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Great Barrier Reef Marine Park Authority

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A REPORT TO THE GREAT BARRIER REEF MARINE PARK AUTHORITY

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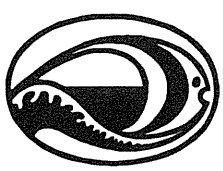

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Executive Summary

The Great Barrier Reef Marine Park Authority (GBRMPA) is responsible for the care and development of a marine park within the Great Barrier Reef region. The object of the marine park is conservation of the reef. Reasonable use of the reef must be ensured in the development of zoning plans and management plans. Under its legislation, the Great Barrier Reef Marine Park Authority in drawing up zoning plans for usage of the area, must take into account all existing uses.

Within the marine park there are Aboriginal individuals and groups who continue to identify themselves as traditional owners of maritime estates and who are keen to have their traditional claims to ownership of estates recognised. There is also a keen interest among maritime Aboriginal people to become more directly involved in marine management and decision-making within the park. The great strength of the bonds linking Aboriginal people and their land is common knowledge but the knowledge and recognition of the cultural, economic and political importance of Aboriginal 'sea country' has not been given as much emphasis or attention.

This report considers the broad direction of how Aboriginal and Torres Strait Islander interests should be incorporated in the marine park.

Existing and emerging international legal norms support Aboriginal people with regard to entitlements to coastal marine resources as well as their strong interests as partners in co-management regimes. These legal norms and principles should inform the Authority as it structures its policies with respect to Aboriginal interests in the park.

Political and legal developments in a number of countries that are attempting to deal with marine rights and indigenous people also need to be understood because these developments demonstrate that the political importance of sea rights is now seen as a matter of some interest by Aboriginal people, not only as a focus for Aboriginal identity and to compensate for past wrongs, but also to gain the economic potential that the sea and its resources may provide.

In Canada, New Zealand, the US and the South Pacific indigenous groups have taken their battle for indigenous sea rights to the courts and won. Judicial decisions have been followed by legislative and executive changes which have given indigenous owners a primary role in the management of the marine resources of traditional domains. In framing its policies the Authority should be aware that the broad political and legal trends overseas exhibit a respect for the existence of genuine, and possibly extensive marine resource rights and a commitment by government to prepare for co-management negotiations.

At the national level Aboriginal groups have concentrated on land ownership. Aborigines have thus put their political energies into negotiating land rights. This is reflected in the fact that the recognition of Aboriginal 'sea country' has not seen much movement at the legal or political level. However, Aboriginal groups are now looking closely at how indigenous marine rights issues are being developed overseas. It seems likely that marine oriented indigenous people in Australia will want to study such developments, legal trends and agreements and examine their relevance for their own situation.

Perhaps the greatest boost to Aboriginal demands for marine rights has come from the Murray Island case, which in June 1992 effectively overturned the long held legal doctrine of *terra nullius*; that Australia was land belonging to no-one prior to Crown acquisition of sovereignty. Mabo certainly opens the way for arguments supporting marine traditional native property rights, although there are different problems in applying native title to the seabed than is the

case on land. Mabo has and will continue to raise expectations by Aboriginal groups for recognition of marine estates and to raise aspirations for a greater degree of involvement in marine policy matters that affect their traditional maritime domains. The most likely offshore rights are those associated with fishing and marine hunting for food.

Mabo principles if applied to native marine rights issues could see some groups take their cases to the courts. The Authority should avoid costly litigation by taking positive steps to respond to what have been the conservative claims of Aboriginal people to joint as opposed to exclusive management strategies in the park.

GBRMPA has taken a number of steps to recognise Aboriginal interests in the park and it is perhaps unfortunate that there may have grown up a perception by some that the Authority has not considered Aboriginal traditional use and rights. There has certainly been a category of traditional hunting and gathering with an associated definition of traditional inhabitant in all zoning plans from the Cairns plan onwards. In fact the Authority has led the way in commissioning research on various aspects of Aboriginal maritime culture. The reputation of the Authority has been given a boost by these reports. Again on the issue of consultation it is probably fair to say that for some Aboriginal communities the Authority was the first government agency to consult them on *anything*. While the Authority has undertaken a number of positive steps its efforts have been somewhat token. It has failed to come to grips with a number of key recommendations that it has already been given in previous research reports on the way forward on indigenous issues in the marine park.

The Authority needs to act on these if it is to be seen to be seriously addressing Aboriginal and Torres Strait Islander interests. Indigenous issues are really long-term and cannot be submerged by short-term considerations in marine management. As 1993 is the International Year for the World's Indigenous People the Authority has a chance to be recognised as undertaking positive steps to realise Aboriginal and Torres Strait Islander marine interests by developing co-management arrangements in appropriate areas in the Marine Park.

The key recommendations that the Authority needs to consider relate to places on the consultative committee, longer term structures to facilitate consultation, recognition of Aboriginal clan boundaries and maritime estates in zoning and management plans, establishment of Aboriginal heritage zones, the need for Aborigines to be involved in joint management strategies, using community rangers and extra resources for Aboriginal liaison. The Authority will also need to liaise with relevant Queensland State Government departments and be actively involved in negotiations on land claims and claims to tidal areas under the new Queensland Aboriginal and Torres Strait Islander Lands Acts. The new Acts may well see more Aboriginal coastal communities in the future. Resources will need to be provided if a successful Aboriginal and Torres Strait Islander strategy is to be implemented.

Terms of Reference

1. Analysis of legal and political trends in Australia and overseas countries with respect to the recognition of the rights of indigenous people to marine resources.

2. Analysis of implications of these legal and political trends for GBRMPA.

3. Examination of the recommendations presented to the GBRMPA from commissioned research, workshop proceedings and MPA decisions etc.

4. Analysis of actions which the GBRMPA could take with respect to ATSI interests having regard for compliance with Government policy and directions, moral obligations, statutory requirements and the State/Commonwealth division of powers, effects on other park users, current ATSI practices with respect to traditional hunting and fishing, endangered species legislation, establishment of co-management strategies, Aboriginal Management Zones, etc.

1. INTERNATIONAL LEGAL DEVELOPMENTS RELATING TO RECOGNITION OF ABORIGINAL PEOPLES' RIGHTS TO MARINE RESOURCES

International legal interest in indigenous peoples has increased steadily since 1982, when the UN Economic and Social Council created a Working Group on Indigenous Populations. There has also been a growing direct involvement of indigenous people themselves in all levels of international decision-making (Barsh 1986; Hannum 1988; Williams 1990; Shutkin 1991; Torres 1991).

The *GBRMP Act* (s.65) applies to all persons, vessels and aircraft 'subject *to the obligations of Australia under international law,* including obligations under any agreement between Australia and any other country or countries'. The GBRMPA should be aware that both existing and emerging international legal norms support Aboriginal peoples with regard to entitlements to coastal marine resources, as well as their strong interests as partners in co-management regimes. These legal norms should be understood in the context of the GBRMPA developing its policies with respect to Aboriginal marine interests in the park. The instruments broadly recognise the rights of peoples to self-determination, the protection of cultural rights and to land and resource rights. It is important that the GBRMPA in the development of its policies be informed by the international context of state responsibilities and human rights obligations, even though in many cases there may be very weak enforcement procedures.

1.1 International Covenant on Civil and Political Rights

Several areas of emerging legal norms are important as sources for protecting indigenous peoples' rights. Article 27 of the International Covenant on Civil and Political Rights[1] (ICCPR) provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

This provision has been interpreted by the UN Human Rights Committee as including a protection for the economic and cultural dimensions of resource harvesting. The case was in the context of a complaint by an indigenous person from Sweden relating to the right to carry out reindeer husbandry. The Committee found that while the regulation of an economic activity is normally a matter for the state, where the activity is 'an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the covenant'.[2] The Committee has also held that a law which prevented a member of an indigenous minority from residing on a tribal reserve was a denial of his rights to access his native culture and language if no such community lived outside the reserve.[3] In another case the Committee held that the leasing of Indian land by the Canadian government for commercial timber purposes violated article 27 because it could destroy the traditional lifeground of the Lubicon Lake band.[4]

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[1] Entered into force for Australia on 13 August 1980. The Covenant is a schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Cultural rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) are worth noting. This treaty was ratified by Australia and came into force in 1976. The ICCPR is, however, more relevant to Australia as no steps have been taken by Australia to incorporate the provisions of the ICESCR formally into domestic law.

[2] Kitok v Sweden UN Doc CCPR/C/33/D/197/1985 released 10 August 1988 p.10.

[3] Lovelace v. Canada Report of the Human Rights Committee UN GAOR 36th sess. Supp. No. 40, Annex Agenda Item 18 at 166 UN Doc A/36/40.

[4] Chief Ominayak and the Lubikon Lake Cree band v Canada UN Doc CCPR/C/38/D167 1984 released 28 March 1990.

Article 27 will likely evolve in the context of Aboriginal rights to harvest resources, including marine resources, especially where it can be shown that the activity is integral to Aboriginal culture. It should be noted that Australia acceded on 25 September 1991 to the Optional Protocol of the International Covenant on Civil and Political Rights, whereby individuals (not groups) can in certain circumstances lodge a complaint with the Human Rights Committee concerning compliance by Australia with its obligations under the Covenant.[5] An individual must exhaust all available domestic remedies before submitting a written communication to the committee for a confidential hearing. This rule may be waived where the application of domestic remedies is unreasonably prolonged. This highlights the possible implications internationally if Australian human rights standards do not conform with standards as interpreted by the Committee.

1.2 International Convention for the Elimination of all Forms of Racial Discrimination

Australia ratified the International Convention for the Elimination of all Forms of Racial Discrimination in September 1975. Article 5 creates a positive obligation on Australia to prohibit and eliminate racial discrimination and to guarantee equality before the law. Such equality extends to equality of economic, social and cultural rights. *The Racial Discrimination Act 1975* partially implements the Convention. Australia's obligations under the Convention require special measures to equalise the effects of past discrimination or to meet special need. Special measures are a form of discrimination in that they represent a form of different treatment toward an individual or group because of their racial identity or ethnic group. Article 4 of the Convention deals with this matter directly:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure that such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The High Court has ruled that a provision in the *South Australian Lands Right Act* which restricted access to Aboriginal land without special permission was prima facie discrimination on the basis of race but was valid because it was a 'special measure' under the Convention.[6]

1.3 International Labor Organisation Convention No. 169

In the field of international protection for Aboriginal rights, mention should also be made of the work of the International Labor Organisation. In 1989 it adopted a new Convention Concerning Indigenous and Tribal Peoples in Independent Countries. This far-reaching convention was the result of pressure from indigenous organisations to revise an earlier ILO convention No. 107 which was adopted in 1957. ILO 107 was adopted by only a few countries because of outdated references, in particular the emphasis on 'integration' was not seen as reflecting present thinking on the provision of a degree of autonomy and self-management for indigenous peoples. The drafting sessions were attended by indigenous NGO's—a first for the ILO, which ordinarily limits its meetings to governments, national trade unions, and employers' organisations. A coalition with the trade unions moreover gave indigenous peoples control of one third of the votes in the negotiations. This resulted in a comparatively strong final text (Barsh 1987). The treaty has thus far been ratified by Bolivia, Colombia, Mexico and Norway and entered into force on 5 September 1991. The main theme of the Convention is indigenous

[5] Justice Elizabeth Evatt has recently been elected to the Committee.
[6] Gerhardy v. Brown (1985) 59 A.L.J.R. 311.

peoples' rights to 'control, as far as possible, their own development'. This includes their rights to continue to own and operate and manage every part of the ecosystem they have traditionally used, except minerals; to 'collaborate' in planning and impact assessment if nearby lands are developed; and to be protected from adverse environmental impacts. It does include several provisions which could be very important in the future:

Article 7. Identification and Monitoring

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 13. Public Education and Awareness

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14. Impact Assessment and Minimizing Adverse Impacts

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15. Access to Genetic Resources

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 23. Conference of the Parties

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

States which ratify Conventions are legally bound to meet their obligations under the provisions of the instruments. This convention, if ratified by Australia, will place a positive obligation to safeguard Aboriginal marine resource rights, particularly a right to continuity of enjoyment of subsistence resources, including fisheries.[7] The convention requires governments to negotiate and seek agreements with indigenous peoples before taking any action affecting them directly, and to obtain their consent to measures which treat them differently from other persons. A decision on Australian ratification is expected to be made sometime in 1993. As Australia has consistently taken a prominent role in the development of international standards for the protection of the rights of indigenous peoples it would be consistent with this involvement for Australia to ratify this convention.

1.4 1982 Law of the Sea Convention

Another area of relevance may be the conceptual framework of the 1982 Law of the Sea Convention. Australia has signed but not ratified the Convention. The Convention is expected to enter into force in the next year. (Currently there are 51 States that have ratified the Convention. It requires 60 ratifications to enter into force.) Compensation may be paid to indigenous peoples displaced, marginalised or otherwise injured by marine or marine related

[7] Some Aboriginal groups claim that the Convention does not go far enough. They claim firstly that it provides for consultation with indigenous people rather than control by these people on issues affecting them, secondly that it fails to address the issue of sovereignty, thirdly the use of the term 'peoples' in the Convention is given a restricted meaning, in particular as it affects the right to self-determination and finally that in parts it remains 'assimilationist', (Personal communication Peter Schnierer, ATSIC).

developments. Article 235 urges states to develop the law and procedures for compensation payable because of pollution damage to the marine environment. Such an international obligation may be voluntarily assumed by states at a national level, as well as in a negotiated search with indigenous peoples as to the parameters of an adequate compensation scheme (Valencia and VanderZwaag 1989,156).

1.5 Draft Declaration on the Rights of Indigenous Peoples

Also important in the emerging international norms in the field of Aboriginal rights and of particular interest in considering Aboriginal marine interests is the recent United Nations Draft Universal Declaration of the Rights of Indigenous Peoples (Sanders 1989; Barsh 1990). The Working Group on Indigenous Populations has met every year since its establishment in 1982 except 1987, providing a uniquely unrestricted forum for indigenous peoples to express their concerns. Representatives of Australian indigenous organisations have participated in the Working Group's negotiations. Early drafts were prepared by the Chair of the Working Group, Professor Erica-Irene Daes of Greece, but a new procedure was adopted in 1990, in which representatives of both governments and indigenous peoples participated in revising the text line by line. This recognised the special character of indigenous peoples since non-government organisations (NGOs) do not have a formal drafting role in UN bodies. A number of the draft principles may open the door to greater maritime rights for indigenous peoples:[8]

Operative paragraph 16

Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective measures by States to prevent any interference with or encroachment upon these rights. Nothing in the foregoing shall be interpreted as restricting the development of self-government and self-management arrangements not tied to indigenous territories and resources;

Operative paragraph 17

Indigenous peoples have the right to restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost;

Operative paragraph 18

Indigenous peoples have the right to the protection and, where appropriate, the rehabilitation of the total environment and productive capacity of their lands and territories, and the right to adequate assistance, including international cooperation, to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories;

[8] Ref UN Doc E/CN.4/Sub.2/1992/20 August 1992.

Operative paragraph 20

Indigenous peoples have the right to require that States and domestic and transnational corporations consult with them and obtain their free and informed consent prior to the commencement of any large-scale projects, particularly natural resource development projects or exploitation of mineral and other subsoil resources, in order to enhance the projects' benefits and to mitigate any adverse economic, social, environmental and cultural effects. Just and fair compensation shall be provided for any such activity or adverse consequence undertaken;

Operative paragraph 21

Indigenous peoples have the right to maintain and develop within their lands and other territories their economic, social, and cultural structures, institutions and traditions, to be secure in the enjoyment of their traditional means of subsistence, and the right to engage freely in their traditional and other economic activities, including hunting, fishing, herding, gathering, lumbering and cultivation. In no case may indigenous peoples be deprived of their means of subsistence. They are entitled to just and fair compensation if they have been so deprived.

The declaration even recognises indigenous peoples' right to 'self determination', defined as their right to determine their relationships with the states in which they live. In other words it would call upon governments to negotiate with indigenous peoples, and come to constitutional agreements on the extent to which their indigenous peoples would govern themselves and their own territories.[9]

Important in the Australian context are the right to traditional economic structures, the right to engage in traditional activities and the concept of fair compensation for deprivation for resource rights. These provisions will become an international declaration—a statement of policy by the UN General Assembly. Unlike a convention it is not legally binding on ratifying states. However in practice there is very little distinction between the two kinds of instrument when it comes to enforcement.

The declaration will probably be 'implemented' through some annual discussions in the UN Commission on Human Rights while the ILO convention will, as noted above, require governments to submit periodic reports to the ILO. It should be noted that many UN declarations eventually end up as international conventions, which do of course create legally binding obligations on the ratifying state, including periodic reporting on domestic measures taken to give effect to its obligations under the instrument. The declaration will certainly be used by indigenous groups to support their goals and objectives.

The Working Group on Indigenous Populations met in its tenth session from 20-31 July 1992. It decided to make every effort to complete its work on the Draft Declaration at its eleventh session in 1993, so that the text would be ready to be reviewed by the relevant bodies of the UN in 1994. Aborigines and the Australian government have played a significant role in the deliberations of the working group (Brennan 1991,110-120). Australia has taken an active role in the Working Group and at its last meeting the Minister for Aboriginal and Torres Strait Islander Affairs, Mr Tickner, emphasised the important role of the Working Group in promoting and protecting the rights of indigenous peoples (Tickner 1992).

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[9] The conceptual framework in the declaration finds support in the World Commission on Environment and Development which stressed the need for indigenous participation in resource development decisions.

1.6 Agenda 21

Various key indigenous NGO's were granted accreditation at the UN Conference on Environment and Development meeting (UNCED) convened in Rio de Janiero from June 3 to June 14 1992. Oceans matters were a major part of the UNCED negotiations from the first preparatory session in 1990 (Knecht and Cicin-Sain, 1993). The resulting oceans chapter in the 700 page program of national and international action ('Agenda 21') adopts a number of principles and actions that will impact on Aboriginal marine interests. Agenda 21 is not legally binding, but as Australia participated in the drafting of Agenda 21 and formally approved its content, it has associated itself with the findings of the Agenda (as to the existence of certain problems and needs), and with the prescriptions for solutions laid out in the document. Australia can be expected, therefore, to commit itself to implementing the Agenda's action programs.

17.6 Each coastal State should consider establishing, or where necessary strengthening, appropriate coordinating mechanisms (such as a high-level policy planning body) for integrated management and sustainable development of coastal and marine areas and their resources, at both the local and national levels. Such mechanisms should include consultation, as appropriate, with the academic and private sectors, non-governmental organizations, local communities, resource user groups, and indigenous people.

17.15. Coastal States should promote and facilitate the organization of education and training in integrated coastal and marine management and sustainable development for scientists, technologists, managers including community-based managers and users, leaders, indigenous peoples, fisherfolk, women and youth, among others. Management, development, as well as environmental protection concerns and local planning issues should be incorporated in educational curricula and public awareness campaigns, with due regard to traditional ecological knowledge and socio-cultural values.

17.75. States commit themselves to the conservation and sustainable use of marine living resources under national jurisdiction. To this end, it is necessary to:

(a) Develop and increase the potential of marine living resources to meet human nutritional needs, as well as social, economic and development goals;

(b) Take into account traditional knowledge and interests of local communities, small-scale artisanal fisheries and indigenous people in development and management programmes;

(c) Maintain or restore populations of marine species at levels that can produce the maximum sustainable yield as qualified by relevant environmental and economic factors, taking into consideration relationships among species;

(d) Promote the development and use of selective fishing gear and practices that minimize waste in the catch of target species and minimize by-catch of non-target species;

e) Protect and restore endangered marine species;

(f) Preserve rare or fragile ecosystems, as well as habitats and other ecologically sensitive areas.

17.83.Coastal States should ensure that, in the negotiation and implementation of international agreements on the development or conservation of marine living resources, the interests of local communities and indigenous people are taken into account, in particular their right to subsistence.

17.95.Coastal States, with the support of relevant subregional, regional and global agencies, where appropriate, should:

(a) Develop research capacities for assessment of marine living resource populations and monitoring;

(b Provide support to local fishing communities, in particular those that rely on fishing for subsistence, indigenous people and women, including, as appropriate, the technical and financial assistance to organize, maintain, exchange and improve traditional knowledge of marine living resources and fishing techniques, and upgrade knowledge on marine ecosystems;

Chapter 26 of Agenda 21 is titled 'Recognising and Strengthening the Role of Indigenous People and their Communities'. It defines 'lands' to include the environment of the areas which the people concerned traditionally occupy.

26.3. In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:

(a) Establishment of a process to empower indigenous people and their communities through measures that include:

(i) Adoption or strengthening of appropriate policies and/or legal instruments at the national level;

(ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;

(iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;

(iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;

(v) Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;

(vi) Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development;

(vii) *Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development;*

(b) *Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;*

(c) *Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.*

The UNCED Declaration on Environment and Development ('Rio Declaration') includes the principle that;

Indigenous peoples and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Agenda 21 in terms of the standards endorsed represents a new benchmark in global consensus on the approaches states should be adopting to achieve sustainable development. Australia will now have to consider how its policies support these goals. It should be pointed out, however, that the reporting and review procedures that emerged from the UNCED process are not particularly rigorous. Under the heading of national implementation in the institutional chapter of Agenda 21, there is no reporting obligation, but 'states could consider the preparation of national reports ... and national action plans for the implementation of Agenda 21'. The Commission on Sustainable Development that will be established under the UN Economic and Social Council with overall responsibility for follow up of Agenda 21 will 'consider information provided by governments, including, for example, in the form of periodic communications or national reports regarding the activities they undertake to implement Agenda 21'.

1.7 Biological Diversity Convention

The Biological Diversity Convention, signed by Australia as well as more than 150 countries in June 1992 at Rio, is also likely to impact on traditional hunting and fishing practices. The Convention will enter into force 90 days after 30 countries have ratified it. The Convention, which sets out obligations and objectives for nations to combat the destruction of plant and animal species and ecosystems, recognises the rights of indigenous peoples in the following provisions:

Article 8. In-situ Conservation

(j) *Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and*

encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

Article 10. Sustainable Use of Components of Biological Diversity

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

Article 18. Technical and Scientific Cooperation

4. The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.

Like most other international agreements, enforcement mechanisms are its weakness—there is a requirement for periodic reports to a conference of the parties for their review and comment.[10]

1.8 SPREP

At the regional level Sutherland points out that governments in the South Pacific and Australia have been recently urged at a South Pacific Regional Environment Program meeting to promote 'protection, recording and integration into biological conservation of traditional knowledge and resource use practices'. The Convention on Conservation of Nature in the South Pacific (SPREP) which came into effect in March 1990 when Australia ratified allows contracting parties to make provision for customary use of areas and species in national parks and national reserves in accordance with traditional customary practices (Sutherland 1992). The Convention only mentions traditional practices in its preambular paragraph but Sutherland points out that the 1991 SPREP Ministerial Declaration on Environment and Development reaffirmed principles in the 1982 Rarotonga Declaration on the Human Environment in the South Pacific. The latter Declaration urged the study of traditional marine tenure systems and their reconciliation with environmental management (Sutherland 1992: see generally Bergin 1992).

1.9 GBRMPA Implications

The provisions outlined above represent areas of emerging international norms and are likely to be the main features of human rights law in the future.[11] The GBRMPA should use these principles to structure the development of policy relating to Aboriginal and Torres Strait Islander marine rights. At the international level the enforcement of indigenous rights recognised by international law will lie in the pressure of other states and the encouragement of UN functionaries. There are few incentives for governments to comply with the formal findings or recommendations of UN committees. Of course for an open society like Australia publicity

[10]The United States has refused to sign the Biodiversity Convention. They objected to the language of the provision on patenting of products made from natural biological resources; they feared that the article on funding of conservation projects in developing countries would not leave sufficient control in the hands of donors and they also cited scientific uncertainty surrounding loss of diversity as a reason for not signing. See *New Scientist* 6 June 1992. The US refusal to sign is unlikely to prevent the Convention from getting the necessary 30 ratifications to bring it into force.

[11]It is worth noting that an important NGO, the International Union for the Conservation of Nature has recently established an IUCN Task Force on Indigenous Peoples. The Task Force will be funded by IUCN to examine cross sectorial issues in nature conservation in relation to the involvement of indigenous people. The Task Force should act as forum to promote the awareness and involvement of indigenous peoples in the full spectrum of IUCN activities. The IUCN also has a working group on cultural sustainability.

and embarrassment as a result of international criticism may have some effect. In the past, though, Australia has used UN meetings to detail new initiatives on indigenous rights hoping to attract international support. In the municipal sphere Aboriginal rights under general international law do not generate rights except to the extent of any parliamentary response. Where statute law is silent the common law can only respond to international law in a very limited manner (McHugh 1991,216). However, countries have based their domestic initiatives on ideas which originated in international discussions. A striking example here was New Zealand's publication of the Draft Declaration of Indigenous Rights—in Maori—as a basis for continuing domestic negotiations on Maori rights.

However, policy makers should also bear in mind that increasingly Australian courts are being presented with arguments that certain statutory provisions must be construed in conformity with a human rights treaty even though it has not been incorporated into Australian law; or that a court should treat a principle contained in the treaty as part of customary law that should be regarded as directly applicable; or that administrative discretions under statute must be exercised in conformity with, or having regard to those international law rules. Judges will therefore need to become more familiar with international material. Australia's acceptance of the Optional Protocol to the International Covenant on Civil and Political Rights may make Australian judges more conscious of human rights standards (Burmester 1992,20). While traditionally courts have tended to shy away from the whole area of international law because of its 'political character' (Crawford and Edeson 1984) courts are now being called upon to apply and be guided by international human rights standards. As to how the courts will use international law material the head of the Office of International Law in the Commonwealth's Attorney General's Department has pointed out after an extensive analysis of the case law that while it is early days and generalisations are difficult courts will use international law to resolve ambiguities and gaps. While a fairly narrow view of the types of customary rules that might be incorporated has been taken, where Australia is party to a treaty a court will be more prepared to consider the relevance of the treaty standard to a particular situation and may be expected to give a wide purposive interpretation to the particular provision (Burmester 1992).[12]

Certainly indigenous peoples are arguing strongly that their relationship to the State should be treated as a matter of international law. As Nettheim has pointed out: 'What is already evident is that the collective rights of indigenous peoples have joined the individual rights of humans generally as a legitimate concern of international law' (Nettheim 1991,19). In the evolution towards greater self determination indigenous groups will seek to rely on the development and application of international human rights doctrines. These doctrines will increasingly come to be relied on by indigenous peoples in a legal, political and moral sense in the control and management of marine resources and ocean space. In shaping its policies on indigenous marine issues the GBRMPA should be aware that these principles are likely to be the mainstays of international human rights law. They should be regarded by the Authority as the minimal requirements as it shapes a holistic marine policy.[13] Since many of the international standards in this area are still evolving the Authority's indigenous policy should be geared to the norms and standards likely to be in force in a generation hence, even though, as noted earlier, in most cases these may possess nebulous enforcement procedures.

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[12] As Brennan J pointed out in the recent *Mabo* judgement: 'The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.' (1992) 66 A.L.J.R. 422.

[13] It may be worth noting that the Human Rights and Equal Opportunity Legislation Amendment Bill (No.2) 1992 creates a new Aboriginal and Torres Strait Islander Social Justice Commissioner who will prepare an annual report on the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander people, to be tabled in parliament and sent to all States and Territories. *Senate*

2. OVERSEAS EXPERIENCE WITH INDIGENOUS SEA RIGHTS

In New Zealand, US, Canada, and the South Pacific indigenous groups have taken their battle for indigenous sea rights to the courts and won. Judicial decisions have been followed by legislative and executive changes which have given traditional owners a primary role in the management of the marine resources of their traditional domains.[14]

2.1 New Zealand

The last decade has witnessed a dramatic advance in both statute law and case decisions concerning the recognition of Maori rights, originally provided in the Treaty of Waitangi of 6 February 1840 (see McHugh 1991). The Waitangi tribunal was set up in 1976 to inquire into any claims by the Maori people that some action of the Crown violated the principles of the Treaty of Waitangi, principles which the tribunal was also obliged to interpret. The tribunal's findings are not binding as it is more a commission of inquiry than a court. It passes recommendations to government, which has no specifically established procedure for dealing with them.

In 1983 the New Zealand parliament amended the fisheries act so that 'nothing in this Act shall affect any Maori fishing rights'. Subsequently the courts, which prior to 1986 had consistently rejected Maori fishing claims, have held that validity and primacy of traditional fishing rights are exempt from the ordinary regulations and limitations under the act on fishing grounds and quotas. The rights are limited to the particular tribe and its authorised relatives for food supply. Some commentators suggest that in New Zealand sea rights are incidents of native title, recognised by treaty, rather than deriving from treaty (see Boast 1990). The Waitangi Tribunal's view is that treaty rights do include the right to commercial development of the fishery. In Muriwhenua, the Tribunal found that the laws of general applicability made for the purpose of conservation are a valid exercise of the governorship granted to the crown, provided that the priority of treaty fishing interests over recreational fishing is taken into account (Muriwhenua 1988; 227; Mylonas-Widdall 1988; Austin 1989; Levine 1989).

Just as importantly was a High Court judgement obtained by Maori interests in 1987 restraining the government from implementing a quota system for sea fisheries (see McHugh 1991,142). The Maoris argued that the quotas were creating new property rights without reference to them and was contrary to the principles of the Treaty of Waitangi. The upshot was a *Maori Fisheries Act 1989*, which recognises Maori fishing rights secured under the Treaty of Waitangi and reserved 10% of the total fishery quota for Maori interests. According to the NZ fishing industry this equates in value to approximately 50% of the total inshore quota. This quota forms an important source of earnings for tribal trusts. The South Island's Ngai Tahu tribe has earned more than $1 million in 1992 by leasing its quota.

This amount may well be boosted by the Waitangi Tribunal's 400 page report on the Ngai Tahu Sea Fisheries handed down on the 11 August 1992 (Waitangi Tribunal 1992a). The Tribunal's recommendations proposed a negotiated settlement of the Ngai Tahu sea fishery grievance. It recommended that a settlement should include an additional percentage of quota to Ngai Tahu under the quota management system and the delivery mechanism should be the *Maori Fisheries Act 1989*. The Tribunal also recommended return of exclusive eel fishing rights in Lake Ellesmere and cancellation of existing eel fishing licenses with compensation to existing licence holders. The Waitangi Tribunal rejected the Ngai Tahu claim to all sea fisheries off their boundaries. The Tribunal found that Ngai Tahu has an exclusive treaty right to the sea

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Hansard, 24 November 1992, pp.3340-3341. The first Aboriginal and Torres Strait Islander Social Justice Commission is Mr. Michael Dodson, the Director of the Northern Land Council. See 'Social Justice Commissioner named', *The Australian*, 23-24 January 1993.

[14]This chapter focuses on fisheries issues although it is recognised issues relating to cultural tourism may also be relevant in the GBRMP.

fisheries surrounding the whole of their coastline to a distance of 12 miles or so. Ngai Tahu also has a treaty development right, exclusive to the tribe, to a reasonable share of the sea fisheries off their coastline extending beyond the continental shelf and into deep water fisheries within the exclusive economic zone.

The Tribunal found that it was not in a position to evaluate accurately the value of sea fisheries to which Ngai Tahu is entitled. However, it was noted that appropriate allowance should be made for the inshore fishery off the Ngai Tahu coastline when assessing the reasonable share of the Ngai entitlement. There is a need for the crown and Ngai Tahu to negotiate and reach a settlement by way of compromise. According to the report, circumstances such as public conscience, the nation's ability to meet the cost and the need for a permanent solution should be considered.

The Tribunal found that Ngai Tahu were prejudicially affected by various acts and omissions, policies and statutes of the Crown relating to their sea fisheries. These breaches were inconsistent with the principles of the Treaty of Waitangi. The failure of the Crown to provide adequate land resources directly affected the tribe, preventing the continuation of their thriving and expanding sea fishing activity. A further serious breach was the assumed right of the Crown to dispose of Maori fisheries without the consent or consultation with the tribe as if the fisheries were crown property under the quota management system. Further breaches were a failure to protect and conserve sea fisheries; the Crown's assumption that non-Maori had equal rights with Maori in the whole of their fishery; the Crown's wrongful assumption that it owned the oysters offered for sale for public tender; and the Crown's failure to give statutory recognition of the Treaty in fisheries legislation. The report also recorded that despite repeated requests from Ngai Tahu the Crown refused to give effect to legislative provisions which provided for the reservation of exclusive Maori fishing grounds.

Since the release of the report Maori and Crown negotiators have announced a proposal that they hope will take care of the Maori share in commercial fishing once and for all. The deal involves the Crown buying for the Maori half of New Zealand's biggest fishing company, Sealords. All fishing claims under the Treaty of Waitangi would then be dropped. On the 27 August 1992 the New Zealand government announced that it would fund Maori interests in a joint venture bid to buy 100% of Sealord products, New Zealand's largest seafood company, mainly involved in deepwater fishing. It holds about a quarter of all New Zealand fishing quotas. Carter Holt Harvey's income from the company in the year to March this year was nearly $NZ35 million. The company will sell Sealords for $NZ325-375 million. The government is seeing it, if the bid is successful, as a full and final settlement of commercial fishing claims. The Prime Minister has stated that the funding arrangement 'will be a bold, fair and final resolution of Maori commercial fishing claims'.[15]

Not all Maori are happy with the deal. Some argue that it is not clear how ordinary Maori will benefit, there are concerns about the proposed repeal of statutes relating to Maori fishing rights, the amount of quota transferred under the deal and the effect on traditional fishing rights.[16] During September 1992 discussions were held by different tribes throughout New Zealand on the agreement. The Chairman of the Maori Fisheries committee pointed out that it spares Maori the necessity and costs of negotiating for many years in a situation where there are limited options.[17] The Chairman of the Maori fisheries negotiators stated in mid September that the deal was not under any threat.[18] The agreement was signed on 23 September 1992. Some

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[15] 'Maori fishing rights go commercial' *Australian Financial Review* 28 August 1992.

[16] 'Ngai Tahu rejects deal for Maori fisheries' *Evening Post* (NZ) 12 September 1992: 'Maori spotlight on Sealord deal' *New Zealand Herald* 12 September 1992.

[17] 'An honourable offer on fishing' *Evening Post* (NZ) 31 August 1992; 'Fishing deal Welcome' *The Dominion* September 1992.

[18] 'Rata perceives no threat to Sealord deal' *New Zealand Herald* 14 September 1992.

tribes have not signed, however, fearing that it purports to extinguish a tribal right that it does not want to sign away.[19]

The *Treaty of Waitangi (Fisheries Claims) Settlement Bill* was passed by the New Zealand Parliament on 10 December 1992.[20] The Bill gives effect to the legislative proposals embodied in the Deed of Settlement of 23 September 1992 between the Crown and Maori whereby in return for the Crown providing for the purchase of Sealords by Maori BIL (Brierly Investments Ltd) Joint Venture, the payment of $150 million to Maori and the granting of indemnity to Waitangi Fisheries Commission against certain liability for goods and services tax, all claims both current and future by Maori in respect of commercial fishing would be recognised as finally settled (ss. 5,6,7 and 8). The Bill also made provision for non-commercial Maori fishing rights and interests (s 9).

Reflecting the disquiet felt by some Maori at the terms of the Settlement, all six Maori MPs expressed dissatisfaction with, and strong opposition to, the Bill warning that 'it was doomed to fail'. They expressed reservations on the extent of Maori support for the terms of the Settlement and at the provisions for traditional fishing, arguing that many Maoris would not benefit from the Sealord deal. They also felt that the Bill abrogated the terms of the Treaty of Waitangi.[21]

All these concerns had been considered by the Waitangi Tribunal in its Report on the Fisheries Settlement. With regard to the question of ratification of the Deed of Settlement, the Tribunal found that given the difficulty in determining who might be seen as possessing the necessary authority to negotiate on behalf of Maori, the Crown was correct in assuming that it had received 'a mandate for the settlement, provided however that the Treaty itself was not compromised'.(Waitangi Tribunal Report 1992,15). This difficulty in determining Maori representation was acknowledged by the Justice Minister when he referred to 'the main problem in negotiations (as being) the lack of a structure within Maoridom to speak in a united way'.[22] With the allocation of the benefits resulting from the agreement, the Tribunal found that the present provisions could not give adequate assurance that all interests would be dealt with fairly in the apportionment of fishing benefits and recommended that the 'Crown should appoint a special court or body to hear any objections'.(Waitangi Tribunal Report 1992,20). The Tribunal, while commending the Crown for 'seeking to provide for Maori interests in commercial fisheries', expressed strong reservations with 'the effective extinguishment of the Treaty interest' as embodied in the Deed of Settlement (Waitangi Tribunal Report 1992,21). In the opinion of the Tribunal the obligation to 'actively protect the Maori fishing interest' (Waitangi Tribunal Report 1992,22) embodied in the Treaty cannot be extinguished, an opinion with which the Justice Minister when addressing opposition to the Bill chose to disagree.[23]

The provisions for establishing traditional fishing reserves (whereby local marae committees could apply to the Fisheries Minister for permission to set up seafood-gathering reserves), were attacked because access to such areas would be prohibited to both Pakeha and to Maori who did not belong to the area. Maori negotiator, Maitu Rata, believed that the Bill 'formalised rather than created fishing rights for Maori' and offered reassurances that the marae committees 'would not be able to rule against pakeha or Maori fishing because of their race or tribe' but could decide whether 'a species could only be fished for marae ceremonial use' in which case the prohibition 'would apply equally to pakeha and Maori'.[24]

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19 'Maoris pin their hopes on a slippery deal' *The Australian* 1 October 1992.
20 'Graham angry at Maori MPs' stance'. *The Dominion* 12 December 1992.
21 'Fisheries bill doomed, say Maori MPs'. *The Dominion* 10 December 1992; 'Graham angry at Maori MPs' stance'. *The Dominion* 12 December 1992.
22 'Graham angry at Maori MPs' stance'. *The Dominion* 12 December 1992.
23 'Fisheries bill seen as fair to everyone'. *The Dominion* 10 December 1992.
24 'Pakeha not shut out by fishing Bill - Rata'. *The Evening Post* 11 December 1992.

Concern was expressed also by the President of the Fishing Industry Association at the provisions for the distribution of new species quotas and the effect this could have on fishing companies. He believed that the Government's guarantee of 20% of the quota with the remainder subject to tender amounted to the fishing industry contributing to the Government's $150 million payment to Maoris.[25]

In the New Zealand context the fishing rights issues are best understood as a 'medium for achieving a workable ideology, in an official forum, which could further the aims of Maori ethnic revival on a wider front' (Levine 1989,26). While the courts will decide what fishing rights actually exist the Tribunal has, by creating a framework for insinuating the principles of the Treaty of Waitangi into the legal system, significantly increased the chances that real gains will be made. Certainly in any expansion of the fishing industry Maori interests will be major players. Through the Maori Fisheries Act they now have 10 per cent of quotas. They will have acquired another 11 per cent, and a half share of Sealords quota will give them 12 per cent more. Through such programs Maori dependency on government programs and welfare diminish and wealth and job opportunities flow back to the tribes.

2.2 Canada

In Canada the Supreme Court in 1990 handed down a landmark judgement statement on the nature of aboriginal fishing rights and on the constitutional protection afforded them (Sparrow 1990). In 1984, Ronald Edward Sparrow a member of the Musqueam Indian band, was charged under the Fisheries Act with using a driftnet longer than that permitted under the band's Indian food fishing license. Sparrow did not deny the fact, but defended himself against the charge on the grounds that he was exercising an aboriginal right to fish, as guaranteed by the constitution, and that the driftnet restriction was therefore invalid. The court accepted this defence. The aboriginal right to fish cannot be extinguished by the Fisheries Act, only restricted by it. As well these rights must be interpreted in a generous way and the government has the responsibility to act in a trust relationship with respect to aboriginal peoples and is held to a high standard of honourable dealing with them.

The court elaborated a two part test for determining whether a regulation under the fisheries act infringes on an existing aboriginal right, and where that infringement is justified. The first test is whether the legislation in question has the effect of interfering with an existing aboriginal right. Few aboriginal rights have been precisely defined in law, but the court then asks if the limitation is unreasonable, whether it imposes undue hardship, and whether it denies the holders of the right their preferred means of exercising it. The court stated that a *prima facie* infringement would consist not just in reducing the catch below reasonable food and ceremonial needs, but even the imposition of undue cost or hardship in obtaining that catch. The burden of proof with respect to the first test is on the Aboriginal person or group challenging the legislation. The tests for justifying the limitation and the fact that the burden of proof falls on the Crown are novel features of *Sparrow*. These tests are:

- Is there a valid legislative objective?
- Is the legislation consistent with the special relationship and the responsibilities of the government vis-a-vis aboriginals? Here the court said in effect that whatever surplus exists beyond the requirements of conservation shall be allocated to meet Indian food requirements in their entirety.
- Has there been as little infringement as possible in order to effect the desired result?
- In a situation of expropriation is fair compensation payable?
- Has the aboriginal group in question been consulted with respect to the conservation measures being implemented?

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[25] 'Fishing chief fears industry value cuts'. *The Dominion* 10 December 1992.

Sparrow opens the way for challenging the system of state management through the first three tests, particularly the third tested noted above. If the infringement encompasses not just harvesting activity but also tenure and management arrangements the Crown will have to show that the regulation has the objective of conservation but also is the most efficacious and acceptable from the aboriginal viewpoint. The *Sparrow* case indicates that aboriginal fishing rights consist not just in a claim to a share of the harvest but also a stake in the management of the resource. The onus will be on Canadian governments to justify regulations affecting native harvesting in accordance with the Sparrow tests. Notably the court did not foreclose the possibility of constitutional protected rights to fish commercially. The case was cited in the recent Australian case of *Mabo* as demonstrating the requirement for clear and plain intention before aboriginal rights are taken to have been extinguished.

In the Canadian context of marine resource management it is also worth noting the eight year old Inuvialuit Final agreement and the recent Nunavut arrangements.[26] The Inuvialuit agreement was proclaimed in force in July 1984. The Inuvialuit number over 2,500 and live in six coastal settlements in the western Arctic, in what is both the Yukon (one settlement) and the northwest territories (five settlements). Under the final agreement, the Inuvialuit gained title to approximately 35,000mi^2 of land, of which 5,000mi^2 included the sub-surface. In exchange for extinguishing their Aboriginal title to the land and waters they traditionally used, the Inuvialuit were given $45 million (in 1977 dollars) payable over a thirteen year period. The settlement recognised Inuvialuit priority in the harvesting of marine mammals, including first access to all harvestable quotas. This recognises that the Inuvialuit have the right to harvest a subsistence quota of marine mammals, according to a quota set by them and the government. They are also entitled to harvest any portion of any commercial or other quotas that they can expect to take within any given quota year, once such quotas have been set jointly according to sound conservation principles.

The Inuvialut have a preferential right to harvest fish for subsistence within the settlement region: this includes trade, barter, and sale to other Inuvialuit. Subject only to restrictions imposed by quotas each year, Inuvialuit are issued non-transferable commercial licences to harvest a total weight of fish equal to the largest annual commercial harvest of that species taken by Inuvialuit from those waters over the preceding three years. Access to commercial harvests above that level is granted on the same basis to Inuvialuit as to other applicants. A Fisheries Joint Management Committee became operational in 1987 and assists the Ministry of Fisheries and Oceans in the management of marine resources and provides advice on all matters relevant to harvests in the settlement. Its activities overlap with other institutions such as a Game Council, and Hunter and Trappers Committees. It currently monitors Aboriginal subsistence harvests of both fish and marine mammals, as well as sports fishing on Inuvialuit lands. It monitors the beluga whale hunt and managed a quota involving a total annual intake of 130. Inuvialuit hunters are hired as whale monitors and they record the number of animals struck and the sex and size of the landed whales. They also take biological samples and make a report to the Fisheries Joint Management committee after the whaling season. In sum the Final Agreement contains all the required ingredients for a co-management regime. As Doubleday points out: 'It recognises preferential or exclusive harvesting rights, control of access to the resource, participation in management, relevance of traditional knowledge, and modern scientific approaches to conservation—all of which represent elements of special status and self-government necessary for the survival of indigenous peoples' (Doubleday 1989,221).

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[26] In addition to these final agreements two recent final agreements have been reached on outstanding claims, the council for Yukon Indian claims and the Dene and Metis claim in the Northwest of Canada. One earlier ratified land claim agreement which has been widely criticised for problems of implementation is the James Bay and Northern Quebec Native Lands claim settlement of 1976-77 (see Berkes 1989). There are about 20 other claims submitted by aboriginal peoples and are waiting discussion.

In April 1992 the Canadian government signed an agreement with the Tungavik Federation of Nunavut for the establishment of the new Nunavut territory. The land settlement was ratified in November 1992.[27] The Inuit claim is the largest in Canada, involving 17,500 Inuit and covers a land area of 775,000 square miles of land and 800,000 square miles of ocean. The accord provides for a transition process leading to the creation of the Nunavut government no later than 1 April 1999. Like other lands claims the agreement provides for the effective extinguishment of Aboriginal title to lands and adjacent offshore areas in exchange for a variety of rights and benefits in the settlement area. Under the settlement Nunavut's inhabitants will be paid $1.44 billion over the next 14 years (Jull 1992).

From the mid 1980s traditionally used offshore areas were admitted into the negotiating arena for purposes of harvesting rights and for participation in environmental management and resource sharing. The Inuit are by and large a sea-based people. They are a coastal people who spend much of the year harvesting marine mammals and all but one of the communities in Nunavut, Baker Lake, is located on the coast. Under the agreement (see Fenge 1992) Inuit will be guaranteed, subject to principles of conservation, the right to harvest marine and terrestrial wildlife throughout Nunavut sufficient to meet their consumption needs, and will be given priority in establishing sport or commercial wildlife ventures. The government is to give 'special consideration' to Inuit when allocating commercial fishing licenses in Hudson Bay and Davis strait, adjacent to, but outside the Nunavut settlement area. The resource management provisions of the agreement operate on consensual principles as much as possible, and mesh the different experiences and expertise of Inuit and government (see Fenge 1992,28-32). They reflect a commitment to cooperative management of natural resources by both government and users. A Nunavut Wildlife Management Board (NWMB) is established. It will be composed of nine members, four appointed by Inuit organisations, three appointed by the governor-in-council upon the advice of ministers responsible for fish and marine mammals, the Canadian Wildlife Service and Indian Affairs and Northern Development and one appointed by the Commission-in-Executive council.

Where a total allowable harvest for a stock has not been established by the NWMB, Inuit have a right to harvest that stock up to the full level of their economic, social and cultural needs. Inuit must abide by a total allowable harvest established by the NWMB but they have first claim on any wildlife. The basic needs level shall constitute the first demand on the total allowable harvest. Where the total allowable harvest is equal to or less than the basic needs level, Inuit shall have the right to the entire allowable harvest. A five year harvest study to assist the NWMB set a basic needs level will commence shortly. The board is required to presume, however, that Inuit need the total allowable harvest of a number of listed species, including bowhead whales. The board is to periodically review the basic needs level to determine if an additional harvest allocation to Inuit is required in light of growth of the Inuit population, increased intersettlement trade or other factors. The resulting 'adjusted basic needs level' may over time reach the total allowable harvest, but may never be reduced below the basic needs level. The surplus (animals that remain to be harvested) are to be allocated first to other residents of the NWT for personal consumption, second to sport or commercial operations existing at the time of ratification of the agreement, and third for new sport and commercial operations. The board or federal or territorial minister may restrict Inuit harvesting only to effect a valid conservation purpose, to give effect to the allocative system detailed in the agreement, or to provide for public health and safely (Fenge 1992,30). The board is to have a major role in preserving wildlife habitat, but the agreement makes clear that the primary responsibility for the management of lands shall be exercised by appropriate government agencies and such related bodies as may be established by the agreement. This rider was insisted upon by government that feared an expansive board mandate might hinder the disposition of rights to use and develop sub-surface resources. Fenge states that the 'ability of

[27] 'Eskimos granted land rights' *Canberra Times* 1 November 1992.

the NWMB to exercise the various functions identified in the agreement will depend upon the budget that it receives, the number, quality and dedication of its staff, and foremost, the attitudes and skills of the board members' (Fenge 1992,32).

2.3 United States

As far back as 1905, the US Supreme Court recognised that the native American tribes of the North West coast were not 'much less dependent upon fishing than the air they breathed'.[28] The *Winans* case established the fishing right as a property right that burdened both the title of federal land grantees and state regulatory activities, even though the state was not a party to the treaty. This gave native American fishers the right to be treated separately from the rest of the fishing community and to participate meaningfully in the formulation of fishing regulations (Anderson 1987).

In 1974 the district Court of Washington, in US v Washington recognised the right of a North West tribe to 50% of fishery allocations under treaty. This right was confirmed by the Supreme Court in 1979.[29] Cohen has pointed out that the response to this ruling has been the development of innovative institutional initiatives, including tribal fisheries committees, a three tribe cooperative which jointly provides harvest management, biological research enforcement and other functions for member tribes and the inter-tribal Northwest Indian fisheries commission which serves as a coordinating agency which provides services such as technical assistance and public information (Cohen 1989).

Moreover the treaty right implied an environmental right which native Americans have successfully used to restrain development that threatens marine stocks. In 1985 treaty tribes were instrumental in negotiating the US—Canada Pacific Salmon Treaty which upholds the Indian right to take fish. The US legislation implementing the Pacific Salmon Treaty considers the tribes on an equal basis with the states, and gives them direct representation on the institutions established to implement the treaty (Yanagida 1987; Jensen 1986; Cohen 1989).

Professor Meyers' recent article reviews the legal literature on native fishing rights in the US and Canada and concludes that the states and provinces are permitted to regulate native access to natural resources but only to the degree necessary to conserve those resources (Meyers 1991).

With respect to treaty-guaranteed rights there is emerging case law in both the US and Canada suggesting that treaty language providing the 'sharing of resources in common with' means that indigenous people have some priority to those resources, after conservation measures are met. This 'priority' reflects the duty to interpret agreements made between the natives and their governments as the natives understood them. The 'priority' also owes a debt to the nature of aboriginal rights, as rights existing from time immemorial. Additionally, in both countries, there is also an emerging sense that native rights may impose a servitude on the federal and state/provincial governments to protect the 'property right' in the resource.

2.4 South Pacific

In the South Pacific there exist a large variety of marine tenure systems, although more often than not coastal villagers claim and exercise strong traditional rights over nearshore fishing grounds. Such institutions of customary marine tenure regulate fishing by limiting access to resource areas, restricting the use of various fishing methods and regulate the capture of certain species. Fishing grounds contained within customary marine tenure (CMT) systems of the

[28] United States vs. Winans 198 US.371 1905.
[29] Washington Passenger Fishing Vessel Assn 443 U.S. 658 1979.

South Pacific are generally communally-held property, inherited as ancestral title through generations, and cannot be sold or transferred to outsiders. CMT is much more than a resource management tool: it forms an important part of the framework for organising political and social relationships and for defining cultural identities in the Pacific. Sophisticated local knowledge also tells them where and how they ought to fish to get the best catches. There is now an expanding literature that describes customary marine tenure and traditional environmental knowledge in the South Pacific (Doulman 1992; Hviding 1991; Hviding and Ruddle 1991; Hviding 1992).

Kenneth Ruddle has identified six basic social principles of CMT in the Pacific: (1) that rights in sea and marine resources depend on social status: (2) that resource exploitation is governed by resource use rights: (3) that resource use territories are defined: (4) that marine resources are controlled by traditional authorities: (5) that conservation is widely practised: (6) that sanctions and punishments are meted out for breaking regulations (Ruddle 1988). While CMT in the Pacific may be referred to as systems of 'traditional resource management' this does not mean that 'tradition' is something static, rigid and unchanging. As Hviding and Ruddle point out: '"Tradition", as it exist in the rapidly changing world of indigenous peoples, is a system of knowledge and rules which has, on the one hand, strong roots in local history and experience, and which is on the other unwritten and uncodified, thereby allowing for flexibility in adapting to changing social, political, economic, or ecological circumstances. Thus, far from being overwhelmed by commercialisation and resource scarcity, many CMT systems in Oceania appear to have considerable capacity for handling and adapting to new circumstances, thereby becoming potentially important tools in the contemporary management of fisheries and of the coastal zone in general' (Hviding and Ruddle 1991,10). Most types of marine tenure systems are, as noted above, of traditional, unwritten kind, based on local customary law. However in Fiji, Vanuatu, Cook Islands, French Polynesia, Solomon Islands and Western Samoa the existence of viable CMT systems is given explicit legislative support (Hviding and Ruddle 1991,6).

It remains a difficult question as to whether and how far traditional systems should be codified. At a workshop on 'People, Society, and Pacific Islands Fisheries Development and Management' held in Noumea 5-9 August 1991 there seemed clear agreement that it was not desirable to dilute the flexibility of CMT systems and several representatives noted that codification of CMT is very difficult and not desirable (Hviding and Ruddle 1991,80). At this workshop there seemed to emerge an approach of 'joint management' that has national government settling basic rules and principles while simultaneously recognising important aspects of customary resource rights, and local 'government' handling locally appropriate management within this legislative framework. It was argued by several speakers that local 'title to' resources should imply an obligation to manage that resource effectively. This stand is not unproblematic, however, since it involves political issues far beyond the restricted field of fisheries legislation, relating to local-level autonomy, rural influence on development policy, and recognition of hereditary claims and customary rights, all of high importance in the contemporary South Pacific (Hviding and Ruddle 1991,8). A recent consultant's report to the Forum Fisheries Agency recommended that the transfer of traditional knowledge and practices to guidelines for resource use legislation be a logical focus for future action (Hviding and Ruddle 1991).

At the sixth technical Subcommittee of the FFA workshop on decentralised Nearshore Fisheries management in Oceania held in Niue 27—30 April 1992 one subject kept coming up—to help people manage their resources more effectively they must be supported not only scientifically but also *legally* and *politically*. In the absence of strong legal protection local authority over marine resources is likely to break down if outsiders see a high enough value in obtaining access to them. This brings pressure on the courts to define precisely relevant local

oral traditions, such as those associated with CMT. This tends to freeze tradition, leaving villages less flexible in their response to population movements, changes in fishing methods, or other developments that require adjustments in local resource-use patterns and controls (Johannes 1992[a]). The Niue workshop recommended that FFA should conduct a review of regional constitutional and legislative provisions and international law relevant to customary marine tenure and management systems. The report should be available to member countries before the annual session of the Forum Fisheries committee in 1993 (Johannes 1992).[30] As a member of the Forum and participant in the Niue workshop Australia could be expected to respond to the recommendations flowing from the report.

2.5 Implications for GBRMPA

In the evolution towards greater self-determination, indigenous groups have sought greater legal and political protection of marine resources. Legal and political aspirations for self-government are in fact being incorporated in marine resources policies in the US, Canada, New Zealand and the South Pacific. Decisions in Canada and New Zealand, in particular establish a priority be given to aboriginal interests, an equitable allocation of the resource, and potentially, decision making in the co-management schemes. Although these decisions are often clouded by treaties, not relevant to the Australian situation, it should be noted that Aboriginal peoples are being invited to become genuine partners in management and government interferences are having to be justified by cogent reasons. The scope of protected aboriginal rights to marine resources in the US, NZ and Canada is evolving through judicial elaboration and political negotiation. In the main that evolution is towards widening the scope for co-management initiatives and joint conservation projects. In framing its policies the GBRMPA should be aware that while it may not have the power to act independently from the Commonwealth on some of these issues, the broad political and legal trends overseas exhibit a respect for the existence of genuine, and possibly extensive marine resource rights and a commitment by government to enable aboriginal communities to prepare for co-management negotiations. On the basis of overseas experience this seems the *sine qua non* for effective policy development in this area.

[30] In July 1992 the first issue of the *Traditional Marine Resource Management and Knowledge Information Bulletin* appeared. This provides a vehicle for communication among members of the Traditional Marine Resource Management and Knowledge Special Interest Group (SIG). This SIG was established as a result of recommendation No 12 of the 23rd Regional technical meeting on fisheries, held at SPF headquarters Noumea 5-9 August 1991, to provide a focus for collection, discussion and dissemination of information on traditional marine ecological knowledge.

3. AUSTRALIAN EXPERIENCE WITH SEA RIGHTS

The great strength of the bonds linking Aboriginal people and their land is common knowledge to a growing sector of Australian society. The political demand for land rights has ben very important in extending that knowledge. Land rights has been the focus for indigenous groups to maintain and recreate the spiritual linkages essential to cultural stability as well as to achieve social and economic development. Over 12% of Australia is now under their control. As Young points out; 'Land not only reinforces aboriginal identity and gives confidence to withstand forces of an advanced industrial society, it is also a resource, possibly of considerable economic potential' (Young 1992,146). In general the current distribution of Aboriginal lands and the types of tenure granted depend on the different types of legislation which operate in each state and territory. No national Aboriginal land rights legislation exists and it is basically only the Northern Territory that is subject to federal legislation (Young 1992).[31]

While the value of land is recognised for the vitality it gives to Aboriginal society and the positive contribution that Aborigines can play in land management is also widely recognised (see Young *et al* 1991) the importance of sea rights for Aboriginal groups has received little judicial or legislative recognition in Australia (Cordell 1991). There is no doubt that for many Aboriginal groups the boundaries of their ancestral estates do not end at the water line and that there is an intimate relationship between land and sea (Cordell 1991; Johannes and MacFarlane 1991). In the case of the Torres Strait it is impossible to isolate the sea from Torres Strait culture and this region also provides examples of customary sea tenure. The linking of land and sea is a fact of creation with mythical beings leaving dreaming tracks and sacred sites far offshore. These tracks define clan estates in marine environments as well as on the land (see generally Davis and Prescott 1992). In the northern section of the GBRMP Smyth suggests that any particular stretch of coastline and its adjacent sea, reefs, islands, cays and associated resources are under the ownership and stewardship of a particular and identifiable descent group. That group will have primary rights of access to those places and resources and primary responsibility for management (Smyth 1992,37).

3.1 Sea Rights in the Northern Territory and Queensland

The Northern Territory is the only place in Australia that provides for Aboriginal sea rights, although in a very limited way. The author has discussed the Northern Territory situation extensively (see Bergin 1991) but in brief the situation is as follows:

- S.12(3) *Aboriginal Land Act (NT) 1978* makes provision for the NT government to grant 'sea closures' over areas of the coast within 2 km of mean low water mark adjacent to Aboriginal land. To date there have been two sea closures.[32]

- Closed seas are not owned by Aboriginal land owners and they do not have management responsibilities.[33]

- Closed seas are still open to holders of commercial fishing licenses that predated the actual date of sea closure.

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[31] There is also federal land rights legislation for the ACT [*Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)*] and for Victoria]Aboriginal Land (*Lake Condah and Framlingham Forest) Act 1987 (Cth)*]. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* also has national reach.

[32] Three new sea closure applications have recently been made in the NT, two of which are the result of concern at a proposal to declare a marine park in the areas, without taking into account Aboriginal interests. Personal communication David Allen, Northern Land Council, Darwin. See also 'Blacks claim part of NT's fishing grounds: council' *Canberra Times* 8 January 1993.

[33] Aborigines in the NT informed the Resource Assessment Commission in 1992 that the sea closures had failed to prevent the slaughter of important fish species as well as failing to prevent damage to sacred sites off the coast. See 'Aborigines call for Sea Rights in NT' *The Age* 8 October 1992.

- Sea closure applications have been expensive and slow to be resolved.

The only other Land Rights Act to provide control by Aboriginal people below high water mark is in Queensland, although the new Aboriginal land Act 1991 does not include provision for sea rights.[34] Under that Act Aboriginal people cannot claim marine estates unless they fall within the provision of 'tidal land', the requisite traditional, historic or economic association is established and the governor declares by Order in Council that the tidal land should be so claimable, s.2.15(1). Tidal land is land that is 'ordinarily covered and uncovered by the flow and ebb of the tide at spring tides', s.1.03. Sea waters and non-tidal seabed cannot be claimed, s.2.19. As noted above claims for tidal land (and not the water inundating the land which would remain under government control) can only be made if the tidal lands are made available for claim by the government. It is the policy intention of the Lands department to consider those tidal lands adjacent to either transferable land or vacant crown land under the new Act. It is not envisaged that strips of tidal land not adjacent to transferable land or vacant crown land to be gazetted as claimable land will be considered. It is not envisaged that tidal lands adjacent to national parks would be gazetted if they are outside the national park.[35] No tidal land has yet been made available for claim in Queensland.

3.2 Legislation on Aboriginal fishing Rights

While current Australia law is silent on the question of customary sea rights it does accommodate to varying degrees customary marine use rights. As will be noted in the next chapter, the High Court held in Mabo that traditional fishing as a usufructuary right is consistent with the crown's radical title. Such rights would be territory bound and in most cases operate within fairly narrow areas. They can be extinguished in the same way as native title—if for example it was incompatible with other usages in areas of large public access areas or a particular statute regulated the activity in a particular way or explicitly extinguished the right. Brennan, J. concluded that:

Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights (Mabo 1992,426).

The Law Reform Commission in 1986 did a comprehensive analysis on Aboriginal fishing rights in Australia. The Committee found that there are no exemptions for traditional fishing under fisheries legislation in South Australia, Victoria or Tasmania. In New South Wales there is no exemption from general fisheries legislation, with the exception of inland anglers license under the *Fisheries and Oysters Farms Act 1935 (NSW)*. In Western Australia Aboriginal people engaged in traditional fishing are exempt from the *Fisheries Act 1905 (WA)*. However the government may restrict or limit this exemption if it is abused or the species is likely to become depleted. In the Northern Territory Aborigines are only subject to fishing laws which expressly apply to them. However they are not authorised to trespass on leases or to interfere with traps or nets on another person's property, nor engage in commercial activity under the

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[34] Sea rights are not even noted in Brennan's comprehensive book on the Queensland Lands Right legislation (see Brennan 1992). Sutherland suggests that this may raise concerns about consistency with Art.27 of the International Covenant on Civil and Political Rights because it may prevent Aboriginal coastal communities from exercising their own culture in relation to traditional marine estates (Sutherland 1992,11). This is too broad an interpretation. The Queensland Aboriginal Land Act does not really *deal* with maritime estates. If it actually stated that there would be no title to marine estates then that may be a different matter.

[35] Personal communication Ross Rolfe, Aboriginal Lands Officer.

fisheries act. This Act does enable a community license to be taken out for a nominal license fee to use up to 200 metres of gillnet (mesh size 100mm or less) and sell or barter fish in that community. This permits a quasi-commercial fishing operation to exist without other provisions of the regulations being enforced, such as the need to provide detailed catch and sales returns.

3.3 Queensland Fisheries Legislation

In *Queensland the Fisheries Act 1976 (Qld)* prohibits the taking of fish or marine products in closed waters or closed seasons, and prohibits the taking of protected species, but residents of Trust areas (formerly Reserves) and Aboriginal lands who engage in non-commercial fishing without explosives or noxious substances are generally exempt under that and other acts, except in relation to certain matters such as mangrove protection measures. A similar provision exists in the *Community Services (Aborigines) Act 1984 (Qld)* s.77 and the *Community Services (Torres Strait) Act* s.76. It should be noted that an Aboriginal who is resident of an 'area' (defined as meaning a trust area) who takes marine products by traditional means for consumption by members of the community outside that 'area' is not liable for prosecution under the provisions of the *Fauna Conservation Act 1974*. There are no words in the *Community Services (Aborigines) Act* or in the fisheries legislation to limit the taking to an 'area' as defined in the Act so that the exemption applies to collecting anywhere in Queensland. The Minister may issue a permit to any person for the collection of protected species such as dugong and turtle, although it is understood that this is rarely done. Approvals have been administered under the exemption provision. Queensland Aboriginal communities are required to be licensed under the Fishing Industry Organisation and Marketing Act 1982 (Qld) for all commercial fishing. The Queensland Fish Management Authority (QFMA) issues community permits to engage in commercial fishing. Each DOGIT community has such a permit but these are utilised to varying extents (Sutherland 1992). The Queensland Department of Primary Industries and QFMA negotiate with Torres Strait Islanders through Treaty fisheries liaison meetings.

The recent *Nature Conservation Act (Qld) 1992* applies to areas under Queensland jurisdiction. In areas where the GBRMPA operates the Commonwealth legislation covers the field so the state act would have no valid operation. It allows for the taking and use of wildlife for traditional purposes, even in national parks, but only in compliance with conservation plans for areas and wildlife (ss.85,102). An offence is created when an Aboriginal or Torres Strait Islander person takes, uses or keeps protected wildlife in contravention of a conservation plan or other authority. A defence relating to unintentional taking or interference with a cultural or natural resource is provided, an addition to the defences provided under the *Criminal Code* (s.57). The provisions relating to taking or using wildlife were based on the Law Reform Commission report on traditional hunting and gathering which provided for precedence of conservation principles (LCR 1986). Restrictions however would be developed cooperatively in close consultation with the community concerned.[36] Departments may issue permits for taking wildlife which can include fish species in state waters and the IUCN categories for protected species will apply (Part 7). Once the Act is proclaimed in whole any 'protected wildlife' under the Act will be removed from the definition of 'fish' for the purposes of the *Fisheries Act and the Fisheries Industry Organisation and Marketing Act 1982 (Qld)*. The Act also extends to the natural and cultural resources of declared 'protected areas' to the exclusion of the *Fisheries Act*. The *Community Services (Aborigines) Act (Qld)*, the *Community Services (Torres Strait) Act 1984 (Qld)* and the *Local Government Aboriginal Lands Act 1978 (Qld)* are also amended to provide that the traditional taking of indigenous animals and plants which are prescribed under the *Nature Conservation Act 1992 (Qld)* are undertaken in accordance with that latter Act. S.90 of the Act provides that an Aboriginal or Torres Strait islander does not

[36] Second reading speech, Hon. P. Comben, Parliamentary Debates, Queensland Legislative Assembly, 28 April 1992,4584, 4588.

have the right to enter any land for the purpose of taking wildlife without the landholders consent. 'Land' in the act also includes 'waters'. The GBRMPA would not be a landholder under the Act given the definition in the Act of landholder, so permission would not be needed under the Act. But of course regulations made under the GBRMP Act do require permission to enter or use a zone for the purpose of traditional fishing.

The *Nature Conservation Act* while making conservation a first priority in areas of national park claimed by traditional owners does recognise traditional fishing and provides for opportunities for Aboriginal involvement in agreed conservation plans in those areas of national parks gazetted as national park (Aboriginal land) and national Park (Torres Strait Islander Land). It allows for the process of setting up of management committees to do the management plan similar to conservation plans under the Act. A National Park (Aboriginal Land) is to be managed 'as far as practicable, in a way consistent with any Aboriginal tradition applicable to the area, including any tradition relating to activities in the area' s.18(2).

3.4 GBRMPA and Traditional Fishing

As far as traditional fishing in the GBRMP is concerned there is an absence of any recognition of traditional fishing interests in s.32(7) of the *GBRMP Act.*[37] However, there is provision in zoning plans for Aborigines and Islanders to carry out traditional hunting and fishing. There has been a category of use, traditional fishing, and traditional hunting and gathering with an associated definition of traditional inhabitant in all zoning plans from the Cairns plan onwards. The original zoning plan made no such mention because there was no trace of any traditional hunting or fishing in the Capricorn bunker group.[38] Permits have to be sought for traditional hunting and fishing in the GBRMP consistent with zoning plans and GBRMP officers generally follow the Fisheries Act when allocating permits which can be individual or community based.

Traditional fishing is taken to mean fishing, otherwise than for purpose of recreation, sale or trade, in an area by a traditional inhabitant or group of traditional inhabitants. A traditional inhabitant means an Aboriginal or Torres Strait Islander who lives in an area or areas in accordance with Aboriginal tradition or Islander tradition, respectively. Regulation 13AC(5) requires that in considering an application for permission to enter or use a zone or designated area in the Mackay/Capricorn and central sections of the marine park, for the purposes of traditional hunting or gathering, the Authority have regard to the need for conservation of endangered species and, in particular, the capability for the relevant population of that species to sustain harvesting; the means employed in the proposed traditional fishing or traditional hunting and gathering; the number of plants and animals or the amount of marine product proposed to be taken; the purpose of the taking (primarily to ascertain whether the hunting will comply with the provision of the zoning plan where traditional hunting and gathering is interpreted as 'collecting, otherwise than for the purposes of recreation, sale or trade'); whether entry and use of the area in which the activity is to take place will be in accordance with Aboriginal or Torres Strait Islander tradition; the normal place of residence of the applicant: whether the applicant is a traditional inhabitant.

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[37] S.32(7) In the preparation of the plan, regard shall be had to the following objects:
(a) the conservation of the Great Barrier Reef;
(b) the regulation of the use of the Marine Park so as to protect the Great Barrier Reef while allowing the reasonable use of the Great Barrier Reef Region;
(c) the regulation of activities that exploit the resources of the Great Barrier Reef Region so as to minimize the effect of those activities on the Great Barrier Reef;
(d) the reservation of some areas of the Great Barrier Reef for its appreciation and enjoyment by the public; and
(e) the preservation of some areas of the Great Barrier Reef in its natural state undisturbed by man except for the purposes of scientific research.

[38] Personal communication R. Kenchington.

For urban based Aboriginals and Torres Strait Islanders permits were in the past refused on the basis that they would not allow for compliance with the fisheries legislation. The *Fisheries Act 1976 (Qld)* provides that Aborigines 'who are not at the material time a resident of a reserve' are subject to the provisions of the fisheries legislation (s.6). However the recent trend has been for QDPI to interpret the fisheries legislation in a broad fashion and to allow non-reserve Aborigines to engage in traditional hunting on the proviso that only Aboriginal and Islander people who are residents of a reserve undertake the collection of dugong and turtles. (In the past prosecutions have occurred against non-trust Aboriginal people for dugong and turtle hunting.) As GBRMP permits are subject to the condition that 'all activities must be in accordance with the provisions of the laws in force from time to time in Queensland' this means that in assessing an application GBRMP must make sure that the permit is issued in the name of, and hunting will be undertaken by, a person who meets the QDPI proviso.

Applicants are assessed against the criteria and if supported against the criteria applicants are advised of a QDPI requirement that hunting be undertaken under the direct supervision of a resident of a reserve (at least one member of the hunting party) or a DOGIT Community.[39]

GBRMP officials use the working definition of a traditional inhabitant as adopted by the Commonwealth in 1978: 'an Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted by the Community which he/she is associated'. Aboriginality is therefore defined in terms of self-perception not in terms of place of residence. Aboriginals are not restricted to using only traditional means of fishing or hunting under the Fisheries Act or in terms of how officials interpret the regulations in the GBRMP. Modern technology is permitted and there are no requirements to use traditional means such as the dugong harpoon or sailing canoes. This is in accordance with the recommendation in the 1986 Law Reform Commission report that in determining whether an activity is 'traditional' attention should be focussed on the purpose of the activity rather than the method. This approach, as noted earlier, is adopted in the new Queensland *Nature Conservation Act.*

The current permit system which regulates traditional hunting for dugong and turtle (specifically the green turtle, Chelonia mydas) by Aborigines and Torres Strait Islanders may be affected by the Endangered Species Protection Act 1992 (CES), designed to promote the recovery of endangered species and to prevent others from becoming endangered. Currently dugong are not listed as endangered in Australia but are declared as vulnerable by the IUCN. They are 'declared animals' in schedule 1b of the GBRMP regulations, thereby invoking the protective ambit of those regulations (Sutherland 1992,31).[40] Four species of sea turtles are listed as endangered by the IUCN but only the loggerhead turtle is currently listed as endangered in Australia, the other three as vulnerable. Of course the categories indicating threat levels may be changed from time to time. It should be noted that current restrictions on traditional fishing and hunting that place emphasis on conservation are consistent with international human rights obligations, although arbitrary and non-justifiable restrictions may not be (Sutherland 1992,29).

3.5 Torres Strait

As far as Torres Strait Islanders are concerned there is an extensive consultative structure pursuant to the Torres Strait treaty (Elmer and Coles 1991) and the treaty recognises the rights of traditional inhabitants of the protected zone to the marine resources of the region, so long as the fisherman is not prohibited from doing so under a Commonwealth or State law. Outside the protected zone Commonwealth fisheries legislation provides no recognition of indigenous fishing rights.

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[39] Personal communication Dr David Lawrence, GBRMPA.

[40] This only means that a permit is required and taking is only permissable in certain zones.

In contrast to the GBRMPA the *Torres Strait Fisheries Act 1984 (Cth)* 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 of the traditional inhabitants, including their rights in relation to traditional fishing (Article 12). The Protected Zone Joint Authority established under the Act is to manage fisheries in Torres Strait and to seek the views of traditional inhabitants where it considers it appropriate to do so where a matter may affect traditional inhabitants interests. It is advised by a Torres Strait Fisheries management committee which includes Islander representation and this committee also receives advice from Torres Strait Fishing Industry and Islander Consultative committee.(Elmer and Coles 1992,28). The 18 member Joint Advisory Council is to include three members representing traditional inhabitants from Australia and PNG, unless otherwise agreed. The Council should ensure traditional inhabitants are consulted and given an opportunity to comment on matters of concern to them. These consultative mechanisms are not enshrined in the Treaty or the *Torres Strait Fisheries Act.* They are instruments devised by the Protected Zone Joint Authority.

Commercial dugong and turtle hunting is not allowed in the strait but traditional hunting for consumption is allowed with catches monitored by the Australian Fisheries Management Authority (Coles and Depper 1992). Traditional inhabitants are entitled to engage in community fishing in the strait without a license unless the Minister has issued a declaration that a license is required or unless Queensland fisheries law applies (Sutherland 1992,32). The *Torres Strait Fisheries Act* allows community fisherman using vessels less than 6m in length to fish commercially in a Protected Zone Joint Authorities fisheries without licenses. It does this by creating a special category of commercial fishing by Australian traditional inhabitants called 'community fishing'. According to Coles and Depper: 'Community fishing is allowed for fishermen who are Australian traditional inhabitants and who live in the TSPZ or in adjacent coastal area and maintain traditional customary association with areas in or in vicinity of the TSPZ. Community fishing is an Australian initiative and does not apply in PNG waters' (Coles and Depper 1992,9). Boats above six metres are required to be licensed for commercial fishing. Community fishing should not be confused with traditional fishing which can only be for private consumption. The commercial exploitation of barramundi fishery in the Torres strait is restricted to community fishing by Australian traditional inhabitants (Coles and Depper 1992,3) and both the crayfish and spanish mackerel fishery are managed to promote the benefits of Torres Strait Islanders (Coles and Depper 1992,4).

Despite the fact that Torres Strait Islanders are involved in an advisory capacity in fisheries management there has been concern expressed by Torres Strait Islanders about perceived damage to subsistence and Islander commercial fisheries by non-Islander operators. For example non-Islander use of underwater breathing equipment for catching crayfish is seen as a threat to the free diving and subsistence and commercial operations of Islanders. On Badu Island the people have expressed the view that the resources of Torres Strait should be for the benefit of the Islanders and that they should be given control of waters within 3 miles of their island (Smyth 1992b,37).

3.6 Summary

Australian laws do not recognise Aboriginal marine tenure, except in a very limited sense in the Northern Territory. This is, however, a deficient approach, with the 2 km limit being an inadequate buffer for Aboriginal people, (even if it were to exclude commercial fishing). In the Northern Territory no real Aboriginal management role is envisaged in areas of 'closed seas'. Some fishing legislation does make provision for Aboriginal traditional fishing rights, although fishing rights have not emerged as an important indigenous political issue in the way they have in New Zealand. Traditional fishing is permitted in all zones except in Preservation Zones in

the Great Barrier Reef Marine Park. Aborigines can of course fish 'non' traditionally in the appropriate zones, at least for recreation. When considering traditional fishing 'tradition' needs to focus on the purposes of action rather than means, and so can include the use of modern technology. While Aboriginal sea rights have not had much prominence in Australia the political and legal setting in which these issues are considered has been transformed with the High Court's decision in Mabo. This is discussed in the next chapter.

4. MABO AND MARINE TRADITIONAL NATIVE PROPERTY RIGHTS

On the 3 June 1992 a majority of the High Court ruled in favour of Mr. Eddie Mabo and others in the claim against the Queensland government for recognition of their ownership of most of Mer, one of three islands in the Murray Group in eastern Torres Strait. In Mabo the court effectively overturned the long held legal doctrine of *terra nullius*, which maintained that Australia was land belonging to no-one prior to Crown acquisition of sovereignty. The High Court established that the people of Mer hold a 'native title' to their island which is recognised under Australian law. The case has changed the political and legal setting in which the Authority must deal with indigenous issues and therefore deserves careful attention.

4.1 Summary of Mabo judgement

All seven High Court judges in Mabo[41] explicitly accept that (by varying names) traditional native property rights (TNPR) existed before European colonisation of Australia. Even Dawson J. who was the lone dissentient, assumed this was the case (Mabo 1992,465). Not that this made much difference: he laid emphasis on the need for the Crown to recognise any form of native interest in land and noted that had not occurred. In the absence of that recognition, on the assumption of crown sovereignty, any TNPR as may have existed were extinguished (Mabo 1992,480.481). The other six judges found both that TNPR existed and had survived the assertion of crown sovereignty in Australia. Brennan J. (with whom Mason C.J. and McHugh J. concurred) formulated his judgement basically as follows. After a long historical survey of the law and relevant sociopolitical history, he concluded that TNPR existed and could continue to exist and were cognisable by the common law after colonisation. The assertion of Crown sovereignty in Australia delivered the *radical* title to all land in Australia to the Crown. But that radical title did not equal absolute *beneficial* title. Radical title indeed could co-exist with TNPR; it was not incompatible with TNPR. Deane and Gaudron JJ. essentially came to the same conclusion, again after a long historical discussion where they canvassed the appalling history of Aboriginal deprivation and destruction in Australia in detail and with considerable feeling. TNPR, they said, have existed and survived into post-colonial Australia although they could be extinguished by the Crown. They described TNPR as 'presumptive common law native title' (Mabo 1992,456). This formulation is somewhat different to that used by Brennan J but nothing seems to turn on the difference.

At least with respect to land-based TNPR the following aspects of TNPR are now relatively settled in Australia.[42]

1. TNPR survived the assertion of Crown sovereignty in Australia.

2. The Crown's acquisition of radical title did not, of itself, disturb TNPR.

3. TNPR arise from the connection of a particular Aboriginal group to particular land.

4. The survival of TNPR to contemporary times requires the survival of the particular group(as recognised within the group) and a remaining general connection between that group and the particular land pursuant to the laws and customs of that group.

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[41] Eddie Mabo and Others v The State of Queensland. (1992) 66 A.L.J.R. 408. The Mabo decision is also reported in (1992) 107 A.L.R. 1.

[42] Most of these propositions are drawn from the judgement of Brennan J (A.L.J.R. 1992,434-435). The main difference Deane, Gaudron and Toohey JJ have with Brennan J is on the compensation point. This is discussed in the text at point 4.6. Toohey J. is also expansive on the issue of a fiduciary duty owed by governments to indigenous people.

5. TNPR may be lost 'naturally' with the death of the last of the members of the relevant group or clan, or by severing of connection between the group and the particular land through the group ceasing to observe the laws and customs of that group.

6. It is immaterial, however, that the laws and customs of the particular group have undergone some change: TNPR can survive such modifications.

7. TNPR generally are inalienable although they may be voluntarily surrendered to the Crown.

8. The nature of TNPR may vary, in common law terms, from usufructuary (the right of using or taking the fruits of something belonging to another), to proprietary. An example of usufructuary rights might be fishing rights (Mabo 1992,435).

9. Subject to particular group laws and customs, TNPR usually will be communal title.

10. A sub-group or an individual member of such a sub-group would have a sufficient interest to protect or enforce the communal title (Mabo 1992,431).

11. The precise bounds of given TNPR are to be ascertained according to the laws and customs of the particular group which has connection with that particular parcel of land (Mabo 1992,434-435).

12. Where the crown has validly alienated land by granting an interest that is wholly or partially inconsistent with the continuation of TNPR in a given case, the TNPR are extinguished to the extent of the inconsistency (Mabo 1992,434).

13. Freehold title extinguishes TNPR. The valid granting of leasehold interest at least where it gives a right of exclusive occupancy or possession is sufficient to extinguish TNPR (Mabo 1992,434,436).

14. The valid grant of lesser interests, however, for example, authority to prospect for minerals, may not extinguish TNPR (Mabo 1992,434).

15. Neither the creation of aboriginal reserves nor the appointment of trustees to control a reserve would extinguish TNPR (Mabo 1992,433).

16. TNPR continue where waste lands have not been appropriated or where appropriation and use is inconsistent with the concurrent enjoyment of native title over the land (for example, where land is set aside for a national park (Mabo 1992,434).

17. A law merely regulating the enjoyment of TNPR or which creates a regime of control which is consistent with the enjoyment of TNPR will not extinguish TNPR (Reg. v Sparrow (1990) 70 DLR(4th)385).

18. The extinguishment of TNPR depends on the intention of the Crown in making the grant rather than on the effect which the grant has on the right to enjoy the native title.

19. Until 1975, the states appear to have enjoyed fairly well unfettered power to extinguish TNPR. Since the passage of the Racial Discrimination Act 1975 (Cth), the ability of the states to extinguish TNPR has been significantly curtailed. The Mabo case of 1988

makes it clear that any attempt explicitly or via practical effect, to target TNPR for extinguishment will be constitutionally invalid (Mabo 1992,452).[43]

4.2 Mabo and Marine Traditional Native Property Rights

Can marine TNPR be recognised in common law following the Mabo case? The issue of rights to the seas, seabed and reefs of Murray Island was not addressed in the final judgement. Claims to Commonwealth and subsequently Queensland waters were withdrawn as the case proceeded, so the High Court was only called upon to rule in respect of the land of the island of Mer. It is understood that the Murray Islanders wish to reopen negotiations on this aspect of their claim with the Queensland government and have indicated that they want a negotiated settlement rather than go through the judicial process. A working group of Murray Islanders and people from Torres Strait and the mainland has been formed to further these claims.[44]

Both Sutherland and Bartlett suggest that there is no reason why following Mabo that customary marine tenure could not be recognised and that Mabo can be read as not just applying to land tenure.[45] This would appear to be a correct reading of the case (see Sutherland 1992,12-18, Bartlett 1993), but while Mabo opens the way for arguments supporting the existence of native marine tenure there are different problems than is the case on land.

If it can be established that there is a continuing traditional association with the seabed then native title principles would appear to apply to it. A common law that did not recognise Aboriginal title to the marine portion of an international state's territory would, after Mabo, seem arbitrary given that the Aboriginal claim to land and the states claim to land and water both stem from the legal consequences of discovery. Arbitrarily excluding the sea from Aboriginal title would not seem consistent with the sympathetic approach adopted in Mabo that looked to the unity of the Aboriginal environment. The approach after Mabo would be to see whether the territorial sea or beyond was being used. If, as was held in Mabo, loss of customs and connection with the land can be extinguish title then there would need to be established such a connection with seabed and territorial sea. It is clear from Mabo that you do not require to be physically located on the land (a nomadic lifestyle would thus be accommodated).

Of course as a matter of fact it may be more difficult to demonstrate a traditional connection with the seabed than with the land and it may be that the right recognised is simply a right to gather. A group of people, say, that caught turtle every year would have a good prospect of establishing their association. Of course it may be necessary to draw a distinction here between the sea and seabed—a right to gather may not be a title to the seabed depending on the degree of association with the actual seabed. The difficulty here is that it is not entirely clear from Mabo what the native title is—it may extend from an interest similar to fee simple to that simply of a right to traverse the land/sea. Thus it is possible that Aborigines may be able to gather resources and that might be the extent of their native title. They may not be able to establish a fee simple type title in the seabed. It is still native title but less than a fee simple. Traditional fishing, as a usufructuary right, was recognised as consistent with the Crown's radical title in Mabo (Mabo 1992,440-443). Brennan J. suggested that usufructuary rights could be protected by such legal or equitable remedies as were appropriate, including a representative action (Mabo 1992,431). Thus assuming marine TNPR can be established the most likely offshore rights that may be applicable will be rights associated with fishing and that those

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[43] The Mabo case of 1988 concerned the preliminary issue of the validity of the *Coastal Islands Declaratory Act 1985(Qld)*. That Act was found to be invalid by the High Court because it was in conflict with section 10 of the *Racial Discrimination Act (1988)* 166 C.L.R. 186.

[44] See 'Islanders may claim waters of Strait' *The Australian* 23-24 January 1993.

[45] In a recent current issues paper on Mabo issued by ATSIC the commission notes that there can be 'no doubt' that under indigenous systems of land tenure, ownership could extend to stretches of coastline and adjacent seas, reefs, islands etc. Nevertheless, native title claims to areas beyond the foreshores—e.g. to the seabed and territorial sea areas—may be matters of 'international concern', incapable of determination on Mabo principles see ATSIC 1993,7.

rights will be rights that involved fishing for food, that is not fishing rights of a more commercial nature, unless this could be established as an aspect of traditional custom (see Dawson J., Mabo 1992,462-463).[46]

There are international law aspects to recognition of native title to the seabed as opposed to land that may constrain recognition of native title to the seabed, a fact acknowledged by Mr Justice Brennan. He suggested that under international law the Commonwealth government would have primary sovereignty over the territorial sea , seabed and air space and continental shelf and incline (Mabo 1992,433). The application of international law of the sea would be relevant here and no grant of title to the seabed would, for example, allow restrictions to be placed on the right of innocent passage.

In the pivotal case, the Seas and Submerged Lands case 1975,[47] the High Court finds support for the proposition that both the territorial sea and the continental shelf accrue to the Commonwealth without any need of any legislative assertion of offshore rights. While the States retain their inland waters, they enjoy no property or property-like rights over other offshore areas, except by virtue of Commonwealth statute. The Commonwealth enjoys sovereignty in the territorial sea which equates with proprietorial rights in the seabed, subsoil, sea and air space. These rights accrue through a process of absorption of customary and treaty international law principles into Australian municipal law (see Cullen 1990,52-58).[48] The court was unclear about when absorption occurred. It appears that the earliest this could have occurred in the case of Australia was 1901. Basically the court said that there had to be a recognised international entity, being a coastal state, who could absorb the territorial sea. In the case of Australia, no such entity existed until federation in 1901 (Cullen 1990,56-57). In the case of the continental shelf it would appear that the earliest Australia acquired rights over the continental shelf was 1953, when Australia declared its rights over the shelf (*Gazette* 11 September 1953).

Generally the courts have equated rights over the territorial sea as proprietal in the usual sense. These rights are described as 'sovereignty' in respect of the territorial sea and the air space over it and the seabed and subsoil beneath it. In the case of the continental shelf the Commonwealth enjoys 'sovereign rights' to explore and exploit natural resources. The point here is that the courts have taken the view that offshore rights accrue only to international entities (ie. a coastal state must be a nation or state recognised at international law). The lack of this status proved fatal to the claims of the Australian states and also the Canadian provinces during the judicial phase of the offshore disputes in each country (see Cullen 1990). The States did not extend beyond low water mark—government power and indeed ownership beyond that point lay with the Commonwealth. Offshore rights appear to be the product of the interaction of international law and municipal law and it seems that the earliest date at which it may have taken effect in Australia was 1901.[49] It is doubtful the common law would recognise native marine tenure on the basis of a long association in circumstances where international law has only recently recognised the interests of nations in adjacent marine areas. It could not be said that at the time of European settlement in Australia that international law recognised that nations had an interest in an area beyond 3 nautical miles from the coast. In those circumstances did the common law begin to recognise a right of ownership in individuals at the same time the right

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[46] Aboriginal coastal people in North Queensland, for example, are interested in establishing mariculture enterprises, particularly clam and oyster farming. A pilot project has already been established off Fitzroy Island near Cairns (Smyth 1993, 44).

[47] New South Wales v Commonwealth (1975) 135 C.L.R. 337.

[48] As noted the High Court recognised that there were land-adjacent waters of the sea which the Commonwealth did not acquire offshore rights. These were inland waters of the sea which, for various reasons, remained within the geographic boundaries of the States see Cullen 1990,87-88.

[49] It is true that the High Court has recognised that the Australian states nowadays enjoy wide powers to legislate with effect in the offshore. This power is quite separate from enjoying any property rights in the offshore. To the extent that the States do enjoy any property rights in the offshore they do so pursuant to the 1979 Offshore Constitutional Settlement. The OCS conferred jurisdiction and title (but not sovereignty) on the States, with particular regimes set up for offshore petroleum etc. see Cullen 1990, 122-132.

of nations was recognised in international law? The accrual issue, and the temporal elements are not addressed in Mabo. However, for reasons noted above it is certainly possible that on Mabo principles an argument for native sea title could be constructed, although I think the accrual problems, in particular would be difficult to surmount. It should be born in mind, however, that the brutal history of Aboriginal repression in Australia shaped the court's approach to the legal problem they confronted. It might also influence the approach taken on the question of marine TNPR.

4.3 Commonwealth Extinguishment of Marine TNPR

Assuming native title is there and the accrual hurdle can be jumped, can the Commonwealth extinguish native title? The answer is yes, the Crown can extinguish TNPR (Mabo 1992:434-435). It must do so clearly although words expressly extinguishing TNPR are not required (Mabo 1992,433-434). This approach is not surprising since it is only since 3 June 1992 that we know (with legal certainty) that TNPR exists in Australia. Deane J and Gaudron J came to the same conclusion as Brennan J: TNPR existed and survived into post colonial Australia although they could be extinguished by the Crown.

The extinguishment of marine TNPR would not depend, any more than land based TNPR, on the intention of the Crown in right of the Commonwealth. It would depend on the *effect* of the Commonwealth action.[50]

In the Seas and Submerged Lands case the High Court held that the Commonwealth had sovereignty over waters out to 3 nm and waters behind the baselines not within the limits of the states. There is no doubt that sovereignty has a certain title aspect to it as the Commonwealth later gave title to the seabed to the states in the Offshore Constitutional Settlement in 1979 (Cullen 1988,8-113.) There would be a strong argument that the Seas and Submerged Lands Act has extinguished any marine TNPR as the vesting of sovereignty in the territorial sea and seabed is a sufficient alienation to satisfy the Mabo test and that really all that could be argued is that Commonwealth assertion of rights was not inconsistent with the continuation of marine TNPR to fish for food.

Arguably the assertion of rights in the *Seas and Submerged Lands Act (SSLA)* and the offshore constitutional settlement could not be categorised as the marine equivalent of simply setting aside land for a post office or a national park.[51] The same reasoning applies to the continental shelf, possibly more so where sovereign rights to explore and exploit the natural resources of the continental shelf are vested in the Commonwealth. There are no 'savings clauses' in the *SSLA* which could be applied to marine TNPR.

On the other hand an argument could be constructed that the *Seas and Submerged Lands Act* does not extinguish any subsisting native title in the seabed, in much the same way that after Mabo the Crown's assertion of sovereignty in 1788 or thereafter did not extinguish it in relation to land. If marine TNPR could survive the assertion of Commonwealth rights in the *SSLA* could it also survive the further assertion of Commonwealth rights in the *Coastal Waters (State Title) Act 1980 (Cth)* and the *Coastal Waters (State Powers) Act 1980 (Cth)*? These were the key acts in the 1979 Offshore Constitutional Settlement, whereby the Commonwealth agreed to

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[50] It is for this reason that it is very doubtful whether the caveat the Authority has placed on the cover of its draft strategic plan has any legal effect. The caveat states that: 'Nothing in this Strategic Plan is intended to diminish or extinguish native title. In implementing this plan agencies and other organisations should not take any action which might unintentionally affect native title'. As noted above it is the effects not *intentions* which are important in extinguishing native title.

[51] Brennan J thought such reservations may not be effective to extinguish TNPR see Mabo 1992,434.

give to the states jurisdiction over coastal waters which equates to the traditional 3 nautical mile territorial sea together with internal waters (see Cullen 1990,108-128).[52]

The *Coastal Waters (State Title) Act 1980 (Cth)* confirms that the sovereignty aspect of the *Seas and Submerged Lands Act* does have a title attribute to it because the former act in section 4(2)(a) states that: 'The rights and title vested in a State under sub-section (1) are vested subject to any right or title to the property in the sea-bed beneath the coastal waters of the State of any other person(including the Commonwealth) subsisting immediately before the date of commencement of this Act, other than any such right or title of the Commonwealth that may have subsisted by reason only of the sovereignty referred to in the *Seas and Submerged Lands Act 1973*'. The States have been given title to the seabed out to 3 nautical miles but that is subject to subsisting rights as in 4(2)(a) of the CW(ST)A. Assuming that Aborigines have native title then that exists unless it has been extinguished by some clear legislative or executive action. This action must be unambiguous. While the SSLA has probably extinguished any marine TNPR which might be established it is doubtful whether the language used in the *Coastal Waters (State Title) Act* is sufficiently clear and unambiguous to extinguish any native title that might be there. If there was any native title when the Act was *passed* the title given to the States would be subject to preexisting title. Section 4(2)(a) only saves the 'right or title [of another person] to the property in the seabed'. This saving clause looks of limited use to preserve marine TNPR, however, which appear most likely usufructuary in nature and more often than not related to the *sea* rather than the *seabed.* The States would, however, be subject to these preexisting rights.[53]

While the States have title to the seabed out to 3nm as a result of the State Titles Act what about from 3nm out to the edge of 12 nautical mile limits? In November 1990 the Commonwealth extended the territorial sea to 12nm. At present the Commonwealth has no formal declaration of common law title to the area from 3 to 12nm but the Commonwealth still maintains a declaration of sovereignty. There is probably still a title aspect to that declaration of sovereignty despite the fact that there has been no formal declaration of this. Under the *Coastal Waters (State Title) Act* the title to the seabed has been vested in the States but it is subject to section 4(2)(a) noted above. Assuming Aborigines can establish native title then that exists unless its been extinguished by executive or legislative action and that must be clear and unambiguous. As noted above the wording in 4(2)(a) is not sufficiently clear and unambiguous and therefore native title to the seabed from 3 to 12nm may not be extinguished.

4.4 State extinguishment of marine TNPR

As far as the effects of the GBRMP Act is concerned the Act makes provision for declaring parts of the sea and seabed as part of the marine park and that has been done in proclamations.[54] None of this extinguishes any native title that might be there and there are specific references in Mabo that national parks are not alienated land and do not extinguish title (A.L.J.R. 1992,434)[55]. But that it not necessarily to say that if someone had any right it could not be regulated by the *GBRMP Act.* The GBRMP Authority does this in zoning plans which

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[52] Coastal waters do not extend to encompass Australia's new 12 nautical mile territorial sea. See sections 4(1) and 4 (2) of the *Coastal Waters (States Powers) Act 1980 (Cth)* and section 3(1) of the *Coastal Waters (State Title) Act 1980 (Cth).*

[53] The *CW(SP)A* and the *CW(ST)A* both were enacted after the *Racial Discrimination Act 1975*. Unless the latter Act enjoys some sort of quasi constitutional status, however, the *CW(SP)A* and the *CW(ST)A* probably are not subject to it. This is because of the doctrine of implied repeal. The general rule of the common law for resolving conflicts between two laws of the same legislative body is that the latter law impliedly repeals the former to the extent of any inconsistency. It is unlikely that the *Racial Discrimination Act* enjoys any quasi-constitutional status. There is a strong argument that the Commonwealth parliament cannot impose 'manner and form' procedures on itself as this would infringe the clear reservation of all constitutional change power in Australia to section 128 of the Australian constitution. See Peter Hanks, *Constitutional Law in Australia* (Butterworths, Sydney 1991,99-102).

[54] The zoning plans have no independent legal effect. They are given legal effect by the Great Barrier Reef Marine Park Act.

[55] It should be noted that there are islands or parts of islands in the Great Barrier Reef Marine Park which are owned by the Commonwealth. For the most part Queensland sold the relevant islands or parts of islands to the Commonwealth for the purpose of lighthouses. It may be that any pre-existing native title has been extinguished in the process.

provide for traditional hunting and gathering but in other areas such as preservation areas this right may not necessarily be carried out. If the GBRMPA make a preservation area and does not allow particular activities there it may extinguish that right in that particular area or the title to some reef if they do not allow a particular activity to go on. It should be noted that under 4(3)(a) of the *Coastal Waters (State Title) Act* the rights and duties are subject to the operation of GBRMPA. I do not think this has relevance to the question of native title and appears to be in the Act to save any claims under s.51(31) of the *Constitution* (the provision stipulating for just terms in any Commonwealth property acquisition) by reason of something done under the GBRMPA that might inhibit state title later.

Most of the GBRMP is beyond 3nm and is subject to *Commonwealth Fisheries Management Act 1991*. That Act regulates commercial fishing so that there is no problem with Aborigines carrying out traditional fishing. Provisions in the Act also allow private fishing to be regulated and for prohibitions on particular species. The Commonwealth, if it prohibited the exploitation of a particular fishery may extinguish a particular right, so it would depend on what a particular group had a title *to*. The *Minerals (Submerged Lands) Act* and the *Petroleum (Submerged Lands) Act* do not have any practical application because under the GBRMP Act it is not permitted to undertake any operation to recover minerals. Even so a right to explore would not extinguish any preexisting native title.[56]

As far as state legislation is concerned it can apply in the marine park to the extent that it is not inconsistent with Commonwealth legislation. Queensland has a *Marine Park Act* which purports to operate out to tidal waters which includes the 3nm territorial sea [*Marine Parks Act 1982 Qld)*]. This legislation would not appear to validly operate where the GBRMPA operates, because that latter act covers the field in its area of operations. Thus the *Queensland Marine Park Act* would not be relevant to determine whether there is subsisting title in the GBRMP. (It would be relevant to intertidal areas and internal waters of Queensland which may be in a Queensland marine park.)

It should be noted that State Acts can have extraterritorial application. The extraterritorial aspects of this power have been considered by the High Court in a number of cases most recently in Port Macdonell Professional Fisherman's Association v South Australia.[57] The court held that the extent of the extra-territorial power depended not on distance alone but on the existence and nature of the activity regulated and the state. Therefore it held that a law concerning rock lobster fisheries within 200nm of South Australia was valid. Given that is the case native title may have been extinguished by a range of state legislation affecting coastal management.[58] It was noted earlier that the *Queensland Aboriginal Land Act* provides that Aboriginal people cannot claim customary marine estates unless they fall within the definition of tidal land. This may have extinguished some customary marine tenure, but Sutherland correctly points out that to exclude areas from claim under that Act may not extinguish title—it may just be considered as excluding claims under that particular statutory process (Sutherland 1992,18). Where the Governor in Council issues a declaration under the *Aboriginal Land Act* that certain lands, including tidal lands are excluded from claim following the expression of the wish of a substantial majority of Islanders resident in or concerned with transferred areas, that would probably effect extinguishment (Sutherland 1992,18).

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[56] Brennan J stated this in Mabo in relation to exploration, although not exploitation.
[57] (1989) 63 A.L.J.R. 167
[58] See legislation listed in Coastal Protection Strategy Green Paper Queensland Government 1991,38-41.

4.5 The Commonwealth and Marine TNPR

Could the Commonwealth move to recognise marine TNPR? The Commonwealth constitutional power to enact legislation relating to the territorial sea was confirmed by the Seas and Submerged Lands Act case. This case held that the Commonwealth has powers to legislate with respect to matters 'physically external' to Australia. This was recently reaffirmed by the High Court in the War Crimes case.[59] This power would probably enable the Commonwealth to legislate with respect to all matters beyond mean low water on the coast of Australia (although this particular consequence has not been confirmed by the High Court). There would also be scope to legislate under the external affairs power of the Constitution (for example to give effect to Art 27 of the ICCPR which provides a right of indigenous people to enjoy their own culture).[60] The Commonwealth also has an additional and wider power, namely s.51(26) which allows it to pass laws with respect to Aborigines and Torres Strait Islanders. The Commonwealth enjoys virtually plenary powers in the offshore and there would be no legal barrier to pass legislation directly to recognise indigenous marine tenure and resource rights, where these existed. The saving of existing title in the *CW(ST) Act*, is an important factor in there being no barrier to recognition. As a matter of policy, however, it would appear doubtful whether the Commonwealth would do so in isolation from national land rights legislation. Presumably the same sorts of concerns about inhibiting resource development that prevented national land rights would also be operating when it came to recognising sea rights.

4.6 Compensation for Loss of Marine TNPR

In the event of marine TNPR having survived, providing extinguishment is valid, a majority in Mabo found that no compensation would be payable. What is different about the Deane/Gaudron judgement and that of Toohey J. is that all three justices argued that, in certain circumstances, any government extinguishing TNPR would be obliged to make compensation (Mabo 1992,452-453 and 456 per Deane and Gaudron JJ. and 499 per Toohey J.). However, Mason C.J. and McHugh J. in their half page concurring judgement explain that the combined views of themselves and Brennan and Dawson JJ. constitute a majority against the proposition that: 'in the absence of clear and unambiguous statutory provisions to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages'. Thus a majority of the court considered that compensatory damages are not payable. The question of compensation for Commonwealth extinguishment of TNPR is not discussed in any detail by these majority judges. Rather, they say that they disagree with the argument of the other three judges that compensation may be payable for extinguishment of TNPR in some circumstances. A caution on the issue of compensation needs to be noted, however. The majority finding that no compensation appears payable was not argued through in any detail. Rather, it was an assertion of disagreement with the proposition put by the minority judges (on this point) that compensation could be payable for extinguishment of (land-based TNPR in certain circumstances).

Could extinguishment amount to an acquisition under 51(31). of the constitution? That is a difficult question. Because the Commonwealth extinguished native title it would not necessarily follow that the government acquired a property right. There would also be the 'live' question of whether 51(31) in fact applies offshore. There are no precedents here, although when the Commonwealth cancelled petroleum licences in the Great Barrier Reef some time ago there was no compensation paid.

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[59] Polyukhovich v. the Commonwealth (1991) 172 C.L.R.501.

[60] The scope of the 'external affairs' power of course includes matters 'physically external' to Australia and also matters affecting Australia's relations with other countries such as treaty obligations.

4.7 GBRMPA Implications

Judicial recognition of customary marine TNPR following Mabo remains a potential. Indigenous groups may follow the path of litigation. The Minister for Aboriginal and Torres Strait Islander Affairs has stated that although there are no plans for test cases yet the government may facilitate test cases to clarify key issues left unresolved by Mabo and avoid a plethora of court challenges. The most likely source for the test cases is funding through the Aboriginal and Torres Strait Islander Commission.[61] Another option the government is considering is creating a statutory tribunal that would investigate the details of individual land claims and be used by the courts to help settle disputes arising from Mabo. A tribunal could conceivably be set up to arbitrate on unresolved differences. Other options the government is considering include a statutory framework to define native title rights and the encouragement of negotiated settlements on land claims perhaps with the appointment of mediators. The most politically ambitious approach would be to broaden the Mabo debate by tying it into Canberra's existing 'process of reconciliation', under which a broadly representative committee is examining over several years the relationship between black and white Australians.[62]. The Minister for Aboriginal and Torres Strait Islander Affairs has also not ruled out a referendum as part of a long term solution to some of the uncertainty surrounding Mabo. The Minister has stated that the fallout from Mabo is 'very much linked to the reconciliation process' and in the longer term 'this idea of constitutional change to recognise the rights of indigenous people deserves serious consideration'.[63] A referendum would no doubt be supported by Aboriginal groups concerned that any post-Mabo regime could change at the whim of a future government, although referendums have not had a great deal of success in Australia.

Already Aboriginal communities in Queensland are expected to launch High Court challenges to the *Nature Conservation Act*, the *Aboriginal Land Act* and legislation proposed to manage the wet tropics world heritage listing on the grounds that they have the effect of extinguishing native title in a discriminatory way.[64] Queensland has large areas of State crown land that could be affected by the Mabo case. Sea claims based on Mabo principles may eventuate from Aboriginal groups to force governments to negotiate on political and management recognition of customary marine tenure.

A group of traditional land owners from the Kimberley region of Western Australia filed a statement of claim to the High Court in July 1991 that includes offshore areas. The statement refers to adjacent seas, reef, islets off the Worora coast, the Mitchell plateau, and the Drysdale river regions in the Kimberley region. The claim refers to longstanding fishing interests in adjacent seas and water, the use of water of the 'deep oceans, beyond the farthest reefs, and from the coastal waters and rivers, for sustenance, medicinal and spiritual purposes'. It states that throughout known history the people laws, rights, and traditions and practices have given them rights to coasts and reefs and the 'deep water beyond the north-west of Western Australia,

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[61] The Prime Minister, Mr Keating, will also chair a committee of Ministers to consult with Aboriginal groups, mining and farming groups and the States about land rights in the wake of Mabo. Both the National Farmers Federation and the Northern Land Council have stated that they would prefer legislation rather than expensive court actions. The committee will provide an interim report by March 1993 and finalise its inquiries by September 1993, although some mining groups are pressing for a shorter time frame. The Coalition also supports consultation with Aborigines and industry to determine the effects of Mabo rather than waiting for the outcome of lengthy court cases. The Coalition does support the principle that government funding should be provided in instances where test cases were initiated to establish a principle. see *The Australian* 28 October 1992; *Canberra Times* 29 October 1992.

[62] See 'Tickner to consider land rights tribunal' *The Australian* 30 November 1992. The reconciliation process here refers to the work of the Council for Aboriginal Reconciliation, a 21 person body of prominent Australians established in September 1991 and appointed by the Prime Minister with bi-partisan support. The Council has issued various press releases on the Mabo judgement and is intending to publish a booklet 'Making Things Right' this year which explains the judgement in the context of the Council's national consultation strategy.

[63] See 'Mabo doubts may spark referendum' *The Australian* 1 December 1992.

[64] *The Age* 19 October 1992.

to the farthest territorial limits and beyond'. They therefore claim a right to enjoy the ownership, use and occupation of such 'land and seas'.[65]

The GBRMPA would be wise to avoid a situation that saw it in conflict with indigenous Australians fighting to gain this kind of recognition. It would *not* be sensible, however, for the Authority to explicitly recognise native tenure when the location of it is unknown. There would also be political problems if the Authority was seen to be too far ahead of Commonwealth policy in this area. Rather, the Authority needs to provide indigenous groups a decisive voice in park management, in appropriate areas. The broader political implications of Mabo need to be appreciated by the Authority—that Aboriginal peoples aspirations for greater involvement in all aspects of resource management have been raised by the decision and has created a climate of heightened expectations about what the Authority should deliver by way of Aboriginal involvement in the park.

It is understood for example that following Mabo the Cape York Land Council has withdrawn from the strategic planning process for the Barrier Reef region because it does not explicitly recognise Aboriginal ownership of customary marine estates in the marine park.[66] In NSW also Aboriginal people are using Mabo as a defence to a charge of illegally taking abalone. Around a dozen Aboriginal people face charges of illegally taking abalone and the magistrate hearing the case has agreed to admit evidence of customary right to the abalone as a defence argument. As traditional fishing was recognised as consistent with the crowns radical title in Mabo the Authority would be wise to move towards a greater degree of community management of traditional hunting.

The Authority should avoid a situation of possible litigation (that would be a long, costly and uncertain process) if groups become dissatisfied with the lack of political and legal recognition of sea tenure and try and secure recognition of customary rights through the courts. Smyth reports that claims by coastal Aboriginal people to customary marine estates are under active consideration by legal advisers to Aboriginal organisations around the country and were raised in consultations during meetings at Broome, Cape Leveque, Maningrida, Cairns, Yarrabah, Gordonvale and Palm Island as well as at formal hearings of the Resource Assessment Commission in Darwin (Smyth 1993,80). Even without litigation, though, the Authority should be aware that in the post-Mabo environment there is going to be increased activity on issues relating to native title, certainly in the form of legislation. This will all create pressure on the Authority to be seen to be dealing with indigenous rights issues at a high level.

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[65] Statement of claim Utemorrah ors v. The Commonwealth of Australia & Ors File Claim P18 1991 High Court of Australia. The claim of the wik peoples of Cape York lodged in the Federal Court in 1993 also includes offshore areas. Personal communication, Mr B. Keon-Cohen.

[66] Personal communication Ross Williams, GBRMPA. Of course there is no way such a document could, given its nature, recognise marine estates.

5. GBRMPA AND INDIGENOUS RIGHTS ISSUES

The Aboriginal and Torres Strait Islander population of Queensland is unevenly distributed throughout the state. In the northern statistical section, which centres on Townsville the Aboriginal population is 7,204 persons. This is made up of 5,505 Aboriginal people and 1699 Torres Strait Islander people. From Cairns to Cape York the total Aboriginal population is 19,121 which includes 11,452 Aboriginal people and 7,669 Torres Strait Islanders. Almost 38% of Aboriginal people and over 60% of all Torres Strait Islanders live in the far northern statistical division yet, of the total Aboriginal population of Queensland, only 22.3% live in the Torres Strait island communities or in mainland communities designated by the Queensland Department of Family Services and Aboriginal and Islander Affairs [67]

The largest populations of Aborigines and Torres Strait Islanders are in communities on Thursday Island, Palm Island and at Yarrabah. Thursday Island is an Aboriginal reserve, part of the Torres Shire (but not Port Kennedy). Palm Island and Yarrabah are the largest Aboriginal communities having direct access to the Great Barrier Reef and are reserve lands. Each of these communities has a representative on the Aboriginal Coordinating Council. ACC members include Wujal, Hope Vale, and Lockhart on the east coast and Umagico, New Mapoon, Injinoo (Cowal Creek) at the tip, as well as other communities in Queensland such as Cherbourg, Woorabinda, Doomadgee, Kowanyama, Pormpuraaw (Edward River), Old Mapoon and Weipa Napranum. The community in Cooktown (Gungarde) is included in deliberations but is not part of the ACC.

In the Torres Strait all Islander communities including Bamaga and Seisa on the tip of Cape York, but excluding Thursday Island, Horn Island, Hammond Island and the Prince of Wales (Muralag) are represented on the Island Coordinating Council. It is the main organisation representing Islanders at Torres Strait Treaty meetings and at federal and state levels. There is little direct interaction between ICC and ACC. Sixteen Aboriginal councils are charged with the management of lands belonging to Aboriginal communities in Queensland (see table 3 and 4). Fourteen of these were constituted as Aboriginal Councils under the Community Services (Aborigines) Act 1984 and two as Shire Councils under the Local Government (Aboriginal Lands) Act 1978.

While information on customary resource usage is patchy the GBRMPA has funded three important studies of Aboriginal resource use in the marine park and these have provided opportunities for selected indigenous people to contribute to research relating to the management of the GBRMP. There has been a fair amount of Aboriginal site recording and estate mapping, in particular in the far northern section between Shelbourne Bay and Cooktown.

[67] ABS 1989, *Census 86—Aboriginal and Torres Strait Islander Population in Queensland.*

TABLE 1: ABORIGINAL DEED OF GRANT IN TRUST COMMUNITIES IN QUEENSLAND

Community	Population	Area of DOGIT (hectares)	Established	Original Administration	Qld Govt Admin	Major geographic origin of residents
Cherbourg	c.1200	3,130	1904	Qld Govt	-	Major receiving centre for removals (SQ, SWQ, Central Coast, SEQ)
Woorabinda	c.1400	38,811	1927	Qld Govt	-	Major receiving centre for removals (SWQ, Central Q, Central Coast)
Palm Island	c.3000	7,101	1928	Qld Govt	-	Major receiving centre for removals (all areas)
Doomadgee	c.1200	178,600	1933	Brethren	1983	Local population (NWQ, NE Northern Territory)
Yarrabah	c.2000	15,609	1892	Anglican	1960	Local population and some removals (Cairns area, Fraser Island)
Wujalwujal	c.400	1,102	1957	Lutheran	-	Local population (Annan and Bloomfield Rivers)
Hope Vale	c.800	110,000	1886	Lutheran	-	Local population and some removals (Cape Bedford, Cooktown to Laura area)
Kowanyama	c.950	252,000	1905	Anglican	1967	Local population (Mitchell and Gilbert Rivers areas)
Pormpuraaw	c.450	436,000	1939	Anglican	1967	Local population (Holroyd and Coleman Rivers areas)
Napranum	c.800	200,730	1898	Presbyterian	1966	Local population and some removals (NW Cape York Peninsula)
Lockhart River	c.450	359,685	1924	Anglican	1967	Local population (NE Cape York Peninsula)
Injinoo	c.420	79,542	1915		c.1949	Local population (N Cape York Peninsula)
New Mapoon	c.200	9,390	c.1962	Qld Govt	-	Removals from Mapoon (N of Weipa)
Umagico	c.200	5,340	c.1963	Qld Govt	-	Removals from Lockhart River

Source: Parliamentary Committee of Public Accounts (1991). Financial Administration of Aboriginal and Island Councils, Report 2, Effectiveness of Councils and Support for Councils, Training, PCPA Report No.8, February 1991.

TABLE 2: ABORIGINAL LOCAL GOVERNMENT COMMUNITIES

Community	Population	Lease Area (ha)	Established	Original Administration	Qld Govt Admin	Major Geographic Origin of Residents
Arukun	c.900	750,000	1904	Presbyterian	1978	Local Population (Embley River to Christmas Creek)
Mornington Island	c.450	119,200	1904	Presbyterian	1978	Regional Population (Morn. Is., Bentinck Is., Northern Gulf Region)

Source: Department of Family Services, Division of Aboriginal and Islander Affairs, May, 1991.

5.1 Smith Report 1987

The first was a study of marine resources by Aboriginal communities on the east coast, particularly Hope Vale and Lockhart River communities by Andrew Smith. Smith was funded by the Authority to live and work with the Lockhart River community for the purpose of learning more of the traditional understanding of the reef and of sea rights and ownership rights (Smith 1987).

When examining the importance of the marine environment to the communities, Smith found that -

- the marine environment was inextricably linked to the overall/social cultural system;
- marine resources not only provided sustenance and material needs, but also formed a cognitive resource;
- Aborigines developed a range of exploitation strategies to maximise the diverse range of utilisable marine habitats.

The Report highlights the need for consultation with, and education of, Aboriginal communities on Park management issues. The Report recommended that:

- The Authority should set up a formal consultative or coordinating committee for the consultation and direct participation of Hopevale and Lockhart River communities in the management of their marine resources, primarily dugong but with potential to include other species.

- A representative from the east coast Cape York Peninsula Aboriginal communities should be appointed to the Great Barrier Reef Consultative Committee.

- The dugong hunting permit system be modified as follows: The areas presently used for dugong hunting by each community be declared 'hunting areas'. The catch quota and attendant permit system for Hopevale be discontinued, but the closed season be retained. The duration and timing of the closed season be negotiated with the Council. The Council have the right to apply for a special permit to take dugongs for community occasions. Dugong hunting at Lockhart be permitted in the hunting area via a community dugong hunting permit, and that no other controls be applied at this stage. QNPWS should attempt to maintain catch records for both communities. Provisions should be made for the collection of skulls and/or tusks and associated capture

information, which would be forwarded to appropriate scientists. Recommendation accepted and trialed Jan 1987.

- The imposition of any inappropriate or unenforceable restrictions should be avoided.

- GBRMPA/QNPWS should continue and expand their extension/education programmes in Aboriginal communities explaining the need for, purposes of, and effects of the Marine Park.

- GBRMPA/QNPWS should take immediate steps to control illegal trawling activities in the Marine Park 'A' Zone immediately north of Cape Bedford.

- That serious consideration be given to the potential problems of implementing management of turtle hunting.

- Aborigines should be employed as Liaison Officers and Rangers by GBRMPA/QNPWS to work in the Cairns and Far Northern Sections of the Park.

- Continuity of QNPWS Officers and Rangers should be maintained when working with an Aboriginal Community.

- The GBRMPA should undertake to support an anthropological study, or studies, in all the Aboriginal communities adjacent to the Marine Park, aimed at determining how the Aboriginal communities perceive the GBRMPA; and to provide guidelines on how best the GBRMPA/QNPWS can present their aims and aspirations to those communities, so as to prevent confrontationist situations from developing.

- If Coastwatch flights are to be used for monitoring GBRMPA permit conditions, then the Coastwatch observers should be encouraged to record the race of occupants of dinghies and runabouts in the areas adjacent to Aboriginal Trust Areas, and hunting/fishing areas.

- That future ethnobiological studies in Aboriginal communities consider adopting a research strategy concentrating on specific topics in a geographically-broad range of communities.

5.2 Smyth 1990

A second study of Aboriginal maritime sites in the Cairns section funded by the Authority was conducted by Dr Dermot Smyth (Smyth 1990). Smyth's study found that:

- Only three sites out of 24 were in the marine park, the rest were in the Queensland marine park. This reinforced the idea that aboriginal exploitation of the reef was limited to inshore waters and some close offshore islands.
- There was little positive reaction among Aboriginal people to the idea of establishing separate Aboriginal hunting and fishing zones.
- Communities were satisfied with current multiple use zonings system, although they were critical of the dugong hunting system and they found the zoning system complex.
- The possibility of establishing Aboriginal management zones was seriously considered by community members The emphasis of each community where the idea was discussed was on involvement in the management of the zone, rather than exclusive use.

- There was a need to establish Aboriginal management zones in areas of the marine park where Aboriginal cultural affiliations persist.
- There was a clear need for interpretive material about the aims and methods employed by the Authority itself, targeted specifically at Aboriginal communities adjacent to the Reef.

5.3 Smyth 1992

A third study was also undertaken by Dr Smyth on GBRMPA's behalf in the Far Northern section of the marine park (Smyth 1992). Smyth provided evidence that Aboriginal use of the marine park extended to the outer reef. His evidence included Aboriginal claims extending to the outer barrier reef, art sites on islands close to the outer Barrier reef (e.g. Clack island in the Flinders group), egg collecting sites on cays/islands (e.g. Claremont and Raine island), Aboriginal language names for the sea beyond the outer barrier reef, Aboriginal occupation of offshore islands, and use of double out-rigger sea going canoes.

The Report provides information on cultural sites and their implications for Park management, strategies for further research, Aboriginal concerns with Park management and the implications for Park management of the proposed Queensland Aboriginal Lands Bill and declaration of the Cape York Marine Park. Proposals for the establishment of Aboriginal Management Zones and for formal joint management arrangements are discussed. The Report found that:

- There are Aboriginal individuals and groups who continue to identify with their traditional maritime domain in the Far Northern Section of the Marine Park.
- Primary Aboriginal knowledge, interest and concern relates to the inshore coastal areas, reefs and islands, but there are instances of use and knowledge of resources on the outer reef.
- Aboriginal people along eastern Cape York Peninsula consistently stated that their 'country' (traditional estates) includes all waters, reefs and islands within and including the outer barrier.
- The objectives of the Authority, its management strategies, use of zones etc. are very poorly understood by Aboriginal people with traditional links to the Marine Park.
- There is widespread concern by Aboriginal people consulted about the over-exploitation of fish resources by commercial fishermen, and in certain instances by recreational fishermen.
- There is keen interest among maritime Aboriginal people to be directly involved in management and planning decision-making within the Far Northern Section.
- The traditional Aboriginal maritime estates have been extensively mapped by anthropologists and Aboriginal people from Cooktown to Shelbourne Bay.
- Access by the Authority (or other government conservation agencies) to this anthropological mapping is likely to be linked to the establishment of meaningful Aboriginal involvement in Marine Park management.
- Aboriginal people along eastern Cape York Peninsula are disadvantaged in regards to their access to traditional and economic fisheries as compared to Torres Strait Islanders.
- Aboriginal people are concerned about the social, economic and ecological impact of current Torres Strait Islander fishing and hunting activities within the Marine Park, especially close to Aboriginal settlements and outstations.
- There is currently no adequate forum for Aboriginal and/or Torres Strait Islander concerns about Marine Park management to be discussed.
- The World Heritage Nomination document inadequately represents/documents the Aboriginal cultural dimension of the Marine Park.

- The Marine Park Act undervalues the significance of the Marine Park to Aboriginal people and inadequately provides for their involvement in its management.
- Consultative arrangements involving Torres Strait Islanders in the management of the Torres Strait Protected Zone can provide a first-step model for Aboriginal involvement in Marine Park management in the Far Northern Section.
- There has been inadequate consultation with relevant Aboriginal groups and individuals with regards to the imminent declaration of the Queensland government's Cape York Marine Park.
- There is growing concern amongst Aboriginal people about apparent reduction in availability of some marine resources within the Marine Park.
- Aboriginal aspirations for exclusive commercial exploitation of some marine resources currently exist and are likely to increase.
- There is no feedback to communities from the Consultative Committee.

The Report made a number of key recommendations:

- That the Authority commence as soon as possible consultations and negotiations with Aboriginal maritime groups to further explore -
  - the establishment of a Far Northern Section Aboriginal consultative Committee with the suggested composition of at least two representatives of each of the major language areas, and one representative of the ACC, ICC and CYLC
  - the establishment of Aboriginal Management Areas
  - establishment of Aboriginal Heritage Zones.

- That the Authority investigate the administrative and legal steps necessary to establish Boards of Management to administer Aboriginal Management Areas. In the Far Northern Section the maximum number of maritime areas would be nine and the minimum one.

- That the Authority proceed with the preparation and dissemination of interpretive material re Aboriginal interests in the Marine Park as recommended in Smyth's 1990 report.

- That the design and implementation of further research into the Aboriginal maritime culture in the Marine Park be under meaningful Aboriginal control (e.g. of the FNSACC and subsequently Aboriginal Management Area Boards of Management).

- That the Authority take due cognizance of Aboriginal maritime tenure systems, and other relevant aspects of the cultural, social and economic relationship between indigenous people and the marine environment, in all its planning, management and consultancy activities.

5.4 Dugong Management

The Authority has funded a number of studies by Dr Helene Marsh on dugong Management. Marsh found (1992 c):

- That the potential impact of traditional hunting on dugong stock is exacerbated by a number of factors. The current demography of Aboriginal and Islander populations indicates a movement away from areas supporting high dugong populations (Torres Strait and far north Queensland) to areas in the south where dugong stocks are lower.

- This factor is further complicated by the present interpretation of Queensland Fisheries legislation which allows Aborigines and Islanders living in Trust Territories to hunt anywhere in the State and for urban Aborigines and Islanders to hunt providing they are accompanied by a resident of a Trust Territory.
- An assessment of the impact of hunting on dugong is hindered also by the dearth of information on life cycle, reproduction rates and causes of mortality. What is known is that dugong have a slow rate of natural increase. For these reasons there is a need to limit the issuing of permits for areas south of Cooktown.

Marsh recommended:

- The development of an extension program to allow for the participation of Aborigines and Islanders in deciding what should be done about allowing traditional hunting in areas away from Trust Territories.

In a recent paper (1991) Marsh and Saafeld found that:

- At the present time there is insufficient information to be able to confirm whether the present catch rate for dugong in the Torres Strait is below the sustainable level.
- Continued monitoring of catches and aerial surveys are advocated as a means of addressing the paucity of data.
- The need for public education is considered to be important as a way of pre-empting any approaches that may be made for increased catches.

5.5 Ziegelbauer Report 1991

Ziegelbauer (through GBRCC) in 1991 pointed out in a paper on behalf of DOGIT communities that the Yarrabah, Hopevale and Wujalwujal communities wished for greater involvement in GBRMP management. He found that:

- It is important and necessary for Governments and GBRMPA to recognise and understand the particular needs and aspirations of the Aboriginal people in relation to use of the Great Barrier Reef Marine Park and that for cultural reasons, their use of the Park is more important than that of others.
- Major Concerns of DOGIT Communities with regard to their use and involvement in the Marine Park related to:
    - The recognition of traditional rights and traditional use made of marine resources.
    - Desire to be involved in the management of the Marine Park and resources so as to have input into the conservation of the various species utilised by Aboriginal people.
    - The impact of other users on resources, which also raises conservation issues for Aboriginal users.

Ziegelbauer's report recommended:

- The GBMCC recommend that representatives from the GBRMPA and the QNPWS visit each of the Aboriginal Communities affected by the Zoning Plan for the Cairns Section to listen to their concerns and discuss with them the Authority's intentions for the proposed new Zoning Plan.

- The GBRCC recommend to the Federal Minister and the Authority the need for legislative recognition of Aboriginal representation on the GBRCC.

- The GBRCC recommend to the Federal Minister and the Authority that they recognise Authorised Officers of DOGIT Community Councils where the relevant by-laws exist, and move to provide them with inspectoral powers under Section 42 and/or Section 43 of the GBRMP Act.

- The GBRCC recommend to the GBRMPA to implement Zones areas as Aboriginal Management Zones adjacent to the DOGIT Lands to be managed with the assistance of the Authorised Officers of those communities.

OTHER RELEVANT REPORTS

Three recent reports are also worth noting in the context of Aboriginal involvement in the marine park. They are a report commissioned by the ESD working group on fisheries; the report of the ESD working group on fisheries; and third a report by Dr Dermot Smyth to the Resource Assessment Commission.

5.6 The Cordell Report 1991

Managing Sea Country: Tenure and Sustainability of Aboriginal and Torres Strait Island Marine Resources by Dr John Cordell is a study commissioned by the Fisheries Working group on Ecologically Sustainable Development (ESD) to help answer some basic questions regarding the sustainability of fisheries and aquatic resources used by indigenous peoples in Australia.[68] The Report focuses on the kinds of things fisheries and marine protected area authorities ought to know and take into account in planning programs and in forming relationships with indigenous communities.

In recognition of the complex nature of the relationship between indigenous people and their marine domain the report examines fishing-related customs, laws, beliefs and social interaction. While the sense of identification with sea country is as strong as with the land for indigenous people, this relationship is more likely to be ignored by government authorities with an emphasis in law and public policy on the 'common property' nature of the sea and its resources. The communal nature of customary marine tenure (CMT) with its shared responsibilities and obligations, is not easily translated into European institutions and property law. The Report suggests that the establishment of marine parks has reduced rather than enhanced Aboriginal control over marine estates through the failure to recognise this unique relationship between Aboriginal people and their marine environment.

While there has been some movement by marine park managers towards recognising the rights of Aboriginal groups as being more than those of just another 'user group', it is not reflected in public policy or legislation. It is recommended that there must be legislative change, addressed nationally and cooperatively, directed towards recognising the existence of contemporary CMT systems and towards incorporating indigenous marine resource rights into all natural resource management legislation. Legislation would need to be flexible to accommodate differing geographic and cultural conditions.

The Report raises the question as to whether ESD can be adapted to accommodate and reconcile matters of indigenous sea tenure with the country's economic and biodiversity support priorities and finds that there is compelling evidence which suggests that subsistence practices constitute a sound form of resource management. The Report recommends exploring the potential for CMT-based management strategies as an ESD instrument but stops short of

[68] The report remains unpublished and was made available to the author by Dr David Lawrence, GBRMPA.

recommending what specific form of recognition of indigenous rights and territories future CMT based management strategies should assume.

The Report suggests future research needs and offers policy guidelines.

RESEARCH NEEDS

- Need to learn more about CMT.

- Need for consent and close collaboration of indigenous groups - time and resources for consultation to reach all indigenous user groups and decision makers.

- Need for independent task force.

- Lack of knowledge of peri-urban groups. Sea rights studies should be designed to take into account not only urban-based Aborigines but Torres Strait Islanders living on the mainland.

- ESD needs to consider 'other cultural' factors (sacred sites etc) in ESD management frameworks.

- Need to increase indigenous community representation and decision-making participation in appropriate fishery management frameworks and advisory committees.

- Importance of consultation cannot be over-emphasised. The lack of it continues to confound nearly all relations indigenous groups have with state administration. There is a need to understand how these communities operate and their decision making processes. Local councils are not necessarily the places where decisions are made, particularly those relating to the disposition of resources. They are not necessarily representative and may not represent the actual owners of marine estates or resources. In the context of fisheries management, there is a need to talk to the people with direct responsibility for the area in question and with the right to make decisions about it.

- Sea tenure systems often embody solutions to fishery management problems. CMT is a potential method to help sustain resources. There are conservation benefits to be gained from protecting communal rights to inshore fishing grounds.

POLICY GUIDELINES

- Cultural and Biological Diversity. ESD policy should promote and safeguard the cultural as well as the biological diversity associated with indigenous homelands.

- Priority conservation areas often coincide with indigenous homelands. The interests of indigenous groups and environmental concerns are not mutually exclusive. Management strategies should seek to complement and work within pre-existing customary territorial and resource systems.

- 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. Indigenous peoples do not constitute just another 'user group'. They are a special group of stakehoders whose cultural survival depends on protection of local environments.

5.7 ESD Fisheries Working Group Report 1991

The ESD Working Group on Fisheries (see ESD 1991) appeared to find favour with Cordell's *Managing Sea Country* Report. It found that:

- There was a need to find ways to engage indigenous communities in all aspects and levels of management. A framework must be found to work within customary tenure systems.
- Indigenous peoples are a special group of stakeholders whose cultural survival as well as livelihood depends on protection of environment and wise management.
- Aspects of ecologically sustainable development, such as management principles and research priorities applying to fishing industry as a whole apply also to resource use by indigenous peoples.
- Longstanding sea tenure practices and customary law were unrecognised in a legal or management context.
- There was a need to devote more attention to long-term planning
- The Prime Minister's proposal to establish a national representative system of marine protected areas needs to consider indigenous rights
- All relevant user groups should be included in resource management and the indigenous population is not generally integrated in national fisheries administration.
- There was potential for increased inequities and conflicts between indigenous section and other user groups and management authorities unless an integrated approach is taken.
- There were benefits of an integrated approach including increased social equity, incentives to sustainably develop coastal 'home reef' and 'home country' fisheries and wildland economies and opportunity for authorities to take advantage of indigenous peoples' own resource management procedures.

The ESD Working Group 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.

- Integrate the indigenous sector in a national framework of coastal fisheries and marine management.

- Investigate new co-management procedures with indigenous communities.

- Ensure that indigenous communities have membership on management advisory committees of appropriate fisheries.

5.8 Smyth Report to the Resource Assessment Commission 1993

In January 1993 Dr Dermot Smyth presented a report to the Resource Assessment Commission (RAC) on Aboriginal and Islander Interests in Australia's Coastal Zone (Smyth 1993). The report was commissioned by the RAC for its inquiry on Coastal Zone Management. The RAC's report is to be handed to the Prime Minister in November 1993.[69] Smyth spent three months

[69] The Commonwealth is also developing a policy for Commonwealth coastal zone responsibilities and DASET released a draft copy of the report in December 1992. In developing a Commonwealth policy for the coastal zone the Report points out that a significant number of Aboriginal and Torres Strait Islander communities are located within or adjacent to the coastal zone. It then points out that : 'Present and future management of the coastal zone must therefore incorporate mechanisms that recognise and ensure that the rights, roles and interests

consulting with Aboriginal and Islander communities and organisations around Australia. The Resource Assesment Commission largely accepted Smyth's findings in its own draft Report released on 1 February 1993 (RAC 1992).

Smyth found that -

- There was widespread frustration, disappointment and anger at the lack of opportunity for Aboriginal and Torres Strait Islander people to make decisions about, and to control the future of, their coastal areas.
- There were three major concerns and conflicts reported by Aboriginal and Islander people.

    * First a perceived failure by government at all levels to provide meaningful opportunity for Aboriginal and Islander participation in decision-making.
    * The second group of concerns related to inadequate responses from government when administrative or legislative mechanisms have ben established to involve them in the decision-making process.
    * The third group of concerns relate to the lack of benefits (defined broadly) flowing to Aboriginal and Islander people from projects which commercially exploit what are regarded by indigenous people as their resources.
- Specifically Smyth found the following concerns about commercial fishing; commercial fishing competes with subsistence fishing; commercial vessels enter Aboriginal and Islander estates without obtaining permission; and there is no structural involvement of subsistence fishermen and customary marine owners in the management of the commercial fishing industry.
- Mining was viewed as a serious threat to many coastal communities, and sand mining in particular was raised as an issue by coastal Aboriginal people in New South Wales, Queensland, the Northern Territory and Western Australia.
- There was a common theme to exert control on the impact of tourism on Aboriginal and Islander cultural life.
- There was a great deal of interest in sea farming, which included not only interest in becoming involved in the industry (especially oyster and clam farming) but also concerns about conflict developing between sea farms and area of continuing cultural and/or subsistence interest to Aboriginal people, and concerns about the exclusion of indigenous people from mariculture operations.
- Concerns were expressed about the impact of building and associated development on Aboriginal cultural sites as well as the environmental impacts of large new infrastructure projects.
- An underlying concern was expressed about the lack of adequate protection offered by responsible agencies for Aboriginal cultural sites and a lack of Aboriginal involvement in the management of Aboriginal cultural heritage generally.
- There was concern about the lack of formal powers to control people and manage resources within marine areas adjacent to community land by community rangers, and the lack of long term funding for employment.

In the context of improved Coastal Zone Management, Aboriginal and Islander people have specifically asked the RAC to recommend or consider:

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of Aboriginal and Torres Strait Islander communities, including community councils and their representative organisations, are incorporated in the management process' (see DASET 1992, 5).

- Recognition of Aboriginal and Islander customary marine tenure as an extension of customary ownership of land;
- Recognition of indigenous people's right to control traditional resources;
- Endorsement of ESD Fisheries Working Group recommendations in respect of indigenous fishing;
- Legislative or other recognition of traditional Aboriginal land ownership;
- Legislative or other recognition of the right of Aboriginal and Islander people to be consulted about, and involved in, the management of coastal land, sea and resources;
- The establishment of new Aboriginal and/or Islander institutions to ensure the control by Australia's indigenous people of their cultural heritage, environment and customary domains on land and sea;
- The relevance to Australia of international developments in the recognition of indigenous people's rights to involvement in coastal zone management.

5.9 GBRMPA and Aboriginal and Islander Involvement

Certainly the GBRMPA has done more to sponsor research on Aboriginal maritime culture than other government agencies. While a number of the reports cited above have criticised GBRMPA's record on Aboriginal interests in the park it is certainly not the case that the GBRMPA has ignored Aboriginal interests in the park. An early contrary impression may have arisen from the Law Reform Commission Report of 1986 which asserted that Aboriginal traditional rights had not been considered by the GBRMPA and implied there was no provision for traditional hunting and fishing (LRC 1986, 165). This was misleading for as already noted there has been a category of use, traditional hunting and gathering, with an associated definition of traditional inhabitant from the Cairns plan onwards. The original zoning plan for the Capricornia Section made no such mention because there was no trace of any traditional hunting or fishing in the Capricorn bunker group. While the Authority as far as one can tell never presented any suggestions that certain areas should be preserved, or more properly reserved, for traditional use (the Authority appears to have avoided naming zones with a specific user activity for fear of creating problems with other user groups) traditional hunting and fishing have been recognised. As already noted zoning plans permit traditional inhabitants to carry out traditional hunting and fishing activities which go beyond the practices allowed under other types of fishing (e.g. traditional hunting of dugong and turtle).

On the matter of consulting with Aboriginal people certainly the evidence would appear to be that this has been relatively recent (from the early 1980's). It must be stated that the Authority undertook one of the first initiatives in this area when it commissioned Andrew Smith in the mid 1980's to work in the Lockhart community to gain an understanding of Aboriginal interests in the reef. According to the former chief planning officer of the GBRMPA, Richard Kenchington, who was employed at the Authority from 1977 and was involved with all the initial zoning for the park it was very difficult to arouse any Aboriginal interest in the issue despite the fact that it was simultaneously a major issue in the Northern Territory.[70] The situation was particularly complicated by the deliberate displacement of Aborigines to settlements many hundreds of kilometres from traditional lands. This occurred until the 1960's. As a consequence it was difficult for the Authority to find communities which were close to the traditional areas of operation. The Authority during the 1980's never received claims that any

[70] The following relies on personal communication with Mr. Kenchington.

particular area was a traditional area for a particular group of Aborigines other than in areas in close vicinity to certain of the current communities. This was despite efforts in consultation with Aboriginal communities. The Authority was in fact looking for this kind of information so that it could be taken into account with the general consideration of zoning. While the consultation process was not ideal (and there was a certain amount of resentment within the Authority that it was spending more time on consulting with Aborigines than other interest groups) it should be noted that the Aboriginal people of Hopevale said that the GBRMPA (that had approached the people on the hunting issue) were the first government agency that had visited them and consulted them on *anything*. Nevertheless, the Authority should have spent more time with more members of Aboriginal communities. But for many in the organisation the whole idea of consultation and involvement with native peoples was fairly novel, as well as the whole concept of Aboriginal association with 'sea country'.

There is no doubt that one of the real difficulties is the mutual problem of communication and comprehension. It seems that in developing zoning plans it requires three or four orders of magnitude more of direct one to one contact working with traditional communities than with other user communities of the Barrier Reef.[71] One of the basic problems is often to find the appropriate people to consult with. This can be affected by a vast range of factors (age, gender, language, the time involved etc). The Authority has however, undertaken a number of initiatives here to make contact with the Aboriginal communities. The most important are the following:

- In 1978 Aboriginal and Islander people attended a marine park workshop prior to the development of the first far northern section zoning plan.[72]

- In 1985 Aboriginal and Islander people participated in a workshop on Traditional Knowledge of the Marine Environment (Gray and Zann 1988).[73]

- In 1988 Aboriginal and Islander people participated in an Innovative Planning and Management Workshop.

- In 1989 the Authority funded Dr Dermot Smyth to assist two Aboriginal communities to prepare submissions in relation the second zoning plan for the Cairns section of the GBRMP. The submissions outline Aboriginal aspirations for greater involvement in the management of the marine park, and especially the protection of their marine sacred sites (Smyth 1989).

- In 1990 Aboriginal and Islander people participated in the Torres Strait Baseline Study Conference (see Laurence and Cansfield-Smith 1991).
- Cairns section zoning plan considered the cultural and heritage values of an area for traditional inhabitants and involved community councils meeting with staff of the Authority. From the 3 April 1992 changes to the assessment criteria have been implemented to read '(b) the need to protect the cultural and heritage values held in relation to the Marine Park by traditional inhabitants and other people'. Where the plans include areas of value to Aboriginal people they would be prepared jointly by community councils, GBRMPA, and QNPWS (Briggs and Zigterman 1992, 276).

- An Aboriginal liaison group was established in 1991 with representation from all sections of GBRMPA, QNPWS, and ATSIC. This forum provides a focus for discussion

[71] Personal communication Mr. G. Kelleher, Chairman of the Great Barrier Reef Marine Park Authority.
[72] A paper by Athol Chase at the meeting canvassed a number of significant Aboriginal maritime interests in the marine park. See Chase 1983.
[73] It is interesting to note that Mr Eddie Mabo spoke at this meeting. See Gray and Zann 1988, 47-49.

of Aboriginal and Islander use of marine resources and participation in marine park management.

- The GBRMPA has employed community rangers on research projects under the ANPWS contract program. These projects involved the gathering and recording of information about sacred sites and story places which are within and/or close to marine parks. In November 1992 funding was received from ANPWS for a three year training program for community rangers. They will be employed in nine communities and trained at Cairns TAFE and the Authority in Townsville. The TAFE will also run pilot inspectors courses from March 1993. The Authority intends to fund the communities so that they can administer the funds.

- The development of an Aboriginal employment strategy, including the appointment in 1992 of an Aboriginal Liaison Officer to consult with Aboriginal communities.

- Involvement in and support for community ranger courses conducted by Cairns TAFE.

- The amendment to the *Great Barrier Reef Marine Park Act* in October 1991 which will enable the appointment of Aboriginal and Islander people as special inspectors with limited powers.[74]

- The involvement of Aboriginal communities in dugong management. While in the past the Hopevale Council did not wish to take responsibility for issuing permits for dugong hunting because they did not feel that they could enforce it (which led to complaints by Aboriginal people of heavy handed enforcement carried out by other government agencies on GBRMPA's request) the communities now wish to be involved in management. Self regulation in tandem with scientific monitoring of dugong numbers was introduced and involved a high degree of consultation with the GBRMPA. It has proved relatively successful although there is increasing pressure on dugong and turtle populations from the growth of communities, from increased mobility of people and from increasing requests from urban Aboriginal and Torres Strait Islander people, using the traditional ceremonies as a lever to gain hunting rights. A Working Group on dugong and turtle management has recently been established by the Authority and this group has extensively consulted with Aboriginal groups from Hopevale, Lockhart River and Mackay. A draft plan will be distributed in 1993 to Aboriginals and Torres Strait Islanders for comment.[75]
- On traditional fishing permits an increased effort has been made to raise public awareness of the permit system, particularly in the central and southern sections of the marine park where there is a good deal of illegal hunting. This will enable the Authority to identify the urban based population who could then be targeted by the Authority for resource use information and gain a better idea of annual catch rates.

- Attendance by staff at a cross-cultural workshop with community rangers, QNPWS, TAFE.

- An Aboriginal person was appointed in 1988 to the Authority's statutory consultative committee which reports direct to the Minister. (These appointments are at the

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[74] The reason why this amendment was put in was that a number of compulsory pilotage inspectors were being appointed to do these inspections. They were employed by the Australian Maritime Safety Authority and were not doing marine parks type enforcement. It was felt appropriate to differentiate between these two types of inspectors and so a third category—special inspectors was introduced. It has not yet been decided exactly what powers they will get but probably not powers of seizure of vessels and aircraft. Personal communication Stephen Sparkes, GBRMPA. The Act does allow the Authority to specify which powers an inspector has see s.43(b) *GBRMP Act 1975*.

[75] The Queensland Department of Environment and Heritage have also initiated their own process of consultation on traditional hunting and fishing prusuant to provisions in the *Nature Conservation Act*.

Minister's discretion however and are individual appointments not representative ones.) Unfortunately the individual concerned did not attend any meetings. This was not the case with his successor.

- The production of a special section on recognition of Aboriginal and Torres Strait Islander interests in a draft strategic plan for the Authority which was released in 1992 (GBRMPA November 1992). The plan is yet to be endorsed by the Federal and Queensland governments. The main thrust of the strategy is to ensure that the interests of Aboriginal and Torres Strait Islander people are reflected in the management of the area and to establish cooperative arrangements between Aboriginal and stakeholder agencies in the area, as well as to provide the legislative basis to establish such arrangements. Projects related to the social, cultural and economic interests of Aboriginal and Torres Strait Islander people should be included in research and monitoring programs. Other objectives and strategies dealing with the development of culturally relevant interpretative material, membership of advisory boards and the development of Aboriginal and Islander training and employment programs are also important initiatives (see Appendix A).

- The establishment of the Torres Strait Baseline Study in 1989 which GBRMPA has been charged with managing (the most northerly section of the Barrier reef, which forms the eastern boundary of the Torres strait, is not within the jurisdiction of the Authority).

5.10 Summary

Over the last ten years the Authority has made a number of limited efforts to offer participatory opportunities for Aboriginal and Torres Strait Islander communities and there has been an improvement in liaison over the years. These steps have been broadly seen as positive by Aboriginal groups, particularly efforts by Authority staff to hold liaison meetings with communities. Meetings appear, however, to be arranged in response to particular problems rather than to develop co-operative management arrangements. Of course, resources are always limited but there does appear to be a gradual recognition within the organisation that it is not doing enough in this area and that its past efforts on indigenous issues have been somewhat token.[76] The *process* of recognition of indigenous issues, the implementation of self-management strategies and a recognition of such cultural and life-style issues as protecting sites and greater self-management in dugong and turtle management need to be addressed. The recommendations that have been put forward to the Authority from previous reports appear, however, to have been considered in only a very generalised manner. A more disciplined and focussed approach needs to be adopted by the Authority at a senior level, or the nineties will come to be seen as a lost decade as far as the Authority's handling of indigenous rights issues is concerned.

[76] However, it should be noted that there is no written policy document for example from the QNPWS on Aboriginal use of marine parks. A recent consultants' report to DASET on Australian marine protected areas did not refer to indigenous issues. See Carleton Ray and McCormick-Ray 1992.

6. FUTURE DIRECTIONS

While the GBRMPA has been active in researching and attempting to come to grips with Aboriginal and Islander interests a number of steps need to be undertaken by the Authority to incorporate indigenous maritime interests. The GBRMPA is acknowledged as a leader in the area of multiple use marine park planning, but it has not been a leader in terms of matching other national terrestrial parks such as Kakadu and Uluru in involving Aboriginal people in park management. In particular the Authority needs to recognise traditional ownership and responsibility for marine estates, traditional responsibility for marine resources and customary stewardship of maritime sacred sites by putting in place co-management arrangements.

It should be stated that most of the recommendations that follow are not original. They have been put forward in one form or another in a number of the previous reports already commissioned by the Authority. These studies suggest there is some frustration at the pace at which the Authority is moving to provide opportunities for Aboriginal and Torres Strait Islander people to participate in decisions about areas of sea country in the park and manage their customary coastal domains. Needless to say the Authority, if it is to be seen to be dealing with these issues in a positive manner, must come to terms with the recommendations that it has already been given. The following issues are in my view the most important that the Authority needs to act upon:

6.1 Recommendations for Aboriginal and Torres Strait Islander representation on the Consultative Committee need to be acted upon with a consequent change to the Act.

In 1986 the Law Reform Commission recommended that there be Aboriginal representation on the Authority's Consultative Committee (LRC 1986,197). There is no statutory requirement for an Aboriginal person to be appointed to the committee. In 1988, 13 years after the establishment of the marine park, the first Aboriginal person was appointed to the Committee. There is now no Aboriginal appointment on the Committee, (the term of the last Aboriginal person appointed on the committee expired in early 1992).[77] In 1991 the Aboriginal Coordinating Council passed a resolution calling on the Minster for the Environment to enlarge the representation on the Consultative body to 5 members (Smyth 1992,46).

The argument against a large increase would be that there needs to be an approximate cross-section of interests represented over time and that it would inhibit this process, and reduce the long term effectiveness of the committee to require specific groups to be represented at all times. Arguably also if there were to be a specification that particular groups were to be represented there would be pressure to define similarly a range of other groups. To expand the membership much beyond the previous 16 members could also make the committee difficult to manage.

There is some force in these arguments but they ignore the fact that Aboriginal and Islander communities should be seen not just as another user-group, but rather as co-managers of some areas. As Cordell points out: 'Indigenous people are a special group of stakeholders, marginalised and displaced by colonialism, trying to hold onto what is left of their traditional homelands. Their cultural survival, not simply their subsistence livelihood, depends on protection of local environments and wise management of the remaining ancestral resource base' (Cordell 1991,129). As was pointed out in Chapter two indigenous groups are seen as co-managers in other parts of the world when it comes to marine management issues. The effect of

[77] The committee's appointments terminated in the third quarter of 1992 and new members have not been appointed. The committee members are appointed by the Minister on the advice of DASET and the Queensland government. The Authority's advice is sought on appointments. The Committee comprises one member of the Authority and at least twelve other members. Members are appointed on a personal basis, not delegates of particular groups. In earlier committees, indigenous people's interests were represented by the administrative head of the Queensland Government Department responsible for Aboriginal and Islander Affairs.

most legal structures is in fact to assign different rights to specific classes of people according to different circumstances. Different conditions affect different groups. This will dictate different treatment. In the case of Aboriginal people the purpose here would be to give them special representation, but that is justifiable on the grounds that as a group whose rights are threatened they deserve special protection. Aboriginal and Islander involvement should be increased, probably by at least two members (one Aboriginal and one Torres Strait Islander) on the Consultative Committee and there should be a legislative requirement to this effect. Indeed the 25 year GBRMPA draft strategic plan seems to acknowledge the need for such a change by referring to the need to establish 'a legislative basis for cooperative arrangements'. Aboriginal people have a right to see their culture not only protected within the marine park, but also visibly present in the Authority's chief advisory forum. A dramatic increase, however, would be hard to justify against the charge that it made other groups with an interest in the park 'second class citizens' and therefore open to the claim that it is undemocratic. A slight increase will, however, ensure that the risks of Aboriginal and Islander people being marginalised or ignored by the Authority as a whole are minimised.[78]

Great care must be taken in selecting the Aboriginal and Islander representation on the committee. It was somewhat unfortunate that the first person selected did not attend any meetings.[79] The broad point is that the Authority should speak to Aboriginal people about who they prefer and that the actual process of selection needs to involve the communities.[80] The person(s) selected must be *representative* of the various Aboriginal and Islander communities and organisations. Unless this is done the representative(s) are unlikely to have much credibility with the Aboriginal and Islander population. It will also be important that the Aboriginal and Islander person(s) be properly resourced to travel and to liaise with Aboriginal and Islander people. The people selected should be funded to take time off from their jobs to at least report back to communities after consultative meetings. They should also regularly attend meetings of the Aboriginal Liaison group.

There is a broader point to make about the actual selection of the Aboriginal and Torres Strait Islander representation. If there were Aboriginal management committees (see below) it would be a relatively straightforward process of getting nominees. It is not the best approach to start with the structure at the top without the structures in place at the bottom. Aboriginal people are going to be interested in who has got control 'on the ground' rather than who is sitting in a high level consultative committee. It should not be assumed, therefore, that by putting people in at the top the Authority will solve all its problems.

6.2 Augment the resources of the Aboriginal liaison officer and move towards making this a higher level position.

Communication problems between the Authority and communities have been persistent, despite the recent appointment of an Aboriginal liaison officer. The need for regular direct face to face liaison with Aboriginal and Islander communities will need a long term commitment by the Authority and a clear recognition that the role of the Aboriginal Liaison officer should be very much one of reporting to the Authority *from the communities*. In this respect the three

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[78] The government's National Strategy for Ecologically Sustainable Development released in December 1992 states that Governments will examine the representation of Aboriginal and Torres Strait Islander peoples on decision-making or advisory bodies relevant to their interests in resource allocation on ESD-related issues (DASET 1992a,83).

[79] The person appointed was at the time chairman of the Aboriginal Co-ordinating Council, an organisation established by the Queensland government to provide advice on matters relating to the management of Queensland's 16 designated Aboriginal Trust Territories. His appointment was made with little prior consultation with coastal Aboriginal communities. Personal communication Dr D. Smyth.

[80] In 1990 the ACC nominated one of its employees as the replacement member of the Consultative Committee and he made a significant contribution to the Committee. Personal communication G. Kelleher, Chairman, GBRMPA. When this person resigned from the ACC, the ACC unsuccessfully sought to have his appointment on the Consultative Committee terminated and replaced with another ACC staff member. As noted earlier the appointments of all Consultative Committee members have since lapsed. A new Committee is due to be appointed in 1993.

weeks allocated for the liaison officer to consult with Aboriginal communities on the draft strategic plan was clearly deficient. The plan itself refers to the need for an 'effective' consultation processes and this clearly did not happen.

The need is for the Authority to seek advice rather than a heavy 'top down' approach. This point was implicitly made in Smyth's 1991 study that found that the Authority's approach to Aboriginal communities had been 'consultative' in the sense of the Authority dealing *down* to the communities rather than the communities up to the Authority. Consultation, negotiation, and compromise have always been part of Aboriginal and Islander ways and no Aboriginal or Islander would use another person's country without first asking permission.

Steps should be taken to adding staff in this area (strong consideration should be given to appointing at least one female officer) as one liaison member will not be enough given the range of issues and distances the officer has to cover. At least six officers are needed. These people should come from the major communities. They would form an Aboriginal liaison unit placed in the organisation where they would be most useful. No doubt they would spend a lot of their time in the management section and so consideration could be given to placing them there. When zoning was taking place an officer from the unit would be located in planning to assist.[81] The same would apply to information and education to allow the liaison officer to be part of the team for each major project. This would appear to be how the Authority operates its projects generally. If the Authority itself is to grapple with the complexities of Aboriginal and Islander interests and understand the different range of issues and concerns of each community it will need to appoint other staff in the area of Aboriginal liaison. In the post-Mabo environment native title issues will assume greater importance in the planning process and extra staff will be necessary to ensure that the Authority knows when its management and zoning plans adversely impact on marine tenure/native title. This will require some program to identify traditional owners and be aware of developments in documenting customary law. When such staff are on board it would make sense for an Aboriginal and Islander policy unit to be formed in the Authority to act as a link to an indigenous consultative committee(see below).

In the short term consideration should be given to upgrading the seniority of these positions. The current appointment is at ASO 6 level. If the Authority wants to be seen to be serious about embracing indigenous rights issues it should consider the example of some mining companies in negotiations on aboriginal issues—they appoint a senior adviser to the Chief Executive Officer. That way the Chief Executive sends a message to the whole organisation that these issues are to be dealt with at senior levels. The risk of only maintaining the liaison officer position (and this is no comment on the present occupant who is, by all accounts, doing an extremely good job) is that the Authority is simply seen as only 'giving a little' on these issues. A more senior level position would dispel any perceptions that the organisation is simply adopting a 'holding the line' position and is genuinely willing to inculcate fresh perspectives. A more senior level position is also likely to command more resources to do the jobs that are required.

6.3 The establishment of a separate Aboriginal and Islander Consultative Committee should be considered.

The Aboriginal Liaison group, on which government officers are in an overwhelming majority, has proved useful (Smyth 1992,47). The liaison group started as a 'worry group' among middle level (non-Aboriginal) staff that kept bumping up against indigenous issues in their work. It does *not* provide for significant Aboriginal participation nor is it genuine forum for the Authority to really enter into dialogue with maritime Aboriginal people. To be fair, of course, it

[81] Aboriginal and Islander ecosystem knowledge might, for example, be sought during environmental planning and implementation processes.

was never really intended to do this. However, what it has done rather effectively is to expose the *need* for this to happen. A separate indigenous consultative body would provide a means for the Authority to directly access the views of Aboriginal maritime groups and to have its views reported back to those groups. (For example the Authority already talks to other representative groups such as the Association of Marine Park Tourism Operators in relation to tourism.) Such a committee should not necessarily be viewed as a permanent structure. The committee should focus on getting some resolution of issues of local control and be used to start a process of genuine consultation on setting up Aboriginal management committees. It *may* be a permanent structure but it may turn out to be a stage in the process towards devolution of power to Aboriginal management committees. Structures should be seen as *evolving* rather than set in concrete.

The risk of setting up an indigenous consultative committee before the devolution of Aboriginal management committees takes place is of course that the Authority may well end up with an unrepresentative body. This would cause more problems than it solves. That is why it should be used to get the process of dialogue going on devolution of control.

6.4 There should be a formal recognition in the Act that maritime clan boundaries and maritime clan estates will be recognised in zoning and management plans.

The GBRMPA has been managing Aboriginal marine estates within the park since 1975 without any formal recognition of this fact. There has, however, been some recognition of aboriginal maritime cultural sites by the change in the regulations from 3 April 1992, acknowledging the need to protect the cultural and heritage values held in relation to the marine park by the traditional inhabitants. Smyth's studies demonstrate that for large parts of the Northern and Far northern sections of the marine park the traditional owners of the coast, inshore waters, reefs and islands can be easily identified.[82] These people have, however, played no significant part in managing the marine park. For example they do not have a voice in determining commercial fishing access within their traditional marine estates.

While s.32 of the Act provides for an extensive process of public notification and consideration of public representations by the Authority a more formal recognition of Aboriginal clan boundaries and maritime clan estates would signal the importance that the Authority attaches to the just claims of Aboriginal people. It should not be seen as opening the gates to single out other groups in the Act. Varying circumstances will affect different groups and this will sometimes warrant different treatment. The formal recognition of cultural sites should facilitate the development of marine protected areas in Aboriginal and Islander traditional 'sea country'.[83]

6.5 Recommendations for Aboriginal Management zones and Heritage areas in coastal regions near communities need to be acted upon.

The establishment of these areas would (as Smyth notes in his reports) greatly assist the Authority in its interactions with Aboriginal communities. The current focus by Aboriginal communities in the marine park is on *joint* management of areas rather than *exclusive* rights to those areas. This is of course a different direction from the way in which *land* rights issues

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[82] The use of the term 'owners' is meant in a moral sense, not necessarily legal.

[83] Some Aboriginal groups have suggested that the GBRMP should be nominated to the world heritage list for its *cultural* values. If this was done important legal obligations regarding the identification, preservation, transmission of those values would arise. Mixed natural/cultural nominations under the list currently include Kakadu, the Tasmanian south-west forests and the Willandra Lakes region. The Wet Tropics World Heritage Protection and Management Agency is examining the prospects for re-nominating at least part of the wet tropics world heritage area for its cultural values. Should the area be renominated, the *World Heritage Properties Conservation Act 1983 (Cth)* provisions regarding cultural heritage might also then be more readily used in the GBRMP if need arises. I am grateful to Ms J. Sutherland, Law School, James Cook University, for this point.

have gone elsewhere (see Young 1992). Aboriginal communities want involvement in the management of areas where they have lived and worked for many years. Maritime areas are of additional importance when they provide sea access to aboriginal land.

A small Aboriginal management area is being declared at Mission Bay within the Cairns marine park, close to Yarrabah. That agreement was possible in part because commercial fishing is excluded in the bay. In their submission, the Yarrabah community indicated involvement in the management of all maritime areas within 5 kilometres from their land, including Fitzroy and Green Islands. After negotiation with the Yarrabah community council by QNPWS, the Council endorsed the designation of Mission Bay as an AMA as part of the proposed new zoning plan for the Cairns Marine Park (Briggs and Zigterman 1992,279). Aboriginal Management zones would need to involve consultation with elders responsible for particular areas, patrolling by community rangers and joint management by the Authority and Aboriginal people appointed by the local community councils. Such options would provide the community with a degree of control over the sea and access to trust lands, active involvement in the management and protection of sites of significance within the marine areas, and official recognition of inshore waters within traditional clan estates. It would also provide a structured process for consultation and management of areas of Aboriginal significance within the marine park. Such zones could not have provisions which were inconsistent with a zoning plan, except where a special management area applies.

The evidence taken during Smyth's consultations with Aboriginal and Islander people for the RAC strongly supports the desire of Aboriginal and Torres Strait Islander people to regain control of their sites of significance. This was the most striking concern about cultural site management-the only place where harmony in site management is achieved is where Aboriginal people have ownership and control of their land, so that control of cultural sites is under their control (see Smyth 1993 68-69).

6.6 Previous recommendations for Aboriginal communities to be involved in joint management strategies, using community rangers (see point 7 below) and to be directly consulted on marine resource use and management need to be acted upon.

In most Australian States/Territories Aborigines now have some degree of input into the operation and management of national parks (see Young et al., 1991,136-50). This situation owes much to certain components of Northern Territory land rights, in the course of which aboriginal land has been leased back to the Federal agency, ANPWS, to form Kakadu and Uluru/Kata Tjuta national parks. In both these cases Aborigines exert substantial power in the boards of management (Aboriginal people are in a majority and the Board approves the management plan). Aborigines are heavily involved in decisions over tourist use and access, and are employed permanently and on contact by the parks authorities. The granting of Aboriginal ownership was and remains conditional upon Aboriginal consent to the existence of a National Park on their land. (The Uluru model is restricted to four national parks in the Northern territory, a tiny minority of the more than 500 other national parks and other protected areas throughout the country.) The Conservation Commission of the Northern Territory has shown a sympathetic attitude to Aboriginal involvement in tourist activities on their land and a number of collaborative agreements are now in operation. Interestingly however in the marine park surrounding Coburg peninsula there has been a reluctance by the NT government to accede to Aboriginal demands for management in the marine park (Cordell 1991,96). Similarly in the recently proposed Beagle Gulf Marine Park off Darwin Aboriginal people have expressed concern that they have not been consulted about the proposed management of the

park, which includes areas of cultural and subsistence interest to Aboriginal people (Smyth 1993,55).[84]

In WA, SA, and NSW Aboriginal and environmental and spiritual knowledge and interests in safeguarding resource use in parks is being incorporated into management plans. A proposal for leasing back sea areas to the traditional Aboriginal owners of the Buccaneer Archipelago region in WA, to be managed as an 'Aboriginal marine park' by a board of management failed to get the endorsement of Department of Fisheries and did not receive cabinet endorsement. The proposal appears to have lapsed (Smyth 1993,53)[85]. The recent Queensland Land Rights Act will allow Aboriginal ownership of national Parks and the introduction of a modification of the Uluru management model (Aboriginal ownership, though with compulsory leaseback). However, it is unclear whether the government intends to allow majority Aboriginal membership on management boards as in the Northern Territory. The Queensland Act merely provides for Aboriginal representation on the management boards, and unlike the NT Act the Crown is not liable to pay rent to traditional owners for leased land (see generally Brennan 1992 chapter 6).

The specific agreements under which these State and Territory parks functions vary a great deal, from a strong degree of Aboriginal control in parks leased from Aboriginal land to joint management schemes with a high degree of Aboriginal input: to agreements which restrict Aborigines purely to an advisory capacity, with little real influence over policy. The various joint management agreements negotiated even where the land is not held by Aborigines provide interesting models of compromises which may be adapted elsewhere. For example, in recognising the rights of traditional owners in the Purnululu (Bungle Bungle) National park in the East Kimberley region of Western Australia the park allows for the establishment of aboriginal living areas, encourages aboriginal participation in related commercial ventures and accepts subsistence activities. However Aborigines do not exert full powers on the board of management; their role is advisory rather than controlling. Other Western Australian parks Karijini (Hamersley Ranges) and those proposed for the Mitchell Plateau are adopting similar models, as are parks in South Australia. Certainly the evidence would suggest that the accommodation of indigenous people's interests in marine areas has not yet developed to the same extent as in some terrestrial national parks. Table 4 gives an overview of Aboriginal involvement in protected areas around Australia under current State and Commonwealth legislation.

The focus of Aboriginal groups in the GBRMP has, as noted earlier, been on joint management of areas and not exclusive rights to those areas. From the Authority's viewpoint it seems encouraging that Aborigines have not pushed for ownership rights or the very substantial degree of control exercised elsewhere in those national parks leased back to governments. What the Authority should therefore appreciate is that the request by Aboriginal people for protection of traditional sites, involvement in the active management of the park, consultation on such issues as trawler access to inshore waters are not only *legitimate* claims but also quite *conservative*. It should be borne in mind that we live in a time when Aboriginal people everywhere are increasing their control over their own affairs.

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[84] In the Minister's press release announcing the creation of the park there is no mention of Aboriginal interests. See *Media Release* 14 November 1991, Conservation Minister, Mike Reed

[85] The Gulingi Nanggi's proposal contains the following principles. That an Aboriginal marine park be created in the archipelago with most of the islands and all the surrounding waters and the seabed included within it; that all the islands in the archipelago down to the low water mark be proclaimed as Aboriginal reserves and vested in an Aboriginal landholding body; that excluding seven islands which are of special cultural significance to the traditional owners, all islands be leased back to the Executive Director of the Department of Conservation and Land Management to run as a national marine park; that all the waters of the archipelago be vested in the national parks and nature conservation authority and leased to the Aboriginal association; that the Aboriginal marine park be managed by a board of management representing Aboriginal and conservation interests, with an Aboriginal majority and an Aboriginal chairperson. See Nesbitt 1992.

TABLE 3: ABORIGINAL INVOLVEMENT IN NATIONAL PARKS AND PROTECTED AREAS

State/Territory	Key protected areas involved	Aboriginal ownership of parks and protected areas		Aboriginal involvement in protected area management		Aboriginal rights to forage	
		Aboriginal ownership	Genuinely determinable lease	Responsible for management	Involved in management	In protected areas	Outside protected areas
Commonwealth	Uluru (Ayers Rock) Kakadu	Yes	Yes	Yes	Yes	Yes	-
Northern Territory	Gurig (Cobourg Peninsula) Nitmiluk (Katherine Gorge) Watarrka (Kings Canyon)	Yes	Yes	Yes	Yes	Yes	Yes
South Australia	Gammon Ranges Witjira Unnamed Conservation Park Nullabor	No	-	Proposed	Yes	Yes (with proclamation)	Yes
Western Australia	Purnululu (Bungle Bungle) Karijini (Hamersley Range) Karlamilyi (Rudall River) Myala (Buccaneer Archipelago)	No	-	Was proposed	Yes	Yes (not nature reserves)	Yes
New South Wales	Mutawintji (Mootwingee) Lake Mungo Mt Grenfell Mt Yarrowyck	Proposed	No	Proposed	Yes	Proposed (if have ownership)	Yes
Queensland	Archer River McIlwraith Range	Proposed	No	No	Yes	Proposed (if have ownership)	No
Victoria	-	No	-	No	No	No	No
ACT	-	No	-	No	No	Yes	Yes
Tasmania	-	No	-	No	No	No	With permit

Source: Robertson, M., K.Vang and A.J. Brown (1992), *Wilderness in Australia Issues and Options Discussion Paper*, Canberra: ANPWS, 127.

It should also be recognised that demands for joint management are essentially issues to do with power and control and are therefore highly political. Aboriginal issues should not therefore be seen by the Authority as purely management questions. At the same time, however, the Authority ought to recognise that joint management strategies can bring practical management benefits-reducing conflicts, minimising the impact of visitor access, maximising the protection of traditional sites and promoting better overall environmental management. Joint management approaches not only give indigenous resource users a sense of ownership, reduce enforcement costs and offer the best approach to ecologically sound management but also co-management means that personnel can be recruited with a sound knowledge of local areas and can generate indigenous employment on traditional land and seas. Joint management approaches will also improve cross-cultural communication and understanding between the Authority and Aboriginal groups (Berkes, George and Peterson 1991). To establish co-management regimes will require some change to the Act as it does not really provide for the management plans as legislative documents. This is raised again in point 7 below.

Given a growing support for Aboriginal and Islander involvement in the park, the Authority's reputation would be boosted by responding to the modest claims of Aboriginal people to have a greater degree of input into the operation of the marine park. There will be little point in the Authority moving to set up particular structures, however, until Aboriginal people have some input into the kinds of management structures that are most appropriate. Smyth's suggestions on management structures and management areas (see Smyth 1992,51-56) should certainly provide the basis on which the Authority should approach the Aboriginal owners for their comments and suggestions. As Smyth very correctly notes, this must commence with the Authority declaring that it is willing to negotiate on these issues 'in an open-minded way it would then become necessary to establish consultative, research and negotiating processes that could arrive at mutually acceptable joint management arrangements' (Smyth 1992,53). It will mean that the Aboriginal liaison officer will have to have direct links to the highest levels of planning and management in the Authority. While Aboriginal people should be given time to suggest their own structures the Authority should bear in mind that Aboriginal councils in Queensland are often over-worked, under-resourced and inappropriately structured, limiting their control over natural resource use planning in their own communities and participation in regional planning development processes (Dale 1992). The consultation process may therefore be a lengthy one. It will not be made any easier by the fact that there still exists a fair degree of distrust by Aboriginal communities about government and government agencies. This attitude will also obviously bear on the Authority's requirement for a long term commitment to the consultation process. In the immediate future this obviously will need to be taken into account as far as the far northern section of the park, when it comes to the rezoning over the next two years. Aboriginal people will need to be aware of the process of how the work will proceed *before* it actually begins.

One hopeful example is that of Kowanyama, on the eastern side of the Gulf of Carpentaria, that is following a 'grass-roots' rather than a 'top-down' approach to community development. There the community is implementing a management strategy aimed particularly at marine resources and developing a water catchment plan for the Mitchell river, on which the settlement is based (Dale 1991). The plan has involved consultation and cooperation with a wide range of non-Aboriginal people and organisations. Marine resource management has involved consultation with the fishing industry aimed at controlling tourism and recreational fishing (quotas rather than sea closures) and organising patrolling to record illegal fishing. A conference on a long term management plan for the Mitchell River was held in Kowanyama in 1990 attended by local land users (mostly non-Aboriginal) State and Federal management agencies, Aboriginal agencies and people from the fishing and pastoral industries and local government sector. Working parties set up following this meeting are now considering a watershed management plan. These activities have involved many members from the

Kowanyama community. Significant fishing closures have been negotiated as well as enforcement powers for its ranger service. The community has established its own Land and Natural Resource Management Office. Special land and resource education programs have been introduced in the school and extended into the adult education arena and visits to Kowanyama have been organised by Aborigines involved in land management elsewhere as well as by the Sealth people from Washington State U.S.A., a coastal Indian group experienced in negotiating over subsistence fishing rights and water use issues (Dale 1992,40). Kowanyama shows that Aboriginal communities can coordinate a planning process involving predominantly non-Aboriginal organisations and that they can develop longer term strategies. The planning mechanisms and the initiatives taken could form the basis for a community strategy that could usefully form a prototype for others.

The point of this example as far as the GBRMPA is concerned is that if the Authority gives the relevant Aboriginal communities the opportunity to discuss the structures that they believe are appropriate and approach these communities without bias then negotiated solutions are possible to issues concerned with marine management.

On the other hand one cannot expect all communities to have the same human and other resources of Kowanyama and the Authority should not simply expect that small groups with major social problems should have to fight the same problems as Kowanyama did over a ten year period. The Authority should be looking at structural solutions along joint management lines and be willing to recognise local control *without* a decade long struggle. Leaving aside the ethical issues with respect to a 'sit back and wait policy' towards Aboriginal communities, the Authority may well find it develops gaps in its management if it were to adopt such an approach. Many issues will not get resolved if there is not a pro-active approach towards Aboriginal communities. The Authority must approach Aboriginal communities in an open-minded way saying in effect: 'We wish to talk about ways in which you can control these areas'.

6.7 The desire by Aboriginal communities to be involved in management through community rangers should be supported in ways that stress local training and supervision.

We have already noted that a number of Aboriginal communities are explicitly involved in managing national parks. These strategies have most often been implemented by employing Aborigines as rangers with park agencies. This does not however satisfy all needs and more recently some groups have promoted the idea of appointing community rangers, to work not only in conjunction with parks but also land management issues affecting the community in general (see generally Birkhead, de Lacy and Smith 1992). The concept of community rangers, people with the prime responsibility for monitoring and supervising resource husbandry and management in their own communities, has been under discussion since the mid 1980's (Morgan, Smyth and Butler 1986), but has only recently gained support for its practical introduction. North Queensland communities, where around 70 community rangers were employed in 1990/91, have so far been in the forefront of the movement and Aboriginal community ranger services have now been established in almost all communities in Cape York peninsula (see Morgan, Smyth, and Butler 1992, 29-37).

Around half of these have completed an Advanced certification in Natural and Cultural Resource management at Cairns TAFE. They have obtained funds for paying wages by tapping into the Community Development Employment Program, a federally administered scheme which provides funds for community employment in lieu of unemployment benefits. It does not pay full time workers, clearly a disadvantage given that community rangers in carrying out their tasks (monitoring tourist use of marine resources, provision of interpretive material, preparation of management plans for Aboriginal management areas, patrolling beaches,

carrying out customs and quarantine surveillance and generally watching resource use in the community) do not usually work by the hour or day. Full time work would be fairer and more appropriate. The training of community rangers has demanded a significant local initiative, without which the special courses organised through the Cairns TAFE would not have been established or maintained. It has involved senior, culturally knowledgable Aboriginal men and women as teachers (Hill 1992,269). The community ranger idea is now being more widely discussed in a number of Aboriginal communities in Australia (see Birkhead, De Lacy and Smith 1992,239-283), although as yet government recognition of these initiatives remains limited in practical terms. As pressures on resource use intensify through tourists seeking access to remote areas of Aboriginal lands such recognition is, however, becoming more pressing.

The GBRMPA should recognise that community rangers will enable Aboriginal communities to become actively involved in joint management as well as provide an Aboriginal dimension to visitor experiences to the marine park. The key to their success has been local community control of their training and supervision and the Authority should avoid any impression that it is somehow trying to take over such training. Through the employment of community rangers the Authority will need to cooperate closely with QNPWS. Aboriginal people not only find these kinds of positions attractive but because they have a long term commitment to living in remote areas they maximise continuity in management. Community rangers also encourage continuation of traditional aboriginal land and sea management practices. The initiative of the Authority in gaining access to ANPWS funds for community rangers is a welcome one and all efforts should be made to ensure that these rangers are able to assist the Authority's liaison officer gain the views of particular communities.

At present the Authority can only appoint rangers who are officers or employees of Queensland or local governing bodies in Queensland, or members of the Queensland police force.[86] An Aboriginal to be appointed as a ranger would thus have to be employed by an Aboriginal group and that group would have to have the status of a local council. As a number of Aboriginal community organisations are corporations they would be incapable of being employed at the present time. Legislative change is currently being proposed that will rectify this so that the Authority will not be constrained in this way.[87] Depending on the level of training for marine park work they would be appointed as special inspectors or marine park inspectors. The marine park inspectors would have all necessary effective powers except arrest powers. These powers have not been given to non-police officers. It is yet to be decided if special inspectors have powers of seizure.

In giving inspectors powers to rangers through inspectors courses care will need to be taken that Aboriginal communities reaction does not see such inspectors as becoming 'just like those other enforcement officers from (pick the agency)'. Of course rangers, if they are inspectors, will need to enforce the laws of the park without favour.[88] On the other hand, if they do not represent the community and the community's values they are going to be ineffective. Rangers will have greater authority in areas where the communities have some degree of marine tenure and where there is established Aboriginal management zones. Where a community knows that an area is under a particular Aboriginal management committee and these are the rangers doing the day to day management then they are less likely to be seen as heavy handed enforcement

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[86] S.42 *GBRMP Act 1975 (Cth).*

[87] Personal communication Stephen Sparkes, GBRMPA. Currently GBRMPA has 3 types of inspectors—compulsory pilotage inspectors; normal marine park inspectors and a third category special inspectors, to which no-one has been appointed as yet.

[88] The GBRMPA has only one enforcement officer who is a direct employee of the Authority. The majority of the inspectors are employees of Queensland government departments, (such as Environment and Heritage) and the Australian Maritime Safety Authority. The Australian Federal Police are automatically inspectors under the legislation.

officers from Townsville, Brisbane or whereever.[89] In other words, we come back to the need to put in place Aboriginal self-management strategies.

It will also be important for the Authority to resolve issues relating to the legal liability of community rangers and the lines of reporting accountability.[90] Clearly the liability and reporting issues will need to be resolved *before* training courses get very advanced. It is recommended that the Authority and the Queensland Environment and Heritage Department form a joint working party to resolve these issues and put in place a general framework that allows for clear reporting lines and deals with liability issues.

6.8 Move towards local management structures so that in the longer term the need for permits for traditional hunting will be reduced or eventually not be necessary.

There appears to be a clear need to understand Aboriginal and Torres Strait Islander resource exploitation strategies and the establishment of the recent working group on dugong and turtle management should achieve this aim. There are certainly some problems with one-off permit requests from urban communities and some communities not renewing their permits. There is also some resentment at the fact that a permit is necessary at all to carry out what is seen as a traditional right. Urban Aboriginals do not necessarily welcome the fact that they can only hunt if accompanied by a resident from a Trust territory who has obtained a permit. The Authority is, as noted in chapter 5, already moving to deal with this general issue by entering into discussions with Aboriginal and Islander groups to review the permit issues.

To get around some of these problems strong consideration should be given here to longer term permits (around 5 years), non-renewable permits for Aboriginals living in towns and perhaps permits for use in the park as a whole (excluding restricted areas) to get around the problem of hunters visiting other communities and taking food away. However, as Smyth has pointed out (see Smyth 1992) the Authority should not focus too heavily on the problems of Aboriginal hunting and fishing. Aboriginal hunting and fishing is not *the* issue. It is really only a *sub-issue* of the main issue of Aboriginal management of marine park areas, and conservation of the dugong and turtle should be seen in the broader context of co-management strategies.

Once the Authority has in place a devolved Aboriginal management structure many of these issues can be resolved at the local level. It may be possible to do away with permits altogether if such structures are put in place. In the post-Mabo environment where traditional hunting and fishing rights involved in fishing for food are the most likely rights to be recognised under marine TNPR the Authority should move towards providing community management for these resources. It should not be assumed, however, that solutions are going to be the same everywhere. For example in some remote areas local Aboriginal groups may decide that permits are not necessary and incorporate dugong and turtle management in overall management area strategies, while in others there may be a need for a consensus type forum whereby urban Aborigines are invited on a representative working group. This will require giving back powers to local communities and this will only work if the hunters have part of the power.

As currently traditional hunting and fishing can only be done with a permit under zoning plans amendments would need to be made. Under the Act this would require two phases—public participation; then changes would have to go to the Minister and sit in the Parliament for 15 sitting days.[91] But if it were to be done outside the normal zoning reviews it would probably

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[89] It is also regarded by some Aboriginal people as inappropriate to appoint Aboriginal rangers or other authorised conservation officers to areas unless they are connected to areas under customary law. Gender sensitivities may also arise with respect to particular sites.
[90] It may be that they would be liable through Aboriginal corporations if legislative change permits them to be appointed as inspectors.
[91] S.33 *GBRMP Act 1975 (Cth).*

take a minimum of 6 months. It is understood that public participation takes around six months if it is to be done in an effective manner. The Authority has never amended zoning plans outside the normal reviews every 5 years.

As the Act does not prescribe the range of zones that may be included in zoning plans a zone that specifically provided for traditional fishing or hunting without a permit is possible under existing legislation without amendment. All that would be required would be to remove it from the 'requiring a permit' section of the zoning plan to 'as of right section' of each plan zoned.[92] If it was left it out altogether it is likely to be prohibited.

While changing the zoning plan is more difficult than changing the Act (as you do not require any public participation phase to change the Act) whatever mechanism was chosen would need to cross the hurdle of public opinion. Environmentalists would probably not go along with a rezoning or legislative change that wished to do away with permits. Turtles are on the endangered species list and dugong are declared vulnerable by the IUCN—The World Conservation Union. There would have to be assurance from the management agencies that taking these animals was to be on a sustainable basis. Without the requirement for permits there would need to be other mechanisms in place to make sure they were not over-harvested.

Presently the Act does not provide capacity to make management plans in the sense of legislative, not policy documents. The Act should certainly be amended to provide a clear statement that the Authority can enter into co-management agreements with traditional owners, so that you end up with a co-management plan for a particular area if native title exists. It would include development in conjunction with the traditional owners of the management plan for a particular area or a species and also the actual co-management once the management plan is in place for a region or species. It may include limits to hunting. That would be the preferable way forward, and it is understood such legislative changes are to be made.[93] Management of wildlife and fisheries would take place under the provisions of a management plan and one that had statutory 'teeth'. Conservationists should be satisfied that their interests were looked after. The community rangers will be important in feedback catch reporting (the current permit system does not appear to have worked particularly well here).

The development of the community ranger scheme and moves towards local co-management strategies is likely to provide the best solution in the longer term. A move from community permits to effective local ranger management areas is desirable ,with the emphasis being on community environmental management groups achieving community input into decision-making. Self management rather than regulation is preferable and here the Authority should extend its efforts in conservation information through kits, better extension work and the use of the media, print, radio and television. The wider use of video should be considered here. Where necessary materials could be in local languages. I have not been in a position to determine whether resources are being used in the best possible ways but the Aboriginal liaison group should review this issue, bearing in mind the importance of community involvement.

6.9 Strengthen information policies to target both Aboriginal communities and the public on issues of Aboriginal concern.

What comes through a number of the commissioned reports is that Aboriginal communities do not understand or have a poor understanding of the Authority, its management strategies, use of zones etc. This suggests that current efforts at education and information need to be strengthened so that more communities are reached. For many Aboriginal people, English is a

[92] In zoning plans one finds a list of things that can be done without a permit and a list that can be done with a permit. Anything not listed in either is prohibited unless it is decided to permit it under any other purpose which is consistent with the purpose of the zone.
[93] Personal communication, Stephen Sparkes, GBRMPA.

second language and they may have infrequent access to newspapers in which invitations to participate in the planning process are placed. They may not be in a position to make detailed written submissions, outlining their concerns. There may be scope for the Authority to require maps and management prescriptions include Aboriginal and Islander interpretations of areas, (if the areas are not secret). There may also be scope for some material to be in relevant indigenous languages. To have an adequate education program, Aboriginal people have to be involved in its formation, the production of materials, its dissemination and its interpretation. (Material for groups such as the fishing industry involves close contact with that industry.) Unlike some of the other issues that involve issues of power, control and rights this one appears relatively straightforward, although there are always resource constraints. The Authority is currently negotiating with ATSIC to get an officer on secondment for 6 months to produce education material for Aboriginal communities as well as the public.[94] The Authority will need to work more closely with ATSIC regional councils. Extension and information requirements will become more important if as some suggest there is a further growth in the outstation movement, as a result of the lands right legislation with communities going back to their own estate clan areas. This will follow on from improved services in many areas.[95] The use of videos is likely to become much more important. The need by project officers in government agencies for information on Aboriginal interests in the park exists and is growing.

6.10 Consult with the Lands Department on Trends in Aboriginal lands claims.

As a result of the new Queensland Aboriginal and Torres Strait Islander Lands Acts the Authority will need to consult widely with Aboriginal groups and the Queensland Lands department on likely trends on land (and potentially sea) claims. With claims to vacant crown land anywhere in Queensland a possibility as well as access to tidal lands (granted only by the Governor in Council) the structure of Aboriginal communities may be expected to alter. With this may come more Aboriginal and Islander coastal communities and this will necessitate the Authority being actively involved in negotiations on such claims (see Smyth 1992,38-39). The land claim process will clarify who are the traditional owners for particular tracts of coastline. Islands within the GBRMP may have special significance for Aboriginal people who could expect a major role in the management of adjacent waters. The Aboriginal liaison officer will have a vital role to play here in information dissemination to senior planning policy makers in the Authority. To date 13 national parks and 14 pockets of vacant crown land have been gazetted for claim by Aborigines since the Act was proclaimed in December 1991. Thirteen parks have been gazetted, totalling about 2,359,000 hectares. The people of Torres Strait have not made any applications under the legislation. Details are provided in table 4.

[94] The officer will also be coordinating the community rangers program for the ANPWS funding. Personal communication, Ross Williams, GBRMPA.

[95] In such places fishing and hunting are primary economic activities, with commercial lobster fishing and mariculture also possibilities.

TABLE 4: NATIONAL PARKS GAZETTED AS CLAIMABLE

Simpson Desert	1 012 000 ha
Archer Bend	166 000 ha
Alice Mitchell Rivers	37 100 ha
Rokeby Croll	291 000 ha
Cape Melville	36 000 ha
Jardine River	237 000 ha
Iron Range	34 600 ha
Cliff Island	43 ha
Lakefield	537 000 ha
Cedar Bay	5 650 ha
Forbes Island	109 ha
Flinders Group (Two parks)	2 975 ha

Source: Queensland Department of Lands, *Annual Report 1991-1992*;25.

6.11 Improve efforts to consult with Torres Strait Islander people and engage them in the management of the marine park.

The Great Barrier Reef Marine Park does not currently extend up into Torres Strait and clearly if that were to happen the Authority would need a full-time presence to handle the difficult issues there.[96] Torres Strait Islanders, however, regard the northern section of the marine park as part of their traditional fishing grounds for trochus and beche de mer. In recent consultations with Dr Dermot Smyth, Torres Strait Islanders expressed anger at the lack of consultation prior to implementing zoning plans which limited the areas in which they could engage in commercial fishing. (The last zoning plans for the far northern section were done 7 years ago.) They also expressed a strong interest in becoming actively involved in the management of the marine park (Smyth 1993,51). The problem in part stems from the overlapping mind sets of traditional sea country. For example the Badu people believe that their traditional hunting areas extend south along the coast of Cape York peninsula and as far as they are concerned coastal Aboriginal maritime territories extend only a stones throw from the coast. Similarly the Murray Islanders believe that their traditional hunting areas extend south into the Far Northern section and they have exclusive rights to those places.[97] There is no easy solution to this, but clearly these problems need to be discussed. To date Islander involvement in the marine park has been indirect and spasmodic (Smyth 1992,44). The Authority obviously needs to repair its damaged relations with the Islanders and the first step is to engage Islanders in the management of the marine park. This could include representation on the Consultative Committee and regular visits, particularly when the zoning plans for the far northern area are done over the next two years.

The Authority could, in a low key, informal way offer resources (or let it be known via others that it is willing to offer resources) and support for development of the Marine Strategy for Torres Strait (MaSTS) which Islanders are working on in cooperation with the Australian National University's North Australian Research Unit (see Mulrennan and Jull 1992). The strategy is developing under the auspices of the Ocean Rescue 2000 project (administered by the GBRMPA).

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[96] Indeed, without a huge injection of resources the Authority would almost certainly fail if it went into Torres Strait.

[97] Personal communication, Dr Dermot Smyth. One noted expert on traditional marine tenure in the Torres Strait informed the author that when he and another co-researcher interviewed the Islanders extensively on the extent of their traditional fishing grounds they did not claim exclusive rights in the northern section of the GBR. Murray Islanders told them that they did not think they ever claimed exclusive rights to areas south of Seven Mile Reef and Yule Entrance, although they sometimes used them. The northern boundary of the Far Northern Section of the GBRMP appears to be around 30 miles south of there. On that basis this researcher informed the author that the Far Northern Section could not be called part of their traditional *territory*; a portion of it was merely a remoter part of their traditional *range*. Personal communication Dr R. Johannes, CSIRO.

The Islanders 'Principles and Objectives for the Future of Torres Strait' issued in May 1991 centres on a Torres Strait ecologically sustainable strategy. At its heart is a marine strategy, with marine resources being vital to Islander peoples continued survival (Mulrennan 1992,3). The establishment of the MASTS is likely to become a priority of the ICC and the ATSIC regional council (the same people as ICC, plus two others). In October 1992 Islanders persuaded the Federal Resource Assessment Commission to go to Torres Strait to hold hearings there as part of its coastal zone inquiry. In September 1992 Islander leaders reconfirmed the priority of taking the initiative in environmental and political issues with the ICC Chairman issuing a one page press release at a conference in Darwin that stated as follows:

> In our studies of self-government we are looking at practical options for securing Islander land, reef, and sea tenure; managing appropriate social, health, and education services, and facilities; protecting the marine and coastal environments; encouraging appropriate economic development; and maintaining and strengthening unique Torres Strait culture and language. Governing institutions will also be considered (Lui 1992).

At an October 1992 workshop in Darwin the Islander environmental coordinator reminded experts that there were strict practical limits on how much could be done in achieving the Islander environmental agenda due to limited financial and staff resources (Mulrennan and Jull 1992,11). The strategy is consistent with recently announced intentions by the ICC to obtain self-government for Torres Strait within the Australian federation by the year 2001.[98] Given this link there may well be a reluctance by Islanders to welcome any assistance from the Authority, but rather prefer to control it exclusively eg getting consultants but not bringing in government agencies.

While the Authority has been charged with the management of the Baseline Study (Lawrence and Cansfield-Smith 1991), and this has been seen as helpful, it also needs to be taking a positive role in involving Islanders in the marine park. Regular face to face meetings when rezoning is in progress to discus zoning issues in the far north areas (as opposed to the Baseline study) would help. With the Torres Strait marine environment being perceived to be at a crucial point in its history the Authority's prestige and reputation will be enhanced if it is seen to be actively trying to repair relations with the Islanders. As Torres Strait Islander leaders have had extensive contact with international indigenous agencies (see Mulrennan and Jull 1992,6), such action offers the opportunity for the Authority's role to be put in a positive spotlight.[99]

6.12 Collaborative Research Program

The Authority should consider initiating a collaborative research program with relevant Aboriginal and Torres Strait Islander representatives on indigenous issues. The program would focus on marine tenure boundaries and usage, register important cultural sites in the Marine Park, develop a database of local knowledge and indigenous management practices and strategies for effective consultation and social impact assessment procedures.[100] The information could be integrated with biological and social information in zoning and the drafting of management plans. It would be closely associated with the existing socio-economic program. It would require a senior management position as counterpart to the recommended

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[98] See 'Islanders push for self-government' *The Australian* 4 December 1992. The Queensland government would no doubt resist such a development.

[99] The Islanders are developing close ties with the Inuits of Canada and are closely examining the agreement to establish Nunavut (see Mulrennan and Jull 1992).

[100] There is to date no research done by GBRMPA on social impacts and processes in a cross cultural situation. The GBRMPA Research and Monitoring section recently initiated a project on social impacts assessment guidelines but not focussed on the special case of indigenous people. Personal communication Ms D. Benzaken, GBRMPA.

senior advisory position. The Authority should be aware here that the Prime Minister's statement on the environment issued on 21 December 1992 committed the government to allocating funds to ensure greater involvement of Aboriginal and Torres Strait Islander people in marine conservation and management (Keating 1992,26). Funding arrangements should be monitored closely by the Authority as such a collaborative research program as proposed may well fit the funding criteria here.

6.13 Summary

Self determination and the provision of funding provides the basis of Aboriginal policy at the Commonwealth level and, to a lesser extent, at State level. ATSIC's objectives encompass self-determination.[101] That is, Aboriginal peoples are involved in policy through the operation of the Commission and the regional Councils. These organs are subject to Ministerial discretion. Australia has taken a strong stance in supporting the concept of self determination in the Draft Declaration on the Rights of Indigenous Peoples. Australia is one of the very few states to have supported this view, with many countries fearing that the inclusion of such language would open the way for indigenous groups to claim sovereign status within larger states. Australia has taken the concept to mean the continuing right of all peoples and individuals within each state to participate in the political process by which they are governed, and that indigenous peoples are among those groups which may have to overcome barriers inhibiting their full democratic participation in the democratic process. Specific recognition of the right of self-determination for indigenous peoples, as separate and distinct peoples, will, Australia has argued, assist them to overcome the barriers to full democratic participation. It does not extend to the choice of separate status as an independent sovereign state (see Milner 1992; Tickner 1992). The government's major commitment to the principle of self-determination has been the creation of ATSIC, and its system of regional councils.

Within the Great Barrier Reef Marine Park the evidence appears to be that Aboriginal people remain concerned that their participation in policy development, priority setting and overall management issues has been fairly rudimentary. On the other hand the evidence from previous reports is that Aboriginal people are not hostile or bitter towards the Authority or in any way seeking to shame or blame the Authority for any failings that it has it has shown towards incorporating Aboriginal interests in the park. If the Authority genuinely recognises that it can improve its performance then the way is open for real progress in a lot of the issues noted above. Certainly Aboriginal people are interested in the *future* of relations with the Authority, not going over the past. Broadly speaking the steps outlined above should ensure that Aborigines are not only consulted but actively involved in determining policies and program design and implementation for appropriate areas of the Marine Park. The key issues are the establishment of Aboriginal management areas and Aboriginal heritage zones in areas of sensitive cultural interest, the implementation of self-management strategies, places on the consultative committee and ensuring that the Aboriginal Liaison officer has the resources to provide direct linkages with planning and management. Credible models for indigenous involvement in protected area management have been established in such places as Uluru and Kakadu and the general trend towards such involvement does seem fairly inevitable.

These recommendations have been made in one form or another in previous reports but unless the Authority considers implementing them Aboriginal people will no doubt be somewhat

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[101] The *ATSIC Act* does not use the term self-determination but has the objective of ensuring 'maximum participation of ATSI persons in the formulation and implementation of government policies that affect them', and promoting 'self management and self sufficiency' among Aboriginal persons and Torres Strait Islanders s.3(a)(b) *ATSIC Act 1989*. Australia wide there are 60 ATSIC regional councils, whose members are elected by ATSI people living in the region. The regional councils are corporate bodies whose principle functions include the preparation of regional plans to improve the economic, social and cultural status of ATSI people in the region and to prepare draft budgets for consideration by the commission. Regional councils are required to report annually to the commission about the implementation of the regional plan.

cynical about the very positive features of the draft strategic plan. In other words, while the strategic plan could be very useful in presenting the Authority in a positive way to Aboriginal groups there does need to be a genuine commitment to implement the recommendations that the Authority has already been presented with in commissioned reports and other studies.

If there are to be changes made then the first steps must be for the Authority to acknowledge that it needs to improve its performance in the area of indigenous rights and to muster the political will to make changes. There should however be no easy assumption that a quick fix is possible—the *process* will be just as important as the outcomes and a careful attention to process will be very important. Of course planning for change must take place and a number of the recommendations will provide the structure to undertake such a process. Resources will have to be provided if the Authority is to move on these issues. The Authority's overall funding from the federal government is not high-around $11million a year (around the same as the Maritime Museum in Sydney) and this financial year it received a 20% cut from this relatively small base. There is no doubt that the amount of resources needed to consult with Aboriginal groups is much higher than with other groups and unless the resources are provided a consultative process with Aboriginal people will fail. ATSIC should certainly be approached in a direct way for extra funds for positions and training and employment of rangers. The Authority should be honest in stating that it wants to improve its efforts in the area of indigenous issues, but also present any proposals as an *opportunity* to funding bodies. After all, the GBRMPA is recognised around the world as a leader in marine management and improving its performance on Aboriginal and Torres Strait Islander issues is a win-win situation. While the funding and resource constraints issues are extremely important it should also be borne in mind that a number of the strategies advocated do not require a huge injection of funds (although they will obviously require people to spend time on these issues) so much as the inculcation of fresh perspectives at senior levels within the Authority.

As 1993 is the International Year for the World's Indigenous People this will provide a unique opportunity for the Authority to take action on the full set of recommendations it has received. The Authority, along with other government agencies, may come under strong questioning on its indigenous rights policies and it therefore has a vested interest in seeing that it is taking the issue of indigenous marine rights seriously. The Authority's reputation can only receive a boost if it responds to the conservative and legitimate claims of Aboriginal and Islander groups. Indeed the very high international reputation that the Authority has may well be jeopardised if it does not move on the set of recommendations it has been given over the years. The implications of Mabo should provide an added sense of urgency to the Authority here, for the Authority may have to deal with indigenous people as 'owner groups' rather than simply as another 'user-group'.

RECOMMENDATIONS

It would *not* be sensible for the Authority to explicitly recognise native tenure when the location of it is unknown. There would also be political problems if the Authority was seen to be too far ahead of Commonwealth policy in this area. Rather, the Authority needs to provide indigenous groups a decisive voice in park management, in appropriate areas. The broader political implications of Mabo need to be appreciated by the Authority—that Aboriginal peoples aspirations for greater involvement in all aspects of resource management have been raised by the decision and has created a climate of heightened expectations about what the Authority should deliver by way of Aboriginal involvement in the park.

Aboriginal and Islander involvement should be increased, probably by at least two members (one Aboriginal and one Torres Strait Islander) on the Consultative Committee and there should be a legislative requirement to this effect.The person(s) selected must be *representative* of the various Aboriginal and Islander communities and organisations. Unless this is done the representative(s) are unlikely to have much credibility with the Aboriginal and Islander population. It will also be important that the Aboriginal and Islander person(s) be properly resourced to travel and to liaise with Aboriginal and Islander people. The people selected should be funded to take time off from their jobs to at least report back to communities after consultative meetings. They should also regularly attend meetings of the Aboriginal Liaison group.

Augment the resources of the Aboriginal liaison officer and move towards making this a higher level position. Steps should be taken to adding staff in this area (strong consideration should be given to appointing at least one female officer) as one liaison member will not be enough given the range of issues and distances the officer has to cover. At least six officers are needed. These people should come from the major communities. They would form an Aboriginal liaison unit placed in the organisation where they would be most useful. When such staff are on board it would make sense for an Aboriginal and Islander policy unit to be formed in the Authority to act as a link to an indigenous consultative committee(see below). In the short term consideration should be given to upgrading the seniority of these positions. The current appointment is at ASO 6 level. If the Authority wants to be seen to be serious about embracing indigenous rights issues it should consider the example of some mining companies in negotiations on aboriginal issues—they appoint a senior adviser to the Chief Executive Officer.

The establishment of a separate Aboriginal and Islander Consultative Committee should be considered. A separate indigenous consultative body would provide a means for the Authority to directly access the views of Aboriginal maritime groups and to have its views reported back to those groups. Such a committee should not necessarily be viewed as a permanent structure. It *may* be a permanent structure but it may turn out to be a stage in the process towards devolution of power to Aboriginal management committees. Structures should be seen as *evolving* rather than set in concrete.

There should be a formal recognition in the Act that maritime clan boundaries and maritime clan estates will be recognised in zoning and management plans. While s.32 of the Act provides for an extensive process of public notification and consideration of public representations by the Authority a more formal recognition of Aboriginal clan boundaries and maritime clan estates would signal the importance that the Authority attaches to the just claims of Aboriginal people. It should not be seen as opening the gates to single out other groups in the Act. Varying circumstances will affect different groups and this will sometimes warrant different treatment. The formal recognition of cultural sites should facilitate the development of marine protected areas in Aboriginal and Islander traditional 'sea country'.

Recommendations for Aboriginal Management zones and Heritage areas in coastal regions near communities need to be acted upon. Aboriginal Management zones would need to involve consultation with elders responsible for particular areas, patrolling by community rangers and joint management by the Authority and Aboriginal people appointed by the local community councils. Such options would provide the community with a degree of control over the sea and access to trust lands, active involvement in the management and protection of sites of significance within the marine areas, and official recognition of inshore waters within traditional clan estates. It would also provide a structured process for consultation and management of areas of Aboriginal significance within the marine park. Such zones could not have provisions which were inconsistent with a zoning plan, except where a special management area applies.

Previous recommendations for Aboriginal communities to be involved in joint management strategies, using community rangers and to be directly consulted on marine resource use and management need to be acted upon. The focus of Aboriginal groups in the GBRMP has been on joint management of areas and not exclusive rights to those areas. From the Authority's viewpoint it seems encouraging that Aborigines have not pushed for ownership rights or the very substantial degree of control exercised elsewhere in those national parks leased back to governments. What the Authority should therefore appreciate is that the request by Aboriginal people for protection of traditional sites, involvement in the active management of the park, consultation on such issues as trawler access to inshore waters are not only *legitimate* claims but also quite *conservative*.

There will be little point in the Authority moving to set up particular structures, however, until Aboriginal people have some input into the kinds of management structures that are most appropriate. Smyth's suggestions on management structures and management areas should certainly provide the basis on which the Authority should approach the Aboriginal owners for their comments and suggestions. As Smyth very correctly notes, this must commence with the Authority declaring that it is willing to negotiate on these issues 'in an open-minded way it would then become necessary to establish consultative, research and negotiating processes that could arrive at mutually acceptable joint management arrangements' (Smyth 1992,53). It will mean that the Aboriginal liaison officer will have to have direct links to the highest levels of planning and management in the Authority.

The desire by Aboriginal communities to be involved in management through community rangers should be supported in ways that stress local training and supervision.

It will also be important for the Authority to resolve issues relating to the legal liability of community rangers and the lines of reporting accountability. Clearly the liability and reporting issues will need to be resolved *before* training courses get very advanced. It is recommended that the Authority and the Queensland Environment and Heritage Department form a joint working party to resolve these issues and put in place a general framework that allows for clear reporting lines and deals with liability issues.

Move towards local co-management structures so that in the longer term the need for permits for traditional hunting will be reduced or eventually not be necessary. The Authority should not focus too heavily on the problems of Aboriginal hunting and fishing. Aboriginal hunting and fishing is not *the* issue. It is really only a *sub-issue* of the main issue of Aboriginal management of marine park areas, and conservation of the dugong and turtle should be seen in the broader context of co-management strategies. Once the Authority has in place a devolved Aboriginal management structure many of these issues can be resolved at the local level. It may be possible to do away with permits altogether if such structures are put in place.

A move from community permits to effective local ranger management areas is desirable, with the emphasis being on community environmental management groups achieving community input into decision-making. Self management rather than regulation is preferable and here the Authority should extend its efforts in conservation information through kits, better extension work and the use of the media, print, radio and television. The wider use of video should be considered here. Where necessary materials could be in local languages.

Strengthen information policies to target both Aboriginal communities and the public on issues of Aboriginal concern. Aboriginal communities do not understand or have a poor understanding of the Authority, its management strategies, use of zones etc. This suggests that current efforts at education and information need to be strengthened so that more communities are reached. For many Aboriginal people, English is a second language and they may have infrequent access to newspapers in which invitations to participate in the planning process are placed. They may not be in a position to make detailed written submissions, outlining their concerns. There may be scope for the Authority to require maps and management prescriptions include Aboriginal and Islander interpretations of areas, (if the areas are not secret). There may also be scope for some material to be in relevant indigenous languages. To have an adequate education program, Aboriginal people have to be involved in its formation, the production of materials, its dissemination and its interpretation.

Consult with the Lands Department on trends in Aboriginal lands claims. As a result of the new Queensland Aboriginal and Torres Strait Islander Lands Acts the Authority will need to consult widely with Aboriginal groups and the Queensland Lands department on likely trends on land (and potentially sea) claims. With claims to vacant crown land anywhere in Queensland a possibility as well as access to tidal lands (granted only by the Governor in Council) the structure of Aboriginal communities may be expected to alter. With this may come more Aboriginal and Islander coastal communities and this will necessitate the Authority being actively involved in negotiations on such claims.

Improve efforts to consult with Torres Strait Islander people and engage them in the management of the marine park. The Authority needs to repair its damaged relations with the Islanders and the first step is to engage Islanders in the management of the marine park. This could include representation on the Consultative Committee and regular visits, particularly when the zoning plans for the far northern area are done over the next two years. The Authority could, in a low key, informal way offer resources (or let it be known via others that it is willing to offer resources) and support for development of the Marine Strategy for Torres Strait (MASTS).

The Authority should consider initiating a collaborative research program with relevant Aboriginal and Torres Strait Islander representatives on indigenous issues. The program would focus on marine tenure boundaries and usage, register important cultural sites in the Marine Park, develop a database of local knowledge and indigenous management practices and strategies for effective consultation and social impact assessment procedures.

These recommendations have been made in one form or another in previous reports but unless the Authority considers implementing them Aboriginal people will no doubt be somewhat cynical about the very positive features of the draft strategic plan. In other words, while the strategic plan could be very useful in presenting the Authority in a positive way to Aboriginal groups there does need to be a genuine commitment to implement the recommendations that the Authority has already been presented with in commissioned reports and other studies.

There is no doubt that the amount of resources needed to consult with Aboriginal groups is much higher than with other groups and unless the resources are provided a consultative

process with Aboriginal people will fail. ATSIC should certainly be approached in a direct way for extra funds for positions and training and employment of rangers. The Authority should be honest in stating that it wants to improve its efforts in the area of indigenous issues, but also present any proposals as an *opportunity* to funding bodies. After all, the GBRMPA is recognised around the world as a leader in marine management and improving its performance on Aboriginal and Torres Strait Islander issues is a win-win situation. While the funding and resource constraints issues are extremely important it should also be borne in mind that a number of the strategies advocated do not require a huge injection of funds (although they will obviously require people to spend time on these issues) so much as the inculcation of fresh perspectives at senior levels within the Authority.

ACKNOWLEDGMENTS

Many people helped the author in the course of preparing this report. From the Great Barrier Reef Marine Park Authority I would like to thank Dr David Lawrence for his cheerful guidance in overseeing the project, Ross Williams for his valuable perspective on indigenous issue and Stephen Sparkes and Dominique Benzaken for their comments on an earlier draft. Professor G. Kelleher, the Chairman of the Authority was generous in giving his time to discuss many of the themes in the Report. Outside the Authority I would like to thank Dr Dermot Smyth for spending some time with me discussing indigenous issues relating to marine management. Dr Elspeth Young from the Geography and Oceanography Department and University College, ADFA was very helpful in allowing me to examine here collection of material on Aboriginal involvement in national parks. Dr Bob Johannes from CSIRO provide advice and material on customary marine tenure in the South Pacific. I would also like to thank Sue Moss for valuable research assistance and Bev Lincoln for preparing the final manuscript. Bev Cooper from Unisearch was also helpful in project management. Finally I would like to thank the three referees of the report for their comments.

PUBLICATION NOTE

Chapter 4 of this report draws heavily on an opinion on offshore native title written by Dr Richard Cullen, acting head, Department of Professional Legal Education, City Polytechnic of Hong Kong. Parts of this chapter use wording very closely based on Dr Cullen's original opinion.

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APPENDIX A

Recognition of Aboriginal and Torres Strait Islander Interest*

RATIONALE—WHY?

For thousands of years Aborigines and Torres Strait Islanders have used the natural environment of the Area for both cultural and economic purposes in an ecologically sustainable way.

Present and future management of the Area should recognise this continuing use and that *population* changes, modern technology and other activities may impose increased pressure on *resources* requiring innovative management.

25 YEAR OBJECTIVE—WHAT?

To have a community which recognises the interests of Aborigines and Torres Strait Islanders so that they can pursue their own lifestyle and culture, and exercise responsibility for issues, areas of land and sea, and *resources* relevant to their heritage within the bounds of *ecologically sustainable use* and consistent with our obligations under the World Heritage Convention.

BROAD STRATEGIES—HOW?

- Where such plans are appropriate, Aborigines and Torres Strait Islanders to develop with appropriate *stakeholder agencies* and organisations, management plans to ensure that their traditional use of resources is *ecologically sustainable*.
- Ensure that use by Aborigines and Torres Strait Islanders is taken into account in the development of resource management plans.
- Ensure that Aborigines and Torres Strait Islanders have opportunities for membership of, and full involvement in, the relevant consultative and decision-making bodies.
- Provide the full range of employment opportunities for Aborigines and Torres Strait Islanders in *agencies* and industries in the Area.
- Educate the general *community*, other *users* and managers about the cultural heritage and aspirations of Aborigines and Torres Strait Islanders.
- Develop culturally appropriate and understandable formats for regulatory and informative material that is distributed to Aborigines and Torres Strait Islanders.
- Consider the legal implications of the Mabo ruling for the legislative framework for, and management of, the Great Barrier Reef World Heritage Area.

* From: The Great Barrier Reef: Keeping it Great, A 25 Year Strategic Plan for the Great Barrier Reef World Heritage Area 1992—2017, Draft of the Final Draft November 2, 1992.

5 Year Objectives	Strategies
6.1 **To ensure that the interests of Aborigines and Torres Strait Islanders are reflected in the management of the Area.**	6.1.1 Develop effective participation processes and structures in conjunction with Aborigines and Torres Strait Islanders. 6.1.2 Cooperatively develop guidelines for *stakeholder agencies* and organisations for culturally appropriate interaction with Aborigines and Torres Strait Islanders. 6.1.3 Ensure negotiation occurs on all aspects of management. 6.1.4 Ensure that use by Aborigines and Torres Strait Islanders is taken into account in the development of resource management plans. 6.1.5. Where plans are appropriate, Aborigines and Torres Strait Islanders to develop, with *stakeholder agencies* and organisations, management plans to ensure that their traditional use of resources is *ecologically sustainable.* 6.16. Provide opportunity for Aborigines and Torres Strait Islanders for membership on, and full involvement in, advisory committees and management boards. 6.1.7 Develop and implement employment and training programs in *stakeholder* organisations for Aborigines and Torres Strait Islanders. 6.1.8. Consider the implications of relevant legislation for native title.
6.2 **To Inform the general public of the culture and economies of Aborigines and Torres Strait Islanders in relation to the Area.**	6.2.1. Develop educational and interpretive materials and programs, in conjunction with Aborigines and Torres Strait Islanders. 6.2.2. Incorporate information about Aborigines and Torres Strait Islanders in education curricula and interpretive programs.

6.3 **To develop a culturally appropriate information program for Aboriginal and Torres Strait Islanders, regarding the Area and its management.**	6.3.1 Produce culturally -appropriate material 6.3.2 Disseminate information in a culturally-appropriate manner
6.4 **To establish co-operative management arrangements between Aboriginal and Torres Strait Islanders and *stakeholder agencies* in the area.**	6.4.1 Establish a legislative basis for cooperative management arrangements. 6.4.2 Establish cooperative management arrangements for specific areas. 6.4.3 Provide for Aboriginal and Torres Strait Islander representation on advisory committees and management boards.
6.5 **To ensure that projects related to the social, cultural and economic interests of Aboriginal and Torres Strait Islanders are included in the research and monitoring programs.**	6.5.1 Identify and develop research and monitoring projects in consultation with Aborigines and Torres Strait Islanders. 6.5.2 nvolve Aborigines and Torres Strait Islanders in projects that affect the interests of their people.