

SUMMARY OF FINDINGS

This report identifies and summarises those sections of available studies, legislation and policies which are relevant to Aboriginal and Torres Strait Islander peoples' interests in fisheries and aquaculture. It is structured around the key components of the proposed Aboriginal and Torres Strait Islander Fisheries Strategy identified by the Resource Assessment Commission (RAC) in its *Coastal Zone Inquiry Final Report*. These may be summarised as:

- recognition of indigenous Australians' interests in the coastal zone;
- participation in fisheries management;
- economic development and employment opportunities; and
- improving relationships.

The first four sections of this report address each of these elements in turn. Excerpts from relevant studies, policies and legislation are presented in a broadly chronological sequence within each section. The remainder of the report addresses international considerations and comparative developments overseas.

This report also revisits some of the issues which were examined in Dr Dermot Smyth's 1993 consultant's report for the RAC Coastal Zone Inquiry, but it does not update his assessment of Aboriginal and Torres Strait Islander peoples' participation in marine protected area management. To assist readers who may wish to cross-reference this report to the earlier, the order of jurisdictional coverage here mirrors Smyth's — beginning with Tasmania and working clockwise.

Recognising Interests

Aboriginal and Torres Strait Islander peoples hold a range of interests in fisheries and aquaculture, which many have sought to have recognised and protected by participating in government inquiries and consultation processes that have occurred over the last decade or so. The extent to which these interests have been accommodated in law and policies varies markedly around the country. In addition, although there are many common aspirations amongst Aboriginal and Torres Strait Islander peoples, there is also considerable diversity. This reflects in part the heterogeneity of indigenous cultures and their geographic locations.

The report has found that since the RAC recommendations were made, little progress has been made by government agencies in assessing indigenous Australians' rights and interests in fisheries issues, or the impact of current or proposed management regimes on indigenous Australians' rights and interests. The Torres Strait, and to a lesser extent the Northern Territory, seem to be the only areas where detailed economic analyses of fisheries development issues for indigenous fishers have been undertaken.

There has been significant legislative activity in every jurisdiction associated with governments' responses to the High Court's recognition of native title. In Tasmania, Victoria, South Australia, the Northern Territory, Queensland, New South Wales and the Australian Capital Territory, and at the Commonwealth level, governments have confirmed their ownership of natural resources and their capacity to regulate water flows. They have also confirmed existing fishing rights and access to waterways (including beds and banks), beaches and public areas. Such confirmation does not, however, affect native title rights and interests or the conferral of land or water, or interests in land or water, upon Aboriginal peoples or Torres Strait Islanders.¹

The *Native Title Act 1993 (Cwlth)* defines 'native title' as those rights and interests that are possessed under the traditional laws and customs of Aboriginal peoples or 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. Significantly, in the *Native Title Act 1993 (Cwlth)*, native title rights and interests include hunting, gathering or fishing rights and interests. The Act exempts native title holders from requiring a license

¹ For specific references to legislative provisions see: J. Cassidy, 'Federal and State Land and Resource Use Management and Allocation Regimes', *Paper presented at the Indigenous Land Use Agreements Conference, Darwin 24-29 September 1995*, pp.1-44.

or permit to take flora or fauna, when others are required to have one, provided the flora or fauna is taken for personal, community, or other traditional, but non-commercial, purposes.

Consistent with the *Native Title Act 1993 (Cwlth)*, licensing requirements have been waived for Aboriginal and Torres Strait Islander people(s) engaging in traditional and customary activities in Tasmania, Western Australia, the Northern Territory, and Queensland, but conservation regulations and management plans can still be applied. In South Australia there is a general exemption provision which may be exercised at the government's discretion for Aboriginal and Torres Strait Islander peoples, and in NSW fisheries legislation simply purports not to derogate from the relevant Federal native title legislation.

While the recognition of customary or traditional fishing rights and interests in the *Native Title Act 1993 (Cwlth)* is significant, it appears that important fisheries management issues that might arise from such recognition are not being widely addressed by the Commonwealth Government or State and Territory Governments. Such issues might include resolving conflict over rights of access to resources, and addressing the impacts of commercial and recreational fisheries activities or coastal development on species traditionally fished and hunted by Aboriginal peoples and Torres Strait Islanders, according to their native title rights and interests. This is despite the recommendation of the 1986 Australian Law Reform Commission (ALRC) *Report on the Recognition of Aboriginal Customary Laws*, that justifiable priorities for access to resources such as fisheries resources were; firstly, conservation measures and other overriding interests (such as safety and rights of innocent passage); secondly, traditional hunting and fishing; and thirdly, commercial and recreational hunting and fishing. The ALRC recommendations were given further support by the Resource Assessment Commission (RAC) 1993 *Coastal Zone Inquiry*, which recommended that the legislative reform needed to give greater recognition to traditional hunting, fishing and gathering rights be based on the principles, priorities and definitions recommended by the 1986 ALRC report.

Federal agencies responsible for protected area management, including the Australian Nature Conservation Agency and the Great Barrier Reef Marine Park Authority, continue to lead State and Territory agencies with their recognition of Aboriginal and Torres Strait Islander peoples' rights and interests, and their approaches to co-management of natural and cultural resources. Federal legislation for the co-management of Aboriginal-owned and leased-back areas in the Jervis Bay Territory enables a management plan to recognise Aboriginal interests. Regulation of non-Commonwealth, State areas in the Jervis Bay region is subject to continuing negotiation.

There is also the exciting prospect that negotiated regional agreements between stakeholders concerning natural and cultural resource issues will become increasingly common in future in Australia. There has also been an increasing number of conferences, workshops and publications discussing these issues.²

Some Federal policy developments are significant for their omissions; namely the release in 1994 of the National Policy for Recreational Fishing and the National Strategy on Aquaculture. Neither of these documents identify Aboriginal and Torres Strait Islander peoples as stakeholders with interests warranting specific attention.

This report has not included an assessment of the effectiveness or application of heritage legislation in each jurisdiction and offshore, as that was beyond the time-frame of the project. Only in the Northern Territory is there statutory provision for sea-closure inquiries and determinations for Aboriginal landowners. The extent to which existing fisheries management plans do recognise and protect waters and resources near to Aboriginal communities has not been explored either.

² See for example: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: July 1994-June 1995*, Australian Government Publishing Service, Canberra, 1995, ch. 5; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice: Strategies and Recommendations: Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package: Vol.2: Regional Agreements*, Sydney, 1995; B.J. Richardson, D. Craig and B. Boer, 'Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and Their Potential Application to Australia - Part 2', *Environmental and Planning Law Journal*, Vol.11, No.5, 1994, pp.357-381; B.J. Richardson, D. Craig and B. Boer, 'Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and their Potential Application to Australia — Part 1', *Environmental and Planning Law Journal*, Vol. 11, No. 4, 1994, pp.320-343; ATSIIC, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures*, Australian Government Publishing Service, Canberra, 1995.

Participating in Fisheries Management

In relation to indigenous participation within fisheries management bodies at the Commonwealth level, it was found that there are no Aboriginal or Torres Strait Islander members on Management Advisory Committees established by the Australian Fisheries Management Authority, other than in the Torres Strait, although Aboriginal people may attend prawn fishery management advisory meetings. In the Torres Strait, the advisory and consultative structure is extensive and an important development in that region is the finalisation of several community-level environment and resource management plans. Aboriginal and Torres Strait Islander peoples are not represented on the inter-governmental Inland Fisheries Management Co-ordination Council, the Murray Darling Basin Fish Management Advisory Committee or the Murray-Darling Community Advisory Committee, or on the National Recreational Fisheries Management Network.

The Great Barrier Reef Marine Park Authority now has significant Aboriginal and Torres Strait Islander involvement in advisory committees and reef management processes. The Australian Nature Conservation Agency is developing innovative proposals to encourage the customary management of some Aboriginal and Torres Strait Islander land and sea country, and marine protection strategies are also being developed for the Arafura Sea and the Torres Strait under the Ocean Rescue 2000 program.

At the State level, there is no statutory requirement for Aboriginal participation in fisheries management in Tasmania, New South Wales or South Australia, and only in NSW is there reported to be an Aboriginal person on at least one committee (by chance rather than intent).

In Victoria, the new *Fisheries Act 1995* acknowledges indigenous interests in fisheries to the extent that the membership of the newly established Fisheries Co-Management Council, which must reflect a range of expertise, must specifically include a member with knowledge and experience in 'traditional fishing'. Fishery committees specific to the management of particular fisheries are also established under the Victorian legislation, and *may* include members with expertise on traditional fishing. While the Act requires the Minister to declare recognised peak bodies representing commercial fishing, recreational fishing, aquacultural and conservation interests, who must be consulted regarding appointments to the Fisheries Co-Management Council or fisheries committees, similar recognition of peak bodies representing indigenous interests is not specified.

In Western Australia, one Aboriginal person may be appointed to a 14-member Recreational Fishing Advisory Committee, but there is no statutory requirement for an Aboriginal person to be appointed to the Rock Lobster Industry Advisory Committee or the Aquaculture Development Council. The Department does consult with Aboriginal communities however and there is a proposal to involve Aboriginal communities in the Volunteer Fisheries Liaison Officer program.

With the approval of the Northern Territory Government, and after consultations with the Anindilyakwa Land Council and the Tiwi Land Council, the Northern Territory Fisheries Division has put in place the Anindilyakwa Consultative Committee and Tiwi Coastal Waters Consultative Committee. Both these committees are non-statutory. Aboriginal people are not yet represented on species-specific advisory committees in the Northern Territory, although the Minister for Primary Industry and Fisheries has approved Aboriginal membership on some Fishery Advisory Committees (FACs). Commercial licensees (including those of Aboriginal descent) are represented on species-based FACs (where they have been established) by a nominated person(s) elected by the licensees.

In Queensland there is significant Aboriginal and Torres Strait Islander representation on management advisory committees, zonal advisory committees and the Fisheries Policy Council.

Economic Development and Employment Opportunities

There appears to have been negligible research done on fisheries development and resource sharing issues for Aboriginal people, although there has been some work done on the Torres Strait. Fisheries issues have not generated significant attention from the Aboriginal and Torres Strait Islander Commission. However, the Aboriginal and Torres Strait Islander Commercial Development Corporation has invested in an oyster lease joint venture in Ceduna, South Australia. Several other aquaculture projects employ Aboriginal staff on salaries available under the Community Development Employment Program (CDEP), administered by the Aboriginal and Torres Strait Islander Commission (ATSIC). In Western Australia special commercial fishing licences have been available to Aboriginal communities. Western Australia is also developing policies on Aboriginal interests in aquaculture. In April 1996 a landmark agreement was entered into between the Western

Australian Government and a local Aboriginal company for a joint aquaculture park near Broome.³ The non-commercial coastal licence which is available to Aboriginal communities living on land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)* in the Northern Territory enables a specified range of fish to be taken for the licensee's community or group. Coastal licences do not permit commercial sale outside the community. High-cost, potential high-return fisheries are difficult for indigenous fishers to enter, but similar constraints also face non-indigenous interests. In Queensland some Torres Strait Islanders and the Aurukun community are involved in commercial fishing activities, and the Injinoo community may be shortly. Community fishing licences are also available in Queensland. The need for improved and more appropriate training opportunities have been identified as a particular need in the Torres Strait. New South Wales is developing some aquaculture projects with Aboriginal communities. The Victorian Government is negotiating with the Framlingham community over eel netting.

Improving Relationships

Policies, programs and activities being undertaken by the Council for Aboriginal Reconciliation, Ocean Rescue 2000 and by some State and Territory agencies promoting cross-cultural awareness training and conflict resolution are attempting to improve relationships between commercial fishers and indigenous Australians, and between enforcement agencies and indigenous fishers. Aboriginal and Torres Strait Islander peoples in several jurisdictions are seeking to be more closely involved in enforcement and patrolling activities. Some States already have Aboriginal fishery inspectors, and Kowanyama is often cited as a highly successful example of both co-operative and self-management of cultural and natural resources by an Aboriginal community. Cross-cultural awareness courses for fisheries managers and commemorations of indigenous Australians' contributions to fisheries industries are also important.

International Considerations

Current and emerging international human rights standards for indigenous peoples affirm rights to culture and customary use of resources, even in protected areas; rights to participate in decision-making and be included in management regimes which recognise customary resource use, and rights to benefit equitably in the returns generated by resource use. During the last ten years multilateral environmental and human rights treaties and international agencies have also recognised that indigenous and local people[s] and communities⁴ have potentially useful traditional knowledge and techniques of natural/cultural resource management which can contribute to sustainable development. International human rights standards require that governments protect indigenous peoples' customary estates from commercial impacts which diminish customary usage rights, and those standards also recognise that cultural rights can include economic and social activities.

³ M. Irving, 'Venture signals Court's softer line on native title', *The Australian*, April 1, 1996, p.2.

⁴ The use and meaning of the terms indigenous populations/communities/people[s] is not yet agreed in international law, with existing instruments and UN agencies using different terms. The chairperson of the Working Group on Indigenous Populations, Mme Daes, in 1993 urged acceptance of the term 'peoples' as a political, social, cultural and ethnological reality: E.-I. Daes, *Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, Sub-commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, 45th Session, Item 14 of the provisional agenda, UN Doc. E/CN.4/Sub.2/1993/26/Add.1.

Comparative Developments Overseas

The report refers briefly to developments in New Zealand, Canada and the United States and finds that commercial fishing rights for indigenous communities are the norm rather than the exception. There is also a clear trend towards co-management of significant fisheries, but also growing conflict between commercial, recreational and customary fishers over increasingly scarce resources. Priority for indigenous peoples' fishing activities over recreational and commercial activities is policy in Canada.