherers in a Rich Environment: Aboriginal coastal exploitation in Cape York Peninsula', in A. Keast (ed.), *Biogeography and Ecology of Australia*, Junk & Co., The Hague, 1981; A. Chase, 'Dugongs and Australian Indigenous Cultural Systems: Some Introductory Remarks', in H. Marsh (ed.), *The Dugong*, James Cook University of North Queensland, Townsville, 1985.

¹⁶ See: S. Davis, 'Aboriginal tenure of the sea in northern Arnhem Land', in Gray and Zann (eds), *Traditional Knowledge...*, pp.68-98; S. Davis, 'Aboriginal Tenure of the Sea in Arnhem Land, Northern Australia', in J. Cordell (ed.), *A Sea of Small Boats*, Cultural Survival, Cambridge, 1989; S.L. Davis and J.R.V. Prescott, *Aboriginal Frontiers and Boundaries in Australia*, Melbourne University Press, Melbourne, 1992; S. Davis, 'Research Proposal: Aboriginal Subsistence Fishing and Tenure of the Sea', Northern Territory Industry Research and Development Trust Fund, 1983; But cf: P. Sutton, *Country: Aboriginal Boundaries and Land Ownership in Australia*, Aboriginal History Monograph 3, Aboriginal History Inc., Canberra, 1995.

¹⁷ See: R.E. Johannes, 'Traditional Ecological Knowledge of Fishermen and Marine Hunters', in N. M. Williams, G. Baines and A. Brownlee (eds), *Traditional Ecological Knowledge: Wisdom for Sustainable Development: Based on the Traditional Ecological Knowledge Workshop, Centre for Resource and Environmental Studies, Australian National University, Canberra, 18-29 April 1988*, Centre for Resource and Environmental Studies, Australian National University, Canberra, 1993, pp.144-146; R. Johannes and W. MacFarlane, 'Torres Strait Traditional Fisheries Studies: Some Implications for Sustainable Development', in D. Lawrence and T. Cansfield-Smith (eds), *Sustainable Development for Traditional Inhabitants of the Torres Strait Region: Proceedings of the Torres*

'Aboriginal sea rights customs and marine domains in Arnhem land, the Northern Territory sea closures and home reef tenure questions emerging in Torres Strait were discussed at length at the International Union for the Conservation of Nature (IUCN) Parks and Protected Area meetings in Bali in 1981, and at a Pacific maritime institutions conference in Osaka in 1983'.¹⁹ Other contributors to greater cross-cultural understanding of indigenous Australians' maritime and inland fisheries cultures include Beckett,²⁰ Cordell,²¹ Meehan,²² Smith,²³ Bergin,²⁴ Nietschmann,²⁵ Taylor²⁶ and Sinnamon,²⁷ amongst others.²⁸ On comparative developments, particularly in circumpolar communities, Jull's publications are prolific.²⁹

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- Strait Baseline Study Conference*, Kewarra Beach, Cairns, Queensland, 19-23 November, 1990, Great Barrier Reef Marine Park Authority, Townsville, 1991, pp.389-401; R.E. Johannes and J.W. MacFarlane, *Traditional Fishing in the Torres Strait Islands*, CSIRO Division of Fisheries, Hobart, 1991; K. Ruddle and R. E. Johannes, *The Traditional Knowledge and Management of Coastal Systems in Asia and the Pacific*, UNESCO, Jakarta, 1985.
- 18 D.M. Smyth, *Aboriginal Maritime Culture in the Far Northern Section of the Great Barrier Reef Marine Park*, Report to the Great Barrier Reef Marine Park Authority, Townsville, 1992; D.M. Smyth, *Aboriginal Maritime Culture in the Cairns Region of the Great Barrier Reef Marine Park*, Report to the Great Barrier Reef Marine Park Authority, Townsville, 1990; D. Smyth, *A Voice in All Places: Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone: Revised Edition*, Consultancy Report, Resource Assessment Commission: Coastal Zone Inquiry, 1993.
- 19 J. Cordell, 'Indigenous Peoples' Coastal-Marine Domains: Some Matters of Cultural Documentation', in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights, 14 July-16 July 1993*, Faculty of Law, Northern Territory University, Darwin, NT, Australia, 1993, pp.159-174, at pp.159-160.
- 20 J. Beckett, *Torres Strait Islanders: Custom and Colonialism*, Cambridge University Press, Sydney, 1987.
- 21 J. Cordell, 'Lines in the Water: Sea Tenure as "Custom Today" in Western Oceania', in Lawrence and Cansfield-Smith (eds), *Sustainable Development for Traditional Inhabitants*, pp.509-516; Cordell, 'Indigenous peoples' coastal-marine domains...'; J. Cordell, *Managing Sea Country: Tenure and Sustainability of Aboriginal and Torres Strait Islander Marine Resources: Report on Indigenous Fishing*, Ecologically Sustainable Development (ESD) Fisheries Working Group, 1991; J. Cordell, *A Sea of Small Boats...*, J. Cordell, 'Negotiating Sea Rights', *Cultural Survival Quarterly*, Vol.15, No.2, 1991, pp.5-10; J. Cordell, 'Defending Customary Inshore Sea Rights', in K. Ruddle and T. Akimichi (eds), *Maritime Institutions of the Western Pacific*, Senri Ethnological Studies, National Museum of Ethnology, Osaka, 1984, pp.301-326.
- 22 B. Meehan, *Shell Bed to Shell Midden*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1982.
- 23 A. Smith, *Usage of Marine Resources by Aboriginal Communities on the East Coast of Cape York Peninsula*, Report to the Great Barrier Reef Marine Park Authority, 1987.
- 24 See A. Bergin, 'Aboriginal Sea Claims in the Northern Territory of Australia', *Ocean and Shoreline Management*, Vol.15, 1991, pp.171-204; A. Bergin, *Aboriginal and Torres Strait Islander Interests in the Great Barrier Reef Marine Park*, Consultancy report to the Great Barrier Reef Marine Park Authority, Townsville, 1992; A. Bergin, 'A Rising Tide of Aboriginal Sea Claims: Implications of the Mabo Case in Australia', *The International Journal of Marine and Coastal Law*, Vol.8, No.3, 1993, pp.359-37; A. Bergin, 'A rising tide of Aboriginal sea claims: implications of the Mabo case in Australia', *Australian Law Journal*, Vol.67, No.8, 1993, pp.616-620. See also I. Keen, 'Aboriginal Tenure and Use of the Foreshore and Seas: An Anthropological Evaluation of the Northern Territory Legislation Providing for the Closure of Seas Adjacent to Aboriginal Land', *Anthropological Forum*, Vol.5, No.3, 1984-5, pp.421-439.
- 25 B. Nietschmann, and J. Nietschmann, 'Good dugong, bad dugong; bad turtle, good turtle', *Natural History*, Vol.90, No.5, 1981, pp.54-63, 86-87; B. Nietschmann, 'Traditional Sea Territories, Resources and Rights in Torres Strait', in J. Cordell (ed.) *Sea of Small Boats*, Cultural Survival, Cambridge, 1988, pp.60-93.
- 26 J. Taylor, An Overview of Traditional Fishing Rights in Queensland, Report to the Under-Secretary, Queensland Department of Community Services, cited in D. Smyth, *A Voice in All Places...*, p.12.
- 27 The Kowanyama Community near the west coast of Cape York Peninsula is working with Viv Sinnamon on fisheries resources and watershed management. See V. Sinnamon, 'Self-Governance: Planning for a Future', *CYPLUS Talkback*, Vol.5, July 1994, pp.18-21; V. Sinnamon, 'Fisheries of the Lower Mitchell River, North Queensland', in J. Cordell (ed.), *Indigenous Management of Land and Sea and Traditional Activities of Cape York Peninsula*, Cape York Peninsula Land Use Strategy, Department of the Premier, Economic and Trade Development, Brisbane; Department of the Environment, Sport and Territories, Canberra; University of

It is unfortunately the case that court documents are also a fertile source of material on indigenous Australians' maritime cultures. Consider a case from Western Australia in 1994, which was brought before native title and fisheries Acts amendments had partially accommodated indigenous Australians' interests and aspirations. The facts of the case are as follows: in February 1993 about 300 people travelled to Drovers Rest, a small community near Port Hedland, for a wake to commemorate the passing of a prominent Aboriginal man. Several Aboriginal men netted fish in a nearby creek to help feed the congregation, contrary to a gazetted prohibition on certain types of fishing in the area. Professional fishermen could be declared exempt from such a prohibition. Fisheries patrol officers intervened. The Magistrate dismissed the charges against the Aboriginal fishermen, but the Fisheries Department of Western Australia took the case on appeal, and the charges were upheld. Justice Heenan of the Western Australian Supreme Court was not satisfied on the evidence that a native title defence could be made out, and commented that on the afternoon in question, the respondents had merely engaged in an 'ordinary ... activity', and that the regulatory provisions of the Act should apply for the protection of both Aboriginal and non-Aboriginal Australians. Justice Heenan required evidence of the extent of the native title right asserted (whether it was an individual, family or communal right); who could exercise the right; its season, time and frequency; how the right was established and that the particular fishing in question was in fact an exercise of the traditional laws and customs bearing upon the right.³⁰

Thus cases since the native title ruling have reaffirmed the limited recognition which the common law will give to indigenous Australians' cultural practices unless they are fully proved and can constitute a native title defence. It is simply not enough to argue that fishing for food for an important community wake is a cultural practice of much significance, and that fisheries legislation should be interpreted, or recommended for amendment, so as to accommodate that fact.³¹

A recurring theme in comments from fisheries officers contacted during the course of writing this report was that all Australians should be equal before the law, and that the sovereignty of the Crown is paramount. One officer suggested that analogies could be drawn between the criminal law, and natural resources law, and that

Queensland, St Lucia, (forthcoming), 1995, pp.1-31 (and publications cited therein). See also: E. Young, H. Ross, J. Johnson and J. Kesteven, *Caring for Country: Aborigines and Land Management*, Australian National Parks and Wildlife Service, Canberra, 1991, pp.168-170.

- ²⁸ D. Allen, 'Some Shadow of the Rights Known to Our Law', in *Turning the Tide...*, pp.53-64; D. Allen, 'Salt-water Dreaming', in P. Jull, et al. (eds), *Surviving Columbus: Indigenous Peoples, Political Reform and Environmental Management in North Australia: Conference Sponsored by the Central Land Council, Northern Land Council, Island Co-ordinating Council and the North Australia Research Unit*, North Australia Research Unit, Casuarina, 1994, pp.39-46; D. Briggs and R. Zigterman, 'Aboriginal and Torres Strait Islanders' Involvement in Managing the Great Barrier Reef Marine Park and Queensland Marine Parks', in J. Birkhead, T. De Lacy and L. Smith (eds), *Aboriginal Involvement in Parks and Protected Areas*, Australian Institute of Aboriginal and Torres Strait Islander Studies Report Series, Aboriginal Studies Press, Canberra, 1992, pp.275-280; D. Mowaljarlai, 'Wayrrull-Aboriginal Traditional Responsibility in Cultural Resource Management in the Northwest Kimberleys of Western Australia', in Birkhead, De Lacy and Smith (eds), *Aboriginal Involvement in Parks...*, pp.179-189; B. Nesbitt, 'Aboriginal 'Joint' Management of Northwest Kimberley Conservation Reserves: — Achievable Under Existing Legislation but is there the Political Will?', in Birkhead, De Lacy and Smith (eds), *Aboriginal Involvement in Parks...*, pp.251-261.
- ²⁹ P. Jull and N. Bankes, 'Inuit Interests in the Arctic Offshore', in *National and Regional Interests in the North: Third National Workshop on People, Resources, and the Environment North of 60 degrees*, Canadian Arctic Resources Committee, Ontario, 1983, pp.557-586; P. Jull, 'Internationalism, Indigenous Peoples and Sustainable Development', in Lawrence and Cansfield-Smith (eds), *Sustainable Development for Traditional Inhabitants...*, pp.451-460; P. Jull, *A Sea Change: Overseas Indigenous—Government Relations in the Coastal Zone*, Consultancy Report, Resource Assessment Commission, Coastal Zone Inquiry, 1993.
- ³⁰ *Sutton v. Derschaw, Clifton and Murphy*, Appeals SJA 1175-1177, 1994, Supreme Court of Western Australia, unreported, 15 August 1995.
- ³¹ It is worth noting comments in a handbook from Western Australia that in Aboriginal communities 'Death is a community concern, not a private affair ... and involve everyone. Funeral ceremonies take precedence over most other things. When it comes to meetings, it is a good idea if you can regard deaths as similar to rainy days for builders': F. Crawford, *Jalindari Ways: Whitefellas Working In Aboriginal Communities*, Centre for Aboriginal Studies and the School of Social Work, Curtin University of Technology, 1989, p.56, (with thanks to Pat Brady of the AIATSIS library for the reference).

following *Walker v. New South Wales*³² (where a sovereignty defence to a criminal charge was rejected), it might be argued that no special privileges should be available to Aboriginal and Torres Strait Islander peoples. It is suggested further that non-native title holders should not be entitled to any special dispensations and that natural resource laws should be applied universally and without discrimination, so as not to offend s.10 of the *Racial Discrimination Act 1975 (Cwlth)*. It is suggested that such issues are likely to be raised and argued in a constitutional defence to a fisheries prosecution by an aggrieved non-indigenous angler, or may be addressed in native title litigation.³³

But there are a range of arguments to the contrary which also warrant airing.³⁴ If, when laws are applied uniformly they have a differential impact on social, economic and political groups, the law can be considered to involve indirect or structural discrimination. True equality before the law can require judicial officers to give relevant considerations, such as the desirability of supporting diverse cultures, their proper weight, and to disregard irrelevant considerations. To not take account of relevant differences between groups of people can continue the effects of past discrimination and can exacerbate underlying inequalities.

Moreover, the inclusion of special provisions in legislation, or the development of strategies on behalf of, or for the benefit of Aboriginal and Torres Strait Islander peoples, is not an infringement of the *Racial Discrimination Act 1975 (Cwlth)* (RDA). The RDA has incorporated into Australian municipal law the obligations created by Australia's ratification of the Convention on the Elimination of All Forms of Racial Discrimination. Section 9 of the RDA broadly follows the definition of racial discrimination in Article 1 of the Convention. It renders unlawful any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or other field of public life. Section 10 of the Act attempts to secure equality before the law by providing that where, under a Commonwealth, State or Territory law, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, the first-mentioned persons shall, by force of the section, enjoy that right to the same extent as persons of the other race, colour or national or ethnic origin. The section applies specifically to racially differentiating property management provisions.

Section 8 accommodates the 'special measures' provisions of the Convention which allow positive measures to be taken by states to redress disadvantage. Such measures are not to lead to the maintenance of unequal or separate rights for different racial groups, nor be continued after the objectives for which they were taken have been achieved. In 1985 in *Gerhardy v. Brown*³⁵ the High Court held that the *Pitjantjatjara Land Rights Act 1981 (SA)* prima facie infringed the RDA for prohibiting non-Aboriginal persons from entering land vested in the Pitjantjatjara, but the Court held that the prohibition was valid as a 'special measure' under the Convention and the Act.

Special measures, and the recognition of indigenous peoples' interests in fishing, are not founded on romantic, idealistic notions.³⁶ The weight of evidence supports the view that indigenous peoples and their leaders have fairly consistently and actively asserted the value of their cultural heritage and customary practices, and their

³² [1994] 69 ALJ 111.

³³ Personal communication, Tony O'Connor, Department of Fisheries WA, 26 September 1995.

³⁴ See Justice Mary Gaudron, 'Equality Before the Law with Particular Reference to Aborigines', *The Judicial Review*, Vol. 1, No. 2, 1993, pp.81-89.

³⁵ (1985) 159 CLR 70.

³⁶ See this concern in, for example: C. Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993', *Human Rights Quarterly*, Vol.16, 1994, pp.1-57; L. Sackett, 'Promoting Primitivism: Conservationist Depictions of Aboriginal Australians', *The Australian Journal of Anthropology*, Vol.2, No.2, 1991, pp.233-246; K. Palmer *Aborigines, values and the environment*, Fundamental Questions Paper No.7, Centre for Resource and Environmental Studies, Australian National University, 1991; N. Thomas, *Colonialism's Culture: Anthropology, Travel and Government*, Polity Press, Oxford, 1994, ch.6; N. Thomas, *Entangled Objects: Exchange, Material Culture, and Colonialism in the Pacific*, Harvard University Press, Cambridge, 1991, p.10; R. M. Keesing, 'Creating the Past: Custom and Identity in the Contemporary Pacific', *The Contemporary Pacific*, Vol.1, Nos 1 and 2, Spring and Fall, 1989, pp.19-42 at pp.23, 29-30.

wish to share in the benefits of the exploitation of customary natural/cultural resources (where sanctioned), amongst other rights.³⁷

Traditional knowledge and practices should also be considered in support of greater involvement by indigenous Australians in natural/cultural resource management. A workshop in 1985 on traditional knowledge of the marine environment in northern Australia, convened by the Great Barrier Reef Marine Park Authority, Townsville, 1985 concluded that:

A considerable amount of traditional knowledge exists in the Northern Territory, Western Australia and Queensland Aboriginal and Islander communities related to marine biology, marine use and management ...

It is not always clear whether the 'traditional management' of resources has been conscious conservation or whether it has been management by default. Indications of 'worry' about declining or over-use of resources and subsequent reductions in exploitation of those resources suggests that such management may not always be management by default.

Existing traditional use and management of marine resources has changed, because of changing technology, culture and community social requirements. Existing traditional management needs to be related to what is required to ensure availability and sustainability of stocks. There needs to be assessment of what is needed from management agencies to close the gap between current traditional management and currently desirable management.

There needs to be some consideration of the Australian position *vis à vis* the world regarding resource availability with respect to target species, such as turtles, as the ranges of individual species extend beyond the area of Australian jurisdiction...

There is a great need for information on catches of target species involved in traditional fisheries by other than traditional communities...

There appears to be significant traditional knowledge of dugong in Western Australia and Torres Strait, green turtle populations particularly in Western Australia, rock lobster especially in the Northern Territory, trochus in Northern Territory and Western Australia, reef fish generally, sea birds and other fisheries.³⁸

Commonwealth Policies and Inquiry Recommendations

This section identifies various policy commitments and recommendations made by and to the Federal Government regarding Aboriginal and Torres Strait Islander peoples' interests in fisheries, and other coastal and offshore maritime issues. These recommendations and commitments have emerged at a time when governments around the world are responding to the necessity of developing resource management policies which are more ecologically sustainable, and several are pursuing co-management policies with indigenous peoples.³⁹

Aboriginal Land Rights Commission Reports

The Aboriginal Land Rights Commission in 1973 reported that fishing rights were an important issue for the Aboriginal communities who had contributed to the Commission's inquiry. Participants had pointed 'to their traditional dependence on fish, turtles, shellfish, dugong and other forms of sea life' and had asked whether their land rights would extend out to sea and, if so, how far. Commissioner Woodward concluded:

³⁷ J. Sutherland, 'Representations of indigenous peoples' knowledge and practice in modern international law and politics', *Australian Journal of Human Rights*, Vol. 2, No. 1, Oct-Nov. 1995, pp.39-57; and see the content of submissions made to various public inquiries by indigenous Australians on these issues.

³⁸ Gray and Zann, *Traditional Knowledge...*, pp.191-192.

³⁹ M.C. Wood, 'Tribal Management of Off-Reservation Living Resources: Regaining the Sovereign Prerogative', Paper presented at the Indigenous Land Use Agreements Conference, Darwin, September 1995, pp.1-52; C. Wickliffe, 'The Co-Management of Living Resources and Maori Customary Fishing Rights, Paper presented at the Indigenous Land Use Agreements Conference, Darwin, September 26-29, 1995'; G. Osherenko, *Sharing Power with Native Users: Co-Management Regimes for Arctic Wildlife*, Canadian Arctic Policy Paper No.5, Canadian Arctic Resources Committee, Ottawa, 1988.

It seems clear that Aboriginal clans generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land. So also are the waters between the coastline and offshore islands belonging to the same clan.

Some...looking ahead...see the development of fishing ventures as one form of commercial activity holding promise for them, and they fear that some of the best areas may be fished out before they can put such ideas into practice.⁴⁰

But in 1974 the Commission denied requests from the Northern Land Council that Aboriginal land title be recognised to 12 nautical miles offshore. Woodward reported:

It seems to me that the legitimate interests of Aborigines will be protected if their traditional fishing rights are preserved and their right to the privacy of their land is clearly recognised by the establishment of a buffer zone of sea which cannot legally be entered by commercial fishermen or holiday makers...some arbitrary figure...might be two kilometres from low tide.⁴¹

Although the High Court recognised the doctrine of native title in *Mabo v. Queensland* — a case which emanated from the Torres Strait — the court did not rule on offshore native title issues primarily because the sea rights claim was dropped during the course of the litigation. The decision nevertheless generated speculation on the implications of the decision for indigenous Australians offshore.⁴² The 1992 ‘Surviving Columbus’ conference, the 1993 Conference on Indigenous Peoples and Sea Rights in Darwin and the 1993 ‘People-Place-Law’ conference in Sydney also contributed to the recognition of sea rights in Governments’ legislative responses to the decision, which are discussed briefly below.

Recognition of Aboriginal Customary Laws Report

The mid-1980s seemed to be a time of heightened government interest in sea rights questions,⁴³ possibly because of the passing of the *Torres Strait Fisheries Act 1984 (Cwlth)*. The 1986 Australian Law Reform Commission (ALRC) *Report on the Recognition of Aboriginal Customary Laws* made a wide range of recommendations on hunting, fishing and gathering rights for indigenous Australians. It noted the ‘wide variety of legitimate interests such as conservation, effective management of natural resources, pastoral and other residential interests and commercial interests’ which precluded an overriding recognition of traditional hunting, fishing and gathering practices.⁴⁴ The Commission declined to recommend that detailed legislation be introduced, suggesting that a set of general principles be adopted to guide the necessary law reform; the reform of provisions inconsistent with the principles, followed by ‘detailed resource management and administrative decisions made at the appropriate levels in consultation with Aboriginal people affected by these decisions’.⁴⁵

The Commission understood traditional hunting and fishing to include consumption, ceremonial exchange, and satisfaction of kin obligations, including barter or exchange within families or clan groups. But it recommended

⁴⁰ A.E. Woodward, *Aboriginal Land Rights Commission: First Report: July 1973*, Parliamentary Paper No.138, Government Printer, Canberra, 1973, p.33.

⁴¹ A.E. Woodward, *Aboriginal Land Rights Commission: Second Report: April 1974*, Parliamentary Paper No.69, Government Printer, Canberra, 1975, pp.80-81.

⁴² See for example: J. Sutherland, ‘Rising Sea Claims on the Queensland East Coast’, *Aboriginal Law Bulletin*, Vol.2, No.56, 1992, pp.17-19; J. Sutherland, ‘Human Rights, Aboriginal Maritime Culture and the Evolving Regulatory Framework for the East Coast of Queensland’, *Paper presented to the Australasian Law Teachers’ Association 47th Annual Conference*, Brisbane 9-12 July, 1992; G. McIntyre, ‘Mabo and Sea Rights: Public Rights, Property Rights or Pragmatism’, in *Turning the Tide...*, pp.107-112; N. Sharp, ‘Contrasting Cultural Perspectives in the Murray Island Land Case’, *Law in Context*, Vol.8, No.1, 1990, pp.1-31, and Bergin’s publications, cited above.

⁴³ See for example the report: B. Lawson, *Aboriginal Fishing and Ownership of the Sea*, Fisheries Division, Department of Primary Industry, Canberra, 1984; M. Fisher, *The Recognition of Traditional Hunting, Fishing and Gathering Rights*, Australian Law Reform Commission, ACL Research Paper No.15, Australian Government Publishing Service, Canberra, 1984.

⁴⁴ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No.31, Vol. 2, Australian Government Publishing Service, Canberra, 1986, p.200.

⁴⁵ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, p.200

that trade, exchange or sale of species outside the local community should be treated in the same way as other commercial dealings with the species,⁴⁶ and that the purpose of the activity rather than the method should determine whether an activity is 'traditional'.⁴⁷

The Commission recommended that justifiable priorities for access to resources were:

1. conservation measures, and other identifiable overriding interests (such as safety, rights of innocent passage, shelter and safety at sea)
2. traditional hunting and fishing
3. commercial and recreational hunting and fishing.

It recommended:

As a matter of general principle, Aboriginal traditional hunting and fishing should take priority over non-traditional activities, including commercial and recreational activities, where the traditional activities are carried on for subsistence purposes. Once this principle is established the precise allocation is a matter for the appropriate licensing and management authorities acting in consultation with Aboriginal and other user groups.⁴⁸

It preferred legislative provisions which allowed Aboriginal people as a group to take out community licences over those requiring corporate or individual licensing.⁴⁹

The Commission suggested that if Aboriginal people were engaged in recreational hunting and fishing only, that activity should be treated no more favourably than traditional activities. It said:

the exact place of recreational viz-a-viz commercial fishing will depend on the circumstances, but it is hard to see that any justification exists for special measures for Aborigines who are engaged in recreational hunting and fishing.⁵⁰

The Commission suggested that before long-term decisions were taken to restrict traditional hunting and gathering on conservation grounds, it was necessary to determine, 'as far as possible in the circumstances both the status of the species concerned, and the threat to the species posed by traditional hunting and fishing', and that other threats such as commercial or recreational fishing should also be assessed. It suggested that if restrictions were placed on traditional hunting and fishing practices, there should be regular monitoring and assessment of the situation in consultation with those affected.⁵¹

On the issue of sea closures, the Commission recommended that there should be provision for areas of the sea (having some traditional association or special link for Aboriginal people and where adjacent to Aboriginal land) to be preserved for traditional fishing. In this respect the Commission endorsed the recommendations made in the Seaman Report, that the land tribunal should have power to issue determinations that waters adjacent to Aboriginal lands should be protected from commercial fishing and other activities, where Aboriginal applicants could show that such activities interfered with their traditional use. Such determinations would only be available where applicants had a traditional association or special link with the sea adjacent to Aboriginal land.⁵²

The Commission also recommended that Aboriginal people should be able to access traditional lands to hunt, fish and gather, but suggested that where customary lands were alienated, negotiated access arrangements should be developed.⁵³

⁴⁶ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, p.200

⁴⁷ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, p.200.

⁴⁸ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, p.201.

⁴⁹ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, p.201.

⁵⁰ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, p.201.

⁵¹ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, p.201.

⁵² The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, pp.192-193, 202.

⁵³ The Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, p.202.

National Strategy for Ecologically Sustainable Development

The concept of 'sustainable development' was defined in the report of the World Commission on Environment and Development (the Brundtland report) as:

development that meets the needs of the present without compromising the ability of future generations to meet their own needs ...

In essence...a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.⁵⁴

The Commonwealth in 1990 suggested that ecologically sustainable development (ESD) involved:

using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained and the total quality of life, now and in the future, can be increased.⁵⁵

In 1990 the Federal Government announced that it would establish nine sectoral ESD Working Groups, including one on fishing, to develop reports and recommendations on ways of achieving ESD.⁵⁶ The Fisheries Working Group commissioned but did not subsequently publish a consultant's report by John Cordell — *Managing Sea-Country: Tenure and Sustainability of Aboriginal and Torres Strait Islander Marine Resources*. That report recommended that:

- ESD policy should promote and safeguard the cultural as well as the biological diversity associated with indigenous homelands;
- there can be mutual benefits in recognising that priority conservation areas often coincide with indigenous homelands;
- indigenous peoples exercise customary claims and rights to extensive marine as well as terrestrial domains;
- indigenous peoples are the traditional inhabitants and owners of coastal and aquatic areas and fishing grounds, not just peripheral 'users' of today's commercial fisheries;
- further research was needed on customary marine tenure issues; and
- matters such as sacred sites and sea-space and non-economic uses of the sea may enter into sea tenure-based management options and arrangements.⁵⁷

In 1991 the *Final Report of the Ecologically Sustainable Development Working Group on Fisheries* was released. The Final Report recommended that governments:

undertake a comprehensive evaluation of government relationships to indigenous coastal communities, with regard to fisheries management issues and arrangements, laws, obligations, local needs and customs, and traditional environmental knowledge.

It also stated that:

indigenous fishing is a subset of an overall pattern of utilisation of freshwater, estuarine, and marine aquatic resources which includes foraging, collecting shellfish, and hunting turtle and dugong. Studies indicate that dependency on aquatic resources is very extensive, even in urban settings. On the whole, however, indigenous people today have a relatively low level of involvement in commercial fishing.

Although few members of indigenous communities have licenses to fish commercially...there are glimmerings of indigenous entrepreneurial activity...and fishery-related ventures such as 'safari'-style fishing and marine ecotourism. Certain Torres Strait Islander and Aboriginal communities are genuinely interested in opening up new avenues to participate in the commercial fishing industry.⁵⁸

⁵⁴ World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Oxford, 1987, pp.43, 46.

⁵⁵ Commonwealth, *National Strategy for Ecologically Sustainable Development*, Australian Government Publishing Service, Canberra, 1992, p.6, referring to the 1990 Commonwealth Discussion Paper on ESD.

⁵⁶ Commonwealth, *National Strategy for Ecologically Sustainable Development*, p.12.

⁵⁷ Cordell, *Managing Sea Country...*, pp.127-133.

⁵⁸ Commonwealth, *Ecologically Sustainable Development Working Groups, Final Report — Fisheries*, Australian Government Publishing Service, Canberra, 1991, p.64.

The report noted that there was ‘no concrete evidence’ that indigenous harvesting was depleting or significantly risking the depletion of fishery and aquatic resources. It recognised that key Aboriginal concerns regarding the sea and aquatic resources were:

- primarily to control outsiders’ access to land and associated sea territory; to earn a living from ancestral resources, and not to face unilaterally-imposed conservation restrictions;
- to protect significant offshore sites from disturbance;
- to be able to fish and hunt according to customary methods and laws;
- to protect local fishing grounds from intrusions by commercial fishing fleets and other commercial developments;
- to conduct meaningful negotiations with management authorities about preserving Aboriginal cultural and economic values in fisheries and protected area frameworks; and
- to regain some control over the management of traditional maritime and coastal estates which have already been officially enclosed in parks, World Heritage areas, reserves, and zoning plans.

It said:

What people desire above all is to bear the brunt of responsibility in controlling access of outsiders to land and associated sea territory. Also uppermost is a desire to earn a living from ancestral resources, and not have them locked up unilaterally by government agencies as empty ‘wilderness’ areas.⁵⁹

It noted that Federal support for a national representative system of marine protected areas needed to consider indigenous rights and homelands in its development phase.⁶⁰

The 1992 National Strategy for Ecologically Sustainable Development suggests that Governments will:

- have regard to the traditional dependence by Aboriginal and Torres Strait Islander peoples on the management of renewable resources and ecosystems;
- encourage greater recognition of Aboriginal and Torres Strait Islander peoples’ values, traditional knowledge and resource management practices relevant to ESD;
- continue efforts to address Aboriginal and Torres Strait Islander peoples’ employment concerns in natural resource based industries which impact on their communities; and
- support the Council for Aboriginal Reconciliation as a forum for discussion and formulation of Aboriginal and Torres Strait Islander peoples’ positions relating to ESD.⁶¹

The Strategy also identified a need to develop ESD-related policies, programs and actions which did not impact inequitably on women, and which incorporated women’s particular concerns.⁶²

National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders

Also in 1992, all governments endorsed the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders*,⁶³ agreeing on the need to achieve greater co-ordination amongst levels of government concerning the delivery of programs and services to Aboriginal peoples and Torres Strait Islanders. This new National Commitment was seen as necessary to redress the underlying and fundamental causes of Aboriginal and Torres Strait Islander inequality and disadvantage including those identified by the Royal Commission into Aboriginal Deaths in Custody; and to confirm that the planning and provision of government programs and services to Aboriginal peoples and Torres Strait Islanders is a shared responsibility and a legitimate policy interest of all spheres of government. The

⁵⁹ Commonwealth, *Ecologically Sustainable Development Working Groups, Final Report — Fisheries*, p.65.

⁶⁰ Commonwealth, *Ecologically Sustainable Development Working Groups, Final Report — Fisheries*, p.153.

⁶¹ Commonwealth, *National Strategy for Ecologically Sustainable Development*, pp.82-83.

⁶² Commonwealth, *National Strategy for Ecologically Sustainable Development*, pp.84-85.

⁶³ Endorsed by the Council of Australian Governments, Perth, Western Australia, 7 December 1992.

National Commitment also had governments agreeing to empower Aboriginal and Torres Strait Islander peoples regarding their culture and heritage.

Resource Assessment Coastal Zone Inquiry Report

In October 1991 the Prime Minister issued terms of reference to the Federal Resource Assessment Commission (RAC) requiring it to inquire into the management and use of the resources of Australia's coastal zone. The RAC *Coastal Zone Inquiry* commissioned a consultation report on indigenous Australians' interests in the coastal zone, which was prepared by Dr Dermot Smyth. Smyth welcomed the fact that the RAC inquiry was 'the first national resource management inquiry to have actively sought the views of Aboriginal and Torres Strait Islander people about their concerns and interests in coastal land and sea management'.⁶⁴ He noted that the Inquiry had resulted in 'extensive documentation of indigenous coastal interests, both in its published reports and in the many submissions and hearing transcripts which are on the public record'.⁶⁵ In his general conclusions Smyth noted the need for:

- better recognition of indigenous women's interests;
- better recognition of Aboriginal peoples' interests in southern areas of Australia;
- a more proactive stance by the Commonwealth government in protecting indigenous Australians' interests in the coastal zone; and
- a broader commitment to direct communication and improved understanding between industry organisations, fisheries managers and Aboriginal and Torres Strait Islander people, consistent with commitments to reconciliation.⁶⁶

The RAC also commissioned and published two additional consultancy reports which examined indigenous Australians' involvement coastal zone management and comparative international developments respectively.⁶⁷

The Indigenous Reference Group, which had been formed to assist the Inquiry, sought, amongst other recommendations, the enactment of Commonwealth legislation which:

- recognises indigenous peoples' right to hunt, fish, gather and engage in other cultural practices according to tradition or custom;
- provides reasonable access to land, sea and resources to enable such traditional hunting, fishing, gathering and other cultural practices to be conducted; and
- provides mechanisms whereby the exercise of traditional rights to access and use of resources can be negotiated with other interests or interested parties (conservation, pastoral, etc.).⁶⁸

The Reference Group also proposed the establishment of a national Aboriginal and Torres Strait Islander Coastal Committee to oversee the implementation of the recommendations relating to indigenous peoples' issues, with similar committees to be established in each State and Territory.⁶⁹

The RAC consultancy report by Peter Jull — *A Sea Change: Overseas Indigenous-Government Relations in the Coastal Zone* — identified a number of guiding principles for public policy-making regarding marine and coastal matters and the relations between indigenous peoples and nation-states. These included:

- Indigenous peoples of the coast are not individuals in a fisheries occupation — or part of any collectivity which may be identified by policy-makers — so much as they are part of increasingly conscious political communities defined by indigenous ethno-cultural identity and committed to shared

⁶⁴ Smyth, *A Voice in All Places...*, p.211.

⁶⁵ Smyth, *A Voice in All Places...*, p.211.

⁶⁶ Smyth, *A Voice in All Places...*, ch.8.

⁶⁷ Altman, Ginn, Smith and Roach, *Existing and Potential Mechanisms for Indigenous Involvement in Coastal Zone Resource Management*, Consultancy Report, Resource Assessment Commission, Coastal Zone Inquiry, 1993; Jull, *A Sea Change ...*

⁶⁸ Smyth, *A Voice in All Places...*, pp.220-221.

⁶⁹ Smyth, *A Voice in All Places...*, p.223.

agendas which seek real ownership and management rights in respect of traditional resource bases of land and sea.

- Indigenous marine and coastal needs are better addressed as regional/local development measures than solely as an occupation or enterprise of individuals.
- Governments must expand the top-down managerial and scientific expertise mode vis-a-vis local populations to accommodate and encourage a counter-thrust (or 'bottom-up' mode) of traditional knowledge, initiative, and local management in the coastal zone.
- The answers to specific resource management questions is not to be found in *practices* which may be borrowed or replicated from abroad, but in *processes* which generate new relationships between indigenous peoples and the structures of the general community — e.g., governments, interest groups, environmental coalitions — and which yield specific solutions acceptable to the various parties involved.⁷⁰

The Jull report also concluded that the example of indigenous-government co-management of the fisheries of the Pacific Northwest and on Canada's Arctic coasts could provide relevant models to examine for Australia.⁷¹

The RAC consultancy report prepared by Altman, Ginn, Smith and Roach was concerned particularly with management participation issues for indigenous Australians in the coastal zone. It also addressed indigenous Australians' general interests in the coastal zone, statutory rights, and development case studies. It suggested that stakeholders might consider the indigenous Australian perspective that indigenous Australians are more than just interdependent stakeholders, and have interests justifying priority.⁷²

The RAC explored a number of issues of concern to Aboriginal and Torres Strait Islander peoples in its final report. These included:

- participation in fisheries and marine resource management
- coastal land and heritage management
- recognition of traditional rights
- heritage protection
- participation, consultation and negotiation
- involvement in the commercial use of coastal resources
- participation in the National Coastal Action Program.

The Inquiry recommended that:

- the Council of Australian Governments, in conjunction with representatives of land council and other indigenous organisations, initiate a process whereby traditional hunting, fishing and gathering rights are recognised by governments and amendments are made to laws and regulations to incorporate this recognition and provide mechanisms for resolving disputes;
- in the interim, governments ensure that there are no unreasonable prosecutions relating to these matters under existing laws and regulations;
- in the event of failure during 1994 to negotiate satisfactory nationwide arrangements for traditional hunting, fishing and gathering rights, the Commonwealth enact legislation to establish national criteria for such rights;
- the legislation be based on the principles, priorities and definitions recommended by the Law Reform Commission in its 1986 report on customary laws and be agreed through negotiations with the Aboriginal and Torres Strait Islander Commission and representatives of land councils and other indigenous organisations;
- the Australian and New Zealand Environment and Conservation Council, in conjunction with the Aboriginal and Torres Strait Islander Commission and representatives of land councils and other indigenous organisations, establish criteria for the participation of indigenous people in the management of conservation areas, including national parks, marine parks and World Heritage Areas;

⁷⁰ Jull, *A Sea Change...*, pp.5-6.

⁷¹ Jull, *A Sea Change...*, pp.6-7.

⁷² Altman, Ginn, Smith and Roach *Existing and Potential Mechanisms ...*, p.72.

- the criteria include provision for indigenous people's representation on relevant authorities and boards of management or equivalent bodies, and for the establishment of indigenous consultative committees to advise these bodies on issues that affect them;
- the Commonwealth take the initiative ... by amending the Great Barrier Reef Marine Park Authority Act 1975, in accordance with this recommendation and the recommendation of the 1993 Whitehouse report that the Authority be authorised to enter into formal management agreements with indigenous communities;
- the Aboriginal and Torres Strait Islander Commission and the Australian Nature Conservation Agency, in conjunction with state resource management agencies,
 - support, extend and coordinate nationally the community ranger system by ensuring adequate, continuing funding of rangers and by helping local communities to resolve training, accreditation and authority matters
 - support the establishment of agencies similar to the Kowanyama Land and Natural Resources Management Office to help indigenous communities manage those parts of the coastal zone they own or control
 - review funding options for these initiatives, including the provision of additional Commonwealth and state funds, the negotiation of subcontracting arrangements with those resource management agencies that benefit from the initiatives, the earmarking of a proportion of the budgets of such agencies for supporting the initiatives, and the payment of fees and royalties by the users of resources in areas owned or controlled by indigenous people;
- state and Commonwealth natural resource management agencies establish units to provide advice on indigenous interests as part of policy-making mechanisms and consult with representatives of indigenous organisations and peak industry bodies in establishing these units;
- the Aboriginal and Torres Strait Islander Commission ensure that land councils and other indigenous organisations in the coastal zone have sufficient resources to carry out their responsibilities effectively when administering procedures for development proposals;
- the Department of the Prime Minister and Cabinet provide full support for the Committee's proposed Joint Council on Aboriginal Land and Mining;
- the Aboriginal and Torres Strait Islander Commission evaluate the experience of the Australian Centre for International Agricultural Research in supporting indigenous fisheries in the Pacific Islands, with a view to determining options for improving education and training among Australia's indigenous fishing communities;
- this evaluation include assessment of the potential education value of the experience gained by relatively successful indigenous organisations such as the Tiwi Land Council on Bathurst and Melville Islands and Yirkala Business Enterprises Pty Ltd in north-east Arnhem Land;
- the Aboriginal and Torres Strait Islander Commission provide financial assistance and management training to indigenous people, to facilitate their participation in the commercial fishing (including mariculture industry);
- the Australian Aboriginal Affairs Council, in conjunction with representatives of land councils and other indigenous organisations, speedily adopt a national policy on ownership of and access rights to indigenous cultural property, including places, objects and information;
- the Aboriginal and Torres Strait Islander Commission, the Australian Heritage Commission and the Australian Nature Conservation Agency, in conjunction with representatives of land councils and other indigenous organisations, review the role of Commonwealth programs and legislation in securing a national approach to recording and protecting indigenous cultural heritage;
- the review be conducted with a view to extending to other states provisions in existing Commonwealth heritage protection legislation that relate only to Victoria;
- the review examine the option of this Heritage Council playing a central role in helping local communities to implement natural resource management initiatives.⁷³

The RAC Final Report also recommended that the proposed Ministerial Council on Forestry, Fisheries and Aquaculture, in conjunction with the Aboriginal and Torres Strait Islander Commission and representatives of land councils and other indigenous organisations, prepare an Aboriginal and Torres Strait Islander Fisheries Strategy. It identified four key elements for such a strategy, which may be summarised as:

⁷³ Resource Assessment Commission, *Coastal Zone Inquiry: Final Report*, Australian Government Publishing Service, Canberra, 1993, ch. 10.

- assessments by all fisheries authorities of indigenous interests in fisheries for which they have responsibility, including a review of the customary marine tenure and traditional fishing practices in each fishery and how these might contribute to fisheries policy and management; impediments to indigenous people's participation in commercial fishing; and the impact of commercial fishing on fishing for traditional purposes;
- representation of indigenous people on advisory committees for all major fisheries (as recommended by the Ecologically Sustainable Development Working Group on Fisheries) and identification of means by which indigenous communities can participate in the management of local fisheries and marine environments in which they have a traditional interest;
- measures to improve economic development and employment opportunities for indigenous communities in fisheries and mariculture ventures; and
- measures to improve relations between indigenous communities, fisheries agency staff and commercial fishers, including cross-cultural awareness programs for agency staff and the organisation of local and regional workshops to discuss issues of mutual interest and concern.

Living on the Coast: the Commonwealth Coastal Policy

In May 1995 the Commonwealth released its Coastal Policy, *Living on the Coast*, which was developed partly in response to the recommendations of the Resource Assessment Commission's *Coastal Zone Inquiry Final Report*. The policy promotes the ecologically sustainable use of Australia's coastal zone. Increasing Aboriginal and Torres Strait Islander involvement in that process is an important component of the policy. The policy states, amongst other things, that the Commonwealth is committed to:

- supporting the development and implementation of an Aboriginal and Torres Strait Islander Fisheries Strategy by the Ministerial Council on Forestry, Fisheries and Aquaculture in consultation with indigenous communities and the Aboriginal and Torres Strait Islander Commission;
- supporting an Aboriginal and Torres Strait Islander Coastal Reference Group to provide advice to the Commonwealth, through the National Coastal Advisory Committee, on the development and implementation of initiatives to involve indigenous peoples in coastal resource management;
- establishing an Indigenous Communities Coastal Management component under the Coastcare program to encourage Aboriginal and Torres Strait Islander communities to undertake projects to record and protect cultural heritage sites in the coastal zone, to develop coastal management strategies for land and sea areas under their control, and to participate in the development of strategies for areas in which they have an interest;⁷⁴ and
- pursuing the development and adoption of an aquaculture code of practice under the National Strategy on Aquaculture in Australia.⁷⁵

Ocean Rescue 2000

Ocean Rescue 2000 is a ten-year, participatory, conservation and management program being administered for Environment Australia in partnership with the Great Barrier Reef Marine Park Authority and the Australia Nature Conservation Agency. It aims to bring together available marine information and develop long term plans for the ecologically sustainable management of Australia's marine environments. The major components of the program include the State of the Marine Environment Report, National Representative System of Marine Protected Areas; development of an Australian Marine Conservation Strategy; National Marine Education Program; National Marine Information System; and the Marine and Coastal Community Network.⁷⁶

The *State of the Marine Environment Report for Australia* (SOMER) was released in early 1995, describing and assessing Australia's marine environment and human impacts. The major issues and concerns for coastal

⁷⁴ Dept. of the Environment, Sport and Territories, 'Living on the Coast: The Commonwealth Coastal Policy, Canberra, May 1995, pp.30-31

⁷⁵ Dept. of the Environment, Sport and Territories, 'Living on the Coast...', p.41.

⁷⁶ Dept. of the Environment, Sport and Territories, 'Implementation and Performance Plan for Ocean Rescue 2000', March 1994.

indigenous Australians identified in the report, which was produced under the Ocean Rescue 2000 Program, were:

their dispossession from their traditional land/sea estates; the threats, desecration and injury to sites of cultural significance; the loss of ancient fishing and hunting rights; their lack of commercial fishing opportunities; and their general lack of participation in coastal environmental planning and management.⁷⁷

Aboriginal and Torres Strait Islander Commission's Environment Policy

In 1994 the Aboriginal and Torres Strait Islander Commission (ATSIC) adopted an Environment Policy which particularises the broader ATSIC goal, which is to:

secure the empowerment of our people so that, through self-determination, we can make the decisions that affect our lives and share in Australia's land, wealth and resources, contributing equitably to the nation's economic, social and political life, with full recognition of our indigenous cultural heritage as the First Australians.⁷⁸

The principles behind the ATSIC Environment Policy include self-determination and regionality, sustainability, conservation and precaution. Its specific strategies include:

- the involvement of indigenous peoples in natural resource management processes, guided by cultural insights and values and traditional techniques, with proper informed consent and benefit sharing arrangements where traditional knowledge is used;
- engagement by our peoples, with all levels of Government, in decision making over land and resource management, on and off community lands; and
- a recognition of the need to engage indigenous women in decision-making processes.

The policy states that 'hunting, fishing and gathering are fundamental to indigenous Australians' contemporary and traditional cultures, help to define and continue identity, and are the basis of relationships to land; that hunting, fishing and gathering continue to provide a significant amount of raw material and sustenance for indigenous Australians'. It also recognises that indigenous Australians are major stakeholders in Australia's coastal zone and therefore have a major interest in its management, and in the use of its resources on and off community owned lands and waters. It suggests that coastal communities should participate meaningfully in decision-making processes at the local, state, and Commonwealth levels.⁷⁹

National Policy for Recreational Fishing and other inquiries

In 1994 a *National Policy for Recreational Fishing* was released, following its endorsement by the Ministerial Council on Forestry, Fisheries and Aquaculture.⁸⁰ This policy had been developed through the Australian and New Zealand Fisheries and Aquaculture Council (ANZFAC) (which was succeeded by the Ministerial Council), which in 1991 had convened a representative national working group to draft a national policy for public discussion. That working group was replaced by a steering committee comprising Commonwealth, State and Territory fisheries managers, fishing tackle and boating industry representatives, and recreational fishers, which took the draft policy through a broad public consultation process. Although the policy includes commitments to community participation in management and equitable resource sharing amongst recreational fishers and others,⁸¹ nowhere in the policy are Aboriginal and Torres Strait Islander peoples' rights and needs identified. This omission derogates from the recommendations made in the 1986 Australian Law Reform

⁷⁷ Zann, *Our Sea, Our Future...*, p.26.

⁷⁸ Aboriginal and Torres Strait Island Commission, *Annual Report 1993-94*, Commonwealth of Australia, 1994; ATSIC, *Environment Policy adopted by the ATSIC Board of Commissioners November 1994*, Canberra, 1994, pp.1-2.

⁷⁹ ATSIC, *Environment Policy*, pp.4-6, 8, 9.

⁸⁰ National Recreational Fisheries Working Group, *Recreational Fishing in Australia: A National Policy*, Department of Primary Industries and Energy, Canberra, 1994.

⁸¹ National Recreational Fisheries Working Group, *Recreational Fishing in Australia*, p.3.

Commission report on the Recognition of Aboriginal Customary Law that indigenous Australians' traditional fishing should be accorded priority over recreational fishing activities, where prioritisation is necessary.

Similarly, the 1993 report of the Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure, *Fisheries Reviewed*, did not deal with Aboriginal and Torres Strait Islander peoples' interests in fisheries, despite the issue being raised in several submissions. Indigenous Australians' interests are also not discussed in the *National Strategy on Aquaculture in Australia*.⁸² There is however, a growing literature on the potential of the aquaculture industry to contribute to sustainable development.⁸³

Intergovernmental Arrangements Regarding Fisheries Management

In 1979 Australia declared the Australian Fishing Zone (AFZ), which is the area of sea from the coast out to 200 nautical miles offshore (1 nautical mile = 1.85km). The AFZ also includes the waters surrounding the offshore territories of the Cocos, Christmas, Norfolk, Macquarie, Heard and MacDonal Islands. With a total area of 8.94 million square kilometres, the AFZ is the third largest fishing zone in the world. Australia is obliged to conserve and manage the fisheries that occur within the AFZ, and foreign nations are required to obtain prior permission from the Australian Government to legally fish within these waters.

Responsibility for fisheries management is shared between the Commonwealth and the States and Northern Territory on the basis of the Offshore Constitutional Settlement (OCS). The OCS was agreed at the Premiers' Conference in June 1979 and took effect in 1983. Under the OCS, the Commonwealth granted title and legislative power to the states for a range of marine and seabed resources, including fisheries, extending from the low water mark to three nautical miles off-shore. Commonwealth jurisdiction falls over the remaining area, from three nautical miles to the outer limit of the AFZ.

The *Fisheries Management Act 1991 (Cwlth)* further provides that the Commonwealth and the States and Northern Territory may enter into arrangements under the Offshore Constitutional Settlement (OCS) in respect of particular fisheries. These OCS arrangements seek to rationalise jurisdictional arrangements. One of the objectives of this process is to minimise the extent to which a single stock is subdivided between different jurisdictions; a practice which can have negative impacts in a number of areas, including higher costs of management and enforcement.

Conclusion of OCS arrangements regarding particular fisheries has been ongoing since the mid 1980s. This has produced four categories of fisheries management, as follows:

- joint authority management, where a fishery is managed jointly by the Commonwealth and a State under one law;
- State management, where a fishery is managed under a State law;
- Commonwealth management, where a fishery is managed by the Commonwealth; and
- *status quo* management, where State laws control fishing out to three nautical miles offshore, and Commonwealth laws manage the fishery to the outer edge of the Australian Fishing Zone.⁸⁴

Relevant Commonwealth legislation includes: the *Fisheries Management Act 1991 (Cwlth)*; *Fisheries Administration Act 1991 (Cwlth)*; *Fisheries Legislation (Consequential Provisions) Act 1991 (Cwlth)*; *Torres*

⁸² Working Group on Aquaculture, for the Standing Committee on Fisheries and Aquaculture, 'National Strategy on Aquaculture in Australia', Dept. Primary Industries and Energy, Fisheries Policy Branch, Canberra, 1994.

⁸³ Western Australia, Aquaculture Development Advisory Council, *Aquaculture: Development Strategies for the Industry in Western Australia*, Dept of Commerce and Trade, Perth, 1994; B.R. Pollock and H. Quinn (eds), *The Potential of Aquaculture in Queensland: Proceedings of the seminar held at the Professional Development Centre, Brisbane, 24-25 March, 1983*, Department of Primary Industries, Queensland, Brisbane, 1984; Organisation for Economic Co-operation and Development, *Aquaculture: a review of recent experience*, Paris, 1989; Organisation for Economic Co-operation and Development, *Aquaculture: Developing a New Industry*, Paris, 1989.

⁸⁴ Senate Standing Committee on Industry Technology, Transport, Communications and Infrastructure, *Fisheries Reviewed*, Commonwealth of Australia, Canberra, 1993, p.31.

Strait Fisheries Act 1984 (Cwlth); Fisheries Levy Act 1984 (Cwlth); Fishing Levy Act 1991 (Cwlth); Statutory Fishing Rights Charge Act 1991 (Cwlth); Northern Prawn Fishery Voluntary Adjustment Scheme Loan Guarantee Act 1985 (Cwlth); Fisheries Agreements (Payments) Act 1991 (Cwlth); Foreign Fishing Licences Levy Act 1991 (Cwlth); and the Primary Industries and Energy Research and Development Act 1989 (Cwlth).

The Australian Fisheries Management Authority (AFMA) is established under the *Fisheries Administration Act 1991*. AFMA administers the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*.

The fisheries which were managed by AFMA, either in whole or as part of a joint authority, as at 30 June 1995, are the following:

- South East Fishery
- Great Australian Bight Trawl Fishery
- King Crab Fishery
- Southern Bluefin Tuna Fishery
- Jack Mackerel Fishery
- North West Slope Trawl Fishery
- North East Deep Water Fishery
- South Pacific Tuna Fishery
- Northern Shark Fishery
- Christmas and Cocos Island fisheries
- Norfolk Island Fishery.⁸⁵
- Southern Shark Fishery
- Bass Strait Scallop Fishery
- Northern Prawn Fishery
- East Coast Tuna and Billfish Fishery
- West Coast Tuna Fishery
- Western Deepwater Trawl Fishery
- East Coast Deep Water Trawl Fishery
- Squid Fishery
- Northern Fish Trawl Fishery
- Torres Strait Protected Zone fisheries

There are a number of non-statutory advisory bodies on fisheries matters. An Inland Fisheries Management Co-ordination Council has been recently established to facilitate common approaches to fisheries management in south-eastern Australia. Council membership currently includes representatives from relevant government departments in NSW, Victoria, South Australia and the Murray Darling Basin Commission. The ACT is reported to be seeking membership.⁸⁶ That Council is said to have no policy standing with governments but is primarily concerned with information exchange.⁸⁷

Other regional and national fisheries research and management bodies include the Murray Darling Basin Fish Management Advisory Committee and Community Advisory Committee, the National Trout Cod Recovery Team and the National Recreational Fisheries Management Network.⁸⁸ The Recreational Fisheries Management Network comprises state government representatives, and has no community representation.⁸⁹ The NSW Department of Land and Water Conservation (Water Resources) has been consulting with Aboriginal groups regarding their concerns about the management of the Murray and Darling rivers, and those concerns are particularly important to the Murdi Paaki Regional Council.⁹⁰

⁸⁵ Australian Fisheries Management Authority, *Annual Report 1994-95*, AFMA, Canberra.

⁸⁶ ACT Parks and Conservation Service, *A Review of Recreational Fishing in the A.C.T.*, p.2.

⁸⁷ M. Lintermans, ACT Parks and Conservation Service, personal communication, 3 October 1995.

⁸⁸ ACT Parks and Conservation Service, *A Review of Recreational Fishing...*, p.4.

⁸⁹ M. Lintermans, ACT Parks and Conservation Service, personal communication, 3 October 1995.

⁹⁰ J. Hope (ed.), 'Murdi Paaki Water Policy', in *Murray-Darling Basin Aboriginal Heritage Newsletter*, 1995, pp.2-3, J. Hope (ed.), 'Water Management Meeting, Menindee, 12-13 May 1995', in *Murray-Darling Basin Aboriginal Heritage Newsletter*, 1995, pp.3-4; Anon, 'Murdi Paaki Regional Council: Manifesto of Concern: Our Land, Our Water', *Murdi Paaki Regional Council, Annual Report 1993-4*, 1994, pp.4-6.

Relevant Federal Legislation

The Australian Fisheries Management Authority (AFMA) is required under *the Fisheries Administration Act 1991 (Cwlth)* (FAA) and the *Fisheries Management Act 1991 (Cwlth)* (FMA) to ensure that the exploitation of fisheries resources and any related activities are conducted in a manner consistent with the principles of ecologically sustainable development: s.3 FMA, s.6(b) FAA.

Relevant functions of the AFMA include: to devise management regimes for Australian fisheries; to consult and co-operate with the industry and members of the public generally in relation to the activities of the Authority; to establish and allocate fishing rights; and functions relating to plans of management: s.7 FAA.

The *Torres Strait Fisheries Act 1984 (Cwlth)* (hereafter TSFA) provides that in the administration of the Act regard shall be had to the rights and obligations created by the Torres Strait Treaty and in particular to the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing: s.8.

The Native Title Act 1993 (Cwlth)

The *Native Title Act 1993 (Cwlth)* came into effect on 1 January 1994, and was the Federal Government's response to the High Court's native title ruling. The Act defines 'native title' as those rights and interests that are possessed under the traditional laws and customs of Aboriginal peoples and Torres Strait Islanders who, through those laws and customs have a connection with the land or waters. Those rights and interests must also be recognised by the common law: s.223. In the Act, 'rights and interests' include hunting, gathering, or fishing, rights and interests.⁹¹

The *Native Title Act 1993 (Cwlth)* envisages that native title may be recognised over waters, but a judicial determination is needed (and may follow overseas precedents).⁹² Waters under the Act includes sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters, or the bed or subsoil under, or airspace over, any waters: s.253. 'Offshore place' is defined to mean any land or waters to which the *Native Title Act* extends, other than land or waters in an onshore place: s.253. The Act extends to each external territory, to the coastal sea⁹³ of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*. All future acts *offshore* are permissible under the Act, but native title holders have the same procedural rights in relation to offshore places as are available as non-native title rights and interests, except where the future act is a low impact future act: s.23(6). Onshore places are land or waters within the limits of a State or Territory, and tidal foreshores are considered an onshore place, thereby conferring protection against future acts for native title holders.⁹⁴

⁹¹ 'Interest' in relation to land or waters is defined under the Act to mean 'a legal or equitable estate or interest in the land or waters' or 'any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with the land or waters or an estate or interest in the land or waters, or 'a restriction on the use of the land or waters, whether or not annexed to other land or waters': s.253.

⁹² See for example *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* [1980] 1 F.C. 518; *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385; *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 680.

⁹³ Section 15B(1) of the *Acts Interpretation Act 1901 (Cwlth)* provides that except so far as the contrary intention appears, (a) the provisions of every Act, whether passed before or after the commencement of this section, shall be taken to have effect in and in relation to the coastal sea of Australia as if the coastal sea of Australia were part of Australia... 'Coastal sea': in relation to Australia, means the territorial sea of Australia, and the sea on the landward side of the territorial sea of Australia and not within the limits of a State or internal Territory; and includes the airspace over, and the sea-bed and subsoil beneath, any such sea... In 1994 amendments to the *Seas and Submerged Lands Act 1973 (Cwlth)* 'territorial sea' was defined as having the same meaning as in Articles 3 and 4 of the United Nations Convention on the Law of the Sea. The Convention provides that each State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with the Convention: Art. 3. The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea: Art. 4. The Australian territorial sea was proclaimed to extend to 12 nautical miles from the established baselines of low water mark in 1990.

⁹⁴ E. Ganter, 'Northern Territory Sea Closures: A Discussion of Alternatives for Aboriginal Participation in Coastal

The issue of legal recognition of customary marine tenure and fishing rights, or native title to the seabed in nearshore and offshore areas is unclear at the moment, and the nature of native title fishing rights is also unclear. An attempt in New South Wales to appeal against a conviction for a breach of the Fisheries and Oyster Farms (General) Regulations 1989 (NSW) on the basis of a native title right was unsuccessful in the NSW Supreme Court and Court of Appeal in 1993 and 1994, but largely on evidentiary grounds.⁹⁵ The *Derschaw* case noted above was similarly unsuccessful as a native title defence, but the case may be taken again on appeal.⁹⁶

In the *Derschaw* case Justice Heenan approved comments made by Chief Justice Gleeson in *Mason v. Tritton* that:

Fishing is an activity which is so natural ... that some care needs to be exercised in passing from an observation that people have engaged in that activity to an assertion that they are members of a class who have exercised some form of right pursuant to a system of rules recognised by the common law.⁹⁷

Justice Heenan also approved comments by Justice Kirby (who is now a justice of the High Court) in the *Tritton* case, that a 'right to fish' based upon traditional laws and customs is a recognisable form of native title defended by the common law of Australia, but that its evidentiary requirements were exacting, and required that:

- traditional laws and customs extending the 'right to fish' were exercised by an Aboriginal community immediately before the Crown claimed sovereignty over the territory;
- the appellant is an indigenous person and is a biological descendant of that original Aboriginal community;
- the appellant and the intermediate descendants had, subject to the general propositions outlined above, continued, uninterrupted, to observe the relevant traditional laws and customs; and
- the appellant's activity or conduct in fishing for (the fish in question) was an exercise of those traditional laws and customs.⁹⁸

The *Native Title Act 1993 (Cwlth)* expressly permits native title holders to hunt, fish, gather, carry out a cultural or spiritual activity, or do any other kind of prescribed activity for their personal, domestic or non-commercial communal needs. The Act does not link these activities with native title to land. The Act also exempts native title holders from requiring a license or permit to take flora and fauna if it is taken for personal, community or other traditional but non-commercial purposes, and the regulatory legislation is not exclusively for the benefit of Aboriginal peoples or Torres Strait Islanders: s.211(1). In the 1995 High Court decision in *WA v. Commonwealth, Wororra Peoples and Anor v. WA, and Teddy Biljabu and ors. v. WA*,⁹⁹ the High Court upheld the recognition of hunting, fishing, gathering and other rights in s.211, saying that because of that section, native title holders were exempted from statutory requirements under State legislation to hold a licence, permit or other instrument to exercise their native title rights. State legislation requiring that such licences, permits or other instruments be held, would be suspended (inoperative) because of the overriding Federal provision.

Management', *Conference paper presented at the Coast to Coast: National Coastal Management Conference, Hobart, 29 June—2 July 1994*, p.12.

⁹⁵ *Mason v. Tritton* (1993) A Crim R 28.

⁹⁶ *Sutton v. Derschaw, Clifton and Murphy*, Appeals SJA 1175-1177, 1994, unreported, Supreme Court of Western Australia, 15 August 1995. See D. Ritter, 'Casenotes: Native Title and the Fisheries Act 1905 (WA), *Sutton v. Derschaw, Clifton and Murphy*', *Aboriginal Law Bulletin*, Vol.3, No.77, 1995, p.18.

⁹⁷ [1994] 34 NSWLR 572

⁹⁸ *Sutton v. Derschaw, Clifton and Murphy*, pp.12-13.

⁹⁹ *Western Australia v. The Commonwealth, The Wororra Peoples and the Yawuru Peoples v. Western Australia, and Biljabu, Gibbs, Roberts, Fry, Morgan, Samson, and Williams v. Western Australia* [1995] 128 ALR 1; *Western Australia v. The Commonwealth; The Wororra Peoples and Anor v. Western Australia; Biljabu and Ors v. Western Australia (Native Title Act Case)* [1994-5] 183 CLR 373; [1995]128 ALR 1.

The recognition in the Federal native title legislation of traditional fishing rights and protection against prohibitions, licensing and permit requirements has been welcomed as a positive advance for the recognition of cultural rights by several indigenous leaders.¹⁰⁰ But the issue of priority for Aboriginal and Torres Strait Islander traditional fishing, as previously recommended by the Australian Law Reform Commission and the Resource Assessment Commission, has been only partially addressed in current native title legislation. Commercial fishing interests are affirmed, and native title rights and interests are recognised and exempted from licensing requirements, but the Act does not address other important fisheries management issues. For example, if commercial fishers have high levels of bycatch this may impinge on species traditionally fished, hunted or harvested by Aboriginal and Torres Strait Islander peoples, and particularly on dugong and turtle.¹⁰¹ The Turtle Rescue Plan Code of Practice in Queensland is an example of a specific management strategy which is designed to protect species, and thereby also protect Aboriginal and Torres Strait Islander interests.¹⁰² In Queensland the Queensland Fisheries Management Authority (QFMA) and the Great Barrier Reef Marine Park Authority have been facilitating greater communication between commercial fishing interests and coastal indigenous communities on bycatch issues. The QFMA has produced a leaflet on turtle resuscitation for commercial fishers and negotiations have resulted in an agreement to remove gillnets from Shoalwater Bay which have been impacting on dugong particularly.¹⁰³

Whether native title rights will be found by Australian courts to include commercial activities is unclear, although again there are overseas precedents.¹⁰⁴ If native title rights and interests have in the past been converted into statutory rights and interests in relation to the land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression 'native title' and 'native title rights and interests': s.223(3).

Past grants by the Commonwealth Government are affirmed by the *Native Title Act 1993 (Cwlth)*. The Commonwealth Government and the State and Territory Governments are also enabled by the Act to validate past grants and to confirm that fishing access rights in place at 1 January 1994 prevail over any other public or private fishing rights. This will not extinguish or impair any native title rights and interests, and does not affect any conferral of land or waters, or an interest in land or waters, under a law beneficial to Aboriginal peoples or Torres Strait Islanders: s.212(3). Cassidy has identified the relevant provisions in State and Territory native title legislation which have confirmed Crown ownership of natural resources, the regulation of water flow and existing fishing rights; and access to waterways, beds and banks of such, coastal waters, beaches and public areas which were public at the end of 31 December 1993.¹⁰⁵

Compensation may be payable by the Commonwealth Government or State and Territory Governments under the Act for the past extinguishment of, or adverse impact on, or future (not low) impact of an act affecting

¹⁰⁰ Aboriginal and Torres Strait Island Social Justice Commissioner, *Native Title Report: January—June 1994*, Australian Government Publishing Service, Canberra, 1995, p.43; N. Pearson, 'Native title and fisheries management: Where is it heading?', *Australian Fisheries*, Vol.53, No.5, 1994, pp.14-15 at p.15.

¹⁰¹ A. Reynolds, 'Fishers Ban Gill Netting in Shoalwater Bay', *Northern Regional Ripples, North Australia Special Edition*, Supplementary, September, 1995, p.1; A. Bergin, 'International Legal Policy Developments on Bycatch', *Australian and New Zealand Society of International Law: Proceedings of the Third Annual Meeting of the Australian and New Zealand Society of International Law, 7-9 July 1995, Australian National University, Canberra*, 1995, pp.181-190; W. Craik, J. Glaister and I. Poiner (eds), *The Effects of Fishing*, CSIRO, 1990.

¹⁰² Anon, 'Turtle Conservation and the Turtle Rescue Plan, Will it Work?', *Northern Regional Ripples, North Australia Special Edition*, Supplementary, September, 1995, p.2.

¹⁰³ Reynolds, 'Fishers Ban Gill Netting in Shoalwater Bay...'

¹⁰⁴ *R. v. Van der Peet* 83 CCC (3d) is an important adverse precedent for indigenous commercial fisher persons. The British Columbia Court of Appeal held that commercial salmon sales to non-indigenous buyers was qualitatively different to pre-colonial fish trading and therefore was not a traditional aboriginal practice which was protected under the Canadian *Constitution Act 1982*. In contrast the Waitangi Tribunal's reports on fisheries issues in New Zealand do regard significant Maori fisheries interests as commercial. The Nova Scotia Supreme Court is being asked to rule on whether the Micmacs have a treaty right to fish commercially without licences and a decision is expected in 1996. Written arguments were due by February 1996: 'R. v. Donald Marshall', noted in G. Berssenbrugge and B. Cottam, *SSAHRE/ÉRASSH*, Vol. 3, No. 2, Fall/Winter 1995, p. 14,

¹⁰⁵ Cassidy, 'Federal and State Land and Resource Use Management and Allocation Regimes'.

offshore¹⁰⁶ native title (including rights of renewal under pre-1 January 1994 rights to renew): *Native Title Act 1993 (Cwlth)*, ss. 17, 20, 23, 25, 45.

The National Parks and Wildlife Conservation Act 1975 (Cwlth)

The *National Parks and Wildlife Conservation Act 1975 (Cwlth)* makes provision for the establishment and management of parks and reserves in a range of circumstances. For example protected areas can be established— ‘appropriate to be established by the Commonwealth Government, having regard to its status as a national government’; ‘in the Territories’; ‘in the Australian coastal sea’; ‘for purposes related to the rights (including sovereign rights) and obligations of Australia in relation to the continental shelf of Australia’; for facilitating the implementation of international agreements to which Australia is a party, and to encourage tourism between the States and between other countries and Australia. But intergovernmental considerations clearly have an impact on the application of, and exercise of powers under this Act. Existing Commonwealth marine protected areas declared under this Act include the Ningaloo Marine Park (WA), Solitary Islands Marine Reserve (NSW) and Jervis Bay National Park (NSW), in cooperation with relevant State agencies and legislation.¹⁰⁷

In 1995 the Australian Nature Conservation Agency (ANCA) initiated a project to investigate the feasibility of the voluntary inclusion of some Aboriginal and Torres Strait Islander peoples’ land and sea country within Australia’s national representative protected area system. The project aims to explore the potential for protected area arrangements to be concluded where lands owned and managed by Aboriginal and Torres Strait Islander peoples can be classified as IUCN Category VI areas — ‘Managed Resource Protected Areas’. ‘Managed Resource Protected Areas’ are managed mainly for the sustainable use of natural ecosystems. The project aims to support other cooperative Federal, State and Territory initiatives to ensure the conservation and wise management of Australia’s bioregions and the biodiversity they contain.¹⁰⁸

Relevant State and Territory Legislation

Tasmania

In recent years Tasmania has witnessed significant changes in policy and legislation concerning issues of importance to Aboriginal people. In addition to the restoration of title to some former Aboriginal land, cultural activities associated with the sea have been recently recognised. The *Living Marine Resources Management Act 1995 (Tas)* (due for proclamation in April 1996) states that all living marine resources in state waters (except marine farm stock) are owned by the State: s.9. An authorisation under the Act does not extinguish or impair any native title rights and interests, as defined under the *Native Title Act 1993 (Cwlth)*, or ‘preclude any Aboriginal cultural activity by an Aborigine so long as that activity is not likely to have a detrimental effect on living marine resources and is consistent with this Act’ (s.10); however, such an authorisation takes precedence over any other public or private fishing rights.

This provision, like those in s.60 (see below) and s.215 (which covers evidentiary requirements), refers to legislated definitions of both ‘Aborigine’ and ‘Aboriginal cultural activity’: s.3. The *Living Marine Resources Management Act 1995 (Tas)* exempts both recreational fishers engaged in certain activities, and any ‘Aborigine who is engaged in an Aboriginal cultural activity which is not likely to have a detrimental effect on living marine resources’ from the requirement to obtain a fishing licence: s.60(2). The Minister also has powers to exempt ‘a class of persons’ from the operation of the Act, but only for a maximum of 4 months: s.11. The *Living Marine Resources Management Act 1995 (Tas)* enables marine resources protected areas to be established for a variety of purposes: s.105. Before such protected areas can be established a draft management

¹⁰⁶ ‘Offshore place’ is defined to mean any land or waters to which this Act extends, other than land or waters in an onshore place: s.253.

¹⁰⁷ S.E. McNeill, ‘The Selection and Design of Marine Protected Areas: Australia as a Case Study’, *Biodiversity and Conservation*, Vol.3, 1994, pp.586-605 at pp.598-599.

¹⁰⁸ J. Sutherland and D. Smyth, *Investigating Conservation Partnerships: Phase 1 Report*, Australia Nature Conservation Agency, Canberra, 1996 (forthcoming); D. Smyth, *Protecting Country: Indigenous Protected Areas: Phase Two Report*, Australian Nature Conservation Agency, Canberra, 1996 (forthcoming).

plan must be prepared (s.106), with specified public consultation requirements. Habitat protection plans can also be developed: s.118.

Inland fisheries legislation in Tasmania is currently under review. The *Inland Fisheries Act 1995 (Tas)* (also due to be proclaimed in April 1996) is interim legislation. The second stage of the review (late 1996) will recommend new legislative arrangements. The review has received some comment regarding Aboriginal access and rights.

The *Aboriginal Lands Act 1995 (Tas)* establishes the Aboriginal Land Council of Tasmania, in which titles to selected Aboriginal land is to be vested. The Act also amended the *National Parks and Wildlife Act 1970 (Tas)* (NPWCA) to provide that nothing in the NPWCA precludes customary Aboriginal hunting, fishing or gathering on Aboriginal Land, so long as the Minister considers the activity unlikely to have a detrimental effect on fauna and flora and the activity is consistent with the NPWCA.

Victoria

The *Fisheries Act 1995 (Vic)* has reformed the law in Victoria relating to fisheries, having repealed the *Fisheries Act 1968*. The purpose of the new Act is to provide a modern legislative framework for the regulation, management and conservation of Victoria's fisheries including aquatic habitats. The objects of the Act include: to provide for the management, development and use of Victoria's fisheries, aquaculture and associated biological resources; to protect and conserve fisheries resources, habitats and ecosystems; to promote sustainable commercial fishing and viable aquaculture industries and quality recreational opportunities; to facilitate access to fisheries resources for commercial, recreational, traditional and non-consumptive uses; and to encourage the participation of resource users and the community in fisheries management: s.3.

The legislation was drafted to complement the *Native Title Act 1993* and other relevant legislation. For example, management plans may be declared under the Act (s.28), and these must be consistent with the objectives of the Act. Management plans can include guidelines for the criteria to be used in respect of the issue of licences and permits, and in respect of the renewal, variation or transfer of licences. The purpose of a management plan is to specify policies and strategies for the management of the fishery to which the plan applies, on an ecologically sustainable basis, having regard to relevant commercial, recreational, traditional and non-consumptive uses: s.29.

According to Tim Harding in the Department of Conservation and Natural Resources, the process of developing the new Act involved consultation with indigenous communities:

A process for consulting aboriginal communities on the Bill [was] arranged by the Minister responsible for Aboriginal Affairs, the Hon. Michael John MP, and the Minister for Natural Resources, the Hon. Geoff Coleman MP. ... Meetings were held at Mildura, Halls Gap, Shepparton and Bairnsdale. AAV sent all participants a copy of the Fisheries Bill and the Discussion Paper in advance of each meeting.

South Australia

The *Fisheries Act 1982 (SA)* does not explicitly recognise Aboriginal rights and interests in fisheries. It does however include a broad exemption provision which enables the Minister, by notice published in the Gazette, to exempt any person or class of persons from any specified provisions of the Act, subject to prescribed conditions: s.59. Only one exemption has been granted under s.59 — concerning a type of net for the Coorong community.¹⁰⁹

The *Fisheries Act 1982 (SA)* enables aquatic reserves, controlled aquatic reserves, declared waters and marine parks to be proclaimed, and managed by management plans which have been exposed to public comment: ss.47-48, 48A-H. Persons must not enter or remain in an aquatic reserve or marine park, or engage in any activity in an aquatic reserve or marine park except in accordance with a permit or regulations: s.48G. The *Native Title Act 1993 (Cwlth)* (s.211) may exempt some Aboriginal people from this permit requirement in some circumstance but other provisions of a relevant marine park management plan would be unaffected by that exemption.

¹⁰⁹ D. Mackie, Fisheries Department, South Australia, personal communication, 15 September 1995.

Western Australia

The *Land (Titles and Traditional Usage) Act 1993 (WA)* was passed by the Western Australian Parliament before the passage of the Federal Native Title Act, and it purported to supplant common law native title rights in Western Australia with statutory 'rights of traditional usage'. In September the High Court jointly heard three applications: the challenge by the Western Australian Government to the *Native Title Act 1993 (Cwlth)*; and the Wororra and Yawuru and Martu peoples' challenges to the *Land (Titles and Traditional Usage) Act 1993 (WA)*.¹¹⁰ Commentators correctly anticipated that the Western Australia Act would not survive a High Court ruling. The *Land (Titles and Traditional Usage) Act 1993 (WA)* was declared inoperative by the High Court in 1995 because of its inconsistency with the provisions of the *Racial Discrimination Act 1975 (Cwlth)* and the *Native Title Act 1993 (Cwlth)*, and by operation of s.109 of the Federal Constitution. Those sections of the new *Fish Resources Management Act 1994 (WA)* — which was proclaimed to come into effect on 1 October 1995 — which refer to objections based on rights of traditional usage, are considered to be inoperative.¹¹¹

The *Fish Resources Management Act 1994 (WA)* provides that an Aboriginal person¹¹² is not required to hold a recreational fishing licence for fishing in accordance with continuing Aboriginal tradition for non-commercial, and personal or family purposes: s.6. The Minister also has wide powers to grant exemptions from the Act: s.7. There is also power in the Act for the Minister to grant an exclusive licence 'to any person to take fish from a specified area of coastal waters and the foreshore above high water-mark' (s.251) but not for fishing in a marine nature reserve or marine park: s.252.

The *Fish Resources Management Act 1994 (WA)* also provides for the declaration of fish habitat protection areas outside marine nature reserves and marine parks (ss.115-6). Regulations may provide for any matter necessary for the protection or management of a fish habitat protection area, including fishing or aquatic ecotourism or other activity that may affect the fish habitat protection area: s.120.

Marine nature reserves and marine parks can be declared under various Acts in Western Australia, including the *Conservation and Land Management Act 1984 (WA)*. 'Land' under the Conservation and Land Management Act includes tidal land, tidal waters and the waters of any inlet, estuary, lake, lagoon or swamp, or of any river, stream or creek. Marine nature reserves and marine parks accommodate recreational use to the extent of consistency with proper conservation and restoration of the natural environment, and are managed under management plans which are developed for the protection of indigenous flora and fauna, and the preservation of archaeological, historic and scientific areas. The *Fish Resources Management Act 1994 (WA)* also applies within marine protected areas and prevails where it conflicts with the Conservation and Land Management Act. Agreements to manage nature reserves and marine parks can be made between the Executive Director and a landowner, lessee or occupier of land.

Northern Territory

The *Fisheries Act 1995 (NT)* protects non-commercial, traditional resource use. It provides:

s.53 ABORIGINALS

(1) Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an

¹¹⁰ *Western Australia v. The Commonwealth, The Wororra Peoples and the Yawuru Peoples v. Western Australia, and Biljabu, Gibbs, Roberts, Fry, Morgan, Samson, and Williams v. Western Australia* [1995] 128 ALR 1. See also G. Nettheim, 'September Showdown: Validity of Native Title Legislation', *Aboriginal Law Bulletin*, Vol.3, No.69, 1994 pp.8-11; See also: M. Wilkie and G.D. Meyers, 'Western Australia's Land (Titles and Traditional Usage) Act 1993: Content, Conflicts and Challenges', *University of Western Australia Law Review*, Vol.24, 1994, pp.31-50.

¹¹¹ Tony O'Connor, personal communication, September 1995.

¹¹² Aboriginal person is defined as having the same meaning as in the *Land (Titles and Traditional Usage) Act 1993 (WA)*. The effect of the High Court declaration on the invalidity of the *Land (Titles and Traditional Usage) Act 1993 (WA)* is uncertain. Courts may simply substitute another definition for Aboriginal person to prevent the unavailability of the beneficial exemption from licensing requirements for Aboriginal people.

area of land or water in a traditional manner from continuing to use those resources in that area in that manner.

(2) Nothing in subsection (1) shall authorize a person to enter any area used for aquaculture, to interfere with or remove fish or aquatic life from fishing gear that is the property of another person, or to engage in a commercial activity.

Under the *Fisheries Regulations* permanent residents of land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)* who have the approval of the relevant council under the *Local Government Act* (or if there is no council, the approval of persons accepted by the majority of the community or group to be its leaders) may apply to the Director for an Aboriginal coastal licence. Only one, non-transferable Aboriginal coastal licence is available to each community or group: ss.184, 185. Aboriginal coastal licensees must not hold a commercial fishing licence or be an assistant to the holder of a commercial fishing licence: s.187. Only amateur fishing gear can be used by Aboriginal coastal licensees and relevant amateur fishing regulations must be complied with (s.189). Only fish other than barramundi, threadfin salmon, Spanish mackerel or mud crab can be taken from the area identified in the licence. Fish taken with an Aboriginal coastal licence may only be sold within the licensee's community or group, and not for resale: Regs 188-191. The Director may attach other conditions to the licence, having taken into consideration suggestions made by members of the licensee's community or group: s.190.

In the Northern Territory, claimable land under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)* extends to the low water mark, and claims have included 'reefs exposed at low tide, a number of river islands, a sandspit and sandbar'.¹¹³ This Act enables the Northern Territory Government to legislate on the entry of persons into, or controlling fishing or other activities in, sea waters within two kilometres of Aboriginal land, consistent with Aboriginal traditional uses of sea-country.¹¹⁴ Under the *Aboriginal Land Act 1978 (NT)* the Administrator may close the seas adjoining and within 2 kilometres of Aboriginal land to any persons or classes of person, or for any purpose, but an Aboriginal person entitled to use the seas according to Aboriginal tradition may still enter and use the resources of the closed sea area. But even if sea closures are granted they do not confer tenure, nor rights to participate in the management of the area.¹¹⁵ If the Administrator wishes to hold an inquiry before closing seas, or if he does not agree to close an area of sea within 56 days of the matter being referred to him, the matter can be referred to the Aboriginal Land Commissioner for inquiry and report, following the consideration of prescribed matters: s.12. Ganter notes that 'of nine sea closure applications, only two have ever progressed to completion'.¹¹⁶ Persons who hold a commercial fish licence before a sea closure notification, and their employees, may continue to enter and fish the closed sea area after it is closed but must notify the Land Council for the area before entry: s.18. The local Land Council may also issue permits for persons to enter closed seas: s.15.

The jurisdictional arrangements for fisheries which have been put in place in the Northern Territory since the Offshore Constitutional Settlement in 1979 are as follows:

- prawns and tuna are managed by the Commonwealth;
- shark, offshore demersal and Timor reef resources are managed under joint authorities under Northern Territory law; and
- all the remaining fishery and aquatic life resources are managed under Northern Territory law.¹¹⁷

¹¹³ G. Neate, *Aboriginal Land Rights Law in the Northern Territory, Vol.1*, Alternative Publishing Co-operative Ltd, 1989, p.94.

¹¹⁴ Under s.73(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976*. This legislation was introduced following the reports of the Woodward land rights commission.

¹¹⁵ See generally: M. Brady, 'Sea Rights, the Northern Territory, Sea Closure: A Weakened Law', *Aboriginal Law Bulletin*, No.15, 1985, p.8.

¹¹⁶ Ganter, 'Northern Territory Sea Closures...', p.1. See also Aboriginal Land Commissioner, *Report for Year Ended 30 June 1994*, Australian Government Publishing Service, Canberra, 1994, Appendix 2, for description and status of sea closure applications.

¹¹⁷ R. Pyne, 'The Administration and Management of Fish and Aquatic Life in the Northern Territory', Conference paper presented at the *Ecopolitics IX Conference: Perspectives on Indigenous Peoples Management of Environmental Resources*, Northern Territory University, 1-3 September 1995, typescript copy, pp.1-14 at p.7.

The Conservation Commission (CCNT) and the Australian Nature Conservation Authority (ANCA) have jurisdiction over dugong, turtle and crocodile species. Aboriginal people in the Northern Territory are only restricted by the *Territory Parks and Wildlife Conservation Act 1976 (NT)* in their traditional use of land (which is defined to include the sea above any part of the sea bed of the Territory) or water, if regulations are made under the Act for the purpose of conserving wildlife in any area and expressly affecting the traditional use of the area by Aboriginals: s.122. Otherwise Aboriginal people may continue their traditional use of any area of land or water for hunting or food-gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes: s.122. The *Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)* provides for Northern Territory legislation to apply to flora and fauna conservation on Aboriginal lands, where those laws are consistent with that Act, and the *National Parks and Wildlife Conservation Act 1975 (Cwlth)*.

The extent of the rights of Aboriginal people to harvest, hunt and fish in Northern Territory marine protected areas also depends on the legislation and management plan for the area. The *Cobourg Peninsula Aboriginal Land and Sanctuary Act 1981(NT)* provides for joint management of the Gurig National Park, with an Aboriginal majority of the Board to be nominated by the Northern Land Council. Management plans are developed in consultation with the traditional owners. The Board can make by-laws prohibiting or regulating access to the land and the use of firearms and traps. A fisheries management plan will be introduced to regulate fishing activity consistent with the Marine Park Plan of Management. Regulations under the Act can apply to the sanctuary and to the Cobourg Marine Park where they are not inconsistent with the management plan, and this has been seen as a possible derogation from joint management. An agreement to negotiate joint management arrangements was concluded between the Northern Territory Government and traditional owners without a land claim over the area being determined. Inalienable freehold title to the land was vested in the Cobourg Peninsula Sanctuary Land Trust on behalf of the traditional owners and a national park was declared in perpetuity.

The Cobourg Marine Park is declared under s.12 of the *Territory Parks and Wildlife Conservation Act* and is to be managed with a Plan of Management which includes zoning arrangements which attempt to meet the needs of Aboriginal people. The Department of Primary Industry and Fisheries (DPIF) is responsible for managing fisheries in marine parks and reserves, and establishes and manages Aquatic Life Reserves under the *Fisheries Act 1995*.¹¹⁸ Marine protected area management involves both DPIF and the Parks and Wildlife Commission of the Northern Territory. A draft management plan has been prepared for Cobourg Marine Park but negotiations are continuing over the nature and composition of the committees to next consider the draft. The traditional owners of the area are seeking majority membership of the Cobourg Marine Park Area Advisory Committee.¹¹⁹

Marine sacred sites are protected under the *Aboriginal Sacred Sites Act 1989 (NT)* but Ganter noted in 1994 that 'the few instances in which protection has been successfully provided have only been achieved by laying marine markers (buoys) with the assistance of the Australian Navy. This is a time consuming and highly resource intensive operation. To date there have been three successful prosecutions for offences relating to marine sites located off the Arnhem Land coast and there are a number currently before the courts'.¹²⁰

Queensland

The *Fisheries Act 1994 (Qld)* is concerned with the management, use, development and protection of fisheries resources and fish habitats and the management of aquaculture activities, and with related purposes. The Act was developed following government consideration in August 1993 of recommendations from the Recreational Fishing Inquiry, established in December 1992. It held public hearings and invited submissions to its 15 member consultative committee, which included an Aboriginal appointee.

The Act recognises a limited right for Aboriginal and Torres Strait Islander peoples to take fisheries resources in accordance with tradition and custom. It provides:

¹¹⁸ R. Billyard, 'Aboriginal Involvement in Northern Territory Marine Parks', in *Turning the Tide...*, pp.198-206.

¹¹⁹ R. Lea, Department of Primary Industries and Fisheries, personal communication, October 5, 1995.

¹²⁰ Ganter, 'Northern Territory Sea Closures...', p.5.

14(1) An Aborigine may take, use or keep fisheries resources, or use fish habitats, under Aboriginal tradition, and a Torres Strait Islander may take, use or keep fisheries resources, or use fish habitats, under Island custom.

(2) However, subsection (1) is subject to a provision of a regulation or management plan that expressly applies to acts done under Aboriginal tradition or Island custom.

(3) A regulation or management plan mentioned in sub-section (2) may be developed only after cooperating with Aborigines or Torres Strait Islanders, considered by the fisheries agency to be appropriate, to reach agreement, or reasonably attempt to reach agreement, about the proposed regulation or plan.

The previous *Fisheries Act 1976 (Qld)* used only to exempt residents of Trust Areas (formerly Reserves) and Aboriginal lands who engaged in non-commercial fishing without explosives or noxious substances, except in relation to certain matters such as mangrove protection measures. Now the rights to fish according to custom and tradition are also subject to provisions of a regulation or management plan which is expressed to apply in the circumstances. The ability of the Queensland Fisheries Management Authority (QFMA) to consult only with those 'considered by the fisheries agency to be appropriate' has been criticised by Smyth as follows:

The requirement to consult with Aborigines and Torres Strait Islanders *considered by the fisheries agency to be appropriate* is potentially disempowering of indigenous peoples' interests and obligations. This requirement falls far short of recognising indigenous peoples as legitimate partners in marine resource management; it relies on the ongoing goodwill of the fisheries agency and industry rather than securing a guaranteed role for indigenous peoples in fisheries management commensurate with their unique customary and historical relationship with their maritime estates.¹²¹

Fish habitat areas can be declared under the *Fisheries Act 1994* and management plans can be developed for the area: ss.120-125. Marine plants are also protected under the Act: s.123.

The Act re-establishes the Queensland Fisheries Management Authority (s.23) whose primary function is to ensure the appropriate management, use, development and protection of fisheries resources through the development of regulations and management plans and declarations, having regard to the principles of ecologically sustainable development,¹²² and subject to the possible exercise of the reserve powers of the Minister 'in the public interest': ss.29-31.

One of the Queensland Fisheries Management Authority's (QFMA's) other functions is to ensure 'the fair division of access to fisheries resources for commercial, recreational and indigenous use': s.26(1)(a)). Management plans, which consist of rules, are the basic mechanism provided for in the Act. These rules must specify the consultations processes on a draft (s.33). Provisions relating to Aboriginal fishing will therefore be found in Management Plans, and/or in one specific Plan.

The Cape York Peninsula Land Use Strategy includes a project on indigenous Australians' perspectives on the use and management of land and sea resources on Cape York Peninsula, including existing management arrangements, community-level initiatives, traditional management practices, patterns of resource use and responsibilities.¹²³

The *Nature Conservation Act 1992 (Qld)* (NCA) is relevant to dugong and turtle hunting, as turtles and mammals were removed from the definition of 'fish' under the *Fisheries Act 1976 (Qld)* and brought within the NCA.¹²⁴ Compared with legislation in force in most other Australian jurisdictions, the NCA takes a progressive approach to nature conservation and management, but its provisions regarding cooperative management with Aboriginal and Torres Strait Islander peoples have led to few finalised outcomes. The stated object of the Act — the conservation of nature — is to be achieved through measures such as the dedication,

¹²¹ D. Smyth, 'Indigenous Peoples and the Marine Environment of Cape York Peninsula', in Cordell (ed.), *Indigenous Management of Land and Sea ...*, unpagged typescript chapter.

¹²² 'Ecologically sustainable development' is defined as development '(a) carried out in a way that maintains biodiversity and the ecological processes on which fisheries resources depend; and (b) that maintains and improves the total quality of present and future life': s.25.

¹²³ Headed by Dr John Cordell: Anon, 'CYPLUS Update: Indigenous Management of Land and Sea', *CYPLUS Talkback*, Issue 5, July, 1994, p.32.

¹²⁴ Sch.2 *Nature Conservation Act 1992 (Qld)*.

declaration and management of protected areas; the protection of wildlife and habitat (including by entering into conservation agreements); a recognition of the interests of Aboriginal and Torres Strait Islander peoples; the cooperative involvement of Aborigines and Torres Strait Islanders in the conservation of nature, and the cooperative involvement of land-holders in the conservation of nature. The Act also states that it is to be administered, as far as practicable, in consultation with, and having regard to the views of land-holders and interested groups and persons, including Aborigines and Torres Strait Islanders: s.6. Non-commercial fishing in National Parks must comply with applicable regulations: s.62. Aboriginal and Torres Strait Islander peoples are entitled to take, use or keep protected wildlife under Aboriginal tradition or Island customs, but not in a protected area: s.85(1).¹²⁵ That taking, usage and keeping is also subject to any provision of a conservation plan that expressly applies to the taking, using or keeping of protected wildlife under Aboriginal tradition or Island custom: s.93. The Chief Executive also has power to permit certain uses of land in national parks in some circumstances: ss.35-36.

The *Marine Parks Act 1982 (Qld)* provides for the making of zoning plans for declared marine parks, and such zoning regulates the types of activities which may be undertaken in the zone with and without a permit. Zones include general use; habitat protection, estuarine conservation; conservation park, buffer, national park and no structure zones. Aboriginal Management areas are provided for in some park plans, and these envisage the involvement of local Aboriginal and Torres Strait Islander people in the planning and management of the area. In the general use, habitat protection, estuarine conservation; conservation park, buffer, and national park zones traditional fishing and hunting and collecting is permitted once permission has been obtained.

The *Aboriginal Land Act 1991 (Qld)* and the *Torres Strait Islander Land Act 1991 (Qld)* permit land claims to tidal lands in limited circumstances. Tidal land is 'land that is ordinarily covered and uncovered by the flow and ebb of the tide at spring tides': s.3. Tidal land is available for claim if the particular tidal land is declared by regulation to be available Crown land: s.21. In September 1993 the chairperson of the Land Tribunal decided that where tidal land was included within the boundaries of a claimable national park, that tidal land was not claimable unless at it had been expressly so declared by the Governor in Council.¹²⁶ Section 82 of the *Aboriginal Land Act 1991 (Qld)* provides that if coastal land becomes Aboriginal land under a land claim under the Act, and a right of access to or across the area existed before the area became claimable land, that rights of access continues as if the land had not become Aboriginal land. The waters of the sea, the seabed, other than tidal land under s.21, cannot be claimed under the *Aboriginal Land Act 1991*: s.25.

New South Wales

The *Fisheries Management Act 1994 (NSW)* does not include any special recognition for non-native title Aboriginal rights and interests. Section 287 provides that it does not affect the operation of Federal or NSW native title legislation 'in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect'.

The *Fisheries Management Act 1994 (NSW)* provides for habitat protection plans and the declaration of aquatic reserves: ss.192-4. Regulations may prohibit or regulate the taking of fish or marine vegetation from aquatic reserves; provide for the management, protection and development of reserves, and classify areas within an aquatic reserve for different uses (such as recreational uses or as a sanctuary): s.197. Permits are required before marine vegetation (mangroves, sea grasses, etc.) can be cut: s.205. The *Native Title Act 1993 (Cwlth)* may exempt native title users of these marine protected areas from permit requirements, but other management provisions would apply.

The *Fisheries Management Regulations 1994 (NSW)* (Regs 79-104) deal in part with priorities in the use of fishing gear, particularly for commercial fishers, but do not refer to conflict resolution with native title or Aboriginal fisherpersons.

The philosophy of the legislation is that all persons are treated equally regardless of race, gender, or ethnicity, and there has been no systematic attempt to assess the nature of Aboriginal fishing rights and interests in New

¹²⁵ This section was not operational at the time of the second reprint of the Act.

¹²⁶ Queensland Government, *Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands*, Report of the Land Tribunal established under the Aboriginal Land Act 1991 to the Hon the Minister for Lands, May 1994, pp.14-15.

South Wales. There is some continuing conflict with Aboriginal abalone harvesters, particularly regarding shucking on the beach which is contrary to regulations, and there are several outstanding prosecutions of Aboriginal people for abalone poaching.¹²⁷ There is thought to be a significant number of Aboriginal commercial fishermen, but there is no identification requirement during licensing processes, and statistics which identify 'race' and ethnicity are not collected. The Department has employed a couple of Aboriginal fisheries officers, and it is also trying to ensure that MACs are more representative of fishing groups.

Jervis Bay Territory

The *Aboriginal Land Grant and Management (Jervis Bay Territory) Legislation Amendment Act 1995 (Cwlth)* follows the Uluru-Kata Tjuta and Kakadu National Park models of joint management by conferring title to the Jervis Bay National Park and the Jervis Bay Botanic Gardens on the Wreck Bay Aboriginal Council, subject to a lease-back arrangement with the Australian Nature Conservation Agency. The transfer of title was effected on 14 December 1995. The Jervis Bay National Park includes approximately 870 hectares of Jervis Bay waters.¹²⁸ A Board of Management with a majority of Aboriginal representatives is to be established under the *National Parks and Wildlife Conservation Act 1975 (Cwlth)* with the development of a management plan for the park amongst its responsibilities. The area is to be managed as a 'significant and properly planned cultural tourism destination'.¹²⁹ The Council is given by-law making powers under the Act with respect to economic enterprises, cultural activities, management, access, conservation, the declaration of sacred or significant sites and for the control of hunting, shooting and fishing on Aboriginal land (but not on land in the Jervis Bay National Park and the Jervis Bay Botanic Gardens if those areas are declared under s.9A). The by-laws may also apply regulations made under the *National Parks and Wildlife Conservation Act 1975* to Aboriginal land. By laws must not be inconsistent with any other law in force in the Territory.

¹²⁷ Steve Dunn, Gordon Harris, Gary Henry, NSW Fisheries, personal communications, 22, 27 September, 3 October 1995.

¹²⁸ The Navy retains rights of control over activities and traffic over the waters at certain times under the *Control of Naval Waters Act 1918 (Cwlth)*: Wieslaw Lichacz, personal communication, 27 September 1995.

¹²⁹ Hon. R. Tickner, Minister for Aboriginal and Torres Strait Islander Affairs, 'Second Reading Speech: Aboriginal Land Grant and Management (Jervis Bay Territory) Legislation Amendment Bill 1995', typescript copy.

Australian Capital Territory

The ACT Parks and Conservation Service is reviewing recreational fishing management in the ACT, including current freshwater fishing laws. It is seeking public comment on proposed changes and has released a discussion paper for public comment. The aim is to ensure that recreational fishing in the ACT is 'fair, equitable, enjoyable and sustainable'.¹³⁰ The ACT Environment and Conservation Consultative Committee (ECCC) had established a working group to develop a recreational fishing plan in 1993, and it recommended substantial reform of the *Fishing Act 1967 (ACT)*. The discussion paper which has been released for public comment does not identify Aboriginal fishing interests in the ACT as an issue.

¹³⁰ ACT Parks and Conservation, *A Review of Recreational Fishing in the A.C.T: Public Discussion Paper*, Canberra, 1995.