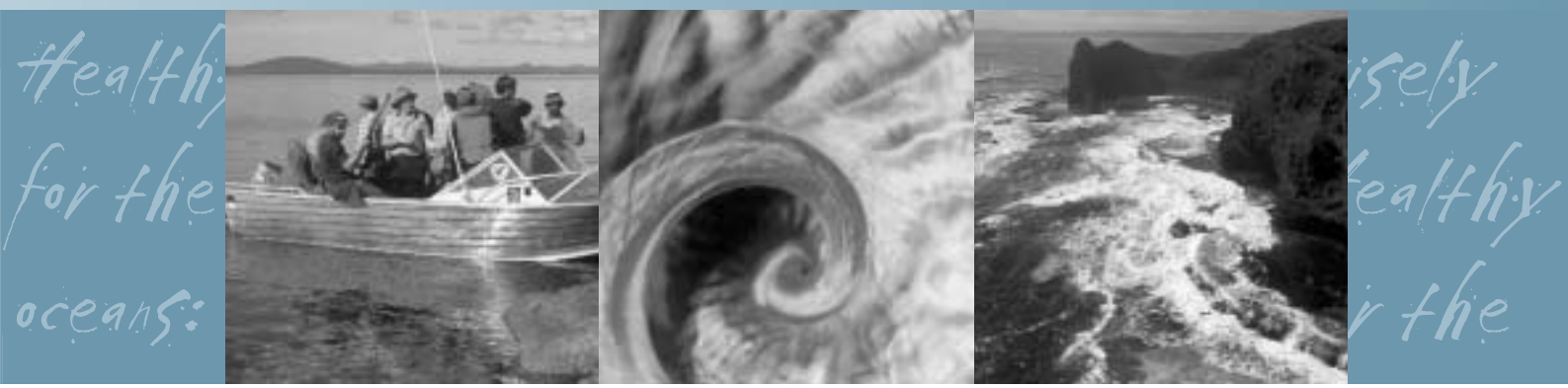
Assessment REPORT

Sea Country

an Indigenous perspective



THE SOUTH-EAST REGIONAL MARINE PLAN

Title:
Sea Country – an Indigenous perspective
The South-east Regional Marine Plan
Assessment Reports

Disclaimer:
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Indigenous people have never surrendered any rights. They have an unbroken custodianship with the land and seas.

Indigenous Working Group Workshop, Melbourne, 8 November.

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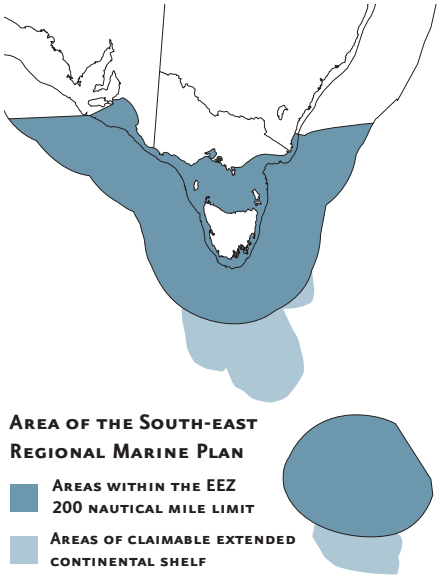
Preface

Australia's Oceans Policy and regional marine planning provides a framework for the people of Australia to explore, use, protect and enjoy our extensive marine resources. As its base, the Policy recognises the need to protect the biological diversity of the marine environment while at the same time promoting and encouraging sustainable, secure marine industries.

Regional marine planning is a way of achieving the *Oceans Policy* vision. It uses large marine ecosystems as one of the starting points for the planning process by creating planning boundaries that are based on ecosystem characteristics – a major step towards ecosystem-based management.

This assessment report is one of six that are an initial step in better managing Australia's oceans. They provide a knowledge base for developing the South-east Regional Marine Plan – the first regional marine plan being implemented under *Australia's Oceans Policy*.

The South-east Marine Region brings together three of the large marine ecosystems: the South-eastern, the South Tasman Rise and Macquarie.



The South-east Marine Region covers over 2 million square kilometres of water off Victoria, Tasmania (including Macquarie Island), southern New South Wales and eastern South Australia.

The Region includes both inshore (State) waters (from the shore to three nautical milesoutside the territorial basline) and Commonwealth waters (from three to 200 nautical miles outside the territorial baseline), as well as the claimable continental shelf beyond the Exclusive Economic Zone.

To build a solid understanding of the complexities of the Region, information on ecosystems and human activities were gathered for both State and Commonwealth waters across six areas:

- biological and physical characteristics – identifying the key ecological characteristics in the Region, their linkages and interactions

- uses within the South-east Marine Region – describing our knowledge of the nature and dimension of human uses and their relationship with each other
- impacts on the ecosystem – providing an objective analysis of how activities can affect the Region's natural system
- community and cultural values – ensuring community wishes and aspirations are reflected in the planning process
- Indigenous uses and values – gaining an understanding of and support for Indigenous interests in the Region.
- management and institutional arrangements – analysing current legislative and institutional frameworks to determine the best mechanism for implementing regional marine plans.

Specific scientific projects have filled gaps in our knowledge wherever possible and have clarified some areas in our understanding of the deep ocean's ecosystems. Specialist working groups of stakeholders and experts in their fields have provided invaluable direction and input to the planning process. As well, stakeholder workshops, community surveys and consultations have all helped build our knowledge base and have provided a voice for the people of the South-east Marine Region. Without this consultation, the picture would not be complete.

Moving Forward

The six assessment reports are about increasing our understanding and appreciation of the Region's wealth and ecosystem diversity, and starting to define what we want for the Region. From this shared understanding, we will move forward to define a plan that maintains ocean health and supports competitive yet sustainable industries, as well as enhancing the enjoyment and sense of stewardship the people of Australia feel for the oceans.

While the Region includes State coastal waters, the South-east Regional Marine Plan will focus on the Commonwealth ocean waters.

The shared values and understanding of the Region gathered during the assessment stage give us a foundation for building a plan for the Region. The National Oceans Office has produced an Assessment Summary which brings together the key findings of the six assessment reports.

Supporting this Summary is a Discussion Paper which provides topic areas to help communities, industry and government begin discussion on the planning objectives, issues and concerns for the South-east Regional Marine Plan. The Discussion Paper also details the next stage of the planning process for the South-east Regional Marine Plan.

Your input into the regional marine planning process is important. To register your interest or for more information about the South-east Regional Marine Plan, *Australia's Oceans Policy* and the National Oceans Office, visit www.oceans.gov.au, or phone (03) 6221 5000.

Introduction

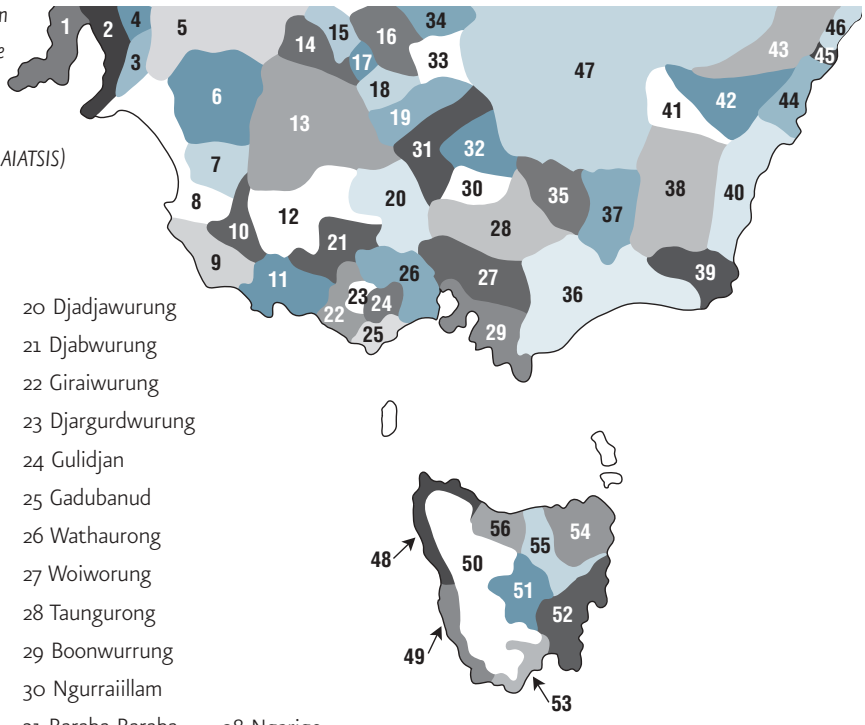
> Indigenous people have a culture that relates to the land and sea in a holistic way that also includes connections to powerful and significant places. However, the emphasis that is now put on management of discrete sites can overlook and diminish Indigenous connections to the environment as a whole.
>
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

Contemporary Indigenous interests in the South-east Marine Region are diverse and complex. Indigenous people live around the Region in major cities, regional centres, small towns and on Indigenous land. There are no reliable statistics for the number of Indigenous people living in coastal areas of the Region in South Australia, New South Wales, Victoria and Tasmania.
But we know that many have been displaced from the coastal areas where their families once lived.

Coastal areas of South-east Australia were amongst the most densely populated regions of pre-colonial Australia. These highly populated areas provided an abundance of marine and other resources that were not available away from the coast and oceans. Coastal shell middens and the many sacred sites, places and artefacts along the coast are stark reminders of this reliance.

The fertile volcanic plains of south-western Victoria were among the most densely populated regions of pre-colonial Australia. The Aboriginal people practiced intensive gathering, harvesting, hunting and fishing economies that included the management and manipulation of plants, land animals and fish. They established semi-permanent base camps and ceremonial and political life involved large social networks (Lourandos 1987).

Map 1: *Approximate location of major Indigenous language groups of South-east Australia at the time of British colonisation. (Source: AIATSIS)*



1 Narangga
2 Kaurna
3 No published information available
4 Ngadjuri
5 Danggali
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7 Bindjali
8 Ngarrindjeri
9 Buandig
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12 Jardwadjali
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27 Woiworung
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31 Baraba Baraba
32 Yorta Yorta
33 Nari Nari
34 Yitha Yitha
35 Waveroo
36 Kurnai
37 Jaitmatang
38 Ngarigo
39 Bidwell
40 Yuin
41 Ngunawal
42 Gundungurra
43 Dharug
44 Tharawal
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46 Kuring-gai
47 Wiradjuri
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54 Pyemmairrener
55 Tyerrernotepanner
56 Tommeginne

Disclaimer: This map indicates only the general location of larger groupings of people which may include smaller groups such as clans, dialects or individual languages in a group. Boundaries are not intended to be exact. The views expressed in this publication are those of the author and not those of AIATSIS. For more detailed information about the groups of people in a particular region, contact the relevant land councils.

This displacement, and the allocation of coastal and sea rights to non-Indigenous people changed the connections to place by contemporary Indigenous people. Most still have strong ssociations with their country.

Indigenous people make no distinction between land and sea. They see themselves as having responsibilities and rights across the land and sea boundaries that have been put in place over the last 200 years. So there is not one story but hundreds that must be heard to understand what people had, and what they want.

Finding out this information and making it available is fundamental to the success of the South-east Regional Marine Plan. The Region can be seen as complex set of relationships between people and the ecosystems that support them. The relationships with sea country and the aspirations of Indigenous people form an integral part of the whole system that makes up the Region.

The Region is based on ecosystem boundaries and includes all marine areas out to 200 nautical miles offshore. There are further areas of the claimable continental shelf extending up to 350 nautical miles offshore that also form part of the Region. While the Region includes coastal or State waters that extend from the shore for three nautical miles, the South-east Regional Marine Plan focuses on Commonwealth marine management.

Report Outline

This summary of *Sea Country: an Indigenous perspective* outlines major issues and findings in two reports commissioned by the National Oceans Office to assist in developing the South-east Regional Marine Plan:

1. Indigenous Uses and Values in the South-east Marine Region – Consultation Report, prepared by Resource Policy and Management (RPM)

2. Indigenous Uses and Values in the South-east Marine Region – Desktop Report, prepared by Smyth and Bahrdt Consultants.

The consultation report summarises Indigenous uses, values, concerns and aspirations for the South-east Marine Region, based on consultations with coastal Aboriginal people and organisations throughout the Region.

The desktop report supports the findings of the consultation report through a review of published and unpublished material from Indigenous, academic and government sources. It also includes assessments of the current recognition of Indigenous people's rights and interests in Commonwealth and State legislation relating to the South-east Marine Region. It includes a summary of Commonwealth policy initiatives relevant to Indigenous people's marine interests in the Region, and a comparative review of relevant legal and policy developments in New Zealand, Canada and the USA.

Both projects were guided and assisted by an Indigenous Working Group, representing Indigenous interests throughout the Region and chaired by Commissioner Rodney Dillon, ATSIC Tasmania Zone Commissioner and National Sea Rights Portfolio Commissioner.

Indigenous people's relationship with the Region

> Indigenous people still relate to land that was inundated by sea during the last ice age and regard it as their own.
>
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

Indigenous information passed down from generation to generation and archaeological records show that Aboriginal people occupied, used and managed coastal land and sea environments within the Region for many thousands of years before the current sea level stabilised about 5000 years ago. Aboriginal people's cultural and economic relationship with the Region begins before the current coastal ecosystems were established. This relationship includes knowledge and use of lands that now lie beneath the ocean all around the coast, and between mainland Australia and Tasmania.

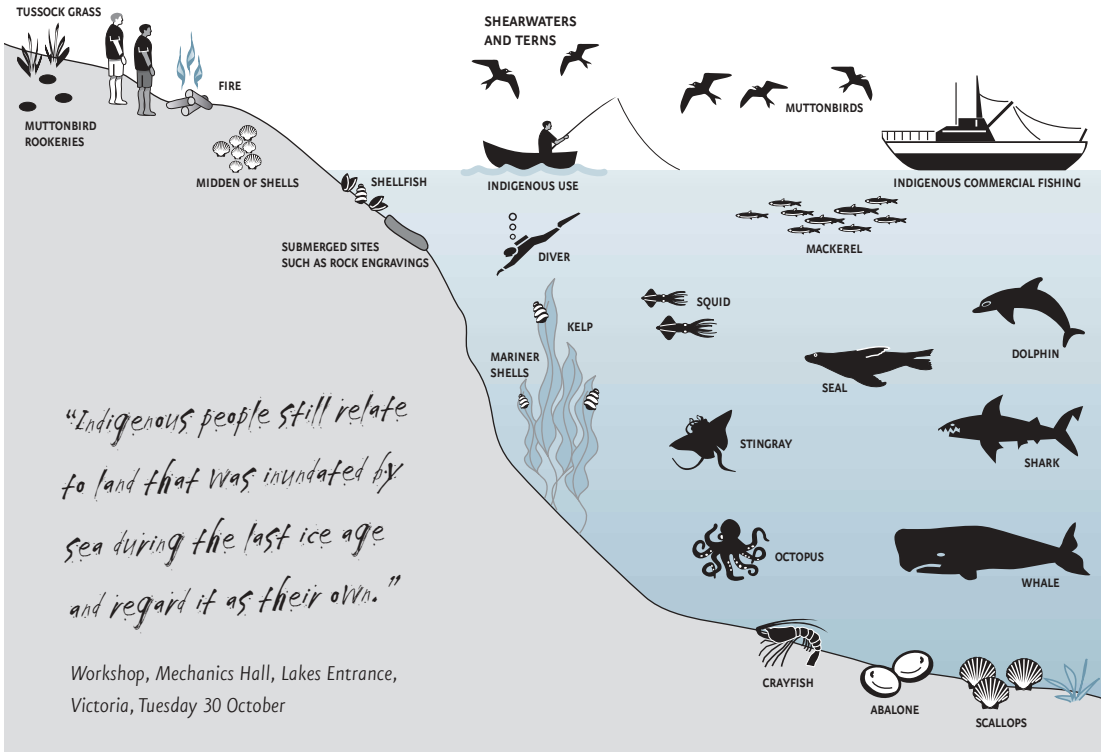
Aboriginal people's relationship with offshore waters was based on travel to islands in bark rafts and canoes, and the use and management of coastal species (eg migratory eels and muttonbirds) that are part of ocean ecosystems far distant from the coast.

At least 17 distinct Aboriginal language groups owned, occupied and used coastal land and seas in the Region. Within these language areas Aboriginal society was made up of smaller groups (now known as family groups) with inherited rights and responsibilities over land and marine environments and resources.

Though each coastal Aboriginal society had a distinct culture, there are common cultural features that link all Aboriginal groups to land and sea. These include an understanding that all land forms, animals, plants, winds, tide and people are the result of journeys and actions taken by ancient creation ancestors. These ancestors also established laws and customs about human behaviour and managing the environment.

Another common feature of coastal Aboriginal cultures is the connectedness of land and sea: together they form people's "Country" – a country of significant cultural sites and "Dreaming Tracks" of the creation ancestors. As a result, coastal environments are an integrated cultural landscape/seascape that is conceptually very different from the broader Australian view of land and sea.

Figure 1: Indigenous use of oceans and marine resources.



Regional issues

While there are coastal and marine issues that are important across many Indigenous individuals and communities, there are also regional differences of history and current concerns that reveal the diversity of Indigenous people in the Region.

New South Wales

The major issues for communities in southeastern NSW are training and the inclusion of Indigenous people in marine enterprises and planning. Also of concern was the need to include a cultural component in planning to keep the customary and cultural links among people and country. Another strong message was the need for recognition by all levels of government of the impacts of planning and development on Indigenous communities.

Victoria

A major issue for Victorians is the lack of recognition of access to and equity in the utilisation of marine resources. The Victorian communities are having difficulty with native title claims. This is closely related to the forced removal from traditional lands experienced by many Indigenous people. Also of concern is the management and passing on of traditional knowledge of marine management practice that is generations old. There is a need for pre-colonial activities, including trade and barter, to be recognised as traditional methods.

Tasmania

A strong message from the Tasmanian consultations is the high level of concern about environmental degradation through pollution and over-exploitation of coastal and marine resources. Another was the importance of continuing use of the coast and seas for food as a means of maintaining cultural links.

South Australia

For South Australians, that no commercial fishing licences have been made available to Indigenous people in that State is the major concern. Other concerns were the sustainability of development processes and a desire for the inclusion of Indigenous people in marine development but not at the cost of exploitation of culture.

Cultural sites and seascapes

> "Our cultural links with the coast and sea are vital to us. To be able to come here and use them to swim and fish is part of our cultural heritage. Mersey Bluff is a known cultural site. Our sense of ownership is continuous."
>
> *Interview with Mr Merv Gower, Administrator, Mersey Leven Aboriginal Corporation, Devonport, Wednesday 24 October*

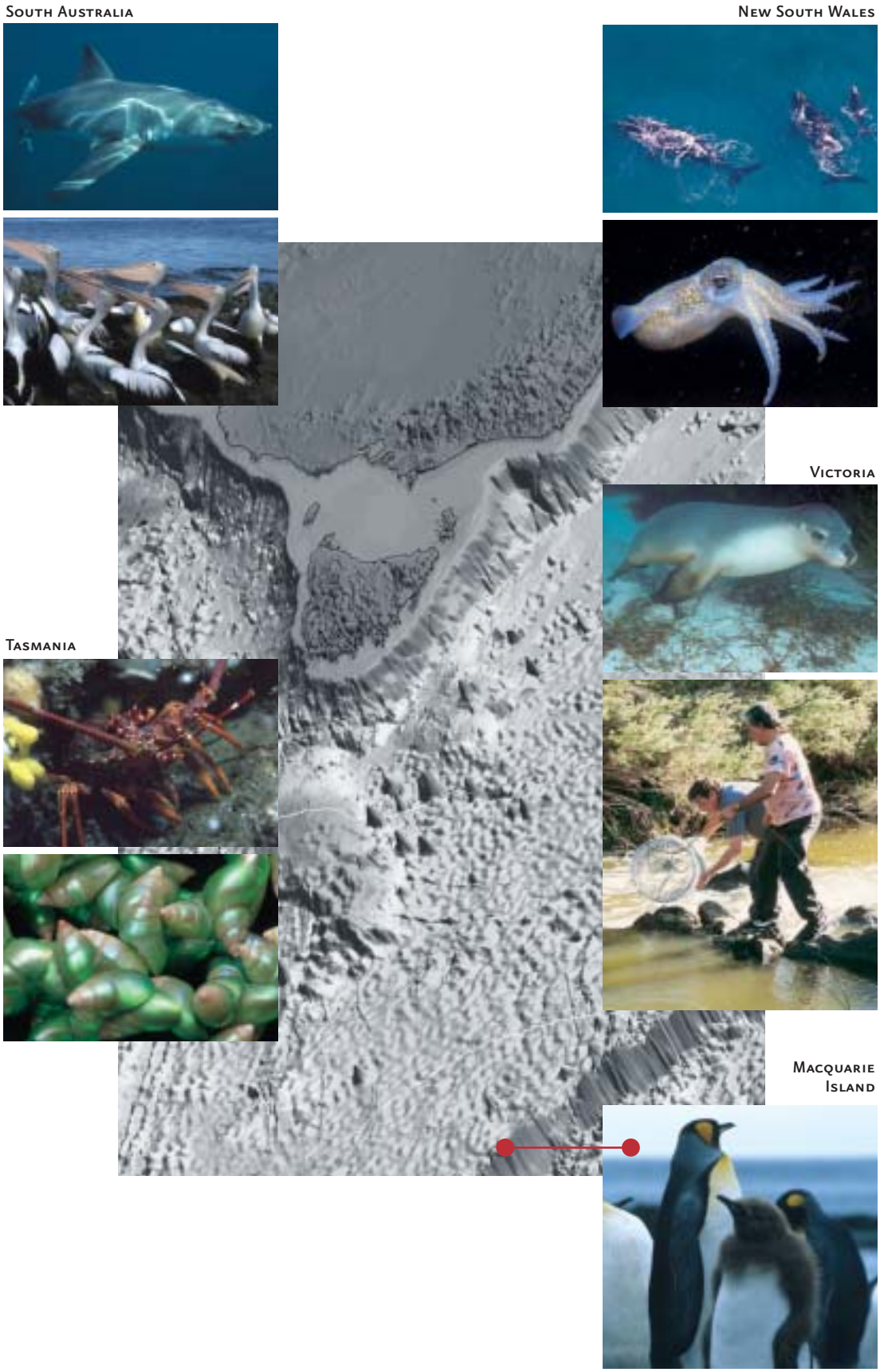
Coastal environments in south-eastern Australia are rich in cultural sites. These include archaeological sites, such as shell middens and stone quarries, as well as "natural" sites, such as headlands, river mouths, reefs and islands. These sites have continuing cultural meaning because of their connection with Creation Stories, Dreaming Tracks, ceremonial places, camping places and massacre sites. Many of these places are listed on the Register of the National Estate, others are recorded in State-based heritage registers, while many others are known only to Indigenous people themselves and are not formally recorded.

All of these sites have significance beyond their immediate location; they indicate the wider connection between Indigenous people, land, sea and resources over time. The shell middens dotted along the mainland and Tasmanian coasts, for example, tell of the unbroken connection between people and marine resources throughout time. The rock shelters of northern Tasmania, containing art, artefacts and animal remains, tell of the connection between people, land and sea 22 500 years ago, when the continental shelf was dry land. Part of this area was flooded by Bass Strait 5000 years ago when sea levels rose.

Coastal sites also link Indigenous people with marine resources and processes far beyond the inshore waters. In this way, coastal sites are indicators of the integrated cultural landscape/seascape of which the Region is a part.

Protecting this cultural heritage is a major concern for Indigenous people.

Figure 2: Some important Indigenous marine resources of the South-east Marine Region.



Indigenous rights in the sea

> Indigneous people have never surrendered any rights. They have an unbroken custodianship with the land and seas…
>
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

Consultations throughout the Region confirm that this uniquely Indigenous view of the sea, which dates back to pre-colonial times, remains a reality for Aboriginal people today. Numerous issues, aspirations and concerns raised by Aboriginal people and organisations relate directly to their assertion of continuing inherited rights and responsibilities to their land and sea country.

Indigenous people's assertions of inherited rights to land were first recognised by Australian law in 1992 with the *Mabo* High Court decision. This recognition of Indigenous "native title" was then formally embraced in statutory law through the *Native Title Act 1993*. These legal developments acknowledge that Indigenous people had, and still have, laws and cultural practices, relating to land ownership, management and resource use that survived the process of British colonisation and are now part of Australian law.

The Native Title Act, however, also recognises that the pre-existing and continuing Indigenous law (native title) must be accommodated with all the other laws, agreements and titles that have been established by successive Australian governments since colonisation. The result is that the native title rights so far accepted by Australian courts may not be as comprehensive as the inherited Indigenous rights asserted by Indigenous people themselves. Though several High Court decisions in recent years, including the Croker Island (*Yamirr*) decision in 2001 which confirmed the existence of native title in the sea, have provided some clarification, considerable uncertainty remains about the extent that Indigenous rights can be accommodated in contemporary Australian law.

Judgements have clarified that native title can include the right to fish and hunt, the right to protect cultural places and knowledge, the right to visit country and the right to conduct ceremonies. But because of the absence of definitive legal judgments, whether native title can include the right to trade or sell natural resources such as fish is unknown. To what extent native title includes a legal right to make, or be involved in making, management decisions about the sea is also unknown. These issues were raised by Indigenous people during the regional consultations, as well as during several earlier government coastal, marine and fisheries inquiries and reports.

The Native Tile Act provides mechanisms to deal with both the certainties and the uncertainties of native title. Native title claimants can seek a formal determination of native title by the Federal Court, assisted by mediation through the National Native Title Tribunal. Alternatively, negotiating an Indigenous Land Use Agreement (ILUA) may resolve a wide range of issues without a formal native title determination. ILUAs can be made over land or sea and become registered agreements that bind the various parties, including native title holders and governments. Some State Governments have developed framework agreements to facilitate negotiating ILUAs in their jurisdictions.

Marine environmental and resource management legislation

> Indigenous people have always used fish and other sea products as items to trade and still need to do so. For example, someone will have a good catch and then use that to barter for mechanical repairs. White laws make this trade very difficult and often completely prevents it.
>
> *Meeting, Bega Aboriginal Land Council, NSW, Wednesday 26 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

The recognition of Indigenous rights and interests in marine environmental and resource management legislation varies considerably between jurisdictions (State and Commonwealth), and between the types of activities being regulated. Indigenous fishing, for example, is seen as a distinct activity in some States but not in others. Similarly, in some States Indigenous people have a statutory advisory role in fisheries and marine protected area management, while in others they do not.

For the South-east Regional Marine Plan, the focus is on the deeper waters under Commonwealth jurisdiction. The Commonwealth's major environmental legislation is the *Environment Protection and Biodiversity Conservation Act 1999*. The Act recognises the important contributions that Indigenous Australians can make to sustainable development and the conservation

of biological diversity, including in marine areas. It promotes a cooperative approach involving governments, the community, industries and Indigenous people.

Several previous national inquiries, notably the *Coastal Zone Inquiry* in 1992/1993, recommended negotiations between governments and Indigenous people to establish accepted national guidelines for the recognition of Indigenous rights and interests, and the equitable participation of Indigenous people in the management of marine environments and resources. An initiative by the Commonwealth Government in 1995 to provide start-up funding aimed at developing an Aboriginal and Torres Strait Islander Fisheries Strategy, was effective in initiating consultations between most State Governments and their Indigenous fishing communities. While significant progress has been made in some jurisdictions, a nationally coordinated approach has not been achieved.

Management issues and opportunities

> "Indigenous people can work with non-Indigenous industry to develop equitable resource management when they are given the opportunity."
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

Specific management issues emerging during the consultations can be summarised as Indigenous people seeking:

- recognition and understanding of rights to the sea and marine resources
- recognition of historical and cultural links with the sea
- education of the non-Indigenous community regarding cultural links between Indigenous people and the sea
- recognition of Indigenous people as sustainable managers of marine environments
- equity in marine resource allocation and usage
- representation in marine environmental and resource management decision-making
- participation in environmental impact assessment for new marine and coastal development
- capacity development of Indigenous people and other marine resource managers to work collaboratively
- development of Indigenous marine industries, including Indigenous commercial fisheries and aquaculture enterprises.

Underlying these needs were expressions of deep concern about the lack of equity in marine resource allocation. There was concern also about the cultural and social impacts of the denial of rights to manage and benefit from marine environments. Also, concerns that unsustainable commercial exploitation of marine resources by others has adversely impacted on the environments and resources on which Indigenous cultures depend.

Indigenous people express the hope that the development of the South-east Regional Marine Plan will present an opportunity to address these issues, and to build on the progress initiated in some jurisdictions. A suggestion from Indigenous people is for them to help reshape existing marine management arrangements and industries to take account of their relationship with the sea and their long experience in sustainable management. Other opportunities include the development of culturally appropriate training, both for Indigenous people and other marine resource managers, and the development of employment opportunities that are economically, environmentally and culturally sustainable.

Economic issues and opportunities

> "Indigenous people have always used fish and other sea products as items to trade and still need to do so. For example, someone will have a good catch and then use that to barter for mechanical repairs. White laws make this trade very difficult and often completely prevents it."
> *Meeting, Bega Aboriginal Land Council, NSW, Wednesday 26 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

Indigenous marine economies, like all human economies, are made up of a complex range of activities and transactions that bring actual benefits to individuals, families and communities. Some of the activities involve the direct harvesting and consumption of resources. Others involve collecting resources on behalf of family members or elders,

while others are of a more commercial nature involving the trade or sale of resources.

The holistic relationship of Indigenous people, land, sea and resources makes it difficult to separate out these various components of Indigenous economies. This may explain the difficulty contemporary marine governance has in accommodating Indigenous economies in management structures, research and resource allocation. While some marine management regimes recognise customary "subsistence" harvesting or fishing rights, they tend not to accommodate Indigenous people's wider management responsibilities or commercial use of resources.

The continuing regular use of marine resources by Aboriginal people around the Region highlights the importance of the sea to the domestic economies of many Indigenous households. While this "subsistence" use of resources is part of a non-cash economy, its contribution in dollar-equivalent terms to household budgets is significant. This continuing economic dependence on marine resources does not readily fit within the category of "recreational" fishing. Some States acknowledge this by legislating for separate Indigenous fishery in fisheries legislation.

Marine Indigenous economic activities have other tangible cultural benefits, like maintaining links with country, passing on skills, knowledge and language to younger people and providing public demonstration of continuing cultural rights and responsibilities.

The breadth of Indigenous economic marine interests establishes a connection between Indigenous culture and marine management issues, including deep ocean management. The significance of the eel harvesting economy of Aboriginal people in western Victoria, for example, connects these people to the management of marine ecosystems in the Southern Ocean, Bass Strait, the Tasman Sea, Coral Sea and Pacific Ocean.

Indigenous trading or commercial marine resource interests are not well understood in south-eastern Australia. In the Torres Strait, Northern Territory and north-Western Australia there is some recognition of a distinctive Indigenous commercial fishery (including the reservation of some species for exclusive Indigenous commercial use). This is not the case in southern Australia.

Indigenous people assert a direct interest in commercial activities and are concerned at attempts to limit Indigenous marine resource rights and interests to "subsistence" and other non-commercial uses.

Education, training and employment

> "There is a great scope to use Indigenous people in policing regulations and monitoring effectiveness. This would provide employment, gain support as well as make better use of Indigenous knowledge and experience."
>
> *Workshop, Eden Land Council, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

Above all else, the message from the consultations was that issues of acceptance of culture, co-management and resource sharing, and a place at the management table are about the health and well-being of Indigenous people. A common understanding and support was seen as necessary to ensure on-going relationships. From these relationships education, training and employment will provide significant benefits to the community.

Possibilities for regional planning

The Indigenous Working Group identified a number of possible positive results for regional marine planning. These include:

- direct Indigenous roles on high-level regional marine planning implementation committees
- an Indigenous Advisory Group/s within the insititutional structure for regional marine planning
- employment creation and training, including monitoring
- application of Indigenous Customary Law to understanding and management of the marine environment
- developing and working in partnerships with industry.

Indigenous Uses & Values

The views expressed in this foreword are those of the authors and not necessarily those of the Commonwealth of Australia. The Commonwealth does not accept responsibility for any advice or information in relation to this material.

Foreword by Commissioner Rodney Dillon:

ATSIC Tasmania Zone Commissioner and National Sea Rights Portfolio Commissioner

Helping to build a better understanding of Indigenous interests in the South-east Marine Region has involved bringing together and working with over seventeen distinct Indigenous language groups. It has required combining the talents, differences, concerns and aspirations of this diverse group of people. In short, the assessment of Indigenous uses and values for the region has been a real challenge for all involved and there is still a lot of work to be done.

Often, it's been an incredibly difficult process. The ocean is close to our hearts, and to tell our story has been confronting. It has meant opening up painful memories and experiences. It has also been a process of sharing and understanding – of seeking common ground.

Indigenous people of the South-east Region are unified by a shared history, a great love for, and connection to the ocean and common issues of concern.

This process provided the opportunity for many of these shared issues to be identified. As part of a workshop facilitated by ATSIC held with the Indigenous Uses and Values Working Group, basic rights and opportunities for Indigenous people were discussed. The Indigenous Uses and Values Working Group agreed on and produced a statement outlining what the Working Group considered are the Basic Rights and Opportunities for Indigenous people.

The process has also highlighted some of our differences: the values, concerns, practices and aspirations that belong only to our own countries. These distinguish us from our neighbours culturally. We are not a collective group with a single view. Many of our ways are different, yet on one point we all agree; the oceans belong to us. They always have, and always will.

The complex nature of Indigenous life, our ocean values and our use of ocean resources is determined by our cultural laws and ways. Our identity as Indigenous people comes from our country – our land and our seas. We have maintained our connection to sea country and we continue to look after our oceans. This is part of our cultural responsibilities for country, and for each other.

Our culture and our view of oceans aren't fixed in time. They aren't held in an institution. They don't hang upon a museum wall. You won't find them searching the texts of the many scientists that have studied our people's ways. Oceans are a part of us, and we are a part of them.

It's an ancient relationship that Aboriginal people of the South-east Marine Region share with our oceans. It's dynamic; its expression changes with the environment

around us. In many ways, we are a changed people. The essence of our modern ways goes back to a time when the oceans were our own, and our concerns were very different than they are today. Our view of economics is as broad as our view of country. Our cultural economy is sustainable. Our economy is driven by our relationship to our resources. The health of these ocean resources, and the ecosystem as a whole, is the foundation of the Indigenous economic system.

The task ahead for our communities is to secure our share in the market place, particularly in marine industries. Recognition of our cultural rights and practices will assist our continuing commitment to the sustainable management of ocean resources. This will provide benefits not only for our communities, but also for all Australians.

We will continue to develop our communities economically, socially and culturally, ensuring that our oceans are respected and cared for. We will continue to seek recognition of our cultural rights to use, enjoy and manage our oceans. This is our cultural way.

I look forward to Indigenous people being explicitly included in the development of the actual SERMP and any future management framework developed for the Region. The question then that must be asked is how are Indigenous rights, uses and issues to be negotiated and considered in the final Plan.

In order for the SERMP to be progressed adequately and Indigenous uses and values to be fully integrated into the Marine planning process, the Commonwealth will need to re-engage with the State Governments and gain commitment from them to enter into Agreements/MOU as part of each regional marine plan. Without this process, the sustainable management of our oceans, particularly Indigenous heritage values and uses, will be seriously compromised. The Indigenous components of the SERMP should be rights based and offer protection for Aboriginal heritage that includes Indigenous values and uses of the oceans.

I look forward to a detailed analysis of the information contained in the two Consultants' reports combined with specific recommendations as to how these issues might be addressed in the SERMP.

In summary, the SERMP will be the first Plan to be developed and I consider that it has been a learning process. As such I believe the Plan should be revisited in regards to Indigenous issues at the completion of each Regional Marine Plan.

Commissioner Rodney Dillon

As part of the consultation held with the Indigenous Working Group, basic rights and opportunities for Indigenous people were discussed. ATSIC were present at this workshop and produced a statement outlining a list of basic wants and concerns. ATSIC acknowledges the original body of work completed by the Framlingham Aboriginal Trust.

Indigenous Uses and Values Working Group Product: Indigenous Basic Rights and Opportunities

Redrafted Document Facilitated by ATSIC

This document was produced during the September 12th and 13th meeting of the Indigenous Uses and Values Working Group and was facilitated by ATSIC.

Aboriginal people express discontent for inadequacy for proper involvement in environment and resource management.

Aboriginal people consent to work with Government in a free and informed consent process where positive outcomes for Aboriginal people can be realised.

Aboriginal people are dismayed about degradation of the natural environment and resource and want to be part of programs and systems that address environmental issues now and in the future.

Access to and use of the land and sea and its resources has a fundamental link to the health and well being of Aboriginal individuals, families and communities.

Aboriginal people must be involved in the ongoing management of the land and sea and its resources to ensure that these resources are sustained.

1. Aboriginal people are recognised as the continued unbroken custodians of the impacted land and seas.

2. Recognition that Aboriginal people have a fundamental right as the custodians of the land and sea to determine the proper management and utilisation of the nations natural resources.

3. As custodians of the land and sea, Aboriginal people are not just another stakeholder along with commercial, scientific and recreational interests but have rights including proper and just settlements.

4. The Australian Government needs to acknowledge and respect international concepts and principles with respect to Aboriginal rights and aspirations.

5. Recognition that the term "Aboriginal Use" of the land and sea includes the rights to barter, trade and sustenance. The Government needs to acknowledge and respect that Aboriginal culture is not stagnant and is alive and evolving.

6. An agreed process or processes that redresses wrongs inflicted upon Aboriginal people and to have in place a means of overcoming processes that deny or erode Aboriginal rights into the future.

7. The removal of inappropriate and unacceptable legislative barriers that prevent or restrict Aboriginal people from carrying out inherent cultural and customary practices for quality of life.

8. Aboriginal people have the right to continuous appropriate access for sustainable yield noting biodiversity protection.

Children dancing at Deen Maar welcome.

The Creation Story

Prepared by:
Neil Martin, Framlingham Aboriginal Trust

Source William Thomas – Letters from Victorian pioneers

> Australian Aborigines believe in two principal Deities, vis.: – Punjil, the maker of earth, trees, animals and man. Punjil, they say, had a wife named Boi Boi, but he never saw her face. She, however, bore him two children, one a son named Binbeal and the other a daughter named Karakarook. To Binbeal is committed the sovereignty of the heaven and to Karakarook the incidental occurrences on earth, and, always carrying a "big one sword". The Australian next Diety is Pallian, brother of Punjil. Pallian made all seas, rivers, creeks and waters, also all the fish in the oceans, seas and rivers. He governs the waters, was always in the waters, walking, bathing and going over the seas.

The narrative then goes on to explain how Punjil created man, woman and how Punjil, Pallian and Karakarook departed this earth –

> ... One morning when they awake they "no see Punjil, Pallian and Karakarook". They had gone up above." The Blacks say that this all took place "very far away" to the NW, alluding to their belief that man and woman were first created in other countries. All agree (I mean different tribes) in stating that the country was "far far away", beyond what they know to the NW over seas. If the point they direct be correct, it tallies with our position of the western part of Asia.

Today, people from this community refer to Deen Maar Island as the point of departure for the Deities Punjil and Pallian.

Sea Country AN INDIGENOUS PERSPECTIVE

Report on Indigenous Community Consultations in the South-east Marine Region

Prepared by RPM for the National Oceans Office as part of preparations for the South-east Regional Marine Plan. October 2001.

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Contents

Introduction

As part of the South-east Regional Marine Planning process, the National Oceans Office commissioned consultants Resource Policy & Management to gather input on Indigenous uses and values from and give voice to Indigenous communities into the South-east Marine Region planning process.

The views presented in this report from Indigenous people within the Region demonstrate a great pride in their traditional connections with the sea and land environments.

The cultural context

> Indigenous people's rights continue and include proper and just settlement of issues such as access to resources that are consistent with self-determination.
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

Australia's oceans are managed and protected through legislative and policy frameworks established by Commonwealth, State and Territory Governments on behalf of the Australian people. They are based on general principles for managing and protecting our country's marine environment. At their foundation are particular norms, beliefs and patterns reflecting the values and interests that the majority of people hold for the management of the sea and land.

Indigenous people of Australia have a different set of norms, beliefs and patterns as the following comments show:

> Indigenous people had a great knowledge and respect for the sea. They could read the wind and the seasons. They harvested on a sustainable basis. However, the loss of rights and the imposition of different restrictions mean that this knowledge is difficult to apply.
> *Workshop, Eden Land Council, Tuesday September 25*

> Indigenous values encompass a wide range of cultural and spiritual matters that extend beyond economic values.
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> Traditional cultural practices are still being passed on to young people. The role of this culture is very important particularly the place of customary law.
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

Before British control in Australia, marine areas were owned and cared for by Indigenous people through a system of strict, complex community rights and responsibilities built up over generations. Land and the sea were not viewed as separate entities but as one customary 'country' (Smyth 2001), which is bound spiritually, culturally and historically to specific communities. For many Indigenous people this relationship remains strong.

Indigenous communities organise and manage their country like "sovereign Indigenous nations so just one Indigenous person may not be able to speak for others" (Winda-Mara, Heywood, Victoria, Wednesday 3 October). This tradition continues and is of fundamental importance when seeking Indigenous people's involvement in decision-making.

It is apparent that in many areas of Australia, including the South-east Marine Region, Indigenous people maintain a relationship with the marine environment that is inextricably linked to a tradition of customary rights and responsibilities, which are based on generations of knowledge and understanding.

What was once managed through complex customary-based rights and responsibilities that identified access, use and distribution of resources, is now centrally allocated and controlled by governments. There are now a mix of activities, enterprises and people who have been granted permits or licences to use the sea's resources.

> Indigenous people continue to hunt and gather despite limits caused by imposed legislation. This imposed legislation involves granting Indigenous resources to non-Indigenous interests.
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

Indigenous people within the Region expressed concern about the change that has occurred under the pressure of competing demands and interests for the sea and its resources under non-Indigenous management systems.

It is also clear from the consultations that Indigenous people want to contribute to regional planning at all levels of decision-making in a way that recognises their rights as Indigenous people. Yet there is apprehension about involvement in a planning exercise that is not inclusive of Indigenous belief systems, particularly as planning exercises are historically associated with European thinking. As the following comments demonstrate, legislative and management arrangements are not seen to recognise Indigenous people's rights and resource access and use:

> "At the moment there is an intricate and dense system of governance and laws that in the end only have the effect of denying and further eroding Indigenous rights and there are never any favourable outcomes."
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

> "Within this current system Indigenous use is often classified by non-Indigenous people as being illegal. Consequently, Indigenous people are prevented from practicing their customs in a society that favours non-Indigenous people."
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> "Indigenous people are not recognised as legitimate and knowledgeable resource managers."
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

It is important that planning and decision-making processes respond in a very practical, respectful and culturally relevant way. Current social needs such as employment opportunities and self-determination, as expressed by Indigenous people in the Region, are issues that also need to be addressed through culturally relevant systems of management.

The consultation process

Indigenous people were interviewed and consulted to gain their perspective on their uses and values of marine areas in the Region.

The aim of the consultations was to include as many Indigenous people throughout the coastal parts of the Region within a six-week period between September and November 2001.

The people consulted were chosen with the help of the Indigenous Uses and Values Working Group. This group was established to advise the National Oceans Office about Indigenous issues and concerns in the South-east Marine Region.

Consultations were conducted through workshops, meetings, tours and interviews. Direct quotes and paraphrasing of people's perspectives were recorded. To ensure that Indigenous people were satisfied with reported information, a copy was sent to workshop coordinators or interviewees for approval before comments were included in this report. This approach also allowed for the inclusion of additional comments from contributors.

Details of the process and a list of people involved in the consultation are included at Appendix 2,3,4,5 and 6. All workshops and interview reports are included at Appendix 1.

Commonwealth/State jurisdiction

The South-east Marine Region is based on ecosystem boundaries – not State or legal boundaries. It includes all marine areas out to 200 nautical miles offshore. There are further areas of the claimable continental shelf extending up to 350 nautical miles offshore that also form part of the Region. While the Region includes coastal or State waters that extend from the shore for three nautical miles, the South-east Regional Marine Plan will focus on only Commonwealth marine management. However, to build a good understanding of the complexities of the Region, this report includes Indigenous people's views on the whole Region including State and Commonwealth waters.

Chapter 1: Relationships and rights

Cultural and traditional relationships

"Indigenous people still relate to land that was inundated by sea during the last ice age and regard it as their own."
Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October

Indigenous people have a continuous link to the marine environment. It is expressed in many ways including custodial responsibilities to certain species:

"Species that are destroyed or over-exploited by non-Indigenous people have totemic and dreaming significance to Indigenous people. They are custodians of a wide range of species such as Pelican and Dolphins. The latter are a powerful totemic species yet they are still being shot by fishers in the Lakes. Black Bream (Tambo) are a species that demands protection. Black Swans belong to certain people who had the right to collect eggs but this is no longer possible."
Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October

"Indigenous people in the region have spiritual links to the land and the environment. The destruction of Aboriginal culture has accompanied the destruction of the environment."
Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October

Coastal and marine resources remain very important to Indigenous people, particularly in relation to hunting and gathering. This is a holistic relationship, which remains frequently overlooked by non-Indigenous people who may emphasise particular sites disconnected from their environmental and cultural context:

"Indigenous people have a culture that relates to the land and sea in a holistic way that also included connections to powerful and significant places. However, the emphasis that is now put on management of discreet sites can overlook and diminish Indigenous connections to the environment as a whole."
Indigenous Working Group Workshop, Melbourne, Thursday 8 November

There are many examples of how basic food resources connected Indigenous people to the seas and oceans. These examples highlight the complex relationships between the ecology of the species and cultural practices:

"The Indigenous people of the region relied heavily on eels and established permanent communities based on both hunting and trapping eels in rock traps associated with their houses. There is still concern about eels, their use and abundance. This species shows the connections between people, the coastline and the open ocean as eels migrate. It provides an avenue for international treaties that involve Indigenous people."
Workshop and tour, Framlingham Aboriginal Trust, Victoria, Tuesday 2 October

"Previously abundant species that were readily accessible such as abalone and crays are now depleted. Not so well-recognised is that beached whales were a major food source and these are no longer available. These are examples of major food losses."
Workshop and tour, Framlingham Aboriginal Trust, Victoria, Tuesday 2 October

"Aboriginal people developed hunting skills and a knowledge about the species they took. People would go in the proper seasons."
Interview with Colleen and Peter Frost, Verona Sands, Tasmania, Tuesday 16 October

Indigenous people feel that much of their culture has suffered because of the practice of relocating Aboriginal people away from their customary country:

> There has been a systematic attempt to destroy Indigenous culture and knowledge that included forced relocation away from the coast or to other areas on the coast in imposed communities where they were not traditional owners. This destruction of Indigenous culture is a continuing process and is experienced in a variety of ways such as being prevented from undertaking ceremonial practices such as burning and group hunting and gathering.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

Today, land developments and laws that preclude access, have meant that many Indigenous people have lost their connections to traditional practices on traditional sea and land country. These traditional practices and knowledge are associated generationally and spiritually with customary estate ownership and management. Indigenous knowledge is inextricably bound with land and sea. The breaking of the strong, cultural bond between specific Indigenous communities and their country, which 'sea country' is integral to, has had an impact that clearly lives on:

> Non-Indigenous people think it all happened suddenly but this loss is continuing. One expression of this loss is a slow continuing loss of access.
>
> *Workshop and tour, Framlingham Aboriginal Trust, Victoria, Tuesday 2 October*

Denial of rights

The denial of rights to coastal and marine resources was raised as a major issue. Many expressed the view that the lack of recognition of Indigenous rights was a fundamental issue:

> There is a very poor relationship between Indigenous people and the uses of the South-east Marine Region because their rights are not recognised.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

This denial of Indigenous rights, as expressed through current management systems, takes many different forms. They range from the obvious such as allocation of land and adjacent coastal waters to national parks where regulations prevent hunting and gathering by Indigenous people, or simply the private ownership of, what is considered by non-Indigenous people, to be prime coastal real estate. These developments act as solid barriers blocking traditional rights and access to a country once owned and managed by coastal Indigenous people:

> Indigenous people are denied access to areas for traditional areas used for food collection. They [traditional areas] are taken up by freehold land, national parks, and recreation reserves.
>
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

> The right to camp for fishing and gathering has been taken away. There used to be hundreds of such camps as shown by middens along the coast. They were prime sites, sheltered and associated with water. The areas where Indigenous use and camping took place are now taken up by private freehold land, local government caravan parks and recreation areas and national parks and each has major restrictions, if not prohibition, on Indigenous use.
>
> *Workshop, Eden Land Council, Tuesday 25 September*

> It should be remembered that while marine parks are good for some they are not necessarily good for Aboriginal people because they impose another layer of regulations that restrict access to food resources.
>
> *Workshop, Cape Barren Island Aboriginal Association, Tasmania, Tuesday 23 October*

Impact of this denial

> Indigenous law exists and it includes a powerful and binding connection with land and sea that includes custodial obligations but this is not recognised in non-Indigenous law.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

Associated with loss of land or loss of traditional use and access is the loss of cultural and spiritual connectedness. There are a wide variety of regulations that prevent Indigenous people hunting, gathering and practicing traditional management and custodial responsibilities:

> People are making money on places from which we are denied access. We cannot exploit resources that we have used for thousands of years. They are either on national parks or private land. No longer can people go to Portland and camp and fish. Our campsites have been taken over and everything is illegal or regulated outside our access. We can't light fires; we cannot practice our culture.
>
> *Meeting, Winda-Mara area, Heywood, Victoria, Wednesday 3 October*

> Getting out to our sites is an economic issue – people need vehicles, they need money for fuel. There are now a whole range of costs associated with access and management that simply did not occur before.
>
> *Meeting, Winda-Mara area, Heywood, Victoria, Wednesday 3 October*

Because of this there is a sense that current legal arrangements favour non-Indigenous people and industries. Indigenous people perceive that current management legislation supports unsustainable practices and excludes Indigenous input into the planning process. Linked to this sense of inequity are the issues of access to traditional sea and land country and the restrictions on practicing of traditional ways:

> Many of the species such as abalone, lobsters, and a wide variety of fish that were hunted and gathered are now depleted and also controlled by licences unavailable to Indigenous people. Abalone is an excellent example, known as 'mutton fish' by Indigenous people it has been allocated to commercial licences and only very small ones are left. Once easy to harvest it is now extremely difficult to obtain those of legal size and bag limits prevent sharing with an extended family or bartering which was a common form of exchange.
>
> *Workshop, Eden Land Council, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

> Indigenous people in the area believe that unless fisheries are properly managed there soon won't be any fish to manage. They see threats to sustainable fisheries coming from agriculture, intensive logging, degradation of streams and rivers and seismic testing. Indigenous people believe that the term 'over-fishing' is used as an excuse for decline in stocks caused by environmental degradation particularly of coastal nursery grounds.
>
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

> We used to light fires on the beach to cook food but this is no longer allowed.
>
> *Interview with Ms Enid Dillon, Nicholls Rivulet. Tuesday 16 October*

Misunderstanding of rights

The entire issue of exactly what legislative rights Indigenous people have under the regulations imposed by non-Indigenous society is unclear to some Indigenous people. This was raised at the workshops and inevitably more questions were asked than answered.

> There is a great deal of uncertainty among Aboriginal people about what they are allowed to do.
> *Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation, Cygnet, Thursday, 17 October*

Responses ranged from very concrete examples of how Indigenous people may be affected by the dense network of existing Commonwealth and State legislation and regulations, to the even more uncertain outcomes or rights associated with the recent Croker Island case and native title:

> There is a need to ascertain just what native title rights exist for the coast and marine environment.
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

Information about what entitlements Indigenous people have in relation to marine resources is not reaching communities. As such they cannot take advantage of their rights:

> It is possible to obtain a special licence for Indigenous people that allow them to harvest and collect for personal consumption. It is available through the Tasmanian Aboriginal Centre in Hobart. No one really informed me about it and I just found out through word of mouth.
> *Interview with Mr Michael Sculthorpe, Committee Member, South-east Tasmanian Aboriginal Corporation, Moonah. Friday 19 October*

Recognising rights

> Indigenous people have never surrendered any rights. They have an unbroken custodianship with the land and seas and this is a continuing inherent right that underpins the Working Group's contribution to this Assessment.
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

Indigenous people living in the South-east Marine Region want recognition of their rights associated with sea and land use, access and resource distribution. This was very strongly expressed by many people consulted:

> We, here in southern Australia, are not treated as real Aboriginal people. White people have a mental map of Australia with a line from Perth to Brisbane and they think that the only real Aboriginal people live to the north of that line. This discrimination is now embedded in our system as more and more white people see images of northern and central Australian Aboriginals.
> *Workshop, Point McLeay, Friday 5 October*

> White people have been dividing the land and water up for years without involving Indigenous people.
> *Workshop and visit to area, Point McLeay, Friday 5 October*

> We do not want much but we want a share.
> *Workshop, Point McLeay, Friday 5 October*

As part of the consultation held with the Indigenous Working Group, basic rights and opportunities for Indigenous people were discussed. ATSIC were present at this workshop and produced a statement outlining a list of basic wants and concerns. ATSIC acknowledges the original body of work completed by the Framlingham Aboriginal Trust.

Indigenous Uses and Values Working Group Product: Indigenous Basic Rights and Opportunities

Redrafted Document Facilitated by ATSIC

This document was produced during the September 12th and 13th meeting of the Indigenous Uses and Values Working Group and was facilitated by ATSIC.

Aboriginal people express discontent for inadequacy for proper involvement in environment and resource management.

Aboriginal people consent to work with Government in a free and informed consent process where positive outcomes for Aboriginal people can be realised.

Aboriginal people are dismayed about degradation of the natural environment and resource and want to be part of programs and systems that address environmental issues now and in the future.

Access to and use of the land and sea and its resources has a fundamental link to the health and well being of Aboriginal individuals, families and communities.

Aboriginal people must be involved in the ongoing management of the land and sea and its resources to ensure that these resources are sustained.

1. Aboriginal people are recognised as the continued unbroken custodians of the impacted land and seas.

2. Recognition that Aboriginal people have a fundamental right as the custodians of the land and sea to determine the proper management and utilisation of the nations natural resources.

3. As custodians of the land and sea, Aboriginal people are not just another stakeholder along with commercial, scientific and recreational interests but have rights including proper and just settlements.

4. The Australian Government needs to acknowledge and respect international concepts and principles with respect to Aboriginal rights and aspirations.

5. Recognition that the term "Aboriginal Use" of the land and sea includes the rights to barter, trade and sustenance. The Government needs to acknowledge and respect that Aboriginal culture is not stagnant and is alive and evolving.

6. An agreed process or processes that redresses wrongs inflicted upon Aboriginal people and to have in place a means of overcoming processes that deny or erode Aboriginal rights into the future.

7. The removal of inappropriate and unacceptable legislative barriers that prevent or restrict Aboriginal people from carrying out inherent cultural and customary practices for quality of life.

8. Aboriginal people have the right to continuous appropriate access for sustainable yield noting biodiversity protection.

Chapter 2: Commercial Interests

Issues of concern

> Too many times we lose out when developments are planned and implemented.
>
> *Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation, Cygnet, Thursday, 17 October*

A number of inter-related impacts and changes resulting from non-Aboriginal activities are of concern to Indigenous people in the South-east Marine Region. Environmental damage, unsustainable management practices, the impact of commercial fishers, and the lack of access to customary sea and land country were all highlighted as significant.

Environmental degradation

Damage to the environment has been witnessed by Indigenous people and is of considerable concern to them:

> We do not want to see the ocean degraded but we have witnessed what has happened to our lakes and estuaries.
>
> *Workshop, Point McLeay, Friday 5 October*

In particular, the impact of non-Indigenous people on marine habitats and the environment was often mentioned. This environmental degradation was seen by one participant as echoing the impact non-Indigenous people have on Indigenous people and their culture:

> Environmental degradation is seen as a form of sickness that mirrors the poor health of Indigenous people. They have suffered by disruption to cultural practices, diminishing food supplies and the lack of exercise and social interaction that came from a meaningful life.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

The role of environmental degradation in diminishing food resources available to Indigenous people was raised frequently in Tasmania. There was also concern expressed about the rapid development of commercial fish farms and the pollution they cause, as well as the introduction of salmon and other species:

> Pollution from the fishing and aquaculture industry is significant yet the debate about controlling them is dominated by the industry itself. Feral salmon are now becoming a pest.
>
> *Interview with Mr Brian Mansell, Mr Stuart Mansell & Mr John Dickson, Tasmanian Aboriginal Land Council, Hobart, Friday 26 October*

Impacts of commercial activity

Of particular concern, is the impact resulting from commercial fishing practices[1]:

> Fisheries are not properly managed. It is far too market-driven and this results in high wastage when unprofitable stocks are caught in nets and dumped. There is also a regular wastage of bycatch. They believe that zoning leads to exploitation of the area and is not adequately policed. They spoke of boats sitting on the edge of zones waiting for opportunities to cross into adjoining fisheries as soon as they thought they could do so unobserved. The main reason for this was too many different jurisdictions. They also said that some boats have multiple licences and this allows them to exploit too many different resources.
>
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

> Channel scallop beds were fished sustainably for years and years. Then one big boat was allowed to use a sputnik dredge and the beds were destroyed.
>
> *Interview with Ms Enid Dillon, Nicholls Rivulet, Tuesday 16 October*

[1] See also comments under the heading 'Current use'.

> We suspect that the drain on the resource is imminent through the fishing and cray industry. There is a constant draining on a resource that must be finite but it does not seem to be slowing down. New niche markets are found and that further increases the drain on the resource.
>
> *Interview with Mr Brian Mansell, Mr Stuart Mansell & Mr John Dickson, Tasmanian Aboriginal Land Council, Hobart, Friday 26 October*

> Commercial fisheries are taking so much yet we get into trouble for taking so little.
>
> *Interview with Ms Enid Dillon, Nicholls Rivulet. Tuesday 16 October*

Indigenous people have lived with and managed the natural resources of the coast of the South-east Marine Region for tens of thousands of years. Because of this, Indigenous people question why current management has not learnt from or integrated traditional Indigenous ways into management systems:

> Indigenous people are environmentalists – sustainability is part of our culture. If we did not look after resources we would starve.
>
> *Workshop, Point McLeay, Friday 5 October*

> Aboriginal people used to know when and how to harvest. We only ever took what we needed.
>
> *Interview with Ms Enid Dillon, Nicholls Rivulet, Tuesday 16 October*

> Indigenous people know the areas that need closing off, where access should be restricted and management practices applied. This approach could be supported by appropriate regulations that Indigenous people have helped design.
>
> *Workshop, Eden Land Council, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

> It would be in the long-term benefit for Australia if Indigenous people were involved in resource management because you can't separate the social from the ecological.
>
> *Workshop, Point McLeay, Friday 5 October*

Access

The lack of access to country through developments along the coastal margin has also impacted on Indigenous people's ability to maintain a relationship with the sea, including resource use:

> The group raised concerns about access being denied by authorities and greenie groups to traditional Aboriginal places where we fished, camped and had our feeds and taught our children. Government agencies, greens groups, and private landholders are locking them off. They expressed that they want these places they will identify open for Aboriginal access.
>
> *Meeting, BEM Federation group of Elders, 28 November*

> The changes imposed on Indigenous people have resulted in pollution and environmental degradation. Habitat has been destroyed and stocks depleted. Indigenous people are now denied access and any involvement in resource management to help rectify the situation.
>
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

Regulations can appear to be subtle but they can have a direct impact on Indigenous people. For example, cleaning and cooking food on beaches is governed by bag limits, camping restrictions and fire regulations that affect the ability to practice culture.

One of the other examples of how access is being denied is by allocating fishing rights to commercial fisheries. Abalone, or mutton fish as it is still widely known among Indigenous people of the South-east, was once easily collected along the rocky shoreline at low tide. As a result of non-Indigenous commercial industry it is no longer available without access to resources such as diving equipment and boats.

Given the high equipment costs it must be asked if it is a worthwhile investment when the bag limit is so low. It was pointed out that 'poaching' is a non-Indigenous term and not part of Indigenous culture because Indigenous people only took what was necessary.

Different economies

Traditional Indigenous economic systems differ from the capitalist, free market systems that dominate Western economies. The Indigenous economy was based on possession and control of their own country and resources:

> Aboriginal people shared among themselves. People's incomes did not reflect the food they ate. They had very low incomes but we grew up "thinking that we lived like kings".
> *Interview with Colleen and Peter Frost, Verona Sands, Tasmania, Tuesday 16 October*

> [We] have lost the ability to trade.
> *Workshop, Point McLeay, Friday 5 October*

Once disassociated from country the ability to maintain an Indigenous economy which was based on access to food and living on country was no longer possible:

> The most significant issue is access to coastal resources and being able to take enough for personal consumption. Access needs to continue into the future.
> *Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation, Cygnet, Thursday 17 October*

The term 'commercial' is a concept belonging to Western capitalist cultures. It is not part of traditional Indigenous culture. 'Trade' and economic systems did, and do, strongly exist within Indigenous cultures but they are built on a totally different belief system. For example, Indigenous people's relationships with the marine environment could be defined in terms of culture, site protection, access and usage, and sustainable distribution of resources. Spiritual understandings underpin this relationship. Cultural ceremonies, for example, were held to protect and secure food and food sources.

> There are many dreamtime stories that show the relationship of original Indigenous inhabitants of the area to the coast and the sea.
> *Meeting, Burrandies Aboriginal Corporation, Mt Gambier, Thursday 4 October*

> Our cultural links with the coast and sea are vital to us. To be able to come here and use them to swim and fish is part of our cultural heritage. Mersey Bluff is a known cultural site. Our sense of ownership is continuous.
> *Interview with Mr Merv Gower, Administrator, Mersey Leven Aboriginal Corporation, Devonport, Wednesday 24 October*

> The way Indigenous people harvested different species at different times can be seen in the middens found along the coastline.
> *Workshop, Framlingham Aboriginal Trust, Tuesday 2 October*

Passing on traditional knowledge and practices is important for Indigenous people. Hunting and gathering is a non-commercial link that Indigenous people have with the marine environment that is highly regarded:

> Aboriginal practices still continue. I have been collecting and harvesting food from the seashore since childhood and now teach my grandchild the Aboriginal ways of doing things. But the decline in species is dramatic.
> *Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation, Cygnet, Thursday 17 October*

> The strongest ties as a child was the connection with hunting and gathering along the seashore. This was the way Aboriginality was expressed.
> *Interview with Colleen and Peter Frost, Verona Sands, Tasmania, Tuesday 16 October*

The way forward

> There is no interaction with commercial fisheries and they exclude Indigenous rights.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

Indigenous people want to get involved in commercial aspects of marine management, but in a way that recognises and respects Indigenous people and their rights. Involvement has the potential for employment and a greater say in management systems:

> New and emerging industries are opening and Indigenous people need to be involved from the outset so that they can benefit from development of industries before all the employment opportunities are taken up by non-Indigenous people.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> There are a numerous Indigenous commercial fishers and they really care about the future of their industry.
>
> *Workshop, ATSIC Regional Council Meeting, Launceston, Thursday 25 October*

The traditional ties between Indigenous people and the marine environment have been changed with the influences and impacts of European systems. However, Indigenous people have maintained traditional knowledge links and attempt to undertake practices that are relevant to both world views. In this way, they can address current employment, social and economic issues, whilst maintaining culturally relevant practices and knowledge. For example, trade was undertaken through a barter system, which still has relevance in today's context yet legalities are viewed as an impediment to this:

> Indigenous people have always used fish and other sea products as items to trade and still need to do so. For example, someone will have a good catch and then use that to barter for mechanical repairs. White laws make this trade very difficult and often completely prevents it.
>
> *Meeting, Bega Aboriginal Land Council, NSW, Wednesday 26 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

Indigenous people's desire to be involved in the sustainable use of marine resources is dampened by the complexity of systems and the over-use of resources under current management arrangements:

> How will State legislation be coordinated and applied? This applies to cultural heritage legislation as well as Indigenous rights. But how will this be done when Indigenous people are not sure of their rights in the first place? For example, the State Fisheries Act is very difficult to interpret when it comes to dealing with Indigenous issues. If an Indigenous person takes more than the bag limit a Fisheries inspector may ignore the situation. However, if say, a non-Indigenous holder of a commercial abalone licence complains then the Fisheries inspector is obliged to prosecute. This situation is further complicated if the Indigenous person is taking more than the bag limit for the purposes of selling them rather than for consumption by an extended family or barter. This is where Indigenous people need to be involved in designing legislation and enforcing regulations.
>
> *Workshop and tour, Framlingham Aboriginal Trust, Victoria, Tuesday 2 October*

Increasing involvement

Indigenous people want to be more involved in all aspects of marine use and management:

> Indigenous people in the South-east Marine Region would welcome positive industry and government support for joint ventures with commercial fisheries and aquaculture where they are regarded as equal partners.
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

Employment is a major concern for Indigenous people, especially the employment of their young people. A way forward is the inclusion of both Indigenous and non-Indigenous knowledge in management procedures and practices.

> We need management rights to areas where we can harvest food such as lobsters and abalone as a community food source.
> *Workshop, Point McLeay, Friday 5 October*

The practices of commercial fishers have led to considerable economic gain for some people, without consideration of the depletion of stock and the sharing of the resource with Indigenous people who owned and managed their marine resources. The economic value of some stock has also risen considerably:

> There has been a huge increase in the price of abalone but Indigenous people have gained no benefit.
> *Meeting at Wallaga Lake, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

Several suggestions were put forward that would bring about increased involvement of Indigenous people in marine management. These suggestions focused on community well-being through defining specific employment roles that are consistent with traditional relationships with the marine environment:

> There should be much greater involvement of Indigenous people in law enforcement and monitoring. They observe many activities such as dumping of rubbish and other pollutants but can't do anything about it. They could be used for mainstream fisheries management but also to manage their own cultural and traditional harvesting methods.
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

> Employment in aquaculture and real jobs associated with it provides an avenue for Indigenous people to gain self-esteem. They can see the results of their efforts and that something they are involved in is not a waste of time.
> *Meeting, Burrandies Aboriginal Corporation, Mt Gambier, Thursday 4 October*

> Indigenous people could be involved and employed in restocking species that are in decline. They could do this using appropriate Indigenous practices and technology as they have ways of doing things that do not destroy the resource.
> *Workshop, Eden Land Council, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

> There is potential for further development of the overlapping interests of Indigenous people with conservation and sustainable natural resource management.
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

Chapter 3: Aspirations

Native title

The issue of native title is intertwined with self-determination and Indigenous rights. The difference between States in determining native title issues is evident. There are some cases where progress is being made:

> One Indigenous Sea Use Agreement is currently being finalised at Twofold Bay, New South Wales.
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

> Indigenous people in Victoria are struggling with native title issues with no claims yet being resolved. However, it may be possible to make claims that lead to co-management and employment.
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

Comments in relation to the implications of native title were varied. The following comments highlight the need for Indigenous people to be fully informed about the repercussions of legal instruments before agreeing to their enactment:

> The Croker Island case has demonstrated that there are rights to the sea.
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> Native title legislation has been primarily used to validate the non-Indigenous occupation of land at the expense of Indigenous people.
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

> There are different implications for native title involved in formalising Indigenous Sea Use Agreements and people need to be aware of all the implications before formalising them.
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> Each of these Elders told how they had grown up under 'white laws and policies'. Changes had been achieved in land rights but very little in the way of access to sea.
> *Meeting, Wallaga Lake, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

Hunting and gathering

Indigenous people throughout the Region recollect that previously abundant species are now difficult or even impossible for them to collect or harvest. They see the commercial fishing industry coupled with environmental degradation as a cause of the decline. In restoring the balance, Indigenous people feel that their rights will be restored. One example they gave was the granting of special permits. A difficulty arising from the granting of special permits to Indigenous people is the perception that only traditional fishing practices should be allowed. This, of course, is difficult as many of the species traditionally caught are no longer available and other fisher people have access to the areas that were once owned by Indigenous people:

> Many Indigenous cultural practices have adapted to use mainstream practices. However, if Indigenous people are given special permits then others complain that they are not using traditional methods. It is also difficult for Indigenous people to acquire equipment such as boats and diving gear. However, this sort of equipment is necessary because the species that were once collected with ease along the shoreline or easily caught have been allocated to commercial operators who do not follow sustainable practices.
> *Interview with Mr Brian Mansell, Mr Stuart Mansell & Mr John Dickson, Tasmanian Aboriginal Land Council, Hobart, Friday 26 October*

Indigenous people are concerned that they do not have any guaranteed rights to the benefits of the commercial fishing industry. New Zealand and Canadian resource allocation models have redistributed benefits to Indigenous communities through treaties or royalties based on catches (Dow and Gardiner-Garden, 1998). This was done through a licence buy-back scheme, with the licences passed to Indigenous people.

"There are appropriate models in New Zealand and Canada for involving Indigenous people in the fishing industry and also methods of devolving some of benefits to them through royalties."
Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November

"There should be a royalty placed on all commercial fishing and fisheries that is distributed to Indigenous people based on the Waitangi Treaty of New Zealand."
Meeting, Wathaurong Aboriginal Corporation, Monday 1 October

The right of Indigenous people to hunt and gather either for themselves as individuals or for an extended family has not been addressed either consistently or equitably in the Region. The common perception of Indigenous people consulted was that the present system is inequitable and or unworkable. For example, a permit system allowing Indigenous people to collect and fish for themselves as individuals does exist, but it does not allow for any other member of the family to use that permit:

"I can get as much fish as I want and fish around Bruny Island. However, the Indigenous permit holder has to be present at all times, even for pulling up a cray pot."
Interview with Mr Michael Sculthorpe, Committee Member, South-east Tasmanian Aboriginal Corporation, Moonah, Friday 19 October

The development of specific enterprises such as aquaculture enterprises were seen as a possible way forward as a means of addressing social issues such as employment as well as ownership issues. Such enterprises can be owned and operated by Indigenous people in a culturally consistent manner. Resourcing of these and other enterprises was raised as an issue:

"There are some initiatives in aquaculture being undertaken through the East Gippsland Aboriginal Corporation, and at Lake Tyers and at Orbost. These are still in their infancy and are experiencing mixed results."
Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October

"The Tasmanian Investment Corporation comprising seven community groups is exploring ways to increase aquaculture ventures at places such as Little Swanport on the east coast."
Meeting, ATSIC office, Hobart, Friday 26 October

Resource sharing through co-management

"Co-management agreements will provide the opportunity for Indigenous people to share in resource use."
Workshop and inspection of issues, Framlingham Aboriginal Trust, Tuesday 2 October

A number of initiatives and structural arrangements to help Indigenous people become active in marine management and the sharing of marine resources were suggested. Of particular concern is the allocation of resources to allow Indigenous people to be involved:

"Indigenous people can work with non-Indigenous industry to develop equitable resource management when they are given the opportunity."
Indigenous Working Group Workshop. Melbourne, Thursday 8 November

"Indigenous people will require funding for them to be involved in coastal and marine management."
Workshop, Eden Land Council, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November

"Indigenous people are entitled to a share of coastal and marine resources and need to find ways of getting that share."
Meeting, Wathaurong Aboriginal Corporation, Monday 1 October

"Indigenous people also need areas set aside for their use that may involve a variety of purposes including aquaculture."
Workshop, Eden Land Council, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November

> Everyone understands the need to manage the resource but it is the complexity that excludes people.
> *Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation, Cygnet, Thursday 17 October*

For Indigenous people access to licences for both culturally relevant practices as well as non-Indigenous practices is a concern:

> There should be equity in the allocation of licences. The rights of Indigenous people need to be recognised and if licences are going to be the way to control harvesting then they need to be allocated an appropriate share of licences.
> *Workshop, Eden Land Council, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

> We want licences and a greater say in policing and protecting stocks.
> *Meeting, Bega Aboriginal Land Council, NSW, Wednesday 26 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

> There is a need to determine sources of finance to buy back commercial licences and distribute them to Indigenous people. This may involve government and or the commercial banking and finance sector.
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

Employment, training and education

> There are other resources and coastal management activities that could provide Indigenous employment. For example, State and local governments spend considerable funds in clearing and cleaning beaches from organic matter washed up by the sea.
> *Workshop and inspection of issues, Framlingham Aboriginal Trust, Tuesday 2 October*

Employment

Co-management decision-making is highly likely to help address one issue that is of concern to Indigenous people – employment. Opportunities were identified that are culturally appropriate, respect Indigenous people's knowledge and respond to their interest in protecting and using marine resources:

> There is great scope to use Indigenous people in policing regulations and monitoring effectiveness. This would provide employment, gain support as well as make better use of Indigenous knowledge and experience.
> *Workshop, Eden Land Council, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

Indigenous people want employment opportunities associated with coastal and marine management and resource use. The need for training, education and capacity building was made very clear by Indigenous people during the consultations:

> Indigenous people are disadvantaged in upgrading their skills. Traditional methods are no longer relevant. Aboriginal people are an evolving race and will use new methods to hunt and harvest coastal and marine resources.
> *Workshop and tour, Framlingham Aboriginal Trust, Victoria, Tuesday 2 October*

The development of aquaculture may result in many employment opportunities for Indigenous people in the Region. Unless Indigenous people are trained at the outset in the positions generated through this emerging industry, then employment opportunities may be taken up by non-Indigenous people.

Workshop participants who represented Community Development Employment Program (CDEP) organisations, or who had past CDEP involvement, frequently mentioned the need for 'real jobs' that provide a reliable income and self-esteem:

> They want to be involved in aquaculture as a way of providing 'real jobs' as distinct from some of the CDEP activities.
> *Meeting, Wallaga Lake, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

Training

A major issue in terms of training is due to a tension between responding to modern conditions and knowledge requirements, and passing on traditional information that has specific cultural significance. A number of views demonstrated that there is a need for both:

> There is an urgent need for opportunities for Indigenous people to be trained in a wide range of specialist activities in coast and sea management. These include habitat management, resource management, fisheries management, aquaculture, managerial skills, marine science and technology, policy and law, designing the regulatory framework and monitoring its implementation.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> Indigenous cultural knowledge and experience should be recognised by giving it appropriate professional standing.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> They need to be recognised as a race of people and given the same parity as white people when it comes to training and capacity building and sharing in resource use.
>
> *Workshop and tour, Framlingham Aboriginal Trust, Victoria, Tuesday 2 October*

It was mentioned that the new RMIT Marine Institute being planned for Lakes Entrance, Victoria, could establish a benchmark by developing an Indigenous Studies Unit that combined Indigenous cultural and management practices to contemporary issues.

The physical location of learning and training activities is also important particularly as learning is intricately linked to country. The cost associated with attending training sessions in other locations also supports the push for localised training. With limited financial resources, travelling to locations for education and training can be difficult. The additional advantage of localised training is that the context may be used for educational examples and, therefore, information will be relevant to local people, settings and relevant issues:

> This training needs to be provided locally because their young people do not have the funds or resources to travel or be away from their community.
>
> *Meeting at Wallaga Lake, Tuesday 25 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

> A major marine environmental education initiative is essential. We need to learn and appreciate how to manage the coast. Right here at Mersey Bluff we regularly witness the inadequacies of dealing with stormwater.
>
> *Interview with Mr Merv Gower, Administrator, Mersey Leven Aboriginal Corporation, Devonport, Wednesday 24 October*

Against the need for cross-cultural training of non-Indigenous people is the concern over the misuse and abuse of Indigenous knowledge that often occurs because of a lack of cultural understanding.

It was also mentioned that Indigenous people are continually being put in a position of training non-Indigenous people yet they are not given accreditation or reward for their efforts and use of knowledge. In particular, the need to retrain new staff because people get promoted or transferred is an issue. Indigenous people feel that their knowledge is freely available without either respect or reward:

> Indigenous people are continually training non-Indigenous people about their culture and providing information during consultations but there is an urgent need for this to be recognised as being important. This would involve formal recognition of Indigenous trainers with them being rewarded for their work and more non-Indigenous people such as natural resource managers, planners and developers having cross cultural training as part of their qualifications. Apart from the need for more respect for Indigenous people and their culture they also combine theory and practice and therefore have much to contribute in integrated resource management.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

The need for long-term relationships among people was identified as being vitally important so that trust, mutual support and understanding is generated. These important aspects of involvement are often overlooked by non-Indigenous systems of learning, planning, and decision-making.

Experience with Indigenous people and an ability to establish a relationship over time is greatly acknowledged and appreciated. Most importantly, respect of cultural knowledge is fundamental to a relationship:

> "The teachers chosen need to have experience with Indigenous people and have knowledge about their cultural perspective. In this way, training could be associated with culture camps that involve young people in an appreciation of their cultural background as well as equipping them for managing Indigenous enterprises. There needs to be cross-cultural education of resource managers so that the few Indigenous people employed in cultural heritage do not have to explain everything all the time. Being called out to inspect every development has become a 'mind-boggling task'."
> *Meeting, Wathaurong Aboriginal Corporation, Monday 1 October*

Education and training were raised as issues in relation to rights and discrimination, and the lack of confidence that some Indigenous people have due to their lack of formal education:

> "A lot of Aboriginal people will not come forward in consultations because they are embarrassed about their lack of formal education. But these are precisely the people who should be included. This is why a lot of Aboriginal people leave it up to one or two representatives. But these people get overworked. We need some way to get broader Aboriginal involvement."
> *Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation, Cygnet, Thursday, 17 October*

A voice in management

> "The problems of access to coastal and marine resources such as fishing, access to coastal areas and cultural recognitions have been raised many times yet nothing seems to have changed."
> *Interview with Mr Brian Mansell. Mr Stuart Mansell & Mr John Dickson, Tasmanian Aboriginal Land Council, Hobart,Friday 26 October*

Indigenous people are concerned that, despite numerous consultative processes that they have been involved in, there have been no positive outcomes for them or it appears that their comments have not been heeded:

> "Indigenous people are tired of talking to politicians and government officers because they never listen or do anything as a result of their consultations."
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria. Tuesday 30 October*

> "They make us part of the planning process and then ignore the results."
> *Workshop and visit to area, Point McLeay, Friday 5 October*

> "Indigenous people have to be included in power sharing and equal in decision-making. Consultation has not resulted in any beneficial results. There are examples of Indigenous people being included in informed debate (for example, fisheries action plans in Victoria) but the end results do not reflect any Indigenous involvement."
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

Indigenous people want representation on high-level committees and management structures to overcome this deficiency. However, the point was made that great care has to be taken to include those Indigenous people who can speak for country. Too often non-Indigenous people believe that representation of Indigenous issues can be achieved by including any Indigenous person. But Australia

includes many Indigenous language groups and a person from another area cannot speak for country other than their own unless given specific permission to do so:

> There are many different Indigenous groups with different backgrounds and perspectives. There is no single Indigenous view and non-Indigenous decision makers need to consult widely and with the people who can speak for the country and or the issue. Some groups may decide to work independently rather than being part of a regional organisation.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> Non-Indigenous resource managers and decision-makers need to recognise that it is important to consult with those Indigenous people who can speak for country. Simply including an Indigenous person on a committee or consulting with communities that include Indigenous people from outside the area or region will lack credibility or be ignored if traditional owners have been overlooked.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> Indigenous people need to be represented at senior levels of decision-making. This involves recognition that there are several sovereign Indigenous nations so just one Indigenous person may not be able to speak for others. There are cases where one person can do this but it should be put to the different Indigenous groups to decide who their representative should be.
>
> *Meetings and tour of area, Winda-Mara, Heywood, Victoria, Wednesday 3 October*

Representation and negotiation

> Indigenous people need to be involved at all stages of development from the initial planning stage through to implementation and on-going management. "We are disenfranchised from our own environment and seeking a way back".
>
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

Negotiations and consultation processes are viewed as difficult and often one-way. Issues raised seem to point to a need for greater negotiation with Indigenous people but also recognising that the process needs to be respectful of Indigenous people's history of resource access, use and ownership. Time spent negotiating and gaining a common understanding of issues and responses would help support an on-going relationship and dialogue:

> We are not even part of the decision-making process about managing fisheries and other coastal and marine resources.
>
> *Workshop and visit to area, Point McLeay, Friday 5 October*

> Organisations such as the National Parks and Wildlife Service don't really recognise us. They use us for our knowledge but do not include us in decision-making. Even as rangers employed by the Service they still bypass us for responsible positions. We are born here and stay here but the non-Indigenous rangers obtain our knowledge and experience, get promotions and move on.
>
> *Workshop and visit to area, Point McLeay, Friday 5 October*

> We want our voice heard in decision-making.
>
> *Workshop and visit to area, Point McLeay, Friday 5 October*

> The opportunities for land management initiatives are declining. Now people are standing up for their rights but many opportunities have been missed. The only way that we can move forward is to give Aboriginal people a seat at the table and include them in decision-making.
>
> *Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation, Cygnet, Thursday, 17 October*

Any process of negotiation with Indigenous people must be built on a trustworthy relationship, which takes time. Planning processes should advocate systems of management that are viewed as long-term, with representatives that are committed to negotiations and representation of interests for considerable periods of time.

Management rights

In seeking involvement in planning and decision-making processes, Indigenous people want recognition of their traditional rights in management systems and processes. There is a level of concern about a loss of rights through the actual act of involvement:

> There is concern about further erosion of rights by being involved in planning processes.
>
> *Workshop and inspection of issues, Framlingham Aboriginal Trust, Tuesday 2 October*

Also of concern is a need to be responsive to current social and economic barriers facing Indigenous people in the Region. Equitable involvement of Indigenous people can only be considered once a situation is created where social and economic issues are no longer barriers. Opportunities will need to be created that respond to cultural requirements as well as addressing associated issues such as access to opportunities. The view was that this will require an overhaul of current forms of consultation, decision-making, time imperatives, underlying assumptions of management and planning processes so that Indigenous people can equally contribute to marine management along with other interested parties.

> Equity in employment must be supported by equity in management and resource sharing.
>
> *Workshop and inspection of issues, Framlingham Aboriginal Trust, Tuesday 2 October*

> Granting Indigenous people rights should not be regarded as an impediment to government or industry.
>
> *Indigenous Working Group Workshop, Melbourne, Thursday 8 November*

> Customary law should be applied to understanding and management of the marine environment.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

> One way for this cross-cultural approach to be developed is to use particular case studies and pilot programs to demonstrate how Indigenous and non-Indigenous people can combine their skills in achieving good coastal and marine resource management.
>
> *Indigenous Uses and Values Working Group Workshop, Melbourne, Thursday 8 November*

Cultural heritage

Indigenous people raised the need to have a strong voice in management to protect cultural heritage sites. This base would include recognition in legislation, access to resource and ownership of management plans.

> Many of the significant cultural sites that require management are centred on coastal and marine resources. These often include midden sites and cultural sites such as those at Rocky Cape and the Bluff at Devonport. Industry is showing some responsibility in dealing with Indigenous cultural sites in development proposals. However, fines are not enough to deter destruction. There was one case recently where it paid the developer to destroy a site and incur a fine.
>
> *Meeting, ATSIC office, Hobart, Friday 26 October*

> Developers should lodge substantial bonds in advance of carrying out works. These should be called on for restitution or for payment of higher penalties that act as real deterrents to the destruction of cultural sites. Interest accrued from bonds while a development is in progress should also be used as a source of income for the Indigenous custodians of the sites. Indigenous people want real protection of sites.
>
> *Workshop, Mechanics Hall, Lakes Entrance, Victoria, Tuesday 30 October*

Contributing to planning outcomes

Indigenous people want to know what benefits the Plan will bring to them. They have numerous positive contributions to make and want to be included at the highest levels of plan preparation. They have ideas such as a zoning system that allows areas to recuperate from over-exploitation. They want the plan to include:

> .... zoning that allows large areas of the marine environment to rest. The fishing licence system is inadequate for dealing with sustainability.
>
> *Interview with Mr Brian Mansell. Mr Stuart Mansell, Mr John Dickson. Tasmanian Aboriginal Land Council, Hobart, Friday 26 October*

> ..... regional fishing strategy put in place to achieve this recognition and it should be based on a zoning system that includes other Islands. The islands of concern are: Cape Barren Island, Chappel Island, Badger Island, Great Dog Island and Clarke Island.
>
> *Workshop, Cape Barren Island Aboriginal Association, Tasmania, Tuesday 23 October*

> ..... an overall strategic plan for coastal and marine resource that includes Indigenous people in its development and application.
>
> *Workshop and visit to area, Point McLeay, Friday 5 October*

Chapter 4: Future Directions

> We support this planning because it would be good to get sustainability in place.
>
> But what will Aboriginal people get out of it?
>
> *Meeting, Bega Aboriginal Land Council, NSW, Wednesday 26 September and approved and endorsed by the BEM Federation group of Elders, 28 November*

Defining future wants to be included in a regional marine plan was a key objective of the consultation process. To achieve this, two specific processes were run.

The Indigenous Working Group were keen to define the possible options for Indigenous people's involvement in the South-east Regional Marine planning process. In addition, they wanted to list those issues they understood to be of concern to their people. The resulting list of possibilities and issues is a snapshot of the Working Group's beliefs at a particular point in time. The list was compiled before the regional consultations were completed.

The Indigenous Working Group drew up the following list of possibilities and issues on the whiteboard (Melbourne, 11-12 October 2001):

Possibilities

- Direct Indigenous role on high-level regional marine plan implementation committee
- Indigenous Advisory Group within institutional structure for RMP
- Role in decision making including resource allocation
- Direct link/overlap with next regional marine plan Indigenous Working Group
- Possibilities for a national role
- Employment creation and training including monitoring
- Opportunities for involvement in commercial activities directly supported by Government
- Consideration of local Indigenous affect of fisheries management arrangements
- Inclusion of Indigenous representatives on industry peak bodies
- Indigenous involvement in enforcement, licensing, policing and patrolling.
- Application of Indigenous Customary Law to understanding and managing the marine environment
- Developing and working in partnerships.

Issues that arose during the meeting

- Shared rights (Treaty)
- Implications of next regional marine plans on the South-east Regional Marine Plan
- Heritage legislation
- Rights versus interests
- Equity
- How is the term "share" defined and quantified?
- Case studies
- Bill of rights
- Constitutional change.

In a second process, the Indigenous Working Group met with the Management and Institutional Working Group to discuss their concerns over current legislative arrangements. The Management and Institutional Working Group have been analysing the current legislation to determine what type, if any, legislation should be introduced to implement regional marine plans.

Following this meeting, the following document was developed as part of the South-east Regional marine planning process.

Management and Institutional Arrangements consultation

Implementing Indigenous Rights

There should be recognition and respect of Indigenous rights to the ocean and Indigenous people's position as custodian of the sea, which is 'more than an interest'. A statement or declaration of rights should be included in all material on the plan and in the South-east Regional Marine Plan (SERMP) itself and these rights should form the basis for both how policy and the plan are implemented and for discussions with Government and industry. There is also a need for a document outlining how implementation of the plan will impinge on Indigenous rights. The rights at issue include:

- rights to practice culture
- fishing rights, access and allocations
- hunting and gathering rights
- cultural use and management rights
- rights of access in policy
- rights of policing
- commercial/economic development.

The Indigenous Working Group should draft a list of rights, allowing for differences between communities. Moreover, existing rights and interfaces with industry should be respected (eg, partnership models, cooperative management, representation, Indigenous Land Use Agreements and Memoranda of Understanding).

Legislation

Any legislation that implements regional marine planning should include recognition of Indigenous customary law and responsibilities and the obligations of Indigenous people. Consideration should also be given to the impact that the current legal framework has on the ability of Indigenous people to realise their rights. It is not so much about Indigenous people realising rights, as receiving formal recognition of rights. There is a concern that any legislative changes resulting from the South-east Regional Marine planning process process may have the potential to diminish the existing rights of Indigenous people. The legislation should be cohesive with respect to Indigenous activity and research. Attention should be given to the interface between European law and Indigenous law.

Fishing

The regional marine plan should include the re-allocation of fishing licences to Indigenous interests. In the event of communities acquiring licences, there would be a need for a binding agreement that communities held licences in perpetuity. There is also a need, which the Government needs to support, to buy into a sustainable harvest without increasing the effort. Money from licences also needs to be earmarked for Indigenous communities (ie capacity building, training, infrastructure). A possible model for the implementation of these points in relation to fishing would be to use an Indigenous Land Corporation (ILC)-type buy-back of allocations and

then utilise good fishers to train Indigenous people in a training arrangement. The New Zealand model should be examined.

The link between commercial fisheries and local Indigenous communities, including overfishing in deep water, ballast water and long-lining, should also be noted.

Croker Island

There is also concern about the impacts of the High Court decision in the Croker Island Case on the ability of Indigenous people to undertake traditional fishery/use practices when Indigenous people do not have their rights recognised with respect to the management of resources. There is also concern in relation to the impact of the case on sharing rights (equity) to resources.

Consultation, participation and negotiation

There is a need for consultation processes before for example, geological survey work and for some examination of the flow-on effects of activities such as seismic testing on species such as cray, scallops and marine mammals. Communities should be provided with more information about issues that may be addressed in the Plan.

General

There is a need to recognise and respect the validity of Indigenous Customary Knowledge systems, and recognise Indigenous community research priorities. There is a need for traditional knowledge to be given an equal weight in planning processes and decision making.

There is also concern about what process would be used for the return of sea country – whether it would be similar to ILC land purchases. Furthermore, there is a need for the Management and Institutional Working Group to examine and consider Indigenous culture, law, industry and native title. Another important consideration is the links existing Commonwealth rights, including those enshrined in the Native Title Act and international law.

Appendix 1
Consultation Reports

Indigenous Uses and Values Working Group Workshop:

Melbourne, Thursday 8 November

The working group decided to address each of the issues that had been listed by the National Oceans office as an outline to the conduct of this assessment.

1) Indigenous people's rights, relationship with and values in the South-east Marine Region

- Indigenous people have never surrendered any rights. They have an unbroken custodianship with the land and seas and this is a continuing inherent right that underpins the Working Group's contribution to this assessment.
- Indigenous people's rights continue and include proper and just settlement of issues such as access to resources that are consistent with self-determination.
- There is a very poor relationship between Indigenous people and the uses of the South-east Marine Region because their rights are not recognised.
- Indigenous values encompass a wide range of cultural and spiritual matters that extend beyond economic values.
- This range of values includes protection of the environment and biodiversity and sustenance and trade are both embraced within them.
- Indigenous people are denied access to a major coastal and marine resource that results in further alienation.
- Indigenous people are not recognised as legitimate and knowledgeable resource managers.
- Non-Indigenous resource managers and decision-makers need to recognise that it is important to consult with those Indigenous people who can speak for country. Simply including an Indigenous person on a committee or consulting with communities that include Indigenous people from outside the area or region will lack credibility or be ignored if traditional owners have been overlooked.

2) Cultural heritage and traditional management

- Indigenous lore exists and it includes a powerful and binding connection with land and sea that includes custodial obligations but this is not recognised in non-Indigenous law.
- There are now numerous jurisdictions involved in coastal and marine management they include Indigenous lore, cultural boundaries that define Indigenous nation-states as well as Commonwealth, State, Local Government and International Maritime law.
- Indigenous people have a culture that relates to the land and sea in a holistic way that also includes connections to powerful and significant places. However, the emphasis that is now put on management of discreet sites can overlook and diminish Indigenous connections to the environment as a whole.
- Environmental degradation is seen as a form of sickness that mirrors the poor health of Indigenous people. They have suffered by disruption to cultural practices, diminishing food supplies and the lack of exercise and social interaction that came from a meaningful life.
- Indigenous use patterns have been declared illegal and penalties imposed on their practice. For example taking food for an extended family, cleaning it and cooking it on the seashore as occurred for thousands of years is now illegal.
- Indigenous people ask: who decided for them how far the boundary of their land extended into the sea? How was the decision made and what criteria is it based on?
- The custodial responsibility of Indigenous people is of paramount importance to them and must be reflected in decision-making.

3) Non-Indigenous impacts and changes of use

- The changes imposed on Indigenous people have resulted in pollution and environmental degradation. Habitat has been destroyed and stocks depleted. Indigenous people are now denied access and any involvement in resource management to help rectify the situation.
- There has been a systematic attempt to destroy Indigenous culture and knowledge that included forced relocation away from the coast or to other areas on the coast in imposed communities where they were not traditional owners. This destruction of Indigenous culture is a continuing process and is experienced in a variety of ways such as being prevented from undertaking ceremonial practices such burning and group hunting and gathering.

4) Current use

- Indigenous people continue to hunt and gather despite limits caused by imposed legislation. This imposed legislation involves granting Indigenous resources to non-Indigenous interests.
- Within this current system Indigenous use is often classified by non-Indigenous people as being illegal. Consequently, Indigenous people are prevented from practicing their customs in a society that favours non-Indigenous people.
- Indigenous people have to be included in power sharing and as equals in decision-making. Consultation has not resulted in any beneficial results. There are examples of Indigenous people being included in informed debate (for example, fisheries action plans in Victoria) but the end results do not reflect any Indigenous involvement.

5) Examine interactions and overlaps between Indigenous marine use and other uses

- There is no interaction with commercial fisheries and they exclude Indigenous rights.
- Marine protected areas must include Indigenous people and uses.
- Indigenous people generally support conservation initiatives and regulations. It only becomes a problem when the regulations exclude Indigenous uses and then it needs to be remembered that conservation is only necessary because of the impact of non-Indigenous people.
- There is potential for further development of the overlapping interests of Indigenous people with conservation and sustainable natural resource management.
- Indigenous use and management is holistic and does not distinguish between commercial and non-commercial. Sustainable yield is part of Indigenous culture and management.

6) Aspirations

Fisheries

- There are appropriate models in New Zealand and Canada for involving Indigenous people in the fishing industry and also methods of devolving some of the benefits to them through royalties.
- Indigenous people in the South-east Marine Region would welcome positive industry and government support for joint ventures with commercial fisheries and aquaculture where they are regarded as equal partners.
- There is a need to determine sources of finance to buy back commercial licences and distribute them to Indigenous people. This may involve government and or the commercial banking and finance sector.
- Indigenous rights and intellectual resources must be protected if there is any genetic modification of native species. For example, the right to hunt or culture a native species that is modified might be taken away through the allocation of patent rights to a commercial interest.

Native title

- The Croker Island case has demonstrated that there are rights to the sea.
- Native title legislation has been primarily used to validate the non-Indigenous occupation of land at the expense of Indigenous people.
- One Indigenous Sea Use Agreement is currently being finalised at Twofold Bay, New South Wales.
- There are different implications for native title involved in formalising Indigenous Sea Use Agreements and people need to be aware of all the implications before formalising them.

Marine related training

- There is an urgent need for opportunities for Indigenous people to be trained in a wide range of specialist activities in coast and sea management. These include habitat management, resource management, fisheries management, aquaculture, managerial skills, marine science and technology, policy and law, designing the regulatory framework and monitoring its implementation.
- New and emerging industries are opening and Indigenous people need to be involved from the outset so that they can benefit from the development of industries before all the employment opportunities are taken up by non-Indigenous people.
- Indigenous people are continually training non-Indigenous people about their culture and providing information during consultations but there is an urgent need for this to be recognised as being important. This would involve formal recognition of Indigenous trainers with them being rewarded for their work and more non-Indigenous people such as natural resource managers, planners and developers having cross cultural training as part of their qualifications. Indigenous people therefore have much to contribute to integrated resource management.
- One way for this cross-cultural approach to be developed is to use particular case studies and pilot programs to demonstrate how Indigenous and non-Indigenous people can combine their skills in achieving good coastal and marine resource management.
- Indigenous cultural knowledge and experience should be recognised by giving it appropriate professional standing.
- Indigenous people need to guard against the use, abuse and unauthorised use of their knowledge and information.

7) Co-management of the South-east Marine Region

- Indigenous people can work with non-Indigenous industry to develop equitable resource management when they are given the opportunity.
- Granting Indigenous people rights should not be regarded as an impediment to government or industry.
- There are many different Indigenous groups with different backgrounds and perspectives. There is no single Indigenous view and non-Indigenous decision makers need to consult widely, and with the people who can speak for the country and or the issue. Some groups may decide to work independently rather than being part of a regional organisation.

8) Legal obligations and institutional structures

- Indigenous people need to be supported in developing decision-making structures.
- There is a direct role for Indigenous representation on any high level Regional Marine Plan Implementation Committee [if formed] to be involved in decision-making and resource allocation. This would also provide a direct link to the next regional marine plan.
- Indigenous people should be appointed to industry peak organisations.
- Customary law should be applied to understanding and management of the marine environment.

Consultation Indigenous Working Group & Management & Institutional Arrangements Working Group: Sydney, Thursday 18 October

Implementation of Indigenous Rights

There should be recognition and respect of Indigenous rights to the ocean and Indigenous people's position as custodian of the sea, which is 'more than an interest'. A statement or declaration of rights should be included in all material on the plan and in the SERMP itself and these rights should form the basis for both how policy and the plan are implemented and for discussions with Government and industry. There is also a need for a document outlining how implementation of the plan will impinge on Indigenous rights. The rights at issue include:

- rights to practice culture
- fishing rights, access and allocations
- hunting and gathering rights
- cultural use and management rights
- rights of access in policy
- rights of policing
- commercial/economic development.

The Indigenous Working Group should draft a list of rights, allowing for differences between communities. Moreover, existing rights and interfaces with industry should be respected (eg, partnership models, cooperative management, representation, Indigenous Land Use Agreements and Memoranda of Understanding).

Legislation

Any legislation that implements RMPs should include recognition of Indigenous customary law and responsibilities and the obligations of Indigenous people. Consideration should also be given to the impact that the current legal framework has on the ability of Indigenous people to realise their rights. It is not so much about Indigenous people realising rights, as receiving formal recognition of rights. There is a concern that any legislative changes resulting from the SERMP process may have the potential to diminish the existing rights of Indigenous people. The legislation should be cohesive with respect to Indigenous activity and research. Attention should be given to the interface between European law and Indigenous law.

Fishing

The RMP should include the re-allocation of fishing licences to Indigenous interests. In the event of communities acquiring licences, there would be a need for a binding agreement that communities held licences in perpetuity. There is also a need, which the Government needs to support, to buy into a sustainable harvest without increasing the effort. Money from licences also needs to be earmarked for Indigenous communities (ie capacity building, training, infrastructure). A possible model for the implementation of these points in relation to fishing would be to use an Indigenous Land Corporation (ILC)-type buy-back of allocations and then utilise good fishers to train Indigenous people in a training arrangement. The New Zealand model should be examined. The link between commercial fisheries and local Indigenous communities, including overfishing in deep water, ballast water and long-lining, should also be noted.

Croker Island

There is also concern about the impacts of the High Court decision in the Croker Island Case on the ability of Indigenous people to undertake traditional fishery/use practices when Indigenous people do not have their rights recognised with respect to the management of resources. There is also concern in relation to the impact of the case on sharing rights (equity) to resources.

Consultation, participation and negotiation

There is a need for consultation processes before, for example, geological survey work and for some examination of the flow-on effects of activities such as seismic testing on species such as cray, scallops and marine mammals. Communities should be provided with more information about issues that may be addressed in the SERMP.

Miscellaneous

There is a need to recognise and respect the validity of Indigenous Customary Knowledge systems, and recognise Indigenous community research priorities. There is a need for traditional knowledge to be given an equal weight in planning processes and decision making. There is also concern about what process would be used for the return of sea country – whether it would be similar to ILC land purchases. Furthermore, there is a need for the Management and Institutional Arrangements Working Group to examine and consider Indigenous culture, law, industry and native title. Another important consideration is the links between existing Commonwealth rights, including those enshrined in the Native Title Act and international law.

Workshop at Eden Land Council:

Eden, Tuesday 25 September

This workshop was organised by Mr Ben Cruise. There were approximately 20 participants comprising Elders, staff and the CDEP supervisor and employees. The following issues were raised and discussed.

Loss of rights

- There has been a major loss of rights. Some of these are difficult for non-Indigenous people to appreciate. For example, it is now illegal to clean abalone and fish on the rocks. The imposition of fire controls prevents cooking seafood where it is collected or caught. The use of spears is illegal. Bag limits are a serious impediment to family support and exchange of services.
- The right to camp for fishing and gathering has been taken away. There used to be hundreds of such camps as shown by middens along the coast. They were prime sites, sheltered and associated with water. The areas where Indigenous use and camping took place are now taken up by private freehold land, local government caravan parks and recreation areas and national parks and each has major restrictions, if not prohibition, on Indigenous use.
- Many of the species such as abalone, lobsters, and a wide variety of fish that were hunted and gathered are now depleted and also controlled by licences unavailable to Indigenous people. Abalone is an excellent example, known as 'mutton fish' by Indigenous people it has been allocated to commercial licences and only very small ones are left. Once easy to harvest it is now extremely difficult to obtain those of legal size and bag limits prevent sharing with an extended family or bartering which was a common form of exchange.
- 'Poaching' is not an Indigenous term and reflects non-Indigenous laws. There always was an Indigenous economy.

Habitat management

Indigenous people have been disadvantaged by degradation of the marine environment through pollution, over-exploitation of resources and the impact of land degradation.

Loss of knowledge and management practices

- Indigenous people had a great knowledge and respect for the sea. They could read the wind and the seasons. They harvested on a sustainable basis. However, the loss of rights and the imposition of different restrictions mean that this knowledge is difficult to apply.

Indigenous input into management

- Indigenous people could be involved and employed in restocking species that are in decline. They could do this using appropriate Indigenous practices and technology as they have ways of doing things that do not destroy the resource.
- Indigenous people know the areas that need closing off, where access should be restricted and management practices applied.
- This approach could be supported by appropriate regulations that Indigenous people have helped design.

Access to resources

- There should be equity in the allocation of licences. The rights of Indigenous people need to be recognised and if licences are going to be the way to control harvesting then they need to be allocated an appropriate share of licences.
- Indigenous people also need area set aside for their use that may involve a variety of purposes including aquaculture.

Access to funds

- Indigenous people will require funding for them to be involved in coastal and marine management.

Consultation processes

- Indigenous people need to be involved at the beginning of planning processes and not included after the major decisions are made.
- Coastal and Regional Marine Planning needs to be recognised as a two-way process that involves Indigenous people.

Input into policing

- There is great scope to use Indigenous people in policing regulations and monitoring effectiveness. This would provide employment, gain support as well as make better use of Indigenous knowledge and experience.

Meeting at Wallaga Lake Aboriginal Community:

Wallaga Lake, Tuesday 25 September

A meeting with the following people took place at Wallaga Lake Aboriginal Community:

Mr Merv Penrith, Chairman Elders Council
Mr Eddie Foster, Chairman Merrimans Land Council
Mr Ken Campbell, Chairperson, Wallaga Lake CDEP

The following issues were raised and discussed.

Loss of rights

- Each of these Elders told how they had grown up under 'white laws and policies'. Changes had been achieved in land rights but very little in the way of access to sea.
- They had been forced to live on a community and that everything that had been gained by Indigenous people had to be fought for.

Aquaculture

- There has been a huge increase in the price of abalone but Indigenous people have gained no benefit.
- They need licences to fish and licences for aquaculture. They want to be involved in fish farming in Wallaga Lake and salmon farming both inshore and offshore.
- They want to be involved in aquaculture as a way of providing 'real jobs' as distinct from some of the CDEP activities.
- They can take control of their own lives if given licences to fish and access to water for aquaculture.

Training

- Training to be involved in aquaculture is essential.
- This training needs to be provided locally because their young people do not have the funds or resources to travel or be away from their community.

- The teachers chosen need to have experience with Indigenous people and have knowledge about their cultural perspective.
- In this way, training could be associated with culture camps that involve young people in an appreciation of their cultural background as well as equipping them for managing Indigenous enterprises.

Meeting at Bega Aboriginal Land Council:

Bega, Wednesday 26 September

A meeting was held in Bega with:

Mr John Dixon, Coordinator, Bega, Eden and Merrimans Elders Council (BEM)
Ms Valmai Cooper, BEM Elder
Ms Margaret Dixon, BEM Elder
Mr Joe Mundy, BEM Elder

The following issues were raised and discussed:

Indigenous use of sea resources

- Indigenous people have always used fish and other sea products as items to trade and still need to do so. For example, someone will have a good catch and then use that to barter for mechanical repairs.
- White laws make this trade very difficult and often completely prevent it.
- "Our fellas were never silly about trade and species only became threatened when they became a commodity on the whitefella market."
- "Now they put bans on everything we used."
- When living in a depressed rural economy the temptation is to poach just to obtain food.

What is in this planning process for us?

- We support this planning because it would be good to get sustainability in place.
- But what will Aboriginal people get out of it?

What we need

- Want a greater say in who is fishing where.
- We want licences and a greater say in policing and protecting stocks.
- We need employment and this includes access to resources and training.

Bega, Eden, Merrimans Consultation Sign-off Meeting: BEM Elders Committee

Meeting Minutes, 28 November 2001

Start 10 am.

The Regional Coordinator John Dixon ran the meeting. John explained to the group of Elders that there was a concern because the three communities of Bega Eden and Wallaga Lake had reflected this when Roland Breckwoldt visited in September 2001 regarding the new Southern Oceans Marine Park and the impacts it will have on the Aboriginal Community. We examined the documents prepared by Roland from each community (BEM) and took comment from the floor.

Daphne Hyde wanted to know what poaching was in there for. Explained that our fellas were poaching because of the white laws, however traditionally they were not.

Shirley Foster asked whose rights were being lost. Explained that the first paragraph of Eden's paper was an example of the loss of Aboriginal Rights when the non-Indigenous people were receiving compensations for licences and our people can't get a thing, not even compensated for all the evils that were done when the Europeans took the land.

The group agreed unanimously that there is an issue to be pursued and yes we should be involved in using the oceans and waters for sustainability and use them for traditional food and pleasure, commercial enterprises such as fishing and aquaculture and police and manage stocks and water ways using our knowledge.

Stocks identified for aboriginal use and protection: muscles, bimblas (cockles), oysters, fish, pipis, perry winkles, crabs, conks (wilks), cobra, lobsters, abalone (mutton fish), prawns, shrimp, eels, scallops, sea urchins, cunje voy, sea grasses, sea weeds etc etc etc.

The group raised concerns about access being denied by authorities and greenie groups to traditional Aboriginal places where they fished, camped, had their feeds and taught their children. Government agencies, greens groups, and private land-holders are locking them off. They expressed that they want these places they will identify open for Aboriginal access.

John Dixon advised the group that they should seek out the authority that controls lands locked-up and negotiate access in the first instance. The State government indicated throughout the RFA that the best negotiations would be at the local agency offices over access.

They do not want to pay fees in NP's to camp there. John Dixon advised the group that the NPWS have been put on notice that Aboriginal people do not pay fees on their own lands, no one is to pay their fees.

Ken Campbell raised a serious issue at Arraganu where the NPWS built a toilet on or above where the Aboriginal people were drinking from a natural water hole, they will never drink the water again, this was done without consultation with the Aboriginal community or the appropriate land council.

MOTION 1: The BEM Federation group of Elders must have Aboriginal people involved in fishing activities and management and decision making as contained in the consultation workshop papers held at Bega, Eden and Wallaga Lake and at today's regional Elders meeting.

Moved: Shirley Foster Seconder: Colleen Dixon Carried unanimously

MOTION 2: The BEM Federation group of Elders approve and endorse consultation papers produced at Bega, Eden and Wallaga Lake with RPM consultant Roland Breckwoldt and at today's regional Elders meeting.

Moved: Elaine Thomas Seconder: Max Munro Carried unanimously

MOTION 3: The BEM Federation group of Elders approve and endorse the BEM secretariat Regional Coordinator Mr John Dixon to sign-off with Resource Policy and Management Office on information and concerns given and raised at consultation workshops in Bega, Eden and Wallaga Lake and at today's regional Elders meeting.

Moved: Jim Holmes Seconder: Kay Russell Carried unanimously

MOTION 4: The BEM Federation group of Elders approve and endorse Mr Ben Cruise to table and raise these issues with the Southern Oceans Marine Park Planning Committee in Hobart on Monday 3rd December 2001 and there after on behalf of the BEM regional Aboriginal Elders.

Moved: Ken Campbell Seconder: Jim Scott Carried unanimously

Meeting closed 12.30 pm
Minute prepared by John Dixon

Attendance Sheet (Name / Community)

Alice Moore Eden
Daphne Hyde Eden
Mavis Andy Bega
Martha Tungai Bega
Alma Carter Bega
Margaret Henry Eden
Max Munro Wallaga Lake
Olga Manton Eden
Earnest Harrison Wallaga Lake
Thelma Stewart Eden
E. Munro Wallaga Lake
Maria Harrison Wallaga Lake
Eddy Foster Wallaga Lake
Albert Solomon Wallaga Lake
Pam Flanders Wallaga Lake
Gladys Solomon Wallaga Lake
Stan Andy Bega
Jim Holmes Eden
Elaine Thomas Eden
Richard Thomas Bega
Shirley Foster Wallaga Lake
Valmai Cooper Bega
Colleen Dixon Bega
Bernie Dixon Bega
Faithy Aldridge Bega
Shirley Aldridge Eden
Liddy Stewart Eden
Nellie Dixon Bega
A Stewart Eden
W Russell Eden
Kay Russell Eden
Margaret Dixon Bega
Joe Mundy Bega
Neville Thomas Eden
Ken Campbell Wallaga Lake
Deanna Campbell Wallaga Lake
Craig Button Bega
Jim Scott Bega
Annette Scott Bega
Mervyn Penrith Wallaga Lake

Workshop at Mechanics Hall:

Lakes Entrance, Tuesday 30 October

Present:

Mr Peter Ratzman, Orbost/Lakes Entrance
Mr Albert Mullet, Elders Council,
Gunnai/Kurnai, Bruthen.
Mr Robbie Thorpe, Lakes Entrance
Mr Alistair Thorpe, Secretariat to
Gunnai/Kurnai, Melbourne
Mr Terry Hayes, Bidwell Native Title Group
Mr Grattan Mullet, Regional Coordinator,
Keeping Place, Gippsland and East Gippsland,
Aboriginal Cooperative, Bairnsdale.
Mr Michael Edwards, Director, Management
Committee, Lake Tyers Aboriginal Trust

1) Issues to do with access to coastal and marine resources access to commercial licences

Indigenous people need an economic base in the region. They need access to licences for abalone, scallops, crays, shellfish and other commercial fisheries.

Access to traditional food for family

Indigenous people are denied access to areas for traditional areas used for food collection. They are taken up by freehold land, national parks, and recreation reserves. Regulations control the amount of take and "we are always running the gauntlet in our own country".

Access to aquaculture

There are some initiatives in aquaculture being undertaken through the East Gippsland Aboriginal Corporation, and at Lake Tyers and Orbost. These are still in their infancy and are experiencing mixed results.

2) Environmental protection

Indigenous people in the area believe that unless fisheries are properly managed there soon won't be any fish to manage. They see threats to sustainable fisheries coming from agriculture, intensive logging, degradation of streams and rivers, and seismic testing. Indigenous people believe that the term 'over-fishing' is used as an excuse for decline in stocks caused by environmental degradation particularly of coastal nursery grounds.

3) Fisheries management

Fisheries are not properly managed. It is far too market-driven and this results in high wastage when unprofitable stocks are caught in nets and dumped. There is also a regular wastage of by-catch. They believe that zoning leads to exploitation of the area and is not adequately policed. They spoke of boats sitting on the edge of zones waiting for opportunities to cross into adjoining fisheries as soon as they thought they could do so unobserved. The main reason for this was too many different jurisdictions. They also said that some boats have multiple licences and this allows them to exploit too many different resources.

4) Employment

Fishing There has been a large decline in employment in the fishing industry and this has led to fewer opportunities for Indigenous people.

Training There should be formal recognition and support for passing on Indigenous cultural knowledge in coastal and marine resource management.

Marine biology A new institute of marine biology is being established on Bullock Island, Lakes Entrance by RMIT. This is an opportunity to teach Indigenous cultural coastal and marine management and also involve Indigenous people in cross-cultural studies.

Native title Indigenous people in Victoria are struggling with Native Title issues with no claims yet being resolved. However, it may be possible to make claims that lead to co-management and employment.

Policing and enforcing regulations
There should be much greater involvement of Indigenous people in law enforcement and monitoring. They observe many activities such as dumping of rubbish and other pollutants but can't do anything about it. They could be used for mainstream fisheries management but also to manage their own cultural and traditional harvesting methods.

5) Indigenous culture

Indigenous people in the region have spiritual links to the land and the environment. The destruction of Aboriginal culture has accompanied the destruction of the environment. Species that are destroyed or over-exploited by non-Indigenous people have totemic and dreaming significance to Indigenous people. They are custodians of a wide range of species such as Pelican and Dolphins. The latter are a powerful totemic species yet they are still being shot by fishers in the Lakes. Black Bream (Tambo) are a species that demands protection. Black Swans belong to certain people who had the right to collect eggs but this is no longer possible.

Indigenous people still relate to land that was inundated by sea during the last ice age and regard it as their own.

Traditional cultural practices are still being passed on to young people. The role of this culture is very important particularly the place of customary law.

6) Decision making

Indigenous people are tired of talking to politicians and government officers because they never listen or do anything as a result of their consultations. There has to be a statement of recognition of Indigenous rights that form the basis of consultations. Such a statement would explicitly state where Indigenous people sit in resource and economic development.

Indigenous people need to be involved at all stages of development from the initial planning stage through to implementation and on-going management. "We are disenfranchised from our own environment and seeking a way back".

Why is it taking so long to include Indigenous people in resource management? Inclusiveness will involve control, ownership and representations.

Local Indigenous people need to be involved in all issues that affect them. It needs to be recognised that there are numerous Indigenous nation-states and an Indigenous person from another area can't speak for anyone else with any authority. There has to be recognition of Indigenous knowledge and authority in management.

7) Protection of cultural heritage

Developers should lodge substantial bonds in advance of carrying out works. These should be called on for restitution or for payment of higher penalties that act as real deterrents to the destruction of cultural sites. Interest accrued from bonds while a development is in progress should also be used as a source of income for the Indigenous custodians of the sites. Indigenous people want real protection of sites.

8) How can the South-east Marine Plan meet the needs of Indigenous people?

There is a need to ascertain just what native title rights exist for the coast and marine environment. Indigenous people need to know their entitlements; only then will they be able to judge what are the direct outcomes and benefits of the Plan.

At the moment there is an intricate and dense system of governance and laws that in the end only have the effect of denying and further eroding Indigenous rights and there are never any favourable outcomes.

Concrete outcomes are required and they will be measured in fundamental ways such as in providing employment, access and fishing licences.

Time and time again we are consulted but do not see the report or the outcomes.

Meeting at Wathaurong Aboriginal Corporation:

Geelong, Monday 1 October

A meeting was held at Wathaurong Cultural Centre with Mr Trevor Edwards, Chief Executive Officer, Wathaurong Aboriginal Corporation and Mr Reg Abrahams, Cultural Heritage Protection Officer, South West and Wimmera Cultural Heritage Program and the following issues were raised and discussed.

Background to Wathaurong situation

- There are between 3-4000 Indigenous people now living in the Geelong area. Very few can be identified as traditional owners because they have originated from a wide area because of forced transportation to missions, being part of the stolen generation and coming to an urban area for employment.
- Under these circumstances it will be difficult to pursue native title so Wathaurong wants to develop Indigenous Protected Areas, partnerships and co-management arrangements as much as possible.
- Wathaurong has in place a protocol with Geelong City Council for dealing with Indigenous issues. It is not certain how far this extends into the coastal and marine environment because it is based on local government responsibilities. Urban cultural heritage matters do take in some parts of Port Phillip Bay.
- Wathaurong has been heavily involved in land-based management issues and has not had the resources to become engaged in coastal and marine issues. Mr Reg Abrahams showed a list of all the committees he is on, and has been a member of, to demonstrate the extent to which his time is totally over-committed. The list contains no less than 15 such committees.
- They would like to expand into dealing with coastal and marine issues but would need more resources to do so effectively.

Needs and capacity building

- It is necessary to determine where Indigenous rights begin.
- There needs to be cross-cultural education of resource managers so that the few Indigenous people employed in cultural heritage do not have to explain everything all the time. Being called out to inspect every development has become a 'mind-boggling task'.
- Indigenous people are finding themselves relying too much on non-Indigenous information and references such as local histories. Understanding Indigenous people is most important.

Directions

- There should be a royalty placed on all commercial fishing and fisheries that is distributed to Indigenous people based on the Waitangi Treaty of New Zealand.
- Indigenous people are entitled to a share of coastal and marine resources and need to find ways of getting that share.
- There needs to be places set aside for Indigenous people on all high-level planning and policy committees.
- There is a need for marine national parks but Indigenous people feel that the first requirement is to restrict recreational fishing, which so commonly depletes food sources around the shoreline.

Workshop and Inspection of Issues, Framlingham Aboriginal Trust:

Framlingham, Tuesday 2 October

A workshop was held at Framlingham with the following people:

Mr Lionel Harradine, Chairman Framlingham Aboriginal Trust and Deputy Chair Working Group
Mr Don Chatfield, Community member
Mr Jason Clark, Community member
Mr Jeremy Clark, Administrator
Mr Neil Martin, Community Development Officer.

The afternoon was spent on an inspection of issues in the region by courtesy of the Framlingham Aboriginal Trust who also provided the use of a mini bus. The following issues were discussed at the morning workshop.

Legislative background

- What status will existing legislation be given in the South-east Marine Plan and how will it be coordinated and applied?
- How will State legislation be coordinated and applied? This applies to cultural heritage legislation as well as Indigenous rights. But how will this be done when Indigenous people are not sure of their rights in the first place?
- For example, the State Fisheries Act is very difficult to interpret when it comes to dealing with Indigenous issues. If an Indigenous person takes more than the bag limit a Fisheries inspector may ignore the situation. However, if say, a non-Indigenous holder of a commercial abalone licence complains then the Fisheries inspector is obliged to prosecute. This situation is further complicated if the Indigenous person is taking more than the bag limit for the purposes of selling them rather than for consumption by an extended family or barter. This is where Indigenous people need to be involved in designing legislation and enforcing regulations.

Loss of rights

- Indigenous people need rights and they need to know what they are to help overcome discrimination.
- There is concern about further erosion of rights by being involved in planning processes.

Some of the things that have been lost

- Loss of fish stocks for hunting and gathering. Previously abundant species that were readily accessible such as abalone and crays are now depleted. Not so well-recognised is that beached whales were a major food source and these are no longer available. These are examples of major food losses.
- Loss of cultural management of coastal and marine resources. The way Indigenous people harvested different species at different times can be seen in the middens found along the coastline.
- Loss of cultural connections. Non-Indigenous people thing it all happened suddenly but this loss is continuing. One expression of this loss is the slow continuing loss of access.

Connections with the ocean

- The Indigenous people of the region relied heavily on eels and established permanent communities based on both hunting and trapping eels in rock traps associated with their houses. There is still concern about eels, their use and abundance. This species shows the connections between people, the coastline and the open ocean as eels migrate. It provides an avenue for international treaties that involve Indigenous people.
- Mutton birds are another species that Indigenous people hunted and demonstrate the same connections between land and the open ocean. Environmental impacts have greatly reduced this species. Legislation under the Victorian Wildlife Act prohibits access to this species.
- Aboriginal people used beached whales and hunted fur seals and both species use Commonwealth waters. Exploitation of these species combined with legislation has excluded these species from Aboriginal uses.
- Deen Maar Island is a special place and is connected to the Creator Spirit, Bunjil. It is where he departed from earth after creating all life. It is a Sacred Place and needs to be recognised as such. It is also an important wildlife refuge and has evidence of Aboriginal heritage supported by anthropological evidence that can be accessed in Framlingham archives. Deen Maar Island is seven kilometres offshore in Commonwealth waters and administered by Parks Victoria. However, it is also within the management area of the Framlingham Aboriginal Trust as stated in the *ATSI Act 1984*.

Capacity building

- Indigenous people are disadvantaged in upgrading their skills. Traditional methods are no longer relevant. Aboriginal people are an evolving race and will use new methods to hunt and harvest coastal and marine resources.
- They need to be recognised as a race of people and given the same parity as white people when it comes to training and capacity building and sharing in resource use.

Opportunities

- Co-management agreements will provide the opportunity for Indigenous people to share in resource use.
- There must be due-process in planning sustainable resource use with Indigenous involvement.
- Equity arrangements and resource sharing will provide some economic independence for Indigenous people.
- Indigenous people need a share of non-renewable resources such as oil and gas as well as renewable resources. This could be achieved for royalties from Bass Strait oil and gas. Such royalties are well-recognised in land-based mining on Indigenous land so why not the seas and oceans.

- There are other resources and coastal management activities that could provide Indigenous employment. For example, state and local governments spend considerable funds in clearing and cleaning beaches from organic matter washed up by the sea.
- However, equity in employment must be supported by equity in management and resource sharing.

Inspection of issues and region

- Killarney Bay – inshore reef system that was/is major Indigenous abalone, crayfish and shellfish harvesting area.
- Deen Maar Indigenous Protected Area – an integrated commercial grazing and conservation area supported by funds from Environment Australia. Contains wetlands, coastal dune systems and shows connection with Deen Maar Island. Attitudes of neighbours still show the impact of the Eumeralla Wars between Aboriginal people and whites.
- Eumarella Backpackers Hostel – an example of cultural tourism being managed by the Framlingham Aboriginal Trust.
- Boona Dairy – this large and modern 450 cow dairy is an example of a major enterprise being undertaken by the Framlingham Aboriginal Trust.
- Tower Hill State Game Reserve – burial sites below larva flows demonstrate the long period Indigenous people have occupied the area.
- Framlingham Forest – a large forest reserve of 840 hectares owned and managed by the Kirrae Whurrong Corporation.

Meeting and Tour of Area – Winda-Mara:

Heywood, Wednesday 3 October

An initial meeting was held with Ms Denise Lovett, Cultural Heritage Protection Officer, based at Winda-Mara Aboriginal Corporation. This visit had been planned to coincide with a Native Title holders meeting. Unfortunately, a bereavement in the community meant that Elders could not attend.

Ms Lovett provided a background on the Indigenous issues in the area before arranging a second meeting with herself and Mr Michael Bell, Chairperson Winda-Mara Aboriginal Corporation, and Mr Daryl Rose, Board Member Mirimbiak Nations Aboriginal Corporation.

The issues raised at this meeting were:

Negotiation procedures

- Non-Indigenous people need to bring things to the table that they are prepared to give up straight away so that negotiations over the difficult issues can proceed. Too often planners and bureaucrats just come and ask our opinions and wants but never give anything away themselves.
- We are tired of being asked for wish lists.
- The professional fishers are scared of negotiations with Kooris because they can't be political with us so they always go directly to government to keep us out.

Access and rights

- People are making money on places from which we are denied access. We cannot exploit resources that we have used for thousands of years. They are either on national parks or private land.
- Getting out to our sites is an economic issue – people need vehicles, they need money for fuel. There are now a whole range of costs associated with access and management that simply did not occur before.
- No longer can people go to Portland and camp and fish. Our campsites have been taken over and everything is illegal or regulated outside our access. We can't light fires; we cannot practice our culture.

What is needed

- Access to economic resources such as commercial fishing licences that lead to real jobs.
- Fishing licences for cultural pursuits that may be different from other regulations.
- Recognition that our interests are consistent with protection of the resource.
- Indigenous people need to be represented at senior levels of decision-making. This involves recognition that there are several sovereign Indigenous nations so just one Indigenous person may not be able to speak for others. There are cases where one person can do this but it should be put to the different Indigenous groups to decide who their representative should be.

Meeting at Burrandies Aboriginal Cororation:

Mt Gambier, Thursday 4 October

An initial meeting was held with Ms Anne Bonney, Indigenous Uses and Values Working Group. The following issues were discussed:

- There is a need to get more employment for Indigenous people out of developments in the fishing and aquaculture industries.
- Training and capacity building is necessary in the early stages so that Indigenous people can be part of the change rather than all the jobs go to non-Indigenous people and then it is too late. No good starting from behind all the time.
- Employment in aquaculture and real jobs associated with it provides an avenue for Indigenous people to gain self-esteem. They can see the results of their efforts and that something they are involved in is not a waste of time.
- The region is geographically well placed for aquaculture with abundant water, floodplains and wetlands that are close to the sea.
- There are many dreamtime stories that show the relationship of original Indigenous inhabitants of the area to the coast and the sea.

Anne Bonney then introduced us to Ms Rowie Brodie, Manager, Burrandies Aboriginal Corporation. This is the Mt Gambier CDEP organisation and Ms Brodie has an interest in developing employment opportunities. It was agreed that Roland would send Anne Bonney this record of the first meeting and Ms Brodie together with Anne might then meet and develop some of the ideas further and send the edited document back to Roland.

Workshop and Visit to Point McLeay Aboriginal Community:

Point McLeay, Friday 5 October

A workshop with the following people was held at Point McLeay Aboriginal Community:

Mr Henry Rankine, CDEP Coordinator
Mr Derek Gollan, National Parks ranger based at Meningee
Mr George Trevorrow, Member of Native Title Committee, and Heritage Committee
Mr Tony Barrett, Coordinator, Raukan Council

The following issues were raised and discussed.

Is there any benefit?

- White people have been dividing the land and water up for years without involving Indigenous people.
- They make us part of the planning process and then ignore the results.
- Indigenous people need to get rid of the word 'consultation' and have it replaced by 'negotiation'.

Long-term benefit for Australia

It would be in the long-term benefit for Australia if Indigenous people were involved in resource management because you can't separate the social from the ecological.

Loss of rights

- Have lost the ability to trade.
- Not a single Indigenous person holds a commercial fishing licence.
- We are not even part of the decision-making process about managing fisheries and other coastal and marine resources.
- We need something based on the New Zealand model that is for Indigenous people.

Recognition

- Australia seems good at recognising ethnic groups but does not recognise Indigenous people.
- There is always suspicion about our motives.
- Many non-Indigenous people find recognition to be very scary.

Decision-making

- We want our voice heard in decision-making.
- Organisations such as the National Parks and Wildlife Service don't really recognise us. They use us for our knowledge but do not include us in decision-making. Even as rangers employed by the Service they still bypass us for responsible positions. We are born here and stay here but the non-Indigenous rangers obtain our knowledge and experience, get promotions and move on.
- It is important that the National Oceans Office provides opportunities for involvement and gives recognition to Indigenous people and their interests.
- When Indigenous people are selected for high-level committees it is important to first establish who and what they can speak for. We don't necessarily want someone else speaking for our area.

Sharing resources

- Non-Indigenous people always say, "Look what I have done" they never say, "Look what we have done together with Indigenous people".

Resource degradation

- Indigenous people at Point McLeay have witnessed first hand a lot of environmental degradation as a result of non-Indigenous change. These include the installation of the Barrages and increased salinity in the Murray River and the resultant decline in fish stocks.
- Indigenous people are environmentalists – sustainability is part of our culture. If we did not look after resources we would starve.
- We do not want to see the ocean degraded but we have witnessed what has happened to our lakes and estuaries.

Discrimination

- We, here in southern Australia, are not treated as real Aboriginal people. White people have a mental map of Australia with a line from Perth to Brisbane and they think that the only real Aboriginal people live to the north of that line.
- This discrimination is now embedded in our system as more and more white people see images of northern and central Australian Aboriginals.
- We do not want much but we want a share.
- We have nothing to pass on – we need to build a future.
- We need benefits from resource management that come back to our community.
- We do not enjoy our present position and could benefit greatly by governments giving something back.

The way ahead

- We need resources for aquaculture.
- We need management rights to areas where we can harvest food such as lobsters and abalone as a community food source.
- There needs to be an overall strategic plan for coastal and marine resource that includes Indigenous people in its development and application.

Inspection of local area

Following the workshop Mr Rankine took us on an inspection of the area. This was a most informative and interesting session. It included a view of the area now owned and managed by the Community as well as aspects of its history that provided an invaluable background to the issues raised at the workshop.

Interview with Colleen and Peter Frost:

Verona Sands, Tuesday 16 October

- The land purchased by the ILC at Bruny Island and handed to Indigenous people is an example that could be applied to aquaculture.
- Recreational fishing is part of Aboriginal culture. The strongest ties as a child was the connection with hunting and gathering along the seashore. This was the way Aboriginality was expressed.
- It is no longer possible to find scale fish and abalone of legal size so we have to use methods associated with commercial diving. But the law discriminates against Aboriginal people.
- The main benefit that could come from the South-east Regional Marine Plan would be to recognise and allow Aboriginal fishing for personal food use.
- At the moment there is always a sense of guilt and constantly watching against being apprehended.
- Poaching is a major problem that is not being adequately dealt with. Gathering from the shore is no longer possible due to poaching.
- Aboriginal people developed hunting skills and a knowledge about the species they took. People would go in the proper seasons.
- Aboriginal people shared among themselves. People's incomes did not reflect the food they ate. They had very low incomes but we grew up "thinking that we lived like kings".
- One of the features of government planning is to implement it in a way that is acceptable but then gradually tighten the regulations.
- The Plan should be based on the thorough scientific information but is the level of information available for the South-east Marine Region?
- There is a need to differentiate between a marine national park and this marine plan.
- Local people need the opportunity for input into policy and regulation that will affect them.

Interview with Ms Enid Dillon:

Nicholls Rivulet, Tuesday 16 October

- Commercial fisheries are taking so much yet we get into trouble for taking so little.
- Many of the commercial practices are unsustainable. The Channel scallop beds were fished sustainably for years and years. Then one big boat was allowed to use a sputnik dredge and the beds were destroyed.
- Aboriginal people used to know when and how to harvest. We only ever took what we needed.
- We used to light fires on the beach to cook food but this is no longer allowed.
- There were many ways that we used to supplement our income that are no longer allowed. We hunted wallabies and possums and sold the fur but this is no longer allowed.

Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation:

Cygnet, Thursday, 17 October

- The most significant issue is access to coastal resources and being able to take enough for personal consumption. Access needs to continue into the future.
- There is a great deal of uncertainty among Aboriginal people about what they are allowed to do.
- Another major issue is environmental degradation. The most recent threat comes from fish farms and other forms of aquaculture. They take up prime waterways and also produce pollution.
- Laws and regulations are formulated without Aboriginal people being consulted.
- A lot of Aboriginal people will not come forward in consultations because they are embarrassed about their lack of formal education. But these are precisely the people who should be included.
- This is why a lot of Aboriginal people leave it up to one or two representatives. But these people get overworked. We need some way to get broader Aboriginal involvement.
- Everyone understands the need to manage the resource but it is the complexity that excludes people.
- Aboriginal practices still continue. I have been collecting and harvesting food from the seashore since childhood and now teach my grandchild the Aboriginal ways of doing things. But the decline in species is dramatic.
- I have noticed over the years that many social justice issues have not been addressed.
- The opportunities for land management initiatives are declining. Now people are standing up for their rights but many opportunities have been missed. The only way that we can move forward is to give Aboriginal people a seat at the table and include them in decision-making.
- Too many times we lose out when developments are planned and implemented.
- The National Oceans Office should give Aboriginal people a say in management as well as consulting us at the planning stage. There is a need for Aboriginal people to be involved all the way through so that non-Aboriginal people just don't convert it back to their way.

Interview with Mr Michael Sculthorpe, Committee Member, South-east Tasmanian Aboriginal Corporation:

Moonah, Friday 19 October

- It is possible to obtain a special licence for Indigenous people that allows them to harvest and collect for personal consumption. It is available through the Tasmanian Aboriginal Centre in Hobart. No one really informed me about it and I just found out through word of mouth.
- I can get as much fish as I want and fish around Bruny Island. However, the Indigenous permit holder has to be present at all times, even for pulling up a cray pot.
- A lot of the work carried out by SETAC is in protection of cultural heritage such as the middens around Cloudy Bay on Bruny Island.

Workshop Cape Barren Island Aboriginal Association:

Cape Barren Island, Tuesday 23 October

Present:

Ms Vicki Little
Ms Denise Gordon
Ms Hilda Thomas
Ms Furley Gardner
Mr Lyle Summers
Mr Chris Mansell

- People on Cape Barren Island have observed a dramatic decline in coastal resources. Warreners are gone. Crayfish are 'fished out'. Have to go a long way out to collect abalone.
- People believe that the main cause of the decline has been overfishing by the commercial industry. There is too much net fishing and they are allowed to come to close to the shore. The point was made that Aboriginal people do not have the equipment to go out where the commercial fishers operate so why should they be allowed to come in so close to the shore where Aboriginal people harvest and collect.
- The people on Cape Barren Island want a fishing system that recognises Aboriginal needs as a separate category to recreational and commercial fishing.
- They want a regional fishing strategy put in place to achieve this recognition and it should be based on a zoning system that includes other Islands. The islands of concern are: Cape Barren Island, Chappel Island, Badger Island, Great Dog Island and Clarke Island.
- This zoning system needs to be coordinated with marine national parks. It should be remembered that while marine parks are good for some they are not necessarily good for Aboriginal people because they impose another layer or regulations that restrict access to food resources.

Interview Mr Merv Gower, Administrator, Mersey Leven Aboriginal Corporation:

Devonport, Wednesday 24 October

- Pollution and degradation of the marine environment are a major issue in the area. The biggest impact is from industry at Burnie. Since the closure of a couple of industries there has been a marked return of dolphins and whales. People cause this pollution and it does not come from the fish or the ocean itself.
- A major marine environmental education initiative is essential. We need to learn and appreciate how to manage the coast. Right here at Mersey Bluff we regularly witness the inadequacies of dealing with stormwater.
- Our cultural links with the coast and sea are vital to us. To be able to come here and use them to swim and fish is part of our cultural heritage. Mersey Bluff is a known cultural site. Our sense of ownership is continuous.
- Establishing a business on a site with such strong cultural links has given us a great sense of empowerment and continuity.

Workshop ATSIC Regional Council Meeting:

Launceston, Thursday 25 October

Present:

Ms Faye Tatnell, Manager,
South-east Aboriginal Corporation, Cygnet.
Mr Clive Lambert, Regional Manager, ATSIC.
Ms Tony Sheldon, Regional Councillor
Ms Leonie Dickson, Regional Councillor,
Women's Karadi Aboriginal Corporation, Goodwood.
Mr Charles Wolf, Regional Councillor
Mr Ted Gower, Regional Councillor
Mr Daniel Wolf, Regional Councillor
Mr Alan Wolf, Regional Councillor,
Circular Head Aboriginal Corporation, Smithton.

- Many of the commercial fishing practices are unsustainable and not properly managed. The orange roughy fishery is an example of overfishing. Fisheries managers must read the signs. There is no point in starting to protect something when it is too late. Native species must be protected while there are some left.
- The impact of environmental degradation has been great and it continues: fish farms, sewage, introduced exotic species such as the pacific oyster taking over scallop beds and Japanese seaweed.
- There are a numerous Indigenous commercial fishers and they really care about the future of their industry.
- Concern was expressed about whether the South-east Marine Plan would actually incorporate all the issues being raised by Indigenous people. Unless there is action it will not be possible to right the wrongs. We want to see action and not have things 'watered' down through process.
- They want the ATSIC Regional Council informed and directly involved throughout the South-east Marine planning process. The Council always seems to miss out on consultations and being included in planning.
- The whaling issue goes beyond the region yet the Plan should address it.

Meeting with Indigenous Staff at ATSIC Office:

Hobart, Friday 26 October

Present:

Ms Ruby Koolmatrie, CDEP and Housing
Ms Shep Tew, Senior Policy Officer
Ms Rosie Smith, Heritage and Environment
Ms Liz Clark, Graduate Assistant,
Heritage and Environment

- Many of the significant cultural sites that require management are centred on coastal and marine resources. These often include midden sites and cultural sites such as those at Rocky Cape and the Bluff at Devonport.
- Industry is showing some responsibility in dealing with Indigenous cultural sites in development proposals. However, fines are not enough to deter destruction. There was one case recently where it paid the developer to destroy a site and incur a fine.
- It can be very difficult for some groups to get involved in enterprises. For example, the Flinders Island community have been trying to establish aquaculture without success.
- The Tasmanian Investment Corporation comprising seven community groups is exploring ways to increase aquaculture ventures at places such as Little Swanport on the east coast.

Interview with Mr Brian Mansell, Mr Stuart Mansell, Mr John Dickson – Tasmanian Aboriginal Land Council:

Hobart, Friday 26 October

- One of the main problems faced by the Council is finding sufficient resources to manage coastal land. There are continuing problems with weed control and preventing destruction of the environment and cultural heritage such as middens by four wheel drive enthusiasts. They are overstretched with land management issues and find that sea issues are very difficult to deal with. "We feel powerless with land and even more powerless with sea which seems even further removed."

- Concern was expressed about the level to which the report on Indigenous Uses and Values will influence the South-east Marine Plan. It was felt that big industries such as energy and fishing dominate consultations and planning. Indigenous people are small players and are worried about being heard.

- Many Indigenous cultural practices have adapted to use mainstream practices. However, if Indigenous people are given special permits then others complain that they are not using traditional methods. It is also difficult for Indigenous people to acquire equipment such as boats and diving gear. However, this sort of equipment is necessary because the species that were once collected with ease along the shoreline or easily caught have been allocated to commercial operators who do not follow sustainable practices.

- The problems of access to coastal and marine resources such as fishing, access to coastal areas and cultural recognitions have been raised many times yet nothing seems to have changed.

- When we get resources such as land handed back then there are always conditions attached. For example, if we want to build something then it must have local government approval.

- Pollution from the fishing and aquaculture industry is significant yet the debate about controlling them is dominated by the industry itself. Feral salmon are now becoming a pest.

- Would like to see the Plan have zoning that allows large areas of the marine environment to rest. The fishing licence system is inadequate for dealing with sustainability.

- We suspect that the drain on the resource is imminent through the fishing and cray industry. There is a constant draining on a resource that must be finite but it does not seem to be slowing down. New niche markets are found and that further increases the drain on the resource.

Regional consultations

Indigenous people throughout the South-east Marine Planning Region were consulted during this Assessment. Consultations were conducted over a six-week period from mid-September to November 2001.

Full details of the workshop and meeting schedules are included at Appendix 2. The method of selecting the workshops for each region was:

1) Victoria and South Australia from Geelong, Victoria to Point McLeay in South Australia – Workshops and meetings were based on the areas and organisations represented by Working Group members.

2) Gippsland, Victoria – A regional workshop was held at Lakes Entrance and Indigenous people from the Sale and Bairnsdale in the south and Orbost and Cann River in the north were invited to attend.

3) Dandenong-Melbourne, Victoria – Kulin Nations, based at Dandenong, were consulted through a telephone conference.

4) South-eastern New South Wales – Meetings and workshops were held at the Eden Land Council, Merrimans Council at Wallaga Lake and at Bega with the Bega Eden and Merrimans Elders Group.

5) Tasmania, including Flinders Island and Cape Barren Island – It was possible to organise some workshops and meetings with key organisations in advance. Wider consultation was achieved through individual interviews with Indigenous people who were available at the time of the regional visit. This list was developed in consultation with the ATSIC Commissioner for Tasmania.

Approach to the workshops and meetings

The people and organisations on the list compiled with the help of the Working Group were contacted through an initial phone call and a consultation schedule was completed for each region. Once the time for a meeting had been agreed a covering letter together with an information leaflet specially prepared for the consultation process together with background material on the planning process and the National Oceans Office was mailed to each of those who would be coordinating the local meeting. A copy of the information leaflet is included at Appendix 3.

The consultations involved a variety of methods depending largely on the number of people attending. Most meetings involved three to seven people. Meetings where there were less than three people were conducted more as interviews rather than workshops. However, wherever possible a workshop approach was taken to benefit from the interactive processes of developing ideas. In this case a whiteboard or butchers paper were used to record material and organise it under appropriate categories.

There was no formal agenda used either for the interviews or workshops. A list of categories of issues was included in a leaflet sent to contact people or meeting organisers in the regions prior to workshops and interviews, but it may or not have been used or referred to beforehand. However, there was no apparent impediment to contributions made by Indigenous people at the meetings or interviews and they became actively involved and contributed without any need to refer to the list of issues.

Each meeting started with a briefing on *Australia's Oceans Policy*, the role of the National Oceans Office, the Working Group and the Assessment process for the South-east Marine Plan. It was explained that the Plan was a Commonwealth initiative that involved sustainable management of the Exclusive Economic Zone outside the three nautical mile limit. It was mentioned that the Commonwealth management of certain fisheries that fell within that three-mile limit complicated this. The approach taken for the consultations was, therefore, based on Indigenous use and values of coastal and marine areas and resources.

This briefing was followed by a period of discussion and clarification. After that there was a session where participants raised their concerns and put forward their uses and values of coastal and marine resources. Most workshop sessions took two to three hours.

The procedure for the initial workshop was to prepare a report that was as accurate a record of the proceedings as possible. As much as was possible, direct quotes were recorded although this was not always feasible because of the speed in which ideas were generated and put forward. It this way, the contributors would be able to recognise their own phrases.

No contribution was intentionally reworded or any attempt made to interpret what was said from any particular perspective.

To ensure that the Indigenous people who attended the workshops were satisfied with the proceedings a copy was sent to every coordinator of each workshop, or interviewee, for approval before it was included in this report. These people were also invited to add any new information should they wish to do so with the approval of other contributors who attended the workshops.

This was in recognition of the fact that in some cases the actual workshops may have been the first opportunity people had to address the issues and, therefore, it may have acted as an introduction to further consideration of the issues. Very little new information was added during this signing-off process, indicating that issues of importance to the people who attended the workshops were covered to their satisfaction at the time.

Peak organisations

A covering letter accompanied by an information package comprising National Oceans Office material on the South-east Marine Plan was sent to 12 peak Indigenous organisations that were identified as representing Indigenous people in the South-east Marine Region. A list of those peak organisations is included at Appendix 4 and a copy of the letter is at Appendix 5.

The purpose of the letter was threefold:

- To provide information on the assessment phase of the South-east Marine Plan and other aspects of the planning process as well as background material on *Australia's Oceans Policy*
- As a courtesy to inform peak organisations that Indigenous people throughout the area that they cover will be involved in the consultations
- To invite submissions from the peak organisations should they wish to be included in the assessment.

No formal submissions had been received by RPM by 30 October. Three people from within three different peak organisations made phone contact with RPM to inquire about the nature of the consultation process. Two of these had heard about the regional consultations from sources other than the letter that was sent to their CEO by RPM.

Appendix 2: Consultation schedules

New South Wales

Date	Location	People attending
Monday 24 Sept	Eden	Mr Cruise and office staff. Met also with Pastor Ossie Cruise and staff of Jigamy Farm and Cultural Centre
Tuesday 25 Sept	Eden	Workshop with Elders, office staff and CDEP workers at Land Council office. 18 participants involved in workshop and results on butcher's paper. Meeting with: Mr Merv Penrith, Chairman Elders Council Mr Eddie Foster, Chairman Merrimans Land Council Mr Ken Campbell, Chairperson, Wallaga Lake CDEP.
Wednesday 26 Sept	AM Bega PM Return to Canberra by 2.00pm	Meeting with: Mr John Dixon, Coordinator, Bega Eden and Merrimans Elders Council (BEM) Ms Valmai Cooper, BEM Elder Ms Margaret Dixon, BEM Elder Mr Joe Mundy, BEM Elder

Western Victoria

Date	Location	People attending
Monday 1 Oct	Geelong Wathaurong Aboriginal Corporation	Meeting with: Mr Trevor Edwards, Chief Executive Officer, Wathaurong Aboriginal Corporation Mr Reg Abrahams, Cultural Heritage Protection Officer
Tuesday 2 Oct	Purnim, Warrnambool. Framlingham Aboriginal Trust	Workshop with: Mr Lionel Harradine, Chairman of Framlingham Aboriginal Trust and Deputy Chair Working Group Mr Don Chatfield, Community member Mr Jason Clark, Community member Mr Jeremy Clark, Administrator, Mr Neil Martin, Community Development Officer
Wednesday 3 Oct	Heywood, Winda-Mara Aboriginal Corporation	Meeting with: Ms Denise Lovett Second meeting with Ms Lovett and Mr Michael Bell, Chairperson Winda-Mara Aboriginal Corporation, and Mr Daryl Rose, Board Member Mirimbiak Nations Aboriginal Corporation

South Australia

Date	Location	People attending
Thursday 4 Oct	Mt Gambier	Meeting with: Ms Anne Bonney Second meeting with Ms Anne Bonney and Ms Rowie Brodie, Manager, Burrandies Aboriginal Corporation
Friday 6 Oct	Point McLeay Aboriginal Community, Lake Alexandrina	Workshop with: Mr Henry Rankine Mr Derek Gollan, National Parks ranger based at Meningee Mr George Trevorrow, Member of Native Title Committee, and Heritage Committee Mr Tony Barrett, Coordinator, Raukkan Council

Gippsland Victoria

The consultations in Gippsland Victoria were centred on a workshop held at Lakes Entrance on October 30. People from throughout the region were invited. Travel and meal costs were reimbursed. There was also provision made to meet accommodation costs if an overnight stay was necessary although no request was made.

Tasmania

The consultations in Tasmania took place between Monday October 15 and Friday October 26. This included a visit to Flinders Island and Cape Barren Island with Indigenous Working Group member, Ms Pat Green on Monday 22 and Tuesday 23.

Date	Location	People attending
Monday 25 Oct	ATSIC Hobart	Met with Commissioner Rodney Dillon at ATSIC office and obtained names of people to meet with and interview
Tuesday 26 Oct	Verona Sands	Interview with Ms Colleen and Mr Peter Frost
Tuesday 26 Oct	Nicholls Rivulet	Interview with Ms Enid Dillon
Wednesday 17 Oct	Bruny Island	Attend handover of Murrayfield a property recently purchased by the ILC and meet Indigenous people from the region.
Thursday 18 Oct	Cygnet	Interview with Ms Faye Tatnell, Manager, South-east Tasmanian Aboriginal Corporation (SETAC)
Thursday 18 Oct	Dover	Interview with Ms Bev Wood, Ms Gayleen Wood, Ms Jo Wood.
Friday 19 Oct	Moonah	Interview with Mr Michael Sculthorpe. Committee Member, SETAC
Friday 19 Oct	Margate	Visit Aboriginal Resource Centre, Margate Public School.
Monday 21 Oct	Flinders Island	Accompany Ms Green to Flinders Island. Meet with Ms Michelle Woolley, Manager, Flinders Island Aboriginal Association
Tuesday 22 Oct	Cape Barren Island	Visited Cape Barren Island with Ms Green and held workshop at the office of Cape Barren Island Aboriginal Association with seven community members.
Wednesday 24 Oct	Devonport	Interview with Mr Merv Gower, Mersey Leven Aboriginal Corporation, Devonport
Wednesday 24 Oct	Launceston	Workshop with delegates representing Indigenous groups attending the ATSIC Regional Council meeting at Launceston
Friday 26 Oct	Hobart	Workshop with Indigenous staff at ATSIC office
Friday 26 Oct	Hobart	Interview with Mr Brian Mansell and staff at Tasmanian Aboriginal Land Council, Hobart

APPENDIX 3:
Information leaflet used during consultations

Indigenous people and the South-east Marine Planning Region

Indigenous people who live within the coastal and marine areas of South-eastern Australia are being asked by the National Oceans Office to participate in planning the use of the marine environment.

The National Oceans Office is based in Hobart and was set up by the Commonwealth Government in 1999 to achieve good planning and management for Australia's oceans. The Office is responsible for implementing *Australia's Oceans Policy* and the South-east Regional Marine Plan is the first plan to be developed. Indigenous people need to be involved in the planning process to ensure that their voice is heard.

The area involved extends from Eden in southern New South Wales around the coast of Victoria and South Australia to about Kangaroo Island. All of Tasmania is included as well as the Bass Strait Islands and Macquarie Island. This area is being called the South-east Marine Planning Region.

This plan will be mainly for the area outside the three-mile limit but, as you know, many of the things that take place along the coast and estuaries connect to deep waters.

Indigenous uses and values

The development of the South-east Regional Marine Plan began with writing the background papers and these are all available from the National Oceans Office if you want copies. The person to contact is Julia Curtis on 03 6221 5041. If you want to know more about the National Oceans Office then you can check out their web site http://www.oceans.gov.au

We want to know what Indigenous people think are important issues in the South-east Region. The National Oceans Office selected a team from Resource Policy & Management (RPM) in Canberra to undertake the discussions with Indigenous people. The person from RPM who will be travelling around talking to people is Roland Breckwoldt.

Indigenous Uses and Values Working Group

A working group has been established by the National Oceans Office to help it and its consultants to incorporate Aboriginal concerns in the marine plan. The people on the working group and their contact details are provided so that you can contact them to discuss any concerns.

Rodney Dillon, ATSIC Commissioner for Tasmania (Chair); Lionel Harridine, Chairman of Framlingham Aboriginal Trust (Deputy Chair); Reg Abrahams, South West and Wimmera Cultural Heritage Program; Alf Bamblett, Victorian Aboriginal Community Services Association; Rocky Sainty, ATSIC Regional Councillor; Alf Bamblett, Victorian Aboriginal Community Services Association; Ben Cruise, Eden Local Aboriginal Land Council; Robbie Thorp, Lake Tyers Aboriginal Trust; Anne Bonney, SENCO; Henry Rankine, Point McLeay Community Council; Clyde Mansell, Tasmanian Aboriginal Centre; Neil Martin, Framlingham Community Development Officer; Rodney Gibbins, ATSIC – State Policy Centre; Joe Agius, South-east Steering Committee; Anita Maynard, Tasmanian Aboriginal Land Council

Proxy Members: Herbie Harridine, Framlingham Cultural Office; Terry Hayes, Lake Tyers Aboriginal Trust; Mona Jean Rankine, Port McLeay Community Council; Thomas Bonney, SENCO

Contacting Roland

Roland and the other people in RPM who you can talk to if he is hard to contact while on the road are Jenny Andrew and Jane Robinson. The contact details for all the RPM team are: Roland Breckwoldt, Jenny Andrew, Jane Robinson; Resource Policy & Management Pty Ltd, PO Box 4758, Kingston ACT 2604; Phone: 02 6232 6956, Roland's Mobile: 0419 245 086, Email:roland@repol.net.au. If people want to make a written submission about the plan or know anyone who does then any comments can be sent to Roland at the above address.

Some issues to be discussed for the South-east Regional Marine Plan

Indigenous peoples rights, relationship with and values in the South-east Marine Region; cultural heritage and traditional management; non-Indigenous impacts and changes of use; current use; examine interaction and overlaps between Indigenous marine use and other uses; aspirations; fisheries; native title; marine related training and education; co-management of South-east Marine Region; legal obligations and institutional structures.

All information from workshops will be treated with respect and if requested will remain confidential.

Appendix 4: List of peak organisations contacted

Binjirru Regional Council
Aboriginal & Torres Strait Islander Commission
Level 26/2 Lonsdale Street Melbourne Victoria 3000

NSW State Policy Centre
Aboriginal and Torres Strait Islander Commission
GPO Box 4193 Sydney NSW 2001

Patpa Warra Yunti Regional Council
Aboriginal & Torres Strait Islander Commission
GPO Box 1672 Adelaide South Australia 5001

Queanbeyan Regional Council
Aboriginal & Torres Strait Islander Commission
PO Box 172 Queanbeyan NSW 2620

Tasmanian Regional Aboriginal Council
GPO Box 8A Hobart Tasmania 7001

Aboriginal & Torres Strait Islander Commission
PO Box 1672 Adelaide, South Australia 5000

Aboriginal & Torres Strait Islander Commission
GPO Box 8 Hobart Tasmania 7001

Tumbukka Regional Council
Aboriginal & Torres Strait Islander Commission
Level 26/2 Lonsdale Street Melbourne Victoria 3000

Aboriginal & Torres Strait Islander Commission
Level 26/2 Lonsdale Street Melbourne Victoria 3000

Manager, Central Division
Indigenous Land Corporation
GPO Box 652 Adelaide, South Australia 5001

Mirimbiak Nations Aboriginal Corporation
75-79 Chetwynd Street North Melbourne, Victoria 3051

NSW Aboriginal Land Council
33 Argyle Street Parramatta, NSW 2150

APPENDIX 5: Letter to peak organisations

National Oceans Office – South-east Regional Marine Plan

Indigenous Uses and Values Assessment

The National Oceans Office is developing the first marine plan under *Australia's Oceans Policy* announced by the Prime Minister in December 1998. The Policy provides a single strategic framework for the planning, management and ecologically sustainable development of the extensive marine resources in Australia's Exclusive Economic Zone, an area covering over 11 million square kilometres.

The South-east Marine Region based on the waters of southern New South Wales, Victoria, Tasmania, Victoria and to Kangaroo Island off South Australia, and including Macquarie Island, was selected as the first planning unit.

The National Oceans Office has prepared a Snapshot of the South-east as a background document to the development of the South-east Regional Marine Plan and a copy is enclosed. A full Scoping Paper and a Summary Scoping Paper were released in January 2001. Copies of these are also included.

The next phase of the planning process is to complete the Regional Assessments that are organised, or coordinated, under six main themes. One of those themes is Indigenous Use and Values – gaining an understanding of and support for Indigenous interests in the Region.

The National Oceans Office selected Resource Policy & Management Pty Ltd (RPM) to conduct the regional consultations with Indigenous people as part of this Assessment. Mr Roland Breckwoldt, a Director of RPM will be travelling throughout the South-east Marine Region during September and October to meet with Indigenous people and their organisations.

It is in regard to this consultation process that we are writing to your organisation to invite your participation and contribution. Your involvement could be achieved through a formal and written submission. However, if that is inconvenient then it may be possible to meet for an interview or discuss the assessment over the telephone. As you will appreciate by far the major proportion of time is being devoted to discussions and workshops in the coastal regions of around Eden in NSW, all of coastal Victoria, part of South Australia, Tasmania and Flinders Island and Cape Barren Island.

Also enclosed is a copy of a brochure prepared by RPM to assist Indigenous people to be involved in the planning process. It includes a list of some of the main issues that might be important to help guide participation and responses.

Should there be any matters that require clarification or further information then please do not hesitate to contact me of members of the Indigenous Values and Uses Working Group whose names are enclosed. Any submission or contribution would be welcome up to October 30 as after that we need to prepare a report for the National Oceans Office.

Yours sincerely

Roland Breckwoldt
Director
18 September 01

Appendix 6: Indigenous Uses and Values Working Group membership

Mr Rodney Dillon	ATSIC Commissioner for Tasmania (Chair)
Mr Lionel Harridine	Chairman of Framlingham Aboriginal Trust (Deputy Chair)
Mr Reg Abrahams	South West and Wimmera Cultural Heritage Program
Mr Alf Bamblett	Victorian Aboriginal Community Services Association
Mr Rocky Sainty	ATSIC Regional Councillor
Mr Ben Cruise	Eden Local Aboriginal Land Council
Mr Robbie Thorp	Lake Tyers Aboriginal Trust
Ms Anne Bonney	SENCO
Mr Henry Rankine	Point McLeay Community Council
Mr Clyde Mansell	Tasmanian Aboriginal Centre
Mr Neil Martin	Framlingham Community Development Officer
Mr Rodney Gibbins	ATSIC – State Policy Centre
Mr Joe Agius	South-east Steering Committee
Ms Anita Maynard	Tasmanian Aboriginal Land Council

Proxy Members

Mr Herbie Harridine	Framlingham Cultural Office
Mr Terry Hayes	Lake Tyers Aboriginal Trust
Mrs Mona Jean Rankine	Port McLeay Community Council
Mr Thomas Bonney	SENCO

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"The sea was always there for us, even when the land had been carved up and sold off."

Delia Lowe, Jerrinja Wandi Wandian woman from the south coast of New South Wales (Lowe and Davies 2001)

Sea Country AN INDIGENOUS PERSPECTIVE

Indigenous people and the sea in the South-east Marine Region

A summary of Indigenous marine uses, values, right and interests for the assessment phase of the South-east Regional Marine Plan as part of *Australia's Oceans Policy*

A desktop study prepared by Smyth and Bahrdt Consultants for the National Oceans Office. November 2001.

The Authors

Preparation of this report was coordinated by Dr Dermot Smyth, principal consultant with Smyth and Bahrdt Consultants, Atherton, and Honorary Research Fellow with the School of Tropical Environment Studies, James Cook University.

The section on native title issues (Section 5) was prepared by Dr Lisa Strelein, Director of the Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

The section summarising Commonwealth and State legislation related to the recognition of Indigenous people's marine rights and interests (Section 6) was prepared by Dr Hanna Jaireth, a specialist in Indigenous environmental and resource management law and member of the IUCN World Commission on Protected Areas.

Acknowledgements

The authors would like to acknowledge and thank the Indigenous Working Group for their guidance, advice and support during this project. Thanks also to the numerous people in Indigenous organisations, government agencies and research institutions who provided information and feedback during the preparation of the report. Finally, we wish to express our appreciation for the assistance and support of Project Officer Julia Curtis and other members of the National Oceans Office through all stages of the project.

Contents

Introduction

Australia's Oceans Policy and the South-east Regional Marine Plan

Australia's Oceans Policy was launched in 1998 to promote ecologically sustainable development of our ocean resources and to encourage internationally competitive marine industries. The Policy stresses the need to manage the use of ocean resources in a coordinated way to maintain the biodiversity of our ocean ecosystems.

Regional marine plans are being developed to implement ecologically sustainable development in Australia's oceans. Through regional marine planning, the Policy considers the pressures from all users, and the need for these uses to be managed carefully, supported by a deeper understanding of the complex marine environment and its cultural significance to Indigenous people.

The South-east Marine Region is the first to be implemented in what will be a nation-wide program. It covers two million square kilometres of water off Victoria, Tasmania, Macquarie Island, southern New South Wales and eastern South Australia.

The report takes a holistic approach to Indigenous marine resource use and management from the coast to the outer limit of Australian territorial waters. The report addresses these issues irrespective of Commonwealth or State responsibilities. The South-east Regional Marine Plan, however only takes in activities under Commonwealth responsibility.

Outline of desktop project and report

This report summarises Indigenous people's uses and values with respect to marine environments in the South-east Marine Region. It is based on a review of published and unpublished material from Indigenous, academic and government sources. This "desktop" project is part of the assessment process being undertaken by the National Oceans Office in preparation for the development of the South-east Regional Marine Plan (SERMP). The project was guided by the Indigenous Working Group, whose members aided Indigenous involvement in the assessment phase of the SERMP.

The report addresses Indigenous marine resource uses and interests from the pre-colonial period to the present. The main focus is on summarising available information on Indigenous people's aspirations and interests today. Also summarised is the current status of State and Commonwealth Government responses to those aspirations, through legislation, regulations and policies.

During the course of the consultancy, the Australian High Court made a landmark decision on a Native Title claim by the traditional owners of sea country around Croker Island in the Northern Territory. This report includes a summary of key features of that High Court judgment.

Relationship with other National Oceans Office consultancy reports and processes

This report, together with a separate report based on consultations with coastal Indigenous communities and organisations in southeast Australia, forms the basis of an assessment report of Indigenous uses and values in the South-east Marine Region. This assessment report, together with assessment reports on other values and uses of the marine region, will contribute to the development of the SERMP during 2002. It is anticipated that a draft plan will be completed by the end of that year.

Previous reviews of Indigenous marine uses and values

This report draws on the outcomes of previous State and Commonwealth Government reviews and inquiries into various aspects of Indigenous interests in marine resources and environmental management. Most significant among previous Commonwealth Government documents are:

- *The Coastal Zone Inquiry Final Report* (Resource Assessment Commission 1993)
- *A Voice In All Places – Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone* (Smyth 1993 – a consultancy report for the Coastal Zone Inquiry)

- *Existing and Potential Mechanisms for Indigenous Involvement in Coastal Zone Resource Management* (Altman et al. 1993 – a consultancy report for the Coastal Zone Inquiry)
- *A Sea Change – Overseas Indigenous-Government relations in the Coastal Zone* (Hull 1993 – a consultancy report for the Coastal Zone Inquiry)
- *Ecologically Sustainable Working Group Final Report - Fisheries* (Commonwealth Government 1991)
- *Managing Sea Country – Tenure and Sustainability of Aboriginal and Torres Strait Islander Marine Resources* (Cordell 1991 – a consultancy report for the Ecologically Sustainable Development Fisheries Working Group)
- *Aboriginal Fishing and Ownership of the Sea* (Lawson 1984 – Department of Primary Industry internal report).

Of these previous studies, only the Coastal Zone Inquiry provided direct opportunities for Indigenous involvement through written submissions, workshops, consultation meetings and participation in formal hearings. Extracts from these proceedings are used to illustrate the various issues addressed throughout this report.

Several of these major Government reports have led to policy developments and reviews directly relating to the recognition of Indigenous rights and interests in the sea. Relevant policy documents are referred to in this report where appropriate.

Other information sources

Published information on Indigenous marine issues is scattered throughout the anthropological, archaeological, linguistic and resource management literature. In recent years, however, several key academic publications have attempted to draw together the diversity of views from many disciplines in this area. They include:

- *Turning the Tide* – papers presented at a conference on Indigenous people and sea rights at Northern Territory in 1993
- *Pre-European Coastal Settlement and use of the Sea* (Nicholson and Cane 1994)
- *Customary Marine Tenure in Australia* – proceedings of a workshop convened by the Australian Anthropological Society in 1996
- *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues* (Tsamenyi and Mfodwo 2000)
- *Water Rights* – special issue of *Indigenous Law Bulletin*, 2000.

These and other published sources, together with Sate and Commonwealth Government reports, policy documents, web sites and legislation provide the basis for this desktop summary of Indigenous rights, interests, uses and values in the marine environments of the Region.

Structure of the report

Section 2 of the report summarises information about the relationship of Indigenous people and the sea in Australia and the South-east Marine Region. Cultural and other differences within the Region are given. The focus of this section is on the relationship between Indigenous people and the sea before British colonisation. Pre-colonial elements of the relationship between Indigenous people and the sea continue to the present day and have a strong bearing on contemporary Indigenous marine uses, values, rights, interests and aspirations.

Section 3 addresses the impacts of British colonisation and post-colonial development on Indigenous maritime cultures in the Region. Included is a summary of impacts on Indigenous marine environments and resources during the colonial and post-colonial period. This historical overview provides a context to understanding contemporary Indigenous uses, values and aspirations.

Section 4 summarises present day Indigenous populations – involvement in fisheries, marine protected area management and cultural heritage management. It also includes Indigenous issues and concerns about marine environmental and resource management, as well as State government initiatives to involve Indigenous people in ocean management.

Section 5 explores native title issues in the sea through a review of the Native Title Act and an analysis

of significant legal judgments. The recent High Court decision relating to the Croker Island case is included. Also included is a summary and analysis of native title determinations and agreements relating to marine areas and resources.

Section 6 examines State and Commonwealth marine environmental, resource and heritage management legislation with respect to the recognition of Indigenous rights, interests, uses and values.

Section 7 summarises recent Commonwealth Government initiatives and policies relating to enhancing recognition of Indigenous interests in the sea. This includes an audit of the implementation of recommendations from the 1993 Coastal Zone Inquiry Final Report from the Resource Assessment Commission, and commitments made in *Australia's Oceans Policy* – the Commonwealth Government's most recent (and current) marine policy framework.

Section 8 provides a brief overview on international consideration of Indigenous marine issues. International agreements as well as legal and policy developments in New Zealand, Canada and the USA are discussed.

Indigenous Relationships to Sea Country

Concept of Indigenous "sea country"

For many years Australia's Indigenous people have strived to communicate the concept of sea country. Their own speeches and writings as well as writing of non-Indigenous researchers help convey the key features of sea country that apply all around Australia's coast.

> Aboriginal songs and stories extend back beyond the 15 000 years when the sea started to rise and describe the landscapes which are now part of the ocean.
>
> (NSW Aboriginal Land Council 1993)

> A fundamental point is that Aborigines see the distinction between land and water as arbitrary. Seas and offshore islands are an integral part of the total environment of coastal Aborigines. Aborigines who own coastal land have rights and duties to the adjacent sea as well as the land.
>
> (Lawson 1984)

> Our middens are proof enough that our people lived off the sea and estuaries. The traditional gathering methods, and foods, are still used today. The seasonal foods are still collected and eaten by us, and the areas where our ancestors gathered foods are still used today, by us and our children, without damage to the ecosystem.
>
> (Wagonga Local Aboriginal Land Council 1992)

> Aboriginal and Torres Strait Islander people in many parts of the coast view the coastal sea as an inseparable extension of coastal land, and subject to the characteristics of traditional ownership, custodianship, spirituality and origins in the Dreamtime and Indigenous law. To them the coastal sea is an owned domain in which members of the local clan or family group have primary and even exclusive use and management rights).
>
> (Smyth 1994)

These statements convey three key themes:

1) areas of sea are an integral part of coastal and island Indigenous estates

2) Indigenous customary law, with respect to ownership, rights and responsibilities, applies to the sea as it does to the land

3) Indigenous customary rights to the sea include rights to harvest and trade in fish and other marine resources, and the right to control access to sea areas and resources.

The extent to which the Indigenous people relationships with the sea are recognised in Australian law is discussed in sections 5 and 6 of this report.

Aboriginal people and country

The following extract from *Australia's Oceans Policy Issues Paper No.6 Saltwater Country* provides a general summary of relationships between Aboriginal groups and the sea before British colonisation. The use of the past tense does not imply that this relationship ceased at colonisation. On the contrary, as will be described later, much of the basis of Indigenous interests in coastal and ocean management today are based on continuing cultural traditions, rights and responsibilities which pre-date colonisation.

Clans and country

Although there was considerable diversity between the cultures of the hundreds of Aboriginal groups around Australia's coast, there were some common factors which reflected the relationship of Aboriginal people to the sea around Australia.

The fundamental social unit around most of coastal Australia was the extended family or `clan'. Clan membership was typically inherited from one's father, but in some parts of Australia, clan membership was passed down through the maternal line. Intimately associated with each clan was their estate or `country'. For coastal clans their country always included the adjoining estuaries, beaches, coastal waters and ocean. Groups of clans speaking a common language formed a wider social group, sharing ceremonies, belief systems, technologies and subsistence strategies.

The ocean, or saltwater country, was not additional to a clan estate on land, it was inseparable from it. As on land, saltwater country contained evidence of the Dreamtime events by which all geographic features, animals, plants and people were created. It contained sacred sites, often related to these creation events, and it contained tracks, or Songlines along which mythological beings travelled during the Dreamtime. The sea, like the land, was integral to the identity of each clan, and clan members had a kin relationship to the important marine animals, plants, tides and currents.

Most Aboriginal people with marine clan estates were coastal mainland dwellers. However, many lived exclusively or periodically on offshore islands, particularly off the Queensland, Northern Territory and Kimberly coasts. These island dwellers were particularly dependent on the subsistence resources of the sea and they maintained control of large marine estates radiating out from their island homes.

Extent of saltwater country

The extent of pre-colonial use of Australia's oceans by coastal Aboriginal groups varied through time and between regions. Aboriginal occupation of Australia extends at least 60 000 years, and possibly considerably longer. During this time, sea levels have risen over 100 metres, resulting in inundation of extensive areas of coastal lands, particularly around northern Australia with a low gradient shoreline and extensive continental shelf.

Following stabilisation of the sea level at its present height, about 6000 years ago, Aboriginal patterns of marine use observed at the time of British colonisation, began to be established. Around northern Australia, this included extended sea voyages by canoe to exploit resources and manage clan sea country, in some places out of sight of the mainland.

Marine technologies

Throughout coastal Australia and along major river systems, logs and bark were used as floating aids for people and their possessions. In some areas more complex rafts and canoes were used, depending on availability of materials and coastal environments.

In southern coastal areas, canoes were made from single strips of curved bark, filled with mud or clay at the ends, or wrapped or tied at either end with fibre. In northern Australia canoes were made of several pieces of bark sewn together, sometimes with pole gunwales, stretchers and ties added to provide greater strength and seaworthiness.

Technologies used for hunting and fishing in the sea included fibre nets, basket fish traps, stone fish traps, spears and harpoons with detachable heads for hunting large prey, such as dugong and turtle in northern Australia.

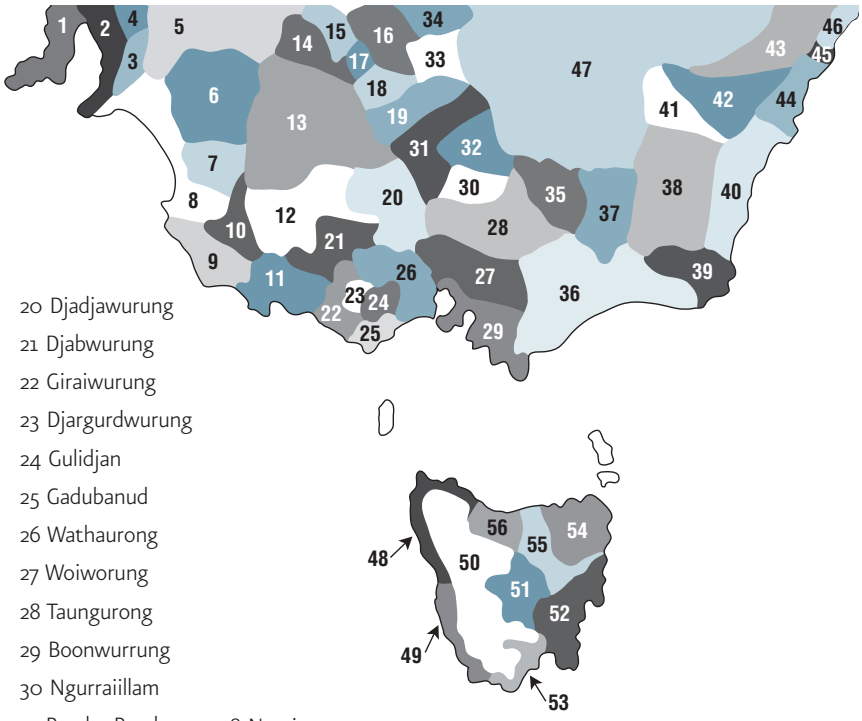
Pre-colonial Indigenous populations

It is difficult to develop accurate estimates of the population of Australia before European colonisation, some of which are based on post-1788 observations of a population already reduced by introduced diseases and other factors. As a result, estimates of pre-colonial population of range from 200 000 to 750 000 (Horton 1994).

Whatever the size of the Indigenous population before European settlement, it declined dramatically under the impact of new diseases, repressive and often brutal treatment, dispossession, and social and cultural disruption and disintegration. The decline of the Indigenous population continued well into the twentieth century.

Figure 1 provides an indication of the location of the major language groups of Indigenous people in southeast Australia at the time of colonisation. This map does not show the location of smaller clan estates and does not indicate the location of native title for a particular Indigenous group. The "boundaries" between the various groups should not be interpreted as firm cadastral boundaries in the European sense. Actual ownership, use and management responsibilities of people for land and sea were and are significantly more complex than indicated on this map.

Figure 1: *Approximate location of major Indigenous language groups of South-east Australia at the time of British colonisation. (Source: AIATSIS)*



1 Narangga
2 Kaurna
3 No published information available
4 Ngadjuri
5 Danggali
6 Ngargad
7 Bindjali
8 Ngarrindjeri
9 Buandig
10 No published information available
11 Gunditjmara
12 Jardwadjali
13 Wergaia
14 Latje Latje
15 Kureinji
16 Madi Madi
17 Dadi Dadi
18 Wadi Wadi
19 Wemba Wemba
20 Djadjawurung
21 Djabwurung
22 Giraiwurung
23 Djargurdwurung
24 Gulidjan
25 Gadubanud
26 Wathaurong
27 Woiworung
28 Taungurong
29 Boonwurrung
30 Ngurraiillam
31 Baraba Baraba
32 Yorta Yorta
33 Nari Nari
34 Yitha Yitha
35 Waveroo
36 Kurnai
37 Jaitmatang
38 Ngarigo
39 Bidwell
40 Yuin
41 Ngunawal
42 Gundungurra
43 Dharug
44 Tharawal
45 Eora
46 Kuring-gai
47 Wiradjuri
48 Peerapper
49 Toogee
50 No published information available
51 Lairmairrener
52 Paredarerme
53 Nuenonne
54 Pyemmairrener
55 Tyerrernotepanner
56 Tommeginne

Disclaimer: This map indicates only the general location of larger groupings of people which may include smaller groups such as clans, dialects or individual languages in a group. Boundaries are not intended to be exact. The views expressed in this publication are those of the author and not those of AIATSIS. For more detailed information about the groups of people in a particular region, contact the relevant land councils.

Cultural sites, Dreaming tracks and cultural seascapes

The Council for Aboriginal Reconciliation's Key Issue Paper No.1 *Understanding Country* (Smyth 1994) provides the following summary of the meaning and significance of Sacred Sites and Dreaming Tracks on land and sea.

> While all landscape features have their origins in Dreamtime creation stories, there are some places of special significance to Indigenous people. These special places are often referred to as sacred sites – a generic term for different types of places or areas of land or sea. Many sacred sites are places where particularly important events occurred during the Dreamtime. Others are places where special ceremonies are conducted to ensure the well-being of particular species. Others are places of great danger, sometimes called 'poison grounds' where it is believed that inappropriate action (such as the killing of forbidden species, or the entrance of a stranger) will cause severe storms, sickness or even death.
>
> The routes taken by the Creator Beings in their Dreamtime journeys across land and sea, are also of continuing significance to Aboriginal people. They link many sacred sites together in a web of Dreaming Tracks criss-crossing the country. Dreaming Tracks can run for hundreds of kilometres, from desert to coast (and out to sea).

Clan estates extending out to sea include a network of cultural sites and dreaming tracks within and linking those estates. This paints Australia's coastal waters as cultural seascapes in the same way that cultural landscapes are understood on land. Where islands (and reefs and cays in the north) provide nautical stepping-stones, these cultural seascapes can extend far out to sea.

Indigenous marine resource rights, responsibilities and use

Membership of a particular clan and the association with clan country is given at birth. Sons and daughters retain that clan membership for life, even though they may move away and live on other clan estates (such as a husband's or wife's clan country), or into community settlements or towns.

Clan membership provides access rights to the hunting, fishing and gathering of resources of the clan estates. It often also allows some rights to resources on neighbouring estates.

Information about Indigenous use of coastal and marine resources in pre-colonial times is derived from archaeological research, from the stories handed down through generations of Indigenous families and from the continuing relationships between Indigenous people and the sea. Nicholson and Cane (1994) reviewed the research literature to develop an understanding of pre-colonial Indigenous maritime societies around the Australian coast.

The general picture that emerges is of coastal Indigenous groups using a variety of fishing and gathering techniques and technologies to harvest intertidal and inshore shellfish, crustaceans and fish to complement animal and plant foods obtained on the land and coastal rivers and estuaries. Marine resource harvesting technologies in southeast Australia included a variety of water craft, spears, fish hooks (from bone and shell) nets, basket traps and stone fish traps.

The following summaries provide an indication of Indigenous marine resource use within each region of the SERMP.

New South Wales

Archaeological excavations of coastal rock shelters and middens indicate that the use of what are now coastal areas was relatively low before the rise in sea level which commenced about 20 000 years ago and stabilised about 6000 years ago (Colley 1992; Lambert 1971; Bowdler 1970). Occupation and use of marine resources increased from about 6000 years ago and again around 3000 years ago. This later increase is thought to reflect increasing populations and use of new technologies (Hughes and Lambert 1971).

Other research shows that coastal Aboriginal societies engaged in a mixed economy, involving both marine and terrestrial resources. In some regions use of particular areas was seasonal (Poiner 1976), with large groups gathering to exploit local abundances of resources at different times of the year. Cane (1998) lists the pre-colonial Indigenous marine resource technology as:

> Shell blades (for prising shellfish from rocks), canoes, shell fishhooks, spears with bone points, hoop nets, traps and weirs (made of branches), baskets for storage, torch light for night fishing, and poisons from various plants.

Archaeological excavations at over 60 coastal rock shelters and middens in southern New South Wales (Sullivan 1987; Lambert 1971; Cane 1988; Bartz 1977; Mackay and White 1987; Officer 1991) reveal a diverse diet of estuarine shellfish, intertidal shell fish, pelagic fish, sea birds and wallabies. Table 1 shows the most common species revealed through archaeological research in the southern New South Wales.

Though occupation dates vary from site to site, the archaeological record indicates the continuous use of marine resources from the time of sea level stabilisation until recent times. The record also indicates that shell fishhooks became part of the coastal Indigenous technology of southern New South Wales about 1000 years ago (Sullivan 1987).

Nicholson and Cane (1994) concluded that seasonal change seems to have influenced coastal settlement in southern New South Wales. They note:

> For example, Poiner (1976) considers occupation to have been seasonal; semi nomadic during the summer, with a wide range of estuarine and marine resources being exploited, and fully nomadic during the winter, when the availability of coastal resources (particularly fish) was reduced.

Table 1:
Common species revealed through archaeological research in southern New South Wales.

Estuarine shellfish	Beach and rocky shore	Pelagic fish	Birds	Mammals
Mud whelk	Mytillus planulatus	Bream	Short-tailed Shearwater	Long-nosed Bandicoot
Oyster	Turbo undulata	Snapper	Piron	Red-necked Wallaby
Mussel	Donax deltoides	Blackfish	Petrel	Swamp Wallaby
Anadara traspezia	Abalone	Dusky Flathead		Grey Kangaroo
		Leatherjacket		Potoroo
		Wrasse		Tiger Cat
				Dingo

Victoria

Archaeological evidence from Victoria indicates that occupation of coastal areas is as old as the present coastline – about 6000 years. Most coastal occupation sites in Victoria, however, are 4000 years old or younger. Populations and resource use have increased throughout the last couple of thousands years (Coutts 1970, 1981; Lourandos 1977). The oldest occupation sites have been located on Wilson's Promontory.

The following summary of pre-colonial maritime culture and resource use is adapted from a recent review of Aboriginal use of the sea in south-western and south-eastern Victoria undertaken by the Research Unit of the National Native Title Tribunal (Wright 2001).

In south-western Victoria, a striking feature of the Gunditjmara people's economy was the building of elaborate permanent systems for harvesting the short-finned eels during their migratory runs in fresh-water. These eels spend most of their lives in the rivers of southern Australia and migrate into the Coral Sea and Pacific Ocean to breed once before dying. The juvenile eels are carried by ocean currents back to the east and south coasts of Australia where they enter the river systems once more.

The Gunditjmara constructed extensive and complex channel, embankment and trapping networks for the manipulation of the swamps around Toolondo and Mount William. Such sophisticated works and water management systems were used to guide migrating eels into nets or basket traps. Spears were also used to harvest eels. Eel fishing seasons extended for one to two months a year, with individual family groups harvesting from their own weirs. Aboriginal people gathered in large numbers for "eel-feasts", with attendances of up to 2500 people recorded (McKinnon 2001).

The fertile volcanic plains of south-western Victoria were among the most densely populated regions of pre-colonial Australia. The Aboriginal people practiced intensive gathering, harvesting, hunting and fishing economies that included the management and manipulation of plants, land animals and fish. They established semi-permanent base camps and ceremonial and political life involved large social networks (Lourandos 1987).

Early ethnographic reports for south-east Victoria (Howitt 1904 and Smyth 1878), combined with more recent archaeological research, have resulted in the following description of pre-colonial economy of the Gunai/Kurnai people of the Gippsland coast and lakes (Hotchkin and May 1984):

The Kurnai focused a great deal of their attention on the Gippsland Lakes and waterways. From spring to autumn, camps were located on the lakes, during the cooler months they moved to the hills. Fishing played a major part in the lake economy, men using spears, while both sexes used nets. Of great interest are the bone fishhooks apparently used exclusively by women. Hooks are not known west of the Kurnai area in Victoria. To the east they are made of shell. Kurnai fished from tied stringy-bark canoes whose raised bow and stern made them considerably more seaworthy than the simple craft to the north and west.

A broad range of estuarine fish was taken from the lakes, and appears to have been a summer staple. Hunting parties added meat from the hinterland. There is little reference to collecting shellfish.

From this there emerges a picture of a dense population whose annual round and material culture was tuned to coastal, particularly lake environments. Fishing was a mainstay of the economy, along with plant gathering and hunting.

Another key feature of pre-colonial Aboriginal life in coastal Victoria was the need to adapt local economies to changing environmental conditions such as rising sea levels and the development of freshwater and estuarine lake systems. Wright (2001) suggests, for example, that:

> …there may have been a slow change in fishing and gathering over the last 1000 years or so. The coastal people's interests moved from salt-water estuarine shellfish and fish, towards greater use of freshwater resources of the lakes (for example birds and eels) and to the ocean beach resources (including shellfish, rock platform species and sea mammals).

The diversity of Aboriginal coastal archaeological sites in Victoria is described in the Victorian Land Conservation Council's *Marine and Coastal Descriptive Report* (Land Conservation Council 1993). The report points out that nearly one fifth of all of Victoria's archaeological sites occur within one kilometre of the coast. By far the most common sites are the shell middens, which are often well preserved and easily recognised. Surface artifact scatters and isolated artifacts are the next most common site types, while rock shelters, scarred trees and quarries are relatively rare.

Tasmania

Archaeological evidence indicates that Aboriginal occupation of Tasmania dates back at least 22 500 years (Bowdler 1984), when sea levels were considerably lower than today. The earliest use of Tasmanian coastal and marine resources in Tasmania is at Rocky Cape on the north coast which is dated at about 8000 years (Jones 1966 & 1977). But most of the coastal midden sites are 2000 years old or younger. It is likely that evidence of earlier marine resource use was lost when rising sea levels flooded coastal occupation sites during the period from 20 000 to 6000 years ago.

It is believed that virtually all Tasmanian Aboriginal groups used marine resources, though some also lived, hunted and gathered inland, particularly in eastern Tasmania (Jones 1984; Vanderwal and Horton 1984). Intertidal and subtidal shellfish, including "mutton fish" (abalone), have always been an important, year round food source, but there is evidence that fish were dropped from the Tasmanian diet about 3500 years ago. In summer months a wider ranger of coastal resources were exploited, including seals and mutton birds (Jones 1984).

Pre-colonial Aboriginal technology on Tasmania was less complex than on the mainland. It included wooden spears with fire-hardened tips, throwing cubs, wooden spatulas, grass baskets, possum-skin bags, water buckets made from kelp, fish nets, fire sticks, kangaroo-skin cloaks, shell necklaces, canoe-rafts, huts and a few stone tools. Bone tools, thought to have been used for constructing fishing nets, have not been found in the archaeological record more recently than 3500 years ago. Watercraft, made from bundles of paperbark or stringybark, first appear about 2500 years ago.

In her review of archaeological evidence of pre-colonial Tasmanian Aboriginal culture, Flood (1983) concludes:

> Prehistoric Tasmanian Aborigines may have had a simple toolkit and limited ceremonial life, but they survived more than 20 000 years on their rugged island, they successfully weathered the glacial cold further south than any other people, they produced some of the finest rock engravings in their world, and they achieved a successful balance between hunters and land, and a population density equivalent to that on the Australian mainland.

South Australia

Aboriginal occupation of the western coastal strip of South Australia dates back over 6000 years, and may extend earlier than the period of the current sea level. In these regions, Aboriginal economies appear to have been based on a combination of arid, inland resources with seasonal or intermittent use of the sea (Nicholson and Cane 1971). Along the eastern coast, in the rich delta land around the mouth of the Murray River, coastal occupation dates back about 2000 years (Luebbers 1978). These coastal communities used marine, intertidal and estuarine resources.

Coastal food resources used along the South Australia coast included shellfish, fish, mammals (including seals) and birds. Along the arid coast to the west, many fish traps can still be seen, indicating a reliance on fish as well as shellfish in those regions.

In the Coorong area (the long salt-water lagoon at the Murray River mouth) various technologies were used, including mesh nets, woven fish traps, spears and canoes.

Archaeological evidence indicates that Aboriginal occupation of Kangaroo Island, located 7 km off Cape Jarvis, may have ceased about 5000 years ago, some time after the island was separated from the mainland by rising sea levels. Creation Stories[2] show the ancient link between people and the sea, and of major environmental changes such as rising sea levels, that coastal Indigenous people have witnessed and to which they have adapted.

[2]The word "Story" in this context means more than a narrative. It conveys an ancient oral tradition that contains both an understanding of origins of land, sea, people and all living things, while at the same time providing the basis of customary law and codes of behaviour.

"Indigenous people of the South-east Region are unified by a shared history, a great love for, and connection to the ocean and common issues of concern."

Commissioner Rodney Dillon.

These regional summaries reveal a diversity of pre-colonial Aboriginal coastal societies that were adaptive to environmental change over many thousands of years and whose economies were sustained by terrestrial, freshwater, estuarine, beach, rocky shore and marine resources. Eel harvesting in western Victoria, in particular, demonstrates how Aboriginal maritime cultures were dependent on the interconnectedness of marine and terrestrial ecosystems stretching from inland freshwater drainage systems to the deep ocean many hundreds of kilometres from the point of harvesting.

The Australian Heritage Commission (AHC) is currently developing a database of coastal Aboriginal cultural heritage sites and places that are on the Register of the National Estate. Sites listed on the Register are protected from damage that may result from decisions made by Commonwealth agencies. This may have particular relevance to Commonwealth activities proposed or endorsed under the SERMP. It is anticipated that this database will be completed by the end of 2001 and be available during the development of the SERMP. While the AHC database will not provide a complete inventory of culturally significant Aboriginal sites along the South-east Australian coast, it will provide further information on the cultural interconnectedness of land and sea.

Aboriginal marine management in pre-colonial Australia

Marine environmental and resource management in pre-colonial Australia involved the control of human access to marine areas and resources. Ceremonial activities aimed at maintaining the well-being of habitats, species or both were also part of marine resource management.

Pre-colonial marine management strategies were based on an understanding of social organisations and a well established system of customary marine tenure all around the Australian coast (Smyth 2001):

Aboriginal people's relationship to their sea country brought with it a complexity of rights and responsibilities, including the right to access, use and distribute resources, and the responsibility to manage those resources through time, from generation to generation. Clan members were owners of their country, they belonged to their country, they were identified with their country and they were stewards or carers of their country.

Marine environments were managed through a variety of strategies and cultural practices, including:

- conduct of ceremonies (songs, dances, story telling and other rituals) with the purpose of nurturing the well-being of particular places, species and habitats
- control of entry into marine clan estates by outsiders – restricting resource use to clan members and others by agreement
- seasonal exploitation of particular marine resources; the opening and closure of seasons were marked by ecological events, such as the flowering of particular plants or the arrival of migratory birds
- restriction on the harvesting of particular species based on age, gender, reproductive conditions, health, fat content etc. of individual animals
- restrictions on resource use and distribution by clan members and others based on age, gender, initiation status, marital status and other factors
- restrictions on the use of particular animals and plants of totemic significance to individual clans; each clan usually identified closely with at least one natural element (usually animal or plant), the use of which was often highly restricted or prohibited
- prohibition of entry to certain areas on land and sea, often associated with storms or other sources of danger; entry and/or hunting and fishing in the these areas was believed to cause severe storms or other forms of danger, not only to the intruders but also to other people in the region.

Together these strategies and practices resulted in a system of marine exploitation which was conservative, which enabled the local population to live within the carrying capacity of the local environment and to adapt to environmental change over time.

Post-Colonial Impacts on Coastal Indigenous Societies and Environments

To understand the link between present day Indigenous marine uses and values and those of pre-colonial Australia, it is necessary to consider the impact of colonisation and subsequent developments on the Indigenous maritime cultures of southeast Australia. This chapter summarises the impacts of the colonial and the post-colonial period on the Indigenous maritime cultures of each State.

New South Wales

The following submission from the New South Wales Aboriginal Land Council to the 1993 *Coastal Zone Inquiry* summarises some of the impacts of colonisation on Aboriginal communities along the NSW coast:

> Many of the Aboriginal settlements along the New South Wales coast have existed for over a hundred years with families able to trace their history back into the contact period. While the land on which the communities were forced to live was regarded as rubbish, the European community did not exert great pressure to remove people. Many families were able to support themselves independently through fishing and seasonal farming such as cane cutting and clearing. In addition, the sea and estuaries continued to provide the basis of the communities' diet. However, following the Second World War, new threats to coastal Aboriginal communities emerged. At first, these included an intensification of agriculture, particularly dairying, and also included others such as sand mining.
>
> By the 1960s, improvements in roads and transport fostered a further threat to coastal communities in the form of tourism and residential developments. Proximity to the ocean rather than the land's agricultural capacity became the prime consideration in determining land's value. Aboriginal communities located close to existing townships and transport routes were particularly vulnerable to the waves of property speculators which followed.

Cane (1998) provides the following summary of Aboriginal coastal societies and marine activities on the south coast of New South Wales following colonisation:

> The earliest historic observations of traditional fishing on the South Coast come from mariners between 1798 and 1826. They speak of the great desire of Indigenous people for fish, observed the remains of fish and seals at Aboriginal camps and saw them actively involved in European-style fishing activities, notably netting, a tradition they already practiced with their own nets, and which is still active today.
>
> Land based settlement after this period – through to the 1840s – brought territorial conflict, warfare, massacre and poisoning of the people on the South Coast. There is reliable evidence that people were successful in maintaining and adapting traditions to the new economic circumstances (Cameron 1987; Rose 1990). Tribal people were recorded assisting the settlement process with traditional skills and resources. A resident in Moruya noted, in 1837, that "shortage of food was at times acute. Aboriginal people saved the settlement several times from starvation by supplying fish and oysters". Whether or not these products were bartered or sold is unclear, but it is clear that traditional foods were being sold later in the century: "about 50 blacks were camped at Blackfellows Lake, on the Bega River between Bega and Tathra, some of whom worked for wages and some sold honey and fish". The application of Aboriginal fishing traditions to support the European economy seems to have begun shortly after colonisation and survives today, through bartering and direct sale.
>
> Aboriginal men and women were involved in the European whaling industry from the outset, although it is unknown whether they received money or goods for their labour. Two boats were manned entirely by Aborigines in 1839 and three Aboriginal crews were working in Eden.
>
> Between 1829 and 1846 Indigenous people between Woolongong and Broulee were described as selling fish and subsisting "from their ordinary pursuits of hunting and fishing" (Organ 1990) and, as access to

land diminished in the 1840s through settlement, forestry and pastoral development, "people in the Broulee district depend more on the sea than the bush for food" (Organ 1990).

A formal request to the New South Wales Government by Aboriginal people for fishing boats occurred in 1876, and by 1878 people in Roseby Park, Bega, Eden and Moruya were fishing with Government boats and equipment. Census information reveals that Indigenous people in Moruya were described as "remarkably well off and can earn the same wages as Europeans" with income earned from four fishing boats (Bailey 1975: Organ 1990).

Between 1885 and 1905, a number of reserves were set up between Milton, Tomakin, Tuross and Wallaga Lake on the South Coast. These were "intended as a residential base from which to fish" (Goodall 1982). People also began to get seasonal work with farmers, such as small fruit and pea farmers. Others worked in timber mills. Most continued to subsist through fishing and the government provided another 18 boats to South Coast people (Goodall 1982).

Life at the end of the last century was captured through the eyes of an Aboriginal artist, Mickey of Ulladulla. His painting reflects camp life, ceremonial activity and the getting of traditional foods. The most relevant paintings in the context of this paper feature sailing ships, fish, fishing boats and fishing. The paintings convey the broad focus of Aboriginal interests and activities at this time, and imply that at least half of their customary interests and activities at this time (Sayers 1994).

On the south coast of New South Wales, despite conflict, dispossession and dramatic lifestyle changes on land, the Indigenous marine economy continued throughout the colonial period. It is clear also that the NSW Government encouraged this tradition by establishing reserves as self-sustained fishing settlements and by the provision of boats and other equipment.

Victoria

Coastal Aboriginal people had been in contact with European whalers and sealers for about 30 years before the first colonial settlements at Portland (1834) and Geelong (1835). Within the next thirty years, the Aboriginal population was reduced to about 2000 – less than one fifth of the most conservatively estimated pre-contact number (Aboriginal Advancement League 1985). Under the Board for the Protection of Aborigines, a system of Aboriginal Stations was established across the State to provide refuge for the dispossessed people. However these stations were inadequately supported by either the Government or the general community.

In 1886 the Victorian Government passed the *Aborigines Protection Act* requiring all "half-castes" under the age of thirty-four be removed from Aboriginal Stations. This Act resulted in a second wave of dispossession and breaking up of families. The resident populations at Aboriginal Stations declined rapidly and most were subsequently closed.

Aboriginal people resisted the Station closures and rejected attempts at forced assimilation. Over 100 years later, three coastal former Aboriginal reserves, at Lake Tyers (near Lakes Entrance on the east cost), Framlingham (near Warrnambool) and Lake Condah (near Portland) on the east coast came under the control of their Aboriginal residents during the 1970s and 1980s.

In many parts of the coast, Aboriginal people regularly engage in fishing, abalone diving and other shellfish collecting. Aboriginal people at Framlingham continue a long tradition of catching eels as they migrate up river from the sea. At Lake Tyers, a community situated on the shores of a large saltwater lake, Aboriginal people obtain much of their food from the lake and nearby ocean.

Tasmania

European contact with Tasmania began in 1642 with the landing of the Dutch navigator Abel Tasman. He saw the fires and heard the voices of Aboriginal people but did not make direct contact. The first British settlement was established in 1803, beginning a long period of destruction and dispossession of Aboriginal society. The first massacre of Aboriginal people occurred at Risdon Cove, near Hobart, in 1804. By 1806 clashes between Aboriginal people and settlers were common.

In the 1830s, more than two hundred Aboriginal people were rounded up and transported to Wybalenna, an Aboriginal reserve established on Flinders Island on Bass Strait. Most people died within a few years and in 1847, the remaining 48 Aboriginal people were moved to Oyster Cove, a former probation settlement on the coast south of Hobart. By 1876 all of these people had died and were buried at Oyster Cove. Officially there were no longer any Aboriginal people living in Tasmania.

A public education booklet published by the Council for Aboriginal Reconciliation and ATSIC in 1991, explains how a distinctive Tasmanian Aboriginal culture managed to survive in spite of this terrible history:

> By this time (the late 1880s), however, a vigorous Aboriginal community had established itself in the Bass Strait islands. They were descended from people who had slipped through the government net. European sealers were working in Bass Strait from 1798; some were convicts or ex-convicts, some were sailors. The Tasmanians and the sealers both profited from the relationship that grew between them. Seal- and kangaroo-skins and women were exchanged for flour, tea, and, most importantly, dogs. Some sealers, however, violated this relationship by raiding Aboriginal groups for women and killing men who tried to protect them. By 1830, the North East group, once 500 strong, number 72 men, six women and no children.
>
> Each sealer had at least two women working for him. At first they were very cruelly treated. In time, however, the community settled down. Sealers and Aboriginal women married and families grew up. The women's traditional skills, first sealing then muttonbirding, became the mainstay of a thriving community.
>
> By 1820 an estimated 50 sealers and 100 Aboriginal women and their children lived in the Strait. By mid-century the community was well established. It was centred mainly on the Furneaux Group which consists of about 50 islands, the two largest being Flinders Island and Cape Barren Island. The people's main economic activity was muttonbirding. The feathers were sold for down, the oil and fat for fuel and grease, and the salted carcasses for food. The people called the bird "Moonbirds".
>
> The Bass Strait lifestyle was based on both Aboriginal and European ways. The islanders grew wheat and potatoes and ran pigs and goats, but they also hunted kangaroos, seals and muttonbirds. The women continued to make shell necklaces and gathered wild foods. The people visited one another, sometimes for months at a time, to use seasonal foods and to enjoy each other's company. There were especially large gatherings at the end of the muttonbird season. They still sang at work and play, though some of the songs were now European. They also retained some remnants of their Aboriginal languages.
>
> This new Aboriginal community began to seek recognition as early as the 1850s. In 1866 they petitioned the governor for exclusive rights to muttonbirds on Chappell Island and asked for an island to be granted to them to serve as the focal point of their life and identity. In 1871 they were offered blocks of land on Cape Barren Island and seven families, comprising 84 people, moved there. A reserve was set up in 1881 in an attempt to control the community's livelihood and movements, and in 1912 the Tasmanian Government passed the Cape Barren Reserve Act.
>
> Many of the State's community descend from the Islander population. However elsewhere in the State less well recorded populations also survived, and the descendants of Fanny Cochrane-Smith are the core of the substantial Aboriginal communities of the Huon and D'Entrecasteaux Channel area in the southeast of the State.

South Australia

Although British colonisation occurred later in South Australia (1836) than other south-eastern States, the spread of European diseases had already impacted on Aboriginal populations before the arrival of the first colonists. The impact of colonisation on the densely populated south-eastern coastal regions were particularly severe, as these well-watered alluvial lands were converted to agricultural use.

The distinctive Aboriginal culture of the southeast coastline of South Australia and the nearby Murray River and associated lakes (Lake Alexandrina and Lake Albert) were drastically affected by the huge drainage works that occurred there during the late 1800s and early 1900s. Large areas of swamp land were drained, and the water flow in the Murray River was controlled by long barrages constructed near the river mouth. This permanently changed the environment and resources of Aboriginal people.

An education booklet produced by the Aboriginal and Torres Strait Islander Commission (ATSIC 1997) concludes:

> In general, for Aboriginal people and their culture, British colonisation was most intense and devastating in this region. However, one Aboriginal group is still very strong. There is still a large community of Ngarrindjeri people based in the Lower Murray and Coorong area. The refuge provided by the establishment of the Point McLeay Mission in 1859 is one reason for this group's survival. Today, many Aboriginal people in the region live at the Raukan (Point McLeay) and Gerard Aboriginal communities and in Meningie, Murray Bridge and other country centres. Many other people have moved into Adelaide. They form a large part of the present-day Adelaide Aboriginal community.

Consultations during the Coastal Zone Inquiry (Smyth 1993) noted that coastal Aboriginal people continue to engage in fishing and shellfish collecting on a regular, sometimes daily basis. In the Coorong area and at Raukan, people engage in line fishing in the sea lakes behind the foredunes and collect sand pippis (shellfish) from the beach. Aboriginal people reported that marine resources had become even more significant because opportunities to hunt on land were now extremely limited, though kangaroos and wallabies were sometimes shot for food. In the Coorong, Aboriginal people continue the traditional practice of gathering swan eggs.

Contemporary Issues and Responses

This section summarises Indigenous people's interests and involvement in marine management as documented during several national and regional consultative processes over the last ten years. An overview of policy responses and initiatives by State Government agencies is also provided. Further government responses are outlined in Section 6 (Review of Commonwealth and State Legislation) and Section 7 (Summary of Commonwealth Government Policies and Initiatives).

Indigenous population

In the last 20 years there has been an increased likelihood of people identifying as being Indigenous. This can be attributed to changing social attitudes, political developments, improved statistical coverage, and a broader definition of Indigenous origin. In each census there is a large increase in the number of people who are identified as Indigenous. These increases are in excess of those which can be attributed to a natural increase in the Indigenous population. If there is no future change in Indigenous identification, the Indigenous population of Australia is projected to be 469 000 in 2006. On the other hand, if there are future increases as happened between the 1991 and 1996 Censuses, then the population is projected to reach 649 000 in 2006 – an increase of over 50% over the 1996 estimate. Table 2 shows the distribution of the Indigenous population between 1901 and 1996 in each State and Territory, and the projections for 2001.

In 1993 the Resource Assessment Commission estimated that nearly half of Australia's Indigenous population lives in the coastal zone (or near the coast).

Table 2:
Estimates of Indigenous populations 1901 – 2001.

	1901(a)		1991(b)		1996(c)		2001(d)	
State/Territory	**no.**	**%**	**no.**	**%**	**no.**	**%**	**no.**	**%**
New South Wales	7,434	8.0	75,020	26.5	109,925	28.5	121,142	28.4
Victoria	652	0.7	17,890	6.3	22,598	5.9	24,586	5.8
Queensland	26,670	28.6	74,214	26.2	104,817	27.2	118,749	27.8
South Australia	5,185	5.6	17,239	6.1	22,051	5.7	24,313	5.7
Western Australia	30,000	32.1	44,082	15.6	56,205	14.6	61,505	14.4
Tasmania	157	0.2	9,461	3.3	15,322	4.0	16,644	3.9
Northern Territory	23,235	24.9	43,273	15.3	51,876	13.4	56,364	13.2
Australian Capital Territory	. .	. .	1,616	0.6	3,058	0.8	3,589	0.8
Australia(e)	93,333	100.0	282,979	100.0	386,049	100.0	427,094	100.0

(a) Estimates in 1901 based on separate State Censuses. WA number was estimated without an enumeration of the Indigenous population.

(b) Estimate based on the 1991 Census of Population and Housing.

(c) Estimate based on the 1996 Census of Population and Housing.

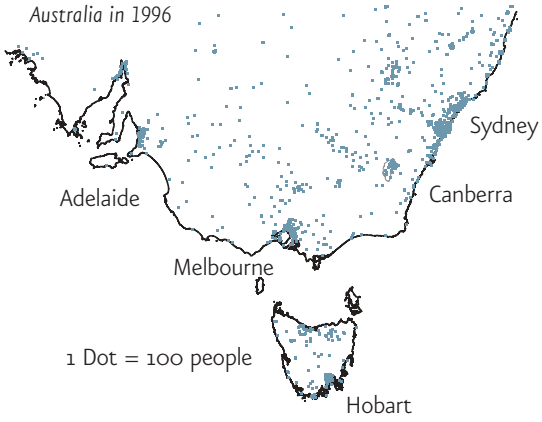
(d) Projection based on low series, which assumes no further increase in propensity to identify as Indigenous from 1996.

(e) Includes Jervis Bay.

Source: Australian Bureau of Statistics website – www.linkabs.gov.au

Map 2 shows the distribution of Indigenous populations at the time of the 1996 Census.

Map 2:
Distribution of Indigenous populations in Australia in 1996



(a) Represents a random distribution within Statistical Local Area boundaries.

Source: ABS, 1996 Census of Population and Housing.

Continuing significance of marine environments to Indigenous communities

The following extract from the 1993 *Coastal Zone Inquiry* consultancy report (Smyth 1993) summarises the continuing significance of coastal and marine environments to Indigenous communities.

Submissions to the Inquiry, supported by information conveyed during consultations, hearings and workshops, confirmed that the current utilization of the coastal zone by Aboriginal and Torres Strait Islander people involves some or all of the pre-contact uses, depending on local history, tenure and legislation. Most parts of coastal Australia are of continuing cultural and spiritual significance to Aboriginal people, who continue to engage in subsistence hunting, fishing and gathering.

Hunting and fishing for traditional foods provide a significant proportion of household nutrition requirement, thus forming an almost invisible non-cash part of the economy in both remote and urban coastal regions. These subsistence activities contribute to the health and cultural well-being of Aboriginal and Torres Strait Islander people and reduce their reliance on the cash economy.

It is important to emphasise that coastal zone land and sea resources continue to be of cultural and economic importance to Aboriginal and Torres Strait Islander people wherever they are living in the coastal zone. Submissions and consultations in southern Australia have clearly established that these cultural and economic interests are not confined to northern communities where the extent of dispossession and loss of cultural knowledge has been less than in the south. Aboriginal people in Tasmania, New South Wales, Victoria, South Australia and southern Western Australia conveyed to the Inquiry a cultural and economic reliance on coastal environments and resources, which was no less significant than for northern Indigenous communities.

The continuing importance of coastal zone resources to Aboriginal people in southern Australia is summarised in the following extract from the Tasmanian Aboriginal Centre's submission to the Inquiry:

The coastline gives us sources of fish foods, plant foods, and cultural activities. It is as meaningful today in our lives as it was thousands of years ago although the same sources of food is not as easily attainable as it was a long time ago due to commercialized fishing and the impacts of tourism on settled areas along the coast.

Following the *Coastal Zone Inquiry*, most State governments held further consultations with coastal Indigenous communities to address some of the issues and concerns brought to light by the Inquiry. Summary outcomes from the *Coastal Zone Inquiry* and from the more recent consultations are given below for each State. A consistent finding across the States is the desire by coastal Indigenous people to have the full extent of their relationship with the sea recognised in contemporary fisheries and marine management. This ongoing relationship includes cultural, subsistence and commercial interests which are currently inadequately recognised in management arrangements.

New South Wales

In 1993, the *Coastal Zone Inquiry* reported significant use of marine resources by Aboriginal people of the south coast. For example, research by Davies (1993) at Wallaga Lake showed that over 90% of adult members of that community regularly collected and shared shellfish from the sea and sea-lakes of the region. This shows the continuing reliance on marine resources over thousands of years to the present time.

The *Coastal Zone Inquiry* also reported that (at that time) no Aboriginal people were involved in the management of coastal national parks, marine reserves, fisheries or forestry reserves. There was also no representation on the Coastal Committee of the Department of Planning. Issues of concern to Aboriginal people were identified as inadequate:

- recognition of Aboriginal rights to coastal land and sea resources
- protection of cultural sites
- opportunities for Aboriginal involvement in coastal zone management.

For fisheries, the major issues were:

- lack of legal recognition of Aboriginal fishing rights
- lack of recognition of the existence of a distinct Aboriginal fishery
- poor management of marine resources and environments, leading to a decline in subsistence marine resources
- lack of consultation on the recent introduction of new regulations regarding size and bag limits, including for intertidal shellfish
- harassment of Aboriginal fishers and their families by fisheries inspectors, especially on the south coast
- frequent confiscation of catches, and the prosecution, fining and sometimes imprisonment of Aboriginal fishers, particularly those involved in collecting abalone
- barriers to involvement in commercial fishing (including high licence fees and increasing regulation).

Consultations showed that some Aboriginal people are involved in commercial fishing though tighter regulations have seen a reduction in the numbers involved. Licence costs, boat registration and equipment costs, minimum catch quotas and reporting requirements all contributed to the difficulties of small scale Aboriginal fishing operations continuing to operate.

The *Coastal Zone Inquiry* highlighted issues relating to Aboriginal harvesting of abalone in southern New South Wales. Harvesting abalone had continued uninterrupted for the last 5000 years up until the late 1960s. During this time, Aboriginal divers were collecting abalone for domestic use, trade and (over the last 100 years or so) for sale in local markets. In the 1970s an export trade in abalone to Asia began, leading to an over exploitation of the resource by non-Aboriginal commercial divers. This led, in the 1980s, to a highly regulated industry involving licences worth over $1 million and restricted bag limits for "recreational" use. The regulations excluded Aboriginal people from a longstanding cultural and commercial activity. Prosecutions of Aboriginal people who breached the new restrictions on harvesting and sale often occurred.

During 1998, the NSW Department of Fisheries conducted a series of regional meetings with Aboriginal communities to discuss their concerns and future involvement in coastal and inland fisheries. The intention was to use these meetings as the basis for the development of an Indigenous Fisheries Strategy for New South Wales. The following extracts from the NSW Indigenous Fisheries Strategy Discussion Paper (Carpenter 1999) summarise statewide and sectoral issues.

Issues arising from the workshop process relate to all management sections of NSW Fisheries and include commercial fishing, aquaculture, recreational fishing, conservation, research, information and advisory, compliance matters, employment and training, and consultation and representation. Aboriginal interests in fisheries also cover the varied geographical regions of NSW and include inland, freshwater, and saltwater fishing.

The major issues that emerged from the workshop process were:

- recognition and accommodation of distinctive Aboriginal fishing practices and needs
- employment within the Department
- protection or closure for important water and fishing sites from the impacts of commercial and/or recreational fishing
- interest in carp reduction (for conservation and commercial purposes) and re-stocking
- recognition of Aboriginal fisheries knowledge, Law and management practices
- access to information and research results in a culturally appropriate manner and form
- improved representation of Aboriginal people on management and advisory bodies
- varied issues relating to commercial fisheries including recognition of the distinctive manner of Aboriginal commercial fishing, and the development of new opportunities for Aboriginal people in commercial fishing and aquaculture.

Issues and Results

Shared Issues

- Recognition of and facilitation of Aboriginal 'traditional', cultural or family fishing (problems staying within bag limits and meeting cultural obligations)
- Aboriginal employment within NSW Fisheries
- Increased Aboriginal employment within the fishing industry (earmarking of licence)
- Interest in aquaculture or fish farming
- Desired involvement and employment in re-stocking of native fish and other resources (such as pipis), and reduction of pest fish
- Recognition of knowledge, Law and management practices
- Social conflict problems with other stakeholders (such as the impacts of commercial fishing activities on Aboriginal fishing)
- Access to information on the Act, regulations, management, management plans, or research results
- Representation on advisory committees and notification and consultation on fisheries issues.

Regional Issues

South Coast

- Review of "priority shot" (to accommodate the smaller size of Aboriginal crews)
- Opportunities for Aboriginal training and employment in the fishing industry
- Earmarking of commercial fishing licences for Aboriginal people
- Re-introduction of Father and Son, or family licences
- Community approved people should be able to dive for abalone for sale on specific days
- Fishers should not be able to cross zones without talking to community people
- Aboriginal people are interested in abalone aquaculture.

Issues by Division

Non-Commercial Fishing (Recreational Fishing)

- Recognition of and facilitation of Aboriginal 'traditional', cultural or family fishing
- Mitigation of impacts of commercial and/or recreational fishing on Aboriginal fishing
- Need for access to all waterways in NSW for hunting, gathering and fishing rights
- Need to have access to fishing without requirements for licences or permits
- Should be able to use any gear for non-commercial, family fishing
- Lift bag limit restrictions on beachworms, pipis, blackfish, tailor, bream and mullet
- People need to be able to collect for community, cultural and ceremonial purposes (including abalone) for Aboriginal week and important school or education purposes
- NSW Fisheries should explore the development of a permit system for cultural purposes
- NSW Fisheries should up-date its attitude on what is "traditional"
- Bait species bag limits are not appropriate for food purposes
- NSW Fisheries should recognise and accommodate kids' fishing practices
- NSW Fisheries should allow Aboriginal people to use spears for fishing for important community, cultural, educational and heritage purposes
- Restrictions should be lifted from Aboriginal fishing
- Bag limits for worming and pipis are too restrictive
- Traditional or cultural fishing should take priority over other fishing
- There should be a permit (photo identification) for Aboriginal fishers
- Aboriginal people should be able to get a feed and fish for cultural purposes but using modern gear.

Commercial Fishing

- Licences for Aboriginal "pocket-money" fishing (fishing not for profit but for "pocket-money")
- Review of zones with consideration of Aboriginal territories and marine tenure
- Development of seasonal or block licences to allow Aboriginal fishing practices in commercial fishing
- Reductions in costs and fees for Aboriginal commercial fishers
- Review of licensing policy with consideration of Aboriginal commercial fisher needs
- Development of community licences
- Review of priority shot (to accommodate the smaller size of Aboriginal crews)
- Opportunity for Aboriginal training and employment in the fishing industry
- Earmarking of commercial fishing licences for Aboriginal people
- Re-introduction of Father and Son, or family licences
- Relax restrictions on restricted beach wormers to allow further access and allow the gathering of bait species
- NSW Fisheries need to recognise that fishing is a traditional way of making a living
- Inability to get new fishing licences means that fishing traditions can't be continued
- Criteria for new licences don't take into consideration family traditions
- NSW Fisheries should be looking to achieve a minimum number of people employed in commercial fishing
- Aboriginal fishing families should be able to keep and use their licences
- Community approved people should be able to dive for abalone for sale on specific days

- Fishing licences should be passed on in families but should not be able to be sold
- Environmental Impact Statements should be conducted for commercial fisheries
- Aboriginal people are interested in permits and licence for sea urchins
- Fishers should not be able to cross zones without talking to community people
- Jobs should be created for getting rid of carp
- Worming is a traditional activity. Aboriginal people should not be restricted by the need to get a licence
- Commercial collection of pippis needs to be controlled or limited because it is affecting Aboriginal foods
- Aboriginal people were traditionally multi-species or multi-purpose fishers; this is a tradition that should be facilitated
- Each region should have its own management
- Aboriginal commercial fishers are distinctive; they should be represented on committees.

Aquaculture

- Interest in aquaculture and fish farming
- NSW Fisheries should provide all necessary support to communities to develop projects and enterprises, like fish farms
- NSW Fisheries should make a commitment to working with communities for setting up fish farms
- Aquaculture should be used to re-stock local areas with Aboriginal cultural seafoods
- Aquaculture people are interested in abalone aquaculture.

Conservation

- Protection of closure for important areas or sites
- Interest in re-stocking
- Interest in eradication of noxious fish and carp
- Access to certain protected fish species for cultural purposes
- NSW Fisheries should involve Aboriginal people in habitat restoration of areas with native fish, and control of fish like carp
- NSW Fisheries should protect spawning grounds as a priority
- St George Basin should be included in the Jervis Bay Marine Park, or should be protected
- Commercial fishing is hurting traditional foods and practices; they are destroying seagrasses and traditional foods, spawning areas and travelling fish
- Woolewayha Lake is a nursery area and should be closed off to commercial fishing
- Restoration of native fish habitats and plants needs to be looked at – "what is being done and how can we be involved?"

Research

- Recognition of knowledge, Law or management practices
- NSW Fisheries should collect information on Aboriginal commercial fishers
- NSW Fisheries should recognise and respect local knowledge of Aboriginal people.

Information and Advisory

- Improved access to information on the Act, regulations, policies, management plans, access areas and research results
- Information and advice should look at Aboriginal designs for pamphlets
- Aboriginal people need to be made aware of the rules or regulations.

Field Services

- Cross-cultural training for local Fisheries Officers should be arranged
- The community should have a role in policing or monitoring areas
- NSW Fisheries should employ local people as Fisheries officers
- Advertisements for Aboriginal Fisheries Officer positions should emphasise local community membership and communication, rather than academic degrees.

Policy

- Needs to consider option of regional agreements
- The Indigenous Fisheries Strategy should develop an Aboriginal Fisheries Unit
- The Minister for Fisheries should have an Aboriginal adviser as soon as possible
- There should be an Indigenous Policy that covers everything (plants, fish, all animals).

Personnel

- Employment within and across NSW Fisheries
- There should be cross-cultural awareness training and Aboriginal people should conduct these
- NSW Fisheries should employ Aboriginal people to manage their own resources
- Local community members should be on interview panels for local Aboriginal positions.

Miscellaneous

- Aboriginal representation on advisory and management bodies.

A proposal to implement the Indigenous Fishing Strategy is expected to go before the NSW Cabinet in the near future. The outcome of this proposal should be known during the development of the South-east Regional Marine Plan in 2002.

Meanwhile, the New South Wales Government has already established the Fisheries Resource Conservation and Assessment Council (FRCAC) to advise NSW Fisheries on a range of fisheries issues. FRCAC members include commercial fishers, recreational fishers, aquaculturalists, conservationists, Indigenous representatives and members with scientific expertise.

One of the roles of the FRCAC is to advise the Government on the establishment of Recreational Fishing Areas. The purpose of these areas is to improve recreational fishing by changing commercial fishing practices in areas popular with large groups of anglers. Commercial fishing methods may be changed, removed or commercial fishing can be completely stopped in an area under this scheme. Recreational fishing areas may include small or large areas. This mechanism potentially provides an opportunity to protect Indigenous fisheries from the impact of commercial fishing, while also providing an Indigenous voice in the establishment of the Recreational Fishing Areas.

Consideration of the establishment of Recreational Fishing Areas is currently underway in each of the eight fisheries regions of NSW. NSW Fisheries notes that Indigenous people have significant cultural and fisheries interests in Region 8 – from Narooma south to the Victorian border:

The estuaries of Region 8 also contain areas of cultural importance to Indigenous people. Fishing is an important part of Aboriginal culture and in Region 8 Indigenous fishing is undertaken by many coastal communities, including Narooma, Bermagui, Bega and Eden, as well as some inland communities. Using a variety of methods and equipment, including hand gathering, lines, rods and reels, nets, traps and spears, Indigenous fishing targets a range of species of fish, shellfish, crabs and worms that are used for food, medicine or bait. Target species in Region 8 include (but are not limited to) mullet, flathead, whiting, tailor, bream, blackfish, crabs, lobsters, oysters, cockles, whelks, abalone and beach worms. Abalone, crab and lobster harvesting are recognised as an important part of the Aboriginal fisheries in Region 8.

NSW Fisheries has also introduced a Recreational Fishing Licence, which is now required by all recreational fishers. An Aboriginal person is exempt from holding such a licence if they are:

1) Under the age of 18; or

2) An adult assisting a person under the age of 18 to take a fish using a single rod or to take prawns using a single dip or scoop net; or

3) A person fishing in a private dam with a surface area of two hectares or less; or

4) An Aboriginal person fishing in freshwater; or, when fishing in saltwater, an Aboriginal person that is a party to a registered native title claim, or is taking part in a traditional cultural activity under the Government's Indigenous Fisheries Strategy; or

5) The holder of a current Commonwealth Pensioner Concession Card issued by Centrelink or the Commonwealth Department of Veteran's Affairs.

The New South Wales Government has also established a mechanism for Indigenous involvement in marine protected area management, through the appointment of an Indigenous representative on the NSW Marine Parks Advisory Council. The role of the Council is to provide advice to the relevant Ministers and the Marine Parks Authority on issues relevant to marine parks, consistent with the objectives of the *Marine Parks Act 1997*.

Members of the Council comprise: the Director of NSW Fisheries; the Director General of the National Parks and Wildlife Service; a representative of the Commonwealth Government; and persons representing the interests of marine conservation (2), Aboriginal communities (1), tourism (1), commercial fishing (1), recreational fishing (1), and scuba diving (1).

It is a policy of the Marine Parks Authority to also appoint Indigenous people to membership of local advisory committees for each marine park. There are currently three marine parks in New South Wales, none of which is along the south coast, and none are currently planned for south coast waters.

Victoria

Coastal Zone Inquiry

The 1993 Inquiry reported that Aboriginal people resident in the three former coastal Aboriginal reserves of Lake Tyers (on the eastern coast) and Framlingham and Lake Condah (on the west coast), as well as many other Aboriginal residents of Victorian coastal towns and cities have continuing cultural and subsistence interests in the coastal zone and its resources. It also reported that at that time the involvement of Aboriginal people in coastal and marine management was limited to some involvement in national park management and cultural site protection. Concerns expressed by Aboriginal people about coastal and marine issues included:

- lack of recognition of subsistence resource rights
- inadequate recognition of customary land rights
- lack of involvement in fisheries management
- inadequate involvement in other forms of coastal management
- inadequate access to commercial benefits of coastal zone resources.

Land Conservation Council – Marine and Coastal Special Investigation

In 1994, the Victorian Land Conservation Council appointed a liaison officer to consult with coastal Aboriginal communities on their interest in the Council's Marine and Coastal Special investigation. The reports of these consultations (Mullet 1994 & 1995) summarised the issues commonly raised by coastal Aboriginal communities as follows:

- lack of recognition, consultation and involvement of Aboriginal communities in coastal management
- inadequate protection of culturally important sites and places
- perceived adverse effects of public land management, commercial fishing, and pollution on traditional coastal uses
- need for better Aboriginal employment and training programs
- legislative restrictions on traditional hunting, fishing and camping, including requirements for permits
- adverse impacts of tourism on Aboriginal culture
- payment of royalties for commercial and tourist exploitation of Aboriginal resources.

Land Conservation – Traditional uses of Victoria's marine and coastal areas

In 1996, the Land Conservation Council commissioned a short paper on traditional use of Victoria's marine and coastal areas, for the purpose of its Marine and Coastal Special Investigation (Harding and Rawlinson 1996). Building on the earlier consultations during the *Coastal Zone Inquiry* and those documented in Mullett (1994 & 1995), the authors identified the following "traditional uses" of marine and coastal areas:

- place-related subsistence (including barter, exchange within local Indigenous communities)
- maintenance of Indigenous culture, including spiritual beliefs, ceremonial practices and traditional fishing and hunting skills.

The authors then recommended that the following principles should be applied in relation to traditional uses of coastal areas:

- the legitimate stakeholding of Indigenous users of coastal resources should be recognised
- resource conservation and sustainability, together with public safety, should be the overriding planning and management considerations in coastal areas and may require some restriction of traditional uses
- all resource users should have equal opportunity in consultation and involvement in coastal resource management
- coastal resources should be generally managed for multiple uses, to minimise conflicts between users and to avoid the need for priority setting between traditional and non-traditional uses
- laws and policies should not unnecessarily restrict or inhibit traditional uses
- there should be legislative exemptions where possible for traditional cultural purposes.

Aquaculture in Victoria

Aboriginal Affairs Victoria and Fisheries Victoria (both part of the Department of Natural Resources and Environment) and the Koori Business Network are currently collaborating to facilitate Aboriginal involvement in aquaculture in Victoria. The collaboration is linked to the National Indigenous Aquaculture Development Strategy (see Section 7) and involves:

- facilitating appropriate training via TAFE Institutes
- technical and business advice – extension officers and workshops
- Business Case Office, via the Koori Business Network to facilitate business planning
- Enterprise Planning Support
- start-up infrastructure development fund.

Victorian Eel Fisheries Management Plan

The draft Victorian Eel Fishery Management Plan (McKinnon 2001) addresses Indigenous interests in eel fishing as follows:

> Many Aboriginal people continue to fish for eel in southwest Victoria. Eel traps and other fishing methods continue to be used to catch eels, which are a prized resource. It is unlikely that the methods employed by Aboriginal people in harvesting eels, and the quantities harvested, would impact on the sustainability of the resource. Management of eel resources, including glass eels and elvers, in areas where Aboriginal use of the resource occurs could conceivably be undertaken through partnership arrangements between these communities and local commercial fishers.

Indigenous Partnership Strategy

On a more strategic level, the Department of Natural Resources and Environment's (NRE) Indigenous Partnership Strategy aims to develop an effective partnership between NRE and Victoria's Indigenous communities. The Indigenous Partnership Strategy provides an umbrella framework for a range of key strategic initiatives that will assist NRE to examine its existing policy and service frameworks. In addition, the NRE is developing a Land Framework Agreement that will integrate the involvement of Indigenous communities in land, resource and cultural heritage management. The Victorian Government's Environment Policy also gives a commitment to the involvement of Aboriginal people in national park management and heritage conservation in forests, while increasing awareness of Indigenous issues within NRE.

The Statement of Purpose of the Indigenous Partnership Strategy commits NRE to:

- recognise Victoria's unique Indigenous culture, society and history
- empower Indigenous communities to collaborate as partners in resource management
- recognise the impact of past policies on the role of Indigenous people as custodians of land and waters
- require priorities and strategies for Indigenous involvement in NRE's operations to be developed and implemented primarily at the local level and agreed with the relevant Indigenous community organisations
- improve information on, and education about services provided by NRE to Indigenous communities
- establish clear lines of accountability for each initiative supported through the strategy
- support initiatives on the basis that they contribute to the achievement of agreed outcomes
- provide a framework in which overall gains are achieved and recognised
- maintain and improve the effectiveness of current systems of planning, funding and providing services and programs.

The Indigenous Partnership Strategy includes the following key strategic initiatives:

- Indigenous Cultural Awareness Program
- Indigenous Community Partnerships
- capacity building of Victoria's Indigenous communities
- cultural heritage, land and natural resource management
- Indigenous employment
- Indigenous economic development
- communication
- development of Indigenous community profiles.

While none of these strategic initiatives refer directly to marine environmental or resource management, the Indigenous Partnership Strategy has the potential to provide the policy framework for enhanced recognition of Indigenous interests in marine management.

Tasmania

Consultations and other meetings with Aboriginal communities and organisations during the *Coastal Zone Inquiry* revealed the following issues and concerns:

- Aboriginal people continue to use and depend on coastal resources for subsistence food and cultural activities
- fish, mutton birds, abalone and other shellfish are especially important
- the coastal archaeological record of past Aboriginal occupation is also of great significance to Aboriginal people
- in 1991 there was one Aboriginal licensed commercial abalone diver.

A submission to the Inquiry from the Tasmanian Aboriginal Centre stated:

> The coastline is dotted with Aboriginal sites that have been there for many thousands of years. These sites give us knowledge not only of our people but tell us how and what type of environment was lived in at the time. The information tells us the sources and indeed how the area was managed. To destroy this is to destroy our heritage.
>
> The coastline gives us our sources of fish foods, plant foods and cultural activities. It is as meaningful today as it was thousands of years ago although the same sources of foods is not as easily obtainable as it was a long time ago due to commercialised fishing and the impact of tourism on settled areas along the coast.

In 1996, following proclamation of the *Living Marine Resources Management Act 1995*, the Minister for the Department of Primary Industry and Fisheries established the Tasmanian Aboriginal Cultural Fishing Advisory Committee to provide advice on all issues relevant to Aboriginal interests in fisheries matters. A major purpose was to undertake consultations with the Aboriginal community. In late 1997 and August 1998, utilising Commonwealth government funding under the Aboriginal and Torres Strait Islander Fisheries Strategy, the Committee undertook consultations with individuals and organisations in the Furneaux Group, on the West Coast and in the North West of the State.

Outcomes of these consultations have not been published, but information from participants involved indicate that the following issues were raised:

- general nature of Aboriginal fishing rights under the Act
- gear tags
- management plans for Aboriginal fisheries
- resource sharing between Indigenous, recreational and commercial sectors – there is concern in some areas about resource depletion by commercial and recreational fishers
- size and bag limits should allow people to take resources on behalf of a family, rather than restricted to individual limits
- the need to provide for group catching for particular cultural purposes
- female crays in berry (with eggs), a traditional food is illegal to take
- shellfish and kelp for craft – potentially an increasing issue because of increasing demand from tourists for Aboriginal shell craft products
- no-take reserves will probably be necessary in some areas.

These consultations, have not been completed, and the Tasmanian Aboriginal Cultural Fishing Advisory Committee has not convened for about three years. This reflects the delays in the Committee's attempts to reach a large settlement with the Aboriginal community, which has failed to pass through the Tasmanian Parliament.

Tasmanian Marine Protected Area Strategy

The Marine and Marine Industries Council was established in 1999. Its first task was to develop a policy framework for a system of Marine Protected Areas (MPAs) in Tasmania. The 18 member Council, representing government, industry, conservation and community interests, includes one representative of the Tasmanian Aboriginal Cultural Fishing Advisory Committee.

While the primary goal of establishing the system of MPAs is to contribute to long term ecological viability of marine and estuarine systems, secondary goals include economic, social and scientific objectives. Among the social objectives is:

> To cater for the management of marine areas and species in partnership with Indigenous communities.

One of the principles adopted for the development of MPAs in Tasmania is that:

> The interests of Australia's Indigenous people should be recognised and incorporated in decision making.

Among the criteria for selecting MPA sites in Tasmania is consideration of Indigenous interests, including:

- traditional usage and/or current economic value
- Indigenous cultural values
- native title considerations.

Indigenous Protected Areas in Tasmania

Over the last couple of years, four coastal and island Indigenous Protected Areas (IPAs) have been established in Tasmania. IPAs are established on Indigenous-owned and managed land that is included as part of Australia's National Reserve System of protected areas. Regaining management responsibility for these island and coastal regions has the potential to provide Tasmania's Indigenous community with an opportunity for greater involvement in managing adjacent marine areas within the South-east Marine Region.

The following extracts from the Environment Australia website (www.ea.gov.au) provides further details on the Tasmanian IPAs.

Mt Chappell and Badger Islands Indigenous Protected Areas

Mt Chappel and Badger Islands are declared Indigenous Protected Areas located in the Furneaux Island Group off the north coast of Tasmania. These islands were handed back to the Tasmanian Aboriginal Centre as part of the land settlement in 1996. The Tasmanian Aboriginal Centre declared Chappell (325 ha) and Badger (971 ha) Islands as IPAs in September 2000. The projects at Mt Chappel and Badger Islands focus on weed and feral animal control and revegetation. These islands have been extensively used by Mutton Bird Industry and have significant cultural heritage value as well as a unique faunal assemblage.

Oyster and Risdon Coves Indigenous Protected Areas

RISDON COVE IPA was declared in July 1999. The 109 ha property, approximately 10 km east of Hobart, is managed by the Tasmanian Aboriginal Centre. The management plan for the property includes recording and evaluating the cultural heritage significance and the natural values of the area. This project has strong Aboriginal community involvement as it incorporates areas of cultural importance and is close to the large population centre of Hobart.

OYSTER COVE IPA was declared in July 1999. The 32 ha property is 30 km south of Hobart and is managed by the Tasmanian Aboriginal Centre. Forest areas contain nocturnal mammals, reptiles and birds, while the wetland mudflats contain crabs, oysters and mussels.

South Australia

Consultations during the *Coastal Zone Inquiry* revealed that coastal Aboriginal people in South Australia engaged in fishing and shellfish collecting on a regular, sometimes daily basis. Aboriginal people in the Coorong area and at Raukan (Point Maclay) and other coastal areas in eastern South Australia adjacent to the South-east Regional Marine Plan area:

> engage in line fishing in the sea lakes behind the foredunes and collect sand pippis (shellfish) from the beach. At Point Pearce and further west around Port Lincoln and Ceduna, Aboriginal people catch fish, dive for abalone and also gather smaller shellfish on the intertidal zone.

Review of Fisheries Act 1982

This Act, which contains no recognition of Indigenous fishing interests (or even recreational fishing interests), is currently under review. As part of the review process, the Department of Primary Industry and Resources South Australia (PIRSA) will establish several focus groups, including an Indigenous group, to provide advice to the Department. Preliminary discussions have also been held with representatives of ATSIC and the Aboriginal Legal Rights Movement. Consideration will also be given to the implications of the Croker Island High Court decision.

Meanwhile the South Australian Department of State Aboriginal Affairs (DOSAA) has supported the establishment of an Indigenous Aquaculture, Fishing and Sea Management Forum. A workshop has been held with all key stakeholders to work towards the establishment of the Forum. It is proposed that the Forum will provide strategies to ensure Aboriginal involvement in commercial fisheries, aquaculture, training, employment and research and development.

Marine and Estuary Strategy for South Australia

In August 1998 the Department of Environment and Heritage released *Our Seas & Coasts — a marine and estuarine strategy for South Australia*. This strategy lays the framework for future management of South Australia's marine environment, including the establishment of marine protected areas. The strategy makes no explicit provision for Aboriginal involvement in marine management, nor does it make any reference to Indigenous fishing. Though not stated directly, it appears that this strategic document incorporates Indigenous uses and values under the category of "recreational fishery". This lack of recognition for a distinct Indigenous fishery in South Australia, and lack of reference to more general Indigenous marine rights and interests, contrasts sharply with provisions for Aboriginal involvement in national park management in South Australia. The South Australian National Parks website (www.denr.sa.gov.au) provides an indication of the extent to which Indigenous interests in protected area management on land has come to be recognised in South Australia. These interests include cultural awareness, recognition and inclusion of Indigenous knowledge and the provision of training, employment in parks and wildlife management.

Keeping Culture and Country Healthy and Strong

Aboriginal people have lived in South Australia for at least 44 000 years. Many of South Australia's National Parks contain sites of significance for Aboriginal communities. These sites include rock engravings and artwork as well as archaeological material – examples can be found in nearly all our mainland parks from the Far North to the South East – from Witjira National Park to Canunda National Park.

For Aboriginal people, land and waters have many interconnected and complex meanings and values and are central to all aspects of people's lives. 'Dreaming' is the term used to describe the combination of these aspects of life, mythology, law and history. An area of land or water that an Aboriginal person has traditional association with is commonly referred to as 'Country'.

'Country' has many meanings and is integral to the Dreaming. Parks are significant places for Aboriginal people and many areas in parks have Dreaming stories associated with them.

National Parks and Wildlife South Australia (NPWSA) recognise that Dreaming stories belong to Aboriginal people and must be respected.

Aboriginal culture in South Australia is rich and in many cases quite unique. The Cooper Creek and Lake Eyre basin supported a relatively dense population of Aboriginal people representing a number of language groups, including the Arabunna, Dieri, Yawrawarka and Yandruwandha – a very diverse culture which remains active today. The remote Nullarbor also has archaeological evidence of Aboriginal occupation and artwork that is culturally significant to the Yalata, Maralinga-Tjarutja, Mirning and Wirangu communities. The coastal and Murray River regions continue to support a number of Aboriginal communities. Remnants of the mysterious Kartan of Kangaroo Island can be discovered at Murray Lagoon – this culture is extinct. However the Dreaming connections with mainland Aboriginal people, including the Kaurna and Ngarrindjeri, remain intact.

All Aboriginal sites in South Australia's National Parks are protected by law.

Aboriginal heritage

Cultural awareness: Respect for traditional and contemporary Indigenous culture to develop partnerships between Indigenous people and parks and wildlife managers.

Aboriginal heritage sites within parks are managed by NPWSA in consultation with the Department of State Aboriginal Affairs (DOSAA), Traditional Owners, Aboriginal communities and Aboriginal Heritage Committees.

Site management includes fencing to exclude feral animals and to protect sites and revegetation programs. Interpretive signs are provided, where appropriate, to educate visitors about the significance of Aboriginal culture. NPWSA is keen to extend interpretive programs to include cultural experiences for visitors with Aboriginal Rangers.

Indigenous Land Use Agreements

An Indigenous Land Use Agreement (ILUA) is a binding agreement under the Native Title Act between Native Title claimants and others who have a legal interest in the subject land. An ILUA covering a park will usually address activities associated with ongoing management of the park.

Native title is the term used to describe the rights and interests of Aboriginal people and Torres Strait Islanders that arise from the traditional laws and customs relating to land and water.

Native title is recognised by the common law of Australia. Title rights depend on Aboriginal people and Torres Strait Islanders maintaining a connection with specific areas of land or water.

Native title may be extinguished by the grant of certain tenures (including freehold title) or modified or suppressed by inconsistent statutory rights and interests over land or waters, but may co-exist with other statutory rights or interests. The declaration of parks under South Australian law does not alter existing native title rights.

The *Native Title Act 1993* attempts to define how certain activities – including managing reserves – can be lawfully carried out where they may affect native title.

Cooperative Parks & Wildlife Management

Indigenous knowledge and skills: Recognising and integrating Indigenous knowledge and skills with park and wildlife management to conserve biodiversity and Indigenous cultural heritage.

In 1987 the SA Department of Environment and Planning developed a management framework which enabled Aboriginal people with a cultural interest in a park to participate in management as a cooperative partnership. This concept is based on the need to recognise and integrate Indigenous knowledge and skills with park and wildlife management. This will assist in conserving biodiversity and natural and cultural heritage and extend the range of quality experiences for park visitors. It will also create training, employment and business opportunities for Traditional Owners and local Indigenous communities.

This cooperative park and wildlife management framework is now referred to as 'cooperative management' and the concept is reflected in the slogan *keeping country healthy and culture strong*.

NPWSA will continue to enter into appropriate arrangements for cooperative management with Traditional Owners and NPWSA however each model may vary depending on the wishes of the particular community and the park. Current examples include Witjira National Park in the far north-east of South Australia and the arrangements being developed for the Unnamed and Ngautngaut Conservation Parks.

There are many other opportunities for the development of cooperative management arrangements which are being actively explored by NPWSA in consultation with local communities.

Aboriginal Partnerships

Indigenous training and employment: Creating opportunities through partnerships with communities and organisations to provide training and employment in parks and wildlife management.

The Aboriginal Partnerships Section (APS) was created to coordinate the development and implementation of parks and wildlife programs with Traditional Owners, Aboriginal communities and representative organisations.

The focus for these programs is reconciliation (respect, recognition and cultural awareness), resolution of Native Title (ILUA), training, employment and enterprise development, Aboriginal heritage and cooperative management of parks and wildlife.

The key functions for the Aboriginal Partnerships Section are as follows:

- the development of policy and strategic directions
- assistance with resolving Native Title issues related through negotiations of Indigenous Land Use Agreements (ILUAs) and other arrangements
- to assist and promote reconciliation through the development of cultural awareness within the Department
- facilitate the development of cooperative parks and wildlife management arrangements between NPWSA and Traditional Owners and local communities
- to support regional management and communities with ongoing consultation and liaison and advocacy for Indigenous communities
- develop training and employment opportunities for Indigenous people within NPWSA
- support enterprise development and ventures that include the employment of Indigenous people – particularly in cultural and ecotourism
- develop policies and practices to facilitate protection of Aboriginal heritage and sites of cultural significance
- provide assistance in management planning.

Native Title in the South-east Marine Region

The views expressed in this chapter are of a speculative nature and are not necessarily consistent with the views of the Commonwealth. The Commonwealth does not accept responsibility for the accuracy or completeness of the information presented within this chapter.

The recognition of native title

In *Mabo v Queensland [No. 2]* the High Court ruled that Indigenous people should be treated equally when considering their rights over their traditional country[3]. The Court rejected any position in law that might discriminate against Indigenous people by denying the existence of rights that had been enjoyed freely before colonisation and continued to be exercised. In this way, it has been said that the myth of *terra nullius*, which asserted that the Australian continent belonged to no-one, was rejected.

An important aspect of the decision recognises that native title predates the assertion of sovereignty by the British. It is not a grant from the Crown like other titles under Australian law. Native title is unique in this sense, when compared with other interests. It is inherent to Indigenous people by virtue of their status as first people. Native title does not depend on government for its existence, but it does require recognition through the common law. Recognising native title allows it be enforced in the Australian legal system[4].

Recognition of rights over sea country was not directly considered in *Mabo*[5]. It was not until the recent High Court decision in *Yarmirr* [more commonly known as the Croker Island case] that it was put beyond doubt that native title extends to the territorial waters.[6]

Establishing native title

The Court in *Mabo* suggested that native title may be recognised where Indigenous people have substantially maintained a traditional connection to the land or waters since the time of colonisation, including observing the laws and customs as far as is practicable.

The *Mabo* judgements describes native titles as the:

> interests and rights of Indigenous inhabitants in law, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants[7].

To characterise native title in this way was an explicit acknowledgment that native title should not be understood by reference to common law property rights. The title was described as *sui generis*, or unique, because it reflects the rights and entitlements of Indigenous people under their own laws[8].

The elements of proof at common law are therefore:

- an identifiable community
- who have a connection with the land or waters claimed
- maintained through traditional laws and customs acknowledged.[9]

[3] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 (*Mabo*).

[4] *Mabo*, at p. 59.

[5] Those elements of the case were dropped at an early stage to allow a less complex case to be argued in the first instance.

[6] *Yarmirr v Commonwealth; NT v Yarmirr* [2001] 56 HCA. (11 October 2001) (*Yarmirr*). Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne gave joint reasons dismissing both appeals, agreeing that native title exists offshore but cannot be an exclusive title. Justice Kirby would have dismissed the Commonwealth's appeal but upheld the appeal by the native title holders to 'qualified' exclusive possession over their sea country. Justices McHugh and Callinan in separate reasons would have allowed the Commonwealths appeal rejecting the extension of native title offshore and dismissed the claimants appeal.

[7] *Mabo*, per Justice Brennan at 57.

[8] *Mabo*, per Justice Brennan, at p. 58, acknowledged: 'The ascertainment may present a problem of considerable difficulty. . . But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert that it was a "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidence of native title.'

[9] Richard Bartlett, *Native Title in Australia*, Butterworths, Sydney 2000, p. 83 summarises the elements as connection occupation use or presence; under laws or customs; of an identifiable community.

The Native Title Act

The *Native Title Act 1993* (Cth) was introduced in response to the *Mabo* decision and further amended after the *Wik* decision.[10] The Act attempted to:

- clarify the definition of native title
- clarify the status of past grants of rights and interests over native title land
- establish a system for the comprehensive identification and registration of native title across the country
- introduce a regime for dealing with future grants of rights and interests affecting native title in the future.

Section 223 defines native title in similar terms to those of the High Court in the *Mabo* case, while leaving the definition open to developments in the common law. The openness of the provision was necessary because the Court in *Mabo* did not exhaustively define the concept of native title. There were inherent difficulties in attempting to define common law native title when the common law on the topic was in its infancy.

The provision reads:

> 223
> (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal people or Torres Strait Islanders; and
>
> (b) the Aboriginal people or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.
>
> (2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing rights and interests.

Section 223 distinguishes two concepts: 'native title' and 'native title rights and interests'. It describes both of these in terms used by Justice Brennan, as the communal group or individual rights of Aboriginal people or Torres Strait Islander people or Torres Strait Islanders in relation to land and waters. Those rights and interests must be possessed under traditional laws acknowledged and the traditional customs observed, by which law and custom they have a connection with the land. Following this provision is the inclusion of hunting, gathering and fishing among the rights and interests protected by the recognition of native title.

The Act declares that native title is recognised and protected according to the Act and cannot be extinguished except according to the procedures set out in the Act (ss.10-11). These procedures include the need for a Federal Court to determine whether native title exists (s.13-15). As such, Indigenous people must establish their claim through the Federal Court according to the elements of proof captured by the definition set out in s.223(1).[11]

[10] The preamble to the *Native Title Act* suggests that '…the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.' The primary object of the Act then, is stated at s. 3(a) as 'to provide for the recognition and protection of native title'. The amending Act is the *Native Title Amendment Act 1998* (Cth).

[11] Note s.62 also sets out certain particulars to be contained in the application for the purposes of registration which are expressed in similar though not identical terms.

The recognition of native title offshore

The inclusion of 'land *and* waters' and 'fishing rights' within the definition of native title in s.223 was not uncontroversial. Section 6 of the Act also says that:

> This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*.

The Commonwealth had argued in *Yarmirr* that these references were not, of themselves, conclusive of the possible existence of native title offshore, but were merely precautionary. The Act still required that it be 'recognised' by the common law. The majority of the High Court agreed that this was the correct approach to interpreting the Act and that the drafting of the legislation did not pre-empt the role of the common law in determining the extent of recognition.[12]

The application in *Yarmirr* concerned the native title of the Mandilarri-Ildugij, Mangalara, Murran, Gadura-Minaga, and Ngaynjaharr[13] over the seas in the Croker Island region off the north-west tip of Arnhem land in the Northern Territory. While several islands, including Croker Island are located within the claim area, they are granted as Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and were not included in the claim. The claim therefore focussed exclusively on sea country.

The joint judgment restated the principle finding of *Mabo* that the rights and interests of Indigenous people to their country survived the acquisition of sovereignty and that common law was adapted to the circumstances of the new colony.[14] However, citing *The Native Title Act* case, the majority also suggested that an acquiring sovereign may extinguish rights and interests 'in the course of the act of state acquiring the Territory'.[15] The majority concluded therefore that the principle issue, as in *Mabo*, was whether there was an 'inconsistency' between the common law and the continued recognition of native title over the territorial sea that would preclude its recognition.

The majority joint judgment began by assessing any 'necessary inconsistency' with the claimed native title rights and interests. They did this by examining the sovereign rights and interests that were and are asserted over the territorial sea.[16] They argued that, while it was difficult to define, the assertion and international recognition of sovereignty over the sea did not amount to a claim of ownership.[17] The Crown's sovereignty was constituted by a right to legislate. Therefore, the passing of legislation concerning the territorial waters was an assertion of sovereignty not ownership. Whatever the powers and title recognised by legislation under the Offshore Constitutional Settlement, and changes to the area considered as territorial waters over time, they had no impact upon the recognition of native title.[18]

The High Court said that there was no need to demonstrate that the common law applies offshore, only that the common law is not 'inconsistent' with the continued existence of native title rights and interests offshore.[19] The majority concluded that, apart from the important qualification in relation to exclusivity, the 'terms' upon which the assertion of sovereignty was and is made in relation to the territorial seas showed no 'necessary inconsistency'

[12] *Yarmirr*, joint reasons at [40] cf Justice Kirby. Justice McHugh agreed that this was the correct inquiry but came to a different conclusion on whether native title did in fact extend offshore.

[13] Referred to variously as the Croker Island community or the native title holders or claimants.

[14] *Yarmirr*, joint reasons, at [41].

[15] ibid at [41], citing *Western Australia v Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373 at 422-23, in turn citing *Mabo v Queensland [No.2]* (1992) 175 CLR 1, per Justices Deane and Gaudron at 95, and Justice Justice Toohey at 193-4.

[16] *Yarmirr*, joint reasons at [50].

[17] Ibid., at [52].

[18] Ibid., at [70]. This was the subject of complex argument and discussion in the lower courts. For a summary see Stephen Sparkes, 'Native Title all at Sea', paper presented to The Past and Future of Land Rights and Native Title: Native Title Legal Conference, AIATSIS, Townsville, 28-30 August 2001 (updated 12 October 2001).

[19] *Yarmirr*, joint reasons, at [76]. Again, Justice McHugh, at [232], explicitly rejected the majority's approach on this point. Justice Kirby, in contrast, while clearly considering that the common law extends to the sea, did not need to discuss the proposition because his Honour took the view that the Act expressly contemplates and allows for the recognition of native title offshore and that effect should be given to that intention: [253]. Justice Kirby is, in turn, expressly critical of the approach of Justice McHugh to the interpretation of the various references to 'waters' and 'fishing' rights in the Act as merely speculative: [256-58].

with the continued recognition of native title rights and interests.[20] There being no inconsistency, the common law recognises native title offshore and gives it effect.[21]

One important point to note is that *Yarmirr* did not involve any claim to sea country outside the 12 nautical mile limit. Australia claims certain sovereign rights beyond the territorial sea. It is not yet clear what the nature of recognition of native title might be, if it were to be recognised in the 'exclusive economic zone'.

Once it was established that native title could exist offshore, the High Court accepted the findings of fact by Justice Olney that the Croker Island community had established a connection to the waters according to traditional law and custom. The Croker Island community was able to demonstrate the existence of traditional laws and customs whereby they had continuously used the waters of the claimed area for hunting, fishing and gathering, to provide sustenance and for spiritual purposes. They used the waters to travel in order to maintain their cultural and spiritual beliefs. They also demonstrated that permission is required amongst themselves to access the area and use the resources. This was sufficient to establish native title.

The limits on exclusivity of native title offshore

The Court in *Yarmirr* refers the 'terms' upon which the Crown asserts sovereignty over the territorial waters. These terms include recognising the right of innocent passage under international law and, as a matter of municipal law, the public rights to navigate and to fish. The majority judgement held that while these rights did not preclude the recognition of offshore native title entirely, they imposed a significant limitation on the recognition:

> The rights and interests asserted at sovereignty carried with them the recognition of public rights of navigation and fishing and, perhaps, the concession of an international right of innocent passage. Those rights were necessarily inconsistent with the continued existence of any right under Aboriginal law or custom to preclude the exercise of those rights.[22]

The Court held, therefore, that native title can not be recognised as an exclusive title over the seas.

It seems from the majority judgment that the limit on exclusivity occurs not as a consequence of extinguishment but in the process of recognition. However, the Court did not apply the 'skeletal principle' test that emerged from *Mabo*. Nor did they apply the stronger test of inconsistency amounting to an affront to natural justice.[23] Instead, the decision was based on a 'fundamental inconsistency' between the rights asserted and a principle of the common law.

The joint judgment acknowledges that the 'qualified exclusivity' proposed by the native title holders could in fact accommodate the public and international rights, as well as validly granted licences and other interests. However, the fundamental inconsistency could not be resisted. This may be so even where, at least in the case of a public right to fish, it is admitted to be fundamentally amenable to regulation and abrogation and indeed has been repealed.[24]

The *Yarmirr* case clarifies some of the basic questions concerning the operation of native title offshore. It allows us to extrapolate from existing jurisprudence concerning native title over land. In particular, we are now able to make some assessment of the relationship between native title and other rights and interests and the impact of various legislative regimes. However, there are still a number of issues that remain to be considered further.

[20] Ibid., joint reasons at [61]. This was disputed by Justice McHugh, in dissent, at [232], who argued that the majority's reasoning was conceptually flawed. The majority did not clearly explain whether native title applied without the extension of the common law offshore or whether the common law was co-extensive with sovereignty.

[21] Ibid., joint reasons at [42] The majority disagreed with the Commonwealth's contention that reference to tenure or radical title was a necessary for the recognition of native title [48-50]. Contrast Justice McHugh at [207].

[22] Ibid., at [61].

[23] Ibid., at [97].

[24] This admission is made by Justice Olney at first instance: *Mary Yarmirr v Northern Territory* [1998] 771 FCA (6 July 1998); (1998) 82 FCR 533, at [137] (the *Yarmirr determination*), citing *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330. This should be directly contrasted with the conclusions of Justice Kirby in this regard, *Yarmirr*, at[278-9]. The reasoning here is strongly reminiscent of the reasoning in *Fejo v Northern Territory* (1998) 195 CLR 96, which was a decision regarding extinguishment of native title by a grant of freehold. This conflation of the two processes is reflected in the majority's joint reasons in *Yarmirr* at [100].

Proving native title in southeast Australia

While the High Court affirmed the determination of native title by Justice Olney at first instance, there are many aspects of the reasoning of Justice Olney that remain in dispute.[25] The role and meaning of tradition in establishing or delimiting native title is currently under scrutiny in the existing appeal in *Ward* and more directly in the pending appeal of the *Yorta Yorta*.[26] The potential gap between the aspirations of Indigenous people and the capacity of common law native title to fulfil those expectations is enormous. Even in *Yarmirr*, the claimed right of the native title holders to exclusive possession and the concurrent power to regulate use and access by others, was reduced to a limited right to fish and gather for subsistence purposes in common with commercial and public rights to fish.[27]

It has been suggested that the development of native title law as highlighted by *Yorta Yorta* may lead to discriminatory differentiation amongst Indigenous people based on the type of society and what are considered appropriately 'traditional' Aboriginal and Torres Strait Islander societies. This is exemplified in the current practice of some judges to examine pre-contact activities and tracing through to the present to determine the content of native title.

The determination against the *Yorta Yorta* has raised significant questions about what is considered 'tradition' or 'custom' in the sense that can sustain native title.[28]

The way that Justice Olney posed the question of proof in *Yorta Yorta*, as in *Yarmirr*, assumed an historical account of the laws and customs of the original inhabitants was required. The traditions and customs observed at the time of settlement were said to constitute the title that burdened the Crown and it seems that only through continued observance of these particular customs would the title survive.[29] The forced settlement on missions within their traditional territories, and the suppression of language and old forms of cultural expression, and, importantly, the taking up of paid employment and admitted 'settling down to more orderly habits of industry',[30] was, according to Justice Olney, evidence that by 1881 – a mere forty years after settlement of the area – the Yorta Yorta had lost their culture and their status as a 'traditional society'. This was in large part measured against their adoption of commercial farming and settled lifestyle.

Contemporary practices that the Yorta Yorta saw as cultural traditions, such as the protection of sites of cultural significance and the involvement in the management of land and waters in their traditional areas, were rejected by Justice Olney because they were not of a kind that were exercised or of significance to the pre-contact society.[31] He concluded that:

> Preservation of Aboriginal heritage and conservation of the natural environment are worthy objectives … but in the context of a native title claims the absence of a continuous link back to the laws and customs of the original inhabitants deprives those activities of the character of traditional ….[32]

On the reasoning of *Yorta Yorta*, adoption of commercial industry may be interpreted as a rejection rather than affirmation of tradition.

It is important to note that other judges may take a different approach to the requirements of proof. The majority on appeal to the full Federal Court in *Yarmirr*, while not rejecting the ultimate finding of Justice Olney, did reject his approach to the concept of tradition. Justice Branson and Justice Katz stated their interpretation:

[25] Ward v Western Australia (the Miriuwung Gajerrong appeal) was heard in March 2001 and is expected to be handed down this year.
[26] The *Yorta Yorta* case hasn't received leave to appeal.
[27] *Yarmirr* determination.
[28] *Members of the Yorta Yorta Community v Victoria* (unreported Federal Court, Justice Olney 18 December 1998).
[29] Even here, the customs observed were said to be those observed by squatters writing at the time. These 'objective' observations were preferred over oral histories of the Yorta Yorta.
[30] referring to the 1881 Petition to the Governor General of New South Wales signed by 42 residents of Maloga Mission who requested that lands be reserved for them so that they could 'support ourselves by our own industry', rather than as evidence of the ongoing struggle for the return of lands, as it was tendered by the applicants, it was adjudged evidence of abandonment of laws and customs.
[31] paras 121-5.
[32] Para 128.

> The test of whether a law acknowledged, or a custom observed, is a traditional law or custom is, in our view, principally an objective test. The primary issue is whether the law or custom has in substance been handed down from generation to generation; that is, whether it can be shown to have its roots in the tradition of the relevant community.[33]

This is a particularly important distinction for native title claim groups whose cultural strength is their participation in local industries such as commercial fishing, who base their cultural identity in their identification as a fishing community and their involvement with local and state authorities, and political and commercial associations. They are intimately involved in debates regarding tourism, sustainable yields, exclusive licences, and aquaculture. They fiercely defend their rights as the first owners to be involved in these debates. They assert their rights and interest through forums and use their commercial and non-commercial activities to reinforce cultural traditions, language and practices. And it is among the key outcomes they wish to achieve from native title.

Native title and native title rights and interests

As with any system of law relating to land, native title involves more than merely a collection of proprietary interests. A community's laws will regulate the transmission of property rights, access, responsibilities, use of resources from the land, and many other rights, responsibilities and community controls.[34] Native title is therefore an important avenue through which Indigenous people assert their aspirations for greater control over their country. This is reflected in those rights and interests that are explicitly identified as important in the applications and determination of native title to date.[35]

The determinations begin with a broad statement of title to "possession, occupation, use and enjoyment" (whether said to be exclusive or not). They are then supported by a statement of the specific rights and interests that are of significant importance to the community and are used to prove the title.[36] The determinations of the content of native title have included not only the right to 'possess, occupy, use and enjoy' the land, but the right to control access, to use and control the use of resources, to maintain and protect places of importance and to safeguard cultural knowledge.[37] Others have sought to pay greater regard to the laws applicable as between members of the native title group.[38]

Particular activities, law, customs and traditions may be of interest to the court in determining if the claimant community has maintained a connection with the land through observance of traditional law and custom. Those traditions, uses or activities, however, do not define or delimit the title.[39] This is certainly consistent with the approach of the High Court in *Mabo*. In that case the Court examined many of the laws and customs of the Meriam people but in ordering that native title existed the Court granted to the Meriam "possession, occupation, use and enjoyment". This was given "as against the world" without reference or limitation by particular rights and customs (though subject to extinguishing acts). The second part of the current form of determinations is a result of s.225 of the Act

[33] *Members of the Yorta Yorta Community v The State of Victoria* [2001] FCA 45 at [127] These arguments are also important to the method of exercise of particular rights and interest, discussed below at 2.8.

[34] *Mabo*, per Justice Brennan, at p. 59 (and Justices Deane and Gaudron, at p. 88), for example, discussed the issue of inalienability and succession in relation to the Crown's rights of pre-emption: 'Its alienability is dependent on the laws from which it is derived'. But it is not alienable by the common law. That is, it is not alienable outside the native title group and the traditional law and custom but the common law recognised the group's right to order their internal affairs in this regard. This was further clarified at p. 61: 'The incidents of a particular native title relating to inheritance, the transmission or acquisitions of rights and interests . . . [etc] are matters to be determined by the laws and customs of the indigenous inhabitants. . .'

[35] Some examples of recent determinations are extracted at appendix 2.

[36] For an analysis of existing determinations, in particular the distinction between consent and contested determinations, see Paul Sheiner 'Consent Determinations', Land Rights Laws: Issues of Native Title, forthcoming.

[37] 'Minute of Order' per Justice Lee in *The Miriuwung Gajerrong determination*; and 'Draft Minute of Proposed Determinations of Native Title', per Justice Olney in *The Arrernte determination*.

[38] See the Gungarri consent determination (agreed btween the Gungarri people, the Queensland government and Telstra, due for handing down on country 4 December 2001.

[39] Greg McIntyre, Native Title is Property, paper presented to the Past and Future of Native Title and Land Rights, AIATSIS, Townsville, 28-31 August 2001.

(amended in 1998) which requires a determination of native title to contain a determination of "the nature and extent of the native title rights and interests in relation to the determination area".[40]

The courts have not interpreted these provisions as requiring an exhaustive account of the rights and interests that may be exercised pursuant to native title.[41] Justice Lee, in the *Miriuwung Gajerrong determination*, explained that:

> The definition of 'native title' in s. 223(1) reflects the elements of native title at common law… The definition is a compendious provision in that it includes particular rights or interests that at common law are treated as the rights or interests that arise out of, and are dependent upon, native title.[42]

The two majority judges in the Croker Island appeal supported this characterisation.[43]

There is currently a debate before the High Court in *Ward v Western Australia* as to whether the title is merely the aggregation of these specific rights, as claimed and proved, or whether the specific rights are merely the exercise or enjoyment of an underlying title reflected in the opening expression. There is a growing body of legal opinion, from the courts and commentators, which supports some interpretation of this latter approach. Arguably, this interpretation is also supported by provisions of the Act.

Non-exclusive title to the seas

The most significant question left open by the High Court in *Yarmirr* is the nature of the non-exclusive title to the sea. In part this question is tied to the appeal in *Ward*, which more directly addresses the nature of native title. Until that decision is handed down there is still doubt as to whether native title is a title in the sense that the holders are able to exercise rights and interests as title holders beyond those specified in the determination.

A related question remains as to whether the non-exclusive title is only subject to those rights specifically identified by the Court in *Yarmirr*. Alternatively, having destroyed the exclusive nature of native title, are the rights and interests open and shared in all instances? If the former is to be the case then the distinction between the 'qualified exclusive title' (recognised by Justice Kirby in dissent), and the non-exclusive title (recognised by the majority) may not be as far apart as it may seem on first reading. Clearly, the courts at all level in the *Yarmirr* case envisage that native title offshore was something more than merely equivalent to the public rights to fish and navigate. What that 'more' entitles native title holders to do with their title is less clear.

Native title rights and interests over the sea

The determination of native title for the Croker Island community originally put forward by Justice Olney in *Yarmirr* at first instance was effectively affirmed by the High Court in rejecting the appeals.

In accordance with s.225, Justice Olney considered that the rights and interests of importance were to have free access for the following purposes:

(a) to travel through or within the claimed area

(b) to fish and hunt for the purpose of satisfying their personal, domestic or non-commercial communal needs, including the purpose of observing traditional, cultural, ritual and spiritual laws and customs

(c) to visit and protect places of cultural and spiritual significance

(d) to safeguard their cultural and spiritual knowledge.[45]

As is usual, the proposed determination stated that the native title rights and interests would be subordinate to any validly granted rights and interests. On appeal to the full bench of the Federal Court, the majority upheld the trial judge's determination and the High Court did not interfere with those findings.[46] The determination therefore stands.

[40] s.225(b). The provision as originally enacted required identification of only those rights and interests considered 'important'.
[41] See *Miriuwung Gajerrong appeal*, per Justices Beaumont and von Doussa, at p. 211.
[42] Ben Ward v Western Australia (1998) 159 ALR 483 per Justice Lee, (*The Miriuwung Gajerrong determination*), per Justice Lee, at p. 505.
[43] *Commonwealth of Australia v Yarmirr* (1999) 168 ALR 426 (*The Croker Island appeal*), per Justices Beaumont and von Doussa, at p. 441.
[44] *The Miriuwung Gajerrong determination* and *Hayes v Nothern Territory* [1999] FCA 1248 (9 September 1999) per Justice Olney, (Hayes).
[45] *Mary Yarmirr v Northern Territory* [1998] 771 FCA (6 July 1998).
[46] Commonwealth v Yarmirr [1999] FCA 1668 (3 December 1999), per Justices Beaumont and von Doussa, Justice Merkel dissenting.

The description of native title in this determination appears to be quite limited. However, with only one determination of native title in relation to offshore areas, there is a great deal that remains to be seen as to the extent of native title rights and interests that will be recognised over waters. Native title claims registered in the South-east Marine Region are shown at Appendix 1.

The determination in *Yarmirr* is specific to the facts established in that case. The elements of the High Court's decision that can be said to have general application are only those relating to the existence of native title offshore and its non-exclusive character. The s.225 description of the important rights and interests asserted under the native title of the Croker Island community may or may not be reproduced elsewhere. This is important in relation to, for example, proof of commercial rights as an element of native title, or rights and interests in relation to certain species or the right to be involved in decision-making. These are significant issues yet to be explored in relation to offshore native title.

There are also implications yet to be drawn from the rights and interest that were recognised in the determination. In particular the scope of the right to protect places of significance and safeguard cultural knowledge. There are also issues to consider in relation to fishing, even of a non-commercial nature, in relation to priorities in resource management, and the co-existence of rights in sea country.

The right to fish

It was always envisaged that the rights and interests protected by native title would include the right to fish, as evidenced in the definition of native title under s. 233(2). This assumption may have been influenced by the large number of Indigenous rights cases in other jurisdictions that concern fishing. Early cases concerning the exercise of native title rights to fish assumed that such a right was a legitimate exercise of native title rights and interests.

These cases indicated that in the prosecution of particular offences, native title may be a defence but it may also fail where there is insufficient evidence that the activity was undertaken as a result of the exercise of native title.[47] While a formal determination of native title is not required in order to exercise native title rights, these early cases show that the level of proof required to support this defence would be met by a determination.

These cases also suggest that there is no Indigenous right to fish 'at large'. There must be a native title connection with the area. The question of an Indigenous right to fish which is not related to land, in a form more like Canadian Aboriginal rights, has not been considered in the Australian courts.[48] Any such right would not be a native title right, which must have a connection with land.[49] However, provisions in existing legislation preserving Indigenous people's right to take species for their personal use still apply outside the native title context.

Commercial rights

Amongst the different levels of appeal decisions in *Yarmirr* some confusion emerges as to why the right to trade was rejected. This will require further clarification. The evidence in that case was presented in a way that tied the right to trade as a necessary incident of the exclusive title claimed. That is, the right to exclude all others and to determine access and use of resources meant the right to exclusively trade in the resources. Justice Olney, at first instance, dealt with the matter as a question of fact. He considered that the right to trade was potentially recognisable under native title, independent of the exclusive title, although the evidence in this case did not support such a right.[50] This would suggest that in a different situation, for example in communities where there is ongoing involvement in the local fishing industry, a commercial right to exploit the resources of the sea could be recognised amongst the rights and interests of importance.

[47] See for example, *Mason v Tritton* (1994) 34 NSWLR 572, *Derschaw v Sutton*, (unreported Full Court, SCW 16 August 1996), *Dillon v Davies* [1998] TASSC (20 May 1998). For a successful case see *Yanner v Eaton* [1999] HCA 53 (7 October 1999)

[48] Compare *R v Sparrow* (1990) 70 DLR (4th) 383 at 399. Also, New Zealand fishing rights have been recognised to exist apart from any connection with land: *Te Runanga o Muriwhenua Inc v Attorney General* [1990] 2 NZLR 641 at 655.

[49] *Yanner* per the majority

[50] [122]

On the first appeal the majority of the full Federal Court presumed that the effective assertion of exclusivity would be necessary to establish an effective right to trade. It is not clear that the majority supported the reasoning of Justice Olney that a right to trade could be demonstrated independently of the exclusive title. In any event, the rationale of the majority reasoning should logically suggest that a right to trade would only be precluded by a non-exclusive title if an *exclusive* right to trade were being proposed. Presumably a non-exclusive title could at least sustain a non-exclusive right to trade.

Right to minerals

Justice Olney's determination extended to rights in the seabed and subsoil, but rejected any right to use of minerals as previous use was not evident. The right of native title holders to the use and enjoyment of minerals or to control access to minerals is one of the questions currently before the High Court in *Ward*. The protection of the Crown's right to control access to minerals has been a prominent feature of the legislative and public responses to native title since its recognition. Justice Olney based his decision on two grounds. First, he said the applicants did not establish traditional laws and customs relating to the acquisition or use or trade in minerals. Secondly, that in any event, legislation claiming Crown ownership of minerals amounts to an appropriation of full beneficial ownership clearly and plainly extinguishing native title rights to minerals. Justice Olney supports this finding with that of the Queensland Supreme Court in *Eaton v Yanner*, concerning Crown 'property' in fauna, which was subsequently overturned by the High Court. It is yet to be determined whether the Crown's assertion of proprietorship in minerals should be treated any differently than those concerning fauna.

Right to protect places of significance

While not recognising a right to exclude people from the area generally, Justice Olney recognised that the Croker Island community had a right to control access to sites and places of significance. He also recognised the significant interest in protecting particular routes and the transfer of cultural knowledge about these places. This was recognised to include a right to have and control access and to protect from unauthorised or inappropriate use.[51]

This again raises a question over the nature of the non-exclusive character of the title recognised by the High Court. The lack of certainty as to the protection provided by explicit recognition of a right to protect sites may result in native title being an effective tool for protection of heritage, especially through the use of Indigenous Land Use Agreements to establish protocols and procedures for exploration. However, it is likely that State and Commonwealth heritage legislation continue to play an important role.[52]

Right to species

Just as the determination in *Yarmirr* recognises the importance of particular places and routes, an Indigenous community may wish to emphasise the cultural and spiritual importance of particular species. This may take the form of hunting for particular rituals or ceremonies, or extend to the assertion of an exclusive right to harvest or a right to protect the species. The Aboriginal and Torres Strait Islander Social Justice Commissioner pointed to an example where protection may be asserted. For example, where commercial fishing practices were killing an important species of turtle as bycatch, "could the native title holders use their native title rights to force a change in fishing practices".[53]

[51] *Yarmirr* [125]
[52] see Minerva gas agreement referred to below at 4.1
[53] ATSISJC *Native Title Report 2000*, HREOC, Sydney 200, p. 12

Right to be involved in decision making

Justice Olney recognised that the Croker Island community may have effectively asserted a right to be consulted and to request that their traditional law and culture be respected in relation to proposed exploration, tourism ventures and marine park developments. He held that this did not amount to exclusive possession.[54] However, his views about the basis for determining native title rights and interests according to pre-contact activities meant that he did not go on to consider that these instances may establish a right to be involved in decision making. Other judges may come to a different conclusion, as Justice Kirby did in the High Court appeal.[55]

The manner of exercising native title rights

The common law accepts that the manner in which native title rights and interests are exercised will develop and change over time. From the *Mabo* case and since, the High Court has firmly stated that it does not expect that the laws and customs that sustain native title will be frozen in time. Nor will they reflect some arcane notion of 'traditional' as reflecting 'pre-contact' activities. Law and custom internal to the group regulate native title rights and interests. The rights change and evolve as the society changes and evolves. All that is required is that the general nature of the connection between the Indigenous people and the land remains.[56] Justice Brennan explained that,

> so long as the people remain an identifiable community, the numbers of whom are identified by one another as members of that community, living under its laws and customs, the communal native title survives to be enjoyed…[57]

For this reason native title rights and interests should not be limited to those that are identified at the point of determination.[58] Law and custom, therefore, regulates the exercise of native title internally and provides the limits on the kinds of 'privileges' of ownership that can be exercised.

Furthermore, there is no prescription on the methods employed in the exercise of native title. It is generally accepted, for example, that modern methods will be employed in hunting and fishing. As Justice Gummow noted in *Yanner* and Justice Lee observed in *Ward* at first instance, it does not matter that fishing is undertaken from an outboard motored dinghy.[59]

Similarly, Justices Gleeson and Gummow expressed concern at the arguments put by Counsel on this matter during argument in *Yarmirr*.[60]

There continues to be some tension here between the rejection of the 'frozen in time' approach and the adoption of a bundle of rights approach by a number of judges of the Federal Court. This issue will be highlighted in the appeal in the Yorta Yorta case due to be heard in 2002.

Enforceability against third parties

Justice Olney has held in a number of determinations that Indigenous people's failure to exercise traditional customs of exclusion, meant that those rights had been extinguished or lost. This is despite the fact that until 1992 Indigenous people had no recognised right to exercise rights over their lands. This was the basis of denying any exclusive possession rights to the Arrernte people in the Alice Springs determination.[61]

In *Yarmirr*, because Justice Kirby had taken a different view of the implications of the public right to fish and the rights of navigation and innocent passage, his

[54] *Yarmirr determination* at [102-107].
[55] *Yarmirr*, per Justice Kirby at [313].
[56] *Mabo* per Justice Brenanan at 61 and 70, Justices Deane and Gaudron at 110. See also, Justice Gummow in *Yanner* at [68] who refered to 'evolved or altered form of traditional behaviour'.
[57] *Mabo*, per Justice Brennan at 61.
[58] *Yorta Yorta appeal* per Justices Branson and Katz at [139].
[59] *Yarmirr*, per Justice Gummow [68]. See also *Campbell v Arnold* (1982) 565 FLR 382 (NTSC), concerning the *Crown Lands Act 1978* (NT) regarding the use of firearms in hunting.
[60] HCA transcript *Yarmirr* (6 September 2001), exchange between Mr Meadows, Solicitor general for Western Australia and Chief Justice Gleeson and Justice Gummow.
[61] *Hayes*

Honour went further to discuss the trial judge's finding in relation to the proof of exclusivity as a matter of evidence. His comments here may be relevant to questions of enforcement more generally. Justice Kirby agreed with Justice Merkel (full Federal Court, dissenting) that the enforcement of laws against others is clearly not determinative:

> It is the traditional connection arising from the acknowledgment of laws and customs of the Indigenous community, and not the recognition or acceptance by others of the connection which is the source of native title.[62]

Justice Kirby criticised the 'overly narrow approach' of Justice Olney as one that will always be unfavourable to the rights of claimants who until the Mabo decision could not assert and uphold their rights to their country.[63] He suggested that such an approach is not only unreasonable, but discriminatory.[64]

The majority in their joint reasons appear to support this criticism. They say that it is not necessary that a claimed right or interest carry with it or be supported by 'some enforceable means of excluding from its enjoyment those who are not it holders', and that there is no need for an enforceable system of sanctions.[65]

The relationship between native title and other interests

As noted by Justice North in the *Miriuwung Gajerrong appeal*, the High Court in *Mabo* was concerned with the existence of native title not with its extinguishment.[66] The same is arguably true of *Yarmirr*, at least in relation to the High Court appeal. The difficulty arises where native title rights and interests conflict with the rights and interests of others. The need to define the scope and nature of native title as against other interests has become a crucial aspect of the determination process.

In the *Mabo* decision, the majority agreed that native title may be lost through a number of circumstances. First, native title will be lost through extinction, that is, when there are no remaining members of the native title group to hold the title. Second, native title may be lost through abandonment, that is, when the people no longer exercise the law or possess a distinct culture that gives native title its source and content.[67] Third, native title can be surrendered to the Crown, although it cannot be alienated in any other way. Finally, native title can be lost through extinguishment by 'a valid exercise of sovereign power inconsistent with the continued right to enjoy native title'.[68] This latter category has attracted by far the most attention, not least through the complex regulatory regime of the *Native Title Act*.

Extinguishment can occur either through:

- a legislative act, which demonstrates a clear and plain intention to extinguish native title rights
- by a grant of an interest that is wholly or partly inconsistent with the continued enjoyment of native title
- where the Crown 'validly and effectively' appropriates land to itself in a manner or for a purpose inconsistent with native title.[69]

The doctrine of extinguishment within the common law of native title, means that Indigenous people's rights over lands will not be recognised by the common law through native title in many circumstances where these rights continue to exist, be asserted, and exercised, under Aboriginal law. In this sense, extinguishment can be explained as the withdrawal of recognition and protection, or 'extinguishment of recognition'. The fact remains that Aboriginal law continues to allocate entitlements to those same lands.

[62] *Yarmirr*, per Justice Kirby [307] (original emphasis).
[63] Ibid., [316], [309]. See for example, Justice Olney's decision in *Hayes v Northern Territory*.
[64] Ibid., [317]
[65] ibid., per joint reasons, at [16]
[66] *The State of Western Australia v Ward &Ors* (2000) 170 ALR 159, per Justices Beaumont, von Doussa and North *(The Miriuwung Gajerrong appeal)*, at pp. 336-7.
[67] Although, it could be argued in many instances that even in the case of abandonment or extinction there are clear laws of succession in Aboriginal law that would apply to ensure that someone speaks of any particular tract of country, see Peter Sutton, *Native Title and the Descent of Rights*, National Native Title Tribunal, 1998. This second circumstance was used by Justice Olney as the basis for rejecting the claim of the Yorta Yorta people, for whom, he said, 'the tide of history has undoubtedly washed away any traditional rights': *Yorta Yorta determination*, per Justice Olney, para 126 referring to Justice Brennan in *Mabo*, at p. 60.
[68] *Mabo*, per Justice Brennan, at p. 69.
[69] Ibid., see also per Justices Deane and Gaudron, at p. 110.

Co-existence and inconsistency

In the 1996 *Wik* decision, the High Court clarified the extent to which native title can co-exist with other interests granted, or uses by the Crown.[70] This sharing of country is an important element of offshore native title. In *Wik* the High Court explained that where limited rights or interests are granted by the Crown, for example in specific purpose leases or licences, native title is only affected to the extent of any inconsistency. This does not mean that past legislation or inconsistent grants were ineffective. The Court has repeatedly affirmed that where an inconsistency arises, the non-native title interest prevails. The *Native Title Act* provides no doubt as to the validity of past acts through its validation provisions.

The Court has recognised instances where an interest granted by the Crown may be so extensive as to be fundamentally inconsistent with the maintenance of the connection that sustains native title. In such instances native title is said to be extinguished. This was held to be the case in relation to freehold or fee simple titles, where the nature of freehold is seen to be 'inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title'. [71]

Under Australian law, however, the seas are not susceptible to such extensive forms of ownership. The kinds of rights and interests granted over waters are limited rights, as discussed in *Yarmirr*. Even where legislation provides for the granting of exclusive fishing licences, these are limited in purpose and scope. So, while the holder of the licence may be able to exclude others from commercial fishing operations in the area, they cannot exclude all people generally for any purpose. This is similar to the pastoral leases considered in *Wik*.

As such, it is unlikely that native title, once proved, would be found to have been extinguished by the rights and interests that currently exist in relation to Australia's oceans. The relationship between native title and other interests will depend on the relative extent of each and their potential for co-existence.

Partial extinguishment

There is still some debate about the effect of limited inconsistency. If an interest granted by the Crown is inconsistent with the continued exercise of particular rights and interests otherwise exercisable under native title, does this amount to the 'partial extinguishment' of native title or merely a restriction of an otherwise undisturbed underlying title?

The Federal Court has now placed the issue squarely before the High Court in the *Miriuwung Gajerrong appeal*. The two majority judges, Justices Beaumont and von Doussa (Justice North dissenting), disagreed with Justice Lee, at first instance, that native title constituted an interest in land. They preferred to view native title as a bundle of rights amounting to a personal interest. All of the judges attached particular implications to the characterisation of native title in this way, especially with regard to extinguishment.

It was recognised in *Mabo* that the requirement of clear and plain intention is a reflection of the 'seriousness of the consequences' of extinguishment of native title for Indigenous people.[72] This sentiment was reflected in the legislation through the 'non-extinguishment principle' when assessing the impact of past and future acts. Section 238(2) explains this principle in terms that native title (in relation to land or waters) can be affected by past or future acts, but the native title is nevertheless not extinguished. For example, where an act is wholly inconsistent with the continued enjoyment of particular native title rights and interests, the native title continues to exist in its entirety. However, the particular rights and interests have no effect in relation to the act.[73] As a corollary, where the act is removed, the native title rights and interests are again fully effective.[74]

Sections 47, 47A and 47B of the Act embody a similar sentiment. Under those provision, past extinguishment may be disregarded in particular circumstances where the native title holders are now the owners of the land under some other form of title.

[70] *Wik People v Queensland* (1996) 187 CLR 1.
[71] Fejo [43]. An estate in fee simple is said to be the closest thing to absolute ownership that exists in the Australian system of land tenure, by which it allows 'every act of ownership which can enter into the imagination'. *Commonwealth v NSW* (1923) 33 CLR 1, 42 per Justice Isaacs.
[72] *Mabo*, per Justice Brennan at p.64.
[73] s.238(2).
[74] s.238(6).

Existing regulatory regimes

Native title is not extinguished by legislation which merely regulates the use of land generally or the enjoyment of native title more specifically. Nor is it extinguished by regimes of control and management of resources where there is no inconsistency with the continued enjoyment of the underlying native title. The High Court has explained that regulation of the exercise of rights and interests under native title does not extinguish native title. This is because the underlying connection cannot be severed by mere impairment of the exercise of certain of the 'privileges' of native title.[75]

As the survey by Justice Olney in *Yarmirr* demonstrates, the complex regimes of regulation and licensing of interests in the territorial waters regulate but do not extinguish native title rights and interests and are capable of co-existing with a non-exclusive right. There is now a complex regime of legislation in each State and at the Commonwealth level to manage the oceans and fisheries: regulating the issuing of commercial and recreational licences, to develop conservation and environmental management regimes, regulation of fishing methods and species specific regimes; as well as regimes concerning particular areas. For example, the South Australian Fisheries Act states its purposes in its long title:

> An Act to provide for the conservation, enhancement and management of fisheries, the regulation of fishing and the protection of certain fish; to provide for the protection of marine mammals and the aquatic habitat; to provide for the control of exotic fish and disease in fish, and the regulation of fish farming and fish processing; and for other purposes.[76]

All of these purposes fall into the category of regulation without extinguishment.

Australia has a complex legislative regime for the division of jurisdiction over the territorial waters as a result of the Offshore Constitutional Settlement. The High Court in *Yarmirr* dealt specifically with legislation asserting or allocating sovereign rights over the seas. It was determined that the *Seas and Submerged Lands Act*, *State Powers Acts and State Titles Acts* were merely an assertion of sovereignty, not ownership and did not impair native title.[77] This kind of legislation can be compared with Crown Lands legislation considered in *Mabo*.

The public right to fish, as noted in the *Yarmirr* decision, is a right amenable to abrogation and regulation. As Justice Kirby highlighted, "the principle behind the public right to fish is based on the (now unscientific) notion that uncontrolled catching of fish in sea areas cannot diminish the stock".[78]

Many of the fishing regimes provide for Indigenous people to take fish without a licence for personal or cultural use.[79] Such provisions are generally accepted to be recognition of rights rather than an extinguishment. The High Court in *Yanner* explained that:

> Regulating the way in which rights and interests may be exercised is not inconsistent with their continued existence. Indeed regulating the way in which a right may be exercised presupposes that the right exists.[80]

The rationale behind this statement reflects the idea of an underlying connection to the land that cannot be severed by regulating particular aspects of Indigenous people relationship with their country. It is that underlying connection that sustains native title.[81] The line where regulation "may shade into prohibition" is yet to be fully explored, but the High Court has been clear that the line is not reached where legislation merely asserts the states power to preserve and regulate the exploitation of valuable and important resources.[82]

[75] *Yanner*, per Justice Gummow.
[76] *Fisheries Management Act 1982* (SA) Long Title.
[77] *Yarmirr*, at [76].
[78] *Yarmirr*, [282].
[79] eg Tasmania's *Living Marine Resources Management Act 1995* (Tas), s.60(2)(c).
[80] *Yanner*, [37] (emphasis omitted).
[81] *Yarmirr*, [38].
[82] *Yanner* [28], citing *Toomer v Witsell* 334 US 385 at 402 (1948). In *Yanner* the Court made this judgement in relation to fauna legislation which similarly regulates the kind of fauna which may be taken and how and the right to receive royalties and impose licensing arrangements. Unlike the *Fauna Act* considered in *Yanner*, fisheries legislation is less likely to contain an assertion of 'proprietorship' by the Crown.

The preservation of native title fishing rights

The Act refers directly to fishing rights in relation to regulation of particular activities by licensing arrangements. Section 211 preserves certain non-commercial rights from such arrangements. The provision reads:

211 Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

(1) Subsection (2) applies if:

(a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and

(b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and

(c) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and

(d) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal people or Torres Strait Islanders.

Removal of prohibition etc. on native title holders

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and

(b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of class of activity

(3) Each of the following is a separate *class of activity*:

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

(e) any other kind of activity prescribed for the purpose of this paragraph.

Pursuant to this provision, non-commercial fishing, as an exercise of native title rights and interests, is exempted from laws prohibiting or restricting fishing activity by licensing regimes, unless for environmental protection or public health.

In *WA v Cth (the Native Title Act case)*, the High Court explained the operation of s.211, saying that it removes such licences or other instruments as a legal condition on the exercise of native title. As such, the provision creates a statutory priority for native title rights over state legislation.[83] As a result, the relevant law's validity is unimpaired but its operation is suspended in relation to the exercise of native title rights and interests.[84]

The exercise of rights pursuant to native title is only trumped by research, environmental and public health and safety legislation. This raises an important question about testing the legitimate objective of legislation to meet these purposes. In Canadian Courts similar issues

[83] and presumably Commonwealth legislation unless later legislation which is clearly inconsistent and overriding the *Native Title Act*.
[84] *WA v Cth* (1995) 183 CLR 373 at 474.

of priorities have arisen. In there it is recognised that Indigenous non-commercial rights are prioritised above all non-Indigenous interests but are subject to legitimate environmental and conservation measures. A doctrine of 'legitimate purpose' has developed to test the effect of legislation.

The Canadian Supreme Court in *Sparrow* recognised the difficulty of assessing the objective of legislation in relation to fisheries between the conservation of heavily burdened fisheries and the efficient allocation and management of scarce and valuable resources on the other. This led the court to clearly establish a link between justification for regulation and the allocation of priorities in the fisheries.

It was held that conservation measures could be justified to take priority over Aboriginal fishing rights because they are inherently consistent with the protection of native title for future generations and the maintenance of the connection that sustains the underlying title. This assumed that the title holders had been consulted (and not just informed) and were unable or unwilling to implement appropriate measures themselves.

In addition, the test assumes that conservation objectives could only be achieved by restricting the rights of Indigenous people and not by restricting other users. The Aboriginal right to fish takes precedence over the rights of others and should be occasioned as little interference as possible to achieve the regulatory objectives. In *Jack v R*, a case which predates the enactment of s.35 of the Canadian Constitution, the Court suggested that 'priority ought to be given to the Indian fishermen subject to the practical difficulties occasioned by international waters and the movement of the fish themselves'.[85]

Under the common law, native title rights are subordinated to non-Indigenous interests that have been granted over native title country, but the potential for co-existence of interests is far more pronounced in relation to the seas. Section 211 recognises the legitimate priority of Indigenous interests over other interests in relation to personal use but Indigenous people will seek the same respect for their pre-existing rights in the future allocation of resources.

Past Acts

Past acts that have extinguished, impaired or regulated native title, through legislation or grants of interests to third parties, may have been invalid as a result of the recognition of native title and the operation of the *Racial Discrimination Act 1975*. The *Native Title Act* validated titles granted before the passing of the Act. The 1998 amendments validated further grants of freehold, certain leases and public work granted up until the High Court's decision in *Wik*.[86] In both instances, overriding the *Racial Discrimination Act* allowed State Governments to pass similar legislation validating titles granted by them.[87] Past acts in relation to offshore areas are likely to be Category D past acts and therefore, the non-extinguishment principle applies.[88]

Future Acts

The definition within the Act of 'offshore' places is important in determining the application of the future acts regime. Specific procedural rights attach to native title offshore while other procedural rights apply only to 'onshore' places. 'Offshore places' are any land or waters to which the Act extends, other than land or waters in an onshore place. An 'onshore place' in contrast is defined to mean land and waters within the limits of a State or Territory.

The future act regime applicable to water management regimes, including the issuing of fishing licences, is contained in Subdivision H. All other offshore acts are considered under Subdivision N. The *Native Title Act* requires that all future acts affecting native title must comply with the procedures set out in the Act. If an Act is done without complying with these procedures it will be invalid to the extent that it affects native title

[85] [1980] 1 SCR 294 at 313. Section 35 of the Canadian Constitution provides a stronger sanction than the common law in relation to the infringement of Aboriginal rights, which would make legislation that did not meet this test invalid rather than merely affording compensatory damages. It is important to note however, that s 35 is not the source of the priority: See *R v Denny* (1990) NSCA approved in *Sparrow*.

[86] Division 2A ss 21 and 22A, 22 F. These are called intermediate period acts. Although not technically the same category of acts, for general purposes throughout this text they are included in the term 'past acts'.

[87] Division 2, s.14, s.19.

[88] Category D past acts are any act that is not a category A, B or C past act , which cover certain grants of freehold, certain leases, and mining leases.

holders (although it may still operate against third parties). The procedural rights needed for a future act under subdivision H specify only that native title holders must receive notice of the Act, and be provided an opportunity to comment.[89] For all other offshore acts, the procedural rights are those that would apply to any "corresponding non-native title rights and interests". This is a difficult test to apply when assessing what kinds of interests, especially offshore interests, 'correspond' to the unique *(sui generis)* form of title recognised by the High Court in *Yarmirr*.

It appears that native title holders may have no greater rights than those provided to other interest holders by the legislation authorising the Act. In most instances it is likely that this will entail no more than a right to be notified and to make comment and compensation. The right to negotiate under the *Native Title Act* certainly does not apply offshore. It will be interesting, in this regard, to see if a right to be consulted is capable of recognition as a native title right. It should be noted that these procedural rights do apply equally to native title applicants as well as registered native title holders. This recognises that native title exists at common law regardless of a determination by a court.

Notifications are required to include a "clear description of the area that may be affected" and "a description of the general nature of the act".[90] Recent cases however have revealed that the Courts will not require authorities to provide native title holders with a level of clarity as to the precise area affected, as it may not be sufficient to identify particular places of significance and are not prepared to invalidate acts that fail to comply with these requirements.[91]

Compensation

Native title holders, whose rights have been affected by past acts are entitled to compensation under the *Native Title Act*.[92] Under common law, the High Court held in Mabo that governments were free to discriminate against Indigenous people in the arbitrary extinguishment of their interests in land without compensation, despite the Constitutional, statutory and common law protection afforded to non-Indigenous interest holders.[93] However, they recognised that such practices were racially discriminatory and therefore prohibited by the *Racial Discrimination Act* introduced in 1975. From that time, just terms, provisions and compulsory acquisition laws were to apply equally to native title.[94]

The validation of past acts relating to offshore areas under the *Native Title Act*, while ensuring their validity, gives rise to compensation. The compensation is payable by either the Commonwealth or the State, depending on who the act is attributed to, but not by any third party who acquired an interest as a result. Compensation, if not specifically provided for in the relevant division of the past acts provisions, is provided for in Division 5 and is determined, under s.51. Compensation is provided on the basis of 'just terms' if it relates to a compulsory acquisition or otherwise in accordance with the principles set out in any relevant compulsory acquisition legislation. Section 51A seeks to limit compensation to the value of a freehold estate. This principle would be difficult to apply to offshore acts, although the operation of the provision is unclear as it is subject to the 'just terms' test.

The Act also provides for non-monetary compensation. In formal hearings requests for non-monetary compensation may be made to the Federal Court, including the transfer of property or the provision of goods and services. The request must be considered and may be recommended by the Court. This also applies to future act compulsory acquisition processes. If just terms compensation is payable in accordance with compulsory acquisition legislation, requests for non-monetary compensation must be considered and negotiated in good faith.[95] These provisions apply to offshore acts [s.24NA(5)] but may also be relevant to onshore compensation negotiation where native title holders may be seeking outcomes involving offshore interests, such as commercial fishing ventures or management and conservation outcomes in relation to the coastal waters or territorial seas.

[89] S.24HA(7).
[90] Native Title (Notice) Determination 1998 s.8(3) Gazette 2 September 1998.
[91] *Harris v Great Barrier Reef Marine Park Authority* (FCA Q23 of 1999, 5 August 1999, per Justice Kieffel; *Lardill*.
[92] ss.17, 20 and 22D, 22G.
[93] This assessment of the ratio of *Mabo* depends on the statement of Chief Justice Mason and Justice McHugh summarising the Court's finding, at 15-16.
[94] *Mabo v Queensland* [No.1] (1988) 166 CLR 186.
[95]

Native title and oceans management

The impact of native title on developing policy and proposals for oceans management is not simply a matter of negotiating particular successful native title applications according to the limits recognised by the determinations in each case. The recognition of native title to the seas is not simply the incorporation of a new property interest within the current structures of marine tenure and licensing. Native title reflects a much more complex relationship between Indigenous people and the institutions of government.

Native title recognises the inherent, pre-existing and continuing rights of Indigenous people as self-governing. It recognises the legitimacy and authority of these societies to determine their relationship with their country. It recognises a sphere of authority and autonomy, capable of expression against the world. How that sphere of authority is to be exercised is a matter not just for determination under the native title processes but to be negotiated between Indigenous people and the various levels of government. For as long as Indigenous people wish to govern themselves to a degree, whether to determine their relationship with their lands and waters, with each other, or with the state, then the right to be involved in decisions affecting their traditional country will continue to be asserted.

The recognition that native title exists offshore, despite the limitations as to exclusivity, recognises the legitimate interests of Indigenous people to be involved in decision making over their sea country. The recognition of native title in individual cases will provide some limited procedural rights in the face of proposed developments or management proposals. However, there is a more general recognition of Indigenous people as stake holders in the management and exploitation of the marine environment. Indigenous people will use native title and other mechanisms to be involved in:

- area management
- the protection of sites of cultural and spiritual significance
- the incorporation of cultural knowledge into management practices
- species management
- involvement in the management of commercial and recreational fishing and tourism
- involvement in proposals and development of new marine parks and management plans
- recognition of native title over and joint management of existing marine parks and other protected areas
- priority or special consideration in the issuing of future commercial licences.[96]

These objectives will be pursued both within and outside the native title process. The limitations of native title and the onerous requirements of proof have led to a culture of consultation and agreement-making at all levels of government policy development and implementation. Particularly in the southeast of Australia, protocols are being developed between Indigenous people and State Governments to deal with these limitations.

Pursuant to the Victorian Government's commitment to 'a whole of government approach' to native title, the Victorian Environment Conservation Council in developing Box-Ironbark Forests and Woodlands recommendations sought to "take into account Indigenous interests … regardless of what title Indigenous people may have to the land, water and resources". While the ECC recognised there may be particular rights and interests of native title holders to the lands, waters and resources that would need specific consideration, consultation with the relevant Aboriginal communities at every stage of the policy development was imperative.[97]

The recognition of native title has arguably heightened the responsiveness of policy and legislation to the legitimate right of Indigenous people to be involved in decision making. In contrast between the need to fit into the cracks and adapt to old management regimes in order to be included, Indigenous involvement under recent proposals reflects a different culture of policy development.

[96] see for example, Address by Councillor Robert Towney, Chairperson NSWALC, 10 May 2000.
[97] See Environment Conservation Council, Box Ironbark Forests and Woodlands Investigation, pp. 44-5.

Indigenous Land Use Agreements

As part of the 1998 Amendment package, comprehensive provisions were introduced for the negotiation and registration of native title agreements called 'Indigenous Land Use Agreements' (ILUAs). In the original Act, s.21 (as it then was) merely stated that native title holders could enter an agreement with the State or Commonwealth to surrender their title, or to authorise a future act. Subsection (4) was merely a negative reference to the fact that this section did not prevent agreement being made on a regional or local basis.

Most parties to the amendment process recognised the need for greater substance in this broad provision to provide a legislative regime to support these kinds of agreements. It also recognised the desire on the part of commercial and Indigenous interests to be able to deal directly with each other in relation to particular projects. As a result, the ILUA provisions are directed primarily toward local commercial agreements.

The registration provisions for ILUA provide certain benefits to registered ILUAs over other agreements that make such an agreement more secure than an ordinary contract and provide greater flexibility in negotiating the provision of the Native Title Act relating to future acts.

The Act provides for three different types of ILUAs, depending upon the subject matter of the agreement, the parties to be involved and the procedures for registration.[98] ILUAs are primarily being used to validate future acts that would otherwise be invalid because they have not gone through the procedures set out in the Act, whether those acts have already been done or may be done in the future. Of these, the majority concern mining proposals or local developments such as infrastructure or tourism projects.[99]

ILUAs can reach agreement to change the effect of an act on native title, for example to provide for non-extinguishment or surrender where it would not otherwise be a consequence of the proposed act.

They can also define the relationship between native title and other rights and how the respective rights are to be exercised. They can also determine compensation for past or future acts. As a result, a number of ILUAs are being negotiated to provide access to country and co-existence of interests on pastoral leases.

ILUAs are also being used for the co-management of national parks, and the use of sea resources.

The three types of ILUAs are:

- **Body Corporate Agreements:** these agreements require one or more Prescribed Body Corporate (PBC) to be involved. Government must also be a party if extinguishment or surrender of native title is required. Therefore, these kind of agreements can only be made where a formal determination of a native title has been made and the PBC established. Any other person, including government, may be a party.

- **Area Agreements:** these agreements can be made were there are PBCs covering the whole of the area subject of the proposed agreement. Therefore they may cover areas where native title has not yet been determined. The parties must include the 'native title group', defined under the Act at s.24CD to include any registered native title claimants, and registered native title bodies for the area and any other Indigenous person who asserts common law native title. These agreements must be authorised by the native title group, either through certification by the Native Title Representative Body that all potential native title holders have been identified or by the parties certifying that 'all reasonable efforts' have been made to identify the native title holders. Again, any other person, including government may be a party and government must be a party if surrender is required.

[98] For greater detail see Diane Smith, Indigenous Land Use Agreements: New Opportunities and Challenges under the Amended Native Title Act, *Land Rights Laws: Issues of Native Title* Regional Agreements Paper no. 7, December 1998. See also, Patricia Lane, 'A Quick Guide to ILUAs', in Bryan Keon-Cohen (ed), *Native Title in the New Millenium*, Aboriginal Studies Press 2001 (also available at nntt.gov.au)

[99] see Joint Parliamentary Committee on native title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into Indigenous Land Use Agreements, September 2001.

- **Alternative Procedure Agreements:** Again, an alternative procedure agreement can be made where there are no PBCs covering the whole area and may therefore be entered into before a determination of native title. Alternative Procedure Agreements may include any of the matters under s.24DB but may also over a framework for developing other agreements. These agreements cannot provide for extinguishment of native title because they do not necessarily require native title holders to be parties. These 'institutional' agreements require all relevant PBCs, Native Title Representative Bodies and all relevant governments to be a party.

Indigenous Land Use Agreements, despite the complexity of the regime and the requirements for registration, have proved a popular option for native title holders and other interest groups to enter into more flexible negotiations than those of the mediation and consent determination processes. The subject matter over which an ILUA can be reached is broad enough to capture most land and water management issues and commercial developments. Over 30 ILUAs are now registered with the National Native Title Tribunal, but over 150 are currently being negotiated through the Tribunal processes. Even more agreements are being negotiated outside of the ILUA process.

Some examples of existing agreements include:

- **Agreements concerning waters:** An ILUA has been registered between a local water authority and a native title group to allow the raising of the water level in the Awoonga Dam near Gladstone (National Native Title Tribunal press release PR01/21, 20 March 2001).

- **Agreements concerning coastal land and adjacent waters:** There have been agreements concerning coastal land abutting commercial fishing and tourism ventures in South Australia. The Narungga people's agreement over the development of a marina at Port Vincent in South Australia provides one such example. The Agreement recognised the attachment of the Narungga to the land and waters of the Yorke Peninsula and provided protection for cultural heritage in the development of the marina.

  The potential for flexible compensation outcomes may mean that ILUAs developed in relation to land may have implications for oceans management. Many seafaring and coastal communities will be interested in the development of commercial fisheries or joint management arrangements and may wish to include these outcomes in negotiations over lands and coastal developments.

- **Agreements over mining and resource development:** The Minerva Gas Fields Agreement between the Kirrae Whurrong Native Title Group, the Victorian government, the NTRB for Victoria, Mirimbiak Nations Aboriginal Corporation, Framlingham Aboriginal Trust, and BHP, signed in November 1999, required a cultural heritage survey and cultural heritage plan. The agreement deals mostly with coastal heritage but given the recognition of greater rights over places of significance in territorial waters may provide a model for exploration offshore.

  The agreement gives the go ahead for BHP Petroleum to construct a pipeline from the Minerva Gas Field (10 km south of Port Campbell in the Southern Ocean) to the coast passing through the Port Campbell National Park to a gas plant approximately 4 km northwest of Two Mile Bay. For local Aboriginal people, the agreement provides heritage protection and management, employment opportunities and financial benefits. The agreement does not extinguish native title. (NNTT Press release PR99/31, 14 July 1999).

[100] The status of this policy is unclear as the government has expressed reservations about the full recognition of native title rights and interests in national parks.

- **Agreements concerning conservation and national parks:** An Indigenous Land Use Agreement between the Arakwal People of northern NSW and the State Government over land at Cape Byron was the first ILUA to involve a State Government and the first to establish a national park. The agreement also involved the National Parks and Wildlife Service, the Department of Land and Water Conservation, the NSW Aboriginal Land Council, the Byron Shire Council and the many local and regional interest groups.

  The New South Wales Government had reached an agreement in 1999 with the NSW Aboriginal Land Council that recognised that the state had created national parks in land and waters which may be subject to native title and pledged to enter into ILUAs regarding their ownership and management.[100]

  The South Australian government is currently negotiating agreements for specific national parks and improvements to heritage protection schemes.

Many agreements that are currently being negotiated, and certainly many of those that have been resolved, have required extinguishment of native title. Native title is still often seen as an impediment to development rather than as a potential partner. It is perhaps a consequence of perceiving native title as a late comer to our way of doing business, and a problem that must be managed successfully so as not to interfere with business in the long run, rather than the original underlying title which reflects ongoing rights and responsibilities.

An agreement to extinguish native title rather than suspend rights, or institute co-existence agreements creates difficult issues in terms of quantifying compensation for permanent extinguishment, and is a difficult proposition for current native title holders in terms of inter-generational responsibility. It is also often unnecessary to the effective implementation of development plans.

State-wide framework agreements and negotiation protocols

In devising the ILUA processes, there was a perception that the State Governments were compromised in their ability to support agreement processes because they were opposing native title claims in the determination process. Moving the focus toward commercial development agreements and away from government has a number of implications. The first has been recognised in the emergence of state-wide framework agreements and protocols.

One of the most important issues in relation to Indigenous-governmental relations is the demonstration of respect, recognition and goodwill. There has been an attempt on the part of a number of State Governments to break away from the animosity that was created during the amendment process by negotiating directly with the Indigenous representatives in their state to reach agreement on protocols for proceeding with native title claims and agreements.

The state-wide framework agreements are a positive development in this sense. They recognise the need for State Governments to deal directly with Indigenous people on an equal footing. This establishes a relationship in a way that, for example, mediation on particular claims may not be necessary where native title holders are one of dozens (if not hundreds) of 'interest holders'.

South Australia: The South Australian Government and the Representative Body for South Australia, the Aboriginal Legal Rights Movement, are utilising the ILUA process to negotiate a State-wide framework agreement. The framework will be implemented through a number of Alternative Procedure Agreements and specific agreements, which will endeavour to establish more effective processes for decisions about issues that affect all native title claims.[101]

[101] SA government submission to the ILUA Inquiry (submission no. 6).

Victoria: In 2000 the Victorian government signed a protocol with the native title representative body for Victoria, Mirimbiak Nations Aboriginal Corporation, and ATSIC. Pursuant to this protocol, the Victorian government has recently released *Guidelines for Native Title Proof*. The protocol and the *Guidelines* commit the government to resolving native title claims through mediation. In doing so, it is hoped that a more flexible approach to proof of connection will result in greater success in the recognition and protection of native title in that State and avoid repetition of the experiences of the Yorta Yorta. The Guidelines contemplate the use of Indigenous Land Use Agreements as an alternative to Federal Court determinations.

New South Wales: The NSW Government had negotiated a framework agreement in relation to National Parks to be developed under the Forestry and National Park Estate Bill. It appears that the Government has now backed away from the agreement that it suggests is too resource intensive and time consuming.

Tasmania: The Tasmanian Government has not had a great deal of involvement in the native title process, concentrating most recently on the transfer of Crown land to Aboriginal ownership under the *Aboriginal Lands Act 1995* (Tas). The introduction of the Aboriginal Lands Act was a recognition of the difficulty of proof of connection in Tasmania given the history of attempts to eradicate the Indigenous population, the forced removal of the population on to islands and reserves, and the denial of Indigenous Tasmanian identity well into the 1970s.[102]

The relationship with the proposed Treaty process

The recognition of native title and the Indigenous Land Use Agreements processes have created an environment for, and an expectation of, agreement making in the whole community which has no doubt fostered current calls for a treaty process that will deal with broader claims. Indigenous people's rights have greater recognition and their right to negotiate with government is more accepted, however long it may take to agree on a process and outcomes.

The native title process, and in particular the ILUA process, cannot respond adequately to the responsibility of governments to resolve these historical and current social and political claims. Providing a mechanism for future act agreements does not remove the need for negotiations between Indigenous people and government over outstanding issues, including historical loss, autonomy options and importantly, involvement in decision-making and natural resource management over country. These broader issues cannot necessarily be fully incorporated into the ILUA process.

If Indigenous people are not engaged in negotiations with the State or Commonwealth Government over these fundamental issues then they will seek these outcomes in the processes that they *are* involved in.

Resourcing negotiations

The resourcing of negotiations is an issue that is raised by both sides of the bargaining table. The chronic under-funding of Native Title Representative Bodies has been recognised as the demands on them continue to rise.[103] The strain on resources for native title claims, let alone ILUA negotiations, has been part of the reason that the burden for funding these negotiations has been laid at the feet of proponents of development. But funding is not the only resource constraint. Indigenous communities are stretched in terms of their capacity, by the rigours of the native title process, producing evidence for applications, participating in mediation meetings and sustaining intra-Indigenous cooperation. For those that are involved in litigation, the additional strain and time of that process further limits their capacity to negotiate.

In this environment, the ILUA processes cannot be as speedy and efficient as those involved might like because they are inextricably tied to this web of processes that Indigenous people and their representative bodies are responding to. There is an ongoing need for assistance and resources to build the capacity, through information, training and personnel.

[102] Tasmania, Government response to the Legislative Council Select Committee on Aboriginal Lands, August 2000, pp. 20-1.
[103] Most recently see the Parliamentary Joint Committee on Native Title, Report on the ILUA inquiry, op.cit.

Commonwealth and State Legislation

Introduction

This section summarises some of the legislation which recognises, or can be applied, to protect the rights and interests of Indigenous Australians within the South-east Marine Region. It focuses on legislation which is administered primarily to protect the marine environment (including marine protected areas), manage fisheries, and recognise and protect cultural heritage (including through place names).

The summary includes an examination of relevant Commonwealth and State legislation. Under Offshore Constitutional Settlement Agreements, the 1992 Intergovernmental Agreement on the Environment and the 1997 Council of Australian Governments (COAG) Agreement on Commonwealth/State Roles and Responsibilities for the Environment, the legislation of either jurisdiction might apply. While it is more likely that Commonwealth legislation will apply beyond the States' coastal waters, where State title and legislation applies (ie beyond three nautical miles from coastal baselines), Commonwealth legislation can also apply to low water mark, and inland.

This summary does not include more generally applicable legislation, such as that relating to environmental protection, pollution control, planning and local government, military activities, tourism, historic shipwrecks or native title. Legislation relating to these issues may include some capacity to recognise or protect Indigenous interests in the sea and is included in the comprehensive list of Commonwealth and State legislation provided in Appendix 3.

Commonwealth marine environmental and protected area legislation

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), is a result of the Federal Government's major consolidation and reform of its environmental legislation. It includes various provisions that recognise the important contributions that Indigenous Australians can make to the conservation of biological diversity and sustainable development, including in marine areas. Many of its provisions of broader application can also be used to protect areas and species that are highly valued by Indigenous organisations, communities or persons.

The objectives of the EPBC Act include the promotion of a cooperative approach to the conservation and ecologically sustainable use of Australia's biodiversity, involving governments, the community, land-holders and Indigenous people [s.3(1)(d)]. Other objectives include recognising the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity, and the promotion of the use of Indigenous knowledge with the involvement of, and in cooperation with, the owners of such knowledge [s.3(1)(f) and (g)]. The Act also provides for:

- An Indigenous Advisory Committee to advise the Minister on the operation of the Act, taking into account the significance of Indigenous people's knowledge of the management of land and the conservation and sustainable use of biodiversity [ss.505A and 505B].

- The creation of Boards with majority Indigenous membership, to manage Commonwealth reserves, including marine reserves [ss.343–352]. Co-management arrangements are not available under the EPBC Act. Co-management provisions only apply where the appropriate land council and the Minister agree to such arrangements, and the Commonwealth reserve is wholly or partly on Indigenous people's land that is leased to the Director of National Parks [ss.374–383, EPBC Regs Part 11]. 'Land' is defined in the Act to include subsoil of land and any body of water (whether flowing or not) except the sea [ss.345(2)].

- Each Commonwealth reserve is assigned an IUCN category [s.347]. The Environment Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations) include the principles by which each category of protected area is managed [s.348]. The Commonwealth, State and Territory Governments are currently cooperating to establish a National Representative System of Marine Protected Areas, using the Interim Marine and Coastal Regionalisation of Australia. Relevant management principles are prescribed in the EPBC Regs. Part 10, and Schedules 5-8. The regulations also regulate other commercial activities in Commonwealth reserves, including commercial and non-commercial fishing. There are two

marine protected areas declared in the South–east Marine Region: the Macquarie Island Marine Park and the Tasmanian Seamounts Marine Reserve. Indigenous cultural values have not been raised in relation to either of these protected areas.[104] A Commonwealth marine protected area may also be declared around Heard and McDonald Islands in the future, but again, Indigenous Australians are unlikely to have interests that are directly affected.

- The continued operation of the *Native Title Act 1993* (Cth), including s.211 which deals with hunting, fishing and gathering native title rights. Section 8 continues the operation of the Act concerned with Indigenous Land Use Agreements, and other provisions that apply in relation to offshore areas. The EPBC Act also allows Aboriginal and Torres Strait Islander people to continue traditional and non-commercial hunting, food-gathering or ceremonial and religious activities in 'Commonwealth reserves'. However, such activities may be restricted by regulations made to conserve biodiversity and are expressed to affect the traditional use of the area by Indigenous persons [s.359A]. Amendments to the EPBC Act in 2001 concerned with the regulation of trade in species and matters arising under the CITES,[105] reiterated (so as to avoid doubt) that the amendments would not prevent an Indigenous person from continuing in accordance with law the traditional use of an area for non-commercial hunting, non-commercial food gathering, or ceremonial or religious purposes [s.303BAA]. The EPBC Regulations also provide that the Director of National Parks and a land council may agree to conditions under which Indigenous Australians may engage in prescribed activities in Commonwealth reserves, which are then not offences under the Act [para 12.06 (1) (d), sub-reg 12.08 EPBC Regs]. These activities include entry into restricted or prohibited areas, the taking or keeping of a native species and the carrying out of a cultural activity.

- Indigenous Australian's interests to be addressed when bilateral agreements [para 50(a)], management plans [ss.367, 368], recovery plans [para 270(3)(e)], wildlife conservation plans [para 287(3)(e)] or threat abatement plans [para 271(3)(e)] and when permits to take listed species are issued to Indigenous Australians [para 201(3)(c), ss.201(4) and para 258(3)(c)].

- The Minister to enter into conservation agreements for the protection and conservation of biodiversity in the Australian jurisdiction [Part 14]. The Act includes provisions concerned with conservation agreements between the Minister and specified Indigenous persons for the protection of biodiversity on land on which Indigenous Australians have usage rights [ss.305(5)]. The Minister must take into account key provisions of the Convention on Biological Diversity concerned with the rights and interests of Indigenous and local communities [ss.305(6)]. Conservation agreements are legally binding and can bind successors in title to affected interests [s.307], although they can also be varied and terminated [s.308].

Enforcing the Act

Wardens and rangers are primarily responsible for enforcing the EPBC Act and regulations. The provisions of the Act could be exercised to enable Indigenous Australians to be recruited, trained and appointed as wardens, rangers or inspectors under the Act, and particularly where public sector employers and statutory agencies (such as the Aboriginal and Torres Strait Islander Commission) are prepared to promote or facilitate this. A warden or an inspector under the EPBC Act is an 'authorised officer' who may exercise a range of enforcement and monitoring powers and take various actions under the Act [Part 17]. The EPBC Regs also specify various additional powers, functions and duties of wardens, rangers and/or inspectors in specific circumstances [EPBC Regs. Part 12, 14].

Indigenous Australians who are Federal or State public servants or employees of public authorities may be appointed as wardens or rangers. Indigenous Australians who are not necessarily public sector servants or employees may be appointed as inspectors under the Act.

[104] Leanne Wilkes, A/g Director, Marine Parks, Environment Australia, pers. comm. 31 Oct. 2001.
[105] CITES means the Convention on International Trade in Endangered Species of Wild Fauna and Flora done at Washington on 3 March 1973.

Environmental impact assessment procedures

The EPBC Act requires approvals to be issued for actions (controlled actions) that will, or may have, a significant impact on matters of national environmental significance, including:

- in a Commonwealth marine area [s.23(1)] that does not involve fishing in a State or Territory fishery
- an area outside a Commonwealth marine area but in the Australian jurisdiction that would have a significant impact in a Commonwealth marine area [s.23(2)]
- fishing in State or Northern Territory waters in a Commonwealth-managed fishery that is likely to or would have a significant impact on the environment in those coastal waters [s.23(3)]
- on listed wild threatened species or communities [s.18]
- on listed migratory species [s.20]
- in a World Heritage area [ss.12 and 13]
- on a declared Ramsar wetland
- any other matter(s) of national environmental significance prescribed by regulations.

Under the Act (ss.15A, 17B, 18A, 19, 20A, 24A, 67) approval must be granted for a person to take an action (a 'controlled action') that has an impact on matters of national environmental significance. Approval may not be required if a bilateral agreement exists, or for some other reason approval is not required (for example under ss. 33, 43, 46, 160).

Before issuing an approval, the Federal Minister may choose to have the action assessed under one of a range of assessment methods [s.87]:

- an accredited assessment process
- an assessment on preliminary documentation
- a public environment report
- an environmental impact statement
- a public inquiry.

Alternatively, the Minister can use another method under a bilateral agreement [s.83], or he or she can declare that the action should be assessed in another way [s.84]. Published guidelines may guide the Minister's decision [s.87(6)].

Whichever method is chosen, the 'relevant impacts' of actions must be assessed [s.82]. These are the impacts that the action has, or will have, or is likely to have, on the matter. The Act and the regulations prescribe what information has to be included in the assessment report, and for each category of national environmental significance. For example, if the 'relevant impacts' are to be assessed using a draft public environment report or environment impact statement, the Minister must prepare written guidelines for the content of the draft report or impact statement about those impact [s.102]. The Minister has to ensure that the assessment report and statement include enough information to make an informed decision. The information must include the matters listed in Schedule 4 of the EPBC Regulations (reg. 5.04). Additional information may also be required if the proposed action will take place in a State or self-governing Territory; the appropriate Minister has asked that certain impacts be addressed; and the action involves relevant trade or commerce. Additional information may also be needed if the regulation is appropriate to give effect to Australia's international legal obligations [s.97(3)].

Under current procedures, the rights and interests of Indigenous Australians are not addressed in the content of these assessment reports. Some regulations do recognise cultural values. For example, assessments of impact in World Heritage areas do need to take account of the World Heritage values of the property, and these may include cultural values (EPBC Regs, Schedule 5). There are no World Heritage sites yet listed for cultural values, or mixed natural/cultural values in the South-east Marine Region.

The guidelines detailing the content for impact statements are merely administrative guidelines. However, it is possible that these could be amended to require that the cultural values ascribed to the environment by Indigenous people be taken into account before an approval is issued under the Act.

In this way, Indigenous cultural values could be included in the 'significance' guidelines and in the guidelines specifying what content is required in impact assessment reports. This would be consistent with the objectives of the Act, which include that its provisions should be interpreted in a way that recognises Indigenous people's knowledge of and values as noted above.

It is interesting to note that cultural heritage values were required to be identified in the draft guidelines issued in 2000 for the preparation of the pre-EPBC impact assessment for the proposed Tasmanian Natural Gas Project. The guidelines referred to the principles contained in the Intergovernmental Agreement on the Environment (1992) and the Australian and New Zealand Environment and Conservation Council (ANZECC) Basis for a National Agreement on Environmental Assessment (1997). The guidelines also noted that the Victorian, Tasmanian, and Commonwealth Governments had agreed to a coordinated environmental assessment process, including joint guidelines for the preparation of a consolidated environmental assessment document. They require that the assessment report identify Aboriginal heritage sites and places and non-Aboriginal cultural heritage sites that could be affected by the project. The assessment had to include:

- cultural heritage sites and places listed, interim listed and additional unlisted sites or areas, as well as areas of sensitivity for unidentified archaeological sites which may be affected by the project
- information on sites or areas of landscape, aesthetic, wilderness, and other listed values
- any places listed or interim listed on the Register of the National Estate
- any places listed on the Tasmanian Heritage Register etc (EA, DI, DPIWE, 2000).

The Federal Government has proposed that the EPBC Act be amended in relation to heritage matters. The Environment and Heritage Legislation Amendment Bill (No.2) 2000 lapsed with the calling of the 2001 Federal election. The Bill was to give effect to the outcomes of the 1997 Council of Australian Governments (COAG) Agreement on Commonwealth/State Roles and Responsibilities for the Environment. COAG agreed on the need to rationalise existing Commonwealth/ State arrangements for the identification and protection of heritage places. COAG agreed that the Commonwealth's role should be focused on places of national heritage significance.

The Bill had proposed that a National Heritage List would be created to consist of natural, historic and Indigenous places of outstanding national heritage significance. The listing process was to include a mechanism for consideration of public nominations, but the Minister would be primarily guided by advice from the Australian Heritage Council. The bill proposed that places on the National List would be identified under the EPBC Act as a matter of national environmental significance. The EPBC Act framework for Commonwealth/State co–operation in relation to this assessment and approval process would also apply.

In May 2001, the Senate Environment, Communications, Information Technology and the Arts References Committee, reported on the Environment and Heritage Legislation Amendment Bill (No. 2) 2000, the Australian Heritage Council Bill 2000, and the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000. The Committee expressed concern that the inter-relationships of these proposed Acts with the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (and proposed replacement, discussed below) were not clear. Relying on expert anthropological evidence, the Committee also suggested that the proposed EPBC Act's focus on 'national significance' would undermine current protections for Indigenous heritage, which may be highly significant to local communities, but would not necessarily be accorded national heritage significance. The Committee requested clarification about these issues.

Commonwealth heritage legislation

Natural Heritage Trust of Australia Act 1997 (Cth)

The Natural Heritage Trust (NHT) is established under the *Natural Heritage Trust of Australia Act 1997* (Cth). It supports the conservation, sustainable use and repair of Australia's 'natural capital infrastructure'.

Arguably the most important NHT program for Indigenous communities is its funding of co-operative joint management arrangements for protected areas, and the Indigenous Protected Areas Program (IPAP). The program is an important component of the National Reserve System Program (NRSP) which is currently administered by the Indigenous Policy Section within Environment Australia, in cooperation with State and Territory agencies. The NRSP aims for the better conservation of Australia's biodiversity by establishing and maintaining a comprehensive and representative national system of protected areas. Between 1997 and 1999 about $2 million was committed from the Trust to fund projects in the IPAP.

The IPAP works with Commonwealth, State and Territory agencies to develop partnerships and agreements with Aboriginal and Torres Strait Islander organisations for the cooperative management of their land and/or sea as a protected area. It also promotes and integrates Aboriginal and Torres Strait Island people's ecological and cultural knowledge in the management of Indigenous Protected Areas.

The IPAP describes the conservation agreements it establishes for funded areas as stewardship agreements. These are based on the development of partnerships between government, landholders to manage their land primarily for the conservation of biodiversity and the recognition and protection of cultural values. Under the Program, Environment Australia proposes that stewardship agreements be established for periods of three to five years, with joint proposals from governments and Indigenous organisations being considered most favourably.

The two main elements of the IPAP are:

- Indigenous Protected Areas (IPA) – the establishment and management of protected areas on Indigenous owned estates
- cooperative management – the establishment of cooperative (joint) management arrangements over government owned protected areas between Indigenous groups and the relevant government nature conservation agencies.

A significant IPA in the South-east Marine Region is Deen Maar, on the southwest coast of Victoria, near the community of Yambuk. The local language was Peek Whurrong for this Dhauwurdwurung (Gundidjmara) nation who are the Traditional Owners of the area, now represented by the Framlingham Aboriginal Trust. The IPA is close to Deen Maar Island (Lady Julie Percy Island) associated with Bunjil, the Creator, which is also linked by a storyline to Gariwerd (the Grampians National Park). This community regards their whale Dreaming as spiritually significant.

The National Recreational and Indigenous Fishing Survey (National Survey) is also being partially funded by the NHT's Fisheries Action Program. It is also funded by the Fisheries Research and Development Corporation (FRDC) and all State and Territory fishery agencies. This survey may provide little useful data about Indigenous fishing practices in the area of the South–east Marine Region because the participating Indigenous communities are located across northern Australia, from Broome to Cairns.[106] Any statistics produced across the top-end could not be credibly adapted for southern contexts.

The NHT is also funding a study of Aboriginal fisheries in central and southern NSW by the College of Indigenous Australian People, Southern Cross University. The study will identify and describe Aboriginal fisheries and related traditional knowledge in those areas; raise awareness about the role of NSW Fisheries in fisheries management; and raise the awareness of NSW Fisheries about the existence and distinctive nature of Aboriginal fisheries. It will also identify areas where Aboriginal people can actively participate in fisheries management, and establish regional Aboriginal fisheries working groups and an Aboriginal fisheries database.

[106] Ref: http://website linkaffa.gov.au/content/output.cfm?ObjectID=D2C48F86–BA1A–11A1–A220006oBoA01291.

Aboriginal and Torres Strait Islander Heritage Protection Act

Federal heritage legislation of relevance to Indigenous Australians' offshore cultural heritage is in the midst of a stalled reform process. The *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* (Cth) lapsed when Parliament was dissolved for the 2001 Federal election. Its passage was already uncertain however, following the inability of the Government and opposition parties to agree on compromise amendments. The Senate had agreed to nearly 180 amendments which were not acceptable to Government members in 1999 and the Bill made little progress in 2000-2001 (Sutherland 2000). The Bill was the then Federal Government's legislative response to the recommendations of the Hon. Justice Evatt's 1996 report on the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act).

The purposes of this Act are to preserve and protect from injury or desecration of areas and objects in Australia and in Australian waters that are of particular significance to Aboriginals in accordance with Aboriginal tradition. The Act defines "Australian waters" as:

- the territorial sea of Australia and any sea on the landward side of that territorial sea
- the territorial sea of an external Territory and any sea on the landward side of that territorial sea
- the sea over the continental shelf of Australia.

It defines "significant Aboriginal area" as :

- an area of land in Australia or in or beneath Australian waters
- an area of water in Australia
- an area of Australian water

being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

Justice Evatt's review of the Act highlighted numerous shortcomings. The Act was only ever intended to be interim legislation and it is used only as a last resort, after State and Territory processes had been expended. The Minister administering the Act has wide discretion, and this has led to protracted legal challenges. The Act is regarded as having limited effectiveness, particularly in its failure to adequately protect confidential information, spirituality and beliefs. The Act also gives inadequate recognition to Indigenous organisations' wishes to be involved in negotiation and decision-making about their heritage (Evatt, 1996).

Australian Heritage Commission Act 1975

The *Australian Heritage Commission Act 1975* established the Australian Heritage Commission (AHC). The Commission acts as an independent advisory body for the Minister for the Environment and Heritage. Its role is to identify places to be entered on the Register of the National Estate. The National Estate consists of those natural or cultural places in Australia that have aesthetic, historic, scientific or social significance [s. 4]. It can include places located in the territorial sea and on the continental shelf [s. 4(2)].

The Commonwealth Government must consult the Commission about proposed actions that may damage the values of a place listed on the National Estate. In addition, the Commonwealth cannot take action that adversely affects the values of a place in the Register or the Interim list, unless there is no feasible and prudent alternative to this action. In such cases damage must be minimised (s.30).

The Commission is also responsible for taking actions to conserve, improve and present the national estate, and for granting Commonwealth financial or other assistance to implement the Act. The Register of the National Estate includes various coastal sites of significance to Indigenous Australians.

Proposed heritage legislation reforms

The Australian Heritage Commission may be replaced by an Australian Heritage Council if the reform package of heritage bills is reintroduced to Federal Parliament and passed. The Australian Heritage Council Bill 2000 proposed the establishment of the Australian Heritage Council to replace the Australian Heritage Commission. Its primary function will be to advise the Minister on the identification, conservation and protection of places on the National Heritage List, the Commonwealth Heritage List and heritage matters under the EPBC Act.

Clause 5 of the Bill lists the functions of the Council, including:

- to make any assessments requested by the Environment Minister under the EPBC Act
- to give any advice requested by the Minister on the conservation and protection of certain places with heritage values
- to give any advice requested by the Minister on a wide range of matters relating to research, education, policy issues, funding, monitoring and the Commonwealth's responsibilities for historic shipwrecks
- to nominate places for inclusion in the National Heritage List or Commonwealth Heritage List
- to perform any functions conferred on the Council by the EPBC Act.

If formed, the Council will consist of eminent experts from the fields of natural, Indigenous and historic heritage.

The Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000 provided for the repeal of the *Australian Heritage Commission Act 1975*, and for the removal of a reference to that Act in the EPBC Act. It also proposed arrangements for a smooth transition from the *Australian Heritage Commission Act 1975* to the new scheme established in the Australian Heritage Council Bill 2000 and the Environment and Heritage Legislation Amendment Bill (No.2) 2000.

Bill (No 2) extends the objects of the EPBC Act to provide for the protection and conservation of heritage. It proposes to include provisions in the Act relating to the identification of places for inclusion in the National Heritage List and Commonwealth Heritage List. "Places" is defined broadly to include "a location, area or region" in relation to the protection, maintenance, preservation or improvement of a place and its immediate surroundings. The Bill creates offences in relation to actions taken against protected heritage in "a Commonwealth area". Commonwealth areas are defined in the EPBC Act to include the coastal sea of Australia, the continental shelf and the waters and airspace above it; the waters of the exclusive economic zone, the seabed under those waters and the airspace above. any other area that has, will have or is likely to have a significant impact on the national heritage values of a national heritage place [s.525 EPBC Act].

The Bill aims to enhance the protection, conservation and presentation of protected heritage places. It proposes to insert into the EPBC Act a definition for the Indigenous heritage value of a place as "the heritage value of the place that is of particular significance to Indigenous persons in accordance with their traditions". The Bill enables the proposed Council to ask the Director of Indigenous Heritage Protection (proposed under the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998) to provide written advice on the place's Indigenous heritage value within 40 business days or within 20 business days for emergency listings.

Aboriginal and Torres Strait Islander people in Australia have an interest in what names are officially ascribed to geographic places within the South–east Marine Region, if those areas are of cultural significance.

The Commonwealth does not have a generic place names act. Place names in areas beyond State and Territory coastal jurisdictions are assigned by the Australian Hydrographer in the Royal Australian Navy, or pursuant to specific legislation.

There is a non-statutory Federal Committee for Geographical Names in Australasia (CGNA) which is located within the Intergovernmental Committee on Surveying and Mapping (ICSM). Its members include representatives of the Geographical Names Boards in the States and Territories, New Zealand (from 1998), and other members with an interest on nomenclature (such as Macquarie University from 1999). The Federal Committee approved guidelines for the use of Aboriginal and Torres Strait Islander place names in October 1995. The guidelines recognise the:

- need for consultation and recognition of community input to the place naming process
- principle of self-determination in place naming issues
- existence of traditional names
- existence of multiple names for one feature
- existence of Aboriginal and Torres Strait Islander place names before the arrival of Europeans in Australia
- equal status of oral recording of place names with that of documentation

- possibility that the use of some names will be subject to restrictions
- need to prefer Aboriginal or Torres Strait Islander names for features unnamed
- need to comply with the written form of a language, where one exists, from which a name is drawn
- need for the relevant communities' consent for a particular change to Aboriginal or Torres Strait Islander names
- need for full consultation with all bodies interested in place names, including National Parks Authorities and heritage bodies.

The EPBC Act is again relevant. It says that a proclamation declaring a Commonwealth reserve must give a name to the reserve; state the purposes for which the reserve is declared; state the depth of any land included in the reserve; state the depth of the seabed that is under any sea included in the reserve; and assign the reserve to one of specified IUCN categories [s.346]. The Act requires the Minister to consider a report about the proposed reserve before it is proclaimed by the Governor-General. The Act prescribes a consultation process, which includes the publication of information about the proposed reserve in the *Gazette* and in accordance with the regulations (if any) [s.351]. The notice must state the matter to be dealt with by the proclamation, and invite the public to comment on those matters. It has to include a statement of the proposed name of the reserve, its boundaries, purposes, and its IUCN category. The public consultation period must be at least 60 days.

Commonwealth fisheries legislation

Intergovernmental arrangements regarding fisheries management

In 1979 Australia declared an area of sea from the coast out to 200 nautical miles offshore as the Australian Fishing Zone (AFZ). The AFZ also includes the waters surrounding offshore territories, including Macquarie, Heard and MacDonald Islands. With a total area of nearly nine million square kilometres, the AFZ is the third largest fishing zone in the world. Australia is obliged to conserve and manage the fisheries within the AFZ. Foreign nations must obtain prior permission from the Australian Government to legally fish within these waters.

Responsibility for fisheries management is shared between the Commonwealth and the States and Northern Territory on the basis of the Offshore Constitutional Settlement (OCS). The OCS was agreed at the Premiers' Conference in June 1979 and took effect in 1983. Under the OCS, the Commonwealth granted title and legislative power to the States for a range of marine and seabed resources, including fisheries, extending from the low water mark to three nautical miles off-shore. Commonwealth jurisdiction falls over the remaining area, from three nautical miles to the outer limit of the AFZ. Provision was made within the OCS for cooperative fisheries and other resource management arrangements, the basic structure of which was seen at that time to entail the making of agreements regardless of the three nautical miles. Also, joint authorities could be established for the management of particularly fishery units.

These OCS arrangements seek to rationalise jurisdictional arrangements. One of the objectives of this process is to minimise the extent to which a single stock is subdivided between different jurisdictions, a practice which can have negative impacts in a number of areas, including higher costs of management and enforcement.

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

- joint authority management, where the Commonwealth and one or more of the States can form a single legal entity which manages a fishery under a single law, either Commonwealth or State
- State management, where a fishery is located off only one State, arrangements can be made to manage that fishery under a State law
- Commonwealth management, where a fishery is adjacent to more than one State, the fishery can, by agreement between all parties, be managed by the Commonwealth
- Status quo management (where State laws control fishing in coastal waters under three nautical miles from shore) and Commonwealth laws control fishing beyond the three mile line to 200 mile limit of the Australian Fishing Zone.

The Australian Fisheries Management Authority (AFMA) is the Commonwealth statutory authority responsible for the efficient management of Commonwealth fishery resources within the 200 nautical mile Australian Fishing Zone and, in some cases, by agreement with the Australian States, to the low water mark. AFMA provides management, advisory, compliance and licensing services and implements appropriate fisheries management arrangements.

Each Australian State and Territory has a Fisheries Research Advisory Body (FRAB) which provides advice to research funding agencies such as the Fisheries Research and Development Corporation (FRDC) about fisheries research priorities within the jurisdiction. The NSW Fisheries Research Advisory Committee (FRAC) is the NSW body. The Advisory Committee provides advice on behalf of key stakeholders (the Minister of Fisheries, commercial fishers, recreational fishers, aquaculturists, post–harvest sectors, conservation groups, and Indigenous stakeholders etc.). Its membership includes an Indigenous representative. The Advisory Body is established under a Memorandum of Understanding between NSW Fisheries, the NSW Indigenous Committee and the Advisory Committee.

Participation in management

The Australian Fisheries Management Authority (AFMA) is established under the *Fisheries Administration Act 1991* (FAA). AFMA administers the *Fisheries Management Act 1991* (FMA).

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

AFMA must ensure that the exploitation of fisheries resources and any related activities are conducted in a manner consistent with the principles of ecologically sustainable development [s.3 FMA, s.6(b) FAA].

Under the Act, AFMA may consult with persons or bodies representative of the whole or a part of the industry, recreational fishing, the Commonwealth, State or Territory Governments, Commonwealth and State/Territory fisheries authorities, and persons having a particular interest in matters associated with the industry (including members of the scientific community) [s.9]. AFMA may establish management advisory committees for particular fisheries [s.56], and also advisory committees other than Management Advisory Committees [ss.54, 55].

Management Advisory Committees

Management Advisory Committees provide advice to the AFMS Board. They must act in accordance with policies determined by, and any directions given by, the Authority [s.59]. MACs have power to do, on behalf of the Authority, all things necessary or convenient to be done for or in connection with the performance of its functions [s.58]. MACs are to comprise the Chairperson, the Authority officer responsible for the management of MAC fishery, and up to seven other members who are considered to have an interest in matters in relation to which the committee is established [s.60]. When appointing members to MACs, AFMA must try to ensure that the MAC "includes an appropriate number of members engaged in, or with experience in, the industry in the fishery in relation to which the management advisory committee is established" [s.62]. Most MAC members are scientific or industry members, and there are no identified Indigenous Australian members of MACs. AFMA have invited Indigenous Australians in the Northern Territory to attend MAC meetings for the northern prawn fishery. On several occasions this invitation has not been accepted.[107]

The *Fisheries Administration Act 1991* (Cth) also provides for a Fishing Industry Policy Council [s.3], although it has never been established, which has the objectives of:

- facilitating an exchange of views between persons having an interest in the industry on matters affecting the industry
- developing a unified approach to matters affecting the industry [s.97].

The functions of the council include:

- inquiring into and reporting to the Minister on matters affecting the industry, of its own motion or when referred by the Minister

[107] Phil Marshall AFMA, pers. com. 2 Nov 2001.

- developing for Ministerial consideration proposed measures to safeguard or further the interests of the industry consistent with the principles of ecologically sustainable development
- consulting and cooperating with persons and organisations in matters affecting the industry, amongst other functions [s.98].

Strategic assessment of fisheries

Under Part 10 of the EPBC Act the Australian Fisheries Management Authority is required to enter into an agreement with the Minister for the Environment and Heritage for the assessment of actions in fisheries managed under the *Fisheries Management Act 1991*, unless exempt under s. 158 of the Act (eg such as when the Minister considers the assessment not to be in the national interest).

Environment Australia encourages input from Indigenous people and others. Management agencies are asked to respond to public comments, and both public and agency comments are taken into account in the assessments.

An agreement must be made whenever a management plan is proposed or a determination not to have a plan is made. Agreements must be made within five years of the commencement of the Act (ie before 16 July 2005) for all fisheries that did not have plans when the Act commenced. Agreements must be in place for at least two thirds of those fisheries before the third anniversary of the commencement of the Act (ie 16 July 2003) [s.150(2)]. State and Territory fisheries that are already managed with a management plan do not have to undergo a strategic assessment.

The Minister may agree that an assessment be made of the impacts of actions under the policy, plan or program, on a matter protected by a provision of Part 3 of the Act [s.146(1)]. The agreement must be in writing. In some circumstances these matters will raise issues of importance to Indigenous Australians directly and should be addressed as a matter of course in the assessment. For example world heritage values may include cultural landscapes of importance to Indigenous Australians.

Under s.146(2) agreements concerned with strategic fisheries assessments must provide for:

(aa) the preparation of draft terms of reference for a report on the impacts to which the agreement relates; and

(ab) the publication of the draft terms of reference for public comment for a period of at least 28 days that is specified by the Minister; and

(ac) the finalisation of the terms of reference, to the Minister's satisfaction, taking into account the comments (if any) received on the draft terms of reference; and

(a) the preparation of a draft of a report on the impacts to which the agreement relates; and

(b) the publication of the draft report for public comment for a period of at least 28 days that is specified by the Minister; and

(c) the finalisation of the report, taking into account the comments (if any) received after publication of the draft report; and

(d) the provision of the report to the Minister; and

(e) the making of recommendations by the Minister to the person about the policy, plan or program (including recommendations for modification of the policy, plan or program); and

(f) the endorsement of the policy, plan or program by the Minister if he or she is satisfied that:

(i) the report adequately addresses the impacts to which the agreement relates; and

(ii) either the recommended modifications of the policy, plan or program (if any) have been made or any modifications having the same effect have been made

(g) any other matter prescribed by the regulations.

If the terms of reference for a strategic fisheries assessment do not adequately take into account Indigenous Australians' interests, relevant State or Territory Ministers may request that these or other matters be taken into account in the assessment. For example, the impacts of fishing activities on Indigenous Australians' interests may be indirect, such as where the available stocks of a non-threatened species used as a subsistence food source are declining in a local area. This could be taken into account.

The Act provides that the agreement may provide for the assessment of other certain and likely impacts of actions under the policy, plan or program in prescribed circumstances, such as if the actions need to be regulated to give effect to Australia's international legal obligations or a State or Territory Minister has asked that specified matters be dealt with in the assessment [see generally s.146(1A)].

The Act also provides that further agreement for an assessment must be made if the impact of the actions is significantly greater than that assessed under an earlier agreement.

Fishery Management in the South-east Marine Region

There are 12 fisheries managed by AFMA on behalf of the Commonwealth that occur wholly or partly in the Region:

- South–east Non–Trawl Fishery
- Southern Shark Fishery
- South–east Trawl Fishery
- Bass Strait Central Zone Scallop Fishery
- South Tasman Rise Fishery
- Southern Squid Jig Fishery
- Southern Bluefin Tuna Fishery
- East Coast Tuna and Billfish Fishery
- Jack Mackerel Fishery
- Great Australian Bight Trawl Fishery
- Macquarie Island Fishery

(National Oceans Office 2001: 32)

Of these, the Southern Bluefin Tuna Fishery and the Bass Strait Central Zone Scallop Fishery are likely to be assessed. Other fisheries, such as the South-east Non-Trawl Fishery, South-east Trawl Fishery, Southern Shark Fishery and the Great Australian Bight Trawl Fishery may be combined and then assessed by December 2003.

New South Wales marine environmental and protected area legislation

The *Marine Parks Act 1997* (NSW) provides for the establishment of marine parks and aquatic reserves in New South Wales. These can be applied to protect Indigenous cultural heritage. Proposed marine parks are identified and assessed for their representativeness and comprehensiveness, and a socio-economic assessment is undertaken during a public consultation stage. Marine parks, and the activities that are permitted to be undertaken within them, are managed through operational plans, and regulations, including zoning plans.

Zoning Plans

- Sanctuary zones may be created which provide the highest level of protection for biological diversity, habitat, ecological processes, natural features and cultural features (both Aboriginal and non–Aboriginal). It may also permit recreational, educational and other activities that do not involve harming any animal or plant or causing any damage to or interference with natural or cultural features or any habitat. They may also permit scientific research [s.6, Marine Park Regulations 1999].

- Habitat protection zones may be created which provide a high level of protection for biological diversity, habitat, ecological processes, natural features and cultural features (both Aboriginal and non–Aboriginal). It may provide opportunities for recreational and commercial activities (including fishing), scientific research, educational activities and other activities, so long as they are ecologically sustainable, do not have a significant impact on fish populations within the zone and have a negligible impact on other animals, plants and habitat [s.10].

- General use zones may be created which provide protection for biological diversity, habitat, ecological processes, natural features and cultural features (both Aboriginal and non–Aboriginal). It will provide opportunities for recreational and commercial activities (including fishing), scientific research, educational activities and other activities so long as they are ecologically sustainable [s.14].

An operational plan under the Marine Parks Act prevails over a plan operating under the *National Parks and Wildlife Act 1974* to the extent of any inconsistency. The advisory committee established for each park may review the operational plan every 12 months to determine whether or not the plan is effective and is being satisfactorily implemented [s.26A].

Protected areas in marine waters may also be created under the *National Parks and Wildlife Act 1974* (NSW). This is because it defines Crown Land as including "those parts of the seabed and of the waters beneath which it is submerged that are within the territorial jurisdiction of New South Wales and not within the Eastern Division described in the Second Schedule to the Crown Lands Consolidation Act 1913" [s.5]. It also can be applied to Aboriginal lands in prescribed circumstances. Management plans which apply to submerged lands cannot be adopted without considering representations from the Minister administering the *Fisheries Management Act 1994* (NSW) [s.80].

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

Participation in management

The *Marine Parks Act 1997* (NSW) establishes a Marine Parks Advisory Council, which includes Indigenous representation. This Council includes the Director of NSW Fisheries, the Director-General of National Parks and Wildlife, and members appointed by the relevant Ministers including: a Commonwealth representative, two members to represent the interests of marine conservation, a marine scientist, a representative of the interests of Aboriginal people, and one member to represent each of the stakeholder groups of tourism, commercial fishers, recreational fishers, and scuba divers. The Minister is required to call for nominations for each of these positions except the Commonwealth representative.

Each marine park in NSW is required to have an advisory committee [s.35] that must include at least nine members. These represent the interests of the National Parks and Wildlife Service, NSW Fisheries, marine conservation, marine science, Aboriginal people, the tourism industry, commercial fishers, recreational fishers, scuba divers and local councils. The Chairs of the committees are nominated by the Minister.

The NSW Marine Parks Authority has established various advisory committees with regard to marine parks but these are not in the South-east Marine Region. For example:

- The Jervis Bay Marine Park Advisory Committee (JBMPAC) including representatives from: NSW Fisheries, the National Parks and Wildlife Service, the Commonwealth Government (2), **persons representing the interests of Aboriginal communities (3)**, scuba diving (2), marine conservation (1), tourism (1), commercial fishing (1), recreational fishing (1), marine science (1), charter boat operators (1), aquaculture (1), and the local council (1). In June 2001 the NSW MPA invited expressions of interest for two more members to represent the local community. Membership is for a period of up to four years. The Committee meets at least twice each year.

- The Solitary Islands Marine Park Advisory Committee (SIMPAC) consists of more than twenty members and meets at least twice each year. The principal function of the SIMPAC is to advise the Ministers and the Authority on the management of the Solitary Islands Marine Park. Representatives of the Committee comprise: NSW Fisheries, the National Parks and Wildlife Service, the Commonwealth Government, and **persons representing the interests of the local community (3)**, Aboriginal communities (3), local councils (2), marine conservation (2), commercial fishing (2), recreational fishing (2), marine science (1), charter boat operators (1), scuba diving (1), and spearfishing (1). In June 2001 the NSW MPA invited expressions of interest for two more members to represent the tourism sector.

The principal function of the advisory committees is to advise the Ministers and the Authority on the management of the marine park and, in particular:

- the appropriate classification of areas within the marine park for the purposes of proposed zoning plans and associated provisions
- the provisions of an operational plan for the marine park
- the conservation of marine biological diversity within the marine park
- the ecologically sustainable use of the marine park and whether any particular use of the marine park is not ecologically sustainable
- the use and enjoyment of the marine park by members of the public. [108]

Indigenous Australians may be eligible to be appointed as a marine park ranger under s.35A of the Act, to assist with its enforcement. This is allowable if they are an officer of the National Parks and Wildlife Service [s.6 of the *National Parks and Wildlife Act 1974*]; a fisheries officer within the meaning of the *Fisheries Management Act 1994*; an officer or employee of a government Department; or a public or local authority.

New South Wales fisheries legislation

The NSW Department of Fisheries is currently developing a NSW Indigenous Fisheries Strategy. The *Fisheries Management Act 1994* recognises Commonwealth and NSW native title processes [s.87]. Even so, the NSW Government has acknowledged that an Indigenous Fisheries Strategy (IFS) could ensure better recognition for Aboriginal heritage, culture, traditions and community values within the Act and regulations.

In 1997 the NSW Government expressed its commitment to the development of a NSW Indigenous Fisheries Strategy as part of its *Statement of Commitment to Aboriginal People*. The NSW Department of Fisheries also accepted Commonwealth

[108] URL: http://website linkfisheries.nsw.gov.au/bulletins/fb_01juno6_eoi_mpa.htm – 4kb – 08 Aug 2001.

funding for consultations on a National Indigenous Fisheries Strategy. Under the consultation process twelve open–forum workshops were held in NSW in 1998. On 18 December 2000 representatives of Aboriginal groups with an interest in fishing agreed that the IFS should address:

- cultural fishing rights
- commercial fishing rights
- employment strategy
- aquaculture industry development and support
- habitat management and protection
- research and development
- stock enhancement programs
- monitoring
- processing/wholesale/retail sectors of the industry
- budget
- legislative change
- education and communication strategy
- Aboriginal unit in NSW Fisheries
- participation, consultation, networking, representation
- cross cultural training in NSW fisheries.

A working paper was released in December 2000 and submissions were invited by February 2001. The working paper suggested that the above concerns could be addressed as four issues:

- lack of accommodation of traditional Indigenous fishing practices
- declining participation of Aboriginal people in commercial, recreational and aquaculture fisheries
- insufficient meaningful presence and participation of Aboriginal people in the processes of managing and conserving fisheries resources
- need for better communication and consultation with Aboriginal people.

The submissions received were still being considered, and the IFS developed, in October 2001. The working paper stated that the following principles should underpin the Strategy:

- sustainability of fisheries resources as the over–riding principle
- Aboriginal heritage, culture, traditions and community values can be supported and strengthened by the Strategy
- the Strategy does not replace native (sic) laws and processes
- the Strategy is a way forward but cannot resolve all issues
- the Strategy should address multiple issues and achieve the broadest spread of benefits to Aboriginal people
- the outcomes of the Strategy must be consistent with the objectives of the *Fisheries Management Act 1994*.

In the working paper a range of options and strategies were identified in relation to each of these issues.

Licencing Issues

In other law and policy developments in NSW, one of the most significant legislative amendments in 2000–2001 was the introduction of a recreational fishing licence fee for recreational fresh and salt water fishers. There are various licence exemptions.

Aboriginal fishers may be exempt from this fee if they are under the age of 18. Other persons are exempt if they are an adult assisting a person under the age of 18 to take a fish using a single rod or to take prawns using a single dip or scoop net; a person fishing in a private dam with a surface area of two hectares or less; an Aboriginal person who is fishing in freshwater, or, when fishing in saltwater, is doing so pursuant to a right or interest under an approved native title determination or of a claim entered on the register of native title claims under the *Native Title Act 1993* (Cth), and the holder of a current Commonwealth Pensioner Concession Card issued by Centrelink or the Commonwealth Department of Veteran's Affairs [see s.34C of the *Fisheries Management Act 1995* and s.119L of the Fisheries Management (General) Regulation 1995].

NSW Fisheries has established a Recreational Fishing Licence Expenditure Committee. The Department is considering the establishment of a Saltwater Licence Expenditure Committee. If established, the committee will have nine regional representatives (not eight) including two metropolitan representatives. It will include representatives of Indigenous fishing interests.

Fishery licences in NSW are issued under the *Fisheries Management Act 1994*. In 2000 the NSW Land and Environment Court held that the NSW Minister for Fisheries must perform an environmental impact assessment under the *Environmental Planning and Assessment Act 1979* (NSW) before issuing a commercial fishing licence.[109] Indigenous organisations may wish to challenge licences on the basis that fisheries licences were impacting on subsistence resources.

Participation in management

NSW has numerous advisory committees, and encourages Indigenous representation. However, according to a 2000 Working Paper, 'finding and retaining Indigenous representatives on these bodies has been difficult' (NSW 2000: 7). NSW Fisheries has established MACs under the *Fisheries Management Act 1994*, such as for the:

- NSW Ocean Haul Fishery: the MAC comprises one representative from each of seven ocean hauling zones and a representative from the purse seine fishery. Non-elected members of the Committee can include a representative from NSW Fisheries, the Nature Conservation Council, recreational fishing and Indigenous people.
- NSW Fish Trawl Fishery: The MAC comprises three representatives from fish trawl north and one from fish trawl south. Non elected members cannot out number elected representatives at any meeting and may include representatives from NSW Fisheries, the Nature Conservation Council, recreational fishing, and Indigenous groups.

NSW also has an Advisory Council on Recreational Fishing (ACoRF). This is a statutory body established under the *Fisheries Management Act 1994* (NSW) to advise the Minister on recreational fishing issues. The Council plays a key role in consultation over new changes to recreational fishing and advises on the feasibility and acceptability of management initiatives.

AcoRF has also had input into the development of the NSW Indigenous Fisheries Strategy.

The interests of Aboriginal and Torres Strait Islander people are represented by Mr Graham Moore who is an Aboriginal land management advisory officer with the Department of Land and Water Conservation (DLWC).[110] He is also a member of the National Indigenous Biodiversity Working Group, State Fisheries Technical Advisory Panel, State Aboriginal Assessment Panel, Aboriginal Natural Resource Environment Council, Protocols Committee, and the Aboriginal Support Network.

In December 2000 NSW Fisheries employed about 10 Indigenous staff, mainly in the compliance area (NSW 2000: 7). A Commonwealth-NSW Community Development and Employment Program has enabled Aboriginal trainees to work in the Department in regional areas, particularly on aquaculture extension and other fieldwork (NSW 2000: 7).

Participation in commercial fisheries

The *Fisheries Management Act 1994* (NSW) does not currently include any special recognition for non-native title Aboriginal rights and interests. Section 287 provides that it does not affect the operation of Federal or NSW native title legislation "in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect". Most fishing by Indigenous people is likely to occur within the current category "of recreational fishing" in NSW, even though this is inappropriate as a category for fishing undertaken in the exercise of longstanding cultural practices (NSW 2000: 5). NSW Fisheries is aware that there are some Aboriginal commercial fishermen in NSW who work mainly in the estuary, general and ocean haul fisheries (NSW 2000: 5). But there is no identification requirement during licensing processes, and statistics which identify 'race' and ethnicity are not collected. NSW Fisheries suggest that the numbers of licence holders may be shrinking because of general restrictions on access, the fees payable and the complexity of administrative processes.

[109] Sustainable Fishing and Tourism Inc v Minister for Fisheries and Anor [2000] NSWLEC 2 (21 January 2000).
[110] URL: http://website linkfisheries.nsw.gov.au/recreational/committees/acorf.htm – 13kb – 30 Jul 2001.

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

New South Wales heritage legislation

Indigenous heritage in New South Wales is protected under the *Environmental Planning and Assessment Act*, the *National Parks and Wildlife Act 1974*, *Heritage Act 1977* and the *Historical Shipwrecks Act 1976* (NSW).

The *National Parks and Wildlife Act* provides that Aboriginal areas of special significance can be dedicated and declared under the Act [eg ss.62, 71D, 84]. Management plans can be developed and applied to such areas [s.77]. The Act establishes an eight member Cultural Heritage (Interim) Advisory Committee which includes five members nominated by the NSW Aboriginal Land Council. The Geographic Names Board legislation does not apply to Aboriginal lands declared for significance under Schedule 14 of the Act [s.71U].

The *Environmental Planning and Assessment Act* (EP & A Act) requires Aboriginal heritage to be assessed when determining land use. Section 90 of the Act lists impacts which must be considered before development approval is granted. Aboriginal heritage is a relevant impact. State Government agencies which act as the determining authority on the environmental impacts of proposed activities must consider a variety of community and cultural factors, including Aboriginal heritage, in their decisions.

The *National Parks and Wildlife Act 1974* protects significant Aboriginal relics and Aboriginal places within NSW's territorial jurisdiction. It establishes various advisory committees with Aboriginal representation.

The *Heritage Act 1977* also protects NSW's natural and cultural heritage. Significant Aboriginal sites and places can be listed on the State Heritage Register. State heritage significance is defined by reference to historical, scientific, cultural, social, archaeological, natural or aesthetic values. An item can be both of State heritage significance and local heritage significance. An item that is of local heritage significance may or may not be of State heritage significance.

The *Geographical Names Act 1966* (NSW) establishes the Geographical Names Board of New South Wales, which assigns names to places and geographical features. The NSW Aboriginal Land Council can nominate a representative to the Board. Naming proposals undergo a one month consultation period. The Board compiles and maintains a vocabulary of Aboriginal words used or suitable for use in geographical names and records their meaning and origin. In 1996 the Board adopted Guidelines for the Determination of Place Names. These specify that 'names of Aboriginal origin or with a historical background are preferred'.[111]

In June 2001, the NSW Minister for Information Technology announced a Dual Naming Policy for geographical features, as proposed by the Board. The Minister established a sub-committee to consider and make recommendations on the draft guidelines and operational procedures to the Board to ensure the system is workable, culturally appropriate and cost effective. The draft NSW policy on dual naming recognises the historical and continuing relationship between Indigenous Australians and land and sea places of cultural and spiritual significance. The policy is proposed to apply generally, including for harbours, inlets and sea areas, but this would be subject to the application of other legislation.

Victorian marine environmental and protected area legislation

In May 2001 the Victorian Government released its full response to the Environment Conservation Council's *Marine Coastal and Estuarine Investigation Final Report*. As part of the Government's response, the National Parks (Marine National Parks and Marine Sanctuaries) Bill was introduced to establish 12 marine national parks and 10 smaller marine sanctuaries, making up about 5.2% of Victoria waters. Several of these are important to Aboriginal communities. However the Government withdrew the Bill for redrafting on 13 June 2001 after it could not obtain support from the opposition parties. The Bill was to be redrafted to provide for a state-funded compensation scheme in relation to affected rights conferred or arising under the *Fisheries Act 1995* and the *National Parks Act 1975*, and to ensure that the Supreme Court's powers were retained in relation to compensation provisions.[112]

[111] http://website linklpi.nsw.gov.au/geog/guidelne.htm.

[112] http://tex2.parliament.vic.gov.au/bin/texhtmlt?form=VicHansard.dumpall&db=hansard91&dodraft=0&speech=12668&activity=NULL&title=NATIONAL+PARKS+%28MARINE+NATIONAL+PARKS+AND+MARINE+SANCTUARIES%29+BILL&date1=13&date2=June&date3=2001.

Participation in management

The Victorian Government says that it has a policy commitment to consulting and collaborating with Indigenous communities 'as partners' in relation to Victorian land and waters, and to the development of more effective relationships between relevant agencies and Aboriginal communities. In its response to the Environmental Conservation Council's *Marine, Coastal and Estuarine Final Report*, the Government said that it would ensure that planning and management in coastal and marine areas would be conducted in a manner that:

- recognises Victoria's unique Aboriginal culture, society and history
- empowers Aboriginal communities to collaborate as partners in resource management
- recognises the impact of past policies on the role of Aboriginal people as custodians of land and waters
- requires priorities and strategies for Aboriginal involvement in land and resource management to be developed and implemented primarily at the local level and agreed with the relevant Aboriginal community organisations.

Victorian heritage legislation

The *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) protect Indigenous heritage in Victoria. The Act can be used to protect Aboriginal places and objects that are of significance in accordance with Aboriginal tradition within the Victorian jurisdiction. It also applies to Aboriginal folklore, which is defined as traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs). Aboriginal cultural property is defined to include Aboriginal places, Aboriginal objects and Aboriginal folklore.

The Act can be used to have a declaration of preservation issued by the Minister in relation to a place or object. A local Aboriginal community, as defined, can seek the declaration. The Minister must consult in relation to the application, but can also issue emergency and temporary declarations. Under Part IIA of the Act local Aboriginal communities have responsibility for their heritage. They can seek declarations, negotiate Cultural Heritage Agreements and appoint wardens.

The *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) can be used to protect Aboriginal relics in Victoria. A 'relic' is defined as "a relic pertaining to the past occupation by the Aboriginal people of any part of Australia, whether or not the relic existed before the occupation of that part of Australia by people of European descent" [s.2]. A 'relic' can be an Aboriginal deposit, carving, drawing, skeletal remains or anything belonging to the total body of material relating to that past Aboriginal occupation of Australia.

The *Geographic Place Names Act 1998* (Vic) establishes a Geographical Names Advisory Committee. "Place" is defined in the Act to include a "topographical feature, including undersea feature" [s.3]. The Surveyor-General and five Ministerial appointees sit on the Committee. Under the Act the Minister may maintain a panel of persons for appointment as members of a Committee. The panel should comprise persons with knowledge, background or experience in prescribed areas, one of which is aboriginal culture and language [s.14(2)(d)]. The Minister can direct the Registrar of Geographic Names to refer a matter relating to the naming of a place, or class of places, to a Committee for its advice [s.12(1)]. Where places or features are regarded as significant the Registrar will refer it to an Advisory Committee for advice.

The Victorian Government's policy on place names provides that the use of traditional Koori place names has been, and continues to be encouraged, subject to the involvement and agreement of relevant Aboriginal communities. It provides that dual naming, recognising both Indigenous and non-Indigenous cultural names, may be appropriate where a feature has held a European name for a long period of time. It also provides that where a Koori name has achieved more community acceptance and recognition it may be appropriate to consider adopting the Indigenous name.

Victorian fisheries legislation

The Environment and Natural Resources Committee of the Victorian Parliament is currently enquiring into fisheries management across Victoria.[113] The inquiry is expected to assess the effectiveness of the Fisheries Co-Management Council, enforcement of recreational and commercial fisheries regulations, and alternative arrangements (eg a single statutory authority) for the management of all aspects of commercial and recreational fishing including abalone and rock lobster). The Committee is inviting comment on a range of issues affecting Aboriginal fishers. For example whether entitlements to the ownership of fish should include special arrangements for traditional user irrespective of the outcome of native title claims, and how to resolve the sharing of available resources amongst various competing user or interest groups, including traditional users. The discussion paper states:

> The relationship of Australia's Indigenous people to waters and aquatic living resources is different to that of other Australians. It is a relationship based on a long tradition of stewardship, utilisation and cultural significance, a tradition that continues in many parts of Australia. Members of many Victorian Aboriginal communities undertake fishing for both personal and family use using traditional techniques supplemented with modern technology. While subsistence use of fish resources is no longer an economic necessity nor practical, access to traditional foods is important for the maintenance of cultural traditions. There is also a desire by contemporary Aboriginal communities to take advantage of opportunities to derive economic benefit from native flora and fauna resources such as fish.
>
> *4.22 Although the Fisheries Act 1995* makes specific objective to facilitate access to fisheries resources for traditional uses, the Committee is not aware of any specific provision for or estimates of the level of catch for such use in Victoria. It is known that members of many Aboriginal communities in Victoria do fish for an array of species in both marine and inland waters.[114]

Participation in management

The *Fisheries Act 1995* (Vic) and the Fisheries Regulations 1998 reformed the law in Victoria relating to fisheries. The legislation was drafted to complement the *Native Title Act 1993* and other relevant legislation.

The purpose of the Act is to provide a modern legislative framework for the regulation, management and conservation of Victoria's fisheries including aquatic habitats. The objectives [s. 3] of the *Fisheries Act 1995* include to:

(d) facilitate access to fisheries resources for commercial, recreational, traditional and non-consumptive uses

(f) encourage the participation of resource users and the community in fisheries management.

The Act provides for the establishment and operation of the Fisheries Co-Management Council and associated Fisheries Committees; for the preparation of fishery management plans; the setting of 'total allowable catch' for fisheries, and the exercise of enforcement powers. The Act also provides limited powers to protect habitats that sustain fish production, such as through the establishment of Fisheries Reserves.

A Fisheries Co-Management Council [s.90] of up to 11 members may be established by the Minister. Members are appointed by the Governor in Council. The Minister is required to consider the need for the members of the Council to hold between them relevant experience and knowledge in the following areas: commercial fishing, fish processing, fish marketing, recreational fishing, traditional fishing uses, aquaculture, conservation and fisheries science [s.90(3)(c)].

The Minister is also empowered to declare recognised peak bodies of commercial, recreational, aquaculture and conservation interests [s.95]. Similar recognition of peak bodies representing Indigenous interests is, however, not specified. The Minister must consult with these recognised bodies before recommending appointment to the Co-Management Council [s.90(3)(d)], or to fisheries committees [s.93(3)(d)].

[113] Victoria, Parliament, Environment and Natural Resources Committee, *Inquiry Into Fisheries Management: Discussion Paper*, September 2000.
[114] http://websitelinknre.vic.gov.au/web/root/domino/cm_da/nrenpr.nsf/frameset/NRE+Parks+and+Reserves?OpenDocument&[/web/root/domino/cm_da/NRECPR.nsf/3d08e37a810f38b94a25678900ee6bb/e91e683c5b8d9fd04a256ace002361a3?OpenDocument].

The functions of the Fisheries Co-Management Council are defined by the Act as to:

- promote co-management fisheries
- oversee the preparation of management plans under s. 28 and to advise the Minister in respect of proposed management plans
- advise the Minister on state-wide priorities for fisheries management and fisheries research, and on matters relating to intergovernmental agreements and arrangements
- advise the Minister generally on the operation, resourcing and administration of the Act and on any matter relating to the achievement of the objectives of the Act or which is referred to the Fisheries Co-Management Council by the Minister
- promote investigation into and research, education and training on any matter relating to fisheries
- advise the Minister on the introduction and issue of recreational fishery licences in marine waters and on the priorities for disbursement of funds obtained from such licences
- prepare, publicise and distribute codes of practice that provide guidance to the holders of fishery licences or permits under this Act on best practice concerning any matter relevant to the holders of fishery licences or permits
- publicise and distribute such codes of practice that have been prepared by a recognised peak body or a fishery committee
- carry out any other function conferred on the Fisheries Co-Management Council by or under this Act or any other Act.

The Act also enables Fisheries Committees to be established on the recommendation of the Co-Management Council, with each committee consisting of up to nine members who are appointed by the Minister. The functions of a committee are to advise the Co-Management Council on the management of the fishery in respect of which it was appointed, and to advise on the preparation of management plans, amongst others [s.94]. Currently there are committees dealing with aquaculture, abalone fisheries, commercial bay and inlet fisheries, inland fisheries, recreational marine fisheries, research, rock lobster fisheries and scallop fisheries. Members of committees are appointed on the basis of experience and knowledge rather than as a representative of a stakeholder group.

Management plans may be declared under the Act [s.28], and these must be consistent with the objectives of the Act. The plans can include guidelines outlining criteria for the renewal, variation or transfer of licences to be used when issuing licences and permits. The purpose of a management plan is to specify policies and strategies for the management of the fishery on an ecologically sustainable basis, having regard to relevant commercial, recreational, traditional and non–consumptive uses [s.29]. The Act requires that proposed management plans be the subject of public consultation [s. 32].

Fisheries management plans are being developed for each fishery in Victoria – initially, with the abalone and eel fisheries. The Act specifies the consultation process that must be followed for plans, including the requirements for publishing a notice of intention to declare a management plan.

Under the Act, Fisheries Regulations 1998 prescribe mandatory controls to be applied to each fishery. They are comprehensive. Regulations can and do prescribe classes and entitlements of fishing licences and licence conditions for a fishery. They place other controls on the fishery such as equipment restrictions, catch limits, size limits and seasonal or area fishing closures.

South Australian marine environmental and protected area legislation

The declaration of managed protected areas such as aquatic reserves and marine parks is covered in the *Fisheries Act 1982* (SA) [ss.47, 48]. The Governor can proclaim marine parks if he or she considers their aquatic flora or fauna or aquatic habitat to be of national significance. The Governor can assign a name to a declared marine park [s.48(1)(b)]. The Minister is responsible for the control and administration of all marine parks established by the Act [s. 48B(1)], primarily through the implementation of management plans which are developed following a public consultation process. Plans must address:

- the protection, conservation and preservation of the flora and fauna of the waters included in the marine park and their habitat
- regulation of fishing, mining and research activities in, public access to, and other use of, the marine park to prevent or minimise adverse effect on the flora and fauna and their habitat
- co-ordination of the management of the marine park with the management of any adjacent reserve, park or conservation zone or area established under the law of this or any other State or of the Commonwealth
- the promotion of public understanding of the purposes and significance of the marine park.

The *Development Act 1993* (SA) does not apply to development undertaken in, or in relation to, a marine park pursuant to a plan of management adopted by the Minister in relation to that marine park [s.48C, 48D]. The Act does not include provisions that explicitly recognise Aboriginal interests offshore.

South Australian heritage legislation

The protection and preservation of Aboriginal sites, objects and remains in South Australia is covered by the *Aboriginal Heritage Act 1988* (SA). It applies to seabed heritage because "land" is defined in the Act to include land lying beneath inland waters or the sea [s.3]. "Aboriginal object" is defined under the Act as an object of significance according to Aboriginal tradition; or of significance to Aboriginal archaeology, anthropology or history, and includes an object or an object of a class so declared by regulation. "Aboriginal tradition" is defined to mean the traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation.

The Act establishes an Aboriginal Heritage Committee to advise the Minister, but the Minister is not bound to follow the Committee's advice. The Minister must accept the views of traditional owners regarding the significance of land or an object, according to Aboriginal tradition [s.13]. "Traditional owner" in relation to an Aboriginal site or object means an Aboriginal person who, in accordance with Aboriginal tradition, has social, economic or spiritual affiliations with, and responsibilities for, the site or object [s.3].

The *Geographical Names Act 1991* (SA) regulates the naming of geographical places in South Australia. The Act establishes the Geographical Names Advisory Committee. The Minister is required to consider the Committee's advice in the performance of his or her functions under the Act. The Minister is also advised by the Surveyor-General on such matters. The Act allows places to be given two geographical names – an Aboriginal name and another name assigned by the Minister. The Act sets out a public consultation process for naming matters.

South Australian fisheries legislation

Participation in management

The *Fisheries Act 1982* (SA) does not explicitly recognise Aboriginal rights and interests in fisheries. However the act includes a broad exemption provision which allows the Minister, by notice published in the Gazette, to exempt any person or class of persons from any specified provisions of the Act, subject to prescribed conditions [s.59].

The *Fisheries Act 1982* (SA) enables aquatic reserves, controlled aquatic reserves, declared waters and marine parks to be proclaimed, and sets out management plan requirements, including public consultation provisions [ss.47–48, 48A–H]. Persons must not enter or remain in an aquatic reserve or marine park, or engage in any activity in an aquatic reserve or marine park except in accordance with a permit or regulations [s.48G]. The *Native Title Act 1993* (Cth) [s.211] may exempt some Aboriginal people from this permit requirement in some circumstance but other provisions of a relevant marine park management plan would be unaffected by that exemption.

The *Fisheries Act 1982* and the Fisheries (Management Committees) Regulations 1995 create management committees for South Australia's fisheries. The committees can prescribe classes of fish farming, their functions, powers and objectives, provide for appointments and address other matters. Committee members represent government, industry and recreational interests. Such Committees can exercise delegated Ministerial powers under the Act.

Tasmanian marine environmental and protected area legislation

National Parks and Wildlife Act

The *National Parks and Wildlife Act 1970* provides for the establishment of Marine Protected Area as either a national park, State reserve, nature reserve, or a conservation area. These are declared by the Governor, and except for conservation areas, need to be approved by both Houses of Parliament. State reserves can be declared for areas of land containing signs, objects or places of significance to Aboriginal people. The purposes of reservation includes to protect the natural and cultural values of the area and sites, objects or places of significance to Aboriginal people contained in that area, use of the area by Aboriginal people while providing for ecologically sustainable recreation. National Parks can be declared for areas of outstanding major natural regions, features or scenery and to protect cultural values. Tasmania's National Parks are: Governor Island Marine Nature Reserve, Ninepin Point Marine Nature Reserve, Tinderbox Marine Nature Reserve, Maria Island National Park, and Macquarie Island Nature Reserve.

The Act applies to offshore areas because "land" is defined to include "land covered by the sea or other waters, and the part of the sea or those waters covering that land" [s.3]. However the Act takes an archaeological approach to heritage by focusing on physical attributes. The Act can be used to protect an "Aboriginal relic", which means any artefact, painting, carving, midden, or other object made or created by any of the Aboriginal inhabitants of any of the islands contained within the State, or any object, site, or place that bears signs of the activities of any such inhabitants" [s.3]. Nothing in the Act precludes an Aboriginal cultural activity by an Aboriginal person on Aboriginal land, within the meaning of the *Aboriginal Lands Act 1995*, so long as that activity is, in the opinion of the Minister, not likely to have a detrimental effect on fauna and flora and is consistent with this Act. Aboriginal land under that Act includes several islands such as Mount Chappell Island, Steep (Head) Island, Badger Island, Babel Island, and part of Cape Barren Island (Sched. 3). "Aboriginal cultural activity" means the activity of hunting, fishing or gathering undertaken by an Aboriginal person for his or her personal use based on Aboriginal custom of Tasmania as passed down to that Aboriginal person. "Aboriginal person" has the same meaning as in the *Aboriginal Lands Act 1995*.

Under s.105 of the *Living Marine Resources Management Act*, the Minister may also establish marine nature resources protected areas. These can have various conservation, research and educative purposes. The Act requires the establishment of consultative processes and management plans for the areas to be formalised. Under the Act, the Minister can give a name to a proposed marine resources protected area [s.112].

Participation in management

The National Parks Act establishes a Conservation Management Trust that includes a person nominated by the Aboriginal Land Council [s.23C]. The Act also enables the appointment of specialist advisory committees [s.12].

The *Living Marine Resources Management Act 1995* (Tas) provides for the creation of management authorities for marine resources protected areas but does not have provisions addressing the involvement of Indigenous Tasmanians.

Participation in Commercial Fisheries

Management of State fisheries in Tasmania is regulated by the *Living Marine Resources Management Act 1995* (Tas). The Act does not recognise any special commercial fishing rights for Indigenous Tasmanians. The Act aims to promote sustainable fishery development, maintain ecological processes and genetic diversity, facilitate economic development and share the responsibility for resource management. Management plans for fisheries are being developed under the Act. Tasmania manages most of the State's commercial fisheries, including several where State jurisdiction extends to Australian waters, particularly the southern rock lobster and abalone fisheries. The Commonwealth manages some other fisheries including the southern bluefin tuna and blue–eye trevalla fisheries, as provided for in the OCS arrangements. The Act enables marine-resource protected areas to be established for a variety of purposes [s.105]. Before such protected areas can be established a draft management plan must be prepared [s.106], with specified public consultation requirements. Habitat protection plans can also be developed [s.118].

The Act does not recognise any distinctive Aboriginal right to participate in commercial fisheries. However, it permits the continuation of Aboriginal cultural activity which is defined as " the activity of fishing or gathering undertaken by an Aborigine for his or her personal use based on Aboriginal custom of Tasmania as passed down to that Aborigine. "Aborigine" is defined to mean a person who is descended from an original inhabitant, and has always been known as an Aborigine.

Under Section 10 of the Act, a permit, licence or other authority issued takes precedence over any other public or private fishing rights. However, this does not preclude any Aboriginal cultural activity from being carried out by Aboriginal people. Again, this is subject to the activity being consistent with the Act and unlikely to have a detrimental effect on living marine resources.

A similar exemption is contained in s.60 of the Act which prohibits fishing in State waters without a fishing licence. Under subsection (2)(c), this prohibition does not apply to Aboriginal people engaged in Aboriginal cultural activities which are unlikely to have a detrimental effect on living marine resources [see also the defence in s.215].

The *Marine Farming Planning Act 1995* (Tas) provides for the development and implementation of Marine Farm Development Plans which allocate marine waters for marine farming around Tasmania. It does not refer to Aboriginal interests specifically but refers to land uses and interests being taken into account when applications are under consideration.

Tasmanian heritage legislation

Aboriginal Relics Act 1975 (Tas)

The definition of a 'relic' [s. 2(3)] in the Aboriginal Relics Act 1975 (Tas) includes:

> (a) any artifact, painting, carving, engraving, arrangement of stones, midden, or other object made or created by any of the original inhabitants of Australia or the descendants of any such inhabitants
>
> (b) any object, site, or place that bears signs of the activities of any such original inhabitants or their descendants.

Under s.7 of the Act, the Minister may declare an area of land within which a relic is situated to be a 'protected site'. The Director of National Parks and Wildlife is responsible for the management and maintenance of all protected sites in Tasmania [s.8(1)].

In addition to the legislation, the Tasmanian State Coastal Policy (1996) stated that:

> 1.2.1. Areas within which Aboriginal sites and relics are identified will be legally protected and conserved where appropriate.
>
> 1.2.2. All Aboriginal sites and relics in the coastal zone are protected and will be identified and managed in consultation with Tasmanian Aboriginal people in accordance with relevant state and Commonwealth legislation.
>
> 2.6.3. Agreements between landowners, landholders and councils or State Government to grant public access to the coast, and Aborigines access to Aboriginal sites and relics in the coastal zone over private and public land will be encouraged and shall be considered when preparing plans or approving development proposals.

The Tasmanian Government can agree to terms for environmental impact assessments for offshore projects that recognise Indigenous cultural values, as discussed above.

The assignment of place names in Tasmania, including for a 'bay, harbour, cape, promontory … or other topographical feature' is the responsibility of the Nomenclature Board established by the *Survey Coordination Act 1944*. The ten member Board is not required by the Act to include a representative of Aboriginal Tasmanians, or anyone with expertise in Indigenous place names. The Board consists of ten members, including the Surveyor–General as Chairman. Five members are senior officers appointed from the Government Agencies responsible for State Mapping, Planning, Forestry, Mines and Hydro Tasmania. Four persons are appointed for a three-year term on the nomination of the Minister for Primary Industries, Water and Environment.

The Act enables objections to place names, or proposed alterations, to be communicated to the Board within a month of the gazettal of its notice of intention with regard to a place name. The Minister, after such inquiry as he or she thinks fit, may confirm, modify, or reverse the decision of the Board, but then his or her decision is final.

The Board has no specific policy regarding Aboriginal place names. It draws a distinction between traditional place names, and words whether from mainland languages or from the Tasmanian dialects which have been adapted and/or adopted since settlement. Almost without exception, the Nomenclature Board is asked to respond to a proposal to assign or alter a name by a second party, rather than instigating the process of its own volition and it treats each proposal on its merits. Should the Board believe that an Aboriginal name is the best choice, whether traditional or otherwise, it refers the proposal to the Tasmanian Aboriginal Land Council and abides by that Council's decision as to whether the name should be applied. Should the name in question relate to an offshore feature, the Board would also refer the proposal to the Hydrographers Office, Royal Australian Navy, and apply the name in consultation with that Office.[115]

Names can be attributed to protected areas under the *National Parks and Wildlife Act 1970* and the *Living Marine Resources Management Act 1995*.

[115] Tony Naughton, Secretary, Nomenclature Board, personal communication, 7/11/01.

Commonwealth Indigenous Marine Initiatives

The Commonwealth Government's role in policy development on the recognition of Indigenous people's rights and interests in marine resource management has been summarised in a recent paper titled *Fishing For Recognition: The Search for an Indigenous Fisheries Policy in Australia* (Smyth 2000) from which the following history of policy development has been adapted.

1984: Commonwealth Department of Primary Industry

The first documented Commonwealth Government initiative to address Indigenous people's marine interests was a research project by Lawson 1984. The report documents Aboriginal uses and interests in the sea from pre-colonial times to the present, and examines the extent to which State and Commonwealth legislation recognised Indigenous marine interests at that time. Though most of the report focuses on northern Australia, some information is provided about Indigenous marine interests in all jurisdictions. In southern Australia, for example Lawson notes that new fisheries legislation in Victoria and South Australia in the 1960s and 1970s removed recognition of Aboriginal fisheries rights that had existed in earlier legislation.

Fifteen years before the recognition of native title in the sea by the High Court in 2001, Lawson summarised her interpretation of Aboriginal ownership and use of the sea as follows:

> There can be no denial of the fact that Aborigines do have a system of sea tenure but these are currently not recognised as forms of title to the sea. Perhaps less fundamental but of more direct relevance to the survival of Aboriginal culture and lifestyle, at least in the short term, is their right to exploit marine resources for subsistence purposes, and their right to control access to territory which is of sacred significance to them. The entitlement of Aborigines to special commercial fishing rights is another issue to be resolved, particularly in the light of the North American experience. In this context it is not related to the issue of assistance to Aborigines to "develop", although commercial fishing ventures are a means to achieve this. Rather commercial fishing rights, as opposed to concessionary treatment, are a natural consequence of recognition of traditional and unrelinquished ownership of the sea.

The report concludes with the following observations and recommendations:

> It is apparent that many White Australians have difficulties coming to terms with traditional Aboriginal land tenure systems, which connect spiritual affiliation with owned territory. These conceptual problems are accentuated when the area under discussion is sea, particularly in light of the ancient European belief that marine resources are common property. This is despite the fact that tenure is practiced by many modern nations in the way they manage their fisheries through complex State, national and international legal arrangements. Systems of sea tenure among Indigenous people, however, are not generally recognised as legitimate in Australia. Rights of Aborigines, vital as they might be to them, are not easily communicated to White Australians who usually regard their own rights as superior. Because Aborigines have been reticent in expressing and defining their rights in recent times, this is often perceived by Whites as proof that Aborigines make no serious claim to territory whether it be land or sea.
>
> There is an urgent need to conduct further research into Aboriginal utilization of the sea, for at least two reasons. One is so Aboriginal traditions are recorded and retained to the greatest possible extent to enable Aborigines who choose to do so to live traditionally, instead of having to live on the fringe of White Australian society. Another important reason for research is to determine the extent of exploitation of marine resources so that fisheries can be managed effectively. This is particularly urgent with respect to overexploitation of such resources as dugong and turtles, both for the survival of the species and of the Aboriginal tradition of exploiting them.
>
> Most of the research in which the Fisheries Division of the Commonwealth Department of Primary Industry is likely to be involved in is of a biological nature. It is important that the research takes into

account the fact that Aboriginal exploitation of marine resources is part of a highly complex system of knowledge, beliefs and attitudes which relate the resources to a wide structure, often involving elements of the mythological past.

In the complex area of cultural continuity and change the adoption of European fishing methods does not mean that the traditional system of beliefs has lost force, nor that a particular resource is necessarily exploited at a higher level than in pre-contact times, though this might be the case.

With Aboriginal cultures under pressure because Europeans seek to assimilate Aborigines into their own culture, albeit to a limited extent, traditional activities such as dugong hunting may be of greater significance than mere food gathering. It is encouraging that Aboriginal traditions are seen as a necessary consideration to be taken into account in fisheries resource management.

1991: Ecologically Sustainable Development (ESD) Working Group on Fisheries

The Lawson report was never published and there is no evidence of the further policy development and research that the report recommended. Seven years later, however, the Commonwealth Government commissioned an independent consultant's report on Indigenous use and management of the sea as part of work undertaken by the Ecologically Sustainable Development (ESD) Working Group on Fisheries.

The Working Group includes senior government officers, academics and representatives of commercial and recreational fishing interests. Despite the findings of the 1984 Lawson Report, there were no representatives of Australia's Indigenous fishers. Lobbying by a non-government conservation group member, resulted in the commissioning of a report on Indigenous fisheries being prepared by an anthropologist with international experience in documenting customary marine tenure.

Titled *Managing Sea Country: Tenure and Sustainability of Aboriginal and Torres Strait Islander Marine Resources* (Cordell 1991), the author laid out plainly the nature and scope of Indigenous people's relationships with Australia's seas and marine resources:

Customary marine tenure (CMT) systems, and ways of managing sea country, vary from community to community around Australia, but they have a critical common denominator. They consist of collective or communal domains – discrete, culturally defined territories, controlled by traditional owners.

The Working Group included the following recommendations in their final report to the Commonwealth Government:

- 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 for coastal fisheries and marine management
- investigate new co-management procedures with Indigenous communities
- ensure that Indigenous communities have a membership on management advisory committees of appropriate fisheries.

1993: Coastal Zone Inquiry

The recommended comprehensive evaluation of Indigenous fisheries interests was not a result of the ESD process. A year later, however, a Commonwealth Government inquiry into the management of Australia's coastal zone, undertaken by the Resource Assessment Commission (since disbanded), provided another opportunity for Indigenous sea country voices to be heard.

Although the Terms of Reference for the *Coastal Zone Inquiry* made no mention of Indigenous issues, the Resource Assessment Commission approved funding for a report on Aboriginal and Torres Strait Islander interest in the coastal zone. A few months later the High Court brought down the *Mabo* native title decision and Indigenous issues were suddenly front page news.

Unlike the two earlier reports, this consultancy had access to resources of a well-funded national inquiry that enabled extensive consultations and workshops with Indigenous communities and organisations in most coastal regions of Australia, including Torres Strait and Bass Strait. The consultancy report (Smyth 1993) summarised the outcomes of these discussions, as well as issues raised in written submissions to the Inquiry.

The Final Report of the *Coastal Zone Inquiry* devoted a chapter to Indigenous coastal issues, which begins with the following observation:

> Aboriginal and Torres Strait Islander people were the earliest owners and managers of Australia's coastal zone. Today many Indigenous communities maintain an active interest and involvement in coastal zone management; in some areas they retain ownership rights.

The *Coastal Zone Inquiry* Final Report contained ten recommendations regarding Indigenous customary rights to use and manage traditional estates in coastal land and sea areas, to benefit commercially from the exploitation of coastal zone resources and to be involved in all levels of coastal zone management. With respect to Indigenous fisheries, the Inquiry called for the development of an Aboriginal and Torres Strait Islander Fisheries Strategy. This strategy was to be developed jointly by fisheries agencies, ATSIC, Aboriginal Land Councils and other Indigenous organisations, under the auspices of a Ministerial Council drawn from the Commonwealth and all State and Territory Governments. It was recommended that the Strategy include a number of measures similar to those proposed previously by the ESD Working Group on Fisheries. It also called for measures to improve economic development and employment opportunities in fisheries and mariculture ventures, and for measures to improve relations between Indigenous communities, fisheries agency staff and commercial fishers.

Audit of Coastal Zone Inquiry Recommendations

The Coastal Zone Inquiry recommendations lead to the development of the terms of reference for the Aboriginal and Torres Strait Islander Fisheries Strategy (ATFS). The terms of reference are:

- establish a structure and process for effective consultation with, and involvement of Aboriginal and Torres Strait Islander communities on the shared use of Australia's fisheries resources which should include the provision of opportunities for dialogue, resolution of conflict and development of fisheries management partnerships between Indigenous peoples, commercial and recreational fishers and fisheries managers

- in consultation with Aboriginal and Torres Strait Islander communities, develop principles to be used in developing and implementing management arrangements, taking into account the characteristics of the resources concerned and the requirements of all users

- establish principles for identification and recognition of Aboriginal and Torres Strait Islander fisheries activities, including traditional and commercial fishing and establish an ongoing program for the collection and assessment of data on those activities to assist in the process

- recommend arrangements for advancing the legitimate claims of Aboriginal and Torres Strait Islanders to participate in the sustainable use of fisheries resources.

Table 3 summarises the ten *Coastal Zone Inquiry* recommendations and the extent to which these recommendations have been implemented to date.

Table 3:

Coastal Zone Inquiry Recommendations

R.17 Recognition of hunting, fishing and gathering rights

The Inquiry recommends that the Council of Australian Governments initiate a process whereby traditional hunting, fishing and gathering rights are recognised by governments and amendments are made to laws and regulations to incorporate this recognition and provide for mechanisms for resolving disputes.

Commonwealth

No national initiative has occurred, other than recognition of hunting, fishing and gathering via the native title act and as the result of various court decisions, eg the *Yanner* and *Yamirr* High Court decisions.

New South Wales

Fisheries Act recognises native title. Aboriginal people who are party to a native title claim are exempt from requiring a Recreational Fishing Licence for sea fishing. Indigenous Fisheries Strategy in preparation.

Victoria

Fisheries Act includes a specific objective to facilitate access to fisheries resources for traditional uses. Fisheries management currently under review by a committee of the Victorian Parliament.

Tasmania

Fisheries Act does not explicitly recognise Aboriginal rights and interests in fisheries. Fisheries Act currently under review.

South Australia

Living Marine Resources Management Act allows Aboriginal "cultural fishing" without a requirement for a permit.

R.18 Commonwealth legislation to establish national criteria for hunting, fishing and gathering rights

The Inquiry recommends that, in the event of failure during 1994 to negotiate satisfactory nationwide arrangements for traditional hunting, fishing and gathering rights, the Commonwealth enact legislation to establish national criteria for such rights; the legislation be based on the principles, priorities and definitions recommended by the Law reform Commission in its 1986 report on customary laws and be agreed through negotiations with the Aboriginal and Torres Strait Islander Commission and representatives of land councils and other Indigenous organisations.

Commonwealth

No legislation has been enacted to establish national criteria for recognition of Indigenous hunting and fishing rights, other than via the Native Title Act. The EPBC Act contains limited recognition of Indigenous rights to resources, via the ability to apply for permit exemptions with respect to threatened species or ecological communities under section 201 of the Act.

R.19 Indigenous participation in management of marine protected areas

The Inquiry recommends that the Australian and New Zealand Environment and Conservation Council (ANZECC) in conjunction with ATSIC, land councils and other Indigenous organisations, establish criteria for the participation of Indigenous people in the management of conservation areas, including national parks, Marine parks and World Heritage Areas. (Note: ANZECC has now been disbanded.)

Commonwealth

In 1999 ANZECC released guidelines for the establishment of a representative system of marine protected areas. The Guidelines included recognition of Indigenous interests and involvement, including:

- recognition of the cultural needs of Indigenous people
- recognition of the interests of Indigenous people in decision-making
- recognition of the need to consider if a marine area has Indigenous cultural values and native title issues when considering a site for a marine protected area.

New South Wales

Under the NSW Marine Park Act there is a requirement to appoint one representative of Aboriginal communities on the 11 member Marine Parks Advisory Committee, which advises the NSW Marine Park Authority. NSW currently has three marine parks – Solitary Islands, Jervis Bay and Lord Howe Island Marine Parks – The former two parks have two to three Indigenous representatives each of their respective local advisory committees. Lord Howe as no Aboriginal residents and consequently no representation. There is an Aboriginal liaison officer employed at Jervis Bay Marine Park.

Victoria

There are currently no marine parks in Victoria.

Tasmania

There are currently five marine protected areas in Tasmania, with no formal mechanism for Aboriginal involvement in management. The Tasmanian Marine Protected Area Strategy (2001), was developed by the Tasmanian Marine and Marine Industries Council, whose 18 members included one representative of the Tasmanian Aboriginal Cultural Fishing Advisory Committee. The Marine Protected Area Strategy incorporates recommendations for recognition of Indigenous interests contained in the ANZECC Guidelines.

South Australia

The 1998 Marine and Estuary Strategy for South Australia makes no reference to Indigenous interests in marine protected areas.

R.20 National support for Aboriginal Community rangers

The Inquiry recommended that ATSIC and the Australian Nature Conservation Agency, in conjunction with State resource management agencies:

- support, extend and coordinate nationally the Community Ranger system
- support the establishment of Aboriginal Land and Natural Resources Management Offices, such as at Kowanyama (nth Qld)
- review funding options for these initiatives, including the provision of additional Commonwealth and State funds, the negotiation of subcontracting arrangements with those resource management agencies that benefit from these initiatives, the earmarking of a proportion of the budgets of such agencies for supporting the initiatives, and the payment of fees and royalties by the users of resources in areas owned or controlled by Indigenous people.

Commonwealth

No national program to coordinate and support community rangers has been established. However, support for some community ranger initiatives has increased through various targeted environmental management grants from Environment Australia, such as Natural Heritage Trust, CoastCare, BushCare and the Indigenous Protected Area program.

1995: Commonwealth Coastal Policy "Living On The Coast"

The Commonwealth Coastal Policy, launched in May 1995, was developed largely in response to recommendations made in the *Coastal Zone Inquiry*. With respect to Indigenous interests, the Policy document *Living On The Coast* stated:

> Aboriginal and Torres Strait Islander people have a special relationship with and interest in coastal lands and waters and their resources. About half of the Aboriginal and Torres Strait Islander population live near the coast; they have a particular association with the land and sea based on ownership, common law rights and interests, cultural affiliation, historic connection and, in some cases, dependence on the coast and its resources for their livelihood. The Commonwealth acknowledges and will take into account Aboriginal and Torres Strait Islander interests in the coastal zone on a wide range of issues, such as land and marine resource management, cultural heritage and protection of heritage sites.
>
> The underlying concern of Australia's Indigenous people in relation to coastal management is that their traditional and cultural rights and interests are not adequately recognised in management arrangements.
>
> As a matter of social justice, Aboriginal and Torres Strait Islander people should be recognised as participants in the coastal management process, and they should be able to derive social, cultural and economic benefit from the use of coastal environments in which they have an interest.

The *Commonwealth Coastal Policy* committed the Commonwealth Government to the following initiatives relating to Indigenous coastal and marine interests:

1. the Commonwealth Government will support the development and implementation of an Aboriginal and Torres Strait Islander Fisheries Strategy by the Ministerial Council on Forestry, Fisheries and Aquaculture in consultation with Indigenous communities and the Aboriginal and Torres Strait Islander Commission

2. the Commonwealth Government will support an Aboriginal and Torres Strait Islander Coastal Reference Group[116] to provide to the Commonwealth, through the National Coastal Advisory Committee, on the development and implementation of initiatives to involve Indigenous people in coastal resources

3. an Indigenous Communities Coastal Management component will be established under the CoastCare program to encourage Aboriginal and Torres Strait Islander communities to undertake projects to record and protect cultural heritage sites in the coastal zone, to develop coastal management strategies for land and sea under their control, and to participate in the development of strategies for areas in which they have an interest.

4. the above initiatives will be used to strengthen existing programs such as the Contract Employment Program for Aboriginal in Natural and Cultural Resource Management and other "community ranger" programs

5. the Commonwealth Government will promote the appointment of Indigenous people to boards and authorities concerned with environmental and resource management affecting the coastal zone. The boards and authorities will also be required to take account of Indigenous interests in developing their policies and programs

6. the Commonwealth Government will encourage, through the Australian and New Zealand Environment and Conservation Council, the development of management arrangements by other spheres of government that ensure substantive participation by Aboriginal and Torres Strait Islander people in the management of coastal resources, including joint management of conservation areas.

[116] This Group was established by Ministerial appointment in 1996, but disbanded in 1998.

In order to progress the development of an Aboriginal and Torres Strait Islander Fisheries Strategy, a Working Group was established under the Standing Committee on Fisheries and Aquaculture (a committee of the Ministerial Counicl on Forestry, Fisheries and Aquaculture). In September 1995 the Coastal Strategy Section in the Department of the Environment, Sport and Territories and the Fisheries Policy Branch in the Department of Primary Industries and Energy (DPIE) commissioned a consultant to identify and summarise the findings of inquiries, reports, legislation and policies relevant to the development of propsed strategy. In 1996 the report *Fisheries, Aquaculture and Aboriginal and Torres Strait Islander: Studies, policies and legislation* (Sutherland 1996) was published. To date the recommendations of the reports have not progressed.

1995: State of the Marine Environment Report: Our Sea, Our Future

Our Sea, Our Future (Zann 1995) was compiled under the auspices of the Commonwealth Government's Ocean Rescue 2000 program of the then Department of Environment, Sport and Territories. The State of the Marine Environment Report was the first comprehensive scientific description of Australia's marine environment and contributed to the overall National State of the Environment Report. The report included a section summarising the importance of the marine environment to Australia's Indigenous people, which includes the following:

Coastal Aboriginal communities

The coastal Aboriginal people have been users and custodians of Australia's marine environment for 40 000 to 50 000 years. For coastal communities "saltwater country" was, and in many communities still remains, an indistinguishable part of the clan estate and culture. Aboriginal shell middens as old as the present coastline (around 5000 years) are found in many coastal areas around Australia.

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

1997: Review of Management of Commonwealth Fisheries

In June 1997 the House of Representatives Standing Committee on Primary Industries, Resources and Rural and Regional Affairs published its review of Commonwealth managed fisheries: *Managing Commonwealth Fisheries: The Last Frontier*. The review made no reference to potential Indigenous interests in south-east Commonwealth fisheries, but did refer to Indigenous interests in Torres Strait and the northern prawn trawl fishery in the Northern Territory. While the review is complimentary of the Australian Fisheries Management Authority's role in involving Indigenous people in fisheries management in Torres Strait, a recommendation was made to enhance Indigenous involvement in the management of the Commonwealth fisheries elsewhere:

> The Committee recommends that the Australian Fisheries Management Authority involve traditional fishers in the management of Commonwealth fisheries where they are legitimate stakeholders, in line with the broadening representation occurring in the management environment. Where appropriate, this should involve representation on management advisory committees, either as full members or as observers.

1997: National Aboriginal and Torres Strait Islander Rural Industry Strategy

In 1997 the National Aboriginal and Torres Strait Islander Rural Industry Strategy (NATSIRIS) was announced as a joint commitment by the Minister for Primary Industries and Energy, and the Minister for Aboriginal Affairs. The Strategy contained many explicit commitments relating to Indigenous fisheries issues, including:

- subsistence fishing
- codes of practice
- means for increasing Indigenous participation in specific industries
- reservation and buy-back of licences
- market opportunities
- development of infrastructure.

Smyth (2000) reported that by early 2000, neither Agriculture, Fisheries and Forestry Australia (AFFA), the successor portfolio agency to the Department of Primary Industries and Energy, nor ATSIC had committed any funding to implementing the fishery components of the Strategy. AFFA has jurisdictional constraints to implement inshore fisheries programs. The Department has promoted Indigenous participation through the National Aquaculture Development Strategy for Indigenous communities, and administers part of the Funding of the National Recreational and Indigenous Fishing Survey.

In recognition of the difficulties in implementing the NATSIRIS, AFFA commissioned an audit, undertaken by Resource Policy and Management (2001), of actions taken against the NATSIRIS. Specific Indigenous fisheries components are provided in Table 4. The audit identifies the jurisdictional restraints on a Commonwealth agency such as AFFA in implementing reform in inshore fisheries policies and programs that are largely administered by State and Territory Government agencies.

Resource Policy and Management (2201) reported that of the 83 recommendations contained within the NATSIRIS, only 34 had been implemented. Aside from jurisdictional limitations, a reorganisation of portfolio responsibilities across the Commonwealth also contributed to some recommendations not being implemented. The review noted that the only aspect of the NATSIRIS for which AFFA could demonstrate "an overall and consistent response" was in fisheries management. In apparent contradiction of this assessment, the review reports the view of "a respondent in the Cairns region", who stated that, following initial progress in 1998, the Indigenous Fisheries Strategy was suddenly cancelled and that further progress would be through the NATSIRIS but that neither AFFA nor ATSIC had done so.

Table 4:
National Aboriginal and Torres Strait Islander Rural Industry Strategy Audit of Actions

Action Recommended Marine Fishing **2.1** Remove barriers to Indigenous groups practicing subsistence fishing. **Relevant AFFA program or service delivery** AFFA has completed a report in response to National Competition Council (NCC) that addresses removing impediments to fishery management. There is no AFMA program or service delivery that would impede Indigenous involvement in fisheries. AFFA did fund a national study on Indigenous fisheries that looked at individual States and the Northern Territory.	**Other organisations involved** The States have the major direct role in managing Indigenous fishing interests as they are mostly within the three-mile zone. **Comment – potential for further AFFA involvement** There is a continuing role for AFFA through supporting research and the development of policy initiatives to support the commercial aspects of Indigenous fisheries.
Action Recommended **2.2** Encourage codes of practice by mainstream fishing enterprises, which include return of bycatch to traditional owners. **Relevant AFFA program or service delivery** Some individual commercial fishers do give bycatch to Indigenous communities when working in waters that are in close enough proximity to make it possible. However, reducing by catch is a major issue. The object of good fishing technology is to develop methods of reducing bycatch through mechanisms such as installing turtle by-pass in nets. Any attempt to institutionalise distribution of by catch may be counter-productive.	**Other organisations involved** States and the Northern Territory Government. **Comment – potential for further AFFA involvement** AFFA is involved in supporting research and policy in reducing bycatch to promote sustainable fisheries with minimum impact on non-target species.
Action Recommended **2.3** Assist the Torres Strait Islander Regional Authority in identifying means for increasing Indigenous participation in the prawn trawling industry. **Relevant AFFA program or service delivery** The Fisheries Resources Research Fund has the capacity to promote research into sustainable harvesting of the three main species: Spanish mackerel, prawns and rock lobster.	**Other organisations involved** This work would be done in cooperation with the Government of Papua New Guinea and the Queensland Government. **Comment – potential for further AFFA involvement** If there is interest from the Torres Strait Islands then AFFA would be in a good position to develop the most appropriate licensing arrangements.
Action Recommended **2.4** Encourage extension of preferential licensing to Indigenous people for collection of abalone, trochus, beche de mer and mud crabs in appropriate locations.	**Relevant AFFA program or service delivery** These are State and Northern Territory responsibilities because they are typically within the three-mile limit. **Other organisations involved** States and Northern Territory Government.

Action Recommended

2.5 Support reservation and buy back of fishing licenses where Aboriginal and Torres Strait Islander people have been excluded from the local commercial fishing industry.

Relevant AFFA program or service delivery

This is a State and Northern Territory matter.

Comment – potential for further AFFA involvement

There is the potential for AFFA to assist with coordinating or assisting with developing the most appropriate schemes. Particularly through its role on the Ministerial Council on Fisheries, Forestry and Aquaculture.

Action Recommended

2.6 Assess the market opportunities for increased production and value adding by Indigenous communities in relation to abalone, trochus, beche de mer, shark fins, rock lobster and mud crabs.

Relevant AFFA program or service delivery

State and Northern Territory matter.

Comment – potential for further AFFA involvement

As above

Action Recommended

2.7 Provide assistance to Indigenous communities in establishing infrastructure for harvesting, storage, processing and transport of fishery products within the context of an enterprise plan.

Action Recommended

Fresh water fishing

2.8 Assist Indigenous communities in gaining access to inland fishery resources for community use.

Relevant AFFA program or service delivery

Freshwater fishering is primarily a State and Northern Territory issue. However, 50%of the cost of the National Recreational Fishing Survey is being funded by AFFA from the Natural Heritage Trust Fisheries Action Program.

Action Recommended

2.9 Support initiatives to restock inland waterways for subsequent sustainable harvesting by Indigenous communities.

Relevant AFFA program or service delivery

State and Northern Territory matter.

Action Recommended

Aquaculture

2.10 Recognise the interests of Indigenous communities within the National Aquaculture Strategy.

Relevant AFFA program or service delivery

AFFA has funded the National Framework for Aboriginal Aquaculture Development.

Action Recommended

2.11 Provide technical support to Indigenous communities wishing to plan for and establish aquaculture enterprises for community food supplies or for external sales.

Subsequent to this review AFFA's Executive Leadership Team agreed to a strategy promoting equitable access by Indigenous clients to AFFA's portfolio of programs and services. This strategy has been developed into four themes:

- on the ground or specific projects
- program and service delivery
- communication
- internal AFFA policies.

These themes form the basis of the AFFA Indigenous Strategy Steering Committee's Action Plan. This Action Plan has three prime objectives:

- an increase in the number of Indigenous clients aware of, and where applicable, accessing AFFA programs and services
- AFFA working cooperatively with Indigenous groups through on-the-ground actions
- within the context of the overall workplace diversity strategy for AFFA, improved awareness of staff of issues relevant to Indigenous people.

AFFA is also developing a leaflet for staff, which highlights how the cultural values of Indigenous people can differ significantly from non-Indigenous people, particularly in relation to their focus on community and the importance of land in their cultural identity.

1998: *Australia's Ocean Policy*

The following extract from the National Oceans Office Website (www.oceans.gov.au) outlines the recognition of Indigenous interests, and mechanisms for Indigenous participation, in *Australia's Oceans Policy*.

Aboriginal and Torres Strait Islander People's Responsibilities and Interests: The Challenge

To involve Aboriginal and Torres Strait Islander people in the use, conservation and management of Australia's marine jurisdictions.

Background

The social, cultural and economic relationships of many Aboriginal and Torres Strait Islander people with the ocean environment mean that they have strong interests in the use, conservation and management of Australia's oceans.

Access to, and use of, marine resources are essential to the social, cultural and economic well being of coastal Aboriginal and Torres Strait Islander communities.

Among the concerns of coastal Aboriginal and Torres Strait Islander people are equitable and secure access to resources; direct involvement in resource planning, management and allocation processes and decisions; formal recognition of traditional patterns of resource use and access; traditional management practices and customary law and conservation of the oceans and its resources; and access to genetic resources, intellectual property and ownership.

Aboriginal and Torres Strait Islander people are concerned with the conservation of the coasts and the oceans for several reasons, including:

- a responsibility to look after and maintain areas with which they have a traditional affiliation and custodianship
- an economic reliance on the resources of the oceans
- the need for continued access to vulnerable species such as dugong and sea turtles.

Response

Awareness and understanding

The Government will:

- promote understanding of the social, cultural and economic importance of the ocean environment and its resources to coastal Aboriginal and Torres Strait Islander people and their role in its conservation.

Use of the ocean environment

The Government will continue to:

- implement the National Aboriginal and Torres Strait Islander Rural Industry Strategy as it is relevant to ocean-based industries, and the National Aboriginal and Torres Strait Islander Tourism Industry Strategy as it is relevant to marine tourism
- remove barriers to Indigenous groups practising subsistence fishing on a sustainable yield basis consistent with conservation of species
- provide increased opportunities for Aboriginal and Torres Strait Islander people to be involved in commercial fishing.

Conservation of the ocean environment and its resources

The Government will continue to:

- provide guidelines for Indigenous communities in the preparation of plans for sustainable enterprise development, including use of information technologies
- provide support for initiatives that will promote and demonstrate ecologically sustainable and multiple use of sea resources by Indigenous communities
- provide assistance to Indigenous communities in documenting traditional resource management practices that can contribute to contemporary best practices, including knowledge that relates to management of biological diversity, and promote equitable sharing of benefits derived from Indigenous knowledge and practices
- address the threats of impacts posed by activities on fishery resources and marine sites valued by Indigenous communities
- implement the National Aboriginal and Torres Strait Islander Cultural Industry Strategy as it is applicable to the natural and cultural heritage values of Australia's marine areas.

Management of the ocean environment and its resources

The Government will:

- provide for Aboriginal and Torres Strait Islander representation on the National Oceans Advisory Group and on Regional Marine Plan Steering Committees
- provide for Aboriginal and Torres Strait Islander participation at the National Oceans Forum
- consult with Indigenous groups on the requirements for establishing a national consultative mechanism, such as an annual forum
- continue to develop and implement principles and guidelines for co-management of relevant marine areas and resources
- continue to facilitate the increased involvement of Aboriginal and Torres Strait Islander people in monitoring, surveillance and enforcement activities
- continue to promote the role of all spheres of government in recognising and developing the participation of Aboriginal and Torres Strait Islander people in the management of the ocean environment and its resources
- continue to actively foster the development of agreements between Aboriginal and Torres Strait Islander people, governments and industry groups involved in the oceans

- continue to promote capacity building, education and training within Aboriginal and Torres Strait Islander communities, to provide a sound base for traditional use and new commercial activities in marine resource use, management and marketing, and to support direct participation in regional planning and management activities
- continue to improve opportunities and appropriate support for Aboriginal and Torres Strait Islander people to become involved in the management of ocean areas as appropriate.

Natural and Cultural Heritage: The Challenge

To identify, conserve, promote and transmit to future generations the natural and cultural heritage of Australia's marine areas.

Background

Our oceans are national heritage assets in community ownership. Australia's coastal zone has significant natural, cultural and maritime heritage values. This places considerable responsibility on all Australians to ensure these assets and their values are managed to conserve their significance, both now and in the future.

Our understanding of marine heritage values and their vulnerability is poor. These values must be identified and included in the conservation planning and management of ocean resources. Failure may result in irreversible damage to Australia's marine heritage.

Our marine heritage includes natural, Indigenous and historical values, including islands and reefs, Aboriginal fish traps and coastal middens, ship-wrecks, lighthouses and immigration facilities. Several of Australia's World Heritage Areas, including the Great Barrier Reef, Shark Bay and the Lord Howe Island Group are listed entirely or in part because of their outstanding marine heritage values.

Non-government groups play a critical role in promoting broader community awareness of, and participation in, heritage identification and conservation. Many groups are developing community information and education programs and fostering cooperation with industry.

This stewardship will be promoted and reinforced at all levels of government and in the community. Responsibility for ocean health rests with the entire community. A critical part of future action will be to broaden acceptance of our duty of care for our marine heritage.

Australia's marine heritage also has an important and potentially increasing economic value, particularly for the expanding marine tourism industry. Coastal sites of natural and cultural significance are often a focus for tourism use. However as a common good these heritage places are liable to be degraded and their values lost through misuse and unplanned access by tourists. It is essential to put in place precautionary strategies to protect these heritage places from the impact of tourism activities, while accommodating reasonable commercial development.

Response

Identification and research

The Government will:

- coordinate government efforts to list and conserve marine heritage through the National Heritage Places Strategy and associated Natural Heritage Trust and State and Territory programmes
- through the regional marine planning process, place greater emphasis on systematically identifying heritage values in the marine environment and ensure that such values are recognised and conserved through programs protecting the marine environment from land-based activities.

Education and training

The Government will:

- continue to ensure that relevant curricula contain information on heritage aspects of the marine environment, including the interests of coastal Indigenous communities
- continue to improve marine heritage identification and research skills through government support of professional development and tertiary courses
- develop an effective training package for use by government, non-government groups, industry and community groups whose activities may affect heritage values, or who need skills to manage those values.

Stewardship

The Government will:

- provide support for information and education and community, industry and academic participation in the identification and protection of marine heritage, marine monitoring, rehabilitation and conservation programs relating to marine natural and cultural heritage.

National Estate and World Heritage

The Government will:

- continue with cooperative National Estate and World Heritage processes for ocean areas, consistent with the Council of Australian Governments' review of environmental roles and responsibilities and the development of a National Heritage Places Strategy.

The *Oceans Policy* also contains a commitment to a contribute $1.8 million to the National Recreational Fishing Survey to "help the better management of both the recreational and commercial fishing sectors". To aid this work a survey is being undertaken on behalf of the Commonwealth by NSW Fisheries, including a survey on Indigenous fishing. In northern Australia, the survey is being undertaken by regular face-to-face interviews with Indigenous fishers. In southern Australia, the survey is being undertaken via telephone interviews, including some interviews with Indigenous fishers. The results of the survey are expected by the end of 2001.

Oceans Policy also contains a commitment for the participation of Indigenous people in the implementation of the policy:

The Government will:

- continue to facilitate Indigenous people's participation in resource assessment, allocation and management
- continue to foster the use of traditional knowledge and resource use data in management
- continue to implement, in conjunction with Aboriginal and Torres Strait Islander groups, cooperative programs in marine protected area development and ecologically sustainable traditional and commercial use of marine fauna and flora.

1999: Strategic Plan of Action for the National Representative System of Marine Protected Areas

This guide for action by Australian governments was prepared by the Australian and New Zealand Environment and Conservation Council whose functions now come under the Natural Resource Management Ministerial Council. It includes an appendix containing *Guidelines for Establishing the National Representative System of Marine Protected Areas*.

The main document recognises Indigenous issues in developing the National Representative System of Marine Protected Areas (NRSMPA). The sole reference to Indigenous interests is that "community groups, including Indigenous and non-government groups"

should be included as stakeholder in the consultation process. However, the attached "Guidelines" include as one of the goals of the NRSMPA is providing for the "recreational, aesthetic and cultural needs of Indigenous and non-Indigenous people".

And one of the principles for developing the NRSMPA is that "the interests of Australia's Indigenous people should be recognised and incorporated in decision making".

The Guidelines also recommend that the following questions should be considered in the selection of a site for a marine protected area:

Does the site:

• Have traditional usage and/or current economic value?

• Contain Indigenous cultural values?

• Have native title considerations?

These Guidelines resulted in part from a workshop on "Developing Australia's Representative System of Marine Protected Areas", convened by the Australian Nature Conservation Agency (now Environment Australia) in 1996 (Thackway 1996). During the workshop more detailed consideration was given to issues relating to Indigenous rights and interests in establishing marine protected areas than subsequently appeared in the Guidelines. In a paper delivered at the workshop Smyth (1996) proposed the following guidelines for establishing marine protected areas (MPAs) in Indigenous environments:

1. assume that substantive Indigenous interests exist in all proposed MPAs around coastal Australia

2. commence negotiations and consultations with relevant Indigenous communities and organisations at the earliest possible stage in the consideration of a new MPA. Such negotiations should address both the principle of establishing the MPA and the ongoing opportunities for Indigenous involvement in planning and management

3. recognise the importance of long-term economic opportunities for coastal Indigenous communities associated with the MPA

4. explicitly recognise Indigenous people's interests in all enabling legislation associated with the MPA. Legislative recognition should include access to subsistence resources and involvement in MPA management at all levels, including the governing board or authority

5. appointment and resourcing of specialist staff to facilitate ongoing liaison with Indigenous communities, and to assist with the implementation of special management arrangements involving Indigenous people.

2000: Fisheries Research and Development Corporation Research and Development Plan 2000 to 2005

The Fisheries Research and Development Corporation (FRDC) is responsible for coordinating and funding fisheries research and development throughout Australia. Its annual budget is approximately A$17 million,[117] of which 25% comes from a levy on commercial fishing and the remaining 75% comes from a direct Commonwealth Government grant.

FRDC's 2000-2005 Research and Development Plan (*Investing in Tomorrow's Fish*) recognises that there are three distinct fisheries in Australia: "commercial", "recreational" and "traditional". The traditional sector is described as including enterprises and individuals associated with fisheries resources from which Aboriginal and Torres Strait Islander people derive products in accordance with their traditions.

The following extracts from the Research and Development Plan describe the traditional sectors and its impact on fishery resources:

[117] Based on figures in the FRDC Annual Report for 1999-2000 (website linkfrdc.com.au).

Traditional Sector

Aboriginal and Torres Strait Islander people have developed a close, interdependent relationship with the land, water and living resources of Australia through traditional fishing practices over tens of thousands of years. That relationship includes customary rights and responsibilities of particular Indigenous groups to particular areas of land, water and resources. Some of these customary rights and responsibilities are now recognised in Australian common law and through native title legislation.

Commercialisation of fisheries and expansion of recreational fishing have affected some traditional fishing. For example, commercialisation of intertidal mollusks in the 1970s, on top of their heavy harvesting by recreational gatherers in some areas, led to restrictions being imposed on what had been an Aboriginal subsistence fishery for thousands of years. Expensive commercial licences and strict recreational bag limits have made it difficult for some Aboriginal fishers to continue their traditional fishing.

Social factors relating to the traditional sector

Many Aboriginal and Torres Strait Islander people share traditional marine and freshwater foods among extended families. This practice helps to continue the customary relationship between Indigenous people and their environments, and to strengthen their ties of kinship.

Traditional fishing is increasingly being addressed in fisheries management plans. Fisheries legislation provides varying recognition of native title fishing rights, in many cases without specifying what those rights may be.

In some Australian jurisdictions, Aboriginal and Torres Strait Islander fishers are exempt from fisheries regulations when they fish according to customary laws and traditions. These exemptions typically apply only to subsistence fishing.

Since the 1992 decision by the High Court of Australia in the *Mabo* case, which recognised the existence of native title in Australia, there has been increasing impetus for implementation of Indigenous access to fisheries. The *Native Title Act 1993* provides for the possibility of native title in the sea, while confirming government ownership of water and minerals and restricting native title rights to non-commercial, subsistence use of living resources. The courts have decided that non-exclusive right can be claimed over parts of the sea and that this right includes hunting living marine resources according to local customary laws and traditions.

Further, a 1999 High Court decision (the *Yanner* decision) confirmed that Aboriginal and Torres Strait Islander people may claim a right under native title to hunt living resources according to local customary law. This decision has implications for recognition of Indigenous people's rights and interests in fisheries management.

Impacts of traditional fishing

The traditional sector has access to some species that the commercial and recreational sectors do not have: for example, turtles and dugongs. Collection of data on both target stocks and broader fisheries ecosystems involved in traditional fishing is less comprehensive than for the commercial and recreational sectors; consequently, the impacts of the sector on both target stocks and broader fisheries ecosystems are the least understood.

As with recreational fishers, most traditional fishers have little knowledge of fisheries management. Some traditional fishers are increasing pressure on fisheries resources by using contemporary technologies such as powerboats.

Aboriginal and Torres Strait Islander people are increasingly involved in fisheries management through consultative processes, employment as rangers and fisheries inspectors, involvement in research, and monitoring of activities of commercial fishers (including Indigenous commercial fishers). However, their involvement by and large has not matched that of the commercial and recreational fishing sectors.

Despite the above acknowledgment of the "traditional" fisheries sector, the FRDC Research and Development Plan makes little reference to this sector of FRDC's future funding programs. The four major funding programs are:

1. Natural Resources Sustainability

2. Industry Development

3. Human Capital Development

4. Management and Accountability.

Each of these programs is considered in the context of outcomes for Government research and development priority, AFFA portfolio, Australian Seafood Industry Council and Recfish Australia. In this way, government, commercial and recreational fishing interests are considered in the development of each research and development-funding program. However, there appears to be no structural consideration of Indigenous ("traditional" sector) outcomes for these research and development programs. This may reflect the current administrative and consultative structures in place within the FRDC.

Membership of the FRDC Board is by ministerial appointment on the advice of a selection committee made up of representatives of national fisheries organisations. In the absence of a national Indigenous fishery organisation, Indigenous fisheries interests are not represented on that selection committee.

2001: A National Aquaculture Development Strategy for Indigenous Communities in Australia

AFFA recently funded Fisheries Western Australia, in partnership with Makaira Pty Ltd, to undertake a study with the following objectives:

- to develop a national strategy and management framework for accelerating the involvement of Australia's Indigenous communities in aquaculture
- to recommend a strategic plan to increase the economic independence and food-production capabilities of Indigenous communities in the country through involvement in aquaculture.

The project was undertaken in response to strong expressions of interest in aquaculture from Indigenous communities around Australia. The report claims that the industry is "culturally in harmony" with the lifestyles and skills of Indigenous people and often well suited for development in the isolated coastal and inland areas were many Indigenous communities are based. It also notes that many factors currently impede the participation of Aboriginal people in aquaculture and their aspirations to use the industry for economic advancement, employment opportunities and food production.

The study invited stakeholders to make submissions. Workshops were held in all State and Territories and a draft report was circulated for comment before preparing a final report (Lee and Nel 2001). The final report deals with Indigenous aquaculture opportunities and issues mainly at a national level, and recognises the need for the implementation of recommendations that will take planning to the levels of individuals and communities, with a high level of State and Territory government involvement.

The report lays the foundation for further work needed to establish viable Indigenous aquaculture projects around Australia, and makes the following 28 recommendations, presented under six headings:

Industry Development

1. Establish a small and highly focused "Aquaculture Steering Committee" to implement the recommendations provided in this study

2. Establish within ATSIC a small and specialised unit with significant aquaculture skills

3. Explore the options that exist to integrate development planning strategies for Indigenous aquaculture with planning for other complimentary activities in the region

4. Consider the establishment of a working group or committee comprising representatives of the state, ATSIC, regional councils and community members, to represent Indigenous aquaculture interests in each of the identified biogeographic regions

5. Contemplate the best means whereby one or more multi-species hatcheries could be established in each of the biogeographic regions identified in this study and the means whereby appropriate synergies could be developed between them and existing Commonwealth and state aquaculture agencies

6. Where appropriate, demonstration farms could be established in selected regions

7. Communicate to proponents the need for and encourage long-term commitments from individuals or communities interested in becoming involved in commercial aquaculture.

Physical Factors and the Environment

8. For any proposed aquaculture project, ensure a thorough assessment is carried out of the selected site to assess its physical, biological and ecological features and evaluate the relevant economic and social factors

9. Ensure that, for any proposed project, culturally sensitive areas are not disturbed and due emphasis is placed on environmental management and sustainability

10. Explore the feasibility to use aquaculture to re-stock or enhance depleted fisheries and the means by which this practice could be most effectively established.

Biotechnical Factors

11. For each of the biogeographic regions, identify species that may be suitable for Indigenous aquaculture and on which relevant research and development is taking place

12. In collaboration with existing Commonwealth, State and Territory research institutions, establish a means of focusing as well as extending research and development efforts on the special requirements of Indigenous communities

13. Establish a means of translating the outcomes of research and development from national and regional institutions into practices that can be transferred to and realistically applied by Indigenous people to aquaculture projects.

Commercial and Legal Factors

14. Establish a national business network to develop and maintain links between Indigenous people or communities involved in aquaculture and the commercial aquaculture industry

15. Develop a register of commercial institutions, organisations and individuals interested in becoming involved in the development of Indigenous aquaculture

16. Establish a clear and transparent process that actively solicits support from the public and relevant industries for Indigenous aquaculture to become major industry stakeholders

17. Encourage the formation of organisations that represent Indigenous communities with common interests in aquaculture development. Establish a working group within each organisation to expedite the identification of suitable aquaculture land that could be developed

18. In each biogeographic region, identify organisations and people who could act as mentors to communities interested in developing aquaculture

19. Develop a detailed document that identifies all organisations that might provide services, programs and funding for Indigenous aquaculture development initiatives and projects

20. ATSIC should develop a flow chart that clearly illustrates its funding process and shows the relevant time lines for funding aquaculture projects

21. Through its regional offices and in its relevant brochures, ATSIC should make it known that it would give strong preference to funding aquaculture projects involving groups of individuals and communities

22. Document and review the decision-making and legislative processes currently in use by the Commonwealth, State and Territory governments in respect of Indigenous aquaculture and suggest solutions where they might be needed

23. Encourage and foster co-operation, interactions and mutual trust between Indigenous communities, regional councils, ATSIC, all funding bodies, the private sector and all Commonwealth, state, territory regulatory bodies.

Education and Training

24. Consider the establishment of a dedicated, nationally accredited Indigenous training course based on currently available and accredited National Seafood Modules

25. To provide the necessary guidance for Indigenous people who wish to follow a career path in aquaculture, prepare a document that clearly explains the training and education opportunities that exist, as well as some details about education and training requirements and opportunities

26. Develop links with TAFE colleges, other relevant institutions and industry organisations that can provide skills-based training courses for Indigenous people, and where appropriate, provide traineeships to the people to attend the course

27. Develop a job-placement program to place trained Indigenous people in commercial aquaculture projects.

Social and Cultural factors

28. Prepare a document that provides an outline of how to do business and develop projects with Indigenous communities, with specific reference to aquaculture.

ATSIC review of Indigenous commercial fisheries rights and interests

In 2000, ATSIC commissioned a review (Tsamenyi and Mfodwo 2000) of the recognition of Indigenous rights and interests in current commercial fisheries policy and management in Australia. The review included a comparison with recent developments in New Zealand. It summarises the current status of Indigenous commercial fisheries in Australia, with reference to Commonwealth, State and Territory legislation and policy, and in the context of emerging native title law in Australia. The review predates the recent High Court Croker Island (*Yamirr*) decision, but discusses the potential implications of that case. A major finding of the review was the need to place more attention on exploring and negotiating Indigenous commercial fisheries rights and interests, in contrast to the hitherto primary focus on securing subsistence fishing interests.

The summary conclusions of the review are:

- there is a need to supplement the current focus on customary or traditional fishing rights with a greater one on commercial fishing rights for Australia's Indigenous people
- the current legislative framework in Australia does not support Indigenous commercial fishing rights; the emerging debate on the negotiation of a treaty would seem to provide an opportunity to address Indigenous commercial fishing issues
- an enhanced access security regime for commercial fishers through the recognition of property rights may result in fisheries quota allocations. Recognition of Indigenous commercial fishing rights will therefore require consideration of compensation for Indigenous Australians who may be excluded from quota allocations
- in addressing Indigenous commercial fishing and related matters, Indigenous Australians will need to consider issues around traditional ownership versus historical association within their communities.

2001: Review of Commonwealth Fisheries Management

Indigenous organisations such as ATSIC made submissions to the 2000/1 Federal Fisheries Review which called for increased representation by Aboriginal and Torres Strait Islander organisations in Commonwealth fisheries management bodies. For example, ATSIC suggested the Commonwealth could:

- [explore the] development of partnership agreements between Indigenous communities or their representatives, the Commonwealth Government and industry groups
- increase opportunities for Indigenous people to be trained and employed by Government, industry and research organisations involved in the marine sector
- provide further opportunities for Indigenous people to be involved in decision–making processes (eg through membership to relevant committees or employed in management).

ATSIC also called for increased Indigenous representation on advisory committees, and even the AFMA Board:

> In order to have proper management of sea resources, where more than one sector impacts on these resources, it is essential that representatives of various user groups (not just representative of key stakeholders) be appointed to MACs, AFMA and other relevant boards of management. This would enable a more equitable access to resources and decision-making processes by various groups rather than promoting continued access to resources from players who are financially more in a position to afford access (eg large commercial fishing and mining companies). It is especially important that Indigenous representatives be appointed to various boards of management so that their rights, interests and aspirations are fully understood and taken into consideration in the management process (ATSIC 2001).

New South Wales delegates at the 1999 national Indigenous Sea Rights Conference, also called for the creation of an Aboriginal Marine Rights Council as a forum through which Aboriginal communities could be informed about on-going processes in relation to marine and coastal issues, and provide an advocacy role (Coombes 1999).

AFFA is currently engaged in a review of the management of Commonwealth fisheries. Advice from AFFA indicates that Indigenous involvement in the management of Commonwealth fisheries, other than in Torres Strait, has not been a major focus of the Review. However, the following extract from *Draft of Review of Commonwealth Fisheries Policy* (Version 7 August 2001) indicates that Indigenous fisheries issues have been addressed to some extent:

> Submissions from Indigenous people to the review raised issues of Indigenous Fishing Rights under Native Title, access to fishery resources for traditional and commercial fishing, conservation of fishery resources including the need to reduce discarding in commercial fisheries and the need for greater Indigenous participation in current fisheries management arrangements.
>
> The High Court of Australia is currently considering whether native title exists over marine areas and the outcome of this process may have significant implications for both Commonwealth and State and Territory fisheries in the future.
>
> A number of initiatives are under-way, which aim to facilitate Indigenous involvement in commercial fisheries and aquaculture production. These include:
>
> - 'A National Aquaculture Development Strategy for Indigenous Communities'
> - a collaborative proposal between the Aboriginal and Torres Strait Islander Commission, the Australian Seafood Industry Council and AFMA to develop Indigenous Commercial fishing interests
> - COAG is also examining strategies to encourage participation of Indigenous fishers in commercial operations.

Options for Discussion

6.1 Consider changing legislation so that AFMA is required to take into account the recreational, charter and Indigenous catch in management arrangements as well as Management Plans?

6.2 Develop a mechanism to allow for allocation of catch shares between the sectors, such as using an independent allocation panel or similar procedure?

6.3 Consider whether steps should be taken to actively seek the participation of recreational or Indigenous representatives on a MAC where they have a significant interest in a Commonwealth fishery.

6.4 What is the most effective way for recreational and charter fishers to contribute to the costs of fisheries management and research in Commonwealth fisheries where recreational and charter fishing is required to be actively managed?

6.5 How can Indigenous aspirations in commercial fisheries and aquaculture be best developed by the government in partnership with Indigenous communities?

2001: National Recreational Fisheries Survey

Funded by the Commonwealth Government through the Natural Heritage Trust, NSW Fisheries is currently undertaking a survey of recreational fishing throughout Australia. The objectives of the survey are:

1. To determine the participation rate in recreational fishing nationally, by states and territories and regionally, and profile the demographic characteristics of recreational fishers.

2. To quantify fish catch and fishing effort of the recreational fishing sector nationally, by States and Territories and, where appropriate, regionally.

3. To quantify economic activity associated with the recreational fishing sector nationally, by states and territories and, where appropriate, regionally.

4. To establish attitudes and awareness of recreational fishers to issues of relevance to their fishery.

5. **To quantify fishing activity by Indigenous fishing communities (where significant) in terms of participation, catch and effort, and attitudes.**

In northern Australia direct consultations with Indigenous coastal communities have taken place in an effort to meet Objective 5 of the Survey. In southern Australia the survey has been conducted by telephone only, with no direct targeted consultations with Indigenous fishers.

2001: National Objectives and Targets for Biodiversity Conservation

Prepared by the Natural Heritage Trust and Biodiversity Policy Branch of Environment Australia, this document sets objectives and targets for ten priority outcomes which the Commonwealth, States and Territories should pursue between now and 2005, consistent with the National Strategy for the Conservation of Australia's Biological Diversity, released in 1996. Of the 10 priority actions, Priority 8 is to "Maintain and record Indigenous people's ethnobiological knowledge". Table 5 outlines the objectives, targets and performance indicators.

Table 5:
National objectives and targets for biodiversity conservation.

Objectives	Targets 2001-2005	Performance Indicators
Ensure Indigenous communities have access to resources to enable them to preserve their ethnobiological knowledge about biodiversity conservation.	By 2002, all jurisdictions have, in cooperation with Indigenous people: • Established mechanisms to facilitate the intergenerational transfer of ethnobiological knowledge • Identified high priority regions for ethnobiological research. By 2005, in cooperation with Indigenous people, ethnobiological research has commenced in all priority regions. By 2003, all jurisdictions have developed mechanisms to ensure Indigenous communities can protect their interests in Indigenous people's ethnobiological knowledge and information.	Number of jurisdictions that have negotiated mechanisms with Indigenous people to facilitate the intergenerational transfer of ethnobiological knowledge. Number and percentage of high priority regions, by jurisdiction, in which ethnobiological research has commenced. Number of jurisdictions with programs to facilitate the intergenerational transfer of ethnobiological knowledge. Number of jurisdictions that have negotiated mechanisms with Indigenous people to protect their ethnobiological knowledge and information.

International considerations

This section summarises the extent to which Indigenous people's rights and interests in the management of marine environments and resources is recognised in international treaties, conventions and other agreements. Also included is a brief review of how these matters are addressed in other countries with colonial histories, economies and legal systems comparable with Australia. The selected countries are New Zealand, Canada and the United States of America.

The summary information that follows is drawn from several discussions on these issues published in Australia over the last ten years. These include Sutherland (1994 and 2000), Jull (1993), Carpenter (1999) and Heremaia (2000).

International Conventions

International standards for recognition of Indigenous people's rights to environmental resources (including marine resources) and human rights in general are covered in the:

- International Labor Organisation's Convention 107 on the Elimination on All Forms of Racial Discrimination
- International Labor Organisation's Convention 169 on Indigenous and Tribal People (not yet signed by Australia)
- International Covenant on Civil and Politic Rights
- International Covenant on Economic, Social and Cultural Rights
- Biodiversity Convention.

At a general level, these conventions recognise and protect the rights of all people to practice their cultures without discrimination and, by implication, to have access to the necessary resources for those cultures to flourish from generation to generation. While none of these conventions address Indigenous marine environmental and resource rights explicitly, their provisions can assist in the development of legislation, policies and programs that:

- protects Indigenous marine resources
- respects Indigenous people's economic rights to and dependence on marine resources
- respects Indigenous people's knowledge of marine resources and supports the transmission of that knowledge from generation to generation
- provides for substantive involvement of Indigenous people in decision-making about the management of marine resources.

In addition to these global conventions, Australia has signed a treaty with Papua New Guinea (The Torres Strait Treaty) that provides explicit recognition of the "traditional customary rights" of the "traditional inhabitants" from both countries with respect to the use and management of marine resources in the Torres Strait. This treaty provides a potential benchmark recognition of Indigenous environmental and resource rights, including involvement in fisheries management. The treaty does not, however, specifically recognise commercial fishing rights to Indigenous people and does not apply to Indigenous people elsewhere in Australia.

Non-binding declarations and agreements

Rio Declaration on Environment and Development

The 1992 the Rio Declaration on Environment and Development (to which Australia was a signatory) includes as one of its principles:

> Indigenous people 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 achievement of sustainable development.

Agenda 21

Agenda 21 is the agreed program of action developed by the international community (including Australia) to implement the principles contained in the Rio Declaration in 1992. Chapter 26[118] includes explicit recognition of the ancient, holistic and continuing relationship between Indigenous people and their environments, and outlines specific objectives for the recognition and strengthening of this relationship. These objectives, to be fulfilled "in full partnership with Indigenous people" include:

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

1. Adoption or strengthening of appropriate policies and/or legal instruments at the national level

2. 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

3. Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development

4. 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

5. Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns

6. 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

7. 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) Establish, where appropriate 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 programs

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

Chapter 17 of Agenda 21 addresses measures for the protection of oceans, seas and coastal areas. It makes specific reference to the inclusion of Indigenous people in all areas of ocean and coastal management and protection, including:

- coordinating mechanisms for integrated management
- education and training
- application and exchange of "traditional knowledge" in management and resource use
- protection of Indigenous cultural and economic resources in the overall sustainable development policies
- support for women in education, training and management of marine resources
- integration of Indigenous fisheries into marine and coastal planning
- protection of Indigenous marine interests in any international agreements.

118 For the full text and discussion of Chatper 26 see Sutherland (1996).

United Nations Draft Declaration on the Rights of Indigenous People

This document, which has yet to be finalised, contains the strongest wording and potential protection of Indigenous people's rights to land, sea and resources of any international instrument. It states:

> Indigenous people have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal sea and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard (Article 25)
>
> Indigenous people have the right to own, develop, control and use the land and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora, fauna and other resources which they have traditionally owned, occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems, and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights (Article 26o)
>
> Indigenous people, as a specific right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions (Article 31).

New Zealand

Maori people make up about 16% of the present population of New Zealand. Though there have been differing interpretations of the Maori and English versions of the 1840 Treaty of Waitangi, this legally binding agreement between the British Crown and the Indigenous people of New Zealand has proved to be an important basis for the resolution of claims to land and marine resources in recent times. In 1975, the Waitangi Tribunal was established under New Zealand Law to investigate breeches of the implementation of the Treaty and to resolve ongoing land and resource claims.

In 1992 the Sealord Commercial Fisheries Settlement was developed as a comprehensive resolution of Maori marine resource claims. The settlement "discharged and extinguished" all commercial fishing rights of Maori and provided:

- the transfer of $175 million worth of fishing quota and funds to the Treaty of Waitangi Fisheries Commission
- control to Maori of approximately one third of the New Zealand fishing quota
- maori representation on fisheries management bodies and the restructure of the Maori Fisheries Commission
- the replacement of customary fishing rights by regulation.

By making this agreement, the New Zealand Government acknowledged that it had wrongfully allocated Maori fish resources to commercial interests as if the resource was Government property. The percentage of fisheries quota allocated to Maori was calculated on estimates of the extent to which Maori would have benefited had their fisheries rights been acknowledged from the beginning of commercial fishing in New Zealand.

Heremaia (2000) has pointed out that the Sealord Settlement has been a controversial resolution of customary resource right claims. It arose out of the legal uncertainty about the interpretation of treaty and native title rights to fish (particularly commercial rights) and it has led to the extinguishment of those customary rights in favour of a commercial settlement and regulation. When it went through the New Zealand Parliament the *Treaty of Waitangi Fisheries Claims Settlement Act* was opposed by all Maori members of Parliament. There have also been subsequent disputes about the allocation of benefits from the settlement, including questions about the appropriate allocation of benefits to "urban" as compared to "tribal" Maori.

Canada

Approximately 3.8% of Canadians have Indigenous ancestry, about half of whom are registered as "Indians". Indigenous Canadians (or "First Nations People") are entitled to participate in marine resource management through recognition of their rights in treaties, the Federal Constitution, court rulings and a Federal Aboriginal Fisheries Strategy. In Canada, the Federal Government has responsibility for Aboriginal affairs and for the management of marine fisheries throughout the country.

In the 1990 *Sparrow* case, the Canadian Supreme Court (Canada's highest court) upheld Indigenous Canadians' right to fish for food and for social and ceremonial purposes. The Court also determined that this right should have priority over other uses, such as recreational and commercial fishing, but that Aboriginal fishing rights were subject to government regulation for an overriding purpose, such as conservation. In the 1999 *Marshall* case, the Supreme Court extended the recognition of Aboriginal treaty rights to include commercial fishing. These court decisions are supported by the *Canadian Constitution Act 1982* which recognised and confirmed all existing Aboriginal and treaty rights of the Aboriginal people of Canada.

The Canadian Aboriginal Fisheries Strategy (AFS), launched in 1993, provided a framework to address fisheries management issues raised by the 1990 *Sparrow* decision, and by the later *Marshall* decision. The following extract from the Canadian department of Fisheries and Oceans website (website linkdfo.gc.ca) summarises the major features of the Strategy:

> The AFS seeks to provide for the effective management and regulation of the Aboriginal fishery and ensures that the Aboriginal right to fish is respected, through negotiation of mutually acceptable, and time-limited Fisheries Agreements between Department of Fisheries and Oceans and Aboriginal groups. Where agreement cannot be reached, DFO will issue a communal fishing licence to the groups allowing them to fish for food, social and ceremonial purposes. The AFS applies only where Canada is responsible for managing fisheries.
>
> Fisheries agreements negotiated under the AFS contain:
>
> - a harvest allocation to the Aboriginal group
> - terms and conditions which will be included in the communal fishing licence (enforcement provisions, data collection)
> - arrangements for the co-management of the Aboriginal fishery by the group and DFO
> - cooperative management projects for the improvement of the management of fisheries generally, such as stock assessment, fish enhancement and habitat management
> - a commitment to provide commercial fishing licences or and other economics development opportunities.
>
> The goals of the Aboriginal Fisheries Strategy are:
>
> - to improve conservation, management and enhancement of the resource
> - to contribute to the economic self-sufficiency of Aboriginal communities
> - to provide a foundation for the development of self-government and treaties
> - through co-management projects with Aboriginal people, to improve the skills and management capacity of First Nations' members
> - To provide mitigation to current licence holders for transfer under the AFS of commercial fishing opportunity to Aboriginal people.
>
> The AFS has offered more stability to all fisheries while providing a greater Aboriginal role in fisheries management and harvesting. This stability is evidenced through the following:
>
> - better monitoring of Aboriginal fishing
> - improved cooperation on enforcement, under the Native Fisheries Guardian Program
> - more selective fishing
> - reduction in protests and confrontation and reduction in litigation.
>
> Funded annually at $32 million, about 125 AFS agreements have been signed each year since the implementation of the Program. Approximately two-thirds of these agreements are reached with

the groups in DFO's Pacific Region, while the balance is made up in Atlantic Canada and Quebec.

An integral component of the AFS is the Allocation Transfer Program (ATP). This Program facilitates the voluntary retirement of commercial licences and the issuance of licences to eligible Aboriginal groups in a manner that does not add to the existing effort on the resource, thereby providing Aboriginal groups with much needed employment and income. Since 1994-95, when the ATP was first launched, 250 commercial licences have been issued to Aboriginal groups.

In addition, approximately 5,000 seasonal jobs have been created through the AFS since 1993 in such areas as commercial fishing, processing, monitoring, and enhancement activities.

The Canadian AFS, and agreements that flow from it, is being implemented in the context of ongoing treaty negotiations at the national and provincial level. For example, the 1993 Nunavut Final Agreement, which established a co-ordinated land and sea co-management regime for the northern territory of Nunavut, and the 1999 Nisga'a Treaty in British Columbia provide considerable detail on the involvement of Indigenous people in fisheries management, allocation of fisheries resources and commercial fisheries trade both within Indigenous communities and on the open market. For further information on the treaty process see Jull (1993) and Sutherland (2000).

United States of America

Like New Zealand and Canada, Indigenous people's rights to land and natural resources in what is now the USA are recognised and protected to greater or lesser extents through a total of 370 treaties negotiated between 1778 and 1871. Though many of these treaty rights have been ignored by successive State and Federal Governments over the years, they do have legal standing in American courts and they are increasingly influencing resource allocation and decision-making.

For example, a court decision in 1974 determined that a treaty provision in Washington State, which protected Indian fishing rights "in common" with non-Indians, meant that 50% of the total fisheries allocation of that State belonged to its Indigenous population. This has resulted in the establishment of a Northwest Indian Fisheries Commission (NWIFC) to manage this Indigenous allocation and to cooperate with other agencies in the management of the total fishery.

The following extract from the NWIFC website (website linknwifc.wa.gov) explains the role and operations of the Commission:

The NWIFC is governed by its member tribes, which appoint commissioners to develop policy to guide the organization. Commissioners elect a chairman, vice-chairman and treasurer. The commission's executive director supervises NWIFC staff in the implementation of the policies and natural resource management activities approved by the commissioners.

Acting as a central coordinating body, the commission also provides a forum for member tribes to jointly address natural resource management issues and enables tribes to speak with a unified voice on issues of mutual concern.

The NWIFC is primarily a support service organization that provides direct services to its member tribes to assist them in their natural resource management efforts. Approximately 70 full-time employees provide services to member tribes through an economy of scale that enables tribes to efficiently use the limited federal funding provided for their natural resource management activities. In addition, the commission provides services to non-member tribes through coordination of several statewide programs.

The NWIFC is headquartered in Olympia, Washington, with satellite offices in Forks, Mount Vernon and Kingston. Four departments comprise the commission: Administration, Fishery Services, Habitat Services and Information and Education Services.

The Administration Division includes the executive director, legislative, fishery and habitat policy analysts, wildlife management program, human resources department, clerical department and accounting department.

Fish and shellfish management programs of member tribes are supported by the Fishery Services Division, which provides technical assistance, coordinating

management programs and representing tribal management policies. The division is comprised of the Fishery Management and Planning Division, Quantitative Services Division and Enhancement Services Division.

The Fishery Management and Planning Division provides technical assistance and coordination to tribes in the development and implementation of annual and long-range fishery plans. Staff also assists tribes in implementation of the U.S./Canada Pacific Salmon Treaty, which regulates fisheries on salmon stocks shared by the two countries. Another major task of the division is to coordinate tribal participation in the implementation of efforts to protect seven western Washington salmon stocks that have been listed as "threatened" under the Endangered Species Act.

The Quantitative Services Division provides data, quantitative analysis tools and technical consulting to aid tribes in their natural resource management activities. The division also administers the Treaty Indian Catch Monitoring Program, which provides a database of harvest statistics critical for fishery management planning and harvest allocation.

The Enhancement Services Division provides coordination for tribal hatchery program activities, including coded wire tagging and fish health programs. Millions of fish produced annually at tribal salmon hatcheries are tagged to provide migration, survival rate and other information critical to fisheries management. NWIFC fish pathologists diagnose illnesses and treat salmon produced at tribal hatcheries to ensure their overall health.

Technical coordination and policy development assistance to member tribes on issues affecting fish habitat and other environmental issues are provided by the Habitat Services Division. The division coordinates tribal participation in forest management processes and conducts a statewide tribal water quality program, as well as a joint salmon habitat inventory and assessment project with the Washington Department of Fish and Wildlife.

... The scope of participation by treaty Indian tribes in the management of natural resources in western Washington has grown steadily since the U.S. vs. Washington ruling that reaffirmed their treaty reserved rights.

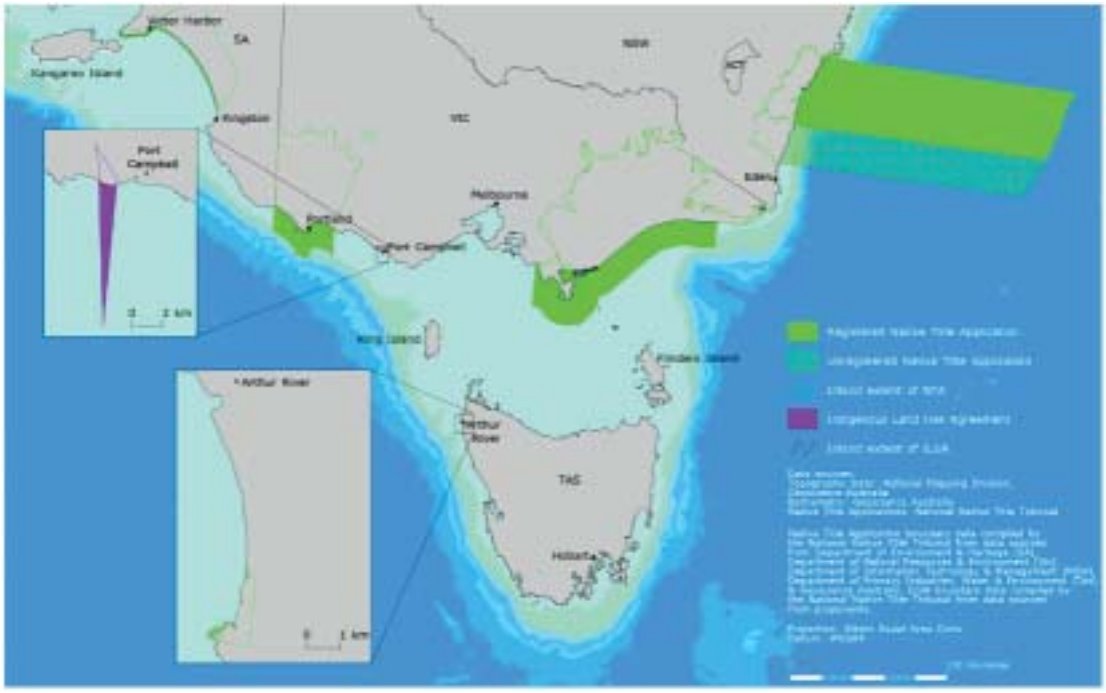
In May 1999, the U.S. Supreme Courts upheld a lower court ruling that reaffirmed the tribes' treaty reserved the right to harvest shellfish, establishing the tribes as co-managers of shellfish resources in western Washington. Because tribes also reserved the right to hunt in treaties with the United States government, tribes also have become active participants in the management of deer, elk, and other wildlife resources in the region.

Shellfish and wildlife management programs have been added to the role of the NWIFC in recent years, and the organization will continue to evolve as necessary to aid the tribes in their effort to protect, preserve and enhance the natural resources of this region for future generations.

Other similar Indigenous fisheries management agencies that have been established as a result of enforcement of treaty provisions in recent times include the Columbia River Inter-Tribal Fish Commission, and the Chippewa-Ottawa Treaty Fishing Management Authority. For further discussion on Indigenous fisheries and marine management in the USA see Jull (1993) and Sutherland (1994).

Appendix 1:

Native Title Claims and Indigenous Land Use Agreements



Appendix 2: Determinations of native title

3.1 Mabo Meriam order

that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer.

3.2 The Croker Island Determination

1. Communal native title exists in relation to the sea and sea-bed within the claimed area.

2. The native title is held by the Aboriginal people who are Yuwurrumu members of the Mandilarri-Ildugij, the Mangalara, the Murran, the Gadura-Minaga and the Ngaynjaharr clans (the common law holders).

3. The native title rights and interests do not confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others.

4. The native title rights and interests which the Court considers to be of importance are the rights of the common law holders, in accordance with and subject to their traditional laws and customs to have free access to the sea and sea-bed within the claimed area for all or any of the following purposes:

    (a) to travel through or within the claimed area;

    (b) to fish and hunt for the purpose of satisfying their personal, domestic or non-commercial communal needs including the purpose of observing traditional, cultural, ritual and spiritual laws and customs;

    (c) to visit and protect places which are of cultural and spiritual importance;

    (d) to safeguard their cultural and spiritual knowledge.

5. The native title rights and interests of the common law holders in relation to the sea and sea-bed within the claimed area are affected by, and to the extent of any inconsistency must yield to, all rights and interests in relation to the sea and sea-bed within the claimed area which exist pursuant to valid laws of the Commonwealth of Australia and of the Northern Territory of Australia including the rights and interests of the lessee of Crown Term Lease No. 1034.

3.3 Hayes v Northern Territory (Alice Springs) Determination

3. The nature and extent of the native title rights and interests in relation to the determination area are:

    (a) the right to possession, occupation, use and enjoyment of the land and waters of the determination area;

    (b) the right to be acknowledged as the traditional Aboriginal owners of the land and waters of their respective estates within the determination area;

    (c) the right to take, use and enjoy the natural resources found on or within the land and waters of the determination area;

    (d) the right to make decisions about the use of the land and waters of their respective estates within the determination area;

    (e) the right to protect places and areas of importance in or on the land and waters within the determination area;

    (f) the right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates within the determination area.

3.4 Ngalpil Tjurabalan consent determination

(i) the nature and extent of the native title rights and interests held by the common law holders in relation to the Determination Area are the right to possess, occupy, use and enjoy the land and waters of the Determination Area to the exclusion of all others, including:

(a) the right to live on the Determination Area;

(b) the right to make decisions about the use and enjoyment of the Determination Area;

(c) the right to hunt and gather, and to take water and other traditionally accessed resources (including ochre) for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual and communal needs;

(d) the right to control access to, and activities conducted by others on, the land and waters of the Determination Area;

(e) the right to maintain and protect sites which are of significance to the common law holders under their traditional laws and customs; and

(f) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the Determination Area.

3.5 Gungarri consent determination

2. …the nature and extent of the native title rights and interests that exist in relation to those parts of the determination area described in Schedule 1 are:

(a) the right to possess, occupy, use and enjoy the area, including the right to live on the area;

(b) the right as between Aboriginal people, to:

(i) resolve disputes about and decide who is or is not a Gunggari person;

(ii) determine as between the common law holders what are the particular native title rights and interests that are held by particular common law holders in relation to particular parts of the area;

(iii) exclude particular common law holders from the exercise of particular native title rights in relation to particular parts of the area;

(iv) regulate among and resolve disputes between Aboriginal people concerning native title rights and interests in relation to the area with the assistance of common law holders and other Aboriginal people from adjoining areas where such assistance is necessary;

(v) uphold, regulate, monitor and enforce the traditional laws and customs of the common law holders;

(c) the right to use and enjoy the natural resources of the area including to hunt, fish and gather;

(d) the right to maintain, protect and preserve areas, places and objects on the area of importance under the traditional laws, customs and practices of the common law holders;

(e) the right to decide on, carry out and pass on the culture, traditions and customs of the common law holders that apply to the area;

(f) the right to conduct and maintain cultural, spiritual and religious practices and institutions in relation to the area;

(g) the right to be buried, and bury common law holders, on the area;

(h) the right to be acknowledged as the traditional Aboriginal owners of the land and waters within the area.

3. The native title rights and interests that exist in relation to the determination area are subject to and exercisable in accordance with:

   (a) the laws of the State and the Commonwealth; and

   (b) the traditional laws acknowledged and the traditional customs observed by the common law holders.

4. The native title rights and interests do not confer possession, occupation, use and enjoyment of those parts of the determination area described in Schedule 1 on the common law holders to the exclusion of all others.

4. Arakwal Indigenous Land Use Agreement (28 October 2001)

In late 1994, Lorna Kelly, Linda Vidler and Yvonne Graham on behalf of the Arakwal People from northern NSW, commenced a process for recognition of native title rights in the land and waters around Byron Bay. A formal native title claim was registered with the National Native Title Tribunal in September 1995.

In his environment policy statement at the 1995 NSW State election, Premier Bob Carr promised to create a national park on Crown land that was included in the Arakwal native title claim area.

To pursue the creation of the new park, the National Parks and Wildlife Service convened the Cape Byron Consultative Committee that included the Arakwal People, the Byron Shire Council and other regional interest groups as well as environmental and resident bodies. That committee made a number of recommendations about the proposed national park and other Crown lands within the Byron Shire.

As a result, a State Recreation Area around the Cape Byron Lighthouse, managed by a Trust made up of Arakwal people and community representatives, was established. In April 1997, representatives of the NSW Government and the Arakwal People signed an agreement establishing the recreation area.

Since early 1996, there have been hundreds of meetings and consultations with all parties and interest-holders affected, or thought to be affected, by the native title claim. The process involved negotiations between the Arakwal People and the NSW Government about the national park proposal, with mediation assistance from the National Native Title Tribunal from 1998 to 2001.

In October 2000, at a meeting arranged by the NSW Aboriginal Land Council, the Arakwal People authorised the Indigenous Land Use Agreement (ILUA) which was registered by the National Native Title Tribunal on 28 August 2001.

The Arakwal Indigenous Land Use Agreement is the result of seven years of consultations between the Arakwal People, the NSW Government through the National Parks and Wildlife Service and the

Department of Land and Water Conservation, a range of community groups and the Byron Shire Council. The NSW Aboriginal Land Council and the National Native Title Tribunal have played key roles in coordinating and mediating the negotiations.

The agreement also marks the beginning of stage two of negotiations for a framework agreement aimed at resolving all native title and other interests in the traditional country of the Arakwal People.

Key features of the ILUA

- It is the first agreement of its kind in Australia as it creates a new national park that will be jointly managed by the Arakwal People and the National Parks and Wildlife Service. The park will provide jobs and training for Arakwal people.
- It provides for Crown land to be transferred to the Arakwal Corporation for traditional owners to live on.
- It also involves the transfer of land for the construction of a cultural centre and tourist facility.

Parties to the agreement hope that it will become a model for other native title negotiations in NSW and around Australia.

Arakwal National Park

The Arakwal National Park stretches south from the Cape Byron Lighthouse, covering around 183.5 hectares of land.

The park forms an important component of the reserve system in the area that includes Taylors Lake Aboriginal Place and Broken Head Reserve in the south and Cape Byron Reserve and Tyagarah Nature reserve in the north.

Cultural values

The area, which has been highly significant to local Indigenous people for thousands of years, contains important Aboriginal mythological and burial sites and campsites.

Natural values

The area provides habitat for significant flora and fauna species, including wintering sites for nomadic and migratory birds and flying foxes. It is also home to:

- the Cibum Margil Swamp, a declared coastal wetland
- a declared Endangered Ecological Community that takes in vegetation of particular interest such as the Wallum Banksia community
- four endangered plant species, including the Byron Bay Diuris
- two endangered animal species - Mitchell's Rainforest Snail and Black-necked Stork
- fourteen vulnerable species, including the Wallum Froglet, Bushhen, Little Bentwing Bat, Large-footed Myotis and Common Planigale

NNTT press release PR01-80, 28 October 2001.

Appendix 3: Relevant Commonwealth and State legislation

Jurisdiction

Commonwealth

Coastal Waters (State Powers) Act 1980 (Cth)
Coastal Waters (State Title) Act 1980 (Cth)
Seas and Submerged Lands Act 1973 (Cth)

NSW

Constitutional Powers (State Waters) Act 1979 (NSW)

VIC

No specific legislation.

TAS

Coastal and Other Waters (Application of State Laws) Act 1982 (Tas)

SA

Constitutional Powers (Coastal Waters) Act 1979 (SA)

Native Title

Commonwealth

Native Title Act 1993 (Cth)

NSW

Native Title Act 1994 (NSW)

VIC

No specific legislation.

TAS

Native Title (Tasmania) Act 1994 (Tas)

SA

Native Title Act (South Australia) 1994 (SA)

Protected Areas: National Parks, Marine Parks

Commonwealth

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

NSW

Marine Parks Act 1997 (NSW)
National Parks and Wildlife Act 1974 (NSW)
Environment Administration Act 1991 (NSW)
Threatened Species Conservation Act 1995 (NSW)

VIC

National Parks Act 1975 (Vic)
Environment Conservation Council Act 1997 (Vic)
Environment Protection Act 1970 (Vic)

TAS

National Parks and Wildlife Act 1970 (Tas)
Threatened Species Protection Act 1995 (Tas)
Living Marine Resources Act 1995 (Tas)

SA

National Parks and Wildlife Act 1972 (SA)

Offshore Mining

Commonwealth

Petroleum (Submerged Lands) Act 1967 (Cth)
Offshore Minerals Act 1994 & assoc. fees/royalties Acts
Sea Installations Act 1987 (Cth)
Submarine Cables and Pipelines Protection Act 1963 (Cth)
EPBC Act 1999/Transitional: Environment Protection (Impact of Proposals) Act 1974 (Cth)

NSW

Offshore Minerals Act 1999 (NSW)
Environment Planning and Assessment Act 1979 (NSW)
Petroleum (Submerged Lands) Act 1982 (NSW)
Pipelines Act 1967 (NSW)

VIC

Environment Effects Act 1978 (Vic)
Petroleum Act 1998 (Vic)
Pipelines Act 1967 (Vic)
Extractive Industries Development Act 1995 (Vic)
Mineral Resources Development Act 1990 (Vic)
Marine Act 1988 (Vic)

TAS

Resource Planning and Development Commission Act 1997 (Tas)
Environment Protection (Sea Dumping) Act 1987 (Tas)
Land Use and Planning Approval Act 1993 (Tas)
Environmental Management and Pollution Control Act 1994 (Tas)
Petroleum (Submerged Lands) Act 1982 (Tas)
Gas Pipelines Act 2000 (Tas)
State Policies and Projects Act 1993 (Tas)

SA

Development Act 1993 (SA)
Environment, Resources and Development Court Act 1993 (SA)
Offshore Minerals Act 2000 (SA)
Mining Act 1971(SA) Petroleum Act 1940 (SA)
Petroleum (Submerged Lands) Act 1982

Fisheries

Commonwealth

Fisheries Management Act 1991 (Cth)
Fisheries Administration Act 1991
Environment Protection and Biodiversity Conservation Act 1999 (Cth)

NSW

Fisheries Management Act 1994 (NSW)
Threatened Species Conservation Act 1995 (NSW)
Environment Planning and Assessment Act 1979 (NSW)

VIC

Fisheries Act 1995 (Vic)

TAS

Living Marine Resources Act 1995 (Tas)
Marine Farming Planning Act 1995 (Tas)

SA

Fisheries Act 1982 (SA)

Coastal Management

Commonwealth

Environment Protection and Biodiversity Conservation Act 1999 (Cth)
National Environment Protection Council Act 1994 (Cth)
Environment Protection (Sea Dumping) Act (Cth)

NSW

Coastal Protection Act 1979 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Protection of Environment Administration Act 1991 (NSW)
Land and Environment Court Act 1979 (NSW)
Environmental Offences and Penalties Act 1989 (NSW)

VIC

Environment Effects Act 1978 (Vic)
Environment Protection Act 1970 (Vic)
Planning and Environment Act 1987 (Vic)
Coastal Management Act 1995 (Vic)

TAS

Crown Lands (Reserves) Act 1978
Environmental Management and Pollution Control Act 1994 (Tas)
Pollution of Waters by Oil and Noxious Substances Act 1987 (Tas)
Environment Protection (Sea Dumping) Act 1987 (Tas)

SA

Environmental Protection Act 1993 (SA)
Marine Environment Protection Act 1990 (SA)
Planning Act 1982 (SA)
Coastal Protection Act 1972 (SA)

Cultural Heritage

Commonwealth

Australian Heritage Commission Act 1975 (Cth)
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
Historic Shipwrecks Act 1976 (Cth)

NSW

Heritage Act 1977 (NSW)
Environment Planning and Assessment Act 1979 (NSW)
National Parks and Wildlife Act 1974 (NSW)
Historical Shipwrecks Act 1976 (NSW)

VIC

Archaeological and Aboriginal Relics Preservation Act 1972 (Vic)
Heritage Act 1995 (Vic)

TAS

Historic Cultural Heritage Act 1995 (Tas)
National Parks and Wildlife Act 1970 (Tas)
Aboriginal Relics Act 1975 (Tas)

SA

Aboriginal Heritage Act 1988 (SA)
Historic Shipwrecks Act 1981(SA)

Geographical Names (general legislation only)

NSW

Geographical Names Act 1966 (NSW)

VIC

Geographic Place Names Act 1998 (Vic)

TAS

Survey Coordination Act 1944 (Tas)

SA

Geographic Names Act 1991 (SA)

Miscellaneous

Commonwealth

Telecommunications Act 1997 (Cth)
Control of Naval Waters Act 1918 (Cth)

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