

**THE RECOGNITION AND SCOPE OF INDIGENOUS
FISHING, HUNTING AND GATHERING RIGHTS
AT COMMON LAW IN AUSTRALIA**

by

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ABSTRACT

Australian courts have yet to uphold the existence of any Indigenous fishing, hunting or gathering rights at common law. The High Court of Australia recognised that Indigenous peoples had existing common law rights to land in the *Mabo* decision in 1992. In doing so, the court fundamentally altered what had been the conventional legal wisdom about the legal rights of Indigenous peoples in Australia. The principles upon which that decision was based pave the way for the recognition of fishing, hunting and gathering rights of Indigenous peoples. But that recognition is yet to occur.

The thesis explores the potential for the recognition of fishing, hunting and gathering rights of Indigenous peoples at common law in Australia. Whilst there have been some tentative steps towards the recognition of such rights, there remains considerable uncertainty as to whether such rights do exist at common law and, if so, their scope. This thesis traces the recent developments in the law concerning the recognition of Indigenous fishing, hunting or gathering rights in Canada, New Zealand and the United States. The thesis argues that Indigenous peoples in Australia have an existing, albeit unrecognised, common law right to fish, hunt and gather.

If common law fishing, hunting or gathering rights exist, further issues arise as to restrictions upon their exercise under regulatory regimes. Particular problems which may arise in Australia in this regard are considered. Issues concerning the extinguishment and regulation of such rights are analysed in detail. The operation of the *Racial Discrimination Act* 1975 (Cth) and the *Native Title Act* 1993 (Cth), which confer additional protection on Indigenous rights recognised at common law, is examined in depth. The impact of these statutes upon State legislation dealing with fishing, hunting and gathering in so far as they affect Indigenous rights is significant.

The thesis explores the potential for the commercial utilisation of Indigenous fishing, hunting and gathering rights. Indigenous peoples have received a greater share of the valuable commercial fishing industry in Canada, New Zealand and the United States in the past two decades. However, in Australia there has been no change in the level of participation of Indigenous peoples in fisheries in the wake the *Mabo* decision. Indigenous peoples remain largely excluded from the current commercial fishing industry. The thesis analyses the legal bases used by Indigenous peoples in other countries to obtain a share in commercial fisheries and considers the applicability of those legal principles to Australia. Finally, issues concerning allocation of natural resources between Indigenous and non-Indigenous users and the regulation or co-management of natural resources utilised by both Indigenous and non-Indigenous persons are explored.

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FORWARD

This thesis had a long gestation period. A number of parts of it have previously been published. Numerous changes to the law have occurred in the intervening periods which are included in the revised version of the material appearing this thesis.

An earlier version of chapters 2, 3, 4, 5, 7 and parts B and C of chapter 8 appeared as D. Sweeney "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16 University of New South Wales Law Journal 97. Parts of Chapter 1(D)(ii), dealing with the operation of the *Racial Discrimination Act* 1975 (Cth.), previously appeared in *Halsbury's Laws of Australia* (Sydney: Butterworths, looseleaf) vol. 1. Finally, certain passages in part C of chapter 7 are based on parts of the conference paper D. Sweeney, "Reflections From The Past: Conceptualisation of State, Citizen and Aboriginality in Australian Law" delivered at the Annual Conference of the Canadian Law and Society Association (Memorial University, Newfoundland, June 1997).

A matter of particular significance since some of these earlier writings is the enactment of the *Native Title Act* 1993(Cth.), which provides additional protection for Indigenous rights recognised at common law. New fisheries legislation has also been enacted in the majority of Australian states, partly to facilitate the introduction of individual transferable quota regimes in fisheries management. Finally, there have been a number of significant judgments handed down in Australia and Canada dealing with Indigenous fishing rights in the intervening period.

CHAPTER 1: INTRODUCTION

A. OVERVIEW

Indigenous peoples of the coastal areas of Australia have a unique connection with the sea. In their view the sea is one with the land. The sea is often described as forming an indissoluble part of their being and connection with their country.¹ Just as the relationship of Indigenous peoples to the land is fundamentally different to that of European societies,² so is

¹ . See generally, D. Smyth, *Understanding Country: The Importance of Land and Sea in Aboriginal and Torres Strait Islander Societies*, Council for Aboriginal Reconciliation Issues Paper No. 1 (Canberra: Australian Government Publishing Service, 1994). He observes that Indigenous peoples in coastal areas of Australia have "a more holistic view of land and sea. That is, land and sea may be viewed by Aboriginal or Torres Strait Islander peoples as central to their identities, their heritage and their economic futures" and that they "view the coastal sea as an inseparable extension of coastal land, and subject to the same characteristics of traditional ownership, custodianship, spirituality and origins in the Dreamtime and indigenous law".

The Minjilang community expressed their relationship with the sea and land in the following terms:

"We, Aboriginal people believed that all human beings go together with the Land and Sea. If we have Land, and no Sea, we will die. if we have Sea and no Land, we will also die. If we have Land and Sea, people will live free.

Letter to the Chief Minister of the Northern Territory from the Minjilang Community, 27 May 1983 (successfully opposing a proposed declaration of a marine park around Croker Island), cited in Northern Land Council, *Croker Island Native Title Claim* (Darwin: Northern Land Council, 1997).

The Northern Land Council, in its submission to the Coastal Zone Inquiry, put it in the following manner. "For Australia's indigenous coastal and island people, the relationship and sense of belonging to 'sea country' is as elemental as their affiliations with the land. ... the traditional estates of Aboriginal people extend from the land into marine areas or 'salt water country'. The rights to exploit and control the exploitation of marine resources within traditional estates are an essential component of traditional ownership." (cited in D. Smyth, *A Voice In All Places: Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone*, Australia. Resource Assessment Commission - Coastal Zone Inquiry, Consultancy Report (Canberra: Australian Government Publishing Service, 1993) [hereinafter Smyth, *A Voice in All Places*] at 26).

² . The special relationship of Indigenous peoples with their land has received judicial acknowledgment in Australia. For example, in *Gerhardy v. Brown* (1985) 159 C.L.R. 70 at 142-43, 57 A.L.R. 472 Brennan J. observed:

... the courts of this country are familiar with the existence of traditional Aboriginal affiliations with, and responsibilities in respect of, land. The existence of such affiliations and responsibilities have been recognized judicially on many occasions and judges who sit in courts in areas where Aboriginal tradition remains strong are familiar, in varying degree, with

(footnotes continue on next page)

their relationship with the sea. It often has a spiritual dimension,³ and the relationship also carries stewardship obligations to the sea, land and their living resources.⁴ It is perhaps not surprising therefore that Indigenous sea rights, and rights associated with marine resources, are shaping up to be a major area of litigation in Australia. But despite the importance of sea and marine resources to Indigenous peoples, no court in Australia has yet upheld any inherent Indigenous rights at common law in respect of the sea or fisheries.

This thesis deals with Indigenous fishing rights. Fishing rights form a significant component of most Indigenous claims to sea rights. Fishing rights are the aspect of the rights related to the sea that form the most immediate potential source of conflict with non-Indigenous interests, namely the commercial fishing industry. The thesis also addresses, to a lesser extent, Indigenous hunting and gathering rights over land as these raise many similar legal issues to fishing rights.

Fishing, hunting and gathering activities of Indigenous peoples have continuing importance for many Indigenous peoples, notwithstanding the introduction of a western market

(Footnotes continued from previous page)

the nature of the affiliations and responsibilities that exists in respect of the country in those areas.

For a discussion of the extent of judicial and statutory recognition of the nature of relationship between Indigenous peoples and their lands and their corresponding responsibilities towards the land, see G. Neate, "Looking After Country: Legal Recognition of Traditional Rights to and Responsibilities for Land" (1993) 16 University of New South Wales Law Journal 161 at 185-217.

3. There are numerous statements as to the spiritual significance of seas to certain Indigenous peoples in Australia. By way of example, the following are statements by the Yolgnu people in northern Australia describing their relationship with their sea country.

In the Yolgnu world view, water is the giver of sacred knowledge, all ceremonies and lands, Whether it's fresh or salt, travelling on or under the land or in the sea, water is the source of all that is holy. [Gailiwin'ku Community Elcho Island, *An Indigenous Marine Protection Strategy for Manbuynga ga Rulyapa* (Darwin: Northern Land Council, 1994) at 4.]

Within these waters are our sacred totems, song cycles, ceremonies and the pathways of creation beings. Responsibility for them is apportioned throughout our community: *ibid.* at 1.

Both spiritually and physically the well-being of the sea has always been and remains crucial to our well-being: Manbuynga ga Rulyapa Steering Committee, *Island Home*, A speech to the Land Rights - Past, Present and Future Conference, Canberra, 16-17 August 1996 (Darwin: Northern Land Council, 1996) at 1.

4. See generally, Smyth, *Understanding Country*, *supra* note 1; Neate, *Looking After Country*, *supra* note 2; G.D. Meyers, "Implementing Native Title in Australia: The Implications for Living Resources Management" (1995) 14 University of Tasmania Law Review 1.

economy.⁵ In addition to providing sustenance to members of the community, fishing, hunting and gathering are an important part of the society and culture of Indigenous peoples. They also are significant for the potential economic benefits the commercial utilisation of these resources have for many Indigenous communities.

The judgment of the High Court of Australia in *Mabo v. Queensland [No. 2]*⁶ was a landmark decision in recognising rights of Indigenous peoples at common law in Australia. Whilst the judgment was confined to interests in land, it left the door open for recognition other rights of Indigenous peoples such as those concerning fishing, hunting and gathering. Furthermore, in contrast to native title to land, which has been extinguished in many areas of Australia in the past 200 years,⁷ there have been few if any actions that have extinguished Indigenous fishing rights. The recognition of such rights at common law would expand the notion of native title and provide the potential for a greater degree of economic self-sufficiency for Indigenous communities.

5. Australia. Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report 31 (Canberra: Australian Government Publishing Service, 1986) [hereinafter ALRC] vol. 2 para. 885 referred to the introduction of a cash economy and the increasing use of shop bought food in Indigenous communities but concluded "despite all these changes, it is clear that hunting, gathering and fishing are of continuing importance in the lives of many Aborigines". Similar findings have been made by other government inquires, including the Aboriginal Land Inquiry (Commissioner: P Seaman), *Report* (Perth: Government Printer, 1984) para. 11.4; Smyth, *A Voice In All Places*, *supra* note 1 at 14. The reports of the Aboriginal Land Commissioner in relation to hearings under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth.) include many specific examples of this. For example, see Aboriginal Land Commissioner, *Upper Daly Land Claim* (Canberra: Australian Government Publishing Service, 1991) vol. 1 para. 13 where, having described the employment of indigenous persons on cattle stations, Kearney J. observed "they have remained throughout their lived in touch with their country .. and led what amounted to a dual lifestyle combining their traditional economy with the introduced economy". Fishing and hunting are viewed by most Indigenous peoples as an important part of their culture, see *infra* notes 142-149 and accompanying text.

6. (1992) 175 C.L.R. 1, 66 A.L.J.R. 408, 107 A.L.R. 1 [hereinafter *Mabo [No. 2]*].

7. Native title is extinguished by the Crown grant of freehold or leasehold conferring exclusive possession. As to extinguishment generally, see Chapter 6, below. A significant percentage of Australia is subject to pastoral leases. It is a matter of statutory construction as to whether the applicable pastoral lease confers exclusive possession on the leaseholder. Pastoral leases which do not confer exclusive possession on the leaseholder (as would seem to be the case for most pastoral leases) do not necessarily extinguish native title; however, native title will be impaired to the extent of any inconsistency with the rights of the leaseholder: *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1, 71 A.L.J.R. 173, 141 A.L.R. 129. For an excellent discussion of the *Wik* decision, see C. MacDonald, "The Wik Decision - Some Implications for Land Use and Land Management" (1996) 3 *The Australian Journal of Natural Resources Law and Policy* 339; see also R.H. Bartlett, "The Fundamental Significance of *Wik v. State of Queensland* in the High Court of Australia" [1997] 2 *Canadian Native Law Reporter* 1.

Notwithstanding the importance of fishing, hunting and gathering to Indigenous peoples in Australia, the legal position has been largely ignored in the legal literature until recently.⁸

⁸ . With the exception of the work of the Australian Law Reform Commission (discussed below), the writer's portion of the "Aboriginal and Torres Strait Islanders" title dealing with Indigenous hunting, gathering and fishing rights in *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) para. [5-2250]-[5-2275] was the first attempt to summarise the large number of existing legislative regimes regulating such activities in Australia. An earlier published draft of this thesis (published as D. Sweeney, "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16 University of New South Wales Law Journal 97) was the first work to give detailed consideration of the potential for common law recognition of Indigenous fishing, hunting and gathering rights in Australia.

In the past few years, there has been an increased academic interest in the area, see: J. Behrendt, "So Long, and Thanks for all the Fish: Aboriginal Fishing rights and the Commonwealth's Acquisition Power" (1995) 20:1 Alternative Law Journal 11; A. Bergin, "A rising tide of Aboriginal sea claims : Implications of the Mabo case in Australia" (1993) 8 International Journal Of Marine and Coastal Law 359; A. Bergin, "International Law and Indigenous Marine Rights: The Evolving Framework" (1993) 10:6 Environmental and Planning Law Journal 438; Berry, *supra* note 101; M. Exel, "Australian Fisheries Management - Resource Allocation and Traditional Rights" (1994) 53:5 Australian Fisheries 15; P. Jeffrey, "Native Title and the Australian Fishing Industry" (1994) 53:11 Australian Fisheries 6; P. Kilduff & N. Lofgren, "Native Title Fishing Rights in Coastal Waters and Territorial Seas" (1996) 81:3 Aboriginal Law Bulletin 16; J. Malbon, "Torres Strait Conference on Land and Sea Claims" (1996) 3:78 Aboriginal Law Bulletin 16; G.D. Meyers, "The Inclusion of Traditional Fishing and Hunting Rights in the Content of Native Title" in R.H. Bartlett & G.D. Meyers, eds., *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University, 1994) 213; Meyers, *Living Resources Management*, *supra* note 4; G.D. Meyers et al., *A Sea Change In Land Rights Law: The Extension of Native Title to Australia's Offshore Areas* (Canberra: Native Title Research Institute, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996) [hereinafter *Sea Change*]; N. Pearson, "Native Title and Fisheries Management: Where Is It Heading?" (1994) 53:5 Australian Fisheries 14; M. Storey, "The Black Sea" (1996) 79:3 Aboriginal Law Bulletin 4; *Turning the Tide: Conference on Indigenous Peoples and Sea Rights, selected papers* (Darwin, NT: Northern Territory University, 1993); P. Summerfield, "Implications of Native Title Legislation for Fisheries Management and the Fishing Industry in Western Australia" in R.H. Bartlett & G.D. Meyers, eds., *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University, 1994) 231; J. Sutherland, "Rising Sea Claims on the Queensland East Coast" (1992) 2:56 Aboriginal Law Bulletin 17; J. Sutherland, *Fisheries, Aquaculture and Aboriginal and Torres Strait Islander Peoples: Studies, Policies and Legislation - Consultancy Report* (Canberra: Australia. Department of Environment, Sport and Territories, 1996).

The decade long research project cumulating in the publication of the seminal report on the recognition of Aboriginal customary laws by the Australia Law Reform Commission includes a part on traditional Aboriginal hunting, gathering and fishing rights, see ALRC, *supra* note 5. It remains a valuable source of information (with the exception of its coverage of commercial utilisation of Indigenous rights, where it adopts what is now considered a somewhat outdated view as to the nature of "traditional" Indigenous activities and rights).

Volume 1 of *The Laws of Australia* (Sydney: Law Book Co, 1992), dealing with Aboriginals, was published in 1992 and remains another useful reference source. The volume was, however, unavailable for the author's research for this thesis, which was undertaken in Canada and, accordingly, is not referred to in this thesis. However, readers are commended to it.

This thesis examines the statutory and common law bases for the recognition of fishing, hunting and gathering rights of Indigenous persons. The following sections of this Chapter describe the methodology used and the legal framework for the regulation of rights of Indigenous peoples in Australia. Chapter 2 briefly examines the historical treatment of fishing and hunting rights of Indigenous peoples and summarises the existing statutory provisions concerning fishing, hunting and gathering by Indigenous persons in Australia. Chapter 3 considers the common law foundation for traditional fishing, hunting and gathering rights of Indigenous peoples. Chapter 4 considers the content and nature of Indigenous fishing, hunting and gathering rights. It also addresses issues arising out the exercise of those rights in a contemporary manner. Chapter 5 examines the power of the Crown to extinguish Indigenous fishing, hunting and gathering rights in Australia. Chapter 6 examines issues relating to the regulation of contemporary Indigenous fishing, hunting and gathering rights. Chapter 7 discusses whether Indigenous peoples are entitled to commercially develop such rights and, in particular, whether there is a right to an Indigenous commercial fishery. It also briefly explores different methods of characterising Indigenous rights at common law. Finally, Chapter 8 undertakes a brief survey of mechanisms designed to achieve an equitable allocation of resources such as fisheries between Indigenous and non-Indigenous users in Canada, New Zealand and the United States, and considers the potential for the application of similar mechanisms in Australia.

B. METHODOLOGY

This thesis primarily adopts a comparative case law analysis in dealing with the potential for the recognition of fishing, hunting and gathering rights of Indigenous peoples at common law in Australia. The common law jurisdictions closest to Australia in terms of legal issues concerning Indigenous peoples are Canada, New Zealand and the United States of America. These jurisdictions (together with Great Britain) are also the jurisdictions whose decisions concerning the common law are afforded a high level of respect in Australian courts. Accordingly, the case law comparison focuses on those countries. Decisions concerning the recognition of the rights of Indigenous peoples at common law in other former British colonies, particularly those of the Judicial Committee of the Privy Council, are also referred to on occasion. In dealing with the issues of how to balance rights of Indigenous peoples against the interests of the broader community and how to share a resource between Indigenous and non-Indigenous persons, recent treaties and legislative settlements in other countries which address these issues are also discussed.

Reference is also made to the reports of the Aboriginal Land Commissioner made under the statutory land claim regime in the Northern Territory.⁹ Though the reports are made in the context of statutory definitions of the traditional owners of land, the findings of Commissioners dealing with the identification of traditional owners and their customary rights may be of some assistance to common law courts when addressing similar issues.

This thesis does not delve into the wider philosophical considerations in relation to the position of Indigenous peoples in the modern nation state. Nor does it seek to analyse in any detail the economic or human rights factors which some may consider to be relevant to the development of the law in this area. Nor does it seek to incorporate views concerning post-

⁹ The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.) provides for the statutory grant of inalienable freehold title over certain categories of Crown land in the Northern Territory to persons who establish they are the traditional Indigenous owners of the land in accordance with the statutory criteria. See generally, G. Neate, *Aboriginal Land Rights Law in the Northern Territory*, vol. 1 (Sydney: Alternative Publishing Co-operative Ltd, 1989).

colonialism,¹⁰ or those which seek to challenge the underlying legitimacy of the introduced British common law legal regime.¹¹

The recognition of hunting, fishing and gathering rights of Indigenous peoples in Australia is something that is possible within an incremental approach to the common law. In one sense, this thesis is an elaborate factum concerning the potential for the recognition by the common law of existing fishing, hunting and gathering rights of Indigenous peoples in Australia. It also addresses particular problems that are likely to arise in the Australian context. The common law judicial process is notorious for attempting to resolve only those issues which are essential to resolve the question at hand. The judicial process eschews grand philosophical or jurisprudential considerations unless they are essential to resolving the case in hand. The common law recognition of Indigenous fishing, hunting and gathering rights is within reach in Australia. Furthermore, such rights are capable of being recognised within the existing narrow framework of recognition of Indigenous rights at common law in Australia. Accordingly, this thesis adopts an incremental approach and one which does not seek to unduly disturb the existing conceptual boundaries. It may well be that once such rights have become established the courts may subsequently seek to situate them in a wider conceptual domain.¹² However, at least initially, the courts are likely to take a narrower approach. In adopting this narrower approach for the purpose of arguing for the initial recognition of Indigenous fishing, hunting and gathering rights at common law in Australia, this thesis does not intend to deny the importance of the broader questions concerning

¹⁰ For an overview of post-colonialism, see B. Ashcroft, G. Griffiths & H. Tiffin, eds., *The Post-Colonial Studies Reader* (New York: Routledge, 1995); P. Mongia, ed. *Contemporary Postcolonial Theory* (London: Arnold, 1996); P. Williams & L. Chrisman, eds., *Colonial Discourse and Post-Colonial Theory: A Reader* (New York: Columbia University Press, 1994).

¹¹ See further M. Mansell, "The Court Gives An Inch But Takes Another Mile" (1992) 2:57 *Aboriginal Law Bulletin* 4 at 6; I. Watson, "Indigenous Peoples' Law-Ways: Survival Against the Colonial State" (1997) 8 *The Australian Feminist Law Journal* 39 at 47-49, 58; I. Watson, "Law and Indigenous Peoples: The Impact of Colonialism on Indigenous Cultures" in C. Arup & L.A. Marks, eds., *Cross Currents: Internationalism, National Identity and Law* (Melbourne: La Trobe University Press, 1996) 107 at 116-19; L. Behrendt, "No One Can Own The Land" (1994) 1 *Australian Journal of Human Rights* 43. See also P. Kainthaje, *The Intersection of Aboriginal Law and Aboriginal Rights in the Common Law Frameworks of Canada and Australia* (LL.M. Thesis, University of British Columbia, 1996).

¹² This would be similar to the process that occurred in Canada. There the courts moved from the initial recognition of Indigenous hunting and fishing rights, to land rights to a much broader range of Indigenous rights and, in hindsight, have reconceptualised the basis of Indigenous rights and categorised Indigenous rights to land or to fish as merely a subset of a broader recognition of Indigenous rights.

Indigenous legal rights. However, the courts are likely to leave those questions for determination at a later date.

It is perhaps a particularly Australian approach to address this issue from the perspective of recognising fishing, hunting and gathering rights of Indigenous peoples *at common law*. However, it is put in this manner simply because, leaving aside the possibility of future legislation, there is no other basis on which to argue for the existence of such rights within domestic Australian law. It is not possible to approach the determination of whether such rights exist and, if so, to ascertain their scope by reference to constitutional recognition of the position of Indigenous peoples or treaties with Indigenous peoples in Australia. In contrast to most other British colonies, there were no treaties between the Crown and any of the Indigenous peoples in Australia. Nor are there any constitutional provisions of relevance in Australia, unlike Canada.¹³ Further, unlike New Zealand, where legislative footholds existed on which to found Maori fishing rights,¹⁴ none exist in Australia. Hence, in light of the absence of other sources, the primary avenue to argue that Indigenous peoples presently have enforceable fishing, hunting and gathering rights in Australia is to seek to source such rights in the mists of the common law.

Of course Indigenous rights do not have their original source in the common law. They pre-date the introduction of the common law to Australia. Hence, they are rights which do not derive from the common law, but depend upon the common law for their recognition.¹⁵

To situate Indigenous rights within the framework of the common law is another example of what one author has described as the “imperialism of the common law”.¹⁶ However, in light

¹³ . In Canada see s. 35(1) *Constitution Act* 1982, discussed *infra* notes 778-804 and accompanying text.. For a discussion of the constitutional provisions affecting Indigenous peoples in Australia, see Chapter 1(D) below and *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) para. [5-30] -[5-80].

¹⁴ . See *Fisheries Act* 1983 (N.Z.) s. 88(2), subsequently repealed by the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992 (N.Z.). See further, *infra* notes 228-232 and accompanying text.

¹⁵ . See *Mabo [No. 2]*, *supra* note 6 where Brennan J. stated that “Native title, though recognized by the common law, is not an institution of the common law ...” (at 59).

In *Wik Peoples v. Queensland*, *supra* note 7, Toohey J. while observing that native title “does not derive from the common law but has been recognised by the common law” (at 122), emphasised that “native title rights depend on their recognition by the common law” (at 129). Similarly, Kirby J. considered that to “the extent native title is recognised and enforced in Australia by Australian law, this occurs because, although not of the common law, native title is recognised by the common law as not inconsistent with its precepts” (at 213). He rejected an argument that, in the context of determining matters concerning the recognition of native title within Australia, native title could exist independently, outside of the common law (at 236-38, 214).

of the firm position taken by the High Court of Australia that issues relating to sovereignty are non-justiciable in domestic courts,¹⁷ the incremental approach of recognising Indigenous fishing, hunting and gathering rights within the common law framework appears to be the approach that has the most prospect of success in the short term.

For similar reasons, this thesis does not address the emergence of the issue of rights of Indigenous peoples at the international law level. While developments in the international arena may generate pressure on Australian governments, particularly if they seek to curtail rights declared by Australian courts, they are unlikely to be as persuasive in Australian courts as the case law from other common law countries.

It has become accepted that an author or researcher should situate himself or herself in relation to the context of the research undertaken. I am a first generation Australian. I am not an Indigenous person and do not purport to speak for any Indigenous persons. I have worked as a retained solicitor for an Aboriginal Legal Service in northern Queensland. I acted as a solicitor in a case for a number of Torres Strait Islanders who had been charged with breaching the applicable fisheries legislation and in which a defence of customary fishing rights was raised.¹⁸ I have also provided legal advice concerning native title issues in my professional capacity to government agencies and to corporate interests (though not fishing, pastoral or hunting interests). I do not have any links to the fishing industry or farming or hunting interests. Where I refer to the views or aspirations of particular Indigenous persons, Indigenous communities or industry, I do so, not to purportedly represent those views but, rather, to provide some context to the issues discussed in this thesis.

(Footnotes continued from previous page)

¹⁶ . For a discussion of the benefits and dangers of situating Indigenous rights jurisprudence within the framework of the common law, see J. Borrows & L. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does It Make A Difference?" (1997) *Alberta Law Review* (forthcoming).

¹⁷ . *Mabo [No. 2]*, *supra* note 6 at 31-32 per Brennan J. (Mason C.J. and McHugh J. concurring), at 78-79 per Deane and Gaudron J.J.; *Western Australia v. Commonwealth* (1995) 183 C.L.R. 373 at 422, 69 A.L.J.R. 309, 128 A.L.R. 1; *Coe v. Commonwealth* (1993) 68 A.L.J.R. 68 at 114-15; *Wik Peoples v. Queensland*, *supra* note 7 at 206 per Kirby J. See also *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337 at 388.

For a critique of this approach, see S. Grey, "Planting the Flag or Burying the Hatchet: Sovereignty and the High Court Decision in *Mabo v Queensland*" (1993) 2 *Griffith Law Review* 39; P. Grose, "The Indigenous Sovereignty Question and the Australian Responses" (1993) 3 *Australian Journal of Human Rights* 40.

¹⁸ . The case is discussed *infra* note 332 and accompanying text. It was prior to the decision of the High Court of Australia in the *Mabo* case (or the determination of facts by Moynihan J.).

Having provided this statement of personal context, I leave it to the reader to determine the impact this context has had on my methodology, research and positions propounded in this thesis.

C. TERMINOLOGY

The following is a short note on terminology used in this thesis.

(i) “Commonwealth” and “national parks”

The federal or national government in Australia is generally referred to as the “Commonwealth” Government (taking its name from the Constitution Act¹⁹ which established the “Commonwealth of Australia”) and its legislation is designated accordingly.²⁰

The term “national park” in Australia does not indicate that the park is under federal control.²¹ Rather it is a term that is also used in State legislation and most States have their own national park legislation. Commonwealth national park legislation generally only applies in federal territories - such as Jervis Bay on the New South Wales Coast or the Northern Territory (which also has its own territorial parks regulated under territorial legislation). However, specific Commonwealth legislation does apply in certain State areas.²²

(ii) “Native title”, “aboriginal title”, “recognised Indian title” and “original Indian title”

In this thesis the term “native title” is used synonymously with the term “aboriginal title”. In the *Mabo* case the judges differed in the terminology they used.²³ Subsequently, the *Native Title Act* 1993 (Cth.) and the establishment of the National Native Title Tribunal have cemented the use of the term “native title” in Australia, notwithstanding some judges’

¹⁹ . *Commonwealth of Australia Constitution Act* 1900, 63 & 64 Vic. c. 12 (U.K.) ss. 3, 6.

²⁰ . “Cth.” is the standard abbreviation used to designate federal legislation.

²¹ . The term indicates the park is under federal control in Canada and the United States. Accordingly, the different use of the term in Australia can be a source of confusion for north American readers.

²² . For example, the *World Heritage Properties Conservation Act* 1983 (Cth.). Other Commonwealth legislation of relevance to the subject matter of this thesis regulates certain state areas in co-operation with the States, such as the *Great Barrier Reef Marine Park Act* 1975 (Cth.); *Wet Tropics of Queensland World Heritage Conservation Act* 1994 (Cth.).

²³ . (Mason C.J., Brennan and McHugh J.J. used the phrase “native title”, Deane and Gaudron J.J. used the phrase “common law native title”, Toohey J. used the phrase “traditional title” and Dawson J. used the phrase “aboriginal title”).

continued discomfort with that term.²⁴ This discomfort may be explained by the often pejorative connotations the word "native" had assumed in Australia, which had resulted in the almost total abandonment of the use of the word prior to the *Mabo* judgment. However, the term "aboriginal title" is also problematic in Australia as there is some sensitivity in applying it to the Torres Strait region, since the indigenous inhabitants of that region do not consider themselves to be "Aboriginals" but rather Torres Strait Islanders. The terms "native title" and "aboriginal title" are used in this thesis as generic terms to describe the rights of indigenous inhabitants of a country arising out of their occupation of their ancestral lands to the extent recognised at common law.²⁵

The term "aboriginal title" has gained currency in Canadian courts and has been used on occasions in courts in New Zealand and the United States. This thesis adopts the terminology of the applicable country when describing its laws and hence uses the phrase "native title" in relation to Australia, "aboriginal title" in relation to Canada and New Zealand and "original Indian title" (to be distinguished from "recognised Indian title") or "aboriginal title" in relation to the United States of America.

(iii) *"Aboriginal", "Aborigine", "Torres Strait Islanders" and "Indigenous" person, persons, people and peoples*

There is no generally accepted term to refer to the indigenous peoples of Australia. Legislation and judgments variously use "Aborigine", "Aboriginal person", "Aboriginal", "aboriginal", "aboriginal person", "Torres Strait Islander" and the plurals of those terms. As discussed above, Torres Strait Islanders (from the Torres Strait region in Queensland) strongly identify themselves as being distinct from "Aboriginals". As a result, the most common usage in national or Queensland legislation or commentary in the 1980s and early 1990's was the compendious phrase "Aboriginal or Torres Strait Islander". Apart from being a mouthful and not providing a short term to describe persons not of that background, the phrase is problematic since, by identifying people from one region as not being "Aboriginal", it implies a degree of homogeneity amongst those who are "Aboriginal". This can be misleading. There is a great degree of cultural and linguistic difference amongst Aboriginals in different parts of the Australian continent. Aboriginals generally identify with

²⁴ . See *Wik Peoples v. Queensland*, *supra* note 7 at 101 note 399 per Toohey J., at 205 note 758 per Kirby J.

²⁵ . The terms "native title" or "aboriginal title" should not be confused with the term "common law aboriginal title" (as used by Toohey J. in the *Mabo* case) which is based on a presumption of possessory title at common law by virtue of occupancy.

their local name of their own people (which generally divide on linguistic lines). Furthermore, the term used by an indigenous people to generally refer to indigenous peoples beyond their own locality varies from region to region (e.g. the term Murri is used in northern Queensland, while the term Koori is used in much of New South Wales and Victoria). Similarly, the terms used to described non-Aboriginals vary from region to region.

In this thesis, the terms "Indigenous peoples", "Indigenous people" and "Indigenous person" and "Indigenous persons" are used when referring to the indigenous inhabitants of Australia rather than the more commonly used terms "aboriginals", "Aborigines", "Torres Strait Islanders" etc. "Indigenous" is also used as adjective. The exception is when quoting from legislation or cases, where the original wording is retained. Where a particular Indigenous people are referred to, it is normally by the actual name of the people (e.g. Yolngu, Meriam, Wik, Yorta Yorta). Where the terms "people" or "peoples" are used it is to denote a collective people or nation (such as in relation to native title rights of a particular Indigenous people) or peoples or nations. Where the terms "person" or "persons" are used it is to refer to Indigenous persons as an individual or a group of individuals but not as a collectivity (as is commonly the case in respect of statutory provisions concerning Indigenous persons). The word "Indigenous" is also capitalised as a proper noun. In this regard, the thesis follows the terminology used in the recent reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner.²⁶

²⁶ See Australia. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, January-June 1994*, Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Minister for Aboriginal and Torres Strait Islander Affairs as required by s. 209 of the *Native Title Act 1993* (Canberra: Australian Government Publishing Service, 1995) [hereinafter ATSIJC, *Native Title Report* June 94]; Australia. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, July 1994-June 1995*, Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Minister for Aboriginal and Torres Strait Islander Affairs as required by Section 209 of the *Native Title Act 1993* (Canberra: Australian Government Publishing Service, 1995) [hereinafter ATSIJC, *Native Title Report* June 1995]; Australia. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, July 1995-June 1996*, Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney-General as required by s. 209 of the *Native Title Act 1993* (Canberra: Australian Government Publishing Service, 1996).

D. LEGAL FRAMEWORK OF INDIGENOUS RIGHTS IN AUSTRALIA

(i) Legislative Powers

In those former British colonies closest to Australia in terms of Indigenous issues, which have a federal structure, issues relating to the respective powers of the federal government and the state or provincial governments have played a significant role in the development of laws and policy affecting Indigenous peoples. Australia is somewhat different in that the constitutional division of powers has not had as nearly as much effect on the development of Indigenous affairs as it has in the United States or Canada.²⁷ Nevertheless, the constitutional structure has gradually assumed more practical importance in Australia over the past two decades. It is summarised below as an examination of Indigenous fishing, hunting and gathering rights must take into account the contemporary legal framework for the regulation of native title and Indigenous affairs in Australia.²⁸

The basic structure of the division of legislative powers between the Commonwealth and the States is that specific powers are conferred on the Commonwealth and the residual general powers remain with the States, within their geographical boundaries.²⁹ Hence, the Commonwealth has an enumerated list of heads of its legislative power,³⁰ but there is no

²⁷ For an overview of constitutional provisions and division of federal-state powers concerning Indigenous peoples or lands: in the United States, see *C.J.S. Indians* 42 §§ 4, 5, 69; F.S. Cohen, *Handbook of Federal Indian Law*, 1982 ed. ed. (Charlottesville, VI: Michie Bobbs-Merrill, 1982) chap. 2; V. Deloria Jr. & C.M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983) chap. 2 "Federal Responsibility and Power over Indian Affairs"; V. Deloria Jr., ed. *American Indian Policy in the Twentieth Century* (Norman, OK: University of Oklahoma Press, 1985); in Canada: see R.A. Reiter, *The Law of First Nations* (Edmonton: Juris Analytica Publishing, 1996) chap. 4.

²⁸ For an analysis for the constitutional division of legislative powers in relation to Indigenous peoples in Australia, see *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) para. [5-30]-[5-80]; P.J. Hanks, *Constitutional Law in Australia* (Sydney: Butterworths, 1991) at 372-380.

²⁹ For an overview of the legislative division of powers, see P.H. Lane, *A Manual of Australian Constitutional Law*, 7th ed. (Sydney: Law Book Co, 1991) at 7-11.

There are some constitutional complexities concerning the geographical reach of State laws, particularly with respect to coastal waters in the period from federation in 1901 until the passage of a various coastal waters legislation by the Commonwealth in 1980 which granted the States title and certain powers in respect of coastal waters and the passage of *Australia Act* 1986 (Cth.). An examination of this issue is outside the scope of this thesis; see further, *Mason v. Tritton*, *supra* note 159 at 593-4 per Kirby P; Behrendt, *supra* note 8 at 13-15; G. McIntyre, "Mabo and Sea Rights: Public Rights, Property Rights or Pragmatism?" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 107 at 109-11; Hanks, *supra* note 28 at 178-83; Lane, *supra* note 29 at 137-39.

³⁰ See *Constitution* s. 51. The Commonwealth's sphere of influence is greater than may appear from
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corresponding list of powers of the States.³¹ Furthermore, Commonwealth legislative power within its enumerated heads of power is generally non-exclusive (with the exception of certain powers, such as defence).³² Where both the Commonwealth and the States have legislative power in respect of a subject matter, the laws of each may operate concurrently. Where there is an inconsistency between a law of a State and a law of the Commonwealth the law of the Commonwealth prevails and the State law is invalid to the extent of the inconsistency.³³

The powers of particular relevance to the subject matters of this thesis, namely fisheries, wildlife conservation, land and Indigenous peoples fall primarily within the powers of the States. There are no corresponding heads of power over these areas for the Commonwealth (with the exception of powers in respect of Commonwealth lands or waters, territories and the non-exclusive Commonwealth race power, discussed below).

Prior to 1967 the Commonwealth did not have any direct power to legislate in respect of Indigenous peoples. The Commonwealth did have power to make laws with respect to persons of any race for whom it was deemed necessary to make special laws. However, this power did not extend to the Indigenous peoples of Australia as the power was expressly limited to races "other than the aboriginal race".³⁴ Nevertheless, the Commonwealth had

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its enumerated list of powers, partly due to the fact that it collects most of the taxable revenue in Australia and makes financial grants back to the States on such terms and conditions it thinks fit (see *Constitution* s. 96). The courts have upheld the widespread use of tied grants which the Commonwealth can use to effectively direct policy in areas over which it has no legislative power; see further, Lane, *supra* note 29 at 387-94; Hanks, *supra* note 28 at 265-76.

31. The *Constitution* provides that the States retain all powers they had prior to the enactment of the *Constitution* unless withdrawn under the *Constitution* or exclusively vested by the *Constitution* in the Commonwealth: s. 107. The position of leaving the States with the residual general powers to be contrasted with the situation in Canada: Lane, *supra* note 29

32. See further, Lane, *supra* note 29 at 7-8. The exclusive powers of the Commonwealth and specific limitations upon the powers of the States are listed in ss. 52, 90, 92 114, 115.

33. *Constitution* s. 109. For an analysis of the operation of s. 109, see Lane, *supra* note 29 at 395-416; Hanks, *supra* note 28 at 210-231.

34. *Constitution* s. 51(xxvi). Contrary to what is often assumed, the exclusion of Indigenous persons from this power was probably not intended to be discriminatory against them. The primary purpose of the power envisaged at the time of the constitutional debates in the 1890's was to permit the Commonwealth to enforce the white Australia policy by passing discriminatory laws against particular races: see Hanks, *supra* note 28 at 373. Hence, the omission of Indigenous persons from this power limited the power of the Commonwealth to pass discriminatory laws against them: see G. Sawyer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17 at 23; and *Kruger v. Commonwealth* (31 July 1997, H.C.A., No.s M21 and D5 of 1995)

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some influence on Indigenous policy through its other powers, such with respect to social security and the use of its territory power in respect of the Indigenous peoples in the Northern Territory after 1911.³⁵

A constitutional amendment in 1967, following a successful constitutional referendum,³⁶ removed the words "other than the aboriginal race" from the Commonwealth's race power.³⁷ Whilst the 1967 referendum is sometimes described as the giving the Commonwealth control over Indigenous persons, it in fact created a neutral constitution. The Commonwealth Parliament now has power to legislate in respect of any race for whom it is deemed necessary to make special laws. Indigenous persons are not signalled out for any special treatment in the *Constitution*. However, the race power can be used to enact special laws concerning Indigenous peoples.³⁸ The Commonwealth Parliament has in fact rarely used its new found powers in respect of Indigenous persons.³⁹ Indeed, what has turned out to be the most significant piece of legislation in protecting native title in Australia, the *Racial Discrimination Act* 1975 (Cth.), was enacted pursuant to the Commonwealth's external affairs power.⁴⁰

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[unreported] at footnote 122 and accompanying text per Toohey J.

35. The Northern Territory was transferred from South Australia to the Commonwealth in 1911.

36. A public referendum is required in order to alter the Australian constitution, see *Constitution* s. 128.

37. *Constitutional Alteration (Aboriginals)* 1967 (Cth.). The amendment also deleted the only other reference to aboriginals in the *Constitution* contained in s. 127 (which provided that aboriginals were not to be counted in a census reckoning the population of Australia and its States or Territories).

38. See further, *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) para. [5-35] and cases cited therein.

39. This appears contrary to the expectations that were created at the time of the 1967 referendum when it was envisaged that the Commonwealth would take a leading role in Indigenous affairs. For an examination of the Commonwealth's gradual use of the power, see P. Hanks, "Aborigines and Government: The Developing Framework" in P. Hanks & B. Keon-Cohen, eds., *Aborigines and the Law* (Sydney: George Allen & Unwin, 1984) 19 at 24-28. The Commonwealth, has assumed the major role for funding programs for assistance to Indigenous peoples. However, it would have been able to do this pursuant to its grants power (discussed at note 30 *supra*) even without the 1967 constitutional amendment.

40. The High Court of Australia held that the legislation was not within the scope Commonwealth's race power, but was within the external affairs power, see *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168.

Accordingly, the present position is that the States and the Commonwealth each have power to legislate in respect of Indigenous peoples.⁴¹ As a result, Indigenous lands or reserves do not form a whole or partial enclave from State laws (in contrast to the positions in the United States and Canada). The laws of both State and Commonwealth with respect to Indigenous peoples have full effect so long as they are not inconsistent with each other. Where a State law affecting Indigenous peoples or rights is inconsistent with a law of the Commonwealth, then by virtue of s. 109 of the Australian *Constitution*, the State law is, to the extent of the inconsistency, invalid.⁴²

As a practical matter, the principal laws of the Commonwealth which limit State powers in relation to Indigenous peoples are the *Racial Discrimination Act* 1975 (Cth.) and the *Native Title Act* 1993 (Cth.). The content of these are briefly summarised below, after which the interaction between these laws and s. 109 of the *Constitution* will be summarised.

(ii) *Racial Discrimination Act*

The *Racial Discrimination Act* 1975 (Cth.) is intended to implement Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁴³

The principal sections of the *Racial Discrimination Act* 1975 (Cth.) are sections 9(1) and 10(2). They are in the following terms:

Racial discrimination to be unlawful

9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

⁴¹ . The situation of the Northern Territory legislative assembly is more complicated, see *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) para. [5-80].

⁴² . See *supra* note 33.

⁴³ . The Convention is reproduced in the Schedule to the Act.

10. (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

The scope of the “rights” or “fundamental freedoms” protected by these sections are very broad as they include any right of the kind referred to in Article 5 of the Convention.⁴⁴ Accordingly, they go beyond matters which had hitherto been legally enforceable rights under domestic Australian law. Hence, though there is no general legally enforceable right to inherit property or not to be arbitrarily deprived of property, law may not adversely affect the ability of one race to enjoy such rights, but must treat persons of all races on an equal basis.⁴⁵

The impact of the *Racial Discrimination Act* 1975 (Cth.) on government actions affecting rights recognised under the common law which are only enjoyed by Indigenous peoples was first considered in *Mabo v. Queensland [No. 1]*.⁴⁶ In that case the Queensland parliament had passed legislation which purported to extinguish any rights that may have existed in respect of the Murray Islands by virtue of traditional claims to ancestral land.⁴⁷ Whilst the legislation affected the rights of all persons who held rights in the islands, regardless of their race, as a practical matter it only affected the rights of Torres Strait Islanders. The law had the effect of establishing formal legal equality (as its provisions applied equally to all persons regardless of race) but substantive inequality (as the practical effect of the legislation was to deprive only Miriam persons of rights in the Murray Islands while leaving any other persons' rights in the island granted by the Crown under Crown lands legislation unaffected). The High Court of Australia held that the *Racial Discrimination Act* 1975 (Cth.) was intended to ensure practical equality and not mere formal equality.⁴⁸ In the case at hand the court

⁴⁴ . *Racial Discrimination Act* 1975 (Cth.) ss. 9(2), 10(2).

⁴⁵ . See *Mabo v. Queensland [No. 1]* (1988) 166 C.L.R. 186, 63 A.L.J.R. 84, 86 A.L.R. 12 at 217-18 per Brennan, Toohey and Gaudron J.J.; at 231-33 per Deane J.

⁴⁶ . *Ibid.*

⁴⁷ . *Queensland Coast Islands Declaratory Act* 1985 (Qld.) ss. 3, 4, 5. The Act was subsequently repealed by the *Torres Strait Islander Land Act* 1991 (Qld.).

⁴⁸ . *Mabo v. Queensland [No. 1]*, *supra* note 45 at 230-1 per Deane J. See also *Western Australia v.*
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considered that persons of one race had been denied the ability to inherit property and not to be arbitrarily deprived of property which were enjoyed by other persons. Accordingly, the Queensland legislation was held to be inoperative as it conflicted with the *Racial Discrimination Act* 1975 (Cth.) s. 10.⁴⁹

The impact of the *Racial Discrimination Act* 1975 (Cth.) on actions by the legislature or executive which purport to affect native title has been subsequently clarified by further decisions.⁵⁰ The *Racial Discrimination Act* 1975 (Cth.) precludes both a bare legislative extinguishment of native title by a State or Territory and any discrimination by a State or Territory against the holders of native title which adversely affects their enjoyment of their title in comparison with the enjoyment by holders of other forms of title of their title.⁵¹ Accordingly, native title holders have, by virtue of the *Racial Discrimination Act* 1975 (Cth.), the same security of enjoyment of their Indigenous rights in respect of land as others who are holders of title granted by the Crown. A State or Territory law which purports to diminish that security of enjoyment is, by virtue of s. 109 of the *Constitution*, inoperative.⁵²

Hence, an attempt by the Western Australian legislature in 1993 to extinguish all native title in Western Australia and replace it by a lesser form of statutory rights that had inferior

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Commonwealth, *supra* note 17 at 436-7.

⁴⁹ . *Mabo v. Queensland [No. 1]*, *supra* note 45 at 217-18 per Brennan, Toohey and Gaudron J.J., at 231-2 per Deane J.; c.f. at 207 per Wilson J. dissenting.

⁵⁰ . A more detailed examination of the impact and scope of the *Racial Discrimination Act* 1975 (Cth.) is outside the scope of this thesis. See further, *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) para. [5-2220]-[5-2230]; R. Bartlett, "Racism and the Constitutional Protection of Native Title in Australia: The 1995 High Court Decision" (1995) 25 *University of Western Australia Law Review* 127; F. Brennan, "Mabo and the Racial Discrimination Act: the Limits of Native Title and Fiduciary Duty Under Australia's Sovereign Parliaments" (1993) 15 *Sydney Law Review* 206; P. Hanks, "Can the State's Rewrite Mabo (No 2)? Aboriginal Land Rights and the Racial Discrimination Act" (1993) 15 *Sydney Law Review* 247; G. McIntyre, "Aboriginal Title: Equal Rights and Racial Discrimination" (1993) 16 *University of New South Wales Law Journal* 57; K. McNeil, "Racial Discrimination and the Unilateral Extinguishment of Native Title" (1996) 1 *Australian Indigenous Law Reporter* 181; G.D. Meyers, "WA v Commonwealth of Australia" in G.D. Meyers, ed. *Implementing The Native Title Act: First Steps, Small Steps* (Perth: National Native Title Tribunal, 1996) 27; N. Nygh, "Implications of Recent High Court Decisions for State Laws Dealing with Aborigines and Aboriginal Land: Gerhardy v Brown and Mabo v Queensland" (1990) 1 *Public Law Review* 329; P. Vines, "Western Australia and Native Title: Western Australia v The Commonwealth" (1995) 2 *Australian Journal of Human Rights* 127.

⁵¹ . *Western Australia v. Commonwealth*, *supra* note 17 at 418, 441, 463.

⁵² . *Western Australia v. Commonwealth*, *supra* note 17 at 438, 439.

priority to other forms of title and interests granted by the Crown was held to infringe the *Racial Discrimination Act* 1975 (Cth.) and was, accordingly, invalid.⁵³

Whilst these cases considered the application of the *Racial Discrimination Act* 1975 (Cth.) in relation to Indigenous rights concerning land, the same principles apply to other Indigenous rights recognised at common law in light of the broad definition of the rights protected by the *Racial Discrimination Act* 1975 (Cth.).⁵⁴

(iii) *Native Title Act*

The *Native Title Act* 1993 (Cth.)⁵⁵ was enacted in response to the decision of the High Court of Australia in *Mabo v. Queensland [No. 2]*.⁵⁶ It principally deals four matters:

- (a) It permits the validation of certain interests which had been previously been granted (and the future renewal of these interests) and which were invalid, but would have been valid in the event there had been no native title;
- (b) It protects native title from future extinguishment, other than as authorised by the Act.
- (c) It establishes a regime regulating future dealings with native title lands.
- (d) It establishes a regime for the determination of who holds native title and creates a register of native title determinations and native title claims. The regime established is too detailed to consider here. However, some provisions, such as dispensing of the rules of evidence in proceedings brought under the Act in the Federal Court of Australia to determine the existence of native title,⁵⁷ are of considerable practical importance.

⁵³ . *Western Australia v. Commonwealth*, *supra* note 17. The legislation in question was the *Land (Titles and Traditional Usage) Act* 1993 (W.A.).

⁵⁴ . See *supra* notes 44-45 and accompanying text.

⁵⁵ . Each State enacted complimentary legislation necessary in order to validate titles granted by that State and, in some instances the State legislation dealt with matters beyond the validation of titles. However, the State legislation must be consistent with the *Native Title Act* 1993 (Cth.) and, accordingly, will not be discussed in this thesis.

⁵⁶ . *Mabo v. Queensland [No. 2]*, *supra* note 6.

⁵⁷ . *Ibid.* s. 82(3). See also s. 109(3)

For present purposes, the most significant aspect of the *Native Title Act* 1993 (Cth.) is what it does not attempt to do. It does not attempt to define when native title exists or what the scope or content of native title rights. Rather, it incorporates the common law definition of native title. Nor does it establish a test as to the circumstances in which native title has been extinguished in the past.⁵⁸ These matters are left for the courts to determine applying common law principles concerning native title.

The *Native Title Act* 1993 (Cth.) does make a number of express references to Indigenous fishing and hunting rights. The definition of native title is based upon the "rights and interests" of Indigenous peoples in relation to land or waters.⁵⁹ "Rights and interests" are in turn defined to include any "hunting, gathering or fishing rights and interests".⁶⁰ However, any such rights and interests must be "rights and interests [that] are recognised by the common law of Australia".⁶¹ Accordingly, the *Native Title Act* 1993 (Cth.) does not attempt to resolve the question as to whether Indigenous fishing, hunting or gathering rights in fact exist at common law in Australia and, if so, in what circumstances. But if such fishing and hunting rights do exist at common law, the definition makes clear that those rights are subject to the provisions of the Act (including the procedural provisions and the protection from future impairment other than in accordance with the Act). Accordingly, the *Native Title Act* 1993 (Cth.) takes essentially the same approach to Indigenous fishing and hunting rights at common law as it does concerning native title to land or waters.⁶²

A general examination of the operation of the *Native Title Act* 1993 (Cth.) is beyond the scope of this thesis.⁶³ However, certain aspects pertinent to the exercise of Indigenous

⁵⁸ . Other than in the limited circumstance of validating otherwise invalid titles.

⁵⁹ . See *Native Title Act* 1993 (Cth.) s. 223(1).

⁶⁰ . *Native Title Act* 1993 (Cth.) s. 223(2).

⁶¹ . *Native Title Act* 1993 (Cth.) s. 223(1)(c). For a contrary view, see *infra* note 163.

⁶² . The minor differences are that the preamble of the *Native Title Act* 1993 (Cth.) acknowledges that native title to land exists (in at least some parts of Australia) whereas it does not expressly acknowledge that Indigenous peoples have any fishing and hunting rights. There are also special provisions dealing with confirmation of existing fishing access rights, ownership of natural resources and restrictions on licences and prohibitions of fishing, hunting and gathering activities of native title holders in certain circumstances. These are discussed *infra* at notes 419-424 and notes 491-497 and accompanying text.

⁶³ . See further, G. Nettheim, "The Native Title Act of the Commonwealth" in R.H. Bartlett & G.D. Meyers, eds., *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University, 1994) 7; M.A. Stephenson, ed. *Mabo: The Native Title Legislation* (Brisbane: University of Queensland Press, 1995); G.D. Meyers, ed. *Implementing the Native Title Act: Selected Discussion Papers of The National Native Title*

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fishing and hunting rights will be discussed throughout this thesis.⁶⁴ As many of the provisions of the *Native Title Act* 1993 (Cth.) remain politically controversial and may be subject to change,⁶⁵ where the *Native Title Act* 1993 (Cth.) contains particular provisions which may impact Indigenous fishing, hunting or gathering rights this thesis will generally first consider the general position at common law and then consider the impact of the particular provisions of the *Native Title Act* 1993 (Cth.).

(iv) *Summary of Limits on Executive and Legislative Powers concerning Indigenous Affairs*

As discussed above, each State has full powers in respect of Indigenous affairs, land management and fishing, hunting and gathering rights within their boundaries. However, those powers are subject to s. 109 of the *Constitution* which provides that where there is any inconsistency between a law of a Commonwealth and a law of a State, that the law of the Commonwealth shall prevail. This section summarises the practical effect of the Constitutional division of powers and the *Racial Discrimination Act* 1975 (Cth.) and the *Native Title Act* 1993 (Cth.) on legislative and executive powers of the States and Commonwealth with respect to Indigenous affairs.

(1) Prior to 1901

Prior to federation of the British colonies of New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania to form the Commonwealth of Australia on 1 January 1901, there was no issue of a legislative division powers in those colonies in respect of Indigenous affairs. The Crown had full power in respect of Indigenous affairs. The local legislature of each Colony gained full power over Indigenous affairs at the same time as it

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Tribunal (1994-1995) (Perth: National Native Title Tribunal, 1996); ATSIJSC, *Native Title Report June 94*, *supra* note 26 chap. 1 "The Native Title Act".

⁶⁴ . As to the future regulation of Indigenous fishing rights, see Chapter 6(D) "Impact of the Native Title Act On The Regulation of Indigenous Fishing Rights" below; as to the effect of the Act on the recognition of non-site specific Indigenous fishing rights, see *infra* notes 291-295 and accompanying text.; as to the confirmation of ownership of natural resources, see Chapter 5(D) "Confirmation Of Ownership Of Natural Resources", below.

⁶⁵ . By way of example, in the past four years, a number bills have been introduced into Parliament (or exposure drafts released) by the governing party of the time which would have substantially modified the provisions of the *Native Title Act* 1993 (Cth.) but, at the time of writing none have been passed.

did in respect of other matters, with the exception of Western Australia where the colonial representative government was denied full power over Indigenous affairs until 1897.⁶⁶

(2) From 1901 until 30 October 1975

There were no applicable constitutional limits on the power of the States in relation to Indigenous rights prior to 31 October 1975.⁶⁷ The Commonwealth could also impair or extinguish Indigenous rights in this period subject to its action being within an appropriate head of Commonwealth power.⁶⁸

(3) From 31 October 1975 until 30 June 1993 (or 31 December 1993)

From 31 October 1975 to 30 June 1993 (in respect of legislation) or to 31 December 1993 (in respect of non-legislative actions) States could deal with Indigenous rights (including native title) provided they did so in a manner which was not racially discriminatory. This meant as a practical matter the States could not deal with (or extinguish) native title in a manner which was less favourable than freehold property. However, where they did so, and granted interests to third parties, those interests have subsequently been validated at the expense of the native title interests, and native title holders given a right to compensation for the impairment of their rights.⁶⁹ The same position applies to executive acts of the Commonwealth government during this period, but not to legislation of the Commonwealth Parliament.

⁶⁶ . As to the evolution of responsible government in each of the Australian colonies, see R.D. Lumb, *The Constitutions of the Australian States*, 5th ed. (Brisbane: University of Queensland Press, 1991) at 3-41; A.C. Castles, *An Australian Legal History* (Sydney: Law Book Co, 1982). As to the peculiar position of Western Australia in relation to Indigenous affairs, see E.M. Russell, *A History of the Law in Western Australia and its Development From 1829 to 1979* (Nedlands, WA: University of Western Australia Press, 1980) at 321; P.W. Johnston, "The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust" (1989) 19 *University of Western Australia Law Review* 318; P. Hasluck, *Black Australians: A Survey of Native Policy in Western Australia, 1829-1897* (Melbourne: Melbourne University Press, 1942) at 165-66, 200-203.

⁶⁷ . This was the date of commencement of the *Racial Discrimination Act* 1975 (Cth.). See further, *supra* notes 43-54 and accompanying text.

⁶⁸ . As to Commonwealth heads of power and the effect of the 1967 referendum and constitutional amendment in expanding those powers, see notes 34-40 and accompanying text.

⁶⁹ . See *Native Title Act* 1993 (Cth.) Part 2, Division 2, dealing with the validation of past titles.

(4) From 1 July 1993 (or 1 January 1994) to date

From 1 July 1993 (in respect of legislation) or from 1 January 1994 (for executive or other actions) the States may only affect the rights of Indigenous peoples in a non-discriminatory manner and any actions affecting native title (including fishing and hunting rights) are void unless they comply with the detailed procedural provisions of the *Native Title Act* 1993 (Cth.). This is significant in relation to the future operation and management of fisheries, which until now have primarily been a State matter. The Commonwealth is in the same position as the States with the exception that any legislation passed after the enactment of the *Racial Discrimination Act* 1975 (Cth.) or the *Native Title Act* 1993 (Cth.) may impliedly override the earlier legislation and hence not be bound by the terms of the earlier legislation.⁷⁰

Another relevant constitutional requirement is that where the Commonwealth acquires property situated in a State it must do so on "just terms";⁷¹ but the States are not under any such requirement. However, the operation of the *Racial Discrimination Act* 1975 (Cth.) and *Native Title Act* 1993 (Cth.) now mean that any extinguishment of native title rights by the States must also be on the payment of just terms.

From the above summary it can be seen that many of the constitutional factors that affect powers in respect of Indigenous rights in other countries, such as Canada and the United States, have no counterpart in Australia. In particular, while the above constraints apply to State and federal legislative powers, there is no general separation of powers with respect to Indigenous peoples or lands between the federal and state parliaments. Furthermore, unlike the United States and Canada, whilst Indigenous rights may confer a benefit they will not generally act as a shield from State or federal laws in the absence of statutory protection.⁷²

With this framework in mind, the statutory treatment of fishing, hunting and gathering by Indigenous persons will now be considered.

⁷⁰ . See *Pareroultja v. Tickner* (1993) 42 F.C.R. 32 at 46 (Full Ct.); *Western Australia v. Commonwealth*, *supra* note 17 at 484.

⁷¹ . *Constitution* s. 51(xxxi). Extinguishment of native title is likely to constitute an "acquisition of property" for the purposes of the "just terms" provision, see *infra* notes 364-367 and accompanying text.

⁷² . As to the issue as to whether, as a matter of statutory construction, particular legislation applies to native title or Indigenous rights, see Chapter 6(B) "An Issue of Statutory Construction", below.

CHAPTER 2: HISTORICAL AND STATUTORY TREATMENT OF INDIGENOUS FISHING AND HUNTING RIGHTS

A. BRIEF HISTORY

A practice of permitting the Indigenous inhabitants to fish in the same waters as the colonists and sharing the colonists catch with them arose in the early days of the colony of New South Wales. As the first Governor of the Colony, Governor Phillip, recorded on 10 July 1788:

Yesterday twenty of the natives came down to the beach, each armed with a number of spears, and seized on a good part of the fish caught in the seine. *The coxswain had been ordered, however small the quantity he caught, always to give them a part whenever any of them came when he was fishing,* and this was the first time they ever attempted to take any by force ... the coxswain very prudently permitted them to take what they chose, and parted good friends. They, at present find it very difficult to support themselves.⁷³

As the colonial settlement expanded the ability of the Indigenous peoples to exercise traditional fishing, hunting and gathering rights was limited as settlers progressively occupied traditional hunting lands. There was inevitably conflict as Indigenous peoples were dispossessed of their traditional lands. Concern was expressed by some colonial officials about the ability of the Indigenous peoples to sustain themselves.⁷⁴ Accordingly special

⁷³. Phillip to Nepean, 10 July 1788, *Historical Records of Australia* (Canberra: Library Committee of the Commonwealth Parliament, 1914) series I, vol. 1 at 66-67, cited in J. Woolmington, ed. *Aborigines in Colonial Society*, University of New England Monograph Series No. 7, 2nd ed. (Armidale: University of New England, 1988) at 34 (emphasis added).

See also M. Barnard, *A History of Australia* (Sydney: Angus & Robertson, 1962) at 52, who summarised the fishing practices in the early period of the colony as follows:

“The new settlement posed a number of problems. The first and most pressing was food. The country offered very little, the most useful being hauls of fish. These could not be relied upon, sometimes they were plentiful, sometimes the nets came up empty. *Despite everyone's hunger, Phillip insisted that the aborigines should have a share of the catch. If the fish belonged to anyone - except His Majesty, of course - it was theirs.* The remainder went to feed the sick.” (emphasis added)

⁷⁴. For example, the Report of the Select Committee on the Aborigines in Victoria in 1858 contained a damning criticism of the lack of efforts to provide for Indigenous persons in light of the “taking”
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provisions were made in a number of jurisdictions permitting Indigenous persons access to pastoral leases on Crown land to hunt and forage.⁷⁵ Fishing areas were also reserved for the use of Indigenous persons in a few parts of Australia. The legislature in most jurisdictions also acknowledged the special claim of Indigenous persons to maintain their hunting and fishing practices by exempting them from regulations concerning fishing and hunting practices.⁷⁶

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of their hunting grounds and their means of living". It considered that "great injustice has been perpetrated upon the Aborigines" and that "proper provision should have been made for them" and recommended the establishment of reserves on the tribes' own hunting grounds: Victorian Legislative Council Votes and Proceedings, , 1858-59, No. D. 8, iv-v, cited in H. Reynolds, *Dispossession: Black Australians and White Invaders* (Sydney: Allen & Unwin, 1989) at 193-95. The Committees recommendations in this regard were not implemented.

- ⁷⁵. For example, see *Crown Lands Ordinance* 1924 (N.T.) ss 26(e), 39(b) [now *Pastoral Land Act* 1992 (N.T.) ss 38(1)(n), 38(2)]; *Pastoral Act* 1904 (S.A.) schedule cl 3(q) (now *Pastoral Land Management and Conservation Act* 1989 (S.A.) s. 47(1)); *Land Act* 1933 (W.A.) s. 106(2).

For a discussion of the historical background to the inclusion of reservations for access of Indigenous peoples in pastoral leases, see H. Reynolds, *The Law of the Land*, 2nd ed. (Melbourne: Penguin Books, 1992) at 146-47, 150-51; H. Reynolds, "Mabo and Pastoral Leases" (1992) 2:59 *Aboriginal Law Bulletin* 8; H. Reynolds, "Pastoral Leases in Their Historical Context" (1996) 3:81 *Aboriginal Law Bulletin* 9; H. Reynolds & J. Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *University of New South Wales Law Journal* 315.

- ⁷⁶. In New South Wales, see *Fisheries Act* 1902 (N.S.W.) s. 23(4); *Fisheries and Oyster Farms (Amendment) Act* 1957 (N.S.W.) (inserting s. 25A(b) into the principal Act); *Fisheries and Oyster Farms (Amendment) Act* 1979 (N.S.W.) sched. 4 s. 15(c); *National Parks and Wildlife (Hunting and Gathering) Regulation* 1985 (N.S.W.) cl 3-4.

In the Northern Territory, see *Birds Protection Ordinance* 1928 (N.T.) s. 19(a); *Birds Protection Ordinance* 1959 (N.T.) s. 19(a); *Wildlife Conservation and Control Ordinance* 1962 (N.T.) s. 54(1); *Wildlife Conservation and Control Ordinance* 1966 (N.T.) s. 8; *Territory Parks and Wildlife Conservation Act* 1976 (N.T.) s. 122; *Fish and Fisheries Act* 1979 (N.T.) ss 14, 93; *Fish and Fisheries Regulation* 1980 (N.T.) cl. 7B, 56(2).

In Queensland, see *Native Birds Protection Act Amendment Act* 1877 (Qld.) s. 1; *Native Animals Protection Act* 1906 (Qld.) s. 9(c); *Animals and Birds Act* 1921 (Qld.) s. 17(b); *Aboriginals Protection and Restriction of the Sale of Opium Act* 1927 (Qld.) s. 2; *Fauna Protection Act* 1937 (Qld.) s. 24; *Fauna Conservation Act* 1952 (Qld.) s. 78; *Fisheries Act* 1957 (Qld.) s. 3(i); *Fisheries Act* 1976 (Qld.) s. 5(1)(d); *Fishing Industry Organisation and Marketing Act* 1982 (Qld.) s. 45AA(1)(d) (see also s. 31(1)(e)).

In South Australia, see *Fisheries Act* 1878 (S.A.) s. 14; *Fisheries Amendment Act* 1893 (S.A.) s. 8; *Fisheries Act* 1904 (S.A.) s. 22; *Fisheries Act* 1917 (S.A.) s. 48; *Birds Protection Act* 1900 (S.A.) s. 4; *Animals Protection Act* 1912 (S.A.) s. 18; *Animals and Birds Protection Act* 1919 (S.A.) ss 20(a), 21; *Fauna Conservation Act* 1964 (S.A.) s. 42(1).

In Victoria, see *Preservation of Game Act* 1862 (Vic.); *Fisheries and Game Act* 1864 (Vic.) s. 39; *Protection of Game Act* 1867 (Vic.) s. 12; *Fisheries Act* 1873 (Vic.) s. 39; *Fisheries Act* 1890 (Vic.) s. 41; *Game Act* 1890 (Vic.) s. 21; *Fisheries Act* 1915 (Vic.) s. 4; *Fisheries Act* 1928 (Vic.) s. 4; *Fisheries Act* 1958 (Vic.) s. 4.

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B. EXISTING STATUTORY PROVISIONS

(i) Overview

Indigenous peoples are presently partially or wholly exempt from a range of legislation regulating fishing, hunting and gathering rights. In some jurisdictions the exemptions only apply to specific provisions, to certain classes of Indigenous peoples or for specified purposes. Legislation in most States regulates fishing, hunting and gathering as different subject matters.

The least regulated of these activities is gathering of flora (including berries and roots) which is generally unregulated outside of national parks and wildlife conservation areas. As national parks and other wildlife conservation areas comprise a large portion of the land area which is still accessible to Indigenous peoples to carry out these activities, the statutory provisions permitting the continuation of these activities (in varying degrees) are considered in detail below. There is virtually no regulation of commercial utilisation of flora. Falling mid-way in the spectrum of regulation is hunting of fauna. Regulation of hunting on private land generally only extends to endangered or protected species. However, hunting is highly regulated in national parks or wildlife conservation areas. There is almost no regulation of the commercial utilisation of hunting (other than in respect of protected or endangered species and regulations concerning processing of foodstuffs of a public health nature). The most highly regulated of the subject matters is fishing. Fishing is generally wholly regulated no matter where it takes place. Most fisheries legislation contains a blanket prohibition of any fishing activities other than those specifically authorised under the legislation.⁷⁷ Accordingly, the legislation displaces the usual common law rights concerning fisheries.⁷⁸ All aspects of commercial utilisation of fisheries are regulated. Indigenous peoples are

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In Western Australia, see *Preservation of Game Act* 1874 (W.A.) s. 13; *Fisheries Act* 1899 (W.A.) s. 11; *Fisheries Act* 1905 (W.A.) s. 43 (subsequently s. 56); *Fauna Protection Act* 1950 (W.A.) s. 23; *Fauna Protection Act Amendment Act* 1954 (W.A.) s. 13(c); *Wildlife Conservation Act Amendment Act* 1976 (W.A.) s. 11; *Fisheries Act Amendment Act* 1975 (W.A.) s. 15.

For a detailed analysis of the statutory exemptions operating in the early 1980's, see ALRC, *supra* note 5 vol. 2, chapter 35.

⁷⁷ For example, s. 10(1) of the *Fisheries Act* 1988 (N.T.) prohibits the taking of any fish other than in accordance with a licence.

⁷⁸ As to the common law right of the public to fish in tidal waters, see *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1977) vol. 18, para. 609-14. The issue as to whether common law recognition of specific rights of Indigenous peoples concerning fisheries are also displaced by such fisheries legislation is considered in Chapter 6, below.

partially or wholly exempt from a range of fishing rights in some States, but not others. These provisions are considered in detail below. Generally, any commercial fishing activities undertaken by Indigenous peoples fall outside the ambit of the exemptions and, hence, such activities are governed under the normal regulatory regime.

In addition to the general regulatory regimes, specific regimes concerning wildlife management often apply on land which has been granted to Indigenous communities under statutory land claim legislation.⁷⁹ This legislation generally permits non-commercial hunting, gathering and fishing on Indigenous land and, in some instances, permits the Indigenous community to regulate the wildlife management on the land. As these provisions tend to be local in nature and vary with each of the twenty-one types of statutory Indigenous land ownership regimes,⁸⁰ they will not be considered further here. There is no comparable legislation in relation to land held by Indigenous communities by reason of common law native title to land and such land is governed by the general regulatory regimes applicable in the jurisdiction in question. The interaction between any native title or Indigenous fishing rights and general legislative regulatory regimes is considered in Chapter 6.

(ii) Specific Provisions

The specific provisions dealing with Indigenous peoples in the general regulatory regimes concerning fishing, hunting or gathering in each jurisdiction are outlined in this section. The relatively narrow scope of the provisions, particularly in relation to commercial activities, can be contrasted with the potential for a broader common law recognition of fishing, hunting and gathering rights of Indigenous peoples discussed in the remainder of this thesis.

In national parks under Commonwealth jurisdiction,⁸¹ Indigenous persons are exempt from regulations which would prevent them from continuing "the traditional use of any area of

⁷⁹ For an overview of the various statutory regimes pursuant to which aboriginal land is held, see H. McRae, G. Nettheim & L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: Law Book Co, 1991), chap 5, *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) para. [5-120]-[5-1030].

⁸⁰ Aboriginal land is held pursuant to three different statutory regimes in the Northern Territory, five different regimes in Queensland, three different regimes in South Australia, four different regimes in Victoria, three different regimes in Western Australia and one regime in each of New South Wales, Tasmania and the Australian Capital Territory and Jervis Bay. See further note 79 *infra*.

⁸¹ The major parks under Commonwealth jurisdiction are Uluru - Kata Tjuta National Park and Kakadu National Park (both of which are situated in the Northern Territory) and Jervis Bay National Park (on the southern coast of New South Wales). Most "national parks" are under State

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land or water for hunting or food-gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes".⁸² Plans of management of Commonwealth national parks also make provision for traditional hunting and gathering.⁸³ In world heritage areas, Indigenous persons may be granted authorisation for activities which damage flora where the activities are part of the "traditional activities of Aboriginal people" or are "performed by Aboriginal people for their own use".⁸⁴ Indigenous persons may also apply for a permit in relation to endangered species protected under Commonwealth laws where the acts to be done are of particular significance to aboriginal tradition and will not appreciably reduce the survival or recovery of the endangered species concerned.⁸⁵

In the Northern Territory, Indigenous persons are exempt from wildlife conservation regulations which would prevent them from continuing "the traditional use of any area of land or water for hunting or food-gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes".⁸⁶ Fisheries regulations in the Northern Territory do not affect "the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner".⁸⁷ However, the exemption does not extend to Indigenous persons engaged "in a commercial activity".⁸⁸ A special form of a fishing licence may be issued to Indigenous communities in the Northern Territory. However, the entitlements conferred by the licence are quite restricted. One licence may be issued to each Indigenous community for which land has been granted in trust under the *Aboriginal Land Rights (Northern Territory) Act 1976*

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jurisdiction, see *supra* note 21-22 and accompanying text.

82. *National Parks and Wildlife Conservation Act 1975* (Cth.) s. 70(1). The exemption is subject to any regulations made for the purpose of conserving wildlife in any area which expressly affect the traditional use of the area by Indigenous persons: s. 70(2).

83. See, for example, Kakadu National Park Plan of Management para. 34.2.4.

84. *World Heritage Properties Conservation Regulations 1983* (Cth.) s. 3E(2)(c).

85. *Endangered Species Protection Act 1992* (Cth.) s. 89.

86. *Territory Parks and Wildlife Conservation Act 1976* (N.T.) s. 122(1). The exemption is subject to regulations expressly made for the purposes of conserving wildlife in any area which expressly affect the traditional use of the area by Indigenous persons: s. 122(2). See also *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.) ss 73(1)(c)-(d) regarding limitations on the legislative power of the Northern Territory in relation to the utilisation of wildlife resources and fisheries by Indigenous persons.

87. *Fisheries Act 1988* (N.T.) s. 53(1). The exemption is subject to any restrictions which expressly apply to Indigenous persons.

88. *Ibid.* s. 53(2).

(Cth.).⁸⁹ The licensee may take fish from within the area specified in the licence and may sell fish (other than certain specified species) within the boundaries of the community's lands.⁹⁰ However, the licensee may not sell the fish for the purpose of resale⁹¹ and is restricted to using amateur fishing gear.⁹² Hence, any viable participation by Indigenous peoples in the commercial fishing industry is governed by the same regulatory mechanism as non-Indigenous commercial fishing operators. There is also provision for the closure of seas within two kilometres of aboriginal land to persons who are not entitled by aboriginal tradition to enter and use those seas.⁹³

In New South Wales, Indigenous persons and their dependants are exempt from prohibitions against taking fauna in wildlife districts, wildlife refuges, wildlife management areas, conservation areas, wilderness areas and areas subject of a wilderness protection agreement and from taking or killing protected fauna (but excluding threatened species) anywhere in the State for domestic purposes.⁹⁴ Similarly, Indigenous persons are exempted from prohibitions against picking or having in their possession native plants in those areas and or protected native plants anywhere in the State for domestic purposes; provided, in the case of protected native plants, the gathering or harvesting of the fruit, flower or other parts of the plants is carried out in a manner that does not harm the plants or interfere unreasonably with their means of propagation.⁹⁵ In addition, the usual restrictions prohibiting the taking of animals or gathering of flora in national parks, nature reserves, or karst conservation areas does not apply to traditional Indigenous owners of such areas (or other Indigenous persons authorised by the Indigenous owners) in respect of those areas which have been vested in the Indigenous owners, where taken "for domestic or for ceremonial or cultural purposes".⁹⁶

⁸⁹ . *Fisheries Regulation* 1992 (N.T.) regs. 183-84. The licence is held by an individual who must be approved by the local aboriginal council (in those communities who have a council recognised under the *Local Government Act* 1985 (N.T.)) or approved by persons accepted by the majority of the community to be its leaders (in those communities which do not have such a council): *ibid.* reg. 183(c).

⁹⁰ . *Ibid.* regs. 186, 190(2), 191(2). Amongst the species which may not be sold (even within the Indigenous community) are baramundi and mud crab, both of which are highly valued species.

⁹¹ . *Ibid.* reg. 191(1). See also reg. 59(2).

⁹² . *Ibid.* reg. 189.

⁹³ . *Aboriginal Land Act* 1978 (N.T.) s. 12. See further, *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991), Vol 1, para. [5-335]; M. Brady, "Sea rights the Northern Territory 'sea closure': a weakened law" (1985) 15 *Aboriginal Law Bulletin* 8.

⁹⁴ . *National Parks and Wildlife (Land Management) Regulation* 1995 (N.S.W.) ss. 37.

⁹⁵ . *Ibid.* ss. 38-39.

This exemption does to threatened species or animals protected by management plans for the particular area.⁹⁷

However, Indigenous persons are not exempt from general fishing regulations.⁹⁸ However, New South Wales (together with Tasmania) are the only jurisdictions in which the issue of native title is addressed in fisheries legislation.⁹⁹ This is discussed below.¹⁰⁰

In Queensland, Indigenous persons acting in accordance with Aboriginal tradition are exempt from general fisheries legislation.¹⁰¹ The exemption does not apply to any regulations or management plans that expressly apply to acts done in accordance with Aboriginal tradition.¹⁰² Any such regulations or management plans must be developed in consultation with Indigenous persons.¹⁰³ In addition, Indigenous persons residing on former aboriginal reserves or trust areas and are exempt from fisheries regulations provided the fish are not taken for commercial purposes or by use of any noxious substance or explosive.¹⁰⁴ Special provisions also apply in the Torres Strait region in northern Queensland in accordance with the Torres Strait Treaty between Australia and Papua New Guinea which makes special provision for traditional fishing of the Indigenous inhabitants of the region.¹⁰⁵

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⁹⁶ . *National Parks and Wildlife Act* 1974 (N.S.W.) ss. 45(7), 56(7), 57(7), 58Q(7), 58R(7), 117(2). These sections were inserted by *National Parks and Wildlife Amendment (Aboriginal Ownership) Act* 1996 (N.S.W.) which provided for the vesting of certain national parks, nature conservation areas and karst conservation areas in the traditional Indigenous owners and the lease by them back to the State for use as a national park, conservation areas or karst conservation area.

⁹⁷ . *Id.*

⁹⁸ . The last remaining exemption was repealed in 1994.

⁹⁹ . See *Fisheries Management Act* 1994 (N.S.W.) s. 287

¹⁰⁰ . See Chapter 6(F)(i) "Specific Statutory Provisions Dealing with the Relationship between Native Title Fishing Rights and General Regulatory Regimes", below.

¹⁰¹ . *Fisheries Act* 1994 (Qld.) s. 14(1). For an analysis of the statutory regime in Queensland, see M. Berry, "Indigenous Hunting and Fishing in Queensland: A Legislative Overview" (1995) 18 *University of Queensland Law Journal* 326. However, Berry's analysis of the interaction between the *Native Title Act* 1993 (Cth.) and Queensland legislation is not entirely correct, see *infra* note 493 and accompanying text.

¹⁰² . *Ibid.* s. 14(2).

¹⁰³ . *Ibid.* s. 14(3).

¹⁰⁴ . *Community Services (Aborigines) Act* 1984 (Qld.) s. 77(1)(a); *Community Services (Torres Strait) Act* 1984 (Qld.) s. 76(1)(a).

¹⁰⁵ . The treaty is implemented by the *Torres Strait Fisheries Act* 1984 (Cth.) and *Torres Strait Fisheries Act* 1984 (Qld.). See further *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) vol. 1 para.

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Zoning plans for the Great Barrier Reef Marine Park also permit traditional fishing by Indigenous persons in specified zones with permission¹⁰⁶ and they are exempted from restrictions on collecting protected organisms for their own use in zones which are designated as "limited collecting" zones.¹⁰⁷

Different regimes apply in Queensland as to the taking of flora or fauna in "protected" and "non-protected" areas. In "protected areas" (national parks, conservation parks, nature refuges, wilderness areas and World Heritage management areas) there is provision for the grant of an "Aboriginal tradition authority" which authorises the taking or using cultural or natural resources (including plants and animals) in accordance with Aboriginal tradition.¹⁰⁸

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[5-2270]; ALRC, *supra* note 5 para. 943-49; S. Kaye, "The Torres Strait Treaty: A Decade in Perspective" (1994) 9 International Journal of Marine and Coastal Law 311; M. Exel, "Australian Fisheries Management - Resource Allocation and Traditional Rights" (1994) 53:5 Australian Fisheries 15; K. Mfodwo & M. Tsamenyi, "The Regulation of Traditional Fishing under the Torres Strait Treaty" in *Turning the Tide Conference: selected papers* (Darwin: Northern Territory University, 1993) 229; R.E. Johannes & J.W. MacFarlane, "Traditional Fishing Rights in the Torres Strait Islands" in A.K. Haines, G.C. Williams & D. Coates, eds., *Torres Strait Fisheries Seminar, Port Moresby, 11-14 February 1985* (Canberra: Australian Government Publishing Service, 1986) 31. See also J.C. Altman, *Indigenous Participation in Commercial Fisheries in Torres Strait* (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 1994); M. Mulrennan & M. Sullivan, "Torres Strait: Recent Initiatives in Environmental Management" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 253.

Kaye observes that the treaty 'was hailed as a triumph for preserving the way of life of the Indigenous people of the region' and that it is 'the only example of a maritime delimitation agreement that took into account the specific interests and concerns of the traditional inhabitants of the delimitation area' (at 323). However, the Indigenous people have not been entirely satisfied with their level of participation in either the growing commercial fishery or in the management of fisheries in the region: *ibid.* at 324-25, 329.

¹⁰⁶ See, for example, Cairns and Cormorant Pass Zoning Plan cl 4(1)(a) and 5.2(i)(xv) made under the *Great Barrier Reef Marine Park Act 1975* (Cth.). However, nothing in the zoning plan permits the taking of any animal or plant otherwise protected under Commonwealth or Queensland laws: cl 14-15.

¹⁰⁷ *Great Barrier Reef Marine Park Regulations 1983* (Cth.) s. 13AB(2)(d). As to co-management arrangements in relation to the Great Barrier Reef Marine Park and attempts by the Great Barrier Reef Marine Park Authority to take into account Indigenous interests in the management of the marine park, see A. Bergin & D. Lawrence, "Aboriginal and Torres Strait Islander Interests in the Great Barrier Reef Marine Park" in *Turning the Tide Conference: selected papers* (Darwin: Northern Territory University, 1993) 25; D. Briggs & R. Zigterman, "Aboriginal and Torres Strait Islanders' Involvement In Managing the Great Barrier Reef Marine Park and Queensland Marine Parks" in J. Birckhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992) 275.

¹⁰⁸ *Nature Conservation Regulation 1994* (Qld.) regs. 28-9. The application for an Aboriginal tradition authority must be made by a corporation whose members represent Indigenous persons particularly

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An Aboriginal tradition authority cannot be granted in respect of wildlife if doing so would reduce the ability of the wildlife to maintain its natural population levels in the area or be granted in respect of rare or threatened wildlife.¹⁰⁹ In non-protected areas Indigenous persons are permitted to take, use or keep protected wildlife in accordance with Aboriginal tradition, notwithstanding the provisions of any other Act.¹¹⁰ The exemption does not apply to conservation plans that expressly apply to acts done under Aboriginal tradition.¹¹¹

“Aboriginal tradition” is defined to mean “the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships”.¹¹² Accordingly, the exemptions do not exclude the possibility of commercial utilisation by indigenous peoples if such utilisation is encompassed by the broad notion of “Aboriginal tradition”.

Further exemptions in relation to the taking of fauna or flora apply to the residents of particular Indigenous communities in Queensland. Indigenous persons residing on former aboriginal reserves or trust areas are permitted to take native fauna by traditional means for consumption by members of their Indigenous community.¹¹³ Similarly, Indigenous persons resident in the Shires of Aurukun or Mornington (former aboriginal reserves in the Gulf of Carpentaria) may take fauna “to the extent necessary for the sustenance” of the Indigenous person’s family or household.¹¹⁴ These exemptions apply notwithstanding the provision of

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concerned with the area: *ibid.* s. 31.

¹⁰⁹ . *Ibid.* s. 33(1).

¹¹⁰ . *Nature Conservation Act 1992* (Qld.) s. 85(1).

¹¹¹ . *Ibid.* s. 85(3).

¹¹² . *Acts Interpretation Act 1954* (Qld.) A similar definition is provided of “Island custom”. Generally, in Queensland parallel sections or acts apply to “Aboriginals” and “Torres Strait Islanders”. The phrase “Aboriginal tradition” is used in relation to Aboriginals and “Island custom” in relation to Torres Strait Islanders. For brevity, where the provisions are equivalent this thesis will refer solely to the provisions dealing with Aboriginals.

¹¹³ . *Community Services (Aborigines) Act 1984* (Qld.) s. 77(1)(a); *Community Services (Torres Strait) Act 1984* (Qld.) s. 76(1)(a). The exemptions in these Acts apply only to Indigenous persons who reside on land that has been granted in trust, or reserved and set apart, under the *Land Act 1962* (Qld.) for the benefit of Indigenous persons or formed part of Aurukun or Mornington Island Shire Councils (even though that land may have subsequently become “aboriginal land” under the *Aboriginal Land Act 1991* (Qld.) or *Torres Strait Islander Land Act 1991* (Qld.)).

¹¹⁴ . *Local Government (Aboriginal Lands) Act 1978* (Qld.) s. 29(1)(a).

any other legislation, other than conservation plans concerning protected wildlife or flora which expressly apply to Indigenous persons.¹¹⁵

In South Australia, Indigenous persons are exempted from certain restrictions in taking native plants and protected animals on land that is not a national park.¹¹⁶ Within national parks, Indigenous persons may take native plants and protected animals in accordance with the terms of any proclamation permitting them to do so.¹¹⁷ Indigenous persons are also exempted from the requirement to hold a hunting permit.¹¹⁸ The exemptions only apply if the plant or animal is taken for the purposes of food or for "cultural purposes of Aboriginal origin".¹¹⁹ Indigenous persons are also exempted from restrictions applying in wilderness protection areas to the extent necessary to enable them to observe Aboriginal tradition.¹²⁰ There are no exemptions in South Australia from fisheries legislation.

In Tasmania, Indigenous persons engaged in an "Aboriginal cultural activity" are exempt from the need to obtain a fishing licence in coastal waters provided that the activity is not likely to have a detrimental effect on living marine resources.¹²¹ Fishing for commercial purposes is not permitted under the exemption by reason of the definition of "Aboriginal cultural activity".¹²² However, there is no similar exemption for Indigenous persons when fishing in inland waters.¹²³ Nor is there any exemption in relation to hunting or gathering activities by Indigenous persons.

¹¹⁵ . *Ibid.*

¹¹⁶ . *National Parks and Wildlife Act 1972 (S.A.)* s. 68d(1)-(2). The exemption does not apply to prescribed species or to the taking of plants or animals by prescribed means: s. 68c(2).

¹¹⁷ . *Ibid.* s. 68d(3)-(5).

¹¹⁸ . *Ibid.* s. 68e.

¹¹⁹ . *Ibid.* ss 68d(6), 68e.

¹²⁰ . *Wilderness Protection Regulations 1992 (S.A.)* s. 32. "Aboriginal tradition" is defined to mean "Aboriginals traditions, observances customs or beliefs and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation": *Wilderness Protection Act 1992 (S.A.)* s. 3.

¹²¹ . *Living Marine Resources Management Act 1995 (Tas.)* s. 60(2)(c). See also s. 10(2)(b).

¹²² . An "Aboriginal cultural activity" is defined to mean "the activity of fishing or gathering undertaken by an Aboriginal for his or her personal use based on Aboriginal custom of Tasmania as passed down to that Aborigine": *ibid.* s. 3.

¹²³ . Inland fisheries are regulated under the *Inland Fisheries Act 1995 (Tas.)*. The omission of an exemption in favour of Indigenous persons is strange given that the associated legislation, the *Living Marine Resources Management Act 1995 (Tas.)*, that regulates coastal fisheries was passed in the same year containing such an exemption.

There are no exemptions for Indigenous persons from general fishing, hunting and gathering regulations in Victoria.¹²⁴

In Western Australia, Indigenous persons are permitted to take fauna and flora on any Crown land or other land, other than a nature reserve or wildlife sanctuary, with the consent of the occupier (if any) of that land for the purpose of food for themselves and their families, but not for sale.¹²⁵ If the Governor is satisfied that these provisions are being abused or that any species is becoming or is likely to become unduly depleted, he or she may by regulation suspend or restrict the operation of the exemption.¹²⁶ Indigenous persons acting in accordance with aboriginal tradition are also exempt from the requirement to hold a recreational fishing licence, provided the fish are taken for the purpose of the person or the person's family and not for a commercial purpose.¹²⁷

A number of joint management schemes have been established for certain national parks and wildlife refuges, which permit Indigenous persons to be involved in the development of management plans for such parks, and hence, the extent to which customary activities of Indigenous peoples will be permitted.¹²⁸ However, fisheries legislation is generally silent on the issue of co-management with Indigenous peoples. For example, in the Northern Territory various objectives are to be accomplished by fisheries management plans, none of which include the involvement of Indigenous peoples in the management of the fisheries,¹²⁹

¹²⁴ . The current fisheries legislation is the *Fisheries Act* 1995 (Vic.).

¹²⁵ . *Wildlife Conservation Act* 1950 (W.A.) s. 23(1). Where an Indigenous person has taken a kangaroo for food, the Executive Director of the Department of Conservation and Land Management may issue a certificate authorising the sale of the kangaroo skin: *ibid* s. 23(2).

¹²⁶ . *Wildlife Conservation Act* 1950 (W.A.) s. 23(1) .

¹²⁷ . *Fish Resources Management Act* 1994 (W.A.) s. 6. Aboriginal tradition is not defined in the legislation.

¹²⁸ . For example, the Cobourg Peninsular Sanctuary Board established under *Cobourg Peninsular Aboriginal Land and Sanctuary Act* 1981 (N.T.); the board of management established under the *Nitmiluk (Katherine Gorge) National Park Act* 1991 (N.T.); boards of management in respect of certain Commonwealth national parks, see *National Parks and Wildlife Conservation Act* 1975 (Cth.) s. 14C; in respect of national parks transferred to Indigenous ownership and leased back to the State in New South Wales, see *National Parks and Wildlife Amendment (Aboriginal Ownership) Act* 1996 (N.S.W.) which inserted ss. 63, 71AN, 77 into the *National Parks and Wildlife Act* 1974 (N.S.W.); boards of management in respect of national parks on aboriginal land under the *Aboriginal Land Act* 1991 (Qld.) s. 5.20; *Torres Strait Islander Land Act* 1991 (Qld.) s. 5.20.

See further, *infra* notes 744-748 and accompanying text.

¹²⁹ . *Fisheries Act* 1988 (N.T.) s. 21.

nor does the statute require that the membership of Fisheries Management Advisory Committees include any Indigenous persons.¹³⁰

(iii) Scope of Statutory Exemptions

It is evident from the above survey that statutory provisions concerning Indigenous fishing, hunting and gathering activities are haphazard. Exemptions are not consistent between jurisdictions. For example, Victoria has no exemptions whilst Queensland and the Northern Territory have quite broad exemptions in favour of Indigenous persons. Even within a particular jurisdiction the nature of the exemptions is often not consistent. For example, New South Wales and South Australia have exemptions for Indigenous persons from hunting and gathering legislation but makes them fully subject to legislation concerning fisheries. Similarly, in Tasmania, Indigenous persons are largely exempt from regulations concerning coastal fisheries, but not from inland fisheries.

However, it is possible to make some general observations. Seven jurisdictions contain exemptions of some type which implicitly acknowledge that Indigenous persons should be treated differently in management of fisheries, fauna or flora than the general members of the public. The exemptions often call upon notions of aboriginal "tradition." In legislation which defines aboriginal tradition, a broad definition is usually adopted. The legislation usually makes it clear that it is aboriginal traditions as currently observed that are relevant, permitting those traditions concerning fishing, hunting and gathering to change to reflect contemporary Indigenous ways of life. On the other hand, the exemptions are generally expressly limited to either domestic or non-commercial use of the resource in question.

Generally the statutory exemptions from fisheries regulations are fairly wide in the northern States and Territories of Australia, but are non-existent in the more densely populated south eastern States (other than in respect of coastal fisheries in Tasmania). The lack of statutory recognition of traditional fishing rights is regarded by many Indigenous people in the south

¹³⁰ *Ibid.* s. 24. In appointing members to a Fisheries Management Advisory Committee the Minister is required to have regard to "the users of an area or fishery" (s 24). Where Indigenous peoples have a significant current involvement in a fishery this section should ensure that they have some representation on a fisheries management committee. But where Indigenous peoples have been excluded from a fishery (particularly in relation to the commercial utilisation of a fishery) this stipulation may work against them by directing that regard be had to the status quo in appointing members of the committees.

For a discussion of recent recommendations concerning representation of Indigenous peoples on management advisory committees, see *infra* note 871 and accompanying text.

eastern States as a denial of the special identity and a restriction of their cultural expression.¹³¹

The exemptions are generally silent as to native title or Indigenous fishing, hunting or gathering rights recognised at common law.¹³² The existing exemptions from the general regulatory regimes therefore do not seem to be based on an attempt to accommodate what the legislatures perceived to be existing legal entitlements of Indigenous peoples, but rather an acknowledgement that they should be subject to a different regime due to their traditional reliance upon fishing, hunting and gathering as their means of sustenance. Accordingly, the interaction between native title or common law Indigenous fishing, hunting or gathering rights and the regulatory regimes is left for the courts to determine.¹³³

¹³¹ . Smyth, *Understanding Country*, *supra* note 1 (in the section titled "Hunting, Gathering and Fishing Rights").

¹³² . The exceptions are fisheries legislation in New South Wales and Tasmania, which refer to the impact of the legislation on native title rights. This is discussed in Chapter 6(F)(i) "Specific Statutory Provisions Dealing with the Relationship between Native Title Fishing Rights and General Regulatory Regimes", below.

¹³³ . This matter is considered in detail in Chapter 6, below.

CHAPTER 3: COMMON LAW RECOGNITION OF INDIGENOUS FISHING AND HUNTING RIGHTS

A. INTRODUCTION

In *Walden v. Hensler*¹³⁴ an elder of the Gungalida people in Queensland was charged and convicted for taking a bush turkey in contravention of the *Fauna Conservation Act* 1974 (Qld.). The defendant was acting in accordance with aboriginal custom and believed he was entitled to take the turkey. The defendant argued that he was acting in accordance with an honest claim of right in respect of property which, under the provisions of the applicable Criminal Code, constituted a defence to the charge.¹³⁵ The High Court of Australia held, by a majority, that the defence was not available to the defendant.¹³⁶ However, the more fundamental question of whether the *Fauna Conservation Act* 1974 (Qld.) applied to the defendant's activities was not litigated. As Justice Brennan observed:

It would not have been surprising if a question had been raised by the appellant as to whether and how it came about in law that Aboriginal people had their traditional entitlement to gather food from their own country taken away.¹³⁷

The existence of native title to land at common law in Australia was subsequently recognised by the High Court in *Mabo [No. 2]*.¹³⁸ The court rejected the previously accepted proposition that Indigenous rights could only exist after the colonisation of Australia if they

¹³⁴. (1987) 163 C.L.R. 561, 61 A.L.J.R. 646, 74 A.L.R. 173.

¹³⁵. The defence of an honest claim of right is a general defence in respect of offences relating to property: *Criminal Code* (Qld.) s. 22.

¹³⁶. The decision turned on whether the offence was "an offence relating to property" within the meaning of s. 22 of the *Criminal Code* (Qld.). Brennan, Deane and Dawson J.J. held that the offence of keeping fauna was not an offence relating to property (Toohey and Gaudron J.J. dissenting).

¹³⁷. *Walden v. Hensler*, *supra* note 134 at 565.

¹³⁸. *Mabo [No. 2]*, *supra* note 6. See further R.D. Lumb, "Native Title to Land in Australia: Recent High Court Decisions" (1993) 42 International and Comparative Law Quarterly 84; M.A. Stephenson & S. Ratnapala, eds., *Mabo: A Judicial Revolution* (Brisbane: University of Queensland Press, 1993); G. Nettheim, "Judicial Revolution or Cautious Correction? *Mabo v Queensland*" (1993) 16 University of New South Wales Law Journal 1; G.D. Meyers & J. Mugambwa, "The Mabo Decision: Australian Aboriginal Land Rights in Transition" (1993) 23 Environmental Law 1203.

were recognised or granted by the Crown. While holding that the Crown had power to extinguish native title, the court held that in the case of the Murray Islands the Meriam people's native title to the Murray Islands remained intact to the present day.

A question that arises in the wake of the *Mabo* decision is if native title to land is recognised at common law, to what extent are fishing, hunting and gathering rights of Indigenous peoples also recognised at common law.¹³⁹ The juristic foundation of such rights may arise either as an incident of native title, as an independent Indigenous right recognisable at common law or by virtue of a local custom. To the extent such rights are recognised as an incident of native title they may either be characterised as flowing from native title to land or seabeds or as a separate native title or Indigenous right in fisheries which is independent of native title to land or seabeds. These different juristic foundations of Indigenous fishing, hunting and gathering rights are considered in this Chapter.

The starting point for the consideration of the existence of any Indigenous rights at common law in Australia is the decision of the High Court of Australia in *Mabo [No. 2]*. In *Mabo [No. 2]* the court held that the content of Indigenous rights to land (which it called "native title") comprises "the interests and rights of indigenous inhabitants in land whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants".¹⁴⁰ Consequently, as one author has observed, "[w]hether the content of rights associated with a claim of native title include hunting and fishing rights ... is a question of fact; it is a matter of proof, not a question of existence".¹⁴¹ There is no doubt that hunting, gathering and fishing comprised an important part of Indigenous societies and were highly regulated by Indigenous laws and customs prior to colonisation.¹⁴² In relation sea and fishing rights, it is clear that the

¹³⁹ The plaintiffs had originally sought declarations of native title both in relation to the lands of the Murray Islands and in respect of "rights to the sea and seabeds extending to the fringing reefs surrounding the said islands, and right to the fringing reefs surrounding the said Islands". The claim for these declarations was abandoned before the High Court. Nevertheless, the decision of the High Court did not preclude a future claim for native title over those reefs, seas and seabeds provided those interests had not been extinguished.

¹⁴⁰ *Mabo [No. 2]*, *supra* note 6 at 57 per Brennan J. See also at 58, 70 per Brennan J., at 110 per Deane and Gaudron J.J.

¹⁴¹ Meyers, *Traditional Fishing and Hunting Rights*, *supra* note 8 at 227. See also Meyers, *Living Resources Management*, *supra* note 4 at 18-19; T.A. Gray QC, "The Myths of Mabo" in *Essays on the Mabo Decision* (Sydney: Law Book Co, 1993) 148 at 159; M. Mansell, "Australian and Aborigines and the Mabo Decision: Just Who Needs Whom the Most?" in *Essays on the Mabo Decision* (Sydney: Law Book Co, 1993) 48 at 48-49.

¹⁴² For an overview of literature concerning traditional Indigenous fishing, hunting and gathering rights see ALRC, *supra* note 5, vol. 2, chapter 33 "Traditional Hunting, Fishing and Gathering

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boundaries of the traditional territories of many Indigenous peoples in coastal regions in Australia included areas of seas and they often exercised exclusive control over sea resources within their marine territories.¹⁴³ In the words of one author, "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".¹⁴⁴ Furthermore, the "traditional rights to the resources of clan estates included rights to use and control the resources of the sea".¹⁴⁵ Hence, there would seem to be little doubt that the rights and interests possessed under the traditional laws and customs of Indigenous peoples include the right of the traditional owners to hunt, gather and forage on the land and to fish in its rivers and adjacent seas.¹⁴⁶

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Practices".

¹⁴³ . As to traditional Indigenous views as to ownership of adjacent seas and waters see Aboriginal Land Rights Commission, *First Report* (Canberra: Australian Government Publishing Service, 1973) para. 205; S.L. Davis, "Aboriginal Sea Rights in Northern Australia" (1985) 12 *Maritime Studies* 12; N. Green, "Aboriginal Affiliations with the Sea in Western Australia" in G. Gray & L. Zann, eds., *Workshop on Traditional Knowledge of the Marine Environment in Northern Australia* (Townsville: Great Barrier Reef Marine Park Authority, 1988) ; W. Lanhupuy, "Marine Management For 40,000 Years: A Yolgnu View of Sea Rights" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 4; B. Lawson, *Aboriginal Fishing and Ownership of the Sea* (Canberra: Department of Primary Industries, 1984), D. Allen, "Salt Water Dreaming" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 58; J. Cordell, "Indigenous Peoples' Coastal-Marine Domains: Some Matters of Cultural Documentation" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 159; D. Smyth, *Aboriginal Maritime Culture in the Far Northern Section of the Great Barrier Reef Marine Park: Final Report* (Townsville: Great Barrier Reef Marine Park Authority, 1991); Smyth, *A Voice In All Places*, *supra* note 1; Smyth, *Understanding Country*, *supra* note 1.

¹⁴⁴ . Smyth, *A Voice In All Places*, *supra* note 1 at 166.

See also S.L. Davis & J.R.V. Prescott, *Aboriginal Frontiers and Boundaries in Australia* (Melbourne: Melbourne University Press, 1992) who refer to "the unquestionable fact that Aboriginal communities regarded inshore waters as a part of their territory. Further, marine sections of the territory were also determined by precise boundaries" in the Northern Territory (at 146). Their discussion of boundaries in part of the Torres Strait region notes that "[r]ights in the seas, reefs and marine resources of the seas beyond the home reef are held by the four Maluigal clans as a corporate group" (at 129)

¹⁴⁵ . Smyth, *Understanding Country*, *supra* note 1 at 24.

¹⁴⁶ . Indeed, the statutory definition of "traditional Aboriginal owners" in s. 3(1) of *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.) requires persons claiming to be the traditional owners of land to, inter alia, establish that they are "entitled by Aboriginal tradition to forage as of right over that land". See further, G. Neate, *Aboriginal Land Rights Law in the Northern Territory*, vol. 1 (Sydney: Alternative Publishing Co-operative Ltd, 1989) at 77-9; ALRC, *supra* note 5 para. 889. The definition relates to the criteria necessary for persons to establish they are the traditional owners of the land, rather than the nature of the rights conferred by a grant under the legislation

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Whilst English law has tended to treat rights to land and sea differently from each other, Indigenous laws did not draw the same distinction between land and sea rights. The content of Indigenous rights at common law, on the basis of the decision in *Mabo [No. 2]*, is to be determined by reference to Indigenous laws and customs. Whilst Indigenous rights depend upon the common law for their recognition, they are not creatures of the common law.¹⁴⁷ Hence, Indigenous rights need not be confined to rights found in English property law. In many parts of Australia, the Indigenous peoples view "the coastal sea as an inseparable extension of coastal land, and subject to the same characteristics of traditional ownership, custodianship, spirituality and origins in the Dreamtime and indigenous law".¹⁴⁸ As one Indigenous elder succinctly put it, "The sea and the land are one".¹⁴⁹ Hence, there appears to be no barrier to the recognition of Indigenous rights at common law extending to the sea itself and its marine resources.¹⁵⁰

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(which is dealt with elsewhere in the legislation). However, the definition is significant as it indicates the anthropological view of ownership indicia at the time of its enactment. Furthermore, in light of the large number of successful claims under the legislation, one can conclude that, at least in the Northern Territory, a *right* to forage over one's land was part and parcel of most if not all Indigenous people's laws and customs.

¹⁴⁷ See *supra* note 15 and accompanying text.

¹⁴⁸ Smyth, *Understanding Country*, *supra* note 1; Smyth, *A Voice In All Places*, *supra* note 1 at 166. See also ALRC, *supra* note 5 para. 890.

In land claims under the statutory regime in the Northern Territory, the Land Commissioners have also addressed the extent of the entitlements of the traditional aboriginal owners of a region (for the purpose of determining the identification of the traditional owners of an area and the extent of their traditional territories. The nature of the traditional entitlements are not related to the rights conferred under the statutory regime). In his report on the Milingimbi claim, Justice Toohey stated he was "satisfied that, in accordance with Aboriginal tradition, strangers were restricted in their right to enter the seas adjoining the land under consideration". A similar conclusion was reached by Justice Kearney in his report on the Castlereagh Bay claim: see Northern Land Council, *Croker Island Native Title Claim* (Darwin: Northern Land Council, 1997). In the report of the Aboriginal Land Rights Commission that led to the establishment of the statutory regime in the Northern Territory, the Commissioner, Justice Woodward, noted that "Aborigines generally regard estuaries, bays and waters immediately adjacent to the shore line as being part of their land". He recommended that their traditional fishing rights be preserved by "the establishment of a buffer zone [of two kilometres from the coast line] which cannot legally be entered by commercial fishermen or holiday makers": Aboriginal Land Rights Commission, *Second Report* (Canberra: Australian Government Publishing Service, 1974) at 80-81.

¹⁴⁹ Mary Yarmirr of the Minjalang community on Croker Island, cited in Northern Land Council, *Croker Island Native Title Claim* (Darwin: Northern Land Council, 1997).

¹⁵⁰ Indeed, the definition of "native title" in the *Native Title Act 1993* (Cth.) contemplates that native title may extend to the sea. Section 223(1) defines "native title" to mean the communal, group or individual rights and interests of Indigenous peoples recognised by the common law "in relation to

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Indigenous fishing, hunting and gathering rights have been characterised as being analogous to a *profit a prendre*.¹⁵¹ While caution needs to be exercised to avoid classifying the incidents of native title in English property law concepts¹⁵² it seems clear that fishing, hunting and gathering rights can comprise part of native title to land. However, as discussed below, while Indigenous fishing, hunting and gathering rights may be part of the bundle of rights comprised in native title to land, there is no necessary nexus between them. The issue as to the relationship between title to land and fishing rights will be revisited in more detail later in this thesis,¹⁵³ as will the issue of the characterisation and scope of Indigenous rights.¹⁵⁴

B. INITIAL MOVES TOWARDS RECOGNISING INDIGENOUS FISHING RIGHTS AT COMMON LAW IN AUSTRALIA

At the time the research for this thesis commenced, there had been no case in Australia which had recognised the existence of any fishing, hunting or gathering rights of Indigenous peoples (other than those expressly granted by statute). Prior to *Mabo [No. 2]* a number of lower court decisions had rejected such claims.¹⁵⁵

Since *Mabo [No. 2]* the issue of native title fishing rights have been raised as a defence to criminal charges for breach of State fisheries legislation. The results at first instance have been mixed. However, the appellate courts have rejected the defence in both of the cases that have reached the appellate level.¹⁵⁶ The issue has also been raised in numerous civil

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land or waters". "Waters" are in turn defined to include "sea" and the "bed or subsoil under any waters": s. 253.

¹⁵¹ See *R. v. Isaac* (1975) 13 N.S.R. (2d) 460 at 469 (N.S. C.A.); *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991) 54 B.C.L.R. (2d) 156 at 185 (C.A.), affirming (1990) 50 B.C.L.R. (2d) 157, [1991] 1 C.N.L.R. 14; *Bolton v. Forest Pest Management Institute* (1985) 21 D.L.R. (4th) 242 at 248-49, 66 B.C.L.R. 126, [1985] 6 W.W.R. 562, [1986] 2 C.N.L.R. 26 (B.C. C.A.), reversing (1985) 34 C.C.L.T. 119 (B.C.S.C.). See also the discussion of usufructuary rights in *Mason v. Tritton*, *supra* note 159 at 580-82 per Kirby P.

¹⁵² See *infra* notes 300-306 and accompanying text.

¹⁵³ See Chapter 3, Part D "Relationship Between Native Title and Indigenous Fishing, Hunting and Gathering Rights", below.

¹⁵⁴ This is dealt with primarily in Chapter 7, below.

¹⁵⁵ For example, see *R. v. Bourne*, *infra*, note 332.

¹⁵⁶ The defence was also rejected in *NSW Fisheries v. Gordon* (18 May 1993, N.S.W. Local Court Sutherland, Clugston S.M.) [unreported], cited in McIntyre, *supra* note 29 at 111, the Magistrate

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proceedings which seek a declaration that the claimants hold fishing, hunting and gathering rights as a part of their native title interests. However, no judgments have yet been handed down in those civil matters.¹⁵⁷ Accordingly, at the time of writing there have been no successful claims for Indigenous fishing rights. The issue as to whether such rights exist remains of some currency and controversy.¹⁵⁸

Though the two criminal cases which reached the appellate level ultimately rejected the defence raised by the Indigenous persons, they did provide the first tentative steps towards recognising the potential for recognition of Indigenous fishing rights at common law in Australia. Those aspects of the cases which deal with the existence of such rights will be considered here; other aspects of the cases dealing with the interaction between native title fishing rights and the regulatory mechanisms of the applicable fisheries legislation are considered in later chapters.

In the first case, *Mason v. Tritton*,¹⁵⁹ the defendant was charged with being in possession of greater than the permitted quantity of abalone and of shucking abalone adjacent to the sea contrary to the *Fisheries and Oyster Farms (General) Regulation* 1989 (N.S.W.). He argued that he was exercising a native title right to fish and that in consequence the

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holding that *Mabo*[No.2] did "not support the proposition the common law now recognises customary aboriginal fishing rights such that a claimed right must first be extinguished by legislation before an aboriginal exercising such a right is obliged to comply with legislation affecting the right".

A further unreported case finding in favour of the Indigenous defendant was determined before the Mount Isa Magistrates Court in Queensland on 11 October 1996. Though the basis of the decision from the short published note is unclear, the court appeared to accept that the defendant was exercising a native title fishing right and accordingly was exempted from the operation of the applicable Queensland fisheries legislation by virtue of s. 211 of the *Native Title Act* 1993 (Cth.) (the operation of which is discussed *infra* notes 491-497 and accompanying text). The Crown has lodged an appeal against the decision. See further G. Atkinson, "Yanner v Eaton: Walden v Hensler reversed?" (1997) *Indigenous Law Bulletin* .

¹⁵⁷ . Two civil proceedings have reached trial, the Yorta Yorta claim in a region on the New South Wales and Victorian border and the Croker Island claim in the Northern Territory, see further, R. Levy, "Croker Seas Native Title Application: Federal Court Hearing" (1997) 4:2 *Indigenous Law Bulletin* 21; Northern Land Council, *Croker Island Native Title Claim* (Darwin: Northern Land Council, 1997); K. Derkley, "Ancient customs, legal first" (1997) 71:1 *Law Institute Journal* 14.

¹⁵⁸ . See N. Hooper, "Sea rights: Mabo's second coming" (October 1993) 15:41 *Business Review Weekly* 33; M. Hogarth, "Northern Territory test case seen as crucial for marine environment" *The Sydney Morning Herald* (1 January 1997); M. Ceresa, "Sea Change in Native Title" *The Australian* (18 March 1997).

¹⁵⁹ . (1994) 34 N.S.W.L.R. 572 (C.A.).

regulation did not apply to him. The expert evidence relied upon concerning the traditional laws, customs and practices of the Indigenous community in question was scant. Furthermore, the defendant did not give evidence himself. The defendant was convicted in the Magistrates Court and the conviction upheld on appeal to the Supreme Court. He then appealed to the Court of Appeal. The major difficulty for the defendant at all stages was the paucity of the evidence. The case ultimately turned upon the lack of evidence that the defendant was exercising a native title right. The Court of Appeal unanimously dismissed the appeal on this basis. Nevertheless, the court made a number of comments about native title fishing rights. Kirby P. held that the common law recognises a native title right to fish.¹⁶⁰ Gleeson C.J. did not positively hold the common law recognised such a right, but his short judgment was open to the possibility of the common law recognising such a right.¹⁶¹ He emphasised the need for the defendant to establish the existence and content of a system of rules of Indigenous peoples concerning the right capable of recognition at common law and to bring his activities within the scope of the right.¹⁶² Priestly J.A. did not express any concluded view on the issue of whether the common law recognised fishing rights of Indigenous peoples, as his decision was confined to the failure of the defendant to lead evidence sufficient to establish such a right.¹⁶³

¹⁶⁰ . *Ibid.* at 575.

¹⁶¹ . *Ibid.* at 574.

¹⁶² . *Ibid.* at 574-75.

¹⁶³ . *Ibid.* at 601, 604. Though not expressing a concluded view as to the common law recognition of Indigenous fishing rights, Priestly J.A. ventured the opinion that s. 223(2) of the *Native Title Act* 1993 (Cth.) "puts beyond doubt the inclusion of hunting, gathering or fishing rights and interests within the meaning of native title". While observing that the common law may have reached that position "in due course", he considered that the section "puts an end to possible argument about the matter" in cases brought under the *Native Title Act* 1993 (Cth.): *ibid.* at 600.

However, with respect to His Honour, that analysis is not supported by an examination of the legislation. As discussed *infra* at notes 59-61 and accompanying text, the *Native Title Act* 1993 (Cth.) deals with native title only to the extent native title is recognised by the common law. In this regard, s. 223(2) (which provides that "rights and interests" in s. 223(1) "includes hunting, gathering, or fishing, rights and interests") must be read in conjunction with s. 223(1)(c) (which provides that the rights and interests comprising native title must be "rights and interests [which] are recognised by the common law of Australia").

A lexical substitution makes this clear. The definition of "rights and interests" in s. 223(2) does not apply to the bolded phrase in quotation marks appearing in s. 223(1) of "native title rights and interests" (which is one of the terms being defined in that section) but the subsequent phrase "rights and interests" appearing in that section and in the following sub-sections 223(1)(a) and 223(1)(c). Accordingly, the expanded s. 223(1), incorporating the additional definition in s. 223(2), reads as follows:

The expression "native title" or "native title rights and interests" means the communal, group or individual rights and interests [including hunting, gathering, or fishing, rights

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The second case was *Derschaw v. Sutton*. The defendants were charged with being in possession of 66 mullet which had been taken in contravention of notices issued under sections 9 and 11 of the *Fisheries Act* 1905 (W.A.), which prohibited the taking of fish by certain types of net (subject to exemptions for certain persons).¹⁶⁴ At trial the magistrate held that the defendants had raised sufficient doubt as to whether they were exercising a native title fishing right, which had not been rebutted by the Crown. He held that therefore the Crown failed to establish that the defendants had committed any offence under the *Fisheries Act* 1905 (W.A.). This finding was reversed on appeal in the Supreme Court and a conviction entered.¹⁶⁵ The Court held that although a right to fish based upon the traditional laws and customs of Indigenous peoples was recognised by the common law, the defendants had failed to satisfy the evidentiary burden that they possessed, or were exercising, such a right.¹⁶⁶ On further appeal to the Court of Appeal, the court, by a majority of two to one, upheld the convictions.¹⁶⁷ Franklyn J., writing for the majority, adopted the view of Kirby P.

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and interests] of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests [including hunting, gathering, or fishing, rights or interests] are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; *and*
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; *and*
- (c) *the rights and interests [including hunting, gathering, or fishing, rights and interests] are recognised by the common law of Australia.*

[emphasis in italics added, emphasis in bold in original]

Furthermore, to the extent it be considered that there is any ambiguity, there is nothing in the legislation, the second reading speeches or parliamentary debates which indicate that parliament intended the *Native Title Act* 1993 (Cth.) to operate as a positive source or grant of new Indigenous rights. The highest that the position can be put is that parliament considered that the common law *may* recognise fishing, hunting and gathering rights of Indigenous peoples and, if so, intended those rights to be subject to the provisions of the *Native Title Act* 1993 (Cth.).

¹⁶⁴ Section 12(1)(d) created an offence for taking fish in contravention of such notices.

¹⁶⁵ *Sutton v. Derschaw* (1995) 82 A. Crim. R. 318 (S.C. W.A.), affirmed (unreported, W.A. C.A., 16 August 1996, No.s S.J.A. 1175-77 of 1994, Lib. No. 960449S), special leave to appeal to H.C.A. refused (unreported, H.C.A., 30 May 1997, No. P44-46 of 1996)

¹⁶⁶ *Ibid.* at 324.

¹⁶⁷ *Derschaw v. Sutton* (16 August 1996, W.A. C.A., No.s S.J.A. 1174-77 of 1994, Lib. No. 960449S) [unreported], affirming (1995) 82 A. Crim. R. 318, special leave to appeal to the H.C.A. refused

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in *Mason v. Tritton*¹⁶⁸ that the common law of Australia recognised a right to fish based upon the traditional laws and customs of the Indigenous people concerned.¹⁶⁹ He considered such a right to fish to be a "form of native title".¹⁷⁰ However, the majority judgment upheld the conviction on the basis of the failure of the defendants to lead sufficient evidence to establish that they were exercising a native title right to fish.¹⁷¹ The dissenting judge, Wallwork J., also found that the common law recognised a right of Indigenous people to fish and, for the reasons discussed below, would have allowed the appeal against their conviction.¹⁷² The High Court of Australia refused special leave to appeal, on the basis that the case was not a suitable vehicle for a determining the important questions of principle involved due to the lack of an evidentiary foundation on which to consider these matters.¹⁷³

Accordingly, whilst the defendants ultimately failed to meet the evidentiary burden that they were exercising an Indigenous fishing right, the Magistrates Court, the Supreme Court and all three judges in the Court of Appeal unanimously agreed that, in principle, such a fishing right was capable of recognition under the common law.

However, in the absence of a case positively upholding the exercise of such a right or a determination by the High Court of Australia on the matter, there are likely to remain doubts as to the existence of such rights. Justice Debele of the South Australian Supreme Court recently expressed the view, in an article on Indigenous customary law and the common law, that whilst *Mabo* "may influence the capacity of the common law to recognise customary rights concerning hunting, fishing and food gathering", the "present position is that the common law has not recognised such rights".¹⁷⁴ This indicates the uncertainty that continues

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(unreported, H.C.A., 30 May 1997, No. P44-46 of 1996).

¹⁶⁸ . *Mason v. Tritton*, *supra* note 159.

¹⁶⁹ . *Derschaw v. Sutton*, *supra* note 167 at 7 (Murray J. concurring).

¹⁷⁰ . *Ibid.*

¹⁷¹ . *Ibid.* at 8, 14

¹⁷² . *Ibid.* at 18.

¹⁷³ . *Derschaw v. Sutton* (30 May 1997, H.C.A., Dawson, Toohey and Kirby J.J., No. P44-46 of 1996) [unreported], refusing special leave to appeal from (unreported, W.A. C.A., 16 August 1996, No.s S.J.A. 1175-77 of 1994, Lib. No. 960449S), affirming (1995) 82 A. Crim. R. 318 (the comments of Toohey and Dawson J.J. are contained in the transcript of the special leave application).

¹⁷⁴ . Judge B. Debele, "Aboriginal Customary Law and the Common Law" in E. Johnston QC, M. Hinton & D. Rigney, eds., *Indigenous Australians and the Law* (Sydney: Cavendish Publishing, 1997) 81 at 98.

to surround this issue in Australia. The recognition that Indigenous peoples possess fishing rights at common law would bring the common law in Australia into conformity with the common law in other countries, which are considered below.

C. RECOGNITION OF INDIGENOUS FISHING AND HUNTING RIGHTS IN OTHER COMMON LAW COUNTRIES

Preface

This part of the thesis contains a survey of other certain common law jurisdictions in which Indigenous fishing, hunting or gathering rights have been recognised. This part focuses on case law in those countries which find "pre-existing", "inherent" or "continuing" Indigenous rights which do not derive their source from treaty, proclamation, statute or any other similar positivist source.

Where courts find that Indigenous peoples have such pre-existing legal rights that are legally enforceable today the question arises as to the present day legal source of the right (in the absence of a positivist source). The courts are often silent on this issue. Two broad approaches can be found in judicial decisions. The first would be that Indigenous laws and rights, on their own strength, continue into the era of colonisation (subject to actions by the new sovereign). The second is that some Indigenous rights are recognised by reason of the laws of the newly introduced English legal regime. They pre-date it and had independent existence under Indigenous laws. However, under this approach, there are common law principles as to what pre-existing rights and laws will be recognised and their present day enforceability depends upon the common law recognition of those rights.

It is the second approach which has clearly been adopted in Australia.¹⁷⁵ That is what is meant in this thesis when reference is made to the recognition of Indigenous rights at common law. The position is less clear in Canada. It is possible to read some judgments as saying that some parts of the former Indigenous legal regimes survive into the new colonial order of their own force,¹⁷⁶ perhaps as some type of inter-societal accommodation¹⁷⁷

¹⁷⁵ See *supra* note 15 and accompanying text.

¹⁷⁶ For example see *Calder v. Attorney-General of British Columbia*, *infra* note 185, at 328 per Judson J. (Martland and Ritchie J.J. concurring) ("Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is which Indian title means ...").

(without a clear articulation of the legal basis on which this occurs). Other judgments in Canada refer to the recognition of Indigenous rights by the common law.¹⁷⁸ The initial United States cases, notably the decisions of Marshall C.J., refer to colonial practice and what are said to be international law concepts concerning discovery and colonisation.¹⁷⁹ These decisions can be seen as applying common law principles, although that language is not expressly used.¹⁸⁰ In my view, these variant approaches ultimately rely upon the common law, as they involve a juridical articulation of basic principles, not the interpretation of positivist sources.

Issues dealing with the reception of laws within new colonies, which are referred to at times during this thesis, are not part of the body of the “domestic” content of the common law, but can still be seen as a part of the wider body of the common law.¹⁸¹ References to the common law in this thesis are to this expanded notion of the common law and the notion of recognition of rights at common law, should be understood in this context.

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¹⁷⁷ . This basis of Indigenous rights is explored in the articles cited in *infra* note 688, some of which have been cited with approval in subsequent judgments.

¹⁷⁸ . For example see *Calder v. Attorney-General of British Columbia*, *infra* note 185, at 376, 396, 401 per Hall J. (Spence and Laskin J.J. concurring); *R v. Isaac*, *infra* note 188, at 469 per MacKeigan C.J.N.S. See also *R. v. Sparrow*, *supra* note 189 at 1091 where Dixon J. emphasised the notion of “pre-existing” aboriginal rights.

The prior jurisprudence was read in this light, namely as recognising Indigenous rights at common law, in *R. v. Van der Peet*, *infra* note 190, para. 28 per Lamer C.J.C. (La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major J.J. concurring).

¹⁷⁹ . See *Johnson v. McIntosh* 21 U.S. (8 Wheat.) 543 (1823); *Worcester v. Georgia* (1832) 31 U.S. (7 Pet.) 515.

¹⁸⁰ . This analysis appears to be consistent with the statement of Deane J. in *Gerhardy v. Brown* (1985) 159 C.L.R. 70 at 149 in his oft quoted statement dealing with the “retreat from injustice” by the common law in the context of referring to the Marshall decisions

¹⁸¹ . See generally, W. Blackstone *Commentaries on the Laws of England*, 17th ed, (1830), book 1, chap. 4, at 106ff.

(i) *Canada*

Overview

In Canada issues relation to Indigenous fishing and hunting rights have been litigated for many decades.¹⁸² However, the framework in which those rights have been situated has changed over time. The evolution of this framework is briefly discussed in this overview, prior to examining the individual cases which focus on a common law basis of those rights in the following section.

Indigenous peoples in many regions of Canada were guaranteed certain fishing and hunting rights in treaties with the Crown. The treaties were entered into from the earliest days of the British colonies in north America to the last of the so called "numbered" treaties in Canada in 1921. The first phase of litigation often dealt with the scope of these treaty rights in the context of s. 88 of the *Indian Act*,¹⁸³ and references to Indian fishing and hunting rights in resource transfer agreements that became part of the constitutional framework in the prairie Provinces.¹⁸⁴ The cases during this phase were ultimately about constitutional division of

¹⁸² For an overview of Indigenous hunting and fishing rights in Canada, and the different legal basis of those rights, see D.E. Sanders, "Indian Hunting and Fishing Rights" (1974) 38 *Saskatchewan Law Review* 45; K. McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 1983); P.G. McHugh, "Maori Fishing Rights and the North American Indian" (1985) 6 *Otago Law Review* 62 at 65-82; J. Woodward, *Native Law* (Toronto: Carswell, 1989) chapter 13; T. Isaac, *Aboriginal Law: Cases, Materials and Commentary* (Saskatoon: Purich Publishing, 1995) chapter 4. For an excellent review of Indigenous involvement in, and subsequent exclusion from, Pacific coast fisheries in Canada, see D. Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993). See also Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Ministry of Supply and Services, 1996) [hereinafter RCAP] vol. 2 at 496-519.

¹⁸³ *Indian Act*, R.S.C. 1985, c. I-5 s. 88 is in the following terms:

"Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province except to the extent that such laws are inconsistent with the Act ..."
(emphasis added).

Section 88 accordingly incorporates provincial laws of general application into federal law and applies them to Indians. In the absence of this provision, due to exclusive federal power over "Indians, and lands reserved for the Indians" by reason of s. 91(24) of the *Constitution Act* 1867, R.S.C. 1985, App. II. No. 5, (30 & 31 Vict., c. 3) (U.K.), provincial laws affecting the status of Indians of their "Indianess", such as those regulating hunting of game, would probably not apply to Indians: *Dick v. R.* [1985] 2 S.C.R. 309, [1986] 1 W.W.R. 1, 23 D.L.R. (4th) 44. See further, T. Isaac, *Aboriginal Law: Cases, Materials and Commentary* (Saskatoon: Purich Publishing, 1995) at 161-65; Reiter, *supra* note 27 at 194ff.

¹⁸⁴ A right of Indigenous persons to hunt and fish for food on all unoccupied Crown lands and on other
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powers issues delimiting the reach of Provincial laws upon Indigenous peoples. Indigenous fishing and hunting rights were generally viewed in a positivist framework. The source of the right was seen as the applicable statutory protection granted in respect of, or at least the positive recognition by the Crown of, the right in treaties with Indians. Nevertheless, these cases remain of some interest where they deal with the scope of the treaty right. This is particularly so in light of some more recent cases which have viewed treaties as preserving pre-existing common law rights, rather than a grant of rights.

The second phase of litigation comprises those cases which moved towards tentatively recognising Indigenous rights to land at common law. This started with the *Calder* case in 1973,¹⁸⁵ which was quickly followed by a lower court injunction in Quebec in relation to the proposed James Bay hydro-electric project.¹⁸⁶ In some cases, during this phase, such as the *Baker Lake* case,¹⁸⁷ wildlife hunting and rights were viewed as being part and parcel of aboriginal title and capable being protected by the law from interference. These cases moved away from the positivist approach to finding the source of Indigenous rights to be pre-

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lands on which they have a right of access notwithstanding provincial laws was guaranteed in Alberta, Manitoba and Saskatchewan when control over natural resources was transferred from the federal government to those provinces in 1930: see s. 12 of the Alberta and Saskatchewan Natural Resource Transfer Agreements and s. 13 of the Manitoba agreement, confirmed by the *Constitution Act* 1930 reproduced in the Schedule to R.S.C. 1985, App II, No. 26. See further, Sanders, *supra* note 182 at 54-56; T. Isaac, *Aboriginal Law: Cases, Materials and Commentary* (Saskatoon: Purich Publishing, 1995) at 163-65, 237-38.

¹⁸⁵ *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 1 W.W.R. 1.

¹⁸⁶ *Le Chef Max "One-Onti" Gros Louis v. La Societe de developpement de la Baie James* [1974] R.P. 38, 8 C.N.L.C. 188 (Que. S.C.), reversed by *La Societe de Developpement de la Baie James c. Chef Robert Kanatewat* [1975] C.A. 166, 6 C.N.L.C. 373 (Que. C.A.) (the case was in a civil law jurisdiction, though many of the issues were the same). Though the interlocutory injunction was reversed after only 1 week by the Court of Appeal, there were intense negotiations between the parties in an attempt to conclude a settlement prior to the trial of the action. This cumulated in the James Bay and Northern Quebec Agreement which was the first of the modern land claim settlements in Canada. See further, J. O'Reilly, "The Role of the Courts in the Evolution of the James Bay Hydroelectric Project" in S. Vicent & G. Bowers, eds., *Baie James et Nord Quebecois: Dix Ans Apres* (Montreal: Recherches amerindiennes au Quebec, 1988) 34; T. Morantz, "Aboriginal Land Claims in Quebec" in K. Coates, ed. *Aboriginal Land Claims in Canada: A Regional Perspective* (Toronto: Copp Clark Pitman, 1992) 101 at 111-116.

¹⁸⁷ *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979), [1980] 1 F.C. 518, (1979) 107 D.L.R. (3d) 513, [1980] 3 W.W.R. 193, [1979] 3 C.N.L.R. 17 (F.C. T.D.), additional reasons [1981] 1 F.C. 266. The case is discussed *infra* notes 204-205 and accompanying text.

existing Indigenous rights. The courts found that some elements of “pre-existing” rights survived in Canadian law.¹⁸⁸

The next phase commenced with the seminal decision of the Supreme Court of Canada in *R. v. Sparrow*.¹⁸⁹ The decision was also the first to consider the recognition and affirmation of aboriginal rights contained in s. 35(1) of the *Constitution Act* of 1982. The case did not directly address the issue of the relation between Indigenous rights to land and other Indigenous rights, such as fishing and hunting. It simply held that Indigenous fishing rights of the Musqueam were an existing aboriginal right.

The next phase commenced with the trilogy of cases handed down by the Supreme Court of Canada, generally referred to as the *Van der Peet* trilogy.¹⁹⁰ They were quickly followed by further decisions of the Supreme Court of Canada in *R. v. Adams*¹⁹¹ and *R. v. Cote*.¹⁹² These cases directly addressed, for the first time, the relationship between Indigenous rights to land and other Indigenous rights. They held that Indigenous rights to land were a subset of a wider range of Indigenous rights, which included a right to fish. At the same time the court required a great degree of specificity in characterising particular Indigenous rights. This characterisation of Indigenous rights has been pushed even further in the arguments of the Province of British Columbia in its argument before the Supreme Court of Canada in the appeal in the *Delgamuukw* case.¹⁹³

With this framework in mind, a number of cases touching upon the existence of Indigenous fishing rights at common law in Canada will now be considered.

¹⁸⁸ . Even during this phase, the judges differed in their approaches to the source of aboriginal rights. For an examination of the different approaches of the judges in the *Calder* case, *supra* note 185, see D. Sanders, “Pre-existing Rights: The Aboriginal Peoples of Canada” in G.A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Toronto: Carswell, 1996) chap. 17 at [17-11]. As to the source of Indigenous rights in Canada see also, *supra* notes 176-178.

¹⁸⁹ . [1990] 1 SCR 1075, 70 DLR (4th) 385, affirming (1986) 36 DLR (4th) 246, 9 BCLR (2d) 300.

¹⁹⁰ . The cases were *R. v. Van der Peet* [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289, [1996] 9 W.W.R. 1; *R. v. Gladstone* [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648, [1996] 9 W.W.R. 149; *R. v. N.T.C. Smokehouse Ltd.* [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528, [1996] 9 W.W.R. 114. The Supreme Court of Canada refers to these cases collectively as “the *Van der Peet* trilogy”, see *R. v. Cote*, *infra* note 192 para. 3, 4, 31, 37, 51. *R. v. Adams*, *infra* note 191 para. 4. That phrase is adopted in this thesis.

¹⁹¹ . [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657, reversing [1993] R.J.Q. 1011, 3 C.N.L.R. 98, 55 Q.A.C. 19 (Que. C.A.), [1985] 4 C.N.L.R. 39 (Que. Superior Ct.), [1985] 4 C.N.L.R. 123 (Que. C.S.P.).

¹⁹² . [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385, reversing [1993] R.J.Q. 1350, 98 107 D.L.R. (4th) 28, [1994] 3 C.N.L.R. 98, which had affirmed [1989] R.J.Q. 1893, [1991] 1 C.N.L.R. 107, which had affirmed [1988] R.J.Q. 1969, [1989] 3 C.N.L.R. 141.

¹⁹³ . See *infra* notes 702ff and accompanying text.

Case Law

As discussed above, the right of Indigenous persons "to hunt and fish as usual" on unoccupied Crown land was confirmed in many treaties with Indigenous peoples in different parts of the country. Similarly, a right of Indigenous persons to hunt and fish for food on certain lands within the prairie provinces, notwithstanding provincial laws was guaranteed when control over natural resources was transferred from the federal government to those provinces in 1930.¹⁹⁴ However, it is only relatively recently that the courts have recognised that Indigenous peoples have inherent rights to fish and hunt.

In *R. v. Isaac* the court recognised a usufructuary right of Indigenous persons on reserve land "to use that land and its resources, including, of course, the right to hunt on that land". That right was said to arise out of "our customary and common law" (though subsequently confirmed by the *Royal Proclamation* and other declarations).¹⁹⁵ The court characterised the right as "akin to a profit a prendre" which "arose long before [the *Royal Proclamation* of 1763] but has not been extinguished as to reserve land". It stated that "this stresses legalistically and the perhaps self-evident proposition that hunting by an Indian is traditionally so much a part of his use of his land and its resources as to be for him, peculiarly and specially, integral to that land".¹⁹⁶

In *R. v. Taylor and Williams*¹⁹⁷ the defendants were members of the Chippewa Nation which had, by treaty, surrendered 1.9 million acres of land to the Crown "without reservation or limitation in perpetuity" in 1818. The defendants were charged with taking bullfrogs during closed season. Notwithstanding the surrender of their aboriginal title to land, the Ontario Court of Appeal, having regard to the Indians understanding of the treaty, held that they not surrendered their Indigenous right to hunt and fish over that land. Hence, in the absence of valid legislation restricting that right the defendants were entitled to hunt and fish over that land.¹⁹⁸ The decision of the court is significant in that it indicates that an Indigenous right to hunt and fish over land can continue independently of Indigenous rights

¹⁹⁴. See *infra* note 184.

¹⁹⁵. *R. v. Isaac*, *supra* note 151 at 469 per MacKeigan C.J.N.S. See also at 496 per MacDonald J.A.

¹⁹⁶. *Ibid.* at 469, and also at 485, per MacKeigan C.J.N.S. See further *R. v. Cope* (1981), (1982) 65 C.C.C. (2d) 1, 132 D.L.R. (3d) 36, 49 N.S.R. (2d) 555 (N.S. C.A.) at 2-3.

¹⁹⁷. (1981), (1982) 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 (C.A.).

¹⁹⁸. No such federal legislation had restricted the defendants right to hunt or fish and the provincial legislation under which the defendants were charged was inapplicable due to constitutional reasons: see *Constitution Act* 1867, R.S.C. 1985, App. II. No. 5, (30 & 31 Vict., c. 3) (U.K.) s. 91(24), *Indian Act*, R.S.C. 1985, c. I-5 s. 88.

to the land itself. Many treaties have expressly guaranteed the right to hunt and fish to Indigenous persons in exchange for surrender of land. However, the court did not characterise the basis of the hunting and fishing rights upon a promise by the Crown, but rather that the Indigenous persons retained their existing Indigenous right to hunt and fish.¹⁹⁹ Presumably, they only had an "existing" right if, at the time of the treaty, that right was recognised at common law.²⁰⁰

In *R. v. White and Bob*²⁰¹ the British Columbia Court of Appeal considered whether the defendant was bound by regulations which prohibited deer hunting other than in open season. In 1854, the defendant's band had surrendered their land on terms which included that the Indians were "at liberty to hunt over the unoccupied lands, and to carry on [their] fisheries as formerly". The case turned upon an exemption of treaty rights from the application of provincial laws under the s. 88 of the *Indian Act*, the court holding that the terms of the surrender constituted a "treaty" for the purposes of the Act. However, Norris J.A. emphasised that the terms of the surrender and *Royal Proclamation* of 1763 simply affirmed an existing Indigenous right to hunt and fish,²⁰² and observed that:

This is not a case merely of making the [game] law applicable to native Indians as well as to white persons so that there may be equality of treatment under the law, but of depriving Indians of *rights vested in them from time immemorial*, which white persons have not had, viz., the right to hunt out of season on unoccupied land for food for themselves and their families.²⁰³

¹⁹⁹ While there are certain legal consequences which arise as a result of the right being guaranteed in a Treaty (see s. 88 *Indian Act*, R.S.C. 1985, c. I-5) the *content* of the fishing and hunting right appears to be no more than that which existed at common law: see *R. v. Simon* [1985] 2 S.C.R. 387, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390 "the right to hunt already existed at the time the Treaty was entered into by virtue of the Micmac's general aboriginal right to hunt" at 402 and "the Treaty did not *create* new hunting and fishing rights but merely *recognised* pre-existing rights" at 409 (emphasis in original); *R. v. Taylor and Williams*, *supra* note 197 (reference to the "preservation" of the Indians historic right to hunt and fish and that "the right would continue" at 367-8); *R. v. Isaac*, *supra* note 151 at 485; *R. v. White and Bob*, *supra* note 199 at 634-5, 646-7. The same approach has been taken in interpreting constitutional limitations on provincial powers in the Prairie provinces, see *R. v. Wesley* [1932] 4 D.L.R. 774 at 781, 58 C.C.C. 269 (s 12 of the Alberta Natural Resource Transfer Agreement "re-assured ... the continued enjoyment of a *right* which [Indians have] enjoyed from time immemorial". (emphasis added).

²⁰⁰ See further *supra* notes 175-181 and accompanying text.

²⁰¹ (1964), (1965) 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C. C.A.), affirmed (1965) 52 D.L.R. (2d) 481n (S.C.C.).

²⁰² *Ibid.* at 635, 646-47.

²⁰³ *Ibid.* at 648.

While the early Canadian cases were primarily concerned with treaty rights, the courts have recognised in recent years that Indigenous peoples possess fishing, hunting and gathering rights which exist either as a part of aboriginal title to land or as a separate Indigenous right. In *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* the plaintiffs claimed aboriginal title over a large area in the Northwest Territories. The court, in granting an interlocutory injunction to restrain mineral exploration activities and to restrict low flying aircraft over the calving areas of wild caribou herds upon which the plaintiff community was heavily dependent, stated "if there is substance to the Inuit's right to the continued enjoyment of land used by them and their ancestors from time immemorial, it is difficult to see how that substance does not, to some extent, embrace their traditional activities of hunting and fishing for the indigenous wildlife".²⁰⁴ At the subsequent trial of the action, the court upheld the plaintiffs' claim to aboriginal title. In relation to fishing and hunting activities, the court stated aboriginal title carries "with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit".²⁰⁵

As discussed above, the case of *R. v. Sparrow*²⁰⁶ marked the beginning of a new phase concerning Indigenous rights in Canada. A member of the Musqueam First Nation, was charged with fishing in contravention of the terms of a Musqueam food fishing licence under the *Fisheries Act*. The accused's Indian band held an "Indian food fish licence" under s 27 of the *British Columbia Fishery (General) Regulation* which permitted members of the band "to fish for salmon for food for themselves and their families" in specified areas and subject to certain conditions, including limitations on the length of drift net to be used. The decision provided the first opportunity for the court to consider s 35(1) of the *Constitution Act* 1982) which provided that:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

²⁰⁴. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1978), [1979] 1 F.C. 487, (1978) 87 D.L.R. (3d) 342 (F.C. T.D.) at 491 (F.C.), at 344-55 (D.L.R.) (emphasis added).

²⁰⁵. *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979), [1980] 1 F.C. 518, (1979) 107 D.L.R. (3d) 513, [1980] 3 W.W.R. 193, [1979] 3 C.N.L.R. 17 (F.C. T.D.), additional reasons [1981] 1 F.C. 266 at 563, 579 (F.C.), at 547, 560 (D.L.R.). The Inuit lost the case, not due to the non-recognition of aboriginal title or hunting or fishing rights, but due the court's finding that the exploration activities in question did not interfere with those rights.

²⁰⁶. *R. v. Sparrow*, *supra* note 189.

As the Musqueam has not entered into any treaty, the court was solely concerned with aboriginal rights at common law. While much of the analysis of the Supreme Court focused on s 35(1), which has no counterpart in Australia, the decision is still significant in relation to the court's findings as to the existence, scope and prior extinguishment of existing aboriginal rights.

The Court held that the word "existing" in s 35(1) meant that it applied only to those aboriginal rights that were in existence when the *Constitution Act* 1982) came into effect.²⁰⁷ Hence, extinguished aboriginal rights were not revived by the *Constitution Act* 1982).²⁰⁸ The court rejected an argument that "existing rights" meant freezing those rights in the specific manner in which the rights of each Indian band were regulated on the date s 35(1) came into force. To do so would create a constitutional "patchwork quilt".²⁰⁹ Rather, the phrase "existing aboriginal rights" was to be interpreted flexibly so as to permit the evolution of aboriginal rights over time.²¹⁰ Having regard to anthropological evidence concerning Musqueam fishing practices, the court did not have any difficulty in finding that there was an aboriginal right to fish.²¹¹ The court characterised the aboriginal right to fish of the Musqueam band as "not only for consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions".²¹²

A major issue on the appeal was whether the aboriginal right had been extinguished by prior regulations under the *Fisheries Act*.²¹³ The court held it had not. The regulatory scheme was "simply a manner of controlling the fisheries, not defining underlying rights".²¹⁴ Similarly, "historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right".²¹⁵ The aspects of the case concerning extinguishment are considered further below.²¹⁶

²⁰⁷. *Ibid.* at 1091.

²⁰⁸. *Id.*

²⁰⁹. *Ibid.* at 1091-3.

²¹⁰. *Ibid.* at 1093.

²¹¹. *Ibid.* at 1095.

²¹². *Ibid.* at 1101. The court declined to address whether the right extended to a right to fish for commercial purposes. Commercial aspects of Indigenous fishing rights are considered in Chapter 7, below.

²¹³. R.S.C. 1970, c. F-14.

²¹⁴. *supra* note 189 at 1099.

²¹⁵. *Ibid.* at 1101.

The remaining issue concerned whether the government regulations were invalid by virtue of s 35(1) of *Constitution Act* 1982). The court held that government could regulate the aboriginal fishery for conservation purposes, but only if in doing so the aboriginal food fishery was given priority over non-aboriginal sports and commercial fishermen. This aspect of the judgment is not relevant for present purposes, though will be considered later in the context of mechanisms to allocate fisheries between Indigenous and non-Indigenous users.²¹⁷

The most recent phase of cases dealing with Indigenous fishing rights in the Supreme Court of Canada commenced with the *Van der Peet* trilogy,²¹⁸ followed by the decisions in *R. v. Adams*²¹⁹ and *R. v. Cote*.²²⁰ These again upheld the existence of Indigenous fishing rights. The primary aspects of the *Van der Peet* trilogy dealt with the commercial component of Indigenous fishing rights and the justificatory standard required under s. 35(1) to impinge upon the commercial component of such rights. The *Adams* and *Cote* cases also clarified the relationship between Indigenous fishing rights and aboriginal title. These aspects of the cases will be discussed in detail later in the thesis.²²¹ The *Van der Peet* trilogy also marked a new approach to determining the existence and content of Indigenous rights affirmed and recognised under s. 35(1) of the *Constitution Act* 1982). The court held that Aboriginal rights comprise those practices, customs or traditions integral to the distinctive culture of the Indigenous people claiming the right prior to contact with Europeans.²²² A critique of this test and, in particular for making the criteria for the ascertainment of rights dependant on cultural aspects of the Indigenous people concerned, is undertaken later in the thesis.²²³ But,

(Footnotes continued from previous page)

²¹⁶ . See Chapter 8 below.

²¹⁷ . See *infra* notes 778-792 and accompanying text.

²¹⁸ . *Supra* note 190. For a general analysis of the approach of the Court in the *Van der Peet* trilogy, see the articles cited *infra* note 586.

²¹⁹ . *Supra* note 191.

²²⁰ . *Supra* note 192.

²²¹ . As to the commercial component of Indigenous fishing rights, see *infra* notes 586-595 and accompanying text; the justificatory standard for impinging such rights, see *infra* notes 794-803 and accompanying text; the relationship between aboriginal title and Indigenous fishing rights see *infra* notes 272-282 and accompanying text.

²²² . *R. v. Van der Peet*, *supra* note 190 at para. 46, 55-9 per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major J.J.; *R. v. Adams*, *supra* note 191 para. 26, 33-34, 37; *R. v. Cote*, *supra* note 192 para. 58; *R. v. Gladstone*, *supra* note 190 para. 25; *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 22.

²²³ . See Chapter 7(C)(v) "Framework For Assessing Indigenous Claims to Commercial Fisheries:
(footnotes continue on next page)

for present purposes in dealing with the existence of Indigenous fishing rights in other common law countries, the cases strongly affirm that such rights can exist. Those rights now receive additional protection in Canada by virtue of s. 35 (1) of the *Constitution Act* 1982); however, that is not the source of the rights, but rather the common law.²²⁴

(ii) *New Zealand*

A form of traditional Maori fishing rights was recognised in New Zealand last century.²²⁵ However, after the case of *Wi Parata v. Bishop of Wellington*,²²⁶ which held that the Treaty of Waitangi was a “simple nullity”, recognition of Maori rights was limited to where those rights were granted or recognised by statute. Similarly, common law aboriginal title (as opposed to any rights flowing from the Treaty of Waitangi) was not recognized after 1877 until the case of *Te Weehi v. Regional Fisheries Officer*.²²⁷

Te Weehi's case considered s. 88(2) of the *Fisheries Act* 1983 (N.Z.) which provided “Nothing in this Act shall affect any Maori fishing rights”. A similar provision had been included in all fishing legislation since its inception in 1877, with the exception of the period

(Footnotes continued from previous page)

Characterisation by reference to integral elements of a distinctive culture (the Van der Peet test)- A Critique”, below.

- ²²⁴ . However, see the discussion *infra* notes 653-660 and accompanying text. See also *supra* notes 175-181 and accompanying text.
- ²²⁵ . See the address of Chief Judge Fenton of the Maori Land Court to the Native Affairs Committee of the House of Representatives, June 1880, reproduced in S. Kenderdine, “Legal Implications of Treaty Jurisprudence” (1989) 19 Victoria University of Wellington Law Review 347 at 357-8. As to the nature of traditional Maori fisheries, see New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries: A Background Paper*, Preliminary Paper 9 (Wellington: Law Commission, 1989) at 26-35.
- ²²⁶ . (1877) 3 N.Z. Jur. (N.S.) S.C. 72. For a review of New Zealand cases concerning recognition of aboriginal title, see P. McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991) at 113-126; New Zealand Law Commission, *supra* note 224 at 54-9, 97-129.
- ²²⁷ . [1986] 1 N.Z.L.R. 680 (H.C.) (“*Te Weehi's* case”). See generally, F.M. Brookfield, “Maori Fishing Rights and the Fisheries Act 1983: *Te Weehi's* case” (1987) 13 New Zealand Recent Law 63; P.G. McHugh, “The Legal Status of Maori Fishing Rights in Tidal Waters” (1984) 14 Victoria University of Wellington Law Review 247 at 2-3, 14; A.L. Mikaere & D.V. Williams, “Maori Issues” [1992] New Zealand Recent Law Review 152 at 157-8. A Maori Land Court was established under statute to adjudicate on Maori customary land claims, but in the positivist approach of the time, the legal source of these rights was considered to be the legislation itself and Maori rights not deriving from legislation were not recognised.

from 1894 to 1903.²²⁸ Williamson J. held that the defendant was exercising a customary Maori fishing right which had not been extinguished by law. In doing so he resurrected the implicit recognition of aboriginal title at common law in *R. v. Symonds*.²²⁹ Therefore, by virtue of s. 88(2) the defendant was not bound by the provisions of the Act regulating the taking of undersized paua. The statutory provision was not the source of the right, but merely exempted the existing common law Maori fishing right from the regulatory regime. The reasoning in *Te Weehi*'s case, subsequently described as a "watershed decision",²³⁰ was followed in other cases.²³¹

The issue of the existence of common law Indigenous fishing rights in New Zealand has never been conclusively settled by the Court of Appeal. *Te Weehi*'s case was not appealed. However, on an appeal in other interlocutory proceedings, it was implicitly approved by Cooke P. who stated:

While this Court cannot at the present stage rule on questions of law that are not before us for decision and have not been fully argued, there is clearly a real possibility that the view of the law, and in particularly Maori customary fishing rights, provisionally taken by Greig J will prove to be right. The judgment of Williamson J in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 points in the same direction.²³²

²²⁸. For a history of the legislation see *Te Rununga o Muriwhenua Inc v. Attorney-General* [1990] 2 N.Z.L.R. 641 (C.A.) at 645 and New Zealand. Law Commission, *supra* note 224 p 55.

²²⁹. (1847) N.Z.P.C.C. 387 at 390.

²³⁰. *Ministry of Agriculture and Fisheries v. Hakaria* [1989] D.C.R. 289 at 291.

²³¹. See *Ministry of Agriculture and Fisheries v. Love* [1988] D.C.R. 370; *Rarere v. Ministry of Agriculture and Fisheries* (11 February 1991, H.C., Smellie J, Gisborne) [unreported] cited by A.L. Mikaere & D.V. Williams, "Maori Issues" [1991] New Zealand Recent Law Review 149 at 161-2; *Paku v. Ministry of Agriculture and Fisheries* (13 September 1991, H.C., Gallen J, Masterton) [unreported] [1991] B.C.L. 2001 [1991] B.C.L. 2001; *Ngaheue v. Ministry of Agriculture and Fisheries*, *supra* note 231; contrast: *Green v. Ministry of Agriculture and Fisheries* (1988), [1990] 1 N.Z.L.R. 411 (H.C.). See also *Ministry of Agriculture and Fisheries v. Campbell* (1988), [1989] D.C.R. 254 (where the court found that the defendant was not exercising a traditional Maori right, but implicitly acknowledged that had he been exercising such a right he would have been exempt from the Act); *Ministry of Agriculture and Fisheries v. Hakaria*, *supra* note 230 (where the court treated Maori fishing rights the defendant sought to uphold under s. 88(2) as being derived from the Treaty of Waitangi and did not rely upon common law aboriginal right to fisheries).

²³². *Te Rununga o Muriwhenua Inc v. Attorney-General*, *supra* note 228 at 654. See further F.M. Brookfield, "Constitutional Law" [1991] New Zealand Recent Law Review 253 at 253-7.

As a pan-Maori settlement and subsequent legislation has resolved the issue of Maori fishing rights in New Zealand at present, the Court of Appeal is unlikely to be called upon in the near future to clarify the issue.²³³

(iii) *United States*

Fishing and hunting rights of the Indigenous peoples in the United States of America have been recognised since the earliest days of European occupation.²³⁴ Most issues concerning the extent or scope of hunting and fishing rights in the United States have arisen in the context of treaty rights. The focus on treaty cases has tended to obscure the issue as to whether Indigenous rights recognised at common law in the United States include hunting and fishing rights.²³⁵ There may be a tendency in countries such as Australia to disregard the United States jurisprudence concerning treaty rights on the basis that it is not applicable to the common law position.²³⁶ A distinction is made in the United States between common law rights (commonly referred to as aboriginal or original Indian title) and treaties or other congressionally recognised lands (commonly referred to as recognised title) which is important in relation to extinguishment of title²³⁷ and compensation for taking such land.²³⁸

²³³ For a discussion of the settlement and legislation, see *infra* 850-859 notes and accompanying text. For a discussion of the approach of the New Zealand courts concerning commercial components of Maori rights, see *infra* notes 599-606 and accompanying text.

²³⁴ For an overview of the sources of Indigenous fishing, hunting and trapping rights in the United States, see F.S. Cohen, *Handbook of Federal Indian Law*, 1982 ed. ed. (Charlottesville, VI: Michie Bobbs-Merrill, 1982) at 441-56; W.C. Canby, *American Indian Law in a Nutshell*, 2nd ed. (St Paul: West Publishing, 1988) at 295-301; Conference of Western Attorneys General, *American Indian Law Deskbook*, (Niwot, CO: University Press of Colorado, 1993) [hereinafter, "CWAG"] at 210-62. For a recent analysis of treaty fishing rights jurisprudence, see F.P. Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley, CA: University of California Press, 1994) at 402-408, 419-422.

²³⁵ As late as 1976, the Full Court of the Idaho Supreme Court, having reviewed the United States case law, referred to the "paucity of opinions on the subject of whether the rights to hunt and fish are included among the rights of aboriginal title": *State of Idaho v. Coffee* 97 Idaho 905 at 908, 556 P.2d 1185 at 1188 (1976). The case is discussed *infra* at notes 246-247 and accompanying text.

²³⁶ Australian judges tend to regard the United States jurisprudence as being of only limited assistance as they view it as stemming from a very different history of relation between the Crown and the Indigenous peoples which they consider has no parallel to Australia, see *Coe v. Commonwealth* (1979) 53 A.L.J.R. 403 at 408; *Mabo [No. 2]*, *supra* note 6 at 131, 135 per Dawson J. (dissenting); *Coe v. Commonwealth* (1993) 68 A.L.J.R. 68 at 115. A similar, caution has been expressed by some Canadian judges concerning the application of principles developed in jurisprudence in the United States, see *R. v. Sparrow*, *supra* note 236 at 273-74; c.f. *R. v. Van der Peet*, *supra* note 190 para. 35 per Lamer C.J.

²³⁷ Recognised title and rights guaranteed by treaty are afforded greater protection than original Indian title, as a greater degree of explicitness by Congress is required to abrogate the former rights, see

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However, the courts in the United States have generally treated the underlying rights in the treaties as flowing from original Indian title. This is since the treaties are generally regarded as confirming rights, rather than conferring rights on the Indigenous peoples.²³⁹

Therefore, the scope of the Indian rights in question in treaty cases often turns upon the scope of the original Indian title.²⁴⁰ Further, there are a number of cases which directly address the issue of the recognition of Indigenous fishing rights in the absence of treaties. Accordingly, United States jurisprudence may be of some assistance in determining the scope of Indigenous fishing and hunting rights in Australia.

In *United States v. Winans* the United States Supreme Court considered the impact of a treaty which was expressed to give the Indians an exclusive fishing right upon certain land and a "right of taking fish at all usual and accustomed places, in common with the citizens of the territory" upon the fishing rights of the Yakima Indians.²⁴¹ It considered that the treaty constituted a limitation of the Yakima's existing rights. "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them" and a "reservation [to the Indians] of those [existing Indian rights] not granted".²⁴² The right of the Indians to take fish at their usual and accustomed places, in common with citizens of the territory, outside their reserve lands was "a remnant of the great rights they possessed" prior to the treaty.²⁴³

(Footnotes continued from previous page)

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt 700 F. 2d 341 at 352-54 (7th Cir. 1983), cert. denied sub nom. *Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 464 U.S. 805, 78 L. Ed. 2d 72, 104 S. Ct. 53 (1983).

²³⁸ . The general position is that a taking of original Indian title lands by the federal government does not give rise to any rights of compensation under the Fifth Amendment of the United States Constitution, whereas a taking of recognised title does give rise to a right of compensation, see: F.S. Cohen, *Handbook of Federal Indian Law*, 1982 ed. ed. (Charlottesville, VI: Michie Bobbs-Merrill, 1982) at 491; W.C. Canby, *American Indian Law in a Nutshell*, 2nd ed. (St Paul: West Publishing, 1988) at 259, 263.

²³⁹ . See *C.J.S. Indians* 42 § 35b; CWAG, *supra* note 234 at 211; *State of Minnesota v. Keezer* 292 N.W. 2d 714 at 716 (1980), cert. denied 450 U.S. 930, 101 S. Ct. 1389, 67 L. Ed. 2d 363 ("Cession treaties are therefore conceptualized and construed as a grant from the Indians to the United States and as reserving to the Indians rights not granted"); *United States v. Winans*, *supra* note 241 at 381 (discussed below).

²⁴⁰ . See *In re Wilson* 30 Cal. 3d 21 at 26, 177 Cal. Rptr. 336 at 339 n6 (1981); *United States v. Washington* 873 F. Supp 1422 at 1429 (W.D. Wash. 1994) (observing "the starting point for analysis of the treaty is the Indian's pre-existing rights").

²⁴¹ . 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905).

²⁴² . *Ibid.* at 381.

²⁴³ . *Ibid.* at 384.

Likewise, in dealing with an issue of fishing rights in Michigan on lands ceded by the Indians to the government under treaty, the court had to consider the effect of a provision in the treaty of cession that guaranteed the Indians the "right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement". Again, whilst ostensibly dealing with a treaty, the court related those rights back to the underlying Indigenous right. The court, in upholding the exercise of Indian treaty fishing rights, held that the claim to:

fishing rights here depends upon their having possessed such rights at the time of the [treaty of] cession. The legal predicate to this holding is a holding that they possessed aboriginal rights in the area of cession.

...

The Indians have a right to fish today wherever fish are to be found within the area of cession - as they had at the time of cession - a right *established by aboriginal right and confirmed by the Treaty of Ghent, and the Treaty of 1836*.²⁴⁴

In *State of Idaho v. Coffee* the court, whilst ultimately holding that the Indigenous right to fish had been extinguished on the particular land in question, considered "hunting and fishing rights are part and parcel with aboriginal title".²⁴⁵ In its view "treaties provide for the *retention* ... of hunting and fishing rights, both on and off the reservation, indicating that hunting and fishing rights are a part of the aboriginal title which may be ceded by treaty or reserved by the Indians".²⁴⁶ The court continued:

We hold that, where established by historical use, aboriginal title includes the right to hunt and fish and where those rights have not been passed to the United States, by treaty or otherwise, the rights continue to adhere to the current members of the tribe which held them aboriginally.²⁴⁷

²⁴⁴ . *United States v. Michigan* 471 F. Supp. 192 at 255, 280 (1979), affirmed (1981) 653 F. 2d 277, cert. denied 454 U.S. 1124. In a subsequent hearing the court reiterated this view, stating:

"the Indians of Michigan *presently hold an unabridged, aboriginal, tribal right to fish derived from thousands of years of occupancy and use of the fishery* of the waters of Michigan. That aboriginal right arose from the tribes' reliance upon the fishery for its livelihood, that is, from its dependence upon this fishery for food and trade. This *right was confirmed in its entirety by the Treaty of Ghent and left whole by the Treaties of 1836 (7 Stat. 459) and 1855 (11 Stat. 621)*. Thus, today the Michigan tribes *retain* the right to fish Michigan treaty waters to the full extent necessary to meet the tribal members' needs."

United States v. Michigan, *supra* note 244 at 472 (emphasis added).

²⁴⁵ . *State of Idaho v. Coffee*, *supra* note 235 at 908 (Idaho), 1188 (P. 2d). See also *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, *supra* note 237 at 352; *C.J.S. Indians* 42 § 122.

²⁴⁶ . *State of Idaho v. Coffee*, *supra* note 235 at 908 (Idaho), 1188 (P. 2d) (emphasis added).

²⁴⁷ . *Ibid.* at 909 (Idaho), 1189 (P. 2d).

Similarly, in *State of Montana v. Stasso*, the court reiterated that “[h]unting and fishing rights are part and parcel with aboriginal title”.²⁴⁸ The court then proceeded to approach the issue of the impact of a treaty by determining the extent to which the existing aboriginal hunting and fishing rights survived the treaty.²⁴⁹ In *Leech Lake Band of Chippewa Indians v. Herbst* Devitt J. stated: “I am satisfied that the Leech Lake Indians held aboriginal fishing and hunting rights, that these rights were preserved by treaty”.²⁵⁰ Numerous other cases have characterised fishing, hunting and trapping rights as incidents of aboriginal title.²⁵¹

Hence, whilst the historical development of Indigenous rights jurisprudence in the United States is unique, the source and content of fishing rights in the United States (subject to the terms of each treaty) is still generally derived from common law principles as to the rights of the Indigenous peoples of the land. This is significant as the United States courts have generally had little difficulty in considering that Indian fishing rights not frozen as at the point of European contact or acquisition of sovereignty but can be exercised in a contemporary manner and for commercial purposes. These issues, and that of allocation of resources such as fisheries between Indigenous and non-Indigenous users of the resource, have significant implications in the Australian context.²⁵²

²⁴⁸ . *State of Montana v. Stasso* 172 Mont. 242 at 244, 563 P.2d 562 at 563 (1977).

²⁴⁹ . The court’s approach is summarised in the following passages (*ibid.* at (Mont.) 244, 246, (P.2d) 563, 564):

Aboriginal title is founded on the concept that Indian occupancy and use of the land prehistorically predated the present sovereign. This being so, we examine the terms by which the Indians ceded their land to the United States to determine to what extent Indian hunting rights on that land remain unextinguished.

....

It is clear however that the provisions of the treaty must be considered as a reservation by the Indians, rather than a grant by the federal government. Therefore, the Indians, at the time of the treaty, reserved the right to hunt on open and unclaimed lands outside their present day reservation, but within their aboriginal hunting territory.

²⁵⁰ . *Leech Lake Band of Chippewa Indians v. Herbst* 334 F. Supp. 1001 at 1006 (1971).

²⁵¹ . *In re Wilson* 30 Cal. 3d 21 at 26-30, 177 Cal. Rptr. 336 at 339-42 (1981); *State of Minnesota v. Keezer* 292 N.W. 2d 714 at 720-21 (1980), cert. denied 450 U.S. 930, 101 S. Ct. 1389, 67 L. Ed. 2d 363; *United States v. State of Minnesota* 466 F.Supp. 1382 at 1385 (D. Minn. 1979), affirmed *sub nom. Red Lake Band of Chippewa Indians v State of Minnesota* 614 F.2d 1161 (8th Cir. 1980), cert. denied 449 U.S. 905, 101 S. Ct. 279, 66 L. Ed. 2d 136. See also CWAG, *supra* note 234 at 210.

²⁵² . United States jurisprudence concerning the modern manner of exercising rights is discussed below in Chapter 4(B), commercial utilisation of fishing rights is discussed in Chapter 6 and allocation issues are discussed in Chapter 8.

D. RELATIONSHIP BETWEEN NATIVE TITLE AND INDIGENOUS FISHING AND HUNTING RIGHTS

There is a tendency to approach the categorisation of Indigenous rights in concepts familiar to existing common law concepts. Hence, it is not surprising that the initial case law in Australia focused on Indigenous land ownership. There is a natural tendency to approach the issue of Indigenous fishing rights by considering them to arise out of, or be associated with, native title to land. This tendency can be seen in recent Australian decisions. In *Derschaw v. Sutton*, Franklyn J., writing for the majority, held that the common law of Australia recognised a right to fish based upon the traditional laws and customs of the Indigenous people concerned.²⁵³ He considered that such a right to fish to be a “form of native title”.²⁵⁴

Similarly, in *Mason v. Tritton*, Kirby P. held that the Indigenous fishing right claimed was “a recognisable form of native title”.²⁵⁵ The appellant put forward two alternative arguments as to the basis of the fishing right. First, that the right arose from an underlying native title to the submerged lands.²⁵⁶ Second, that the right was a right wholly separate from and not dependent upon any rights in the submerged lands. Dealing with the first basis Kirby P. considered that “there was no bar to the recognition of those rights” at common law in Australia, though noting that the manner of use, possession and occupation of the submerged lands would be different from that of dry land.²⁵⁷ In his view the fishing right claimed on that basis “was prima facie capable of recognition within the reasoning of the *Mabo* decision”.²⁵⁸ In light of his findings on this first basis he considered it unnecessary to deal with the alternative claim of a “mere right to fish”.²⁵⁹

Both of these Australian cases proceed on the basis that Indigenous fishing and hunting rights are incidents of, or a form of, native title. However, there is no reason why Indigenous fishing and hunting rights are not capable of existing independently of ownership of land. For example, in relation to fishing rights on seas or oceans, a number of Indigenous peoples may

²⁵³ . *Derschaw v. Sutton*, *supra* note 167 at 7 (Murray J. concurring).

²⁵⁴ . *Derschaw v. Sutton*, *supra* note 167 at 7 (Murray J. concurring).

²⁵⁵ . *Supra* note 159 at 579

²⁵⁶ . For an analysis of whether native title can exist in submerged lands and, in particular, offshore lands and seabeds, see the sources cited *infra* in note 413.

²⁵⁷ . *Ibid.* at 580.

²⁵⁸ . *Ibid.* at 582.

²⁵⁹ . *Ibid.* at 582.

have a non-exclusive right to fish in the area.²⁶⁰ As such, they may have Indigenous rights to the fishery capable of recognition at common law, independently of any native title in the lands or seabed. While use of the words "title" or "native title in the fishery" may be misleading in these circumstances, it is clear that at common law proprietary rights can exist in fisheries independently of ownership of the soil²⁶¹ and even different proprietary rights in different fisheries may exist in the same area at common law.²⁶² Though native title and Indigenous rights need not conform to English property law concepts,²⁶³ if a separate proprietary interest can exist in fisheries at common law, there appears no reason why there cannot be a separate native title or Indigenous rights directly in fisheries not dependant on any underlying title to land.²⁶⁴ The content of those rights would, as with the content of native title to land, be determined in accordance with the customs and laws of the Indigenous peoples concerned.²⁶⁵

Support for this proposition can be found in overseas cases. In New Zealand, Williamson J. stated:

In my view a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore.²⁶⁶

²⁶⁰ As to the possibility of a number of Indigenous communities making a collective claim for an area over which none may have an exclusive use, see *Mabo [No. 2]*, *supra* note 6 at 100 per Deane and Gaudron J.J., at 190 note 19 per Toohey J.

²⁶¹ *Attorney-General v. Emerson* [1891] A.C. 649 at 654. See further, *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1977) vol. 18, para. 601.

²⁶² *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1977) vol. 18, para. 603.

²⁶³ See *infra* notes 300-306 and accompanying text. As to the inapplicability of applying the rule that private right in fisheries can only be created by legislation or by a presumed grant prior to the Magna Carta to indigenous peoples, see New Zealand Law Commission, *supra* note 224 at 70-2.

²⁶⁴ A number of authors have quoted or cited an earlier version of this paragraph (see D. Sweeney, "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16 University of New South Wales Law Journal 97 at 110-11) agreeing with the proposition contained therein that Indigenous fishing rights should be capable of existing independently of rights to land, see M.A. Burnett, "The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations" (1996) 19 Suffolk Law Review 389 at 418; Meyers, *Traditional Fishing and Hunting Rights*, *supra* note 8 at 226; Meyers, *Living Resources Management*, *supra* note 4 at 18; Behrendt, *supra* note 8 at 11.

²⁶⁵ See *infra* notes 300-306 and accompanying text.

²⁶⁶ *Te Weehi's case*, *supra* note 227 at 690. See also *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 at 270. In both cases, the underlying aboriginal title to land had been extinguished.

In another case, Cooke P. was of the view:

In principle the extinction of customary title to land does not automatically mean the extinction of fishing rights ... The survival of fishing rights though land titles have been extinguished was recognised even as to the foreshore by Chief Judge Fenton in his *Kauwaeranga Judgement* of 1870 ... If anything, the case for the survival of sea fishing rights may be stronger.²⁶⁷

In Canada, the courts avoided directly addressing this issue for some time. For example, in the case of *R. v. Sparrow* the Supreme Court of Canada simply characterised the defendant's right as "an aboriginal right to fish" and did not discuss the relationship with aboriginal title to land.²⁶⁸ A lower court subsequently expressed the view that:

There is a distinction to be drawn between the nature of a right to fish in waters which constitute traditional fishing grounds and aboriginal title at common law in relation to land. In my view it is again not a question of "title" or "ownership", it is a question of the right to fish in those waters and to enjoy the benefit of the resource to be found there.²⁶⁹

In the subsequent *Van der Peet* trilogy,²⁷⁰ which adopted new basis for the characterisation of Indigenous rights in general, the Supreme Court of Canada again did not deal in any depth as to the relationship between Indigenous fishing rights and aboriginal title.²⁷¹

Any uncertainty as to the position in Canada was clarified by the recent cases of *R. v. Adams*²⁷² and *R. v. Cote*.²⁷³ The court characterised the issue as "whether an aboriginal fishing or other right must be necessarily incident to a claim of aboriginal title in land, or whether an aboriginal right may exist independently of a claim of aboriginal title"²⁷⁴ and whether there could be "a free-standing aboriginal right to fish independent of title".²⁷⁵ In

²⁶⁷ . *Te Rununga o Muriwhenua Inc v. Attorney-General*, *supra* note 228 at 655. A contrary view has been taken in the United States, see *In re Wilson* 30 Cal. 3d 21 at 26-30, 177 Cal. Rptr. 336 at 339-42 (1981).

²⁶⁸ . *Supra* note 189.

²⁶⁹ . *R. v. Jones* (1993) 14 O.R. (3d) 421, [1993] 3 C.N.L.R. 182.

²⁷⁰ . *Supra* note 190.

²⁷¹ . The judgment which most directly addressed this issue was that Justice L'Heureux-Dube (in her dissenting judgment), see *R. v. Van der Peet*, *supra* note 190 para. 116.

²⁷² . *Supra* note 191.

²⁷³ . *Supra* note 192.

²⁷⁴ . *R. v. Cote*, *supra* note 192 para. 3.

²⁷⁵ . *R. v. Cote*, *supra* note 192 para. 11.

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each case the Supreme Court of Canada unanimously concluded that Indigenous fishing rights may exist independently of title to land.²⁷⁶ The court observed that “aboriginal title is simply one manifestation of the doctrine of aboriginal rights”.²⁷⁷ Accordingly, “while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out”.²⁷⁸ However, though

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See also *R. v. Adams*, *supra* note 191 where the court characterised the question as “whether aboriginal rights are necessarily based in aboriginal title to land, so that the fundamental claim that must be made in any aboriginal rights case is to aboriginal title, or whether aboriginal title is instead one sub-set of the larger category of aboriginal rights, so that fishing and other aboriginal rights can exist independently of a claim to aboriginal title” (para. 3) and “the fundamental question to be answered in this case is as to whether a claim to an aboriginal right to fish must rest in a claim to aboriginal title to the area in which the fishing right took place. In other words, this Court must determine whether aboriginal rights are inherently based in aboriginal title to the land, or whether claims to title to the land are simply one manifestation of a broader bases conception of aboriginal rights” (para. 25).

²⁷⁶ *R. v. Adams*, *supra* note 191 para. 25-26, 64; *R. v. Cote*, *supra* note 192 para. 38.

²⁷⁷ *R. v. Cote*, *supra* note 192 para. 38; *R. v. Adams*, *supra* note 191 para. 30.

²⁷⁸ *R. v. Adams*, *supra* note 191 para. 26.

The reasoning of the Supreme Court of Canada was influenced by a concern that some Indigenous peoples may not be able to meet the requirements to establish aboriginal title to land in Canadian law, see *R. v. Adams*, *supra* note 191 para. 26-27, 65. Accordingly, in separating Indigenous rights from aboriginal title, the court permitted Indigenous peoples a mechanism to establish a right to undertake particular activities on the land even though they may not be able to establish the strict requirements necessary to prove “title” to the land. This in turn seems to be a response to the high degree of use and occupation (which is sometimes thought to require exclusive use of the land by a particular Indigenous people) presently required under Canadian law in order to establish aboriginal title. In contrast, the criteria to establish native title in Australia does not require intensive use or occupation of the land in question. Nor is use of the land required to be to the exclusion of other Indigenous peoples (provided the co-use of the land is harmonious or consensual arrangement between the different Indigenous peoples concerned). The corollary of this lesser hurdle to establish native title in Australia is that the content of native title in a particular area will reflect the laws and customs of the particular Indigenous peoples in that area. Hence, the content of native title in Australia may vary from area to area and may range from the equivalent of freehold title to mere usufructuary rights over particular land (see *Mabo [No. 2]*, *supra* note 6 at 57, 67, 70 per Brennan J., at 86, 88-89 per Deane and Gaudron J.J.; *Wik Peoples v. Queensland*, *supra* note 7 at 126-27 per Toohey J., at 249 per Kirby J). In light of the manner in which the judges have approached the determination of native title in Australia, native title may properly be described as comprising any Indigenous rights relating to the specific land in question. As this approach is more flexible than the Canadian approach concerning aboriginal title there has not been the same need to separate Indigenous rights from native title in Australia to date and no claims have yet been adjudicated which have not been able to be accommodated within this flexible notion of native title.

The foregoing is not intended to derogate from the valid point that Indigenous rights need not be related to native title. There are clearly some aboriginal rights, such as any right to self-regulation dealing with marriage or adoption, that do not have a nexus to land and clearly would exist separately to native title to land. However, the difference in approach of the Australian and Canadian courts as to the nature of native title partly explains the need for the Canadian Supreme

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an aboriginal right need not be linked to underlying rights to land the court noted that the exercise of the right may, depending upon the nature of the right established, be limited to specific tracts of land or areas.²⁷⁹ For example, though an Indigenous people may possess fishing rights independently of native title to land, those fishing rights might be limited to traditional fishing areas of the Indigenous people concerned.²⁸⁰

The decision in *R. v. Adams* is of particular relevance to Australia, since any native title to land had been extinguished by the raising of the water level in the St. Lawrence River, for the construction of the Beauharnois canal in 1845, which left the land being permanently submerged. The area was also the subject of a treaty of cession in 1888 under which the Mohawks ceded a large area of land (including the fishing area) to the Crown (though the validity of this treaty was contested by the Mohawks). The trial judge, and Paul J. of the Quebec Superior Court on appeal, held that an aboriginal fishing right could survive notwithstanding the extinguishment of aboriginal title. The Court of Appeal held by a two to one majority that the aboriginal fishing rights could not exist in the absence of aboriginal title to land. As discussed above, the Supreme Court of Canada unanimously held that aboriginal fishing rights could exist independently of aboriginal title. Further, in discussing extinguishment the court drew a distinction between extinguishment of aboriginal title and extinguishment of aboriginal fishing rights. Whilst the court considered the submersion of the land might demonstrate a clear and plain intention of the Crown to extinguish any aboriginal title to the land it did not consider the action demonstrated a clear and plain intent to extinguish an aboriginal right to fish for food in the area.²⁸¹ Justice L'Heureux-Dube, in her separate concurring judgment, emphasised that "aboriginal rights can be incidental to aboriginal title but need not be: they are *severable* from and can exist independently of aboriginal title".²⁸²

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Court to make the conceptual jump to separate Indigenous rights from native title even when dealing with site-specific fishing or hunting rights.

²⁷⁹ *R. v. Cote*, *supra* note 192 para. 38; *R. v. Adams*, *supra* note 191 para. 30.

²⁸⁰ For an detailed analysis of the impact of the mobility of Indigenous peoples on present day Indigenous fishing and hunting rights and the possibility of non site specific fishing and hunting rights see Chapter 4, below.

²⁸¹ *Ibid.* para. 49. It reached the same conclusion concerning the treaty of cession which it held dealt only with the Mohawks proprietary interest to the land and did not a free-standing aboriginal right to fish.

²⁸² *Ibid.* para. 64 (emphasis added).

Courts in the United States have also grappled with this issue, though with less clarity than the Canadian and New Zealand courts. The United States Court of Appeals considered it would be clearly erroneous to suggest that usufructuary rights of Indigenous peoples to fish or hunt are limited to areas which they had a right to occupy.²⁸³ However, the issue has usually arisen in somewhat complex situations involving an analysis of wider Congressional action affecting Indigenous lands.

In *Menominee Tribe of Indians v. United States* the United States Supreme Court considered the effect of *Menominee Indian Termination Act* 1954). The statute provided for the termination of federal supervision over the Menominee Indians and that all tribal property was to be transferred to new hands. The court held that though the legislation was effective to terminate the reservation, it did not abrogate Indian fishing and hunting rights which had been preserved by an earlier treaty. In doing so the court had regard to congressional policy of the time as demonstrated in another statute enacted at the same time. While the fact situation is quite specific, what is significant is that the Supreme Court “decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of those Indians”.²⁸⁴ Hence, legislation terminating reservations and providing for the transfer of land was not necessarily to be read as abrogating Indigenous fishing rights.

Similarly, in *Leech Lake Band of Chippewa Indians v. Herbst*,²⁸⁵ the United States District Court considered the effect of the extinguishment of Indian title upon the Indians’ hunting and fishing rights. Congress had passed the *Nelson Act* of 1889 (25 Stat. 642) in respect of the lands in question, which provided for “a complete extinguishment of the Indian title” to the lands of the Leech Lake Reservation. The Nelson Act also authorized the United States to pass legal title to certain reservation lands to outsiders. At the time of the case only 20% of the reservation remained in Indian hands. The reservation had previously been established pursuant to a treaty, which the court characterised as preserving the existing aboriginal interests in land and hunting and fishing rights of the Indians. At the time of the passing of the Nelson Act the Indians entered into a further agreement with the United States which provided that: “[We] do hereby grant, cede and relinquish and convey to the United States, for the purposes and upon the terms stated in said (Nelson) Act, all our right, title and

²⁸³ . *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, *supra* note 237 at 362-63.

²⁸⁴ . *Menominee Tribe of Indians v. United States* 391 U.S. 404 at 412-13, 20 L. Ed. 2d 697, 88 S. Ct. 1705 (1968).

²⁸⁵ . *supra* note 250.

interest in and to the lands reserved and set apart". The Nelson Act did not directly address the issue as to its effect upon the Indians' rights to hunt and fish. The court rejected the argument that the Act had the necessary effect of extinguishing the Indians' hunting and fishing rights. The court considered that a purpose of the Act was to distribute land "to land hungry settlers for farming and lumbering" and to homesteaders and others.²⁸⁶ It did not find the requisite intention necessary to terminate the federal-Indian relationship (which affected the ability of the state to regulate hunting and fishing activities of the Chippewa Indians) nor the Indians' fishing and hunting rights.²⁸⁷ While much of the reasoning in the judgment focuses on whether there was an intention by the government to terminate the federal-Indian relationship, which is not applicable to Australia, the ability of Indigenous fishing rights to survive a termination of Indian title is relevant to Australia. The High Court of Australia has embraced the requirement that there be a clear and plain intention to extinguish native title rights and, in doing, so cited United States case law as authority.²⁸⁸ This case provides an example of the application of the principle of not lightly inferring such an intention with the result that fishing rights may survive an extinguishment of title to land.

Not all cases have held Indigenous fishing rights survive extinguishment of Indian title. In *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe* the United States Supreme Court held that though "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land", an unqualified conveyance of "all their right, title, and claim" in respect of the lands, absent an express reservation of hunting and fishing rights, served to extinguish those rights.²⁸⁹ There is also a line of authority in lower courts that the principles in cases previously discussed are only applicable to the issue of extinguishment and, leaving aside the situations where the extinguishment of aboriginal title to land is limited or qualified in a manner which leaves fishing rights intact or where prior treaties guaranteed fishing rights over ceded land, aboriginal fishing rights are part and parcel of Indian title and have no separate existence.²⁹⁰

²⁸⁶ . *Ibid.* at 1004-5.

²⁸⁷ . *Ibid.* at 1006.

²⁸⁸ . *Mabo [No. 2]*, *supra* note 6 at 64 per Brennan J., at 195-96 per Toohey J.

²⁸⁹ . *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe* 473 U.S. 753 at 765-68, 87 L. Ed. 2d 542, 105 S. Ct. 3420 (1985). See also *Western Shoshone National Council v. Molini* 951 F.2d 200 at 203 (9th Cir. 1991), cert. denied 506 U.S. 822, 121 L. Ed. 2d 39 (1992). A different position applies with respect to hunting of fishing rights expressly guaranteed by a treaty which will not subsequently be extinguished by a later treaty ceding land in the absence of express language: *Antoine v. Washington* 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975).

²⁹⁰ . *In re Wilson* 30 Cal. 3d 21 at 26-30, 177 Cal. Rptr. 336 at 339-42 (1981) (by a majority of 5 to 2);
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Hence, while the United States cases reach the same conclusion as Canadian and New Zealand courts that Indigenous fishing rights may exist independently of rights to land, they do so in the context where rights to land have been extinguished and the courts in the United States still conceptually tie the original source of Indigenous fishing and hunting rights to the underlying title to land.

The better approach would appear to be that of Canada and New Zealand courts. However, ultimately the distinction has a more theoretical than practical significance in Australia. There will be little difficulty in Indigenous peoples in Australia establishing that they had Indigenous rights to fish - whether as a free standing right or as an incident of native title to land. What does have great practical significance in Australia is that Indigenous fishing rights may survive extinguishment of rights to land. This is recognised in all three common law jurisdictions discussed. As native title to land has been extinguished in many areas in Australia, fishing rights may be one of the few economically valuable rights retained by Indigenous peoples in many regions that have survived two hundred years of colonisation.

Prior to passing from this topic, it is necessary to consider the potential impact of the *Native Title Act* 1993 (Cth.) on the common law position. The definition of "native title" and "native title rights and interests" in the *Native Title Act* 1993 (Cth.) refers to the rights and interests (including hunting, gathering or fishing rights or interests) "in relation to land or waters".²⁹¹ Does this limit the potential for recognition of rights not related to any particular lands or waters by requiring that the rights be site dependent? The wording of the definition of native title is modelled on passages from the judgment of Brennan J. in *Mabo [No. 2]*.²⁹² There does not appear to be any intention in the legislation to narrow the scope of common

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United States v. State of Minnesota 466 F.Supp. 1382 at 1385 (D. Minn. 1979), affirmed *sub nom. Red Lake Band of Chippewa Indians v State of Minnesota* 614 F.2d 1161 (8th Cir. 1980), cert. denied 449 U.S. 905, 101 S. Ct. 279, 66 L. Ed. 2d 136 (which held that aboriginal hunting, fishing, trapping or wild rice harvesting rights "are mere incidents of Indian title, not rights separate from Indian title, and consequently if Indian title is extinguished [by cession] so also would these aboriginal rights be extinguished."); *State of Minnesota v. Keezer* 292 N.W. 2d 714 at 720-21 (1980), cert. denied 450 U.S. 930, 101 S. Ct. 1389, 67 L. Ed. 2d 363.

²⁹¹ . *Native Title Act* 1993 (Cth.) s. 223(1).

²⁹² . In particular ss. 223(1)(a) and 223(1)(b) in effect summarise the broad definition of native title from the judgment of Brennan J. Furthermore, s. 223(1)(c) makes it clear that only those rights
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law rights and interests.²⁹³ Indeed, the heading of section which defines “native title” suggests that the section is trying to incorporate the common law notion of native title rights and interests.²⁹⁴ Furthermore, whilst non-site specific fishing rights may not be in relation to specific lands or waters, such fishing rights are always “in relation to land or water” at the time they are exercised. Hence, the better view is that they come within the statutory definition.

Even if such rights are not encompassed within the statutory definition (assuming non-site specific rights exist at common law) then, since there is nothing in the *Native Title Act* 1993 (Cth.) that would operate to extinguish those rights, they would still exist at common law and be enforceable in ordinary courts. However, such rights would be outside the mechanisms of the *Native Title Act* 1993 (Cth.). Amongst other matters, the *Native Title Act* 1993 (Cth.) establishes public registers of native title claims and determinations which will assist in avoiding, or at least provide a means to identify, potential conflicts concerning future land and resource use.²⁹⁵ If non site-specific native title rights exist that fall outside the ambit of the *Native Title Act* 1993 (Cth.), they would not be included within those registers. As any non-site specific rights would be non-exclusive by their nature, this may not create as a significant problem as may initially be thought. However, to have two categories of native title rights - one recognised under the *Native Title Act* 1993 (Cth.) and the other only at common law - would clearly be undesirable. This is another reason to hold such rights, to the extent they exist at common law, come within the ambit of the *Native Title Act* 1993 (Cth.).

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recognised at common law are included in the definition.

²⁹³ . Section 10 speaks in terms of native title being “recognised” by the Act. Similarly, the Preamble to the Act speaks in terms of “full recognition”, and refers to the need for their common law rights to be “supplemented” and that native title holders be able to “enjoy fully their rights and interests”.

²⁹⁴ . The sub-heading of s. 223(1) is “Common law rights and interests”. It would also appear to be the intent of s. 223(2) [the sub-heading of which is “Hunting, gathering and fishing covered”] is that such rights (to the extent they exist at common law) come within the ambit of the Act.

²⁹⁵ . See *Native Title Act* 1993 (Cth.) Parts 7 and 8.

E. CUSTOM: AN ALTERNATIVE BASIS?

An alternative basis for the recognition of Indigenous fishing, hunting and gathering rights at common law is based on custom. The common law will recognise a local custom provided it has existed from time immemorial without interruption, been exercised peacefully and as of right, is sufficiently certain as to its content, the beneficiaries are capable of ascertainment, is not inconsistent with any statute or fundamental principle of the common law and is regarded as reasonable.²⁹⁶ If these pre-conditions are met the custom "obtains the force of law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm".²⁹⁷ A right based on custom is independent of ownership of the land on which the custom is exercised, and survives a transfer of ownership. Indeed a custom "may virtually deprive the owner of the land of any benefit in it" since the owner may not use the land in any way as to hinder the exercise of the custom.²⁹⁸ Further a custom, once established, cannot be lost by disuse or abandonment and can only be abolished or extinguished by the legislature.²⁹⁹

Nevertheless, the degree of flexibility and protection afforded by a claim based on native title or the doctrine of Indigenous rights in most circumstances would appear to be greater than a claim based on custom. The remainder of this thesis will consider Indigenous fishing, hunting and gathering rights on the basis of comprising part of, or being analogous to, native title, or being a freestanding Indigenous right.

²⁹⁶ See *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1975) vol. 12 para. 406 and C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Oxford University Press, 1964) at 129-51. As to the limitation on recognition of fishing rights which amount to a profit a prendre on the basis of local custom see *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1975) vol. 12 para. 431. In the context of customs of Indigenous peoples, see A.N. Allott, "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20 *Modern Law Review* 244; T.W. Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Cape Town: Juta & Co, 1991). As to the potential for recognising Maori fishing rights on the basis of local custom, see New Zealand Law Commission, *supra* note 224 at 137-41. See also, G. McIntyre, "Proving Native Title" in R.H. Bartlett & G.D. Meyers, eds., *Native Title Legislation in Australia* (Perth: Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University, 1994) 121 at 150-54 (dealing with a claim based upon local custom).

²⁹⁷ *Lockwood v. Wood* (1844) 6 Q.B. 50 at 64.

²⁹⁸ *New Windsor Corporation v. Mellor* [1975] 1 Ch. 380 (C.A.) at 387 per Lord Denning MR.

²⁹⁹ *Hammerton v. Honey* (1876) 24 W.R. 603; *Wyld v. Silver* [1963] Ch. 243 at 255-6 per Lord Denning MR, at 263-4 per Harman LJ; *New Windsor Corporation v. Mellor* [1975] 1 Ch. 380 (C.A.) at 387 per Lord Denning MR, at 395 per Browne LJ (where the custom had not been exercised for 100 years, although the rights had been claimed from time to time).

CHAPTER 4: CONTENT AND NATURE OF INDIGENOUS FISHING AND HUNTING RIGHTS

A. GENERAL PRINCIPLES

Native title exists by virtue of Indigenous interests and laws which pre-date the introduction of the common law to Australia. As native title is not created under common law, its nature and incidents are not determined by English common law concepts of property. As Brennan J. stated:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.³⁰⁰

This statement of Brennan J. has been given legislative force by the definition in the *Native Title Act* 1993 (Cth.) which adopts this statement.³⁰¹ Hence, Indigenous law will inform the content of native title, albeit common law doctrines such as extinguishment will delimit the scope in which Indigenous law can define the content.³⁰²

³⁰⁰. *Mabo [No. 2]*, *supra* note 6 at 58. See also at 57, 70 per Brennan J. The other members of the court broadly agreed with this approach, see at 110 per Deane and Gaudron J.J., at 187 per Toohey J. See also *Western Australia v. Commonwealth*, *supra* note 17 at 452 per Mason C.J., Brennan, Deane, Toohey, Gaudron and McHugh J.J., at 492-93 per Dawson J.

Justice Toohey was also prepared to entertain a claim of common law possessory title based solely on prior possession of, and presence on, the land by the Indigenous inhabitants: *Mabo [No. 2]*, *supra* note 6 at 206-214.

³⁰¹. *Native Title Act* 1993 (Cth.) s. 223(1).

³⁰². See further the extra-judicial comments of Justice Gray, of the Federal Court of Australia, who, whilst being cognizant of the significant the problems of ascertaining the content of native title by reference to Indigenous laws in each instance, nevertheless considered that this state of the law "is particularly exciting because we are, as it were, deferring to Aboriginal law and saying: look you tell us the answer": F. McKeown, ed. *Native Title: An Opportunity for Understanding - Proceedings of an induction course conducted by the National Native Title Tribunal to increase awareness of Aboriginal and Torres Strait Islander and other cultural perspectives in the native title process* (Perth: National Native Title Tribunal, 1994) at 52.

See also *supra*, note 15 and accompanying text, as to the relationship between native title and the common law.

As long ago as 1926 the Privy Council cautioned against rendering Indigenous rights conceptually in English law concepts.³⁰³ Prior decisions which required that pre-existing rights of Indigenous peoples be reconcilable with existing English common law concepts of property were rejected by the High Court.³⁰⁴ Justices Deane and Gaudron, referring to the inappropriateness of forcing native title to conform to traditional common law concepts, characterised native title as “*sui generis*”.³⁰⁵

Similarly, the Canadian Supreme Court observed that:

Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of ... the ‘*sui generis*’ nature of aboriginal rights.³⁰⁶

An examination of a differing approaches to determining the precise scope and content of Indigenous rights is left to a later stage of this thesis, dealing with commercial utilisation of Indigenous rights, as it is that issue that throws the competing characterisations of Indigenous rights into sharp relief.³⁰⁷ For present purposes, it suffices to observe that fishing, hunting and gathering by Indigenous peoples for sustenance or ceremonial purposes would, for virtually all Indigenous peoples, be encompassed within each of the differing methods by which courts in common law countries have sought to define Indigenous rights. However, in Australia, the starting position is a set out in the above passage by Brennan J., namely, that the nature and incidents of Indigenous rights are to be determined by reference to Indigenous laws and customs. As previously discussed, Indigenous laws and customs extended to, and governed the use of, seas and fisheries.³⁰⁸

³⁰³ *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399 at 403-404, cited with approval in *Mabo [No. 2]*, *supra* note 6 at 49-50 per Brennan J., 84-85, 87 per Deane and Gaudron J.J., at 195 per Toohey J. See also *Adeyinka Oyekan v. Musendiku Adele* [1957] 1 W.L.R. 876 (P.C.) at 880.

³⁰⁴ *Mabo [No. 2]*, *supra* note 6 at 83-85, 102 per Deane and Gaudron J.J.; at 185-87 per Toohey J.

³⁰⁵ *Mabo [No. 2]*, *supra* note 6 at 89; *Wik Peoples v. Queensland*, *supra* note 7 at 215 per Kirby J. See also *Guerin v. The Queen* [1984] 2 S.C.R. 335 at 382. For an analysis of the “*sui generis*” characterisation of Indigenous rights, see J. Borrows & L. Rotman, “The Sui Generis Nature of Aboriginal Rights: Does It Make A Difference?” (1997) *Alberta Law Review* (forthcoming).

³⁰⁶ *R. v. Sparrow*, *supra* note 189 at 1112 (emphasis in original).

³⁰⁷ See Chapter 7, Part B below.

³⁰⁸ See *supra* notes 142-150 and accompanying text.

An Indigenous fishing or hunting right is not necessarily open-ended. In many Indigenous communities hunting and fishing practices are carefully regulated. The form of regulation varies between different Indigenous communities, however, it is often designed to conserve the resource (such as by limiting the time or locations of hunting or fishing).³⁰⁹ The relevant laws and customs of the Indigenous people concerned may also limit the scope of the Indigenous right to using a resource for specific purposes, such as to provide sustenance or for ceremonial purposes. An Indigenous right is not an absolute right, but carries with it associated responsibilities and obligations as a condition of exercising the right under the laws and customs of the Indigenous people. These obligations and restrictions in relation to Indigenous fishing rights have been referred to as “self-regulation in the management of an important resource”.³¹⁰ Put another way, if a community has a right to fish or hunt that right necessarily includes the ability to regulate the hunt.³¹¹

Where Indigenous fishing and hunting rights are exempt from the normal regulatory scheme, it does not mean there is “open-slather”. Only fishing and hunting practices carried out in accordance with the traditions, customs or laws of the Indigenous people concerned will be encompassed within the Indigenous fishing or hunting right and, arguably, exempt from the general regulatory scheme.³¹² Hence, where an Indigenous person does not comply with his or her community’s internal regulations or customs concerning the exercise of the right, he

³⁰⁹. ALRC, *supra* note 5 para. 883; H. Reynolds, *The Law of the Land*, 2nd ed. (Melbourne: Penguin Books, 1992) at 63; N.M. Williams, *The Yolngu and their Land* (Canberra: Australian Institute of Aboriginal Studies, 1986) at 93. See also *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 at 257-59, 269, 271; *R. v. Sparrow* (1986), (1987) 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300, [1987] 2 W.W.R. 557 (B.C. C.A.), affirmed by [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 at 254, 269; *R. v. Nikal*, *supra* note 309 at 255.

³¹⁰. *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 at 269. See also , ALRC, *supra* note 5 para. 884.

³¹¹. In this regard see, in a different context, *R. v. Simon*, *supra* note 199 at 403 where the court observed “the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself”. See also *R. v. Sparrow*, *supra* note 236 at 269.

³¹². There are a number of recent examples of this in New Zealand: *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 at 257-59, 264, 271 *Ministry of Agriculture and Fisheries v. Hakaria*, *supra* note 230 at 294, 296; *Ngaheue v. Ministry of Agriculture and Fisheries*, *supra* note 231. See also *Ministry of Agriculture and Fisheries v. Love*, *supra* note 231 at 371.

Australian courts have also made it clear that native title fishing rights may be limited by internal qualifications or restraints imposed by the Indigenous laws or customs by which the right is defined: see *Mason v. Tritton*, *supra* note 159 at 574-75 per Gleeson C.J.; *Sutton v. Derschaw*, *supra* note 165 at 324.

The issue as to whether existing Indigenous fishing, hunting and gathering rights are subject to the existing regulatory regimes is considered in Chapter 6, below.

or she must comply with the general regulatory scheme. In this way, the elders of the community can seek to have the person prosecuted where the person neither complies with the community's customs or the general regulatory requirements.³¹³

Whilst the ascertainment of the precise nature and incidents of the rights of a particular Indigenous people may pose considerable difficulty the courts will nevertheless give effect to those rights.³¹⁴

B. MANNER OF EXERCISING FISHING AND HUNTING RIGHTS

Native title, and the rights comprised in it, are flexible and can adapt to the times. As discussed above, the content of native title and Indigenous fishing and hunting rights are to be determined by reference to the customs and laws of the Indigenous people. However, these customs and laws are not fixed as at the date of European settlement.

As Brennan J. observed in *Mabo [No. 2]*:

Of course *in time the laws and customs of any people will change* and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members 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 by the members according to the rights and interests to which they are respectively entitled under the traditionally based *laws and customs, as currently acknowledged and observed*.³¹⁵

and that:

It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connexion between the indigenous people and the land remains.³¹⁶

³¹³ For example, in *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 the defendants were charged for non-compliance with the *Fisheries (Commercial Fishing) Regulations* (N.Z.). The prosecution was carried out with support of the local Maori community who gave evidence on behalf of the prosecution that the defendants (who were attempting to commercially exploit traditional fisheries) were not acting in accordance with any traditional Maori right.

³¹⁴ *Ibid.* at 58, 60 per Brennan J.

³¹⁵ *Mabo [No. 2]*, *supra* note 6 at 61 (emphasis added). See also at 62 where Brennan J. refers to the "contemporary rights and interests" of the Meriam people (emphasis added).

³¹⁶ *Ibid.* at 70.

Similarly, Deane and Gaudron J.J. were of the view that:

The *traditional law or custom* [by which the content of native title is to be ascertained] is *not*, however, *frozen as at the moment of establishment of a Colony*. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land.³¹⁷

Toohy J. rejected an argument that the plaintiffs had lost their native title because they no longer exercised “traditional” rights and duties and had adopted European ways, observing:

There is no question that indigenous society can and will change on contact with European culture ... But modification of traditional society in itself does not mean traditional title no longer exists.³¹⁸

While these comments of the High Court were directed towards whether changes in the Indigenous societies would result in a loss of native title, the same comments logically apply to the manner of exercise of Indigenous fishing rights. Indeed, in his summary of the relevant principles in *Mason v. Tritton* (which concerned the existence of Indigenous native title fishing rights), Kirby P. stated that:

Evidence of change in the indigenous community’s traditional laws and customs is not of itself fatal to a claim for native title. Rather, the claimant will enjoy native title to the extent to which the traditional laws and customs are currently acknowledged and observed.³¹⁹

These views are consistent with that of the Privy Council, expressed as long ago as 1919, where it considered that Indigenous customs may evolve over time and in this regard are not to be considered analogous to fixed local customs in England.³²⁰

³¹⁷. *Ibid.* at 110. See also at 88.

³¹⁸. *Ibid.* at 192.

³¹⁹. *Mason v. Tritton*, *supra* note 159 at 583. This passage was quoted with approval in *Derschaw v. Sutton*, *supra* note 167 at 10 per Franklyn J. (Murray J. concurring) which was a case that also dealt with Indigenous fishing rights.

³²⁰. *Hineiti Rirerire Arani v. Public Trustee N.Z.P.C.C.* 1. The case dealt with Maori rights to land and whether a European child adopted by a Maori family obtained any rights to Maori owned land. The Native Land Court had held that: “According to the ancient law of Maori custom it is obvious that there were no European children to adopt, and ergo there could be no custom of adopting European children” (at 4). The Appellate Court allowed the appeal holding that “Native custom ... is not a fixed thing. It is based upon the old custom as it existed before the arrival of Europeans, but it has developed, and become adapted to the changed circumstances of the Maori race today”. The Privy Council upheld the decision of the appellate court on a number of alternative bases. In relation to adaptation of Maori custom, the Privy Council stated: “It may well be that this is a sound view of the law, and that the Maoris as a race may have some internal power of self-government enabling

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The Supreme Court of Canada also cautioned in *R. v. Sparrow* that “it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised”³²¹ and emphasised that an Indigenous right may be exercised in a contemporary manner.³²² Other Canadian cases have adopted the same approach.³²³

A similar position has been taken in the United States where:

The Indians’ [treaty] right to fish, *like the aboriginal use of the fishery on which it is based*, is not a static right. The reserved fishing right is not affected by passage of time or changing conditions. The right *is not limited as to species of fish, origin of fish, purpose or use or time or manner of taking. The right may be exercised utilizing improvements in fishing techniques, methods and gear.* It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.³²⁴

....

The Indians have a right to fish today wherever fish are to be found within the area of cession - as they had at the time of cession - *a right established by aboriginal right* and confirmed by the Treaty of Ghent, and the Treaty of 1836. The right *is not a static right* today any more than it was during treaty times. *The right is not limited as to the species of fish, origin of fish, the purpose of use or*

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the tribe or tribes by common consent to modify their customs and that the custom of such a race is not to be put on a level with the custom of an English borough or other local areas which must stand as it always has stood” (at 6).

The arguments in this case concerning adoption are very similar to the present debate concerning Indigenous rights to participate in a market or cash economy, which are considered in Chapter 7 below in dealing with commercial fishing rights.

³²¹. *Supra* note 189 at 1112.

³²². *Ibid.* at 1099. See also at 1093 where the court stated that phrase “existing aboriginal rights” in s. 35(1) *Constitution Act* 1982 was to be interpreted flexibly so as to permit the evolution over the aboriginal rights over time. While this comment is made in the context of s. 35, it equally applies to the evolution of aboriginal fishing and hunting rights at common law. See further Sanders, *supra* note 182 at 45; B. Slattery, “Understanding Aboriginal Rights” (1987) 66 *Canadian Bar Review* 727 at 746-7 (aboriginals “are not waxen figures on display for tourists ... Any rule that would hold them in permanent bondage to ancient practices must be regarded with scepticism”); R.H. Bartlett, *Resource Development and Aboriginal Land Rights* (Calgary: Canadian Institute of Resources Law, 1991) at 5-12.

³²³. See *Simon v. The Queen* [1985] 2 S.C.R. 387, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390 where the court considered a treaty entered into in 1752 which provided that the Indians “shall not be hindered from, but have free liberty of Hunting & Fishing as usual”. The court rejected the Crown’s submission that the words “as usual” limited the exercise of the right to the types of weapons used in 1752 stating “any such construction would place upon the ability of the Micmac to hunt an unnecessary and artificial constraint” and referred to the natural “evolution of changes in normal hunting practices” (at 402); *R. v. Cooper* (1968) 1 D.L.R. (3d) 113 at 115.

³²⁴. *United States v. Michigan*, *supra* note 244 at 260 at 260 (emphasis added).

*the time or manner of taking. It may be exercised utilizing improvements in fishing techniques, methods and gear.*³²⁵

Hence, while the existence of Indigenous rights is to be ascertained as at the date of the acquisition of sovereignty, the means of exercising those rights are not limited to the means utilised at that time.³²⁶ In particular, the use of present day tools in the harvesting of plants, modern transport and firearms in hunting animals, boats and nets made of present-day materials in fishing still comprise the exercise of a traditional right, albeit in a modern way. To hold otherwise, would be to commit Indigenous peoples to a living archaeological museum.

Turning to the Australian jurisprudence, only two cases have considered the issue of the method of exercising Indigenous hunting and fishing rights. This first case was *Campbell v. Arnold*.³²⁷ Section 24(2) of the *Crown Lands Act* 1978 (N.T.) provided that a reservation in a pastoral lease in favour of Indigenous persons should be read as permitting Indigenous persons:

who in accordance with Aboriginal tradition are entitled to inhabit the leased land-

(c) ... to take or kill for food or for ceremonial purposes animals *ferae naturae* on the leased land

The defendant shot two kangaroos on a pastoral leasehold and was charged under s 94 of the *Firearms Act* 1979 (NT). An issue arose as to whether shooting a kangaroo with a firearm was permitted under the section. Forster C.J. held that it was, observing:

It has been common knowledge for many years that in the process of adaptation of old Aboriginal ways many Aboriginal people have adopted firearms as a method of killing, being more efficient for many purposes than spears or boomerangs or other traditional weapons. Had the legislature

³²⁵ . *Ibid.* at 280-81 (emphasis added). See also *United States v. Washington*, *supra* note 754 at 402 (the "treaties do not prohibit or limit any specific manner, method or purpose of taking fish. The treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource"); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* 653 F. Supp. 1420 at 1430 (W.D.Wis. 1987). See also, *C.J.S. Indians* 42 § 123; CWAG, *supra* note 234 at 212.

³²⁶ . A variant of this approach applies in Canada, where the relevant time for determining the nature of the Indigenous rights is prior to, or at the time of, initial contact with Europeans rather than at the date of British acquisition of sovereignty, see *infra* note 678 and accompanying text.

³²⁷ . (1982) 56 F.L.R. 382 (NT S.C.).

intended that only traditional weapons and methods were permitted, it would have been easy enough for it to say so.³²⁸

While this case was in a statutory context, the result accords with common sense. The same approach was adopted in relation to native title fishing rights by Wallwork J. in *Derschaw v. Sutton* who relied upon Canadian case law as authority for the proposition that the use of a net was not inconsistent with the exercise of a native title right to fish in Western Australia.³²⁹ Accordingly, in the absence of statutory provisions limiting the exercise of that right, the manner of exercising Indigenous fishing, hunting and gathering rights at common law is not frozen as at the time of European settlement may be exercised by modern means.³³⁰

C. MOBILITY

At the time of European settlement, most Indigenous peoples remained in their own, well defined, territories.³³¹ With modern transport and a highly mobile society, many Indigenous persons now live away from their ancestral lands. In many cases, Indigenous persons or even whole communities were forcibly removed from their lands. An issue arises as to whether common law Indigenous fishing, hunting and gathering rights may only be exercised by Indigenous persons within their ancestral lands or on a wider basis. As a practical matter, the issue arises primarily in relation to fishing rights since it is not feasible to hunt or gather flora in areas to which many Indigenous persons have moved.

³²⁸. *Ibid.* at 384.

³²⁹. (16 August 1996, W.A. C.A., No.s S.J.A. 1174-77 of 1994, Lib. No. 960449S) [unreported], affirming (1995) 82 A. Crim. R. 318, special leave to appeal to the H.C.A. refused (unreported, H.C.A., 30 May 1997, No. P44-46 of 1996) at 23. Wallwork J. dissented on the issue as to whether the defendants had led sufficient evidence to establish a native title fishing right. The majority judgment made no comment on the manner of the exercise of the right.

³³⁰. The Aboriginal Land Inquiry in Western Australia considered Indigenous persons should be entitled to use modern technology in the exercise of fishing and hunting practices. It observed "if the right were confined narrowly by reference to traditional methods ... it would be meaningless to almost every Aboriginal person ... The argument ... that Aboriginal people should only enjoy such a right if they confine themselves to pre-settlement methods of hunting, fishing and foraging ... is really an argument that they should not have rights ... at all": Aboriginal Land Inquiry, *supra* note 5 para. 11.9.

³³¹. However, a particular Indigenous people did not necessarily have exclusive occupation of the land as others Indigenous peoples may have been entitled to enter the land for ceremonial purposes or to hunt and forage, see *R. v. Toohey; Ex parte Meneling Station Pty. Ltd.* (1982) 158 C.L.R. 327 at 357-8 per Brennan J.; *Mabo [No. 2]*, *supra* note 6 at 190 per Toohey J.; Neate, *supra* note 9 at 78-9.

A case involving Indigenous fishing rights in Townsville in 1990 is illustrative of a number of the issues that can arise.³³² The defendants, who took a dugong and turtle for the purpose of a traditional burial feast, were charged with taking protected species in contravention of s 56 of the *Fisheries Act* 1976 (Qld.).³³³ They argued that the Act did not abrogate their common law right to fish for traditional purposes. The defendants were Torres Strait Islanders and had moved to Townsville with their parents when they were children. They formed part of a sizeable Torres Strait community in Townsville. They had maintained their contact with their communities in the Torres Strait and had returned to visit those communities from time to time. A number of alternative bases were proposed to overcome the problem of exercising their right well away from their ancestral lands.

(i) *The nature of the right*

The primary argument was that the defendants' traditional fishing rights were not limited to areas in which they claimed exclusive fishing rights, but also included a non-exclusive fishing right in areas of ocean over which no other Indigenous group had an exclusive right. Evidence was led that communities in the Torres Strait from which the defendants were from and still considered themselves to be part,³³⁴ had three categories of fishing rights: (1) areas in which the fishing right exclusively belonged to a particular family group; (2) areas where the fishing right belonged to members of the whole clan; and (3) "open" waters in which all Indigenous persons could fish. The so-called "open" waters were not completely without restriction as persons who fished in those areas were still bound by their traditional practices and observances in relation to fishing. The most commonly used "open" waters were in the Torres Strait but some distance out from the islands; however, open waters were not limited to the Torres Strait region. The defendants also proposed to lead historical evidence of sightings by early European explorers of Torres Strait Islanders in boats along the Queensland coast a few hundred kilometres from the Torres Strait, in support of their claim that Torres Strait Islanders had traditionally travelled and fished in areas where they

³³². *R. v. Bourne* (19 January 1990, Townsville Magistrates Court, Barrett S.M.) [unreported], Order Nisi to review granted (Qld. S.C., Dowsett J.) [unreported], appeal subsequently withdrawn.

³³³. As the defendants did not reside on an aboriginal or islander reserve or trust area, the exemption in favour of certain classes of Indigenous persons in s. 5(1)(d) of the Act did not apply to them.

³³⁴. See J. Beckett, *Torres Strait Islanders: Custom and Colonisation* (Cambridge: Cambridge University Press, 1987) at 226-8 regarding the retention of Island identity and attitudes to those who have permanently settled on the mainland as opposed to those who have gone for education or training or to accumulate money.

did not claim exclusive fishing rights.³³⁵ The defendants were prepared to accept that the utilisation of a traditional right to fish in so-called "open waters" in a territory far away from their own was (at least in the present day conditions) dependent upon those waters not being subject to any exclusive fishing right by local Indigenous peoples. As a result the defendants claimed that they were exercising a traditional right to fish in "open" waters.³³⁶

The accuracy or otherwise of the nature of the rights claimed in the case is not relevant for present purposes. Further the existence of any such rights must depend upon the evidence to be led in each case as the types of traditional fishing rights may differ in different parts of Australia.³³⁷ However, the possibility that under Indigenous laws and customs a traditional fishing or hunting right may extend to a non-exclusive right in an area outside of the Indigenous people's ancestral territory is significant. If this is correct, and if Indigenous fishing and hunting rights at common law are capable of existing independently of native title in the soil or seabed,³³⁸ then as the content of Indigenous rights are to be determined in accordance with Indigenous customs or laws, an Indigenous person might be able to exercise an Indigenous right outside of his or her ancestral lands.

³³⁵ This evidence was not led in court as the magistrate held that the s. 56 of the *Fisheries Act* 1976 (Qld.) applied to the defendants and hence that anthropological evidence to establish that the defendant's were exercising an aboriginal right to fish at common law was inadmissible (except in relation to mitigation of sentence). An appeal was lodged against the Magistrate's finding that the provisions the *Fisheries Act* 1976 (Qld.) applied to the defendants; an order nisi for review was granted by Dowsett J. though the appeal was discontinued prior to hearing due to other reasons.

³³⁶ In this regard evidence was to be led that both the purpose for which the defendants were fishing (a traditional burial feast) and the manner of fishing were done in accordance with their traditions.

³³⁷ However, similar elements of marine tenure systems have been documented for other Indigenous peoples. For example, the Yolngu describe their system as a "zoning system" in which "some areas are open to all; some places are only accessible to certain classes of people; some are prohibited to all because they are dangerous or sacred": Gailiwin'ku Community Elcho Island, *An Indigenous Marine Protection Strategy for Manbuynga ga Rulyapa* (Darwin: Northern Land Council, 1994) at 6. Davis & Prescott, *supra* note 144 at 55 also observe that some marine areas in the Northern Territory "are not seen as belonging to Group A or Group B but as being available for use of all Aboriginal people of the area".

See also Smyth, *Understanding Country*, *supra* note 1 who discusses marine tenure in parts of the Torres Strait. He observes that most of the Torres Strait was traditionally divided into marine estates associated with each island and these were often subdivided into smaller family territories. He also notes that "these systems of land and sea tenure continue to exist in much of the Torres Strait". Davis & Prescott, *supra* note 144 at 123, in their discussion of part of the Torres Strait, note that certain marine areas belong to a particular Indigenous group of clan, whilst other marine areas "are not exclusive to any one clan" but are available for everybody.

³³⁸ See Chapter 3(D) "Relationship Between Native Title and Indigenous Fishing and Hunting Rights", above.

(ii) *Claiming through another's right*

In *Te Weehi v. Regional Fisheries Officer* the court held a Maori of one tribe could exercise a traditional Maori fishing right of another tribe, in accordance with the customs of that other tribe.³³⁹ A person may only exercise a right held by other people if the customs of that people permit outsiders to exercise that right. It may be surmised that most Indigenous peoples permitted visitors to their land to fish and hunt in order to feed themselves.³⁴⁰ Where the customs of the Indigenous people holding the right permit others to exercise it, prior consent must usually be sought.³⁴¹ It is not clear whether an Indigenous right may only be exercised by other Indigenous persons.³⁴² The use of a traditional right in this manner may be seen as the granting of a privilege or a courtesy to visitors or neighbouring tribes.

Where an Indigenous fishing or hunting right is exercisable with consent of the local Indigenous people issues arise as to whether actual prior consent is required, whether implied consent is sufficient, whether the persons may rely upon a general custom in the area permitting visitors to fish,³⁴³ and whether there can be subsequent ratification of the exercise

³³⁹. *Te Weehi v. Regional Fisheries Officer*, *supra* note 227 at 683.

³⁴⁰. See in this regard the reports of the Aboriginal Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.) which contain frequent references to the traditional obligations of aboriginal people towards visitors on their traditional lands.

³⁴¹. See *Upper Daly Land Claim*, *supra* note 5 vol. 1 para. 45 where Justice Kearney observed that "it is common throughout Aboriginal Australia that those who have the right to forage also have the right to be asked first by others who wish to do so". See further Williams, *supra* note 309 at 84-5.

³⁴². This would be the case where the laws and custom of the community holding the right limits the exercise of that right to Indigenous persons. However, where the custom is not so limited there appears no reason to limit the ability to exercise the right to Indigenous persons. By analogy to the limitation imposed by the common law on the inalienability of native title outside the Indigenous system (see note 122 *infra*) it could be argued that the right can only be exercised by Indigenous persons. However, there is a distinction between the *exercise* of a right and alienation of it. The policy reasons for restricting the exercise of the right in this way are not nearly as strong as the cases for restricting non-Indigenous persons from acquiring native title or restricting the alienation of the fishing or hunting right.

³⁴³. For example, in describing the customs of the Yir-Yiront people in Cape York Peninsular in northern Queensland, Sharp states that: "People gather and hunt, ordinarily, in whatever country they will. Thus there is practically a standing permission which opens a clan's countries to all ... this permission may be withdrawn by the clan for those who are *persona non grata*": R.L. Sharp, "Ritual Life and Economics of the Yir-Yiront of Cape York Peninsula" (1934) 5 *Oceania* 19 at 23; c.f. F.R. Myers, "Always Ask: Resource Use and Land Ownership Among Pintupi Aborigines of the Australian Western Desert" in N.M. Williams & E.S. Hunn, eds., *Resource Managers: North American and Australian Hunter-Gatherers* (Canberra: Australian Institute of Aboriginal Studies, 1982) 173 at 181. Similarly, Davis & Prescott, *supra* note 144 at 53, 134-35, observe that Indigenous persons other than the primary right holders may have a "standing invitation" to enter

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of the right. Rather than resolving these issues from an English common law approach it may be more appropriate to determine them in accordance with the customs and laws of Indigenous people who hold the fishing or hunting right.³⁴⁴

(iii) *Transfer of Indigenous rights*

The issue of alienability of native title to other Indigenous persons was touched upon by members of the High Court in *Mabo [No. 2]*. Whilst native title cannot be alienated to non-Indigenous persons,³⁴⁵ it is possible that it may be alienated within the "indigenous system".³⁴⁶

Where the traditional Indigenous owners of an area die out their land would traditionally be taken up by adjacent tribes. This may be accomplished by either a formal transfer by the remaining survivors of the traditional owners or by a process of natural take-over of land. An actual transfer of native title or fishing and hunting rights by the remaining members of one tribe to another tribe may well come within the concept of "alienation"; however, it is unclear whether a "take over" of the land of an extinct tribe by an adjacent tribe can be recognised by the common law. The process of a new tribe imbuing an area with their own stories and taking over responsibilities for sacred sites within the area has been documented in a number of areas.³⁴⁷ Indeed, this may be seen as a natural process and encompassed

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and use an area in certain circumstances.

³⁴⁴ See, for example, *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 at 271 where it was suggested that where permission had not been sought prior to the exercise of the right, in certain circumstances, the local Maori could, in accordance with local custom, subsequently ratify the exercise of the right.

³⁴⁵ *Mabo [No. 2]*, *supra* note 6 at 59-60, 70 per Brennan J., at 88-9, 110 per Deane and Gaudron J.J., at 194 per Toohey J.

³⁴⁶ Brennan J. left open the possibility that the common law would recognise a right or interest where "the acquisition is consistent with the laws and customs of that people" (at 60); however, he also stated that native title is extinguished "on the death of the last members of the group of clan" (at 70). Toohey J. left the question open, observing that alienability is a relative concept and referred to evidence in the Aboriginal Land Commissioner, *Alligator Rivers Stage II Land Claim* (Canberra: Australian Government Publishing Service, 1981) under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.) where land was "given" by the few remaining survivors of one group to another group (at 194).

For a recent example in the United States of a court holding one Indian tribe to be the successor to another adjacent tribe's rights, see *United States v. Washington* 873 F. Supp. 1422 at 1448-49 (W.D. Wash. 1994). See also Slattery, *supra* note 322 at 769.

³⁴⁷ See J. Stanton, "Old Business, New Owners: Succession and 'the Law' on the fringe of the Western" (footnotes continue on next page)

within a wide notion of Indigenous traditions. In a statutory context, Kearney J., accepted that persons who took over the land of an extinct tribe could become the "traditional owners" of that land in accordance with the statutory criteria of traditional ownership.³⁴⁸ Therefore, it is possible that Indigenous persons who fish or hunt outside the boundaries of their traditional territory at the time of European settlement, may nevertheless be entitled to exercise fishing and hunting rights if that area has become part of their territory in accordance with Indigenous tradition.

(iv) *Conclusions concerning mobility*

The issues arising from the mobility of Indigenous persons create interesting conceptual problems.³⁴⁹ The issues are of considerable importance given the number of Indigenous

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Desert" in N. Peterson & M. Langton, eds., *Aborigines, Land and Land Rights* (Canberra: Australian Institute of Aboriginal Studies, 1983) 160; , *Upper Daly Land Claim*, *supra* note 5 vol. 3 para. 50; Davis & Prescott, *supra* note 144 at 51-52, 77-79; E. Young, "Resettlement and Caring for Country: The Anmatyerre Experience" (1987) 11 *Aboriginal History* 156. See also Williams, *supra* note 309 at 176-77; Aboriginal Land Rights Commission, *First Report* (Canberra: Australian Government Publishing Service, 1973) para. 46.

³⁴⁸ *Upper Daly Land Claim*, *supra* note 5 vol. 3 para. 48, 50, 112. See also Aboriginal Land Commissioner, *Alligator Rivers Stage II Land Claim* (Canberra: Australian Government Publishing Service, 1981) para. 118-19. c.f. Aboriginal Land Commissioner, *Kenbi (Cox Peninsula) Land Claim* (Canberra: Australian Government Publishing Service, 1991). See also, Aboriginal Land Rights Commission, *Second Report* (Canberra: Australian Government Publishing Service, 1974) at 143.

³⁴⁹ In *R. v. Bourne*, *supra* note 332, the issues were further complicated as there were no surviving descendants of the traditional Indigenous inhabitants of the area in which the fishing occurred. Hence there was no-one from which to obtain permission. The defendants gave evidence that had there still been traditional owners of the area they would have sought permission and on the occasions in which they had fished in an another area they had sought and received permission to fish from the traditional owners of that area. As a result, it was unclear whether the waters could be classified as "open waters" (in which case the defendants were exercising their own customary rights), whether the defendants were able to claim through the general Indigenous system of fishing rights in the area (under which all local tribes could fish in the area without no prior consent as the original traditional owners had died out) or whether the rights of the extinct tribe had been transferred to, or taken over by, the surviving traditional owners of the adjacent area through which the defendants could claim the right (in which case issues of implied consent or subsequent ratification arose). As can be seen from this illustration, resolution of these issues is dependent upon the particular factual circumstances in each area.

The only other case to date, of which the writer is aware, where similar issues have been raised is in the Croker Island native title sea and fishing rights case in the Northern Territory (the trial of which has commenced but not yet concluded, see *supra* note *). An Indigenous person who was not a member of the local Indigenous people (and indeed was recognised as a traditional owner of land elsewhere in the Northern Territory under the provisions of the *Aboriginal Land Rights (Northern*

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persons who no longer live on their ancestral lands but still retain their traditions and seek to exercise customary rights. The High Court in *Mabo [No. 2]* recognised that Indigenous communities have wide scope to adapt their lifestyles and conditions in light of contemporary day society without a loss of native title. It is unrealistic not to acknowledge the mobility of contemporary Australian Indigenous communities. So long as Indigenous communities can agree amongst themselves as to issues arising from increased mobility, there appears to be little justification to impose arbitrary limits on the manner in which former customs can be modified to reflect present day conditions. There may reach a stage, to use the words of Brennan J., where “the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs” with the result that native title or Indigenous rights no longer survive.³⁵⁰ However, where this has not occurred, the recognition of the prior governance of Indigenous peoples by themselves and their continuing ability to resolve land disputes in accordance with present day customs,³⁵¹

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Territory) Act 1976 (Cth.)) applied to be joined as a party to the proceedings asserting she had a native title right to fish in the area. She had been removed from her family as the age of 18 months and placed in a Methodist Church mission for Aboriginal children on Croker Island. While living on the island she regularly fished in its waters. As an adult she did not live on the island, but retained contact with the island and regularly fished in its waters under licences issued under the applicable fisheries regulations.

She asserted she possessed native title rights to fish in the waters on two bases: The first basis was that under the laws, customs and traditions of her own people should she find herself in the vicinity of Croker Island she was entitled to fish. The second basis was that under the law, custom, tradition, observance and belief of the Aboriginal people of the Northern Territory she had an entitlement to fish in the waters surrounding Croker Island by virtue of her period of incarceration and residence at the Methodist mission on the island. There are considerable difficulties with the first basis as the local Indigenous people do not recognise her claim or the laws of her people to fish in the waters should they be passing through. If the local Indigenous people are successful in establishing they had dominion over the area, it is hard to see how the common law could recognise what would in effect be foreign laws in the area and hold that they had precedent over the laws of the local Indigenous people. However, the second basis of her claim raises interesting questions, both as to the adaptability of Indigenous laws and customs in the face of widespread forcible relocation of Indigenous persons by the Crown and the potential for the merging of local laws of customs or synthesis of regional Indigenous laws or customs and their interaction with local Indigenous laws.

The court did not address any these issues in determining the motion at hand as it held that under the procedures of the *Native Title Act 1993 (Cth.)* a determination of a claim to native title rights can only be done where the persons claiming the rights first make their own claim for a declaration of native title under the Act, rather than simply intervening as a respondent to other claimant proceedings: *Yarmirr v. Northern Territory* (21 March 1997, Fed. C. of A., Olney J., DG 6001 of 1996) [unreported]. The court simply observed in passing that the claim raised “difficult and novel questions as to the nature and extent of native title as recognised by the common law”.

³⁵⁰. *Mabo [No. 2]*, *supra* note 6 at 60.

³⁵¹. *Ibid.* at 58, 60-62, 70 per Brennan J., at 99, 110, 115 per Deane and Gaudron J.J.

indicates that they can determine the manner of exercise of rights within the "indigenous system". The mobility of Indigenous peoples and use of modern fishing and hunting techniques may raise issues regarding conservation and the need to regulate Indigenous fishing and hunting rights. However, this is a separate issue from whether those rights are capable of adaptation to changing circumstances and is considered separately below.³⁵²

³⁵² This issue is discussed in the context of allocation of resources between Indigenous and non-Indigenous in Chapter 8, below.

CHAPTER 5: EXTINGUISHMENT OF INDIGENOUS FISHING AND HUNTING RIGHTS

A. GENERAL PRINCIPLES

The Crown has the power to extinguish native title and other rights of Indigenous peoples. As Brennan J. stated:

Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory.³⁵³

Hence, native title in land and Indigenous rights to fish and hunt may be extinguished by the Crown and, in this respect, stand in no special position over other private rights.³⁵⁴

Notwithstanding the difference of views amongst the majority members of the High Court as to whether the executive has a prerogative power to extinguish native title,³⁵⁵ the following principles are clear:

³⁵³. *Mabo [No. 2]*, *supra* note 6 at 63. See also *Western Australia v. Commonwealth*, *supra* note 17 at 421; *Wik Peoples v. Queensland*, *supra* note 7 at 206 per Kirby P.

³⁵⁴. *Mabo [No. 2]*, *supra* note 6 at 67 per Brennan J., at 111 per Deane and Gaudron J.J., at 194-5 per Toohey J. However, issues may arise as to compensation and whether the Crown has breached any fiduciary duty toward the traditional owners in extinguishing their traditional rights, see notes 141 and 296 *infra*. For an analysis of the general principles concerning extinguishment of native title, see ATSIJC, *Native Title Report June 94*, *supra* note 26 at 77-103.

³⁵⁵. In *Mabo [No. 2]*, *supra* note 6, Brennan J. (Mason C.J. and McHugh J. concurring) was of the view that native title could be extinguished either by statute or the exercise of prerogative power. However, the exercise of prerogative power to extinguish native title was subject to any statutes which limited that power (as there were in relation to granting interests in Crown land which, by virtue of ss 30 and 40 of the *Constitution Act* 1867 (Qld.), was an exclusively statutory power). Hence, the validity of a purported exercise of prerogative power will depend upon conformity with any relevant statutory provisions limiting this prerogative power (at 63, 70-1). Deane and Gaudron J.J. held that there was no prerogative power to extinguish native title and only the legislature could extinguish native title. Hence, while an inconsistent grant of land by the executive would have the effect of extinguishing native title that extinguishment would involve a wrongful infringement of the rights of the native title holders and give rise to a claim for compensation (at 79-80, 100-1, 111-2). Toohey J. was of the view that while the legislative had the power to extinguish native title, the combined effect of the fiduciary duty of the Crown towards traditional native title holders and the *Racial Discrimination Act* 1975 (Cth.) meant that the title could not be extinguished without the payment of compensation (at 195-6, 205, 214-6). Dawson J. (dissenting) was of the view that native title, where it existed, was a permissive occupancy terminable at the will of the Crown (at 138).

- (a) The legislature has power to extinguish native title in land,³⁵⁶ and hence, by analogy to extinguish Indigenous rights to fish and hunt recognised at common law. The power to extinguish Indigenous hunting and fishing rights does not depend upon whether these rights are characterised as an incident of native title in land or as a separate right.
- (b) The exercise of a power to extinguish native title or Indigenous rights to fish and hunt must “reveal a clear and plain intention to do so”.³⁵⁷ This applies both to extinguishment by the executive or legislature.³⁵⁸

The rationale for requiring a clear and plain intention to extinguish native title “flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land”.³⁵⁹ The same rationale must apply to taking away the right of Indigenous inhabitants to utilise natural resources for their subsistence.

Where the Crown, by either legislative or valid executive act, has taken action which is wholly or partially inconsistent with a continuing right to enjoy native title, the native title is extinguished to the extent of the inconsistency.³⁶⁰ In this regard, the ascertainment of the “clear and plain intent” of the action or legislation in question is not dependant upon the subjective intention of the legislature or the Crown, but rather about the legal effect of the

³⁵⁶. *Mabo [No. 2]*, *supra* note 6 at 67 per Brennan J., at 110-1 per Deane and Gaudron J.J., at 138 per Dawson J. (dissenting), at 195 per Toohey J.; *Mason v. Tritton*, *supra* note 159 at 591, 594 per Kirby P.

³⁵⁷. *Mabo [No. 2]*, *supra* note 6 at 64 per Brennan J., See also at 111 per Deane and Gaudron J.J., at 195, 205 per Toohey J.; *Western Australia v. Commonwealth*, *supra* note 17 at 423; *Wik Peoples v. Queensland*, *supra* note 7 at 123-24 per Toohey J., at 155 per Gaudron J., at 168 per Gummow J., at 247 per Kirby J. The High Court stated this test in the context of extinguishing native title to land. However, the same test logically applies to the extinguishment of Indigenous fishing rights and two of the authorities dealing with extinguishment relied upon by Brennan J. in *Mabo [No. 2]*, *supra* note 6 dealt with Indigenous fishing rights: see *R. v. Sparrow*, *supra* note 189 at 1099; *Te Weehi's case*, *supra* note 227 at 692. The clear and plain intent test has been reiterated in the an Australian case dealing with Indigenous fishing rights, see *Mason v. Tritton*, *supra* note 159 at 591 per Kirby P.

³⁵⁸. *Mabo [No. 2]*, *supra* note 6 at 64 per Brennan J., at 111 per Deane and Gaudron J.J., at 196, 205 per Toohey J.

³⁵⁹. *Ibid.* at 64 per Brennan J. See also at 111 per Deane and Gaudron J.J., at 195 per Toohey J.

³⁶⁰. *Ibid.* at 69-70 per Brennan J.; *Wik Peoples v. Queensland*, *supra* note 7 at 133 per Toohey J. (Gaudron, Gummow and Kirby J.J. concurring).

action upon the ability of the Indigenous people to enjoy their native title.³⁶¹ Native title will only be extinguished by the grant of an interest in land to a third party by the Crown where it is impossible for that interest and native title to co-exist.³⁶² The onus of proving either express or implicit extinguishment is on the Crown.³⁶³

There are constraints on the power to extinguish Indigenous interests. Commonwealth legislation is subject to the constitutional guarantee that the acquisition of property be on just terms.³⁶⁴ Though native title is *sui generis* and does not have the characteristics of a full property right,³⁶⁵ the High Court indicated that “just terms” provision of the *Constitution* would apply to it.³⁶⁶ These comments were directed to extinguishment of native title in land. However, as Indigenous fishing, hunting and gathering rights are akin to a profit a prendre³⁶⁷ they are also likely to attract the protection of just terms provisions.³⁶⁸ As previously discussed, State or territory legislation extinguishing Indigenous interests must not be inconsistent with the *Racial Discrimination Act* 1975 (Cth.).³⁶⁹ There is no constitutional requirement for state or territory legislation to provide just compensation for the appropriation of property interests. However, where the state or territory has enacted legislation providing for the appropriation of property interests only on just terms, the effect

³⁶¹ *Western Australia v. Commonwealth*, *supra* note 17 at 422; *Wik Peoples v. Queensland*, *supra* note 7 at 120 per Toohey J.; *Mason v. Tritton*, *supra* note 159 at 591 per Kirby P.

³⁶² *Wik Peoples v. Queensland*, *supra* note 7 at 126 per Toohey J. See also at 185 per Gummow J. and at 249 per Kirby J. The question of the ability of the interests to co-exist was also considered to be the essential factor in a passage of the judgment of Macfarlane J.A. in *Delgamuukw v. British Columbia* (1993) 104 D.L.R. (4th) 470 (B.C. C.A.) at 529, which was cited with approval in *Wik Peoples v. Queensland*, *supra* note 7 at 125-26 per Kirby J.

³⁶³ *Mabo [No. 2]*, *supra* note 6 at 183 per Toohey J. See also *R. v. Sparrow*, *supra* note 189 at 1099; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, *supra* note 187 at 567-8 (FC), 550-1 (DLR); *R. v. Horseman*, *supra* note 578 at 930.

³⁶⁴ Constitution s. 51 (xxxi).

³⁶⁵ See *supra* notes 300-306 and accompanying text.

³⁶⁶ *Mabo [No. 2]*, *supra* note 6 at 111 per Deane and Gaudron J.J.; See also at 51-2 per Brennan J. (referring to a proprietary community title even though the rights of individual members of the community may only be usufructuary) and at 216 per Toohey J. See further, J. Gobbo, “Mabo: Compensation for Extinguishment of Native Title” (1993) 57 Law Institute Journal 1163; A. Turello, “Mabo: Extinguishment of Native Title and the Constitutional Requirement of Just Terms” (1993) 3:62 Aboriginal Law Bulletin 11.

³⁶⁷ See *supra* note 151.

³⁶⁸ See further, Behrendt, *supra* note 8 at 12-15.

³⁶⁹ See *Mabo v. Queensland [No. 1]*, *supra* note 45; *Mabo [No. 2]*, *supra* note 6 at 67, 72 per Brennan J., at 112 per Deane and Gaudron J.J., at 214-6 per Toohey J. See further, Chapter 1(D)(ii) “Legal Framework of Indigenous Rights in Australia - *Racial Discrimination Act*”, above.

of the *Racial Discrimination Act* 1975 (Cth.) may be that special legislation extinguishing Indigenous fishing or hunting rights may be invalid unless it also provides for compensation.

Indigenous rights will also be extinguished if surrendered to the Crown or abandoned by the Indigenous people concerned.³⁷⁰

Perhaps the most important aspect of extinguishment is that Indigenous rights, such as fishing rights, can survive the extinguishment of native title to the land itself. This is since Indigenous fishing rights may be a free standing Indigenous right not dependant on any underlying title to land. Alternatively, if Indigenous fishing rights are considered to be an incident of native title to land, those rights are severable from the land. Accordingly, the effect of legislation or actions by the Crown upon Indigenous fishing rights must be weighed separately to the impact of the legislation or actions upon native title to land. These matters have been discussed in detail in Chapter 3 and will not be considered further here.³⁷¹ Instead the following parts of this Chapter will consider other types of action that may have directly affected, and arguably extinguished, Indigenous fishing rights.

B. EXPRESS EXTINGUISHMENT

Subject to the limitations discussed above, it is within the legislative competence of parliament to enact legislation expressly extinguishing Indigenous rights. However, no legislation in Australia has expressly extinguished Indigenous fishing, hunting or gathering rights.³⁷² This not surprising as governments did not, prior to *Mabo [No. 2]*, consider Indigenous rights to be legally enforceable rights. As a result, any claim that the rights of Indigenous peoples recognised at common law have been extinguished by the Crown must depend upon implied extinguishment.

³⁷⁰ *Mabo v. Queensland [No. 2]*, *supra* note 6 at 59-60, 70 per Brennan J., at 110 per Deane and Gaudron J. The common law position concerning surrender of native title to the Crown is maintained in a statutory form under *Native Title Act* 1993 (Cth.) s. 21(1).

³⁷¹ See Section 3(D) "Relationship Between Native Title and Indigenous Fishing and Hunting Rights" above.

³⁷² The *Queensland Coast Islands Declaratory Act* 1985 (Qld.) purported to extinguish any Indigenous rights existing in respect of certain Torres Strait islands and waters at the time of the annexation to Queensland. Similarly, the *Land (Titles and Traditional Usage) Act* 1993 (W.A.) purported to extinguish any native title rights and interests in Western Australia and replace them by lesser statutory rights which would have a lower priority to other forms of title and rights. However, both statutes were invalid as they conflicted with the provisions of the *Racial Discrimination Act* 1975 (Cth.): *Mabo v. Queensland [No. 1]*, *supra* note 45; *Western Australia v. Commonwealth*, *supra*

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C. IMPLIED EXTINGUISHMENT

(i) General regulatory schemes

As previously discussed, native title and Indigenous rights will not be extinguished in the absence of a clear and plain intent to do so.³⁷³

A law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title does not extinguish that title.³⁷⁴ Therefore general Crown lands legislation “is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title”.³⁷⁵ Similarly, where the legislature confers power on the executive it is not to be taken as authorising the executive to exercise that power in a manner which will extinguish native title, in the absence of clear and

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note 17. See further, *supra* notes 43-53 and accompanying text.

The *Native Title Act* 1993 (Cth.) Part 2, Division 2, permits the validation of certain third party interests and other actions and provides that, in respect of certain classes of interests or actions validated under the Act, native title is extinguished. However, as the triggering of the validation provisions depends upon a prior grant of the third party interests or action being *invalid* at law, relatively few interests or will come within its provisions, and those that do will primarily concern interests in land. Accordingly, these validation provisions will have little or no effect on Indigenous fishing rights and will not be considered further here.

³⁷³. See *supra* notes 357-359.

In Canada the courts have developed a principle of statutory interpretation that statutes relating to Indigenous persons should be liberally construed and doubtful expressions resolved in favour of the Indigenous persons: *Nowegijick v. The Queen* [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193 at 36; *Mitchell v. Peguis Indian Band* [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193 at 98-9 per Dickson C.J., at 142-3 per La Forest J.

A similar approach has been taken in the United States where the rule of construction has been that “doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith”: *Choate v. Trapp* (1912) 224 U.S. 665 at 675. The Supreme Court has also stated that “extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards”: *United States v. Santa Fe Pacific Railroad Co* (1941) 314 U.S. 339 at 354.

³⁷⁴. *Mabo [No. 2]*, *supra* note 6 at 64 per Brennan J.; *Mason v. Tritton*, *supra* note 159 at 591 per Kirby P.

³⁷⁵. *Mabo [No. 2]*, *supra* note 6 at 111 per Deane and Gaudron J.J. See also at 114 per Deane and Gaudron J.J., at 196 per Toohey J. See also *Gila River v. United States* (1974) 494 F.2d 1386 at 1391; c.f. *Delgamuukw v. British Columbia* (1991) 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C. S.C.), reversed by (1993) 104 D.L.R. (4th) 470.

unambiguous words to the contrary.³⁷⁶ The same approach is likely to be taken concerning general fisheries or game legislation which provides for the granting of licences to fish or hunt.

(ii) General prohibitions against fishing or hunting

Where a general regulatory statute contains a blanket prohibition it may be read down, depending upon the statutory context, so as not to apply to pre-existing Indigenous interests. For example, in *Mabo [No. 2]*, Brennan J. considered statutory provisions relating to trespassers on Crown land. The provisions were not to be construed as applying to Indigenous persons even though, in the words of the statute, they were not claiming occupation under a lease or licence. Had a literal interpretation been taken "the Meriam people could lawfully have been driven into the sea at any time after annexation".³⁷⁷ Such a construction "would be truly barbarian" and "make a nonsense of the law".³⁷⁸ The same may be said in relation to blanket prohibitions in hunting and fisheries legislation.³⁷⁹ Otherwise, while the Indigenous peoples could remain on their land, they would be consigned to starvation.

Brennan J. suggested that such blanket provisions such as these should be construed as being directed to those "without any colour of right" and are not directed to Indigenous persons who were exercising their customary rights recognised at common law.³⁸⁰

(iii) Statutory grant of fishing and hunting rights to third parties

While the imposition of general regulatory scheme is unlikely to extinguish Indigenous rights, the exercise of specific powers under the regulatory scheme can extinguish Indigenous rights. For example, though general Crown lands legislation does not in itself

³⁷⁶. *Mabo [No. 2]*, *supra* note 6 at 111 per Deane and Gaudron J.J., at 196 per Toohey J.

³⁷⁷. *Mabo [No. 2]*, *supra* note 6 at 66.

³⁷⁸. *Id.* See also *ibid.* at 114 per Deane and Gaudron J.J.; *Wik Peoples v. Queensland*, *supra* note 7 at 120-21 per Toohey J., at 247, 249-50 per Kirby J.

³⁷⁹. Different considerations may apply where the legislation imposes a specific prohibition on the taking of endangered species, which may evidence an stronger intention that the species is to be protected absolutely from fishing by any person, Indigenous or non-Indigenous.

³⁸⁰. *Ibid.* at 66. See also the comments of Norris J.A. in *R. v. White and Bob*, *supra* note 199 at 648. See further, *infra* note 546.

extinguish native title, the grant by the Crown of a freehold or unqualified leasehold interest under the legislation conferring exclusive possession will necessarily extinguish native title.³⁸¹

Nevertheless, the types of interest granted under most fishing and game legislation are fundamentally different in nature to the grant of freehold or leasehold interests in land. Fishing regulations generally prohibit certain types of fishing activities other than in accordance with the terms of a licence.³⁸² However, the licences do not normally grant the holder any exclusive rights. As a result, the operation of such licences may be capable of co-existing with Indigenous fishing rights. Where the Indigenous right is a non-exclusive right to fish in an area, there is no conflict between the continued existence of that right and the exercise of fishing rights by third parties under the licence. Where the Indigenous right is an exclusive right to fish in an area the licence could either be taken subject to existing Indigenous rights³⁸³ or be construed as a form of statutory authorisation permitting the licensee to fish notwithstanding any existing Indigenous rights.³⁸⁴ In the latter case, the consequence is that the previously exclusive right is now subject to the rights granted under the statute. In other words, the Indigenous right remains, but is no longer exclusive. This is since where the Crown does an act inconsistent with an ongoing right to enjoy native title, native title is extinguished only to the *extent* of the inconsistency.³⁸⁵ Obviously, fisheries legislation could provide for the granting of exclusive fishing rights to particular persons in particular areas, which would be inconsistent with ongoing Indigenous rights. However, the regulatory regime of hunting and fishing rights does not generally provide for the grant of exclusive rights.³⁸⁶

³⁸¹. *Mabo [No. 2]*, *supra* note 6 at 68-70 per Brennan J., at 110 per Deane and Gaudron J.

³⁸². For example, s. 10(1) of the *Fisheries Act* 1988 (N.T.) prohibits the taking of any fish other than in accordance with a licence.

³⁸³. A licence which confers a general right to the holder to fish within the jurisdiction is unlikely to be specific enough to abrogate any surviving Indigenous interests. The presumption that legislation is not intended to derogate from proprietary rights (including any such rights in fisheries) is likely to apply, particularly as the rights conferred on the holder of the licence can still be exercised in other areas where there is no surviving native title.

³⁸⁴. A licence is issued in respect of a particular area is more likely to authorise fishing activities notwithstanding any Indigenous interests than where the licence simply authorises the licensee to fish anywhere within the jurisdiction.

³⁸⁵. *Mabo [No. 2]*, *supra* note 6 at 70 per Brennan J.

³⁸⁶. In contrast, the introduction of tradable individual commercial fishing quotas in New Zealand which gave the holder a right to harvest a portion of the commercial fishery for a particular species each year (which was akin to the grant of a proprietary right in the fishery) was potentially

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(iv) *Partial exemption of Indigenous fishing and hunting rights*

Legislation in most Australian jurisdictions contains partial exemptions for Indigenous persons in relation to hunting, fishing and gathering.³⁸⁷ The question arises whether the legislature by exempting certain categories of people or activities from the operation of the Act, thereby impliedly extinguished other Indigenous rights not covered by the exemption.

A beneficial approach is to be taken in interpreting such provisions. For example, in *Mabo [No. 2]*, the Murray Islands had been declared to be permanently reserved and set apart for the use by Indigenous persons. Under the terms of the relevant proclamation made under the *Land Act* 1910 (Qld.), the reserve was not simply for use of the traditional Indigenous owners but for "the use of Aboriginal Inhabitants of the State".³⁸⁸ Nevertheless, despite the conflict between the reservation for Indigenous persons in general³⁸⁹ and the right of the Meriam people "as against the whole world, to possession, occupation and use of the lands of the Murray Islands"³⁹⁰ the reservation of the land was not construed as impliedly extinguishing the Meriam people's native title. The rights of Indigenous persons other than Meriam people to use the land under the statute were "necessarily subordinate to the right of user consisting in legal rights and interests conferred by native title".³⁹¹ This can only be rationalised by taking a beneficial approach to construing the legislation. As the legislation was intended to benefit Indigenous persons, it should not be construed as abrogating any existing Indigenous rights.³⁹²

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inconsistent with Maori fishing rights: see notes 308-19 *infra* and accompanying text.

As to the recent introduction of individual transferable fishing quotas in Australia and their impact upon Indigenous fishing rights, see *infra* notes 518-538 and accompanying text.

³⁸⁷. See "Existing Statutory Provisions" in Chapter 2(B), above.

³⁸⁸. The Privy Council in *Corporation of the Director of Aboriginal and Islanders Advancement v. Peinkinna* (1978) 52 AJLR 286 at 290-1 rejected an argument that a similar trust created at Aurukun reserve was solely for the benefit of persons residing at Aurukun and held that the trust was for all the Indigenous persons of Queensland.

³⁸⁹. Under s. 339 of the *Land Act* 1962 (Qld.) the trustees had power to make by-laws generally for carrying out the objects and purpose of the trust including regulating the use and enjoyment of the land and regarding trespass.

³⁹⁰. *Mabo [No. 2]*, *supra* note 6 at 217.

³⁹¹. *Ibid.* at 67 per Brennan J. See also at 64-5, 71 per Brennan J., at 111 per Deane and Gaudron J.J.

³⁹². See *ibid* at 118 per Deane and Gaudron J.J.

A similar view was taken in *United States v. Santa Fe Pacific Railroad Co* (1941) 314 U.S. 339 at 353-4 where the United States Supreme Court held that Congress in creating an Indian reserve did

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The same approach logically applies to fishing, hunting and gathering legislation. For example, in Queensland, the exemption from fisheries legislation has historically applied only to Indigenous persons residing on an aboriginal reserve.³⁹³ Is this to be construed as impliedly extinguishing the existing rights recognised at common law of other Indigenous peoples? To do so it is necessary to find in the section or overall scheme of the Act a clear and plain intention to extinguish those rights. It is arguable that the exemption reflected the prevailing view of the times that only "traditional" Indigenous persons still fished and hunted and that the remaining "traditional" Indigenous persons lived on reserves. Hence, the exemption may be seen as an attempt by parliament to preserve the existing rights or practices of Indigenous persons (as then understood) rather than to derogate from Indigenous rights.

Indeed, as Deane and Gaudron J.J. observed, while many executive and legislative actions may not seem consistent with the existence of Indigenous rights, those actions will nevertheless often not evince an intention to extinguish Indigenous interests of a kind presumptively recognized by the common law as "when [or if] they were purportedly rationalized and justified, it was on the basis of a denial that there were pre-existing Aboriginal interests of the relevant kind for the law to respect and protect" rather than an intention to extinguish those rights.³⁹⁴

Another reason for construing the Queensland legislation as not evincing an intention to extinguish existing Indigenous rights arises from the fact that many Indigenous persons on reserves in Queensland had been forcibly removed from their ancestral lands. Hence, those

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not intend to extinguish the rights of the of Indians in their traditional lands. See also the principle of statutory interpretation in relation to Indigenous persons in Canada and the United States, *supra* note 373.

³⁹³. The exemptions in the *Community Services (Aborigines) Act* 1984 (Qld.), *Community Services (Torres Strait) Act* 1984 (Qld.), *Fisheries Act* 1976 (Qld.) and *Local Government (Aboriginal Lands) Act* 1978 (Qld.) were limited to Indigenous persons who reside on land that was formerly a reserve or trust area. The exemptions in *Fisheries Act* 1976 (Qld.) s. 5(1)(d) and *Fishing Industry Organisation and Marketing Act* 1982 (Qld.) s. 45AA(1)(d) were limited to Indigenous persons who resided on a reserve or trust area, until the introduction of the *Aboriginal Land Act* 1991 (Qld.) when the exemption was widened to include Indigenous persons resided on land granted as aboriginal land under that Act. The limitation of exemptions to Indigenous persons living on reserve areas was first introduced in the *Fisheries Act* 1957 (Qld.) s. 3(i). In 1992 the exemption was widened again by the *Nature Conservation Act* 1992 (Qld.) which permits Indigenous persons "despite any other Act" to take, use or keep protected wildlife in accordance with aboriginal tradition, applies to all Indigenous persons irrespective of their place of residence.

³⁹⁴. *Mabo [No. 2]*, *supra* note 6 at 99.

Indigenous persons may not have had any customary Indigenous fishing rights at common law which they could exercise on the reserve. The exemption can be rationalized as creating an exemption from the provisions of the Act for those Indigenous persons on reserves who no longer retained a common law right to fish and hunt. As such, the exemption is not inconsistent with an continuing common law Indigenous fishing right.

Similar considerations apply where an exemption in favour of Indigenous persons has been included in legislation but subsequently omitted.³⁹⁵

(v) *Special regimes for Indigenous fishing and hunting rights*

In some circumstances legislation, instead of exempting Indigenous persons, creates a special regime for the exercise of fishing or hunting rights by them. For example, legislation in the Northern Territory (and formerly in Queensland) provides for the issue of special community fishing licences to Indigenous communities.³⁹⁶ Again the question arises whether, by including a special regime applicable to Indigenous persons, parliament has demonstrated a "clear and plain intent" to extinguish existing common law Indigenous rights.

This situation was considered in the Canadian case of *R. v. Denny*.³⁹⁷ The Micmac people had entered into treaties with the Crown but the treaties did not extinguish their aboriginal right to fish. Hence, an Indigenous right to fish (as opposed to a treaty right) continued to

³⁹⁵. See the comments of Mahoney J. in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, *supra* note 187 at 572 (FC), at 554 (DLR) of "the irony implicit in the idea that such a basic right, particularly vested in certain people, then helpless to look after their own interests ... was ... so casually extinguished" by the omission of a specific reference to Indigenous rights.

See also *Te Weehi's case*, *supra* note 227 in relation to traditional Maori fishing rights. The specific statute under consideration expressly provided that nothing in it affected any Maori fishing right. However, a similar provision been omitted from fisheries legislation between 1894 to 1903. In rejecting an argument that the Maori fishing right had been extinguished, Williamson J. stated: "The customary right involved has not been expressly extinguished by statute and I have not discovered ... any adverse legislation or procedure which plainly and clearly extinguishes it ... If Parliament's intention is to extinguish such customary or traditional rights then it will no doubt do so in clear terms" (at 692).

³⁹⁶. *Fisheries Regulation* 1992 (N.T.) regs. 183-191; *Fishing Industry Organisation and Marketing Act* 1982 (Qld.) s. 31(1)(e) (subsequently repealed).

³⁹⁷. *R. v. Denny* (1990) 55 C.C.C. (3d) 322 (N.S. C.A.) approved by the SCC in *R. v. Sparrow*, *supra* note 189 at 1116.

exist beyond the boundaries of the Indian reserve.³⁹⁸ Section 6.6(1) of the *Nova Scotia Fishery Regulations* provided that, notwithstanding any other provisions in the regulations, a licence could be issued to an Indian or Indian Band authorising the Indian or members of the Indian band to fish for food. The Crown argued that it was necessarily inconsistent with the scheme under the regulations for an Indigenous right to fish to remain, and hence that such a right had been extinguished.³⁹⁹ However, the court drew the opposite conclusion from the existence of the special statutory regime, stating:

This regulation ... is evidence of the federal government's intention to recognize and preserve an Indian food fishery. It adds support to the proposition that Nova Scotia Indians' aboriginal right to fish for food has not been extinguished ... [T]he fact that these regulations were enacted is further recognition of the existence of an aboriginal right to fish for food possessed by the Micmac Indians of Nova Scotia.⁴⁰⁰

Similarly in *R. v. Sparrow* it was argued that the special regulatory regime, which included special Indian food fishing licences, was necessarily inconsistent with the continued enjoyment of Indigenous fishing rights. The Court of Appeal in British Columbia rejected this argument stating:

In our view, the "extinguishment by regulation" proposition has no merit. The short answer to it is that regulation of the exercise of a right presupposes the existence of the right. If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognised the Indian right to fish, are strong evidence that the right does exist.⁴⁰¹

The Supreme Court of Canada, in affirming the Court of Appeal judgment, stated:

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.⁴⁰²

³⁹⁸. *Ibid.* at 333.

³⁹⁹. *Ibid.* at 334.

⁴⁰⁰. *Ibid.* at 334-5.

⁴⁰¹. *Supra* note 236 at 266.

⁴⁰². *Supra* note 189 at 1097.

A contrary conclusion was reached at by the trial court in *R. v. Dick* (16 February 1993, B.C. Prov. Ct., Saunderson D.J., Campbell River No.) [unreported] at 16-7, which held that any Indigenous right to a commercial fishery (which it doubted had ever existed) had been impliedly extinguished by a statutory regime providing for Indigenous fishing rights but which limited those rights to fishing for food. However, the judgment was heavily influenced by the reasoning of McEachern

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This passage of was quoted with approval by Kirby P. in the Australian case of *Mason v. Tritton*. Kirby P. considered that the “same distinction would, in my view, be applicable to the present case. The history of the *Fisheries and Oyster Farms Act* 1935 and its accompanying Regulation established a regime of control of New South Wales fisheries in a manner amounting to stringent regulation, but not extinguishment, of any otherwise established proprietary rights.”⁴⁰³ He went on to observe that “stringent regulation may reach the point where the ordinary rights and privileges associated with property are so curtailed that proprietary rights can no longer be enjoyed”, but did not consider that applied to the claimed Indigenous fishing right under the New South Wales legislative history.⁴⁰⁴

However, the judges in the other Australian case, *Derschaw v. Sutton* differed in their analysis of the presumptions to be drawn from the inclusion of special provisions dealing with Indigenous persons in fisheries legislation. At first instance, the magistrate considered that the specific exemptions in the act from certain types of prohibitions (though not the one in question) constituted an acknowledgment that a native title right to fish exists, provided the fishing is for the provision of food for a family.⁴⁰⁵ However, in the Court of Appeal Franklyn J., having reviewed the statutory history of exemptions for Indigenous persons, concluded that the statutes were clearly regulatory and not intended to confer or recognise rights. In his opinion, the statutes were not concerned with native title rights or traditional rights held by particular Indigenous peoples.⁴⁰⁶ He considered that the legislation did “no more than recognise that Aborigines do fish and consume fish as food”.⁴⁰⁷ On that basis, such a special regime is neutral as to the existence or otherwise of any special Indigenous

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C.J.B.C. in *Delgamuukw v. British Columbia*, *supra* note 375, who held that general pre-confederation Crown lands legislation had impliedly extinguished all aboriginal title in the province. The reasoning of McEachern C.J.B.C. in *Delgamuukw* (which was subsequently overturned on appeal by the British Columbia Court of Appeal) is at odds with the approach taken by the High Court of Australia in *Mabo*, and accordingly the result in the *Dick* case may also be open to doubt in an Australian context. In any event, the *Dick* decision is probably no longer valid law in Canada in the wake of the *Van der Peet* trilogy, *supra* note 190.

⁴⁰³ . *Mason v. Tritton*, *supra* note 159 at 592-93.

⁴⁰⁴ . *Ibid.* at 593.

⁴⁰⁵ . (16 August 1996, W.A. C.A., No.s S.J.A. 1174-77 of 1994, Lib. No. 960449S) [unreported], affirming (1995) 82 A. Crim. R. 318, special leave to appeal to the H.C.A. refused (unreported, H.C.A., 30 May 1997, No. P44-46 of 1996) at 5 (in the judgment of Franklyn J). The exemption for Indigenous persons contained in s. 56(1) was expressly subject to notices, such as the one in question, issued under s. 9 of the legislation.

⁴⁰⁶ . *Ibid.* at 25-28.

⁴⁰⁷ . *Ibid.* at 27.

rights. Wallwork J. (dissenting) considered that the history of statutory exemptions (in whole or part) of Indigenous persons from fisheries legislation in Western Australia meant that there was "no doubt that in this State, the Aboriginal people have since 1899 had a traditional right to fish recognised by Statute".⁴⁰⁸

The same argument was considered in New Zealand in *Te Weehi's case*. The court upheld a submission that provision for exclusive use of certain areas for Maori fishing was not inconsistent with a reservation of customary or traditional rights but rather provided a formal management and control structure for some particular fisheries.⁴⁰⁹

Hence, it is arguable the history of exempting Indigenous persons from the operation of fishing, hunting and gathering legislation in Australia and the creation of special Indigenous community fishing licences, rather than indicating an intention by the legislature to extinguish Indigenous rights, constitutes recognition of the continuing existence of those rights. Even if the other view is taken, namely that these specific regimes do not constitute positive recognition of Indigenous rights, the existence of a special regime or exemptions for Indigenous persons does not by itself seem to give rise to an inference that the legislature intended to extinguish any existing Indigenous rights.

(vi) *Marine parks, national parks and wildlife reserves*

Unlike the general regulation of fishing, where the legislative purpose may simply be to better manage the resource (which is not necessarily inconsistent with an ongoing Indigenous fishing right) the dedication of an area as a marine park may be inconsistent with ongoing Indigenous fishing rights.⁴¹⁰ Whether the dedication of an area as a marine park will have that affect will be a matter to be determined in each case. For example, in the *Mabo [No. 2]*, Brennan J. considered that the setting aside of an area as a national park may not be inconsistent with the continuing concurrent enjoyment of native title.⁴¹¹ However in

⁴⁰⁸ . *Ibid.* at 23.

⁴⁰⁹ . *Te Weehi v. Regional Fisheries Officer*, *supra* note 227 at 688.

⁴¹⁰ . For example, marine parks created under the *Marine Parks Act 1982* (Qld.) and *Great Barrier Reef Marine Park Act 1975* (Cth.).

⁴¹¹ . *Mabo [No. 2]*, *supra* note 6 at 70. See also *R. v. Sioui* [1990] 1 S.C.R. 1025 at 1072-3 where the exercise of Huron religious treaty rites and customs (in cutting down trees, camping and making fires) were held not to be inconsistent with the use of a provincial recreation park. For an in depth analysis as to whether particular national parks legislation is inconsistent with the continued existence of native title, see H. Wooten QC, "The Mabo Decision and National Parks" in S. Woenne-Green *et al.*, eds., *Competing Interests: Aboriginal Participation in National Parks and*

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particular circumstances, such as the zoning of an area of reef as a "preservation zone" under zoning and management plans under the *Great Barrier Reef Marine Park Act 1975* (Cth.), traditional Indigenous fishing activities may be excluded by implication.⁴¹²

(vii) *Vesting of ownership of seabeds, riverbeds and waters*

At common law, the Crown is presumed to be the owner of the seabed and land below the low water mark in tidal waters. Just as the Crown's radical title to land is burdened by pre-existing Indigenous interests, it is arguable that its title to the seabed is also burdened by pre-existing Indigenous interests.⁴¹³ However, legislation has vested the ownership of various harbours and other areas in Crown instrumentalities.⁴¹⁴ It is arguable that such legislation does not extinguish any native title in the river bed or ocean floor.⁴¹⁵ However, even if such legislation extinguishes native title to the river bed or ocean floor, it may not have the affect of extinguishing native title to a fishery or an independent Indigenous right to fish in the sea, river or estuary.⁴¹⁶ Put another way, the vesting of full ownership of a seabed, river bed and of their waters in the Crown, is not necessarily inconsistent with an ongoing right of Indigenous peoples to fish in the river in accordance with their laws and customs.

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Conservation Reserves in Australia (Melbourne: Australian Conservation Foundation, 1994) 306 at 318-23, 341-45.

⁴¹². A "preservation zone" is the highest conservation zone, in which even scientific research is restricted, the purpose of which is to keep the area as far as possible unaffected by human use. A relevant factor in determining whether traditional aboriginal fishing activities are impliedly excluded may be that zoning plans expressly provide for traditional aboriginal fishing activities in other areas: see for example Cairns and Cormorant Pass Zoning Plan cl 4(1)(a) and 5.2(i)(xv).

⁴¹³. See *Halsbury's Laws of England* (4th ed.) vol. 8 para. 1418 and vol. 49 para. 292 and 379 concerning the presumption of Crown ownership of the seabed, foreshore and beds of estuaries and tidal rivers. As to the application of the common law presumption that the Crown is the owner of the foreshore to settled colonies, see New Zealand. Law Commission, *supra* note 224 at 68-70. The common law presumption that a grant of land includes the bed of non-tidal rivers has been negated in most Australian jurisdictions: see for example *Rights in Water and Irrigation Act 1914* (W.A.) s. 5; *Water Act 1912* (Qld.) s. 5; hence, the bed of non-tidal rivers has generally not been alienated by Crown grant and any pre-existing native title may survive over those river beds.

Some, if not all, Indigenous peoples considered adjacent reefs, islands and waters as part of their traditional lands, see note 35 *supra*. However, it is unclear whether Indigenous peoples while, using the sea, actually had any recognisable rights under the common law in the seabed itself. For recent academic commentary on this issue in Australia, see R. Bartlett, "Aboriginal Sea Rights and Common Law" in *Turning the Tide Conference: selected papers* (Darwin: Northern Territory University, 1993) 9; A. Bergin, "A rising tide of Aboriginal sea claims : Implications of the Mabo case in Australia" (1993) 8 *International Journal Of Marine and Coastal Law* 359; R. Cullen, "Rights to Offshore Resources After Mabo 1992 and the Native Title Act 1993 (Cth)" (1996) 18 *Sydney Law Review* 125; R. Cullen, "Natural Resources in the Offshore: The Australian position

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after Mabo's case" (1997) 9 Law and Anthropology 158; J. Malbon, "Torres Strait Conference on Land and Sea Claims" (1996) 3:78 Aboriginal Law Bulletin 16; Meyers *et al.*, *Sea Change*, *supra* note 8; M. Storey, "The Black Sea" (1996) 79:3 Aboriginal Law Bulletin 4; J. Sutherland, "Rising Sea Claims on the Queensland East Coast" (1992) 2:56 Aboriginal Law Bulletin 17. See also ALRC, *supra* note 5 para. 890.

In Alaska, there have been some attempts to litigate the issue of whether Indigenous fishing rights in offshore areas are recognised under the common law. For example, Indigenous peoples recently sought to claim subsistence hunting and fishing rights in the offshore continental shelf in an area over which oil and gas explorations leases had been granted, the United States Supreme Court having held that the *Alaska Native Claims Settlement Act*, 43 U.S.C.A. §1601-1628 did not extinguish any aboriginal title in the area: *Amoco Production Company v. Village of Gambell* 480 U.S. 531, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987). However, the case was eventually dismissed for want of jurisdiction as being moot (the leases having expired): *Gambell v. Babbitt* 999 F. 2d 403 (9th Cir. 1993). See also *None Eskimo Community v. Babbitt* 67 F.3d 893 (9th Cir. 1995). The issue as to Indigenous rights in the outer continental shelf off Alaska remains unresolved.

Cullen argues that in the Australian context the *Seas and Submerged Lands Act* 1973 (Cth.), by vesting of sovereignty in the territorial sea and sea-bed, extinguished any marine traditional native property rights as the legislation constituted "sufficient alienation of all the offshore rights by the Crown (to itself) to satisfy the *Mabo*(No. 2) test": see R. Cullen, "Natural Resources in the Offshore: The Australian position after Mabo's case" (1997) 9 Law and Anthropology 158 at 170, 172. I disagree. The assertion of sovereignty is not inconsistent with the survival of native title interests. In this regard, the extension of sovereignty over the territorial sea and seabed is no different to the acquisition of sovereignty over the Australian mainland or subsequent annexation of the Torres Strait islands which were the subject of the native title claim in *Mabo* [No. 2], *supra* note 6.

414. For example, *Sydney Harbour Trust Act* 1900 (N.S.W.) ss 27-8; *Sydney Harbour Trust Land Titles Act* 1909 (N.S.W.); *Maritime Services Act* 1935 (N.S.W.) ss 13A, 13H.

415. The legislation vesting the ownership and control of harbours and other areas in a Crown instrumentality does not in itself grant third party interests in the harbour. Accordingly, the vesting of control of the area in a Crown instrumentality, the purpose of which is to provide for better management of the area, may not be inconsistent with ongoing native title to the area. However, specific grants of proprietary interests to third parties or the building of public works, such a port facilities, would necessarily extinguish native title over those specific areas. A similar view is taken in relation to the vesting of certain national parks in the Director of National Parks or Crown corporations by H. Wootten QC, "The Mabo Decision and National Parks" in S. Woenne-Green *et al.*, eds., *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia* (Melbourne: Australian Conservation Foundation, 1994) 306 at 337-39.

416. A contrary decision was reached in *Inspector of Fisheries v. Weepu* [1956] N.Z.L.R. 920 (S.C.) at 923, 926 where any customary Maori fishing rights were held to be extinguished by the transfer of ownership of the bed of the river (and surrounding land) to the Maori Trustee. However, the court treated any such fishing rights as merely flowing from the Treaty of Waitangi and as not being enforceable at common law (at 922). Hence, in light of more recent cases such as *Te Weehi's case*, *supra* note 227 and the subsequent recognition of aboriginal title at common law in Australia and Canada this result needs to be treated with caution. See also *Keepa v. Inspector of Fisheries* [1965] N.Z.L.R. 322 (S.C.) at 326-8; *Green v. Ministry of Agriculture and Fisheries*, *supra* note 231 at 414.

There is no necessary nexus between Indigenous fishing rights and rights to a riverbed or seabed. Even, if there were such a nexus, jurisprudence in other common law countries is unanimous in holding that Indigenous fishing rights can survive the extinguishment of title to land. These issues have been discussed in detail above.⁴¹⁷ Hence, even if the vesting of ownership of seabeds, riverbeds or waters extinguished native title, Indigenous fishing rights may survive in respect of those rivers or seas.

In the case of the vesting of title to the territorial sea and seabed within three nautical miles of the coastline of the States in the States under the *Coastal Waters (State Title) Act* 1980 (Cth.) there can be no doubt that native title rights are unaffected as the Act expressly preserves any existing right or title to the property in the sea-bed beneath the coastal waters.⁴¹⁸

⁴¹⁷ . See Part 3(B) "Relationship Between Native Title and Indigenous Fishing and Hunting Rights" above.

⁴¹⁸ . *Coastal Waters (State Title) Act* 1980 (Cth.) s. 4(2)(a). See further, Behrendt, *supra* note 8 at 14.

D. CONFIRMATION OF OWNERSHIP OF NATURAL RESOURCES

Section 212 of the *Native Title Act* 1993 (Cth.) permits a law of a State of the Commonwealth to confirm any existing ownership of natural resources by the Crown and confirm that any existing fishing access rights prevail over any other public or private fishing rights.⁴¹⁹ Most States have enacted legislation in accordance with the section confirming the ownership of all natural resources owned by the State.⁴²⁰ For the purposes of the following analysis it will be assumed that fish are “natural resources” within the meaning of the section.

The section is somewhat obscure. If the laws in question may “confirm” only “existing” ownership they accomplish nothing. Further, the section expressly provides that any such confirmation “does not extinguish or impair any native title rights and interests”.⁴²¹ One can

⁴¹⁹ . The section is in the following terms:

Confirmation of ownership of natural resources, access to beaches etc..

Confirmation of ownership of natural resources etc.

212 (1) Subject to this Act, a law of the Commonwealth, a State or Territory may confirm:

(a) any existing ownership of natural resources by the Crown ...;

...; or

(c) that any existing fishing access rights prevail over any other public or private fishing rights.

Confirmation of access to beaches etc.

(2)

Effect of confirmation under subsection (2)

(3) Any confirmation under this section does not extinguish or impair any native title rights and interests and does not affect any conferral of land or waters, or an interest in land or waters, under a law that confers benefits only on Aboriginal peoples or Torres Strait Islanders.

⁴²⁰ . For example, see *Land Titles Validation Act* 1994 (Vic.) s. 14(1) (“The existing ownership of all natural resources owned by the State is confirmed”) and s. 14(3) (“All existing fishing access rights under State law are confirmed to prevail over other public or private fishing rights”). See also *Native Title Act* 1994 (A.C.T.) ss. 11(1), 11(3); *Validation of Title and Action Act* 1994 (N.T.) ss. 12(1), 12(3); *Native Title (New South Wales) Act* 1994 (N.S.W.) ss. 17(1), 17(3); *Native Title (Queensland) Act* 1993 (Qld.) ss. 17(1), 17(3); *Native Title (South Australia) Act* 1994 (S.A.) ss. 39(1), 39(3); *Native Title (Tasmania) Act* 1994 (Tas.) ss. 13(1), 13(3).

⁴²¹ . s. 212 (3). [The section is reproduced *supra* note 419]. There is some ambiguity as the sub-heading of s. 212(3) indicates it applies only to a confirmation under s. 212(2) (dealing with public access to beaches etc.) whilst the actual wording of sub-section 212(3) applies to the whole section (footnotes continue on next page)

question why the section was included if it accomplishes nothing and ask whether it should be construed in a different manner. There were extensive amendments to the legislation, including this section, during the passage of the legislation through the House of Representatives and Senate. Ultimately, the drafting history does not assist in construing the purpose to be served by the section, other than it being a political compromise. In the absence of a clear purpose intended to be served by the section, the words in the section should be given their plain and ordinary meaning. Accordingly, the section does not seem to affect any Indigenous fishing rights.⁴²²

In any event, ownership is separate from the question of a right to utilise a resource. Indigenous fishing and hunting rights are often referred to as usufructuary rights. As Kirby P. observed in *Mason v. Tritton* a usufruct is a right to use or benefit from property that is owned by another.⁴²³ In a similar vein, the United States District Court, in dealing with the effect of federal legislation transferring title and ownership of seabeds, waters and fish in those waters to the States, observed that a "state may own the resources of these lands, even the fish, but this does not necessarily abrogate the Indians' right to fish".⁴²⁴ Hence, even if the provision of the *Native Title Act* 1993 (Cth.) permitting the confirmation of ownership cures any doubts about the Crown's title to natural resources, it does not of itself alter any existing Indigenous rights to utilise the resources.

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(which includes subsection 212(1) dealing with confirmation of existing ownership of natural resources). However, as the heading of a section is to be disregarded if it conflicts with an unambiguous text of a section, it would seem that the proviso applies to the whole section (see further *Acts Interpretation Act* 1901 (Cth.) s. 13(3); D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, 3rd ed. (Sydney: Butterworths, 1988) para. 4.35).

Only Queensland and the Northern Territory have tried to take advantage of this ambiguity. The legislation in other states makes it clear that the preservation of native title rights applies to both the confirmation public access to beaches etc. and to the confirmation of existing ownership of natural resources and existing fishing access rights: see *Native Title Act* 1994 (A.C.T.) s. 13(a); *Native Title (New South Wales) Act* 1994 (N.S.W.) note following s. 18; *Native Title (South Australia) Act* 1994 (S.A.) s. 39(5)(a); *Native Title (Tasmania) Act* 1994 (Tas.) s. 13(4); *Land Titles Validation Act* 1994 (Vic.) s. 16; c.f. *Native Title (Queensland) Act* 1993 (Qld.) ss. 17, 18; *Validation of Title and Action Act* 1994 (N.T.) ss. 12, 13.

⁴²² The same conclusion is reached by the Aboriginal and Torres Strait Islander Social Justice Commission in his statutory report concerning the operation of the *Native Title Act* 1993 (Cth.), see ATSIJSC, *Native Title Report June 94*, *supra* note 26 at 43-44, 155.

⁴²³ *Mason v. Tritton*, *supra* note 159 at 580-81.

⁴²⁴ *United States v. Michigan*, *supra* note 244 at 276. Ultimately it did not have to decide this issue, as taking into account other provisions in the Act it considered that "[n]either the language of the Act nor its purposes are in conflict with the Indians' retention of fishing rights": *id*

CHAPTER 6: REGULATION OF SURVIVING INDIGENOUS FISHING AND HUNTING RIGHTS

A. INTRODUCTION

Assuming that Indigenous rights to fish, hunt and gather are recognised at common law and have not been extinguished, a number of issues arise. First, how may those rights be regulated? Second, are those rights subject to existing fisheries and hunting legislation? Given the number of different regulatory regimes across the States and territories of Australia, an analysis of particular regimes will not be undertaken here. Rather, the applicable principles will be discussed.

In the same manner that the legislature has power to extinguish Indigenous rights, it has the power to regulate the exercise of those rights. As previously discussed, legislation will only extinguish Indigenous fishing and hunting rights if it contains a plain and clear intention to do so.⁴²⁵ The same principles logically apply in determining whether a regulatory regime imposed by legislation is intended to restrict Indigenous rights. It may be surmised that the greater the degree to which legislation impinges on the exercise of Indigenous rights, the clearer the intent will need to be in order for the legislation to apply to those rights. For example, legislation which imposes a minimum size of particular fish that may be caught or a maximum net length may infringe less on Indigenous rights than legislation which limits a fishing or hunting season to only a few weeks a year. The former permits Indigenous persons to still obtain food (albeit under some restrictions) while the latter effectively deprives them of their ability to seek sustenance for much of the year. The greater the interference with common law Indigenous rights, the greater the presumption that the legislation is not intended to apply to those rights in the absence of clear and unambiguous words.

The Canadian cases concerning regulation of Indigenous fishing and hunting rights have taken a different approach. They have held that general fishing and hunting regulations apply to common law Indigenous hunting and fishing rights, in the absence of jurisdictional or constitutional restraints.⁴²⁶ However, the early Canadian precedents were decided prior to

⁴²⁵. See *supra* notes 357-359 and accompanying text.

⁴²⁶. *R. v. Sikyea* [1964] 2 C.C.C. 325, 46 W.W.R. 65 (NWT C.A.), affirmed [1964] 2 S.C.R. 642, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80; *R. v. George* [1966] S.C.R. 267, [1966] 3 C.C.C. 137, 55

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the recognition of aboriginal title at common law in Canada. Therefore, in holding that Indigenous rights preserved under treaty or proclamation to fish and hunt were subject to general fishing and hunting regulations, the courts did not need to address the presumption that legislation is to be construed as not derogating from proprietary rights in the absence of clear intent to do so.⁴²⁷ Given the enactment of s 35(1) of the *Constitution Act* 1982), which gives constitutional protection to Indigenous rights, the practical need to reconsider the approach of the earlier cases has largely disappeared. In *R. v. Sparrow*,⁴²⁸ which was also the first occasion on which the court considered s 35(1), the court did not need to consider whether a plain and clear intent was necessary for the regulations to apply to Indigenous rights as the particular regulations were specifically directed to Indigenous fishing.⁴²⁹ Therefore, while the court emphasised the need for a “clear and plain” legislative intention to *extinguish* Indigenous rights it did not articulate whether the same standard was required in order to *regulate* those rights.⁴³⁰

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D.L.R. (2d) 386; *Daniels v. White* [1968] S.C.R. 517, [1969] 1 C.C.C. (2d) 99, 2 D.L.R. (3d) 1; *R. v. Derriksan* (1976), (1977) 71 D.L.R. (3d) 159, 31 C.C.C. (2d) 575n (S.C.C.), affirming (1975) 24 C.C.C. (2d) 101, 60 D.L.R. (3d) 140 (B.C.C.A.); *Kruger and Manuel v. The Queen* [1978] 1 S.C.R. 104, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434 (S.C.C.); *Jack v. The Queen* (1979), [1980] 1 S.C.R. 294, 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193; *R. v. Sutherland* [1980] 2 S.C.R. 451, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374; *Dick v. R.*, *supra* note 183.

⁴²⁷ See *Dick v. R.*, *supra* note 183 at 315 where the Supreme Court stated the decision was made on the basis of the hunting right being a personal right and left open the question of whether the same result would arise where the right was based on aboriginal title.

An alternative approach is that s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5 by expressly making provincial laws of general application applicable to Indians, other than to extent Indian rights are protected under treaty, thereby displaces the presumption that provincial laws of general application should not to be construed as infringing common law Indigenous rights. If this interpretation of s. 88 is correct, then s. 88 not only subjects Indians to provincial jurisdiction (which they would not otherwise be subject to by reason of s. 91(24) of the *Constitution Act* 1867, R.S.C. 1985, App. II. No. 5, (30 & 31 Vict., c. 3) (U.K.) which provides that the federal parliament has. exclusive legislative authority over Indians) but also displaces the common law presumption that the legislature is assumed not to intend to infringe upon existing rights in the absence of a clear and plain intention to do so. This could explain the apparently incongruous situation where Canadian courts require a “clear and plain” legislative intent to extinguish common law Indigenous rights but adopt a less strict approach in determining whether the same common law Indigenous rights are subject to regulation or infringement (falling short of extinguishment) by provincial game and wildlife laws. However, this interpretation of s. 88, does not explain why a similar approach has been taken in interpreting federal legislation (to which s. 88 is inapplicable).

⁴²⁸ *Supra* note 189.

⁴²⁹ The defendant was charged with breaching the terms of a special Indian food fishing licence issued under s. 27(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248.

⁴³⁰ An analysis of Canadian cases since 1982 is complicated by the interplay between general rules of interpretation in relation to Indigenous rights and the protection afforded to Indigenous rights under
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The position in Australia, from the limited cases to date, is far from clear. Ultimately the courts have not had to resolve the issue as to whether the regulations in question applied to Indigenous fishing rights, as the defendants in each case failed to establish they were exercising a native title fishing right. However, some divergent views were expressed in the judgments.

In *Mason v. Tritton*, Kirby P. considered that Indigenous persons would be bound by fisheries legislation of general application. He considered that:

... civilised societies demand that proprietary rights and interests be highly regulated. I do not take it to be the intent of the High Court in *Mabo* that successful claimants to a form of native title should then be able to remove themselves from the ordinary regulatory mechanisms of Australian society. In the particular context of this case, the control and the regulation of fishing activity applies to all those who fish, regardless of the nature of the fishing right which they severally purport to exercise.⁴³¹

These comments sit uneasily with an earlier passage in his judgment where Kirby P. stated the appellant had “failed to provide sufficient evidence that he had exercised such a traditional and customary ‘right to fish’ ... *Had he established such exercise* [of a customary Indigenous right to fish] *he would* in my opinion, by law, now *be entitled to the relief which he sought*”.⁴³² Kirby P. also expressed a strong view that Indigenous fishing rights would not be extinguished by a history of regulation.⁴³³ However, his statement that

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s. 35(1) *Constitution Act* 1982. An analysis of a particular situation involves the following issues: (1) Was the accused exercising an Indigenous right? (2) Has the Indigenous right claimed by the accused previously been extinguished? (3) If not, is the legislation intended to restrict the exercise of that right? (4) If so, the legislation invalid by virtue of s. 35(1) *Constitution Act* 1982? However, the analysis adopted in post-*Sparrow* cases has tended to skip over the question (3) and jump directly to the question of whether the Crown can justify an infringement of Indigenous rights under s. 35(1). The attraction for courts to omit step (3) in a Canadian context is that it permits the courts a degree of flexibility (in terms of assessing whether the justificatory standard imposed under s. 35(1) is met) in determining whether the legislation applies to Indigenous persons. If the legislation is inapplicable by virtue of inconsistency with s. 35(1) there is no need for a court to spend time on issue (3). Further, the constitutional protection given by s. 35(1) reduces the impact of holding that particular legislation is intended to apply to Indigenous rights and this may displace the common law presumption that legislation is to be presumed not to interfere with property rights in the absence of a clear intent to do so. These factors may result in a tendency by Canadian courts to brush over the issue of whether legislation is intended to apply to customary Indigenous rights. For these reasons Canadian decisions on this issue may need to be treated with caution.

⁴³¹ . *Supra* note 159 at 593.

⁴³² . *Ibid.* at 575 (emphasis added).

⁴³³ . See *supra* notes 403-404 and accompanying text.

such rights are subject to any existing regulations which on their face apply to all persons no matter what the source of the right, severely limits the practical consequences of holding an Indigenous fishing right exists.⁴³⁴ Furthermore, his assertion that the control and regulation of the fishing activity in the case at hand (regulating the possession and shucking of abalone) applied "to all those who fish regardless of the nature of the fishing right" exercised is curious.⁴³⁵ Whilst the regulation was superficially neutral in that it applied to all persons, holders of commercial abalone licences were exempt from its operation. Furthermore, the true question is not what consequences the High Court envisaged in *Mabo*, but whether the courts will hold that parliament intended the regulations in question to apply to this type of existing right. This is ultimately a matter of statutory construction.

The above comments of Kirby P. were strictly obiter dicta.⁴³⁶ The other judges did not address the issue. Gleeson C.J. observed in passing that "there are a number of important and potentially difficult steps to be taken in passing from the premise that the appellant was exercising a traditional right to the conclusion that the regulations did not apply to him".⁴³⁷ Nevertheless, his judgment seems to leave open the possibility that such regulations may not apply in appropriate circumstances. In particular, in one passage in dealing with the need for the appellant to prove the content of the rules governing the Indigenous use of fisheries in the area in question, he referred to the appellant "seeking to bring his conduct within a system of rules, recognised by the common law, and arguably outside the purview of the relevant regulations".⁴³⁸ Priestly J.A. did not deal with the issue, focusing on the failure of proof in the appellants case.⁴³⁹

The other Australian case which has touched upon the issue is *Derschaw v. Sutton*. At trial the magistrate held that the defendant had raised sufficient doubt as to whether he was exercising a native title fishing right, which had not been rebutted by the Crown. He held that accordingly the defendant was not guilty of the offence under the *Fisheries Act 1905*

⁴³⁴ . The general regime in fishing legislation in Australia for the legislation to contain a blanket prohibition on fishing by any person, other than as authorised under the legislation. See *infra* note 77 and accompanying text.

⁴³⁵ . *Mason v. Tritton*, *supra* note 159 at 593.

⁴³⁶ . This is acknowledged by Kirby P. in his judgment (at 590).

⁴³⁷ . *Ibid.* at 574.

⁴³⁸ . *Id.*

⁴³⁹ . Priestly J.A. again stressed the need for evidence establishing a well-defined group of Indigenous people abiding by a proved or at least recognisable system of rules in relation to the claimed right: *ibid.* at 604.

(W.A.). This finding was reversed on appeal in the Supreme Court and a conviction entered.⁴⁴⁰ As previously discussed, on further appeal, the Court of Appeal, by a majority of two to one, upheld the conviction on the basis that the defendant failed to satisfy the evidentiary burden that he was exercising a native title right to fish.⁴⁴¹ This was the same basis on which the Supreme Court had entered the conviction. Accordingly, neither the Supreme Court or the majority judgment in the Court of Appeal needed to address the issue of the interaction between such a right and the regulation in question; however, both proceeded on that basis that if the native title fishing right had been established the regulation would not be applicable to the activities in question.⁴⁴² The dissenting judgment of Wallwork J. in the Court of Appeal in upholding of the original dismissal of the charges necessarily held that, as a matter of law, a person exercising such a native title right to fish was not bound by the particular regulation in question. However, his reasoning was based upon the operation of the *Racial Discrimination Act* 1975 (Cth.).⁴⁴³ Accordingly, he again did not directly address the issue as to whether, as a matter of statutory interpretation, the legislation applied to the activities in question.

B. AN ISSUE OF STATUTORY CONSTRUCTION

On the basis of these judgments the law in Australia as to the interaction between general regulatory regimes and existing Indigenous fishing rights is unclear. It is submitted that the resolution of this issue is ultimately a question of statutory construction.⁴⁴⁴ This will often be a difficult question as, prior to the *Mabo* decision, the legislatures had proceeded on the assumption that no persons had any rights of a quasi-private nature in fisheries other than that those granted under statute.

⁴⁴⁰ . *Sutton v. Derschaw*, *supra* note 165

⁴⁴¹ . *Derschaw v. Sutton*, *supra* note 167.

⁴⁴² . For example, Franklyn J. stated that the "claim of native title fishing rights can only be properly seen as a claim that the same example [the defendants] from the operation of the relevant provisions of the *Fisheries Act*."; *ibid.* at 23 (Murray J. concurring) The judgment of Heenan J. in the Supreme Court seems to have implicitly proceeded on the same basis, see *Sutton v. Derschaw*, *supra* note 165 at 324.

⁴⁴³ . The operation of the *Racial Discrimination Act* 1975 (Cth.) is discussed in Chapter 1(D)(ii) "Racial Discrimination Act", above.

⁴⁴⁴ . As least, that is the position in the absence of any constraint on legislative power. As discussed above, there are no relevant limits on state legislative powers over Indigenous fishing rights prior to 31 October 1975. However, any state legislation since that time must comply with the provisions of the *Racial Discrimination Act* 1975 (Cth.) and, more recently, the *Native Title Act* 1993 (Cth.). See further Chapter 1(D) "Legal Framework of Indigenous Rights in Australia".

Three standard cannons of statutory construction are that: (1) legislation is presumed not to alienate vested proprietary interests without adequate compensation; (2) legislation is presumed not to interfere with vested property rights; and (3) legislation is presumed not to invade common law rights.⁴⁴⁵ The courts have embraced these cannons of statutory construction in relation to Indigenous rights, holding that legislation demonstrate must a clear and plain intent to abrogate Indigenous rights.⁴⁴⁶

The first of these cannons of statutory interpretation is not directly applicable here as it applies to the alienation (or extinguishment) of rights, rather than their regulation. However, it may apply by analogy to much of the fisheries legislation in Australia which, whilst not alienating a private right to fish, nevertheless deprives the holder of that right of any additional benefit conferred by the right compared to general members of the public exercising rights under the applicable legislation. Such legislation would operate to effectively to nullify such rights if the legislation were held to apply to those rights.

However, a further matter needs to be addressed in the context of applying these cannons of construction in the context of fisheries legislation. Such legislation clearly is intended to derogate from the common law rights of members of the public to fish. Unless it does so, the legislation would generally fail to accomplish its purpose. Accordingly, if the legislation is intended to apply to common law rights held by the community in general, why is it not also intended to apply to rights of Indigenous peoples also recognised at common law? After all, one of the changes made by the *Magna Carta* was to take away the Crown's prerogative to grant new private fisheries, thereby strengthening the common law right of the public to fish.⁴⁴⁷ Therefore, it is legitimate to ask why a common law Indigenous fishing rights stand in a different position to other common law fishing rights when it comes to applying the cannons of statutory interpretation.

⁴⁴⁵ See D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, 3rd ed. (Sydney: Butterworths, 1988) at 101-107 and cases cited therein.

⁴⁴⁶ See *supra* note 357 and accompanying text. For a discussion of the application of principles of statutory construction in the context of native title fishing rights, see J. Blokland & M. Flynn, "Fishing for Equality: The Tide is High" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 263 at 270-73.

⁴⁴⁷ See generally, Lord Hale *De Jure Maris* (Hargrave's Law Tracts, 7, 11); *Malcomson v. O'Dea* (1863) 10 H.L.C. 595 at 618; *Neill v. Duke of Devonshire* (1882) 8 App. Cas. 135 at 178-80 per Lord Blackburn (H.L.). This position is applicable in Australia, see *Minister for Primary Industry and Energy v. Davey* (1993) 47 F.C.R. 151, 119 A.L.R. 108 at 168.

There are three responses to this argument.

- (1) The principal response is that the question ultimately turns upon the difference between a private (or proprietary or quasi-proprietary) right as opposed to a merely public and non-proprietary right. Indigenous fishing rights recognised at common law do not let an Indigenous person fish anywhere in Australia, but only in those areas traditionally fished by the Indigenous people of which he or she is a member. This will generally be a relatively small contiguous area, in keeping with the proprietary or quasi-proprietary nature of the right. This can be contrasted with the common law right of public fishery under which members of the public may fish in all tidal waters "within the limits of all of the territorial waters of the kingdom".⁴⁴⁸ Such a right is not a proprietary right.⁴⁴⁹ The public right is different in nature to native title or an Indigenous fishing right recognised at common law. The right of an Indigenous person to fish at common law does not apply across most of the country, but is confined solely to their ancestral lands.⁴⁵⁰ In this sense, the Indigenous fishing right is akin to private fisheries in England prior to the *Magna Carta* (which still exist in parts of England).⁴⁵¹
- (2) The public right to fish is a derivative right flowing from the presumed ownership of the soil by the Crown.⁴⁵² As the Crown's radical title to land in Australia is burdened by the surviving native title of the Indigenous peoples, any public rights contingent upon the Crown's full and beneficial ownership of the soil, are subject to pre-existing Indigenous rights.^{452A}

⁴⁴⁸ . *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1977) vol. 18, para. 609.

⁴⁴⁹ . See *Harper v. Minister for Sea Fisheries* (1989) 168 C.L.R. 314 at 330; *Mason v. Tritton* (25 October 1993, N.S.W. Sup. Ct., Young J., 12048 of 1993) [unreported], affirmed by (1994) 34 N.S.W.L.R. 572 (C.A.) at 12 ("in Australian law and English law a right in a member of the public because he or she is a member of the public or a right to be enjoyed by all the inhabitants of a State is not considered to be a proprietary rights or a land right").

⁴⁵⁰ . This is subject to qualification by some of the arguments considered in Chapter 4(B), above, dealing with mobility, that may apply in certain specific circumstances.

⁴⁵¹ . In this regard, the treatment of Indigenous fishing rights would probably stand in do different position under the applicable legislation to that of non-Indigenous persons who had been granted a private fishery by the Crown.

⁴⁵² . See *Neill v. Duke of Devonshire*, *supra* note 447 at 178-80 per Lord Blackburn; *Malcomson v. O'Dea* (1863) 10 H.L.C. 595 at 618; c.f. *Attorney-General for British Columbia v. Attorney-General for Canada* [1914] A.C. 153 at 168-171. See also *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1977) vol. 18 para. 625-26.

^{452A} . A contrary argument is that the a right of fishing in offshore waters "is an attribute of ...
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- (3) It is possible to characterise the difference between Indigenous fishing rights and those of the general public in terms of a qualitative difference between a “right” to fish and a “mere privilege” to fish. This approach has been alluded to by the United States District Court when contrasting the common law aboriginal rights and treaty rights of the Indians with that of other citizens of Michigan. The court considered that whilst citizens of Michigan possess “only a privilege to fish” the Indians possessed a “right to fish”.⁴⁵³ In response to claims that the court’s approach discriminated against non-Indian fishermen, the court observed that “the white man is a late comer to the Great Lakes fisheries when it is considered in the light of centuries”. Accordingly, “[s]portsmen and non-Indian commercial fishermen cannot raise the issue of equal protection without showing entitlement founded upon use and occupancy similar to that of the Indians”.⁴⁵⁴

There are some difficulties with this “right” versus “mere privilege” characterisation, as the public’s right to fish (at least in tidal waters) is a legally enforceable right, which may only be taken away by statute. Nevertheless, the court’s approach reflects the fundamentally different nature of the respective fishing rights in question.

From this perspective, an application of the above cannons of statutory construction may lead to different conclusions as to whether the legislation is intended to apply to private or quasi-proprietary Indigenous rights as opposed to rights of the general public. The different conclusion results, not from the fact that the rights are held by Indigenous persons, but due to the different nature of the rights in question.

In addition, to these usual cannons of statutory construction, the courts in other common law countries have developed a specific principle of statutory construction in dealing with Indigenous rights or native title, namely, that any doubtful expressions should be construed

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sovereignty, rather than a proprietary right available under private law” (see *Minister for Primary Industry and Energy v. Davey*, *supra* note 447 at 160 and *Harper v. Minister for Sea Fisheries* (1989) 168 C.L.R. 314). This is clearly the situation under the general common law. However, as discussed previously, in recognising Indigenous rights the common law does not force them to accord to form of existing property rights recognised at common law. It would appear to be an open question whether the common law, in recognising rights deriving from another legal system which pre-date the introduction of the common law, can recognise private rights in territorial waters. This matter is discussed further in a number of the articles cited *supra* in note 413.

⁴⁵³ . *United States v. Michigan*, *supra* note 244 at 260 at 266.

⁴⁵⁴ . *Ibid.* at 271.

in favour of Indigenous peoples.⁴⁵⁵ As that specific principle of statutory construction is based in part on the existence of a fiduciary duty of the Crown to Indigenous peoples or on the avowed solicitude of the Crown to their welfare,⁴⁵⁶ the same basis may not exist on which to found such a principle of statutory construction in Australia. The High Court of Australia has, to date, preferred to apply the usual principles of statutory construction, discussed above, in dealing with Indigenous rights rather than treating such rights in a different manner to other rights.⁴⁵⁷

Whether regulations are to be interpreted as applying to Indigenous fishing rights may depend upon the nature of the regulations in question. Where the regulations regulate the manner in which the right is exercised and do so in a relatively non-intrusive manner it may be appropriate to assume that they apply to all persons fishing. However, where the regulations are such to substantially deprive the holder of Indigenous fishing rights the ability to enjoy those rights, then the issue becomes whether parliament intended to deprive those persons who had a proprietary right in fisheries of the ability to exercise that right. The resolution of this question will depend upon the particular nature of the regulation in question. Where the primary purpose of the regulation is conservation of a species it is more likely that parliament intended to override any applicable property rights. However, where the purpose of the regulation is to grant commercial interests to individual interests, there is less reason to assume that parliament intended this is to be done at the expense of existing property holders (particularly where, as is the case, no compensation is provided to existing Indigenous interest holders).

⁴⁵⁵ . See *supra* note 373 and accompanying text. The courts have also adopted a principle of statutory construction that legislation must evidence a clear and plain intent to extinguish Indigenous rights, see *supra* note 357 and accompanying text. The Australian courts, while adopting this latter test, have considered it to simply be a particular application of the general rules of statutory construction concerning extinguishment of private rights, see *Wik Peoples v. Queensland*, *supra* note 7 at 155 per Gaudron J.

⁴⁵⁶ . See *supra* note 373 and accompanying text.

⁴⁵⁷ . In the recent decision of *Wik Peoples v. Queensland*, *supra* note 7, the only member of the High Court who seemed to adopt a broader approach was Kirby J. He referred to principles being protective of the rights of Indigenous peoples being known at common law and existing in colonial times in light of the duty of the Crown, in honour, to Indigenous peoples under its protection (at 248). He also phrased the clear and plain intention text against extinguishment in terms of extinguishing native title (at 247). However, Gaudron J. considered that the rule "is not a special rule with respect to native title; it is simply a manifestation of the general and well settled rule of statutory construction ..." (at 155).

Accordingly, different consequences may apply to regulations designed for conservation (which affect all persons) and those which are designed to confer a benefit for particular groups or individuals but would be primarily at the expense of Indigenous peoples (if the regulation were to apply to them).⁴⁵⁸

Two other matters which may affect the extent to which persons exercising common law Indigenous fishing rights are bound by existing regulations are the *Racial Discrimination Act* 1975 (Cth.) and *Native Title Act* 1993 (Cth.). These will now be considered.

C. IMPACT OF THE *RACIAL DISCRIMINATION ACT* ON THE REGULATION OF INDIGENOUS FISHING RIGHTS

The general impact of the *Racial Discrimination Act* 1975 (Cth.) on Indigenous rights has been discussed above.⁴⁵⁹ This section focuses on its impact upon the regulation of Indigenous fishing rights. The same principles apply to Indigenous hunting and gathering rights.

The *Racial Discrimination Act* 1975 (Cth.) only applies to discriminatory actions. Hence, regulations which affect Indigenous fishing rights in a non-discriminatory manner vis a vis other fishing rights will not be affected by the *Racial Discrimination Act* 1975 (Cth.). However, regulations which on their face apply to all persons but in fact impinge only upon the rights of Indigenous peoples (which may be the case where Indigenous persons have rights not shared by others in the community) may be discriminatory.⁴⁶⁰

It will not always be a straightforward exercise to determine what regulations affecting Indigenous fishing rights will infringe the *Racial Discrimination Act* 1975 (Cth.). At one end of the spectrum is legislation that imposes a restriction for the purpose of conferring rights to third parties and does so only at the expense (or predominately at the expense) of native title holders. Such legislation is more likely to infringe the *Racial Discrimination Act* 1975 (Cth.). At the other end of the spectrum are regulations solely directed at conservation. Such regulations are less likely to infringe the *Racial Discrimination Act* 1975 (Cth.).

⁴⁵⁸ . This is discussed further *infra* note 499 and accompanying text.

⁴⁵⁹ . See *supra* notes 43-54 and accompanying text.

⁴⁶⁰ . See *supra* notes 47-49 and accompanying text. This matter is also discussed in Blokland & Flynn, *supra* note 446 at 223-75.

For example, a blanket ban on any fishing of an endangered species affects all persons. Whilst the impact of the restriction may be heavier on native title holders (who may be more reliant on that species than other persons), the legislation is arguably still neutral. The legislation is unlikely to be characterised as legislation which singles out Indigenous persons for special treatment, but rather seen as the means by which the public interest in the conservation of the species must be carried out and which necessarily must affect all persons regardless of the source of their fishing rights.⁴⁶¹ Also as overseas courts have observed, such regulations are in fact consistent with the (future) enjoyment of native title fishing rights as they are designed to preserve the subject matter of the right.⁴⁶²

Regulations which have a dual purpose - for example, conserving the species by limiting the total catch as well as allocating the harvestable portion of a species amongst different users - are more problematic. If the true purpose of a particular regulation is to allocate the harvestable fishery to third parties at the expense of the existing common law rights of Indigenous persons then that particular regulation may infringe the *Racial Discrimination Act* 1975 (Cth.). Though the objective of conservation or of management may be non-discriminatory, the method of implementing it may be held to be discriminatory.⁴⁶³

The interaction between the *Racial Discrimination Act* 1975 (Cth.) and State fisheries legislation was considered by one member of the Western Australian Court of Appeal in *Derschaw v. Sutton*.⁴⁶⁴ The dissenting judgment of Justice Wallwork proceeded on the basis that if the regulation in question purported to apply to the defendants' native title fishing rights, it contravened the *Racial Discrimination Act* 1975 (Cth.) and therefore was inoperative.⁴⁶⁵ The notice in question purported to restrict the manner of fishing of all

⁴⁶¹ . A different situation may apply if the legislation were to provide compensation for existing licence holders as a result of their may being able to catch the species, but no compensation provisions apply to the native title holders. In that case the exclusion of the native title holders from the compensation provisions may well be discriminatory, but the prohibition on catching would still be valid.

⁴⁶² . See *infra* note 616 and accompanying text.

⁴⁶³ . For a discussion of the need for such legislation to achieve its object by the means which cause minimum interference with Indigenous fishing rights, in the context of s. 35(1) of the *Constitution Act* 1982, in Canada see *infra* notes 786 and accompanying text.

⁴⁶⁴ . (16 August 1996, W.A. C.A., No.s S.J.A. 1174-77 of 1994, Lib. No. 960449S) [unreported], affirming (1995) 82 A. Crim. R. 318, special leave to appeal to the H.C.A. refused (unreported, H.C.A., 30 May 1997, No. P44-46 of 1996).

⁴⁶⁵ . *Ibid.* at 23. Wallwork J. dissented on the principal issue in the case as to whether the defendants had led sufficient evidence to raise the issue of whether they were exercising a native title fishing right. However, the remainder of his reasoning is not contrary to that of the majority.

general members of the public but not that of certain professional fishermen holding appropriately endorsed licences under the legislation. The effect of the notice was "that licensed professional fishermen can by endorsement of their licence be given greater rights to fish than Aboriginal people exercising their native title fishing rights".⁴⁶⁶ Indeed, counsel for Western Australia conceded that the *Racial Discrimination Act* 1975 (Cth.) would operate to override a State law that sought to restrict a private right enjoyed by Indigenous persons (as opposed to public rights enjoyed by all citizen), in a discriminatory manner.⁴⁶⁷ The other judges did not need to consider this issue.⁴⁶⁸

A contrary view was taken by Justice Young in the Supreme Court of New South Wales in *Mason v. Tritton*.⁴⁶⁹ In his view a law which "reduces aboriginal rights to the same state as other people's rights" was not racially discriminatory.⁴⁷⁰ However, His Honour's statement was made in the context of the very vague evidence in the case concerning the nature of the alleged Indigenous fishing right. In light of the paucity of the evidence, His Honour seemed to proceed on the basis that the Indigenous right was akin to a public right to fish at common law. As previously discussed, this is not necessarily the case.⁴⁷¹ This is different to the nature of the right contemplated by Wallwork J. in *Derschaw v. Sutton*, which was in the nature of a private right. The removal of a private right enjoyed only by the persons of a particular race or races *would* be racially discriminatory.⁴⁷² The judgment of Young J. was appealed to the New South Wales Court of Appeal. Only Kirby P. referred to the operation of the *Racial Discrimination Act* 1975 (Cth.) upon the fisheries legislation in question. Given his view on other matters in the appeal, he considered that it was unnecessary to determine the issue. However, he went on to state that assuming that the *Racial Discrimination Act* 1975 (Cth.) was applicable, then in his view it would not be inconsistent

⁴⁶⁶ . *Ibid.* at 9. The fact that some professional fisherman were exempt from the restriction in question was considered significant by Wallwork J., *ibid.* at 6, 9, 14.

⁴⁶⁷ . *Ibid.* at 16-17, 23 (in the judgment of Wallwork J.)

⁴⁶⁸ . *Ibid.* at 25.

⁴⁶⁹ . *Supra* note 449

⁴⁷⁰ . *Ibid.* at 25.

⁴⁷¹ . See *supra* notes 448-454 and accompanying text.

His Honour also expressed the view that where rights of A and B have different origins "and *both have the same content*, that if one abolishes both the rights A and B have" one is not "discriminating in favour or against either A or B" (*id.*) (emphasis added). This statement clearly does not apply in circumstances where the content or nature of the rights of A and B and qualitatively different.

⁴⁷² . See (1988) 166 C.L.R. 186, 63 A.L.J.R. 84, 86 A.L.R. 12.

with the regulation in question. Unfortunately, having expressed that conclusion, he decided "not [to] extend these already long reasons by elaborating the point".⁴⁷³ Accordingly, we are left without the benefit of His Honour's reasoning. The other judges in the Court of Appeal stressed the need for the appellants to establish the precise nature of the Indigenous fishing right in question.⁴⁷⁴ To the extent that the reasoning of Young J. is confined to a situation where Indigenous and non-Indigenous rights have the same nature and content, there may be no conflict with the reasoning of Wallwork J. However, if Justice Young's reasoning is not confined to that limited circumstance, it is submitted that the reasoning of Wallwork J. concerning this matter is correct.

The Court of Appeal judges are correct to emphasise the need for evidence as to the nature of the right in question. Ultimately, the issue of whether a particular regulation is racially discriminatory must be analysed in the particular circumstances. It will depend both upon the precise nature of the Indigenous right in question and upon the practical operation of the legislation itself. The latter point can be illustrated by the following example. Take a situation where the legislation is superficially neutral but contains a licensing regime which only permits certain classes of activities, such as commercial fishing, by holders of licences issued under the legislation. Let us further assume the following matters: (a) at the commencement of the legislation an Indigenous people hold an unextinguished Indigenous fishing right recognised at common law; (b) departmental policy is not to issue any further commercial licences, but simply to renew existing licences;^{474A} (c) the savings provisions of the legislation provide that any person holding *statutory* interests under prior legislation are deemed to hold an equivalent licence under the new legislation. In those circumstances the legislation effectively precludes the exercising of Indigenous fishing right. Arguably, the legislative regime does not treat Indigenous fishing rights equally with rights held by other members of the public, but rather gives preference to existing statutory right holders (who, due to historical and other reasons will normally be non-Indigenous persons). In which case it is arguable that the legislative prohibition on Indigenous persons exercising their rights contravenes the *Racial Discrimination Act 1975* (Cth.).

⁴⁷³ . *Mason v. Tritton*, *supra* note 159 at 594.

⁴⁷⁴ . See *supra* note 162ff and *infra* notes 721-725 and accompanying text.

^{474A} . This is the situation in a number of states, see R. Green, S. Harris & D. Throsby, *Ecologically Sustainable Development Working Groups: Final Report - Fisheries* (Canberra: Australian Government Publishing Service, 1991).

This discussion concerning the operation of the *Racial Discrimination Act* 1975 (Cth.) on State and territory regulations affecting Indigenous fishing rights is similar to that in the proceeding section of this thesis dealing with statutory construction. This is not surprising since in relation to the issue at hand - the protection of private fishing rights of a quasi-property nature - the *Racial Discrimination Act* 1975 (Cth.) and the common law cannons of statutory interpretation both seek to preserve existing property rights - the common law on a broad basis and the *Racial Discrimination Act* 1975 (Cth.) where actions affect those rights on a discriminatory basis. However, though the principles may be similar, the cannons of statutory interpretation can be displaced by clear words in a statute, whereas a State law cannot displace the operation of the *Racial Discrimination Act* 1975 (Cth.).

D. IMPACT OF THE *NATIVE TITLE ACT* ON THE REGULATION OF INDIGENOUS FISHING RIGHTS

The *Native Title Act* 1993 (Cth.) affects the regulation of native title fishing rights in two main ways.⁴⁷⁵

(i) Permissible future acts

The first aspect of the *Native Title Act* 1993 (Cth.) which affects the future regulation of native title fishing rights relates to future impairment of native title. Native title (including fishing, hunting and gathering rights) are not able to be extinguished contrary to the *Native Title Act* 1993 (Cth.).⁴⁷⁶ Furthermore, acts other than "permissible future acts" are invalid to the extent that they affect native title.⁴⁷⁷ The definition of a "permissible future act" was

⁴⁷⁵ . There has been surprisingly little commentary on the impact of the *Native Title Act* 1993 (Cth.) on fisheries. The most detailed consideration is in ATSIJ, *Native Title Report June 94*, *supra* note 26 at 153-57. See also P. Jeffrey, "Native Title and the Australian Fishing Industry" (1994) 53:11 Australian Fisheries 6 (which is essentially a verbatim restatement of the applicable provisions of the *Native Title Act* 1993 (Cth.)).

⁴⁷⁶ . *Native Title Act* 1993 (Cth.) s. 11(1).

⁴⁷⁷ . *Ibid.* ss. 22, 236. Renewals, extensions or re-grants of pre-1994 commercial leases are also permissible future acts: *ibid.* s. 235(7). However, as most fishing interests are licences and not leases, this provision is not applicable to most of the fishing industry. Certain renewals of, or options contained in, pre-1994 licences or interests may also be permissible. These are not dealt with under the "future act" regime, but rather are deemed to be "past acts": *ibid.* ss. 228(3)-(9). They are dealt with by the validation provisions concerning past acts. The operation of these provisions are highly complex, requiring an act that was wholly or partially invalid due to the existence of native title, to trigger the provisions. A consideration of these provisions is outside the scope of this thesis.

clearly drafted with native title interests in land in mind. Hence, the application of the definition to fishing, hunting and gathering rights is somewhat awkward.⁴⁷⁸

The simpler part of the definition concerns future acts in relation to an “offshore place”, all of which are “permissible future acts”.⁴⁷⁹ An offshore place is land or waters beyond the limits of a State or Territory. Hence, any fisheries legislation applicable beyond State limits would be an offshore act and a “permissible future act”.

For onshore places (i.e. land or waters within a State or Territory) the following are permissible future acts:

- (a) certain low impact future acts⁴⁸⁰ prior to, but not after, a determination of native title is made in respect of an area.

For example, under this provision the grant of a fishing licence would be a permissible future act if no native title determination has been made in the area of the licence, but the licence would cease upon the making of a native title determination (if the licence is inconsistent with that native title determination).

- (b) the act could be done if the native title holders instead held freehold title to the land concerned;⁴⁸¹ or
- (c) the act could be done to the waters concerned if the native title holders held freehold title to the land adjoining, or surrounding, the waters.⁴⁸²
- (d) in the case of legislation, the legislation applies in the same way to native title holders as it would if they instead held freehold title to the land or to the land adjoining, or surrounding, the waters affected or the effect of the legislation is

⁴⁷⁸ . Indigenous fishing, hunting and gathering rights recognised at common law are included in the definition of “native title rights and interests” in the Act, see *supra* notes 60 and 163 and accompanying text.

⁴⁷⁹ . *Native Title Act 1993* (Cth.) s. 235(8)(a).

⁴⁸⁰ . *Ibid.* s. 235(8)(b). “Low impact future acts”, relevantly, do not include the grant of a lease of the conferral of a right of exclusive possession over any land or waters: *ibid.* s. 234(b).

⁴⁸¹ . *Ibid.* s. 235(5)(b)(i).

⁴⁸² . *Ibid.* s. 235(5)(b)(ii).

not such to cause the native title holders to be in a more disadvantageous position at law than they would be if they instead held freehold title to the land or to the land adjoining, or surrounding, the waters.⁴⁸³

The difficulty with this definition is apparent. Leaving aside low impact future acts, the definition focuses on land *ownership*. For the purpose of determining what actions are permissible in future, native title is equated with freehold ownership of land. The act in question is permissible if it treats Indigenous native title holders at no disadvantage vis a vis holders of freehold title. However, fishing rights are generally unrelated to freehold ownership. Hence, the definition does not fit. On one view, all future fisheries legislation is therefore permissible even if detrimentally affects native title fishing rights whilst leaving other fishing rights untouched. This would seem to run counter to the policy of the Act in endeavouring to provide increased protection of native title rights from future impairment.⁴⁸⁴ To apply the policy underlying the Act of equating native title interests with the strongest form of private interests at common law and granting native title the same degree of protection, the logical test for fishing rights would be to classify as a permissible future act that legislation which treats native title fishing rights at least as favourably as other existing (whether statutory or common law) fishing rights held by other persons in the area. However, it remains to be seen to what extent the underlying policy of the Act will influence the courts interpretation of these sections.⁴⁸⁵

In light of these provisions, the Aboriginal and Torres Strait Islander Social Justice Commission, in his annual statutory report on the operation of the *Native Title Act* 1993 (Cth.) concludes that the Act “offers only limited protection for the fishing rights of Indigenous people” which, in his view, “does not impair the existing activities of the fishing industry”.⁴⁸⁶

The non-extinguishment principle applies to most “permissible future acts”.⁴⁸⁷ This means that the rights and interests of the native title holders will be temporarily suspended to the

⁴⁸³ . *Ibid.* 235(2).

⁴⁸⁴ . In particular, see the Preamble and ss. 3(a), 3(b), 10.

⁴⁸⁵ . A similar problem exists with the wording of the provisions dealing with procedural rights in relation to permissible future acts: s. 23(6), and the “similar compensable interest test”: s. 240.

⁴⁸⁶ . ATSIJSC, *Native Title Report June 94*, *supra* note 26 at 153.

⁴⁸⁷ . *Ibid.* s. 23(4)(a). The major exception is for compulsory acquisition by the Crown for a particular purpose. An act done in giving effect to that purpose (though not the initial compulsory acquisition) may extinguish the native title interests: *ibid.* s. 23(2).

extent of any inconsistency for the duration of the act (e.g. for the duration of the licence period) but after that period they will fully revive.⁴⁸⁸ Hence, there can be no issue of the grant of future fisheries interests extinguishing native title fishing interests.

In the event that definition of “permissible future act” has the consequence that the *Native Title Act* 1993 (Cth.) does not limit the type of future fisheries management, any State or Territory legislation must nevertheless still comply with the provisions of the *Racial Discrimination Act* 1975 (Cth.) in the manner in which it regulates Indigenous fishing rights.⁴⁸⁹ Furthermore, the *Native Title Act* 1993 (Cth.) requires that native title holders be compensated for any future impairment of their rights.⁴⁹⁰

(ii) *Removal of certain prohibitions affecting native title holders*

The second aspect of the *Native Title Act* 1993 (Cth.) which affects the exercise of native title fishing rights is section 211(2), which provides:

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.

The “classes of activity” are hunting, fishing, gathering, cultural or spiritual activities or any other prescribed kind of activity.⁴⁹¹ The subsection applies where native title rights and interests in relation to land or waters include, or consist of, the carrying on of certain classes of activity and a law of the Commonwealth, a State or a Territory prohibits or restricts

⁴⁸⁸ . *Ibid.* s. 238.

⁴⁸⁹ . See *Native Title Act* 1993 (Cth.) s. 7(1) which states that the operation of the *Racial Discrimination Act* 1975 (Cth.) is not to be affected by the *Native Title Act* 1993 (Cth.). In *Western Australia v. Commonwealth*, *supra* note 17 at 483 the High Court of Australia observed that the *Native Title Act* 1993 (Cth.) “assumes, or at least allows for, the operation of the *Racial Discrimination Act*” in relation to future discriminatory acts affecting native title rights or interests.

⁴⁹⁰ . For a discussion of compensation issues in , see D.C.H. Mah, “Compensation Issues” in G.D. Meyers, ed. *Implementing the Native Title Act: Selected Discussion Papers of the National Native Title Tribunal* (Perth: National Native Title Tribunal, 1996) 16

⁴⁹¹ . *Native Title Act* 1993 (Cth.) s. 211(3).

persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument issued or granted under the law.⁴⁹²

Accordingly, where a blanket prohibition is imposed under a statute, say against fishing, but the statute permits persons to apply for, say, an amateur fishing licence or commercial fishing licence which entitles them to fish, then native title holders are exempt from the requirement to obtain the licence in exercising their native title rights. However, native title holders would not be exempt from other provisions of the statute which apply universally to all persons, such as a prohibition of certain types of fishing gear or closed seasons.⁴⁹³ No reported decisions have yet considered the operation of the section.⁴⁹⁴

Some doubt exists as to the breadth of the section. It is clear that native title holders will only be exempt if they are exercising a native title right and for the purpose of satisfying their personal, domestic or non-commercial communal needs. However, it is not apparent whether *any* exception from a general prohibition will trigger the section in its entirety. For example, where legislation prohibits all persons from taking an endangered species, other than scientists under a special licence for scientific purposes, it is not clear whether the section would operate to permit native title holders exercising an native title fishing or hunting right to take as many of the species they wished for their own domestic purposes. That would appear to be the plain meaning of the section. However, it is more likely that the courts will seek to avoid that result. As previously discussed, the portions of the Act dealing with future actions by third parties on native title land equates native title rights to freehold thereby removing the disadvantage that native title holders were under in comparison to

⁴⁹² . *Native Title Act* 1993 (Cth.) s. 211(1). Laws which confer rights or interests only on Indigenous peoples are excluded from the operation of the section: s. 211(1)(c). Hence, if a statute prohibits any person from fishing for, say, an endangered species and the only exemption contained within the statute is for Indigenous persons who are permitted to fish in accordance with the terms of a special licence which may be granted to them under the statute, then the *Native Title Act* 1993 (Cth.) does not remove the requirement for native title holders to obtain the licence under the statute and comply with its terms.

⁴⁹³ . Berry, *supra* note 101 asserts that the effect of s. 211 "seems to be that Aborigines and Torres Strait Islanders who have native title rights or interests may hunt in accordance with those rights and interests *regardless of any law*, unless that law specifically regulates that activity by conferring rights or interests only on of for those indigenous persons" [emphasis added] (at 326, see also at 332). However, that is clearly erroneous. Section 211 does not exempt Indigenous persons who are exercising native title rights, from statutory prohibitions applicable to all persons without exception. This latter view is consistent with the view of the acting Senior General Counsel of the Native Title Unit of Attorney-General Department of the Commonwealth, see P. Jeffrey, "Native Title and the Australian Fishing Industry" (1994) 53:11 *Australian Fisheries* 6 at 7.

⁴⁹⁴ . However, an unreported Magistrates Court decision in Queensland, presently under appeal, appears to have acquitted the defendant on the basis of the operation of the section. See *supra* note 156.

persons who held freehold, it can be argued that the purpose of s. 211 is to ensure that native title holders are not disadvantaged vis a vis any other sector of the community in terms of the regulation of fishing, hunting and gathering rights. Accordingly, it will be interesting to see how the courts interpret the exemption in relation to fisheries legislation that only allows fishing for special purposes not which do not permit commercial, recreational or private fishing use.

The use of the phrase "personal, domestic or non-commercial communal needs" is interesting. By only applying the requirement that the activity be "non-commercial" in relation to communal needs, the sub-section arguably permits commercial activities where the native title fishing right is exercised for personal or domestic needs.⁴⁹⁵ Arguably, fish caught and sold in the exercise of a native title fishing right for the purpose of raising money for a personal or domestic needs (such as acquiring medication or baby food) come within the exemption. This seems to be a product of poor drafting rather than a specific policy decision of the government to allow this type of small-scale commercial sale.

An example of a situation that would clearly be encompassed within the section is the fact situation presented in *Derschaw v. Sutton*.⁴⁹⁶ There, under the applicable Western Australian legislation, the prohibition on the use of the fishing nets did not apply to professional fishermen holding licenses under the legislation endorsed with an exemption from the notice. Accordingly, the Indigenous persons would be exempt from the prohibition on the use of the nets when fishing to obtain food for a wake at a burial if they can establish they are exercising native title fishing rights.⁴⁹⁷

⁴⁹⁵ . In this regard, the definition of "native title rights and interests" expressly includes both communal and individual rights of Indigenous peoples which are recognised at common law: *Native Title Act* 1993 (Cth.) s. 223(1).

⁴⁹⁶ . (16 August 1996, W.A. C.A., No.s S.J.A. 1174-77 of 1994, Lib. No. 960449S) [unreported], affirming (1995) 82 A. Crim. R. 318, special leave to appeal to the H.C.A. refused (unreported, H.C.A., 30 May 1997, No. P44-46 of 1996)

⁴⁹⁷ . Section 211 was not applicable in the actual case as the events in question occurred on 21 February 1993, which was prior to the commencement of the *Native Title Act* 1993 (Cth.). However, the fact that certain professional fishermen were exempt from the restriction was a significant factor in the decision of the dissenting judge in holding that the prohibition did not apply to the defendant: see the discussion of Wallwork J's judgment in relation to the application of the *Racial Discrimination Act* 1975 (Cth.) *infra* notes 464-467 and accompanying text.

E. REGULATION OF COMMERCIAL ASPECTS OF INDIGENOUS FISHING RIGHTS

A further consideration is the impact of principles of statutory construction, the *Racial Discrimination Act* 1975 (Cth.) and the *Native Title Act* 1993 (Cth.) on existing regulatory regimes in so far as they effect any Indigenous commercial fishing rights recognised at common law. The preliminary issue as to whether Indigenous fishing rights recognised at common law include a right to fish for commercial purposes is addressed in the next Chapter. For present purposes, it will be assumed that such rights can exist, and the issue of the regulation of those rights will be discussed.

The exemption in the *Native Title Act* 1993 (Cth.) concerning native title fishing rights previously referred to would seem, subject to the drafting matter discussed in the previous part, to be limited to non-commercial use. However, to the extent that the common law recognises an Indigenous commercial fishing rights, the better view would appear to be that the *Native Title Act* 1993 (Cth.) does not limit those common law rights.⁴⁹⁸ Accordingly, the question as to whether existing legislation is to apply to the exercise of such a right remains for consideration.

There is a tendency to approach this issue on the assumption that either the whole of the applicable regulatory regime is to apply to Indigenous fishing rights or none of the regulatory regime is to apply. However, that need not be the case. As a matter of statutory construction it may be that different parts of the regime may or may not apply to the particular type of right in question. For the purpose of discussion, let us assume, somewhat simplistically, that the provisions of a particular regulatory regime can be divided into two

⁴⁹⁸ For example, the objectives of the *Native Title Act* 1993 (Cth.) set out in s. 3 are, inter alia, "to provide for the recognition and protection of native title". See also s. 10. Similarly, the Preamble to the Act speaks in terms of "full recognition", and refers to the need for their common law rights to be "supplemented" and that native title holders be able to "enjoy fully their rights and interests". Nowhere in the Act (other than with respect to the validation provisions), or in its explanatory memorandum or the second reading speech, is there any indication that parliament intended the Act to operate to limit native title rights recognised at common law. Therefore, the specific exemption of native title holders from certain types of fishing, hunting and gathering regulations where undertaken for non-commercial purposes, would seem to be an additional protection granted to native title holders, rather than an attempt to impliedly limit the scope of native title fishing rights to non-commercial activities.

(Note: Extrinsic material such as explanatory memorandum, second reading speeches in the House of Representatives or Senate, and parliamentary debates are admissible as an aid to statutory construction in all Australian jurisdictions. e.g. see *Acts Interpretation Act* 1901 (Cth.) s. 15AB. They are frequently referred to in judgments. See further D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, 3rd ed. (Sydney: Butterworths, 1988) at 45-49.)

categories. The first category is those provisions primarily concerned with conservation. The second category is those provisions primarily concerned with the grant of valuable commercial rights in relation to the resource in question (say, fisheries) upon the payment of a fee to the Crown and the subsequent protection, management and provision for transfer of those rights. The former provisions have a specific objective - to preserve the species in question. As a matter of statutory construction there is no reason why those would not be applicable to all activities which would otherwise affect the conservation of those species. The purposes of second category of provisions are more complicated. Depending upon the legislation in question, the purposes may include providing a degree of economic security to the licensees to encourage them to spend capital to exploit the resource, providing a source of revenue for the Crown, providing for the orderly management of a resource, and so on. The legislation may well have been enacted on the assumption that no person had any existing private interests in the resource other than that conferred by prior legislation. Hence the legislature will rarely have expressly addressed the relationship between the new rights to be conferred and any existing private rights in the fishery recognised at law which arise independently of the legislation, such as native title fishing rights.⁴⁹⁹

The issue is again primarily a matter of statutory construction, namely whether the regime for the granting of new interests in the fishery is intended to exclude existing valuable commercial interests. To a degree, this necessarily involves supposition as the legislature did not have native title rights in mind at the time it enacted the legislation. Hence, one falls back upon established canons of statutory interpretation.⁵⁰⁰ This includes a presumption that the legislature does not intend to deprive persons of property rights without compensation in the absence of clear language. This is not the occasion for a discussion as to whether native title rights are properly categorised as property rights. However, at least they are analogous to property rights. Accordingly, the question in each case is whether the legislation is to be interpreted as intending to abrogate existing valuable commercial rights, particular where it does not provide for compensation.

It is rare for the Crown to seek to acquire revenue for itself by appropriating others rights and then re-granting them (in a new form) to others. Similarly, it is rare for the Crown to undertake a blanket appropriation or extinguishment of existing commercial rights. Such acts of appropriation or nationalisation are usually moments of great concern. Accordingly, while

⁴⁹⁹ . The provisions of fisheries legislation in New South Wales and Tasmania, which expressly refer to native title interests, are discussed in Chapter 6(F)(i) "Specific statutory provisions dealing with the relationship between native title fishing rights and general regulatory regimes", below.

⁵⁰⁰ . These are discussed in Chapter 6(B) "An Issue of Statutory Construction", above.

the Crown has power to appropriate any existing interests, it is usually done clearly. Likewise, it must be asked whether the legislation was intended to enrich certain persons (such as where it grants renewable and transferable commercial licences) at the expense of another segment of the community. In this regard a prohibition on other members of the public fishing except under the licence provisions of the statute may simply be part and parcel of protecting the commercial licence interests granted under the same statute. In the event that the commercial licence is not intended to be granted at the expense of existing Indigenous right holders, the prohibition would fall away as against them to the extent they were exercising native title rights if its purpose was simply to provide a mechanism to protect the other statutory interests.⁵⁰¹

Assistance in resolving this issue may be gained from the other parts of the legislation in question. For example, if the legislation provides that the Crown may cancel the interests granted upon the payment of compensation or buy back the interests granted under the legislation or for the preservation of rights granted under prior statutory regimes, this may indicate an intent of the legislature to protect the existing interests of persons in the fisheries, notwithstanding the Crown's control over the resource.

Where legislation of a State or territory is interpreted as applying to any existing Indigenous commercial fishing rights, there is a further question as to whether the legislation contravenes the *Racial Discrimination Act* 1975 (Cth.). In particular, if the legislation is taken to extinguish or render nugatory any existing Indigenous commercial fishing rights (such as by a blanket ban on fishing other than in accordance with licences granted under the legislation) and grants commercial fishing interests to third parties, with the consequence that only Indigenous persons were deprived of existing commercial fishing rights, the legislation may be inoperative by reason of the *Racial Discrimination Act* 1975 (Cth.). As the operation of the *Racial Discrimination Act* 1975 (Cth.) has been discussed in detail earlier, it will not be considered further here.⁵⁰²

⁵⁰¹ . See the discussion concerning the reading down of trespassing provisions in Crown lands legislation so not to apply to native title holders, *supra* note 380 and *infra* notes 546-547 and accompanying text.

As discussed above, a different consideration may apply if the purpose of the prohibition is not simply a mechanism to protect the statutory interests granted, but is intended for conservation purposes.

⁵⁰² . See Chapter 1(D)(iii) "Legal Framework of Indigenous Rights in Australia - *Racial Discrimination Act*", above.

I do not suggest that there is a simple answer in relation to the regulation of existing Indigenous rights to a commercial fishery. The resolution of the issue may differ depending upon the particular legislation involved. However, I do suggest one must go beyond the superficial generality of the legislation in question, which will normally on face value apply to all persons. The mere fact that a particular regulatory regime may appear upon an initial reading to apply to all persons is not conclusive as to whether it is to be read a displacing or abrogating existing Indigenous fishing rights (including any commercial component of those rights). The above cannons of statutory interpretation and the operation of the *Racial Discrimination Act* 1975 (Cth.) must be taken into account in assessing the legislation.

F. SPECIFIC STATUTORY PROVISIONS AND ITQ MANAGEMENT REGIMES

As stated previously, the myriad of regulatory regimes governing fishing, hunting and gathering in Australia are too numerous to analyse in this thesis. Accordingly, this Chapter has concentrated on identifying the principles which will determine whether such regimes affect Indigenous fishing, hunting and gathering rights. However, there are some specific provisions which deal with the relationship between native title rights and general regulatory regimes. These are discussed in this section. In addition the relatively recent introduction of individual transferable quotas in fishery management will be examined due to its potential impact upon Indigenous fishing rights.

(i) Specific Statutory Provisions Dealing with the Relationship between Native Title Fishing Rights and General Regulatory Regimes

Section 10(1) of the *Living Marine Resources Management Act* 1995 (Tas.) provides that an authorisation under the Act "takes precedence over any other public or private fishing rights". However, section 10(2)(a) provides that s 10(1) does not:

- (a) extinguish or impair any native title rights and interests; or
- (b) preclude any Aboriginal cultural activity by an Aborigine so long as that activity is not likely to have a detrimental effect on living marine resources and is consistent with this Act.

Hence, the issue of commercial fishing licences or other types of authorisations under the Tasmanian legislation does not impair native title fishing rights. Presumably, that means that such licences are taken subject to, and may not be exercised in a manner which impairs, native title fishing rights. However, the legislation does not make clear whether persons exercising native title fishing rights are subject to the legislation, as the subsection is

confined to the effect of statutory authorisations *upon* native title and does not deal with the operation of other aspects of the legislation, such as prohibitions on fishing apply to native title fishing rights.

The section is of interest as it deals separately with the issue of native title rights and cultural activities by any Indigenous persons. Conceptually this makes sense since there may be Indigenous persons who for a variety of reasons can no longer claim native title fishing rights. Such persons are therefore treated separately to those Indigenous persons who hold native title rights. However, whilst other parts of the legislation expressly exempts Indigenous persons engaged in an "Aboriginal cultural activity" from the need to obtain a licence, provided the activity is not likely to have a detrimental effect on living marine resources, no such exemption is made for persons exercising native title fishing rights.⁵⁰³ The exemption in respect of "Aboriginal cultural activity" does not apply to fishing for commercial purposes.⁵⁰⁴ Hence, whilst it would appear that s. 10(1)(a) means that commercial fishing licences are taken subject to any native title fishing rights, it is arguable that Indigenous persons seeking to exercise their rights for commercial purposes are nevertheless required to obtain an licence under the legislation.

In New South Wales, section 287 of the *Fisheries Management Act* 1994 (N.S.W.) provides that the Act "does not affect the operation of the *Native Title Act* 1993 (Cth.) or the *Native Title (New South Wales) Act* 1994 (N.S.W.) in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect". However, as previously discussed, the *Native Title Act* 1993 (Cth.) does not necessarily prevent the application of future fisheries legislation to native title fishing rights. Hence, "the operation of" the native title legislation would not be affected if the fisheries legislation were to apply to native title fishing rights. Whilst stating that the fisheries legislation does not affect the operation of native title legislation, the section does not deal directly with the issue of whether the legislation is intended to apply to native title fishing rights. However, such a limited interpretation of the section would deprive the section of any effect. It is arguable that the section evidences an intention that the rights righted under the legislation are not to derogate from any native title rights. As with the Tasmanian legislation previously discussed, such an interpretation would still leave the issue as to whether Indigenous persons must still obtain a licence under the legislation when fishing for commercial purposes unresolved.

⁵⁰³ . *Living Marine Resources Management Act* 1995 (Tas.) s. 60(2)(c).

⁵⁰⁴ . See the definition of "Aboriginal cultural activity" in s. 3.

In Western Australia the situation is complicated by the unique legislative history in relation to native title and fisheries legislation. As previously discussed, the Western Australian parliament enacted the *Land (Titles and Traditional Usage) Act* 1993 (W.A.) in response to the *Mabo* decision. That legislation purported to extinguish all native title rights and interests in Western Australia and replaced them with a statutory grant of rights of traditional usage.⁵⁰⁵ The legislation was subsequently held to be inoperative as it conflicted with the provisions of the *Racial Discrimination Act* 1975 (Cth.).⁵⁰⁶ However, in the interim, the Western Australian parliament had enacted new fisheries legislation.⁵⁰⁷ This provided, amongst other matters, for the issue of exclusive fishing licences for a period of up to 14 years.⁵⁰⁸ The legislative regime provided for an objection procedure by persons holding statutory rights of traditional usage who would be affected by the issuance of exclusive fishing licences or aquaculture leases.⁵⁰⁹ The *Land (Titles and Traditional Usage) Act* 1993 (W.A.) contained mechanisms for the notification of persons enjoying rights of traditional usage and determination by the Supreme Court of the precise rights of usage conferred by the statute. However, in light of the invalidity of the legislation, no persons hold statutory rights of traditional usage. Furthermore, the subsequent repeal of the *Land (Titles and Traditional Usage) Act* 1993 (W.A.) has removed the procedural mechanisms that were assumed to be in place, in relation to the determination of rights of traditional usage, by the fisheries legislation.⁵¹⁰ Hence, the objection provisions in the fisheries legislation cannot apply. Furthermore, the legislation was premised upon the existence of statutory rights, which do not exist, and upon the non-existence of native title rights, which do exist. It was also passed at a time when a provision on the statute books expressly declared all general laws applied to rights of traditional usage; hence the fisheries legislation did not need to evidence such an intention itself. However, that declaration, which also formed part of the *Land (Titles and Traditional Usage) Act* 1993 (W.A.),⁵¹¹ has also been repealed.

⁵⁰⁵ . *Land (Titles and Traditional Usage) Act* 1993 (W.A.) s. 7.

⁵⁰⁶ . See *supra* note 53 and accompanying text.

⁵⁰⁷ . *Fish Resources Management Act* 1994 (W.A.).

⁵⁰⁸ . *Ibid.* s. 251.

⁵⁰⁹ . *Ibid.* Part 14, Division 2.

⁵¹⁰ . The *Land (Titles and Traditional Usage) Act* 1993 (W.A.) was repealed by the *Acts Amendment and Repeal (Native Title) Act* 1995 (W.A.) s. 15. The repealing legislation amended numerous other legislation dealing with public works, mining and other matter affected by the repeal. However, it did not deal with effect of the repeal upon the *Fish Resources Management Act* 1994 (W.A.).

⁵¹¹ . *Ibid.* s. 17(2).

Accordingly, the legal consequences of the operation of the current fisheries legislation in Western Australia upon Indigenous native title or fishing rights are not clear. However, it is arguable that in light of the peculiar legislative history, the rights granted under the fisheries legislation do not derogate from or impair any native title fishing rights.⁵¹²

Finally, in Queensland section 13A(1) of the *Acts Interpretation Act* 1954 (Qld.) provides that any legislation enacted after its date of commencement affects native title only in so far as the legislation expressly provides.⁵¹³ It further provides that future legislation is deemed to "affect native title" if it extinguishes or is wholly or partly inconsistent with the continued existence, enjoyment or exercise".⁵¹⁴ Hence, any future fisheries legislation in Queensland will be assumed not to interfere with the enjoyment and exercise of Indigenous fishing rights unless is expressly provides to the contrary.⁵¹⁵

(ii) *Individual Transferable Quotas (ITQs)*

Fisheries management in Australia is undergoing a significant change with the introduction of individual transferable quotas ("ITQs"). Within a designated fishery, the licensed commercial fishing operators are each granted an ITQ which guarantees them a certain (normally fixed) percentage of the particular fishery in any year. The actual number of fish an ITQ holder may catch will vary from year to year as it is dependant on the total allowable catch for that fishery in a particular year. The total allowable catch is set having regard to conservation needs necessary to keep the fishery at an ecologically sustainable level.

⁵¹² Of course, all State legislation must in any event comply with the *Native Title Act* 1993 (Cth.) and the *Racial Discrimination Act* 1975 (Cth.).

⁵¹³ *Acts Interpretation Act* 1954 (Qld.) s. 13A(1).

⁵¹⁴ *Ibid.* s. 13A(2).

⁵¹⁵ Section 36 of the *Acts Interpretation Act* 1954 (Qld.) makes it clear that a reference to "native title" in legislation, unless the context requires otherwise, includes "hunting, gathering and fishing rights and interests" of Indigenous peoples recognised by the common law.

The explanatory memorandum to the *Native Title (Queensland) Amendment Act* 1993 (Qld.), which inserted s. 13A, states that its purpose is "to clarify the effect of future legislation on native title. This makes it [the revised form of s. 13A] consistent with the Commonwealth *Native Title Act* 1993". However, the draftsman of the Queensland legislation may be mistaken in this regard, since, as discussed *supra* notes 478-485 and accompanying text, it is arguable that due the wording of the definition of "permissible future act" in the *Native Title Act* 1993 (Cth.) all future fisheries legislation affecting native title fishing rights is permissible. Of course, the Queensland legislation does not prevent future legislation affecting Indigenous fishing rights, it merely requires it to be expressly stated, which is a higher standard than simply evidencing a clear and plain intent.

Numerous reasons have driven the introduction of ITQs. One of the reasons is that since each ITQ holder has a guaranteed entitlement to a proportion of the harvestable fish in any year, he or she may choose to spread out the time over which those fish are caught. This reduces the inefficiencies and over-capitalisation encouraged by prior systems which generally tried to regulate the number of fish caught through a series of limited openings and closings of the fishery, during which the commercial fishery operators were all free to fish and catch as many fish as possible until such time as the fishery was closed. ITQs therefore reduce production costs. At the same time, by establishing secure, quantifiable rights with market transferability, ITQ regimes permit the Crown to treat fisheries as an asset which it can sell to the highest bidders,⁵¹⁶ subject to the Crown retaining overall management of the resource. Inherent in such regimes are the quasi-property or private rights established in fisheries through the introduction of ITQs.

The movement to ITQs is part of a world wide trend in fisheries management.⁵¹⁷ It is of significance to this thesis is due to the change in the nature of the fishing rights involved. The nature of the rights have changed from a generally non-exclusive right to an exclusive right to fish for that part of the fishery allocated to the ITQ holder. It completes the transformation of fisheries from what was originally treated as a commons, to an increasingly regulated right under licence, to what is now essentially a private right. The widespread introduction of ITQs allocates and divides the world's fisheries into legal entitlements, potentially at the expense of Indigenous peoples' existing rights.

ITQs have been introduced in Commonwealth fisheries management and in a number of Australian States.⁵¹⁸ Whilst the details vary, the essential element is the same, namely the allocation of entitlements to a fixed proportion or number of the total allowable catch of fisheries brought under the regimes. Whether or not ITQs are classified as "property" rights,⁵¹⁹ it is clear that once a defined share of the fishery is allocated to particular persons, the legislature intended to exclude others from catching that portion of the fishery. The issue is whether the legislature intended the implementation of the ITQ regimes to be done in a manner which would exclude Indigenous persons from exercising an Indigenous right to fish.

⁵¹⁶ For example, see *Fisheries Management Act* 1991 (Cth.) s. 29.

⁵¹⁷ See L. Wilson, "ITQs around the World" (1991) 50:10 *Australian Fisheries* 15.

⁵¹⁸ The *Fisheries Management Act* 1991 (Cth.) permits the creation of statutory fishing rights, including a right to a particular proportion of the fishing capacity permitted under a plan of management for a managed fishery: ss. 21(1)(b), 21(1C)(b). The Commonwealth legislation grants considerable latitude to the Australian Fisheries Management Authority to determine the precise

(footnotes continue on next page)

In some jurisdictions the ITQ entitles the holder a percentage of a total allowable catch set for a particular fishery, in others it is a percentage of the total allowable catch allocated to the "commercial fishing sector".⁵²⁰ However, there is a considerable degree of flexibility as to the definition of a fishery, which may permit the exercise of Indigenous rights to be defined as a separate fishery.⁵²¹ As a total allowable catch is set in relation to each fishery, this would permit a separate total allowable catch allocations to be made in respect of ITQ holders and persons exercising Indigenous rights. It must be acknowledged that though this is theoretically possible under many legislative regimes, it is not directly contemplated by any of them. However, as previously discussed, where the legislative confers power on the executive it is not to be taken as authorising the executive to exercise that power in a manner which would extinguish (or arguably impair) native title, in the absence of clear and unambiguous words to the contrary.⁵²² Hence, in exercising the discretion conferred upon them by legislation to implement ITQ regimes, the regulatory agencies arguably must do so in a manner which takes into account the existence of Indigenous rights.

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nature of the fisheries management scheme under plans of management for particular fisheries made by it: ss. 17, 22.

In New South Wales. Part 3 of the *Fisheries Management Act* 1994 (N.S.W.) permits the establishment of commercial share management fisheries and Part 2 Division 4 provides for the determination of total allowable catchers for the fisheries.

In Queensland, Part 5 Division 2 of the *Fisheries Act* 1994 (Qld.) permits the declaration of fish quotas. However, s. 14(1) exempts Indigenous persons acting in accordance with Aboriginal tradition from the provisions of the legislation; see further *supra* notes 101-103 and accompanying text.

In Tasmania, Part 4 Division 6 of the *Living Marine Resources Management Act* 1995 (Tas.) permits the declaration of species subject to quota management. The total allowable catch is allocation amongst licence holders, see ss. 94, 95.

In Victoria, the *Fisheries Act* 1995 (Vic.) provides for the issue of transferable, renewable fisheries licences and Part 4, Division 2 permits the declaration of quota management fisheries where each unit of quota entitles the holder to fish for a specified quantity of fish as declared from year to year.

⁵¹⁹ See further, Australia. Senate Standing Committee on Industry Science Technology Transport Communications and Infrastructure, *Fisheries Reviewed* (Canberra: Australian Government Publishing Service, December 1993) chap. 4 "Property Rights Under the Commonwealth Fisheries Management Act" at 17ff; C. McCamish, "Fisheries Management Act 1991: Are ITQs Property?" (1994) 22 Federal Law Review 375. See also *Minister for Primary Industry and Energy v. Davey*, *supra* note 447.

⁵²⁰ *Fisheries Management Act* 1994 (N.S.W.) s. 78.

⁵²¹ For example, s. 6(2) of the *Fisheries Management Act* 1994 (N.S.W.) permits a fishery to be identified by reference to one or more of, inter alia, the species of fish, an area, class of persons or purpose of activities.

⁵²² *Mabo [No. 2]*, *supra* note 6 at 196 per Toohey J., at 111 per Deane and Gaudron J.J.

The Victorian legislation will be taken as an example. The legislation permits the declaration of a quota managed fishery.⁵²³ The holder of each unit of a quota is entitled to a quantity of fish in the fishery as set out in a declaration for a particular period.⁵²⁴ Unlike legislation in other States, it does not specify how the total allowable catch or quota is to be calculated.⁵²⁵ In accordance with usual principles of statutory construction, the determination must be undertaken in light of the objectives of the legislation. However, what is significant for present purposes is that this leaves room for discretion. Turning to other provisions of the legislation. The legislation expressly provides that no compensation is payable by reason of any loss or damage as a result of its enactment.⁵²⁶ However, the legislation contains transitional provisions which grant holders of permits or licences under the prior legislation access to a licence for a licence with similar entitlements under the new regime.⁵²⁷ One of the specific provisions in the clause dealing with no compensation expressly provides that no compensation is payable for any loss or damage resulting from the conversion of licences or permits under the prior legislation to licences or permits under the new legislation. Hence, when these sections are read in conjunction with each other, it can be seen that the “no compensation” provision is not intended to leave prior statutory right holders without any compensation but, rather, that their compensation is in the form of rights granted to them under the new statutory regime. However, if the ITQ regime under the legislation were to operate so to deprive Indigenous peoples of their rights, they would be deprived of their rights without compensation. Accordingly, as a matter of statutory construction the question needs to be asked whether the legislation is intended to displace the presumption that parliament will not abrogate existing proprietary rights (of Indigenous people) not expressly dealt with under the legislation without compensation.

A clear answer to this question cannot be given. However, it is at least arguable that the legislation does not displace this presumption of statutory construction. Unlike legislation in other States, the issue is not complicated by any exemptions for, or specific provisions dealing with, Indigenous peoples. The legislation is totally silent as to whether it is intended to apply to existing Indigenous rights. This is notwithstanding that it was enacted after the decision in *Mabo [No. 2]* and the enactment of the *Native Title Act 1993* (Cth.). The latter

⁵²³ . *Fisheries Act 1995* (Vic.) ss. 52(1)(a), 53.

⁵²⁴ . *Ibid.* s. 53(2)(b).

⁵²⁵ . This is subject to any regulations proclaimed under the legislation governing the calculation of the total allowable catch.

⁵²⁶ . *Ibid.* s. 143(1).

⁵²⁷ . *Ibid.* s. 155.

at least contemplated the possible existence of native title fishing rights being recognised by the common law. The fact that the legislation expressly denies any right of compensation, but at the same time it “grandfathers” existing statutory interests, suggests the overall legislative regime was not intended to totally strip people of their existing rights. If anything, these strengthens the position of Indigenous right holders as it is consistent with the presumption of statutory interpretation that legislation is not intended to abolish existing rights.

If the Victorian legislation is not intended to abrogate any existing rights of Indigenous people to commercially fish, how is the legislation to operate? The answer is presumably through the declaration of what an entitlement of unit of quota confers on the holder of the quota. This declaration could take into account the need to leave sufficient fish for those Indigenous peoples who can establish an Indigenous commercial fishing right. Obviously this will not be a precise calculation. It will also depend upon the precise nature and extent of the commercial component of any existing Indigenous fishing rights. However, this does demonstrate that it is possible for the legislation and the ITQ regime to operate concurrently with the recognition of Indigenous commercial fishing rights.

Some support for this can be obtained from the legislation itself. One of the objectives of the legislation is “to facilitate access to fisheries resources for commercial, recreational, *traditional* and non-consumptive uses”.⁵²⁸ However, the legislation does not specifically deal with “traditional” uses. The declaration of a quota management fishery “must be consistent with any relevant management plan in force”.⁵²⁹ Management plans must, in turn, “be consistent with the objectives of this Act”.⁵³⁰ Accordingly, it would be anomalous if the manner in which a quota management fishery is implemented totally ignored “traditional” uses of the fishery. If “traditional” uses are considered to include pre-existing Indigenous fishing rights to the fishery recognised at common law and which predate the statutory management of the fishery, then the implementation of the quota management fishery must have regard to their rights.

For the reasons previously discussed in this Chapter it is arguable that the introduction of ITQ regimes does not authorise the impairment of Indigenous rights (either due to interpretation of the legislation itself or operation of the *Racial Discrimination Act* 1975

⁵²⁸ . *Ibid.* s. 3(d) (emphasis added).

⁵²⁹ . *Ibid.* s. 52(6).

⁵³⁰ . *Ibid.* s. 28(6)(a).

(Cth.) or *Native Title Act* 1993 (Cth.) upon the applicable State legislation). Though that may be the legal position, what remedies can Indigenous peoples seek if the regulatory authority proceeds to implement an ITQ regimes in a manner which conflicts with their rights? As Justices Deane and Gaudron observed in *Mabo [No. 2]*, “the fact that rights under [native title] are true legal rights means they can be vindicated, protected and enforced by proceedings in ordinary courts ... Actual or threatened interference with their enjoyment can, in appropriate circumstances, attract the protection of equitable remedies”.⁵³¹ Hence, to the extent that the legislative regimes which govern the grant and management of ITQs do not authorise impairment of Indigenous fishing rights, Indigenous peoples would be entitled to enjoin actions by the executive or persons purporting to act in accordance with ITQ entitlements that infringe Indigenous rights.⁵³²

Indeed, it was the introduction of ITQs in New Zealand that resulted in the first civil declarations, albeit interlocutory, in relation to Maori fishing rights.⁵³³ The court did not have a difficulty with the introduction of an ITQ system per se, if properly implemented. Its concern was that “what has been done in the promulgation and the operation of the quota management system has been done without taking into account Maori rights in the fisheries”.⁵³⁴ The court granted interim declarations which prevented the government from bringing more species under the ITQ regime until legal issues raised concerning Maori rights were determined. The dispute over the introduction of ITQs and the resulting intervention of

⁵³¹ . *Mabo [No. 2]*, *supra* note 6 at 112-13.

⁵³² . For an analysis of the potential use of interlocutory injunctions to prevent interference with Indigenous rights in Australia, see D. Sweeney, “Interlocutory Injunctions to Restrain Interference with Aboriginal Title - The Balance of Convenience” (1993) 17 *University of Queensland Law Journal* 141; G.J. Koppenol, “Interlocutory Injunctions on Native Title” (1997) 17 *Proctor* 26; in Canada, see R. Townshend, “Interlocutory Injunctions in Aboriginal Rights Cases” [1991] 3 *Canadian Native Law Reporter* 1; K. Roach, “Remedies for Violations of Aboriginal Rights” (1992) 21 *Manitoba Law Journal* 498; Reiter, *supra* note 27 at 799-803.

⁵³³ . The legal position in New Zealand as to the relationship between the ITQ regime and Indigenous fishing rights was expressly dealt with in the legislation. Section 88(2) of the *Fisheries Act* 1983 (N.Z.) provided that “Nothing in this Act shall affect any Maori fishing rights”. Hence, it was common ground that the ITQ regime could not infringe Maori rights.

The present position in Australia is less clear. But through either the principles of statutory construction, the operation of the *Racial Discrimination Act* 1975 (Cth.) or the operation of the *Native Title Act* 1993 (Cth.) it is possible that the same position may be reached. If that position is reached, then the New Zealand cases on interlocutory relief would appear to be directly relevant to Australia.

⁵³⁴ . *Ngai Tahu Maori Trust Board v. Attorney-General*, *infra* note 840 at 9.

the courts were major factors leading up to the Sealord settlement of Maori commercial fishing claims.⁵³⁵

It is perhaps for this reason that the New South Wales legislation establishing the framework for the introduction of ITQs expressly provides that the Act does not affect the operation of native title legislation in respect of the recognition of native title rights and interests.⁵³⁶ Hence, any commercial fishing operators who purchase ITQs in New South Wales take them subject to any future native title rights to fisheries. However, as discussed above, the New South Wales legislation is silent as to whether native title holders are also subject to the general regulatory regime.

A final, but significant, consideration in relation to the introduction of ITQs, is the question of compensation for any impairment of Indigenous peoples' common law rights. The legislative framework for the introductions of ITQs in some cases pre-dates, and in other cases post-dates, the *Native Title Act* 1993 (Cth.). However, the legislative regimes simply establish the framework for the management of ITQs. It is only when a regulatory agency announces a plan of management or takes other steps to bring a particular type of fishery within a quota management system that any ITQ rights are created. It is only at this latter stage that any Indigenous fishing rights are impaired.⁵³⁷ So in even in those jurisdictions where the legislation introducing the ITQ management framework was enacted prior to the *Native Title Act* 1993 (Cth.), any grant of actual ITQ interests after the *Native Title Act* 1993 (Cth.) will be governed by the compensation provisions of the *Native Title Act* 1993 (Cth.).⁵³⁸

⁵³⁵ . See *infra* notes 838-856 and accompanying text. ITQs are generally referred to as a "quota management system" (or "QMS") in New Zealand.

⁵³⁶ . See Chapter 6(F)(i) "Individual Transferable Quotas", above.

⁵³⁷ . In this regard the general regulatory regimes stand in a similar position to that of general Crown lands legislation. As with Crown lands legislation, it is only when particular interests are granted under the legislation that any native title rights are impaired. See further, *supra* notes 373-376 and accompanying text.

⁵³⁸ . Compensation is also payable in respect of legislation or actions which impaired native title fishing rights after the commencement of the *Racial Discrimination Act* 1975 (Cth.) on 31 October 1975 and which depend upon the validation provisions of the *Native Title Act* 1993 (Cth.): ss. 17, 20.

Compensation is not generally payable for impairment of native title fishing rights: (1) prior to 31 October 1975; or (2) after that date but prior to the enactment of the *Native Title Act* 1993 (Cth.) where the applicable legislation or action did not affect native title fishing rights in a racially discriminatory manner in contravention of the *Racial Discrimination Act* 1975 (Cth.).

The compensation provisions of the *Native Title Act* 1993 (Cth.) apply both to the extinguishment and impairment of native title rights and interests (including fishing, hunting and gathering rights and interests).⁵³⁹ For present purposes it will be assumed that fisheries legislation enacted since 1 January 1994 and the introduction of ITQs are “permissible future acts” under the *Native Title Act* 1993 (Cth.).⁵⁴⁰ To the extent that the introduction and grant of ITQs impair native title fishing rights compensation is payable to the Indigenous peoples affected.⁵⁴¹ As other provisions of the *Native Title Act* 1993 (Cth.) exempt non-commercial traditional use of fisheries from regulatory regimes which permit other persons to fish under a licence or permit,⁵⁴² compensation issues will tend to be confined to the impairment of the commercial component of Indigenous fishing rights. Not any restriction will amount to an impairment of an Indigenous fishing right and give rise to an obligation to compensate. For example, restrictions on commercial fishing for the purpose of conserving a species have been characterised by overseas courts as facilitating, rather than impairing, the exercise of Indigenous fishing rights (since they are designed to preserve the subject matter of the right).⁵⁴³ But to the extent ITQ regimes restrict commercial Indigenous fishing rights by allocating an entitlement to a portion of the fishery to other persons, compensation will be payable.⁵⁴⁴ Depending upon the precise extent of the commercial component of the native

⁵³⁹ See *Native Title Act* 1993 (Cth.) s. 51(1) where an entitlement for compensation under the Act “is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests”.

⁵⁴⁰ This issue is discussed *supra* notes 477-485 and accompanying text.

⁵⁴¹ *Native Title Act* 1993 (Cth.) s. 23(4) and Part 2, Division 5. See further *supra* note 490.

A potential difficulty with the application of the compensation provisions of the *Native Title Act* 1993 (Cth.) concerning permissible future acts in relation to “onshore places” is that they are predicated upon the satisfaction of a “similar compensable interest test” (see ss. 23(4)(b)(ii)(B), 240). The application of this test is, for the same reasons discussed in relation to the wording of the definition of “permissible future act”, unclear in its application to fisheries, see further *supra* notes 478-485 and accompanying text. However, in the case of impairment of Indigenous fishing rights, the application of the *Racial Discrimination Act* 1975 (Cth.) may, in any event, require that the Indigenous right holders be compensated in a similar manner to statutory right holders. Any such right of compensation is expressly preserved by *Native Title Act* 1993 (Cth.) s. 45.

⁵⁴² See Chapter 6(D)(ii) “Removal of certain prohibitions affecting native title holders”, above.

⁵⁴³ See *supra* note 616 and accompanying text.

⁵⁴⁴ Where the right to compensation arises by virtue of the *Native Title Act* 1993 (Cth.), the person liable to pay the compensation will depend upon the applicable Commonwealth, State or Territory law. However, these may provide that where the action in question is done at the request of a person (e.g. the issue of a licence or quota) that the compensation is payable by that person and, in other circumstances, the compensation is payable by the Crown: see *Native Title Act* 1993 (Cth.) s. 23(5).

title fishing rights of the Indigenous people concerned, the compensation could be considerable.⁵⁴⁵

The uncertainty surrounding the interaction of ITQs and Indigenous fishing rights is unfortunate for all parties concerned. However, the uncertainty is due in a large part to the failure of the legislatures to clarify the relationship between the ITQ management regimes and any Indigenous fishing or native title rights. This is so even though the legislative framework has, in most cases, been enacted since the recognition of native title in *Mabo [No. 2]*. Accordingly, the legislature has chosen to leave the resolution of these issues largely to the courts.

G. SUMMATION

In case it be thought that the arguments in the preceding parts of this Chapter, particularly with respect to statutory construction, constitute a radical departure from the existing approach of the courts, it is worth referring again to two judgments of the High Court of Australia. In *Mabo [No. 2]* the trespassing provisions of the applicable Crown lands legislation made it an offence for a person to be found in occupation of Crown land "unless lawfully claiming under a subsisting lease or licence". As a matter of statutory interpretation it was held that the section was not to be construed as applying to indigenous inhabitants who were in occupation of Crown land by right of their unextinguished native title even though, in the words of the statute, they were not claiming occupation under a lease or licence from the Crown.⁵⁴⁶ Similarly, in *Walden v. Hensler* Brennan J. raised of his own motion the issue "as to whether and how it came about in law that Aboriginal people had their traditional entitlement to gather food from their own country taken away".⁵⁴⁷ His Honour's comment seemed to leave open the possibility that the applicable section of the *Fauna Conservation Act 1974* (Qld.), although it was superficially directed to all persons, may not apply to Indigenous hunting rights.

⁵⁴⁵ Sectors of the commercial fishing industry have expressed concern that the compensation payable (in the event that native title rights include commercial fishing rights) may mean it is no longer viable for non-Indigenous persons to acquire new fishing interests: ATSIJ, *Native Title Report June 94*, *supra* note 26 at 155.

⁵⁴⁶ *Mabo [No. 2]*, *supra* note 6 at 66 per Brennan J. (Mason C.J. and McHugh J. concurring). The notion of "reading down the statute" so to exclude its operation on native title rights is discussed further by H. Wootten QC, "The Mabo Decision and National Parks" in S. Woenne-Green *et al.*, eds., *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia* (Melbourne: Australian Conservation Foundation, 1994) 306 at 342-43.

⁵⁴⁷ *Supra* note 137. As the defendant had not raised this issue in his defence, the court did not deal with
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To summarise the position concerning regulation of Indigenous fishing, hunting and gathering rights: The Crown has power to regulate common law Indigenous fishing, hunting and gathering rights. However, the better view would appear to be any legislation or regulations must reveal "a clear and plain intention" to regulate those rights. This will ultimately be a matter of statutory construction in each case. It is yet to be seen whether the courts will approach the construction with a presumption that certain types of provisions are not intended to apply to Indigenous persons exercising an Indigenous fishing, hunting or gathering right recognised at common law or whether they will assume that all rights including those of a quasi-private nature arising independently of the legislation are intended to be subject to all aspects of the regulatory regime. The initial indications from judges of the Courts of Appeal in New South Wales and Western Australia in this regard are not consistent with each other.

Furthermore, the operation of both the *Racial Discrimination Act* 1975 (Cth.) and the *Native Title Act* 1993 (Cth.) impact the regulation of Indigenous fishing, hunting and gathering rights. First, any regulation must be done in a non-discriminatory manner which does not disadvantage Indigenous fishing rights vis a vis fishing rights conferred on other segments of the community. Second, where an exemption is made in the regulatory regime for a particular class of persons, Indigenous persons exercising native title fishing rights will be exempted from any obligation to obtain a permit or licence (where the fishing is for purpose of satisfying personal, domestic or non-commercial communal needs). The issue as to whether commercial aspects of Indigenous fishing rights are subject to existing regulations is more difficult; however, it is to be resolved by reference to the same principles of statutory construction and the respective operation of the *Racial Discrimination Act* 1975 (Cth.) and *Native Title Act* 1993 (Cth.).

There is no doubt that the existence of Indigenous fishing rights raises uncertainties and complexities in the administration and management of marine resources. There may be a tendency for a knee jerk reaction that this is all too complex and a desire by those responsible for interpreting the laws to hold that all Indigenous fishing rights, no matter what their nature, are subject to all existing regulatory regimes. That solution has the appeal of simplicity. But the High Court of Australia has made it clear that the practical difficulties in

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this issue.

the administration of legislation for natural resources posed by native title is simply a fact of life.⁵⁴⁸

The present uncertainty is a factor of the long non-recognition of Indigenous rights. The product of this prior non-recognition cannot now be used to justify an approach which would arbitrarily restrict the exercise of those rights - no matter how appealing such an approach may seem to some. Legislation must be considered individually in light of the specific provisions of the legislation, the type of discretion and flexibility conferred upon resource managers by the legislation and the nature of the Indigenous rights involved. It is a matter of working through these matters to determine the implications of native title and Indigenous rights upon resource management regimes. This will undoubtedly take time, both until the nature and extent of Indigenous rights are ascertained and as resource managers develop ways to accommodate Indigenous interests in management regimes.

⁵⁴⁸ See *Western Australia v. Commonwealth*, *supra* note 17 at 480-81, where the court stated:

Such practical difficulty as there may be in the administration of the legislation in Western Australia governing land, minerals and the pipeline transportation of petroleum products can be attributed to the realisation that land subject to native title is not the unburdened property of the State to use or to dispose of as though it were the beneficial owner. The notion that the waste lands of the Crown could be administered as the "patrimony of the nation" and that the traditional rights of the holders of native title could be ignored was said to be erroneous in *Mabo [No 2]* and the effect of the *Native Title Act* on State administration must be seen in that light.

CHAPTER 7: COMMERCIAL UTILISATION OF INDIGENOUS FISHING AND HUNTING RIGHTS

A. INTRODUCTION

Fishing, hunting and gathering were essential to the existence of Indigenous communities. They formed the livelihood of members of the community. In contemporary society the issue arises as to whether common law Indigenous fishing, hunting and gathering rights permit the commercial exploitation of those rights.

The nature of the adaptation of Indigenous communities to present-day forces, including a cash based market economy has been the subject of numerous studies.⁵⁴⁹ Whilst hunting and fishing have reduced in significance to many communities, they still form an important part of community life, both in cultural and economic terms.⁵⁵⁰ However, even in what may loosely be referred to as more “traditional” Indigenous communities, the market economy plays a significant role and cash is needed to buy essentials of contemporary life (such as petrol, medical supplies, clothing and electricity). Clearly the exploitation of natural resources, in particular coastal fisheries, has considerable potential to provide not only food for the community but also a means to acquire income to buy other essential goods and services. The recognition by the High Court that Indigenous communities can change and adapt to changing conditions, without losing their common law native title, has already been referred to.⁵⁵¹ However, a question remains as to whether the commercial exploitation of natural resources is encompassed within common law Indigenous rights.

The statutory regime in Australia has generally limited statutory fishing, hunting and gathering rights of Indigenous persons to non-commercial purposes.⁵⁵² However, as the Supreme Court of Canada emphasised in *R. v. Sparrow*, neither statutory provisions nor historical policy on the part of the Crown is capable of delineating the content of the Indigenous right.⁵⁵³ The courts in other common law countries have experienced

⁵⁴⁹. See the studies cited in ALRC, *supra* note 5 vol. 2 para. 885, 887.

⁵⁵⁰. *Supra* note 5.

⁵⁵¹. See *supra* notes 315-320 and accompanying text.

⁵⁵². See Chapter 2, above.

⁵⁵³. *Supra* note 189 at 1099, 1011.

considerable difficulty in addressing this issue of whether Indigenous rights include a commercial component.

The approaches of courts in Canada, New Zealand and the United States are briefly summarised below, before returning to consider the appropriate framework to address the issue.

B. OVERSEAS APPROACHES TO COMMERCIAL FISHING RIGHTS

(i) United States

Indigenous rights confirmed by treaty to fish and hunt, include a right to fish and hunt for commercial purposes in the United States. Indian tribes (particularly in the north-west) had already established a commercial trade in fisheries or in animal furs at the time treaties were entered into. Therefore, treaties which reserved to the Indians the “right of taking fish ... in common with all other citizens” were to be interpreted as permitting the Indians to pursue their existing commercial activities in relation to hunting and fishing.⁵⁵⁴ Though the extent of commercial exploitation has changed considerably with modern fishing techniques it has never seriously been questioned that these modern techniques fall within the original concept of commercial exploitation of the resources.⁵⁵⁵ However, whilst acknowledging that Indigenous fishing, hunting and trapping rights include a commercial component, the courts have held the right is limited to taking sufficient of the resource to sustain a “moderate living” for the tribe.⁵⁵⁶

Whilst most of the cases have dealt with treaty rights, the courts have generally regarded the underlying rights in treaties to be pre-existing aboriginal rights.⁵⁵⁷ This is, however, subject to the interpretation of the particular treaty in hand. Some caution needs to be applied as the jurisprudence in this area is influenced by the fact that the courts have considered that in entering into many treaties Congress intended to provide the Indians with an ability to remain economically independent. Nevertheless, as the underlying scope of the rights is

⁵⁵⁴. See *infra* note 753.

⁵⁵⁵. See *supra* note 324.

⁵⁵⁶. See *infra* notes 708-766 and accompanying text.

⁵⁵⁷. See *supra* notes 239-251 and accompanying text.

based upon common law aboriginal rights, the United States experience may still be of some relevance to Australia.

(ii) *Canada*

Canadian jurisprudence in relation to aboriginal title has been closer, at least until recently, to the approach taken by the High Court in Australia. However, courts in Canada have taken divergent views as to whether Indigenous rights at common law or under treaty include a commercial component. The current state of the law in Canada is as expounded by the Supreme Court of Canada in the *Van der Peet* trilogy.⁵⁵⁸ The *Van der Peet* trilogy marked a significant departure as to the manner of characterising Indigenous rights and placed considerable emphasis on framing the rights in light of the constitutional entrenchment of the rights.⁵⁵⁹ The earlier cases placed greater emphasis on the determination of the rights based on common law principles. The earlier cases also demonstrate the wide range of approaches considered possible under the common law by different judges in relation to this issue. Accordingly, these earlier cases will be considered prior to turning to the approach in the more recent cases.

*Initial approaches*⁵⁶⁰

In *Attorney-General for Ontario v. Bear Island Foundation* Steele J. was of the view that the Indigenous right included the right to "hunt all animals for food, clothing, personal use and adornment, to exclusively trap fur bearers ... and to sell the furs ...".⁵⁶¹ However, in *Delgamuukw v. British Columbia* the trial court disagreed with Steele J. that the sale of furs was ever an "aboriginal" activity.⁵⁶² The court characterised Indigenous rights as "all those sustenance practices and the gathering of all those products of the land and waters of

⁵⁵⁸ . *Supra* note 190.

⁵⁵⁹ . See *infra* notes 653-660 and accompanying text.

⁵⁶⁰ . For an overview of the law dealing with the commercial components of Indigenous rights prior to the *Van der Peet* trilogy, see M.R.V. Storrow QC, "The State of the Law in British Columbia Regarding Aboriginal Commercial Activity" paper delivered at Asia Pacific Institute (Vancouver, November 1990); S. Gilby, "The Aboriginal right to a commercial fishery" (1995) 4 *Dalhousie Journal of Legal Studies* 231; B.H. Wildsmith, "The Mi'kmaq and the fishery: beyond food requirements" (1995) 18 *Dalhousie Law Journal* 116; M.A. Burnett, "The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations" (1996) 19 *Suffolk Law Review* 389.

⁵⁶¹ . (1984), (1985) 15 D.L.R. (4th) 321, 49 O.R. (2d) 353 (Ont. H.C.J.) at 360 (emphasis added).

⁵⁶² . *Delgamuukw v. British Columbia*, *supra* note 375 at 458.

the territory ... which they practised and used before exposure to European civilization ... for subsistence or survival, including wood, food and clothing, and for their culture or ornamentation - in short, what their ancestors obtained from the land and waters for their aboriginal life".⁵⁶³ Though the court accepted there had been bartering of products it considered that products would be exchanged for other "sustenance products likewise obtained by aboriginal practices"⁵⁶⁴ and hence was of the view that aboriginal rights do not include present day commercial practices.⁵⁶⁵

The trial judgment in *Delgamuukw* appeared to be influenced by the consequences of holding Indigenous fishing rights included commercial fishing in light of the priority that would be accorded to these rights by virtue of the constitutional recognition and affirmation of such rights in Canada.⁵⁶⁶ These considerations do not apply in Australia, as Indigenous rights are not constitutionally entrenched and any Indigenous commercial fishing right would be subject to the legislative powers of parliament.

In contrast, Selbie J. of the British Columbia Supreme Court, in *R. v. Vanderpeet*,⁵⁶⁷ criticised the trial judge in the Provincial Court for using contemporary tests for "marketing" to determining whether the Indigenous right at the time of settlement included a component

⁵⁶³. *Id.*

⁵⁶⁴. *Ibid.* at 459.

⁵⁶⁵. *Ibid.* at 439, 459-60, 462. These observations were strictly obiter dicta, as the court held that the Indigenous rights had been extinguished. The findings of the trial judge that Indigenous rights had been extinguished in British Columbia was unanimously overturned by the Court of Appeal, though the Court of Appeal judges differed amongst themselves as to the extent and content of Indigenous rights, see *Delgamuukw v. British Columbia* (1993) 104 D.L.R. (4th) 470 (B.C. C.A.). The subsequent judgment of the Supreme Court of Canada is discussed *infra* notes 586-598 and accompanying text.

⁵⁶⁶ *Ibid.* at 459. However, as one commentator observed at this time, "whether the same priority would be accorded to a commercial aboriginal fishing right under s. 35(1) of *Constitution Act* 1982 as has been given to aboriginal food and ceremonial fishing rights is a matter for conjecture. While the aboriginal food fishery is to be given absolute priority (after conservation measures) over non-aboriginal commercial and sports fishing (see *R. v. Sparrow*, *supra* note 189), it may well be that the constitutional protection of aboriginal commercial fishing rights would be limited to a reasonable share of the commercial fishery": D. Sweeney, "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16 *University of New South Wales Law Journal* 97 at 137, n212.

⁵⁶⁷. (1991) 58 B.C.L.R. (2d) 392, [1991] 3 C.N.L.R. 161 (S.C.), reversing [1991] 3 C.N.L.R. 155 (Prov. Ct.). This judgment was appealed to the British Columbia Court of Appeal and the Supreme Court of Canada, where a different approach to characterising Indigenous rights was adopted. This approach is discussed *infra* notes 586-598 and accompanying text.

of trade.⁵⁶⁸ As to distinctions drawn between the barter, sale or exchange of goods, he stated:

In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes - the words "sell", "barter", "exchange", "share", are but variations on the theme of "disposing". It defies common sense to think that if the aboriginal did not want the fish for himself there would be some stricture against him disposing of it by some other means to his advantage.⁵⁶⁹

He then considered the extent to which the Indigenous right could evolve over time and whether it could include a modern day commercial component. He held that it could, observing:

We are speaking of an aboriginal "right" existing in antiquity which should not be restrictively interpreted by to-days standards. I am satisfied that when the first Indian caught the first salmon he had the 'right' to do anything he wanted with it eat it, trade it for deer meat, throw it back or keep it against a hungrier time ... With the white-man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must needs change with them - and he did. A money economy eventually developed and he adjusted to that also - he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such ... The Indian right to trade his fish is not frozen in time ... he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money.⁵⁷⁰

The Provincial Court in *R. v. Dick*⁵⁷¹ subsequently disagreed with Selbie J.'s observations about the nature of the right, characterising the right as "an aboriginal right to take salmon for food, ceremonial, and societal purposes only". The court focused on the particular fishing practices of the tribe prior to European contact, referring to the methods of fishing

⁵⁶⁸. *Ibid.* at 397.

⁵⁶⁹. *Id.*

⁵⁷⁰. *Ibid.* at 397-8.

See also *British Columbia (Attorney General) v. Wale* (1986), (1987) 9 B.C.L.R. (2d) 333, [1987] 2 W.W.R. 231 (C.A.), affirmed 53 B.C.L.R. (2d) 189 (S.C.C.) at 336-7 where Seaton J.A. (dissenting) stated that it was open to the defendants to argue that they had an Indigenous right to a commercial fishery; *R. v. Jackson* [1992] 4 C.N.L.R. 121 at 137 (Ont. C.J.).

⁵⁷¹. *R. v. Dick*, *supra* note 402.

and particular species of fish caught.⁵⁷² The court accepted there was occasional bartering of goods (including food) between Indigenous peoples but considered that barter was “incidental” to the Lekwiltok’s existence and not the focal point of their attempt to earn a livelihood.⁵⁷³ The court doubted barter in salmon amongst Indigenous peoples could be classified as commerce, but was the view that even if it could it did not give rise to a right to conduct a modern commercial fishery.⁵⁷⁴

The Supreme Court of Canada at this juncture had not yet decided whether Indigenous fishing or hunting rights at common law could be exercised for commercial purposes. In *R. v. Sparrow* the Supreme Court characterised the right as an Indigenous right “to fish for food and social and ceremonial purposes”.⁵⁷⁵ As the issue as to whether the Indigenous right included fishing for commercial or livelihood purposes had not been raised in the lower courts, it declined to consider whether the right extended that far.⁵⁷⁶ In *Simon v. The Queen* the Supreme Court of Canada suggested that a treaty in 1752 which preserved to the Micmac “free liberty of Hunting & Fishing as usual” did not limit the hunting to non-commercial purposes.⁵⁷⁷

A third possibility was broached by the Supreme Court in *R. v. Horseman*⁵⁷⁸ where the dissenting judges characterised the right as one to hunt for subsistence which, in contemporary society, included the right to sell or exchange the products of the hunt in order to support themselves and their families, but not for commercial profit. The case concerned the interpretation of Treaty 8 in 1899 which had guaranteed the Indians the “right to pursue their *usual vocations of hunting, trapping and fishing* ... subject to such regulations as may from time to time be made” and of s 12 of the *Natural Resources Transfer Agreement* 1930 (Alta.) which provided that “laws respecting game in force in the Province from time to time shall apply to the Indians ... provided, however, that the said Indians shall have the right ... of hunting, trapping and fishing game and fish *for food*”. The

⁵⁷². *Ibid.* at 13, 18.

⁵⁷³. *Ibid.* at 13.

⁵⁷⁴. *Ibid.* at 14-5. In any event, it held that such a right had been extinguished (see *supra* note 402).

⁵⁷⁵. *supra* note 189 at 1099-1101.

⁵⁷⁶. *Ibid.* at 1101.

⁵⁷⁷. *Simon v. The Queen*, *supra* note 323 at 403. However, this interpretation was influenced by other provisions in the treaty which contemplated commercial activities.

⁵⁷⁸. [1990] 1 S.C.R. 901, 55 C.C.C. (3d) 353, [1990] 4 W.W.R. 97, affirming (1987) 53 Alta LR (2d) 146. [1987] 5 W.W.R. 454.

difference between the majority and dissenting judges was that the former thought that s 12 restricted the rights previously guaranteed to the Indians under treaty. The effect of the section need not concern us. However, the observations of the court on the nature of the Indians' rights are notable.

Wilson J. (dissenting, Dickson C.J. and L'Heureux-Dube J. concurring) stated:

In his Commentary on Economic History of Treaty 8 Area (unpublished; June 13, 1985, at p. 8), Professor Ray warns of the dangers involved in trying to understand the hunting practices of Indians in the Treaty 8 area by drawing neat distinctions between hunting for domestic use and hunting for commercial purposes ... 'differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact'.⁵⁷⁹

and concluded:

In my view, it is in light of this historical context, one which did not, from the Indians' perspective, allow for simply distinctions between hunting for domestic use and hunting for commercial purposes ... that one must understand the provision of Treaty 8 ...⁵⁸⁰

Having referred to the purpose of the treaty in preserving the Indian's traditional way of life, she stated:

But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the *purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families*, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course be a question of fact in each case *whether a sale is made for purposes of sustenance or for purely commercial profit*.⁵⁸¹

⁵⁷⁹. *Ibid.* at 908.

⁵⁸⁰. *Ibid.* at 912.

⁵⁸¹. *Ibid.* at 919 (emphasis added).

See also *R. v. Jones*, *supra* note 269 where the Crown conceded and the court accepted, that the defendants had Indigenous right to fish for commercial purposes which has not been extinguished. The Indigenous right was characterised as "the Band's continuing communal right to continue deriving 'sustenance' from the fishery resource which has always been an essential part of the community's economic base" (at 441). See further, P.J. Blair, "Solemn promises and solum rights:

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Turning to the facts of the case, she adopted the trial judge's characterisation of the defendant's activity:

I find that Mr. Horseman sold the grizzly bear hide in a manner, and for a purpose consistent with the tradition of his ancestors, that is 'for the purposes of subsistence and exchange'. I find that Mr. Horseman did not engage in a commercial transaction, that is one having profit as a primary aim.⁵⁸²

The majority judges accepted the conclusions of Professor Ray cited above that it was unrealistic from the Indians point of view to differentiate domestic hunting from commercial hunting. While holding that the Indians' rights had been restricted by s 12 of the Transfer Agreement, they were "in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for the purpose of commerce".⁵⁸³ Hence, one can surmise that since the content of the Indigenous right at common law is generally the same as that preserved under treaty,⁵⁸⁴ the extent of the Indigenous right at common law includes the right to hunt or fish for commercial purposes. The court would have to squarely address this issues later in the *Van der Peet trilogy*.

Notwithstanding the uncertainty in the early 1990's as to whether Indigenous rights at common law included a right to commercially develop the fishery, the federal government changed its policy in 1992 in the wake of the Supreme Court's decision in *Sparrow* to allow Indigenous communities a greater share of the commercial fishery.⁵⁸⁵

Van der Peet trilogy

The *Van der Peet trilogy*⁵⁸⁶ was the first occasion the Supreme Court of Canada was required to directly address the general issue of commercial utilisation of Indigenous rights

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the Saugeen Ojibway fishing grounds and *R. v. Jones and Nadjiwon*" (1997) 28 Ottawa L. Rev 125.

⁵⁸² *R. v. Horseman*, *supra* note 578 at 922-3.

⁵⁸³ *Ibid.* at 928-9. See also *R. v. Penasse* (1971) 8 C.C.C. (2d) 569.

⁵⁸⁴ See *supra* note 199.

⁵⁸⁵ See *infra* note 793.

⁵⁸⁶ *supra* note 190.

For an analysis of the approach of the Supreme Court of Canada in the *Van der Peet* trilogy in relation to the content of Indigenous rights, see D.W. Elliott, "Fifty Dollars of Fish: A Commentary on *R. v. Van Der Peet*" (1997) 35 Alberta Law Review 759; J. Borrows, "The trickster: integral to a distinctive culture" (1997) 8 Constitutional Law Forum 27; J. Borrows, "Fish and chips: aboriginal

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at common law, outside of a treaty context. The court took the opportunity to redefine the manner of characterising and determining the content of Indigenous rights. The approach of the court was marked by requiring a high degree of specificity in characterising the right in question and introducing a culturally based approach to the determination of Indigenous rights.

The first stage of the *Van der Peet* test requires the determination of the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been done pursuant to an Indigenous right, the government regulation argued to infringe the rights, and the government regulation argued to infringe the right, and the tradition, practice or custom relied upon to establish the right.⁵⁸⁷

In the *Van der Peet* and *N.T.C. Smokehouse* cases the court characterised the claimed right as a right to exchange fish for money or other goods, rather than on a scale characterised as commercial.⁵⁸⁸ In the *Gladstone* case the court considered that the size of the transaction, involving thousands of pound of herring spawn on kelp sold to a buyer for the purpose of export to Japanese markets, and the historic trade in the resource was to such an extent it was best characterised as the commercial exploitation of herring spawn on kelp.⁵⁸⁹ The

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commercial fishing and gambling rights in the Supreme Court of Canada" (1996) 50 C.R. (4th) 230; A. Zalewski, "From *Sparrow* to *Van der Peet*: The Evolution of a Definition of Aboriginal Rights" (1997) 55 University of Toronto Faculty Law Review 435; C.C. Cheng, "Touring The Museum: A Comment on *R. v. Van der Peet*" (1997) 55 University of Toronto Faculty Law Review 419; R.M. Kyle, *Aboriginal Use and Management of Fisheries in British Columbia* (LL.M. Thesis, University of British Columbia, 1996) at 84-109; K. McNeil, "Aboriginal Rights in Canada in 1996: An Overview of the Decisions of the Supreme Court" (1997) 4:2 Indigenous Law Bulletin 4. For a discussion of the approach in the British Columbia Court of Appeal, see A. Bowker, "Sparrow's promise: aboriginal rights in the B.C. Court of Appeal" (1995) 53 University of Toronto Faculty Law Review 1; M. Asch & C. Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 19 Queen's Law Journal 503; M. Guerin, *Fishing: aboriginal rights in British Columbia* (Vancouver: Native Programs, Legal Services Society, 1995); B. Ryder, "Aboriginal rights and *Delgamuukw v. the Queen*." (1994) 5 Constitutional Forum 43.

⁵⁸⁷ . *R. v. Adams*, *supra* note 191 para. 35; *R. v. Cote*, *supra* note 192 para. 55; *R. v. Gladstone*, *supra* note 190 para. 23; *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 16; *R. v. Van der Peet*, *supra* note 190 para. 53.

⁵⁸⁸ . *R. v. Van der Peet*, *supra* note 190 para. 76-77; *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 17, 20.

⁵⁸⁹ . *R. v. Gladstone*, *supra* note 190 para. 24, 26. See also *R. v. Pamajewon* [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204 where the majority of the Supreme Court of Canada characterised the right in question as "the right to participate in, and to regulate, high stakes gambling activities" on their lands (para. 26). It rejected broader alternative categorisations of the right as a component of any

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court saw particular Indigenous practices as falling within a spectrum of commercial activities, ranging from local exchange for similar goods to large scale commercial exploitation. In its view it was necessary to determine the part of the spectrum in which the claimed right fell.

The second stage of the *Van der Peet* test requires the court to determine whether the activity is part of a practice, custom or tradition which was, prior to contact with Europeans, an integral part of the distinctive culture of the Indigenous people in question.⁵⁹⁰ Only activities which meet this criteria are encompassed within the Indigenous right.

The court explained that:

To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.⁵⁹¹

As a part of the second stage of the *Van der Peet* test there must be "continuity" between aboriginal practices, customs and traditions that existed prior to contact and a particular practice, custom or tradition that is integral to Indigenous communities today.⁵⁹²

In each of the *Van der Peet* and *N.T.C. Smokehouse* cases the court accepted that the evidence established that the Sto:lo, Sheshaht and Opetchesaht peoples had engaged in a limited exchange and trade of salmon with other Indigenous peoples. But, in the *N.T.C.*

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Indigenous right of self-government, a right to manage the use of their reserve lands or right to participate in and regulate gambling in general, which it considered would be to frame the right as a "level of excessive generality" (para. 27).

⁵⁹⁰ . *R. v. Van der Peet*, *supra* note 190 at para. 46, 55-9 per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major J.J.; *R. v. Adams*, *supra* note 191 para. 26, 33-34, 37; *R. v. Cote*, *supra* note 192 para. 58; *R. v. Gladstone*, *supra* note 190 para. 25; *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 22. This aspect of the test is further discussed in Chapter 7, Section C: "Framework for Assessing Indigenous Claims to Commercial Fisheries: (v) Characterisation by reference to integral elements of a distinctive culture (the *Van der Peet* test)", below.

⁵⁹¹ . *R. v. Van der Peet*, *supra* note 190 para. 55.

⁵⁹² . *R. v. Adams*, *supra* note 191 para. 47; *R. v. Cote*, *supra* note 192 para. 69; *R. v. Van der Peet*, *supra* note 190 para. 63, 65; *R. v. Gladstone*, *supra* note 190 para. 28.

Smokehouse case, the court considered that the sale or barter of fish were too few and far between to constitute an integral part of the culture of the Sheshaht and Opetchesaht peoples. In the *Van der Peet* case, the court considered that the exchanges by the Sto:lo people were only incidental to their fishing for food purposes.⁵⁹³ Accordingly, the appellants in both of these cases failed to satisfy the second part of the test.

However, in the *Gladstone* case, the court found that the Heiltsuk people had engaged in the bartering and trading of herring spawn on kelp on a large scale prior to contact with Europeans. Furthermore it held that the trade was not merely incidental to social or ceremonial activities, but formed an integral part of the distinctive culture of the Heiltsuk people.⁵⁹⁴ Accordingly, the court found that the Heiltsuk people had an Indigenous right to trade in herring spawn on kelp on a commercial basis.⁵⁹⁵

The court then proceeded to consider the degree of protection afforded to that right by s. 35(1) of the *Constitution Act* of 1982. That aspect of the case is considered later in this thesis.⁵⁹⁶ However, for present purposes, the significant aspect of the *Gladstone* case is that the Supreme Court of Canada recognised the existence of an existing Indigenous right to fish for commercial purposes. Furthermore, that right was not internally limited, such as by reference to a moderate living standard.⁵⁹⁷ Instead, the Indigenous right included the right to fully commercially exploit the resource.

Notwithstanding the success of the Heiltsuk people in establishing an Indigenous right to commercially harvest herring spawn on kelp, it is apparent that the test enunciated by the Supreme Court of Canada imposes a very high hurdle to any Indigenous people seeking to establish a right to commercially utilise fisheries. A critique of the test, in particular the cultural focus of the test, is undertaken later in this thesis.⁵⁹⁸

⁵⁹³ . *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 25-26; *R. v. Van der Peet*, *supra* note 190 para. 85-91.

⁵⁹⁴ . *R. v. Gladstone*, *supra* note 190 para. 29.

⁵⁹⁵ . *R. v. Gladstone*, *supra* note 190 para. 26-28, 30

⁵⁹⁶ . See *infra* notes 794-802 and accompanying text.

⁵⁹⁷ . *R. v. Gladstone*, *supra* note 190 para. 57.

⁵⁹⁸ . See Chapter 7, Section C: "Framework for Assessing Indigenous Claims to Commercial Fisheries: (v) Characterisation by reference to integral elements of a distinctive culture (the *Van der Peet* test) - A Critique".

(iii) *New Zealand*

In New Zealand, divergent opinions have been expressed as to whether the Maori fishing right at common law includes a right to fish for commercial purposes. In *Ministry of Agriculture and Fisheries v. Love*⁵⁹⁹ Taylor DJ held that the provisions of the *Fisheries (Commercial Fishing) Regulations* (N.Z.) were not applicable to the defendant by virtue of s 88(2) *Fisheries Act* 1983 (N.Z.) which provided that nothing in the Act affected “any Maori fishing rights”. In doing so he accepted that the Maori fishing rights included a right to a commercial fishery. He stated:

There was almost certainly some bartering between different tribes. It is clear on the evidence that the local tribes jealously guarded their own fishing rights and endeavoured to exclude tribes who had no rights to the particular area, but I imagine that even between tribes there were exchanges of fish for other articles, as would happen in any society. I find that clearly there were inherent in Maoris, in accordance with Maori custom, commercial fishing rights, that is rights of trading with fish. It is contrary to the traditions of any people to suggest that there was no use of the fish as a commercial object in the ordinary sense of that word.⁶⁰⁰

Similarly in *Ngai Tahu Maori Trust Board v. Attorney-General*, Greig J. stated that:

I am satisfied that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole coast of New Zealand, at least where they were living. That was divided into zones under the control and authority of the hapu and the tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries. Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of the local dwellers.⁶⁰¹

A similar view has been taken by the influential Waitangi Tribunal.⁶⁰²

⁵⁹⁹. *Ministry of Agriculture and Fisheries v. Love*, *supra* note 231.

⁶⁰⁰. *Ibid.* at 373-4.

⁶⁰¹. (2 November 1987, H.C., Greig J) [unreported] at 6, reproduced in Appendix F(6) of New Zealand. Law Commission, *supra* note 224.

⁶⁰². See the Waitangi Tribunal *Muriwhenua Fishing Report* (WAI-22, June 1988). Having surveyed the extent of Maori fishing rights prior to 1840, the Tribunal found that those rights had been developed on commercial lines. The Tribunal considered that Article 2 of the Treaty of Waitangi guaranteed protection of fishing activities and for their development in both customary and a modern manner. The Crown, by permitting commercial fishing without obtaining the consent of the Muriwhenua iwi had breached that guarantee (p 239). The quota management system of fisheries under the *Fisheries Amendment Act* 1986 (N.Z.), as implemented by the government, was inconsistent with the Treaty as it had the effect of allocating to non Maori the full, exclusive and undisturbed possession of the property in fishing. The interim report did not make any final

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A contrary view was taken in *Ministry of Agriculture and Fisheries v. Campbell*, where the court considered “the exercise of a traditional Maori right did not involve a taking for commercial purposes” since the “concept of a commercial purpose ... is a European concept [that] was not known to the Maoris of old.”⁶⁰³ The court accepted that a Maori practice of exchanging gifts (including fish) existed prior to 1840, but was “unable to equate this concept with what is understood in today’s thinking to be a dealing in or exploitation of fish for commercial purposes.”⁶⁰⁴

Again, notwithstanding these divergent views, the government implicitly accepted that the Maori retained a commercial fishing right, by reaching a settlement in 1992 with the Maori in relation to the extent of those rights.⁶⁰⁵

In a subsequent case, not involving fishing rights, the Court of Appeal observed that “a right of development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such [commercial] right is not necessarily exclusive of other persons or interests.”⁶⁰⁶

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recommendations as Maori and government were in the process of negotiating changes to the quota management system. See further *infra* notes 838-856 and accompanying text.

In a subsequent report, Waitangi Tribunal *Ngai Tahu Sea Fisheries Report* (WAI-27, 1992), the Tribunal found that the Ngai Tahu also had, prior to 1840, an extensive and exclusive fishery extending 12 miles to sea from all of their lands on New Zealand’s south island. It also concluded that the traditional fisheries included a commercial component and that the Ngai Tahu were entitled to develop that commercial component in the contemporary market economy.

⁶⁰³ *Ministry of Agriculture and Fisheries v. Hakaria*, *supra* note 230 at 274.

⁶⁰⁴ *Id.* Strictly these views were obiter dicta, as the evidence in the case of the present day customs of the particular tribe established that either fishing for commercial purposes was prohibited or was only permissible with prior consent of the elders tribe, which the defendants had not obtained: at 257-9, 271. See also *Ministry of Agriculture and Fisheries v. Hakaria*, *supra* note 230 where the court considered that taking toheroa for sale in public bars would be “an offence against strong traditional Maori values” and could not be regarded as the exercise of a traditional Maori fishing right (at 294), but nevertheless approved the reasoning of Taylor DJ in *Ministry of Agriculture and Fisheries v. Love*, *supra* note 231 (at 296), presumably on the basis that in the circumstances of that case the court was satisfied that the commercial fishing was done in accordance with the customary law of the local Maori people.

⁶⁰⁵ See notes 322-3 *infra* and accompanying text.

⁶⁰⁶ *Ngai Tahu Maori Trust Board v. Director-General of Conservation* [1995] 3 N.Z.L.R. 553 at 560 (C.A.). The case concerned commercial whale watching tours. Further aspects of the case are discussed *infra* notes 692-701 and accompanying text.

C. FRAMEWORK FOR ASSESSING INDIGENOUS CLAIMS TO COMMERCIAL FISHERIES

(i) Introduction

As can be seen from the above cases, courts in other common law countries have had difficulty in addressing the question of whether Indigenous peoples are entitled to commercially exploit Indigenous fishing and hunting rights recognised at common law. Further, the cases have failed to articulate a consistent means by which the issue should be addressed. This part explores a number of different approaches to the issue.

The manner of phrasing the test is important. If Indigenous peoples are required to have participated in a cash economy prior to European contact then, by definition, they will be prevented from utilising their Indigenous rights for the purpose of participating in the present day cash economy. Some judges have grasped at the concept of barter in pre-contact societies and seen if this can be extrapolated to a modern day market economy. However, as the divergent results of taking such an approach may indicate,⁶⁰⁷ this approach is neither determinative nor has any explanation been proffered as to why this is the relevant test. Other judges have sought to take a purposive view as to the purpose of the recognition of Indigenous rights. However, they have disagreed amongst themselves as to the purpose - whether it is to preserve a particular way of life, aspects of a distinctive culture or the social purposes to which Indigenous practices were directed. Other judges have taken a very broad view, holding that in that in the absence of restraints imposed by a new sovereign Indigenous peoples were to entitled to use resources within their lands as they saw fit.

Starting from the basic propositions that the nature and content of the right is to be determined in accordance with the customs of the particular Indigenous people and that they may exercise that right in a contemporary way,⁶⁰⁸ the crucial question is how the original right is characterised. This section considers four approaches to defining the scope and content of Indigenous rights. These are (i) characterisation as a subsistence right; (ii) characterisation by the observed manner of exercise of the right (i.e. Indigenous practices); (iii) characterisation by reference to integral elements of a distinctive culture;

⁶⁰⁷ The courts held that a practice of bartering or exchanging goods could not be relied upon to found a modern Indigenous commercial fishing right in *R. v. Dick*, *supra* note 402 at 14-15; *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 at 274; *Delgamuukw v. British Columbia*, *supra* note 375 at 459-62; but that it could in *Ministry of Agriculture and Fisheries v. Love*, *supra* note 231 at 373-4; *R. v. Vanderpeet*, *supra* note 567 at 397-8.

⁶⁰⁸ See *supra* notes 140, 300, 315-320 and accompanying text.

(iv) characterisation by reference to Indigenous concepts of the rights in question in light of their customs and laws. These do not exhaust the possible approaches, but they indicate the breadth of the spectrum in which Indigenous rights can be characterised. The attempt of many courts to find a form a self-limiting Indigenous rights is also discussed.

Whilst the issue of characterisation is relevant to all types of Indigenous fishing, hunting and gathering rights, it becomes of critical importance when assessing the extent to which Indigenous peoples may commercially utilise fishing, hunting and gathering rights.

(ii) *Characterisation as a subsistence right*

A number of early Canadian decisions characterised Indigenous rights as those rights necessary to continue a subsistence economy and way of life.⁶⁰⁹ A categorisation of Indigenous fishing, hunting and gathering rights which limit them to subsistence activities, rather than as a general right to utilise the natural resources of their traditional lands in a manner to sustain their community, invokes the same stereotype of Indigenous persons being a “primitive” people being somehow on a different level to European society. That approach typified Indigenous rights cases during the latter part of the 19th century and the early part of this century.⁶¹⁰ That approach was unequivocally rejected by the High Court of Australia in the *Mabo* case.⁶¹¹ The court acknowledged that Indigenous peoples at the time of

⁶⁰⁹ See *supra* notes 561-565 and accompanying text.

For example, in *Attorney-General for Ontario v. Bear Island Foundation*, *supra* note 561 Steele J. stated the “essence of aboriginal rights is the right of Indians to continue to live on their lands as their forefathers lived”. He rejected the argument that the *Royal Proclamation* of 1763 gave aboriginals “the right to use the lands for any purpose that they may chose over the succeeding centuries” (at 354-55). He continued: “while I accept the “view that Indians are as adaptable as anyone else, I do not accept that aboriginal rights include any use whatsoever, including all present uses. I am of the opinion that aboriginal rights are limited by the wording of the *Royal Proclamation* and by decided court cases to the uses to which the Indians put the lands in 1763” (at 359). Steele J. proceed to articulate a detailed list of the particular uses of land and the resources on it as utilised by the aboriginals in 1763 in which in his view comprised the defendants’ aboriginal rights (at 360).

These aspects of the case were strictly obiter dicta, as Steele J. held that any aboriginal rights were subsequently extinguished by the Robinson-Huron Treaty of 1850. The Ontario Court of Appeal and the Supreme Court of Canada upheld the decision of Steele J., but the appeals were limited to the issue of extinguishment.

⁶¹⁰ For example, see Lord Sumner’s statement in *In re Southern Rhodesia* [1919] A.C. 211 (P.C.) at 233 that certain Indigenous peoples were “so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society”.

⁶¹¹ *Mabo v. Queensland [No. 2]*, *supra* note 6 at 41-2 per Brennan J. See also the similar comments in
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European settlement had their own social and community structures.⁶¹² As previously discussed, the court also stated that exercise of that right could change in accordance with changes to the customs and traditions of the particular Indigenous community.⁶¹³ Accordingly, Indigenous rights of fishing, hunting and gathering are capable of modernisation. While the manner of exercising those rights at the time of European settlement may have been directly for sustenance; today that same right may be exercised in the manner whereby available surplus fish are bartered (or sold in today's market economy) for other daily needs - for example, to provide shelter, clothes and other essentials of contemporary life.⁶¹⁴

It has been suggested that the concept of "commercial" activities was unknown to Indigenous peoples.⁶¹⁵ However, the concept of providing for oneself and one's family is known in all societies. Indigenous peoples shared and exchanged goods amongst themselves and, in some cases, bartered with neighbouring peoples. In the present day, the concept of utilising the resources of the land in order to provide day to day living items for one's family is unchanged from that before European settlement. Only the medium of the exchange, through a cash economy, has changed.

Even this approach is a fairly narrow view of the content of the right. It is arguable that fishing, hunting and gathering formed the livelihood of Indigenous communities and that the present day exercise of that right should permit it to be exercised as their livelihood in a contemporary society. In other words, they should be entitled to utilise their traditional

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R. v. Syliboy [1929] 1 D.L.R. 307 (of a "civilized nation first discovering a country of uncivilized people or savages") which were criticised by Dickson C.J. who stated "the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law": *Simon v. The Queen*, *supra* note 323 at 399.

⁶¹². *Mabo v. Queensland [No. 2]*, *supra* note 6 at 18, 33 per Brennan J., at 99-100, 115 per Deane and Gaudron J.J., at 190-1 per Toohey J. See also *Milirrpum v. Nabalco Pty. Ltd.* (1970) 17 F.L.R. 141 (NT S.C.) at 267-8.

⁶¹³. *Supra* notes 315-320 and accompanying text.

⁶¹⁴. Such a characterisation was suggested by Dickson C.J., Wilson and L'Heureux-Dube (dissenting) in *R v Horseman* discussed *supra* at notes 578-584 and accompanying text. See also McLachlin J. (dissenting) in *R. v. Van der Peet*, *supra* note 190 para. 227 and L'Heureux-Dube J. (dissenting) at para. 191.

⁶¹⁵. *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 at 274; *Delgamuukw v. British Columbia*, *supra* note 375 at 459 (barter limited to other sustenance products obtained by aboriginal practices).

rights of fishing and hunting to earn a livelihood by making a commercial profit out of the enjoyment of those rights.

This is not to say there may not be limits on the right. For example, the right may not extend to harvesting every last fish or animal.⁶¹⁶ Nor would a right to utilise the natural resources of, say, their traditional lands permit a community to pollute rivers or detrimentally affect neighbouring land owners. To do so would not be in accordance with Indigenous concepts of responsibility to the land and its living resources. Where the line is to be drawn is not clear. However, that there may be some uncertainty does justify an artificially narrow interpretation of the right.

(iii) Characterisation of the right by observed manner of exercise of the right

Some cases have attempted to characterise the relevant Indigenous right by reference to the activities of Indigenous peoples at the time of European settlement or contact. However, attempting to define the content of the traditional right by the observed manner in which the right was exercised is clearly erroneous.

A simple example makes this clear. Take a farming family which for generations has grown wheat on the family farm. The family holds a fee simple estate in the land. An observer who attempted to define the rights of the family over that land may well say that they comprise of a right to grow and harvest wheat on the land. The farmer then decides to graze cattle on part of the land. Is this allowed? Under the initial definition of the right in the land as "a right to grow and harvest wheat" the apparently new use of grazing cattle would not be permissible. Had the observer categorised the right in slightly broader terms, for example "to use the land for farming purposes", the new use would be permitted. However, even on this broader characterisation of the right the building of residential buildings on the land and leasing them out to members of the public would not be permitted. The dichotomy between the manner in which a right is traditionally exercised and the content of that right is clear. The concept of a fee simple title in land cannot be understood by looking at the manner in which the holders of that right choose to enjoy it. Similarly, the content of a particular Indigenous right cannot be understood by simply looking at the manner in which that right is exercised.⁶¹⁷

⁶¹⁶. See *Puyallup Tribe v. Washington Department of Game (No 2)* (1973) 414 U.S. 44 at 49.

⁶¹⁷. This analogy was first used in a comparative analysis of the manner of characterising Indigenous commercial fishing rights in D. Sweeney, "Fishing, Hunting and Gathering Rights of Aboriginal
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One can also examine the utility of this approach, of determining the content of Indigenous rights by reference to observed practices, by taking the reverse approach. In other words, take a well known right and try to determine what practices could adequately demonstrate the content of the right. For example, take the right of "freedom of expression". It is difficult to imagine any combination of actions or practices which could adequately describe the concept or what is understood in our legal system by the right. We have to describe what we understand the concept of the right to be to appreciate what it means. Of course this example is not a simple right, but a complex one with limitations and competing considerations that must be balanced against it. In this regard, Indigenous rights are no different.⁶¹⁸

To an extent, the present jurisprudence attempts to alleviate the difficulties created by relying on the observations of an outsider, by stating that the Indigenous perspective must be given significant weight. However, where this has been done, such as in the *Van der Peet* trilogy,⁶¹⁹ it has usually been in order to determine which pre-contact practices were integral to the distinctive culture, and there has been no attempt to incorporate the Indigenous perspective as to the nature of the *right* in question.⁶²⁰

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Peoples in Australia" (1993) 16 University of New South Wales Law Journal 97 at 144-45. The analogy was quoted with approval in ATSIJJC, *Native Title Report June 94*, *supra* note 26 at 55-6. The Commissioner reiterated his view that the common law recognition of aboriginal title derives from Indigenous laws and customs and not pre-contact uses in ATSIJJC, *Native Title Report June 95*, *supra* note 26 at 45.

A similar analogy (in relation to a beef farmer who decided to change the use of his farm to a zoo or game reserve) was subsequently used in an argument dealing with Maori commercial rights before the New Zealand Court of Appeal in 1995, see *Ngai Tahu Maori Trust Board v. Director-General of Conservation*, *supra* note 692 at 560. That case is discussed *infra* notes 692-701 and accompanying text.

⁶¹⁸. This is particularly so as Indigenous "rights" are often intertwined with corresponding duties and obligations which may not be at all obvious from observing the manner in which the right is exercised.

⁶¹⁹. See *R. v. Van der Peet*, *supra* note 190 para. 49, 68; c.f. *R. v. Sparrow*, *supra* note 189 at 1112.

⁶²⁰. With the exception of the *Delgamuukw* and *Van der Peet* cases, Canadian courts do not seem to have directly addressed the rights versus practices issue. They seem to implicitly assume that the rights must be defined by criteria developed by common law judges, rather than the notion that the common law can recognise Indigenous rights as defined by the pre-existing Indigenous legal regimes. For a analysis of the approaches of the judges in the *Delgamuukw* and *Van der Peet* cases on this issue, see *infra* note 637.

The Aboriginal and Torres Strait Islander Social Justice Commissioner in his report under section 209 of the *Native Title Act* 1993 (Cth.) argued strongly for the recognition of Indigenous rights upon the basis of Indigenous concepts of the right in question. He argued:

To pigeon-hole native title and to analogise it to western concepts of land tenure is paradoxical to the recognition of a title based on our laws and customs... It is equally wrong to adopt the approach of limiting the content of native title according to particular uses. [He then referred to the judgment of Brennan J. in *Mabo*, and continued:] Justice Brennan did not rely on "use" as the defining character of native title but the traditional laws and customs of Indigenous peoples.

At another level this approach involves defining our laws and customs in the most simplistic manner imaginable. To suggest that our ownership of land only extended to the right to use for certain purposes is an absurdity. It does not accord with our laws and customs in the way in which we could understand them.⁶²¹

The Honourable Hal Wootten, Deputy-President of the National Native Title Tribunal (and former Supreme Court Justice) has put the issue in the following way:

Rights are something that owe their existence to, and are defined by, their recognition by a system of law and custom. To assume that the traditional system could define rights and interests only in terms of actual use is in effect a covert reintroduction of the expanded doctrine of terra nullius, which saw the Aborigines present, but without an ordered social system capable of yielding recognisable rights.⁶²²

If an Indigenous elder at the time of European settlement had been asked what the traditional rights of the particular Indigenous community were, it is highly unlikely that he or she would have responded with a definition of say, 20 or so, separate practices. Rather, it is likely the elder would have responded by indicating the boundaries of land, rivers and sea that belonged to the community and by saying that the community was entitled to use the natural resources on that land and in those rivers and seas to provide for the community and its future generations.⁶²³ It is also likely that the elder would have described the obligations

⁶²¹ . ATSIJSC, *Native Title Report June 94*, *supra* note 26 at 55.

⁶²² . H. Wootten QC, "The Mabo Decision and National Parks" in S. Woenne-Green *et al.*, eds., *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia* (Melbourne: Australian Conservation Foundation, 1994) 306 at 314.

⁶²³ . For example, Williams, *supra* note 309 p 75 writes: "The Yolngu view of responsibility for land includes control of its resources ... Like Aborigines in all other parts of Australia, they regarded their land as rich in all the resources on which their economy is based, and like other Aborigines, Yolngu people are likely to begin a conversation about their own land with an enthusiastic recitation of the bountifulness of its natural resources. They may even add that their land is richer than anybody else's."

of the community to the land - to care for it and to respect the life and spirits within it and to fulfil its spiritual obligations to the land and the community's ancestors. In this sense, the rights to utilise the land and its resources were not absolute rights in a European sense, but were accompanied by corresponding responsibilities.⁶²⁴

It is only when the Indigenous conception of the right is understood that a definition of the right can have meaning. This cannot be accomplished by merely looking at the manner in which the rights were exercised or Indigenous practices carried out at the time of European contact. Ultimately, the difference in approaches comes down to the difference in protecting existing uses as opposed to existing rights. The narrow approach of defining Indigenous rights by reference to uses confuses the manner in which an Indigenous right is exercised with the content of that right.⁶²⁵ It is to the latter that we must look.

(iv) *Characterisation by reference to Indigenous concepts of the right in question*

If Indigenous rights are not defined by reference to practices or notions of subsistence lifestyles, how are they to be defined? It is submitted that Indigenous concepts of the right concerned are fundamental to the initial characterisation of the right. These concepts will be reflected in the laws of the Indigenous peoples in question.

In *Mabo [No. 2]*, Brennan J. held that native title "*has its origin in ... the traditional laws acknowledged by and the traditions customs observed by the indigenous inhabitants of a territory*". Native title comprises "*the interests and rights of indigenous inhabitants in land whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants*".⁶²⁶ This approach has been reiterated by the court subsequently.⁶²⁷ The court further acknowledged that these laws and customs could change over time and were not to be frozen at the time British acquired sovereignty.⁶²⁸ This approach places considerable emphasis on the rights as understood in

⁶²⁴ . See further, G. Neate, "Looking After Country: Legal Recognition of Traditional Rights to and Responsibilities for Land" (1993) 16 University of New South Wales Law Journal 161

⁶²⁵ . This point is also made by McLachlin J. (dissenting) in *R. v. Van der Peet*, *supra* note 190 para. 238-40.

⁶²⁶ . *Mabo [No. 2]*, *supra* note 6 at 57, 58 per Brennan J. (emphasis added). See also at 70 per Brennan J. and at 110 per Deane and Gaudron J.

⁶²⁷ . See *Western Australia v. Commonwealth*, *supra* note 17 at 452 per Mason C.J., Brennan, Deane, Toohey, Gaudron and McHugh J.J., at 492-93 per Dawson J.

⁶²⁸ . See *supra* notes 315-319 and accompanying text.

Indigenous societies as they evolve over time within those societies. The inquiry is not limited to Indigenous practices or customs, but extends to the underlying concepts of the rights and interests as defined in the applicable Indigenous laws.

That many Indigenous peoples may have hunted and fished primarily for sustenance at the time of European settlement does not mean their rights in respect of hunting and fishing were so confined. Rather, the better view is that the manner in which they exercised their rights was in response to their needs and surroundings. Indigenous peoples were highly adaptable to their surroundings. The natural resources of their lands would be used in whatever manner was appropriate to their changing needs and surroundings. Indigenous peoples on the northern coastal fringe of Australia adapted to their changing surroundings by engaging in trade with neighbouring Melanesian peoples and early European explorers when the opportunities arose.⁶²⁹ In the present day the adaptation may be in the form of selling fish or other products in the market economy. Anthropological evidence supports the contention that traditional Indigenous rights to land included the right to exploit the economic value of the resources on that land. For example, Bell writes:

Access to the country of one's forebears provided substance for the Dreamtime experience and an identity based on the continuity of life and values which were constantly reaffirmed in ritual and in use of the land. Economic exploitation of the land to support material needs, and its spiritual maintenance were not separate aspects of people's relations to country, but rather each validated and underwrote the other.⁶³⁰

Any attempt to ascertain the content of an Indigenous right must seek to understand the relationship of Indigenous peoples to their land and the natural resources on that land. Focusing on the particular activities carried out at the time of European settlement is likely to miss the underlying Indigenous concepts which give form to otherwise hollow rights. Further, it is important not to attempt to define those rights too rigidly. Native title to land comprises a bundle of rights and in defining those rights, or other Indigenous rights, one must be careful not to inadvertently limit the rights by applying preconceived European concepts.

Furthermore, it is submitted that this approach accords with basic common law principles. The starting point for the consideration of the nature of rights of Indigenous peoples

⁶²⁹. See note 259 *infra*.

⁶³⁰. D. Bell, *Daughters of the Dreaming* (Sydney: McPhee Gribble/George Allen & Unwin, 1983) at 47-8. See also J.C. Altman, *Hunter-Gatherers and the State: The Economic Anthropology of the Gunwinggu of North Australia* (Canberra: Australian National University, 1982).

recognised at common law is logically the theory of reception of law in new colonies. This is sometimes referred to as the unwritten constitutional common law. It determines what rights and laws are recognised in a new colony. The application of the principles led to different outcomes, depending upon the circumstances in the colony. Depending upon the circumstances the laws in operation on the colonies might be English law alone, the laws already in existence in the new colony or a combination.⁶³¹ In particular colonies, the courts have held that English law governs English colonists, but the local laws govern the existing inhabitants of the new colony.⁶³² There were certain limitations, for example, local laws considered to be repugnant to common law would not be recognised by the common law. Similarly, proclamations or statutes may vary the applicable laws. This is not the occasion for a review of these matters.⁶³³

However, for present purposes, two observations can be made. Firstly, existing private rights of the citizens of the new colony are assumed to be respected by the common law. Secondly, the existing laws normally continue to apply, at least to the existing inhabitants, unless or until the new sovereign chooses to displace those laws.⁶³⁴ Hence, British law tended

⁶³¹ For example, on occasion it has been held that local laws applied to land and social matters, but that English law applied to certain types of transactions, such as mercantile transactions.

⁶³² See the discussion in *Freeman v. Fairlie* (1828) 1 Moo. I.A. 306, 18 E.R. 117 (K.B.).

⁶³³ The leading works dealing with reception of English law in new colonies and the interaction with existing local laws are K.O. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966); M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans Green, 1926); T.O. Ellias, *British Colonial Law: A Comparative Study of the Interaction Between English and Local Laws in British Dependencies* (London: Stevens & Sons, 1962). See also L.C. Green, "The Common Law and Native Systems of Law" in R.R. Wilson, ed. *International and Comparative Law of the Commonwealth* (Durham, N.C.: Duke University Press, 1968) 81; K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) chap. 4; J.N. Matson, "The Common Law Abroad: English and Indigenous Laws in the British Commonwealth" (1993) 42 *International and Comparative Law Quarterly* 753; M. Walters, "British imperial constitutional law and aboriginal rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 *Queen's Law Journal* 350 at 358 ff; H. Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Sydney: Allen & Unwin, 1996).

⁶³⁴ The position of the newly arrived English colonists, the issue as to what laws were to regulate their conduct and the exercise of the Crown prerogative to modify those laws, are further matters that tend to take up much space in most of the texts and cases. But they need not concern us here. Similarly, the distinction often drawn between conquered, ceded and settled colonies will not be discussed here, which some, such as McNeil, argue are often misstated in relation to the laws which will apply to existing inhabitants of the colony as opposed to the arriving British colonists. In this regard the three categories of colonies set out by Blackstone in his *Commentaries on the Laws of England*, (see 17th ed., vol. 1, at 106ff) do not easily fit with a number of colonies, including the Australian colonies, and are best seen as an attempt to classify colonies for the purpose of determining the principles as to what laws which would apply to the newly arriving British colonists, rather than the existing inhabitants. The most thorough analysis of this issue in a judgment from the period is

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to respect the existing *rights* of inhabitants, as defined under their *own laws* until such time as the Crown chose to modify them. This was the situation whether it be in Asia, Africa, central America, other parts of Great Britain or the Pacific Islands. Admittedly, in some countries, such as Australia, the legal position of Indigenous peoples tended to be ignored. This was often since it was incorrectly assumed that Indigenous peoples were too primitive to have any laws of their own or that such laws were barbarous.⁶³⁵ However, that does not alter the underlying common law principles concerning the recognition of rights of existing inhabitants of a new colony.

The basis of common law rights of Indigenous peoples arises out of the recognition of the fact that societies over which Britain asserted sovereignty had existing forms of government. Hence, recognition by the common law of Indigenous rights is based on a presumption of an existing regime or system of governance prior to the reception of English law. If the common law was not based upon such an understanding it would be understandable why it would not recognise rights but merely particular practices. If one were to consider pre-European contact societies in the new world had no laws or means of governance, the common law could not recognise rights or entitlements to be determined in accordance with those laws. The only thing capable of protection in such a scenario would be the observed practices or traditions of the Indigenous peoples. However, as demonstrated above, the common law is no longer so Eurocentric or unenlightened. Hence, when the common law chooses to recognise classes of rights of Indigenous peoples, that recognition can be based on the Indigenous concepts of rights and entitlements as reflected in their laws. To do otherwise, is to fall into the fallacy of assuming that only European societies are capable of having codes or laws.

Hence, the position taken by the High Court of Australia in *Mabo [No. 2]* that the content of native title rights are to be defined by reference to Indigenous laws accords with

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that of Master Stephen in *Freeman v. Fairlie* (1828) 1 Moo. I.A. 306, 18 E.R. 117 (K.B.).

A contrary argument is that it the variations in practice between different British colonies makes it difficult if not impossible to argue that there is a general theory or law governing the reception of laws in new colonies (at least as regards the existing inhabitants).

⁶³⁵ See generally, H. Reynolds, *The Law of the Land*, 2nd ed. (Melbourne: Penguin Books, 1992) at 23-9; D. Sweeney, "Reflections From the Past: Conceptualisation of State, Citizen and Aboriginality in Australian Law" paper delivered at the Annual Conference of the Canadian Law and Society Association (Memorial University, Newfoundland, June 1997). These sentiments were common in many of the other European colonising States, see further R.A. Williams Jr., "Columbus's Legacy: Law As An Instrument of Racial Discrimination Against Indigenous Peoples" (1991) 8 *Arizona Journal of International and Comparative Law* 51.

conventional common law theory concerning reception of laws. Furthermore, the judgment of Brennan J. contemplated that any disputes as to the respective entitlements of persons within an Indigenous community is to be determined in accordance with Indigenous laws and customs.⁶³⁶ This acknowledges that Indigenous legal systems continue to govern the private rights of Indigenous peoples (at least in areas, such as land law, where those rights are consistent with the common law recognition of Indigenous rights). Hence, since those Indigenous laws are capable of recognition, the logical starting point for determining the content of Indigenous rights is by reference to those laws.⁶³⁷

⁶³⁶ See *Mabo [No. 2]*, *supra* note 6 at 61 per Brennan J. ("the communal native title survives to be enjoyed by the members [of an Indigenous community] according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed").

⁶³⁷ This can be contrasted with the approach of the majority in *Delgamuukw v. British Columbia* (1993) 104 D.L.R. (4th) 470 (B.C. C.A.). The judgement of Wallace J. contains probably the most direct consideration of this issue in any Canadian judgement. He considered that "while customary practices received the protection of the common law after its introduction into British Columbia, any aboriginal system of customary law did not" (at 577). This was based upon his view as to the significance of British Columbia being classified as a "settled colony" (at 566). However, as previously discussed, while the settled conquered colony distinction has direct relevance to the laws that would govern the arriving British colonists and whether the Crown prerogative could be used to modify those laws; it does not by itself determine whether local laws would continue to govern local inhabitants. See also the criticism of the analysis of the majority on this issue by Lambert J.A. (dissenting) at 642-43). Wallace J.A. accordingly rejected the view that the content of Indigenous rights recognised at common law could be defined by reference to Indigenous concepts of legal rights. He stated: "Prior to the exercise of sovereignty and the introduction of the common law, the issue of aboriginal 'rights' did not arise. For the aboriginal peoples to have the right, vis-a-vis European settlers, to engage in those traditional practices and uses of land which were integral to their aboriginal society there must be recognition of such a right by those outside the aboriginal community and some mechanism requiring them to respect such a 'right'." (at 570).

Wallace J.A.'s analysis does not accord with the common law theory concerning reception of laws. Furthermore, even if one were to accept that the Indigenous legal systems did not to continue after British acquisition of sovereignty, there is still a further presumption that the existing private rights of the inhabitants are to be respected by British law. In this regard, Wallace J.A.'s analysis can be contrasted with the detailed analysis of Brennan J. on this issue in *Mabo v. Queensland [No. 2]*, *supra* note 6 at 34-43. Lambert J.A. in his dissenting judgment, (at 641) expressed a contrary view to that of Wallace J.A. on the issue of the source of the legal rights. However, even he ultimately adopted a culturally based approach to determining the present day content of protected Indigenous rights. For a detailed discussion of the respective approaches of the Court of Appeal in *Delgamuukw* to these issues, see K. McNeil, "The Meaning of Aboriginal Title" in M. Asch, ed. *Aboriginal and Treaty Rights in Canada* (Vancouver: University of British Columbia Press, 1997) 135.

The majority of the Supreme Court of Canada was surprisingly silent on this issue in *R. v. Van der Peet*, *supra* note 190. Only the dissenting judges addressed this issue. McLachlin J. (dissenting) referred to the continuation of Indigenous laws after the British acquisition of sovereignty and considered that the aboriginal right in question was "rooted in the historical laws or customs of the people" in question: see para. 230, 249, 263-69. L'Heureux-Dube J. (dissenting) also referred to these matters (see para. 173-76), but ultimately still adopted a culturally based test for the

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It follows from the foregoing, that the starting point for the ascertainment of the scope of Indigenous rights is to discard any notion that the rights are somehow "Indigenous" or "aboriginal". To the common law, the fact that Indigenous peoples have particular attachment to their land or a particular culture is neither here or there. It treats Indigenous peoples occupying land in a new colony the same as it would treat a newly acquired colony solely occupied by a group of merchant bankers who had made the territory into an offshore tax haven or an international tourist timeshare resort, provided it had its own laws and system of governance.⁶³⁸ As will be seen in the following section, this approach is the opposite to that adopted recently in Canada, which has sought to put the notion of "aboriginality" back into rights.

What is relevant is that at common law the starting point is not based upon the culture or nationality of the peoples in the new colony. Rather, the starting position for the identification of rights respected by the new legal regime is the existing private rights and the existing laws of the inhabitants of the new colony.⁶³⁹ That in turn, means that the initial stage of the inquiry of Indigenous rights is not by reference to practices, activities, cultural distinctiveness of the society or a subsistence or other lifestyle. Rather it is the existing private rights and legal regime of the existing inhabitants of the new colony.⁶⁴⁰

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recognition of aboriginal rights.

⁶³⁸ This approach devalues the cultural aspects of, and different nature of, many Indigenous societies. This tends to be at odds with most contemporary commentators on Indigenous rights. It may also be considered offensive or culturally insensitive by some Indigenous peoples. However, this thesis is not concerned with the larger questions of moral rights, international law issues, legitimacy of the common law or cultural rights. Rather, as explained in the methodology section, this thesis explores arguments within the framework of the English common law.

The present section is an exploration of one such argument. Ironically, as I hope this and the following section demonstrate, a culturally neutral argument within the traditional common law framework, might in fact yield a broader definition of Indigenous rights than that arrived at through a process of cultural relativism.

⁶³⁹ This is not to say that laws of the original inhabitants of a territory necessarily survive in a manner which is at odds with the contemporary legal systems. It may be that those laws have largely been displaced by the introduction of new laws or it may be that they survive in varying degrees in a way which can work alongside other non-Indigenous laws. Those are matters outside the scope of this thesis.

⁶⁴⁰ This is not to suggest that evidence of practices or activities is irrelevant, nor that obtaining an understanding of the cultural importance of particular matters within the Indigenous society is unimportant. Those matters are relevant *to the extent they assist in gaining an appreciation of the underlying rights or legal regime*. But they do not themselves constitute a definition of the right in question.

In this thesis, it is submitted that "Indigenous concepts of the right in question" are the starting point. It is then stated that this is normally reflected in the applicable Indigenous laws. One could equally say that the rights are determined directly by the Indigenous laws in question. However, the prior manner of expressing it is preferable for a number of reasons. First, it avoids the debate about whether Indigenous laws become "fixed" at the time of British acquisition of sovereignty or continue to be able to change. This is perhaps more of an issue in Canada than Australia, as the Australian courts have made it clear that in their view the Indigenous laws upon which the content of native title to be ascertained can undergo modification.⁶⁴¹ Secondly, it avoids an approach of defining the right by the minutia of laws, perhaps many at a very detailed level (e.g. as to whom in the community is entitled to receive what body parts of a turtle caught for a particular ceremony) and instead focusing on a higher level dealing with the broader nature and scope of the right. Thirdly, and perhaps more importantly, it avoids the difficulties of what happens if, in a particular Indigenous community, there is no longer an authority or governing structure which commands the respect or adherence of the community. Without such a structure, it is arguable that there is no longer any mechanism for Indigenous laws to be modified to take into account changing conditions. The argument would then continue that there are no longer any Indigenous laws which exist to define the right in question. On that basis, either the Indigenous right must be defined by laws from a prior period or the rights no longer exist.⁶⁴² However, even if no structure exists which commands the respect of the majority of an Indigenous community, it is arguable that the underlying Indigenous concepts of the nature of the rights still exist and that those can continue to inform the nature of the right. This last matter may initially seem

⁶⁴¹ . See *supra* notes 315-319 and accompanying text.

⁶⁴² . The latter was suggested by Brennan J. in *Mabo [No. 2]*, *supra* note 6 at 60. He considered that there may reach a stage where "the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs" with the result that native title customary rights no longer survive.

However, it would seem strange that since one of the presumptions of the common law is to respect existing property rights, that those rights can simply disappear solely because a community no longer has a central governing structure. While the disappearance of a mechanism for permitting Indigenous laws to evolve (or the disappearance of those laws) means that such laws can no longer evolve to take into account changing conditions, that does not necessarily require that the property interests governed by those laws disappear. Perhaps, at that stage, the rights become fixed. Alternatively, the property interests that are vested in particular Indigenous persons or groups of persons might be regulated from that time on in accordance with general property laws. Alternatively, perhaps persons in possession of property at the time the Indigenous laws cease to operate, subsequently hold the property by common law possessory title arising out of presumptions flowing from the fact of their possession. These are matters well beyond the scope of this thesis. However, some caution needs to be applied in relying upon the dicta of Brennan J. on this matter. It may well be that if the court is presented with a particular factual situation that raises this issue it will give a more considered response to the issue.

not to be particularly relevant to defining Indigenous communal rights vis a vis the wider community. However, the focus of cases to date, in focusing on the definition of rights of the Indigenous peoples as against the wider community, have tended to ignore mechanisms by which disputes about Indigenous rights within an Indigenous community can be resolved. Any definition of Indigenous rights should take into account the fact that courts may be called to adjudicate upon both aspects of the rights in question.

The reluctance of courts in some countries to embrace a rights based approach may be partly explained by the tendency of such an approach to lead to very wide definition of the rights in question. However, it is submitted that the common law principles concerning the reception of English law in new colonies were designed to give a broad definition to the existing rights. This was a practical approach. By ensuring that the existing legal regimes and private rights continued in force until such time as the Crown abrogated them, it provided for continuity and order. To have broadly abolished existing legal regimes and private rights amongst the existing inhabitants of the new colony could have led to chaos amongst the existing inhabitants. This approach permitted the orderly introduction of new laws and rights by the new sovereign if and when, the sovereign chose to do so. The major complication in some countries today arises through the constitutional entrenchment of, or legislative division of powers concerning, Indigenous rights. But, as suggested later in this thesis, the solution to resolving difficulties posed by those matters is not to artificially limit the initial definition of the right, but to address them at the stage of determining the degree of protection or priority to be given to such rights.

If the above arguments seem to threaten the notion of sovereignty that settlers brought with them or imply that there are parallel systems (something which appears to strike fear into the heart of many jurists) thereby challenging the Crown's sovereignty, one should remember this. The reason why rights of existing inhabitants of a country colonised by Britain are recognised in the domestic legal system is because the conqueror's own laws chose to recognise those rights (i.e. though common law principles dealing with reception of law). On that basis there is no threat to the British Crown's sovereignty at time of acquisition. Indigenous rights are recognised by the common law not because of any inherent sovereignty arguments or any defect in the Crown's sovereignty, but because British law chose to respect those rights.

While there may be some hesitancy in adopting a broad approach to determining the content of Indigenous rights, two matters should be remembered. Firstly, Indigenous rights cannot generally be alienated.⁶⁴³ Hence an Indigenous right to fish for commercial purposes at common law cannot be transferred to Europeans; it must be used for the benefit of the Indigenous community. Secondly, no matter how narrow or wide a definition is given to the content of those rights, those rights in Australia are subject to the legislative power of the government to regulate (or extinguish) them.⁶⁴⁴

(v) *Characterisation by reference to integral elements of a distinctive culture (the Van der Peet test)*

Overview

As previously discussed, in the *Van der Peet* trilogy the Supreme Court of Canada enunciated a new test for the recognition of Indigenous rights. It held that Indigenous rights comprise those practices, customs or traditions integral to the distinctive culture of the Indigenous people claiming the right prior to contact with Europeans.⁶⁴⁵

The practice, tradition or custom in question must have been “one of the things that truly made the society what it was”.⁶⁴⁶ At various stages in the judgements the court expressed the test as whether the “practice, tradition or custom is a defining feature of the culture in question”,⁶⁴⁷ “an integral part of the specific distinctive culture ... prior to the contact with Europeans”,⁶⁴⁸ or “a central, significant or defining feature of the distinctive culture”.⁶⁴⁹

⁶⁴³ See *supra* note 345.

⁶⁴⁴ The situation is different in Canada, where the government must justify any infringement of constitutionally recognised Indigenous rights, See further, Chapter 8(B)(ii) “s 35(1), Constitution Act, 1982”, below.

⁶⁴⁵ *R. v. Van der Peet*, *supra* note 190 at para. 46, 55-9 per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major J.J; *R. v. Adams*, *supra* note 191 para. 26, 33-34, 37; *R. v. Cote*, *supra* note 192 para. 58; *R. v. Gladstone*, *supra* note 190 para. 25; *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 22.

⁶⁴⁶ *R. v. Van der Peet*, *supra* note 190 para. 55.

⁶⁴⁷ *R. v. Van der Peet*, *supra* note 190 para. 59.

⁶⁴⁸ *R. v. Van der Peet*, *supra* note 190 para. 80.

⁶⁴⁹ *R. v. Adams*, *supra* note 191 para. 37; *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 22, 26. See also *R. v. Gladstone*, *supra* note 190 para. 29.

If an Indigenous people can establish that they had engaged in large scale commercial trade or exploitation of natural resources prior to contact with Europeans, and that such an activity was a central, significant or defining feature of their distinctive culture, then their Indigenous rights would extend to the present day commercial trade or exploitation of the resource.

The court also required a high degree of specificity in identifying the particular Indigenous right in question. It preferred to consider rights in light of the specific extent and purpose of a particular activity, rather than a general description of a right. As these aspects of the test have already been described, they will not be elaborated further here.⁶⁵⁰

A Critique

There has been considerable criticism of the recent approaches of the Supreme Court of Canada and the Court of Appeal in British Columbia concerning the characterisation of Indigenous rights. Space does not permit a full analysis or critique of these approaches in this thesis.⁶⁵¹ Indeed, given the Supreme Court of Canada's acknowledgement that its determination of the scope of Indigenous rights is based upon the purposes for which those rights were given constitutional recognition in Canada,⁶⁵² the recent jurisprudence has little direct relevance to Australia.

However, Australian courts have yet to articulate the bounds of Indigenous rights. Nor have they had to deal with commercial aspects of Indigenous rights. Accordingly, they have not been forced to address many of the hard questions of how to characterise, and define the scope and content of, Indigenous rights. They are likely to seek assistance from courts in other common law countries which have addressed these issues, albeit in different contexts. Accordingly, a brief critique of the *Van der Peet* test is included in this thesis.

In light of space constraints, the critique is limited to only three aspects of the judgments: (1) the ascertainment of the scope of Indigenous rights by reference to the reasons for constitutional recognition of those rights; (2) the cultural basis of, and subjectivity of, the test; and (3) the concept of reconciliation as applied in the judgments.

⁶⁵⁰ . See *supra* notes 586-597 and accompanying text.

⁶⁵¹ . For a detailed analysis and critique of the approach of the courts in defining the content of Indigenous rights, see the articles cited *supra* in note 586.

⁶⁵² . See *infra* notes 654-660 and accompanying text.

The short critique that follows only deals with the test adopted of the majority of the Supreme Court of Canada in the *Van der Peet* trilogy. Again, space constraints, do not permit a critique of the alternative approaches of the dissenting judges in Supreme Court of Canada or in the British Columbia Court of Appeal. Those alternative approaches, whilst varying in significant respects from the majority in *Van der Peet*, still pose numerous difficulties, particularly as they still propound what is essentially a culturally based test for Indigenous rights.

(1) *Constitutionalisation of Indigenous rights and the consequential alteration of the common law position*

The constitutionalisation of aboriginal rights in s. 35(1) of the *Constitution Act* 1982) has created its own problems for the determination of the scope and extent of aboriginal rights. As the Supreme Court of Canada observed, the “entrenchment of aboriginal ancestral and treaty rights in s. 35(1) of the *Constitution Act*, 1982 has changed the landscape of aboriginal rights in Canada”.⁶⁵³ The entrenchment has not only has influenced the protection to be given to the rights, but also, the nature and scope of the rights themselves.

In *Van der Peet*, the majority of the Supreme Court of Canada considered that in order to define the scope of aboriginal rights it was necessarily to consider the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Lamer C.J. stated that until it was understood why aboriginal rights exist *and* were constitutionally protected, no definition of those rights was possible.⁶⁵⁴ He then set about his task which he saw to be to “articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interests which that constitutional provision is intended to protect”.⁶⁵⁵

Lamer C.J, speaking for a majority of the court, concluded that:

the purpose of the entrenchment of s. 35(1) was to extend constitutional protection to the practices, customs and traditions central to the distinctive culture of aboriginal societies prior to contact with Europeans.⁶⁵⁶

⁶⁵³ . *R. v. Cote*, *supra* note 192 para. 51.

⁶⁵⁴ . *R. v. Van der Peet*, *supra* note 190 para. 3.

⁶⁵⁵ . *R. v. Van der Peet*, *supra* note 190 para. 4. See also para. 21, 27, 31. See also *R. v. Gladstone*, *supra* note 190 para. 71-72.

⁶⁵⁶ . *R. v. Adams*, *supra* note 191 para. 33.

(footnotes continue on next page)

At the same time, other passages of the judgment indicate a view that the rights are based upon common law rights.⁶⁵⁷ In this regard, the Supreme Court seemed to be fudging its position somewhat. It had not formally abandoned its statement in *R. v. Sparrow* that only rights in existence prior to the enactment of s. 35(1) received constitutional protection.⁶⁵⁸ But, at the same time, the court was now defining the content of the rights in light of what it saw to be the purpose of s. 35(1).

It would have been helpful had the court clarified whether the source of the “rights” referred to in s. 35(1) was s. 35(1) itself (and consequently that the “rights” were not limited to legally enforceable at the time of the enactment of s. 35) or whether the “rights” are confined to existing rights of indigenous peoples in Canada recognised under treaty or by the common law. If the former approach is adopted, the court is at liberty to “define” the rights by reference to the purposes for which s. 35(1) was passed. If the latter, then the court is not at liberty in defining the rights recognised at common law to have regard to the purpose of s. 35(1). Rather, in the latter case, the purpose of s. 35(1) is to be taken into account not in determining the common law existence of rights but in the effect of the application of s. 35(1) to those rights. In other words, the degree of protection afforded by s. 35(1) to common law Indigenous rights may take into account the supposed purpose of s. 35(1). But logically, s. 35(1) cannot retrospectively alter the common law test for the recognition of rights.

Shortly after the *Van der Peet* trilogy, the Supreme Court of Canada had to deal with the issue of Indigenous rights in Quebec. An argument was raised that colonial French law did not recognise any Indigenous rights and, hence, there were no “existing” rights within the meaning of s. 35(1). The court stated that:

Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal approval of British and French coloniser.⁶⁵⁹

(Footnotes continued from previous page)

As to different purposes, to those referred to by the Supreme Court of Canada, which could inform the nature of Indigenous rights recognised and affirmed by s. 35(1), see K.C. Yukich, “Aboriginal Rights in the Constitution and International Law” (1996) 30 *University of British Columbia Law Review* 235 at 246-51, 256-59, 275-78.

⁶⁵⁷ See *R. v. Van der Peet*, *supra* note 190 para. 28-29.

⁶⁵⁸ *supra* note 189 at 1091.

⁶⁵⁹ *R. v. Adams*, *supra* note 191 para. 233.

The court declined to address the substantive argument about the operation of colonial French law as it considered that the purpose of section 35(1) "was to *extend* constitutional protection to the practices, customs and traditions" of Indigenous peoples (subject to them satisfying the other elements of the *Van der Peet* test).⁶⁶⁰ Hence, the emphasis on "existing" rights in the *Sparrow* judgment, was quietly forgotten.

While one can understand the motivation to seek to circumvent the issue of "existing" rights in Quebec, in light of the possibility of there being no surviving Indigenous rights by reason of the operation of colonial French law, the Supreme Court of Canada appears to have ignored the background of the constitutional debates leading to the inclusion of s. 35(1). The section was only accepted after the word "existing" was inserted.⁶⁶¹ It is clear that the section was never intended to be a fresh source of Indigenous rights - which is what the Supreme Court has turned it into, but at the same time narrowed the scope of those rights to less than would have been recognised at common law. This judicial activism in divining the noble purpose of s. 35(1), whilst arguably benefiting Indigenous peoples in Quebec, does so at the expense of rights of Indigenous peoples in other parts of Canada.

It is apparent from the *Van der Peet* trilogy and the subsequent decisions in *R. v. Adams* and *R. v. Cote* that the framework for the definition and determination of the scope of Indigenous rights in Canada is now substantially influenced by the constitutional protection given to those rights. Accordingly, considerable caution needs to be applied in following the approach of the Canadian courts in other common law countries.

(2) *Cultural basis*

The test enunciated by the Canadian Supreme Court is unique for its emphasis on cultural criteria for determining Indigenous rights. Only those practices integral to a distinctive culture of the Indigenous people in question qualify as an Indigenous rights. There are two primary problems with this approach. The first is that it appears to be out of step with approaches in all other common law countries. Admittedly, this criticism focuses more on the lack of precedent for such an approach, rather than the substance of the test itself. The second criticism is that the test is unduly subjective and focuses on cultural relativism which

⁶⁶⁰ *Id.*

⁶⁶¹ See D. Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada" in G.A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Toronto: Carswell, 1996) chap. 17 at 17-14.

is highly problematic and undesirable in a legal system. This is a criticism of substance. Each of these criticisms will now be examined.

The court's approach defines rights by reference to the 'distinctive' culture of the Indigenous peoples in question. That which is common to all cultures is deemed not to be Indigenous (the judges offer the example of 'eating to survive' as something that is non-Indigenous).⁶⁶² Even if something is distinctive it must then pass the further characterisation of being "truly integral", "a defining feature" or "a central and significant part of the society's distinctive culture" and not simply "incidental or occasional" to the Indigenous society in question.⁶⁶³ Furthermore, a court must ensure that the particular practice, custom or tradition is of independent integral significance to the Indigenous society.⁶⁶⁴

Admittedly, the court drew a distinction between requiring the practice to be an integral element of a distinctive culture and an element of a distinct aboriginal culture.⁶⁶⁵ It considered its test of "distinctive" required that the practices simply be a distinguishing characteristic of that culture and need not be unique or distinct from other cultures.⁶⁶⁶ But at the same time, it made it clear that aspects of an Indigenous society common to every human society are not included in the right.⁶⁶⁷ This distinction emphasises the cultural subjectivity of judges of one culture having to sit and adjudicate aspects of another culture. This is particularly so, as the test requires integral aspects of the culture be separated from incidental aspects of the culture. Furthermore the court made it clear that "a claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question".⁶⁶⁸ Hence, even if an activity was very significant to the society, unless it was also a central or defining feature of the distinctive *culture* it is not recognised as an aboriginal right. This requires a judge to sit and dissect aspects of a culture, to weight each element and determine whether it is sufficiently central, not to the society itself, but to the aboriginal culture.

⁶⁶² . *R. v. Van der Peet*, *supra* note 190 at para. 56 per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major J.J.

⁶⁶³ . *Ibid.* at para. 55-9.

⁶⁶⁴ . *Ibid.* para. 70.

⁶⁶⁵ . *Ibid.* para. 71-73.

⁶⁶⁶ . *Id.*

⁶⁶⁷ . *Ibid.* para. 56.

⁶⁶⁸ . *Ibid.* para. 79.

It is apparent how different this test for a determination of legal rights is from most other legal tests. The rights of the Scottish in Europe or the Quebecois in North America were never defined by cultural criteria. Nor were the rights of the existing inhabitants in newly acquired British colonies who possessed very different cultures, such as those of the Mohomedans, Hindus and other persons in many of the British colonies in Asia to the extent they were recognised by the British legal system, defined by cultural criteria. It may be said that the documents of cession, treaties of surrender, Royal charters or proclamations expressly dealt with the recognition of legal rights in many of the places referred to. But that does not detract from the fact that the rights of no other peoples are defined in British law by cultural criteria.

The recognition of rights of existing inhabitants in a new colony at common law was not based upon cultural difference.⁶⁶⁹ A wide spectrum of rights, including the minutia of land laws, master-servant laws, marriage and laws dealing with the day-to-day running of peoples lives were, *prima facie*, recognised. Many of the laws and rights dealing with those matters that are common to most societies (such as employment and social relations) that were recognised. To universally have abolished those laws could have lead to chaos amongst the existing inhabitants. This is particularly so, where there were no means of translating English laws dealing with all these day-to-day matters into the myriad of local languages. Common law reception theory, whilst acknowledging the power of the new sovereign to impose its own laws, was ultimately practical and it would have been counter-productive for all local laws (other than those of a culturally significant nature) to have been abolished *in toto*.

It is not surprising therefore that the Supreme Court of Canada does not cite any authority from any other common law jurisdiction, nor cite an example from any of large number of former British colonies, to support its *culturally* based approach to determining the rights of the existing inhabitants of a newly acquired colony.⁶⁷⁰ It is an approach without precedent.

It is of course true that, as a matter of fact, the laws and existing rights of Indigenous peoples in Canada and Australia tended to be ignored. The original reason that Indigenous rights, land ownership and laws were ignored by colonial administrators and law makers (in

⁶⁶⁹ . However, the degree of cultural difference may be significant in determining what laws were to govern the newly arriving British colonists, see further *Freeman v. Fairlie* (1828) 1 Moo. I.A. 306, 18 E.R. 117 (K.B.) at 325, cited with approval by Gummow J. in *Western Australia v. Commonwealth*, *supra* note 17 (it was decided that the applicability of the law of those [local] inhabitants to settlers depended upon 'the existence of a *lex loci*, by which the British settlers might, without inconvenience, for a time, be governed'').

⁶⁷⁰ . As to Lamer C.J.C.'s use of overseas authorities in the judgment, see *infra* note 706.

terms of common law reception of law theories of the time) in certain British colonies was because Indigenous societies, laws and methods of land use were too different from European society.⁶⁷¹ In many instances the European perception was that the Indigenous peoples and any laws or customs they may have had were too primitive or barbarous to be capable of recognition. Those perceptions have undergone considerable change in recent decades. Had the Indigenous peoples been closer to a European style way of life and had similar laws and systems of governance, there seems little doubt that their rights would have in fact been recognised (in the absence by actions of the Sovereign to the contrary) by those responsible for administering the law. Hence, it appears wrong in principle to use cultural distinctiveness as the cornerstone upon which to now recognise rights of the existing inhabitants of new colonies. It is ironic that now the judiciary has swung to the opposite approach in formulating a test under which the law only recognises those practices considered to be truly "aboriginal".

The *Van der Peet* trilogy appear to have ushered in a new era of cultural relativism. However, if we have learnt anything from history it is that one culture's perception of another culture is usually very flawed. The Canadian test, by requiring the determination of cultural difference and moreover, the ascertainment of what is 'integral' to that other culture, is highly subjective and fraught with danger.⁶⁷² The use of cultural criteria is an inappropriate, vague and unduly subjective means of defining legal rights.

Allowing for the fact that judges will hear evidence of Indigenous peoples first hand and take into account superior court exhortations to take into account Indigenous perspectives,⁶⁷³ judges still have to see through the cultural lenses they are brought up with. As Judge Durie in New Zealand has observed, "judges are not without culture" and they "see the world in terms of their own upbringing and cultural experiences which, naturally, colours their thinking". He concludes that "there can be no impartiality where questions of culture are involved".⁶⁷⁴ Accordingly, in formulating the law in the area of Indigenous rights it would seem preferable to do so in a manner which de-emphasises rather than emphasises the need for cultural judgments.

⁶⁷¹ . There were also generally regarded by British colonial officials as being too primitive and lacking any form of social organisation, see *supra* note 635.

⁶⁷² . For a critique of the court's approach in defining aboriginal rights, see J. Borrows, "The trickster: integral to a distinctive culture" (1997) 8 Constitutional Law Forum 27.

⁶⁷³ . *R. v. Sparrow*, *supra* note 189 at 1112; *R. v. Van der Peet*, *supra* note 190 para. 49, 68.

However, for criticism of the Chief Justice McEachern's ability to understand aboriginal culture in British Columbia in the *Delgamuukw* case see, M. Asch, "Errors in *Delgamuukw*: An
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The law has never attempted to define the rights of the English by such criteria. I image an English person would be highly offended if it did.⁶⁷⁵ My rights in relation to freehold land are not defined by my cultural traditions. Nor, if I am a litigant, does the outcome of my case depend upon the subjective assessment of another persons as to whether I am or am not truly European or whether a particular activity is European. Legal entitlements are normally defined by more objective criteria. It is true that in some areas of the law, such as freedom of religion, it may be necessary for persons to assert beliefs personal to them, in order to establish a right. However, that is the exception, not the rule. Nor are rights generally defined by reference to activities carried out in an earlier period by a person's ancestors. for example, a court does not commence its determination of the usage rights of a landowner over land in post-industrial Britain by reference to the activities traditionally carried out on the land during the Tudor period. It would seem anomalous then to define the whole spectrum of rights to be enjoyed by Indigenous peoples by such criteria. Furthermore, the test is by its very nature very subjective assessments which are necessarily based upon particular cultural views formed by the tribunal of fact. In the absence of compelling reasons to the contrary, the courts should avoid defining rights of any nature and of any segment of the community by such vague, imprecise and unduly subjective criteria.

In articulating this test, the court attempted to put the "aboriginal" back into aboriginal rights. It expressly acknowledged that this involved capturing the "aboriginality" of the right.⁶⁷⁶ Hence, the test is essentially a culturally based test. But there is great difficulty and

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Anthropological Perspective" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Montreal: Institute for Research on Public Policy, 1992) 221; M. Asch & C. Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 19 *Queen's Law Journal* 503; A. Bowker, "*Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal*" (1995) 53 *University of Toronto Faculty of Law Review* 1; B.D. Cox, "The Gitksan Wet'suwet'en as 'primitive' peoples incapable of holding proprietary interest: Chief Justice McEachern's underlying premise in *Delgamuukw*" (1992) 1 *Dalhousie Journal of Legal Studies* 141; G. Sherrott, "The Court's Treatment of the Evidence in *Delgamuukw v B.C.*" (1992) 56 *Saskatchewan Law Review* 441.

⁶⁷⁴ Judge E.T. Durie, "Justice, Biculturalism and the Politics of Law" in M. Wilson & A. Yeatman, eds., *Justice and Identity: Antipodean Practices* (Wellington: Allen & Unwin, 1995) 33 at 35.

⁶⁷⁵ Admittedly, there could be many entertaining cases if the law were to do so. For example, we could have long cases about whether cricket was an integral part of English culture and, if so, whether the highly commercialised one day game, as opposed to the traditional 5 day test match or a gentleman's game on a local village green and played for honour and not for profit, comes within the modern expression of that right or whether such a modern game is fundamentally different in nature.

⁶⁷⁶ *R. v. Van der Peet*, *supra* note 190 para. 17, 19-20.

danger in trying to define rights by reference to notions of 'aboriginality'.⁶⁷⁷ History shows the impossibility of capturing the essence of 'aboriginality', even if such a single thing exists. But the passage of time has shown that both societal and anthropological views of other peoples and the manner of relating to other cultures constantly change and are often at variance with the views of the other culture. Aboriginality (or the determination of what is an integral part of a culture) is not an empirical calculation. It seems highly problematic to define rights by reference to such matters. In addition, it is a course that will inevitably lead to dissatisfaction in generations of Indigenous peoples to come on the basis that the courts or the experts on whom they rely misunderstood Indigenous culture.

If the law in Canada is merely about preserving a right of cultural expression, then it should say so - and, in that limited circumstance, it may be appropriate to define the right by reference to culture. But to talk about substantive property, natural resource or other rights by cultural criteria is anomalous.

A further requirement imposed by the court was that for an activity to form the basis of an Indigenous right it must be an activity that predates contact between the Indigenous people and Europeans. This requirement that the activity be an integral element of a *pre-contact* practice seems to be based upon the notion of there being a "pristine" aboriginality. In legal terms there is nothing special about the date of first contact. If one were seeking a historical date in legal terms, one could imagine a justification for selecting the date of British acquisition, or assertion, of sovereignty, but not the date of first contact with Europeans. However, the stipulation that the activity originate in the pre-contact period (and not an activity, such as fur trade, which developed in parts of Canada with European traders prior to the assertion of sovereignty) reinforces the notion that what is being protected is an "uncontaminated" Indigenous lifestyle and culture. This again seems to indicate the misguided focus of the Canadian test. Rights recognised at common law of the existing inhabitants of a colony, have not been for the purpose of preserving culture per se. Rather, they appear designed to protect the existing legal rights, laws and ability of the societies to function notwithstanding the change in sovereign.⁶⁷⁸

⁶⁷⁷ . This topic is discussed in detail in D. Sweeney, "Reflections From the Past: Conceptualisation of State, Citizen and Aboriginality in Australian Law" paper delivered at the Annual Conference of the Canadian Law and Society Association (Memorial University, Newfoundland, June 1997).

⁶⁷⁸ . In this regard, Australian courts have differed from those in Canada in considering that the relevant date to be the date the British acquired sovereignty over the particular territory in question (to be determined under British domestic law).

Whilst formally rejecting the “frozen theory” of Indigenous rights,⁶⁷⁹ the *Van der Peet* test focuses on past practices and only those past practices can be updated. This is a hybrid approach. Whilst permitting the modern adaptation of pre-contact practices, the practices are defined by a pre-contact culture. Hence, though the practices encompassed within the right are not frozen, the culture that is protected is frozen at the time of contact. It is inherent in any culture that the culture adapts and changes over time. This legal framework enunciated by the Supreme Court of Canada does not recognise that cultures grow and respond to a changing world. Or, perhaps more accurately, whilst the approach permits the culture to adapt, the enjoyment of that adapted culture must be through legal rights enjoyed by all other Canadians. Hence, the adapted parts of the culture enjoy no preference to the rights of other Canadians.

If one must adopt an approach of considering that the purpose of Indigenous rights is to ensure the cultural survival of Indigenous peoples, the preferable manner of achieving this seems to be that suggested by Borrows and Rotman. This involves protecting those rights necessary to ensure a vibrant and economically self-sufficient societies thereby protecting the cultural and physical survival of Indigenous peoples as distinct communities.⁶⁸⁰ This in turn may entail the exercise of modern rights and economic resources derived from their ancestral lands and waters.

This criticism is not intended to suggest that all aspects of the modern Indigenous societies receive the same degree of protection. It may be that certain aspects and matters which have particular cultural significance may receive greater protection than some of the more modern elements or general economic elements. These matters are discussed further below when considering justification and reconciliation. However, a simplistic application of the *Van der Peet* approach denies *any* protection to the modern aspects of the adapted cultures other than those which can be traced back to pre-contact practices. Similarly, the criticism of the culturally based approach of the court in *Van der Peet* is not intended that matters relating to culture are unimportant. They may be quite important in determining the degree of protection or priority to be accorded to Indigenous rights. However, the culturally based approach is inappropriate at the initial stage of determining the nature and scope of the rights in question.

⁶⁷⁹ . *R. v. Van der Peet*, *supra* note 190 para. 64. However, McLachlin J. (dissenting) criticised the majority for what she considered was a reintroduction of a frozen rights theory by focusing on pre-contact practices: para., 240-41.

⁶⁸⁰ . This is a slight gloss on the approach of Borrows and Rotman, but it captures the underlying elements of their argument. See further, J. Borrows & L. Rotman, “The Sui Generis Nature of Aboriginal Rights: Does It Make A Difference?” (1997) *Alberta Law Review* (forthcoming).

(3) *Reconciliation basis*

A major component of the rationale underlying the *Van der Peet* test is the concept of reconciliation.

The court stated that the purposes underlying the recognition and affirmation of aboriginal rights were:

first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.⁶⁸¹

In its view the “*content* of aboriginal rights must be directed at fulfilling both of these purposes”⁶⁸² - i.e. the reconciliation of the prior occupation of the land by Indigenous peoples with the assertion of Crown sovereignty form part of determining the content of the rights. It considered that s. 35(1) provided a means “through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditional and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purposes ... [and] must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.⁶⁸³

I argue that this approach and the use of the concept of reconciliation in the initial phase of determining the scope of the right is misguided. Rather, the aim of reconciliation which has been articulated by the courts is better served by a broad definition of aboriginal rights and a more sophisticated reconciliation process. This section briefly explores these matters.

First, reconciliation occurs in the present day. However, the court’s approach attempts to reconcile pre-contact practices with the needs of the contemporary Canadian society. If any support is needed for the proposition that reconciliation is to occur in contemporary Canadian society, it is s. 35(1) of the *Constitution* which was enacted in 1982. Section 35(1) does not speak of old practices or a modernised form of old practices, but of the present day existence of aboriginal rights. It speaks to the present day and the future, not to the past. It

⁶⁸¹ . *R. v. Gladstone*, *supra* note 190 para. 72; *R. v. Van der Peet*, *supra* note 190 para. 43.

⁶⁸² . *R. v. Van der Peet*, *supra* note 190 para. 43 (emphasis added).

⁶⁸³ . *Ibid.* para. 31. See also para. 57.

is submitted that to the extent reconciliation may be a useful concept in Indigenous rights jurisprudence it must have regard to the present day rights of interests of Indigenous and non-Indigenous peoples and not solely to the past.

Second, it is necessary to ask, the court is reconciling what? Some passages in the judgements suggest the court is reconciling the *fact* of prior Indigenous occupation with the fact of British assertion of sovereignty. But one does not reconcile facts. It might be possible to reconcile competing claims, positions, rights or powers; but not facts. The court's approach to the notion of reconciliation only really makes sense if seen in terms of reconciling *power* or *sovereignty*. There are passages in the judgments which support this view. For example, the court refers to "reconciling pre-existing aboriginal societies with the assertion of Crown sovereignty".⁶⁸⁴ From these passages, it would seem the task at hand was about reconciling the competing sovereigns or sources of power at the time of colonisation.

However, from an internal British law view there was no conflict. Under standard reception of laws theory, the laws of a civilized nation over whom the British acquired sovereignty, could remain in force - though British acquisition of sovereignty gave power to the legislature or the Crown to abrogate or modify those laws if it so chose. Hence, under conventional common law theory there was no need to reconcile powers. Further, under conventional common law theory, the laws and rights of the existing inhabitants of a newly acquired colony that were recognised, were broad in scope. There was no limitation in terms of cultural criteria to those laws or rights. Furthermore, one does not find in the judgement of the Canadian Supreme Court any suggestion that the sovereignty of the Crown was, or is, limited in any manner. It is strange therefore to now use the notion of reconciliation of sovereignty to limit the initial scope of the rights or laws of Indigenous peoples recognised at common law.

There was no limit on the sovereignty or power of the Crown. Accordingly, there is no need to reconcile power or sovereignty. At least that was the position in the absence of s. 35(1). However, s. 35(1) was inserted in the *Constitution* at the request of a democratically elected Canadian government. Hence, it represents a voluntary limitation of powers, not a challenge to sovereignty. Accordingly, reconciliation in the sense of sovereign powers is simply misplaced. Notions of reconciliation of the broader position of Indigenous and non-Indigenous communities may be relevant to the extent of protection or priority to be given

⁶⁸⁴ . *Ibid.* para. 57. See also para. 31, 43 and *R. v. Gladstone*, *supra* note 190 para. 73.

to Indigenous rights, but that is a different matter to applying notions of reconciliation of the definition of the rights themselves.

The third criticism about the notion of reconciliation as applied in the *Van der Peet* trilogy, is that it actually limits the opportunity for meaningful reconciliation.

I have argued elsewhere, in relation to commercial Indigenous fisheries, that regardless of the legal source of Indigenous rights courts in different common law countries are moving in similar directions as they are all seeking to reach a just and equitable sharing of the resource. The attempts to achieve a just and equitable sharing generally have regard to both the historical use and the current needs of both Indigenous communities and other users of the resource. The inevitably involves a creative approach in relation to the particular legal basis of the rights in question.⁶⁸⁵

Accordingly, I see the notion of reconciliation as being an essential part in any jurisprudence concerning Indigenous rights. However, use of the notion of reconciliation by Canadian courts puts it in the wrong place. The Canadian jurisprudence uses the notion of reconciliation both to limit the Indigenous right in question at the outset of determining the nature of the rights and then again in the process of balancing the Indigenous right against the rights of others as part of the "justification" phase under s 35(1). I argue that the proper place for the reconciliation is in the justification phase and that it is inappropriate to introduce it in the initial stage of determining the content of the Indigenous right.

An initial objection is one of principle. The Canadian approach starts off with an imbalance. The definition of rights of the Crown or private interests which may be opposed to the Indigenous right in question are not limited at the outset by a concept of reconciliation. It is only the definition of the Indigenous right that is singled out for truncation at the outset. The new society of the European newcomers is assumed to have the full spectrum of rights, limited only by the content of Indigenous rights. At the second stage of the reconciliation process - the justification phases - a truncated Indigenous right is then balanced against a broad untruncated non-Indigenous right. If one is trying to reconcile the respective positions of the Indigenous and non-Indigenous communities, this is a strange manner in which to proceed.

⁶⁸⁵ . These matters are generally discussed in Chapter 8, below.

A further objection is more substantive and practical. The stage at which the reconciliation process is best done is at the second stage. At the first stage of defining the scope of the right, the nature of the limitation is more crude. Put simply, there is less room for achieving an appropriate balance. The only balancing that can be done at that stage is to chop off aspects of the Indigenous right. This is done by delimiting the activity in question to be not an "aboriginal" activity by reference to the integral to a distinctive culture test. There is no opportunity at that initial stage to see if that truncation is necessary to preserve non-Indigenous interests in the particular circumstances having regard to the resource, societal needs, historic involvement of others etc. For example the recent Agreement in Principle between the Crown and the Nisga'a people in British Columbia contains an elaborate sharing mechanism for commercial salmon fisheries.⁶⁸⁶ It is elaborate due to the competing interests of different users of the resource. However, the Nisga'a AIP confers on the Nisga'a an exclusive right to commercial use of Oolichan oil. This occurred since, as a practical matter, non-Nisga'a do not presently commercially utilise oil from Oolichan fish. This result reflects the reconciliation process. The accommodation of the parties rights is arrived at by looking at present day competing needs and demands. It is worthwhile to contrast this result with that which might have resulted under the approach enunciated by the Supreme Court of Canada. By rooting the definition of an Indigenous right to a commercial Oolichan oil fishery in the establishment of a pre-contact practise on a scale best characterised as commercial, the court imposes a very high initial hurdle. Let us assume that the Nisga'a were unable to meet that high hurdle,⁶⁸⁷ then the opportunity to permit the Nisga'a to develop a commercial trade in Oolichan oil as part of their bundle of Indigenous rights would be lost. This is so, even though it could be done at no expense to or detriment to the existing rights or interests of the non-Indigenous community. Hence, an opportunity for achieving reconciliation between the interests of Indigenous and non-Indigenous societies would also be lost

It is perhaps ironic that the test enunciated by the Supreme Court of Canada, whilst purportedly based on a desire to reconcile the interests of Indigenous and non-Indigenous societies, arrives at a result where it is illegal for Mrs Vanderpeet to sell ten fish to her neighbour for fifty dollars, but it is legal for the Heiltsuk to engage in a large scale modern form of commercial fishery exporting herring-roe-on-kelp worth millions of dollars. The approach towards reconciliation that leads to this result - by focusing on reconciling the

⁶⁸⁶ . The Nisga'a AIP is discussed *infra* notes 822-837 and accompanying text.

⁶⁸⁷ . As a matter of fact, the Nisga'a could probably have met that hurdle in light of the traditional importance of Oolichan oil to their society and the extensive trade of Oolichan oil they engaged in with other Indigenous peoples. However, that does not detract from the example.

theoretical nature of the right and reducing it to a pre-contact practice, rather than reconciling the enjoyment of the right - is questionable.

A number of Canadian commentators have argued that Indigenous rights are founded upon an inter-societal accommodation or set of norms governing the respective conduct of Indigenous and non-Indigenous peoples towards each other.⁶⁸⁸ In one sense this is true. The end result of the process will be to reach such an accommodation. However, the focus upon the initial definition of the Indigenous right (leaving the wider societal right untouched) and then subjecting that truncated form of an Indigenous right to a further broad justification process (as in the *Gladstone* case), is unbalanced. I argue that the aim of Slaterry and others who argue for an inter-societal accommodation is, as with the notion of reconciliation, better served by adopting a much more flexible approach to the notion of accommodation and the manner in which it is achieved.

A final comment is warranted prior to passing from the recent Canadian jurisprudence concerning the place of reconciliation in Indigenous rights jurisprudence. By focusing the reconciliation phase at the initial determination of the scope of rights and by making the time for the crystallisation of the content of these rights prior to European contact, there is a failure to take into account the vast changes brought by colonisation. In particular, the Canadian courts seem to expect that "traditional" activities carried out on a lesser land base are capable of sustaining an Indigenous community today. But years of expropriation of the traditional land base of Indigenous communities have dramatically reduced the land base available to many Indigenous communities. Hence, those communities by necessity must adapt the type of use of land and the extent of type of resources utilised on that remaining land base in order to be able to sustain the community. It is unrealistic to talk about reconciliation in the context of Indigenous rights jurisprudence without acknowledging these matters. Under the *Van der Peet* test, Indigenous communities may modernise the method of harvesting a traditional resource encompassed within their Indigenous rights, but they may not harvest new resources or otherwise adapt the types of practices or activities to contemporary needs to sustain their community. As a land base reduces the manner in which

⁶⁸⁸ See B. Slaterry, "The Legal Basis of Aboriginal Title" in F. Cassidy, ed. *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books / The Institute for Research on Public Policy, 1992) at 121-22; B. Slaterry, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727; J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Commentary between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall Law Journal 623; K. McNeil, "The Meaning of Aboriginal Title" in M. Asch, ed. *Aboriginal and Treaty Rights in Canada* (Vancouver: University of British Columbia Press, 1997) 135. See also, M. Walters, "British imperial constitutional law and aboriginal rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's Law Journal 350.

the land base and its resources are used inevitably will change as does the communities activities in response the different times. Whilst the community will still use the land base to provide for the economic needs to sustain the community, the means of doing so will necessarily change. This would seem to be self-evident. It is how all societies survive. But, somehow a Eurocentric concept of "aboriginality" has infused Indigenous rights jurisprudence resulting in a view of Indigenous societies which makes them their culture incapable of change. However, change is a fundamental part of any society or culture. The application of the notion of reconciliation must take this into account.

The New Zealand approach to reconciliation

The Canadian approach to reconciliation in the context of Indigenous rights, can be contrasted with that developed over the past decade in New Zealand. Though the New Zealand courts do not use the term "reconciliation", the underlying concept is the same.

Though the legal status of the *Treaty of Waitangi* remains uncertain to this day, it continues to have considerable influence over the development of Maori rights.⁶⁸⁹ The three articles of the treaty are almost elegant in their simplicity. It remains a unique treaty in that it dealt with the conceptual relationship between Maori rights and the British exercise of sovereignty, rather than dealing with specific subject matters. While there has been much argument as to the meaning of the treaty, particularly given the differences in meaning in the Maori and English versions, and the legal effect of the treaty it has been used in the past two decades to give rise to a notion of an ongoing partnership between Maori and pakeha. Furthermore, the notion of partnership that has developed is one of an ongoing partnership which must evolve to take into account contemporary needs of both Maori and pakeha. Though the treaty is unique, with no directly comparable legal foundation in Canada, the principles behind the recognition and affirmation of Indigenous rights in s 35(1) can be seen to be similar.

⁶⁸⁹ It is beyond the scope of this thesis to discuss the means by which the Treaty affects the development of these rights. On some occasions it is through a legislative hook - which contains a reference to the principles of the Treaty. On other occasions the courts have held that the existence of the treaty is a relevant matter to be taken into account in administrative decision making. On other occasions it is through the politically significant, but not binding, recommendations of the Waitangi Tribunal. See further, P. McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991); I. McManus, *The Principles of the Treaty of Waitangi* (Auckland: University of Auckland, 1995).

The New Zealand courts had been grappling with the notion of the commercial aspect of Maori fishing rights at the same time the Canadian courts were approaching the same issues. The judicial response in New Zealand was not uniform, but was moving in favour of recognising a commercial fishery. Ultimately the courts did not have to resolve the issue, as political events overtook the case in form a settlement of Maori claims. As these matters are dealt with in other parts of the thesis, they will not be discussed here.⁶⁹⁰

However, at the same time the New Zealand Court of Appeal has been slowly refining its notion of "partnership" between Maori and pakeha. This notion is both flexible and very powerful. As often is the case in Indigenous rights jurisprudence, the legal basis upon which the notion is founded is not entirely clear; however, it seems to flow from, or be a part of the fiduciary relationship, between the Crown and Maori.⁶⁹¹

An interesting example of how the notion of partnership operates in practice is the decision of the Court of Appeal in *Ngai Tahu Maori Trust Board v. Director-General of Conservation*.⁶⁹² The Ngai Tahu had developed a successful whale watching tourism business at Kaikoura. They held a permit under the *Marine Mammals Protection Act* 1978 (N.Z.). An additional permit for whale watching was later issued under the Act to a non-Maori business which intended to operate in competition with the Ngai Tahu. The Director-General for Conservation was entrusted with administration of the *Marine Mammals Protection Act* 1978 (N.Z.) under the *Conservation Act* 1987 (N.Z.), which in turn provided that the legislation was to "be interpreted and administered as to give effect to the principles of the Treaty of Waitangi".⁶⁹³ The Ngai Tahu sought to challenge the issuance of the second permit on the grounds that pursuant to either the principles of the Treaty of Waitangi or their aboriginal title rights that no permit could be issued other than with their consent, such consent not to be unreasonably withheld by them. Alternatively, as a fallback position, the Ngai Tahu argued that the application of the treaty principles required that they be protected from competition for a reasonable period. At trial the High Court held that the Director-

⁶⁹⁰ . As to the judicial approaches to Maori commercial fishing rights in New Zealand, see Chapter 7 (B)(iii) "Overseas Approaches to Commercial Fishing Rights - New Zealand", above. As to the subsequent political events and settlement, see Chapter 8 (B)(iii) "Overseas Allocation and Management Models", below.

⁶⁹¹ . For a summary of the recent cases referring to this fiduciary relationship see *New Zealand Maori Council v. Attorney-General* [1996] 3 N.Z.L.R. 140 at 169 (C.A.) per Thomas J. (dissenting in part) ("the treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other").

⁶⁹² . [1995] 3 N.Z.L.R. 553 at 560 (C.A.).

⁶⁹³ . *Conservation Act* 1987 (N.Z.) s. 4.

General ought to have consulted the Ngai Tahu interests before granting the permit but rejected the claim by the Ngai Tahu that they should be afforded any protection, priority or preference in the permit allocation process.

On appeal, the Court of Appeal held that commercial whale watching boat tours were a "very recent enterprise, founded on the modern tourist trade and distinct from anything envisaged on or any rights exercised before the treaty" and, hence, "however, liberally Maori customary title and treaty rights may be construed, tourism and whale-watching are remote from anything in fact contemplated by the original parties to the treaty".⁶⁹⁴ Accordingly, the Ngai Tahu's claim for a right of veto was rejected.⁶⁹⁵ However, the court also rejected the Crown's position that in determining whether to issue a permit to non-Maori the Crown's obligations were limited to consulting the Maori. The Court of Appeal held a requirement of mere consultation "would be hollow" and that the Crown's obligations extended to requiring "active protection of Maori interests".⁶⁹⁶ The Court held that the Crown was obliged "to recognise the special interests of that the Ngai Tahu have developed in the use of these coastal waters"⁶⁹⁷ and that the Crown, in determining whether to issue a new permit, was required to take into account "protection of the interests of Ngai Tahu in accordance with Treaty of Waitangi principles".⁶⁹⁸

In applying those principles, though the Court held commercial whale watching was beyond anything exercised or envisaged at the time of the treaty it was nevertheless analogous to fishing and that historically guiding visitors to see the natural resources of the country had been a natural role of the indigenous people.⁶⁹⁹ The court emphasised its statements in prior cases that the relationship between Maori and pakeha was "an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other".⁷⁰⁰ The combination of that "positive duty" and the statutory incorporation of the principles of the Treaty of Waitangi in

⁶⁹⁴. *Ngai Tahu Maori Trust Board v. Director-General of Conservation*, *supra* note 692 at 559-60.

⁶⁹⁵. *Ibid.* at 560.

⁶⁹⁶. *Ibid.* at 560.

⁶⁹⁷. *Ibid.* at 560.

⁶⁹⁸. *Ibid.* at 561.

⁶⁹⁹. *Ibid.* at 561.

⁷⁰⁰. *Ibid.* at 561. The quoted passage is from *Te Runanga o Wharekauri Rekohu Inc. v. Attorney-General* [1993] 2 N.Z.L.R. 301 at 304 (C.A.), which in turn was summarising the effect of the separate judgments of members of the court in *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (C.A.).

the legislation in question meant that “a reasonable treaty partner would not restrict consideration of Ngai Tahu interests to mere matters of procedure” and that, subject to conservation measures, the Ngai Tahu were “entitled to a reasonable degree of preference”.⁷⁰¹

It is interesting to contrast this case with the approach in Canada. Given the court’s finding that commercial whale watching tourism business was a recent enterprise far beyond, and distinct from, anything envisaged in the treaty or any rights exercised at the time of the treaty, a claim by Indigenous peoples in Canada under the *Van der Peet* test would fail at that stage. It would not meet the test of being a modern form of a pre-contact practice which was integral to the distinctive culture of the Maori. But the New Zealand court, whilst rejecting exclusive rights for things not encompassed by traditional Maori uses, nevertheless recognised right of the Maori to utilise their economic and other resources lands and waters. Reconciliation comes in through holding that such a right is non-exclusive, but at the same time recognised that the Maori has legitimate economic claims which deserve some priority in the legal process.

The result is that a higher degree of protection is given to Maori for those matters of particular cultural or customary significance and a lesser degree of protection is given to modern commercial undertaking, particularly, where the undertaking is not an extension of, or based upon, a traditional Maori activity or resource. However, the Maori are recognised as having legal rights to each, flowing from the concept of partnership. A similar result would be achieved in Canada if the significance of the activity to the culture of the Indigenous peoples involved was seen as a factor in the justification test rather than as a factor in the initial threshold test as to the scope of Indigenous rights. This creates a better opportunity to achieve true reconciliation of the rights of Indigenous and non-Indigenous peoples.

⁷⁰¹. *Ibid.* at 561-2.

The logical consequences - the Provincial Crown's position in Delgamuukw

Prior to passing from the *Van der Peet* test, it is worth averting to some of the logical consequences of the test. These were neatly encapsulated in the Provincial Crown's argument in the appeal in *Delgamuukw v. British Columbia* before the Supreme Court of Canada in July 1997.⁷⁰²

The Provincial Crown put forward two primary arguments. The first was that there was no such thing as aboriginal "title". Rather, Indigenous rights were designed to protect activities and practices which were integral to the distinctive culture of the Indigenous people. Hence, whilst particular activities or practices carried out on particular lands may be protected, it was wrong to consider that this amounted to ownership or title over the land. On this view, aboriginal title was simply a convenient description to describe land that was burdened by the right of Indigenous peoples to carry out particular practices or activities. The second argument, which was made in the alternative, was that if "title" meant full title or ownership of the land in question then such title extended to only such land that was integral to the distinctive culture of the Indigenous people. In this scenario, villages, fishing spots, graveyards, areas of intensive use and other particular areas of particular cultural significance would be encompassed within their aboriginal title but nothing else. In other words, those culturally important areas of the traditional territories of the Indigenous people would be included within their aboriginal title, but not the whole of their traditional territories.

Such an interpretation of aboriginal title would result in the Indigenous peoples of Canada being the only people or culture in the world which are incapable of owning land. It would treat them as merely being fauna - incapable of ownership, but merely roaming across the land to undertake particular practices on the land.⁷⁰³ The Provincial Crown, in urging such a characterisation of aboriginal rights, far from advancing the "honour of the Crown" in its dealings with aboriginal peoples is adopting a self-serving characterisation of the title.

This is not the place for a general analysis for the nature of aboriginal title. The courts have generally avoided trying to define the precise nature of aboriginal title. Suffice to say, that the foundations of that title have remained somewhat elusive.⁷⁰⁴ However, as against the rest

⁷⁰² . At the time of writing, no judgment has been issued in the appeal.

⁷⁰³ . These phrases are borrowed from a memorable speech by Mr Noel Pearson, a leading Indigenous lawyer in Australia, to the National Press Club in Canberra.

⁷⁰⁴ . For a discussion of the nature of aboriginal title, see F.S. Cohen, "Original Indian Title" (1947) 32
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of the world, Indigenous persons must be regarded as being capable of ownership of their ancestral lands. To deny this would be to rely upon legal sophistry for ultimately the Indigenous peoples were the owners at the time of the arrival of the British, there were not others there. If the Indigenous peoples were not the owners, who were? As Brennan J. observed in *Mabo [No. 2]* "ownership of land within a territory in the exclusive possession of a people must be vested in that people: land is susceptible of ownership and there is no other owner".⁷⁰⁵

The best argument for the Crown is that only private rights of ownership survive the transfer of sovereignty. i.e. the new sovereign while taken to respect private rights in the territory acquires for itself any rights, such as those to vacant lands, held by the prior sovereign. But even on such an analysis, the determination of the private / public right divide would be done in accordance with the existing laws in the territory. By way of example, after the Norman Conquest of England the rights of the feudal lords to ownership of land and their ability to determine the sub-categories of rights of tenure within their fiefdom were left intact. One would not look to the lowest level of tenure by which any particular land was occupied (such as by serfs or the actual farmers) to determine the nature or extent of ownership. Rather is the whole land system is taken to be respected and preserved. Similarly, the Crown's fallback position of aboriginals only having ownership of those portions of the land under intensive use does not withstand scrutiny any more than to suggest that portions of a manorial estate in Britain which were unsuitable for cultivation were not owned by the manor and hence open to a claim of ownership by a foreign power. And under the broad brush of the common law they would remain the owners unless, after conquest or change of sovereignty, the Crown exhibited a clear and plain intention to deprive them of their lands.

However, notwithstanding these responses to the Crown's argument, it should be acknowledged that such an argument is the logical extension of the test enunciated in the *Van der Peet trilogy*. Indigenous rights are reduced substantive legal rights to a right of cultural expression.

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Minnesota Law Review 28; J.Y. Henderson, "Unraveling the Riddle of Aboriginal Title" (1977) 5 American Indian Law Review 75; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727; K. McNeil, "The Meaning of Aboriginal Title" in M. Asch, ed. *Aboriginal and Treaty Rights in Canada* (Vancouver: University of British Columbia Press, 1997) 135; N. Pearson, "The Concept of Native Title at Common Law" in G. Yunupingu, ed. *Our Land is Our Life: Land Rights - Past, Present and Future* (St Lucia, Queensland: University of Queensland Press, 1997) 150.

⁷⁰⁵. *Mabo [No. 2]*, *supra* note 6 at 51. See also at 31, 45.

Concluding comments on the Van der Peet test

The recent Canadian jurisprudence has replaced the notion of “existing rights” in s. 35(1) with “old pre-contact practices”. With the greatest of deference and respect to the Canadian judiciary, the substitution does not make sense. There is no sustainable legal basis for it; it is contrary to the general approach in Indigenous rights jurisprudence in the rest of the common law world.

One could understand why Canadian judges might be driven to this approach if the constitutionalisation of aboriginal rights in s 35(1) of the *Constitution Act* 1982 imposed a straight jacket on future government activities. But it does not. Section 35(1) has already been interpreted by Canadian courts to apply a flexible standard of protection dependent upon the context of the right and the competing needs of the wider society. Accordingly, it is hard to understand why the recent Canadian jurisprudence seems to be departing from the more conventional approaches to defining aboriginal rights.

If the *Van der Peet* trilogy is intended to be based upon the common law principles concerning recognition of rights in new colonies, then in confining that recognition only to matters culturally significant practices the decision is wrong. It is wrong as it misstates the common law. It is wrong as it is discriminatory as it permits the common law to protect existing rights and laws of conquered European countries but only practices of conquered Indigenous countries.

Furthermore, the Canadian approach is unique in its cultural relativism. In requiring a cultural determination to be made in respect of each Indigenous right claimed, the courts are leaving themselves open to challenge to charges of bias and misinterpretation by future generations of Indigenous peoples. Rather than leading to a just and lasting settlement, this approach seems to be sowing the seeds for ongoing dissatisfaction.

Similarly, the notion that reconciliation will take place between the practices of pre-contact aboriginal societies and the rights of a contemporary wider Canadian society seems misplaced. Reconciliation must take place between the contemporary forms of the societies taking into account their contemporary needs and modes of economic production and survival. Not only does the jurisprudence misapply the notion of reconciliation but it limits the opportunities for reconciliation. A mere right of cultural expression without an accompanying land and economic base will not lead to a viable, just or lasting settlement.

The recent Canadian jurisprudence is marked by its limited reference to overseas authorities.⁷⁰⁶ Instead it focuses on the purposes underlying s. 35(1) of the *Constitution Act* of 1982. Accordingly, the jurisprudence response to the unique legal framework governing Indigenous rights in Canada. In this sense it is a truly “made in Canada” solution. It is a solution that is probably best confined to the Canadian context.

(vi) *The search for self-limiting rights*

A number of courts have striven to articulate a test for the recognition of Indigenous rights which has a natural cap on the extent of resources Indigenous peoples may utilise. This has tended to occur where the right in question involves a right to use a resource where there are a number of other competing users, such as fisheries. The limitation can be imposed by various methods. It may be through holding the Indigenous right is limited to taking a specified percentage of available resource, by holding that it may only be used for particular purposes (e.g. for food or ceremonial purposes) or by holding that the resource may only be utilised to the extent necessary to maintain a particular standard of living. I call these forms of “self-limiting” Indigenous rights.

The best known form of self-limiting right is that stemming from the *Boldt* series of cases. They dealt with fishing rights guaranteed in treaties with Indian tribes in the Pacific north west of the United States. The specific details of the cases and the mechanisms used to allocate fish entitlements between the Indians and non-Indians are discussed later in this thesis.⁷⁰⁷ But for present purposes, the significant matter is that the United States Supreme Court held that the Indians were entitled to take sufficient fish to sustain a moderate living for a tribe.⁷⁰⁸ In its view the right “secures so much as, but no more than, is necessary to provide the Indians with a livelihood - that is to say, a moderate living”.⁷⁰⁹ In light of the

⁷⁰⁶ There is reference to early decisions in the United States and to *Mabo [No. 2]*, *supra* note 6 from Australia. Whilst, the Chief Justice Lamer is correct in stating that those decisions base Indigenous rights upon the fact that Indigenous peoples with existing social organisations occupied the land prior to the arrival of Europeans, he is incorrect when he asserts that the decision were based on a view of a “distinctive” aboriginal societies or culture: see *R. v. Van der Peet*, *supra* note 190 para. 43. Nor do those decisions confine aboriginal rights to only those practices which were integral to aboriginal cultures prior to their contact with Europeans.

⁷⁰⁷ See Chapter 8(B)(i) “Overseas Allocation and Management Models - United States”, below.

⁷⁰⁸ *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra* note 754 at 685-87.

⁷⁰⁹ *Ibid.* at 686. See further, *C.J.S. Indians* 42 § 129.

See further, *United States v. Washington*, *supra* note 240 at 1445-46, where the moderate living

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wording of the treaty, which provided that right of Indians was to fish "in common with all citizens of the Territory", the court also held that the Indians could take no more than 50 per cent of the fish runs which passed through their fishing grounds.⁷¹⁰ The "moderate living doctrine" has been considered by United States courts to be equally applicable to pre-treaty or common law aboriginal rights.⁷¹¹

Some Canadian judges have also grasped at the concept of a moderate living. In the *Van der Peet* trilogy, in the British Columbia Court of Appeal, Lambert J.A. (dissenting), who adopted a test for Indigenous rights based upon the social purpose or function of an activity, considered that fishing was the means by which the Indigenous peoples have provided themselves with a livelihood. Hence, he considered that their Indigenous right extended to the sale of fish which, when coupled with their other financial resources, would provide the Indigenous people concerned with a "moderate livelihood" for themselves and their families.⁷¹² A similar conclusion was reached by the dissenting judges in the Supreme Court of Canada. L'Heureux-Dube J. considered that the "case law on treaty and aboriginal rights relating to trade supports the making of a distinction between on the one hand, the sale, trade, barter of fish for livelihood, support and sustenance purposes and, on the other hand, the sale, trade and barter of fish for purely commercial purposes".⁷¹³ McLachlin J. considered that Indigenous rights encompass a "right to be sustained from the land or waters upon which an aboriginal people have traditionally relied upon for sustenance. Trade in the resource to the extent necessary to maintain traditional levels of sustenance is a permitted exercise of that right".⁷¹⁴ She concluded that the Indigenous peoples "made their living from

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doctrine was raised by the State in 1994 in resisting an attempt by the same tribes for a declaration of a right to take 50% of the shellfish in their accustomed fishing grounds. The court, relying upon a range of economic indicators, held that the Indian tribes still had a standard of living considerably below that of the general population in the State and therefore did not consider that an allocation of a lesser share was warranted. The onus is on the State to establish that a lesser allocation is sufficient to satisfy the needs of the Indigenous peoples: *United States v. Washington* 626 F. Supp. 1405 (W.D. Wash. 1985).

⁷¹⁰ . *Ibid.* at 685. In those states where treaties do not impose a limit on the Indian share, the 50% limit is not applicable, but the underlying aboriginal right is still limited to the taking of sufficient fish to fulfil the tribes' needs: *United States v. Michigan*, *supra* note 244 at 472-73

⁷¹¹ . See *United States v. Michigan*, *supra* note 244 at 472-73.

⁷¹² . *R. v. Van der Peet* (1993) 60 B.C.L.R. (2d) 75, 137 D.L.R. (4th) 289, [1996] 9 W.W.R. 1 (B.C. C.A.) para. 150.

⁷¹³ . *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 47.

⁷¹⁴ . *R. v. Van der Peet*, *supra* note 190 para. 227

the fishery” and that therefore their Indigenous right was to obtain “sustenance” (in a broad sense, but not extending to transactions purely for commercial profit) from the fishery.⁷¹⁵

This approach to a self-limiting form of right can also be seen in some, though not all, of the modern Canadian land claim settlements. For example, the Yukon land claim agreements provide for the sharing of any mining royalties received by the government of the Yukon with the Indigenous peoples.⁷¹⁶ However, the agreements limits the amount payable in any year to an amount which, if distributed equally among all Indigenous persons, would result in an average per capita income for Indigenous persons equal to the Canadian average per capita income.⁷¹⁷

However, there is no compelling reason why Indigenous rights should be self-limiting. Rights of individuals are not limited in such a manner. If I am fortunate enough to have a large seam of coal running under my property then, subject to compliance with any applicable statutes, I am entitled to use that asset to its full commercial potential. I am not limited to simply obtaining a moderate living from the coal seam. Property law is not concerned with wealth redistribution. Nor are other types of rights recognised by the common law affected by considerations of what is an appropriate living standard for the holder of that right. Considerations of economic fairness and the means to distribute the benefits of a resources (such as through resource royalties) are generally left to the legislature to deal with. It would seem anomalous to limit Indigenous use of a fishery to a moderate living standard, if other users of the same fishery are not also limited to the same standard.

There is some recent support for this unrestricted approach in the case law dealing with Indigenous rights. In *R. v. Gladstone* the majority of the Supreme Court of Canada held that the Indigenous right of the Heiltsuk people to engage in a commercial trade of herring spawn on kelp, was not internally limited or capped at a moderate living standard.⁷¹⁸ It did

⁷¹⁵ . *R. v. N.T.C. Smokehouse Ltd.*, *supra* note 190 para. 91.

⁷¹⁶ . For example, see *Champagne and Aishihik First Nations Final Agreement* (Ottawa: Indian and Northern Affairs Canada, 1993) cl. 23.2.1.1, which provides that 50% of the first \$2million dollars of any royalty in any year, and 10% of any royalties above \$2million in any year, shall be paid by the Yukon government to the Yukon First Nations.

⁷¹⁷ . *Ibid.* cl. 23.2.2.

⁷¹⁸ . *R. v. Gladstone*, *supra* note 190 para. 57. McLachlin J. dissented on this point, considering that the right only extended to “such trade as secures the modern equivalent of sustenance: the basics of food, clothing and housing, supplemented by a few amenities” (para. 165).

The majority of the court went on to hold that though the Indigenous right was not internally
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not suggest a commercial rights would never be internally limited, but in its view it depended upon the nature of the Indigenous pre-contact practices.

Nevertheless, a form of self-limiting rights has its attractions, as it makes Indigenous rights less threatening to other users of the resource. It remains to be seen whether Australian courts will follow the self-limiting route adopted in some overseas courts, or whether they will consider that any issue of allocation or re-allocation of wealth and resources is a matter for parliament.

(vii) Conclusion

This part has explored four different frameworks for defining the content and scope of Indigenous rights. Ultimately the issue of whether Indigenous fishing, hunting and gathering rights at common law include a commercial component will be largely determined by the framework that Australian courts adopt to characterise Indigenous rights.

The Australian jurisprudence on this issue is still in its infancy. However, the initial signs point to a fairly broad approach. As previously discussed, the High Court of Australia held that native title has its origin in and is given its content by the traditional laws and customs acknowledged by the Indigenous people.⁷¹⁹ Furthermore, that the nature and incidents of native title are to be ascertained by reference to those laws and customs.⁷²⁰ Dealing briefly with the two Indigenous fishing rights cases to date in Australia, as previously discussed, the defendants had not led sufficient evidence to require the Crown to negative a defence based upon Indigenous fishing rights. However, the judges emphasised the need for evidence as to the scope of the fishing right as defined by the laws or customs of the Indigenous people in question. In this regard the manner of determining the scope of the fishing right was seen as the same as determining the scope of native title to land. Hence the judges considered that the "right to fish" was "based upon traditional laws and customs".⁷²¹ In *Derschaw v. Sutton*

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limited, that the degree of protection or priority to be given to such a right under s. 35(1) of the *Constitution Act*, 1982, was less than would be given to self-limiting rights. This aspect of the case is discussed further, *infra* notes 794-802 and accompanying text.

⁷¹⁹ See *supra* notes 300-302 and accompanying text.

⁷²⁰ *Id.*

⁷²¹ *Derschaw v. Sutton*, *supra* note 167 at 7, 14, 15, 17, 19 per Franklyn J. (Murray J. concurring); *Mason v. Tritton*, *supra* note 159 at 579 and at 584 (necessary to demonstrate "that traditional laws and customs extending to the 'right to fish' were exercised by an Aboriginal community immediately before the Crown claimed sovereignty over the territory") per Kirby P. See also the

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the majority stated that “to be a relevant fishing right, it must be encompassed within traditional laws and customs extending to the right to fish and that the fishing the subject of the charge was an exercise of those traditional laws and customs”.⁷²² They referred to the passage of the judgment of Gleeson C.J. in *Mason v. Tritton* where he stated that the relevant fact was not that Indigenous persons had engaged in the activity in question, but that they “are members of a class who have exercised some *form of right pursuant to a system of rules* recognised by the common law”.⁷²³ Accordingly, evidence as to a “widespread customary practice” or activity of the Indigenous people in the area was not relevant, rather the defendants had to prove that their actions were encompassed by, and in accordance with, their traditional laws and customs concerning a right to fish.⁷²⁴ The failure to establish those laws and customs and to bring their conduct within them was fatal to the defence.⁷²⁵

Hence, the focus of the inquiry in Australia has not been the activities or practices of Indigenous peoples but rather nature and scope of the rights encompassed by the laws of the Indigenous people concerned. This approach is consistent with the observation of Justice Toohey that the right of Indigenous peoples to land recognised by the common law “arises from the fact of occupation, not the occupation of a particular kind of society or way of life”.⁷²⁶ It is also consistent with the fundamental common law principles concerning reception of laws in new colonies.

A definite answer as to whether the common law in Australia recognises a right of Indigenous peoples to utilise their traditional fishing, hunting or gathering rights for commercial gain cannot be given. If the content of Indigenous rights is determined by

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judgment of Priestly J.A. which refers to the need for there to have been in existence immediately prior to the introduction of the common law “a system of rules relating either to fishing generally or to abalone in particular” of the Indigenous people in the area: in *Mason v. Tritton*, *supra* note 159 at 602 (see also 604).

⁷²² . *Derschaw v. Sutton*, *supra* note 167 at 19 per Franklyn J. (Murray J. concurring).

⁷²³ . *Mason v. Tritton*, *supra* note 159 at 574 (emphasis added); *Derschaw v. Sutton*, *supra* note 167 at 7.

⁷²⁴ . *Derschaw v. Sutton*, *supra* note 167 at 17, 19 per Franklyn J. (Murray J. concurring). See also the judgment of Heenan J. in the Supreme Court in *Sutton v. Derschaw*, *supra* note 165 at 323 where he held that evidence of a widespread customary practice of Indigenous people in the area for hundreds of years was not to the point; rather the issue was whether the Indigenous people exercised a right to fish. cf. *Mason v. Tritton*, *supra* note 159 at 585 per Kirby P.

⁷²⁵ . *Derschaw v. Sutton*, *supra* note 167 at 14-16 per Franklyn J. (Murray J. concurring).

⁷²⁶ . *Mabo [No. 2]*, *supra* note 6 at 192.

reference to prior-colonisation practices then some Indigenous communities may be able to establish the requisite right. To do this they would need to establish that they bartered goods with other tribes and the modern-day exercise of this right includes commercial trade or, alternatively, that they had already engaged in trade with passing European explorers or neighbouring Melanesian peoples.⁷²⁷ Similarly, if Indigenous rights are to be defined solely by those activities which form part of a practice or custom integral to the distinctive culture of the Indigenous people, it is possible that some, but not many, Indigenous peoples will be able to establish varying degrees of commercial components to their rights.

However, the preferable approach is that Indigenous rights should not be determined solely by the observed manner of exercise of the right at the time of European settlement, but rather by reference to the underlying Indigenous concepts of their relationship to the land and its resources. These concepts will generally be reflected in their laws and customs. These concepts may well permit the exploitation of the natural resources of the land or seas to provide for the needs of the Indigenous community. If so, the means of exercising that right in contemporary Australian society could include the commercial development of those natural resources.

⁷²⁷ For example, there were well established extensive trade routes across large areas of Australia in pre-European contact times: see R.M. Berndt & C.H. Berndt, *The Word of the First Australians*, 4th ed. (Sydney: Rigby, 1985) at 17-21, 129ff; F.D. McCarthy, "'Trade' in Aboriginal Australia, and 'trade' relationships with Torres Strait, New Guinea and Malaya" (1939) *Oceania* vols. 9:4, 10:1, 10:2; W.E. Roth, *Ethnological Studies Along the North-West-Central Queensland Aborigines* (Brisbane: Government Printer, 1897) at 134-36; F.J. Micha, "Trade and Change in Australian Aboriginal Cultures: Australian Aboriginal Trade as an Expression of Close Culture Contact and as a Mediator of Cultural Change" in A.R. Piling & R.A. Waterman, eds., *Diprotodon to Detribalisation: Studies of Change Amongst Australia Aborigines* (East Lansing, MI: Michigan State University Press, 1970) 285; R. Fitzgerald, *A History of Queensland: From the Dreaming to 1915* (Brisbane: University of Queensland Press, 1982) at 17. In the Torres Strait, Islanders had traded amongst themselves and with neighbouring peoples from Papua New Guinea over a long period of time and, in the years immediately prior to annexation of certain of islands by Queensland, they participated in a commercial pearling and beche-de-mer industry and made occasional exchanges with passing Europeans of food for iron, see Beckett, *supra* note 334 at 5, 29, 32; J. Singe, *The Torres Strait: People and History* (Brisbane: University of Queensland Press, 1979) at 160-3. There is also a well documented trading between Indigenous peoples in the northern coastal regions of Australia and Macassan seafarers.

CHAPTER 8: NATURAL RESOURCE MANAGEMENT AND ALLOCATION OF RESOURCES BETWEEN INDIGENOUS AND NON-INDIGENOUS USERS

Assuming an Indigenous fishing right exists at common law and that such a right may extend to the development of a commercial fishery, how is the right to be balanced against other competing interests of commercial and sport fishermen and conservation needs? This Chapter contains a brief survey of the different legal mechanisms in Canada, New Zealand and the United States to address allocation issues. Whilst the prior Chapters of this thesis have focused on Indigenous fishing rights at common law, this Chapter looks at allocation issues regardless of whether the basis of the Indigenous right is treaty, proclamation or common law as the underlying issues are substantially the same.

While the conflict has largely arisen in respect of fisheries, the same issue arises in relation to Indigenous rights to other natural resources. This chapter does not undertake a critical analysis of allocation and management issues. Rather, the purpose of the chapter is to place the substantive rights discussed in the prior parts of this thesis in a wider context.

Prior to embarking upon this survey, the present role of Indigenous peoples in Australia in marine resource management, and their demands for an increased participation, will be examined.

A. THE ROLE OF INDIGENOUS PEOPLES IN AUSTRALIA IN MARINE RESOURCE MANAGEMENT AND DEMANDS FOR CHANGE

The concerns, aspirations and demands of Indigenous peoples in Australia are very similar to that of Indigenous peoples in other countries. These focus on desire to be able to continue their traditional fisheries free of government interference, a demand for a greater participation in the management of marine resources and an increased share of the economic benefits brought by those resources.⁷²⁸

⁷²⁸ See N. Pearson, "Native Title and Fisheries Management: Where Is It Heading?" (1994) 53:5 Australian Fisheries 14 at 14; Australia. Council for Aboriginal Reconciliation & Aboriginal and Torres Strait Islander Commission, *Towards Social Justice? Compilation Report of Consultations* (Canberra: Australian Government Publishing Service, 1995) [hereinafter CAR/ATSIC, *Towards Social Justice*];

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As present Indigenous communities are almost totally excluded from marine resource management in Australia. Their involvement is generally dependant upon the view of local fisheries officers or regulatory agency. Those who view Indigenous persons as having something to contribute normally seek to involve them or, at least, consult with them. As such Indigenous involvement depends upon goodwill rather than any formal recognised role. There are a number of exceptions, particularly in the Torres Strait region,⁷²⁹ the northern parts of the Great Barrier Reef marine park⁷³⁰ and the western part of Cape York in Queensland.⁷³¹ The absence of a formal co-management role has caused considerable dissatisfaction amongst Indigenous communities.

Indigenous communities in Australia have not, until recently, been successful in bringing the demands concerning a greater involvement in fisheries to the general Australian populace and government decision makers. That has started to change in the past five years. This is due to two factors. First, a number of government inquiries set up to advise generally on various resource issues have specifically reported on the concerns of Indigenous peoples.⁷³²

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Australia. Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A report to government on native title social justice measures* (Canberra: Aboriginal and Torres Strait Islander Commission, 1995) paras. 6.69-6.71; R. Green, S. Harris & D. Throsby, *Ecologically Sustainable Development Working Groups: Final Report - Fisheries* (Canberra: Australian Government Publishing Service, 1991) [hereinafter ESD - Fisheries] at 65.

⁷²⁹ See *supra* note 105.

⁷³⁰ See *supra* notes 106-107.

⁷³¹ A local fisheries co-management scheme has been successfully operating in western Cape York with the Kowanyama people. It is undertaken in co-operation with the Queensland Fish Management Authority and the Queensland Commercial Fisherman's Organisation. See further, V. Sinnamon, "Gulf of Carpentaria Coast and River Management: An Aboriginal Agency Perspective" in *Proceedings of Queensland Environmental Law Society Conference, May 1992* (Brisbane: Queensland Environmental Law Society, 1992) ; Smyth, *Understanding Country*, *supra* note 1 (discussed under "Fisheries Management"); H. Daphney & F. Royce, "Kowanyama and Malanbarra Views on Nature Conservation Management" in J. Birkhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992) 39.

⁷³² Most notably the Coastal Zone Inquiry (discussed below). Ironically it has been the inquiries with the least direct focus on fisheries management that have dealt with Indigenous concerns about fisheries management. Inquiries directly dealing with fisheries management have tended to skirt the issue. For example the report of the Senate Standing Committee responsible for fisheries in late 1993 did not contain any recommendations dealing with, or a part even referring to, Indigenous concerns, but merely stated that the Committee was "aware that there are a number of other areas which may have to be examined in the future" including "the treatment of indigenous people under fisheries law" and "the question of native title with respect to fisheries": Australia. Senate Standing Committee on Industry Science Technology Transport Communications and Infrastructure, *Fisheries Reviewed* (Canberra: Australian Government Publishing Service,

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Second, Indigenous peoples have engaged in a much more effective media and public relations strategy which has resulted in their concerns being brought to the attention of a wider section of the community.

The Commonwealth government commissioned a major inquiry into the management of Australia's coastal zone in the early 1990s. The report and other papers published by the Inquiry devoted considerable space to the concerns of Indigenous peoples. Amongst the major concerns expressed by Indigenous persons to the Inquiry were the following:⁷³³

- (1) the lack of a role for Indigenous peoples in marine resource management and failure to utilise local Indigenous knowledge;
- (2) the lack of consultation with Indigenous peoples in the decision making process for the management of marine resources;
- (3) the poor management of commercial fisheries (including a high level and wasteful discarding of by-catch, which many Indigenous peoples consider to be disrespectful to the resource);
- (4) the lack of benefits to Indigenous peoples from commercial activities;

The report noted that the traditional Indigenous owners of marine resources do not receive any royalties, lease or licence payments for the exploitation of the resource.

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December 1993) at 5. A more recent federal inquiry into fisheries management has been prepared to heard evidence of Indigenous concerns, see "Indigenous people want say in fisheries, inquiry told" *Australian Broadcasting Commission On-line news* (8 April 1997). The recommendations of this and other government inquiries are discussed in Chapter 8(D) "Proposals For Change in Recent Government Inquiries", below.

⁷³³ See generally, Australia. Resource Assessment Commission, *Final Report, Coastal Zone Inquiry* (Canberra: Australian Government Publishing Service, 1993) [hereinafter RAC, *Coastal Zone Inquiry*]; Smyth, *A Voice In All Places*, *supra* note 1. The following summary is from Summerfield, *supra* note 8 at 240.

See also, P. Josif, "An Overview of Anindilyakwa Aspirations to Manage the Marine Environment Adjacent to Their Lands Under Two Laws" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 21; Green, *ESD - Fisheries*, *supra* note 728 at 65; Smyth, *Understanding Country*, *supra* note 1 (discussed under "Hunting, Gathering and Fishing Rights"); A. Bergin & D. Lawrence, "Aboriginal and Torres Strait Islander Interests in the Great Barrier Reef Marine Park" in *Turning the Tide Conference: selected papers* (Darwin: Northern Territory University, 1993) 25 at 41-46.

The absence of royalties can be contrasted with the position as to mining royalties in the Northern Territory.

- (5) unfair competition between commercial fishing and traditional fishing activities; and
- (6) the prohibitive cost of obtaining commercial fishing licences which, as a practical matter, precludes Indigenous involvement in the commercial fishing industry.

Some Indigenous communities have been developing their own marine strategies with the aims of regaining some control over their traditional marine territories and providing for the better management of the marine environment.⁷³⁴ They have been achieving a degree of political support and success.⁷³⁵ In addition, the Croker Island and seas native title claim and the Yorta Yorta native title claim both involve a claim for fisheries. Both claims have received a lot of media attention. Probably for the first time in the history of Australia, Indigenous claims for greater rights to and involvement in fisheries are being successfully brought to the public arena.

⁷³⁴ For example the Torres Strait Islander Co-ordinating Council has been working on developing a marine strategy with the principal stakeholders and regulatory bodies for a number of years, see M. Mulrennan *et al.*, *Towards a Marine Strategy for Torres Strait* (Darwin: Jointly published by Island Co-ordinating Council and the North Australia Research Unit, Australian National University, 1993); M. Mulrennan & M. Sullivan, "Torres Strait: Recent Initiatives in Environmental Management" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 253 at 255-57; Smyth, *Understanding Country*, *supra* note 1 (see "Aboriginal and Torres Strait Islander Peoples' Marine Management").

The Yolgnu people in eastern Arnhem Land in the Northern Territory have also prepared an Indigenous marine protection strategy which they have called upon the Commonwealth and Northern Territory government to implement. See Gailiwin'ku Community Elcho Island, *An Indigenous Marine Protection Strategy for Manbuynga ga Rulyapa*, *supra* note 337; Manbuynga ga Rulyapa Steering Committee, *Island Home*, A speech to the Land Rights - Past, Present and Future Conference, Canberra, 16-17 August 1996 (Darwin: Northern Land Council, 1996); Northern Land Council, Press Release, "Manbuynga ga Rulyapa makes presentation to Governor General" (20 August 1996); Northern Land Council, Press Release, "Yolngu call for co-operation in management of seas" (29 August 1996).

⁷³⁵ In relation to the Yolgnu Indigenous marine strategy, see Northern Land Council, Press Release, "Yolngu welcome Territory Opposition Leader's support for joint management effort" (26 April 1996); in relation to the Torres Strait, see Federal Minister for Resources and Energy & Queensland Minister for Resources and Energy, Joint Media Release DPIE96/66PJ, "New Management Initiatives for Torres Strait Fisheries" (28 October 1996) (announcing measures to encourage Indigenous participation in the prawn fishery). As to the acceptance by government inquiries or agencies of the need for at least increased Indigenous participation in management advisory committees, see *infra* note 871 and accompanying text.

These claims not only push for recognition of what Indigenous peoples regard as their inherent right to develop their fisheries but also for co-management of the fisheries.⁷³⁶ Management of an overall fishery necessarily involves regulating users and protecting habitat over areas extending far beyond the territory of any one Indigenous people. Hence, central management and co-ordination of a fishery is essential. However, local conservation measures can potentially be greatly enhanced by utilising local Indigenous knowledge. Hence, there would appear to be real opportunities for local co-management regimes. Local co-management schemes could simultaneously meet demands of Indigenous communities that they have greater participation in the management of the resource and benefit the overall management of conservation of the resource.

Commercial fishing is a small, but nevertheless significant, industry sector in Australia.⁷³⁷ The commercial fishing catch is worth approximately AUS\$1.7 billion per annum⁷³⁸ and the industry employs approximately 15,800 people.⁷³⁹ The commercial fishing industry is almost wholly owned and controlled by non-Indigenous persons.⁷⁴⁰

⁷³⁶ . For example the Indigenous Marine Protection Strategy for Manbuynga ga Rulyapa (the Arafura Sea) off the coast of Arnhem Land in the Northern Territory prepared by the Yolgnu people calls for the Commonwealth and Northern Territory governments to implement a marine protection strategy in conjunction with the Yolgnu people based upon Yolgnu management principles of djaagamirr and djaamamirr which have governed Yolgnu use of marine resources for centuries. They also seek more than consultation. Instead they argue for a the implementation of a marine protection strategy which involves Yolgnu "at its very core". They consider that this is the only way to reverse what they view as alarming mismanagement of the northern marine resources. See further, W. Lanhupuy, "Marine Management For 40,000 Years: A Yolgnu View of Sea Rights" in *Turning the Tide: Conference on Indigenous Peoples and Sea Rights: selected papers* (Darwin: Northern Territory University, 1993) 4; Gailiwin'ku Community Elcho Island, *An Indigenous Marine Protection Strategy for Manbuynga ga Rulyapa*, *supra* note 337; Manbuynga ga Rulyapa Steering Committee, *Island Home*, A speech to the Land Rights - Past, Present and Future Conference, Canberra, 16-17 August 1996 (Darwin: Northern Land Council, 1996).

⁷³⁷ . The commercial fishing sector contributed 2.1% of the value of Australian merchandise exports in 1994-95. By way of comparison, this makes fishing 40% larger than the forestry sector, in terms of exports, but less than a tenth of the value of farming and agricultural exports. See Australian Bureau of Agricultural and Resource Economics, *Australian Commodity Statistics* (Canberra: Australian Government Publishing Service, 1995) [hereinafter ABARE] at 7.

⁷³⁸ . ABARE, *supra* note 737 at 105. The figure is the value of production based upon values to fishermen for 1994-95. See also Australian Bureau of Statistics, *Year Book Australia 1996* (Canberra: Australian Government Publishing Service, 1996) at 443 (which only contains fisheries statistics up to the 1993-94 year). Approximately 19% of the gross value of fisheries production is now derived from aquaculture production: *ibid.* at 443. The commercial fishing industry catches approximately 209,000 tonnes of fish per year, compared with a recreational fishing catch of 31,000 tonnes: *ibid.* at 443, 448.

⁷³⁹ . ABARE, *supra* note 737 at 102. This is the combined employment figure for fishing and hunting
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Indigenous peoples have tried to allay fears that they would seek to assert any exclusive fishing rights. Instead they argue for an ability to participate in the commercial fishing and to be involvement in management decisions concerning affecting the fisheries.⁷⁴¹ Some Indigenous peoples have preferred to notion of a resource royalty or tax on existing fishing operators profiting from what they view as Indigenous peoples' traditional resources, rather than direction participation in or reallocation of commercial fishing rights to Indigenous peoples.⁷⁴²

The initial fishing industry response was generally supportive for an increased role for Indigenous communities in fisheries management. It was more cautious about greater commercial involvement of Indigenous peoples in fisheries, arguing that this should be done through the purchase of existing interests in commercial fisheries, rather than through the creation of any special rights for Indigenous peoples. However, it did countenance the possibility of reserving small areas for the exclusive use of Indigenous community where the community already has a high level of use of the fishery, provided that commercial fishermen are compensated for the diminution of their access rights to those areas. Sections of the industry also expressed concern about the impact of the recognition of Indigenous rights upon the renewability of existing licences and on their livelihood.⁷⁴³

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industries.

⁷⁴⁰ For a review of Indigenous involvement in the fishing industry, see Smyth, *A Voice In All Places*, *supra* note 1.

⁷⁴¹ Northern Land Council, Press Release, "Yolngu call for co-operation in management of seas" (29 August 1996); Gailiwin'ku Community Elcho Island, *An Indigenous Marine Protection Strategy for Manbuynga ga Rulyapa*, *supra* note 337 Part 7. See also R. Australia. House of Representatives Standing Committee on Primary Industries, and Rural and Regional Affairs, *Managing Commonwealth Fisheries: The Last Frontier* (Canberra: Australian Government Publishing Service, 1997) [hereinafter AHRSC, *Managing Fisheries*] at 128, where the Committee refers to the evidence of Mr John Christopherson, a member of the Cobourg Peninsula Sanctuary and Marine Park Board, who stated that:

There is this notion that to accept sea rights, or claims to the seas, is mutually exclusive of any other commercial operation, but that is not necessarily the case. What we are talking about, in terms of sea rights, is exercising our inherent rights to control and managing the use and occupation of areas that we consider to be part of our estate.

⁷⁴² Summerfield, *supra* note 8 at 248; CAR/ATSIC, *Towards Social Justice*, *supra* note 728 (discussed in sections on "Clarification of Sea Rights" and "Economic base").

⁷⁴³ See Western Australian Fishing Industry Council, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs - Native Title Bill 1993* (Perth: WAFIC, 1993), cited in Summerfield, *supra* note 8. at 242-45; the Western Australian Fishing Industry Council's draft Aboriginal Fishing Policy, reproduced in Summerfield, *supra* note 8, Appendix 1. There has also

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There is already considerable experience in co-management of national parks in Australia with the traditional Indigenous owners of the land.⁷⁴⁴ This is an area in which Australia probably leads the world. A number of joint management schemes have been established for certain national parks and wildlife refuges, which permit Indigenous persons to be involved in the development of management plans for such parks.⁷⁴⁵ The specific co-management

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been confusion within government regulatory agencies as to the renewability of existing licences, see Summerfield, *supra* note 8 at 245-46

⁷⁴⁴ For an introduction to the voluminous literature on Indigenous co-management of national parks, see ALRC, *supra* note 5 chapter 35; J. Birckhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992); S. Woenne-Green et al., *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia* (Melbourne: Australian Conservation Foundation, 1994).

See further, J.C. Altman & L.M. Allen, *Living Off The Land in National Parks: Issues for Aboriginal Australians* (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 1991) esp. 14-20; J.C. Altman, *Aborigines, tourism and development: The Northern Territory experience* (Darwin: Northern Australian Research Unit, Australian National University, 1988) chaps. 4, 7; A.J. Brown, "Wild Place, Aboriginal Place" (1992) 2:56 *Aboriginal Law Bulletin* 20; R. Blowes, "From Terra Nullius to Every Person's Land: Legal Bases for Aboriginal Involvement in National Parks - Precedents from the Northern Territory" (1991) 2:52 *Aboriginal Law Bulletin* 4; R. Blowes, "From *terra nullius* to every person's land - a perspective from legal history" in J. Birckhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992) 149; J. Birckhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992); D. Craig, "Environmental Law and Aboriginal Rights: Legal Framework for Aboriginal Joint Management of Australian National Parks" in J. Birckhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992) 137; B. Miller, "Green Fingers Across Black Land" (1992) 2:58 *Aboriginal Law Bulletin* 3; Neate, *Looking After Country*, *supra* note 2 at 209-216; M. Nutting, "Competing Interests Or Common Ground? Aboriginal participation in the management of protected areas" (1994) 22:1 *Habitat Australia* 28; H. Ross, E. Young & L. Liddle, "Mabo: An Inspiration for Australian Land Management" (1994) 1 *Australian Journal of Environmental Management* 24; S. Stevens, *Inhabited National Parks: Indigenous Peoples in Protection Landscapes*, East Kimberley Impact Assessment Project, Working Paper No. 10 (Canberra: Centre for Resource and Environmental Studies, Australian National University, 1986); J. Sutherland, "Rising Sea Claims on the Queensland East Coast" (1992) 2:56 *Aboriginal Law Bulletin* 17; D. Smyth, *Indigenous Protected Areas: Conservation Partnerships with Indigenous Landholders: A Report* (Canberra: Environment Australia, 1996); G. Douglas, "Towards A Policy On Aboriginal Ownership of Natural Areas" (1994) 38:1 *National Parks Journal* 12; J.E. Gardner & J.G. Nelson, "National Parks and Native Peoples in Northern Canada, Alaska and Northern Australia" in J.H. Bodley, ed. *Tribal Peoples and Development Issues: A Global Overview* (Mountain View, CA: Mayfield Publishing, 1988) 334.

⁷⁴⁵ For example, the Cobourg Peninsular Sanctuary Board established under *Cobourg Peninsular Aboriginal Land and Sanctuary Act* 1981 (N.T.); the board of management established under the *Nitmiluk (Katherine Gorge) National Park Act* 1989 (NT); boards of management in respect of certain Commonwealth national parks, see *National Parks and Wildlife Conservation Act* 1975 (Cth.) s 14C; in respect of national parks transferred to Indigenous ownership and leased back to

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regime is normally incorporated directly into the application legislation.⁷⁴⁶ For example, in Uluru National Park the local Mutitjulu people form a majority on the board of management for the Park, which has considerable control over the management of the Park.⁷⁴⁷ Traditional Indigenous owners also have the majority vote in the boards of management of numerous other parks and conservation areas.⁷⁴⁸ However, fisheries legislation is generally silent on the issue of co-management with Indigenous peoples.⁷⁴⁹

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the State in New South Wales, see *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996* (N.S.W.) which inserted ss. 63, 71AN, 77 into the *National Parks and Wildlife Act 1974* (N.S.W.); boards of management in respect of national parks on aboriginal land under the *Aboriginal Land Act 1991* (Qld.) s 5.20; *Torres Strait Islander Land Act 1991* (Qld.) s 5.20.

⁷⁴⁶ This has normally been done at the request of the Indigenous peoples involved, as they view the need for legally enforceable management rights as being more important than informal but more flexible arrangements.

⁷⁴⁷ See further, T. Tjamiwa, "Tjunguringkula Waakaripai: Joint management of Uluru National Park" in J. Birckhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992) 7; J. Willis, "Two Laws, One Lease: Accounting for traditional Aboriginal law in the lease for Uluru National Park" in J. Birckhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992) 159.

⁷⁴⁸ For example, traditional Indigenous owners comprise a voting majority (though the casting vote of the Indigenous chairperson) on the Cobourg Peninsular Sanctuary Board (which exercises powers in relation to the Gurig (Cobourg Peninsular) National Park); and a majority of the members of the boards of management for Kakadu National Park, Nitmiluk (Katherine Gorge) National Park and Uluru (Ayers Rock - Mt. Olga) National Park. The traditional Indigenous owners of those national parks in Queensland and New South Wales which have been vested in them, generally have guaranteed representation on, but not control of, the relevant park management boards.

In most cases though the management boards are responsible for approving plans of management and other major decisions concerning the parks, the day to day running of the park is in the hands of the Commonwealth, State or Territory National Parks and Wildlife Service.

However, even in respect of the day to day management of the parks, Indigenous interests are required to be respected. For example in the lease for Kakadu National Park (which is vested in the traditional Indigenous owners and leased back to the Commonwealth for use as a national park) the Director of the Australian National Parks and Wildlife Service covenants in clause 9:

- (m) to take all practicable steps to promote Aboriginal administration management and control of the Park;
- (n) subject to the Plan of Management to engage as many relevant Aboriginals as is practicable to provide services in and in relation to the Park;
- (o) to utilise the traditional skills of Aboriginals individuals and groups in the management of the Park;
- (p) subject to the Plan of Management, to encourage Aboriginal business and commercial initiatives and enterprises within the Park;"

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In light of the generally successful experience in co-management of national parks in Australia, prospects for local co-management of fisheries would seem to have reasonable prospects of success. Co-management is also probably more effectively addressed through the political process rather than through the assertion of existing legal rights. Accordingly, the following sections of this Chapter will focus on perhaps the more difficult outstanding issue, that of the allocation of marine resources between Indigenous and non-Indigenous users.

B. OVERSEAS ALLOCATION AND MANAGEMENT MODELS⁷⁵⁰

(i) *United States*

There was protracted litigation in the Pacific northwest in the 1970's as to the extent of Indian fishing rights. The cases involved anadromous fish (primarily salmon and steelhead trout) whose life cycle begins by hatching in rivers, before migrating to the oceans and their subsequent journey to their original rivers to spawn. Allocation issues are particularly acute with anadromous fish since over fishing in one part of the migratory path can irreparably deplete the whole fisheries stock.

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See further, R. Blowes, "From *terra nullius* to every person's land - a perspective from legal history" in J. Birckhead, T. De Lacy & L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas* (Canberra: Aboriginal Studies Press, 1992) 149.

⁷⁴⁹ For example, whilst traditional Indigenous owners have co-management rights over the Cobourg Peninsular National Park (see *supra* note 745) they have no formal co-management role, and are not even required to be consulted concerning management decisions, in the adjacent Cobourg Marine Park (which is regulated under a separate regime under the *Territory Parks and Wildlife Conservation Act 1976* (N.T.)). The only area in which Indigenous people have some statutory rights in relation to fisheries management is the Torres Strait region, see further *supra* notes *-* and accompanying text.

⁷⁵⁰ For an overview of allocation and management issues see: E. Pinkerton, "Introduction: Attaining Better Fisheries Management through Co-Management: Prospects, Problems and Propositions" in E. Pinkerton, ed. *Co-operative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989) 1; F. Cassidy & N. Dale, *After Native Claims? - The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia* (Halifax: Oolichan Books and The Institute for Research on Public Policy, 1988) at 36-85; G. Osherenko, *Sharing Power with Native Users: Co-Management Regimes for Arctic Wildlife*, Canadian Arctic Policy Paper No. 5 (Ottawa: Canadian Arctic Resources Committee, 1988); M.C. Wood, "Tribal Management of Off-Reservation Living Resources" in G.D. Meyers, ed. *The Way Forward: Collaboration and Cooperation 'In Country'*, 2nd ed. (Perth: National Native Title Tribunal, 1996) 34.

The importance of fish to the tribes in the Pacific northwest has long been recognised. In 1905 the United States Supreme Court observed that fish "were not much less necessary to the existence of the Indians than the atmosphere they breathed".⁷⁵¹ The treaties in the northwest generally preserved to the Indians "the right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory".⁷⁵² As Indians were engaged in commercial fishing and trade with the European settlers at the time the treaties were entered into there has never been any doubt that the fishing rights preserved by treaty included a commercial component.⁷⁵³ However, the portion of the fishery that the Indians were entitled to has been the subject of much controversy. In the *Boldt* series of cases,⁷⁵⁴ the courts considered that the Indians were entitled to more than

⁷⁵¹. *United States v. Winans*, *supra* note 241 at 381. For an overview of Indigenous fishing and hunting rights in the United States, see G.C. Coggins & W. Modrcin, "Native American Indians and Federal Wildlife Law" (1979) 31 *Stanford Law Review* 375; L. Reynolds, "Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption" (1984) 62 *North Carolina Law Review* 743; D.H. Getches & C.F. Wilkinson, *Cases and Materials in Federal Indian Law*, 2nd ed. (St Paul: West Publishing, 1986) chapter 12; G.D. Meyers, "Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada" (1991) 10 *UCLA Journal of Environmental Law* 67.

⁷⁵². See *Sohappy v. Smith* (1969) 302 F Supp 899 at 904, affirmed (1976) 529 F2d 570 (9th Cir) at 904; *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra* note 754 at 674.

⁷⁵³. See *United States v. Washington*, *supra* note 754 at 350-2, 406-7; *United States v. Michigan*, *supra* note 244 at 260; M.C. Blumm, "Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits a Prendre and Habitat Servitudes" (1989) 8 *Wisconsin International Law Journal* 1 at 4.

⁷⁵⁴. *United States v. Washington* (1974) 384 F Supp 312, affirmed (1975) 520 F2d 676 (9th Cir), certiorari denied (1976) 423 U.S. 1086 subsequently affirmed by *Washington v. Washington State Commercial Passenger Fishing Vessel Association* (1979) 443 U.S. 658. The cases are generally referred to as the 'Boldt' cases, after the Federal District Court judge who retained control of the cases over their long history.

For the background to, and aftermath of, the decisions, see American Friends Service Committee, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians* (Seattle: University of Washington Press, 1970); R. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique*, 2nd ed. (Seattle: University of Washington, 1979); F.G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle: University of Washington Press, 1986); F.G. Cohen, "Treaty Indian Tribes and Washington State: The Evolution of Tribal Involvement in Fisheries Management in the U.S. Pacific Northwest" in E. Pinkerton, ed. *Co-operative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989) 37; L.J. Landau, "Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest" (1980) 10 *Environmental Law* 413; United States Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* (Washington DC: US Government Printing Office, 1981); S. Bentley, "Indian's Right to Fish: The Background, Impact, and Legacy of *United States v. Washington*" (1992) 17 *American Indian Law Review* 1; The Institute for Natural Progress, "In Usual and Accustomed Places: Contemporary American Indian Fishing Rights Struggles" in M.A. Jaimes, ed. *The State of Native America*

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"merely the chance, shared with millions of other citizens, occasionally to dip their nets into territory waters".⁷⁵⁵ A purpose of the treaties was to provide the tribes with a livelihood and a moderate living.⁷⁵⁶ Hence, the state was not entitled to "rely on property law concepts ... license fees, or general regulations to deprive Indians of a fair share" of the fishery. Nor were the Indians entitled to "rely on their exclusive right of access to the reservations to destroy the rights of 'other citizens of the Territory'". Both sides have a right, secured by treaty, to take a fair share of the available fish.⁷⁵⁷

In the Boldt cases, the court held the Indians were entitled to an "equitable measure" of the fishery, which it initially assessed as 50 per cent of the fish runs which passed through their fishing grounds.⁷⁵⁸ However, in setting the 50 per cent share, the court imposed the proviso that the portion could be reduced if the tribe dwindled to a small number or abandoned its fishery.⁷⁵⁹ The court, through a series of orders, required the parties to negotiate and resolve allocation issues, subject to the supervision of the court in case of dispute.⁷⁶⁰ In addition, the court confirmed that the tribes were entitled to regulate their own fishery and enforce their tribal laws at their off-reservation fishing grounds.⁷⁶¹ Should the tribe or non-Indigenous commercial fishermen fail to utilise their share of the harvestable resource in a

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(Boston: South End Press, 1992) 217.

As to allocation issues generally, see T.F. Haensly, "Equitable apportionment of intertribal shares of anadromous fish" (1989) 8 Stanford Environmental Law Journal 174; E. Eisenstadt, "Fish out of water: setting a single standard for allocation of treaty resources: Where do the buffalo roam? Determining the scope of American Indian off-reservation hunting rights in the Pacific Northwest" (1992) 17 American Indian Law Review 209; D. Johnson, "Native American treaty rights to scarce natural resources" (1995) 43 U.C.L.A. Law Review 547.

⁷⁵⁵. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra* note 754 at 679.

⁷⁵⁶. *Ibid* at 686.

⁷⁵⁷. *Ibid* at 684-5.

⁷⁵⁸. *Ibid.* at 685.

⁷⁵⁹. *Ibid* at 687.

⁷⁶⁰. For a description of the process, see Cohen, (1989), *supra* note 754 at 40-5; N. Dale, "Getting to Co-Management: Social Learning in the Redesign of Fisheries Management" in E. Pinkerton, ed. *Co-operative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989) 49 at 54-6; Bentley, *supra* note 754 at 7-9.

⁷⁶¹. See further, *Settler v. Lameer* (1974) 507 F2d 231 (9th Cir.).

particular year, the other is entitled to utilise the surplus, thereby ensuring that the resource is fully utilised.⁷⁶²

In analysing the extent of the commercial component of treaty fishing right the court concluded that Indians are limited to taking sufficient fish to sustain a moderate living for a tribe.⁷⁶³ The consequence is that "treaty hunting and fishing rights are not immutable, and the scope of the right can vary according to the present needs of the tribe."⁷⁶⁴ Hence, in allocating the Indigenous peoples of 50% of the harvestable fish in Washington State, the court held that if the tribal needs could be satisfied by a lesser amount the Indigenous share could be reduced.⁷⁶⁵ Where, as in the Boldt series of cases, the resource in question is scarce, this may require a precise allocation of the resource between Indigenous and non-Indigenous users of the resource. However, where there is no scarcity of the resource there is no need for the courts to allocate the resource.⁷⁶⁶ Whilst the "moderate living doctrine"

⁷⁶² This has become known as the "foregone opportunity doctrine". See *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra* note 754 at 686-87; *United States v. Washington*, *supra* note 754 at 384, 390; *United States v. Washington* 761 F. 2d 1404 at 1408 (9th Cir. 1985); *United States v. Washington* 774 F. 2d 1470 at 1478-79 (9th Cir. 1985). See further, *C.J.S. Indians* 42 § 129.

⁷⁶³ *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra* note 754 at 685-87 (the right "secures so much as, but no more than, is necessary to provide the Indians with a livelihood -- that is to say, a moderate living": *ibid.* at 686); *United States v. Michigan*, *supra* note 244 at 473. In the Washington state cases the maximum take is further limited by a cap of 50% of the resource (imposed by reference to the words "in common with" in the applicable treaties). See further, *C.J.S. Indians* 42 § 129.

⁷⁶⁴ CWAG, *supra* note 234 at 213.

⁷⁶⁵ *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra* note 754 at 685-87 (where the court held that the allocation could be modified in response to changing circumstances). See further, *United States v. Washington*, *supra* note 240 at 1445-46, where the moderate living doctrine was raised by the State in 1994 in resisting an attempt by the same tribes for a declaration of a right to take 50% of the shellfish in their accustomed fishing grounds. The court, relying upon a range of economic indicators, held that the Indian tribes still had a standard of living considerably below that of the general population in the State and therefore did not consider that an allocation of a lesser share was warranted. The onus is on the State to establish that a lesser allocation is sufficient to satisfy the needs of the Indigenous peoples: *United States v. Washington* 626 F. Supp. 1405 (W.D. Wash. 1985). In those states where treaties do not impose a limit on the Indian share, the 50% limit is not applicable, but the underlying aboriginal right is still limited to the taking of sufficient fish to fulfil the tribes' needs: *United States v. Michigan*, *supra* note 244 at 472-73.

⁷⁶⁶ *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, *supra* note 325 at 1433-34; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* 740 F. Supp. 1400 at 1413-14 (W.D. Wis. 1990); *Mille Lacs Band of Chippewa Indians v. Minnesota* 952 F. Supp. 1362 at 1386-88 (D. Minn. 1997).

originated in the context of treaty cases, courts have subsequently considered it to be equally applicable to pre-treaty or common law aboriginal rights.⁷⁶⁷

Courts have also held that the treaties guaranteed the tribes a right of access across private property holder's property in order to gain access to their usual and accustomed fishing grounds. Notwithstanding the silence of the treaty on the matter and the absence of any reservation in grant of title to private property owners, the right to take fish imposed a prior servitude on the title of the burdened property owner.⁷⁶⁸ The Supreme Court initially held that the treaty right was subject to the right of the state to regulate for necessary conservation purposes.⁷⁶⁹ However, the Court subsequently qualified its earlier ruling stating that regulations for conservation purposes must not unnecessarily burden the Indian fishery over non-Indian fisheries.⁷⁷⁰

The Boldt cases are undoubtedly the most significant series of cases dealing with allocation issues in the United States.⁷⁷¹ Two examples from other regions dealing with regulation issues will be briefly mentioned. In Oregon, a similar outcome was reached, albeit in a different context, where the court stated that: (1) state regulation of the fishery must be the least restrictive regulation consistent with preservation of the resource, (2) the Indians were entitled to a fair share of the remainder of the fishery, and (3) there were to be procedural protections, including providing the Indians with notice and an opportunity to be heard and participate in a meaningful way in the formulation of fishing regulations.⁷⁷²

⁷⁶⁷ See *United States v. Michigan*, *supra* note 244 at 472-73.

⁷⁶⁸ *United States v. Winans*, *supra* note 241 at 381; see also *Seufort Bros v. United States* (1919) 249 U.S. 194; *Tulee v. Washington* (1942) 315 U.S. 681, 86 L Ed 1115.

⁷⁶⁹ *Puyallup Tribe v. Washington Department of Game (No. 1)* (1968) 391 U.S. 392 [hereinafter *Puyallup I*] at 398, 401-3.

⁷⁷⁰ *Puyallup Tribe v. Washington Department of Game (No. 2)*, *supra* note 616 at 48-9.

⁷⁷¹ The Boldt cases were based on litigation asserting Indigenous rights. However, the political process has also delivered a share of fisheries to Indigenous peoples in parts of the United States. For example, in Alaska, western native villages have been allocated 7.5% share of the total allowable catch of pollock in the Bering Sea in its management plan under a community development quota. See further, L.E. Tryon, "An Overview of the CDQ Fishery Program for Western Alaskan Native Communities" (1993) 21 *Coastal Management* 315.

⁷⁷² *Sohappy v. Smith*, *supra* note 752 at 907-11. See further J.C. Gartland, "*Sohappy v. Smith*: Eight Years of Litigation over Indian Fishing Rights" (1977) 56 *Oregon Law Review* 680; Blumm, *supra* note 753 at 7. The limitation on State's powers in relation to Indigenous fisheries arose from the constitutional division of powers in the United States. See further, F.S. Cohen, *Handbook of Federal Indian Law*, 1982 ed. ed. (Charlottesville, VI: Michie Bobbs-Merrill, 1982) at 458-62; CWAG, *supra* note 234 213-19;

A negotiated settlement was reached between the State of Minnesota and Indian tribes in relation to the scope of the State's regulation of Indian fishing rights. This occurred after initial litigation concerning whether Indigenous fishing rights were subject to State regulation.⁷⁷³ Under the settlement, which was ratified by the Minnesota legislature and incorporated in a consent judgment settling the federal court case, Indians were expressly exempted from State regulation while fishing or hunting on their reserve lands, the Indians agreed to pass their own conservation code to regulate members of the tribe, and the State imposed a licence fee on non-Indians hunting or fishing within the reserve areas which it agreed to pass on to the tribe.⁷⁷⁴

In response to the need to regulate their own fisheries, a number of Indian tribes established the Northwest Indian Fisheries Commission and the Columbia River Inter-tribal Fish Commission to provide a means for inter-tribe regulation.⁷⁷⁵ Congress subsequently enacted the *Salmon and Steelhead Conservation and Enhancement Act* which formalised the co-management of the fisheries.⁷⁷⁶

⁷⁷³ . See *supra* note 250.

⁷⁷⁴ . See Minn. Stat. §§ 97.151, 97.155 (1986); CWAG, *supra* note 234 at 238-39. As in the *Sohappy* case in Oregon, the result was largely driven by the constitutional limitations on the State powers to regulate Indian rights.

⁷⁷⁵ . See Dale, *supra* note 760 at 52-3.

⁷⁷⁶ . 16 USCS §3301 et seq. See further J.P. Mentor, "Fishing Rights: Indian Fishing Rights and Congress - The Salmon and Steelhead Conservation and Enhancement Act of 1980" (1983) 9 American Indian Law Review 121. There is also Indian representation on the United States section of the commission established under the 1985 Pacific Salmon Treaty. See T.R. Busiahn, "The Development of State/Tribal Co-Management of Wisconsin Fisheries" in E. Pinkerton, ed. *Co-operative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989) 170; D.D. Goble, "Introduction to the Symposium on Legal Structures for Managing the Pacific Northwest Salmon and Steelhead" (1986) 22 Idaho Law Review 417. Other statutes providing for Indian fishing to be taken into account include the *Pacific Northwest Electric Power Planning and Conservation Act* 1980 16 USC §839 under which the Columbia River Basin Fish and Wildlife Program was adopted, see M.C. Blumm, "Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection" (1981) 11 Environmental Law 497; E. Chaney, "The Last Salmon Ceremony: Implementing the Columbia River Basin Fish and Wildlife Program" (1986) 22 Idaho Law Review 561; M.C. Wood, "Tribal Management of Off-Reservation Living Resources" in G.D. Meyers, ed. *The Way Forward: Collaboration and Cooperation 'In Country'*, 2nd ed. (Perth: National Native Title Tribunal, 1996) 34.

(ii) *Canada*

In Canada, issues concerning allocation of fisheries between Indigenous and non-Indigenous users have arisen both in land claim settlements and in court decisions on the scope of and protection of Indigenous rights afforded under the Canadian constitution.⁷⁷⁷

s 35(1), *Constitution Act*, 1982

Existing aboriginal and treaty rights were “recognized and affirmed” by constitutional amendment in 1982.⁷⁷⁸ The first occasion for the Supreme Court of Canada to consider this constitution provision was in *R. v. Sparrow*, where the court stated that:

the words ‘recognition and affirmation’ incorporate the fiduciary relationship referred to earlier and so import some restraint in the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. ... In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.⁷⁷⁹

While this statement is in the context of constitutional interpretation, the suggestion of that the section incorporates the existing fiduciary relationship of the Crown towards Indigenous peoples in Canada is interesting.⁷⁸⁰ The issue of whether the Crown is under a fiduciary

⁷⁷⁷. The types of co-management and allocation mechanisms have considerable variation. The following sections of this chapter can provide only a thumb nail sketch. For a detailed analysis of co-management issues, see RCAP, *supra* note 182 vol. 2 at 665-680; R.M. Kyle, *Aboriginal Use and Management of Fisheries in British Columbia* (LL.M. Thesis, University of British Columbia, 1996) at 110-184. For an overview of Canadian developments in the 1980's, see Cassidy, *supra* note 750 at 36-85. See also K. Abel & J. Friesen, eds., *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991).

⁷⁷⁸. s. 35(1) *Constitution Act* 1982.

⁷⁷⁹. *Supra* note 189 at 1109.

⁷⁸⁰. As to the existence of the fiduciary duty in Canada, see R.H. Bartlett, “You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: *Guerin v. The Queen*” (1984) 49 *Saskatchewan Law Review* 367; D.M. Johnston, “A Theory of Crown Trust Towards Aboriginal Peoples” (1986) 18 *Ottawa Law Review* 307; M.A. Donohue, “Aboriginal Land Rights in Canada: A Historical Perspective on the Fiduciary Duty” (1991) 15 *American Indian Law Review* 369; W.R. McMurtry Q.C. & A. Pratt, “Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective” [1986] 3 *Canadian Native Law Reporter* 19; R.A. Reiter, *The Fundamental Principles of Indian Law* (Edmonton: First Nations Resource Council, 1991) vol 1 chapter IV “The Crown's Fiduciary Obligation to Indians”; B. Slaterry, “First Nations and the Constitution: A Question of Trust” (1992) 71 *Canadian Bar Review* 261; A. Pratt, “Aboriginal self-government and the Crown's fiduciary duty: squaring the circle or completing the circle?” (1992) 2 *National Journal of Constitutional Law* 163; M.J. Bryant, “Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law” (1993) 27 *University of British Columbia Law Review* 19; D.P. Owen, “Fiduciary obligations and aboriginal peoples: devolution in action” [1994] 3 *Canadian*

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duty towards Indigenous peoples in relation its dealing with their common law rights has not been decided in Australia.⁷⁸¹ However, if the approach of Justice Toohey in the *Mabo* case is adopted,⁷⁸² then the practical consequences of such a fiduciary duty and s 35(1) may be

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Native Law Reporter 1; L.I. Rotman, "Provincial fiduciary obligations to First Nations: the nexus between governmental power and responsibility" (1994) 32 Osgoode Hall Law Journal 735; O. Griffiths, "Sui semantics and generis gratuities: the conundrum of Crown fiduciary obligations to aboriginal peoples" (1995) 6 Windsor Review of Legal & Social Issues 39; P.W. Hutchins, D. Schulze & C. Hilling, "When do fiduciary obligations to aboriginal people arise?" (1995) 59 Sask. L. Rev 97; D.W. Elliott, "Aboriginal peoples in Canada and the United States and the scope of the special fiduciary relationship" (1996) 24 Manitoba Law Journal 137; O.B. Griffiths, "Is the Crown fiduciary obligation in the currents of change?" [1996] 3 C.N.L.R. 25; D.C. Knoll, "Improvident surrenders and the Crown's fiduciary obligations: Blueberry River Indian Band v. Canada" (1996) 54 Advocate (Van.) 715; L.I. Rotman, *Parallel paths: fiduciary doctrine and the Crown-Native relationship in Canada* (Toronto: University of Toronto Press, 1996); J.P. Salembier, "Crown fiduciary duty, Indian title and the lost treasure of I.R. 172: the legacy of Apsassin v. The Queen" [1996] Canadian Native Law Reporter 1; R.A. Reiter, *The Law of First Nations* (Edmonton: Juris Analytica Publishing, 1996) chap. 4; L.I. Rotman, "Hunting for answers in a strange kettle of fish: unilateralism, paternalism and fiduciary rhetoric in Badger and Van der Peet" (1997) 8 Constitutional Forum 40.

⁷⁸¹. In *Mabo [No. 2]*, *supra* note 6 Brennan J limited his observations about fiduciary duties to circumstances where traditional owners surrender their native title to the Crown in expectation of a grant of tenure (at 60). Toohey J was the only member of the High Court to give a detailed analysis of fiduciary duties of the Crown towards aboriginal peoples in relation to its dealings with native title (at 199-205). Dawson J (dissenting) held that since, in his view, native title did not survive annexation of the Murray Islands, there was no scope for the imposition of any fiduciary duty arising out of native title (at 163-9).

The most recent reference to the potential existence of such a fiduciary duty by the High Court of Australia was in *Thorpe v. Commonwealth [No. 3]* (1997) 71 A.L.J.R. 767. Kirby J. observed that whilst a fiduciary relationship existed between the Crown and Indigenous peoples in the United States and Canada in certain circumstances, so far the existence of such a duty has "not gathered the support of the majority of this Court ... the result is that whether a fiduciary duty is owed by the Crown to the indigenous peoples of Australia remains an open question" (at 775-77). See also *Northern Land Council v. Commonwealth* (1987) 75 A.L.R. 210 (H.C.A.) at 215.

For opposing views as to the applicability of the fiduciary doctrine to the relationship between the Crown and Indigenous peoples in Australia, see L. DiMarco, "A Critique and Analysis of the Fiduciary Concept in *Mabo v Queensland*" (1994) 19 Melbourne University Law Review 868 and D. Tan, "The Fiduciary as an Accordion Term: Can the Crown Play a Different Tune" (1995) 69 Australian Law Journal 440. See also J. Behrendt, "Fiduciary Obligations and Native Title" (1993) 3:63 Aboriginal Law Bulletin 7; R. Blowes, "Governments: Can You Trust Them with Your Traditional Title - *Mabo* and Fiduciary Obligations of Governments" (1993) 15:2 Sydney Law Review 254; C. Hughes, "The Fiduciary Obligations of the Crown to Aborigines: Lessons From the United States and Canada" (1993) 16 University of New South Wales Law Journal 70; J. Malbon, "The Fiduciary Duty - the next step for Aboriginal Rights?" (1994) 19:2 Alternative Law Journal 72; D. Sweeney, "Broken Promises - The Crown's Fiduciary Duty to Aboriginal Peoples" (1995) 3:75 Aboriginal Law Bulletin 4.

⁷⁸². *Mabo v. Queensland [No. 2]*, *supra* note 6 at 199-205.

similar. At the present stage of the development of Indigenous rights at common law in Australia, this must necessarily be speculative.

In *Sparrow* the court held that in order to determine if there is a prima facie infringement of s 35(1) the following factors must be considered: (a) whether the limitation imposed by the legislation is unreasonable; (b) whether the limitation imposes undue hardship; (c) whether the limitation denies the holders of the right their preferred means of exercising that right?⁷⁸³ If there is a prima facie interference with the right, the Crown must justify the interference. The justification requires both that there be a valid legislative purpose⁷⁸⁴ and a consideration of the special trust relationship and responsibility of the government vis-a-vis Indigenous persons.⁷⁸⁵ This in turn involves an assessment of whether there has been as little infringement as possible with the Indigenous right in order to achieve the legislative purpose; whether, if the legislation involves expropriating the resource, compensation is payable; and whether the Indigenous persons involved has been consulted in relation to the proposed measures.⁷⁸⁶

In considering whether the terms of the Indian food fishing licence constituted a prima facie infringement of an Indigenous right to fish, the court noted that “the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs” of the Indigenous persons but also whether there is unnecessary infringement on the exercise of that right. For example, if they “were forced to spend undue time and money per fish caught or if the net length resulted in hardship” then there would be prima facie infringement.⁷⁸⁷ Not all regulations will be inconsistent with, or infringe, Indigenous rights.⁷⁸⁸ The need to conserve a species is a justifiable purpose to

⁷⁸³. *R. v. Sparrow*, *supra* note 189 at 1112. For subsequent elaboration of part of this test, see *R. v. Gladstone*, *supra* note 190 para. 43; *R. v. Cote*, *supra* note 192 para. 75.

⁷⁸⁴. *R. v. Sparrow*, *supra* note 189 at 1113. The court considered that conservation measures and other objectives which were “compelling and substantial” would satisfy this test: *id.* See also *R. v. Adams*, *supra* note 191 para. 56; *R. v. Cote*, *supra* note 192 para. 81.

⁷⁸⁵. *R. v. Sparrow*, *supra* note 189 at 1114.

⁷⁸⁶. *Ibid* at 1119. See also *R. v. Nikal*, *supra* note 309 at 256 regarding consultation.

⁷⁸⁷. *R. v. Sparrow*, *supra* note 189 at 1112.

⁷⁸⁸. For example, the requirement to obtain a licence, where the licence does not impose a restriction on the manner of fishing and was available at no cost, was not considered to involve any prima facie infringement of an Indigenous right to fish by the Supreme Court of Canada, see *R. v. Nikal* [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658, [1996] 5 W.W.R. 305 para. 92-102. Nor is there a conflict between a right to hunt and a prohibition against doing so in a dangerous manner: *Myran v. R.* [1976] 2 S.C.R. 137, 23 C.C.C. (2d) 73, 58 D.L.R. (3d) 1. A prohibition against taking shellfish from a contaminated area is a reasonable restraint on the right in order to protect public health: *R.*

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interfere with Indigenous rights.⁷⁸⁹ However, the court held the burden of conservation measures should not fall upon the Indigenous fishery. As the court observed “the pursuit of conservation in a heavily used fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource”.⁷⁹⁰ Hence, while conservation is a valid legislative purpose for the interference with Indigenous fisheries, the mechanism of implementing that purpose must give top priority to the Indigenous food fishery after valid conservation measures have been implemented.⁷⁹¹ The justificatory test is stringent and, as the court acknowledged, places a heavy burden on the Crown to justify the interference with Indigenous rights.⁷⁹²

Though the *Sparrow* decision did not deal with commercial fisheries, the federal government modified its policy in wake of the decision and, in June 1992, announced an “Aboriginal Fisheries Strategy”, which provides Indigenous communities with a greater share of commercial fisheries.⁷⁹³

The *Sparrow* test went under some modification in the subsequent *Van der Peet* trilogy.⁷⁹⁴ The situation presented in these cases was no longer simply a food fishery or the use of fish

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v. *Hopkins* [1993] 1 C.N.L.R. 123 (B.C. S.C.). Similarly, it has been suggested that a requirement to keep records of fish caught (which may be essential for the government to allocate quotas to non-Indigenous fishermen at an appropriate level to conserve the resource) may not be inconsistent with the Indigenous right: *Ministry of Agriculture and Fisheries v. Campbell*, *supra* note 231 at 265.

⁷⁸⁹. *Ibid* at 1113-4.

⁷⁹⁰. *Ibid* at 114.

⁷⁹¹. *Ibid* at 1116. See also *R. v. Denny*, *supra* note 397.

⁷⁹². *R. v. Sparrow*, *supra* note 189 at 1119. For an analysis of the *Sparrow* decision, see D.W. Elliott, “In the wake of Sparrow: a new department of fisheries?” (1991) 40 University of New Brunswick Law Journal 23; W.I.C. Binnie, “The Sparrow doctrine: beginning of the end or end of the beginning?” (1990) 15 Queen's Law Journal 217; M. Asch & P. Macklem, “Aboriginal rights and Canadian sovereignty: an essay on *R. v. Sparrow*” (1991) 29 Alberta Law Review 498; T. Isaac, “Discarding the rose-coloured glasses: a commentary on Asch and Macklem” (1992) 30 Alberta Law Review 708.

⁷⁹³. Canada. Department of Fisheries and Oceans, *Aboriginal Fishing Strategy* (Ottawa: Department of Fisheries and Oceans, 1992); R.M. Kyle, *Aboriginal Use and Management of Fisheries in British Columbia* (LL.M. Thesis, University of British Columbia, 1996) at 31-33, 118-20. For a review of the initial implementation of the strategy, see P. Pearse, *Managing Salmon in the Fraser. Report to the Minister of Oceans and Fisheries on the Fraser River Salmon Investigation* (Vancouver: Department of Fisheries and Oceans, 1992); Canada. Department of Fisheries and Oceans, *Aboriginal Fishing Strategy Qualitative Research: Report of Findings* (Ottawa: Department of Fisheries and Oceans, 1993).

⁷⁹⁴. *supra* note 190.

for ceremonial purposes, but a commercial use of the fishery. The Supreme Court of Canada considered that the high level of protection afforded to Indigenous rights for sustenance or ceremonial purposes was not appropriate for a broader commercial claim. Those aspects of the case which deal with whether particular Indigenous rights have a commercial component are considered elsewhere in this thesis.⁷⁹⁵ What is considered here is the balancing mechanism adopted by the court between Indigenous and non-Indigenous users when the Indigenous right is held to include a commercial component that was not internally self-limited (such as by reference to a moderate living standard).

The majority of the court approached the issue from the position that:

[T]he purposes underlying the rights must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable ... Because ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable.⁷⁹⁶

The court considered that where the Indigenous right is internally limited, so when that right has been satisfied and other users will be allowed to participate in the fishery, the notion of absolute priority over other persons articulated in the *Sparrow* case made sense. However, the court observed that where the Indigenous right was not internally limited, if absolute priority were accorded to the right it could effectively become an exclusive right and exclude all other users of the resource.⁷⁹⁷ The majority of the court stated that the "existence of such difficult questions of resource allocation supports the position that, where a right has no adequate internal limitations, the notion of exclusivity of priority must be rejected".⁷⁹⁸ Instead, the priority to be given to this type of right is "something less than exclusivity but which nonetheless gives priority to the aboriginal right".⁷⁹⁹ The court held that the process through which rights in fisheries were allocated must reflect the prior interest of Indigenous right holders in the fishery, but the government need not give absolute priority to Indigenous

⁷⁹⁵ . See *supra* notes 586-598 and accompanying text.

⁷⁹⁶ . *R. v. Gladstone*, *supra* note 190 para. 71, 73.

⁷⁹⁷ . *Ibid.* para. 58-61.

⁷⁹⁸ . *Ibid.* para. 66.

⁷⁹⁹ . *Ibid.* para. 63.

persons and may justify allocating a share of the resource (thereby restricting the scope of the Indigenous rights) to other persons.⁸⁰⁰

The court suggested that after:

the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this [justification] standard.⁸⁰¹

Though it declined to lay down a precise test as to when infringement of Indigenous commercial fishing rights would be permissible, it stated the government's actions would be subject to scrutiny on a case by case basis to see if due priority had been given to Indigenous right holders. In doing so it would have regard to a wide range of factors including whether the government accommodated the exercise of the Indigenous right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of Indigenous rights holders, the extent of the participation in the fishery of Indigenous rights holders relative to their percentage of the population, how the government has accommodated different Indigenous rights in a particular fishery (such as food versus commercial rights), how important the fishery is to the economic and material well-being of the Indigenous people in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.⁸⁰²

The evidence in the case was insufficient for the Court to determine whether the particular regulatory scheme was justified and that matter was remitted for a new trial.⁸⁰³ Nevertheless, the case is of considerable interest for its approach in trying to balance rights of Indigenous peoples to commercially exploit their resources against the interests of other segments of the wider community.⁸⁰⁴

⁸⁰⁰ . *Ibid.* para. 62.

⁸⁰¹ . *Ibid.* para. 75.

⁸⁰² . *Ibid.* para. 64. It is clear that the *Sparrow* test remains applicable in relation to an infringement of a self-limiting Indigenous right to fish for food, see *R. v. Adams*, *supra* note 191 para. 52, 59; *R. v. Gladstone*, *supra* note 190 para. 58.

⁸⁰³ . The Crown did not proceed to a new trial, so the courts have not had to determine whether the particular restriction on the Indigenous right infringed s. 35(1) of the *Constitution*.

⁸⁰⁴ . The strongest dissent to the approach of majority on the issue of justification was that of McLachlin J. Her dissenting reasons are contained in the accompanying *Van der Peet* judgment released on
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Land claim settlements

Over the past two decades Canadian governments have entered into a number of settlements with Indigenous peoples in northern parts of Canada whose aboriginal title to the land had not been extinguished. The first of the "modern" land claim settlements was the James Bay and Northern Quebec Agreement of 1975 with the Cree and Inuit in northern Quebec,⁸⁰⁵ which was subsequently extended to the Naskapi in northeastern Quebec in 1978.⁸⁰⁶ Agreements have also been entered into with the Inuvialuit in the western Arctic in 1984,⁸⁰⁷ the Council for Yukon Indians in 1991,⁸⁰⁸ the Gwich'in in the Northwest Territories in 1992,⁸⁰⁹ the Tungavik Federation of Nunavut in the eastern Arctic in 1992,⁸¹⁰ and the Sahtu

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the same day. In her view, once it is established the Indigenous right includes a commercial component, the exercise of the constitutionally recognised right is only subject to a limitation that the right be used responsibly. She considered that the approach of the majority, in cutting down the Indigenous right, amounted to a judicially authorised reallocation of the benefit of the right, contrary to the constitutional recognition and affirmation of the rights. In her view this was beyond the powers of the court and could only be accomplished by either a further constitutional amendment or by treaty between the Crown and the Indigenous peoples concerned: see *Van der Peet* para. 301-18.

For a critique of this aspect of the case, see K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified" (1997) 8 Constitutional Forum 33.

⁸⁰⁵ *The James Bay and Northern Quebec Agreement* (Quebec: Editeur officiel du Quebec, 1976). The fisheries and wildlife portions of the agreement were implemented by *Lois concernant les droits de chasse et de peche dans les territoires de la Baie James et du Nouveau-Quebec* ("An Act respecting hunting and fishing rights in the James Bay and New Quebec Territories") 1978, LQ, c. 92.

For a background of the events leading to the settlement, see J. O'Reilly, "The Role of the Courts in the Evolution of the James Bay Hydroelectric Project" in S. Vicent & G. Bowers, eds., *Baie James et Nord Quebecois: Dix Ans Apres* (Montreal: Recherches amerindiennes au Quebec, 1988) 34; W. Moss, "The Implementation of the James Bay and Northern Quebec Agreement" in B. Morse, ed. *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1985) ; T. Morantz, "Aboriginal Land Claims in Quebec" in K. Coates, ed. *Aboriginal Land Claims in Canada: A Regional Perspective* (Toronto: Copp Clark Pitman, 1992) 101 at 111-116.

⁸⁰⁶ *Northeastern Quebec Agreement* (Ottawa: Indian and Northern Affairs Canada, 1979).

⁸⁰⁷ Canada. Department of Indian Affairs and Northern Development, *The Western Arctic Claim: The Inuvialuit Final Agreement* (Ottawa: , 1984). The enabling legislation is the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c. 24.

⁸⁰⁸ *Council for Yukon Indians Umbrella Final Agreement* (Ottawa: Indian and Northern Affairs Canada, 1992). The umbrella final agreement deals with matters on a territory wide basis and is subject to the final terms of agreements to be reached with the 14 individual Yukon First Nations which incorporate its general provisions. Specific agreements have been finalised with the Vuntut Gwich'in (Old Crow) Nation, Nacho Nyak Dun, Champagne and Aishihik First Nations, the Tesline Tlingit Council and the Little Salmon-Carmale First Nation, subject to a ratification vote on the agreements.

⁸⁰⁹ *Gwich'in Comprehensive Land Agreement* (Ottawa: Indian and Northern Affairs Canada, 1991).

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Tribal Council in 1993.⁸¹¹ All of the settlements contain extensive provisions concerning fisheries and wildlife.⁸¹²

While there are substantial differences between these agreements, there are common elements in framework for allocating fishing and wildlife resources.⁸¹³ Within the lands over which the Indigenous people retain title, they have exclusive harvesting rights for any purpose (subject only to conservation needs).⁸¹⁴ In respect of the lands over which the

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The agreement is in similar terms to the Inuvialuit Agreement. See s 12 "Wildlife Harvesting and Management" and s 17 "Harvesting Compensation".

⁸¹⁰ The Nunavut settlement is fundamentally different to the other land claim settlements. It involves both a land claim settlement and the creation of a new self-governing territory within Canada in the eastern half of the existing Northwest Territories: see *Tungavik Federation of Nunavut Final Land Claims Agreement* (Ottawa: Indian and Northern Affairs Canada, 1991) and *Nunavut Political Accord* (Ottawa: Indian and Northern Affairs Canada, 1992). The new territory will be governed by a democratically elected government. However, as the Inuit constitute a majority of electors, it will in effect provide self-government for the Inuit of the Eastern Arctic. As a result, the land claim settlement does not contain the same detailed provisions dealing with control of natural resources and wildlife as the other agreements. For an analysis of the agreement, see J. Merritt & T. Fenge, "The Nunavut land claims settlement: emerging issues in law and public administration" (1990) 15 *Queen's Law Journal* 255; T. Isaac, "The Nunavut agreement-in-principle and section 35 of the Constitution Act, 1982" (1992) 21 *Manitoba Law Journal* 390.

⁸¹¹ *Sahtu Dene and Metis Comprehensive Land Claim Agreement dated 6 September 1993* (Ottawa: Indian and Northern Affairs Canada, 1993). The agreement is in substantially the same as the Gwich'in agreement.

⁸¹² For an excellent summary of the general provisions of the settlements see RCAP, *supra* note 182 vol. 2 Appendix 4A at 720-34. For a summary of the co-management provisions of the settlements and other co-management agreements with Indigenous persons in Canada, see RCAP, *supra* note 182 vol. 2 Appendix 4B at 735-774.

⁸¹³ The Inuvialuit Final Agreement, Gwich'in Comprehensive Land Agreement and the Sahtu Tribal Council Agreement are in substantially the same terms. The James Bay and Northern Quebec Agreement and Northeastern Quebec Agreements are in substantially the same terms. They do not contain the same level of detail as the Inuvialuit Final Agreement concerning fisheries and wildlife issues, though the framework is similar. One major difference is the income security program for hunters and trappers, see *infra* note 819. For a review of the provisions in the James Bay agreements see F. Berkes, "Co-Management and the James Bay Agreement" in E. Pinkerton, ed. *Co-operative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989) 189; H.A. Feit, "The Power and the Responsibility: Implementation of the Wildlife and Hunting Provisions of the James Bay and Northern Quebec Agreement" in S. Vincent & G. Bowers, eds., *Baie James et Nord Quebecois: Dix Ans Apres* (Montreal: Recherches amérindiennes au Québec, 1988) 74. The framework regarding fisheries and wildlife in the Yukon Final Umbrella Agreement and specific agreements made under it is similar to the Inuvialuit Final Agreement, though the specific provisions differ. The specific details of the Inuvialuit Final Agreement are used as example in this section.

⁸¹⁴ See Inuvialuit Final Agreement s 14(6)(d) (exclusive right to harvest game).

Indigenous people surrender their aboriginal title (i) first priority is to be given to conservation needs,⁸¹⁵ (ii) second priority is to be given to Indigenous subsistence needs (including barter and exchange between Indigenous communities);⁸¹⁶ and (iii) in relation to commercial fishing and hunting activities, Indigenous persons are given (in varying degrees) either preference in the allocation of the commercial quota or receive a minimum commercial quota.⁸¹⁷ Provision is also made for either compensation in the event of wildlife loss by future development⁸¹⁸ or, in the case of the James Bay Agreement, for an income security program for hunters, trappers and fishermen.⁸¹⁹ Indigenous peoples are to be consulted in relation to proposed conservation measures and allocation of quotas and various joint Indigenous-government administrative and advisory bodies have been established in relation to wildlife and fisheries management, whose functions include advising the government on harvest quotas and aboriginal subsistence needs.⁸²⁰

Many other agreements are in various stages of negotiation.⁸²¹ The most advanced of these is an Agreement in Principle reached between the Canadian government, British Columbia government and the Nisga'a in British Columbia in 1996.⁸²² The Nisga'a AIP is precisely

⁸¹⁵. *Ibid* ss 14(1),(6),(29),(30),(36).

⁸¹⁶. *Ibid* s 14(6)(a) (preferential right to harvest wildlife, excluding migratory non-game birds, for subsistence usage), s 14(12) (may sell, trade and barter fish and marine mammals acquired in subsistence fisheries to other Inuvialuit), s 14(29) (right to harvest a subsistence quota of marine mammals), s 14(31) (preferential right to harvest fish for subsistence). s 14(36)(c)(ii) (determination of subsistence quotas).

⁸¹⁷. *Ibid* s 14(6)(b)-(c) (exclusive right to harvest furbearers, polar bear and muskox), s 14(6)(29) (first priority for commercial quotas to harvest of marine mammals that the Inuvialuit can reasonably be expected to harvest in the quota year); ss 14(32)-(33) (for commercial fisheries other than marine mammals the Inuvialuit are guaranteed a quota based on their greatest fish harvest in the 3 years prior to the Agreement; however, beyond this their allocations are on the same basis as other users).

⁸¹⁸. *Ibid* s 13. See further J.M. Keeping, *The Inuvialuit Final Agreement* (Calgary: Canadian Institute of Resources Law, 1989) at 47-61.

⁸¹⁹. See further, H.A. Feit, "The Income Security Program for Cree Hunters in Quebec: An Experiment in Increasing the Autonomy of Hunters in a Developed Nation State" (1982) 3 *Canadian Journal of Anthropology* 57.

⁸²⁰. Inuvialuit Final Agreement ss. 14(3), (19), (36), (45), (61), (73). See further N.C. Doubleday, "Co-Management and the Inuvialuit Final Agreement" in E. Pinkerton, ed. *Co-operative Management of Local Fisheries* (Vancouver: University of British Columbia Press, 1989) 209 at 212-9.

⁸²¹. The region with the most intensive land claim negotiations is British Columbia. See further, British Columbia Treaty Commission, *Annual Report 1995-96* (Vancouver: British Columbia Treaty Commission, 1996).

⁸²². *Nisga'a Treaty Negotiations Agreement-in-Principle dated February 15, 1996* Issued jointly by the Government of Canada, the Province of British Columbia and the Nisga'a Tribal Council [hereinafter "Nisga'a AIP"].

that, an agreement in principle, and is not a binding agreement. It is subject to the parties agreeing upon a final text of a treaty and it then being ratified by the parliaments of Canada and British Columbia and being approved in a plebiscite amongst the Nisga'a.⁸²³ Nevertheless, the provisions of the Nisga'a AIP are quite detailed, running to 127 pages.⁸²⁴ Its provisions differ in many respects from the northern agreements. This is not surprising as it is the first attempt in British Columbia to develop a modern treaty and deals the Nass River area in which there is an existing highly developed commercial fishery. It also has the most sophisticated provisions of any agreement dealing with commercial fisheries. Accordingly, it is an interesting example of an attempt to balance competing Indigenous and non-Indigenous interests to commercial fisheries. The following summary deals only with Nisga'a entitlements to salmon, which is by far the most valuable fishery in the region.

Nisga'a are granted a treaty entitlement to harvest up to a specified number of each Nass area salmon species that varies with size of the run of each species.⁸²⁵ This right is subject to measures necessary for conservation and minimum escapement levels for each species of Nass River salmon are to be established where necessary for conservation.⁸²⁶ In addition to the treaty fish entitlement, there is to be a separate harvest agreement under which the Nisga'a may harvest sockeye salmon equivalent to 13% of the remaining total allowable catch of the sockeye salmon run and pink salmon equivalent to 15% of the remaining total allowable catch of the pink salmon run.⁸²⁷ The harvest agreement, which is to be established pursuant to the settlement legislation, is for an initial term of 25 years and renewable at the option of the Nisga'a every 15 years for a further term of 25 years.⁸²⁸ Allocation of the fishery entitlement amongst Nisga'a is left to the Nisga'a Central Government,⁸²⁹ and the

⁸²³ . *Ibid.* at 3, 125-26.

⁸²⁴ . For an overview of the Nisga'a AIP see D. Sanders, "The Nisga'a Agreement" paper delivered at American Anthropological Association Conference (San Francisco, 1996). For a review of initial public reaction to the Nisga'a AIP, see British Columbia. Select Committee On Aboriginal Affairs, *Towards Reconciliation: Nisga'a Agreement-In-Principle and British Columbia Treaty Process - First Report* (Victoria, B.C.: Legislative Assembly of British Columbia, July 1997).

⁸²⁵ . Nisga'a AIP, Fisheries chapter, cl. 10 and Appendix H.

⁸²⁶ . Nisga'a AIP, Fisheries chapter, cl. 2, 9.

⁸²⁷ . *Ibid.* cl. 16, 17

⁸²⁸ . *Ibid.* cl. 17b., 18

⁸²⁹ . *Ibid.* cl. 63 The Nisga'a Central Government also has internal regulatory and licensing powers over Nisga'a citizens: cl. 63-64.

Nisga'a Central Government may allocate non-Nisga'a persons to harvest any or all of the Nisga'a salmon entitlement.⁸³⁰

The purpose for the separation of the Nisga'a entitlement into two components is that only the treaty component will receive protection under s. 35(1) of the *Constitution*.⁸³¹ This probably has more political than practical significance as the initial obligation upon the governments of Canada and British Columbia to enter into the initial harvest agreement with the Nisga'a will be a treaty protected rights under s. 35(1).⁸³² In practical terms, the fishery provisions of the Nisga'a AIP represent a trade off whereby, in exchange for accepting a harvest entitlement below their previously constitutionally protected food fishery in years of poor runs, thereby permitting commercial fishing by non-Indigenous persons in some poor run years, the Nisga'a receive a greater entitlement in good run years.⁸³³ The Nisga'a may commercially sell all, or any part, of both the treaty protected and harvest agreement components of a particular species, provided that non-Nisga'a persons are also permitted to fish that species for either recreational or commercial purposes in a given year.⁸³⁴

In addition, and on top of the general settlement monies, \$11.5 million is to be provided to the Nisga'a to enable it to increase its capacity, in the form of buying licences and vessels, to

⁸³⁰ . *Ibid.* cl. 15.

⁸³¹ . *Ibid.* cl. 19.

⁸³² . *Ibid.* cl. 16. Some commentators have stated that of the two components of fisheries dealt with by the Nisga'a AIP only one will form part of the treaty and the other will be outside the treaty. This is an oversimplification. As discussed, there will be a legal obligation upon the Crown (which will form part of the treaty) to enter into the harvest agreement. As a consequence the obligation upon the Crown to enter the harvest agreement is a s. 35(1) protected treaty right, but once the Crown enters into the harvest agreement that obligation is discharged. The harvest agreement (which includes the renewal provision) is to be established pursuant to the settlement legislation (cl. 18). Accordingly, there will be a statutory, but not constitutionally protected, right of renewal. In theory, parliament could at a later date enact legislation to repeal those provisions of the settlement legislation dealing with the harvest agreement. However, unless subsequent legislation is enacted the Nisga'a will have a legally enforceable right to the harvest component.

⁸³³ . Part of the increased entitlement in good run years is reflected in the treaty protected component and part of this increased entitlement is in the harvest agreement component.

The Nisga'a AIP was finalised on 15 February 1996, at a time when the prevailing jurisprudence concerning Indigenous fishing rights in Canada was the *Sparrow* decision. Hence, at that time, the issue of an existing Indigenous commercial fishery being protected under s. 35(1) was unclear.

⁸³⁴ . *Ibid.* cl.28, 29. Accordingly, in any year in which there is any recreational or commercial fishery for non-Nisga'a persons, the Nisga'a may choose to sell for commercial gain what would previously, under the *Sparrow* test, have been the non-commercial food or sustenance component of their fishery.

participate in the coast wide commercial fishery.⁸³⁵ A fisheries conservation trust for the Nass region is also established, with initial contributions of \$10 million from Canada and \$3 million from the Nisga'a.⁸³⁶ A Joint Management Committee is also established pursuant to the settlement to facilitate co-operative planning and conduct of Nisga'a fisheries and enforcement activities in the Nass area; however, subject to the treaty allocation, the federal Minister retains ultimate control over fishery management.⁸³⁷

The importance given to fishing and wildlife issues in these settlements is not surprising given the significance of fisheries and natural resources in both Indigenous cultures and their contemporary economies in Canada. They may serve as models for addressing fishing and wildlife issues in any land claim settlements in parts of Australia where fish and wildlife remain important to Indigenous peoples.

(iii) *New Zealand*

There has been a long struggle in New Zealand over commercial fisheries.⁸³⁸ The struggle came to a head with the introduction of a quota management system ("QMS") for commercial fisheries by the *Fisheries Amendment Act* 1986 (N.Z.). The system provided for individual transferable quotas, which guaranteed the holder a specified share of the commercial quota for particular species of fish each year. The Maori commenced proceedings alleging the QMS improperly interfered with Maori fishing rights.⁸³⁹ An interim declaration was granted by the High Court in September 1987 that the Minister ought not to proceed further with implementing the QMS. A further interim declaration was made in relation to a particular species of fish that the government proposed to bring under the QMS

⁸³⁵ . *Ibid.* cl. 89-90.

⁸³⁶ . *Ibid.* cl. 78-88.

⁸³⁷ . *Ibid.* cl. 62-76.

⁸³⁸ . See K.A. Palmer, "Law, Land, and Maori Issues" (1988) 6 *Canterbury Law Review* 322 at 333-335; J. Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989* (Wellington: Allen & Unwin, 1990) at 107-39; D.V. Williams, "Maori Issues II" [1990] *New Zealand Recent Law Review* 129 at 130-5; Sharp, *Justice and the Maori*, 1990) at 82-5; McHugh, *supra* note 226 at 142-3 and the recitation of the recent history in *Te Rununga o Muriwhenua Inc v. Attorney-General*, *supra* note 228 at 645-50.

⁸³⁹ . The Waitangi Tribunal has expressed its concern to the government that the introduction of an individual transferable fishing quotas may limit the ability of the government to implement recommendations the Tribunal may make on the Muriwhenua fishing claim currently before the Tribunal. The government nevertheless proceeded with the introduction of the QMS.

in November 1987.⁸⁴⁰ In May 1988 the Waitangi Tribunal⁸⁴¹ published its Muriwhenua Fishing Report in which it found traditional Maori fisheries included a commercial component and that the Treaty of Waitangi "guaranteed to the Maori full protection for their fishing activities, including unrestricted rights to develop them along either or both customary or modern lines".⁸⁴² In response the government tabled a Maori Fisheries Bill in September 1988 under which the Maori would be theoretically entitled to receive up to 50 per cent of the commercial fisheries quota over a period of 20 years. However, due to various clawback provisions, the Maori were unlikely to receive more than 10 per cent of the quota.⁸⁴³

The Bill was strenuously opposed by the Maori who commenced a second wave of legal proceedings in which they pleaded trespass, breach of fiduciary duty and negligence against the Crown and sought damages and an account of profits.⁸⁴⁴ A substantially modified *Maori Fisheries Act* 1989 (N.Z.) came into effect on December 1989. It established a Maori Fisheries Commission to "facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing".⁸⁴⁵ The Commission received a capital grant of \$10 million and the Crown was to transfer 10% of the commercial fishing quota to the Commission over 4 years.⁸⁴⁶ The original provision in the Bill which would have extinguished any customary Maori fishing rights had been deleted. Hence, the issues as to whether the government had breached any Treaty obligations, any fiduciary duty towards the Maori or improperly abrogated Maori common law fishing rights remained before the courts.⁸⁴⁷

⁸⁴⁰. *Ngai Tahu Maori Trust Board v. Attorney-General* (2 November 1987, H.C., Greig J) [unreported] reproduced in Appendix F(6) of New Zealand. Law Commission, *supra* note 224.

⁸⁴¹. The Tribunal was established pursuant to the *Treaty of Waitangi Act* 1975 (N.Z.) and, subject to limited exceptions, its powers are only advisory. See further, R.P. Boast, "The Waitangi Tribunal: 'conscience of the nation', or just another court?" (1993) 16 *The University of New South Wales Law Journal* 223.

⁸⁴². New Zealand. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wai-22 (Auckland: Waitangi Tribunal, Department of Justice, 1988).

⁸⁴³. See Kelsey, *supra* note 838 at 124-7.

⁸⁴⁴. *Te Rununga o Muriwhenua Inc v. Attorney-General*, *supra* note 228 at 648-9. The proceedings were based on a number of alternative grounds including breach of Treaty rights and on aboriginal title.

⁸⁴⁵. *Maori Fisheries Act* 1989 (N.Z.) s 5(a).

⁸⁴⁶. *Ibid* ss 45, 40.

⁸⁴⁷. See *Te Rununga o Muriwhenua Inc v. Attorney-General*, *supra* note 228 at 649-50.

An application to rescind the two interim declarations restraining the government from proceeding with the QMS was initially rejected, but was later successful after the trial date had been vacated, the court considering that the ongoing delay was prejudicing commercial fishermen.⁸⁴⁸ However, the Court of Appeal reserved the decision and restored the interim declarations.⁸⁴⁹ As a result the government continued to be frustrated in its attempt to implement the QMS system for commercial fisheries.

Eventually the Maori and the Crown reached a settlement in September 1992. The timing of the settlement was influenced by the largest company in the commercial fishing industry (which owned approximately 25% of all existing commercial fishing quotas) being put up for sale. Both the Crown and Maori seized the opportunity to settle their differences, so that the proceeds of the settlement could be used by Maori to purchase a share of the company. The major provisions of the settlement were: (i) a \$150 million payment by the Crown to the Maori for the development Maori commercial fisheries (part of which was to be used in a joint venture to purchase the company which owned approximately 25% of the existing commercial fishing quotas);⁸⁵⁰ (ii) the Maori would receive 20% of the quota for all new species of fish brought under the QMS;⁸⁵¹ and (iii) increased Maori representation on various statutory bodies concerning fish management.⁸⁵² In exchange any Maori commercial fishing rights (based on aboriginal title, customary law or the Treaty of Waitangi) were extinguished and all existing litigation concerning those rights discontinued.⁸⁵³ The total value of the settlement in monetary terms was estimated to be \$500 million.⁸⁵⁴ The settlement was implemented by the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992 (N.Z.).⁸⁵⁵ As a result, Maori now control close to 40% of the New Zealand commercial fishing industry.⁸⁵⁶

⁸⁴⁸. *Ngai Tahu Maori Trust Board v. Attorney-General* (12 April 1990, N.Z. H.C., Grieg and McGehan J.J.) [unreported] [1990] B.C.L. 838 [1990] B.C.L. 838.

⁸⁴⁹. *Te Runanga o Muriwhenua Inc v. Attorney-General* (28 June 1990, C.A., Richardson, Casey and Hardie Boys J.J.) [unreported] [1990] B.C.L. 1293 [1990] B.C.L. 1293. See further, Williams, *supra* note 838 at 135.

⁸⁵⁰. Settlement Deed, dated 23 September 1992, cl 3.1.

⁸⁵¹. *Ibid* cl 3.2.

⁸⁵². *Ibid* cl 3.3.

⁸⁵³. *Ibid* cl 5.1 and 4.3.

⁸⁵⁴. D. Graham, (1992) 532 *New Zealand Parliamentary Debates* 12817, cited in J. Munro, "The Treaty of Waitangi and the Sealord deal" (1994) 24 *Victoria University of Wellington Law Review* 389 at 389.

⁸⁵⁵. For further discussion of the settlement (generally known as the "Sealords deal" after the company
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Non-commercial Maori fishing rights, though not extinguished, were made unenforceable in civil or criminal proceedings. However, the Waitangi Tribunal's jurisdiction to make recommendations in relation to whether the Crown had honoured its Treaty obligations in respect to those rights was left intact. The settlement also provided that s. 88(2) of the *Fisheries Act* 1983 (N.Z.) would be repealed. Non-commercial rights were to be provided for by the making of new regulations.⁸⁵⁷ Subsequently, Part IX of the *Fisheries Act* 1996 (N.Z.) was enacted to establish a framework for the regulation and co-management of local non-commercial Maori customary fishing.

There has been considerable litigation in relation to the settlement, which has predominantly dealt with challenges by particular Maori groups concerning decisions of the Maori Fisheries Commission as to the distribution of settlement assets and benefits amongst different sections of the Maori population.⁸⁵⁸ The Court of Appeal has characterised the settlement as

(Footnotes continued from previous page)

holding the existing fishing licences which was bought by the joint venture the Maori participated in with the settlement monies), see S. Davidson, "Maori Fishing Rights - Current Legal Developments" (1994) 9 *International Journal of Marine and Coastal Law* 408; W. Dewes, "Fisheries: a case study of an outcome" (1995) 25:2 *Victoria University Of Wellington Law Review* 219; P.G. McHugh, "Sealords and sharks: the Maori Fisheries Agreement" [1992] *The New Zealand Law Journal* 354; Maori Fisheries Commission, *The Sealord Deal: What It Means for Maori*, 1992); J. Munro, "The Treaty of Waitangi and the Sealord deal" (1994) 24 *Victoria University of Wellington Law Review* 389; New Zealand. Waitangi Tribunal, *Fisheries Settlement Report*, Wai-307 (Auckland: Waitangi Tribunal, Department of Justice, 1992); M. Robinson, "The Sealord fishing settlement: an international perspective" (1994) 7 *Auckland University Law Review* 557; A.M. Waetford, "Treaty of Waitangi (Fisheries Claims) Settlement Act" (1992) 7:2 *Auckland University Law Review* 402; J. Willing, "New Zealand's Experience in Settling Maori Fishing Claims" (1994) 53:5 *Australian Fisheries* 19; P.A. Memon & R.C. Cullen, "Rehabilitation of Indigenous Fisheries in New Zealand" in R. Howitt, J. Connell & P. Hirsch, eds., *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (Melbourne: Oxford University Press, 1996) 252 at 256-63; C. Wickliffe, "The Co-Management of Living Resources and Maori Customary Fishing Rights" in G.D. Meyers, ed. *The Way Forward: Collaboration and Cooperation 'In Country'*, 2nd ed. (Perth: National Native Title Tribunal, 1996) 67. See also, R. Miller, ed. *New Zealand Politics in Transition* (Auckland: Oxford University Press, 1997) (Part 7 "Maori Politics") at 359ff.

⁸⁵⁶ J. Willing, "New Zealand's Experience in Settling Maori Fishing Claims" (1994) 53:5 *Australian Fisheries* 19 at 21. This comprises the original 10% of quota transferred under the *Maori Fisheries Act* 1989 (N.Z.), the half share of the Sealord quota (held via the joint venture company), the 20% share of subsequent fisheries brought under the QMS and subsequent purchases on behalf of the Maori.

⁸⁵⁷ Settlement Deed cl. 5.2.

⁸⁵⁸ An attempt by dissenting Maori to obtain an injunction preventing the introduction of the settlement legislation into parliament failed, see *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* (1992), [1993] 2 N.Z.L.R. 301 (C.A.). For subsequent litigation concerning the implementation and administration of the settlement assets, see *Hauraki Maori Trust Board v.*

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a pan-Maori settlement designed to benefit all Maori and not only those who retain their customary Maori tribal (or iwi) association.⁸⁵⁹

C. RELEVANCE OF OVERSEAS MODELS TO AUSTRALIA

Notwithstanding the different legal foundation of Indigenous fishing rights in Canada, United States and New Zealand there are a number of similarities in the mechanism for allocating the resource, both under court imposed results and in land claim settlements. Generally, the allocation of fisheries between Indigenous and non-Indigenous users is guided by the following principles.

- (1) Conservation needs are to be allocated first priority.
- (2) Indigenous subsistence and cultural needs are to be allocated the highest priority after conservation.

To ensure this, any conservation measures must not adversely impact Indigenous fishing rights more than non-Indigenous fishing rights. The conservation measures are to be goal oriented (i.e. in total quantity of fish to be harvested) and Indigenous peoples are to be given wide latitude in how they implement their own conservation measures to meet that goal. Where it is necessary to impose conservation measures on Indigenous communities, those communities should be consulted about the measures.

- (3) Indigenous and non-Indigenous commercial fishermen are each to receive an equitable share of the remaining harvest quota. The Indigenous portion will vary from year to year depending upon the ability of the Indigenous peoples to utilise their portion of the commercial fishery, so that the available commercial harvest is fully utilised.

(Footnotes continued from previous page)

Treaty of Waitangi Fisheries Commission [1995] 2 N.Z.L.R. 702 (H.C.); *Te Rununga o Muriwhenua Inc v. Te Runanganui o Te Upoko o Te Ika Association Inc* [1996] 3 N.Z.L.R. 10 (C.A.); and see the numerous unreported cases referred to in A.L. Mikaere, "Maori Issues" [1994] New Zealand Recent Law Review 265 at 276-77 and A.L. Mikaere, "Maori Issues" [1994] New Zealand Recent Law Review 265 at 143-45.

⁸⁵⁹ *Te Rununga o Muriwhenua Inc v. Te Runanganui o Te Upoko o Te Ika Association Inc* [1996] 3 N.Z.L.R. 10 (C.A.). See further, A. Kawharu, "Urban iwi: the new tribes of Maoridom?" (1996) 8 Auckland University Law Review 209. The decision of the Court of Appeal was subsequently overturned on procedural grounds by the Privy Council and a new trial ordered: *Treaty Tribes Coalition v. Urban Maori Authorities* [1997] 1 N.Z.L.R. 513 (P.C.).

Of course, while there are similarities, the particular regimes arrived at reflect the particular constitutional framework, legal foundation of the Indigenous rights and factual circumstances in each case.⁸⁶⁰ Nevertheless, it is not surprising that the allocation mechanisms in different countries have much in common since they all reflect an attempt to equitably allocate the resource between different users taking into account the historical importance of fisheries to Indigenous peoples.

The relevance to Australia is threefold. First, to the extent that there is an Indigenous right to fish which has not been extinguished by statute, the exercise of a broad discretion under fisheries legislation to allocate quotas, grant fishing licences or implement conservation measures is not (in the absence of a clear legislative intent to the contrary) to be exercised in a way inconsistent with existing Indigenous rights.⁸⁶¹ Commonwealth and State legislation must also deal with Indigenous fishing rights in a non discriminatory manner. The overseas models illustrate how conservation, allocation and other measures may be implemented in a way that tries to accommodate Indigenous rights. Second, to the extent that the Crown is under a fiduciary duty in its dealings with native title or other Indigenous rights,⁸⁶² these models indicate allocation mechanisms that are likely to comply with that duty. In particular, the existence of a fiduciary duty places the Crown in a position of conflict as on the one hand it has a duty not to act adversely to Indigenous interests or to obtain a benefit for itself but on the other hand it cannot abdicate its responsibility to manage the resource. The overseas models may indicate a manner in which the Crown can try to reconcile its competing duties. Third, to the extent that governments and Indigenous peoples in Australia choose to resolve uncertainties arising out of the existence of common law Indigenous rights by entering into regional settlements, these models indicate the types of issues that are likely to arise.⁸⁶³

⁸⁶⁰. See *R. v. Sparrow*, *supra* note 236 at 273-74; *Van der Peet* para. 35.

⁸⁶¹. *Supra* note 376.

⁸⁶². See *supra* notes 780-781 and accompanying text.

⁸⁶³. In relation to the potential application of the environmental management components of these agreements in Australia, see B.J. Richardson, D. Craig & B. Boer, "Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and Their Potential Application to Australia - Part 1" (1994) 11 *Environmental and Planning Law Journal* 320; B.J. Richardson, D. Craig & B. Boer, "Indigenous Peoples and Environmental Management: A Review of Canadian Regional Agreements and Their Potential Application to Australia - Part 2" (1994) 11 *Environmental and Planning Law Journal* 357.

The present position in Australia concerning Indigenous people in relation to fisheries resources is a far cry from that in the other common law countries discussed above. The statutory exemptions from fisheries regulations are generally limited to a right to take fish for food. Even this limited right is haphazard as it varies both across and within different states and territories. The *Native Title Act* 1993 (Cth.) grants a uniform exemption from fisheries regulations in respect of native title fishing rights; however, that exemption is still limited in its scope and for the purpose for which the fish may be taken. There is no exemption from the general regime applicable to the commercial fisheries. Only one state has a very limited community fishing licence which permits limited commercial sale, but only to other members of the Indigenous community. As a practical matter Indigenous peoples in Australia have very limited participation in the mainstream commercial fishing industry. In light of the historical reliance upon fisheries in many areas and the continuing importance of fisheries to Indigenous peoples, this is anomalous. However, the same position occurred in each of the United States, New Zealand and Canada. It was only when the courts in each of those countries started recognising Indigenous rights to the fisheries that the position changed. Whilst Indigenous peoples were not uniformly satisfied with the extent of change in those countries, and are pressing for even greater change, they now have a much greater share of and say concerning the management of fisheries than Indigenous peoples in Australia.

However, quite apart from whether Indigenous peoples have any existing legal rights in respect of marine resources, Government inquiries over the past decade have generally supported an increased role for Indigenous peoples in Australia in marine resource management. The calls for change are unlikely to disappear and, if anything, seem to be gaining some impetus. The recommendations of the inquiries largely deal with the general principle of involving Indigenous peoples in marine management. They tend not to look at the particular means by which this is to be achieved. Accordingly, the overseas models may provide guidance for statutory resource managers as to possible ways to involve Indigenous peoples in a co-management role or advisory role in relation to resource management.

D. PROPOSALS FOR CHANGE IN RECENT GOVERNMENT INQUIRIES

As discussed above, there have been a number of government inquiries which have touched upon the issue of Indigenous involvement in marine management. The recommendations will be briefly examined.

The report of the Australian Law Reform Commission on the recognition of the customary laws of Indigenous peoples, in 1986, recommended that Commonwealth and State legislation be amended:

- to require consultation with Indigenous people affected before steps are taken to restrict tradition fishing and hunting by Indigenous persons;
- to ensure that view of Indigenous persons whose traditional activities may be affected are taken into account in reaching any decision on the management of resources; and
- as far as possible, to ensure Indigenous representation on decision making bodies and advisory committees.⁸⁶⁴

It suggested the following order of priorities for the allocation of fisheries and wildlife:

- (1) conservation and other identifiable overriding interests;
- (2) traditional Indigenous fishing and hunting;
- (3) commercial and recreational fishing and hunting.⁸⁶⁵

The fisheries working group in the government sponsored ecologically sustainable development process, delivered its final report in November 1991. It observed that:

Indigenous peoples are a special group of stakeholders, historically marginalised and displaced, trying to hold on to what is left of their traditional homelands. Their cultural survival, not simply their subsistence livelihood, depends on the protection of local environments and wise management of the remaining ancestral resource base. To be effective, sustainability policies must succeed socially by working to overcome inequities and ignorance concerning indigenous people's interests and rights in fisheries and an array of coastal and aquatic systems.⁸⁶⁶

⁸⁶⁴ . ALRC, *supra* note 5 para. 997.

⁸⁶⁵ . *Ibid.* para. 978-988, 1001.

⁸⁶⁶ . Green, *ESD - Fisheries*, *supra* note 728 at xliii, 152-53.

It recommended that fisheries management authorities “need to find ways to engage indigenous communities in all aspects and levels of management”. It further recommended that “an appropriate framework must be found to work within the customary tenure systems which extended over the land-sea interface and coastal water used by indigenous groups in much of Australia”. It observed that “[p]erhaps the major obstacle to implementing ecologically sustainable development criteria in the context of indigenous sea resources is that the indigenous sector is not generally integrated in national fisheries management”.⁸⁶⁷ It made a number of recommendations as steps towards achieving this, including co-management procedures with Indigenous communities.⁸⁶⁸

The themes in this report were taken up in the report of the Coastal Zone Inquiry in 1993, undertaken by the Resource Assessment Commission. It considered that “[a]s the original owners and managers of the coastal zone, Australia’s indigenous people have a right to participate in, and benefit from, the management, development and protection of the zone”.⁸⁶⁹ The Commission recommended that:

- a process be initiated, in conjunction with representatives of land councils and other Indigenous organisations, whereby traditional fishing, hunting and gathering rights are recognised by governments, with appropriate amendments to be made to laws to incorporate this recognition;
- support be provided for the establishment of Indigenous resource management agencies and the community ranger system in some communities be extended; and
- a national Indigenous fisheries strategy be developed.

It was envisaged that the strategy would permit fisheries management agencies to assess Indigenous interests in fisheries and to negotiate appropriate mechanisms for the involvement of Indigenous peoples in resource management. It was also envisaged that the strategy would facilitate greater Indigenous participation in commercial fishing.⁸⁷⁰

⁸⁶⁷ . *Ibid.* at 153.

⁸⁶⁸ . *Ibid.* at 154,

⁸⁶⁹ . RAC, *Coastal Zone Inquiry*, *supra* note 773 at 183.

⁸⁷⁰ . *Ibid.* chap. 10.

The Coastal Zone Inquiry also criticised governments for failing to act on the recommendations of prior inquiries; in particular, the report of the Australian Law Reform Commission on the recognition of Indigenous customary laws.

However, the recommendations of these inquiries dealing with increased Indigenous involvement in fisheries and marine management have generally not been acted upon. In particular, there remains a lack of a formal or legal framework for ensuring Indigenous participation.

The most recent inquiry is the of a Standing Committee of the Commonwealth House of Representatives in mid 1997. Its recommendations were softer than those of the previous inquiries discussed. Nevertheless, it still supported an increased role for Indigenous peoples in fisheries management. In particular, it recommended that the Australian Fisheries Management Authority involve Indigenous fishers in the management of Commonwealth fisheries where they are legitimate stakeholders. It recommended that, where appropriate, Indigenous persons with an interest in the fisheries be represented on management advisory committees.⁸⁷¹

Indigenous peoples already have significant interests and presence in the maritime areas in parts of Australia. For example, of the 5,100km of coastline in the Northern Territory, approximately 72% is owned as inalienable Aboriginal freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.). Offshore islands contain a further 2,100 km of coastline in the Northern Territory of which 95% is Indigenous owned. Therefore within the Northern Territory alone, 5,670km (being approximately 80% of the coastline in the territory) is owned by Indigenous peoples.⁸⁷² The involvement of Indigenous communities of a management role in relation to the marine environment and resources would be a natural extension of their existing presence and existing legal interests in coastal areas.

⁸⁷¹ . AHRSC, *Managing Fisheries*, *supra* note 741 Recommendation 41 (at 128). Previous inquiries have also recommended that Indigenous communities have membership on management advisory committees concerning appropriate fisheries, e.g. see Green, *ESD - Fisheries*, *supra* note 728 at 154. See also G. Leyland, "Native Title and the Fishing Industry" in F. McKeown, ed. *Native Title: An Opportunity for Understanding* (Perth: National Native Title Tribunal, 1994) 176 at 176, where Guy Leyland, a spokesperson for the Western Australian Fishing Industry Council, notes that the industry endorsed the proposition that where Indigenous groups are significant users of a fisheries, they should be represented on the relevant management advisory committees. He also observes, that though that position was endorsed in 1991, the Australian government has not acted upon that recommendation.

⁸⁷² . Northern Land Council, *Croker Island Native Title Claim* (Darwin: Northern Land Council, 1997).

The recommendations of the above inquiries go some way towards meeting the demands of Indigenous peoples for a greater involvement in marine resource management. However, they tend not to address the further issue of Indigenous peoples being able to participate in the commercial utilisation of marine resources. This is likely to be the more controversial issue, in light of existing commercial interests of other persons.

As previously discussed, probably for the first time in the history of Australia, these claims are being successfully brought to the public arena. They are unlikely to go away.⁸⁷³ In light of the generally successful co-management regimes for many national parks across Australia, there appears to be a reasonable possibility of success for local fishery co-management schemes. These are matters for the future, beyond the immediate scope of this thesis. However, overseas experience shows that such outcomes are only likely to occur if Indigenous peoples can first establish, or create sufficient uncertainty, as to a legal right to the resource in question. It is only then that governments invest the necessary effort into trying to establish mechanisms that provide a degree of co-operation in relation to the management of, and sharing benefits of, resource. The slowness to implement the recommendations of the inquiries in Australia, indicates that Australian governments are no different to those in other countries. Accordingly, it may be that Indigenous peoples will have to pursue their claims through the courts in an attempt to force the issue.

⁸⁷³ . As of March 1997, Indigenous peoples in Australia had lodged 157 native title claims with the National Native Title Tribunal in respect of seas, fishing rights or both., see M. Ceresa, "Sea Change in Native Title" *The Australian* (18 March 1997).

CHAPTER 9: CONCLUSION

Fishing, hunting and gathering still form an important part of the lives of many Indigenous peoples. The importance is not limited to the food that is obtained, but it is also a means of passing on aspects of their culture from one generation to the next. They also have an important economic component. In the wake of the *Mabo* decision there is scope for common law recognition of Indigenous fishing, hunting and gathering rights. The scope of these rights is likely to be wider than existing statutory exemptions. This thesis has argued that Indigenous peoples have an existing, albeit unrecognised, common law right to fish, hunt and gather. The recognition of such a right by Australian courts would bring the common law in Australia into conformity with the common law in other countries. Such recognition can occur within the existing framework for the recognition of rights articulated by the High Court of Australia in *Mabo [No. 2]*.

As with the adaptability of Indigenous laws and customs in relation to land, Indigenous laws and customs governing fishing, hunting and gathering rights evolve with the time and those rights may be exercised in a contemporary manner.

The extension of the common law recognition of Indigenous rights to include fishing, hunting and gathering is a natural extension of the decision in *Mabo [No. 2]*. It seems clear that conceptually these rights are not necessarily linked to, or arise from, rights to land. However, the conceptual basis of other aspects of the rights are not at all clear. In particular, courts in other countries have grappled with the issue of characterising the nature and extent of Indigenous rights. On occasions, they have sought to define them by reference to the observed practices of Indigenous peoples, by the purpose for which certain practices were carried out, by notions of a subsistence lifestyle, by reference to activities important to a distinctive culture and by reference to the underlying purposes of particular constitutional or other legislative provisions. Within each of these approaches there has been considerable dissent as to the precise manner of determining the parameters of an Indigenous right. Whilst claims for Indigenous rights to fish for food or cultural purposes are unlikely to raise these issues, claims to fish for commercial purposes or to be able to exploit a resource for the economic sustenance of the Indigenous community are likely to force Australian courts to address this issue. The initial indications in Australia are that the starting point will be by reference to the rights as defined under Indigenous laws and customs. However, the extent

to which Australian courts will accept the logical consequences of this approach, or feel they need to find a self-limiting form of Indigenous rights, has yet to be seen. Paradoxically, the absence of constitutional protection of Indigenous rights in Australia may permit the courts to adopt a broad approach to the initial characterisation of Indigenous rights.

If these rights are recognised at common law questions as to the extent to which these rights have been extinguished or are currently regulated will arise. Though no definitive answer can be given, it is likely that these rights and, in particular Indigenous fishing rights, have survived to a much greater extent than native title to land. There is no issue in Australia as to the power of the Crown to extinguish or regulate Indigenous rights. In this regard, Indigenous rights stand in no different position to other private rights. However, the issue as to the extent to which such rights are subject to existing regulatory regimes is unclear. It will depend upon a consideration of the cannons of statutory construction and the operation of the *Native Title Act* 1993 (Cth.) and *Racial Discrimination Act* 1975 (Cth.) in the particular circumstances. It may be that some parts of a regulatory regime, such as those dealing with conservation issues, are held to be applicable to Indigenous rights, but other parts of the regulatory regime are held not to derogate from Indigenous rights. The issue is of pressing importance with the widespread introduction of individual transferable quotas ("ITQs") in fisheries management. In the absence of legislation specifically addressing the issue, it will be left for the courts to determine this on a case by case basis. Where regulatory regimes are held to derogate from Indigenous rights, further issues arise as to the extent of the compensation payable. This has considerable significance for the further extension of ITQs.

The commercial potential of Indigenous fishing and hunting rights is considerable. The commercial fishing catch in Australia is worth approximately \$1.7 billion per annum.⁸⁷⁴ However, Indigenous persons have virtually no role in the commercial fishery. In other countries the recognition of Indigenous fishing rights has led to a considerable increase in Indigenous involvement in the fishing industry. For example, between 1974 and 1985 the Lummi tribe in the United States increased its fishing fleet from 43 to 335 vessels and the Washington tribes as a whole increased their share of commercial fisheries from 2 per cent to 50 per cent.⁸⁷⁵ In New Zealand, the Maori received a \$150 million settlement in 1992 to

⁸⁷⁴ See *supra* note 738.

⁸⁷⁵ Bentley, *supra* note 754 at 15, 19. See also Cassidy, *supra* note 750 at 66-7. For the share allocated to western Alaskan Indigenous peoples, see *supra* note 771.

help them buy a share of the existing commercial fishery and are guaranteed 20 per cent of all future commercial fisheries. In a short period of time the Maori have gone from a position of almost total exclusion from the commercial fishery to a 40% share.⁸⁷⁶ The situation in Canada is still evolving; however, it appears likely that Indigenous peoples will receive a significant increase in the share of the fisheries allocated to them. The juristic basis of the Indigenous fishing right varied in each of the above situations. In the United States the right stemmed from treaty, but was often considered to be based on underlying Indigenous rights. In New Zealand, the basis of the right was never finally juridically determined, but appeared to be based both on treaty and aboriginal title. In Canada, the basis of the right varies by region and includes proclamation, treaty and aboriginal title. While the outcomes were to a large degree dependant upon historical and political circumstances in each case, and have no direct application to Australia, the potential for commercial development of common law Indigenous fishing rights in Australia should not be overlooked. At a time when Indigenous communities are seeking ways to increase their economic self-sufficiency these rights could be significant.

Many aspects concerning the exercise of Indigenous fishing, hunting and gathering rights are presently undetermined. It is not clear to what extent Indigenous fishing and hunting rights at common law are subject to existing regulatory schemes. Nor is it clear whether the Crown is under a fiduciary duty in its dealings with Indigenous rights and what impact such a duty may have on the management of fisheries and other resources. Further, there are a range of issues arising from the displacement of Indigenous peoples from their traditional land and the increased mobility of Indigenous peoples which need to be resolved. The extent to which the Indigenous rights may impact other activities is also not clear. For example, in other countries Indigenous fishing rights, at least where based on treaty, have been held to extend to habitat protection.⁸⁷⁷

However, these uncertainties do not detract from the importance of the rights. Recognition of Indigenous fishing, hunting and gathering rights at common law is likely to occur in

⁸⁷⁶ See *supra* note 856.

⁸⁷⁷ See Blumm, *supra* note 753; H. Foster, "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title" (1989) *University of British Columbia Law Review* 629; G.D. Meyers, "*United States v. Washington (Phase II)* Revisited: Establishing and Environmental Servitude Protecting Treaty Fishing Rights" (1988) 67 *Oregon Law Review* 771.

Australia in the next few years. Further, should Australia proceed along the same land claims settlement path that has been taken in Canada, the resolution of conflicts arising out of the allocation of fisheries and other natural resources is likely to form a significant component of any land claim settlement.

The existence of Indigenous rights at common law raises issues concerning the effective management, conservation and allocation of fisheries and other resources. However, recent experience in Australia concerning the joint management of national parks, and in the United States and Canada concerning fisheries, indicates that successful mechanisms can be arrived at to effectively manage natural resources taking into account both Indigenous and non-Indigenous needs. The recognition of Indigenous fishing, hunting and gathering rights, whilst posing challenges as to the management of natural resources, is the next natural step in trying to accommodate Indigenous rights within the common law framework in Australia.

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Marine Mammals Protection Act 1978 (N.Z.)

State Owned Enterprises Act 1986 (N.Z.)

Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (N.Z.)

Treaty of Waitangi Act 1975 (N.Z.)

Wildlife Act 1953 (N.Z.)