FISHING, HUNTING AND GATHERING RIGHTS OF ABORIGINAL PEOPLES IN AUSTRALIA

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I. INTRODUCTION

Aboriginal peoples have a special and enduring relationship with their land and surroundings in Australia. That relationship extends not only to the land itself but also its living resources. An important part of that relationship is fishing, hunting and gathering practices. These practices have continuing importance for many Aboriginal peoples, notwithstanding the introduction of a western market economy.[1] In addition to providing sustenance, fishing, hunting and gathering form

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1 Australian Law Reform Commission, Report 31 *The Recognition of Aboriginal Customary Laws* (1986) vol 2 at [885] (ALRC) referred to the introduction of a cash economy and the increasing use of shop bought food but concluded "despite all these changes, it is clear that hunting, gathering and fishing are of continuing importance in the lives of many Aborigines". Similar findings have been made by other government inquires, including Aboriginal Land Inquiry (Commissioner: P Seaman) *Report* (1984) at [11.4]. The reports of the Aboriginal Land Commission under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) include

an integral part of Aboriginal culture. The judgment of the High Court of Australia in *Mabo v Queensland (No 2)*[2], (*Mabo*) was a landmark decision in recognising rights of Aboriginal peoples at common law. While the judgment was confined to interests in land, it left the door open for recognition of other Aboriginal rights such as fishing, hunting and gathering.

In contrast to Aboriginal title to land, which has been extinguished by the Crown grant of freehold or leasehold over large areas of Australia in the past 200 years, there has been relatively little interference with traditional Aboriginal hunting, gathering and, in particular, fishing rights. The recognition of such rights at common law would expand the notion of Aboriginal title and provide the potential for a greater degree of economic self-sufficiency for Aboriginal communities.

This article examines statutory and common law recognition of Aboriginal fishing, hunting and gathering rights. Part II briefly examines the historical treatment of Aboriginal fishing and hunting rights and summarises the existing statutory provisions concerning Aborigines. Part III considers the common law foundation for traditional Aboriginal fishing and hunting rights. Part IV considers the content and nature of Aboriginal fishing and hunting rights. It also addresses issues arising out of the exercise of those rights in a contemporary manner. Part V examines the power of the Crown to extinguish and regulate traditional Aboriginal rights. Part VI discusses whether Aborigines are entitled commercially to develop traditional rights and, in particular, whether there is a right to an indigenous commercial fishery. Finally, Part VII undertakes a brief survey of mechanisms designed to achieve an equitable allocation of resources such as fisheries between aboriginal and non-aboriginal users in Canada, New Zealand and the United States.

II. HISTORICAL TREATMENT OF ABORIGINAL FISHING AND HUNTING RIGHTS

A. BRIEF HISTORY

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

> Yesterday twenty of the natives came down to the beach, each armed with a number of spears, and seized on a good part of the fish caught in the seine. *The coxswain*

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many specific examples of this. For example, see Aboriginal Land Commissioner *Upper Daly Land Claim* (1991) vol 1 at [13] where, having described the employment of Aborigines on cattle stations, Kearney J observed "they have remained throughout their lives in touch with their country...and led what amounted to a dual lifestyle combining their traditional economy with the introduced economy".

2 (1992) 175 CLR 1.

> *had been ordered, however small the quantity he caught, always to give them a part whenever any of them came when he was fishing,* and this was the first time they ever attempted to take any by force...the coxswain very prudently permitted them to take what they chose, and parted good friends. They, at present find it very difficult to support themselves.[3]

As the colonial settlement expanded, the ability of Aborigines to exercise traditional fishing, hunting and gathering rights was limited as settlers progressively occupied traditional hunting lands. There was inevitably conflict as Aboriginal peoples were dispossessed of their traditional grounds. Concern was expressed by some colonial officials about the ability of Aborigines to sustain themselves. Accordingly special provisions were made in a number of jurisdictions permitting Aborigines access to pastoral leases on Crown land to hunt and forage.[4] The legislature in most jurisdictions also acknowledged the special claim of Aborigines to maintain their traditional hunting and fishing practices by exempting them from regulations concerning fishing and hunting practices.[5]

B. EXISTING STATUTORY PROVISIONS

Aborigines are presently partially or wholly exempt from a range of legislation regulating hunting, gathering and fishing rights.[6] In some jurisdictions the exemptions only apply to specific provisions, to classes of Aborigines or for specified purposes.

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3 Phillip to Nepean *Historical Records of Australia* (10 July 1788) series I vol i pp 66-7 cited in J Woolmington (ed) *Aborigines in Colonial Society* (2nd ed, 1988) p 34 (emphasis added).

4 For example, see *Crown Lands Ordinance* 1924 (NT) ss 26(e), 39(b) (now *Pastoral Land Act* 1992 (NT) ss 38(1)(n), 38(2)); *Pastoral Act* 1904 (SA) schedule cl 3(q) (now *Pastoral Land Management and Conservation Act* 1989 (SA) s 47(1)); *Land Act* 1933 (WA) s 106(2). For a discussion of the historical background to the inclusion of reservations in pastoral leases, see H Reynolds *The Law of the Land* (2nd ed, 1992) pp 146-7, 150-1; H Reynolds "Mabo and Pastoral Leases" (1992) 2(59) *Aboriginal Law Bulletin* 8.

5 In New South Wales: *Fisheries Act* 1902 s 23(4); *Fisheries and Oyster Farms (Amendment) Act* 1957 s 25A(b). In the Northern Territory: *Birds Protection Ordinance* 1928 s 19(a); *Birds Protection Ordinance* 1959 s 19(a); *Wildlife Conservation and Control Ordinance* 1962 s 54(1); *Wildlife Conservation and Control Ordinance* 1966 s 8; *Territory Parks and Wildlife Conservation Act* 1976 s 122; *Fish and Fisheries Act* 1979 ss 14, 93. In Queensland: *Native Birds Protection Act Amendment Act* 1877 s 1; *Native Animals Protection Act* 1906 s 9(c); *Animals and Birds Act* 1921 s 17(b); *Aborigines Protection and Restriction of the Sale of Opium Act* 1927 s 2; *Fauna Protection Act* 1937 s 24; *Fauna Conservation Act* 1952 s 78; *Fisheries Act* 1957 s 3(i). In South Australia: *Fisheries Act* 1878 s 14; *Fisheries Amendment Act* 1893 s 8; *Fisheries Act* 1904 s 22; *Fisheries Act* 1917 s 48; *Birds Protection Act* 1900 s 4; *Animals Protection Act* 1912 s 18; *Animals and Birds Protection Act* 1919 ss 20(a), 21; *Fauna Conservation Act* 1964 s 42(1). In Victoria: *Fisheries and Game Act* 1864 s 39; *Protection of Game Act* 1867 s 12; *Fisheries Act* 1873 s 39; *Fisheries Act* 1890 s 41; *Game Act* 1890 s 21; *Fisheries Act* 1915 s 4; *Fisheries Act* 1928 s 4; *Fisheries Act* 1958 s 4. In Western Australia: *Preservation of Game Act* 1874 s 13; *Fisheries Act* 1899 s 11; *Fisheries Act* 1905 s 43 (now s 56); *Fauna Protection Act* 1950 s 23; *Fauna Protection Act Amendment Act* 1954 s 13(c); *Wildlife Conservation Act Amendment Act* 1976 s 11; *Fisheries Act Amendment Act* 1975 s 15.

6 See ALRC note 1 *supra* vol 2, ch 35 for a detailed analysis of the provisions.

In the Northern Territory, Aborigines are exempt from wildlife conservation regulations which would prevent them from continuing "the traditional use of any area of land or water for hunting or food-gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes".[7] A similar exemption provision is contained in Commonwealth national parks legislation.[8] Plans of management of Commonwealth national parks also make provision for traditional hunting and gathering.[9] Fisheries regulations in the Northern Territory do not apply to traditional Aboriginal activities.[10] There is also provision for the closure of seas within two kilometres of Aboriginal land to persons who are not entitled by Aboriginal tradition to enter and use those seas.[11]

In New South Wales, Aborigines and their dependants are exempt from prohibitions against taking fauna in wildlife districts, wildlife refuges, wildlife management areas, conservation areas, wilderness areas and areas the subject of a wilderness protection agreement and from taking or killing protected fauna (but excluding endangered fauna) anywhere in the State for domestic purposes.[12] Similarly, Aborigines are exempted from prohibitions against picking or having in their possession native plants in those areas and protected native plants anywhere in the State for domestic purposes; provided, in the case of protected native plants, the gathering or harvesting of the fruit, flower or other parts of the plants is carried out in a manner that does not harm the plants or interfere unreasonably with their means of propagation.[13] Aborigines are not exempt from fishing regulations, other than the requirement to hold an inland angling licence to fish in inland waters.[14]

In Queensland, Aborigines residing on land that was an Aboriginal reserve are permitted to take native fauna for consumption by members of their Aboriginal community[15] and are exempt from fisheries regulations provided that the fish are

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

8 *National Parks and Wildlife Conservation Act* 1975 (Cth) s 70(1). As with the exemption under Northern Territory legislation, this exemption is subject to any regulations made for the purpose of conserving wildlife in any area which expressly affect the traditional use of the area by Aborigines: s 70(2).

9 See, for example, Kakadu National Park Plan of Management at [34.2.4].

10 *Fisheries Act* 1988 (NT) s 53. The exemption does not apply to commercial activities and is subject to any restrictions which expressly apply to Aborigines.

11 *Aboriginal Land Act* 1978 (NT) s 12. See further, *Halsbury's Laws of Australia* vol 1 at [5-335].

12 *National Parks and Wildlife (Hunting and Gathering) Regulation* 1985 (NSW) cl 3. The exemption does not apply in respect of raptors or parrots.

13 *Ibid* cl 4.

14 *Fisheries and Oyster Farms Act* 1935 (NSW) s 25(a).

15 *Community Services (Aborigines) Act* 1984 (Qld) s 77(1)(a); *Community Services (Torres Strait) Act* 1984 (Qld) s 76(1)(a); *Local Government (Aboriginal Lands) Act* 1978 (Qld) s 29(1)(a). The exemptions in these

not taken for commercial purposes or by use of any noxious substance or explosive.[16] Aborigines are also exempt from prohibitions against taking, using or keeping protected wildlife in accordance with Aboriginal tradition.[17] Aboriginal communities may also apply for a community fishing licence to engage in commercial fishing.[18] Special provisions also apply in the Torres Strait in accordance with the *Torres Strait Treaty* which makes special provision for traditional fishing.[19] Zoning plans for the Great Barrier Reef Marine Park also permit traditional fishing by Aborigines in specified zones with authorisation.[20]

In South Australia, Aborigines are exempt from certain restrictions in taking native plants and protected animals on land that is not a national park.[21] Within national parks, Aborigines may take native plants and protected animals in accordance with the terms of any proclamation permitting them to do so.[22] Aborigines are also exempt from the requirement to hold a hunting permit.[23] The exemptions only apply if the plant or animal is taken for the purposes of food or for "cultural purposes of Aboriginal origin".[24] There are no exemptions in South Australia from fisheries legislation.

In Western Australia, Aborigines are permitted to take fauna and flora on any Crown land or other land, other than a nature reserve or wildlife sanctuary, with the consent of the occupier (if any) of that land for the purpose of food for

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Acts apply only to Aborigines who reside on land that has been granted in trust, or reserved and set apart, under the *Land Act* 1962 (Qld) for the benefit of Aborigines, or that forms part of Aurukun or Mornington Island Shire Councils (even though that land may have subsequently become "Aboriginal land" under the *Aboriginal Land Act* 1991 (Qld) or *Torres Strait Islander Land Act* 1991 (Qld)). These exemptions are subject to provisions of any conservation plans made under the *Nature Conservation Act* 1992 (Qld) which expressly prohibit the taking, using or keeping of protected wildlife under Aboriginal tradition.

16 *Fisheries Act* 1976 (Qld) s 5(1)(d); *Fishing Industry Organisation and Marketing Act* 1982 (Qld) s 45AA(1)(d). These exemptions only apply to Aborigines who live on land that is "Aboriginal land" under the *Aboriginal Land Act* 1991 (Qld) or *Torres Strait Islander Land Act* 1991 (Qld). See also the exemptions concerning fisheries in *Community Services (Aborigines) Act* 1984 (Qld) s 77(1)(a); *Community Services (Torres Strait) Act* 1984 (Qld) s 76(1)(a).

17 *Nature Conservation Act* 1992 (Qld) s 85(1). This exemption applies to all Aborigines, regardless of their place of residence. The exemption is subject to any provision of a conservation plan that expressly applies to the taking, using or keeping of protected wildlife under Aboriginal tradition: s 85(2).

18 *Fishing Industry Organisation and Marketing Act* 1982 (Qld) s 31(1)(e).

19 The treaty is implemented by the *Torres Strait Fisheries Act* 1984 (Cth) and *Torres Strait Fisheries Act* 1984 (Qld). See further *Halsbury's Laws of Australia* vol 1 at [5-2270].

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

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

22 *Ibid* s 68d(3)-(5).

23. *Ibid* s 68e.

24 *Ibid* ss 68d(6), 68e.

themselves and their families, but not for sale.[25] Aborigines are also exempt from most of the restrictions concerning fishing and may take by any means sufficient fish for food for themselves and their families, but not for sale.[26] If the Governor is satisfied that these provisions are being abused or that any species is becoming or is likely to become unduly depleted, he or she may suspend or restrict the operation of the exemption by regulation.[27]

A number of joint management schemes have been established for certain national parks and wildlife refuges, which permit Aborigines to be involved in the development of management plans for such parks, and hence, the extent to which traditional Aboriginal activities will be permitted.[28]

There are no exemptions for Aborigines from fishing, hunting and gathering regulations in either Tasmania or Victoria.

III. COMMON LAW RECOGNITION OF ABORIGINAL FISHING AND HUNTING RIGHTS

A. INTRODUCTION

In *Walden v Hensler*[29] an Aboriginal elder of the Gungalida people in Queensland was charged and convicted for taking a bush turkey in contravention of the *Fauna Conservation Act* 1974 (Qld). The defendant was acting in accordance with Aboriginal custom and believed he was entitled to take the turkey. The High Court of Australia held, by a majority, that the defence of an honest claim of right

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

26 *Fisheries Act* 1905 (WA) s 56(1). However, the exemption is subject to ss 9, 10, 23, 23A, 24 and 26 which, amongst other matters, prohibit the taking of undersized fish, and the use of explosives and permit the closure of fisheries and the gazettal of special regulations prohibiting the taking of particular species of fish.

27 *Wildlife Conservation Act* 1950 (WA) s 23(1); *Fisheries Act* 1905 (WA) s 56(2).

28 For example, the Cobourg Peninsula Sanctuary Board established under *Cobourg Peninsula Aboriginal Land and Sanctuary Act* 1981 (NT); the board of management established under the *Nitmiluk (Katherine Gorge) National Park Act* 1989 (NT); boards of management in respect of certain Commonwealth national parks, see *National Parks and Wildlife Conservation Act* 1975 (Cth) s 14C; boards of management in respect of national parks on Aboriginal land under the *Aboriginal Land Act* 1991 (Qld) s 5.20; *Torres Strait Islander Land Act* 1991 (Qld) s 5.20.

See further, ALRC note 1 *supra* chapter 35; R Blowes "From Terra Nullius to Every Person's Land: Legal Bases for Aboriginal Involvement in National Parks - Precedents from the Northern Territory" (1991) 2(52) *Aboriginal Law Bulletin* 4; J Birckhead, T De Lacy, L Smith (eds) *Aboriginal Involvement in Parks and Protected Areas* (1992); B Miller "Green Fingers Across Black Land" (1992) 2(58) *Aboriginal Law Bulletin* 3; J Sutherland "Rising Sea Claims on the Queensland East Coast" (1992) 2(56) *Aboriginal Law Bulletin* 17.

29 (1987) 163 CLR 561, 61 ALJR 646, 74 ALR 173.

was not available to the defendant.[30] However, the more fundamental question of whether the *Fauna Conservation Act* 1974 (Qld) applied to the defendant's activities was not litigated. As Justice Brennan observed:

> It would not have been surprising if a question had been raised by the appellant as to whether and how it came about in law that Aboriginal people had their traditional entitlement to gather food from their own country taken away.[31]

The existence of Aboriginal title to land at common law in Australia was accepted by the High Court in the *Mabo* case.[32] The Court rejected the previously accepted proposition that customary Aboriginal rights could only exist after the colonisation of Australia if they were affirmed or recognised by the Crown. While holding that the Crown had power to extinguish Aboriginal title, the Court held that in the case of the Murray Islands the Meriam people's Aboriginal title to the Murray Islands remained intact to the present day.

A question that arises in the wake of the *Mabo* decision is: if traditional Aboriginal title to land is recognised at common law, to what extent are traditional fishing, hunting and gathering rights of Aboriginal peoples also recognised at common law?[33] The juristic foundation of such rights may arise either as an incident of Aboriginal title or by virtue of custom. To the extent that such rights are recognised as an incident of Aboriginal title, they may either be characterised as flowing from Aboriginal title to land or seabeds or as a separate Aboriginal title in fisheries which is independent of Aboriginal title to land or seabeds. These

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30 The decision turned on whether the offence was "an offence relating to property" within the meaning of s 22 of *The Criminal Code* (Qld). Brennan, Deane and Dawson JJ holding that s 22 had no application to the offence of keeping fauna (Toohey and Gaudron JJ dissenting).

31 Note 29 *supra* at 565.

32 Note 2 *supra*. See further RD Lumb "Native Title to Land in Australia: Recent High Court Decisions" (1993) 42 *International and Comparative Law Quarterly* 84; MA Stephenson, S Ratnapala (eds) *Mabo: A Judicial Revolution* (1993).

Note: in this article the term 'Aboriginal title' is used synonymously with the terms 'native title' (as used by Mason CJ, Brennan and McHugh JJ), 'common law native title' (as used by Deane and Gaudron JJ), 'traditional title' (as used by Toohey J) and 'Aboriginal title' (as used by Dawson J). It should not be confused with the term 'common law aboriginal title' (as used by Toohey J) which is based on a presumption of possessory title at common law by virtue of occupancy. The term 'aboriginal title' has gained currency in Canadian courts. It avoids the sometimes pejorative connotations of the word 'native'. Though there may be some sensitivity in applying it to the Torres Strait region, it is used here as a generic term to describe the rights of indigenous inhabitants of a country arising out of their occupation of their traditional lands to the extent recognised at common law.

33 The plaintiffs had originally sought declarations of Aboriginal title both in relation to the lands of the Murray Islands and in respect of "rights to the sea and seabeds extending to the fringing reefs surrounding the said Islands, and right to the fringing reefs surrounding the said Islands". This claim was not pressed before the High Court. Nevertheless, the decision of the High Court left the way open for Aboriginal title to be claimed over those reefs, seas and seabeds provided those interests had not been extinguished.

different juristic foundations of Aboriginal fishing, hunting and gathering rights are considered below.

B. CONTENT OF ABORIGINAL TITLE

The content of Aboriginal title in land comprises "the interests and rights of indigenous inhabitants in land whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants".[34] There is little doubt that those rights include the right of the traditional owners to hunt, gather and forage on the land and to fish in its rivers and adjacent seas.[35] Indeed, the statutory definition of traditional Aboriginal owners of land for the purposes of statutory land rights in the Northern Territory encompasses the notion of an entitlement to forage over land.[36]

Aboriginal fishing, hunting and gathering rights have been characterised as being analogous to a *profit a prendre*.[37] While caution needs to be exercised to avoid classifying the incidents of Aboriginal title in terms of English property law concepts,[38] it seems clear that fishing, hunting and gathering rights can comprise part of Aboriginal title to land. However, as discussed below, while customary Aboriginal fishing, hunting and gathering rights may be part of the bundle of rights comprised in Aboriginal title to land,[39] there is no necessary nexus between them.[40]

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34 Note 2 *supra* at 57 per Brennan J. See also at 58, 70 per Brennan J, and at 110 per Deane and Gaudron JJ.

35 For an overview of literature concerning traditional Aboriginal fishing, hunting and gathering rights see ALRC note 1 *supra* vol 2 ch 33 "Traditional Hunting, Fishing and Gathering Practices". As to traditional Aboriginal views of 'ownership' of adjacent seas and waters see Aboriginal Land Rights Commission *First Report* (1973) at [205]; SL Davis "Aboriginal Sea Rights in Northern Australia" (1985) 12 *Maritime Studies* 12; N Green "Aboriginal Affiliations with the Sea in Western Australia" in G Gray, L Zann (eds) *Workshop on Traditional Knowledge of the Marine Environment in Northern Australia* (1988); B Lawson *Aboriginal Fishing and Ownership of the Sea* (1984); D Smyth *Aboriginal Maritime Culture in the Far Northern Section of the Great Barrier Reef Marine Park: Final Report* (1991).

36 See the definition of "traditional Aboriginal owners" in s 3(1) of *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) which requires persons claiming to be the traditional owners of land to, inter alia, establish that they are "entitled by Aboriginal tradition to forage as of right over that land". See further, G Neate *Aboriginal Land Rights Law in the Northern Territory* (1989) vol 1 pp 77-9.

37 See *R v Isaac* (1975) 13 NSR (2d) 460 at 469 (CA); *British Columbia (Attorney General) v Mount Currie Indian Band* (1991) 54 BCLR (2d) 156 at 185 (CA).

38 See notes 88-91 *infra* and accompanying text.

39 DE Sanders "Aboriginal Peoples and the Constitution" (1981) 19 *Alberta Law Review* 410 at 412.

40 See discussion of 'territorial' and 'non-territorial' rights at notes 76-83, 184-91 *infra* and accompanying text.

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

(i) Canada

Customary aboriginal fishing, hunting and gathering rights have been recognised in Canada for many years.[41] Fishing and hunting have been considered to be part of the 'core' of Canadian aboriginal life.[42] The right of aborigines 'to hunt and fish as usual' was confirmed in many treaties with aboriginal peoples in different parts of the country. Similarly, the right of aborigines to hunt and fish for food under provincial laws was given constitutional recognition in Alberta, Manitoba and Saskatchewan when control over natural resources was transferred from the federal government to those provinces in 1930.[43]

In *R v Isaac* the Court recognised a usufructuary right of aborigines on reserve land "to use that land and its resources, including, of course, the right to hunt on that land". That right was said to arise out of customary and common law (though subsequently confirmed by the *Royal Proclamation* and other declarations).[44] The Court characterised the right as "akin to a *profit a prendre*" which "arose long before [the *Royal Proclamation* of 1763] but has not been extinguished as to reserve land". It stated that this "stresses legalistically the perhaps self-evident proposition that hunting by an Indian is traditionally so much a part of his use of his land and its resources as to be for him, peculiarly and specially, integral to that land".[45]

In *R v Taylor*[46] the defendants were members of the Chippwea Nation which had, by treaty, surrendered 1.9 million acres of land to the Crown "without reservation or limitation in perpetuity" in 1818. The defendants were charged with taking bullfrogs during closed season. Notwithstanding the surrender of their aboriginal title to land, the Ontario Court of Appeal held, having regard to the Indians' understanding of the treaty, that they had not surrendered their aboriginal right to hunt and fish over that land. Hence, in the absence of valid legislation

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41 For an overview of aboriginal hunting and fishing rights in Canada, and the different legal basis of those rights, see PG McHugh "Maori Fishing Rights and the North American Indian" (1985) 6 *Otago Law Review* 62 at 65-82; DE Sanders "Indian Hunting and Fishing Rights" (1974) 38 *Saskatchewan Law Review* 45; J Woodward *Native Law* (1989) ch 13.

42 See, for example, Wilson J (dissenting) in *R v Horseman* [1990] 1 SCR 901 at 911, 55 CCC (3d) 353, [1990] 4 WWR 97 affirming (1987) 53 Alta LR (2d) 146, [1987] 5 WWR 454 ("Hunting, fishing and trapping lay at the centre of their [the Indians'] way of life").

43 See s 12 of the Alberta and Saskatchewan Natural Resource Transfer Agreements and s 13 of the Manitoba Agreement, confirmed by the *Constitution Act* 1930 reproduced in the Schedule to RSC 1985, App II, No 26.

44 *R v Isaac* note 37 *supra* at 469 per MacKeigan CJNS. See also at 496 per MacDonald JA.

45 *Ibid* at 469, and also at 485, per MacKeigan CJNS. See further *R v Cope* (1982) 65 CCC (2d) 1 at 2-3, 132 DLR (3d) 36, 49 NSR (2d) 555 (NS CA).

46 (1982) 62 CCC (2d) 227, 34 OR (2d) 360 (CA).

restricting that right, the defendants were entitled to hunt and fish over that land.[47] The decision of the Court is significant in that it indicates that an aboriginal right to hunt and fish over land can continue independently of aboriginal rights to the land itself. Many treaties have expressly guaranteed the right to hunt and fish to aborigines in exchange for surrender of land. However, the Court characterised the hunting and fishing rights as rights based upon an existing aboriginal right to fish and not upon a promise by the Crown.[48] Presumably, they only had an 'existing' right if, at the time of the treaty, that right was recognised at common law.

In *R v White and Bob*[49] the British Columbia Court of Appeal considered whether the defendant was bound by regulations which prohibited deer hunting other than in open season. In 1854, the defendants' band had surrendered their land on terms which included that the Indians were "at liberty to hunt over the unoccupied lands, and to carry on [their] fisheries as formerly". The case turned upon an exemption of treaty rights from the application of provincial laws under the *Indian Act*, the Court holding that the terms of the surrender constituted a 'treaty' for the purposes of the Act. However, Norris JA emphasised that the terms of the surrender and *Royal Proclamation* of 1763 simply affirmed an existing Aboriginal right to hunt and fish,[50] and observed that:

> This is not a case merely of making the [game] law applicable to native Indians as well as to white persons so that there may be equality of treatment under the law, but of depriving Indians of rights vested in them from time immemorial, which white persons have not had, *viz.*, the right to hunt out of season on unoccupied land for food for themselves and their families.[51]

While the early Canadian cases were primarily concerned with treaty rights, the courts have recognised in recent years that aboriginal fishing, hunting and

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47 No such federal legislation had restricted the defendants' right to hunt or fish and the provincial legislation under which the defendants were charged was inapplicable due to constitutional reasons: see *Constitution Act* 1867 s 91(24), *Indian Act* RSC 1970 c I-6 s 88.

48 While there are certain legal consequences which arise as a result of the right being guaranteed in a treaty (see s 88 *Indian Act* RSC 1970 c I-6) the *content* of the fishing and hunting right appears to be no more than that which existed at common law: see *Simon v R* [1985] 2 SCR 387, 23 CCC (3d) 238, 24 DLR (4th) 390 at 402 "the right to hunt already existed at the time the Treaty was entered into by virtue of the Micmac's general Aboriginal right to hunt" and, at 409, "the Treaty did not *create* new hunting and fishing rights but merely *recognised* pre-existing rights" (emphasis in original); *R v Taylor* note 46 *supra* (reference to the "preservation" of the Indians' historic right to hunt and fish and that "the right would continue" at 367-8); *R v Isaac* note 37 *supra* at 485; *R v White and Bob* note 49 *infra* at 634-5, 646-7. The same approach has been taken in interpreting constitutional limitations on provincial powers in the Prairie provinces: see *R v Wesley* [1932] 4 DLR 774, 58 CCC 269 (s 12 of the Alberta Natural Resource Transfer Agreement "re-assured...the continued enjoyment of a right which [Indians have] enjoyed from time immemorial").

49 (1965) 50 DLR (2d) 613, 52 WWR 193 (BC CA) affirmed (1965) 52 DLR (2d) 481*n* (SCC), (subsequent references are in the DLR).

50 *Ibid* at 635, 646-7.

51 *Ibid* at 648.

gathering rights exist at common law either as a part of aboriginal title to land or as a separate aboriginal title in hunting or fishing. In *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* the plaintiffs claimed aboriginal title over a large area in the Northwest Territories. The Court, in granting an interlocutory injunction to restrain mineral exploration activities and to restrict low flying aircraft over the calving areas of wild caribou herds upon which the plaintiff community was heavily dependent, stated: "if there is substance to the Inuit's right to the continued enjoyment of land used by them and their ancestors from time immemorial, it is difficult to see how that substance does not, to some extent, embrace their traditional activities of hunting and fishing for the indigenous wildlife".[52] At the subsequent trial of the action, the Court upheld the plaintiffs' claim to aboriginal title. In relation to fishing and hunting activities, the Court stated aboriginal title carries "with it the right freely to move about and hunt and fish" in the traditional territory.[53]

In *R v Sparrow*[54] the Supreme Court of Canada considered whether the accused could be convicted of breaching the terms of a Musqueam food fishing licence under the *Fisheries Act*. The accused's Indian band held an "Indian food fish licence" under s 27 of the *British Columbia Fishery (General) Regulation* which permitted members of the band "to fish for salmon for food for themselves and their families" in specified areas and subject to certain conditions, including limitations on the length of drift net to be used. The decision provided the first opportunity for the Court to consider s 35(1) of the *Constitution Act* 1982 which provided that:

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

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

The Court held that the word "existing" in s 35(1) meant that it applied only to those aboriginal rights that were in existence when the *Constitution Act* 1982 came into effect.[55] Hence, extinguished aboriginal rights were not revived by the

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52 *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979] 1 FC 487 at 491, (1978) 87 DLR (3d) 342 at 344-5 (FC TD).

53 *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1980] 1 FC 518 at 563, 579, (1979) 107 DLR (3d) 513 at 547, 560 (FC TD).

54 [1990] 1 SCR 1075, 70 DLR (4th) 385 affirming (1987) 36 DLR (4th) 246, 9 BCLR (2d) 300 (BCCA), (subsequent references are in the SCR).

55 *Ibid* at 1091.

Constitution Act 1982.[56] The Court rejected an argument that "existing rights" meant freezing those rights in the specific manner in which the rights of each Indian band were regulated on the date s 35(1) came into force. To do so would create a constitutional "patchwork quilt".[57] Rather, the phrase "existing aboriginal rights" was to be interpreted flexibly so as to permit the evolution of aboriginal rights over time.[58] Having regard to anthropological evidence concerning Musqueam fishing practices, the Court did not have any difficulty in finding that there was an aboriginal right to fish.[59] The Court characterised the aboriginal right to fish of the Musqueam band as "not only for consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions".[60]

The major issue on the appeal was whether the aboriginal right had been extinguished by prior regulations under the *Fisheries Act*.[61] The Court held it had not. The regulatory scheme was "simply a manner of controlling the fisheries, not defining underlying rights".[62] Similarly, "historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right".[63] The aspects of the case concerning extinguishment are considered further below.[64] The remaining issue concerned whether the government regulations were invalid by virtue of s 35(1) of *Constitution Act* 1982. The Court held that government could regulate the aboriginal fishery for conservation purposes, but only if in doing so the aboriginal food fishery was given priority over non-aboriginal sports and commercial fishermen. This aspect of the judgment is not relevant for present purposes, although it will be considered later in the context of mechanisms to allocate fisheries between aboriginal and non-aboriginal users.[65]

A number of other cases have considered the existence and extent of aboriginal fishing rights at common law in Canada and have generally found that the claimants possess such a right.[66]

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56 *Id.*

57 *Ibid* at 1091-3.

58 *Ibid* at 1093.

59 *Ibid* at 1095.

60 *Ibid* at 1101. The court declined to address whether the right extended to a right to fish for commercial purposes. Commercial aspects of aboriginal fisheries are considered in Part VI *infra*.

61 RSC 1970 c F-14.

62 Note 54 *supra* at 1099.

63 *Ibid* at 1101.

64 See Part V *infra*.

65 See notes 293-307 *infra* and accompanying text.

66 *R v Nikal* (1991) 51 BCLR (2d) 247, [1991] 2 WWR 359, [1991] 1 CNLR 162 (SC); *R v Sampson* [1992] 3 CNLR 146 at 149 (BC SC) (however the regulation under which the defendant was charged did not interfere with the aboriginal fishing right); *R v Joseph* [1992] 2 CNLR 128 (Yukon Terr Ct).

(ii) New Zealand

A form of traditional Maori fishing rights was recognised in New Zealand last century.[67] However, after the case of *Wi Parata v Bishop of Wellington*,[68] which held that the *Treaty of Waitangi* was a "simple nullity", recognition of Maori rights was limited to where those rights were granted under statute. Similarly, common law aboriginal title (as opposed to any rights flowing from the *Treaty of Waitangi* was not recognised after 1877 until the case of *Te Weehi v Regional Fisheries Officer*.[69]

Te Weehi's case considered s 88(2) of the *Fisheries Act* 1983 (NZ) which provided: "Nothing in this Act shall affect any Maori fishing rights". A similar provision had been included in all fishing legislation since its inception in 1877, with the exception of the period from 1894 to 1903.[70] Williamson J held that the defendant was exercising a customary Maori fishing right which had not been extinguished by law. In doing so he resurrected the implicit recognition of aboriginal title at common law in *R v Symonds*.[71] Therefore, by virtue of s 88(2) the defendant was not bound by the provisions of the Act regulating the taking of undersized paua. The statutory provision was not the source of the right, but merely exempted the existing common law fishing right from the regulatory regime. The reasoning in *Te Weehi's* case, subsequently described as a "watershed decision",[72] has been followed in other cases.[73]

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67 See the address of Chief Judge Fenton of the Maori Land Court to the Native Affairs Committee of the House of Representatives, June 1880, reproduced in S Kenderdine "Legal Implications of Treaty Jurisprudence" (1989) 19 *Victoria University of Wellington Law Review* 347 at 357-8. As to the nature of traditional Maori fisheries, see New Zealand Law Commission *The Treaty of Waitangi and Maori Fisheries: A Background Paper* Preliminary Paper 9 (1989) pp 26-35.

68 (1877) 3 NZ Jur (NS) SC 72. For a review of New Zealand cases concerning recognition of Aboriginal title, see PG McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991) pp 113-126; New Zealand Law Commission *ibid* pp 54-9, 97-129.

69 [1986] 1 NZLR 680 (HC) ('*Te Weehi's* case'). See generally, FM Brookfield "Maori Fishing Rights and the Fisheries Act 1983: *Te Weehi's* case" (1987) 13 *New Zealand Recent Law* 63; PG McHugh "The Legal Basis for Maori Claims Against the Crown" (1988) 18 *Victoria University of Wellingon Law Review* 1 pp 2-3, 14; AL Mikaere, DV Williams "Maori Issues" [1992] *New Zealand Recent Law Review* 152 at 157-8.

70 For a history of the legislation see *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 645 (CA) and New Zealand Law Commission note 67 *supra* p 55.

71 (1847) NZPCC 387 at 390.

72 *Ministry of Agriculture and Fisheries v Hakaria* [1989] DCR 289 at 291.

73 See *Ministry of Agriculture and Fisheries v Love* [1988] DCR 370; *Rarere v Ministry of Agriculture and Fisheries* (unreported, Smellie J, 11 February 1991) cited by AL Mikaere, DV Williams "Maori Issues" [1991] *New Zealand Recent Law Review* 149 at 161-2; *Paku v Ministry of Agriculture and Fisheries* (unreported, High Court, Gallen J, 13 September 1992) noted in [1991] BCL 2001; *Ngaheu v Ministry of Agriculture and Fisheries* (unreported, High Court, Doogue J, 25 September 1992) noted in [1993] BCL 203; contrast: *Green v Ministry of Agriculture and Fisheries* [1990] 1 NZLR 411 (HC). See also *Ministry of Agriculture and Fisheries v Campbell* [1989] DCR 254 (where the court found that the defendant was not

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

> While this Court cannot at the present stage rule on questions of law that are not before us for decision and have not been fully argued, there is clearly a real possibility that the view of the law, and in particularly Maori customary fishing rights, provisionally taken by Greig J will prove to be right. The judgement of Williamson J in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 points in the same direction.[74]

As legislation has resolved the issue of Maori fishing rights in New Zealand at present, the Court of Appeal is unlikely to be called upon in the near future to clarify the issue.[75]

D. RELATIONSHIP BETWEEN ABORIGINAL TITLE AND ABORIGINAL FISHING AND HUNTING RIGHTS

Aboriginal fishing and hunting rights have generally been considered to comprise part of the claimant's Aboriginal title in land. However, some cases have held that traditional fishing and hunting rights may exist independently of ownership of land. For example, in relation to fishing rights on seas or oceans, a number of Aboriginal communities may have a non-exclusive right to fish in the area.[76] As such they may have an Aboriginal title to the fishery, independently of any Aboriginal title in the lands or seabed. While the word 'title' may be misleading in these circumstances; it is clear that at common law proprietary rights can exist in fisheries independently of ownership of the soil,[77] and even different proprietary rights in different fisheries may exist in the same area at common law.[78] Though

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exercising a traditional right, but implicitly acknowledged that had he been exercising such a right he would have been exempt form the Act); *ibid* (where the court treated Maori fishing rights the defendant sought to uphold under s 88(2) as being derived from the *Treaty of Waitangi* and did not rely upon common law aboriginal right to fisheries).

74 *Te Runanga o Muriwhenua Inc v Attorney-General* note 70 *supra* at 654. See further FM Brookfield "Constitutional Law" [1991] *New Zealand Recent Law Review* 253 at 253-7.

75 For a discussion of the legislation, see notes 320-323 *infra* and accompanying text.

76 As to the possibility of a number of Aboriginal communities making a collective claim for an area over which none may have an exclusive use, see *Mabo* note 2 *supra* at 100 per Deane and Gaudron JJ, at 190 note 19 per Toohey J.

77 *Attorney-General v Emerson* [1891] AC 649 at 654. See further, *Halsbury's Laws of England* (4th ed) vol 18 at [601].

78 *Halsbury's Laws of England* (4th ed) vol 18 at [603].

Aboriginal title need not conform to English property law concepts,[79] if a separate proprietary interest can exist in fisheries at common law, there appears no reason why there cannot be a separate Aboriginal title directly in fisheries not dependant on any underlying Aboriginal title to land. The content of that title would, as with the content of Aboriginal title to land, be determined in accordance with the customs and laws of the traditional Aboriginal holders of that title.[80]

Support for this proposition can be found in overseas cases. The Supreme Court of Canada, in *R v Sparrow*, while not directly addressing the matter, characterised the plaintiff's right as "an aboriginal right to fish" but did not refer to aboriginal title to land.[81] Similarly, in New Zealand, Williamson J stated:

> In my view a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore.[82]

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

> In principle the extinction of customary title to land does not automatically mean the extinction of fishing rights... The survival of fishing rights though land titles have been extinguished was recognised even as to the foreshore by Chief Judge Fenton in his *Kauwaeranga Judgment* of 1870... If anything, the case for the survival of sea fishing rights may be stronger.[83]

An alternative basis for the recognition of Aboriginal fishing, hunting and gathering rights at common law is based on custom. The common law will recognise a local custom provided it has existed from time immemorial without interruption; it has been exercised peacefully and as of right; it is sufficiently certain as to its content; the beneficiaries are capable of ascertainment; it is not inconsistent with any statute or fundamental principle of the common law; and it is regarded as reasonable.[84] If these preconditions are met the custom "obtains the

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79 See notes 88-91 *infra* and accompanying text. As to the inapplicability of applying the rule that private right in fisheries can only be created by legislation or by a presumed grant prior to the Magna Carta to indigenous peoples, see New Zealand Law Commission note 67 *supra* pp 70-2.

80 See notes 88-99 *infra* and accompanying text.

81 Note 54 *supra*. See also *R v Jones* (unreported, Ont Ct J, Fairgrieve J, 26 April 1993): "There is a distinction to be drawn between the nature of a right to fish in waters which constitute traditional fishing grounds and Aboriginal title at common law in relation to land. In my view, it is again not a question of 'title' or 'ownership', it is a question of the right to fish in those waters and to enjoy the benefit of the resource to be found there".

82 *Te Weehi's case* note 69 *supra* at 690. See also *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* at 270. In these cases, the underlying Aboriginal title to land had been extinguished. See further, the discussion of 'territorial' and 'non-territorial title' at notes 184-7 *infra* and accompanying text.

83 *Te Runanga o Muriwhenua Inc v Attorney-General* note 70 *supra* at 655. A contrary view has been taken in the United States, see *In re Wilson* (1981) 30 Cal 3d 21, 177 Cal Rptr 336 at 339-42 .

84 See *Halsbury's Laws of England* (4th ed, 1975) vol 12 para 406 and CK Allen *Law in the Making* (7th ed, 1964) pp 129-51. As to the limitation on recognition of fishing rights which amount to a *profit a prendre* on the basis of local custom see *Halsbury's Laws of England* vol 12 at [431]. In the context of customs of indigenous peoples, see AN Allott "The Judicial Ascertainment of Customary Law in British Africa" (1957)

force of law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm".[85] A right based on custom is independent of ownership of the land on which the custom is exercised, and survives a transfer of ownership. Indeed a custom "may virtually deprive the owner of the land of any benefit in it" since the owner may not use the land in any way as to hinder the exercise of the custom.[86] Further, a custom, once established, cannot be lost by disuse or abandonment and can only be abolished or extinguished by the legislature.[87] Nevertheless, the degree of flexibility and protection afforded by a claim based on Aboriginal title in most circumstances would appear to be greater than a claim based on custom. The remainder of this article will consider Aboriginal fishing, hunting and gathering rights on the basis of comprising part of, or being analogous to, Aboriginal title.

IV. CONTENT AND NATURE OF ABORIGINAL FISHING AND HUNTING RIGHTS

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

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[88]

As long ago as 1926 the Privy Council cautioned against rendering Aboriginal rights conceptually in English law concepts.[89] Prior decisions which required that pre-existing rights of indigenous peoples be reconcilable with existing English

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20 *Modern Law Review* 244; TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991). As to the potential for recognising Maori fishing rights on the basis of local custom, see New Zealand Law Commission note 67 *supra* pp 137-41.

85 *Lockwood v Wood* (1844) 6 QB 50 at 64.

86 *New Windsor Corporation v Mellor* [1975] 1 Ch 380 at 387 per Lord Denning MR.

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

88 *Mabo* note 2 *supra* at 58. See also at 57, 70 per Brennan J, at 110 per Deane and Gaudron JJ, at 187 per Toohey J.

89 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 403-4, cited with approval in *Mabo* note 2 *supra* at 49-50 per Brennan J, at 84-5, 87 per Deane and Gaudron JJ, at 195 per Toohey J. See also *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876 at 880 (PC).

common law concepts of property were rejected by the High Court.[90] Justices Deane and Gaudron, referring to the inappropriateness of forcing Aboriginal title to conform to traditional common law concepts, characterised Aboriginal title as "*sui generis*".[91]

Similarly, the Canadian Supreme Court observed, in relation to aboriginal fishing rights at common law, that:

> Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of...the '*sui generis*' nature of aboriginal rights.[92]

A traditional Aboriginal fishing or hunting right is not necessarily open-ended. In many Aboriginal communities hunting and fishing practices are carefully regulated. The form of regulation varies between different Aboriginal groups, however, it is often designed to conserve the resource (such as by limiting the time or locations of hunting or fishing).[93] The traditional right may also be limited to specific purposes, such as to provide sustenance or for ceremonial purposes. An Aboriginal right is not an absolute right, but carries with it associated responsibilities and obligations as a condition of exercising the right. These obligations and restrictions in relation to traditional fishing rights have been referred to as "self-regulation in the management of an important resource".[94] Put another way, if a community has a right to fish or hunt that right necessarily includes the ability to regulate the hunt.[95]

Where traditional Aboriginal fishing and hunting rights are exempt from the normal regulatory scheme, it does not mean there is 'open-slather'. Only fishing and hunting practices carried out in accordance with the traditional fishing or hunting right will be exempt from the general regulatory scheme.[96] Hence, where an Aborigine does not comply with his or her community's internal regulations or

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90 *Mabo* note 2 *supra* at 83-5, 102 per Deane and Gaudron JJ, at 185-7 per Toohey J.

91 *Ibid* at 89. See also *Guerin v The Queen* [1984] 2 SCR 335 at 382.

92 *R v Sparrow* note 54 *supra* at 1112 (emphasis in original).

93 ALRC note 1 *supra* at [883]; H Reynolds *The Law of the Land* (2nd ed, 1992) p 63; NM Williams *The Yolngu and their Land* (1986) p 93. See also *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* at 257-9, 269, 271; *R v Sparrow* (1987) 36 DLR (4th) 246 at 254, 269, 9 BCLR (2d) 300, [1987] 2 WWR 557 (BC CA) affirmed by [1990] 1 SCR 1075, 70 DLR (4th) 385; *R v Nikal* note 66 *supra* at 255.

94 *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* at 269.

95 In this regard see, in a different context, *R v Simon* note 48 *supra* at 403 where the court observed "the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself". See also *R v Sparrow* note 93 *supra* at 269.

96 There are a number of recent examples of this in New Zealand: *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* at 257-9, 264, 271; note 72 *supra* at 294, 296; *Ngaheu v Ministry of Agriculture and Fisheries* note 73 *supra*. See also *Ministry of Agriculture and Fisheries v Love* note 73 *supra* at 371.

customs concerning the exercise of the right, he or she must comply with the general regulatory scheme. In this way, the elders of the community can seek to have the person prosecuted where the person neither complies with the community's customs or the general regulatory requirements.[97]

While the ascertainment of the nature and incidents of Aboriginal title of a particular group may pose considerable difficulty the courts will nevertheless give effect to those rights.[98]

A. MANNER OF EXERCISING FISHING AND HUNTING RIGHTS

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

As Brennan J observed in *Mabo*:

> Of course *in time the laws and customs of any people will change* and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based *laws and customs, as currently acknowledged and observed.*[99]

and that:

> It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connexion between the indigenous people and the land remains.[100]

Similarly, Deane and Gaudron JJ were of the view that:

> The *traditional law or custom* [by which the content of Aboriginal title is to be ascertained] *is not*, however, *frozen as at the moment of establishment of a Colony.* Provided any changes do not diminish or extinguish the relationship between a

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97 For example in *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* the defendants were charged for non-compliance with the *Fisheries (Commercial Fishing) Regulations* (NZ). The prosecution was carried out with support of the local Maori community who gave evidence on behalf of the prosecution that the defendants (who were attempting to commercially exploit traditional fisheries) were not acting in accordance with any traditional Maori right.

98 Note 2 *supra* at 58, 60 per Brennan J,

99 *Ibid* at 61 (emphasis added). See also at 62 where Brennan J refers to the "*contemporary* rights and interests" of the Meriam people (emphasis added).

100 *Ibid* at 70.

> particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land.[101]

Toohey J rejected an argument that the plaintiffs had lost their Aboriginal title because they no longer exercised 'traditional' rights and duties and had adopted European ways, observing:

> There is no question that indigenous society can and will change on contact with European culture... But modification of traditional society in itself does not mean traditional title no longer exists.[102]

While these comments of the High Court were directed towards whether changes in the Aboriginal society would result in a loss of Aboriginal title, the same comments logically apply to the manner of exercise of the rights comprising a community's Aboriginal title.

The Supreme Court of Canada cautioned in *R v Sparrow* that "it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised"[103] and emphasised that the aboriginal right may be exercised in a contemporary manner.[104]

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

> The Indians' [treaty] right to fish, *like the aboriginal use of the fishery on which it is based*, is not a static right. The reserved fishing right is not affected by passage of time or changing conditions. The right *is not limited as to* species of fish, origin of fish, *purpose or use or time or manner of taking. The right may be exercised utilizing improvements in fishing techniques, methods and gear.* It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish.[105]

Hence, while the existence of Aboriginal rights is to be ascertained as at the date of the acquisition of sovereignty, the means of exercising those rights are not limited to the means utilised at that time. In particular, the use of present day tools

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101 *Ibid* at 110. See also at 88.

102 *Ibid* at 192.

103 Note 54 *supra* at 1112.

104 *Ibid* at 1099. See also at 1093 where the Court stated that phrase "existing aboriginal rights" in s 35(1) *Constitution Act* 1982 was to be interpreted flexibly so as to permit the evolution over the aboriginal rights over time. While this comment is made in the context of s 35, it equally applies to the evolution of Aboriginal fishing and hunting rights at common law. See further DE Sanders note 41 *supra* at 45; B Slattery "Understanding Aboriginal Rights" (1987) 66 *Canadian Bar Review* 727 at 746-7 (Aborigines "are not waxen figures on display for tourists... Any rule that would hold them in permanent bondage to ancient practices must be regarded with scepticism"); RH Bartlett *Resource Development and Aboriginal Land Rights* (1991) pp 5-12.

105 *United States v Michigan* (1979) 471 F Supp 192 at 260 affirmed (1981) 653 F 2d 277, cert denied 454 US 1124 (emphasis added). See also *United States v Washington* note 264 *infra* at 402 (the "treaties do not prohibit or limit any specific manner, method or purpose of taking fish. The treaty tribes may utilise improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource").

in the harvesting of plants, modern transport and firearms in hunting animals, boats and nets made of present day materials in fishing still comprise the exercise of a traditional right, albeit in a modern way. To hold otherwise would be to commit Aboriginal peoples to a living archaeological museum

The only reported Australian case to specifically consider the method of exercising Aboriginal hunting and fishing rights was *Campbell v Arnold*.[106] Section 24(2) of the *Crown Lands Act* 1978 (NT) provided that a reservation in a pastoral lease in favour of Aborigines should be read as permitting Aborigines:

> ...who in accordance with Aboriginal tradition are entitled to inhabit the leased land-
>
> (c) ...to take or kill for food or for ceremonial purposes animals ferae naturae on the leased land

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

> It has been common knowledge for many years that in the process of adaptation of old Aboriginal ways many Aboriginal people have adopted firearms as a method of killing, being more efficient for many purposes than spears or boomerangs or other traditional weapons. Had the legislature intended that only traditional weapons and methods were permitted, it would have been easy enough for it to say so.[107]

While this case was in a statutory context, the result accords with common sense. A similar approach has been taken in Canadian cases.[108] In the absence of statutory provisions limiting the exercise of that right, the manner of exercising traditional Aboriginal fishing, hunting and gathering rights at common law is not frozen as at the time of European settlement and may be exercised by modern means.[109]

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106 (1982) 56 FLR 382 (NT SC).

107 *Ibid* at 384.

108 See *Simon v R* note 48 *supra* where the Court considered a treaty entered into in 1752 which provided that the Indians "shall not be hindered from, but have free liberty of Hunting & Fishing as usual". The Court rejected the Crown's submission that the words "as usual" limited the exercise of the right to the types of weapons used in 1752 stating, at 402 (SCR), "any such construction would place upon the ability of the Micmac to hunt an unnecessary and artificial constraint" and referred to the natural "evolution of changes in normal hunting practices"; *R v Cooper* (1968) 1 DLR (3d) 113 at 115.

109 The Aboriginal Land Inquiry in Western Australia considered Aborigines should be entitled to use modern technology in the exercise of traditional fishing and hunting practices. It observed "if the right were confined narrowly by reference to traditional methods...it would be meaningless to almost every Aboriginal person ... The argument...that Aboriginal people should only enjoy such a right if they confine themselves to pre-settlement methods of hunting, fishing and foraging...is really an argument that they should not have rights ... at all": Aboriginal Land Inquiry note 1 *supra* at [11.9].

B. MOBILITY

At the time of European settlement, most Aboriginal communities remained in their own, well defined, territories.[110] With modern transport and a highly mobile society, many Aborigines now live away from their traditional lands. In many cases, Aborigines or even whole communities were forcibly removed from their lands. An issue arises as to whether common law Aboriginal fishing, hunting and gathering rights may only be exercised by traditional inhabitants of an area within their traditional lands or on a wider basis. As a practical matter, the issue arises primarily in relation to fishing rights, since it is not feasible to hunt or gather traditional foods in areas to which many Aborigines have moved.

A case involving traditional Aboriginal fishing rights in Townsville in 1990 is illustrative of a number of the issues that can arise.[111] The defendants, who took a dugong and turtle for the purpose of a traditional burial feast, were charged with taking protected species in contravention of s 56 of the *Fisheries Act* 1976 (Qld).[112] They argued that the Act did not abrogate their common law right to fish for traditional purposes. The defendants were Torres Strait Islanders and had moved to Townsville with their parents when they were children. They formed part of a sizeable Torres Strait community in Townsville. They had maintained their contact with their communities in the Torres Strait and had returned to visit those communities from time to time. A number of alternative bases were proposed to overcome the problem of exercising their right well away from their ancestral lands.

(i) The nature of the right

The primary argument was that the defendants' traditional fishing rights were not limited to areas in which they claimed exclusive fishing rights, but also included a non-exclusive fishing right in areas of ocean over which no other indigenous group had an exclusive right. Evidence was led that communities in the Torres Strait from which the defendants were from and still considered themselves

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110 However, a particular Aboriginal group did not necessarily have exclusive occupation of the land as other groups may have been entitled to enter the land for ceremonial purposes or to hunt and forage: see *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 357-8 per Brennan J; *Mabo* note 2 *supra* at 190 per Toohey J; G Neate note 36 *supra* pp 78-9.

111 *R v Bourne* (unreported, Townsville Magistrates Court, Barrett SM, 19 January 1990), order nisi to review granted (unreported, Qld SC, Dowsett J), appeal subsequently withdrawn.

112 As the defendants did not reside on an Aboriginal or Islander reserve or trust area, the exemption in favour of certain Aborigines in s 5(1)(d) of the Act did not apply to them.

to be part,[113] had three categories of fishing rights: (1) areas in which the fishing right exclusively belonged to a particular family group; (2) areas where the fishing right belonged to members of the whole clan; and (3) 'open' waters in which all indigenous persons could fish. The so-called 'open' waters were not completely without restriction as persons who fished in those areas were still bound by their traditional practices and observances in relation to fishing. The most commonly used 'open' waters were in the Torres Strait but some distance out from the islands; however, 'open' waters were not limited to the Torres Strait region. The defendants also proposed to lead historical evidence of sightings by early European explorers of Torres Strait Islanders in boats along the Queensland coast a few hundred kilometres from the Torres Strait, in support of their claim that Torres Strait Islanders had traditionally travelled and fished in areas where they did not claim exclusive fishing rights.[114] The defendants were prepared to accept that the utilisation of a traditional right to fish in so-called 'open' waters in a territory far away from their own was (at least in the present day conditions) dependent upon those waters not being subject to any exclusive fishing right by local Aboriginal peoples. As a result the defendants claimed that they were exercising a traditional right to fish in 'open' waters.[115]

The accuracy or otherwise of the nature of the rights claimed in the case is not relevant for present purposes. Further, the existence of any such rights must depend upon the evidence led in each case as the types of traditional fishing rights may differ in different parts of Australia. However, the possibility that a traditional fishing or hunting right may extend to a non-exclusive right in an area outside of the Aboriginal group's traditional territory is significant. If this is correct, and if Aboriginal fishing and hunting rights at common law are capable of existing independently of Aboriginal title in the soil or seabed,[116] then as the content of Aboriginal rights is to be determined in accordance with Aboriginal custom, an Aborigine may exercise a traditional right outside of his or her traditional lands.

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

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

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

116 See notes 77-82 *supra* and accompanying text.

(ii) Claiming through another's right

In *Te Weehi v Regional Fisheries Officer* the Court held a Maori of one tribe could exercise a traditional Maori fishing right of another tribe, in accordance with the customs of that other tribe.[117] A person may only exercise a right held by other people if the customs of that people permit outsiders to exercise that right. It may be surmised that most Aboriginal peoples permitted visitors to their land to fish and hunt in order to feed themselves.[118] Where the customs of the people holding the right permit others to exercise it, prior consent must usually be sought.[119] It is not clear whether a traditional right may only be exercised by other indigenous people.[120] The use of a traditional right in this manner may be seen as the granting of a privilege or a courtesy to visitors or neighbouring tribes.

Where a traditional fishing or hunting right is exercisable with consent of the local Aboriginal people, issues arise as to whether actual prior consent is required; whether implied consent is sufficient; whether the persons may rely upon a general custom in the area permitting visitors to fish; and whether there can be subsequent ratification of the exercise of the right. Rather than resolving these issues from an English common law approach it may be more appropriate to determine them in accordance with the customs and laws of Aboriginal people who hold the fishing or hunting right.[121]

(iii) Transfer of traditional rights

The issue of alienability of Aboriginal land to other Aborigines was touched upon by members of the High Court in *Mabo*. While Aboriginal title cannot be

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117 Note 69 *supra* at 683.

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

119 See *Upper Daly Land Claim* note 1 *supra* vol 1 at [45] where Kearney J observed that "it is common throughout Aborginal Australia that those who have the right to forage also have the right to be asked first by others who wish to do so". See further NM Williams note 93 *supra* pp 84-5.

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

121 See, for example, *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* at 271 where it was suggested that where permission had not been sought prior to the exercise of the right, in certain circumstances, the local Maori could, in accordance with local custom, subsequently ratify the exercise of the right.

alienated to non-Aborigines,[122] it is possible that it may be alienated within the 'indigenous system'.[123]

Where the traditional Aboriginal owners of an area die out their land would traditionally be taken up by adjacent tribes. This may be accomplished by either a formal transfer by the remaining survivors of the traditional owners or by a process of natural takeover of land. An actual transfer of Aboriginal title or fishing and hunting rights by the remaining members of one tribe to another tribe may well come within the concept of 'alienation'; however, it is unclear whether a 'takeover' of the land of an extinct tribe by an adjacent tribe can be recognised by the common law. The process of a new tribe imbuing an area with their own stories and taking over responsibilities for sacred sites within the area has been documented in a number of areas.[124] Indeed, this may be seen as a natural process and one encompassed within a wide notion of Aboriginal traditions. In a statutory context, Kearney J accepted that persons who took over the land of an extinct tribe could become the 'traditional owners' of that land in accordance with the statutory criteria of traditional ownership.[125] Therefore, it is possible that Aborigines who fish or hunt outside the boundaries of their traditional territory at the time of European settlement, may nevertheless be entitled to exercise fishing and hunting rights if that area has become part of their territory in accordance with Aboriginal tradition.

(iv) Conclusions concerning mobility

The issues arising from the mobility of Aborigines create interesting conceptual problems.[126] The issues are of considerable importance given the number of

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122 Note 2 *supra* at 59-60, 70 per Brennan J, at 88-9, 110 per Deane and Gaudron JJ.

123 Brennan J left open the possibility that the common law would recognise a right or interest where "the acquisition is consistent with the laws and customs of that people" (at 60); however, he also stated that Aboriginal title is extinguished "on the death of the last members of the group of clan" (at 70). Toohey J left the question open, observing that alienability is a relative concept, and referred to evidence in the *Alligator Rivers Stage II Land Claim* (1981) under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) where land was 'given' by the few remaining survivors of one group to another group (at 194). See also B Slattery note 104 *supra* at 769.

124 See J Stanton "Old Business, New Owners: Succession and 'the Law' on the fringe of the Western Desert" in N Peterson, M Langton (ed) *Aborigines, Land and Land Rights* (1983); *Upper Daly Land Claim* note 1 *supra* vol 3 at [50]. See also NM Williams note 93 *supra* pp 176-7; Aboriginal Land Rights Commission *First Report* (1973) at [46].

125 *Upper Daly Land Claim* note 1 *supra* vol 3 at [48], [50], [112]. See also Aboriginal Land Commissioner *Alligator Rivers Stage II Land Claim* (1981) at [118-9].

126 In *R v Bourne* note 111 *supra* the issues were further complicated as there were no surviving descendants of the traditional inhabitants of the area in which the fishing occurred. Hence there was nobody from whom to obtain permission. The defendants gave evidence that had there still been traditional owners of the area they would have sought permission and on the occasions in which they had fished in another area they had sought

Aborigines who no longer live on their traditional lands but still retain their traditions and seek to exercise customary rights. The High Court in *Mabo* recognised that Aboriginal communities have wide scope to adapt their lifestyles and conditions in light of contemporary society without a loss of Aboriginal title. It is unrealistic not to acknowledge the mobility of contemporary Australian Aboriginal communities. So long as Aboriginal communities can agree amongst themselves as to issues arising from increased mobility there appears to be little justification for imposing arbitrary limits on the manner in which former customs can be modified to reflect present day conditions. There may reach a stage, to use the words of Brennan J, where "the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs" with the result that Aboriginal title to fisheries or customary rights no longer survive.[127] However, where this has not occurred, the recognition of the prior governance of Aboriginal peoples by themselves and their continuing ability to resolve land disputes in accordance with present day customs,[128] indicates that they can determine the manner of exercise of rights within the 'indigenous system'. The mobility of Aboriginal peoples and use of modern fishing and hunting techniques may raise issues regarding conservation and the need to regulate Aboriginal fishing and hunting rights. However, this is a separate issue from whether those rights are capable of adaptation to changing circumstances and is considered separately below.[129]

V. EXTINGUISHMENT OF ABORIGINAL FISHING AND HUNTING RIGHTS

A. GENERAL PRINCIPLES

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

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and received permission to fish from the traditional owners of that area. As a result, it was unclear whether the waters could be classified as 'open waters' (in which case the defendants were exercising their own customary rights), whether the defendants were able to claim through the general indigenous system of fishing rights in the area (under which all local tribes could fish in the area without prior consent as the original traditional owners had died out) or whether the rights of the extinct tribe had been transferred to, or taken over by, the surviving traditional owners of the adjacent area through which the defendants could claim the right (in which case issues of implied consent or subsequent ratification arose). As can be seen from this illustration, resolution of these issues is dependent upon the particular factual circumstances in each area.

127 Note 2 *supra* at 60.

128 *Ibid* at 58-60, 62, 70 per Brennan J, at 110 per Deane and Gaudron JJ.

129 See Part VII *infra*.

> Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory.[130]

Hence, Aboriginal title in land and Aboriginal rights to fish and hunt may be extinguished and, in this respect, stand in no special position over other private rights.[131]

Notwithstanding the difference of views amongst the majority members of the High Court as to whether the Executive has a prerogative power to extinguish Aboriginal title,[132] the following principles are clear:

1. The legislature has power to extinguish Aboriginal title in land,[133] and hence, by analogy, traditional Aboriginal rights to fish and hunt. The power to extinguish traditional Aboriginal hunting and fishing rights does not depend upon whether these rights are characterised as an incident of Aboriginal title in land or a separate right.
2. The exercise of a power to extinguish Aboriginal title or Aboriginal rights to fish and hunt must "reveal a clear and plain intention to do so".[134] This applies both to extinguishment by the executive or legislature.[135]

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130 *Mabo* note 2 *supra* at 63.

131 *Ibid* at 67 per Brennan J, at 111 per Deane and Gaudron JJ, at 194-5 per Toohey J. However, issues may arise as to compensation and whether the Crown has breached any fiduciary duty toward the traditional owners in extinguishing their traditional rights: see notes 141 and 296 *infra*.

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

133 *Ibid* at 67 per Brennan J, at 110-1 per Deane and Gaudron JJ, at 138 per Dawson J (dissenting), at 195 per Toohey J.

134 *Ibid* at 64 per Brennan J. See also at 111 per Deane and Gaudron JJ, at 195, 205 per Toohey J. The High Court stated this test in the context of extinguishing Aboriginal title to land. However, the same test logically applies to the extinguishment of traditional Aboriginal fishing rights and two of the authorities relied upon by Brennan J concerned traditional Aboriginal fishing rights: see *R v Sparrow* note 54 *supra* at 1099; *Te Weehi's* case note 69 *supra* at 692.

135 *Ibid* at 64 per Brennan J, at 111 per Deane and Gaudron JJ, at 196, 205 per Toohey J.

The rationale for requiring a clear and plain intention to extinguish Aboriginal title "flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land".[136] The same rationale must apply to taking away the right of indigenous inhabitants to utilise natural resources for their subsistence.

Where the Crown, by either legislative or valid executive act, has taken action which is wholly or partially inconsistent with a continuing right to enjoy Aboriginal title, the Aboriginal title is extinguished to the extent of the inconsistency.[137] The onus of proving either express or implicit extinguishment is on the Crown.[138]

There are constraints on the power to extinguish Aboriginal interests. Commonwealth legislation is subject to the constitutional guarantee that the acquisition of property be on just terms.[139] Though Aboriginal title is *sui generis* and does not have the characteristics of a full property right,[140] the High Court indicated that 'just terms' provisions would apply to it.[141] These comments were directed to extinguishment of Aboriginal title in land. However, as traditional Aboriginal fishing, hunting and gathering rights are akin to a *profit a prendre*,[142] they are also likely to attract the protection of just terms provisions. State or territory legislation extinguishing Aboriginal title must not be inconsistent with the *Racial Discrimination Act* 1975 (Cth).[143] There is no constitutional requirement for state or territory legislation to provide just compensation for the appropriation of property interests. However, where the state or territory has enacted legislation providing for the appropriation of property interests only on just terms, the effect of the *Racial Discrimination Act* 1975 (Cth) may be that special legislation extinguishing traditional Aboriginal fishing or hunting rights may be invalid unless it also provides for compensation.

Aboriginal rights will also be extinguished if surrendered to the Crown or abandoned by their traditional owners.[144]

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

137 *Ibid* at 69-70 per Brennan J.

138 *Ibid* at 183 per Toohey J. See also *R v Sparrow* note 54 *supra* at 1099; *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* note 53 *supra* at 567-8 (FC), 550-1 (DLR); *R v Horseman* note *226 infra* at 930.

139 Constitution s 51(xxxi).

140 See notes 88-92 *supra* and accompanying text.

141 *Mabo* note 2 *supra* at 111 per Deane and Gaudron JJ; See also at 51-2 per Brennan J (referring to a proprietary community title even though the rights of individual members of the community may only be usufructuary) and at 216 per Toohey J.

142 Note 37 *supra*.

143 See *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 63 ALJR 84, 86 ALR 12 ; *Mabo v Queensland (No 2)* note 2 *supra* at 67, 72 per Brennan J, at 112 per Deane and Gaudron JJ, at 214-6 per Toohey J.

144 Note 2 *supra* at 59-60, 70 per Brennan J, at 110 per Deane and Gaudron JJ.

B. EXPRESS EXTINGUISHMENT

Subject to the limitations discussed above, it is within the legislative competence of parliament to enact legislation expressly extinguishing traditional Aboriginal rights. However, no legislation in Australia has expressly extinguished Aboriginal fishing, hunting or gathering rights.[145] This is not surprising, as governments have not considered traditional Aboriginal rights to be legally enforceable rights. As a result, any claim that traditional Aboriginal rights recognised at common law have been extinguished by the Crown must depend upon implied extinguishment.

C. IMPLIED EXTINGUISHMENT

(i) General regulatory schemes

As previously discussed, Aboriginal title and customary rights will not be extinguished in the absence of a clear and plain intent to do so.[146]

A law which merely regulates the enjoyment of Aboriginal title or which creates a regime of control that is consistent with the continued enjoyment of Aboriginal title does not extinguish that title.[147] Therefore general Crown lands legislation "is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title".[148] Similarly, where the legislature confers power on the executive, it is not to be taken as authorising the executive to exercise that power in a manner which will extinguish Aboriginal title, in the absence of clear and unambiguous words to the contrary.[149] The same approach is likely to be taken concerning general

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145 The *Queensland Coast Islands Declaratory Act* 1985 (Qld) purported to extinguish any rights in certain Torres Strait islands at the time of the annexation to Queensland. However, it was invalid as it conflicted with the provisions of the *Racial Discrimination Act* 1975 (Cth): *Mabo v Queensland (No 1)* note 143 *supra*.

146 See notes 134-6 *supra* and accompanying text. In Canada the courts have developed a principle of statutory interpretation that statutes relating to aborigines should be liberally construed and doubtful expressions resolved in favour of the aborigines: *Nowegijick v The Queen* [1983] 1 SCR 29 at 36, 144 DLR (3d) 193; *Mitchell v Peguis Indian Band* [1990] 2 SCR 85, 71 DLR (4th) 193 at 98-9 per Dickson CJ, at 142-3 per La Forest J. A similar approach has been taken in the United States where the rule of construction has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith": *Choate v Trapp* (1912) 224 US 665 at 675. The Supreme Court has also stated that "extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards": *United States v Santa Fe Pacific Railroad Co* (1941) 314 US 339 at 354.

147 *Mabo* note 2 *supra* at 64 per Brennan J.

148 *Ibid* at 111 per Deane and Gaudron JJ. See also at 114 per Deane and Gaudron JJ, at 196 per Toohey J. See also *Gila River v United States* (1974) 494 F 2d 1386 at 1391; cf *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185, [1991] 3 WWR 97 (BC SC).

149 *Mabo* note 2 *supra* at 111 per Deane and Gaudron JJ, at 196 per Toohey J.

fisheries or game legislation which provides for the granting of licences to fish or hunt.

(ii) General prohibitions against fishing or hunting

Where a general regulatory statute contains a blanket prohibition it may be read down so as not to apply to Aboriginal interests. For example, in *Mabo*, Brennan J considered statutory provisions relating to trespassers on Crown land. The provisions were not to be construed as applying to Aboriginal people even though, in the words of the statute, they were not claiming occupation under a lease or licence. Had a literal interpretation been taken "the Meriam people could lawfully have been driven into the sea at any time after annexation".[150] Such a construction "would be truly barbarian" and "make a nonsense of the law".[151] The same may be said in relation to blanket prohibitions in hunting and fisheries legislation.[152] Otherwise, while the indigenous inhabitants could remain on their land, they would be consigned to starvation.

Justice Brennan suggested that blanket provisions such as these should be construed as being directed to those "without any colour of right" and are not directed to indigenous inhabitants who were exercising their traditional rights recognised at common law.[153]

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

While the imposition of a general regulatory scheme is unlikely to extinguish Aboriginal rights, the exercise of specific powers under the regulatory scheme can extinguish Aboriginal rights. For example, though general Crown lands legislation does not in itself extinguish Aboriginal title, the issue of a Crown grant of a freehold or unqualified leasehold interest under the legislation will necessarily extinguish Aboriginal title.[154]

Nevertheless, the types of interest granted under most fishing and game legislation are fundamentally different in nature to the grant of freehold or leasehold interests in land. Fishing regulations generally prohibit certain types of

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150 *Ibid* at 66.

151 *Id.* See also at 114 per Deane and Gaudron JJ.

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

153 *Mabo* note 2 *supra* at 66. See also the comments of Norris JA in *R v White and Bob* note 49 *supra* at 648 (DLR).

154 *Mabo* note 2 *supra* at 68-70 per Brennan J, at 110 per Deane and Gaudron JJ.

fishing activities other than in accordance with the terms of a licence.[155] However, the licences do not normally grant the holder any exclusive rights. As a result, the operation of such licences may be capable of coexisting with Aboriginal fishing rights. Where the Aboriginal right is a non-exclusive right to fish in an area, there is no conflict between the continued existence of that right and the exercise of fishing rights by third parties under the licence. Where the Aboriginal right is an exclusive right to fish in an area the licence could either be taken subject to existing Aboriginal rights,[156] or be construed as a form of statutory authorisation permitting the licensee to fish notwithstanding any existing Aboriginal rights.[157] In the latter case, the consequence is that the previously exclusive right is now subject to the rights granted under the statute. In other words, the Aboriginal right remains, but is no longer exclusive. This is because where the Crown does an act inconsistent with an ongoing right to enjoy Aboriginal title, Aboriginal title is extinguished only to the *extent* of the inconsistency.[158] Obviously, fisheries legislation could provide for the granting of exclusive fishing rights to particular persons in particular areas, which would be inconsistent with ongoing Aboriginal rights. However, the regulatory regime of hunting and fishing rights does not generally provide for the grant of exclusive rights.[159]

(iv) Partial exemption of Aboriginal fishing and hunting rights

Legislation in most Australian jurisdictions contains partial exemptions in favour of Aboriginal persons in relation to hunting, fishing and gathering.[160] The question arises whether the legislature by exempting certain categories of people or activities from the operation of the Act, thereby impliedly extinguished other Aboriginal rights not covered by the exemption.

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

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

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

158 *Mabo* note 2 *supra* at 70 per Brennan J.

159 In contrast, the introduction of tradeable individual commercial fishing quotas in New Zealand which gave the holder a right to harvest a portion of the commercial fishery for a particular species each year (which was akin to the grant of a proprietary right in the fishery) was potentially inconsistent with Maori fishing rights: see notes 308-19 *infra* and accompanying text.

160 See "B. Existing Statutory Provisions" in Part II *supra*.

A beneficial approach is to be taken in interpreting such provisions. For example, in the *Mabo* case, the Murray Islands had been declared to be permanently reserved and set apart for use by Aborigines. Under the terms of the relevant proclamation made under the *Land Act* 1910 (Qld), the reserve was not simply for the use of the traditional Aboriginal owners but for "the use of Aboriginal Inhabitants of the State".[161] Nevertheless, despite the conflict between the reservation for Aboriginal people in general[162] and the right of the Meriam people "as against the whole world, to possession, occupation and use of the lands of the Murray Islands",[163] the reservation of the land was not construed as impliedly extinguishing the Meriam people's Aboriginal title. The rights of Aborigines other than Meriam people to use the land under the statute were "necessarily subordinate to the right of user consisting in legal rights and interests conferred by native title".[164] This can only be rationalised by taking a beneficial approach to construing the legislation. As the legislation was intended to benefit Aborigines, it should not be construed as abrogating any existing Aboriginal rights.[165]

The same approach logically applies to fishing, hunting and gathering legislation. For example, in Queensland, the exemption from fisheries legislation has historically applied only to Aborigines residing on an Aboriginal reserve.[166] Is this to be construed as impliedly extinguishing the traditional rights of other

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

162 Under s 339 of the *Land Act* 1962 (Qld) the trustees had power to make bylaws generally for carrying out the objects and purposes of the trust including regulating the use and enjoyment of the land and regarding trespass. As to the objects of the trust, see note 161 *supra*.

163 *Mabo* note 2 *supra* at 217.

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

165 *Ibid* at 118 per Deane and Gaudron JJ. A similar view was taken in *United States v Santa Fe Pacific Railroad Co* note 146 *supra* at 353-4 where the United States Supreme Court held that Congress, in creating an Indian reserve, did not intend to extinguish the rights of the Indians in their traditional lands. See also the principle of statutory interpretation in relation to Aborigines in Canada and the United States: note 146 *supra*.

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

Aborigines? To do so it is necessary to find in the section or overall scheme of the Act a clear and plain intention to extinguish those rights. It is arguable that the exemption reflected the prevailing view of the times that only 'traditional' Aborigines still fished and hunted and that the remaining 'traditional' Aborigines lived on reserves. Hence, the exemption may be seen as an attempt by parliament to preserve the existing rights or practices of Aborigines (as then understood) rather than to derogate from Aboriginal rights.

Indeed, as Deane and Gaudron JJ observed, while many executive and legislative actions may not seem consistent with the existence of Aboriginal rights, those actions will nevertheless often not evince an intention to extinguish Aboriginal interests of a kind presumptively recognised by the common law as "when [or if] they were purportedly rationalized and justified, it was on the basis of a denial that there were pre-existing Aboriginal interests of the relevant kind for the law to respect and protect" rather than an intention to extinguish those rights.[167]

Another reason for construing the Queensland legislation as not evincing an intention to extinguish existing Aboriginal rights arises from the fact that many Aborigines on reserves in Queensland had been forcibly removed from their traditional lands. Hence, those Aborigines may not have had any traditional fishing rights at common law which they could exercise on the reserve. The exemption can be rationalised as creating an exemption from the provisions of the Act for those Aboriginal persons on reserves who no longer retained a common law right to fish and hunt. As such, the exemption is not inconsistent with a continuing common law Aboriginal fishing right.

Similar considerations apply where an exemption in favour of Aborigines has been included in legislation but subsequently omitted.[168]

(v) Special regimes for Aboriginal fishing and hunting rights

In some circumstances, legislation instead of exempting Aborigines, creates a special regime for the exercise of fishing or hunting rights by them. For example,

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167 *Mabo* note 2 *supra* at 99.

168 See the comments of Mahoney J in *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* note 53 *supra* at 572 (FC), at 554 (DLR) of "the irony implicit in the idea that such a basic right, particularly vested in certain people, then helpless to look after their own interests...was...so casually extinguished" by the omission of a specific reference to aboriginal rights. See also *Te Weehi's* case note 69 *supra* in relation to traditional Maori fishing rights. The specific statute under consideration expressly provided that nothing in it affected any Maori fishing right. However, a similar provision been omitted from fisheries legislation between 1894 to 1903. In rejecting an argument that the Maori fishing right had been extinguished, Williamson J stated at 692: "The customary right involved has not been expressly extinguished by statute and I have not discovered...any adverse legislation or procedure which plainly and clearly extinguishes it... If Parliament's intention is to extinguish such customary or traditional rights then it will no doubt do so in clear terms".

legislation in Queensland (and formerly in the Northern Territory) provides for the issue of special community fishing licences to Aboriginal communities.[169] Again the question arises whether, by including a special regime applicable to Aborigines, parliament has demonstrated a 'clear and plain intent' to extinguish traditional Aboriginal rights.

This situation was considered in the Canadian case of *R v Denny*.[170] The Micmac people had entered into treaties with the Crown but the treaties did not extinguish their aboriginal right to fish. Hence, an aboriginal right to fish (as opposed to a treaty right) continued to exist beyond the boundaries of the Indian reserve.[171] Section 6.6(1) of the *Nova Scotia Fishery Regulations* provided that, notwithstanding any other provisions in the regulations, a licence could be issued to an Indian or Indian band authorising the Indian or members of the Indian band to fish for food. The Crown argued that it was necessarily inconsistent with the scheme under the regulations for an aboriginal right to fish to remain, and hence that such a right had been extinguished.[172] However, the Court drew the opposite conclusion from the existence of the special statutory regime, stating:

> This regulation...is evidence of the federal government's intention to recognize and preserve an Indian food fishery. It adds support to the proposition that Nova Scotia Indians' aboriginal right to fish for food has not been extinguished... [T]he fact that these regulations were enacted is further recognition of the existence of an aboriginal right to fish for food possessed by the Micmac Indians of Nova Scotia.[173]

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

> In our view, the 'extinguishment by regulation' proposition has no merit. The short answer to it is that regulation of the exercise of a right presupposes the existence of the right. If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognised the Indian right to fish, are strong evidence that the right does exist.[174]

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

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169 *Fishing Industry Organisation and Marketing Act* 1982 (Qld) s 31(1)(e); *Fish and Fisheries Act* 1979 (NT) s 14 (subsequently repealed).

170 (1990) 55 CCC (3d) 322 (NS CA) approved by the Supreme Court of Canada in *R v Sparrow* note 54 *supra* at 1116.

171 *Ibid* at 333.

172 *Ibid* at 334.

173 *Ibid* at 334-5.

174 Note 93 *supra* at 266 (DLR).

> At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.[175]

The same argument was considered in New Zealand in *Te Weehi's* case. The Court upheld a submission that provision for exclusive use of certain areas for Maori fishing was not inconsistent with a reservation of customary or traditional rights but rather provided a formal management and control structure for some particular fisheries.[176]

Hence, it is arguable that the history of exempting Aborigines from the operation of fishing, hunting and gathering legislation in Australia, and the creation of special Aboriginal community fishing licences, rather than indicating an intention by the legislature to extinguish Aboriginal rights, constitutes recognition of the continuing existence of those rights.

(vi) Marine parks

Unlike the general regulation of fishing, where the legislative purpose may simply be to better manage the resource (which is not necessarily inconsistent with an ongoing Aboriginal fishing right) the dedication of an area as a marine park may be inconsistent with ongoing Aboriginal customary fishing rights.[177] Whether the dedication of an area as a marine park will have that affect will be a matter to be determined in each case. For example, in the *Mabo* case, Brennan J considered that the setting aside of an area as a national park may not be inconsistent with the continuing concurrent enjoyment of Aboriginal title.[178] However in particular circumstances, such as the zoning of an area of reef as a 'preservation zone' in zoning and management plans under the *Great Barrier Reef Marine Park Act* 1975 (Cth), traditional Aboriginal fishing activities may be excluded by implication.[179]

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175 Note 54 *supra* at 1097. A contrary conclusion was reached by the trial court in *R v Dick* (unreported, BC Prov Ct, Saunderson DJ, 16 February 1993) at 16-7, which held that any aboriginal right to a commercial fishery (which it doubted had ever existed) had been impliedly extinguished by a statutory regime providing for aboriginal fishing rights but which limited those rights to fishing for food. However, the judgment was heavily influenced by the reasoning of McEachern CJBC in *Delgamuukw v British Columbia* note 148 *supra*, who held that general pre-confederation Crown lands legislation had impliedly extinguished all aboriginal title in the province. The reasoning in *Delgamuukw* is at odds with the approach taken by the High Court of Australia in *Mabo*, and accordingly the result in the *Dick* case may also be open to doubt in an Australian context.

176 Note 69 *supra* at 688.

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

178 Note 2 *supra* at 70. See also *R v Sioui* [1990] 1 SCR 1025 at 1072-3 where the exercise of Huron religious treaty rites and customs (in cutting down trees, camping and making fires) were held not to be inconsistent with the use of a provincial recreation park.

179 A 'preservation zone' is the highest conservation zone, in which even scientific research is restricted, the purpose of which is to keep the area as far as possible unaffected by human use. A relevant factor in

D. VESTING OF OWNERSHIP IN SEABEDS, RIVERBEDS AND WATERS

At common law, the Crown is presumed to be the owner of the seabed and land below the low water mark in tidal waters. Just as the Crown's radical title to land is burdened by pre-existing Aboriginal interests, it is arguable that its title to the seabed is also burdened by pre-existing Aboriginal interests.[180] However, legislation has vested the ownership of various harbours and other areas in Crown instrumentalities.[181] It is arguable that such legislation does not extinguish any Aboriginal title in the river bed or ocean floor.[182] However, even if such legislation extinguishes Aboriginal title to the river bed or ocean floor, it may not have the effect of extinguishing Aboriginal title to a fishery in the river or estuary.[183] Put another way, the vesting of full ownership of the river bed and of its waters in the Crown, is not necessarily inconsistent with an ongoing right of Aboriginal peoples to fish in the river in accordance with their customs.

There is no necessary nexus between Aboriginal fishing rights and rights to a riverbed or seabed. As previously discussed, at common law fishing rights can

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determining whether traditional Aboriginal fishing activities are impliedly excluded may be that zoning plans expressly provide for traditional Aboriginal fishing activities in other areas: see for example Cairns and Cormorant Pass Zoning Plan cll 4(1)(a) and 5.2(i)(xv).

180 See *Halsbury's Laws of England* (4th ed) vol 8 at [1418] and vol 49 at [292] and [379] concerning the presumption of Crown ownership of the seabed, foreshore and beds of estuaries and tidal rivers. As to the application of the common law presumption that the Crown is the owner of the foreshore to settled colonies, see New Zealand Law Commission note 67 *supra* pp 68-70. The common law presumption that a grant of land includes the bed of non-tidal rivers has been negated in most Australian jurisdictions: see for example *Rights in Water and Irrigation Act* 1914 (WA) s 5; *Water Act* 1926 (Qld) s 5; hence, the bed of non-tidal rivers has generally not been alienated by Crown grant and any pre-existing Aboriginal title may survive over those river beds.

Some, if not all, Aboriginal communities considered adjacent reefs, islands and waters as part of their traditional lands, see note 35 *supra*. However, it is unclear whether Aboriginal communities, while using the sea, actually had any recognisable rights in the seabed itself.

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

182 The legislation vesting the ownership and control of harbours and other areas in a Crown instrumentality does not in itself grant third party interests in the harbour. Accordingly, the vesting of control of the area in a Crown instrumentality, the purpose of which is to provide for better management of the area, may not be inconsistent with ongoing Aboriginal title to the area. However, specific grants of proprietary interests to third parties or the building of public works, such as port facilities, would necessarily extinguish Aboriginal title over those specific areas.

183 A contrary decision was reached in *Inspector of Fisheries v Weepu* [1956] NZLR 920 at 923, 926 (SC) where any customary Maori fishing rights were held to be extinguished by the transfer of ownership of the bed of the river (and surrounding land) to the Maori Trustee. However, the court treated any such fishing rights as merely flowing from the *Treaty of Waitangi* and as not being enforceable at common law (at 922). Hence, in light of more recent cases such as *Te Weehi's* case note 69 *supra* and the subsequent recognition of Aboriginal title at common law in Australia and Canada this result needs to be treated with caution. See also *Keepa v Inspector of Fisheries* [1965] NZLR 322 at 326-8 (SC); *Green v Ministry of Agriculture and Fisheries* note 73 *supra* at 414.

exist independently of 'ownership of the soil'.[184] This issue has been considered by New Zealand courts in terms of 'territorial' and 'non-territorial' aboriginal rights. In *Te Weehi's* case the Maori right was classified as 'non-territorial'.[185] McHugh, whose work was referred to with approval by Williamson J,[186] argues that all Maori fishing rights were originally 'territorial' but that once ownership of the land was transferred the fishing right became a 'non-territorial right'. A 'non-territorial' fishing right is neither dependent on ownership of the seabed nor the foreshore and is generally a non-exclusive right.[187] Whatever the appropriateness of this classification in New Zealand, it does not appear to be a useful classification in Australia. As previously discussed, at least some Aboriginal peoples exercised non-exclusive fishing rights in areas over which they claimed no ownership of land.[188] Similarly, to say that a 'territorial fishing' right changes to a 'non-territorial' right when ownership of the soil or adjacent foreshore is transferred may be accurate in some circumstances, but not in others. Some Aboriginal fishing rights (such as in 'open' waters)[189] may never have been dependent upon ownership of the underlying seabed or adjacent foreshore. Similarly, where a fishing right was an exclusive right of a tribe, the mere fact that ownership of the underlying seabed is transferred does not necessarily mean that the exclusive right becomes non-exclusive. If the Aboriginal fishing right survives the transfer of ownership of the soil,[190] it may well remain an exclusive right to fish in that area. Hence, a broad classification of rights into 'territorial' and 'non-territorial' rights does not appear to be appropriate for Australian circumstances and does not accurately reflect how the indigenous people viewed their rights.

The nature and content of Aboriginal title or Aboriginal fishing rights are to be determined according to the customs and laws of the relevant Aboriginal group.[191] Rather than classifying the title as 'territorial' or 'non-territorial', the preferable approach is to consider the nature of the right and then see if the relevant executive or legislative act interferes with that right.

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184 Notes 77-83 *supra* and accompanying text.

185 *Te Weehi's* case note 69 *supra* at 692.

186 *Ibid* at 691-2.

187 PG McHugh (1991) note 68 *supra* pp 138-40; PG McHugh (1988) note 69 *supra* at 14-9. See also New Zealand Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai-22, 1988) pp 207-8.

188 See notes 113-115 *supra* and accompanying text.

189 *Id.*

190 See notes 76-83 *supra* and accompanying text.

191 See notes 34, 88 *supra* and accompanying text.

E. REGULATION OF SURVIVING ABORIGINAL FISHING AND HUNTING RIGHTS

There is a strong argument based on the High Court's reasoning in *Mabo* that traditional Aboriginal fishing and hunting rights at common law have not been extinguished by legislation. However, are those rights subject to existing fisheries and hunting legislation?

In the same manner that the legislature has power to extinguish Aboriginal rights, it has the power to regulate the exercise of those rights. As previously discussed, legislation will only extinguish Aboriginal fishing and hunting rights if it contains a plain and clear intention to do so.[192] The same principles logically apply in determining whether a regulatory regime imposed by legislation is intended to apply to Aboriginal rights. It may be surmised that the greater the degree to which legislation impinges on the exercise of Aboriginal rights, the clearer the intent will need to be in order for the legislation to apply to those rights. For example, legislation which imposes a minimum size of particular fish that may be caught or a maximum net length may infringe less on customary Aboriginal rights than legislation which limits a fishing or hunting season to only a few weeks a year. The former permits Aboriginal persons to still obtain food (albeit under some restrictions) while the latter effectively deprives them of their ability to seek sustenance for much of the year.[193] The greater the interference with common law Aboriginal rights, the greater the presumption that the legislation is not intended to apply to those rights in the absence of clear and unambiguous words.

The Canadian cases concerning regulation of aboriginal fishing and hunting rights have taken a different approach. They have held that general fishing and hunting regulations apply to common law aboriginal hunting and fishing rights, in the absence of jurisdictional or constitutional restraints.[194] However, the early Canadian precedents were decided prior to the recognition of aboriginal title at

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192 See notes 134-136 *supra* and accompanying text.

193 Similarly, it has been suggested that a requirement to keep records of fish caught (which may be essential for the government to allocate quotas to non-Aboriginal fishermen at an appropriate level to conserve the resource) may not be inconsistent with the Aboriginal right: *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* at 265; cf *R v Nikal* note 66 *supra* at 255. Nor is there a conflict between a right to hunt and a prohibition against doing so in a dangerous manner: *Myran v R* [1976] 2 SCR 137, 23 CCC (2d) 73, 58 DLR (3d) 1. A prohibition against taking shellfish from a contaminated area is a reasonable restraint on the right in order to protect public health: *R v Hopkins* [1993] 1 CNLR 123 (BC SC).

194 *R v Sikyea* [1964] 2 CCC 325, 46 WWR 65 (NWT CA) affirmed [1964] 2 SCR 642, [1965] 2 CCC 129, 50 DLR (2d) 80; *R v George* [1966] SCR 267, [1966] 3 CCC 137, 55 DLR (2d) 386; *Daniels v White* [1968] SCR 517, [1969] 1 CCC (2d) 99, 2 DLR (3d) 1; *R v Derriksan* (1977) 71 DLR (3d) 159, 31 CCC (2d) 575*n* (SCC) affirming (1975) 24 CCC (2d) 101, 60 DLR (3d) 140 (BCCA); *Kruger and Manuel v The Queen* [1978] 1 SCR 104, 34 CCC (2d) 377, 75 DLR (3d) 434 (SCC); *Jack v The Queen* [1980] 1 SCR 294, 48 CCC (2d) 246, 100 DLR (3d) 193; *R v Sutherland* [1980] 2 SCR 451, 53 CCC (2d) 289, 113 DLR (3d) 374; *Dick v R* [1985] 2 SCR 309, 22 CCC (3d) 129, 23 DLR (4th) 44 .

common law in Canada. Therefore, in holding that aboriginal rights preserved under treaty or proclamation to fish and hunt were subject to general fishing and hunting regulations, the courts did not need to address the presumption that legislation is to be construed as not derogating from proprietary rights in the absence of clear intent to do so.[195] Given the enactment of s 35(1) of the *Constitution Act* 1982, which gives constitutional protection to aboriginal rights, the practical need to reconsider the approach of the earlier cases has largely disappeared. The most recent Supreme Court decision in relation to fishing and hunting rights was *R v Sparrow*,[196] which was also the first occasion on which the Court considered s 35(1). In *R v Sparrow* the Court was not required to consider whether a plain and clear intent was necessary for the regulations to apply to aboriginal rights, as the particular regulations were specifically directed to aboriginal fishing.[197] Therefore, while the Court emphasised the need for a 'clear and plain' legislative intention to *extinguish* aboriginal rights, it did not articulate whether the same standard was required in order to *regulate* those rights.[198]

To summarise, the Crown has power to regulate common law Aboriginal fishing, hunting and gathering rights. However, any legislation or regulations must reveal 'a clear and plain intention' to regulate those rights. Otherwise principles of statutory construction will lead to the presumption that the relevant provisions are not intended to apply to Aborigines exercising a traditional fishing, hunting or gathering right recognised at common law.

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

196 Note 54 *supra*.

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

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

VI. A RIGHT TO FISH OR HUNT FOR COMMERCIAL PURPOSES?

A. INTRODUCTION

Fishing, hunting and gathering were essential to the existence of Aboriginal communities. They formed the livelihood of members of the community. In contemporary society the issue arises as to whether common law Aboriginal fishing, hunting and gathering rights permit the commercial exploitation of those rights.

The nature of the adaptation of Aboriginal communities to present day forces, including a cash based market economy has been the subject of numerous studies.[199] While hunting and fishing have reduced in significance to many communities, they still form an important part of community life, both in cultural and economic terms.[200] However, even in what may loosely be referred to as more 'traditional' Aboriginal communities, the market economy plays a significant role and cash is needed to buy essentials of contemporary life (such as petrol, medical supplies, clothing and electricity). Clearly the exploitation of natural resources, in particular coastal fisheries, has considerable potential to provide not only food for the community but also a means to acquire income to buy other essential goods and services. The recognition by the High Court that Aboriginal communities can change and adapt to changing conditions, without losing their common law Aboriginal title, has already been referred to.[201] However, a question remains as to whether the commercial exploitation of natural resources is encompassed within common law Aboriginal rights.

The statutory regime in Australia has generally limited statutory fishing, hunting and gathering rights of Aboriginal people to non-commercial purposes.[202] However, as the Supreme Court of Canada emphasised in *R v Sparrow*, neither statutory provisions nor historical policy on the part of the Crown are capable of delineating the content of the aboriginal right.[203] The courts in other common law countries have experienced considerable difficulty in addressing this issue of whether aboriginal rights include a commercial component. The views may generally be broken into two categories: those which see aboriginal rights 'frozen' as at the time of European settlement and those which consider that aboriginal rights are capable of evolving over time to respond to contemporary needs.

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199 See the studies cited in ALRC note 1 *supra* vol 2 at [885], [887].

200 Note 1 *supra*.

201 See notes 99-102 *supra* and accompanying text.

202 See Part II *supra*. However, commercial Aboriginal community fishing licences are issued in Queensland: see note 18 *supra*.

203 Note 54 *supra* at 1099, 1011.

The approaches of courts in Canada, New Zealand and the United States are briefly summarised below, before returning to consider the appropriate framework to address the issue.

B. OVERSEAS APPROACHES TO COMMERCIAL FISHING RIGHTS

(i) United States

Aboriginal rights, conferred by treaty, to fishing and hunting include a right to fish and hunt for commercial purposes in the United States. Indian tribes (particularly in the north-west) had already established a commercial trade in fisheries or in animal furs at the time treaties were entered into. Therefore, treaties which reserved to the Indians the "right of taking fish...in common with all other citizens" were to be interpreted as permitting the Indians to pursue their existing commercial activities in relation to hunting and fishing.[204] Though the extent of commercial exploitation has changed considerably with modern fishing techniques it has never seriously been questioned that these modern techniques fall within the original concept of commercial exploitation of the resources.[205] However, the United States experience is of limited assistance in Australia due to the different source of the right (stemming from treaty rather than common law Aboriginal title) and the differing historical background.[206]

(ii) Canada

Canadian jurisprudence in relation to aboriginal title is closer to the approach taken by the High Court of Australia. However, courts in Canada have taken divergent views as to whether aboriginal rights at common law or under treaty include a commercial component.

In *Attorney-General for Ontario v Bear Island Foundation*, Steele J was of the view that the aboriginal right included the right to "hunt all animals for food, clothing, personal use and adornment, to exclusively trap fur bearers...*and to sell the furs* ...".[207] However, in *Delgamuukw v British Columbia* the trial court disagreed with Steele J that the sale of furs was ever an 'aboriginal' activity.[208] The Court characterised aboriginal rights as "all those sustenance practices and the gathering of all those products of the land and waters of the territory...which they

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204 See note 263 *infra*.

205 See note 105 *supra*.

206 In particular, Indian tribes have historically been regarded as domestic dependent nations with inherent powers of self-government, subject to the ability of Congress to change their status or abrogate their rights: *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1; *Worcester v Georgia* (1832) 31 US (6 Pet) 515 at 559.

207 (1985) 15 DLR (4th) 321, 49 OR (2d) 353 (Ont. HCJ) at 360 (emphasis added).

208 Note 148 *supra* at 458.

practised and used before exposure to European civilization...for subsistence of survival, including wood, food and clothing, and for their culture or ornamentation - in short, what their ancestors obtained from the land and waters for their aboriginal life".[209] Although the Court accepted there had been bartering of products, it considered that products would be exchanged for other "sustenance products likewise obtained by aboriginal practices"[210] and hence was of the view that Aboriginal rights do not include present day commercial practices.[211]

The judgment in *Delgamuukw* appeared to be influenced by the consequences of holding aboriginal fishing rights included commercial fishing in light of the priority that would be accorded to these rights by virtue of the constitutional recognition and affirmation of such rights in Canada.[212] These considerations do not apply in Australia, as Aboriginal rights are not constitutionally entrenched and any Aboriginal commercial fishing right would be subject to the legislative powers of parliament.

In contrast, Selbie J in *R v Vanderpeet*[213] criticised the trial judge for using contemporary tests for 'marketing' to determine whether the aboriginal right at the time of settlement included a component of trade.[214] As to distinctions drawn between the barter, sale or exchange of goods, he stated:

> In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes - the words "sell", "barter", "exchange", "share", are but variations on the theme of "disposing". It defies common sense to think that if the aboriginal did not want the fish for himself there would be some stricture against him disposing of it by some other means to his advantage.[215]

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209 *Id.*

210 *Ibid* at 459.

211 *Ibid* at 439, 459-60, 462. These observations were strictly obiter dicta, as the court held that the aboriginal rights had been extinguished.

212 *Ibid* at 459. However, whether the same priority would be accorded to a commercial aboriginal fishing right under s 35(1) of *Constitution Act* 1982 as has been given to aboriginal food and ceremonial fishing rights is a matter for conjecture. While the aboriginal food fishery is to be given absolute priority (after conservation measures) over non-aboriginal commercial and sports fishing (see *R v Sparrow* note 54 *supra*), it may well be that the constitutional protection of aboriginal commercial fishing rights would be limited to a reasonable share of the commercial fishery: see in this regard interpretation of treaties in the United States discussed at notes 264-74 *infra* and accompanying text.

213 (1991) 58 BCLR (2d) 392, [1991] 3 CNLR 161 (SC) reversing [1991] 3 CNLR 155 (Prov Ct).

214 *Ibid* at 397.

215 *Id.*

He then considered the extent to which the aboriginal right could evolve over time and whether it could include a modern day commercial component. He held that it could, observing:

> We are speaking of an aboriginal "right" existing in antiquity which should not be restrictively interpreted by to-days standards. I am satisfied that when the first Indian caught the first salmon he had the "right" to do anything he wanted with it eat it, trade it for deer meat, throw it back or keep it against a hungrier time... With the white-man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must needs change with them - and he did. A money economy eventually developed and he adjusted to that also - he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such... The Indian right to trade his fish is not frozen in time...he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money.[216]

The Provincial Court in *R v Dick*[217] subsequently disagreed with Justice Selbie's observations about the nature of the right, characterising the right as "an aboriginal right to take salmon for food, ceremonial, and societal purposes only". The Court focused on the particular fishing practices of the tribe prior to European contact, referring to the methods of fishing and particular species of fish caught.[218] The Court accepted there was occasional bartering of goods (including food) between aboriginal peoples but considered that barter was 'incidental' to the Lekwiltok's existence and not the focal point of their attempt to earn a livelihood.[219] The Court doubted that an aboriginal barter in salmon could be classified as commerce, but was of the view that even if it could it did not give rise to a right to conduct a modern commercial fishery.[220]

The Supreme Court of Canada has yet to decide whether aboriginal fishing or hunting rights at common law may be exercised for commercial purposes. In *R v Sparrow* the Supreme Court characterised the right as an aboriginal right "to fish for food and social and ceremonial purposes".[221] As the issue as to whether the aboriginal right included fishing for commercial or livelihood purposes had not been raised in the lower courts, it declined to consider whether the right extended

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216 *Ibid* at 397-8. See also *British Columbia (Attorney General) v Wale* (1987) 9 BCLR (2d) 333 at 336-7, [1987] 2 WWR 231 (CA) affirmed 53 BCLR. (2d) 189 (SCC.) where Seaton JA (dissenting) stated that it was open to the defendants to argue that they had an aboriginal right to a commercial fishery; *R v Jackson* [1992] 4 CNLR 121 (Ont CJ).

217 Note 175 *supra*.

218 *Ibid* at 13, 18.

219 *Ibid* at 13.

220 *Ibid* at 14-5. In any event, it held that such a right had been extinguished (see note 175 *supra*).

221 Note 54 *supra* at 1099-1101.

that far.[222] Nevertheless, it has given some indications that the right may extend to a commercial fishery. For example, in *R v Sparrow* the Court emphasised that prior legislation and government policies were incapable of delineating the right or describing the content of the aboriginal right.[223] Hence, government regulations restricting the right of aborigines to fish "for food purposes" could neither define the right nor, in the absence of a clear intention to extinguish the aboriginal right, extinguish a wider right.[224] In *Simon v R* the Supreme Court of Canada suggested that a treaty in 1752 which preserved to the Micmac "free liberty of Hunting & Fishing as usual" did not limit the hunting to non-commercial purposes.[225]

A third possibility was broached by the Supreme Court in *R v Horseman*[226] where the dissenting judges characterised the right as one to hunt for subsistence which, in contemporary society, included the right to sell or exchange the products of the hunt in order to support themselves and their families, but not for commercial profit. The case concerned the interpretation of *Treaty 8* in 1899 which had guaranteed the Indians the "right to pursue their *usual vocations of hunting, trapping and fishing*...subject to such regulations as may from time to time be made" and of s 12 of the *Natural Resources Transfer Agreement* 1930 (Alberta) which provided that "laws respecting game in force in the Province from time to time shall apply to the Indians...provided, however, that the said Indians shall have the right...of hunting, trapping and fishing game and fish *for food*". The difference between the majority and dissenting judges was that the former thought that s 12 restricted the rights previously guaranteed to the Indians under the treaty. The effect of the section need not concern us. However, the observations of the Court on the nature of the Indians' rights are notable.

Justice Wilson (Dickson CJ concurring and L'Heureux-Dube dissenting) stated:

> In his Commentary on Economic History of Treaty 8 Area (unpublished; June 13, 1985, at p 8), Professor Ray warns of the dangers involved in trying to understand the hunting practices of Indians in the Treaty 8 area by drawing neat distinctions between hunting for domestic use and hunting for commercial purposes... 'differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact'[227]

and concluded:

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222 *Ibid* at 1101.

223 *Id.*

224 *Ibid* at 1099, 1101.

225 Note 108 *supra* at 403 (DLR). However, this interpretation was influenced by other provisions in the Treaty which contemplated commercial activities.

226 [1990] 1 SCR 901, 55 CCC (3d) 353, [1990] 4 WWR 97 affirming (1987) 53 Alta LR (2d) 146; [1987] 5 WWR 454.

227 *Ibid* at 908 (SCR).

> In my view, it is in light of this historical context, one which did not, from the Indians' perspective, allow for simple distinctions between hunting for domestic use and hunting for commercial purposes...that one must understand the provision of Treaty 8... [228]

Having referred to the purpose of the Treaty in preserving the Indians' traditional way of life, she stated:

> But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the *purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families*, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course be a question of fact in each case *whether a sale is made for purposes of sustenance or for purely commercial profit*.[229]

Turning to the facts of the case, she adopted the trial judge's characterisation of the defendant's activity:

> I find that Mr. Horseman sold the grizzly bear hide in a manner, and for a purpose consistent with the tradition of his ancestors, that is 'for the purposes of subsistence and exchange'. I find that Mr. Horseman did not engage in a commercial transaction, that is one having profit as a primary aim.[230]

The majority judges accepted the conclusions of Professor Ray cited above that it was unrealistic from the Indians' point of view to differentiate domestic hunting from commercial hunting. While holding that the Indians' rights had been restricted by s 12 of the *Transfer Agreement*, they were "in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for the purpose of commerce".[231] Hence, one can surmise that since the content of the aboriginal right at common law is generally the same as that preserved under treaty,[232] the extent of the aboriginal right at common law to hunt and fish includes the right to hunt or fish for commercial purposes.

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228 *Ibid* at 912.

229 *Ibid* at 919 (emphasis added). See also *R v Jones* note 81 *supra* where the Crown conceded and the Court accepted, that the defendants had an aboriginal right to fish for commercial purposes which has not been extinguished. The aboriginal right was characterised as "the Band's continuing communal right to continue deriving 'sustenance' from the fishery resource which has always been an essential part of the community's economic base".

230 *Ibid* at 922-3.

231 *Ibid* at 928-9. See also *R v Potts* [1992] 2 CNLR 142 at 156-7 (Alta Prov Ct); *R v Penasse* (1971) 8 CCC (2d) 569 .

232 See note 48 *supra*.

Notwithstanding the uncertainty as to whether an aboriginal right at common law includes a right to commercially develop the fishery, the Federal Government changed its policy in 1992 in the wake of the Supreme Court's decision in *R v Sparrow* to allow aboriginal communities a greater share of the commercial fishery.[233]

(iii) New Zealand

In New Zealand, divergent opinions have been expressed as to whether the Maori fishing right at common law includes a right to fish for commercial purposes. In *Ministry of Agriculture and Fisheries v Love*,[234] Taylor DJ held that the provisions of the *Fisheries (Commercial Fishing) Regulations* were not applicable to the defendant by virtue of s 88(2) *Fisheries Act* 1983 (NZ) which provided that nothing in the Act affected "any Maori fishing rights". In doing so he accepted that the Maori fishing rights included a right to a commercial fishery. He stated:

> There was almost certainly some bartering between different tribes. It is clear on the evidence that the local tribes jealously guarded their own fishing rights and endeavoured to exclude tribes who had no rights to the particular area, but I imagine that even between tribes there were exchanges of fish for other articles, as would happen in any society. I find that clearly there were inherent in Maoris, in accordance with Maori custom, commercial fishing rights, that is rights of trading with fish. It is contrary to the traditions of any people to suggest that there was no use of the fish as a commercial object in the ordinary sense of that word.[235]

Similarly in *Ngai Tahu Maori Trust Board v Attorney-General*, Greig J stated that:

> I am satisfied that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole coast of New Zealand, at least where they were living. That was divided into zones under the control and authority of the hapu and the tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries. Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of the local dwellers.[236]

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233 See note 307 *infra*.

234 Note 73 *supra*.

235 *Ibid* at 373-4.

236 (unreported, HC, Greig J, 2 November 1987) at 6, reproduced in Appendix F(6) of New Zealand Law Commission note 67 *supra*. See also Waitangi Tribunal *Muriwhenua Fishing Report* (Wai-22, June 1988). Having surveyed the extent of Maori fishing rights prior to 1840, the Tribunal found that those rights had been developed on commercial lines. The Tribunal considered that Art 2 of the *Treaty of Waitangi* guaranteed protection of fishing activities and for their development in both customary and a modern manner. The Crown, by permitting commercial fishing without obtaining the consent of the Muriwhenua iwi had breached that guarantee (p 239). The quota management system of fisheries under the *Fisheries Amendment Act* 1986 (NZ), as implemented by the government, was inconsistent with the Treaty as it had the effect of allocating to

A contrary view was taken in *Ministry of Agriculture and Fisheries v Campbell*, where the Court considered "the exercise of a traditional Maori right did not involve a taking for commercial purposes" since the "concept of a commercial purpose...is a European concept [that] was not known to the Maoris of old".[237] The Court accepted that a Maori practice of exchanging gifts (including fish) existed prior to 1840, but was "unable to equate this concept with what is understood in today's thinking to be a dealing in or exploitation of fish for commercial purposes".[238]

Again, notwithstanding these divergent views, the government implicitly accepted that the Maori retained a commercially fishing right, by reaching a settlement in 1992 with the Maori in relation to the extent of those rights.[239]

C. FRAMEWORK FOR ASSESSING ABORIGINAL CLAIMS TO COMMERCIAL FISHERIES

As can be seen from the above cases, courts have had difficulty in addressing the question of whether aboriginal peoples are entitled to commercially exploit traditional fishing and hunting rights. Further, the cases have failed to articulate the means by which the issue should be addressed. This part suggests a framework for approaching the issue.

The manner of phrasing the test is important. If aboriginal peoples are required to have participated in a cash economy prior to European settlement then, by definition, they will be prevented from utilising their traditional right for the purpose of participating in the present day cash economy. Some judges have grasped at the concept of barter in pre-contact societies to see if this can be extrapolated to a modern day market economy. However, as the divergent results

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non-Maori the full, exclusive and undisturbed possession of the property in fishing. The interim report did not make any final recommendations as Maori and the government were in the process of negotiating changes to the quota management system. See further notes 308-21 *infra* and accompanying text.

237 Note 73 *supra* at 274.

238 *Id.* Strictly these views were obiter dicta, as the evidence in the case of the present day customs of the particular tribe established that either fishing for commercial purposes was prohibited or was only permissible with prior consent of the elders of the tribe, which the defendants had not obtained: at 257-9, 271. See also *Ministry of Agriculture and Fisheries v Hakaria* note 72 *supra* where the Court considered that taking toheroa for sale in public bars would be "an offence against strong traditional Maori values" and could not be regarded as the exercise of a traditional Maori fishing right (at 294), but nevertheless approved the reasoning of Taylor DJ in *Ministry of Agriculture and Fisheries v Love* note 73 *supra* (at 296), presumably on the basis that in the circumstances of that case the court was satisfied that the commercial fishing was done in accordance with the customary law of the local Maori people.

239 See notes 322-3 *infra* and accompanying text.

of taking such an approach may indicate,[240] this is neither determinative nor has any explanation been proffered as to why this is the relevant test.

Starting from the basic propositions that the nature and content of the right is to be determined in accordance with the customs of the particular aboriginal peoples and that they may exercise that right in a contemporary way,[241] the crucial question is how the original right is characterised. The two most prevalent methods of characterising the right have been to either characterise it as a subsistence right or to look at the manner in which the right was exercised at the time of European settlement.

(i) Characterisation as a subsistence right

A categorisation of Aboriginal fishing, hunting and gathering rights which limits them to subsistence activities, rather than as a general right to utilise the natural resources of their traditional lands in a manner to sustain their community, invokes the same stereotype of Aborigines being 'primitive' people being somehow on a different level to European society that characterised Aboriginal cases during the latter part of the 19th century and the early part of this century.[242] That characterisation was unequivocally rejected by the High Court of Australia in *Mabo*.[243] The Court acknowledged that Aboriginal peoples at the time of European settlement had their own social and community structures.[244] As previously discussed, the Court also stated that the exercise of that right could change in accordance with changes to the customs and traditions of the particular Aboriginal community.[245] Accordingly, Aboriginal rights of fishing, hunting and gathering are capable of modernisation. While the manner of exercising those rights at the time of European settlement may have been directly for sustenance,

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240 The courts held that a practice of bartering or exchanging goods could not be relied upon to found a modern Aboriginal commercial fishing right in *R v Dick* note 175 *supra* at 14-15; *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* at 274; *Delgamuukw v British Columbia* note 148 *supra* at 459-62; but that it could in *Ministry of Agriculture and Fisheries v Love* note 73 *supra* at 373-4; *R v Vanderpeet* note 213 *supra* at 397-8.

241 See notes 34, 88, 99-109 *supra* and accompanying text.

242 For example, see Lord Sumner's statement in *In re Southern Rhodesia* [1919] AC 211 at 233 (PC) that certain indigenous peoples were "so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society".

243 Note 2 *supra* at 41-2 per Brennan J. See also the similar comments in *R v Syliboy* [1929] 1 DLR 307 (of a "civilized nation first discovering a country of uncivilized people or savages") which were criticised by Dickson CJ who stated "the language used by Patterson J, illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law": *Simon v R* note 48 *supra* at 399.

244 Note 2 *supra* at 18, 33 per Brennan J, at 99-100, 115 per Deane and Gaudron JJ, at 190-1 per Toohey J. See also *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141 at 267-8 (NT SC).

245 See notes 99-102 *supra* and accompanying text.

today that same right may be exercised in the manner whereby available surplus fish are bartered (or sold in today's market economy) for other daily needs - for example, to provide shelter, clothes and other essentials of contemporary life.[246] It has been suggested that the concept of 'commercial' activities was unknown to Aboriginal communities.[247] However, the concept of providing for oneself and one's family is known in all societies. Aboriginal people shared and exchanged goods amongst themselves and, in some cases, bartered with neighbouring tribes. In the present day, the concept of utilising the resources of the land in order to provide day to day living items for one's family is unchanged from that before European settlement. Only the medium of the exchange, through a cash economy, has changed.

Even this approach is a fairly narrow view of the content of the right. It is arguable that fishing, hunting and gathering formed the livelihood of Aboriginal communities and the present day exercise of that right should permit it to be exercised as their livelihood in a contemporary society. In other words, they should be entitled to utilise their traditional rights of fishing and hunting to earn a livelihood by making a commercial profit out of the enjoyment of those rights.

This is not to say that there may not be limits on the right. For example, the right may not extend to harvesting every last fish or animal.[248] Nor would a right to utilise the natural resources of, say, their traditional lands permit a community to pollute rivers or detrimentally affect neighbouring land owners. To do so would not be in accordance with Aboriginal concepts of responsibility to the land and its living resources. Where the line is to be drawn is not clear. However, that there may be some uncertainty does not justify an artificially narrow interpretation of the right.

(ii) Characterisation of the right by observed manner of exercise of the right

Some cases have attempted to characterise the relevant Aboriginal right by reference to the activities of Aboriginal peoples at the time of European settlement. However, attempting to define the content of the traditional right by the observed manner in which the right was exercised is clearly erroneous.

A simple example makes this clear. Take a farming family which for generations has grown wheat on the family farm. The family holds a fee simple estate in the land. An observer who attempted to define the rights of the family over that land may well say that they comprise of a right to grow and harvest wheat on the land. The farmer then decides to graze cattle on part of the land. Is this

246 Such a characterisation was suggested by Dickson CJ, Wilson and L'Heureux-Dube (dissenting) in *R v Horseman* discussed at notes 226-9 *supra*.

247 *Ministry of Agriculture and Fisheries v Campbell* note 73 *supra* at 274; *Delgamuukw v British Columbia* note 148 *supra* at 459 (barter limited to other sustenance products obtained by aboriginal practices).

248 See *Puyallup Tribe v Washington Department of Game (No 2)* (1973) 414 US 44 at 49.

allowed? Under the initial definition of the right in the land as "a right to grow and harvest wheat" the apparently new use of grazing cattle would not be permissible. Had the observer categorised the right in slightly broader terms, for example "to use the land for farming purposes", the new use would be permitted. However, even on this broader characterisation of the right the building of residential dwellings on the land and leasing them out to members of the public would not be permitted. The dichotomy between the manner in which a right is traditionally exercised and the content of that right is clear. The concept of a fee simple title in land cannot be understood by looking at the manner in which the holders of that right choose to enjoy it. Similarly, the content of a particular Aboriginal right cannot be understood by simply looking at the manner in which that right is exercised.[249]

If an Aboriginal elder at the time of European settlement had been asked what the traditional rights of the particular Aboriginal community were, it is highly unlikely that he or she would have responded with a definition of say, 20 or so, separate rights (eg to catch as many turtles, barramundi, goanna and bush wallabies as we need to eat; to cut down as many trees as we need for fire or building materials; to use yadinin trees to obtain cream to treat sores; to use pandanus leaves to make baskets; etc). Rather, it is likely that the elder would have responded by indicating the boundaries of land, rivers and seas that belonged to the community and by saying that the community was entitled to use the natural resources on that land and in those rivers and seas to provide for the community and its future generations.[250] It is also likely that the elder would have described the obligations of the community to the land - to care for it and to respect the life and spirits within it and to fulfil its spiritual obligations to the land and the community's ancestors. In this sense, the rights to utilise the land and its resources were not absolute rights in a European sense, but were accompanied by corresponding responsibilities.

A very different approach to defining the content of aboriginal rights was adopted by Steele J in *Attorney-General for Ontario v Bear Island Foundation*.[251] He rejected the argument that the *Royal Proclamation* of 1763[252] gave aborigines "the right to use the lands for any purpose that they may choose over the

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249 This is particularly so as Aboriginal 'rights' are often intertwined with corresponding duties and obligations which may not be at all obvious from observing the manner in which the right is exercised.

250 NM Williams note 93 *supra* p 75 writes: "The Yolngu view of responsibility for land includes control of its resources Like Aborigines in all other parts of Australia, they regarded their land as rich in all the resources on which their economy is based, and like other Aborigines, Yolngu people are likely to begin a conversation about their own land with an enthusiastic recitation of the bountifulness of its natural resources. They may even add that their land is richer than anybody else's".

251 Note 207 *supra*.

252 RSC 1980, App II, No 1.

succeeding centuries", stating that the "essence of aboriginal rights is the right of Indians to continue to live on their lands as their forefathers lived".[253] He continued:

> while I accept the view that Indians are as adaptable as anyone else, I do not accept that aboriginal rights include any use whatsoever, including all present uses. I am of the opinion that aboriginal rights are limited by the wording of the *Royal Proclamation* and by decided court cases to the uses to which the Indians put the lands in 1763.[254]

Justice Steele proceeded to articulate a detailed list of the particular uses of land and the resources on it as utilised by the aborigines in 1763 which in his view comprised the defendants' aboriginal rights.[255] This very narrow approach to defining Aboriginal rights confuses the manner in which an aboriginal right is exercised with the content of that right.

(iii) An expansive notion of Aboriginal rights

That many Aboriginal communities may have hunted and fished primarily for sustenance at the time of European settlement does not mean their rights in respect of hunting and fishing were so confined. Rather, the better view is that the manner in which they exercised their rights was in response to their needs and surroundings. Aboriginal peoples were highly adaptable to their surroundings. The natural resources of their lands would be used in whatever manner was appropriate to their changing needs and surroundings. Aboriginal peoples on the northern coastal fringe of Australia adapted to their changing surroundings by engaging in trade with neighbouring Melanesian peoples and early European explorers when the opportunities arose.[256] In the present day the adaptation may be in the form of selling fish or other products in the market economy. Anthropological evidence supports the contention that traditional Aboriginal rights to land included the right to exploit the economic value of the resources on that land. For example, Bell writes:

> Access to the country of one's forebears provided substance for the Dreamtime experience and an identity based on the continuity of life and values which were constantly reaffirmed in ritual and in use of the land. Economic exploitation of the land to support material needs, and its spiritual maintenance were not separate

253 Note 207 *supra* at 354-5.

254 *Ibid* at 359.

255 *Ibid* at 360. These aspects of the case were strictly obiter dicta, as Steele J held that any aboriginal rights were subsequently extinguished by the *Robinson-Huron Treaty* of 1850. The Ontario Court of Appeal and the Supreme Court of Canada upheld the judgment of Steele J, but the appeals were limited to the issue of extinguishment.

256 See note 259 *infra*.

> aspects of people's relations to country, but rather each validated and underwrote the other.[257]

Any attempt to ascertain the content of an Aboriginal right must seek to understand the relationship of Aboriginal peoples to their land and the natural resources on that land. Focusing on the particular activities carried out at the time of European settlement is likely to miss the underlying Aboriginal concepts which give form to otherwise hollow rights. Further, it is important not to attempt to define those rights too rigidly. Aboriginal title to land comprises a bundle of rights and in defining them one must be careful not to inadvertently limit those rights by applying preconceived European concepts.

While there may be some hesitancy in adopting a broad approach to determining the content of Aboriginal rights, two matters should be remembered. Firstly, Aboriginal rights cannot generally be alienated.[258] Hence an Aboriginal right to fish for commercial purposes at common law cannot be transferred to Europeans; it must be used for the benefit of the Aboriginal community. Secondly, no matter how narrow or wide a definition is given to the content of those rights, the rights are subject to the legislative power of the government to regulate (or extinguish) them.

A definite answer as to whether the common law recognises a right of Aboriginal peoples to utilise their traditional fishing, hunting or gathering rights for commercial gain cannot be given. If the content of Aboriginal rights is determined by reference to pre-colonisation practices then some Aboriginal communities may be able to establish the requisite right. To do this they would need to establish that they bartered goods with other tribes and the modern day exercise of this right includes commercial trade or, alternatively, that they had already engaged in trade with passing European explorers or neighbouring Melanesian peoples.[259] However, the preferable approach is that Aboriginal rights should not be determined solely by the observed manner of exercise of the right at the time of European settlement, but rather by reference to the underlying Aboriginal concepts of their relationship to the land and its resources. These concepts may well permit the exploitation of the natural resources of the land or seas to provide for the needs

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257 D Bell *Daughters of the Dreaming* (1983) pp 47-8. See also JC Altman *Hunter-Gatherers and the State: The Economic Anthropology of the Gunwinggu of North Australia* (1982).

258 Note 122 *supra*.

259 For example, there were well established extensive trade routes across Queensland in pre-European contact times: R Fitzgerald *A History of Queensland: From the Dreaming to 1915* (1982) p 17. In the Torres Strait, Islanders had traded amongst themselves and with neighbouring peoples from Papua New Guinea over a long period of time and, in the years immediately prior to annexation of certain of islands by Queensland, they participated in a commercial pearling and beche-de-mer industry and made occasional exchanges with passing Europeans of food for iron: see J Beckett note 113 *supra* pp 5, 29, 32; J Singe *The Torres Strait: People and History* (1979) pp 160-3.

of the Aboriginal community. If so, the means of exercising that right in contemporary Australian society could include the commercial development of those natural resources.

VII. ALLOCATION OF FISHERIES AND NATURAL RESOURCES BETWEEN ABORIGINAL AND NON-ABORIGINAL USERS

Assuming an Aboriginal fishing right exists at common law and that such a right may extend to the development of an Aboriginal commercial fishery, how is the right to be balanced against other competing interests of commercial and sport fishermen and conservation needs? This Part contains a brief survey of the different legal mechanisms in Canada, New Zealand and the United States to address allocation issues.[260] While the prior Parts of this article have focussed on Aboriginal fishing rights at common law, this Part looks at allocation issues regardless of whether the source of the Aboriginal right is treaty, proclamation or common law as the underlying issues are substantially the same. While the conflict has largely arisen in respect of fisheries, the same issue arises in relation to Aboriginal rights to other natural resources.

A. OVERSEAS MODELS

(i) United States

There was protracted litigation in the Pacific northwest in the 1970s as to the extent of Indian fishing rights. The cases involved anadromous fish (primarily salmon and steelhead trout) whose life cycle begins by hatching in rivers, before migrating to the oceans and their subsequent journey to their original rivers to spawn. Allocation issues are particularly acute with anadromous fish since overfishing in one part of the migratory path can irreparably deplete the whole fisheries stock.

The importance of fish to the tribes in the Pacific northwest has long been recognised. In 1905 the United States Supreme Court observed that fish "were not much less necessary to the existence of the Indians than the atmosphere they breathed".[261] The treaties in the northwest generally preserved to the Indians "the

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260 For an overview of allocation issues see: E Pinkerton "Introduction: Attaining Better Fisheries Management through Co-Management: Prospects, Problems and Propositions" in E Pinkerton (ed) *Co-operative Management of Local Fisheries* (1989); F Cassidy, N Dale *After Native Claims? - The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia* (1988) pp 36-85.

261 *United States v Winans* (1905) 198 US 371 at 381. For an overview of aboriginal fishing and hunting rights in the United States, see GC Coggins, W Modrcin "Native American Indians and Federal Wildlife Law" (1979) 31 *Stanford Law Review* 375; L Reynolds "Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption" (1984) 62 *North Carolina Law Review* 743; DH Getches, CF Wilkinson *Cases*

right of taking fish, at all usual and accustomed grounds and stations...in common with all citizens of the Territory".[262] As Indians were engaged in commercial fishing and trade with the European settlers at the time the treaties were entered into there has never been any doubt that the fishing rights preserved by treaty included a commercial component.[263] However, the portion of the fishery that the Indians were entitled to has been the subject of much controversy. In the 'Boldt' series of cases,[264] the courts considered that the Indians were entitled to more than "merely the chance, shared with millions of other citizens, occasionally to dip their nets into territory waters".[265] A purpose of the treaties was to provide the tribes with a livelihood and a moderate living.[266] Hence, the State was not entitled to "rely on property law concepts...license fees, or general regulations to deprive Indians of a fair share" of the fishery. Nor were the Indians entitled to "rely on their exclusive right of access to the reservations to destroy the rights of 'other citizens of the Territory'. Both sides have a right, secured by treaty, to take a fair share of the available fish".[267]

The Court held the Indians were collectively entitled to 50 per cent of the fish runs which passed through their fishing grounds. However, in setting the 50 per cent share, the Court imposed the proviso that the portion could be reduced if the

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and Materials in Federal Indian Law (2nd ed, 1986) ch 12; GD Meyers "Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada" (1991) 10 *UCLA Journal of Environmental Law* 67.

262 See *Sohappy v Smith* (1969) 302 F Supp 899 at 904 affirmed (1976) 529 F 2d 570 (9th Cir); *Washington v Washington State Commercial Passenger Fishing Vessel Association* note 264 *infra* at 674.

263 See *United States v Washington* note 264 *infra* at 350-2, 406-7; *United States v Michigan* note 105 *supra* at 260; MC Blumm "Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits a Prendre and Habitat Servitudes" (1989) 8 *Wisconsin International Law Journal* 1 at 4.

264 *United States v Washington* (1974) 384 F Supp 312 affirmed (1975) 520 F 2d 676 (9th Cir), certiorari denied (1976) 423 US 1086 subsequently affirmed by *Washington v Washington State Commercial Passenger Fishing Vessel Association* (1979) 443 US 658. The cases are generally referred to as the 'Boldt' cases, after the Federal District Court judge who retained control of the cases over their long history. For the background to and aftermath of the decisions, see American Friends Service Committee *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians* (1970); R Barsh *The Washington Fishing Rights Controversy: An Economic Critique* (2nd ed, 1979); FG Cohen *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (1986); FG Cohen "Treaty Indian Tribes and Washington State: The Evolution of Tribal Involvement in Fisheries Management in the US. Pacific Northwest" in E Pinkerton (ed) *Co-operative Management of Local Fisheries* (1989); LJ Landau "Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest" (1980) 10 *Environmental Law* 413; United States Commission on Civil Rights *Indian Tribes: A Continuing Quest for Survival* (1981); S Bentley "Indian's Right to Fish: The Background, Impact, and Legacy of *United States v Washington*" (1992) 17 *American Indian Law Review* 1.

265 *Washington v Washington State Commercial Passenger Fishing Vessel Association* note 264 *supra* at 679.

266 *Ibid* at 686.

267 *Ibid* at 684-5.

tribe dwindled to a small number or abandoned its fishery.[268] The Court, through a series of orders, required the parties to negotiate and resolve allocation issues, subject to the supervision of the court in case of dispute.[269] In addition, the Court confirmed that the tribes were entitled to regulate their own fishery and enforce their tribal laws at their off-reservation fishing grounds.[270]

A similar outcome was reached in Oregon, where the Court stated that (1) state regulation of the fishery must be the least restrictive regulation consistent with preservation of the resource; (2) the Indians were entitled to a fair share of the remainder of the fishery; and (3) there were to be procedural protections, including providing the Indians with notice and an opportunity to be heard and participate in a meaningful way in the formulation of fishing regulations.[271]

The Courts also held that the treaties guaranteed the tribes a right of access across private property holder's property in order to gain access to their usual and accustomed fishing grounds. Notwithstanding the silence of the treaty on the matter and the absence of any reservation in grant of title to private property owners, the right to take fish imposed a prior servitude on the title of the burdened property owner.[272] The Supreme Court initially held that the treaty right was subject to the right of the State to regulate for necessary conservation purposes.[273] However, the Court subsequently qualified its earlier ruling by stating that regulations for conservation purposes must not unnecessarily burden the aboriginal fishery over non-aboriginal fisheries.[274]

In response to the need to regulate their own fisheries, Indians established the Northwest Indian Fisheries Commission and the Columbia River Inter-tribal Fish Commission to provide a means for inter-tribe regulation.[275] Congress subsequently enacted the *Salmon and Steelhead Conservation and Enhancement Act* which formalised the co-management of the fisheries.[276]

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268 *Ibid* at 687.

269 For a description of the process, see FG Cohen (1989) note 264 *supra* pp 40-5; N Dale "Getting to Co-Management: Social Learning in the Redesign of Fisheries Management" in E Pinkerton (ed) note 260 *supra* pp 54-6; S Bentley note 264 *supra* at 7-9.

270 See further, *Settler v Lameer* (1974) 507 F 2d 231 (9th Cir.).

271 *Sohappy v Smith* note 262 *supra* at 907-11. See further JC Gartland "*Sohappy v. Smith*: Eight Years of Litigation over Indian Fishing Rights" (1977) 56 *Oregon Law Review* 680; MC Blumm note 263 *supra* at 7.

272 *United States v Winans* note 261 *supra* at 381; see also *Seufort Bros v United States* (1919) 249 US 194; *Tulee v Washington* (1942) 315 US 681, 86 L Ed 1115 .

273 *Puyallup Tribe v Washington Department of Game (No 1)* (1968) 391 US 392 at 398, 401-3.

274 *Puyallup Tribe v Washington Department of Game (No 2)* note 248 *supra* at 48-9.

275 See N Dale note 269 *supra* at 52-3.

276 16 USCS §3301 et seq. See further JP Mentor "Fishing Rights: Indian Fishing Rights and Congress - The Salmon and Steelhead Conservation and Enhancement Act of 1980" (1983) 9 *American Indian Law Review* 121. There is also Indian representation on the United States section of the commission established under the 1985 *Pacific Salmon Treaty*. See TR Busiahn "The Development of State/Tribal Co-Management of

(ii) Canada

In Canada, issues concerning allocation of fisheries between aboriginal and non-aboriginal users has arisen both in land claim settlements and in court decisions on the scope of aboriginal rights.[277]

Land Claim Settlements

Over the past 20 years the Canadian Government has entered into a number of settlements with aboriginal peoples in northern parts of Canada whose aboriginal title to the land had not been extinguished. The first of the 'modern' land claim settlements was the *James Bay and Northern Quebec Agreement* of 1975 with the Cree and Inuit in northern Quebec,[278] which was subsequently extended to the Naskapi in northeastern Quebec in 1978.[279] Agreements have also been entered into with the Inuvialuit in the western Arctic in 1984,[280] the Council for Yukon Indians in 1991,[281] the Gwich'in in the Northwest Territories in 1992,[282] the

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Wisconsin Fisheries" in E Pinkerton (ed) note 260 *supra*; DD Goble "Introduction to the Symposium on Legal Structures for Managing the Pacific Northwest Salmon and Steelhead" (1986) 22 *Idaho Law Review* 417. Other statutes providing for Indian fishing to be taken into account include the *Pacific Northwest Electric Power Planning and Conservation Act* 1980 16 USC §839 under which the Columbia River Basin Fish and Wildlife Program was adopted: see MC Blumm "Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection" (1981) 11 *Environmental Law* 497; E Chaney "The Last Salmon Ceremony: Implementing the Columbia River Basin Fish and Wildlife Program" (1986) 22 *Idaho Law Review* 561.

277 See F Cassidy note 260 *supra* pp 36-85 for an overview of Canadian developments in the 1980s. See also K Abel, J Friesen (ed) *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (1991).

278 *The James Bay and Northern Quebec Agreement*, Editeur Official du Quebec (1976). The fisheries and wildlife portions of the agreement were implemented by *Lois concernant les droits de chasse et de peche dans les territoires de la Baie James et du Nouveau-Quebec* ("An Act respecting hunting and fishing rights in the James Bay and New Quebec Territories") 1978 LQ c 92. For a background of the events leading to the settlement, see J O'Reilly "The Role of the Courts in the Evolution of the James Bay Hydroelectric Project" in S Vincent, G Bowers (ed) *Baie James et Nord Quebecois: Dix Ans Apres*, Recherches Amerindiennes au Quebec (1988); W Moss "The Implementation of the James Bay and Northern Quebec Agreement" in B Morse (ed) *Aboriginal Peoples and the Law* (1985); T Morantz "Aboriginal Land Claims in Quebec" in K Coates (ed) *Aboriginal Land Claims in Canada: A Regional Perspective* (1992) pp 111-116.

279 Department of Indian Affairs and Northern Development *Northeastern Quebec Agreement* (1979).

280 Canada. Department of Indian Affairs and Northern Development *The Western Artic Claim: The Inuvialuit Final Agreement* (1984). The enabling legislation is the *Western Artic (Inuvialuit) Claims Settlement Act* SC 1984 c 24.

281 Canada. Department of Indian Affairs and Northern Development *Council for Yukon Indians Umbrella Final Agreement* (1993). The umbrella final agreement deals with matters on a territory wide basis and is subject to the final terms of agreements to be reached with the 14 individual Yukon First Nations which incorporate its general provisions. Specific agreements have been finalised with the Vuntut Gwich'in (Old Crow) Nation, Nacho Nyak Dun, Champagne and Aishihik First Nations and the Tesline Tlingit Council subject to a ratification vote on the agreements.

Tungavik Federation of Nunavut in the eastern Arctic in 1992,[283] and the Sahtu Tribal Council in 1993.[284] All of the settlements contain extensive provisions concerning fisheries and wildlife.

While there are substantial differences between the agreements, there are common elements in the framework for allocating fishing and wildlife resources.[285] Within the lands over which the aborigines retain title, they have exclusive harvesting rights for any purpose (subject only to conservation needs).[286] In respect of the lands over which aboriginal title has been surrendered (1) first priority is to be given to conservation needs;[287] (2) second priority is to be given to Aboriginal subsistence needs (including barter and exchange between aboriginal communities);[288] and (3) in relation to commercial fishing and hunting activities, aborigines are given (in varying degrees) either preference in the allocation of the commercial quota or receive a minimum commercial quota.[289] Provision is also

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282 Canada. Department of Indian Affairs and Northern Development *Gwich'in Comprehensive Land Agreement* (1991). The agreement is in similar terms to the *Inuvialuit Agreement*. See s 12 "Wildlife Harvesting and Management" and s 17 "Harvesting Compensation".

283 The Nunavut settlement is fundamentally different to the other land claim settlements. It involves both a land claim settlement and the creation of a new self-governing territory within Canada in the western half of the existing Northwest Territories: see *Tungavik Federation of Nunavut Final Land Claims Agreement* (1991) and *Nunavut Political Accord* (1992). The new territory will be governed by a democratically elected government. However, as the Inuit constitute a majority of electors, it will in effect provide self-government for the Inuit of the Eastern Artic.

284 The *Sahtu Tribal Council Agreement* is substantially the same as the *Inuvialuit Final Agreement, Gwich'in Comprehensive Land Agreement*.

285 The *Inuvialuit Final Agreement, Gwich'in Comprehensive Land Agreement* and the *Sahtu Tribal Council Agreement* are in substantially the same terms. The *James Bay and Northern Quebec Agreement* and *Northeastern Quebec Agreements* are in substantially the same terms. They do not contain the same level of detail as the *Inuvialuit Final Agreement* concerning fisheries and wildlife issues, though the framework is similar. One major difference is the income security program for hunters and trappers, see note 291 *infra*. For a review of the provisions in the *James Bay Agreements* see F Berkes "Co-Management and the James Bay Agreement" in E Pinkerton (ed) note 260 *supra*; HA Feit "The Power and the Responsibility: Implementation of the Wildlife and Hunting Provisions of the James Bay and Northern Quebec Agreement" in S Vincent, G Bowers (ed) *Baie James et Nord Quebecois: Dix Ans Apres* (1988). The framework regarding fisheries and wildlife in the *Yukon Final Umbrella Agreement* and specific agreements made under it is similar to the *Inuvialuit Final Agreement*, though the specific provisions differ. The specific details of the *Inuvialuit Final Agreement* are used as examples in this section.

286 See *Inuvialuit Final Agreement* s 14(6)(d) (exclusive right to harvest game).

287 *Ibid* s 14(1),(6),(29),(30),(36).

288 *Ibid* s 14(6)(a) (preferential right to harvest wildlife, excluding migratory non-game birds, for subsistence usage), s 14(12) (may sell, trade and barter fish and marine mammals acquired in subsistence fisheries to other Inuvialuit), s 14(29) (right to harvest a subsistence quota of marine mammals), s 14(31) (preferential right to harvest fish for subsistence), s 14(36)(c)(ii) (determination of subsistence quotas).

289 *Ibid* s 14(6)(b)-(c) (exclusive right to harvest furbearers, polar bear and muskox), s 14(6)(29) (first priority for commercial quotas to harvest of marine mammals that the Inuvialuit can reasonably be expected to harvest in the quota year); s 14(32)-(33) (for commercial fisheries other than marine mammals the Inuvialuit are

made for either compensation in the event of wildlife loss by future development[290] or, in the case of the *James Bay Agreement*, for an income security program for hunters, trappers and fishermen.[291] Aborigines are to be consulted in relation to proposed conservation measures and allocation of quotas and various joint aboriginal-government administrative and advisory bodies have been established in relation to wildlife and fisheries management, whose functions include advising the government on harvest quotas and aboriginal subsistence needs.[292] The importance given to fishing and wildlife issues in the settlements is not surprising given the significance of the subsistence economy in the northern parts of Canada. They may serve as models for addressing fishing and wildlife issues in any land claim settlements in parts of Australia where fish and wildlife remain important to Aboriginal peoples.

Section 35(1) Constitution

Existing aboriginal and treaty rights were "recognized and affirmed" by a constitutional amendment in 1982.[293] In *R v Sparrow* the Supreme Court stated that:

> ...the words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint in the exercise of sovereign power. Rights that are recognized and affirmed are not absolute... In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[294]

While this statement is in the context of constitutional interpretation, the suggestion that the section incorporates the existing fiduciary relationship of the Crown towards aboriginal peoples in Canada is interesting.[295] The issue of

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guaranteed a quota based on their greatest fish harvest in the 3 years prior to the Agreement; however, beyond this their allocations are on the same basis as other users).

290 *Ibid* s 13. See further JM Keeping *The Inuvialuit Final Agreement* (1989) pp 47-61.

291 See further, HA Feit "The Income Security Program for Cree Hunters in Quebec: An Experiment in Increasing the Autonomy of Hunters in a Developed Nation State" (1982) 3 *Canadian Journal of Anthropology* 57.

292 Note 286 *supra* s 14(3),(19),(36),(45),(61),(73). See further NC Doubleday "Co-Management and the Inuvialuit Final Agreement" in E Pinkerton (ed) note 260 *supra* pp 212-9.

293 Section 35(1) *Constitution Act* 1982.

294 Note 54 *supra* at 1109.

295 As to the existence of the fiduciary duty in Canada, RH Bartlett "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: *Guerin v. The Queen*" (1984) 49 *Saskatchewan Law Review* 367; MA Donohue "Aboriginal Land Rights in Canada: A Historical Perspective on the Fiduciary Duty" (1991) 15 *American Indian Law Review* 369; DM Johnston "A Theory of Crown Trust Towards Aboriginal Peoples" (1986) 18 *Ottawa Law Review* 307; WR McMurtry QC, A Pratt "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective" [1986] 3 *Canadian Native Law Reporter* 19; RA Reiter *The Fundamental Principles of Indian Law* (1991) vol 1 ch IV "The Crown's Fiduciary Obligation to

whether the Crown is under a fiduciary duty towards aboriginal peoples in relation to its dealing with their common law rights has not been decided in Australia.[296] However, if the approach of Toohey J in *Mabo* is adopted,[297] then the practical consequences of such a fiduciary duty and s 35(1) may be similar. At the present stage of the development of Aboriginal rights at common law in Australia, this must necessarily be speculative.

In order to determine if there is a prima facie infringement of s 35(1) the following factors must be considered: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the limitation imposes undue hardship; (3) whether the limitation denies the holders of the right their preferred means of exercising that right?[298] If there is a prima facie interference with the right, the Crown must justify the interference. The justification requires both that there be a valid legislative purpose[299] and a consideration of the special trust relationship and responsibility of the government vis-a-vis aborigines.[300] This in turn involves an assessment of whether there has been as little infringement as possible with the aboriginal right in order to achieve the legislative purpose; whether, if the legislation involves expropriating the resource, compensation is payable; and whether the aboriginal group involved has been consulted in relation to the proposed measures.[301]

In considering whether the terms of the Indian food fishing licence constituted a prima facie infringement of an aboriginal right to fish, the Court noted that "the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs" of the aborigines but also whether there is unnecessary infringement on the exercise of that right. For example, if the aborigines "were forced to spend undue time and money per fish caught or if the net length resulted in hardship" then, prima facie, there would be infringement.[302] The need to conserve a species is a justifiable purpose to

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Indians"; B Slattery "First Nations and the Constitution: A Question of Trust" (1992) 71 *Canadian Bar Review* 261.

296 In *Mabo*, note 2 *supra*, Brennan J limited his observations about fiduciary duties to circumstances where traditional owners surrender their Aboriginal title to the Crown in expectation of a grant of tenure (at 60). Toohey J was the only member of the High Court to give a detailed analysis of fiduciary duties of the Crown towards Aboriginal peoples in relation to its dealings with Aboriginal title (at 199-205). Dawson J (dissenting) held that since, in his view, Aboriginal title did not survive annexation of the Murray Islands, there was no scope for the imposition of any fiduciary duty arising out of Aboriginal title (at 163-9). See also *Northern Land Council v Commonwealth* (1987) 75 ALR 210 at 215 (HCA).

297 Note 2 *supra* at 199-205.

298 *R v Sparrow* note 54 *supra* at 1112.

299 *Ibid* at 1113.

300 *Ibid* at 1114

301 *Ibid* at 1119. See also *R v Nikal* note 66 *supra* at 256 regarding consultation.

302 *R v Sparrow* note 54 *supra* at 1112.

interfere with aboriginal rights.[303] However, the Court held the burden of conservation measures should not fall upon the aboriginal fishery. As the Court observed "the pursuit of conservation in a heavily used fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource".[304] Hence, while conservation is a valid legislative purpose for the interference with aboriginal fisheries, the mechanism of implementing that purpose must give top priority to the aboriginal food fishery after valid conservation measures have been implemented.[305] The justificatory test is stringent and, as the Court acknowledged, places a heavy burden on the Crown to justify the interference with aboriginal rights.[306]

Though the decision in *R v Sparrow* did not deal with commercial fisheries, the Federal Government modified its policy in wake of the decision and in June 1992 announced its "Aboriginal Fisheries Strategy", providing aboriginal communities with a greater share of commercial fisheries.[307]

(iii) New Zealand

There has been a long struggle in New Zealand over commercial fisheries. The struggle came to a head with the introduction of a quota management system (QMS) for commercial fisheries by the *Fisheries Amendment Act* 1986 (NZ).[308] The system provided for individual transferable quotas, which guaranteed the holder a specified share of the commercial quota for particular species of fish each year. The Maori commenced proceedings alleging the QMS improperly interfered with Maori fishing rights.[309] An interim declaration was granted by the High Court in September 1987 that the Minister ought not to proceed further with implementing the QMS. A further interim declaration was made in relation to a particular species of fish that the government proposed to bring under the QMS in

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303 *Ibid* at 1113-4.

304 *Ibid* at 114.

305 *Ibid* at 1116. See also *R v Denny* note 170 *supra*.

306 *Ibid* at 1119.

307 Canada. Department of Fisheries and Oceans *Aboriginal Fisheries Strategy* (1992). For a review of the initial implementation of the strategy, see P Pearse *Managing Salmon in the Fraser. Report to the Minister of Oceans and Fisheries on the Fraser River Salmon Investigation* (1992).

308 See KA Palmer "Law, Land, and Maori Issues" (1988) 6 *Canterbury Law Review* 322 at 333-335; J Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (1990) pp 107-39; DV Williams "Maori Issues II" [1990] *New Zealand Recent Law Review* 129 at 130-5; A Sharp *Justice and the Maori* (1990) pp 82-5; PG McHugh note 68 *supra* pp 142-3 and the recitation of the recent history in *Te Runanga o Muriwhenua Inc v Attorney-General* note 70 *supra* at 645-50.

309 The Waitangi Tribunal has expressed its concern to the government that the introduction of an individual transferable fishing quotas may limit the ability of the government to implement recommendations the Tribunal may make on the Muriwhenua fishing claim currently before the Tribunal. The government nevertheless proceeded with the introduction of the QMS.

November 1987.[310] In May 1988 the Waitangi Tribunal[311] published its *Muriwhenua Fishing Report* in which it found traditional Maori fisheries included a commercial component and that the *Treaty of Waitangi* "guaranteed to the Maori full protection for their fishing activities, including unrestricted rights to develop them along either or both customary or modern lines".[312] In response, the government tabled a *Maori Fisheries Bill* in September 1988 under which the Maori would be theoretically entitled to receive up to 50 per cent of the commercial fisheries quota over a period of 20 years. However, due to various clawback provisions, the Maori were unlikely to receive more than 10 per cent of the quota.[313]

The Bill was strenuously opposed by the Maori who commenced a second wave of legal proceedings in which they pleaded trespass, breach of fiduciary duty and negligence against the Crown and sought damages and an account of profits.[314] A substantially modified *Maori Fisheries Act* 1989 (NZ) came into effect in December 1989. It established a Maori Fisheries Commission to "facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing".[315] The Commission received a capital grant of $10 million and the Crown was to transfer 10 per cent of the commercial fishing quota to the Commission over 4 years.[316] The original provision in the Bill which would have extinguished any customary Maori fishing rights had been deleted. Hence, the issues as to whether the Government had breached any Treaty obligations, any fiduciary duty towards the Maori or improperly abrogated Maori common law fishing rights remained before the courts.[317]

An application to rescind the two interim declarations restraining the government from proceeding with the QMS was initially rejected, but was later successful after the trial date had been vacated, the Court considering that the ongoing delay was prejudicing commercial fishermen.[318] However, the Court of Appeal reserved the

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310 *Ngai Tahu Maori Trust Board v Attorney-General* note 236 *supra*.

311 The Tribunal was established pursuant to the *Treaty of Waitangi Act* 1975 (NZ) and, subject to limited exceptions, its powers are only advisory.

312 New Zealand. Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai-22) 1988.

313 See J Kelsey note 308 *supra* pp 124-7.

314 *Te Runanga o Muriwhenua Inc v Attorney-General* note 70 *supra* at 648-9. The proceedings were based on a number of alternative grounds including breach of Treaty rights and on aboriginal title.

315 *Maori Fisheries Act* 1989 (NZ) s 5(a).

316 *Ibid* ss 45, 40.

317 See *Te Runanga o Muriwhenua Inc v Attorney-General* note 70 *supra* at 649-50.

318 *Ngai Tahu Maori Trust Board v Attorney-General* (unreported, NZ HC, Grieg and McGehan JJ., 12 April 1990) noted in [1990] BCL 838.

decision and restored the interim declarations.[319] As a result the government continued to be frustrated in its attempt to implement the QMS system for commercial fisheries.

Eventually the Maori and the Government reached a settlement in September 1992. The major provisions of the settlement were: (1) a $150 million payment by the Crown to the Maori for the development of Maori commercial fisheries (part of which was to be used in a joint venture to purchase a company which owned approximately 25 per cent of the existing commercial fishing quotas);[320] (2) the Maori would receive 20 per cent of the quota for all new species of fish brought under the QMS;[321] and (3) increased Maori representation on various statutory bodies concerning fish management.[322] In exchange any Maori commercial fishing rights (based on aboriginal title, customary law or the *Treaty of Waitangi*) were extinguished and all existing litigation concerning those rights discontinued.[323] The settlement was implemented by the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992 (NZ).

B. RELEVANCE TO AUSTRALIA

Notwithstanding the different legal foundation of aboriginal fishing rights in Canada, United States and New Zealand there are a number of similarities in the mechanism for allocating the resource, both under court imposed results and in land claim settlements. Generally, the allocation of fisheries between aboriginal and non-aboriginal users is guided by the following principles.

1. Conservation needs are to be allocated first priority.
2. Aboriginal subsistence needs are to be allocated the highest priority after conservation.
   To ensure this, any conservation measures must not adversely impact upon aboriginal fishing rights more than non-aboriginal fishing rights. The conservation measures are to be goal oriented (ie in total quantity of fish to be harvested) and aboriginal peoples are to be given wide latitude in how they implement their own conservation measures to meet that goal. Where it

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319 *Te Runanga o Muriwhenua Inc v Attorney-General* (unreported, CA Richardson, Casey and Hardie Boys JJ, 28 June 1990, CA 110/90) noted in [1990] BCL 1293. See further DV Williams note 308 *supra* at 135.

320 Settlement Deed, dated 23 September 1992, cl 3.1.

321 *Ibid* cl 3.2.

322 *Ibid* cl 3.3.

323 *Ibid* cll 5.1 and 4.3. Non-commercial Maori fishing rights, though not extinguished, were made unenforceable in civil or criminal proceedings. However, the Waitangi Tribunal's jurisdiction to make recommendations in relation to whether the Crown had honoured its Treaty obligations in respect to those rights was left intact. Non-commercial rights were to be provided for by the making of regulations under the *Fisheries Act* and s 88(2) of the Act (see notes 69-73 *supra*) was repealed: *ibid* cl 5.2.

is necessary to impose conservation measures on aboriginal communities, those communities should be consulted about the measures.

3. Aboriginal and non-aboriginal commercial fishermen are each to receive an equitable share of the remaining harvest quota. The aboriginal portion will vary from year to year depending upon the ability of the aboriginal peoples to utilise their portion of the commercial fishery, so that the available commercial harvest is fully utilised.

Of course, while there are similarities, the particular regimes arrived at reflect the particular constitutional framework, legal foundation of the aboriginal rights and factual circumstances in each case.[324] Nevertheless, it is not surprising that the allocation mechanisms have much in common since they all reflect an attempt to equitably allocate the resource between different users taking into account the historical importance of fisheries to aboriginal peoples.

The relevance to Australia is threefold. First, to the extent that there is an Aboriginal right to fish which has not been extinguished by statute, the exercise of a broad discretion under fisheries legislation to allocate quotas, grant fishing licences or implement conservation measures is not (in the absence of legislative intent to the contrary) to be exercised in a way inconsistent with existing Aboriginal rights.[325] The overseas models illustrate how conservation and other measures may be implemented in a way consistent with those rights. Second, to the extent that the Crown is under a fiduciary duty in its dealings with Aboriginal title or other Aboriginal rights,[326] these models indicate allocation mechanisms that are likely to comply with that duty. In particular, the existence of a fiduciary duty places the Crown in a position of conflict as on the one hand it has a duty not to act adversely to Aboriginal interests, but on the other hand it cannot abdicate its responsibility to manage the resource. The overseas models may indicate a manner in which the Crown can reconcile its competing duties. Third, to the extent that governments and Aboriginal peoples in Australia choose to resolve uncertainties arising out of the existence of common law Aboriginal rights by entering into a settlement, these models indicate the types of issues that are likely to arise.

VIII. CONCLUSION

Fishing, hunting and gathering still form an important part of the lives of many Aborigines. The importance is not limited to the food that is obtained, but it is also a means of passing on aspects of Aboriginal culture from one generation to the

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324 See *R v Sparrow* note 93 *supra* at 274.

325 Note 149 *supra*.

326 See notes 295-6 *supra* and accompanying text.

next. In the wake of the *Mabo* decision there is scope for common law recognition of Aboriginal fishing, hunting and gathering rights. The scope of these rights may be wider than existing statutory exemptions. If these rights are recognised at common law, questions as to the extent to which these rights have been extinguished or are currently regulated will arise. Though no definitive answer can be given, it is likely that these rights and, in particular Aboriginal fishing rights, have survived to a much greater extent that Aboriginal title to land. As with the adaptability of Aboriginal customs in relation to land, Aboriginal customs governing fishing, hunting and gathering rights evolve with the time and those rights may be exercised in a contemporary manner.

The commercial potential of Aboriginal fishing and hunting rights is considerable. For example, between 1974 and 1985 the Lummi tribe in the United States increased its fishing fleet from 43 to 335 vessels and the Washington tribes as a whole increased their share of commercial fisheries from 2 per cent to 50 per cent.[327] In New Zealand, the Maori received a $150 million settlement in 1992 to help them develop commercial fisheries and are guaranteed 20 per cent of all future commercial fisheries. The situation in Canada is still evolving; however, it appears likely that aboriginal people will receive a significant increase in the share of the fisheries allocated to them. The juristic basis of the aboriginal fishing right varied in each of the above situations. In the United States the right was based on treaty. In New Zealand, the basis of the right was never finally juridically determined, but appeared to be based both on treaty and aboriginal title. In Canada, the basis of the right varies by region and includes proclamation, treaty and aboriginal title. While the outcomes were to a large degree dependant upon historical and political circumstances in each case, and have no direct application to Australia, the potential for commercial development of common law Aboriginal fishing rights in Australia should not be overlooked. At a time when Aboriginal communities are seeking ways to increase their economic self-sufficiency these rights could be significant.

Many aspects concerning the exercise of Aboriginal fishing, hunting and gathering rights are presently undetermined. It is not clear to what extent Aboriginal fishing and hunting rights at common law are subject to existing regulatory schemes. Nor is it clear whether the Crown is under a fiduciary duty in its dealings with Aboriginal rights and what impact such a duty may have on the management of fisheries and other resources. Further, there are a range of issues arising from the displacement of Aboriginal peoples from their traditional land and the increased mobility of Aboriginal peoples which need to be resolved. The extent to which the Aboriginal rights may impact other activities is also not clear. For

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327 S Bentley note 264 *supra* at 15, 19. See also F Cassidy note 260 *supra* pp 66-7.

example, in other countries aboriginal fishing rights, at least where based on treaty, have been held to extend to habitat protection.[328]

However, these uncertainties do not detract from the importance of the rights. Some degree of recognition of Aboriginal fishing, hunting and gathering rights at common law is likely to occur in Australia in the next few years. Further, should Australia proceed along the same land claims settlement path that has been taken in Canada, the resolution of conflicts arising out of the allocation of fisheries and other natural resources is likely to form a significant component of any land claim settlement. The existence of traditional Aboriginal rights at common law raises issues concerning the effective management, conservation and allocation of fisheries and other resources. Recent experience in Australia concerning the joint management of national parks, and in the United States and Canada concerning fisheries, indicates that successful mechanisms can be arrived at to effectively manage natural resources taking into account both Aboriginal and non-Aboriginal needs. The recognition of Aboriginal fishing, hunting and gathering rights, while posing challenges as to the management of natural resources, may go part way towards redressing the past wrongs visited upon Aboriginal peoples.

328 See MC Blumm note 263 *supra*; H Foster "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title" (1989) *University of British Columbia Law Review* 629; GD Meyers "*United States v. Washington (Phase II)* Revisited: Establishing and Environmental Servitude Protecting Treaty Fishing Rights" (1988) 67 *Oregon Law Review* 771.