ABORIGINAL PEOPLES AND OCEANS POLICY IN AUSTRALIA – AN INDIGENOUS PERSPECTIVE

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INTRODUCTION[1]

In a recent publication on Aboriginal customary marine tenure, it was noted that even in the field of anthropology, Aboriginal relationships to the sea have been misunderstood and neglected in a manner which "has resulted in the indigenous relationship to the sea being seen only in terms of resource usage and in the many and complex indigenous systems of near-shore marine tenure worldwide becoming invisible."[2] One of the reasons proffered for this 'blind spot'[3] was the manner in which western relationships to the sea, including views that the seas were open to all, blinkered the way in which indigenous cultures were understood.

This 'invisibility' has been more than just a 'blind spot' in the field of anthropology. It has been a matter of great convenience to governments and industry groups who, by ignoring Aboriginal interests in marine environments, have been able to exploit the resources that we have always managed. It has also served to deny us a right to make a livelihood from those resources.

While the myth of invisibility is being increasingly dispelled, the desire of governments and industry to continue to reap the benefits of that historical injustice remains largely unchanged. Despite being the subject of numerous reports and policy statements espousing principles of increased participation in both resource management and industry participation, tangible benefits for Aboriginal people have yet to be realised.[4]

The *Oceans Policy* was released on 23 December 1998. The extent to which the Australian *Oceans Policy* can deliver outcomes where previous reports and policies have failed remains to be seen but current indications are that it will be unlikely to deliver real change to how Indigenous interests are recognised and protected.

ABORIGINAL INTERESTS IN THE MARINE ENVIRONMENT

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[1] I would like to acknowledge the assistance of the Jumbunna Indigenous House of Learning, University of Technology for their assistance in the preparation of this paper.

[2] Peterson, N and Rigsby, B., *Customary Marine Tenure in Australia*, Oceania Monograph 48, University of Sydney, 1998, p. 1.

[3] *Ibid*, p. 2.

[4] For a description of some of those varying reports see Tsamenyi, M., and Mfodwo, K, *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues*, ATSIC, July, 2000; and Smyth, D., "Fishing for Recognition: The Search for an Indigenous Fisheries Policy in Australia", *Indigenous Law Bulletin*, Vol.4, No: 29, 2000, pp. 8-10.

The special relationship between Aboriginal peoples and marine environments is, at least, becoming increasingly understood by non-Indigenous people. For Aboriginal peoples living in coastal regions, the marine environment has always constituted a fundamental economic and cultural resource. It is central to the spiritual well being of Aboriginal peoples. Indeed, in some parts of the country, it is not unusual for Aboriginal people to have stories and Dreaming tracks which travel through the sea, imbuing those areas with the cultural identity of the communities to which they belong. The travels of Dreaming creatures and the songs associated with them are sign posted by numerous sites of significance that can be located several kilometres offshore.[5]

The coastal environment is also important to Aboriginal peoples in other ways. Activities such as hunting and fishing have been passed down over the centuries and are carried out with the knowledge and pride that they represent the continuing of a tradition. It is a means of being on country, of enjoying our home, and making a living from a country that has always been ours. In these ways hunting and fishing by Aboriginal people are not merely physical activities, they are cultural activities which are central to our identity. Understanding Aboriginal hunting and fishing in these ways makes it easy to understand why Aboriginal people are angered[6] when they are treated by governments and policy makers as just another category of recreational user of marine resources.

We have an understanding of our coastal environment that has assisted us to manage coastal resources for generations. We understand the lifecycles and seasonal movements of many species. We have knowledge of the times of the year when it is appropriate to fish certain species. There are areas where we do not fish at particular times of the year because they are known breeding areas. We know how to look for, and understand, indicators from the environment that tell us when a particular resource is under threat and should be left alone. When we see those signs we do not fish in those areas. That is how we have traditionally ensured that the species is properly managed.

For Aboriginal people, the marine environment is not only an important source of food it remains an important economic resource. It constitutes a resource that has always been exploited to the extent necessary to satisfy the needs that were required to be satisfied in order to sustain our existence.

The requirement that Aboriginal interests in coastal environments be protected is no longer solely in the realm of the goodwill of Governments. Our entitlement to have our interests in coastal waters protected arises from a range

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[5] See for example, Dick Roughsey's account of the flood making ceremony on Sydney Island in the Gulf of Carpentaria in Roughsey, D., *Moon and Rainbow: The Autobiography of an Aboriginal*, A.H & A. W. Reed Pty Ltd, 1971, pp.63-69. See also Memmott, P., and Trigger, D., "Marine Tenure in the Wellesley Islands Region, Gulf of Carpentaria" in Peterson, N and Rigsby, B., *Customary Marine Tenure in Australia*, Oceania Monograph 48, University of Sydney, 1998, pp.109-124 esp. at pp119-121. See generally, Sharp, N., "Following in the Seamarks? The Salt Water Peoples of Tropical Australia", *Indigenous Law Bulletin*, Vol.4, Issue 29, pp. 4 -7.

[6] See for example Leon, M., "NSW Indigenous Fisheries Strategy: Friend or Foe", *Indigenous Law Bulletin*, Vol.5, No: 9, at p. 13.

of international instruments[7] in relation to our rights to be free from the arbitrary deprivation of property,[8] and to be free from racial discrimination.[9] It also arises from Australia's international obligations to protect Aboriginal cultures, particularly under the International Covenant on Civil and Political Rights ('ICCPR') and the Biodiversity Convention.

In *Mabo [No:2]* Justice Brennan noted that Australia's accession to the ICCPR, and Australia's signing of the Optional Protocol to the ICCPR which allows for complaints to be made to the Human Rights Committee, brought a powerful influence to bear on the common law.[10] That covenant, and other international instruments that Australia has ratified should drive legislative and policy decisions in the same manner.

The need for the involvement of Aboriginal people in the management of resources and our active participation in resource industries also arises as a matter of social justice. So much was recognised by the Commonwealth Coastal Policy that stated:

> As a matter of social justice, Aboriginal and Torres Strait Islander peoples should be recognised as participants in the coastal management process, and should be able to derive social, cultural and economic benefit from the use of coastal environments in which they have an interest.[11]

NATIVE TITLE

The recognition of native title in *Mabo [No:2]*[12] was a significant step for Aboriginal people. In relation to the sea, the recognition of native title is a means by which some Aboriginal people can obtain limited recognition and protection of Aboriginal relationships to land and sea, including some hunting and fishing activities.

However, native title is a white man's law. At the same time as recognising traditional Aboriginal interests in the form of native title it also sanctioned the dispossession of Aboriginal people by recognising the authority

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[7] For an overview of these instruments in so far as they are relevant to fisheries issues see Sutherland, J., *Fisheries, Aquaculture and Aboriginal and Torres Strait Islander Peoples: Studies, Policies and Legislation*, Consultancy Report Commissioned by the Department of the Environment, Sport and Territories, 1996.

[8] See Art.17 of the *Universal Declaration of Human Rights* and Art.5 of the *International Convention on the Elimination of All Forms of Racial Discrimination.*

[9] See Art. 2 of the *Universal Declaration of Human Rights*, Art. 2 of *the International Covenant on Civil and Political Rights*, Art.2 on *the International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 2 of the *International Covenant on Economic Social and Cultural Rights.*

[10] *Mabo v State of Queensland* (1992) 175 CLR 1 per Brennan J at 42.

[11] Commonwealth Coastal Policy (1995) as quoted in Sutherland, J, *Fisheries, Aquaculture and Aboriginal and Torres Strait Islander Peoples: Studies, Policies and Legislation*, Consultancy Report Commissioned by Environment Australia, 1996, p. 57.

[12] *Mabo v State of Queensland [No:2]* (1992) 175 CLR 1.

of Australian governments to extinguish Aboriginal interests in land and sea.[13] Such concepts of 'extinguishment' are foreign to our cultures.

Furthermore, the recognition of native title itself only occurs on limited terms that have nothing to do with the full and meaningful recognition of Aboriginal interests in land and sea. Despite the fact that many Aboriginal cultures consider that they own their sea country as much as their land, the Australian Courts will not recognise the existence of those interests.[14] The Courts have also introduced arbitrary requirements in relation to continuing connection which have meant that although Aboriginal people themselves maintain their laws and customs, the Courts will no longer recognise them.[15] This is done through a criterion that pays no regard to the views of Indigenous people in relation to such matters.

The manner in which Aboriginal cultures are dealt with under the Australian legal system was highlighted in the *Yarmirr v Northern Territory*.[16] That case involved a native title claim to seas around Croker Island in the Northern Territory. The Aboriginal people had lived there for thousands of years before the coming of white people. For hundreds of years the islanders had traded with the Macassans. The Aboriginal people claimed that they had a right to trade the resources of the claim area. The people of Croker Island considered, and had always considered, that the seas around the islands belonged to them. The seas were divided into estates that belonged to different family groups. Under their laws and customs a person had to ask permission to fish in a particular part of the sea. An estate owner was entitled to a share of resources caught in their country by others. They asked the Court to recognise and protect these long-standing interests.

So how did the Court deal with these laws and customs? Firstly, although the common law has been able to recognise ownership of areas of the intertidal zone, and in some cases, out into the sea as far as a 'lumber-cask could be seen,[17] and the fact that such interests have been recognised notwithstanding the existence of the public right of fishing and navigation,[18] the Court held that for Aboriginal people to have similar rights, would be inconsistent with the common law.[19] Furthermore, despite the fact that the

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[13] *Mabo v State of Queensland [No:2]* (1992) 175 CLR 1 per Brennan J at pp. 63-69. See also *Fejo v Northern Territory* (1998) 195 CLR 96, *Western Australia v Ward* (2002) 191 ALR 1, *Wilson v Anderson* (2002) 190 ALR 313 HCA 29, and *Fourmile v Selpam Pty Ltd* (1997) 80 FCR 151.

[14] *Commonwealth v Yarmirr* (2001) 208 CLR 1 at paras 97-100

[15] See for example *Members of the Yorta Yorta Aboriginal Community v State of Victoria*[2002] HCA 58 and *De Rose v South Australia* [2002] FCA 1342.

[16] *Yarmirr v Northern Territory* (1998) 82 FCR 533 (at trial) and on appeal to the High Court, *Commonwealth v Yarmirr* (2001) 208 CLR 1.

[17] *Calmady v Rowe* (1848) 6 CB 861. See also *Earl Cowper v Baker* (1810) 17 Ves 129.

[18] See *Lord Fitzhardinghe v Purcell* [1908] 2 Ch 139 at 166; *Foster v Warblington Urban Council* [1906] 1 KB 648 at 683; *Llandudno Urban District Council v Woods* [1899] 2 Ch 705 at 709; *Orr Ewing v Colquhoun* (1877) 2 App. Cas. 839, per Lord Gordon at 868 and Lord Blackburn at 854; *Mayor of Colchester v Brooke* (1845) 7 QB 339.

[19] *Commonwealth v Yarmirr* (2001) 208 CLR1 per Gleeson CJ, Gaudron Gummow and Hayne JJ at paras 97-100.

common law has always recognised exclusive fisheries in England,[20] the High Court held that no such rights could exist for Aboriginal people in Australia.[21]

In relation to the requirements of permission to fish in the sea, the Court held that although the system of permission applied to Aboriginal people it did not apply to white people.[22] This has in effect meant that white people are not bound by that system of law and custom. To have a system of law and custom which can be freely ignored by a section of the community is little different from having that section of the community saying it does not exist at all.

In relation to the right to trade, the Court said that the Aboriginal people did not really trade with the Macassans, they merely exchanged goods with them in return for allowing the Macassans to fish there. At trial Justice Olney noted "there is some evidence that in the past the ancestors of some of the applicants engaged in a form of trade both amongst themselves and with the Macassan trepangers".[23] After referring to evidence in relation to trade of clay, bailer shells, spears and turtle shells Olney J stated:

> Whilst there can be no doubt that the trade here described related to objects which can properly be categorised as resources of the waters and land, the trading was constituted by the exchange of goods. The so-called "right to trade" was not a right or interest in relation to the waters or land. Nor were any of the traded goods "subsistence resources" derived from either the land or the sea.[24]

After considering evidence that the Macassans gave the Croker Islanders calicos, cloth, rice and Tamarind' in return for being allowed to fish in the waters, Justice Olney considered that the "evidence suggests no more than that the Macassans sought and received permission to take trepang from the waters around the island."[25] If I were to apply that way of thinking to my local supermarket, I could say that I never bought my groceries from the shop, nor did I trade, I simply left some money with the cashier in exchange for being allowed to walk out the store with the goods. Everyone else would call it trade.

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[20] While the Crown has been prohibited from granting such interests since Magna Carta, where it can be established that the private or "several" fishery predates Magna Carta it is still capable of recognition. See, for example, *Malcomson v O'Dea* [1862-1863] 10 HLC 593 at 618; and *Gann v Whitstable Free Fishers* [1864-1865] XI HLC 192.

[21] See at trial *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 593. It was also implicit in the majority judgment in the High Court: see *Commonwealth v Yarmirr* (2001) 208 CLR1 per Gleeson CJ, Gaudron Gummow and Hayne JJ at paras 97-100. See *also State of Western Australia v Ward* (2002) 191 ALR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at para 388.

[22] *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 585. That finding was not disturbed on appeal to the High Court. Part of the reasoning was based on an answer given by an Aboriginal witness who had poor English skills. For an account of some of the evidence in this matter and how it was misconstrued in that case see Evans, N., "Country and the Word: Linguistic Evidence in the Croker Sea Claim" in Henderson, J., and Nash, D., (Eds) *Language in Native Title*, AIATSIS, 2002, pp. 53-99 esp. pp. 86-93.

[23] *Yarmirr v Northern Territory* (1998) 82 FCR 533 per Olney J at p. 586.

[24] Ibid; per Olney J at p. 587. It is unclear where Olney J considered that bailer shells or turtle shells 'derived from'.

[25] Ibid; per Olney J at p. 588. These findings were not disturbed by the High Court on appeal.

This finding highlights that not only do the Australian Courts not approach the recognition of Aboriginal laws and customs from the perspective of Aboriginal people, they do not even approach the recognition from a manner in which their own customs would tolerate being judged.

The government's response to the recognition of native title was the Native Title Act 1993 (Cth) ('NTA'). In relation to coastal areas the *NTA* affords little protection to native title rights and interests even in the limited form in which they have been recognised. Any future act in relation to the management of waters and living resources in those waters is valid.[26] Although native title holders are afforded a right to comment in relation to those acts,[27] that right has been read to provide for only minimal involvement in the management processes,[28] and even if the procedural right is not afforded to native title holders the future act will be valid anyway. Furthermore, there is no right to negotiate in relation to the inter-tidal zone or areas below low-water mark.[29] Any act in relation to an offshore place affecting native title is also valid regardless of whether the appropriate procedural rights[30] are afforded to native titleholders.[31] While Aboriginal people are entitled to be compensated for such acts,[32] no such compensation has been paid to date.

While the *NTA* protects Aboriginal hunting and fishing rights by exempting those activities from certain licensing regimes,[33] that protection does not extend to the protection of those rights carried out for commercial purposes, even where they are recognised.

Finally, one unintended and negative impact of the recognition of native title has been the increasing tendency of Australian governments to consider Aboriginal interests in marine resources only in terms of native title rights and interests. It is, however, a flawed approach to see the need to recognise the rights of Aboriginal people only in terms of the limited, and artificial, confines of native title. Our involvement in resource management, the continuation of customary fishing rights, and our need to be able to obtain a livelihood from our country is required as a human right as well as an issue of social justice.

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[26] See section 24HA(3), *Native Title Act* 1993 (Cth).

[27] Section 24HA(7), NTA.

[28] See generally Anggadi, F., "The Ambit and Nature of Claimant Rights Under S.24HA of the Native Title Act: Harris v Great barrier Reef Marine Park Authority [2000] FCA 603", *Indigenous Law Bulletin*, Vol.5, No: 2, 2000, p. 18.

[29] Section 26(3), NTA.

[30] In relation to off-shore places native title holders have the same procedural rights as if they instead held corresponding non-native title rights in those waters: 24NA(8). In relation to coastal water which would be regarded as an on-shore place native title holders have the same rights as other title holders, although in relation to a compulsory acquisition a right to negotiate may apply: s.24MB and 24MD, NTA. Neither of these rights apply if the act relates to the management of water and airspace because such acts would then be covered by s.24HA, NTA.

[31] The act will be valid regardless of the procedural rights being afforded: *Lardil Peoples & Ors v State of Queensland & Ors* [2001] 108 FCR 453.

[32] In relation to acts constituting management of water and airspace see s.24HA(5) and in relation to off-shore places see s.24NA(5) and (6) of the *Native Title Act* 1993 (Cth).

[33] Section 211, *Native Title Act* 1993 (Cth).

ABORIGINAL PEOPLE AND AUSTRALIA'S OCEAN POLICY

The *Oceans Policy* identifies the concerns of the coastal Aboriginal peoples as including the equitable and secure access to resources, direct involvement in resource planning, management and allocation processes and decisions, formal recognition of traditional patterns of resource use and access, traditional management practices and customary law and conservation of the oceans and its resources, intellectual property and ownership. In its response to those concerns the Commonwealth has committed itself to a number of goals in relation to a number of different areas of Aboriginal concern.

(a) The Oceans Policy and the Recognition of Aboriginal Sea Titles

While the legal recognition of pre-existing Aboriginal interests through the recognition of native title in *Mabo [No:2]* has increased focus on Aboriginal interests in marine environments, it should not have taken that recognition to trigger such an interest. The *Coastal Zone Inquiry: Final Report* ('the Coastal Zone Inquiry') noted the perceived inadequacy of land tenure arrangements and marine estates commensurate with our status as original owners of the coastal zone.[34]

The *Oceans Policy* does not satisfactorily address this issue and the absence of an adequate legislative response to the non-recognition of Aboriginal sea titles, and the limitations of native title, means that their will be an ongoing grievance on the part of Aboriginal people in relation to this lack of recognition.

(b) The Oceans Policy Customary Fishing Rights

The recognition of Aboriginal hunting and fishing rights has been the subject of numerous reports including the Law Reform Commission's inquiry into the Recognition of Aboriginal Customary Law,[35] and the Coastal Zone Inquiry.[36]

What is clear from the numerous reports and the recommendations contained therein is that, in recent years at least, it is not through a lack of any identification of Aboriginal interests that they have not been recognised. It is through a lack of will power, and in some instances outright antagonism, on the part of governments. Indeed, it has often been more convenient to governments to merely have another report or inquiry than to meaningfully implement the recommendations of the previous report.

For most Aboriginal people in the country, the protection of Aboriginal hunting and fishing rights has generally only taken the form of exempting

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[34] Resources Assessment Commission, *Coastal Zone Inquiry: Final Report*, 1993, p. 177.
[35] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No: 31, Vol.2, 1986, p. 200.
[36] Resource Assessment Commission, *Coastal Zone Inquiry: Final Report*, 1993, Chapter 10.

Aboriginal people from licenses and otherwise allowing Aboriginal people to take flora and fauna which the general public are prohibited from taking.[37] Very little regard has been given to protecting Aboriginal people from the effects of the intrusion caused by the exploitation of our traditional sea country by commercial fishers, tourist operators and recreational users.

The *Oceans Policy* provides that the Government will "continue" to "remove barriers to indigenous groups practising subsistence fishing on a sustainable yield basis consistent with conservation of species".[38]

A number of points can be made in relation to this aspect of the strategy. The first is that any measures which will increase our ability to exercise our traditional hunting and fishing is welcomed. The second is that the measure is limited to 'subsistence' hunting and fishing. It is regrettable that a similar goal is not made in relation to Aboriginal hunting and fishing activities generally. Thirdly, the goal is limited to a 'sustainable yield basis'. While this is in principle a matter of general support, in practice it is a matter of considerable controversy. Unless the Government is willing to address all matters relevant to a particular resource it is wrong to simply point the finger at Aboriginal people for the impact on the species and judge sustainability by that criteria without first reducing the impact on species by other users and coastal development generally.

Finally, it is doubtful just how committed the Commonwealth is in relation to this matter anyway. At the time of the release of the *Oceans Policy* which undertook to "remove barriers to indigenous groups practicing subsistence fishing", the Commonwealth was actively arguing in Australian Courts that the Australian legal system should not recognise the traditional native title rights of Aboriginal people below low water mark. Indeed, it lodged an appeal in the *Croker Island Case* to specifically argue that point. Far from trying to remove barriers, it was actively seeking to create them. With such a two-faced approach to such a fundamental issue, is it any wonder that Aboriginal people are sceptical that the other measures in the *Oceans Policy* will be approached in good faith.

(c) Oceans Policy and Aboriginal Cultural Heritage

No where is the tension between being seen to protect Indigenous interests and the need to protect the convenience of the 'invisibility' of Aboriginal interests more apparent than in the area of Aboriginal cultural heritage. White Australians are happy to hang our cultures on their wall or use them in opening ceremonies for sporting events, but when it comes to a choice between protecting sites of significance and other cultural interests which

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[37] See for example s.60(2) *Living Marine Resources Management Act* 1995 (Tas), s.6 of the *Fish Resources Management Act* 1994 (WA), s.53, *Fisheries Act* 1995 (NT), and s.14 of the *Fisheries Act* 1994 (Qld). For an overview see Sutherland, J., *Fisheries Aquaculture and Aboriginal and Torres Strait Islander Peoples: Studies, Policies and Legislation*, Consultancy report commissioned by Environment Australia, 1996, pp.25-36.

[38] *Australia's Oceans Policy Specific Sectoral Measures*, Part 2.11, p. 24.

conflict with the interests of industry, our cultural heritage is seldom the winner.

Commonwealth and State heritage protection legislation is as inadequate to protect Aboriginal interests in coastal areas as it is in relation to other areas.[39] Some State heritage legislation tends to emphasise the protection of Aboriginal cultural heritage of archaeological value such as 'artefacts' and 'relics' but is inadequate to protect sites of spiritual significance.[40] Furthermore, in some legislation, part of the protection mechanism is to deem those 'artefacts' and 'relics' the property of the Crown.[41] This is a matter that is offensive to Aboriginal people. Far from providing protection, it often is no more than a means of regulating the destruction of that material, with government agencies being provided with authority to give consent for its destruction.[42] While the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) is supposed to provide protection where State regimes are inadequate, that protection is afforded at the discretion of the Government.[43] Not only has it been sparingly used,[44] but when convenient the Government has also passed specific legislation removing the protection afforded by the Act.[45]

The Coastal Zone Inquiry noted the concerns of Aboriginal people that our cultural heritage, including sites of cultural significance in coastal areas, was not under Aboriginal control, was inadequately protected or managed by government agencies and that such heritage should be under the control of Indigenous people.[46] There has been little change to heritage legislation since that report.

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[39] For a comparative overview of State and Territory Aboriginal heritage legislation see Evatt, E., "Overview of State and Territory Aboriginal Heritaqe Legislation", *Indigenous Law Bulletin 1998,* Vol.4, No:16, pp.4-8. For a specific discussion of the inadequacy of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987 (Qld) see Memmott, P and Long, S., "The Significance of Indigenous Place Knowledge to Australian Cultural Heritage" *Indigenous Law Bulletin* 1998, Vol.4., No: 16, pp.9 - 13 and Jago, M., and Hancock, N., "The Case of the Missing Blanket: Indigenous Heritage and States Regimes" *Indigenous Law Bulletin,* Vol 4, No: 16, pp.18-21.

[40] Evatt, E., *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* 1996, pp.77-81.

[41] See for example s.83 of the *National Parks and Wildlife Act* 1974 (NSW). S.11 of the *Aboriginal Relics Act* 1975 (Tas.) and s.33of the *Cultural Record (Landscape Queensland and Queensland Estate) Act* 1987 (Qld).

[42] See for example s.14(1) of the *Aboriginal Relics Act* 1974 (Tas) and s.87 of *the National Parks and Wildlife Act* 1974 (NSW).

[43] Sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth).

[44] For a complete analysis of the *Aboriginal and Torres Strait Islander Protection Act* 1984 (Cth) see Evatt, E, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* 1996.

[45] See for example the *Hindmarsh Island Bridge Act* 1997 (Cth) and *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

[46] Resource Assessment Commission, *Coastal Zone Inquiry: Final Report,* 1993, p.178, 10-35.

The *Oceans Policy* now provides that the Government will address the threats of impacts posed by activities on fishery resources and marine sites valued by Aboriginal communities.[47] While this is welcomed, it is in many respects an example of the Government being seen to be doing something without really doing anything. If the Government was serious about addressing our concerns it could have enacted legislation improving the protection of Aboriginal cultural heritage and implemented the recommendations of the *Review into the Aboriginal and Torres Strait Islander Heritage Protection* Act that took place in 1996.[48]

In any event, given the reluctance of the Commonwealth to use its own legislation to protect sites of significance, Aboriginal people can have little comfort that this will be meaningfully implemented. Indeed, at the same time that the *Oceans Policy* was being developed, the Commonwealth was removing the protection of that legislation in relation to one coastal region to allow the construction of the Hindmarsh Island Bridge. [49] Similarly, at the same time the *Oceans Policy* was being released, and after, the Commonwealth was opposing the recognition of native title rights to protect sites of significance in coastal waters,[50] even though a native title right to access waters for the purpose of protecting sites of significance had been recognised in *Yarmirr*.[51]

(d) The Oceans Policy and the Recognition of Aboriginal Marine Knowledge

There is presently an inadequate recognition of Aboriginal cultural knowledge in the marine environment. It receives inadequate protection under copyright laws and as a native title right.[52] The Courts have recently also stated that native title does not extend to the protection of knowledge of sites and country, because such matters are not regarded as interests in land and waters as defined in the NTA.[53] It is also inadequately protected under Aboriginal cultural heritage legislation.

In relation to Aboriginal cultural knowledge, the *Oceans Policy* states that the Government "will continue to implement the National Aboriginal and Torres Strait Islander Cultural Industry Strategy as it is applicable to the natural and cultural heritage values of Australia's marine areas."[54] That strategy is aimed at providing economic empowerment, access and coordination and

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[47] *Australia's Ocean Policy Specific Sectoral Measures*,Part 2.11, p.24.
[48] Evatt, E., *Aboriginal and Torres Straight Islander Heritage Protection Act* 1984, 1996.
[49] See for example the *Hindmarsh Island Bridge Act* 1997 (Cth) and *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
[50] See for example *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v State of Queensland & Ors,* Federal Court Proceedings QG207, Written Submissions of the Second Respondent: The Commonwealth of Australia, 1 November 2002, paras 85-86.
[51] *Yarmirr v Northern Territory* (1998) 82 FCR 533 per Olney J at 602. The orders were not disturbed by the High Court.
[52] *Bulun Bulun v R&T Textiles Pty Ltd* (1998) 86 FCR 244 per Van Doussa J at 256.
[53] *State of Western Australia v Ward (2002)* 191 ALR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 58-60.
[54] *Australia's Oceans Policy Specific Sectoral Measures*, Part 2.11, p. 24.

various support networks to enable Indigenous communities to use their cultural resources to obtain a degree of self-sufficiency.[55]

(e) Oceans Policy and the Involvement of Aboriginal People in Management of Marine Resources

Along with the rejection of the stereotype of hunter gatherers as passive "food-collectors" in opposition to "active, food producing agriculturalists"[56] has come a greater recognition of the benefits of Aboriginal participation in resource management.[57] Increasingly, Australian governments and industry have begun to realise the importance of Aboriginal involvement in coastal resource management.[58] Despite this, in most areas governments have refrained from Aboriginal people from enjoying meaningful partnerships or management of coastal environments.

The *Oceans Policy* provides that the Commonwealth Government will:

- Provide for Aboriginal and Torres Strait islander representation on the National Oceans Advisory Group and on Regional Marine Plan Steering Committees;
- Provide for Aboriginal and Torres Strait Islander participation at the National Oceans Forum;
- Consult with indigenous groups on the requirements for establishing a national consultative mechanism, such as an annual forum; and
- Continue to develop and implement principles and guidelines for co-management or relevant marine areas and resources.[59]

Making a statement in relation to Aboriginal involvement in the management of coastal resources, and even making provision for such consultation to occur, does not guarantee effective involvement. Aboriginal people will be unable to benefit from measures designed to increase their involvement in those processes, unless they are adequately resourced to participate effectively in those processes.[60] Furthermore, creating requirements

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[55] *National Aboriginal and Torres Strait Islander Cultural Industry Strategy - A Summary, ATSIC, July 1997.*

[56] Hunn, E and Williams, N., (eds) *Resource Managers: North American and Australian Hunter-Gatherers*, AIAS, 1982, p.1. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January – June* 1994, p. 145.

[57] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January – June* 1994, p. 145.

[58] For an overview of some of reports and policy documents see Sutherland, J, *Fisheries, Aquaculture and Aboriginal and Torres Straight Islander Peoples: Studies, Policies and Legislation*, Consultancy Report commissioned by Department of the Environment, Sport and Territories 1996.

[59] *Australia's Ocean Policy Specific Sectoral Measures*,Part 2.11, p. 24.

[60] Resource Assessment Commission, *Coastal Zone Inquiry: Final Report*, 1993, p.181 at 10.44. See also Tsamenyi, M., and Mfodwo, K., *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues*, ATSIC, July, 2000, pp. 9-12.

for Aboriginal people to be consulted or to have representation on various committees does not mean that Aboriginal views will be accommodated. Meaningful recognition of a role in marine resources management means being able to make decisions in relation to the management of resources. There are now, across the country, numerous policies that require consultation with Aboriginal people in relation to resources management but merely being able to put a point a view across, which may or may not be taken into account, does not constitute management of resources.

Furthermore, Aboriginal involvement in the management of resources, while important, should not be seen as a means of avoiding the need to address other matters of importance, such as the need to increase the involvement of Aboriginal people in the fishing industry.[61]

Again, the Government's commitment to meaningful involvement in the management of resources is questionable. Around the same time that the Commonwealth was formulating the *Oceans Policy* it was enacting the amendments to the *Native Title Act* 1993 (Cth) which ensured that native title holders would only have 'a right to comment" in relation to any future act affecting native title which is done under legislation in relation to the management or waters and marine resources.[62] Again, it is a case of the Government being seen to be doing something rather than providing meaningful reform and adopting a miserly approach when there was an opportunity to provide beneficial change.

(f) Oceans Policy and Aboriginal Involvement in the Commercial Fishing Industry

Aboriginal people in coastal areas have always made our livelihood from the sea. The disruptions caused by white settlement have meant that there are new pressures and demands on Aboriginal communities. Accordingly, our use of sea resources has been required to adapt in order to deal with those new pressures and demands. In many areas Aboriginal people have had a history of involvement in the fishing industry. That involvement has been both with Aboriginal people themselves participating in those industries as well as comprising a labour force for the industry. [63]

With more complicated licensing regimes being introduced, and the introduction of share quota management systems it is Aboriginal people who are increasingly being denied a livelihood from the exploitation of resources

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[61] A similar point has been made in Tsamenyi, M., and Mfodwo, K., *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues*, ATSIC, July, 2000, p. 6.

[62] See section 24HA(7), *Native Title Act* 1993 (Cth).

[63] For one account of a history of Aboriginal involvement in the fishing industry in one community see Cane, S., "Aboriginal Fishing Rights on the New South Wales South Coast: A Court Case" in Peterson, N and Rigsby, B., *Customary Marine Tenure in Australia*, Oceania Monograph 48, University of Sydney, 1998, pp. 66-88. See also Tsamenyi, M., and Mfodwo, K., *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues*, ATSIC, July, 2000, pp. 6-7.

that they have always exploited. Similarly, with the greater mechanisation of the fishing industry, the industry has become less labour intensive and the employment opportunities for Aboriginal people have decreased.

Aboriginal people continue to be disadvantaged by being increasingly isolated from the commercial fishing industry. The increasing emphasis on regional management plans tends to focus on existing uses rather than a reconsideration of the equitable distribution of resources. The nature of the use which Aboriginal people should be entitled to is not properly considered in the preparation of those plans. This can itself form a barrier to the future involvement of Aboriginal people because remedial measures for Aboriginal people which may be considered at a later date may be inconsistent with the plan and this can be used as an excuse to not take any further action.

A similar problem arises in the context of the increasing trend towards share quota management fisheries. Under share-managed fisheries, the allocation of quotas is often worked out by existing commercial operations and the current catches under various licences. In circumstances where we have already been excluded, such a criteria effectively excludes us from the industry permanently. In effect, such criteria rely on the historical invisibility of Aboriginal people and entrench that injustice into the legislative regimes.

The need for a greater level of Aboriginal involvement in the fishing industry has been the subject of numerous reports in the last 20 years.[64] The Coastal Zone Inquiry recommended that an Indigenous fishing strategy should be developed which included:

> - measures to improve economic development and employment opportunities for indigenous communities in fisheries and mariculture ventures. Options include the reservation of a proportion of fishing or other licences for indigenous communities, the purchase of such licences on behalf of indigenous communities by the Aboriginal and Torres Strait Islander Commission, and the establishment of fishing zones adjacent to land owned or controlled by indigenous people in which communities could operate their own commercial enterprises, participate in joint ventures, or licence access by other marine resource users.[65]

Despite such recommendations there have not been any significant moves to involve Aboriginal people in the commercial fishing industry. The *Oceans Policy* does not take any significant step forward on this issue either. The *Oceans Policy* provides that Australia will provide increased opportunities for Aboriginal and Torres Strait Islander people to be involved in commercial fishing and will implement the National Aboriginal and Torres Strait Islander Rural Industry Strategy as it is relevant to ocean based industries. [66] That Strategy relevantly states that the Commonwealth is only to:

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[64] For an overview of some of these see Sutherland, J, *Fisheries, Aquaculture and Aboriginal and Torres Strait Islander Peoples: Studies, Policies and Legislation*, consultancy Report Commissioned by Environment Australia, 1996. See also Tsamenyi, M., and Mfodwo, K., *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues*, ATSIC, July, 2000, pp. 6-7.

[65] Resource Assessment Commission, *Coastal Zone Inquiry: Final Report*, 1993m p. 187.

[66] *Australia's Ocean Policy Specific Sectoral Measures*, 1998, Part 2.11, p. 24.

- Encourage the extension of preferential licensing to Indigenous people for collection of abalone, trochus, beche de mer and mud crabs in appropriate locations; and
- Support the reservation and buy back of fishing licenses where Aboriginal people have been included from the local commercial fishing industry; and
- Assess market opportunities for increased production and value adding by Indigenous communities in relation to abalone, trochus, beche de mer, shark fins, rock lobster and mud crabs.[67]

The goals of the *Oceans Policy* are not sufficiently clear to ensure their effective and meaningful implementation. The policy focuses on increasing opportunities within the existing regime. Where detailed measures could have been implemented, the policy instead speaks in terms of providing 'increased opportunities'. The nature and extent of the increase remains undefined.

If the requisite goodwill was forthcoming the *Oceans Policy* could have been much more precise in its standard setting in this regard. Not only could it have identified tangible steps to ensure a more equitable distribution of the commercial fishery, it could have also set out principles for inclusion of Aboriginal people where new share quotas or developmental fisheries are established. The absence of such measures is unfortunate because both these last mentioned matters represent clear opportunities to provide equity to Aboriginal people in the context of either a broader restructuring of the industry or otherwise with minimal interference with other existing commercial operations. Yet even in these circumstances it seems that the disadvantage to Aboriginal people is difficult to address.

In relation to the implementation of the *National Aboriginal and Torres Strait Islander Rural Industry Strategy* two short points need to be noted. The first is that the Rural Industry Strategy was developed in response to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1992 and prepared by the Department of Primary Industry and Energy in consultation with the Aboriginal and Torres Strait Islander Commission.[68] It is hardly a large policy development to agree to implement a policy that has already been agreed to. The second point that can be made is that the Rural Industry Strategy itself had an implementation target of 4 years.[69] It was released in 1997. It is now five years since its release and 4 years since the

[67] See Actions 2.4 - 2.6, the National Aboriginal and Torres Strait Islander Rural Industry Strategy.

[68] *National Aboriginal and Torres Strait Islander Rural Industry Strategy*, prepared by ATSIC and the Department of Primary Industry & Energy, 1997, pp. 4-5. See also Royal Commission into Aboriginal Deaths in Custody, *Final Report* 1992, recommendations 203 and 320.

[69] *National Aboriginal and Torres Strait Islander Rural Industry Strategy*, prepared by ATSIC and the Department of Primary Industry & Energy, 1997, p. 3. The strategy provided that "The Strategy has a timeframe of four years, and a separate implementation plan will provide specific tasks and targets for relevant agencies within this period. There will be annual reporting to the general public on implementation of the strategy."

release of the *Oceans Policy* and much of what it recommended in the Rural Industry Strategy and in particular Actions 2.4-2.6 remain largely unimplemented.

Such lack of progress compares poorly to the measures that have been introduced in other jurisdictions over the same period. In New Zealand, the Sealords Settlement and the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992 not only provided Maori people with a meaningful share of the commercial fishery, it included an entitlement to a prescribed allocation of all new species brought under the quota system. In return, the Maori agreed to withdraw all claims before the Courts and agreed to the Crown extinguishing the right to make such claims.[70] These measures were introduced in a manner that respected the interests of indigenous peoples, while at the same time providing certainty for the commercial fishing industry.

(g) The Oceans Policy and Aquaculture

One area where there has been increasing interest in developing partnerships with Aboriginal people is in respect to aquaculture. The area of aquaculture represents a valuable opportunity for a different outcome for Aboriginal people from our isolation from traditional fish resources. The *National Aquaculture Development Strategy For Indigenous Communities*[71] at least identifies a number of steps that may be undertaken to provide Aboriginal people with the means to enter into that industry. The undertaking in the *Oceans Policy* to implement the *National Aboriginal Torres Strait Island Rural Industry Strategy*[72]includes the references in that Strategy to measures in relation to aquaculture. Those measures include that the Commonwealth is to:

> **Action 2.10**: Recognise the interests of Indigenous communities within the National Aquaculture Strategy.
> **Action 2.11**: Provide technical support to Indigenous communities wishing to plan for and establish aquaculture enterprise for community food supplies or for external sales.
> **Action 2.12**: Assist the planning and establishment of aquaculture enterprises where they are likely to achieve significant economic benefits for Indigenous communities, either in their own right or as a component of diversified production.

As this is a developing area of the fishing industry it is perhaps too early to pass judgment on how meaningfully these measures will be introduced and how effectively the lead to the ongoing involvement of Aboriginal people in the industry. It is hoped that it will be pursued with more conviction by Australian governments than other areas of the *Oceans Policy* relating to Aboriginal people.

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[70] Bennion, T., *Protecting Fishing Rights – Recent Fisheries Settlements in New Zealand,* Paper delivered at Turning he Tide: Conference on Indigenous Peoples and Sea Rights, 14 –1 6 July 1993, p. 15-16.

[71] Lee, C., and Nel, S., *A National Aquaculture Development Strategy for Indigenous Communities in Australia: Final Report*, March 2001, commissioned by Agriculture Fisheries and Forestry – Australia.

[72] *Australia's Ocean Policy Specific Sectoral Measures*, 1998, Part 2.11, p. 24.

CONCLUSIONS

Dermott Smyth has succinctly summarised the frustration of Aboriginal people over the inaction by governments in relation to Aboriginal participation in the management of marine resources and the active participation in the commercial fishing industry.

> Over the last ten years and more, Aboriginal and Torres Strait Islander people have travelled thousands of kilometres to talk with dozens of consultants, bureaucrats, commissioners, judges and Ministers to patiently explain the meaning of sea country. To explain what it means to belong to the saltwater, to know the stories of the land beneath the sea and to have inherited rights and duties to look after the important places on land and water and to be sustained by their resources. These explanations have been eloquently told and they are readily understood.
>
> And yet our courts insist that these inherited rights are somehow inferior to those of the tourist, the recreational fisher and the commercial fisher, and that they must yield to these more recently bestowed rights. And our policy makers have grown less and less courageous as they turn a blind Orwellian eye to the distinctiveness of Indigenous peoples' relationship with the sea. ...
>
> Not surprisingly, coastal Indigenous peoples have lost patience with governments' failure to implement recommendations of their own inquiries, and failure to fund their policy commitments.[73]

The *Oceans Policy* does not contain structural change in the management of coastal resources or Aboriginal involvement in the commercial fishing industry. Even with those aspects of the *Oceans Policy* that may deliver real change to Aboriginal people, there has been no rush to commit to genuine reform. Instead, we have been left wallowing in a morass of reports and 'feasibility studies' containing recommendations calling for 'the examination of options', the 'development of protocols', the further investigation of 'options', and the identification of 'further strategies'.

While the various policies nearly always represent an improvement on what was previously available, the fundamental issues are not to be addressed. In this way the disadvantage for Aboriginal people, which arises from the historical invisibility of our interests is being entrenched for future generations.

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[73] Smyth, D., "Fishing for Recognition: The Search for an Indigenous Fisheries Policy in Australia", *Indigenous Law Bulletin*, Vol.4, No: 29, 2000, p. 10.