

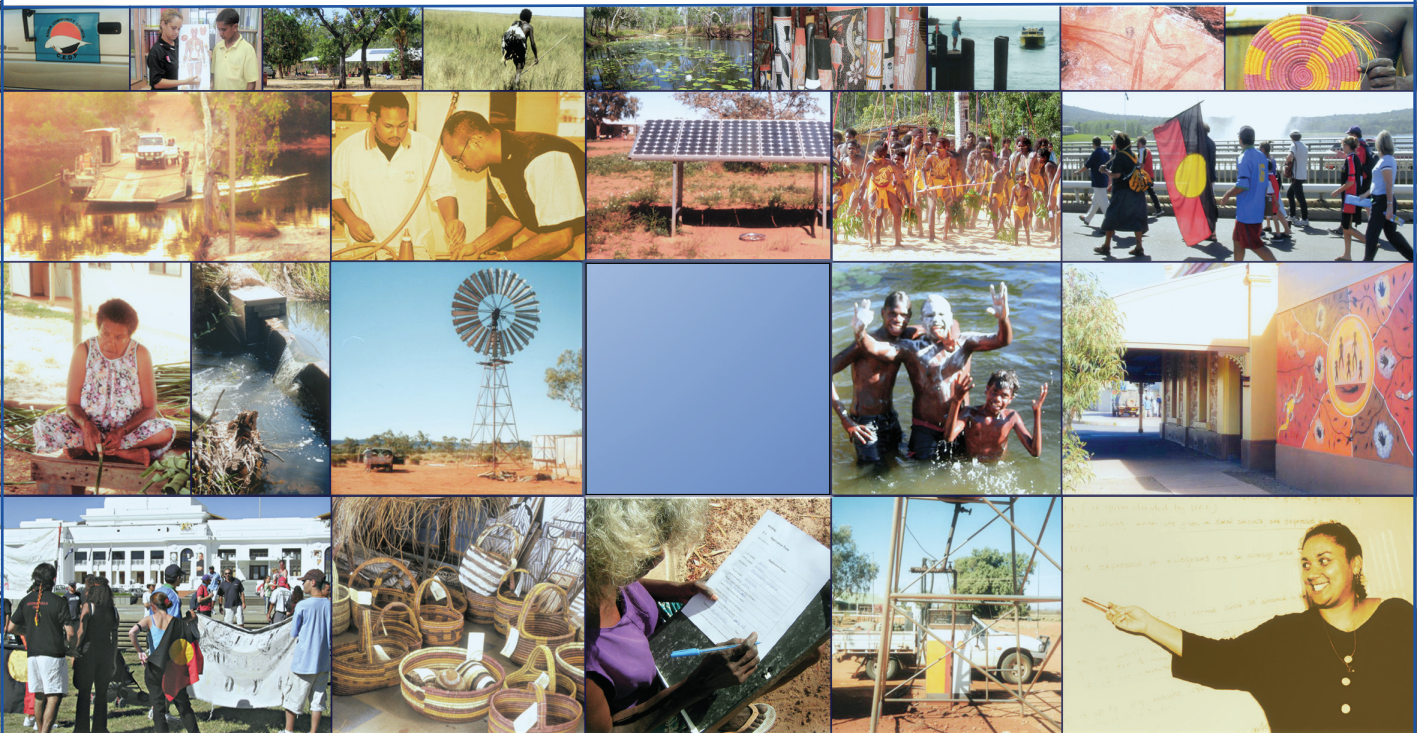
CENTRE FOR ABORIGINAL ECONOMIC
POLICY RESEARCH



INDIGENOUS PROPERTY RIGHTS IN COMMERCIAL FISHERIES: CANADA, NEW ZEALAND AND AUSTRALIA COMPARED

M. Durette

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Enquiries may be directed to:

The Centre for Aboriginal Economic Policy Research
Hanna Neumann Building #21
The Australian National University
Canberra ACT 0200

Telephone 02-6125 8211
Facsimile 02-6125 9730

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Professor Jon Altman
Director, CAEPR
The Australian National University
December 2007

Indigenous Property Rights in Commercial Fisheries: Canada, New Zealand and Australia Compared

M. Durette

Melanie Durette is currently a consultant for Synexe Consulting, with recent projects including a report on Indigenous water rights for the Indigenous Water Policy Group in Australia and working to facilitate engagement of traditional owners on the water issues in Alice Springs. In 2006–07 she was an Intern at CAEPR, participating in the Young Professionals International Program (Canada) sponsored by the Native Law Centre of Canada, University of Saskatchewan. Melanie's current research focus is on natural resource management and Indigenous people, especially with regards to fisheries and water issues.

ABSTRACT

This paper demonstrates, through a detailed comparison with Canada and New Zealand, that the Australian government's approach to Indigenous customary and commercial fishing rights stands outside developments in other Commonwealth countries. It focuses on commercial fishing in particular as an opportunity for Indigenous people to more fully realise their economic rights. The socioeconomic outcomes from Indigenous commercial fishing in Canada and New Zealand identified in this paper highlight the need for Australia to rethink its policies to ensure that the same rights and benefits accrue to Indigenous Australians.

The paper first outlines developments in Canada and New Zealand, focusing less on the history—as this has been the subject of many other papers—and more on the contemporary arrangements for commercial fishing in these countries, especially the emerging cooperative structures between Indigenous people and government. An outline of Australia's position on commercial rights follows, which reveals that state of Aboriginal and Torres Strait Islander participation in commercial fisheries is currently minimal to non-existent. It closes with a discussion drawing out the key differences between Australia and the other two countries. In the end, no specific solution is identified, but rather this paper identifies a variety of possible—and necessary—avenues for change.

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INTRODUCTION

The Australian government's approach to Indigenous customary and commercial fishing rights stands outside developments in other Commonwealth countries. Commercial fishing in particular represents an opportunity for Indigenous people to more fully realise their right to economic self-determination. However, the current state of Aboriginal and Torres Strait Islander participation in commercial fisheries is minimal to non-existent; Australia's Indigenous people have not enjoyed the same economic development in this regard as Indigenous people in Canada and New Zealand. The focus in Australia remains on customary rights, and even these are tenuous in comparison to other countries. The potential benefits accruing from Indigenous participation in commercial fishing still seem a long way off in Australia.

Despite a series of policy statements over the years on the importance of recognizing and encouraging Indigenous participation in commercial fisheries, Australia's common law and statutory regimes have not recognised these economic rights. Not only are these rights unrecognised, but a valid argument can be made that the current state of the law impedes Indigenous Australians from realising commercial fishing rights and so advancing their roles as independent actors in the Australian economy. This paper explores the development of Indigenous commercial fisheries in Canada and New Zealand as a means of demonstrating that Australia's current position and inaction on commercial fishing rights leaves Indigenous Australians in a lesser position in terms of their economic rights when compared to their counterparts in other countries. The socioeconomic outcomes from Indigenous commercial fishing in Canada and New Zealand identified in this paper highlight the need for Australia to actually implement its policy, so ensuring that the same rights and benefits accrue to Indigenous Australians.

This paper first outlines developments in Canada and New Zealand, focusing less on the history—as this has been the subject of many other papers—and more on the contemporary arrangements for commercial fishing. In particular it examines the emerging cooperative structures in these countries between Indigenous people and government; arrangements which can only come about once the government genuinely acknowledges the right to, and overall benefits of, economic self-sufficiency for Indigenous peoples. An examination of Australia's position on commercial fishing rights follows, although the discussion is much less detailed owing to the lack of recognition of such rights in Australia. Indeed, where commercial rights *have* been acknowledged, it has largely been through broad policy statements or piecemeal attempts to implement short-term, uncertain, small-scale projects in aquaculture. The paper closes with a discussion drawing out the notable differences between Australia and the other two countries, and posing questions as to why Australia seems to recognise only minimum Indigenous fishing rights. While no specific solution is identified, a variety of possible—and necessary—avenues for change are proposed.

BACKGROUND

Owing to the diversity of Indigenous groups, geographical differences, and the range of government approaches across both Canada and Australia, it has been necessary to focus this inquiry on particular areas of each country. The west coast of British Columbia in Canada and the Northern Territory in Australia are obvious choices for examination, as Indigenous settlements in both areas had a long historical involvement with fishing well before European settlement.

Canadian First Nations have long fought for commercial fishing rights, especially on the west coast of British Columbia. British Columbia is also comparable to Australia as it is the one province in Canada where treaties between First Nations and the government were not signed. In the absence of such treaties, British Columbia is the jurisdiction where the majority of Canadian Supreme Court cases on fishing rights have originated, and it is the birthplace of the modern treaty process in Canada. Indigenous people in

British Columbia make up around 17 per cent of Canada's total Indigenous population, and four per cent of British Columbia's population.¹ Over 75 per cent of the total population of British Columbia—which in 2001 amounted to just over three million—live on the coast, a situation similar to Australia's Northern Territory.

Coastal Indigenous peoples in the Northern Territory have always depended on the sea and its resources for their livelihoods, and while they have made significant inroads into management of customary fisheries, they have no rights under Australian law to participate in commercial fisheries. Indigenous peoples own approximately 87 per cent of the coastline in the Northern Territory and comprise over 25 per cent of the population. It is surprising, therefore, that an Indigenous commercial fishing sector has not developed in this area. The Torres Strait, by contrast, is one place where an Indigenous fishing sector exists, and is briefly considered as a best-case example in Australia to date.

The Maori people of New Zealand, by comparison, can be looked at as a whole due to the fact that their commercial fisheries are much more organised in comparison to Canada and Australia, as this paper will demonstrate. Maori comprise approximately 15 per cent of New Zealand's population² and have been able to organise themselves into distinct *iwi* (tribal) groups for settlement of fisheries assets. They are represented by a single fisheries trust and constitute a significant and growing force in the New Zealand seafood industry.

THE CANADIAN EXPERIENCE

EARLY WESTERN CANADIAN FISHERIES

The west coast province of British Columbia has a wealth of natural resources, but none have been more important in the history of the Aboriginal people³ than the salmon fisheries. If a salmon run failed, Aboriginal communities faced starvation. For thousands of years prior to European colonisation, Aboriginal settlements were built around the salmon fisheries. Salmon provided plentiful protein, generated wealth as a valuable trade item, and were intimately tied to culture. The fish was even more important to Aboriginal groups in the interior: the major river systems that did not hold the same diversity of aquatic species as the Pacific coast. Aboriginal peoples had rules to govern the fisheries, including fishing and ownership rights, as well as management techniques such as selective capture of healthy stock (First Nations Panel on Fisheries 2004).⁴ Chiefs were responsible for allocating fishing sites, as well as the time and order in which clan members were allowed to fish. 'Ownership' denoted priority to the resource but not the right of exclusion, with the exception that outsiders could be excluded. Rather than exclusive possession, traditional concepts of ownership are better understood in terms of stewardship for the resource. Prior to European contact, Aboriginal people lived in balance with their resources, even though the population significantly exceeded present numbers and resource exploitation levels were higher.

Since the arrival of the Europeans and the establishment of the first commercial cannery in 1871, a telling description of the history of fishing in British Columbia is that of 'a salmon, curved into a dollar sign, fighting its way upriver' away from the grasping hands of mostly corporations and bureaucracies (Isabella 1999). In the 1870s, commercial fisheries were granted licenses from the federal government and began to exploit the salmon runs in British Columbia. Traditional Aboriginal resource management systems were overturned and replaced with minimal access rights in the form of an annual food fish permit (Harris 2005). As pressure on fish stocks increased, the Department of Marine and Fisheries (the federal body then responsible for fisheries)⁵ increasingly limited Aboriginal access to fisheries.⁶ Food fishing permits were only granted to those who were unable to work in the wage economy, and in many places the fisheries were closed to Aboriginal people but left open to both commercial and sport fishing. The Canadian government

refused to recognise the history of Aboriginal people in using and managing the fisheries, granting them only very limited access and discretionary privileges. This restrictive approach would continue for almost a century until the groundbreaking Canadian Supreme Court case in 1990 known as *R v Sparrow*, which forced governments to come to the bargaining table in recognition of Aboriginal rights to fish.

CONSTITUTIONAL RIGHTS

In Canada, the *Constitution Act 1982* protects both Indigenous customary and (to a lesser extent) commercial fishing rights. The jurisprudence on fishing rights is a relatively new development of the 1990s, with commercial fishing rights being an extension of the principles first articulated in cases considering claims for customary rights. The Act provides a strong foundation for Aboriginal fishing rights:

S.35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The scope of s.35(1) was first considered in *R. v. Sparrow*,⁷ where a unanimous Supreme Court held that s.35(1) protected an inherent right to fish for food, social and ceremonial purposes. The Court articulated a number of general principles that apply in considering whether a right exists under s.35.

Firstly, s.35 can only be used to protect rights which existed at the time the provision was enacted and which were not extinguished by the Crown prior to 1982. However, 'existing rights', must be interpreted broadly and flexibly to allow rights to evolve over time and in light of the objectives of s.35. The section was enacted in order to limit Crown interference with Aboriginal rights, and the Crown faces a strict burden of proof in demonstrating clear and plain intent to extinguish an Aboriginal right. Further, when a legislative matter attempts to extinguish or limit the exercise of an existing Aboriginal right, there is *prima facie* infringement of s.35. In practice, this means that unless the Crown can demonstrate a valid objective for the legislation, Aboriginal rights have priority.

The Court recognised that a valid objective for the infringement of Aboriginal customary rights to fish might be the management and conservation of a natural resource. However, justification requires consideration of the federal government's fiduciary duty to Aboriginal people, which has been articulated as the highest duty known in law, a duty highlighted by good faith, loyalty and trust. Therefore, in order to justify an infringement, the Crown must demonstrate as that any infringement of the right is as minor as possible, and that there has been adequate consultation with the Aboriginal group.⁸ As well, if there has been expropriation, the Crown must demonstrate that the Aboriginal group has been fairly compensated.⁹ In solving resource allocation problems the Court ruled that, after conservation measures, subsistence fishing should take priority over commercial and sport fishing.

The *Sparrow* case represents a major turning point for Aboriginal rights in Canada: it has been continually followed by courts in subsequent years and implemented into government policy. For example, in 1999 the Department of Fisheries and Oceans released an allocation policy acknowledging the priority right of First Nations to fish for food, social and ceremonial purposes and treaty obligations over commercial and recreational fisheries.¹⁰

While the *Sparrow* case prioritised customary fishing rights, the status of First Nation commercial fishers had yet to be decided. In 1996, the Supreme Court released three decisions, collectively known as the *Van Der Peet* trilogy¹¹, addressing whether Aboriginal fishing rights included the right to sell fish for commercial purposes. In all three cases, the Government of Canada charged Aboriginal fishers for catching fish for sale without a commercial license. The rule emerging from the trilogy was that, in order for a constitutional right to fish for commercial purposes to exist, an Aboriginal group needed to demonstrate that a defining and central feature of their society prior to European contact was trade in fishery.

Where an Aboriginal group could not demonstrate that commercial fisheries were an integral part of their culture, s.35(1) could not be relied on to defend commercial fishing rights on grounds that this would extend the section beyond what it was intended to protect:

Section 35(1), it is true, recognises and affirms existing aboriginal *rights*, but it must not be forgotten that the rights it recognises and affirms are *aboriginal*.¹²

In reaching this decision, the Supreme Court considered the decision of the High Court of Australia in *Mabo v. Queensland*, where it was similarly held that

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. (Para. 64).

Aboriginal rights, therefore, arose prior to European contact and could not derive from interaction with settler society. The right claimed needed to be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right, and the standard for proving this was higher than if the group was claiming a right to fish for food, social and ceremonial purposes.

Not only is a constitutional right to participate in commercial fisheries more difficult to prove under the common law, but it is also afforded less protection, in that the Crown has a lower burden of proof when justifying an infringement of commercial rights. Whereas customary rights might only be secondary to conservation of the resource, infringement of commercial fishing rights might be justified in recognition of the need to promote regional and economic fairness and the historical reliance on participation in the fishery by non-Aboriginal fishers.¹³

HISTORICAL AND MODERN TREATIES

Historical treaties often allocated general fishing rights by allowing Aboriginal groups to continue 'fisheries as formerly'. Historical treaties, in themselves, form a distinct group of Aboriginal rights with additional protection under s.35(1) of the Canadian *Constitution Act 1982*, which recognises and affirms treaty rights. In the past, treaties might either have been entered into with colonial European nations or with the federal and provincial governments. While treaties will vary from agreement to agreement and group to group, they are all subject to the same rules of interpretation set out in the common law. Treaties are interpreted generously and liberally in the common law owing to the special fiduciary relationship between the Crown and Aboriginal peoples. Such an approach is necessary to uphold the integrity and honour of the Crown and secure the friendship and peace of Aboriginal people. Moreover, Canadian courts have been willing to consider oral evidence where necessary to determine the spirit of the treaty and the position of the Aboriginal group at the time of signing. In some cases, the courts might go so far as to imply treaty terms on this basis—even if the written document appears clear and unambiguous—in order to achieve a fair result.

The 1999 case of *R v Marshall*, where the Supreme Court was faced with the issue of whether historical treaty rights should be liberally interpreted to include a communal right to fish, became the leading authority on treaty interpretation in Canada. The Supreme Court held that historic treaty rights could include the communal right to fish in pursuit of a moderate livelihood. The treaty gave the Mi'kmaq First Nations on the Atlantic coast the right to trade the products of their hunting, fishing and gathering for 'necessaries', but the Supreme Court liberally interpreted this to mean the right to earn a 'moderate livelihood' through trading fish and game. Regulations could not interfere with the right to secure a moderate livelihood, which included a right to sell fish to provide for family. While Canadian courts have followed this case in subsequent years in interpreting historical treaties, modern treaties negotiated

between governments and today's First Nations have had a more powerful impact on Aboriginal fishing rights by clearly delineating the extent of the rights, including the role that Aboriginal groups will play in regulating and conserving fisheries.

British Columbia is unique among Canadian jurisdictions in that it has very few historical treaties and therefore provides an example of the modern treaty process in Canada.¹⁴ Since 1992, the federal and British Columbia provincial governments have engaged First Nations in extensive treaty negotiations through the British Columbia Treaty Process. Modern treaties are negotiated in hopes that, by clearly delineating Aboriginal rights, they will improve economic certainty over Crown land and resources and so materially progress the lives of First Nations. However, the reality is that parties usually disagree on fundamentals, such as compensation for past infringements, governance, financial arrangements, land status and fisheries, thereby holding up the process for years. In 2004, as many as 45 negotiating tables were operating but only five of these had reached final negotiation stages, demonstrating the complexity and slowness of the process (First Nations Panel on Fisheries 2004).

The first modern treaty concluded in British Columbia was the Nisga'a Treaty, negotiated through the 1970s¹⁵ to its conclusion in 2000. The Nisga'a Treaty is an agreement between the Nisga'a Nation, the British Columbia government, and the Canadian federal government. Approximately 2,500 of the 5,500 Nisga'a people live in remote northwest British Columbia in the Nass Valley. Forestry is the dominant economic activity, along with fishing, eco-tourism, pine mushroom harvesting and service industries. The final step required to give legal effect to the Treaty took place on 13 April 2000, when Parliament passed the *Nisga'a Final Agreement Act*.¹⁶ The Act gives effect to the agreement that in turn provides a full and final settlement of the Nisga'a Nation's rights and land claims, including self governance.

In relation to fisheries, the Nisga'a Treaty clearly sets out the Nisga'a Nation's authority to manage land and resources in relation to the federal *Fisheries Act*, as well as specific catch allocations, fisheries management structures, and related financial commitments. Under the agreement, the Nisga'a Nation is allocated just over one-quarter of the salmon stock in the Nass Valley area, including the right to sell the catch. The only condition is that it must be in a year where commercial fishers are allowed to catch and sell salmon. The Treaty confirms a role for the Nisga'a Nation as stewards of the Nass Valley area fisheries through the Nisga'a Fisheries Program, operated in partnership with the Canadian Department of Fisheries and Oceans (DFO),¹⁷ and establishes a C\$13 million trust fund to promote conservation and protection of fish species. The Nisga'a Nation also received C\$15 million towards the purchase of commercial fishing vessels and licenses. In relation to title, the province of British Columbia is recognised as owning the rights to lands submerged under water, but holds a strong duty to consult and seek consent when making decisions which might adversely affect the Nisga'a lands and interests.

In the years following the implementation of the Nisga'a Treaty, the Nisga'a Nation and the DFO have participated in several forums designed to brief each other on fisheries matters, and disputes between the parties have been substantially reduced. The Nisga'a Nation has been able to manage the fishery and assess stock, and catches have been consistently within their allocation. The Nisga'a Fisheries Program has received awards in recognition of the ability of the current management structure to protect salmon stocks. In 1992, in recognition that fisheries were vital to Nisga'a for both cultural and economic reasons, the government and the Nisga'a Nation cooperated in the creation of Nisga'a Fisheries, which would be responsible for managing the salmon resource and investments. In 2001, 800 Individual Sale Permits for salmon were sold to Nisga'a fishers, resulting in Nisga'a C\$386,126 in revenue to Nisga'a fishers and C\$162,908 to the Nisga'a Government (Province of British Columbia 2002). Nisga'a Fisheries continues to grow as it acquires more fishing boats and expands fishing plants.

DFO: Department
of Fisheries and
Oceans

AIP:
agreement-in-principle

In reality, agreements such as the Nisga'a settlement take years to finalise. As an interim measure where a modern treaty has not been negotiated, some First Nations will enter into agreements-in-principle (AIPs) with the federal and provincial governments. AIPs will have provisions similar to those in the Nisga'a Treaty, though each one will vary according to the circumstances, and will generally be viewed as the penultimate stage before the signing of a treaty. For instance, an AIP signed by the Tsawwassen Nation, who fish the Fraser River, has a total allowable catch of sockeye salmon that varies with the run size in recognition of the many First Nation groups with a claim to the fishery on that same river. Under the AIP, the federal government has agreed to issue a commercial license for fishing to augment opportunity of the Tsawwassen Nation to participate in the commercial fisheries. However, these agreements do not receive the same constitutional protection as the treaties, and therefore are regarded as temporary measures before a treaty is concluded.

ABORIGINAL FISHERIES STRATEGY

AFS:
Aboriginal
Fisheries Strategy

In response to the Canadian Supreme Court decision in *Sparrow* defining Aboriginal rights to fish for food, social and ceremonial purposes and setting out the necessity of consulting with Aboriginal groups when their fishing rights might be affected, the DFO created an Aboriginal Fisheries Strategy (AFS) in 1992.¹⁸ The AFS seeks to enhance Aboriginal participation in fisheries—giving effect to recent common law developments in the area. In its first year, C\$14.7 million was spent in British Columbia with nearly 75 per cent of Aboriginal people in the province (who traditionally depend on the salmon fishery) reaching agreements on resource management projects (Allain & Frechette 1993). Annual funding of the AFS is C\$35 million, with about 125 agreements signed each year. Approximately two-thirds of these agreements are reached with Aboriginal groups in the Pacific Region, with the remainder being in Atlantic Canada and Quebec.

Fisheries agreements negotiated under the AFS contain provisions respecting amounts of fish that may be fished for food, social and ceremonial purposes; terms and conditions of communal fishing licences; and co-management arrangements between Aboriginal groups and DFO involving stock assessment, fish enhancement and habitat management, and fisheries enforcement initiatives. In the absence of agreement, the DFO can issue a communal fishing license consistent with the *Sparrow* decision allowing an Aboriginal group to fish for food, social and ceremonial purposes.

The AFS also creates approximately 1,300 seasonal jobs in areas such as processing, monitoring and enhancement activities. Fishing agreements negotiated under the AFS are time-limited interim measures for the management and regulation of fishing while treaties and outstanding claims are being settled.

ATP:
Allocation Transfer
Program

The Allocation Transfer Program (ATP) is an integral component of the AFS which enables Aboriginal participation in commercial fisheries through the transfer of licenses. The ATP facilitates the voluntary retirement of commercial licenses and the reissuance of the equivalent commercial fishing capacity as communal commercial licenses to eligible Aboriginal groups.¹⁹ Since its launch in 1994, approximately 900 commercial licences have been issued to Aboriginal groups under the ATP.

AAROM:
Aboriginal
Aquatic Resource
and Ocean
Management
Program

Other initiatives under the AFS include the creation of an Aboriginal Aquatic Resource and Ocean Management Program (AAROM), which was developed as part of a cooperative 2002-2003 Renewal Process between the DFO and First Nation groups.²⁰ The AAROM provides funding to assist Aboriginal groups in acquiring the administrative capacity and scientific and technical expertise to facilitate their participation in aquatic resource and oceans management; to enhance existing collaborative management structures; to facilitate representation in interactions with DFO and other government departments at the multi-stakeholder level; and to strengthen relationships through improved information-sharing between Aboriginal communities, DFO and other stakeholders. Funding may also be available to obtain commercial licences, vessels and gear, to take advantage of aquaculture opportunities, and for the development of

Aboriginal Community Fisheries Officers. In the Pacific region alone, the AAROM has an annual operating mandate of C\$6 million. A related program is the Aboriginal Inland Habitat Program, which assists inland Aboriginal groups to manage fish habitat.

The AFS has developed a good working relationship between the DFO and various Aboriginal groups, including improved cooperation on enforcement and monitoring of fishing, more selective fishing regimes, and a reduction in protests and confrontation. In spite of its successes, the AFS still must overcome issues not unfamiliar to any sort of Aboriginal programming, including the impracticality of annual funding for long-term planning, the complexity of agreements, and the need to coordinate across a number of government departments.

While the government's purpose in adopting the AFS was to facilitate cooperation among government, Aboriginal peoples, and non-Aboriginal fishing groups, the AFS remains controversial. One of the greatest challenges to the AFS has been a strong resistance on the part of non-Aboriginal groups, who argue that they had little to do with the negotiations, that they do not receive complete and accurate information, and that the AFS disrupts a balanced management of salmon stocks by allowing Indigenous people to fish in an unregulated manner.

The matter of whether the AFS creates a 'race based' fishery recently came before the British Columbia Court of Appeal in *R. v. Kapp* in 2004, where a group of non-Aboriginal commercial fishermen were charged with conducting a protest fishery. The commercial fishermen argued that a pilot sales program under the AFS, which allocated a certain amount of salmon to First Nation groups, violated their equality rights under the *Charter of Rights and Freedom*. The Court of Appeal rejected this argument, recognising the historical inequality and prejudice faced by Aboriginal groups and that no commercial groups were displaced by the pilot sales allocation.

THE MODERN FISHERIES ACT

The *Fisheries Act* is the federal Canadian law that governs the management of fisheries and the protection of fish habitat. It was first enacted in 1868, before all the provinces and territories had entered Confederation, and well before the introduction of modern fishing technology. The Act has been amended occasionally over the years, but required a significant overhaul to better meet the challenges faced by modern fisheries.²¹ Recent changes to the legislation have been negotiated through extensive consultations with provinces, territories, fishing interests, Aboriginal groups and other stakeholders. The changes were introduced into Parliament at the end of 2006. Under the theme of shared stewardship, the Act seeks to expand the role of stakeholders, including Aboriginal groups, and would also specify harvesting rules, programs, services and funding arrangements in conservation harvesting plans. To promote compliance, an arms-length tribunal will be established that can deal more quickly and efficiently with license infractions than the court system.

The DFO expects the Act to benefit all fishers, not just one specific group, but there are provisions within specifically aimed at Aboriginal fishers. It emphasises shared management and provides First Nations and Aboriginal groups, along with industry, with a more direct role in the fisheries management. This would be done through mechanisms such as legally binding Fisheries Management Agreements, which would identify and clarify details on involvement in management and decision-making. As well, provisions allow for the formation of advisory bodies having the function of providing advice to the Minister on matters relating to fisheries management. The new Act acknowledges a role for traditional knowledge in decision-making, in cases where such information is made available to DFO. It also requires that those involved in the administration of the Act seek to manage fisheries in a manner consistent with the constitutional protection provided to existing Aboriginal and treaty rights.

Finally, the new Act provides a legal mechanism to the Minister to set allocations for up to 15 years for fleets and groups in commercial, recreational and Aboriginal fisheries in marine waters. When making decisions on allocation under the proposed regime, the Minister may, but is not obliged, to consider historical participation in fisheries and the best use of fish to ensure the fisheries' social, economic and cultural potential. One of the key values identified in the preamble is the constitutional protection of existing Aboriginal and treaty rights and the importance of fisheries to many Aboriginal communities. Ultimately, through the new legislation, it is hoped Aboriginal fishers will have greater control over their livelihood.

DUTY TO CONSULT AND ACCOMMODATE

In Canada, there has been a recent emergence of a duty to consult and accommodate Aboriginal groups that is recognised by the courts and put into practice at different levels of government. The duty to consult requires the Crown to consult Aboriginal stakeholders in good faith with the intention of substantially addressing the concerns of the Aboriginal people whose lands are at issue.²² Aboriginal people must be fully informed with respect to all of the proposed activities or measures and their impacts, and given ample opportunity to fully inform the government of the basis for title and rights, as well as any interests and concerns. This process is more than mere consultation and obliges government to give meaningful consideration to Aboriginal interests and at all stages to act in accordance with its fiduciary obligations to Aboriginal people. Depending on the nature of the interests and title, full consent might be necessary in certain circumstances. Accommodation means government and third parties must seriously consider alternative actions to address Aboriginal concerns and infringe their rights as minimally as possible. Finally, in some cases the government is obliged to pay compensation to accommodate Aboriginal economic interests.

These duties provide immense bargaining power for Canadian First Nations. Even in the absence of Aboriginal title being proven, the most recent rulings in 2004 by the Supreme Court make it clear that the duty to consult and accommodate still applies. The Crown's duty to consult and accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title, is grounded in the principle of the honour of the Crown. For example, in one case involving the logging of old-growth forest in an area where Aboriginal title was still being decided, the Supreme Court stated very clearly that it is not honourable to unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, thereby depriving the Aboriginal claimants of some or all of the benefit of the resource.

Governments, third parties, and their legal advisors are now bound by these duties, even without legal action being taken, and it is in their interests to act in accordance with them to facilitate development. This would apply, for instance, to offshore oil and gas development in British Columbia, where Aboriginal groups have claimed the sea bed and ocean waters as part of their title as well as a right to traditional and economic use of the marine resources. In such a case not only is the government obliged to consult and accommodate Aboriginal interests, regardless of the outcomes of the legal claims, but oil and gas companies, or industry in general, also must act to minimise risk by identifying any Aboriginal claims to titles and other interests; finding out whether government has engaged in consultation; including Aboriginal stakeholders in the project; and infringing Indigenous rights as little as possible. Where rights *are* infringed, oil and gas companies must negotiate with and pay compensation directly to the affected Aboriginal group.

MOU:
Memorandum of
Understanding

In recent years, this duty to consult is reflected in Memorandums of Understanding (MOUs) between First Nation groups and the government. For example, in 2001 six First Nations groups under the same treaty signed a MOU with the British Columbia provincial government (in representation of the Oil and Gas Commission as well), which clearly states that consultation should involve a timely, detailed and ongoing exchange of information in good faith and that calls for measures to be implemented which will avoid or

mitigate potential infringements of rights under s.35(1) of the *Constitution Act 1982*.²³ The consultation process was developed with the goal of increasing certainty for the First Nation, the provincial government and the oil and gas industry, as well as the identification of opportunities to address other First Nation values, concerns and interests, and the fulfilment of British Columbia's lawful obligations. Further, the parties to the MOU agree to, from time to time, examine joint solutions, new industry initiatives, and to collaborate with industry to test new solutions and best practice. The MOU goes even further to specify such things as weekly reporting requirements from industry to First Nations, timing of meetings and workshops, and dispute resolution processes.

THE NEW RELATIONSHIP

The concept of a 'new relationship' is beginning to pervade interactions and agreements between government and First Nations,²⁴ a result of the recent common law developments in Canada, especially those articulating a duty to consult, and the ensuing statutory obligations. Though not specifically aimed at fisheries, it will no doubt have a positive impact on First Nations' bargaining power within the commercial fishing industry. The shared vision is of a new government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights, including respect for respective laws and responsibilities. Through this new relationship, both the government and First Nations commit to reconciliation of Aboriginal and Crown titles and jurisdictions. Aboriginal title is recognised 'in its full form', including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions. They agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, along with the acknowledgment that the financial capacity of both the First Nation groups and the provincial government need to be strengthened to do so. This shared vision can only become a reality if backed with funding, and indeed in British Columbia, a *New Relationship Act* has been passed allowing for the creation the New Relationship Trust Corporation, through which the provincial government has committed C\$100 million to assist First Nation communities to improve their social and economic well-being, and to become effective partners in land and resources.

CANADIAN FISHERIES TODAY

In 2003, a report on First Nation participation in British Columbia commercial fisheries indicated that there were 595 First Nation-owned and operated commercial vessels in the province (James 2003).²⁵ Of those vessels, First Nations' members owned 564. The remaining 31 were owned by non-First Nations, but operated for First Nations' interests. The number of commercial licenses held by First Nations in 2003 was 2,007 out of a total of 7,468, equating to 27 per cent of the commercial fleet. The total landed value of all First Nations commercial catches (including salmon) was C\$52 million, representing 14 per cent of the total landed value of all commercially caught fish species. In terms of the commercial salmon catch alone, 40 per cent of the landed value was taken by Aboriginal commercial licensees, who held approximately one-third of the licenses.

As of 2003, it was estimated that First Nations people accounted for 31 per cent of the commercial fishing jobs in British Columbia. While this may seem substantial, the actual total number of First Nations jobs was only 2,684—many of which were seasonal and not providing steady incomes. When viewed in comparison with the early commercial salmon fishing industry in British Columbia, where as many as 10,000 First Nations people derived their primary livelihood from commercial fishing, it is less impressive.

Fisheries in Canada face many challenges. The salmon fishery is declining in value and the industry is close to insolvency while, at the same time, other fisheries are growing in value and importance.²⁶ Parallel to these changes, First Nations have made significant advancements in their fishing rights and accordingly

are able to play a greater role in commercial fisheries. The emphasis for governments and Aboriginal groups is currently on stewardship for fisheries, and they have come a long way to working cooperatively to this goal. In the years to follow, Canada's fisheries will largely be under the control of co-management structures between governments, Aboriginal groups, and industry. These co-management structures will likely begin to rely more on traditional knowledge in managing the fisheries, as its role and value is only just being acknowledged in Canada.

THE NEW ZEALAND EXPERIENCE

EARLY MAORI FISHERIES

Maori culture associates fisheries with the gods, giving them an element of sacredness which should be given the highest respect and protection. Water, in general, is viewed as having a *mauri*—a force ensuring that all species within the sea, rivers and lakes will have continual life unless something unnatural disturbs the balance. Prior to European contact, property rights to fisheries resided in the *hapu*, a collection of extended families that occupied adjacent land. Fisheries were under the authority of the hapu's chief, the *rangatira*, who could place spiritually-based restrictions, with the authority and influence of the gods behind them, on fish stocks (Bess 2001). A highly organised set of customs—*tikanga*—guided the gathering and handling of seafood, and practical rules protected fisheries, including rules about nets, lines and bait, bans on certain species and areas to allow for regeneration, and disposal of waste to prevent water pollution.²⁷ Seafood—*kaimoana*—was the main source of animal protein, fats, vitamins and minerals; and also a status symbol through which a host displayed hospitality and generosity. Thus, fisheries were an essential part of the spiritual, cultural and physical balance of the Maori world and accordingly were highly prized and strictly guarded to be passed down through generations.

The distinction between customary and commercial is ambiguous in the context of Maori fisheries, and as discussed in the following text, New Zealand courts often refer to Maori fishing rights as 'customary commercial rights.' The uncertainty arises because traditional Maori fisheries were significantly 'commercial' at the time of European exploration in the late 1700s, and early settlements were dependant on trade with Maori. Maori fishing rights remained largely undisturbed until the 1860s, when Britain entered war with Maori and subsequently enacted laws attempting to break Maori control of their land and resources, as well as undermining their extensive trading practices (Waitangi Tribunal 1988). Early legislation prohibited the selling of species that Maori had previously used in lucrative trade, restricting rights to customary alone in certain reserved fishing areas.

European commercial fisheries developed slowly through the nineteenth and early twentieth centuries.²⁸ By and large, their growth continued uncontrolled until the late 1930s, when due to the expanding national fishing industry and ensuing stress on stocks, the government implemented a licensing regime. In the late 1950s, foreign fishing vessels began to enter New Zealand waters. The industry was almost completely deregulated, with the government providing financial incentives to encourage investment. During the same period, regulations were created in the guise of conservation measures, but in fact operated to advance commercial and recreational interests over Maori customary fishing rights (Webster 2002). Maori were required to obtain permits from the Crown specifying location, occasion, and quantity for customary fishing and gathering for subsistence. The final blow to Maori fishing rights was the introduction of a quota management system in 1986 which apportioned the total commercial catch of a certain species to individual fishermen in an attempt to limit the commercial fishing enterprise. This privatisation of fishing rights effectively transferred to non-Maori the 'full, exclusive, and undisturbed' possession of rights previously held by Maori (Waitangi Tribunal 1988).

TREATY OF WAITANGI

The Treaty of Waitangi is an agreement between the British Crown and Maori signed in 1840 that purported to protect the interests of both parties during settlement of New Zealand. In its early history, though, the Treaty was little use in defending Maori proprietary rights. A court decision in 1877 declared the Treaty a legal nullity, and asserted that any Maori property rights within it were unenforceable against the Crown, unless its principles were incorporated in legislation.²⁹ Other difficulties arose from the fact that two versions of the Treaty exist—an English version and a Maori version. When translated the Maori version differs significantly in meaning. For example, the English-language version of the Treaty guarantees Maori 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively and individually possess ...' whereas the Maori version translated gives Maori 'full authority of their lands, those places where the fires burn and all those things important to them'.³⁰ The English version also states Maori cede to the Crown 'absolutely and without reservation all the rights and powers of Sovereignty'. In the Maori version, the sovereignty that they ceded translates as *kawanatanga*—which is a somewhat lesser form of governance than envisioned in the English version. For Maori, governance was not as significant as chieftainship—which was guaranteed in the Maori version.³¹ These different understandings influence the expectations that Maori and the Crown bring into modern negotiations.

While Maori have many potential sources on which to base their claims to self-determination, they have predominantly been based on the Treaty of Waitangi (Jones 2003). Although the Treaty of Waitangi does not confer specific rights as in the case of Canadian treaties, today the principles embodied within it provide a lever for Maori in resource negotiations. Perhaps most importantly, the principles of the Treaty require the Crown to act honourably and treat Maori fairly, especially in relation to land acquisition. Legislation often gives effect to the principles of the Treaty and binds agencies and departments to act accordingly, and the judiciary interprets legislation in line with the principles. Recently, concepts such as *tinio rangatiratanga*—Maori notions of self-determination—are beginning to be incorporated into modern settlements and emerging management structures. Finally, in recent years, the Crown has entered into a number of settlements in accordance with the spirit of the Treaty, including good faith, transparency, restoration of relationship, and just redress. In the context of commercial fisheries, a settlement involving an interim agreement in 1989 and a final settlement in 1992 resulted in NZ\$170 million of cash and quota being allocated for Maori (Office of Treaty Settlements 2006).³² Today these principles inform the Crown in their attempt to reach a comprehensive settlement of all Maori claims, ensuring all historical grievances are met and thereby allowing the Crown and Maori to enter into a new forward-looking relationship.

RIGHTS AT COMMON LAW

While in other jurisdictions, such as Canada, judicial decisions emanate mainly from the court system, in New Zealand Maori claims historically were heard by special courts, notably the Native Land Court, and by the Waitangi Tribunal, established after the passing of the *Treaty of Waitangi Act 1975* to investigate Crown breaches of the Treaty. While the latter is not a legally binding court, but a commission of inquiry with a historical focus, its decisions often parallel those from the courts and influence the legal system and general ways of thinking about Maori customary rights. Prior to the mid-1980s, which was a great period of mobilisation for Maori, the general judiciary took a restrictive approach to customary rights, limiting them to those within the Treaty of Waitangi.

Te Weehi v Regional Fisheries Officer in 1986 was a landmark case, one that changed the earlier narrow view of Maori customary rights. In this case, a Maori man was charged with harvesting undersized shellfish contrary to the *Fisheries Act* regulations. The charge was defended on grounds that the harvesting was customary because it was for subsistence rather than commercial purposes. The New Zealand High Court

considered s.88(2) of the *Fisheries Act 1983* which stated that 'Nothing in this Act shall affect any Maori fishing rights' and held that customary fishing rights were non-territorial and existed independently of land ownership. In *Te Weehi*, the Court went back to British common law concept of 'aboriginal title'—that Indigenous title holds with the coming of British law and all existing property rights are maintained. Such rights can only extinguished by clear and plain legislation, not by accident or mere afterthought. This was extremely important decision for Maori, since rights no longer needed to be located in the Treaty of Waitangi but rather were now based in common law principles.

During the same period, two other important developments for Maori fishing interests took place: the Waitangi Tribunal issued a decision recognising Maori customary rights as protected by the Treaty, and the quota management system (QMS) was successfully challenged in the High Court by four Maori groups—Ngai Tahu, Muriwhenua, Tainui and the New Zealand Maori Council. The High Court accepted the argument that the QMS did not take into consideration preexisting Maori fishing rights, which were protected under the *Fisheries Act 1983*. Section 88(2) exempted Maori from the Act to the extent that it conflicts with their customary rights. The High Court's decision was also influenced by the Tribunal's historical review of Maori fishing which found that customary fishing rights had a commercial element. In recognition of these customary commercial rights, the High Court issued an injunction in 1987 preventing the Crown from allocating further quota under the QMS. The government was now forced to plan major reallocations of commercial fishery rights already distributed as individually transferable quotas.

Following the *Te Weehi* case, New Zealand courts would recognise 'customary commercial rights', on the same basis that Canadian courts allowed for commercial rights—namely, that the right claimed must have been an integral practice, custom or tradition prior to European contact. For example, in *Ministry of Agriculture and Fisheries v. Love*, the Court dismissed charges against a Maori man for taking undersized crayfish for sale and for breach of various other regulations. The Court found that there was clear evidence, from the time of Captain Cook, that Maori traded fish amongst themselves and also traded them with early Europeans in exchange for western goods. This amounted to sufficient compliance with Maori custom to constitute a customary commercial fishing right.

One limitation on Maori fishing rights recognised by the common law has been conservation legislation. For example, in the *Ngai Tahu Maori Trust Board v Director-General of Conservation* case in the High Court in 1993, Justice Neazor rejected Ngai Tahu's Treaty-based claim to control access to the commercial Kaikoura whale resource. The judge found that this had been overridden by conservation legislation protecting the whales and by the fact that Ngai Tahu's use of the whales had lapsed in the early twentieth century. The Court of Appeal confirmed the decision stating that statutory provisions giving effect to the Treaty should be broadly interpreted, but that the Crown had the power to pass statutes for the good of all New Zealanders, including conservation legislation. The Court of Appeal also rejected the applicability of the aboriginal title doctrine to distinctly modern resource uses such as whale watching.

FISHERIES LEGISLATION AND SETTLEMENTS

Up until the mid-1980s, fisheries legislation effectively excluded Maori from participating in commercial fisheries by setting standards for obtaining the necessary permits which Maori were often unable to meet.³³ The only recognition of Maori fishing rights in the *Fisheries Act 1983* was s.88(2), which provided a legal exemption Maori could rely on in the courts by stating that 'Nothing in this Act shall affect any Maori fishing rights'. However, the replacement Act in 1986 did not go any further in acknowledging in any other manner customary or treaty-based fishing rights (Nursey-Bray & Palmer 2006). As previously discussed, the mid-1980s witnessed a great change in Maori fishing rights, largely driven by the *Te Weehi* case and the injunction against the QMS, and this would include changes to the Fisheries Act that would better reflect Maori interests.

The government and Maori entered into a negotiation process with the goal of resolving claims outside the court system. For fisheries this resulted in the *Maori Fisheries Act 1989* as an interim measure until a full settlement could be reached. Amendments to the Act better reflected customary fishing rights as well as facilitated increased participation in commercial fishing. The new Act incorporated the traditional concept of *tinu rangatiratanga*, or tribal authority, into the legislative scheme, thereby allowing Maori to control and manage *taiapure*—local fisheries of high spiritual or sustenance value to any *iwi* (tribe) or *hapu* (extended family). Upon successful application, the Minister of Fisheries nominates a management committee to develop and recommend regulations to control fishing within that area. As of June 2006, there were seven *taiapure* in New Zealand, with two others constituted but without acting committees.

Assets transferred to Maori under the 1989 interim settlement are known as 'pre-settlement assets' (PRESA), meaning assets received prior to the final settlement in 1992. They included 60,200 tonnes of quota valued at NZ\$252.7 million and full control of Moana Pacific Ltd—New Zealand's largest inshore fishing business. As well, Maori were allocated 10 per cent of the stocks introduced into the QMS and NZ\$10 million which was made available through a newly created Maori Fisheries Commission. The total estimated value of PRESA was NZ\$320.3 million (Clarke & Sundakov 2002).

In 1992, Maori and the Crown negotiated a full and final settlement of all marine and freshwater claims in the *1992 Fisheries Deed of Settlement*,³⁴ subsequently passed into law by the *Treaty of Waitangi (Fisheries Claims) Act 1992*.³⁵ Commercial and customary Maori fishing were separated into two different management regimes. Customary fishing rights would now come under a comprehensive set of regulations. These regulations create a framework for the declaration of *mataitai* reserves—being traditional fishing grounds or areas of special significance for customary food gathering—and a process through which the Minister appoints a local guardian who is responsible for issuing customary fishing authorisations and overall ongoing management of the fishing resources within the reserve area. These guardians are able to make by-laws to manage any non-commercial fishing in the area. The challenge for Maori will be to align management of customary and commercial resources when the current practice is for customary regulations to be implemented without reference to commercial interests (Te Ohu Kiamoana 2006a), and similarly for commercial interests to act without regard to customary interests.

The 1992 settlement also finalised all Maori commercial fishing claims and discharged any obligations the Crown may have had in this regard under the Treaty of Waitangi. The settlement allocated 20 per cent of new species quota to Maori, NZ\$22 million in cash, and promised increased participation through fisheries management bodies. The most important commercial aspect was the Crown's agreement to finance the purchase of Sealord Products Ltd, New Zealand's biggest fishing company, which held 27 per cent of New Zealand's quota resource. The total value of the assets under the 1992 settlement, including the allocated quota, is an estimated NZ\$336.1 million. In return, Maori agreed that all their current and future claims regarding all commercial fishing rights were fully satisfied and discharged.

The Maori Fisheries Commission was restructured to make it more accountable to Maori and increase its input to fisheries management. Re-named the Treaty of Waitangi Fisheries Commission, it was designated the primary tasks of holding settlement assets on behalf of *iwi* and developing an allocation model for them. From 1993 to 2003, the Commission undertook substantial consultation and negotiation with government, lobby groups, and Maori. The resulting model led to the Maori Fisheries Bill in December 2003, and ultimately concluded in the passage of the *Maori Fisheries Act 2004*.³⁶ Having completed its primary task, the Commission was dissolved—its successor would be Te Ohu Kiamoana.

PRESA:
Pre-Settlement
Assets

MAORI FISHERIES ACT 2004 AND TE OHU KAIMOANA

The *Maori Fisheries Act 2004* was the culmination of nearly two decades of conflict, negotiation and litigation. The Act formally established Te Ohu Kaimoana, the corporate trustee of the Maori Fisheries Trust along with its associated entities, to allocate the assets transferred through the Maori Fisheries Settlement from the Crown to *iwi*. As of September 2006, 35 out of 57 *iwi* had been approved as mandated *iwi* organisations, meaning they have met the requirements set out by the *Maori Fisheries Act 2004* to receive funding. Sixty per cent of the Maori Fisheries Settlement assets, amounting to more than NZ\$350 million, have been transferred to these 35 *iwi*. In addition to allocation of assets, Te Ohu Kaimoana assists individual *iwis* develop governance structures appropriate to their particular situation, manage settlement assets, meet their responsibilities under relevant legislation, and conclude quota agreements with neighbouring mandated *iwi* organisations. As of January 2007, 22 *iwi* remained to be mandated and Te Ohu Kaimoana was looking to turn its attention from allocation to fisheries management.

AFL:

Aotearoa Fisheries
Limited

The 2004 Act also established and set out the duties of Aotearoa Fisheries Limited (AFL), a company owned by Te Ohu Kaimoana which would maximise the value of Maori fisheries assets for the benefit of its *iwi* and Maori shareholders. AFL holds around half the total value of the Maori fisheries assets and is estimated to be worth at least NZ\$350 million. AFL has a 50 per cent shareholding in Sealord Products, and 100 per cent ownership of Moana Pacific, Chathams Processing, Pacific Marine Farms and Prepared Foods Processing.

MAORI FISHERIES TODAY

Te Ohu Kaimoana declared 2006 one of the most successful years for Maori commercial fisheries, reporting a net profit after-tax of NZ\$19.9 million dollars (Te Ohu Kaimoana 2006b). Aotearoa Fisheries Limited, owned by Te Ohu Kaimoana, also had a successful year and reported a profit of NZ\$16.5 million.³⁷ Sealord Products had sales exceeding NZ\$600 million for the first time and returned a net profit after tax of NZ\$24.6 million, out of which AFL will receive NZ\$8 million as a dividend. Te Ohu Kaimoana staff members have worked to establish and develop the workload for two trusts—Te Putea Whakatupu Trust and Te Wai Maori. Te Putea Whakatupu will focus on developing Maori leadership while Te Wai Maori will support important projects to enhance Maori customary and commercial interests in key native freshwater species. According to the 2006 Annual Report of the Maori Fisheries Trust, Maori now have investments in well over one-third of the commercial fishing industry, with fishing assets continuing to grow (Te Ohu Kaimoana 2006a).

Through careful investments and business management, at present Maori control an estimated 40 per cent of the New Zealand seafood industry, including processing and aquaculture operations. The foremost challenge for Maori today is the sharing of settlement benefits among various Maori tribes, and it is expected that legislation will soon be passed to resolve Maori inter-tribal allocations. For individual *iwi*, the amount of quota they receive is not sufficient to purchase boats, processing plants or retail outlets, and the best strategy as recommended by Te Ohu Kaimoana is to increase the value of the company and provide an annual dividend stream for the shareholder. The best outcomes in this regard will likely be seen once *iwi* resolve how to work together in the management of their assets and fisheries.

At the second annual Maori Fisheries Conference in April 2007 it was clear that Maori were beginning to align themselves strategically to become global players in the seafood industry, and that the industry's representatives recognised them as a significant force. Developing key partnerships with business and research sectors and the refinement of the QMS were identified as crucial to the advancement of Maori interests in the international seafood industry.

THE AUSTRALIAN EXPERIENCE

EARLY AUSTRALIAN FISHERIES

For coastal Aboriginal people, the land and sea are one. The journey of Ancestral creatures connects people and places, and land and sea (Barber 2005). All bodies of water are interrelated, including the sky and its clouds. The concept of ownership involves connections between people and the land and the sea, far beyond ordinary notions of legal title. Ownership is generally clan-based, but the fact that a person might also have an important secondary right to the country of one's kin creates linkages between people and groups. Connections are also created from the flow of resources, from the sea to the land, and from coastal to inland people. A system of localised control and traditional management of marine resources known as 'customary marine tenure' has been in place for thousands of years.

As early as the 1700s, evidence suggests that Macassan fishermen from the Indonesian archipelago sailed to the Northern Territory to fish for trepang in what constituted Australia's first commercial fishery (National Oceans Office 2003). Goods traded between the Macassans and Aboriginals were circulated in a wide-ranging ceremonial exchange cycle, and formed a key part of the early economy in the area. This trade carried on for approximately 200 years until the South Australian Parliament (then responsible for the Northern Territory) enacted prohibiting legislation in 1906 on the grounds of protecting Australia's territorial integrity (Macknight 1976).

During the mid-1860s traders, shippers and merchants built ports in northern Australia to take advantage of Asian markets. Indigenous people provided most of the labour for the early fishing industry, often working for minimal or no pay as deckhands and divers in dangerous and abusive conditions. Through the nineteenth and twentieth centuries, settlers received large grants of land for pastoral development, including many northern bodies of water. In the 1960s, the first non-Aboriginal commercial fisheries were established and ports were developed for export, primarily to meet the demands of the expanding mining industry. In the early years of the fishing industry, licenses were issued for very minimal fees. These licenses, for those who have retained them, are of considerable value, for many fisheries no longer issue new licenses due to the need to protect depleted stocks. Today, the Australian Fishing Zone is the third largest in the world, covering approximately nine million square kilometres. The Australian fishing industry adds more than AUS\$2.2 billion per year to the national economy.³⁸

NATIVE TITLE ACT 1993 AND JURISPRUDENCE

While both the common law and legislation in Australia recognise customary fishing rights, neither has provided for the priority or adequate protection of those interests in relation to other interests. As the following discussion demonstrates, the most recent jurisprudence suggests the inferiority of such rights where other rights exist, and it remains unclear as to what rights Indigenous people would have against others who impinge the enjoyment of traditional fishing rights. Since customary rights remain uncertain in Australia, there is a long way to go before the courts address, and especially acknowledge, commercial fishing rights.

In Australia, customary rights are only recognised where native title has been established. *Mabo v Queensland (No. 2)* was the first time native title was recognised under Australian common law, and would provide the basis for later claims to the sea and sea beds. In order to make a successful claim for title, the Indigenous group must demonstrate the existence of an identifiable community or group, a traditional connection with or occupation of the land, and a substantial maintenance of the connection. The content of native title is ascertained on a case-by-case analysis in accordance with traditional laws and customs

acknowledged and observed by the Indigenous group making the claim. By emphasising that native title is linked to traditional laws and custom, the Australian High Court's policy objective seems to be to protect traditional rights and uses of the land rather than gaining economic benefit from land ownership—this latter position being the one taken up by Canadian courts. The High Court has also suggested that native title can be extinguished without compensation by the legislature, but only if there is a clear and plain intention to do so.

NTA:

Native Title Act

Owing to pressure from both industry and Indigenous people post-*Mabo*, the Commonwealth publicly contemplated national native title legislation for the purposes of certainty, especially regarding the circumstances in which native title ceases to exist. In an historic compromise, Indigenous representatives agreed to the Commonwealth's proposed retroactive validation of non-Indigenous landholders interests in exchange for a guaranteed 'right to negotiate' non-Indigenous land use on traditional territory. As a result the *Native Title Act 1993* (NTA) was passed, giving effect to all that had been agreed to in the compromise and affirming native title common law principles from *Mabo*. Aboriginal landholders were given a right to negotiate where future acts purported to extinguish title, and the National Native Title Tribunal was established to facilitate the resolution of difficult claims. Section 223 of the NTA confirms common law native title rights and interests for Australian Aboriginals and Torres Strait Islanders, with ss.223(2) specifying that these rights include hunting, gathering and fishing. Section 211 exempts native title holders from permit or license requirements for hunting, fishing, or gathering done for the purpose of satisfying personal, domestic or non-commercial communal needs, or is otherwise in the exercise or enjoyment of native title rights.

In *Commonwealth v Yarmir*, also known as the Croker Island decision, the High Court recognised that native title could exist over marine areas where traditional laws and customs demonstrated a connection to the land or water. On the content of native title to the sea and sea beds, the Court held that it includes free access to the area, fishing and hunting, visiting and protecting places with cultural and spiritual importance, and safeguarding traditional knowledge. The right is limited, however, as it is not exclusive: rather it must yield to all other rights and interests in the area to the extent of inconsistency, including licenses held under the Fisheries Act.³⁹ This, therefore, suggests that native title encompasses fishing in accordance with traditional laws and customs, but these rights are not afforded the same priority as in Canada and New Zealand, where such rights thus far have only been second to conservation measures. Finally, the Court also rejected the argument that native title rights included a right to receive a portion of non-Indigenous catches in the area, nor was there a right of trade despite proof of pre-contact trade in the area. The evidence in this regard was deemed insufficient to demonstrate such trade was a traditional custom and, regardless, any such trade was no longer practised.

The recent case of *Western Australia v Ward*—where it was held that the NTA allows for the partial or full extinguishment of native title rights—is indicative of the need for reform of the NTA to better reflect Indigenous rights. The legal arguments in this case are complex and beyond the scope of this paper, but a few relevant principles emerge. First of all, it is an illuminating case when viewed in comparison with legal developments from the same time period in other Commonwealth countries.⁴⁰ For example, the Court in *Ward* considered Canada's Supreme Court 1997 decision in *Delgamuukv v. British Columbia* on native title, which provided substantial protection for native title holders by placing the burden on the Crown to justify any extinguishment of rights. Any legislation purporting to do so must have 'substantial and compelling' objectives and a 'clear and plain' legislative intention to extinguish the rights. The trial court judge in *Ward* followed this approach, and rejected the notion that native title is a 'mere bundle of rights' whereby certain rights might be partially extinguished.⁴¹ On appeal, the Court in *Ward*, although aware of *Delgamuukv*, instead applied a bundle of rights test which renders the rights of native title holders

more tenuous. Applying this test, if particular Indigenous rights and interests in or in relation to land are inconsistent with rights conferred under a statutory grant, the bundle of rights known as 'native title' to the extent of inconsistency is reduced accordingly.

This judgment, when read in comparison with *Delgamuukv*, seems to give little, if any, consideration to the underlying policy implications of such decisions. By compartmentalising Indigenous rights, it opens the door to partial extinguishment and creates less certainty for native title holders. This case was also particularly alarming for its finding that the creation of nature reserves does not necessarily extinguish native title, unless the reserve vests in a person or body, but it is inconsistent with a continued right for native title holders to make decisions on how the land may and may not be used. This again differs from *Delgamuukv*, where the Court stated that even where infringement of Aboriginal title is justified, there is always a duty to consult Aboriginal peoples in relation to their lands. This duty is significant, and in most cases goes beyond mere consultation to the point of requiring compensation. The Court's position in *Ward* is surprising as it stands in sharp contrast to parallel common law developments in Canada, and seemingly dismisses the Canadian position with minimal consideration of the ensuing policy implications.

The most recent case to come before the Australian courts was in early 2007 when the Arnhem Land Aboriginal Land Trust, the Northern Land Council and a number of traditional Yolngu people in the Blue Mud Bay in eastern Arnhem Land sought a declaration to the effect that the rights of the traditional owners to enter and occupy the land and waters covered by the grants were exclusive of all others. In this case, known as *Gumana v Northern Territory of Australia* (or *Blue Mud Bay No. 2*), the Federal Court recognised an exclusive right to the inter-tidal zone, including a right to exclude those seeking to exercise a public right to fish or to navigate. While there has been some indication in the media following the decision that this was a 'native title' decision, it must be considered with caution. The Federal Court very clearly states that if this was a native title decision per se, it would not have allowed an exclusive right. This case is distinguishable as the exclusive right came about from the interests of the Arnhem Land Aboriginal Land Trust from a grant of land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). That is, it was the rights that arise from holding a fee simple at common law rather than native title interests that led to the resulting decision. It is, though, a useful case for explicating the Court's approach. The Australian Federal Court interpreted the legislation before them in a manner that the Supreme Court in Canada has consistently utilised to the benefit of First Nations people. In this way, the legislative intent of the legislation before the court is paramount—the question to be asked being what rights was it designed to protect given the content, history and state of the law when the legislation was implemented? This approach allowed the Court to reach a decision favourable to the Indigenous interests under the ALRA, and read down the Fisheries Act to provide for these rights.

FISHERIES LEGISLATION

Commonwealth

The *Fisheries Management Act 1991* (Cwlth) provides a statutory basis for fishing rights and deals with the granting of permits and licenses for fishing, but it does not make any reference to the rights of Indigenous people. The Australian Fisheries Management Authority (AFMA) is the body responsible for management of Commonwealth fisheries and administration of the Act. Its duties include consultation with foreign fisheries agencies and governments, establishing management regimes that reflect ecologically sustainable development principles, and ensuring accountability to the Australian fishing industry and the general public. While the Act deals comprehensively with management of fisheries, fishing rights, granting of permits and licenses, and offences, it makes no reference to the rights or roles of Indigenous Australians in fisheries. For example, as per s.24, AFMA *may* give public notice of its intent to grant rights in a fishery with such notice being published in the *Gazette* and State and Territory newspapers, but there is

ALRA:
Aboriginal Land
Rights (Northern
Territory) Act

AFMA:
Australian Fisheries
Management
Authority

no obligation to give notice to any Aboriginal group which may have interests in the fishery. Similarly, there are provisions for the establishment of joint authorities for the management of fisheries, yet such authorities are only between the Commonwealth and State, with no mention of the role for Indigenous communities.

Northern Territory Legislation

The Northern Territory *Fisheries Act 1995*, s.53(1), provides the standard protection for the right of Aboriginal people to the traditional use of resources in a traditional manner, however, ss.(2) qualifies this right by clearly stating that it is not a commercial right nor does it authorise any interference with the fishing rights of others. Aboriginal coastal licenses are available under s.183 of the *Fisheries Act Regulations*, which allows Aboriginal coastal communities and Land Trusts—established to hold title to land under the ALRA—to obtain a license to fish and sell fish with restricted conditions and only for the benefit of the community. The selling of fish is not permitted outside the area covered by the license, nor to someone who would resell the fish. The licenses are also restricted by species—excluding barramundi, Spanish mackerel, and mud crab—all of which are the more lucrative species of the yearly commercial harvests in the Northern Territory. As well, a holder of such a license may use only amateur fishing gear and cannot concurrently hold a commercial fishing license, assuming they could afford the fee. In any event, there are currently only two active s.183 licenses in operation in the Northern Territory.

Indigenous rights and interests are further provided for in the ALRA which, although it makes no specific reference to fishing rights, envisioned increased involvement of Aboriginal people in decision making regarding their lands. The ALRA acknowledges the Commonwealth's power to legislate regarding the entry of persons to Aboriginal lands, sacred sites, and waters of the sea adjoining Aboriginal lands for the purpose of controlling fishing; however, any such laws must provide for the right of Aboriginals to enter and use the land in accordance with tradition. As in the discussion of *Blue Mud Bay, No. 2* above, where a fee simple interest in land can be established under this ALRA, Northern Indigenous people potentially will have exclusive rights over their fishing grounds and traditional territories.

The ALRA also allows for the establishment of land councils which act as representatives for Aboriginal people, fulfilling responsibilities including issues of management, protection of sites, and land claims. For example, the Northern Land Council is largely responsible for the Croker Island native title sea claim. Aboriginal communities can also work with the land councils to create economic opportunities such as land use agreements, tourist ventures, and lease arrangements with non-Aboriginal business enterprises. While land councils are a potential force for advancing Indigenous rights, recent reviews of the ALRA have suggested breaking up the larger land councils while at the same time increasing the Northern Territory government decision-making powers over Aboriginal land. Thus, the long term viability of the ALRA in terms of securing Aboriginal rights is questionable given that it has been reviewed numerous times since its inception and Indigenous Australians find themselves more often in the position of defending the existence of the ALRA rather than using it for the purposes for which it was originally intended (Sutherland 2006).

TORRES STRAIT

The fisheries regime in the Torres Strait provides Australia's best example of Indigenous participation in commercial fishing. Torres Strait is located between the tip of Cape York and Papua New Guinea, and includes over 100 islands, though only 18 are inhabited. The traditional inhabitants of the Torres Strait make up 11 per cent of the Australian Indigenous population according to 2001 Census data. Commercial fishing is the most economically important activity in the Torres Strait and is governed by the *Torres Strait Fisheries Act 1984*, which gives effect to the fisheries elements of the Torres Strait Treaty, ratified in 1985.

PZJA:

Protected Zone
Joint Authority

TSPZ:

Torres Strait
Protected Zone

The Act also established a Protected Zone Joint Authority (PZJA), which is responsible for management of commercial and traditional fishing in the Australian area of the Torres Strait Protected Zone (TSPZ) and designated adjacent Torres Strait waters.

Not only does the Torres Strait Treaty contain an express guarantee of protection for traditional fisheries⁴², but it also was designed to support economic development and employment opportunities in the Torres Strait, including commercial fishing. The PZJA has an explicit policy agenda to maximise Islander participation in commercial fishing. In 2000 it effected a change to licensing in the Torres Strait that would prevent any further non-Islander participation by issuing new licenses only to Islanders. To gain access to a fishery in the TSPZ, a non-Islander commercial fisher must now buy an existing license.⁴³ In some fisheries, such as the tropical rock lobster, Islanders now own all of the commercial licenses.

There is a strong commitment to move resource allocation in so far as possible to favour Islanders. To achieve this outcome the PZJA made the decision to implement a new quota system in 2007 (Fogarty 2006).⁴⁴ After allocating the Papua New Guinea share required under the Treaty, the balance of the fishery will be split equally between the Indigenous and non-Indigenous fishing sectors. The Papua New Guinea share of 25 per cent will be funded by a Commonwealth buy-out from a voluntary surrender of licenses, and the remaining funding to achieve allocations will come from the Queensland government. The PZJA indicates that its goal is a 30 per cent allocation to the commercial sector and 70 per cent to the Indigenous sector, which will be achieved through open market trading.

ABORIGINAL AND TORRES STRAIT ISLANDER FISHERIES STRATEGY

In 1996, following the 1992–1993 Commonwealth's Coastal Zone Inquiry into the management of Australia's coasts, the Australian Government allocated AUS\$300,000 to initiate the Aboriginal and Torres Strait Islander Fisheries Strategy.⁴⁵ In comparison, during the same time, Canada was implementing an Aboriginal Fishing Strategy worth C\$140 million. The Australian Strategy did not aim to increase participation in commercial fisheries per se as in Canada, but the terms of reference spoke of improving consultation, participation in fisheries management, and recognition of traditional use of coastal resources. In Tasmania, AUS\$25,000 went to the establishment of an Aboriginal Fishery Advisory Committee (since disbanded), and New South Wales used the funding to develop its own Indigenous Fishing Strategy. Apart from the initial funding, the Strategy was not followed up until a 2003 Review of Commonwealth Fisheries Policy expressed a renewed commitment to ensuring the long-term sustainability of traditional Indigenous fishing and to examine opportunities for Indigenous commercial fishing (Department of Agriculture, Fisheries, and Forestry 2003). The Review identifies the Aboriginal and Torres Strait Islander Commission and the Australian Seafood Industry Council as partners to the development of Indigenous commercial fishing interests—however, since that Review both of have ceased to exist.

Most recently, in November 2005, the Commonwealth announced a *Securing our Fishing Future* package, valued at AUS\$220 million, which represents its most significant financial contribution to the Australian fishing industry to date. However, the package does little to secure a role for Indigenous commercial fishers. The main component of the package is a fishing concession buy-out aimed at reducing overall fishing, and offering business assistance to commercial fisherman affected by the buy-out. Once licenses are surrendered under this package, they cease to exist. There is no public discussion of how some of the fishing rights might be transferred to Indigenous people along the same lines as buy-out strategies in Canada. The package also reserves a portion for Community Assistance, but it does not distinguish between Indigenous and non-Indigenous communities. This most recent package indicates that the Commonwealth's priority is commercial fishers and the health of the fishing industry, while the concept of an Aboriginal Fishing Strategy seems to have disappeared along with the bodies which may have pushed it through.

Despite the fact that 85 per cent of the coastline in the Northern Territory is owned by Indigenous people who have a long history with the sea and using its resources, there is no discussion of an Aboriginal Fishing Strategy for the area. The Northern Territory government's long-term vision for Indigenous involvement in fisheries speaks of consultation and participation in management rather than commercial fishing. To date this has involved partial funding (of AUS\$60,000 per group) of six of the 14 Aboriginal sea ranger groups. The Aboriginal sea ranger network, established by traditional owners as part of the wider Caring for Country Programme, was developed to keep sea country culture strong and mitigate environmental impacts, such as marine debris, on marine life. Many of the sea ranger groups also report to government agencies on issues such as illegal foreign fishing vessels and illegal domestic fishing.

However, consultation with traditional owners remains weak. While the Northern Territory government has created a network of Aboriginal Fisheries Consultative Committees, the process remains flawed as there is no participation of the Northern Land Council, the peak Aboriginal representative organisation under the ALRA and NTA (Northern Land Council 2006).

As to increased participation in commercial fishing, the government acknowledges changes to the current commercial licensing system would need to occur, as well as ongoing government support, but does not go so far as to make a commitment to do so beyond mentioning an expectation of increased employment within fisheries.⁴⁶

INDIGENOUS FISHING TRUST

IBA:
Indigenous
Business Australia

Indigenous Business Australia (IBA) was established by the *Aboriginal and Torres Strait Islander Commission Amendment Act 2001* and given the role of creating opportunities for Aboriginal and Torres Strait Islander individuals and communities to build their assets and wealth.⁴⁷ It works within the Australian Government's Indigenous Economic Development Strategy to offer assistance with home ownership and the acquisition of business and investments. In cooperation with the Aboriginal and Torres Strait Islander Commission the IBA developed an Indigenous Fishing Trust to assist Indigenous Australians enter the fishing industry through the buying and holding of quota and licenses. The Trust acquired its first quota in December 2004, allowing for abalone fishing in Victoria. In 2005, the Trust leased a mud crab license to a local Indigenous fisherman in the Northern Territory who currently runs his business on a loan from IBA Enterprises. IBA has a stream of flexible funding to increase the skills and capacity of potential business owners and is able to assess loan applications with a more holistic perspective than is possible by banks. As IBA looks to increase its investments in the coming years, it represents a significant opportunity for Indigenous Australians with entrepreneurial aspirations to move into the commercial fishing industry.

AUSTRALIAN FISHERIES TODAY

In general Australian wild fisheries, like other fisheries world-wide, are declining in annual productive output as a result of various factors including climate change and over-fishing. One way for Indigenous people to continue participating in spite of depleted stocks and increasing conservation measures is through aquaculture. There has been a movement to Indigenous involvement, particularly in Northern Queensland and the Northern Territory, where Aboriginal lands are often prime sites for the development of such ventures. For example, several agreements for pearl farms have been reached, with one of the most significant being a 10 year lease for the use of about two square kilometres for pearl culturing between Barrier Pearls and traditional owners at Croker Island. As well, two Indigenous mud crab ventures at Darwin and Maningrida are underway, though they are too recent to have yet provided any significant economic value to the communities. There is an obvious long-term employment and economic benefit to communities able to secure such fish-farming leases. While most of the projects to date are small scale, Indigenous people will develop skills necessary for larger scale commercial enterprise.

The participation of Indigenous Australians in today's commercial fisheries is mainly as labourers, clerical staff, and transport workers, and is constrained by factors such as widespread health problems and low levels of education. A recent study of working trends for Indigenous Australians indicated that only one-quarter of Indigenous people employed by the agriculture, fisheries, and forestry industry have education levels of year 12 or higher (Rodriquez, Puangsumalee & Griffiths 2006). This same study shows Indigenous people are much less likely to work within commercial fishing industry, as compared to almost all other industries. In terms of resource allocation, Indigenous interests are almost always overlooked, with the majority of debate surrounding commercial and recreational fishers, and which is more responsible for declining stocks.

The National Recreational and Indigenous Fishing Survey conducted in 2000–2001 found that recreational fishers harvested approximately 136 million aquatic animals during the survey year, while Indigenous fishers harvested approximately 3 million aquatic animals (Henry & Lyle 2003).⁴⁸ The number of Indigenous fishers in Northern Australia⁴⁹ was estimated at 37,000, this compares to a national estimate of recreational fishers that numbers 3.36 million Australian residents and 191,000 international fishers. Indigenous participation can also be gauged from looking at the total commercial landings of mud crab—which is the most valuable commercial, wild-harvest fishery—at AUS\$9.6 million in the Northern Territory in 2002 (Slack-Smith 2004). Approximately 85.2 per cent of this catch was taken by the commercial fishery, 5.6 per cent by recreational fishers, and only 9.2 per cent by Indigenous fishers—despite the mud crab being an important food source. A final related statistic deserving of consideration is that while Indigenous people account for 25 per cent of all adults in the Northern Territory, the Indigenous share of total income is only 11 per cent (Office of Indigenous Policy 2005). It is clear, therefore, that there is a need to increase economic opportunity for Indigenous Australians. In the Northern Territory, where the lives of Indigenous people have always been interconnected with the sea and the fisheries, increasing meaningful participation in the commercial fishing industry represents a significant means to achieving this end.

HOW AUSTRALIA COMPARES OVERSEAS

As the Canadian and Australian experiences demonstrate, participation in commercial fisheries not only generates income and employment, but ultimately moves Indigenous people closer to economic self-sufficiency. Not only will Indigenous people benefit, but the seafood industry would enjoy lower costs through facilitated access to Indigenous-owned land and reduced travel expenses—especially in Australia. The non-economic benefits, such as overall well-being of communities, are difficult to quantify but equally valued by Indigenous people. The question that remains to be answered, then, is why in spite of the obvious benefits as being enjoyed in other Commonwealth countries, has Australia not developed the same fishing rights for Indigenous people?

One of the key differences, as outlined in this paper, is the dissimilar way the common law has developed in Australia as compared to Canada and New Zealand. In Canada, the impetus for the recognition of the right to economic self-determination came from a number of high profile Supreme Court decisions in the 1990s. As already discussed Australia, at the same time, took an opposite approach and the decisions of the High Court have impaired the chance for Indigenous Australians realise their economic rights. The Canadian Supreme Court almost appears more influenced by the policy implications behind their decisions than the Australian High Court: at the very least, the question of why Canadian courts are more likely to make decisions that protect and advance Indigenous rights as compared to Australian courts needs to be addressed.

In a review of constitutional law in Australia, Emeritus Professor Blackshield highlighted a tendency for judicial subservience to Parliament and the wishes of executive government—this may be one reason that the common law has not developed in the same way as Canada. There is, according to him, a 'repeated tendency to focus on sustained interpretation of the relevant statute, as a strategy for producing an answer to the immediate question ... in a way that avoids any need to consider the deeper issues ...' (2007: 23). Using the *Yorta Yorta* case as an example, he notes a tendency for the judiciary to engage in a process 'shot through with fallacies, of reinterpreting the definitions in the Native Title Act 1993 ... in such a way as drastically to narrow the possibilities for successful native title claims, while excluding any possibility of continued development of the common law notion of native title.' Therefore, it seems that the common law has stagnated in terms of Indigenous fishing rights and while it preserves some customary rights, it is unlikely to recognise commercial fishing rights in the immediate future. Recently, though, there is hope with the *Blue Mud Bay No. 2* decision, where the Federal Court engaged in a thoughtful analysis of the legislative intent behind the ALRA. If the High Court upholds this decision, it will be a valuable precedent for its approach to statutory interpretation.

Another obvious difference between Australia and both Canada and New Zealand is the lack of historical treaties allocating natural resource rights. However, this should not be a barrier but rather an opportunity for Indigenous Australian to negotiate clear fishing rights as has been done in Canada's modern treaties and the recent fisheries settlements in New Zealand. The Nisga'a Agreement in British Columbia and the 1992 Fisheries Settlement in New Zealand facilitated clear and beneficial economic outcomes in a way which the court system cannot similarly achieve. Indeed, this would be a more effective solution than dealing with Indigenous rights in a moribund common law system as found in Australia at present. This view was expressed at the High Court level in *Ward* by Justice Callinan, who contrary to the majority view, argued that the current law of native title means that Indigenous interests give way to non-Indigenous interests every time:

I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols. It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law (970).

Thus, the usefulness of the Canadian and New Zealand models should not be overlooked as one of the strongest mechanisms available to Indigenous Australians in pursuit of their fishing rights. It is this author's view that these agreements and settlements, combined with a common law which at the very minimum imposes a duty on the government to consult Indigenous people in good faith on natural resource issues, are a necessary step to securing a viable Indigenous fishing industry.

Possibly the greatest barrier to Indigenous fishing rights in Australia is the inharmonious relationship between government and Indigenous people. Both the Canadian and New Zealand governments have been much more ready to come to the bargaining tables and negotiate meaningful agreements on fisheries—while the Australian government continues to hedge on customary rights. In part, the cooperative (though constantly evolving) nature of the relationships in Canada and New Zealand is due to recognition of legal rights to land and resources by the common law. However, the common law would not have advanced to such a point had there not been strong foundations for Indigenous rights in founding documents such as the Charter of Rights and Freedoms and the Treaty of Waitangi. Australia has no similar document to confirm Indigenous rights or even to bind its government to act in good faith when dealing with Indigenous Australians. At present, the government retains an unfettered discretion and is not legally bound any Charter of Rights or historical treaty—this, therefore, represents a significant barrier to the economic rights of Indigenous Australians.

Another key factor for the success of Indigenous fisheries in Canada and New Zealand—which is notably absent in Australia—has been the commitment of the governments in both countries to the development of a meaningful fishing strategy. The first and necessary step in a fishing strategy would be the recognition of an Indigenous fishing sector—both a customary and commercial sector. Until such sectors are acknowledged there is no way to allocate quota and funding, nor can roles in fisheries management be clearly defined. In recognition of traditional use of fisheries, Indigenous customary fishing should have priority over all other fisheries, as in Canada and New Zealand. This, for the most part, seems to be accepted by the Australian government, though to date it refuses to acknowledge an Indigenous commercial fishing sector and has not developed any real strategy to recognise these rights. Fishing strategies within Australia to date have focused mainly on customary fishing, and the most recent *Securing our Fishing Future* makes no reference to Indigenous fishing, either customary or commercial. As well, AFMA reports a total AUS\$62.1 million available for 2006–07, but no specific allocation is made for Indigenous programs.⁵⁰ The effect can be seen in the Northern Territory of Australia, with its largely coastal Indigenous population, where at present only restricted community fishing licenses are available and even these are not fully utilised. In a recent report entitled *Out of the Blue: Strengthening Indigenous Participation in a Proposed Act for Australia's Oceans*, the Australian Conservation Foundation and the National Environmental Law Association recommends the implementation of a national Aboriginal Fishing Strategy using the Canadian model, especially the Allocation Transfer program and funding for capacity building and the establishment of regional authorities.⁵¹ In both Canada and New Zealand, the benefits to the fishing industry of the Fishing strategies have been widely felt, yet the Australian government remains uncommitted to similar initiatives within its own country.

One of the major obstacles to Indigenous commercial fishing rights is the absence of a body to bring them forward. In its 1992–1993 Coastal Zone Inquiry, the Commonwealth identified the Aboriginal and Torres Strait Islander Commission and the Australian Seafood Industry Council, both of which have been dissolved, as partners for collaboration with itself to develop Indigenous commercial fishing interests. In July 2000, the Aboriginal and Torres Strait Islander Commission released a report entitled *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues*, attempting to place commercial fishing on the policy agenda. That many of the same issues raised by the Aboriginal and Torres Strait Islander Commission are again considered in the 2006 *Out of the Blue* report indicates that not much has changed. This is not surprising given that the political organisation necessary to advance the economic interests of Indigenous people does not exist, nor is it clear as to where it will come from. Even if the government decides to allocate quota and licenses to Indigenous people, the benefit will not be realised in the absence of capacity building and strong regional bodies to ensure maximum outcomes. Thus, a key component of an Aboriginal Fishing Strategy would involve a commitment for funding of skills and capacity building.

In a sense, then, this paper is ahead of its time. Until Indigenous Australians have the political structures in place to advance this issue, it is unlikely that there will be any major advance in commercial fishing participation. In addition, Indigenous Australians currently face a whole host of other basic human rights issues more pressing than commercial fishing. There are also strong cultural barriers emanating from the Indigenous communities themselves—for example, the reluctance to enter another's land or fishing territory without permission, and a lack of understanding of modern practices such as preservation that are necessary for participation in the seafood industry. There is also distaste for certain environmentally destructive technologies, and the appeal of smaller-scale operations as opposed to the hierarchies of larger businesses. The irony is that meaningful participation in commercial fisheries would alleviate many

of these basic human rights issues in Northern communities as they moved themselves towards greater economic self-sufficiency. This paper, then, is also well-timed in that it highlights the need for Australia to bring itself in line with other international developments in the economic right to self-determination for Indigenous peoples. As the overseas experience in Canada and New Zealand demonstrates, meaningful participation in commercial fisheries can lead to improved social and economic outcomes and ultimately lead to stronger, self-sufficient Indigenous communities.

WHERE TO GO FROM HERE?

This paper does not purport to provide answers, but rather to spur debate on Australia's current position on Indigenous commercial fishing rights. Possible mechanisms for change have been identified, with the first necessary step being the negotiation of modern agreements and settlements on fisheries. However, given that the Australian government retains an unfettered discretion and is not bound to consult Indigenous people in good faith on natural resource issues by the common law or by strong founding documents, this first step to securing a viable Indigenous fishing industry is unlikely to be taken. As it stands then, Australia's Indigenous people are left scrambling in a legal system that is unwilling to recognise their rights to be economically self-sufficient. The bodies that would drive these issues to the forefront in Australia are overworked and under-resourced, and some face an uncertain future. This paper, it is hoped, will at least encourage those bodies to consider commercial fishing rights as one mechanism for building stronger and more self-sufficient Indigenous communities. The experience of Indigenous people in Canada and New Zealand should serve as inspiration in what will be a lengthy and arduous, but worthwhile, battle.

NOTES

1. Data from the 2001 Canadian Census indicates that in British Columbia approximately 170,025 people identified as Aboriginal (which is defined as Native American, Inuit or Registered Indian under the Indian Act). The total Aboriginal population of Canada was 976,305. Population estimates from the 2006 Census indicate Canada's total population is 32,623,500 and British Columbia's total population is 4,310,500.
2. Based on 2006 New Zealand Census data, usually resident population count, Table 23, and defined as any descendant of a Maori.
3. In this section of the paper, 'Aboriginal people' and 'First Nations' are used interchangeably, the latter being a term coined by Canadian Aboriginal leaders in recognition of the sovereign nature of Canadian Aboriginal people.
4. Indian Agent R.E. Loring noted in 1905 that fisheries were highly organised and that fishing activities were carefully timed, an indication that First Nations fished in a manner that ensured large numbers of fish were caught and sufficient numbers were able to spawn.
5. The *Constitution Act 1867* vests the legislative authority for the protection and conservation of sea coast and inland fisheries to the Parliament of Canada. In 1868, Parliament enacted the *Fisheries Act* to carry out this responsibility. Over time, Canada has delegated many freshwater fisheries management responsibilities, in whole or in part, to Provinces and Territories. The provincial government has a proprietary right to most inland fisheries, so provincial legislatures have the legislative responsibility for regulating how and to whom fishing rights can be conveyed. For more on the roles and responsibilities of government and governing legislation in Canada see the Department of Fisheries and Oceans website available at http://www.dfo-mpo.gc.ca/regions/CENTRAL/pub/initiative/5roles_e.htm.
6. Prior to the 1960s, fisheries in Canada were largely open and unregulated, and focused on economic production.
7. The case emerged from a dispute between the Musqueam Nation and the Government of Canada over access to the salmon fishery when Sparrow was caught fishing with a net larger than that allowed by the band's fishing license under the *Fisheries Act*.
8. In *R. v. Jack* (1995), 131 D.L.R. (4th) 165 the British Columbia Court of Appeal acknowledged that conservation measures might legitimize interference with an Aboriginal right to fish but stated that, in this instance, the conservation measures should have first been directed at sport fishers in recognition of priority of Aboriginal rights. As well, the government did not fulfil its duty to consult with Aboriginal groups when the band was not given full information on all conservation measures and their potential effect on them.
9. Compensation is judged on a case-by-case basis depending on the nature of the right and the extent of infringement.
10. Also, while this policy seeks to minimise surplus stock, if this should occur, First Nations must be given the first opportunity to catch these fish.
11. *R v Van Der Peet* [1996] 2 SCR 507; *R v Gladstone* [1996] 1 SCR 1013; *R. v. Smokehouse* [1996] 2 SCR 672.
12. See *Van Der Peet* at para. 17.
13. While this was suggested by the Supreme Court in *R v Gladstone*, the matter of justification was left undecided due to insufficient evidence on the matter. As yet, Canadian courts have not ruled on the matter.
14. While there are approximately 200 Indian Bands in British Columbia, there are only three sets of treaties: Treaty 8, the Douglas Treaties, and the modern Nisga'a Treaty.

15. Therefore, the Nisga'a Treaty was negotiated outside the 1992 British Columbia Treaty Process.
16. The modern practice for such land claims agreements is for Federal settlement legislation to give effect to a modern treaty. For further detail on the Nisga'a Treaty and Final Agreement, see Province of British Columbia 2002.
17. This program is funded through the Aboriginal Fisheries Strategy discussed below.
18. For more on the Aboriginal Fishing Strategy see the Fisheries and Oceans Canada website, 'Aboriginal Fisheries Strategy', available at <http://www.dfo-mpo.gc.ca/communic/fish_man/afs_e.htm>
19. For more information on this program see the Fisheries and Oceans Canada website, 'Allocation Transfer Program', available at <http://www.pac.dfo-mpo.gc.ca/tapd/atp_e.htm>.
20. For more information on this program see the Fisheries and Oceans Canada website, 'Aboriginal Aquatic Resource and Ocean Management Program', available at <http://www.pac.dfo-mpo.gc.ca/tapd/aarom_e.htm>.
21. For more information see Fisheries and Oceans Canada, *Modernizing the Fisheries Act* available at <<http://www.pskf.ca/publications/fishact/FA%20Stakeholder%20Presentation.pdf>>.
22. This duty was articulated by the Supreme Court in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (a leading case on the nature of Aboriginal title in Canada), and subsequently in cases such as *R. v Jack, Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550.
23. For further information on MOUs with the oil and gas industry see Fisher, B. 8 June 2004. *Offshore Oil and Gas: Aboriginal Issues in B.C.*, Blakes, Cassel & Graydon LLP, available at <<http://blakes.com/powerpoint/OffshoreOGpresAbo.ppt>>. See also the Consultation Process Agreement, 1 December 2006, available at <<http://www.ogc.gov.bc.ca/documents/firstnations/mou/West%20Moberly%20FN%20CPA%20Dec%202006%20mab.pdf>>, amending and replacing the original MOU which expired in March 2006.
24. Though many government website have 'new relationship' statements, see generally <<http://www.newrelationshiptrust.ca/home>> for more information.
25. These data are somewhat unreliable due to the question of whether an individual identifies as 'native' as defined in the report and the lack of data on the commercial sales of excess stock when it is allocated to Aboriginal groups.
26. The ground fish, herring and shellfish fisheries are increasing in importance, and focus is shifting to farmed fish in light of depleted wild stocks.
27. Early explorers were impressed by the extent to which fishing permeated the everyday life of Maori, as well as their knowledge and fishing standards. For example, Joseph Banks, on board Cook's *Endeavour* in 1769, remarked, 'Fishing seems to be the chief business of part of the country; about all their towns are abundance of netts...' (Bess 2001).
28. For more on this see Ministry of Fisheries n.d.
29. See *Wi Parata v The Bishop of Wellington*, 3 NZ Jur 72 [1877].
30. For more on this see Davidson 1993; also see Bess 2001.

31. The Maori version has a guarantee of *tinio rangatiratanga*, which is understood as unqualified exercise of their chieftainship over their lands, villages, fisheries and all their *taonga* (treasures). Further confusion arises as to the meaning of *taonga*, which translates as 'treasures'. For the English, this equated to property and possessions, whereas to Maori this includes all things precious including language and culture. For a more detailed discussion on the different versions of the treaty and their meanings see Christchurch City Libraries, 'Treaty of Waitangi' Reference, available at <http://library.christchurch.org.nz/Reference/TreatyOfWaitangi/Meaning/>.
32. See Table of Treaty Settlements (Office of Treaty Settlements 2006 at 11).
33. A commercial fisher could only obtain a permit where income from fishing exceeded \$10,000 or made up more than 80% of the fisher's income (Deweese 2006).
34. Available at <http://teohu.maori.nz/archive/legislation/DeedofSettlement.pdf>.
35. 1992 No. 121.
36. Public Act 2004 No. 78, available at http://teohu.maori.nz/archive/legislation/maori_fisheries_act_2004.pdf.
37. The major contributions to this surplus have been the proportions of AFL net profit (NZ\$11.9 million) that relate to the income shares held directly by Te Ohu Kaimoana and those held in trust for *iwi*, and interest revenue and proceeds from the sale of annual catch entitlement.
38. The Commonwealth's responsibility for fisheries extends three nautical miles from the low water mark (coastal waters) to the 200 nautical mile limit of the Australian Fishing Zone. Under the Offshore Constitutional Settlement in 1979, the Commonwealth granted title and legislative authority to the States and Northern Territory over marine resources, including fisheries, from the low water mark to three nautical miles off-shore. Agreements have also been made under the Offshore Constitutional Settlement between the Commonwealth and State or Northern Territory governments for the management of fisheries.
39. See also *Wik Peoples v Queensland* where the High Court held that the rights of Indigenous people who can prove a connection to the land can coexist with the rights of leaseholders, in this case pastoralists, but where there is any inconsistency between the two, the rights of the pastoralist will prevail.
40. For a detailed comparison of the Australian and Canadian judiciary approach to extinguishment see McNeil 2004.
41. See trial court judgment at 508.
42. Article 10 states that the 'principal purpose in establishing the Protected Zone ... is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing'. For more on the Torres Strait Treaty see Altman, Arthur, & Bek 1994.
43. See the Torres Strait Licensing pages at Queensland Government, Department of Primary Industries and Fisheries website at <http://www2.dpi.qld.gov.au/fishweb/16212.html> for more information on types of commercial fishing licences.
44. There is strong resistance from the commercial sector, which believes that these rights amount to unfettered rights to take fish. However, they remain involved in the process.
45. Also known as Strategy for Addressing Aboriginal and Torres Strait Islander Interests in Coastal Aquatic Resources' (SAATSIICAR).
46. See the Northern Territory Government website, Department of Primary Industry, Fisheries, and Mines available at <http://www.nt.gov.au/dpifm/Fisheries/index.cfm?Header=Indigenous%20Fisheries:%20Moving%20Forward%202003>.
47. For more on IBA see the Indigenous Business Australia website at <http://www.iba.gov.au>.

48. This figure includes harvesting for traditional purposes only. The estimate does not include Torres Strait Islanders.
49. The area included coastal communities from Broome in Western Australia to Cairns in Queensland and, although not all Indigenous people were surveyed, the survey attempted to provide a 'big picture' of Indigenous fishing in the Northern Territory (see pp. 109–10).
50. Agency Budget Statements: Agency Resources —AFMA.
51. See Nursey-Bray & Palmer 2006.

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