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.