TORRES STRAIT NATIVE TITLE SEA CLAIM

LEGAL ISSUES PAPER

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Scope of Work

This paper considers the range of legal issues affecting the maritime areas in issue in the Torres Strait Sea Claim.

Torres Strait presents a number of jurisdictional issues which are unique not only to Australia, but to the world as a whole. At an international level, the Strait qualifies as an international strait for the purposes of Chapter III of the 1982 United Nations Convention on the Law of the Sea. This creates specific obligations upon Australia, which have direct ramifications for use of marine areas in the regions. Consistency of domestic rights with these international duties was noted by the Court in Yarmirr, and is particularly applicable in Torres Strait. In addition, the Strait is also the subject of resolutions of the International Maritime Organization with respect to shipping and pilotage. While the claim is expressed to apply in a manner consistent with innocent passage under the Law of the Sea Convention, the regime of transit passage that does apply is wider in scope, and when this is considered together with the IMO’s position, there may be some interaction with the rights sought. The linkages between the claim and the international law of the sea will be examined.

The Torres Strait Treaty represents one of the most complicated maritime boundary delimitations in the world, with jurisdiction over seabed and water column divided at different points between Australia and Papua New Guinea. This raises distinct issues in relation to the claim, particularly in the context of the areas of Australian water column that overlay PNG seabed, and in the case of the isolated islets to the north of the boundary. In addition, the relevant area is largely co-located with the Torres Strait Protected Zone, an area which was designed to preserve the rights of the traditional inhabitants. The impact of the Treaty, and the rights pertaining to PNG nationals under it are of relevance to the sea claim and will be explored.

Within the domestic sphere, the division of jurisdiction in the Strait is affected by the Offshore Constitutional Settlement (OCS). This arrangement is supported by a series of Acts passed pursuant to section 51(xxxviii) of the Constitution. Effectively, Queensland has unfettered jurisdiction and effective title to those waters and seabed to a distance of three nautical miles. The Commonwealth retains jurisdiction over the territorial sea beyond three miles, except in the northern portions of the Strait, where no extension of the territorial sea to twelve miles took place, by virtue of the Torres Strait Treaty. The OCS is of direct relevance to the claim, as it extends not merely to waters within three miles of the islands, but to waters out to twelve miles and beyond. The impact of the OCS on the claim will also be examined.

Resource issues in the Strait are affected by jurisdiction. The Commonwealth has principal carriage of fisheries in the region, by virtue of the Torres Strait Fisheries Act 1984 (Cth). This is the only separate fisheries legislation operated by the Commonwealth, outside the Fisheries

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2 Yarmirr v Northern Territory (1998) 156 ALR 370 (Federal Court); Commonwealth v Yarmirr (1999) 168 ALR 426 (Full Federal Court); Commonwealth v Yarmirr (2001) 184 ALR 113 (High Court).
3 Treaty between Australia and the Independent State of Papua New Guinea concerning the Maritime Boundaries in the Area between the Two Countries, including the Area known as Torres Strait, and Related Matters, done at Sydney on 18 December 1978, entered into force on 15 February 1985: Australian Treaty Series 1985 No.5.
Management Act 1991 (Cth), and reflects the unique arrangements for the region. Close coordination is maintained under the arrangements with Queensland, which possesses jurisdiction over fisheries within territorial sea baselines, and out to three nautical miles under the Torres Strait Fisheries Act 1984 (Qld). The management of marine living resources is an issue that is central to the claim, and therefore will be considered in some detail in the paper. In addition, the interaction of the claim with existing and possible marine parks and sanctuaries will be considered. For example, in the western-most portions of the claim, it overlaps with a dugong sanctuary which falls within the responsibilities of the Australian Fisheries Management Authority. The issue of marine protected areas is certainly of relevance to the claim, and will also be explored.

The management of the coastal areas and the territorial sea within three nautical miles is within the legislative competence of the Parliament of Queensland. As such, the Queensland Government has an important place when considering the regulation of the marine areas that are the subject matter of the claim. Relevant Queensland law to the offshore area may impact upon the nature and scope of use of marine areas, and therefore is an important element within the proposed paper.

In addition to Queensland, there are regional authorities that are also relevant to the claim, albeit in a more limited capacity. The Torres Strait Regional Authority occupies a coordination role, as well as being the representative body for the people of the Strait. Its relevance to the claim is implicit, however the nature of the interaction of the functions of the TSRA with the claim in law will be examined. The interaction of the claim with the responsibilities of the Torres Shire Council, the local government in the region, centred on Thursday Island, will also be considered.

The management of non-living resources in the Strait is also a significant issue. The Torres Strait Treaty provided for a moratorium on exploitation of the non-living resources of the continental shelf. This moratorium has been extended, but PNG has, in the past, reportedly pressured Australia to consider what exploitation might be undertaken in the region. Since the claim does take in the continental shelf and its resources, issues surrounding exploitation of such resources will also be considered. It is worth noting, in the case of offshore development, the Commonwealth is the regulatory body, while for onshore development, the Queensland Government has primary responsibility. While the claim is concerned with marine areas, significant mineral exploitation in coastal areas can impact upon sensitive marine ecosystems, making consideration of both regimes of importance.

Law of the Sea Issues

Lying on a major sea route between the Pacific and Indian Oceans, Torres Strait is subject to the provisions of the 1982 Law of the Sea Convention in relation to international straits. Accordingly, it is appropriate to examine the content of the international law of straits generally, and the 1982 Law of the Sea Convention in particular, insofar as it concerns international straits, and then to apply this material to Torres Strait itself.

International Law of Straits

The Law of the Sea Convention's provisions on the question of international straits are to be
found in Part III. It deals with 4 categories of strait:

1. Straits which are subject to international conventions of long-standing;
2. Straits subject to the regime of "transit passage";
3. International straits with other routes of similar convenience (the so-called "Messina Exception")⁴; and
4. Straits which provide access between the high seas or an exclusive economic zone and the territorial sea of a foreign State.⁵

The 3 categories other than transit passage are all ultimately subject to innocent passage rules which are essentially analogous to those under the Territorial Sea Convention. Under the first category, Article 35(c) was designed to protect well-established arrangements, like those in relation to the Turkish Straits, from being brought into question by the 1982 Convention. The third category practically downgrades certain international straits to the status of mere territorial waters. This can occur where the strait does not serve as a significant route for international navigation. The rationale behind it is that if international shipping will not be inconvenienced by the potential withdrawal of an international strait, then there is little reason for the affected coastal State to be burdened with having the care of an international strait.

Part III's principal focus is on stating the content of the regime of transit passage. Such passage is defined as taking place by vessels navigating through an international strait, from one part of the high seas or an exclusive economic zone, to another part of the high seas or exclusive economic zone. Transit passage does not preclude entering or leaving a State bordering the strait, subject to the entry requirements of such a State.⁶ Passage must be without delay, threat or use of force or any other activities apart from those necessary for normal ship (or aircraft) operation.⁷ Article 39(2) also requires compliance with general international regulations pertaining to safety and control of pollution.

Coastal State rights applicable to transiting vessels are very limited. Bordering States are entitled to set up traffic separation schemes, subject to their presentation to the "competent international organization", in this instance the IMO. In addition, littoral States may make laws with respect to pollution, fishing, and breaches of fiscal, customs, immigration or sanitary controls.⁸

Most significant however is Article 44 which provides that transit passage shall not be hampered or suspended. This provision was designed to meet the objective of the maritime powers to ensure that key international straits could not be subject to closure. It makes it clear that under no circumstances can a coastal State block an international strait to vessels, although transiting ships must comply with such regulations that can be validly applied to them.⁹

⁶ Article 37(2), Law of the Sea Convention, supra note 1.
⁷ Article 39, Law of the Sea Convention, supra note 1.
⁸ Articles 41 & 42, Law of the Sea Convention, supra note 1.
The regime of innocent passage has only limited application to States used for international navigation. Article 45 provides that straits falling within the "Messina exception" or between the high seas or EEZ and the territorial sea of a foreign State are subject to the regime of innocent passage. This suggests that the range of activities permissible under the transit passage regime is wider than under innocent passage, although the stipulation that ships and aircraft transiting a strait shall "refrain from any activities other than those incident to their normal modes or continuous and expeditious transit unless rendered necessary by force majeure or by distress" would seem to indicate the differences are minor.

Application of the Law of the Sea Convention to Torres Strait

Although Torres Strait is considerably more than 24 miles wide, it clearly qualifies as an international strait. Any vessel passing through Torres Strait, regardless of its draught or the route it takes, must pass through the Australian territorial sea. As such, it is appropriate to examine the impact of Part III of the 1982 Convention on Torres Strait, to determine to what extent it impinges upon the ability of the two coastal States to regulate activities within the region.

First, it is clear that Torres Strait does not fall into the category of a strait that is the subject of an international convention of long-standing. The Torres Strait Treaty was signed in 1978, and only entered into force in 1985, which would seem to be an insufficient time to achieve the status of a "convention of long-standing". Further, the Torres Strait Treaty was negotiated to be consistent with the provisions of the Law of the Sea Convention, and this objective was explicitly inserted into the Treaty in Article 7. It would be most strange to categorise the Torres Strait Treaty as an exception to the provisions dealing with international straits under this category when the text of the Treaty itself sought to bind the parties to accepting these very provisions. Consequently it is reasonable to assume that Torres Strait does not fall within the ambit of Article 35(c).

Second, it is unlikely that the Messina exception for international straits where routes of similar convenience exist would have any application to Torres Strait. Certainly, the basic geography of the Strait, being formed between a continental land mass (Australia) and an offshore island (New Guinea) might fit the requirements of Article 38(1), but the use of the Messina exception is inappropriate for a number of reasons. Most obviously, the island of New Guinea is not Australian territory, and therefore the article can have no application to it. Further, although all of the smaller islands in the Strait itself are Australian territory, there is no route of similar convenience seaward of any of these islands. Consequently this category has no relevance to Torres Strait.

Third, it is also clear that Torres Strait does not provide access to the territorial sea of a third State. It is not possible to transit Torres Strait and proceed directly from the Australian territorial sea to the territorial sea of another State without passing through an EEZ. Even vessels proceeding from west to east through the Strait, with Daru in Papua New Guinea as their destination must enter the Papua New Guinea EEZ at some point.

This leaves the application of the transit passage regime to Torres Strait. Clearly at least some of the vessels passing through Torres Strait are proceeding from the Pacific Ocean into the
Arafura Sea or vice versa, hence are transiting from one area of EEZ to another. The Strait is used by vessels of a variety of States, so clearly meets the criteria of an international strait under Article 37, and under the Corfu Channel Case.\textsuperscript{10}

As the coastal State through whose territorial sea and internal waters transiting ships must pass when using Torres Strait, Australia has limited legislative competence to deal with vessels using the Strait. Within its competence, it may designate sea lanes and traffic separation schemes, regulations pertaining to pollution control, fishing vessels and customs, immigration, fiscal and sanitation measures. Within these limitations, Australia and Papua New Guinea have liaised with the International Maritime Organization (IMO) to promote the voluntary use of pilots in the Strait.

Some individuals in Australia have been deeply concerned by the risk of pollution in the Strait through an accident involving an unpiloted vessel, as has the Commonwealth Government. While supporting the voluntary measures adopted by the IMO, it has been argued that effective protection can be approached if there is compulsory pilotage. Such a pilotage scheme already exists for the Great Barrier Reef Inner Route, whose northern end includes Torres Strait, and there has been some pressure for its extension to all ships entering the Strait.\textsuperscript{11} These concerns have been reflected in an application by Australia and Papua New Guinea to the IMO seeking endorsement of a compulsory pilotage scheme for Torres Strait.\textsuperscript{12}

However, there are doubts whether Australia will succeed in achieving a compulsory pilotage scheme. It has been argued that while the use of a pilot goes some way to reduce the risk of pollution through collision or grounding, such an interpretation would not seem to be consistent with the tenor of Article 42. That Article provides States can legislate to prevent pollution "by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other substances". This strongly suggests that Article 42 is concerned with giving effect to international regulation of dumping waste, not to provide for the imposition of pilotage to avoid accidental discharge. Further, while Articles 41 and 42 permit the adoption of navigation regulations, these make no mention of pilotage, and would seem to be restricted to matters relating to the operation of traffic separation schemes and sea lanes. Accordingly, refusing access to Torres Strait to vessels refusing to pay for the services of a pilot would seem to amount to hampering transit passage through the Strait and be contrary to Article 44.

There are means that could and have been employed to encourage or even compel usage of a pilot. Since transit passage does not stop regulation by a coastal State of which ships may lawfully enter its ports, or pass through its internal waters away from the area of the Strait, then port States can make the use of a pilot in Torres Strait a condition of entry. By this method, Australia has validly required all vessels using the Great Barrier Reef Inner Route to use a pilot, and has done so with the concurrence of the IMO.\textsuperscript{13} Similarly, Papua New Guinea requires all

\textsuperscript{10}Corfu Channel Case (UK v Albania) 1948 ICJ Reports 15.
\textsuperscript{11}See the extract from Australian Senate Hansard: reprinted (1993) 14 Australian Yearbook of International Law 451-452.
\textsuperscript{12}See <http://www.imo.org/Newsroom/mainframe.asp?topic_id=112&doc_id=3353>. Australia is also seeking an extension of the Particularly Sensitive Sea Area covering the Great Barrier Reef extended to cover Torres Strait: see <http://www.imo.org/Newsroom/mainframe.asp?topic_id=909&doc_id=3797>. The background to Australia obtaining the compulsory pilotage resolution for the Great Barrier Reef by the IMO was expounded by the then Australian Minister for the Environment in answer to a question in
\textsuperscript{13}
tankers wishing to use its Kutubu oil facility that they must use a pilot if passing through Torres Strait. Given that the bulk of Torres Strait traffic is proceeding to or from an Australian, New Zealand or Papua New Guinean port, substantial compliance could be obtained if pilotage through the Strait was made a condition of entry.

Within the limitations of the transit passage regime, Australia with the support of Papua New Guinea was able to obtain IMO support for a compulsory reporting scheme to operate for ships transiting Torres Strait and the Great Barrier Reef. Resolution MSC.52(66), effective as of 1 January 1997, provides that all vessels in excess of 50 metres in length, and vessels carrying hazardous cargo will be obliged to report their location, course and speed, when a pilot is embarking or disembarking and other pertinent information. The measures do not apply to naval and government vessels, although Royal Australian Navy and Australian government vessels will voluntarily make reports under it. Ship reports are to be made at regular intervals through the Strait and along the Great Barrier Reef Inner Route when a vessel passes within 2 nautical miles of a named point. These points are located at key locations at each entrance to Torres Strait, in the Prince of Wales Channel, and at Port Kennedy off Thursday Island.

The Resolution was adopted after changes to the regulations pursuant to the International Convention for the Safety of Life at Sea (SOLAS). SOLAS Regulation V/8-1 permitted the IMO to designate certain areas as subject to a mandatory reporting scheme, but noted that such requirements were expressly noted to be subject to the regime of international straits. It would seem that compulsory reporting does not amount to a restriction preventing vessels from using an international strait, but rather it can be construed as a matter relating to international navigation. While not strictly the designation of sea lanes or a traffic separation scheme, the reporting procedures are certainly directed solely at safety of navigation, and have been approved by the "competent international organization" in the manner outlined in Article 41. Given it relates to navigation, and is based on a SOLAS regulation that purports to be subject to the Law of the Sea Convention as regards international straits, it would seem the mandatory reporting system operating in Torres Strait is consistent with the Law of the Sea Convention.

Relevance to Native Title Sea Claim

The native title to the waters of Torres Strait raises some issues with respect to passage. At international law, it is apparent that Australia is under a duty to not merely permit vessels through the Strait, but to in no way impede or prevent such passage. Even in the face of the grave environmental threat to the waters of the region posed by unpiolated passage by large vessels, Australia has not imposed unilateral pilotage restrictions. This level of access to waters is effectively wider for transiting vessels than that found in the regime of innocent passage which was considered by the courts in *Yarmirr*.

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At first instance, Olney J considered the impact of the claim on Australia’s international obligations. While the bulk of the waters in issue were on the landward side of Australia’s 1983 proclaimed baselines,\(^{17}\) and therefore in internal waters, portions of the waters claimed extended into the Australian territorial sea, potentially affecting the rights of foreign vessels pursuant to the Law of the Sea Convention. Before examining Olney J’s approach to the problem, it is useful to consider the nature of the rights and obligations in issue.

The Law of the Sea Convention does not recognise indigenous rights. It is concerned with the interests, rights and obligations of states in respect of the seas, and there is very little in it directed towards the rights of individuals or groups. That said, the Third United Nations Conference on the Law of the Sea was attended by a number of national liberation movements and observers representing dependent territories seeking independence.\(^{18}\) Resolutions III and IV in the annex to the Final Act of the Conference urge that the Law of the Sea Convention be applied for the good of people in territories whose peoples have not attained full independence. It expressly adopts the notion of the ‘common heritage of mankind’ with respect to the ownership of the resources of the deep seabed,\(^{19}\) which also has echoes of providing benefits to individuals rather than states.\(^{20}\)

Realistically, however, there is little in the Law of the Sea Convention for an indigenous group to take heart in regarding the recognition of special rights and claims of traditional ownership over offshore areas. If anything, the reverse is true. While a state can organise its own internal affairs without interference from other states, it is clear that it cannot use its internal legislative arrangements as an excuse for a dereliction of its international obligations.\(^{21}\) The Law of the Sea Convention imposes limitations upon states in terms of their jurisdiction offshore. Such limitations may not be consistent with an unfettered exercise of native title rights over an offshore area. To remain compliant with international law, a state may have to dilute or even negate indigenous rights over offshore areas.

The potential impact of this notion can be seen in the Torres Strait. As an international strait, meeting the criteria for such straits under Part III of the Law of the Sea Convention, Australia is not permitted to suspend transit passage of foreign vessels through its waters.\(^{22}\) It is clear that if Australia is to maintain its international obligations that whatever the content of the rights accruing to the Torres Strait Islanders as a result of a successful claim, those rights cannot include a right to exclude vessels from transiting their waters, or to impede transit in any way. Were a court to hold otherwise, states whose vessels might be prevented from passing through the Strait would be entitled to pursue Australia for a breach of its Part III

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\(^{17}\) Coastal Waters (State Title) Act 1983 (Cth).


\(^{19}\) Preamble and Article 136, Law of the Sea Convention, supra note 1.

\(^{20}\) The International Court of Justice had the opportunity to consider whether a maritime boundary treaty had to take into account the rights of a minority in a region adjacent to the maritime area concerned in the Case Concerning East Timor (Portugal v Australia) 1994 ICJ Reports 90. The Court did not deem it necessary to consider the issue as a result of the absence of an indispensable third party to the proceedings.


\(^{22}\) Part III, Section 2, Law of the Sea Convention, supra note 1.
obligations, and be confident of success in doing so. Similarly, the duty to permit freedom of navigation is not restricted only to international straits. Coastal states, aside from a limited non-discriminatory right to suspend access temporarily, must permit innocent passage by all vessels. Permanently closing parts of the territorial sea, subject to indigenous access only, would clearly be in breach of Part II section 3 of the Law of the Sea Convention.

Olney J noted that the common law need not conform with international law, but that international law had a legitimate and important influence on its development. His Honour also noted that Australia had a clear and express obligation under the Convention to allow vessels a right of innocent passage through its territorial sea without notice. To allow a claim for exclusive possession to be upheld would breach this obligation, and was deemed untenable. His Honour’s ruling on this point would seem to indicate that the presence of native title claims in areas subject to maritime traffic will produce adverse consequences in so far as international obligations with respect to navigation are concerned.

On appeal to the Full Court, the majority did not feel the need to revisit the status of a right of innocent passage in Australian law in great detail, but rather dealt with the issue by examining a common law right of navigation. In this they reinforced the result reached by Olney J that native title rights were subject to a rule requiring freedom of navigation. What brief mention was made of international law was consistent with Olney J’s approach. In dissent, Merkel J considered the issue in greater depth and expressly agreed with Olney J that whatever rights were held by the indigenous people, they were subject to Australia’s international law obligations — including a right of innocent passage — and accordingly there could be no exclusive possession. These judgments would appear to safeguard Australia’s international obligations with respect to transit passage through the Torres Strait.

The High Court did not substantially readdress the issue of innocent passage. Discussion largely centred upon whether the nature of the concept of innocent passage at common law, to aid in determining whether at common law the existence of innocent passage might have impacted upon any native title that existed prior to British sovereignty. The majority confirmed that:

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\text{...there is a fundamental inconsistency between the asserted [exclusive] native title rights and interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to}
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\[23\] Part III, Section 3 Law of the Sea Convention, supra note 1.
\[25\] Olney J also based this finding on the existence of a common law right of free navigation on the sea. Such a right was skeletal to the common law and therefore rendered the claim of exclusive possession nugatory: Yarmirr v Northern Territory (1998) 156 ALR 370, 430. A similar result was reached by the majority in the Full Court: Commonwealth v Yarmirr (1999) 168 ALR 426 at 473 per Beaumont and von Doussa JJ.
\[26\] Commonwealth v Yarmirr (1999) 168 ALR 426 at 473 per Beaumont and von Doussa JJ.
\[27\] Ibid. at 477.
\[28\] Ibid. at 535 per Merkel J.
As such, the Court explicitly rejected exclusive possession of sea areas under a native title claim, and the findings by the Full Court and Olney J at first instance were largely left undisturbed. This would indicate that any rights accruing at common law or under the Native Title Act would necessarily have to be interpreted in a manner consistent with international law.

One matter affecting the Torres Strait that was not dealt with in Yarmirr was the proximity of the waters of a foreign state. PNG became independent from Australia in 1975, and therefore some of the waters of the Strait are subject to its jurisdiction. It is clear under the Native Title Act that native title rights can only apply to waters subject to Australian jurisdiction. The application of this to the Torres Strait raises some unique problems. Jurisdiction under the Torres Strait Treaty is divided between Australia and PNG on different bases for the seabed and water column, creating multiple boundaries. For example, in some areas, the Papua New Guinean seabed within the claim itself is overlain with Australian fisheries jurisdiction. Logically, this would appear to terminate native title rights for the seabed, but would not interrupt those native title rights applicable to the waters over the seabed. This issue is yet to be tested by an Australian court. A second question arises in relation to the Protected Zone. It explicitly seeks to preserve traditional rights to exploit the waters of the Strait for individuals on both sides of it. It may be argued that the creation of the Protected Zone preserves native title rights and that they could be asserted even in respect of Papua New Guinean waters.

It is submitted that such an alternative is not possible. Clearly the common law will not permit the assertion of rights over waters or territory that belongs to another state. Further, even if native title rights did survive, they would do so subject to Papua New Guinean law and not the regime under the Native Title Act. Claims under Papua New Guinean law would be problematic, as the ability of non-Papua New Guinean citizens to hold proprietary rights in freehold land is restricted under the Constitution of that state, and other rights are subject to regulation. A better argument would be that the Torres Strait Treaty provides for various rights that are embodied in the domestic legislation of both Australia and PNG. These rights are statutory in nature, and are distinct from any rights existing at common law, or pursuant to the Native Title Act. These statutory rights do not displace or extinguish native title rights with respect to Australian waters, but may be all that are left to Torres Strait Islanders with respect to Papua New Guinean waters or seabed. Since the rights are directed towards the same ends as native title rights, the two are analogous, but the statutory rights derived from the Torres Strait Treaty cannot be extinguished in the same fashion as native title rights.

29 Commonwealth v Yarmirr (2001) 184 ALR 113 at para 98 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
30 Native Title Act 1993 (Cth) s 6 provides:

This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the Seas and Submerged Lands Act 1973 (Cth).

31 See above Part III.
32 The Constitution of Papua New Guinea section 56 provides that only Papua New Guinean nationals are permitted to hold freehold land.
As much would seem to have been recognised in the present Torres Strait sea claim. The claim is restricted to only waters and seabed under Australian jurisdiction, and explicitly states that the applicants do not intend to exclude the rights of others under the Torres Strait Treaty, Article 17 of the Law of the Sea Convention, any public right of navigation, or other interest or common law right that other persons might hold over the claim. The only issue that the claim does not address, and this appears to be an oversight rather than a deliberate position, is the distinction between transit passage and innocent passage at international law. In practical terms, the difference between the two regimes is slight, namely that there is no possibility that transit passage can be hampered or prevented in any way, even on a temporary basis.

**Torres Strait Treaty**

Like a number of other straits around the world, Torres Strait is the subject of a specific international treaty. Unlike other international straits, a treaty for Torres Strait was a relatively recent phenomenon, coming into force only in 1985. The reasons for the need for an international convention dealing with activities and jurisdictional issues and the content of that convention are explored below. A map of the region is appended.

**Boundaries & Related Issues**

The principal issue surrounding the negotiation of the Treaty was the location of the maritime boundary between Australia and Papua New Guinea. Since Papua New Guinea was seeking a readjustment southward, while Australian interests were seeking a maintenance of the status quo, no simple solution was possible. A provisional seabed line passing through the central portion of the Strait had been tentatively agreed during the negotiations, but Australia was insistent in retaining sovereignty over the islands north of the line, and to fisheries jurisdiction around them. Papua New Guinea wanted the islands, or failing that, rights over the sea and seabed north of the seabed line. Accordingly a creative approach to the delimitation was necessary to accommodate both these positions, at least to some extent.33

The boundary can be categorised into two parts: those portions of it in the Coral Sea and eastern and western approaches to Torres Strait; and those within Torres Strait. The maritime boundary in the approaches to the Strait, and in the Coral Sea is relatively straightforward. While no particular method of maritime boundary delimitation was expressly preferred in the Treaty, it appears the boundary is broadly based on equidistance, using the mainland territory of each State.34 The vast bulk of the delimitation is beyond the area of the claim.

In Torres Strait itself matters are more complicated. First, the Treaty deals with the sovereignty of the islands of Torres Strait. With the exception of three small islands immediately adjacent to


the Papua New Guinea coast, all islands remain as Australian. This avoided the potential Constitutional difficulties Australia would face in the ceding of islands. Papua New Guinean objections to the impact of Australian sovereignty over the islands are dealt with by the separation of the seabed and fisheries jurisdiction boundary lines. Near the centre of the Strait, the seabed boundary runs along a course well south of the inhabited islands of Saibai, Dauan and Boigu, and a number of small uninhabited cays. It runs northward of the course a median line between the two mainlands would take, taking account of the southern Australian islands in the centre of the Strait. The fisheries jurisdiction line, which is combined with the seabed boundary for most of its course, separates from the seabed line and turns sharply northward to enclose the three northern inhabited islands. However, it does not enclose many of the small uninhabited islands and sand cays at the eastern and western ends of the Strait, even though the Treaty itself confirms them as being under Australian sovereignty. The separation of sea-bed and fisheries jurisdictions has been described as looking like a "top hat" and is designed to try to accommodate Papua New Guinea's wishes for a share of the exploitable resources of Torres Strait, while preserving the right of the Torres Strait islanders to enjoy the fisheries surrounding their islands. The fact the fisheries line does not enclose the eastern and western uninhabited islands demonstrate that the rights of the Torres Strait Islanders to fish ceased to be a factor in the drawing of the fisheries line. As no Islander interests were directly at stake, as the traditional fisheries were preserved under the Protected Zone regime, the fisheries in these areas could be allocated to Papua New Guinea, thus meeting Papua New Guinea's objectives of securing as many rights as possible as far south as possible, without damaging perceived Australian interests.

Although expressly recognised by the International Court of Justice as a legitimate technique in maritime boundary delimitation, the use of multiple maritime boundaries is not commonly used by States. Nor is the separating of seabed and water column jurisdiction easily accommodated under the Law of the Sea Convention, as although rights to the continental shelf are restricted to the sea-bed and subsoil, EEZ rights take in the seabed and superadjacent waters. Accordingly in the areas where one State's sea-bed underlies the other State's waters, only a fishing zone and not a full EEZ can be claimed, and arrangements must exist to clarify the management and regulation of the diverse activities that may take place in such areas. The separation of the two boundaries creates some jurisdictional problems, and the Treaty attempts to deal with these, and the added complication of Australian islands north enclaved of the sea-bed boundary.

35 Article 2, Torres Strait Treaty, supra note 3.
36 The 3 islands confirmed as Papua New Guinean were the subject of Commonwealth research which attempted to show that they had never been part of Queensland. While the validity of this research has been called into question, it is clear that international law would recognise Papua New Guinea's sovereignty over them at the present time: see J. Griffin, "Territorial Implications in the Torres Strait Treaty" in P.J. Boyce and M.W.D. White (eds), The Torres Strait Treaty: A Symposium (Canberra: Australian National University Press, 1981) 92; S.B. Kaye, "The Torres Strait Islands: Constitutional and Sovereignty Questions Post-Mabo" (1994) 18 University of Queensland Law Journal 38.
37 The reference to the area between the seabed and fisheries boundaries as a "top hat" was first made by Burmester, supra note 33, 338; B. Opeskin & D.R. Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles" (1991) 22 Ocean Development and International Law 395 at 399-401.
38 See below.
While some of the northernmost Australian islands are on the Papua New Guinea side of both the fisheries and sea-bed boundaries, Article 2 of the Treaty provides that sovereignty over islands includes sovereignty over the territorial sea and includes rights to the sea-bed and sub-soil. This leaves pockets of Australian jurisdiction around these islands surrounded by the Papua New Guinean EEZ. The northern inhabited islands of Saibai, Dauan and Boigu are enclaved by Papua New Guinea seabed, although as they are southward of the fisheries line, the fisheries beyond the territorial sea are under Australian jurisdiction.

In the central area of the Strait, north of the seabed line, both States agreed that they would limit their territorial seas to 3 nautical miles, even if international law permitted the extension of the territorial sea, or if either State chose to extend their territorial seas for the rest of their territory. Papua New Guinea had asserted a territorial sea of 12 nautical miles for its territory in 1977 but agreed that the extension would not apply to the waters in the vicinity of Torres Strait. Similarly, when Australia extended its territorial sea to 12 miles in 1990, the islands north of the seabed line in Torres Strait were specifically exempted in the Proclamation. Papua New Guinea also agreed not to proclaim any archipelagic baselines in the vicinity of the Strait.40

As Saibai, Dauan and Boigu islands lie within 6 miles of Papua New Guinea territory, the Treaty delimits a territorial sea boundary between them with what appears to be a median line. To ensure there is no confusion as to which waters near the islands are under Australian jurisdiction, the Annexes to the Treaty specify the basepoints to be used to delimit the territorial seas of individually all of the Australian islands north of the sea-bed line, and include maps of the territorial sea of each feature north of the sea-bed line. This is done with an extraordinary degree of detail, and is best exemplified in the case of Turnagain Island which although less than 7 miles long and a mile wide has some 74 basepoints for the calculation of its territorial sea.41 The basepoints have been used to indicate the extent of the sea claim in the vicinity of the northern islands.

Only islands north of the seabed are subject to the limitation of their territorial seas to 3 nautical miles. Islands to the south of the seabed are entitled the full territorial sea currently claimed by Australia, that is twelve nautical miles. This gives rise to some unusual results. For example, Pearce Cay, one of the islands specified in Annex 3, is within three miles of the sea-bed line, so has a 3 mile territorial sea to its north, and a twelve mile territorial sea from its southern coast, producing what has been described as a "flying saucer-shaped" territorial sea.42

The unstable nature of the Papua New Guinea coast, and the strength of the tides in the central Strait mean that there is some probability that over time new islands may form in the region. While such features are almost certainly to be small and relatively insignificant, it was recognised that they could engender problems. Any feature clear of the sea at high tide has the potential to generate a 12 nautical mile territorial sea, and the formation of a new island could conceivably upset the delicate balance sought in the Treaty. As much was foreseen by the parties, and accordingly they provided that new islands would fall under the jurisdiction of the

42 Opeskin & Rothwell, supra note 37, 400-401.
State on whose side of the seabed line they formed.\textsuperscript{43} Since the seabed line is well to the south of the Papua New Guinea coast, it would seem that islands formed by the accretion of silt from the mainland will fall under Papua New Guinea’s jurisdiction, and therefore not be relevant in the future to the sea claim, or any other future claim for native title in the region. Further, the territorial seas of the Australian islands north of the seabed line were fixed, regardless of future changes to the configurations of the coasts of these islands, again anchoring the present claim in its existing form for the future.\textsuperscript{44}

While the principal elements of use of the sea relate to fisheries and the exploitation of the seabed, they are by no means the only jurisdictional issues that have to be considered. The separation of continental shelf and fisheries jurisdictions made it necessary for the parties to consider where the boundary would lie for other more unusual facets of jurisdiction. The Treaty sets down a definition of "residual jurisdiction", to cover such activities as preservation of the marine environment, marine scientific research, energy production from water, currents or winds, and seabed and fisheries jurisdiction not directly related to exploration or exploitation of resources.\textsuperscript{45} In the area between the sea-bed line and the fisheries line, the parties have agreed that neither shall exercise residual jurisdiction without the concurrence of the other, and shall consult on this question.\textsuperscript{46} In other areas, residual jurisdiction is exercised by either Australia or Papua New Guinea, depending on which side of the fisheries line the activity is taking place.

Jurisdiction over wrecks within the Strait is based upon title to the seabed, although is qualified in three ways of varying importance. Firstly, that if a wreck is located in the Strait that is of historical or special significance to one State, but the seabed in which it rests belongs to the other State, then there is a duty on both to consult towards an agreed course of action with respect to the wreck. Secondly, whatever the impact of the article dealing with the issue, it is expressed to be without prejudice to each State's domestic courts in relation to maritime causes of action. Thirdly, a security clause has been inserted stating the article has no application to military aircraft or vessels for either Australia or Papua New Guinea after the entry into force of the Treaty.\textsuperscript{47}

The issue of freedom of navigation is also dealt with in the Treaty. Both Australia and Papua New Guinea recognised that contemporary developments at the Third United Nations Conference on the Law of the Sea would likely guarantee a right of innocent passage through international straits. So that the Treaty ought to reflect international law, Article 7(6) provides that international navigation is to be consistent with the then existing draft articles at the Third United Nations Conference on the Law of the Sea (UNCLOS III), which drafted the 1982 Law of the Sea Convention. The parties further recognised that if the ultimate product of the Conference reflected a different formula to that contained in the existing draft, that a new regime for navigation in the Strait would need to be negotiated, and this too was expressly provided for.\textsuperscript{48} Freedom of navigation and overflight were also provided for throughout the Protected

\textsuperscript{43} Article 2(2), \textit{Torres Strait Treaty}, supra note 3.
\textsuperscript{44} Article 3(2), \textit{Torres Strait Treaty}, supra note 3.
\textsuperscript{45} The definition of "residual jurisdiction" is found in Article 4(3), \textit{Torres Strait Treaty}, supra note 3. See also Mfodwo & Tsamenyi, \textit{supra} note 40, 135-136.
\textsuperscript{46} Article 4(3), \textit{Torres Strait Treaty}, supra note 3.
\textsuperscript{47} Article 9, \textit{Torres Strait Treaty}, supra note 3.
\textsuperscript{48} Note that the draft articles with respect to transit passage were not altered, and are presently embodied in Part III, Section 2 of the Law of the Sea Convention. See Burmester, \textit{supra} note 33, 347; Mfodwo &
Zone which is established under the Treaty, and is dealt with immediately below.

**The Boundary and the Claim Area**

The marine native title claim appears to have been substantially affected by the location of the maritime boundaries under the Treaty. The claim has been divided into two parts. The first relates to waters and seabed under Australian jurisdiction. As such, all waters and seabed south of the seabed jurisdiction line in the Strait region, north of Port Kennedy, are claimed, as well as all waters in the territorial seas of Australian islands north of the jurisdiction line. In addition, a claim to the waters in areas subject to Australian fisheries jurisdiction, in the “top-hat” in the vicinity of Boigu, Saibai and Duaun is made, but not to the seabed. This restriction is because the seabed in the “top-hat” is subject to Papua New Guinea’s jurisdiction, and therefore there is no right to make a claim under the *Native Title Act* 1993 (Cth).

The division of jurisdiction of the seabed and water column by Australia and Papua New Guinea presents an issue for the claimants, and is recognised as such in the nature of their claim. Seabed and waters are claimed with respect to areas south of the seabed jurisdiction line, and within 3 nautical miles of all Australian islands located north of that line. Other waters subject to Australian fisheries jurisdiction only have an Australian water column overlaying a Papua New Guinean seabed.

The most likely difficulty would relate to the undertaking of mining activity on the seabed under Papua New Guinea’s jurisdiction, in areas where Australia possessed fisheries jurisdiction. By virtue of the Treaty, Papua New Guinea would possess the right to authorise mining, which might substantially impact upon native title rights. While Article 12 seeks to protect traditional customary rights belonging to the nationals of both States, it only protects continued exercise of those rights by the national of one State to the same extent as the other State protects its own nationals’ rights. Further, activities that might damage the environment in the Protected Zone or its vicinity only engender a duty to consult, with a view to minimising the damage, not an obligation to prevent the activity going ahead.49

Accordingly, if areas under Papua New Guinea jurisdiction were mined, that mining activity could destroy the ability of Islanders to fish in portions of the claim area, substantially undermining the value of the claim. At present this cannot occur, as noted below, there is a moratorium on mining activity in the Strait under the Treaty. The moratorium was extended once again in 2003 for five years, which removes the issue for the claimants for the present. Any mining activity that did commence north of the seabed line might initially only be subject to Papua New Guinea law, making claims for compensation only possible at an international level.

**Protected Zone**

The separation of the maritime boundary between the two States was only one mechanism employed to meet the various concerns which the Treaty was designed to meet. One

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49 Article 13, *Torres Strait Treaty*, *supra* note 3.
revolutionary aspect of the Treaty was the establishment of a "Protected Zone" in the northern third of the Strait. The Zone surrounds all of the Australian islands north of the sea-bed line, as well as most of the Australian islands in the central part of the Strait, mid-way between the two mainlands. In fact, only the southern Australian islands, those adjacent to Cape York Peninsula, are not within the Zone. In this way, all the islands where the indigenous inhabitants maintain their traditional lifestyles on their ancestral islands, are within the Protected Zone.\(^{50}\)

The Zone incorporates more than just the islands within its area. Article 10 of the Treaty provides that the Zone includes all land, water, airspace, seabed and subsoil within the defined area. Nor would it be correct to say the Protected Zone only affected Australian islands or waters subject to Australian jurisdiction. The Zone also includes Kawa, Mata Kawa, Kussa and Yapere islands which the Treaty confirmed as part of Papua New Guinea. The northern boundary of the Protected Zone is defined as the portion of southern coast of the mainland of Papua New Guinea for most of the area adjacent to the fisheries line. As such, the Zone encompasses land and water subject to the jurisdiction of both States bordering the Strait.

The Protected Zone serves a number of functions in relation to jurisdiction and the traditional inhabitants. Most importantly, it provides an area expressly designated to protect the traditional way of life and livelihoods of the people living in the Zone.\(^{51}\) This objective includes rights to pursue traditional fishing and freedom of movement throughout the Zone, without prejudice to other mechanisms the parties might choose.\(^{52}\)

One way the objective is sought is through the guarantee of freedom of movement between the States for traditional activities.\(^{53}\) This is achieved through the absence of customs and quarantine control for visitors from either State engaged in traditional activities.\(^{54}\) However, the intention of the parties is not to create a customs-free zone. Immigration control is to be preserved for all non-traditional activities, but not applied to inconvenience those engaged in more traditional enterprises. There is also recognition of the Strait as a possible source of entry of disease or pests, so both States retain the ability to reassert their quarantine controls in the face of any perceived threat, temporary or otherwise.\(^{55}\)

In addition, both States are to preserve any traditional rights of use and access of the nationals of the other State, on at least as favourable conditions as its own nationals.\(^{56}\) This raises questions of consistency with the Papua New Guinea Constitution, which provides that only Papua New Guineans can hold title to land, but to the present point in time has not caused any significant difficulties.\(^{57}\) The Treaty also expressly guarantees priority for traditional fishing as against

\(^{50}\) Ryan & White, \textit{supra} note 34, 103.

\(^{51}\) Article 10, \textit{Torres Strait Treaty}, \textit{supra} note 3.

\(^{52}\) Article 11, \textit{Torres Strait Treaty}, \textit{supra} note 3.

\(^{53}\) Article 11(1), \textit{Torres Strait Treaty}, \textit{supra} note 3.

\(^{54}\) Article 16, \textit{Torres Strait Treaty}, \textit{supra} note 3.

\(^{55}\) Article 16, \textit{Torres Strait Treaty}, \textit{supra} note 3.

\(^{56}\) Article 12, \textit{Torres Strait Treaty}, \textit{supra} note 3.

\(^{57}\) Section 56 of the Papua New Guinea Constitution provides that only Papua New Guineans can hold title to land, but to the present point in time has not caused any significant difficulties.
commercial fishing.58

The secondary purpose of the Protected Zone is to act as a marine environment reserve, where the flora and fauna of the region can be protected and preserved. The Treaty does not impose specific standards for environmental protection, but rather encourages cooperative measures between the Parties on a range of subjects. These fall into two broad categories. Firstly, cooperation to bring about the identification and protection of indigenous animal and plant life that is under threat, and for control of noxious pests, both animal and plant, is encouraged.59 Secondly, measures to prevent and limit pollution from vessels, sea installations, riverine and other land-based sources are to be sought, regardless of whether the pollution originates in the Zone.60 While specific standards are not imposed by the Treaty, the parties are expressly urged to take into account relevant international agreed rules and recommended practices in framing their own legislative responses.61

The Treaty is not completely absent of measures to protect the environment. Reflecting the concern of the parties at the risk of petroleum exploration, there was a 10 year moratorium on all drilling and mining in the Protected Zone, which commenced when the Treaty entered into force in 1985. This period expired in 1995, but was renewed for a further 3 years without prejudice to right of either party to undertake seismic exploration of the subsoil of the Protected Zone areas under their jurisdiction. This arrangement was extended for a further 5 years to 2003, when it was again extended for 5 years to 2008.62

It might be argued that the existence of the moratorium has an impact upon subsoil rights under the claim. Since no exploitation is permitted, it might be argued that it amounts to extinguishment of any native title rights to the seabed. However, it is worth noting that the moratorium is not explicitly supported in the domestic law, rather no application for exploitation for the seabed would be approved, as opposed to a prohibition. On the other hand if the Treaty was regarded as an expression of the prerogative, an intention to forbid use of the seabed for mining might be construed as having been made by the Executive. While Teoh’s Case63 might suggest that a reasonable expectation might have existed that no application would be approved, whether this of itself would extinguish native title is problematic. In view of the attitude of the High Court to extinguishment in the context of Wik64, it is submitted unlikely that this would be the case.

Another function of the Protected Zone was to provide a system of marine living resource allocation that Papua New Guinea would accept as providing a more equitable result than any delimitation possible given the territorial configuration of islands in the Strait. In terms of fisheries, the Protected Zone functions as a Joint Development Zone (JDZ), although by no means a typical example of such a zone.

58 Article 20, Torres Strait Treaty, supra note 3; see also Mfodwo & Tsamenyi, supra note 40, 148-151.
59 Article 14, Torres Strait Treaty, supra note 3.
60 Article 13, Torres Strait Treaty, supra note 3.
61 Article 13(1) of the Treaty notes the parties will have regard to "internationally agreed rules, standards and recommended practices": Article 13(1), Torres Strait Treaty, supra note 3.
To begin with, all commercial fishing activity in the Protected Zone is subordinate to traditional fishing. This not only limits the States with regard to the level of catches, but also the manner in which fishing may be conducted, to ensure that traditional fisheries are not damaged or restricted. Even conservation measures imposed upon fishing ventures in the Zone must, as far as possible, not have restrictive outcomes upon the activities of Islanders or Papuans pursuing their traditional livelihoods.65

Once traditional fishing has been taken into account, a complex catch-sharing procedure is outlined. It begins by the establishment of an overall quota for stocks in the Protected Zone. Article 23 provides the total allowable catch is, for the purposes of the Treaty, to be the optimum sustainable yield, and this figure is to be determined by the States jointly. Cooperation and consultation are urged upon both States, even to the extent of negotiating subsidiary catch agreements for individual fisheries if that is thought appropriate, and of a notification procedure in the event that one party takes the view a stock in the Protected Zone requires a cooperative management approach. Such cooperation on fisheries is pursued through the Protected Zone Joint Council, whose functions and structure are considered below.

Actual division of the catch is dependent upon the part of the Zone in which the fish are actually caught. In areas south of the fisheries jurisdiction line, that is to say areas under Australian jurisdiction, Australia is to receive 75% of the total allowable catch and Papua New Guinea is to receive 25%. In the territorial seas surrounding the small uninhabited Australian islands north of the fisheries line, that is those areas under Australian jurisdiction that are enclave within waters subject to Papua New Guinean jurisdiction, the entitlement to the catch is split 50% each. Finally in those waters subject to Papua New Guinean jurisdiction, which is most of what is to the north of the fisheries line, the ratios taken from south of the line are reversed with Papua New Guinea receiving 75% and Australia 25% of the allowable catch.66

However even these complicated arrangements are subject to further qualification. It was felt that to encourage the commercial exploitation of barramundi by the peoples of the Western Province of Papua New Guinea, that that fishery be exempted from the operation of a portion of the division process. This gives Papuans complete and unshared access to the barramundi fisheries subject to Papua New Guinean control.67 By virtue of this anomaly, the Treaty notes that the barramundi fishery is also not to be considered in statistical consideration of the Protected Zone fisheries as a whole.68

Some flexibility is built into the system. By permitting individual agreements to be reached on

65 Article 20, Torres Strait Treaty, supra note 3.
66 Article 23(4), Torres Strait Treaty, supra note 3. See also Burmester, supra note 33, 344-345; Mfodwo & Tsamenyi, supra note 40, 151-157.
67 Article 23(5), Torres Strait Treaty, supra note 3. The only Australian barramundi fishery in the Protected Zone is found in the territorial seas around Saibai, Dauan and Boigu Islands. In 1994 there was no commercial fishing for barramundi from these islands, although small sales were made locally: Commonwealth of Australia, Torres Strait Protected Zone Joint Authority Annual Report 1993-1994, (Canberra: Australian Fisheries Management Authority, 1995) 24-25. No commercial licences for barramundi are currently held by traditional inhabitants: <www.afma.gov.au/fisheries/torres%20strait/default.php> (23 September 2002).
68 Article 23(8), Torres Strait Treaty, supra note 3.
individual stocks, the Treaty is recognising that different fisheries may become more important for the nationals of a particular State. For example, the depressed price of pearl shell, and the costs involved in its collection mitigate against a revival of this industry among Torres Strait Islanders or mainland Australians. However, the marked lower labour costs present in Papua New Guinea may permit Papuans to collect shell in an economically viable way. Similarly, the prawn industry is more capital intensive and usually requires vessels to have on-board freezing capabilities. Trawlers with on-board freezers are expensive and it might be expected that the industry would be dominated by Australian interests who generally have easier access to the capital required. Article 23(7) allows the States to vary the apportionment of the catches between, but subject to the proviso that the ratios for the entire fishing effort ought to still be in the same proportions as those outlined above.

Management of the fisheries is also provided for. Cooperation is required in relation to conservation measures and to seek optimum utilisation of the fishery.\(^69\) This resembles Article 62 of the Law of the Sea Convention, although like the Law of the Sea Convention, it does not seek to define how the optimum utilisation of a fishery ought to be arrived at. Given the paramountcy of traditional fishing, it is doubtful whether the wholesale adoption of the Law of the Sea Convention's standard is entirely appropriate, but since no definition of the term is provided, presumably the parties can arrive at whatever solution they feel reflects the spirit of the Treaty and their own needs.

Flexibility is also built into the management of particular stocks. Provision is made for the negotiation of subsidiary conservation and management arrangements for individual commercial fisheries. Either party can elect to nominate a Protected Zone fishery as one appropriate for consideration in such an individual agreement, and the other must enter into negotiations upon that subject within 90 days of the nomination. Such supplementary arrangements can include resources related to a fishery as well as to the fishery itself.\(^70\) This allows the two States to tailor their management practices to best fit the demands of a particular stock to produce the most suitable result for all concerned.

Cooperation between Australia and Papua New Guinea is the key to a number of other provisions in relation to fisheries in the Strait. In the context of third State commercial fishing in the Protected Zone, both States accept a duty to consult in the event that either is presented with a proposal for such fishing to take place. This is the case whether third State involvement is in terms of vessels flying its flags, vessels carrying predominantly third State crews, or even where third State equity is involved in fisheries ventures in the Protected Zone. Such activities must be approved by both Australia and Papua New Guinea before they can be authorised to take place.\(^71\) Such a policy is consistent with the Treaty's objective of being for the benefit of the inhabitants of the Strait and western Papua, as it allows either State to discourage the influx of foreign labour into the principal industry of the region.

Cooperation is also sought with regard to inspection\(^72\) and enforcement\(^73\). The means by which

\(^{69}\) Article 21, *Torres Strait Treaty*, supra note 3.
\(^{70}\) Article 22, *Torres Strait Treaty*, supra note 3.
\(^{71}\) Article 27, *Torres Strait Treaty*, supra note 3.
\(^{72}\) Article 28, *Torres Strait Treaty*, supra note 3.
\(^{73}\) Article 28, *Torres Strait Treaty*, supra note 3.
the parties can seek to achieve these objectives expressly include the exchange of fisheries personnel. Regular consultation is also required by Article 28, in order that the legislative mechanisms which the two States may use to achieve the effective protection of the fisheries be consistent, and the penalties be analogous for the same offences.

Licensing is also the subject of joint arrangements.74 While both States can maintain their own licensing systems, they are required to make it an offence under their own legislation for their nationals to fish in those portions of the Protected Zone under the jurisdiction of the other State if the vessel concerned is not licensed by that other State. Further, it must also be an offence for a duly licensed vessel in the situation of fishing in the other State's waters to be in breach of that State's regulations.75 This would ensure domestic enforcement of either States' fisheries laws before the courts of the other State for activities taking place in the Protected Zone, thus strengthening the regulatory impact of the Treaty.

The exercise of jurisdiction may also be altered by agreement. The parties may agree to flag State enforcement of the fisheries laws of either party, regardless of where the alleged breach of the law took place. Thus under such an arrangement, Australia might arrest and detain an Australian vessel for breaches of Papua New Guinea fisheries law, that occurred in areas under Papua New Guinea's jurisdiction and vice versa. However, such arrangements must not detract from the enforcement of fisheries laws. Both States have acknowledged that such arrangements are not to be used as a loophole to allow offenders against Australian or Papua New Guinean law to go unpunished.76

Actual enforcement of the relevant fisheries law is also referred to in the Treaty to deal with the potential problems caused by overlap. Where the nationals of one State fish in the other State's jurisdiction within the Protected Zone, the Treaty also provides that "corrective action"77 be taken by the State of the transgressors.78

While the raison d'être for the Protected Zone would seem to be to preserve both the natural and traditional human environments in the region, the treatment of fisheries is indicative that the Zone also functions as a JDZ. Far greater flexibility in the placement of the fisheries line could be achieved by allocating portions of the commercial catch in the Zone. This allowed a more northerly fisheries line to placate Queensland and Islander concerns79, while at the same time implicitly recognising Papua New Guinea's moral claim to some proportion of the resources of the Strait. The nature of the Treaty too lays great stress on cooperative measures, rather than allocating areas of specific responsibility, which may mitigate against potential jurisdictional disputes. The Protected Zone provides a useful example of how a JDZ may be utilised in maritime boundary delimitation agreements, to open a range of options to deal with competing interests that may provide a more workable solution in the long term.

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74 Article 26, Torres Strait Treaty, supra note 3.

75 Article 28, Torres Strait Treaty, supra note 3.

76 Article 28, Torres Strait Treaty, supra note 3.

77 This is defined in Article 28(5) as including the arrest, prosecution and punishment of an offender.

78 Articles 28(6)-28(16), Torres Strait Treaty, supra note 3.; These sub-articles provide for dealing with a variety of situations that might arise in this context.

Joint Advisory Council

In order to facilitate cooperation for the administration of the Protected Zone, the Treaty also established a Torres Strait Joint Advisory Council. The Council’s membership must be drawn in part from the traditional inhabitants, members representing the Queensland and Fly River Province Governments, as well as national representatives of the two States. Such a membership emphasises the various diverse interests which the Treaty seeks to accommodate. The Council’s function however is not administrative, but rather as a conduit for discussion of issues affecting the Treaty and the region, as well as to recommend ways of improving the implementation of the Treaty. The Council also acts as a "environmental watchdog", and is to report on a regular basis to the Parties on matters relevant to the marine environment in or near to the Protected Zone. In addition to the Council, the Treaty also provides for designated representatives from each State to be stationed in the principal centres in the region, to be conduits between local inhabitants and their Governments, and to deal with problems arising from the practical implementation of the Treaty.

The Joint Advisory Council is ultimately designed to cope with the problems that arise through the operation of the Treaty. An example of such a problem has been the consultative arrangements. A senior officer of the Papua New Guinea Department of Foreign Affairs has noted that as the traditional lifestyles of the people living in and adjacent to the Protected Zone are eroded by modern Western ways, there is a greater potential for dispute. As the Treaty does not provide for traditional dispute resolution mechanisms, and the Joint Advisory Council has no power to make binding decisions, there is no potential for preventing the removal of local traditional disputes to a non-traditional, remote body or between national governments. This would not seem to be appropriate given the Treaty's espoused aims.

The reaction to this problem has been to extend the consultative processes outlined in the

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80 Article 19, *Torres Strait Treaty*, supra note 3.
81 The term "Fly River Province" is used in the Treaty for the administrative area now known as "Western Province".
82 Article 19(6), *Torres Strait Treaty*, supra note 3.
83 Article 19(3), *Torres Strait Treaty*, supra note 3.
84 The functions of the Council are expressly stated in Article 19(2):
(a) to seek solutions to problems arising at a local level and not resolved pursuant to Article 18 of this Treaty;
(b) to consider and make recommendations to the Parties on any developments or proposals which might affect the protection of the traditional way of life and the livelihood of the traditional inhabitants, their freedom of movement, performance of traditional activities and exercise of traditional customary rights as provided for in this Treaty; and
(c) to review from time to time as necessary, and to report and to make recommendations to the Parties on, any matters relevant to the effective implementation of this Treaty, including the provisions relating to the protection and preservation of the marine environment, and fauna and flora, in and in the vicinity of the Protected Zone.
86 Article 18, *Torres Strait Treaty*, supra note 3.
87 See Renton, supra note 3, 6-7.
88 This is also a major grievance of the Torres Strait Islanders people: see below.
89 See Renton, supra note 3, 6-7.
To make most effective use of the Treaty Liaison officers provided for in Article 18 of the Treaty, efforts have been made to ensure the officers are in close contact with the communities on all the islands, as well as the Government agencies active in the Strait, both national and regional, and covering a wide variety of services. The officers also schedule Treaty Liaison Meetings three to four times each year, as a means to highlight and tackle local problems, or to refer more serious problems to the Joint Advisory Council.

In addition to the Joint Advisory Council, other committees and special meetings have been arranged to address potential problems and disputes. A Traditional Inhabitants Meeting is held annually, at a time immediately prior to meetings of the Joint Advisory Council, to provide for the identification of issues to be discussed within the Council. The Treaty Liaison Officers assist with these meetings, providing administrative and other support, including advice to delegation leaders. There are also specialist committees to consider environmental management and fisheries enforcement in the region.

**Fisheries Management in the Treaty Area**

Both Australia and Papua New Guinea are under obligations to give effect to their responsibilities under the Treaty. The principal area where this is of concern is in the context of fisheries management, as marine living resources are of critical significance to the traditional inhabitants, and the natural environment of the region.

Both Australia and Papua New Guinea have passed special legislation applicable to Torres Strait to augment or replace elements of their general fisheries legislation. Such legislation is necessary because of the unusual jurisdictional arrangements in the Strait, such as the limitation of territorial seas in parts of the Strait to 3 nautical miles, and also because of the co-operative catch-sharing in the Treaty. As the legislation of both States is relevant, the arrangements made by each will be considered below.

**Australia**

In preparation for the implementation of the Torres Strait Treaty in 1985, the Australian

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90 See Articles 18 and 19, *Torres Strait Treaty*, supra note 3.
91 These include Police, Immigration, Quarantine, Environment, Health and Fisheries: based upon information provided by the Australian Department of Foreign Affairs and Trade.
92 Attempts are made to ensure these meetings coincide with the period immediately prior to meetings of the Joint Advisory Council. See also Commonwealth of Australia, *Report of the Interdepartmental Committee on the Torres Strait Islands*, (Canberra: Department of Aboriginal Affairs, 1988) 15-16.
93 See Article 19, *Torres Strait Treaty*, supra note 3.
94 For example, at the Traditional Inhabitants Meeting held in February 1987, it was agreed that "traditional activities" should not include commercial fishing, as it was considered the Treaty's freedom of movement provisions were being misused. Subsequently, recommendations by the Joint Advisory Council on this issue were taken up by a number of Commonwealth Government departments: Australia, *supra* note 92, 11-13.
95 Titled the Environmental Management Committee.
96 Titled the Joint Australia/Papua New Guinea Fisheries Enforcement Committee.
97 Based upon information provided by the Australia Department of Foreign Affairs and Trade. Other committees have included the Torres Strait Treaty Interdepartmental Committee, the Torres Strait Treaty Implementation and Co-ordination Committee and the Torres Strait Fishing Industry and Islander Consultative Committee: Australia, *supra* note 92, 14-15.
Parliament passed the *Torres Strait Fisheries Act* 1984 (Cth). This Act created the Torres Strait Protected Zone Joint Authority, which was given responsibility for management of the Australian portions of the Protected Zone. This covers all of the waters south of the fisheries jurisdiction line within the Zone, and the territorial seas of the northernmost Australian islands. Beyond the Protected Zone, jurisdiction is shared between the Federal Government, for those waters beyond 3 nautical miles, and the Queensland Government, for waters within 3 nautical miles and for internal waters.

The Joint Authority is a small body, consisting of the Federal and Queensland Ministers with responsibility for fisheries matters. The Joint Authority has several specialist advisory committees made up of representatives of the various stakeholders in the Torres Strait fishing industry. This ensures decision-making is retained at a Ministerial level, while competent advice and feedback on decisions can come from those with the greatest interest in a harmonious and effectively managed fishery. The Joint Authority is also responsible for the negotiation and maintenance of healthy cooperative arrangements with Papua New Guinea.

The most important of the advisory bodies is the Torres Strait Fisheries Management Committee. This body consists of 11 members, 2 from the Commonwealth Government, 2 from the Queensland Government, 3 from the Queensland Commercial Fishermen's Organisation, 3 from the Island Co-Ordinating Council, and 1 from the Torres Strait Fisheries Scientific Advisory Committee. While there has been some Islander dissatisfaction with the small share of representation on this committee, it does represent an attempt to guarantee all interested parties some influence on decision-makers.

Beneath the Fisheries Management Committee are two additional committees: the Torres Strait Fishing Industry and Islanders' Consultative Committee and the Torres Strait Fisheries Scientific Advisory Committee. The latter provides the scientific and technical expertise necessary for assessment of appropriate harvest levels and effective correlation of scientific data. The Fishing Industry and Islanders' Consultative Committee has membership drawn from government (both state and federal) and equal representation from commercial fishing and Islander groups. It oversees the work of specialist working groups into key issues in the management of fisheries in the region. As such there are working groups for prawns, pearl shell, rock lobster, spanish mackerel and licensing.

An example of a programme under the management of the Protected Zone Joint Authority relates to dugong. Commercial fishing for dugong is prohibited in both Australia and Papua New Guinea, but traditional fishing, where sale of the catch is not allowed, is permitted. The Joint Authority has sought to encourage monitoring of dugong numbers, to ensure that the level of traditional hunting activity does not exceed sustainable levels. To this end, recent efforts to involve schools in dugong spotting and recording programmes under the auspices of the Commonwealth Scientific, Industrial and Research Organization (CSIRO) to augment scientific

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98 Although Australia proclaimed a 12 nautical mile territorial sea in 1990, the Australian states only have jurisdiction out to a distance of 3 nautical miles from the territorial sea baselines. A federal territorial sea exists between 3 and 12 nautical miles, and beyond that is the Australian Exclusive Economic Zone. As such state governments only retain fisheries jurisdiction to a distance of 3 miles: see Opeskin & Rothwell, *supra* note 37, 395-398 & 406-410.

99 See diagram in Annex B.

100 Australia, *supra* note 67, 9.
data collected by other means encourage greater community participation.\textsuperscript{101}

It is timely to note that the Australian Fisheries Management Authority (AFMA) has established a dugong sanctuary in the waters to the west of the Strait. A portion of this sanctuary overlaps with the claim area. Traditional hunting of dugong is permitted elsewhere in the Strait. Community involvement in the management of the traditional dugong catch with AFMA suggests that the continuation of the sanctuary will not be problematic, and its overlap with the claim area will not create difficulties.\textsuperscript{102}

One recent legislative development affecting Torres Strait fisheries is found in Part 10 Division 2 of the \textit{Environment Protection and Biodiversity Conservation Act} 1999 (Cth). It provides that the Minister administering the \textit{Torres Strait Fisheries Act} 1984 must make agreements for the assessment of actions permitted by policies or plans for managing fishing in Torres Strait. All policies or plans must be covered by an agreement within 5 years after the commencement of this Act.

\textbf{Papua New Guinea}

Regulation of the Protected Zone fisheries under Papua New Guinea's jurisdiction is done under the \textit{Fisheries (Torres Strait Protected Zone) Act}, Chapter 411. The Act was passed in 1984, prior to the entry into force of the Torres Strait Treaty, and it provides for a licensing system to regulate commercial fishing in the Protected Zone. Approval of licences is done at a Ministerial level, as well as liaison with Australian authorities in respect of management decisions. The Act also prescribes penalties for illegal fishing, including Papua New Guinea vessels fishing illegally in Australian waters. Foreign vessels can be forfeited for certain offences, and if the matter is dealt with on indictment rather than summarily, a prison term of up to one year can be imposed on those fishing illegally on a foreign vessel. This last provision would seem to be contrary to Article 73 of the Law of the Sea Convention.\textsuperscript{103}

\textbf{Cooperative Arrangements}

Articles 22 and 23 of the Torres Strait Treaty encourage both Australia and Papua New Guinea to cooperate on matters relating to the conservation and management of the fisheries in the Protected Zone. To meet these objectives a number of cooperative arrangements have been agreed and these have covered a variety of different subject areas. It was quickly determined that the most effective way to give effect to catch-sharing arrangements in the Treaty was to permit access by a limited number of vessels from one State to the fisheries under the other State's control, and attempting to ensure an overall balance consistent with the Treaty. In the past this has translated into permitting Papua New Guinean vessels access to the Australian portions of the Protected Zone to fish for prawns and rock lobster, and Australian vessels to fish for pearl shell in the Papua New Guinean portions of the Zone. Joint monitoring and continuing

\textsuperscript{103} See generally \textit{Fisheries (Torres Strait Protected Zone) Act}, Chapter 411; and \textit{Fisheries (Torres Strait Protected Zone) Regulation} 1987; see also Mfodwo & Tsamenyi, \textit{supra} note 40, 131-133.
consultation has also been agreed in relation to certain targeted species including dugong, Spanish mackerel and turtle.\textsuperscript{104}

**Queensland Fisheries**

Queensland has jurisdiction over waters within three nautical miles of the coast. Most Queensland fisheries in this area are regulated under the *Fisheries Act 1994* (Qld) by the Queensland Fishing Service (QFS). The QFS is also active in the Strait, although its role is a little different. In the Protected Zone, the *Fisheries Act* is displaced by the *Torres Strait Fisheries Act* 1984 (Qld). This allows for a joint arrangement to take place between the Commonwealth and Queensland. The QFS’s role is to act as agent for the Protected Zone Joint Authority in the management of fisheries.

Outside the Protected Zone, within 3 nautical miles of land, the *Fisheries Act 1994* (Qld) has application. Very little of the claim would fall into this area, but it would include those areas in the extreme south central portion of the claim in the vicinity of Goode Island, just outside the Protected Zone. In addition, it would apply in those waters in the south-easternmost section of the claim around several small islands. These features are evident on the attached map in Annexure C.

The *Fisheries Act 1994* (Qld) explicitly recognises the rights of Torres Strait Islanders to take fish and use fish habitats to support Island custom.\textsuperscript{105} This can be made subject to a management plan, but only after discussions with Islanders, and a “reasonable attempt” has been made to reach an agreement.\textsuperscript{106}

**Fisheries and the Claim**

As the most substantial living resource of the Strait, aside from its people, marine living resources are considered in the claim. The traditional owners are seeking, *inter alia*, to “take, use, enjoy and develop the resources of the claim area, including to make decisions about the allocation, exploitation and conservation of such resources”. As noted above, there is no intention on the part of the claimants to exclude rights created under statute or at common law, of individuals to enter and use the waters, which would include permits to fish. This is a wise course of action to take given the High Court’s judgment in *Ward*:

> It will be recalled that the determination made by the Full Court included among the other interests in the determination area "[o]ther interests held by members of the public arising under the common law". As the reasons of Beaumont and von Doussa JJ reveal, this provision was included in the determination to reflect the common law's recognition of a public right to fish and navigate in the tidal waters of the coastal sea of Australia. The Ward claimants contended that the determination should not recognise the public right to fish in tidal waters as an "other interest" within s 225(c) of the NTA because, so it was argued, the public right to fish is "not a proprietary right". The Ward claimants further contended

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\textsuperscript{104} Australia, *supra* note 67, 10-11.

\textsuperscript{105} Section 14, *Fisheries Act 1994* (Qld).

\textsuperscript{106} Section 14(2) and 14(3) *Fisheries Act 1994* (Qld).
that the majority had erred in holding, as they did, that the public right to fish had the effect of extinguishing the exclusivity of native title rights to fish in the intertidal waters which form part of the claim area.

Section 225(c), and its requirement that there be a determination of "the nature and extent of any other interests in relation to the determination area", must be understood in the light of the definition of "interest" contained in s 253. That definition is very wide. It extends to "any other right ... in connection with ... the land or waters" in question. It follows that, contrary to the contention of the Ward claimants, the public right to fish was properly to be recognised in the determination of native title as an "other interest".

If the evidence otherwise established that the claimants had, under traditional law and custom, an exclusive right to fish in tidal waters, that exclusivity has been extinguished. As has been explained in the joint reasons in The Commonwealth v Yarmirr, there is a fundamental inconsistency between a native title right and interest said to amount to a right to occupy, use and enjoy waters to the exclusion of all others or a right to possess those waters to the exclusion of all others and public rights of navigation over and fishing in those waters. Likewise, there is a fundamental inconsistency between the public right to fish in tidal waters and a native title right and interest said to amount to an exclusive right to fish those waters.107

The above would appear to underscore the wisdom in limiting the scope of the claim in this fashion. In addition, the right to traditional fishing as expressed in the Torres Strait Treaty is certainly not viewed as exclusive, although commercial fishing cannot be administered in such a way as to prejudice the Treaty’s objectives with respect to traditional fishing.108 This is consistent with notions of non-exclusivity as indicated in the extract from Ward above.

Domestic Jurisdiction

Commonwealth and Queensland Jurisdiction

Aside from the problems inherent in any international border region, the geography of the Strait also highlights some practical difficulties in Australia’s domestic offshore legislative arrangements. By virtue of Australia being a Federation, there is a necessary division of power and responsibility between the Commonwealth and the States. Legislative power offshore was expressly considered by the High Court of Australia in 1975 in New South Wales v Commonwealth (‘Seas and Submerged Lands Case’).109 The Court held that all legislative power and title to the sea and seabed was vested in the Commonwealth, and the

107 Western Australia v Ward [2002] HCA 28 (8 August 2002) at para 386-388 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
108 Article 20(1), Torres Strait Treaty, supra note 3.
109 (1975) 135 CLR 337.
States’ jurisdiction effectively ended at the low-water mark. With the exception of internal waters, such as bays and river estuaries, all the seas and seabeds were under the Commonwealth’s control.

The Seas and Submerged Lands Case came as an unpleasant shock to the States, and a change of government in Canberra saw the Commonwealth and State governments commence negotiations on jurisdiction in offshore areas. The Fraser Government reacted strongly against centralism, and sought an agreement with the States to provide a more cooperative arrangement and to restore the situation widely assumed to have existed prior to the enactment of the Seas and Submerged Lands Act 1973 (Cth). In 1979 the negotiations concluded in the Offshore Constitutional Settlement.

The Offshore Constitutional Settlement confirmed the High Court’s view and the Seas and Submerged Lands Act 1973 (Cth) position that sovereignty over all offshore areas (aside from those that were part of a State at the time of Federation) was vested in the Commonwealth. However, the Offshore Constitutional Settlement vested in the States jurisdiction over the sea and seabed within three miles of the baselines of the territorial sea. This allowed the States to maintain the traditional control they had enjoyed over the territorial sea prior to the Seas and Submerged Lands Act 1973 (Cth), without the necessity of altering State boundaries which would have contravened section 123 of the Constitution.

The Offshore Constitutional Settlement was enacted through a series of statutes passed by the Commonwealth and the States. The two principal acts of legislation were the Coastal Waters (State Powers) Act 1980 (Cth) and the Coastal Waters (State Title) Act 1980 (Cth). The former Act provides that a State is to be given legislative power over the territorial sea within three miles of its coast as if those waters were within its limits. The latter Act grants the States title to the same belt of sea, subject to certain limitations, as if the waters were within the limits of the State. Essentially the Commonwealth granted its legislative power and title to the offshore areas, without vesting these areas in the States.

The situation was further complicated in 1983 when the Governor-General proclaimed territorial sea baselines around the Australian continent. These lines, used to close the mouths of various bays, and around offshore reefs and islands, mark the point from which the territorial sea was measured. In the Torres Strait the baselines extend north from Cape York.
Peninsula, enclosing all the southern groups of islands and making a portion of the waters of the south central Strait internal waters of Queensland.\(^\text{117}\)

In the context of the Torres Strait, the Offshore Constitutional Settlement and baseline proclamation mean that waters within three miles of any Australian island or within three miles of a baseline are territorial waters under the jurisdiction of Queensland. Waters up to 12 nautical miles beyond these Queensland waters are part of the Commonwealth’s territorial sea. Beyond these waters from 12 to 24 miles is the Commonwealth’s Contiguous Zone, proclaimed in 1994.\(^\text{118}\) Within the Contiguous Zone international law permits a state to apply fiscal, immigration, sanitation and customs regulations upon vessels, although at the present point in time Australia has not proceeded much beyond the mere proclamation of the zone. Within the Torres Strait, the area covered by the Contiguous Zone is small, as the presence of so many islands militates against areas of sea being more than 12 miles from land. Further, north of the seabed line, the Contiguous Zone is not applied at all, leaving the islands with a three nautical mile territorial sea only.

A recent addition to the jurisdictional patchwork has been the entry into force of the *Crimes at Sea Act* 2000 (Cth). This legislation provides for the consolidation of a new national scheme for the application of the criminal law to Australia’s offshore areas. While the totality of the arrangements need not be considered here, it is sufficient to state that all the waters under Australian jurisdiction in the Torres Strait are deemed to be in adjacent waters to the State of Queensland,\(^\text{119}\) and, where it has application, the *Criminal Code Act* 1899 (Qld) is the appropriate crimes legislation.\(^\text{120}\)

The claim area extends across waters and seabed subject to Commonwealth and Queensland jurisdiction. Most of the fisheries in the claim area are subject to Commonwealth jurisdiction, as discussed above. Other jurisdiction is divided in the manner indicated above.

One matter which was left subject to Commonwealth control by the OCS was the issue of petroleum. The *Petroleum (Submerged Lands) Act* 1967 (Cth) continues to operate, and it vests responsibility for petroleum exploration in offshore areas in the Commonwealth. In the *Yarmirr* litigation at first instance Olney J made the following observation:

*The applicants’ proposed determination, insofar as it seeks recognition of the right of ownership of the waters and land of the claimed area and rights to use and to control the use by others of the resources of the claimed area appears to encompass a claim to all resources existing within the seabed and subsoil including minerals located on or below the seabed. However, as there is no evidence to suggest that any traditional law or traditional custom of the Croker Island community relates to the acquisition or use of, or to trading in, any*

\(^{117}\) Whether such waters were internal waters of Queensland at the time of Federation is an interesting question. Certainly, for the purposes of the Offshore Constitutional Settlement, waters landward of territorial sea baselines are subject to the jurisdiction of the adjacent State, and from the perspective of international law, they are internal waters. The baselines in this case are considered by Prescott: J.R.V. Prescott, *Australia’s Maritime Boundaries* (Canberra: ANU, 1985) 64.


\(^{119}\) Schedule 1, clause 14, *Crimes at Sea Act* 2000 (Cth).

\(^{120}\) Schedule 1, clauses 2 and 14, *Crimes at Sea Act* 2000 (Cth).
minerals that may exist or be found on or in the seabed or subsoil of the waters of the claimed area there can be no basis for a determination that would recognise native title in such minerals. Notwithstanding this, the Commonwealth has made a substantial and well researched submission in support of the proposition that title to minerals in the seabed and subsoil within the limits of the Northern Territory and beneath the coastal waters of the Northern Territory has been vested in the Crown either in the right of the Commonwealth or in the right of the Northern Territory. This result is said to be achieved by the combined effect of the Atomic Energy (Control of Materials) Act 1946 (Cth), the Atomic Energy Act 1953 (Cth), the Minerals (Acquisition) Ordinance 1953, the Petroleum (Prospecting and Mining) Ordinance 1954, the Northern Territory (Self Government) Act 1978 (Cth) and the Coastal Waters (Northern Territory Title) Act 1980 (Cth). For the purposes of these reasons I am content to observe that my own consideration of the rather complex legislative history referred to leads to the conclusion that the Crown has by the exercise of its undoubted legislative powers appropriated to itself an interest in the minerals in question which amounts to the full beneficial ownership thereof. It necessarily follows that no native title rights in the minerals could have survived the acquisition. This conclusion is entirely consistent with the reasons of Brennan J in Mabo No 2 and of the Queensland Court of Appeal in Eaton v Yanner; ex parte Eaton where similar conclusions have been expressed in circumstances where there has been a legislative vesting of property in the Crown.121

Similar considerations may well exist in the Torres Strait sea claim, which also seeks to claim the seabed and subsoil. Again this appears to have been taken into account in making the claim, as it is made except to the extent the sole beneficial ownership of minerals, petroleum or gas has vested in the Commonwealth where that has extinguished native title.

**Torres Strait Regional Authority**

The Torres Strait Regional Authority (TSRA) was established under the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) in 1994. It was designed to be the representative body for Torres Strait Islanders, in its dealings with the Commonwealth, and to undertake a number of functions, including the provision of advice to Government on policy for the Strait, and the maintenance of Ailan Kastom.

The relevance at law of the TSRA to the native title claim is relatively simple to demonstrate, although is not as explicit as it might be. The operation of Commonwealth law beyond the land territory of Australia does not occur for all legislation in all situations. Legislation must have been intended to operate extraterritorially, or it will be assumed not to operate beyond the coast.

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121 Yarmirr v Northern Territory (1998) 156 ALR 370 at 423 per Olney J. His Honour’s reasoning was explicitly adopted by the majority before the Full Court: Commonwealth v Yarmirr (1999) 168 ALR 426 at 477 per Beaumont and von Doussa JJ.
The legislation establishing the TSRA, the ATSIC Act, makes no express statement that it is intended to operate extraterritorially in a general fashion. However, principles of statutory interpretation make it clear that extraterritorial operation of law can be proved explicitly or by necessary implication. Further, they can also be restricted to certain portions of the legislation if necessary.

Part 3A of the ATSIC Act sets out the powers of the TSRA, and two provisions are relevant. Firstly, section 142D(3) provides:

The Plan must outline the strategies and policies that the TSRA intends to adopt in order to implement the Plan, including, but not limited to, a marine strategy for the Torres Strait area.

The reference to the preparation of a marine strategy make it clear the TSRA has a direct interest in the waters of the Strait, and therefore of the claim area.

Secondly, section 142C(4) provides that the powers conferred on the TSRA are exercisable both within and outside Australia. This explicitly gives extraterritorial operation to the TSRA’s functions.

These two sections between them make it clear that in respect of the TSRA, the ATSIC Act was intended to operate extraterritorially and to marine areas, and therefore the powers of the TSRA can extend into the marine areas subject to claim.

The functions of the TSRA indicate that while not having legislative authority to control activities in the marine areas of Torres Strait, the TSRA has an important role.\textsuperscript{122} The direct

\begin{itemize}
  \item[(a)] to recognise and maintain the special and unique Ailan Kastom of Torres Strait Islanders living in the Torres Strait area;
  \item[(b)] to formulate and implement programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;
  \item[(c)] to monitor the effectiveness of programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area, including programs conducted by other bodies;
  \item[(d)] to develop policy proposals to meet national, State and regional needs and priorities of Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;
  \item[(e)] to assist, advise and co-operate with Torres Strait Islander and Aboriginal communities, organisations and individuals at national, State, Territory and regional levels;
  \item[(f)] to advise the Minister on:
    \begin{itemize}
      \item[(i)] matters relating to Torres Strait Islander affairs, and Aboriginal affairs, in the Torres Strait area, including the administration of legislation;
      \item[(ii)] the co-ordination of the activities of other Commonwealth bodies that affect Torres Strait Islanders, or Aboriginal persons, living in the Torres Strait area;
      \item[(g)] when requested by the Minister, to provide information or advice to the Minister on any matter specified by the Minister;
      \item[(h)] to take such reasonable action as it considers necessary to protect Torres Strait Islander and Aboriginal cultural material and information relating to the Torres Strait area if the material or information is considered sacred or otherwise significant by Torres Strait Islanders or Aboriginal persons;
  \end{itemize}
\end{itemize}
recognition of Ailan Kastom, and efforts to further its maintenance, and assist Government in the formulation of policy mean that it clearly has a direct interest in the extent and nature of the sea claim in the Strait.

Torres Shire Council

The Torres Shire Council is a local council operating under the Local Government Act 1993 (Qld). Its ability to operate in offshore areas is limited by the same concerns discussed in the context of the TSRA, that is, the extraterritorial operation of the legislation under which it operates.

As noted above, the Offshore Constitutional Settlement limits the jurisdiction of Queensland in offshore areas in the ordinary course of events to within 3 nautical miles of the coast. In the absence of any other indication, the reach of the Local Government Act 1993 (Qld) would be restricted to waters within this distance. As such much of the claim would automatically be outside any possible jurisdiction of the Torres Shire Council. In addition, nothing in the Local Government Act indicates the Act is intended to have extraterritorial operation. What reference there is to marine areas, does not support a conclusion that the Act is intended to operate extraterritorially. Chapter 13 Part 4 of the Local Government Act 1993 (Qld) deals with marine and aquatic matters. It is restricted to the operation of ferry services across watercourses, a definition that would seem to preclude an area of the sea, the maintenance and construction of harbours for small boats, jetties and breakwaters, all in tidal waters, and to control of the foreshore bordering a local government area, if placed under authority by the Governor in Council. This last provision would confirm that a local government area is restricted to land, watercourses and the foreshore, and does not extend out into the sea.

These factors would indicate that the Torres Shire Council does not have responsibility for the marine areas of the Strait, and its relevance to the matters raised by the claim is limited. Certainly, land use of areas adjacent to the Strait might have an impact upon water quality, marine activities, or fisheries, and as such the Torres Shire Council has some role. However, its connection to the marine areas in issue is indirect.

Environmental Protection

As noted in the above discussion, the Commonwealth has principal responsibility with respect to managing the Torres Strait marine area, by virtue of the OCS. Queensland jurisdiction extends out to three nautical miles from the coast. By virtue of Article 13 of the Torres Strait Treaty, the

(i) at the request of, or with the agreement of, the Australian Bureau of Statistics but not otherwise, to collect and publish statistical information relating to Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;
(j) such other functions as are conferred on the TSRA by this Act or any other Act;
(k) such other functions as are expressly conferred on the TSRA by a law of a State or of an internal Territory and in respect of which there is in force written approval by the Minister under section 142B;
(l) to undertake such research as is necessary to enable the TSRA to perform any of its other functions;
(m) to do anything else that is incidental or conducive to the performance of any of the preceding functions.
Commonwealth could certainly legislate to take back responsibility for the environmental protection of all waters in the Protected Zone. Article 13 clearly creates an international obligation on Australia, and a series of High Court cases since 1983 make it clear that this will be sufficient to give the Commonwealth constitutional authority to legislate were it to choose to do so.123

The claim areas outside the Protected Zone within Queensland jurisdiction are sufficiently close to the Zone to be reasonably regarded as in the vicinity of the Zone, which is explicitly contemplated in Article 13. Those areas in the south-easternmost portion of the claim are in the Great Barrier Reef Marine Park Area. The Marine Park was the subject of an ancillary agreement to the OCS, known as the Emerald Agreement.124 The then Prime Minister and Premier agreed that the OCS arrangements would not affect the Marine Park, which was established in 1975 prior to the OCS’s negotiation. As such Queensland law could be invalidated to the extent of any inconsistency with the Great Barrier Reef Marine Park Act 1975 (Cth), or other applicable Commonwealth legislation operating in the Park. Outside the Park, Queensland law would operate on the same basis as elsewhere in the state, that is, within three nautical miles.