Dedication

For all the residents of the Torres Strait region who daily live and work under the shadow of the Torres Strait Treaty.

*People may cooperate when they have no choice; coercion has its uses and is not to be despised. Far better, however, to create a nexus of interests so that cooperation flows from a sense of mutual advantage; better still to undergird the dictates of reason with ties of emotion, to make community the handmaiden of policy.*

Abstract

This research project’s central proposition argues the nature of governance within the Torres Strait region has undergone major change since the introduction of the Torres Strait Treaty. As a result, the region now exhibits a dynamic set of governance structures that rest beyond the normal tenets of federalism and require multi-level governance (MLG) of a form not yet identified elsewhere within Australia. Moreover, the explanatory powers of existing theories of inter-state relations employed within Australia now prove inadequate for examining the numerous complexities and tensions that continue to emerge from within the various multi-level and multi-jurisdictional political-administrative structures and relationships currently presenting in the Torres Strait area. By contrast, despite Australia’s specific set of underlying constitutional circumstances, the particular analytical framework being facilitated under an actor-centered institutional MLG approach gives purchase to far greater explanatory powers and insights into the dynamism driving this emerging MLG phenomenon, both within Australia and elsewhere. Hence, the concept now merits serious consideration by the political science discipline within this country. To sustain this argument, while bringing understanding and a comparative element to the analysis, two central tasks of the project are to examine the provenance of its theoretical underpinnings and to historically progress the development of previous governance arrangements within the Torres Strait region. The chronology of events surrounding the so-called Torres Strait ‘border dispute’ detailed in Chapter Four also helps to overcome a major gap in historical writings on the region.

In addition to theoretical and historical enquiry, this work also conducts interaction-oriented policy research within the logic of empirical institutional analysis utilising an actor-centered institutional MLG framework to perform a critical analysis of the contemporary management of the common maritime boundary region between Australia and Papua New Guinea. In particular, it seeks to discover what form governance structures in the Torres Strait region have metamorphosed into under the guiding influence of the Torres Strait Treaty. Using the overarching governance regime as its basic unit of analysis, the project first breaks down all factual policy formulation and implementation processes involved in border management practices in the region into three broad embedded subunits of analysis: the border protection, fisheries and environmental management regimes. It then exploits a mix of primary and secondary data, along with the dispersal of authority as its dependable variable, to determine the extent to which authority (power or competencies) is being dispersed across the multiple jurisdictions and levels of governance now presenting within the Torres Strait region.
It is found that a new phenomenon in governance in Australia may now be identified within the Torres Strait region. This new and emergent form of cooperative multi-level governance pragmatically incorporates the dynamics of MLG and federal logic. It also exhibits highly coordinated and consultative modes of interactions, and to a lesser degree, elements of both hierarchical and competitive linkage structures. It is largely being facilitated by the overarching administrative framework provided under the Torres Strait Treaty and can be found wherever the bi-lateral agreement’s terms and provisions are being observed. This latter phenomenon generally tends to occur wherever the Treaty’s requirements are enacted in enabling domestic legislation.

This research project also makes two original contributions to knowledge. It provides the first comprehensive analysis of the set of contemporary overarching governance structures found within the wider Torres Strait region. It further represents the first application of an actor-centered institutional MLG approach to solid empirical research within an Australian context. Another significant outcome of exploiting the work to test the validity of an actor-centered institutional MLG framework has been to highlight the critical need for political analysts to distinguish between two distinct sets of processes, structures and outcomes. The first involves exploiting the MLG concept as a system-wide management arrangement for organising and explaining differing types of complex political-administrative organization and systems. The second involves utilising the notion of MLG as part of an overarching analytical framework designed specifically for organising complex diagnostic enquiry and providing compelling descriptions of what actually happens to decisions taken once they depart the domain of intergovernmental bargaining processes and central government policy control and enter into the real-world, day-to-day, post-decisional policy implementation phase at an operational level. The insights provided in ‘On Community’ in Chapter Six also offer a glimpse inside the internal workings of Australian frontier governance architecture within the Torres Strait region.
Declaration of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Lola Rosalyn O'Donnell
Acknowledgements

An Australian Postgraduate Award from the Australian Government supported research constituting this dissertation. The Commonwealth’s assistance is gratefully acknowledged. I would also like to express my deepest gratitude to my Principal Supervisor, Professor Patrick Moray Weller O.A., for his support, encouragement and professional guidance during the past three and a half years. Many thanks must also go to my Assistant Supervisor, Professor John Kane, who gave generously of his valuable time in reviewing this work.

I remain indebted to all those who agreed to participate in the interviews, giving kindly of their time, knowledge and vast experience. In particular, I wish to thank those participants who allowed me a privileged insight into the real-world workings of frontier governance practices within the Torres Strait region. It is impossible to come away from this remote and challenging northern border environment without bringing back a deep appreciation of the mostly unrecognised work these dedicated frontier governance political-administrators and their wider Torres Strait community networks perform on behalf of their fellow Australians.

During my visit to Torres Strait, I was also blessed with some unexpected gifts. The first was finding time to again sit peacefully at dawn under sea almond trees, watching soft morning light come up on salty water. The second gift was contained in the words of a wild spirit from Muralag who, after covertly watching at work for weeks, then asking far too many questions, took me aside late one morning to caution me to always remember the following: ‘There is no such thing as a Torres Strait Islander’. My third unexpected gift arrived in the shape of those thought provoking insights into the responsibilities of political leadership that Bishop Saibo Mabo shared with the congregation on Good Shepherd Sunday at All Souls Quetta Memorial and St. Bartholomew. I think of these words often. Similarly, Father Charles Loban’s elegant reading of Psalm 23 also remains firmly implanted in my mind, providing calm anchorage.

Finally, I would like to thank my two kindred spirits, Sierra and Romeo, for kindly gifting me with perhaps the greatest gift of all. Without plans or great aforethought, we set off together one cold, wet Cape York morning under stormy skies in a borrowed banana boat, to travel on a rough sea passage, to visit a history, much of which should never have been allowed to happen. Along the way we would experience a truly special, once-in-a-lifetime moment. Such are the magical moments that make my life all the more worth living joyfully, and I thank you both for gifting me with my precious, everlasting memories.
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<th>Description</th>
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<tbody>
<tr>
<td>ACS</td>
<td>Australian Customs Service (AG)</td>
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<td>ACS-COCD</td>
<td>ACS - Coastwatch Operational Concept Document (AG)</td>
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<td>Australian Customs Vessels (AG)</td>
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<td>ADSC</td>
<td>Australian Defence Studies Centre</td>
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<td>ADF</td>
<td>Australian Defence Force (AG)</td>
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<td>AFFA</td>
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<td>AFMA</td>
<td>Australian Fisheries Management Authority (AG)</td>
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<td>Australian Federal Police (AG)</td>
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<td>Australian Government</td>
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<td>Australian Labor Party</td>
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<td>Australian National Audit Office (AG)</td>
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<td>AO</td>
<td>Area of Operations</td>
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<td>Australian Public Service Commission (AG)</td>
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<td>ASG</td>
<td>Abu Sayyaf Group</td>
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<td>Australian Agency for International Development Cooperation (AG)</td>
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<td>Australian Ship Reporting System (AG)</td>
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<td>Australian Quarantine Inspection Service (AG)</td>
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<td>Australian Maritime Safety Authority (AG)</td>
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<td>ASPI</td>
<td>Australian Strategic Policy Institute</td>
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<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<td>ASICJ</td>
<td>Australian Section of the International Commission of Jurists</td>
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<td>BAP</td>
<td>Bycatch Action Plan</td>
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<td>Border Liaison Officer</td>
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<td>British New Guinea</td>
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<td>Bureau of Rural Sciences (AG)</td>
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<td>CAEPR</td>
<td>Centre for Aboriginal Economic Policy Research (ANU)</td>
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<td>CFG</td>
<td>Community Fishers Group</td>
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<tr>
<td>CNS</td>
<td>Compulsory Negotiation System</td>
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<td>COMAST</td>
<td>Command Australian Theatre</td>
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<td>CPA</td>
<td>Chief Protector of Aborigines</td>
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<td>CR</td>
<td>Crayfish - <em>kiar</em></td>
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<td>CRC</td>
<td>Cooperative Research Centre</td>
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<td>Commonwealth of Australia</td>
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<td>CONOPS</td>
<td>Concept of Operations</td>
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<td>DIMIA</td>
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<td>DoD</td>
<td>Department of Defence (AG)</td>
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<td>DoTARS</td>
<td>Department of Transport and Regional Services (AG)</td>
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<td>DP&amp;C</td>
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<td>DSS</td>
<td>Department of Social Security (QG)</td>
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<td>EMC</td>
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<td>EPBC Act</td>
<td><em>Environment Protection and Biodiversity Conservation Act 1999</em> (Cth)</td>
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<td>ERIN</td>
<td>Environmental Resources Information Network</td>
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<td>ESD</td>
<td>Ecologically Sustainable Development</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<td>FBM</td>
<td>Footprints Before Me</td>
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<td>FFV</td>
<td>Foreign Fishing Vessel</td>
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<td>GBRMP</td>
<td>Great Barrier Reef Marine Park</td>
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<td>GNEC</td>
<td>Great North East Channel</td>
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<td>HFSWR</td>
<td>High Frequency Surface Wave Radar</td>
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<td>HMS</td>
<td>Her Majesty’s Service</td>
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<td>HQNORCOM</td>
<td>Headquarters Northern Command</td>
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<td>IC(s)</td>
<td>Island Council(s)</td>
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<td>ICC</td>
<td>Island Coordinating Council</td>
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<td>IDC</td>
<td>Interdepartmental Committee</td>
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<td>ILUA</td>
<td>Indigenous Land Use Agreement</td>
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<td>IIB</td>
<td>Island Industries Board</td>
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<td>International Maritime Organisation</td>
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<td>ISL</td>
<td>International Shipping Lane</td>
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<td>ITQ</td>
<td>Individual Transferable Quotas</td>
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<td>JDS(s)</td>
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<td>LI</td>
<td>Liberal Intergovernmentalism</td>
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<td>LMS</td>
<td>London Missionary Society</td>
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<td>LSNRMS-TS</td>
<td>Land and Sea Natural Resource Management Strategy</td>
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<td>MAC(s)</td>
<td>Management Advisory Committee(s)</td>
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<td>MaSTERS</td>
<td>Marine Strategy for Torres Environment Resources Strategy</td>
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<td>MILF</td>
<td>Moro Islamic Liberation Front</td>
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<td>MLG</td>
<td>Multi-level Governance</td>
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<td>MMO</td>
<td>Movement Monitoring Officer</td>
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<td>Memorandum of Understanding</td>
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<td>MPA</td>
<td>Marine Protected Area</td>
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<td>Motor Vessel</td>
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<td>MZA</td>
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<td>Prescribed Body Corporate</td>
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<td>PZJA</td>
<td>Protected Zone Joint Authority</td>
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QAS  Queensland Ambulance Service (QG)
QBFP  Queensland Boating and Fisheries Patrol (QG)
QDPI&F  Queensland Department of Primary Industries and Fisheries (QG)
QCF  Queensland Commercial Fishermen’s Organisation
QFS  Queensland Fisheries Service (QG)
QG  Queensland Government
QH  Queensland Health (QG)
QLD  State of Queensland
QMS  Quota Management System
QPS  Queensland Police Service (QG)
QSIA  Queensland Seafood Industry Association
RAAF  Royal Australian Air Force (AG)
REEFREP  Reef Reporting System (QG)
RPMCTF  Report of the Prime Minister’s Coastal Task Force
RRV  Rapid Response Vessel
RRATLC  Rural and Regional Affairs and Transport Legislation Committee
SAR  Strategic Assessment Report
SCIPRRRA  Senate Standing Committee on Primary Industries, Resources and Rural and Regional Services
SEZ  Surveillance Environment Zone
SFADTRC  Senate Foreign Affairs, Defence and Trade References Committee
SIEV  Suspected Illegal Entry Vessel
SLA  Service Level Agreement
SOLAS  Convention for the Safety of Life at Sea
SPREP  South Pacific Regional Environment Programme
SSCISTTCI  Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure.
TAC  Total Allowable Catch
TCHAQ  Tripartite Committee on Agricultural Health and Quarantine
TIB  Traditional Inhabitant Boating (licences)
TIM  Traditional Inhabitants Meeting
TLM  Treaty Liaison Meeting
TLO  Treaty Liaison Officer
TRLWG  Tropical Rock Lobster Working Group
TSBAC  Torres Strait Border Action Committee
TSC  Torres Shire Council
TS CRC  Torres Strait Cooperative Research Centre
TSFA  Torres Strait Fisheries Act 1984 (Cth)
TSFMAC  Torres Strait Fisheries Management Advisory Committee
TSSAC  Torres Strait Scientific Advisory Committee
TSNRMLD  Torres Strait Natural Resource Management Ltd
TSPZ  Torres Strait Protected Zone
TSRA  Torres Strait Regional Authority
TST  Torres Strait Treaty
TVH  Torres Strait Fishing Boat Licence
UNESCO  United Nations Educational, Scientific and Cultural Organisation
UVA  Unmanned Aerial Vehicles
VFI  Vertical Fiscal Imbalance
VIC  Victoria
WG  Working Group
MAP 1: Australia-Papua New Guinea Border Region.
MAP 2: Torres Strait Region.
Chapter One

Introduction

The proposition, evident in the title of this thesis, is that the nature of governance1 within the Torres Strait region has undergone major change since the entering into force and ratification on 15 February 1985 of the document commonly known as the Torres Strait Treaty, or the ‘Treaty between the Independent State of Papua New Guinea and Australia concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as the Torres Strait, and Related Matters’2. Consequently, the Torres Strait region now displays a peculiarly dynamic set of governance structures that requires multi-level governance of a form not currently identified elsewhere in Australia.

The Torres Strait Treaty delimits an international frontier just under two thousand kilometres in length, stretching from the Coral Sea in the east to the Arafura Sea in the west. Its most salient features relate directly to the Torres Strait region itself (Maps 1 & 2). However, no legally-binding document can be examined in isolation. Its efficacy relies directly upon its effective implementation, administration and maintenance. Hence, this research project will conduct interaction-oriented policy research within an actor-centered institutional multi-level governance (MLG) framework to perform a critical analysis of the management of the common maritime boundary area between mainland Australia and Papua New Guinea (PNG). In particular, it seeks to determine what form governance structures in the Torres Strait region have metamorphosed into under the influences of the Treaty’s terms and provisions. Several key research questions will be proposed to guide empirical investigation throughout the project as it progresses. A number of minor accompanying questions will also be posed within consecutive individual chapters to build evidence and provide a wider picture on the manner in which this remote northern frontier region is being managed today.

1 ‘Governance’ is a system of formal and informal rule. Its workability is dependent upon acceptance of a majority in the system. By contrast, ‘government’ can operate in the face of majority opposition. In this particular instance, the term ‘governance’ denotes a conceptual or theoretical representation of the entire social system found in wider Torres Strait. It is not just restricted to state action, such as the legitimate exercise of power and authoritative rule making, including implementation and adjudication, but will also embrace ‘all those activities of social, political and administrative actors….. that guide, steer, control, or manage society’ within the area (Kooiman 1993). As Rosenau (1992:42) proposes, it is being interpreted as a ‘more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes informal and non-governmental mechanisms’.

2 Done at Sydney on 18 December 1978: entered into force on the ratification of both States on 15 February 1985, Australian Treaty Series 1985 No.4.
The project’s core assumption and enquiries are as follows:

- The past two decades have witnessed the development of a distinctive political-administrative complex within the Torres Strait region. Could this governance structure be best described as a collection of independently operating silos whose primary purpose is oversight of the Australia-PNG international border region, or is it one that has gradually metamorphosed into a much more complex political system with a life of its own?
- Is there a system of multi-level governance (MLG), as opposed to state-led government, emerging under the influence of the Torres Strait Treaty’s terms and provisions as the various tensions within this system are being worked out?
- If this is the case, what is the nature of this new form of MLG and why is it emerging now? What are its strengths and weaknesses? Is it a general feature of Torres Strait governance arrangements, or merely a phenomenon confined to particular sectors or levels?
- Is the involvement of all the relevant actors (stakeholders/players) within this system being soundly achieved and what overall impact, if any, are the various Treaty-related consultative structures having on governance in the region?

**Developing an Analytical Framework**

In preparation for the project, a wide-ranging theoretical and integrative literature review was undertaken. Its main purpose was to critically explore the substantial bodies of knowledge on the Torres Strait region and theories of inter-state relations. A specific focus was placed on the general applicability of MLG and theories of federalism to political-administrative structures operating under the Treaty’s guiding administrative framework. Despite conducting a thorough assessment, no aggregate support could be found for the exclusive application of any particular model of federalism to an analysis of governance structures in Torres Strait. This lack of agreement between theoretical and empirical literatures is not surprising, given the high levels of state control exercised over the area by successive Queensland governments from the late 1800s until well into the 1970s, and which were, in turn, closely followed by the Treaty’s introduction and ratification. It was thus determined any proposed analysis of the complexity and interconnectedness inherent within contemporary Torres Strait governance spheres necessitated a conceptual framework that was capable of accommodating all formalized (legalised) and non-formalized (non-legalised) institutional arrangements, along

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\[3\] These terms are used as it is often difficult to differentiate between formal and informal processes and structures. **Formalised (legalised) relationships**: Interactions regulated by documents having legal status, such as constitutions, laws, intergovernmental agreements, and ratified bi-lateral treaties. All these interactions are institutionalised and occur within existing institutional mechanisms on a regular basis.
with all the non-static dynamic interactive relationships and political processes currently occurring within the Torres Strait polity. This ordering system would need to provide for an examination of the distribution of vertical and horizontal authority between and across levels of governance in the Strait. It also had to be capable of accommodating both federalism and a supranational level of governance while simultaneously allowing for state-centered and multi-level institutions. Multi-level joint action between individual and collective purposive state and non-state actors was also a consideration. It is doubtful existing theories of inter-state relations based solely on local interpretations of Australia’s federal system would have been sufficient on their own for such analysis, nor would a theoretical model that relies exclusively on a state-centric intergovernmentalist approach.

By contrast, considerable advantages exist in employing a theoretical framework to organize the project’s diagnostic and prescriptive inquiry.

Compared to a fully specified theory, a framework has less information content in the sense that fewer questions will be answered directly and more will have to be answered empirically. Nevertheless, in comparison with the tacit expectations that all of us bring to our empirical research, an explicated framework is more easy to communicate and to criticize and hence to improve and correct. At the minimum, therefore, it should provide us with a descriptive language that helps to discover whether or not we are talking about the same thing and thus to compare assumptions, hypotheses, and findings across the variety of complex and unique cases that we are studying (Scharpf 1997:30).

It was therefore decided the most powerful analytical device, and one most consistent with known contemporary political-administrative relations within the Torres Strait region, was not a single, elegant and powerful parsimonious theory, but rather a loose overarching conceptual framework that has the capacity to integrate a number of different theoretical models, while simultaneously accommodating a supranational level of governance. Only a theoretically richer MLG analytical framework, similar to the actor-centered institutional approach proposed by Fritz Scharpf (1997) in *Games Real Actors Play*, would provide the contextual mix that would allow for descriptions, explanations and analysis on the true nature of the allocation of functions and authority, both within and between the various institutional settings found in Torres Strait. It was therefore, arguably, the most useful means of organising

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4 Polity: ‘the regime and the rule, that is the political structure in the full sense, comprising both the authority and control structures’ (Laswell & Kaplan 1950: 214).

Non-formalised (non-legalised) relationship structures: These interactions are based on factual (real-world) patterns of interactions and typically grow out of practice. They may be institutionalised to a certain degree and occur on an irregular basis.
empirical data on the differing modes of interactions occurring within the Torres Strait area and the one against which empirical data could best be tested in a study that investigates how the region is being managed today.

**Research Project’s Analytical Framework**

Hence in line with these findings, this project employs an actor-centered institutional MLG analytical framework to examine the nature of border governance in the Torres Strait region. The overarching Torres Strait governance regime provides the basic unit of analysis. To differentiate between policy arenas (sectors) and reduce problems of complexity, all multi-arena and multi-level interactions occurring within factual, or real-world, policy formulation and implementation processes within Torres Strait will first be broken down into individual regimes. Disaggregating overarching governance structures by decomposing authority (power or competencies) into smaller specific policy sectors or arenas, in order to assess how authority over each of them is allocated, is an approach also utilised by students of federalism, decentralization, European integration, and regional and global regimes. For the purposes of manageability, the disaggregated regimes will then be regrouped into three broad subsets, or subunits, of analysis: the border protection, fisheries and environmental management regimes. Within each identified regime, the various levels of governance and all major players (actors/stakeholders), whether individual or aggregate, will be identified. A combination of primary and secondary data, along with the dispersal of authority as the dependent variable, will then be used to determine the extent to which authority is being dispersed across the multiple jurisdictions found in the Torres Strait area. It will also establish whether or not the modes of interactions occurring across and between the four levels of governance present are taking place along cooperative, coordinated, competitive or hierarchical lines, or in a combination of these linkage structures. Organising concepts of regimes, networks and joint decision systems (JDSs) will also be employed to classify various formalised and non-formalised relationship structures found within the broad overarching governance arrangement. A skeletal illustration of the project’s investigative framework is provided in Figure 1. This theoretical construct will be applied throughout the analysis of subset regimes in Chapters Seven to Nine.

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5 Federalism: Riker (1964); Elazar (1991); Watts (1999).
European Integration: Deutsch (1954); Lindberg & Scheingold (1970); Schmitter (1996).
Regional and Global Regimes: Matti (1999); Nye & Donahue (2000).
FIGURE 1: Research Project’s Analytical Framework.

<table>
<thead>
<tr>
<th>Basic (Primary) Unit of Analysis</th>
<th>Overarching Torres Strait Governance Regime</th>
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| **Subunits (subsets) of Analysis** | *Border Protection Management Regime*  
                                           *Fisheries Management Regime*  
                                           *Environmental Management Regime* |
| **Levels of Analysis (Levels of Governance)** | *Supranational* - Torres Strait Treaty & bi-lateral forums.  
                                                       *National* - Australia (Commonwealth) and Papua New Guinea  
                                                       *State/Provincial* – Queensland and Western Province  
                                                       *Local* – Torres Shire, Torres Strait Islands, Papuan coastal towns/villages/wards. |
| **Organising Concepts** | *Normative Negotiation Regimes*  
                                  *Self-organising or Voluntary Networks*  
                                  *Joint Decision Systems (JDSs)* |
| **Basic Dependent Variable** | *Dispersal of Authority* (power or competencies)  
                                   The extent to which authority for the Torres Strait region is currently dispersed across the four basic jurisdictional levels exercising authority over the area. |
| **Measurement of the basic dependent variable (Linkage Structures)** | *Modules: Games of Cooperation*  
                                                                 *Games of Coordination*  
                                                                 *Games of Competition*  
                                                                 *Hierarchy* |
| **Relationship Structures** | *Formalised* (Legalized and Institutionalised)  
                                     *Non-formalised* (Factual Patterns of Interactions) |
| **Modes of Interaction** | *Unilateral Action* (Non-cooperation)  
                                     *Negotiation* (Cooperative-negotiated Agreement)  
                                     *Voting* (Majority Rule)  
                                     *Hierarchical Determination* |
| **General Proposition** | Governance structures in the Torres Strait region are beyond the normal tenets of federalism. As current theories of inter-state relations employed within Australia now prove inadequate for examining the complexities inherent in political-administrative structures and relationships within the Torres Strait region, an actor-centered institutional multi-level governance (MLG) theoretical framework is now required. |
It will be argued that a new phenomenon in governance in Australia is now occurring in the Torres Strait region. This new form of cooperative MLG pragmatically incorporates aspects of federalism and is being largely facilitated by the Torres Strait Treaty. It is evident within the border protection regime and can be found wherever the Treaty’s terms and provisions are being observed. The weakness of MLG in this regime occurs because Australia’s strategic and national interests typically override any other factors presenting in the region, including the bi-lateral Treaty. The lack of capacity in neighbouring PNG provides another factor. What is of particular interest here is the unique ‘community’ of professional middle-level bureaucratic managers and the manner in which these predominately Commonwealth frontier governance political-administrators and their agency staff work together in a spirit of mutual cooperation and support, both within the ordering administrative framework provided under the Australian Customs Coastwatch model and within their wider regional and cross-border Torres Strait networks. Most interactions occurring in this regime relate to one level of governance, the Commonwealth or national, and tend to be either co-ordinated, cooperative, consultative or hierarchical, or in some mixture of these linkage structures. Little competition evident as the regime is constituted primarily of Commonwealth military, law enforcement, regulatory and diplomatic agencies, all of which are operating in a unique frontier governance environment where most risks to Australian interests are coming from external sources.

The emergence of a new model of cooperative MLG is also evident within the fisheries management regime where it is gradually emerging as the numerous tensions, conflicts, and inherent systemic problems within the Torres Strait Fishery are being incrementally worked out. Most interactions occurring across and between all four levels of governance within this policy sector are co-operative, but are also to a much greater extent becoming increasingly consultative. However, competition is particularly evident between Islander and non-Islander interests, while at an operational level the Commonwealth government clearly dominates day-to-day management of the fisheries, thus bringing a hierarchical element into the equation. By contrast, despite the Treaty’s environmental protection provisions and an ongoing moratorium on drilling and seabed mining, the potential for any form of cooperative or consultative MLG within the environmental management regime has never been tapped, hence a policy and planning vacuum continues within that arena. Finally, despite increasing evidence of a new form of cooperative MLG emerging in the Strait, much inter-state interaction occurring across and within the three tiers of domestic Australian government presenting at an operational level continues to mirror Australia’s history of federalism.
Dissertation Structure

The project takes the following form. After first establishing the project’s objectives and explaining processes involved in developing its conceptual framework, Chapter One identifies its major contributions to knowledge, along with its research parameters. The general research methodology adopted throughout the work is also explained. Chapter Two then conducts a review of the theoretical literature on inter-state relations. A particular focus is placed on federalism and the concept of multi-level governance (MLG). Scharpf’s (1997) actor-centred institutional MLG analytical approach is also examined, along with three major Australian interpretations of federal theory. In addition, the following background questions are posed to elicit information. What is understood of the incompletely developed concept of MLG? What has sustained and shaped its origins since the late 1980s? Is MLG qualitatively different to current theories of inter-state relations used to examine, and thereby facilitate greater understanding of the growing complexities now experienced within political-administrative structures around the world, and in particular within Australia, or does the general idea exhibit essentially the same characteristics as federalism? How has the rudimentary MLG approach been progressed to develop structural frameworks with the capacity to facilitate analysis of complex policy interactions, and to thereby bring about greater levels of integration between theoretical and solid empirical research? And has a similar mechanism ever been applied within an Australian context before?

Next, to appreciate fully the complexity of governance practices in the Torres Strait region, it will be necessary to not only examine the day-to-day politics and modern practices of policy-making and post-decisional implementation processes within the area, but to also study the underlying historical forces that continue to shape its contemporary governance structures. By way of providing a background on governance structures and practices prior to the Treaty’s introduction, the empirical studies conducted over the next two chapters will adopt a historical form. Chapter Three traces the progression of political-administrative formations in the region from pre-contact time. The following questions are employed to guide enquiry and bring coherence to this complex subject matter. What was the nature of pre-contact indigenous governance and political arrangements in the area? Who were the original Torres Strait Islander communities? Where did they come from? How did they function? What impact did colonial occupation have on local indigenous political-social structures? What forces of change influenced upon this remote northern location? And how did the intrusion of Queensland and Commonwealth governments impact upon the region? Chapter Four prepares the ground for a transition to the second section of the thesis by examining the history of previous border arrangements within the region. It also constructs a chronology of events surrounding the so-called Torres Strait ‘border dispute’. Main enquiries are as follows. What
was the nature of earlier border delimitation arrangements? What is the Torres Strait ‘border dispute’? Why did it occur? How did the Torres Strait Treaty come into being? What were the drivers impelling its creation?

Chapter Five seeks to determine what form the Treaty adopts and how it works in practice. Leading questions are as follows. What is the Torres Strait Treaty? What role does the Department of Foreign Affairs and Trade play within the region? And how effective is the bilateral agreement and its consultative cycle? Chapter Six then examines the key actors involved in border management and asks the following questions. Who are the major actors involved? How do they interact, both with each other and the wider Torres Strait community? What is drawing all these actors together? What, if anything, is exceptional about this remote concentration of Commonwealth frontier governance political-administrators and their agency staff and wider regional networks?

Over the next three chapters, interaction-oriented policy research will be conducted within an actor-centered institutional MLG framework to determine how the Torres Strait region is being managed at a ground level. Here, the dissertation’s analytical framework will be applied to empirical data gathered to examine political-administrative relationship structures within three broad sub-sets, or sub-units, of analysis. These are the border protection, fisheries and environmental management regimes. Chapter Seven conducts an analysis of the Torres Strait border protection management regime. It first considers the numerous challenges affecting operational activities in the area. The dissertation’s game theoretic approach is then applied to the Australian Customs Coastwatch model’s administrative framework and the Torres Strait Treaty’s terms and provisions to help investigate both Treaty Parties’ oversight of this common border region. The following questions are posed. What makes maintaining border integrity in the Torres Strait region so very different to border protection practices employed elsewhere at Australia’s international borders? What major problems face border authorities in the region today? How is the Australia-PNG border being managed at an operational level? And is there any evidence of any form of MLG emerging within the border protection regime, or is it subject exclusively to the dictates of state-led government?

Chapter Eight conducts an examination of the Torres Strait fisheries management regime. It poses four main questions. What major challenges face fisheries managers in the region? How is the Torres Strait Fishery being managed? What is the nature of the interactions occurring across and between the various levels of governance present? And is a new form of MLG emerging within the Fishery as various attendant tensions are being worked out? A number of
minor questions are also employed to help build a wider picture of the overall Fishery and the numerous challenges impacting upon its management. These are as follows. What generic challenges face all Commonwealth fisheries resource managers? What is the Commonwealth model of fisheries and how does it translate in the Torres Strait region? What constitutes the Torres Strait Fishery? What form does the Protected Zone Joint Authority take and how does it function? What roles do the PZJA advisory bodies play? Are they working effectively? And who are they major actors in the Torres Strait’s fisheries regime? Chapter Nine then attempts to determine how the fragile Torres Strait environment is being protected and managed. Major enquiries are as follows. What major environmental and natural resource management (NRM) initiatives are being undertaken and implemented by the actors involved? What possible environmental risks and threats does the Torres Strait region confront? And are the unique environmental protection and conservation opportunities afforded under the Treaty being fully capitalised upon? In conclusion, Chapter Ten then integrates the three subunits’ findings and reviews and presents the project’s overall findings at a single case study level. It revisits key themes of the thesis. It also considers the theoretical implications of the findings for the study of inter-state relations and the manner in which the Australian political science discipline now deals with the analysis of contemporary political-administrative relations within this country.

Throughout the chapters, the expression political-administrators is also employed to describe middle-level bureaucrats working in the Torres Strait area. The term is extracted from Heclo’s and Wildavsky’s [1974]1981) study on community and policy inside British politics, entitled *The Private Government of Public Money*, in which the authors identify an inclusive Whitehall bureaucratic community united by ties of kinship and culture. Heclo and Wildavsky [1974]1981) suggest the term is particularly useful during analysis of power when political analysts face the impossibility of apportioning authority amongst a number of disparate institutions, for example government ministers, politicians and public servants (Heclo & Wildavsky [1974] 1981:2,3,36). Given the futility of trying to isolate daily implementation of government policies and programs within Torres Strait from the all-pervasive influences of domestic and international politics impacting on the region, it is perhaps an apt term to apply to middle-level managers working in government line agencies and organisations in the area. It is also essential to highlight that many people and places in Torres Strait are known by two, or more, different names. Naghir, or Mount Earnest Island, for example, is also referred to as Naghi, Nagi, Nagir and Nagheer. To avoid confusion and repetition, the different names will be employed within their appropriate historical contexts. To provide clarity and further avoid the risk of misinterpretation, several direct quotes are also contained in the footnotes.
Contribution to Knowledge

The research project is justified because of its potential to make two original contributions to knowledge. It represents the first comprehensive analysis of the complex overarching Torres Strait governance structure that was created following the Torres Strait Treaty’s entry into force and ratification in 1985. Second, this project is possibly the first large-scale application of an actor-centered institutional MLG concept similar to that contained in Scharpf’s (1997) original work within an Australian context. It therefore provides a unique test site for testing the concept’s validity. The theoretical framework explored in this thesis is also intended to help fill in a major gap, or inadequacy, within Australian writings on inter-state relations by contributing to the important task of opening up a robust, focused dialogue on the emerging MLG phenomenon within Australia. This unique opportunity to assist in the development of the theoretical dimensions of the political science discipline within Australia, by making an original contribution to the body of knowledge on Australian federalism and by providing an insight into a new emerging form of cooperative MLG in Australia, is being largely facilitated by the supranational nature of the bi-lateral Treaty. In addition, the project provides a unique insight into the real-world workings inside the institutional architecture of Australian frontier governance. It further draws our attention to the huge amounts of additional bureaucracy and resources required to maintain an open-border policy along Australia’s coastline. It also offers a unique opportunity to study interactions between international, national, state and local levels of governance, by focusing upon a particular issue within a specific geographic area. Most importantly, it provides a valuable resource for assisting those with an interest in the Torres Strait region to understand, and thereby help to bring about structural change within Torres Strait governance structures, for the betterment of the wider economic, social, cultural and strategic security interests and concerns of both the region and all its inhabitants.

Research Parameters

The project constitutes a relatively self-contained unit and is confined within fairly distinct boundaries. First, it is limited to an examination of governance structures within an officially-gazetted geographic area. Second, it situates contemporary political and institutional change in Torres Strait within the context of the dynamism of federalism and MLG. The project does not presume to give absolute primacy to any one particular facet of governance, such as politics, administration or legislation, nor does it create an artificially enclosed system. It does not, for example, preclude occasional or temporary exogenous factors that may genuinely impact on activities, processes, institutions or relationships within the research zone6.

6Definition of the Torres Strait region: ‘generally that area of sea and islands lying between Cape York and the Papuan coast bounded as follows: in the East by the north east extremity of the Great Barrier Reef and thence in a north westerly direction to include Bramble Cay terminating at Brampton Point on the Papuan Coast; in the West
Case Study Research Design

Analysis of an overarching governance structure within a defined geographic area necessitates a choice of a single-case study research design. While still searching for significance beyond its boundaries, by focusing primarily on how variables interact and evolve within a particular setting, a case study approach allows for detailed, varied and extensive observation of specific events, relationships, experiences or processes contained within that setting over a period of time (Denscombe 1998). It also facilitates empirical enquiry of contemporary phenomenon within its real-life context using multiple sources of evidence (Yin 1984). Most certainly, the approach establishes linkages, emphasizes interconnected and interrelated relationships, and allows enough detail for the complexities of social life to be teased out. Its value lies in its potential to capture the complex reality inherent within relationships and social processes, typically using a holistic approach to analysis rather than one based on isolated factors. By concentrating effort on one research site, the approach fits well with small-scale research, permits substantial flexibility in the range of data collection efforts, and encourages and facilitates the use of use multiple sources, types of data and research methods. These, in turn, allow for data validation through triangulation. The approach also facilitates comparative analysis of several subunits of significant to the case study and provides an opportunity to explain why outcomes might happen by focusing attention on the detailed workings of relationships and social processes, rather than purely on the outcomes of such processes (Yin 1984: 14, 20; Neuman 1991:26; Denscombe 1998: 30-40; Bouma 2000:91).

Nevertheless, case studies are difficult to perform and few execute them well (Scharpf 1997). The approach is criticized for its alleged lack of high degrees of analytical rigor, tendency to produce ‘soft data’, and its focus on process rather than measurable end products (Yin 1984: 21; Neuman 2000:145). It reportedly provides narrative accounts of situations, but is also time-consuming, generates too much information, and is relatively ill-suited to analyses or evaluations. It also allegedly relies on qualitative rather than quantitative data and employs interpretative rather than statistical methods. Lustick (1996) suggests the method promotes the historical progression of events at the expense of structural explanations and is generally unable to improve predictability. It also fails to contribute to the cumulative growth of a body of systematic knowledge on political structures and processes and their effect on public policy, thus denying the possibility of claiming validity beyond the case at hand. Yin (1984: 21, 48) also notes the approach’s vulnerability to criticism relating to the credibility of scientific generalizations made from its findings, but pragmatically suggests many of the

by Parliament Point on the Papuan Coast; and thence South to latitude 11 [degrees] south including Turu Cay and Cook, Meraka and Proudfoot Shoals’ (JCFADSC 1976).
method’s shortcomings may be offset by careful attention to detail and rigor in the use of the approach. Eckstein (1975) proposes if a case study is to support generabilisable conclusions, it must be treated as a crucial case study that tests the validity of the explanatory hypothesis employed. However, Scharpf (1997) argues stochastic hypotheses (governed by the laws of probability) cannot be tested in single-case studies. Instead, focus should be placed on the composite as a whole, using orienting frameworks such as MLG, macro-levels systems, rational-choice or structuralist ‘theories’ to identify potentially relevant factors, causal mechanisms and contextual conditions. This Scharpf (1997:32) argues is because ‘while the composite explanation of the course of events is likely to be unique for each country… the modules in constructing it may reappear more frequently in other cases as well and thus are more likely to achieve the status of empirically tested theoretical statements’.

Two major operational problems may also arise when adopting a holistic case study design. First, there is a risk the entire case study may be undertaken at an abstract, rather than operational level. Second, should the initial research questions change as the study proceeds, any unsuspected slippage in the case study’s orientation may render the original research design inappropriate. For these reasons, this project employs a more complex embedded single-case study design in which three subunits (subsets) of analysis are utilised to focus the case study inquiry before returning to the larger holistic unit of analysis, where the results will be interpreted at a single-case study level (Yin 1984:44-7). Neuman (2000) argues observing a cross section of subsets at a particular point in time, as will occur in this document, may provide a comparative element. The method’s inherent disadvantage is that it typically attempts to capture social change and understand causal process occurring over time using a ‘snapshot’. Babbie (2001: 101-2, 105) likens this problem to attempting to determine a moving vehicle’s speed using a still photograph in which time is frozen, but nevertheless suggests inferences can still be made about processes that happen over time.

**Data Collection Methods**

The research methodology relies on qualitative, and to a lesser extent quantitative data, drawn from primary and secondary sources. Bouma (2000: 174-5) notes a symbiotic relationship exists between the two approaches, suggesting most innovative and robust research regularly combines both. In this particular instance, the qualitative technique of one-to-one, semi-structured elite interviews using open-ended questions and answers was employed in primary data collection. The method enabled a unique insight into real-world political-administrative life within Torres Strait by exposing new and unexpected aspects, dimensions and nuances of concepts that were not necessarily evident at the project’s onset. Berry (2001) also notes the
paradox of elite interviewing using this approach is that its inherent flexibility may also serve to aggravate difficulties associated with validity and reliability.

While excellent historical and contemporary work exists on a wide variety of issues relating to the Strait’s region, secondary data on the nature of contemporary political-administrative relationships and practices occurring within Torres Strait is scant (Kaye 1997). Yet, as Heclo and Wildavsky [1974] 1981 observe of the influences that bureaucrats and their specific institutional settings exert over society: ‘the rules by which they live, the customs they observe, the incentives they perceive and act upon are important, not only to them, but to the people they govern’ (Heclo & Wildavsky, 1991:lxvii). Hence, to overcome this paucity of evidence, and my own initial ignorance on the subject matter, I needed to first engage with those directly involved in day-to-day border management in the Torres Strait region. Heclo and Wildavsky concur: ‘To understand how political administrators behave, we must begin by seeing the world through their eyes…The participant is the expert on what he [she] does, the observer’s task is to make himself [herself ] expert on why he [she] does it’ (Heclo & Wildavsky [1974]1981, p.lxvii). Three sub-groups of political, administrative and commercial elites were identified as having greatest potential to provide an insight into wider processes of governance occurring within the Torres Strait region. A series of semi-structured interviews was conducted in the region during May 2004. A key focus of the visit was to gain first hand exposure to the major issues affecting political-administrators working in the area. Interviews were guided by an interview schedule, which essentially helped build a governance profile of individual policy sectors. Participants were chosen according to their official positions within their respective institutions. Interviews were also conducted from Brisbane.

Interviewing members of a minority community of elites, especially those accustomed to exercising power and influence in remote locations, such as Torres Strait, raises a number of methodological issues. First, the probability of overlapping multiple interlocking membership of elites across political, administrative and societal organisations is relatively high. Lasswell (1936, 1948) confirms the agglutinative nature of power and influence, suggesting those with some forms tend to attract other forms also. This phenomenon is highly visible within Torres Strait. Second, negotiating access to and gaining the respect and mutual trust of elites requires a demonstrated background knowledge on the subject matter, along with a recognition of the extent to which many elites, in particular political-administrators, value their anonymity and secrecy (Heclo & Wildavsky [1974]1981): lxviii; Arksey & Knight 1999: 121-5; Denscombe 1998: 40). Third, researchers should never forget influence is ‘the coin of the realm’ in an elite’s world. The interviewer has a purpose, but so to does the elite interviewee who is under
no obligation to be objective, or to tell the truth. Similarly, researchers should be wary of subjects exaggerating their own individual roles, both within and outside of their own organisations. Fourth, researchers must always remain conscious that common elite responses on particular issues are not necessarily indicative of any underlying harmonious relationship or unanimous agreement between elites (Devine 1995: 137-46; Denscombe 1998: 116-7). Fifth, never assume elite subjects are only interested in, or knowledgeable about their own roles and organizations. Opportunities to gain unique and insightful perspectives into the wider political-administrative system may unknowingly be lost (Berry 2001). Sixth, always be aware of factors that may influence outcomes, for example the ‘interviewer effect’ and the possibility of spuriousness. Interviewers should also attempt to avoid ambiguity, imprecision, prejudicial language and the use of leading, double-barrelled, assumptive, hypothetical and personal or sensitive questions (Yin 1984: 55-9; Lofland & Lofland 1995:86; Arksey & Knight 1999: 93-5, 101-3; Berry 2001). Finally, used correctly, the empirical investigation of elites’ belief systems, activities, roles in decision-making processes and their relationships with non-elites further provides researchers with an excellent opportunity to develop a sophisticated research project that relies on its own unique primary database (Arksey & Knight 1999: 121-5; Berry 2001).

Secondary data collection was also conducted across a wide variety of sources. A number of methodological, conceptual-substantive and economic advantages are associated with its use. If reliable and accurate, secondary data allows replication and intersubjectivity. It may also improve measurement of certain variables by expanding the range of independent variables used in organising concepts, thereby enabling new or improved insights on certain issues. Systematic secondary data analysis, using unobtrusive measures such as public archival records, the mass media, private records and existing statistics and documents, also provides greater scope and depth in data collection than could be provided by a single primary data source. Secondary data may be used for triangulation to increase the validity of research findings obtained from primary data. It can also be used for comparative purposes, which may enlarge the scope of generalisations. It is less expensive to obtain than primary data, while its availability over time allows a historical approach. Furthermore, it helps describe and explain change and also allows researchers to build on original research, for example by comparing baseline measurements of earlier studies with more recently collected data. However, limitations inherent in secondary data analysis become apparent if a gap emerges between primary data collected for a specific research purpose and secondary data collected earlier for other purposes, for example if researchers are unable to obtain information on the secondary
data collection methods employed. This may exacerbate issues of bias, error or problems with internal and external validity (Frankfort-Nachamias & Nachamias 1996: 13-6, 305-8).

Therefore, in order to construct validity, reduce bias and enhance dependability, reliability, interpretability and accuracy, and to avoid problems of internal and external (generalisability) validity and representativeness, and to also facilitate greater in-depth understanding and completeness, the dissertation will utilise a combination of techniques throughout the critical interpretation and verification of data. These include cross checking and ‘between-method’ multiple data and methodological triangulation of accounts using corroboratory and disconfirmatory evidence drawn from a wide and varied range of primary and secondary data sources spread across aggregate, interactive and collective units of analysis (Yin 1984: 36-41, 89; Fielding & Fielding 1986: 33; Arskey & Knight 1999: 22-31, 51-3; Bouma 2000:85-6). For similar reasons, a check against individual value bias on the part of the researcher during analysis of unstructured qualitative data was provided through peer review and ongoing consultation with select participants (Bouma 2000: 85; Berry 2001). In operationalising the dependent variable, particular attention was also paid to avoiding the pitfalls of ecological (mismatch of units of analysis) and individual fallacy and reductionism (fallacy of non-equivalence) (Babbie 2001: 100-1; Neuman 2000:136-7). General epistemological problems associated with the published material and reportage are also acknowledged. This includes the possibility of any accidental or deliberate misinterpretation or description arising from the many perspectives presented by the actors involved. Finally, any generalisations based on the findings and conclusions drawn from this research project must be tempered by recognition of the degree of uniqueness of the case study and the extent to which the findings are context dependent.

Research Ethics
I recognize and hold great respect for Ailan Kastom and indigenous personal and community knowledge systems, processes and intellectual property rights, along with the diversity and uniqueness of the Torres Strait people, both as individuals and collectively. I remain aware of my ongoing obligations to all participants and members of the wider Torres Strait community. At all times, I have attempted to conduct my research in a manner that reflects sensitivity, honesty, integrity, neutrality and recognizes the extremely fragmented and complicated nature of Torres Strait politics. Consultations with all participants were conducted in good faith and

7 Between-method multiple triangulation employs two or more distinct methods to measure the same phenomenon from different angles, for example using a combination of semi-structured one-on-one interviews, government publications, plus published transcripts of interviews. Denzin’s (1970) proposition triangulation strategies function to reduce bias and improve validity is criticised by Fielding and Fielding (1986) who posit while it may improve range and depth to provide a fuller picture, it does not necessarily make information more objective or accurate.
based on free and informed consent. All participants were fully informed on all aspects of the research project, including their right to withdraw at any time without explanation or notice. All may be assured their confidentiality and anonymity will continue to be maintained by the author.
Chapter Two

Federalism and Multi-level Governance

*Theories bring intellectual order to facts, which are myriad and cannot speak for themselves.*

Adapted from Fred Halliday, *Rethinking International Relations*, (1994).

A prior in-depth understanding and appreciation of the concepts, ideas and principles underlying this dissertation’s analytical framework is an essential foundation for the empirical investigations undertaken in the following chapters. For this reason, this chapter conducts a wide-ranging theoretical review of the two bodies of literature involved: federalism and multi-level governance. It need be noted that owing to the vast difference between the provenances of federalism and MLG, a greater portion of this chapter will be devoted to the concept of federalism. The origins and characteristics of federalism and MLG will first be compared and contrasted. Fritz Sharpf’s (1997) actor-centred institutional MLG framework will then be examined. The chapter next addresses the general theoretical literature on federalism from an international perspective, comparing and contrasting the enormous and rich variety of federal structures found around the world. A particular focus is placed on the sources, composition and differences between Anglo-American and European approaches. This is followed by a brief overview of Australian writings on federal theory. The application of the MLG concept within an Australian context is also considered. It is here we find a serious gap exists within the Australian literature on theories of inter-state relations.

The chapter’s core thesis is that as multiple levels of governance continue to emerge under the influence of forces generally exogenous to central government control, growing levels of complexity and interconnectedness are increasingly becoming common characteristics of political-administrative structures within Western societies. Such forces are being driven by processes like globalisation, regionalisation, localisation and individual nation-states’ treaty-making activities. As a result, despite the great international diversity of interpretations of the federal principle, in-depth empirical policy research on the complex relationships and major structural tensions and conflicts now presenting within many Western governance structures will require far more complex analytical frameworks than those models currently provided by standard theories of federalism. It is also argued that despite Australia’s specific underlying set of federal constitutional circumstances, the particular analytical framework facilitated under an actor-centred institutional MLG approach gives purchase to far greater explanatory
powers and insights into the dynamism driving this emerging MLG phenomenon, both within this country and elsewhere. Hence, the concept now merits serious consideration within the political science discipline in Australia.

Federalism and Multi-level Governance (MLG)

The origins of contemporary theoretical literature on federalism trace back to the first important discussion on federal government, contained in the eighteenth century essays of Hamilton, Jay and Madison under the title of The Federalist (Earle 1941:x; Hamilton, Jay and Madison [1787-89], 1941; Levi 1991:29). The papers were written to garner support for the adoption of federalism, bicameralism and the separation of powers, and were heavily influenced by Montesquieu’s L’Esprit des Lois [1748] 1949). They were also influenced by traditions of British political philosophy, in particular John Locke’s [1689] 1983), [1690] 1987) writings, which stressed representative government, toleration and natural or God-given rights, identified as the rights to life, liberty and property. The essays aimed to provide for stronger national government in the American federation, without infringing too far on the rights and freedoms of its States and individuals. The resultant new Constitution of the United States, agreed upon 17 September 1787, was to provide a major legislative ‘check and balance’ by setting limits on the central government’s political powers. It also fragmented government power by dividing sovereignty between rival levels of government, thus guaranteeing a barrier to the concentration of political power in the hands of a few (The Federalist Papers [1787-89], 1941: 587-604).

By contrast, the term multi-level governance (MLG) represents a relatively new development in political science. It first emerged out of attempts to describe and explain the European Union’s (EU) cohesion policy following the introduction of structural funds during the late 1980s (Marks 1992; Bache & Flinders 2004: 2). More recently, the concept has increasingly been applied as a governance model for analysing qualitative changes, both in institutional decision-making structures and interactive political processes occurring between public and private actors on different levels of the European multi-level polity. These changes are, in large part, the outcome of a common political phenomenon now occurring across Western

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8 In a parallel development of similar ideas and a diffusion of literatures on federalism and new institutionalism, scholars have sought to describe a new political phenomenon in Western governance. One response is to stretch the well-established concept of federalism beyond its typical domestic application to the analysis of power sharing relationships among nation-states. Other responses attempt to establish new theoretical ground between the two main contenders of integration theory, namely liberal intergovernmentalism and the differing strands of neo-functionalism. These initiatives have led to the development of entirely new terms and concepts, including multi-tiered, multi-centric, polycentric and multi-perspective governance, FOCJ (functional overlapping competing jurisdictions), fragmentation, and consortio and condominio, a’ la carte, variable geometry and MLG (multi-level governance) (Moravcsik 1993; Scharpf 1994; Liebfried & Pierson 1995; Hooge 1996; Schmitter 1996; Frey & Eichenberger 1999; Ostrom 1999; Benz & Eberlein 1999).
governance structures, namely the dispersal of authority upwards, downwards and sideways away from central governments. It must be noted however that the MLG concept provides but one possible interpretation of the numerous processes occurring within the European Union (Marks 1993; Christiansen 1994; Leibfried & Pierson 1995; Marks et al. 1996; Hooge 1996; Scharpf 1997; Hooge & Marks 2001; Bache & Flinders 2004).

While appearing different at first sight, both bodies of literature analyse the same phenomenon, namely non-static dynamic relationship structures between levels of government that are subject to constant change and in which power and authority are being distributed across vertical as well as horizontal lines. In such systems, whether described as federalism, federation, federal or MLG, the various levels of government are involved in interactive processes that, in turn, build the basis of the overall system. These can take place along co-operative, coordinated, competitive or hierarchical lines. In fact, MLG literatures do not refer to a qualitatively new phenomenon. Relationship structures analysed by MLG authors are essentially federal in character. Nevertheless, major differences exist between the two approaches. MLG, for example, utilises policy arenas (sectors) rather than individual governments as its basic unit of analysis. The number of levels employed in MLG analysis is also higher than in any federal system as another supranational level of governance stands above central government (Marks et al. 1996; Jordan 2001:196). By contrast, traditional federalism’s primary focus on constitutional federations, which reduces the world to a small number of primary Western cases, is directed towards the analysis of relationships between two levels of government: federal and federated (Sawer 1976; Painter 1996; Elazar 1998; Selway 2001; Saunders 2002). Within this federal structure, policy formulation is generally viewed as the result of interaction processes between two jurisdictional levels, although a third, and often excluded, communal level of local government normally exists below the regional (Gillespie 1994: 84; Worthington & Dollery 2000; Brown 2002).

Multi-level governance literature, on the other hand, embraces the interconnectedness and complexity of contemporary political spheres. Unlike comparative-federalism perspectives or

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9 Hooge (1996) identifies two main MLG types. The first, with its intellectual roots in federalism, conceptualises MLG as the dispersion of authority to multi-task non-overlapping territorial jurisdictions within a relatively stable system-wide framework containing limited jurisdictional levels and a limited number of units. This perspective supports the argument that Westphalian States remains the primary instrument of domestic and global governance, albeit somewhat modified by outside influences such as trans-national movements, the growth of international regimes, corporations and public-private partnerships (Caporosa 2000). The second more pluralistic type Hooge (1996) proposes is not used in this dissertation. It relates to a complex fluid patchwork of innumerable overlapping jurisdictions with extremely fungible competencies within a relatively flexible non-tiered system in which citizens are served not by ‘government’, but by a variety of public service ‘industries’.
the state-centric liberal-intergovernmental interpretations offered by international relations scholars, MLG proposes that as decision-making within multi-level polities spills beyond core representative institutions, central states’ formal authority is increasingly being relocated upwards to supranational institutions, downwards to subnational governments, and sideways to diverse types of public-private partnerships (Marks & McAdam 1996; Scharpf 2000). It also posits the dispersion of governance across multiple jurisdictions is more efficient than, and normatively superior to, central state monopoly as governance needs to operate at multiple levels in order to both capture variations in the territorial reach of policy externalities and to internalise externalities. The approach also rarely ever mentions the terms federal, federation or what Schmitter (1996: 148) terms the ‘dreaded F-word’ federalism, although Jeffery’s (1996) ‘three-tiered’ federal structure and Schobben’s (2000) ‘modest’ federation interpretations of the European Union do provide exceptions. As Marks et al. (1996:41-2) note:

Instead of a bifurcated model of politics across two autonomous levels, these theorists conceptualise the EU as a single, multi-level polity. The point of departure for this multi-level governance (MLG) approach is the existence of over-lapping competencies among multiple levels of governments and the interaction of political actors across these levels.... Instead of the two level game assumptions adopted by state centrist, MLG theorists posit a set of overarching, multi-level policy networks... political influence over outcomes is dispersed among contending subnational, national and supranational actors... in a growing number of cases no one of these actors has exclusive competence over a particular policy. The presumption of multi-level governance is that these actors participate in diverse policy networks and this may involve subnational actors – interest groups and subnational governments – dealing directly with supranational actors.

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10 Liberal Intergovernmentalism (LI): State-centric LI theorists concentrate mainly on ‘high politics’. For example, Moravcsik’s (1993) liberal intergovernmentalist theory of the EU posits individual states function as single agent, rational, self-interested actors in a two level game of conventional (i.e. government dominated) statecraft. States act as gatekeepers between national and international politics, making few concessions beyond their own domestically determined preferences. Individual states also purposively exploit the EU to manipulate their own domestic constituents, by pushing through important, but unpopular, policies to overcome domestic opposition at home (‘slack cutting’). LI runs contrary to more pluralistic accounts, such as MLG, which primarily addresses the ‘low politics’ of policy development and local-level implementation and envisages a much more open and disordered pattern of events in which supranational and subnational level actors play an especially important steering role. According to Marks, MLG in the EU amounts to a ‘system of continuous negotiation among nested governments at several territorial tiers- supranational, national, regional and local - as a result of the broad process of institutional creation and decisional relocation’ (Marks 1993:392).
Jordan (2001) suggests MLG’s popularity derives in large part from its ability to capture the atmosphere of the times by embracing the discourse of ‘governance’\footnote{Jessop (2004) suggests the term governance is being countered by the increasing role of governments in ‘multi-level meta-governance’ processes, that is in providing the ‘ground rules’ for governance occurring within the shadow of a hierarchical state structure.}. It also provides detailed and compelling descriptions of contemporary changes and facilitates interaction with associated subdisciplines. As Jordan notes, ‘MLG successfully carries European studies into other subdisciplines of politics and public administration, such as intergovernmentalism (i.e. central-local relations), core-executive studies, and implementation theory, thereby bridging the long-standing divide between the national and the international aspects of political science’ (Jordan 2001: 201). Nevertheless, MLG is not a fully-fledged theory. The concept remains ill-defined, highly contested, and is poorly understood within contemporary political and academic discourses, both being typically informed by conventional understandings of national politics and international relations (Scharpf 2000; Jordan 2001: 199). Bache and Flinders (2004) also note this requirement for conceptual clarity, identifying four common strands (common understanding and applications) of MLG that might provide a basis for a parsimonious definition of MLG.

- Decision making at various territorial levels is characterised by the increased participation of non-state actors;
- Identification of discrete or nested territorial decision making is becoming more difficult in the context of overlapping networks;
- Within this changing context the role of the state is being transformed as state actors develop new strategies of coordination, steering and networking to protect, and in some cases, enhance state autonomy;
- Within this changing context, the nature of democratic accountability has been challenged and need to be rethought, or at least reinvented.

It is suggested a greater likelihood exists of multi-level governance being prominent during local-level implementation and post-decisional stages, in particular in areas of ‘low politics’ of policy development that national governments classify as being of lesser importance to their priority interests. The approach also is criticised for its tendency to overstate its ability to challenge, even diminish, the influence of central government policy control once decisions escape intergovernmental bargaining processes. In reality, State executives continue to act as effective gatekeepers between national and international politics, while simultaneously giving primacy to their own domestically determined preferences (Fairbass & Jordan 2004; Bache & Flinders 2004). Benz and Eberlein (1999:330) also note little is still understood about the actual workings of MLG, but nevertheless suggest empirical investigation indicates the
concept works in ‘a reasonably satisfactory way’. Benz and Eberlein (1999) argue this is because, despite the structural limits that issues of complexity and institutional diversity place on the linking or ‘coupling’ of multiple arenas, the ‘inherent tensions arising from the threat of overcomplexity and from conflicting operating logics of different arenas and levels trigger and drive restructuring processes, which have the potential to bring about successful adjustments to new requirements’. Nevertheless, despite its potential as a system-wide self-correcting mechanism, Scharpf (2000) argues the concept will remain isolated from the political science mainstream of comparative politics and international relations so long as European empirical research on multi-level interactions continues to: (1) create novel concepts that make ill-fitting contested generalisations; (2) emphasise the uniqueness of its objects; and (3) propose holistic concepts that profess to capture the complex reality of a specific polity as a whole. Scharpf’s (2000:2) proposed alternative is to exploit ‘a plurality of simpler and complementary concepts, each of which is meant to represent the specific characteristics of certain subsets of multi-level actions - which could also be applied and tested in other fields of political science research’.

Fritz Scharpf’s Actor-centered Institutional MLG Framework

In Games Real Actors Play (1997), Scharpf takes the MLG concept one step further. Using an actor-centered institutional approach developed earlier with Renate Mayntz (1995), Scharpf (1997:1) argues MLG is not so much a theory, but rather a ‘conceptual tool kit of analysis’. Utilising the notion of MLG, Scharpf (1997) develops a unifying integrated analytical framework of actor-centered institutionalism that allows for consideration of both state-centered and multi-level institutions. Actor-centered institutionalism explains policy choices as outcomes of interactions among resourceful and boundedly-rational individual, collective and corporate actors whose capabilities, preferences and perceptions are largely, but not completely, shaped by the institutional settings (norms) in which they occur. Institutionalised rules may vary across locations and time, but nevertheless remain relatively invariant within their own sphere of activity, and are thus able to provide the major sources of regularities to realise and employ during explanations. Scharpf (1997) further proposes that methodological individualism’s claim that individual human beings possess exclusive capacity for intentional action renders interaction-oriented policy research impossible, due to the sheer numbers of individual explanations required. He also suggests a majority of actors within the political

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12 Actor-centered institutionalism: According to Scharpf (1997:16), the approach ‘departs from standard rational-actor assumptions by emphasising socially constructed and institutionally shaped perceptions and by distinguishing among three dimensions of preferences, namely (institutional) self-interest, normative orientations, and identity-related preferences’.
process typically act in the interest of, and from the perspective of, much larger units than themselves. Therefore, treating large numbers of units as composites (aggregates, collective or corporate) not only makes interaction-oriented policy research possible, but also allows for valid simplifications of analysis. Nonetheless, it is still possible to revert to individual level analysis should empirical necessity dictate (Scharpf 1997:12, 16, 37, 135-45).

Using fundamental game theory concepts – ‘players’, ‘strategies’, and ‘payoffs’- Scharpf (1997) offers ‘a coherent actor-centered model of institutional rational choice that integrates a wide variety of theoretical contributions, such as game theory, negotiation theory, transaction cost economics, international relations and democratic theory’, in order to offer ‘a framework for theoretically disciplined explanations in small-numbers case studies and for linking positive theory to the normative issues that necessarily arise in empirical policy research’ (Schneider [1997], c.f. Scharpf, 1997). The fundamental concept behind Scharpf’s integration of action-theoretic or rational choice (economic), with institutional or structuralist approaches (sociological), is also evident in Ostrom, Gardner and Walker’s (1994) ‘institutional analysis and development’ (IAD) framework, Burns, Baumgartner and Deville’s (1985) ‘actor-system dynamics’ (ASD), and Zurn’s (1992) ‘situational-structural paradigm’. According to Scharpf (1997: 36):

What is gained by this fusion of paradigms is a better ‘goodness of fit’ between theoretical perspectives and the observed reality of political interaction that is driven by the interactive strategies of purposive actors operating within institutional settings that, at the same time, enable and constrain these strategies. What is lost is the greater parsimony of theories that will ignore either one or the other source of empirical variation.

Scharpf (1997) builds his analytical framework on an initial assumption of unilateral action conducted by self-interested parties within an ‘anarchic field’ and minimal institutions. Such structured conditions are sufficient to ensure both the binding force of criminal and civil legal rights for defending property rights and the binding force of contracts against unilateral violations. Under such conditions, non-cooperative games (Nash 1951) (14), Mutual Adjustment

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13 Schneider notes the framework’s potential application for case studies involving complex policy interactions: ‘Merging sophisticated game theoretical concepts with solid empirical research has been one of the most important intellectual challenges political science has faced for at least two decades. Scharpf’s work is a major step forward in achieving that integration’ (Schneider [1997], c.f. Scharpf 1997).

14 John Nash ‘Nash Equilibrium’ (1951): Scharpf (1997:100) draws heavily on the Nash Equilibrium game-theoretic concept which he describes as: ‘a constellation of individual strategies in which no player could still improve his or her outcome by unilaterally switching to another viable option’.
(Lindblom 1965), and Negative Coordination \(^{16}\) (Mayntz & Scharpf 1975) are possible. However, due to the uncertainty of the future and risk of opportunism associated with an anarchic field, Scharpf (1997) elects to place these negotiations within more demanding institutional arrangements, identified as self-organising networks, negotiation regimes, and joint-decision systems (JDSs). Substantive policy problems are then ‘mapped’ onto the constellations of policy actors involved. For any given actor constellation, policy outcomes are directly affected by the institutional structures and modes of interaction these structures allow (Scharpf 1997: 94-114). The main characteristics of Scharpf’s (1997) classification of institutional arrangements (networks, regimes & JDSs) are illustrated in ANNEX A.

**Self Organising, or Voluntary, Negotiation Networks**

Within policy-related literature, the network concept is interpreted in numerous different ways. Each expression highlights the structural characteristics of network relationships along with its own individual empirical aspects, for example policy, implementation, industrial and regional networks. In this instance, however, the term is defined abstractly, without reference to any identified empirical activity. What is of greater importance to Scharpf (1997) is that network relationships ‘reduce the risk of opportunism using two mechanisms, the longer ‘shadow of the future’ and the ‘higher visibility of transactions relevant to others’. Scharpf (1997) identifies two broad types of network relationships\(^{17}\): ‘network relationships as social capital’, and ‘networks as opportunity and power structures’. The first refers to a semi-permanent structure in which individual interactions are embedded. Interactions within this arrangement are heavily influenced by participants’ recollections of previous encounters (experiences) and their expectations of their future dealings with each other. The existence of the network, and the trust relationships it supports, also allows members to accept higher degrees of vulnerability in their interactions with each other than would be normally possible. This, according to Scharpf (1997), is the core meaning of social capital\(^{18}\), at least within this particular set of circumstances (Scharpf 1997: 136-7). Scharpf also argues trust operates at

\(^{15}\) **Mutual Adjustment**: Scharpf (1997) borrows the term, also known as parametric adjustment, from Charles Lindblom (1965). This mode of interaction is characterised by a minimum level of rationality.

\(^{16}\) **Negative Coordination**: Renate Mayntz and Fritz Scharpf (1975) defined the term, which they use to describe a mode of interaction that Lindblom earlier (1965) titled deferential adjustment (Scharpf 1997: 112). Negative Coordination ‘presupposes that the occupant of a protected interest position is able to block contrary action through the exercise of a veto’ (Scharpf 1997: 112).

\(^{17}\) Scharpf (1997) posits the private law of contracts, torts and civil procedures provides perhaps the most comprehensive model of a negotiation regime.

\(^{18}\) **Social Capital**: Throughout this work, the term is used to refer to relationships built on trust and co-operation.
two levels; ‘weak’ and ‘strong’. These he likens to Granovetter’s (1973) classification of ‘weak’ and ‘strong ties’. By contrast, concepts of negotiating networks as opportunity and power structures are associated with research developed as a critical response to Coleman’s (1986) model of a political market (Atkinson & Coleran [1989]; Knoke [1990]; Marin & Mayntz [1991]; & Schneider [1992]; all cited in Scharpf 1997). Other network theorists, for example Marsden (1983), insist the existence of network linkages among specific actors creates highly selective opportunity structures within which political exchange occurs. Scharpf (1997) however proposes a more correct interpretation of power structures is developed in network-exchange literature tracing back to Emerson’s dependency theory, within which power is envisaged as an ‘asymmetrical exchange relationship’ (Emerson 1962; Emerson [1962], c.f. Scharpf 1997: 138-9).

Negotiation Regimes
Scharpf (1997:141) defines artificially created regimes as ‘purposefully created normative frameworks governing negotiations between a formally specified set of actors that have explicitly undertaken to respect certain interest positions of other parties, to pursue substantive goals, and to follow certain procedures in their future interactions’. Regimes impose obligations. Effective outcomes and cooperative interactions between involved parties are compelled, facilitated and determined not by the regime itself, but rather by the parties’ mutual self-interest and their ongoing adherence and commitment to observing the regime’s common rules, along with a willingness to sanction breaches of regime obligations. Failure to sanction potentially damaging unilateral strategies or violations of regime rules may result in subsequent defections by other parties, and regime collapse. Consequently, the force of rules and availability of fair procedures for settling disputes over breaches of regime obligations, differing interpretations of incomplete contracts, and free-riding on the production of a

19 Weak trust operates at the level of communication and implies, at a minimum, the ‘expectation that information communicated about alter’s own options and preferences will be truthful’, rather than purposely misleading, and that ‘commitments explicitly entered will be honoured’ as long as circumstances under which they were entered do not change significantly. It may also ‘imply a willingness to do small favours and to forgo small advantages that would entail larger losses for alter’ (Granovetter [1973], cited in Scharpf 1997: 137; Scharpf 1997).

By contrast, strong trust’s orientation towards solidaristic interaction operates at the level of strategy choices and implies the ‘expectation that alter will avoid strategy options attractive to itself that would seriously hurt ego’s interests’. However, while players may avoid options that are not in the best interest of other players, problems arise with developing strong trust relationships because individual players are only capable of maintaining a limited number of ‘strong ties’ (Scharpf 1997: 137-8).

20 Free Riding: When actors take more than their fair share of the benefits but do not shoulder their fair share of the costs of their use of a resource, goods, etc.
collective good required for effective regime functioning is essential if successful negotiations are to be facilitated\(^\text{21}\) (Krasner 1983; Scharpf 1997: 124).

**Joint Decision Systems (JDSs)**

By contrast, joint decision systems (JDSs) are instances of compulsory negotiating systems characterised by collective-decision making, or voting systems, operating under unanimity or consensus rules. Within these compulsory relationships systems, binding collective decisions can only be changed by unanimous agreement. Unlike actors in voluntary systems who may ‘exit’ at any time, actors within obligatory decision systems have no choice but to deal with each other. Actors may therefore choose to opt out of negotiations by deliberately switching over to non-cooperative, or even hostile, modes of interaction. Moreover, when negotiations involve high transaction costs, for example under large number conditions, the unanimity rule can turn into a ‘joint decision trap\(^\text{22}\)’, with beneficiaries of the status quo then blocking all reforms, or at least extracting exorbitant side payments. Transaction costs may, however, be reduced through consensus, the institutionalisation of the agenda setting function, and by limiting the numbers of players involved (Scharpf 1988, 1997).

‘Actor Constellations’ and Modes of Interaction

Scharpf (1997) also suggests larger units of policy actors involved in policy interactions, such as political parties and government agencies, typically operate within institutional settings constituted by institutional norms that shape the unit’s cognitive orientations and define its competencies, specific purposes and other action resources. As a result, most actors normally find themselves in relatively stable actor constellations which, within the context of empirical investigation of policy processes, would allow substantive policy problems to be overlaid onto the specific constellations of policy actors involved (Scharpf 1997: 69-96). However, any valid explanation and prediction of outcomes of the policy interactions would first require a complete understanding of the underlying actor constellations and their relationships vis-a-vis-

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\(^{21}\) **Regimes:** In *International Regimes* (1983), Krasner defines regimes as ‘sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations’ (Krasner 1983:2). As fixed-rule institutions with agreed behavioural guidelines, regimes channel political action within a system, provide clear rules, eliminate uncertainty, enable advanced coordination of state and non-state activity, and preclude the need for costly and time consuming negotiations. From another perspective, Susan Strange (1983:337) criticises the term regime for being an imprecise, value biased, overly static and narrow minded, state-centric paradigm that fails to stress the dynamic elements of politics.

\(^{22}\) **Joint Decision Trap (JDT):** The term explains the low capacity for institutional reforms when high-conflict constellations must be resolved through compulsory negotiations systems. Under conditions of large numbers and the subsequent accompanying exponential increase in high transaction costs, the unanimity rule turns into a ‘joint decision trap’ in which reforms can be blocked. For example, the more spheres of government and/or actors involved in decision-making processes, the more difficult it becomes to reach political decisions (Refer Scharpf 1988).
vis one another, along with their strategy options and outcome preferences. This is achievable using relatively simple and transparent game-theoretic explanations (empirical institutional analysis):

‘Actor constellations’ are meant to represent what we know of the set of actors that are actually involved in particular policy interactions – their capabilities (translated into potential ‘strategies’), their perceptions and evaluations of the outcomes obtainable (translated into ‘payoffs’), and the degree to which their payoff aspirations are compatible or incompatible with one another. The constellation thus describes the level of potential conflict, but it does not yet include information about the mode of interaction through which that conflict is to be resolved (Scharpf 1997:72).

Four differing modes of interaction through which actors are able to influence one another and thus shape resulting policy choices are further suggested. These linkage structures should be evaluated according to welfare-theoretic and justice-oriented criteria, and are defined in structural and procedural terms as unilateral action, negotiated agreement, majority voting and hierarchical direction. Policy outcomes for any given actor constellation are not only directly influenced by institutional structures and the mode(s) of interaction these same structures allow, but will also differ according to the mode(s) employed. The main characteristics of the differing mode(s) through which actor (game) constellations are transformed into policy outcomes are detailed in ANNEX B.

Finally, Scharpf (1997) observes that ‘in light of Coase Theorem’, negotiations in general and positive coordination in particular, both offer attractive promise of reaching resolutions of collective action through voluntary agreement’ (Scharpf 1997: 145-6). Indeed, when constellations resemble positive-sum games, such as Assurance, Battle of the Sexes or

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23 Coase Theorem: Ronald Coase (1960) proposes proper assignment of property rights to any good, even if externalities (spill overs) are present, allows bargaining between the affected parties such that an efficient solution can be obtained, regardless of which party is assigned those rights. Problems arise with imperfect information (bluffing), high transaction costs, and the involvement of too many parties.

24 Assurance: Assurance game is a generic term for the game more commonly known as ‘Stag Hunt’ (refer French philosopher Jean Jacques Rousseau [1712-1778] 1972). Two hunters can either jointly hunt a stag or individually hunt a rabbit. Hunting stags requires mutual cooperation, as chances of success are minimal if a hunter hunts a stag alone. Hunting stags together is also more beneficial for a society, but it requires high amounts of trust between members of that society.

25 Battle of the Sexes: In this game there are two pure strategy equilibria. A different pure strategy equilibrium or Nash equilibrium (i.e. a set of strategies, one for each player, such that no player has incentive to unilaterally challenge that player’s action) is preferred by each player (i.e. a husband and wife). However, either equilibria is preferred by both players to any of the non-equilibrium outcomes. Thus, both equilibria are Pareto optimal (a measure of efficiency – the best that could be achieved without disadvantaging one player (refer Vilfredo Pareto[1848-1923] 1968). A mixed equilibrium also exists. Put simply, parties have a common interest in coordinating their choices to attain welfare-superior outcomes.
Prisoner’s Dilemma, theoretically negotiations are capable of providing welfare-maximising solutions. Nevertheless, only parties capable of making contributions of value to others should be included in voluntary negotiations, as there is simply ‘no room at the bargaining table for those who have neither the valuable resources or skills to offer’ (Scharpf 1997: 146). Compulsory negotiations outcomes, on the other hand, have a tendency to ‘reproduce rather than change the given distribution of physically controlled assets, legally protected property rights, and outside opportunities’. Therefore, in situations where redistribution is the central policy problem, negotiations or consensual decision-making are not generally recommended modes of interaction (Mueller [1989], cited in Scharpf 1997; Scharpf 1997:146).

International Perspectives on Federalism

Unlike MLG’s recent origins, the wider contemporary international theoretical literature on applications of the federal idea contains a substantial volume of work dealing with the enormous and rich variety of multi-dimensional federal arrangements found around the world. Comparative studies across individual federal systems highlight numerous differences, both in degrees of centralisation or decentralisation and in financial and institutional arrangements for facilitating intergovernmental relations. No two federations are the same. Individual expressions of the federal principle are influenced by each system’s own distinct setting, albeit historical, cultural, intellectual, philosophical, political, social, economic or ideological (Burgess & Gagnon 1993; Simeon & Swinton 1995; Cairns 1995; Beer 1995; Elazar 1998; Watts 1999). Watts (1999), for example, describes Papua New Guinea’s nineteen provinces and single national capital district as a decentralised union exhibiting some federal features (Watts 1999: 8, 12). Scharpf (2002: 2) concurs on the numerous differing interpretations of the federal concept: ‘What the Germans mean when they say ‘federalism’ is not what the French understand – or what the British seem to hear’. Thus, we are able to draw a clear distinction between federal theory and federal practice.

Watts (1999) summarised the international theoretical literature on federal systems prior to the 1950s, commenting most authors tended to concentrate primarily on the formal legal frameworks within which federal and state/provincial governments conducted their activities, as demonstrated by J. Quick and R. Garran’s, The Annotated Constitution of the Australian

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26 Prisoner’s Dilemma: Each player has a dominant strategy. The resulting equilibrium is Pareto-dominated (outcomes of a game make at least one player better off without hurting any other player) by an alternate outcome in which each player plays the dominant strategy.

27 Unions: Watts (1999) defines unions as ‘polities compounded in such a way that the constituent units preserve their respective integrities primarily or exclusively through the common organs of the general government rather than through dual government structures’ (Watts 1999:8).
Commonwealth [1901] 1976), A.V. Dicey’s, Law of the Constitution [1926] 1996), and K.C. Wheare’s Federal Government [1946] 1951). Wheare, for example, acknowledged the need for intergovernmental cooperation within federations to ensure co-ordinated and complete administration in areas affected under the division of powers, for example aviation and the uniformity of railway gauges. Yet, in applying the federal principle to Australia’s political system, Wheare nevertheless concentrated strongly on the legal aspects of classical, or dual, federalism 28 (Wheare [1946] 1951:17).

Some theorists did attempt to provide a corrective to earlier purely legal and institutional analyses of federal systems. Even Wheare’s aforementioned institutional approach includes a reference to the sociology of federal systems (Wheare [1946] 1951) Chapter XI: 222-260). Other authors adopted a position that over-simplified causal relationships between federal political institutions and federal societies. Livingston (1956), for example, in ‘A Note on the Nature of Federalism, began the intellectual trend away from the legalistic approach by arguing federal institutions were merely instrumentalities of federal societies, rather than of constitutions 29. More recently, there has been a greater recognition of the non-static complex and dynamic causal relationships involving continual interactions between a federal society and its political behaviour, processes, constitutions and institutions. From American metaphors of horizontal ‘layer cake’ dual federalism, to vertical ‘picket fence’ functional federalism, to the cooperation and confusion inherent in Grodzin’s (1966) ‘marble cake’ cooperative federalism 30, there has been a general trend in the literature on federalism away from traditional models of federalism based on divisions of power, territory, function and constituency to issues such as equity, rights, democracy and the requirements of policy efficacy and effectiveness (Grodzin 1966; Norrie 1995; Simeon 1995; Keating 1999: 8-27).

28 Wheare [1946] argued: ‘The Australian Constitution enacted in 1900 established a government for the whole of Australia which, within a sphere, was enabled to exercise powers to act independently of the government of the whole Commonwealth. Neither state nor Commonwealth government acting alone could alter the scope of the other’s powers as laid down in the Constitution. In personnel as well as in powers both Commonwealth and state parliaments were to be independent of each other. Each was to be elected directly by the people. The respective cabinets were to be responsible each to its own parliament. Both Commonwealth and state parliaments were to be limited in their powers, but not by each other: they were to be co-ordinate with each other, but they were to be subordinate to the Constitution’ (Wheare [1946] 1951): 17)

29 Livingston (1956) argued 'the essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces – economic, social, political, cultural – that have made the outwards forms of federalism necessary… The essence of federalism lies not in the constitutional or institutional structure but in the society itself. Federal government is a device by which federal qualities of the society are articulated and protected'.

30 In The American System: A New View of Government in the United States, Morton Grodzin (1966) attempted to overturn popular notions about centralised authority and hierarchical levels of government by using a concept of federalism based on a non-majoritarian theory of political diversity in which power is diffused through a complex system of shared intergovernmental functions.
There is also a greater awareness of the supra and sub-national forces impacting on territorial governments and eroding boundaries between foreign and domestic policy, for example globalisation, regionalisation, localisation and treaty-making agreements (Courchene 1984, 1992; Duchacek 1987; Elazar 1998: 32-6). New and innovative variants in the application of the federal idea have also emerged, as demonstrated with the European Union (EU), a hybrid structure now involving elements of both confederation and federation (Elazar 1998: 87-107; Watts 1999:7). Indeed, it is argued the potential exists in Europe for a multitude of possible federal arrangements that could be developed within the scope of federal principles (Schmitter 1996:2; Watts 1999). Nevertheless, European state centrist continue to view the EU as a set of institutions for facilitating collective action among nation-states. From this perspective, nation-states remain the dominant political actors in a two-level game, as evidenced by their control of the European Council and the Council of Ministers (Moravcsik [1993], cited in Marks et al., 1996:41).

Keating (1999) notes there has also been considerable convergence between the two main ‘ideal’ types of the federal principle. For example, in the United States, greater amounts of overlap, cooperation and joint-policy making are being experienced between levels of government. Meanwhile in Europe, liberalism and individualism have ameliorated traditions of a strong and pervasive state. Yet, the old basic distinctions between the two conceptions remain valid. For example, contemporary conceptions of federalism expressed in Anglo-American literature are broadly associated with post early nineteenth century constitutional practice in the United States. As highlighted, this jurisdictional approach to federalism is originally based on the separation of powers doctrine and anchored in traditions of limited government, countervailing powers, Lockean notions of contract and consent, and separate tiers of government, each with its own constitutionally entrenched competencies. Still today in the United States the doctrine of states’ rights remains strong. Constitutional amendments are rare and government remains limited. A much clearer division of competencies between levels of government than found in Europe is also evident (Keating 1999).

By contrast, European traditions of organic federalism continue to adopt a far more integrated and unitary character. The type of federalism described in European literature and expressed in European, and in particular German political practice, comes from a tradition of a strong pervasive state that enjoys wide powers of social regulation, high degrees of interpenetration, and cooperation between levels of government, along with strong organic connections to civil society. Nevertheless, despite the suggested convergence between Anglo-American and European approaches, today German political practice continues to be characterised by
cooperation, consensus seeking, corporatism and intergovernmental policy-making, as illustrated in the German *Lander* and *Bundestrat* (Burgess & Gagnon 1993; Keating 1999). European discussions on federalism also tend to move across two planes of analysis: institutional and sociological. Institutional level research focuses on regional, or community, structural arrangements located either within central institutions or between orders of governments. By contrast, the growing body of literature on federalism using a sociological approach focuses on issues such as homogeneity and diversity. This is perhaps because, as Elazar (1998:34) points out: ‘A look beneath the surface of national homogeneity in every major Western European state reveals a diversity of ethnic groups, forcibly submerged by the nation-states, that had already begun to resurface and to develop their own cross-border connections.’

Watts (1999) suggests as a liberating and positive form of political organisation combining self-rule and shared rule, federalism’s attractiveness lies in its inherent flexibility, adaptability and ability to accommodate unity and diversity (Watts 1999:3, 5-6). Its renewed popularity in the 1990s has arisen with the concomitant ‘pooling of sovereignty’ to create larger regional political units, such as the North American Free Trade Area (NAFTA) and Association of Southeast Asian Nations (ASEAN). These arrangements are being generated by several factors, including individual nation-states’ aspirations for progress, increased living standards, social justice, and greater international influence on the world stage. They are also motivated by the growing awareness of greater levels of global interdependence and interconnectedness being experienced within this era of advanced technology. Another factor is the demonstrated resilience of classical federations in the face of a rapidly changing social, economic and political world. The United States (1789), Canadian (1867) and Australian constitutions (1901) are, for example, amongst the longest serving today. Federalism’s popularity is also being driven by increasing interest in the decentralist thrust of the subsidiarity principle, along with a growing desire for smaller self-governing political units that are capable of pressuring national governments to become more responsive to individual citizens’ needs and also of giving greater countenance to core group attachments, such as long-established linguistic, cultural, religious, historical and social ties and practices (Elazar 1998: 32-6; Watts 1999). The subnational governments of Galicia, the Canary Islands, Madeira, Brittany,

31 *Subsidiarity Principle*: The notion that ‘a ‘higher’ political body should take up only those tasks that cannot be accomplished by the ‘lower’ political bodies themselves’ (Watts 1999).

Wales, Scotland, Catalonia, Bavaria and the Basque Country all provide excellent examples (Marks et al. 1996:40-61).

Unlike statists’ reification of the State as the repository of all political sovereignty, federalism does not recognise a State apparatus separate from civil society. Nevertheless, interpretations of federalism clearly concentrate on the dispersal of power (or competencies) and jurisdiction within the State. American theoretical perspectives tend to view federalism in a hierarchal manner. A strong central government controls the levers of power, thereby dominating subordinate states (Gagnon 1993). Canadian federalism, on the other hand, is heavily influenced by both American federalism, with its one-nation concept, and European traditions of federalism, which encourage the expression of a diversity of political streams. Vipond (1991) argues Canada has two competing traditions of federalism. One, built on liberalism, highlights individual liberty. Here, the national government’s role is to protect individual liberty and provide leadership. The other stresses the value of community, collective choice and the importance of provincial governments as guardians of regional identities (Vipond 1991:2). By contrast in Europe, Swiss centralist and cantonal perceptions are built on two pillars: autonomy and union. Neither centralists nor cantonalist forces can take precedence over the other without upsetting the delicate balance between union and diversity, and between autonomy and sovereignty, as this could in turn endanger the maintenance of Switzerland’s federal system (Gagnon 1993: 27).

What is Federalism?

Federalism also means different things to different analysts of federalism. Riker’s (1964:13) formally neutral definition defines federalism as a political organisation in which government activities are divided between central and regional levels in a way that each is allowed to retain final decision-making responsibility on certain activities. Watts (1999) interprets federalism as a flexible concept and normative term that finds its expression in different types of state structures (Watts 1999)33. Elazar (1987: 5-7) describes federalism as ‘the linking of

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Federalism: – (from the Latin foedus, meaning ‘pact’ or ‘covenant’).
Federal theory analyses federalism as a normative category. It refers to the advocacy of multi-tiered government combining elements of shared rule and regional self-rule. It is based on the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within a larger political union. The essence of federalism as a normative principle is the perpetuation of both union and non-centralisation at the same time’ (Watts 1999:6).

Federal Political Systems and Federations:
Federal political systems and federations are descriptive terms referring to particular forms of political organisation. Rather than the single source of authority found in unitary systems, the class of federal political systems applies to a broad category of political systems with two (or more) levels of government. They combine
individuals, groups and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties’. Conversely, Simeon (1972: 202-39) perceives federal-state arrangements as the outcome of dialogue in which individual groups and actors capitalise on a variety of resources while attempting to achieve their goals via negotiation. Such resources are legal authority, skills expertise, access to information, perceived expectations of the degree of underlying electoral support in the population for particular positions, and the size and wealth of governments. Simeon (1988) also interprets interregional and intergovernmental conflict arising primarily as a ‘function of the underlying political economy’, emerging issues, the ‘mobilisation of interests’, and the ‘ambitions of federal and provincial leaders’. And in a radical departure, Stevenson (1989) adopted a neo-Marxist approach in which federal-provincial conflicts are representative of ‘class fractions within a dominant world of corporate capitalism’ in which individual fractions identify with a specific level of government.

Some thinkers adopt a beneficial approach to federalism under which a federal system’s component parts may obtain benefits not enjoyed as separate fully independent states. Such entitlements may include a shared defence force, military security, customs and immigration regimes, common foreign affairs representation, accommodation of expansionists’ ambitions, and the economic dynamism of internal free trade regimes. They may also provide potential protection and strength for smaller constituting states. Federalism may also stimulate valuable competition between legal and regulatory regimes in different parts of a country. It can serve the constitutional objective of limiting the concentration of political power by fragmenting it between different levels, thereby enhancing democracy by restraining the coercive powers of central government and making the abuse of power more difficult. It can also provide possible solutions to problems of governmental remoteness, particularly in large territorial units such as Australia, where its huge geographic size necessitates a level of decentralised government (Riker 1964; Else-Mitchell 1983; Hughes 1998; Saunders 2000, 2002).

Elements of shared-rule and regional self-rule for constituent governments and encompass a broad spectrum, from quasi-federations, federations and confederacies to unions, constitutionally decentralised unions, associated statehood, condominiums, leagues and joint functional authorities. Other systems, in looking for workable political arrangements, may pragmatically incorporate aspects of federal systems. For example, the European Union hybrid, once a purely confederal arrangement, has recently adopted certain aspects of a federation (Elazar 1995:2-7,16; Watts 1999:6-7). Conversely, Federations are a type of federal political system ‘in which neither the federal not the constituent units are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers, and each is directly elected by its citizens’ (Watts 1999:7).
Both Elazar (1985) and Tully (1992) propose federalism implies a covenant or compact among equal partners that can only be changed through the consent of the majority. However, Elazar (1984:2) also argues federalism is more than a structural arrangement. It is also a political activity. In this proposition, Elazar is supported by Frenkel (1986:61). In addressing political usages of federalism, Gagnon (1993) emphasises process in particular, conceiving of federalism as a political device for establishing institutions and flexible relations that are capable of facilitating inter-state relations, intra-state linkages and also inter-community cooperation. He suggests federalism both enhances and strengthen democratic practices and traditions by offering more levels of government and by extension, multiple access points to the system. This, in turn, provides better representation and encourages innovation in policy preferences and political choice at the territorial level (Gagnon 1993: 15-6). Similarly, federalism’s ‘spillover effects’ (when activities of one level of government affect operations of another) make areas of joint responsibility between different levels of government inevitable, thereby increasing the responsiveness of government to the people (Grodzins 1966; Spann 1979:189; Chapman 1989:55; Wiltshire 1990:3; Elazar 1991; Fletcher 1991; Rydon 1993:235; Galligan 1995:77).

In the same vein, in the absence of significant constitutional restraints, such as a Bill of Rights for protecting individual citizen’s rights, federalism provides for conflict management by regulating and managing social heterogeneity. It has the potential both to provide protection for minorities and to accommodate and respond adequately to problems occurring within multi-cultural and multi-lingual settings, whether ethnic groupings, territorially structured communities, or both. India and Pakistan provide examples. Federalism’s paradox is that its flexibility for finding solutions and sensitivity to diversity may also provide political instruments that allow tensions and conflicts to emerge and be politicised (Gagnon 1993:18). Access to multiple points in the political process in federal systems may also facilitate the rise of extremist forces that would normally have little prospect of breaking through to national prominence in a more centralised system. Covell (1987:75), for example, argues the existence of provincial government levels in Canada helps exacerbate internal divisions by giving involved groups an institutional power base, thereby creating elites with a vested interest in maintaining poor relations with the national government.

MLG and Federalism within an Australian Context

Painter (2001) argues that despite the existence of Australia’s hybrid federal constitutional circumstances, a result of its dual heritage of American federalism and English monarchism-derived notions of parliamentary responsible government, the types of political administrative
interactions described by Scharpf (1997) may also be identified within Australia (Galligan 1995:38-9; Painter 2001). According to Painter (2001), the nature of relationships between major actors in Australian intergovernmental relations, namely the Commonwealth Prime Minister, State Premiers, and portfolio ministers and their departmental heads, are typically described as a ‘closed, secretive world of executive politics’. Conversely, official level relations are interpreted as a form of ‘extra-constitutional, ‘cooperative’ or ‘administrative’ sphere’. Painter (2001) argues both approaches tend to ignore more recent transformations within Australian inter-state relations, as demonstrated in the increasing levels of cooperation and interdependence now evident between cross-jurisdictional intergovernmental networks. He further suggests the MLG concept, as applied by contemporary scholars of the EU, such as Scharpf (1997), might perhaps prove more suitable than theories of federalism for identifying and explaining major structural tensions and conflicts now emerging in Australia’s federal political system. Unfortunately, to date this author has been unable to locate any attempts to apply an adaptation of Scharpf’s actor-centered institutional MLG framework, or indeed any other similar MLG approach, to an in-depth empirical analysis of governance structures within an Australian context.

Australian Inter-state Relations

Australian writings on inter-state relations typically reflect the orthodoxy of their day. Prior to the 1970s, Australian literature on federalism was dominated primarily by constitutional lawyers who concentrated on formal-legal aspects of federal-state relations, or by economists who centred on fiscal inter-state interactions and the apportionment of taxing and spending responsibilities between levels of government. In both narratives, the metaphor of decline from an ‘original state of balance’ between state and federal levels of government dominates. Since then, Australian federalism has generally been interpreted in terms of three major perspectives: formal or legal constitutional; fiscal federalism; and political federalism, or inter-state relations as politics and power.

The Formal or Legal Constitutional Perspective

Australia’s formal or legal constitutional literature on Australian federalism derives from British constitutional tradition and concentrates on the legal division of power between levels of government. Much of this body of knowledge is underpinned by the negative view of

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Commentators such as Fletcher (1991) and Parkin (2003:102) argue the intellectual influence of British political studies on analyses of the Australian politics and government has resulted in an abundance of literature on majoritarian aspects of the system, at the expense of Australia’s federal institutions. This enduring interest in the strengths and weakness of Australian parliamentary democracy has contributed to the current impoverished state of federal theory in Australia.
federalism held by A.V. Dicey, a leading critic of federalism. In his classic *Introduction to the Study of the Law of the Constitution*, [1885] Dicey champions the superiority of centralised government and parliamentary sovereignty against federalism, which he views as ‘merely a stage in the march to a unitary state’ (Dicey [1926] 1959). Dicey strongly believed that ‘the absolute legal sovereignty, or despotism, of the King in Parliament’ was incompatible with a federal constitution, which ‘implies weak government, legalism and divided allegiance’. Dicey further argues the essential element of federalism is that if people desire equilibrium between federal and provincial federal powers, or forces of centralisation and decentralisation, then they want union, not unity.

This prominent discourse provided by constitutional law focuses primarily on the problem of divided sovereignty within a zero-sum game of dual federal politics. It also concentrates on the progressive expansion of Commonwealth powers enumerated by the Constitution, either as sanctioned by referendum or via an incremental exercise of judicial power by an often activist High Court under a cloak of apolitical formal legalism (Galligan 1995: 161). While having lost some momentum under what Mason (1994) calls a ‘species of legal realism’ in recent years, this technical and legalistic narrative was promoted by centrists, such as Sawyer (1967) and Crisp (1975), who support the High Court’s centralisation of power and endorse sovereignty vested in strong central federal government (Mason [1994], cited in Galligan 1995:161; Galligan 1995). It recounts a history of a steady decline in state powers, under which Australia’s founding fathers’ federation design of dual federalism, with its notions of independent sovereign states, strictly limited central government, and an equilibrium of concurrent power between two autonomous levels of government operating as equal co-ordinate partners, has been progressively eroded to such an extent that states are now perceived, at best, as subservient partners of the Commonwealth. The imprecise nature of the Constitution’s wording, the difficulties associated with achieving reform via referendum, and a gradual centralisation of power away from states to the Commonwealth, has assisted with this decline. It began with the Engineer’s Case\(^{35}\) of 1920 and reached a zenith with the High Court’s broad interpretations of powers vested in the Commonwealth under Section 51 (xxix)\(^{36}\), as illustrated in the *Tasmanian Dams*\(^{37}\) (1983) and *Koowarta*\(^{38}\) (1982) cases, in central

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35 *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* 28 CLR 129.

36 *Section 51:* While the Constitution confers few exclusive grants of legislative power to the Commonwealth, the Commonwealth’s enumerated powers under Section 51 include important central powers, such as currency, customs and excise, external affairs and territories.

37 *Commonwealth v. Tasmania* 156 CLR 1.


However, Gillespie (1994:64) argues certain aspects of this legal-constitutional perspective lack historical accuracy. After Federation, many of the Commonwealth’s newly acquired federal powers accompanied the development of entirely new administrative areas, for example telecommunications and aviation. Moreover, the British Imperial Government continued to exercise power over Australia for several decades post-Federation. Other new domains the Commonwealth government would eventually claim, such as the capacity to negotiate treaties with foreign powers, were transferred across from London, not removed from the states. Indeed, Australia did not establish its first diplomatic missions until 1940, with postings in Washington, Tokyo and Ottawa. Australia’s High Commission in London may have been established in 1910, but was not regarded as a diplomatic mission as Britain was not considered a foreign country. Consequently, Australia’s external policy was left largely in hands of London (Edwards 1983). Along similar lines, state governments may have relinquished a measure of authority to the Commonwealth, but nevertheless still retain the vast majority of residual powers left to them at Federation. The High Court’s activism and concentration of central government power has also, to some extent, been restrained through constitutional adjudication, as illustrated in the Communist Party 40 (1951), State Banking 41 (1947), Queensland Electricity Commission 42 (1985), and Corporation 43 (1990) cases (Galligan 1995: 179-80). Individual states also maintain their own distinctive status, institutional traditions, firmly-entrenched legal powers and constitutional safeguards. States also generally benefit from closer relationships with their citizens and enjoy their electorate’s political loyalties. State-based political parties also provide an organic basis for building national-level political institutions (Galligan 1995; Hughes 1998). Craven (2005) argues that the combination of federalism and sustained political critique by ‘hostile’ state governments also guarantees the Commonwealth remains publicly accountable. He further suggests the

39 Section 96: The Commonwealth may ‘grant financial assistance to any state on such terms and conditions as the Parliament thinks fit’.

40 Australian Communist Party v. Commonwealth 83 CLR 1.


43 NSW v. Commonwealth 169 CLR 482.
Commonwealth’s most productive method for overcoming problems of judicial overlap is to stage a retreat back into its own area of constitutional competency, to thereby leave appropriately-funded state governments to get on with the business of policy and program implementation, on their own (Craven 2005).

**Inter-State Relations as Fiscal Federalism**

The traditional theory of fiscal federalism lays out a general normative framework for the assignment of functions to different levels of government and the appropriate fiscal instruments for carrying out these functions (Oates 1972). In a more prescriptive and normative approach to inter-state relations, within Australia this viewpoint commonly asserts the bulk of intergovernmental relations are being driven by the Commonwealth’s domination of public finance within a fiscal system characterised by extreme vertical fiscal imbalance (VFI). In its attempts to find more efficient ways to structure federal financial relations, the economic doctrine of fiscal federalism focuses on federal-state finances, the federal distribution of taxing and spending powers, and intergovernmental transfers of revenues. Despite early immediate post-federation critiques of an emerging imbalance in fiscal resources and responsibilities (Sir Earle Page), by the 1920s, more pragmatic Anglo-American derived perspectives on fiscal federal relations, such as those held by Australian economists Fisher (1936), Giblin [1926] 1980 and Mills [1928] 1980) were generally accepted. Mills argued: ‘by the Constitution, financial inferiority is the lot of the states and after all we are Australians first and members of State afterwards’ (Mills [1928] 1980), c.f. Prest & Mathews 1980:74; Australian Constitution, S.81-105). From this perspective, the inefficiencies of federalism and constitutional division of power between central and regional governments were interpreted as impediments to the development of a new Commonwealth. According to Warner (1933): ‘Major problems arise from an inadequate distribution of authority; inevitable conflicts; duplication of constitutional machinery; and uncoordinated activities. The practical result is a chaotic constitutional regime, the costly errors of which are borne by the public at large’ (Warner [1933:235], c.f. Gillespie 1994).

The gradual growth of the Commonwealth’s independent control of financial resources and its use of its fiscal dominance as a tool of macro-economic policy is generally dated from (1) the Commonwealth’s monopolisation of income taxation in 1942 (Uniform Tax case 1942)45, (2)

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44 **VFI**: The disparity between taxing and spending responsibilities of each level of government.

45 *South Australia v. Commonwealth* 65 CLR 373.
the centralisation of the domestic economy for war purposes, and (3) the subsequent steady growth of vertical fiscal imbalance (VFI), which was viewed during the post war years as an acceptable accompaniment to Keynesian macroeconomics. Since then, the restructuring of fiscal federalism to redress VFI has been a concern for many economists, in particular for those preferring market-based solutions and limited government, for example Brennan and Buchanan (1980). Other economic commentators have elected to focus on the diversity of issues VFI impacts upon. These range from electoral accountability, financial responsibility, economic efficiency, and effective public choice, to states’ ‘grant seeking’ tendencies and an accompanying waste of scarce state resources, to cash-strapped states levying economically inefficient regressive taxes to offset the impact of VFI, to the compliance and administrative costs of state government taxes and the issue of tax evasion. On a more positive note, although the Commonwealth continues to preserve its policy predominance, more recently the introduction of the Goods and Services Tax (GST) has helped to partially redress problems associated with VFI (Mathews 1982; Officers Report 1987; Walsh 1989; Collins Report 1988; Groenewegen 1979, 1993; Saunders 1992; Gillespie 1994; Galligan 1995; Hughes 1998).

Political Federalism: Inter-state Relations as Politics and Power

Rather than a chronicle of federalism’s decline and views of Commonwealth-state relations as a formal-legal hierarchy of levels of power, this new realist narrative, advocated primarily by Australian political scientists and economists, focuses more on the interdependent nature of intergovernmental relations and consensual political processes occurring at a practical level. Effecting of micro-economic reform and implementation of national and international standards under Hawke and Keating’s ‘New Federalisms’ are examples. Typically employing case studies of specific policy issues, this method builds upon American traditions of states’ rights to propose divided sovereignty guarantees basic liberties and limits the expansionist ambitions of powerful central governments. Generally cooperative intergovernmental relations are perceived of as a continual and relatively open fluid process of bargaining, negotiation, cooperation and conflict between two levels of government for control over and

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46 ‘Hot war’ defence powers: The Commonwealth compulsorily acquired state income tax departments under the ‘hot war’ defence power (War-Time Arrangements Act 1942 (Cth)). Under legislation introduced in May 1942, the Commonwealth assumed the power to impose tax on income for the duration of World War II, plus one additional year.


credit for joint programs. Market forces and competition between relatively autonomous
government levels are also championed as methods for achieving greater efficiency and
responsiveness to popular preferences. This approach also promotes the continuing validity
of the workings of federalism, arguing bias against federalism remains only because of the
intellectual poverty of existing Australian political theories of federalism (Davis [1952];
1998:271-4). It is suggested that if this ideological gap were to be filled with a new ‘standard
repertoire of ideas in Australia that values the regional dispersal of power, the virtues of state
autonomy in the solution of local issues, the inherent benefits of diverse solutions to similar
problems, and the intrinsic advantages of competition and overlap in the supply of
government services’, then the remaining argument for stronger central government would

The approach further concedes that Commonwealth power may have increased and gradually
encroached into areas previously the exclusive responsibility of states, but states nevertheless
still retain considerable power resources and control over the actual business of governing.
Moreover, within the normal confusion and complexity of intergovernmental relations, state
governments are provided with opportunities to not only adapt policies to local conditions,
but to also subvert central government intentions for their own ends. At its most radical
however, the approach can lead to images of administrative chaos within a non-centralised
system in which power is widely diffused. Another major problem with the concept is that it
relies heavily on American ideas, which would have difficulty in standing up to the rigours of
empirical testing, even in their country of origin (Galligan et al. 1991:19; Gillespie, 1994: 68-

Conclusions
This chapter finds that while the two bodies of literature on federalism and MLG may initially
appear different, MLG is not a qualitatively new phenomenon. Relationships analysed by
MLG authors are essentially federal in character, a major difference being the higher number
of levels of governance utilised in MLG analyses. Unlike state-centric approaches, MLG does
not assume the centrality of constituent state actors or use individual governments as its basis
of analysis, but rather focuses on the institutional and political-administrative arrangements
occurring across and between multiple levels of governance within identified policy arenas, or
sectors. As noted, the wider contemporary theoretical literature on the federal idea reflects the
enormous and rich variety of multi-dimensional federal arrangements found around the globe,
with each individual system's expression of the federal principle being influenced by its own
individual setting. From the perspective of inter-state relations in Australia, a slightly less optimistic conclusion may be drawn. On the whole, analysis across the full set of intergovernmental relations within Australia, whether adopted from a legal, economic or political perspective, is currently limited to applications of federal theory. The author's inability to locate any serious attempt to apply a conceptual framework similar to that proposed under Scharpf's actor-centered institutional MLG approach, or indeed any other theoretical interpretation of the MLG concept, to local empirical conditions would indicate a serious gap now exists in the theoretical literature on inter-state relations within this country.

Today, the explanatory powers of federalism can no longer be considered sufficient on their own for providing detailed insights into the many changes now occurring within Australia’s federal system, many of which result from external influences that generally rests outside central government control. Nor does federal theory give adequate leverage for enabling satisfactory explanations of those numerous conflicts and tensions within Australia’s federal system that continue to arise out of an inherent contradiction between its majoritarian aspects versus the dynamics of its federal institutions and political processes, the latter of which only continue to serve to fragment and circumscribe the very exercise of political power that the concept of responsible government intends to unify and consolidate. By contrast, the emergent forms of MLG identified in this chapter raise important theoretical issues for the study of inter-state relations within Australia. By openly embracing the complexity and interconnectedness of contemporary political-administrative spheres, and by acknowledging a dispersal of central state formal authority continues to occur across multiple overlapping jurisdictions, the approach gives far more purchase to more in-depth theoretically-disciplined empirical policy research into new phenomena now emerging within the arena of Australian governance, for example in spheres of political and policy-making activities. Furthermore, the conceptual framework being facilitated by an actor-centered institutional MLG approach not only provides the capacity to overcome federalism’s failure to bridge the long-existing divide between national and international aspects of political science, it also facilitates a merging of positive theory with the many normative issues that arise in solid empirical policy research. Thus, it is argued, the concept now merits serious attention in this country, both politically and theoretically. Finally, no matter what theoretical framework used, any in-depth political analysis on the nature of the distribution of power within a defined geographic area cannot be deduced from abstract reasoning alone. It must also be pragmatically grounded in empirical analysis. Achieving this objective is the ambition of the following chapters.
Chapter Three

History of the Torres Strait Region

Whoever considers the past and present will readily observe that all cities and all people are and ever have been animated by the same desires and the same passions: so that it is easy, by diligent study of the past, to foresee what is likely to happen in the future.

Niccolo Machiavelli, Discourses. Bk.1, Chapter 39.

No incisive analysis of the complexity inherent in contemporary Torres Strait governance structures could be conducted without first acquiring a prior appreciation of the manner in which these political, administrative, legal and legislative arrangements came about. The historical analysis conducted in the next two chapters provides that background information. This chapter allows an insight into the pre-Treaty evolution of governance structures in Torres Strait using the considerable body of existing anthropological, geographical and historical literature on the region. The knowledge gained is intended to provide a starting point for the development of a greater understanding of the numerous complex issues that continue to shape overarching Torres Strait governance arrangements. Due to the lack of documented historical reports written from a local indigenous perspective during this period, this particular investigation relies primarily on European accounts of local traditional inhabitants’ reactions to these unfolding historic processes. It should be noted major philosophical differences also exist between official Queensland colonial perceptions of proceedings and other ethnocentric observations conducted by visiting scientists and officers, in particular those working aboard British hydrographic vessels within the region. The generally better-educated latter typically behaved in a far more enlightened, balanced and objective manner in recording events and in their interactions with the local traditional inhabitants.

The chapter is divided into four sections. The first examines the sources and composition of pre-contact indigenous governance and political formations. Here, the origins of the Torres Strait and its Islander people and their heterogeneous communities are examined. The second section investigates the nature of colonial occupation from the mid-1860s to mid-1880s. It highlights outside forces of change impacting upon the region during this period of radical transformation. The third focuses primarily on the extension of Queensland’s authority into the Outer Islands under Douglas’s administration between 1885-1904. Finally, the nature of
Queensland Government rule within the region from 1904 onwards, along with the local traditional inhabitants’ reactions to that oversight, is addressed.

It will be proposed that under combined processes of evangelistic, secular, commercial and cultural colonisation, the original self-governing pre-colonial indigenous political-social units within the Torres Strait region were geographically divided into two separate, yet parallel, systems of governance. One administrative regime centred upon the Inner (Thursday Island) Group of islands and came under direct oversight of the Queensland Colonial Government. The other system of governance was steered by the London Missionary Society (LMS) and embraced the Outer Islands. It was in this latter social order the greatest forces of change swept into the Torres Strait under processes of colonisation, predominately in the shape of Pacific (South Sea) Islander maritime workers and missionary leaders-teachers. Throughout this period, the Queensland government also began to embark upon a gradual exercise of power across wider Torres Strait Strait using a system of indirect rule. Post-Federation, this dual administrative structure would be replaced by an oppressive and highly-centralised unitary regime under which the State of Queensland would isolate, contain and dominate all activities in the region for several decades. By the late 1930s and early 1940s, Queensland government policies based on paternalism and exclusion would be replaced by yet another governmental plan of action, this one built upon a philosophy of inclusion, preservation, integration and assimilation. Yet, despite enduring the many exacting burdens accompanying the intrusion of what were, at times, insuperable foreign forces, the multi-ethnic and multi-cultural Islander communities that would eventually emerge out of these historic processes somehow managed to retain much of their ancestors’ natural political acumen. As numerous explorers and administrators within the region would record, since the time of first recorded contact, Islander people belonging to Torres Strait have always taken a very keen, albeit often covert interest, both in the activities of outsiders within their region and in the manner in which they and their customary land and sea territories are being governed.

_Bipotaim_ 51 - Pre-contact Indigenous Governance and Political Formations

Despite the existence of ancient stone tools, middens and fish traps, with insufficient archaeological evidence uncovered in Torres Strait to record human occupation or provide a clear representation of life during the prehistoric era, historians base their suppositions on

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51 _Bipotaim_: In the Torres Strait, the Melanesian term _bipotaim_ (before-time) refers specifically to the ‘darkness’ before the arrival of Christianity and the London Missionary Service in 1871, as opposed to _pastaim_, which refers to beyond living memory (Mullins 1995: 7). _Long taim bipo_ is a similar Pigin English term employed in PNG to refer to an earlier era (Dorney 2000).
archaeological evidence recording human settlement in Papua New Guinea and Australia during this period (Douglas 1900:5; Flood 1983:35, 254; Haddon 1935:197). In *Thathiligaw Emeret Lu*, Wilson (1998) echoes Flood’s (1983) hypothesis that people probably migrated from the Asiatic continent across the Sahul Shelf around 70,000 years ago, via the Malay Peninsula and Indonesian Archipelago to PNG, then across the submerged land bridge now known as Torres Strait to mainland Australia (Flood 1983: 27-38, 253; Flood [1983], cited in Wilson, 1998: 2; Wilson 1998:2). The Wallace’s Line hypothesis, backed by evidence of similarities in physiognomy and species composition between flora and fauna on northern mainland Australia and coastal Western Province regions, for example eucalyptus, ti-tree, cassowaries and marsupials such as nail-tail wallabies, would also suggest Australia’s original inhabitants may have arrived on foot via the land bridge from PNG (Wallace [1869] 2000; IUCN 1991; Barham 2001).

When the last ice age ended around 6,000 to 8,000 years ago, ocean levels rose, breaking the land link between the Australian continent and the world’s second largest island. This meeting of Indian and Pacific oceans resulted in a 150 kilometre wide shallow epicontinental seaway (35,000 km²). It provided a natural ‘buffer zone’ separating the cultural and natural resources of the Arafura and Coral Seas, the Great Barrier Reef, and nearby adjacent coastal areas of mainland Australia (‘Great Daudai’) and PNG (‘Little Daudai’). It produced one of the world’s most extensive and ecologically-complex shallow continental shelves, characterised by numerous islets, coral cays and exposed sandbanks, along with high tidal speeds, extensive sub-tidal seagrass beds, and mangrove wetlands. It also created a natural habitat for a high

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52 **Papua New Guinea**: The terms *Papua* and *New Guinea* were coined by European colonialists. Don Jorge de Meneses, navigator and Portuguese Governor-General of the Moluccas, first used the term *Papua* in 1526 after arriving accidentally at Versija, or Warsai, in West Papua (formerly Irian Jaya). He named the country *Ilhas dos Papuas*, taking it from the Malay term for people with frizzy or woolly hair, *Orang Papuwah*. In 1545 Spaniard Captain, Ynigo Ortiz de Retes, while enroute from the Moluccas to Mexico, wrote the name *Neuva Guinea* (New Guinea) on his map, due to his belief that a resemblance existed between the local people and the people of Guinea in Africa (Markham [1886], cited in Gordon 1968).

53 **Wallace’s Line C20**: Named after British naturalist A. R. Wallace [1823 – 1913], Wallace’s Line is the hypothetical boundary between Oriental and Australasian zoogeographical regions. It runs between the Indonesian islands of Bali and Lombok, through the Macassar Strait and south east of the Philippines. As Wallace [1869] observed: ‘In Bali we have barbets, fruit-thrushes, and woodpeckers; on passing over to Lombok these are seen no more, but we have an abundance of cockatoos, honesuckers, and bush-turkeys, which are equally unknown in Bali, or any island further west. The strait is here fifteen miles wide, so that we may pass in two hours from one great division of the earth to another’ (Wallace [1869] 2000). Wallace also noted ‘more striking’ differences between Java/Borneo and Celebes/Moluccas, such as the presence/absence of monkeys, wild cats, deer, civets, otters and squirrels.


55 Torres Strait Islanders later corrupted ‘Daudai’ into ‘Daudi’ (Gill 1873).
proportion of globally-significant populations of endemic biological species and Indo-Pacific marine fauna, for example endangered dugongs (sea-cow), turtles and seabirds (McInnes 1979; Flood 1983:253-54; White [1990], cited in Haigh 1993). The flooding also left the high peaks of the main mountain range exposed, extending northwards from Cape York to PNG’s Western Province. These large, hilly Western Islands, later called Moa (Mua, Banks), Badu (Mulgrave), Mabuiag (Jervis), Muralag (Muralug, Prince of Wales), Waiben (Wyben, Waibene, Thursday Island), Ngurupai (Horn), Keriri (Kiriri, Hammond) and Gebar (Gabba, Two Brothers), are covered in granitic rocks, well-watered and lightly-wooded, with vegetation similar to Cape York’s. To their far east lay the small, but extremely fertile extinct Pleistocene volcanic Eastern Islands of Mer, Waier, Dauar (collectively called the Murray Islands), Erub (Darnley) and Ugar (Stephens), all of which are covered in rich tropical vegetation and subject to periodic earth tremors. Over time, in the Strait’s northwest the low-lying swamppy and mangrove-fringed deltaic islands of Saibai and Boigu (Talbot Islands) were formed with the alluvial deposition from the confluence of four nearby PNG rivers. Unlike the nearby high granitic outcrop of Dauan (Mount Cornwallis) Island, both these islands are physically similar to the adjacent watery Papuan mainland. The Central Islands of Masig (Yorke, York), Poruma (Coconut, Parremar), Aurid (Aureed), Iama (Yam, Turtle-backed) and Warraber (Sue/Sassi) were also created around this time. Except for Iama’s granite outcrop, all these small un hospitable low-lying sand cays are poorly watered, fringed by coral reefs, and support little vegetation apart from coconut groves and wild plum (wongai), although introduced exotic species are now used to recreate tropical garden environments on inhabited coral cays, for example Masig (Douglas 1885; Griffith 1893; Beckett 1966, 1987:27-8; Singe 1979).

Little is also known about the history of immediate pre-colonial Torres Strait societies or their customs, ceremonies, beliefs, or systems of law and order (Haddon 1935; Beckett 1987:25). Local oral histories suggest around 700-800 years ago, migratory groups probably moved down from the lower Fly River region to the northern gateway islands of Saibai and Dauan, before flowing southward and eastward out into wider Torres Strait. This young and energetic heterogeneous society of Melanesian migrants (the original Torres Strait Islanders) developed into robust sea-faring saltwater people, creating a diversity of societies and unique lifestyles across the region, all of which were totally integrated with the sea. Scattered across the Strait in mostly small, autonomous, fiercely competitive\footnote{Inter-island rivalry: This is best expressed today through inter-island competition at sporting events.} and often hostile political-social units, the Islanders nevertheless enjoyed a position of considerable importance in the region through warfare and a system of extensive disjointed inter-island maritime trading chains that also
extended to neighbouring mainland areas. Within these complex exchange networks, Islanders traded stone tools, pearl shells, shell ornaments (dibi-dibi), turtle-shell objects and human heads in exchange for tools, weapons, canoes, sago, cassowary and bird of paradise feathers (Paradise apoda – kakaamma), along with fish poison, ochre and ritual objects. Genetic and cultural diffusion, strong kinship ties and ongoing successful trade was facilitated by processes of intermarriage, fighting, and exchanges of goods and gifts, both between the people of the North Western Islands (Saibai, Dauan and Boigu) and coastal villagers of New Guinea, and between the Islanders and Aborigines on northern Cape York, via the Kaurareg people belonging to the Thursday Island Group. Nevertheless, Islander culture, technology, social organization, language and religion continued to retain a close similarity to that found in the Papuan Gulf and Trans-Fly regions. Indeed, Islanders generally viewed mainland Cape York Aborigines as a culturally distinct group and did not recognize them as inhabitants of the Torres Strait (Macgillivray 1852: 1-38; Gill 1873; Haddon 1953:11; Beckett 1963, 1966; Singe 1979; Schug 1996).

Cook (1968) (1770 Endeavour), Flinders (1814) (1802 Investigator) and Macgillivray (1852 Rattlesnake) would also note obvious differences between the traditional inhabitants of the Thursday Island Group and mainland Cape York Aborigines. For example, Macgillivray (1852:1-4) argued ‘Kowraregas’ (Kauareg) represent a fusion between Australian and Papuan groupings:

the natives of Prince of Wales’ Islands rank themselves with the islanders and exhibit a degree of conscious superiority over their neighbours on the mainland and with some show of reason; although themselves inferior to all the other islanders, they have at least made with them the great advance in civilisation of having learned to

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57 Macgillivray (1852) notes large outrigger canoes of the type common to Torres Strait were sighted as far south as 500 miles away at Fitzroy Island.

38 Battle Tactics: Like Macgillivray (1852:7), Singe (1979:7) also notes Islanders primarily employed strategic tactics of surprise and advantage, such as ambushes and massacres, during raids, as opposed to the set piece battles typically used by PNG Highlanders and some Australian Aborigines.

59 Thursday Island Group (Inner Islands): This country traditionally belongs to the Kaurareg Nation and is collectively constituted of Waibene (Thursday Island), Ngurapai (Horn, Narupai), Muralag (Prince of Wales), Zuna (Entrance), Tarilag (Packe) and Yeta (Port Lihou) Islands, along with Mipa (Pipa Islet, Turtle Island) and Damaralag (Dumuralug Islet). It also includes the surrounding customary waters.

60 In August 1770, on proclaiming British sovereignty and taking possession of the entire Eastern coast of Australia south of Possession (Bisinti) Island, on behalf of His Majesty King George the Third, Captain James Cook noted the Kauralaig Aborigines, unlike mainland Aborigines, were armed with bows and arrows and wearing large breast plates made from pearl ‘Oyster Shells’ (Cook [1770] 1968). Flinders (1802) also noted this difference between mainland Aborigines and Islanders at Mer Island after locals approached the Investigator shouting Toree! Toree! (translated as a desire for iron tools, such as knives and axes).
To cultivate the ground, a process which is practiced by none of the Australian aborigine.

Torres Strait island communities subsisted on resources harvested during a combination of hunting, fishing and agricultural activities. Traditional lifestyles varied from island to island, according to geography and local resources. Inhabitants on the Western Islands were hunter-gatherers. These Islanders primarily hunted turtle, dugong, geese, ducks, pigs and fish, relying on the land for a variety of plant foods. The Eastern Islanders, who were blessed with rich red volcanic soil, became horticulturalists. By contrast, the semi-nomadic Central Islanders relied heavily on the sea and inter-island trade for resources, for example agricultural produce, due to their shortage of reliable fresh water supplies and good fertile soil. They also acted as middlemen within the regional trading system. Generally speaking, larger communities lived on the most fertile islands with the greatest resources. In these abundant, often over-crowded home islands, infanticide was the preferred method of population control. The majority of Islanders also engaged in periodic migrations, for example during the turtling season or water shortages, leaving their headquarter islands in the possession of elderly men (Macgillivray 1852:11, 35-8, 40; Beckett 1963, 1987:28; Singe 1979: 9-10).

Unlike the highly developed systems of chieftainship found in the rigidly stratified chiefdoms of Polynesia and Micronesia, Melanesian societies in Torres Strait generally exhibited small-scale, highly-structured, yet relatively egalitarian socio-political systems. Each consisted of several totemic clan groups, typically drawn together through common religious, language or cultural practices. Alliances between independent villages on each islands were built around

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61 Torres Strait Tribes: Macgillivray (1852) identified tribes inhabiting Torres Strait as: the Kowraregas on Prince of Wales; the Muralegas and Italegas on Banks; the Badulegas on Mulgrave Island; the Gumulegas on the islands between Mulgrave and New Guinea; the Kulkalegas on Mount Ernest and the Three Sisters; the Massilegas on York and adjacent islands; and the Miriam on the north-eastern islands, including Murray and Darnley. He also recorded at least five distinct tribes inhabiting the immediate Cape York region: the Gudang on the Cape’s tip; the Yagulles, situated southwards and eastwards along the coast beyond Escape River; the Katchialaigas and Induyamos (or Yarudolaigas) in the country behind the Cape; and the Gomokudins on the south west shores of Endeavour Strait and at a short distance down the Gulf of Carpentaria (Macgillivray 1852: 1-4).

62 Land and Water Shortages: Shortages of arable land were offset by planting crops on uninhabited islands. Sundried boiled turtle and dugong provided preserved meat for long inter-island sea voyages. Flinders (1802) noted at Halfway Island, the practice of rainwater collection in which circles of shells of the chama gigas were placed around the base of pandanas trees. Long strips of bark were tied around smooth stems of trees, with the loose ends being fed into the shells. Rainwater then slips down the branches and stems and is conducted into the shells. Each shell contained a two to three pints supply of water (Flinders 1802, pp. 112-5). Lewis (1836 Isabella) also noted the same fresh water collection practices on Mer Island (Lewis [1836 cited in Haddon 1953: 10).

63 Egalitarianism: Forge (1972) and Bellwood (1979) both argue Melanesian societies share a common basic egalitarianism. Beyond a group size of around 250, ‘it is assumed that face to face relationships would become attenuated, and ascriptive hierarchies would, in theory, evolve’. Hence, the need exists to internally divide societies into clan or sub-clan groups to preserve each sub-unit’s independence (Forge [n.d.], c.f. Bellwood 1979-92; Bellwood 1979: 92).
clearly-defined sovereign territorial units, each encompassing identified land and maritime territories. Customary laws regulated the ownership of all land. Within most island societies, segmentary groups were further divided into independent patrilineal sub-clan sections, each comprising individual kinship groups headed by an Elder. By way of illustration, the eight Meriam clans of the Murray Islands came together as one under the institutions of the Malo-Bomai (Bomai-Malu) religious cult. They were led by an hereditary priest-chief, or zogo-le, according to Malo’s (the Octopus god) Law, which (1) forbade trespass on other clans’ or individual’s plots of land, (2) encouraged horticultural practices such as seed planting, and (3) bestowed sacred hereditary rights to lands, reefs and named seas. Individual families on Mer Island, for example, held exclusive sea rights to maintain stone fish-weirs and crayfish holes on home reefs fronting their houses. Many distinct Torres Strait clans also possess their own shrine or individual clan totem, the latter generally being linked to some object. For example, individual totems of Boigu Island’s six clans are Samu (cassowary), Dhoebaw Dhoeyban (yam), Koedal64 (crocodile), Sui Baydam (shark), Thabu (snake), and Karbay (heron). Marriage within clans was discouraged to prevent inbreeding. Polygamy65 was practiced, as were elaborate funerary rites, including mummification of the dead. Adoption of children was also common practice, with individual communities recognising the foster, rather than natural father as true parent (Macgillivray 1852; Beckett 1963; Mullins 1995:9-16, 134; FBM 2003).

Rather than genealogical criteria, individual clans typically achieved collective representation on each island through an elected Headman who maintained his prestige and influence using a combination of his social status, level of respect within the community, age and personal accomplishments, along with his ability to engage in consensus decision-making processes with fellow kin-group Elders66. Occasional exercises of sorcery and plays on the superstitious

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64 Koedal Clan: The clan moved from Saibai to Seisia on Cape York in 1948 in a pearling lugger called Seisia. The lugger’s name originates from the first letters of the names of six brothers from Saibai: Sunai, Elu, Ibuai, Sagaukaz, Isua and Aken.

65 Polygamy: The practice permitted up to five wives, betrothed in infancy, but men usually took one, two or three. Some men consequently went without. Possessing several wives guaranteed the husband a level of influence within his tribe through the ownership of much valuable property and the nature and extent of his marital connections. Macgillivray (1852) also contrasts the low respect for females held by men of the ‘Kowrarega’ (Prince of Wales) and ‘Gudang’ (Cape York), who subjected their women to acts of great cruelty and degradation, with the treatment of females in the north east part of Torres Strait, for example at Darnley (Erub) Island, where women were treated with much consideration and kindness (Macgillivray 1852).

66 Macgillivray (1852: 27-8) notes: ‘Throughout Australia and the Torres Strait, the existence of chieftainship, either heredity or acquired, has in no instance of which I am aware been clearly proved: yet in each community there are certain individuals who exercise an influence over the others which Europeans are apt to mistake for real authority. These so-called chiefs, are generally elderly men, who from prowess in war, force of character, or acknowledged sagacity, are allowed to take the lead in everything relating to the tribe. In Torres Strait such people are generally the owners of large canoes, and several wives: and in the northern islands, of groves of ‘cocoa-nut’ trees, yam grounds, and other wealth’ (Macgillivray 1852: 27-8).
fears of others, in addition to reciprocal gift or favour giving arrangements with other community members, were also exploited to shore up power-bases. These men’s authority was wide-ranging. They were often responsible for duties ranging from organising important community events and ensuring the observation of vital social customs and rituals, to overseeing developments within their respective communities. This included house building, canoe construction, land clearing and trading practices, along with local participation in inter-island warfare, much of which employed the Melanesian custom of payback (revenge). Warfare was generally characterized by the timely notice of intended aggression prior to any commencement of hostilities, typically using large fires as signals of defiance. Conversely, modes of warfare were also characterised by sudden short-encounter and unexpected attacks, profound secrecy, treacherous violations of the laws of hospitality, and triumphant rejoicings. No prisoners were taken, spare the occasional abducted woman. Inter-island conflict often also involved ritual sacrifice and cannibalism and was frequently motivated by the theft of food, insults to community leaders, abduction of women, suspected sorcery, or revenge for previous killings. Torres Strait Islanders never individually or collectively engaged in warfare for purposes of territorial expansion. Moreover, no matter how violent past exchanges may have been, when it came to individual Islander communities dealing anew with perceived outsiders, whether from other Torres Strait islands, or the nearby mainland areas, or unknown distant places, the motive of self-interest always overrode any other considerations or emotions, including hatred, affection and revenge. Such opportunistic Islander’ attributes would be repeatedly documented throughout negotiations with Europeans during the ‘passing trade’ phase of history and by subsequent Queensland Colonial Government administrators in the region (Macgillivray 1852:5; Chester 1871; Beckett 1966).

Nevertheless, despite numerous similarities between the diverse Islander communities, both culturally and linguistically the indigenous people of the Torres Strait neither identified nor

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67 Headmen, Chiefs and Big Men: Dorney (2000) notes that while early missionaries recorded no chiefs in Torres Strait, missionary Hunt (Mer Island, 1880s) believed a system of paramount and subordinate chiefs once existed on Mer. Unfortunately, Rivers (Cambridge Expedition) failed to investigate Hunt’s claim of an heredity leadership structure within Mer’s Malo Cult (Dorney 2000). Headmen are also not to be confused with the entrepreneurial ‘Big Men’ found in Melanesian society, who utilise their kin and non-kin ties to build personal wealth and a following of supporters.

68 By contrast, small fires indicated a desire to establish (non-violent) communication (Macgillivray 1852:7).

69 Cannibalism: Human flesh cut from the face cheek was eaten only by those present at a murder, in the belief eating the flesh would increase their bravery (Macgillivray 1852).

70 Languages: Contemporary Torres Strait is a linguistically divide into Kalaw Lagaw Ya (Central, Northern and Western Islands) which is similar to mainland Aboriginal languages, and Meriam Mir (Eastern Islands) which derives form Papuan languages of the Fly Delta region. Both English and Torres Strait Creole (Yumiplataok), the region’s lingua franca, are widely spoken throughout the region. Kiwai is spoken around the Fly River estuary while Gizra, Bime, Gidra and Agob are spoken on PNG coastal plains bordering the Torres Strait.
envisaged themselves as a single monocultural group or nation (Andersen 1983). Nor did Islanders develop any overarching political structure or unified system of pre-colonial rule for administrating the entire region. Perhaps this was because, as Bellwood (1985:147-8) posits: ‘A state cannot develop from a tribal society unless the merging leaders can monopolise power and convert the network of economic and military alliances between tribal sections into a centripetal flow towards themselves’. This was never the case in Torres Strait. Indeed, the absence of any large pre-existing centralised political structures or systems within Melanesian society, similar to those provided elsewhere by the regional despots, chiefs and large tribal organizations that enabled systems of indirect colonial rule in India, Fiji and the Dutch East Indies, would present major difficulties for British and Australian colonial administrations in British New Guinea and Papua (West 1962:52; Nelson [n.d.], cited in Dorney 2000:28). The historic presence of small, autonomous, indigenous Melanesian political units requiring close and constant government supervision would not however present major long-term obstacles for post-colonial Queensland administrations within Torres Strait, largely due to the impact of earlier exogenous influences upon the region.

Colonial Occupation (mid-1860 to mid-1880s) – a ‘troublous period’

During the period of colonial occupation, a new power structure emerged within which two colonial administrations, working in concert, were to develop side by side. The first, led by the Queensland Colonial Government, was headquartered on Thursday Island. It administered the Inner Islands. The other system, run by the London Missionary Society (LMS) (1871), took the form of a de-facto colonial administration. It oversaw the Outer Islands and southern New Guinea coastal areas. The numerous multi-ethnic western Pacific (South Sea) Islanders from Rotuma, Samoa, Nuie and the Loyalty, Society, Fiji, Solomon and New Hebrides Groups of islands, all of who arrived in the Torres Strait region as maritime workers and missionary teachers-leaders, acted as mediators between this new power structure and the original traditional inhabitants upon who the new order was being imposed. And by the mid-1880s, most Outer Island communities were already displaying characteristics similar to those found in many other South Western Pacific communities forever changed by the powerful influence of the maritime trade and Christian missions. While not generally dispossessed of

71 Nation: ‘a group of people who feel themselves to be a community bound together by ties of history, culture, and common ancestry’ (Kellas 1991:2).

72 Nelson [n.d.] states: ‘A problem in Papuan New Guinea was that the traditional political units were so small. There was no centralized system that the colonial authority could take over and modify. It was a case of imposing Western law over an infinite variety of subtly changing local customs. The process had to be repeated over and over again. The Australian field and legal officers did not oversee the work of sultans or chiefs; they themselves determined innocence or guilt, and decided on the appropriate punishment’ (Nelson [n.d.], on ABC Radio Series, c.f. Dorney 2000:28).
their customary land tenure systems, the original Torres Strait Islanders’ traditional religions, cultural practices, customs and socio-political structures, for example their sacred cult houses, long trading voyages to New Guinea and worshipping of culture heroes such as Kuiam, Sigai, Kolka, Siu, Malo and Waiet, had been destroyed as institutions. By now, the often literate and predominately Christian Islanders dwelt in village settlements centred upon mission houses. Rather than enduring past conditions of forced labour, they were now proactively involved in the maritime trade and consumers of Western goods and foods. A strong Polynesian cultural influence was also clearly evident. In a great many cases, violence, introduced diseases and mistreatment accompanied this rapid social and cultural change.

Nevertheless, despite bearing the brunt of alcohol-related abuse, lawlessness, and Pacific Islander ‘drinking sprees’ in a remote, often dangerous Torres Strait, Islander’ communities were remarkably accepting of change and would display great creativity and diversity in their responses to the challenges posed by foreign intrusion. Rather than allow these outside influences to dominate their lives, they subsumed their more positive aspects, eventually emerging with a new culture that was far more appropriate for the times and their individual requirements. Its fundamental components are today reflected in *Ailan Kastom*[^74], and they were already in place in the years before the Cambridge Anthropological Expedition to the Torres Strait, led by A.C. Haddon, arrived in 1898 to encounter these ‘cheerful, friendly and intelligent folk’[^75] and record the detrimental effects that a few decades of intense foreign influences had already wreaked upon Islander’ material culture (Moresby [1871], in Griffin 1976; Murray 1872; Haddon 1935; Beckett 1977; Singe 1979; Graves 1984; Hopkins 1995; Mullins 1995).

[^73]: Alcohol-related problems: Chronic drunkenness and alcohol abuse was not confined exclusively to Pacific Islanders. It was also widespread amongst European police, ‘masters’, and superintendents (Mullins 1995:152).

[^74]: *Ailan Kastom (Island Custom), Ailan Pasin (Island Fashion) & the Ailan Wey (Island Way)*: At one level, these terms refer specifically to the culture and lifestyles of traditional Torres Strait Islander people, quite literally their way of living and doing things. At another level, the terms are promoted as defining statements or assertions of their independence, strength and tenacity. At yet another level, the terms are used to define differences and establish clear boundaries between insiders and outsiders, that is between Islanders and non-Islanders, in much the same way the terms ‘the Asian way’, ‘the Melanesian way’, and ‘the Australian way’ have been used by Prime Ministers Mohammed Mahatir (Malaysia), Somare (PNG), and Howard (Australia) respectively, to reinforce the Principle of Non-Interference in the affairs of another independent or autonomous state, nation or society.

Queensland law specifically recognises *Ailan Kastom*. Section 2.02 of the *Torres Strait Islander Land Act 1991* (Qld) defines *Ailan Kastom* as ‘the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships’.

[^75]: Conversely, in the same Volume 1 General Ethnography introduction, Haddon also implies Islanders belong to some general class of ‘backward societies’, suggesting they were fortunate to have been taken in under the ‘benevolent administration’ of a Queensland colonial government that not only rescued them from their Hobbesian existence in the Outer Islands and secured their lives and property, but also assisted them to ‘bear the strain consequent upon the rapid introduction of an alien and complex civilisation’ (Haddon 1935: ix-xiv).
Forces of Change within Torres Strait

The Maritime Industry

Although no narrative has been located, it is highly likely Chinese, Malays, Egyptians and Indonesians explored the Torres Strait sea passage prior to the arrival of the Spanish, Dutch and British. For centuries before Australian authorities introduced customs regimes, Macassan beche-de-mer fishers from Sulawesi regularly visited Australia’s northern shores, from Melville Island to the southern Gulf of Carpentaria. Many Europeans most likely also made unrecorded voyages through the South West Pacific during the fifteenth and sixteenth centuries (Haddon 1935: 3-4; McIntyre 1977; Singe 1979; Keays 1996). Despite numerous subsequent shipwrecks and the massacres and violent exchanges occurring between Islanders and Europeans during the earlier ‘passing trade’ phase (1770-1840s), by 1838-48 British naval vessels were conducting surveys and had begun marking shipping channels in the region (Carroll 1969:38; Chester [n.d.], in Carroll 1969:37; Haddon 1953:6-12; Singe 1979: 21-29, 45-46; McInnes 1979; Moore 1984: 28). As early as 1848, the Torres Strait’s economic potential was also becoming evident as European-skippered, predominately Pacific (South Sea) Islander-crewed trepanging vessels plied the Strait searching for beche-de-mer (Holothuria). Smoke-dried, this commodity was greatly prized in China and fetched high prices. Both trepangers and the pearlers who followed also frequently used the remote Torres Strait islands as bases and shore-stations for maritime operations, often terrorising the local

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76 In 1803, Flinders encountered a large fleet of Malay vessels trepanging off Arnhem Land (Haddon 1935:15). MacFarlane (LMS) also reported Islanders agreed Chinese trepanging junks, crewed by ‘proper good men’ also worked for lengthy periods in the Western Islands (MacFarlane [n.d.], cited in Haddon 1935:15).

77 Spanish Explorers: Don Diego de Prado y Tovar and navigator Luis Vaez de Torres aboard San Pederico, 1606. In New Light on the Discovery of Australia, (Hakluyt Society, London, 1930), H.N. Stevens unearthed an unpublished account of Prado’s voyage through the Torres Strait. Stevens argues Prado nominally commanded the vessels, while Torres received all credit for the voyage due to his impressive navigational skills. The Spanish monarchy jealousy kept Torres’s discovery a secret until the British claimed Manilla in 1762, when English hydrographer Alexander Dalrymple uncovered a duplicate copy of Torres’s letter to the King of Spain in Manilla’s archives. The passage was subsequently named Torres Strait (Captain Cook’s Journal, ed. Capt. Wharton, [1893], cited in Haddon 1935: 3; 1935: 3; Gordon 1968: 25).

78 Dutch Explorers: William Jansz (Janssoone), Duyfken (Duijcken or Dwyphen), 1606. This was also the first recorded discovery of Australia.

79 British Explorers: James Cook, Endeavour 1770, 2nd recorded passage.

90 Treachery (Treachorous) Bay Incident (1793); In 1793, two English merchant ships, Hormuzeer and Chesterfield, enroute from Norfolk Island to Timor, arrived at Darnley (Erub) Island. The Islanders killed Captain Hill and four seamen at Treachery Bay. An armed European revenge party later returned to burn and destroy 135 huts, sixteen large canoes and several sugar cane plantations. In an account later heard by McFarlane (LMS), the Islanders claimed their island often went for eight months without rain. At the time of the encounter, all Darnley’s wells were dry. The only water supply was the pool at Treachery Bay. Initially, Islanders did not object to casks being filled, but when Hill and the seamen began washing themselves and their clothes with a bar of soap, thus contaminating the only remaining source of drinking water, the Islanders strongly objected. In the altercation that followed many Islanders were killed and a number of girls were removed from the island as prisoners (Haddon 1935: 6-7).

81 Also known as bich-la-mar, sea-slugs or sea-cucumbers.
inhabitants in the process. However, prior to the late 1870s, the lawless Torres Strait lay beyond Queensland’s jurisdiction. The Colony had neither the resources nor legal authority to prevent violent abuses of traditional Islander inhabitants by foreign maritime workers, as evidenced in the use of forced labour and abduction of local women for sexual purposes (Haddon 1935:xiii; Carroll 1969:37; Beckett 1987:32-3; Mullins 1995; Kaye 1997).

In 1868, the European discovery of pearl-shell (Pinctada maxima) precipitated a rapidly expanding pearling industry on Warrior Reef. Within five years, 206 licensed vessels were operating out of thirty-three floating pearling stations in a lucrative trade worth in excess of 100,000 pounds per annum. The trade was monopolised by Sydney-based companies, such as Burns Philp, largely due to the absence of Queensland maritime enterprises (Chester [n.d.], cited in Carroll 1969:37; Ganter 1991). Profits extracted from converting pearl shells into mother-of-pearl buttons (and ornamental inlays) depended primarily on European and American clothing industries. As wages became too depressed to attract white workers, pearl shelling developed into a multi-cultural, multi-national activity in which Asians, in particular Japanese, Malay and Filipino divers were employed, along with a small but substantial proportion of Islanders82. Drawn into the cash economy, Islanders were now able to purchase Western goods and foodstuffs throughout the entire year. During this period, the Outer Island communities remained predominately Melanesian in character. By contrast, Thursday Island (a.k.a. ‘the sink of the Pacific’) was now the main Torres Strait port and regional headquarters for local pearling operations. The town reflected a melting pot of predominately indentured foreign workers drawn from many corners of the world, including Europeans, Polynesians, Melanesians, Micronesians, Malays, Chinese, Japanese, Indian, Ceylonese, Filipinos and mainland Aborigines83. By exploiting mechanisms such as ‘boat dummying’ and ‘veranda pearlers’84, the numerically and hierarchically dominant Japanese would later successfully challenge the Australian ownership monopoly to eventually dominate the pearl shelling industry. By 1900, a large number of Japanese men were working on, or out of Thursday Island. By 1940, the majority of Thursday Island’s boat building enterprises were Japanese owned and operated. As pearling was the only industry formally exempted from the White Australian Policy post-Federation, Thursday Island quickly developed into Australia’s most

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82 Attributed to Sydney-based beche-de-mer trader, Captain Banner (Julia Percy 1868).

83 In 1989 Douglas (1900) recorded Waiben’s (Thursday Island) 816 acres as carrying a population of 1,515, including 574 Europeans. Another 2,132 males of assorted nationalities were employed in the maritime industry and based out of Thursday Island.


**London Missionary Society (LMS)**

The arrival of Christianity and the London Missionary Society (LMS) in the Eastern Islands in July 1871 (known since 1 July 1919 as the ‘Coming of the Light’) also brought about significant changes in Torres Strait Islander culture and society. Originally envisaging Torres Strait as its launching platform for Papua’s conversion to Christianity, the English Protestant mission largely exercised free reign in reconfiguring traditional Torres Strait Islander life according to its own peculiar ecclesiastical vision. The LMS virtually controlled life on the Outer Islands for a quarter of a century, and in that time accomplished much. Virtually all islands had their own Christian missions. In little more than a single generation, the LMS’s predominately Loyalty Islander and Samoan leaders-teachers would convert the deeply religious local Islanders away from many of their traditional religious beliefs and cultural practices to those of a devout conservative Christian society with far higher morals than those exhibited by transient workers in the boisterous frontier town at Thursday Island. In line with Reverend McFarlane’s belief that commerce, civilisation and Christianity journeyed hand in hand, the mission also introduced modern goods and some services to the Torres Strait islands and villages along Papua’s coastline. Even then, Western goods such as flour and tea were always more plentiful in island stores and being traded through traditional links from Torres Strait into Papua. This practice continues today (Beckett 1987:39-44; Mullins 1995: 117-38).

While initial incidents of resistance against the arrival of Christianity occurred spasmodically between 1871 and 1878, as recorded at Erub, Ugar, Parama, Badu, Dauan and Saibai Islands, it is generally held the original Torres Strait Islanders’ receptivity to the new religious rituals contained within the Christian doctrine resulted largely from three factors. First, high levels of compatibility existed between Christian rituals and secretive patriarchal traditional Islander practices. Both, for example, demonstrated respect for clan (or church) heads. Both could also be easily exploited to enhance personal or clan prestige. Second, LMS missionaries were able to the counsel local communities and provide them with a measure of protection against the foreign maritime trade’s less palatable aspects. Third, the LMS was instrumental in closing a violent chapter in local history. The Christian mission’s arrival and subsequent cessation of centuries of inter-island warfare, headhunting and abductions under its tutelage would, within a short period of time, quickly translate into a more positive environment in which Islanders were no longer forced to live in a constant state of constant fear (Murray [1872] & McFarlane
Queensland Colonial Government

With the Outer Islands remaining outside Queensland’s jurisdiction prior to 1879, Queensland colonial authorities were unable to impose their own rule in anything but the most diffuse way. Nor were they always in agreement with the LMS’s actions. Nevertheless, general agreement did exist between both parties on the complementary nature of the relationship between Christianity, commerce and the rule of British Law. Consequently, a financially-strapped, severely under-resourced Queensland colonial administration sought to encourage LMS activity, in recognition of the mission’s superior capacity for bringing about a greater degree of order and stability to relations within the region, in particular to the frequently tense relationships between traditional Islanders and foreign maritime workers. Thursday Island’s then Government Resident, the Honourable Henry Marjoribanks Chester, did enjoy a measure of official authority in the Outer Islands. This was initially achieved through his appointment as Deputy Commissioner for Darnley (Erub) and Murray (Mer) Islands, under direction of the Suva-based Western Pacific High Commissioner, and later due to the northward extension of Queensland’s boundary to encompass Warrior Reef and Saibai, Dauan and the Talbot Islands. And by the late 1870s, Chester was exerting a degree of control over Islanders across wider Torres Strait, but only indirectly by exercising authority over the pearl-shelling masters and capitalising on his influence with LMS missionaries to have colonial government policies implemented via their hierarchical systems (Moore 1984; Beckett 1987: 41; Mullins 1995: Ch.8; Arthur 1998; Kaye 1997).

During the LMS’s Outer Island reign, the Queensland government also appointed leading ‘chiefs’, or ‘mamooses’, to act as Islander representatives on individual islands. However, while the chiefs nominally controlled island affairs, in practice LMS leaders-teachers tended to dominate activities. For example, in 1878 Chalmers, McFarlane and Chester jointly agreed a system of limited secular local government should be initially inaugurated on Mer, by now the LMS’s headquarters site. A recognised ‘chief’ was appointed, together with eight minor chiefs (a council of advisors elected by heads of families). Collectively, these men constituted a local Native Court comprised of local councillors. The Native Court was intended to hold

85 The Commission entered into effect in February 1878, to be returned in 1879 after the Queensland boundary was shifted north to within ‘bowshot’ of coastal mainland New Guinea (Refer Chapter Four) (Moore 1984).
86 The Murray Island Native Court would be later replaced by the Island Court under the Community Services [Torres Strait] Act 1984.
hearings, dispense justice and administer local laws relating to petty crimes, for example disorderly behaviour, damage to property and land disputes. In turn, the system was to be enforced by four Islander men, all of who were to be appointed as police, paid an honorarium of 100 pound per year and dressed in Queensland government-supplied uniforms (Douglas 1900; Beckett 1987:41; QA10448).

In reality, however, the mamoose and island court systems were little more than attempts at creating rudimentary instruments of defacto state control intended to help an under-resourced Queensland Colonial Government maintain order in the Outer Islands. The courts were never meant to be autonomous. Moreover, the concept of centralised control was alien to Islanders’ thinking. Within a society whose core religious, cultural, social and political structures and relationships are forever intertwined with universal principles of kinship and reciprocity, the ability of chiefs to act in an independent manner was constantly being restricted by two sets of factors. The first were the overriding directions being instructed by LMS missionaries and Pacific (South Sea) Islanders. The second were traditional Islander codes of conduct. These included the mutual obligations arising from traditional social alignments within those clans and communities in which they had originally built the high levels of respect that enabled them to be appointed as chiefs in the first place. Nor was it reasonable to expect mamooses to use inappropriate nineteenth century British law to mete out justice or settle disputes in a court system within which ‘malevolent magic’ was the most common cause of injury to person or property. In practice, it was the LMS missionaries and not Queensland’s Colonial Government, who had the greatest input into the formulation of new laws and appointment of officials. Moreover, with Murray and McFarlane frequently absent for considerable periods of time, the island court system was increasingly drawn under the already-considerable influence of the mission’s Pacific Islander leaders-teachers. For example, even prior to the ‘whipping scandal’ of 1880, the despotiec Pastor Josiah was already exercising unrestricted authority over Mer Island’s court (Scott 1884; Beckett 1987: 41; Mullins 1995). Jostling for power and status on the Outer Islands also later caused much tension between traditional Melanesian leaders, LMS Polynesian pastors and Queensland government representatives. The rival court established by Samoan Pastor Finau to counter Queensland government influence, along with Finau’s ‘struggle for supremacy’ against the heredity priest-chiefs, or zogo-te, of the Malu-Bomai cult on the densely populated Murray Islands both provide examples (Wetherell 2001).

87 ‘Whipping Scandal’ 1880: Pastor Josiah flogged a Pacific Island seaman and Mer Island woman for committing adultery.
South Western Pacific (South Sea) Islanders Maritime Workers

While their numbers and impact varied across islands, arguably the most significant agent for change within the Torres Strait during colonisation were the South Western Pacific Island men who initially arrived in the region as crew and divers on beche-de-mer and pearl-shelling vessels, then later as missionary leaders-teachers. South Sea Island maritime workers began arriving in Torres Strait with the extension of the Western Pacific maritime trade in the 1860s. With them, they brought the distinct culture of the Western Pacific sandalwood trade, with its own complex of values, Christian religion, Pacific trade language (beach-la-ma, biche-lamar pigin) and high levels of brutality that were accepted as the norm. With the introduction of the *Imperial Pacific Islanders Protection Act 1872* (the *Kidnapping Act*), by the mid to late 1870s the majority of these South Seas crew members were not black-birding victims, but legally engaged divers, fishers and lugger operators working voluntarily in Torres Strait. Many came directly from the Palmer River gold rush, while others, such as Tongatapu Joe, were widely-travelled and highly-experienced seamen. Many were also missionary-trained Christians. All were independent thinkers and more than capable of protecting their own personal and professional interests. Unafraid to challenge their employers’ authority, these men exploited highly-developed stratagems to improve wages and working conditions, with the first large-scale recorded strike in Torres Strait occurring at Warrior Reef in 1872. By the mid-1870s, strikes were commonplace in the Torres Strait Strait’s fisheries. Over coming decades, both European pearl-shelling masters and colonial administrators would complain about Pacific Islander workers’ practices of uniting to force concessions from their employers. The Pacific Islanders’ arrival further had the dual impact of altering the nature of traditional Torres Strait Islander populations and the way in which they made their livelihood. Far more affluent than local Islander men, the Pacific immigrants’ capacity to raise higher bride prices would result in many traditional men being forced away from their home islands, often with parental blessing, to work on pearling luggers to raise sufficient fortunes to attract a wife. Meanwhile, the South Sea Islanders settled on many islands, marrying local women and raising families (Beckett 1987:36-48; Hopkins 1993; Mullins 1995).

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88 Pacific (South Sea) Islander population distribution patterns in the Eastern Islands: In 1899, Douglas recorded that approximately half of Darnley’s population of 250 were either South Sea Islanders or their immediate descendents. By contrast, Murray Island’s population of 481 was classified as being ‘self-contained’ with few foreigners. Pacific Islander men were not encouraged to integrate into the local community, either through settlement or intermarriage with local women (Douglas 1900).

89 Tongatapu Joe: a.k.a. Joe-Joseph or Joseph John was perhaps the best know Pacific Islander in the maritime industry. This overseer and pilot would collect the first commercial quantities of pearl shell in the Strait after Tudu (Warrior) Islanders took him to a bed of pearl shell in 1869.
South Western Pacific Islander Missionary Leaders-Teachers

While the small number (four) of strict European missionaries and their wives were relatively tolerant of local Islander customs and culture, this was not the case with the 131 (at least) Pacific Islander evangelists and their families who arrived in Torres Strait and South-Eastern New Guinea to pioneer LMS missions between 1871 and 1886. The high costs and difficulties associated with attracting dedicated British clergy and lay preachers to perform pioneer mission work in a remote and isolated Torres Strait led to the LMS’s pragmatic recruitment of Pacific Islanders already trained in LMS Central Pacific missions. Many were recent converts and poorly-educated by Western standards, with limited secular or religious training. Most were chosen for their maritime, house-building and horticultural skills and experience. These assets were intended to maximise their potential for self-sufficiency in the field while simultaneously minimising mission costs under working and living conditions that were at times, as Captain John Moresby (HMS Basilisk) would report, intolerable90 (Moresby [1872], cited in Moore 1984; Moore 1984). The introduction of compulsory (corvee) labour for young men in the French possession of New Caledonia in 1864 also provided the Loyalty Islanders constituting the bulk (70) of the first LMS contingent (1871-1886) with an added incentive for leaving their home islands. Unlike the small Melanesian political units they would encounter within Torres Strait, these Polynesian evangelists and their families left behind comparatively large, highly-structured societies that were characterised by hierarchical tribal groupings, each led by a hereditary chief who was generally treated with the greatest deference and respect (Mullins 1995; Wetherell 2001). Indeed, according to Wetherell (2001) many South Western Pacific immigrants, for example the thirty Samoan pastors (fa’afe’au Samoa) who followed in the Loyalty Islanders’ footsteps (1885-1915), not only exhibited the comportment of chiefs (matai), but were in reality actual heredity chiefs.

Bringing their particular brand of Pacific Protestantism passion with them, and left largely to their own devices by European missionaries, these enthusiastic evangelists were determined to root out as much traditional Torres Strait Islander culture as possible. Within their often tyrannical religious autocracies91, the Polynesian pastors imposed strict regulations and harsh punishments, such as head shavings and whippings, on Islander communities for numerous

90 Conditions at LMS missions were not always ideal. For example, in 1873 Captain John Moresby made a scathing attack on the LMS’s treatment of Loyalty Islanders at Manu Manu mission, Redscar Bay. The Brisbane Courier Mail also described mission conditions there of starving and sick mission teachers as ‘evangelical manslaughter’ (Moore 1984: 32-33).

91 Religious autocracies & ‘Fa’asamoa - ‘the Samoan way’: Wetherell (2001) suggests the essentially autocratic temperament of the Samoan pastors who followed behind the Loyalty Islanders between 1886-1915 can be traced back to their Samoan background, including their strong belief in fa’asamoa and their seminary training at Malua College, Samoa (Wetherell 2001).
offences. These ranged from fornication and family squabbling, to working on the Sabbath. Traditional Torres Strait Islander songs and ‘licentious’ dances were banned, old religious symbols destroyed, and traditional religious practices, such as the worshiping of hero-culture figures, were suppressed in favour of Christianity. The destruction of Islanders’ pre-Christian ceremonial art and value systems resulted in the disintegration of much ancestral knowledge and skill. Meanwhile, under the Samoan pastors’ further influence, the vernacular hymns, dancing, gardening practices and sports of the South Pacific would gradually emerge as the pre-eminent cultural practices around which all secular activities revolved. However, unlike neighbouring Aboriginal communities on Cape York, as noted, the deeply religious Islanders generally welcomed Christianity as a liberating force from centuries of inter-island warfare and sorcery and the depredations of pearlers and trepangers (Moresby [1872], cited in Mullins 1995:121-22; Haddon 1935; Mullins 1995: 117-38; Kaye 1997).

Pioneer Pacific Islander settlers also played a crucial role in European colonization of Torres Strait and Papua. As active agents of the European missionaries, they carried out the day-to-day operations of the LMS de-facto colonial administration and undertook the actual tasks of conversion and running the missions. Yet, they did more than interpret European ways to the local inhabitants. When European LMS missionaries paid their annual visits on just one day per year, the Pacific Islanders happily portrayed the subservient image European missionaries wanted to see, namely that of loyal Christian ‘native’ servant. In reality, however, these South Sea mission workers were just as independently minded as their compatriot maritime workers. Behind the scenes, they actively engaged in commercial arrangements with Islanders and non- Islanders in the maritime industry. They also exploited LMS assets, such as mission cutters, to conduct unofficial meetings with Pacific Islanders on other islands, for example to discuss pay issues and devise mutually agreed upon policies to present to European missionaries. They also acted as mediators between the new Queensland-LMS power structure, local traditional Torres Strait Islanders, and Papuans communities along New Guinea’s southern coastal plains (Mullins 1995: 117-38). These Polynesian migrants’ positions, whether in the maritime industry or missions, also gave them an elite status and authority that enabled them to exert an influence over the individual island communities that was far disproportionate to their actual numbers (Mullins 1955: 137). While most were repatriated after federation under the Pacific Island Labourers Act of 1901, many who married, or cohabitated as man and wife with local Islander women were allowed to remain (Mullins 1995: 159). Able-bodied

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92 Many South Sea influences are evidenced today in contemporary Torres Strait Islanders’ marriage and death customs, for example Tombstone Openings, and also in local gardening and cooking practices.

93 Pacific Islanders with a minimum twenty year Australian residency, or who were old or infirmed, were also excluded under the Act (Mullins 1995).
Pacific Islander workers were generally more skilled and commanded better positions and rates of pay than traditional Islander men, who were paid more than local Aborigines who were, in turn, paid more than Papuan fishers (Arthur 1998). Through strategic marriages, Pacific Islanders acquired family affinities and relationships, land and social ranking within their respective island communities. However, it was only amongst their descendants, as inheritors of land and a secure position within their extended families, that new Torres Strait Islander identities gradually began to emerge within those Torres Strait islands communities with immigrant majorities that were, by now, divided by decades of local inhabitant versus immigrant ethnic rivalries and disputes (Mullins 1995).

From first contact onwards, Pacific Islander migrants and their descendants always considered themselves superior to their ‘full native’ peers (Chief Protector of Aborigines 1910:10). Official Queensland government policies of segregation, protectionism and administrative favouritism under various the Protection Acts would later reinforce their sense of superiority. Within the local ethnicity-based class system, their ‘mixed race’ descendants would constitute the next generations of Torres Strait elites, then the next. Their relationships with the original Torres Strait island inhabitants would never be those of the master-servant or ‘boss-boy’ type exploited by German, British and Australian colonialists in PNG, due primarily to common racial, religious and linguistic traits which were threaded throughout these relationships and tended to ameliorate any overt racist overtones. Nevertheless, the Pacific Islanders would continue to use paternalism to preserve their elite status and maintain the original inhabitants’ loyalty and respect until well into the twentieth century. So deeply engrained is their position today that their descendents constitute an integral part of Torres Strait society, with many continuing to demonstrate great pride in their South Sea ancestry. These elites also exhibit strong leadership skills and historically dominate affairs in many island communities, with power typically being concentrated to a large extent in one personality, or family. Badu Island’s late Tanu Nona and his extended kin provide an excellent example. These leaders have also historically controlled a sizeable proportion of the region’s economic and political power. Today, identity remains an extremely complex and sensitive issue for a vast majority of contemporary Torres Strait Islanders, due to their multi-cultural, multi-national ancestries, along with local traditions of oral genealogies and family histories, both of which are easily manipulated. This can be evidenced in often nostalgic, even romanticised, reinterpretations of the region’s past history (Haddon 1935, Vol1, Part 11, p. 209, Vol.1, Part 111, p. 291; Maori

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94 For example, both Yam (Iama) Island’s Getano Lui Senior and his son Getano Lui Junior (grandson and great grandson of the first LMS teacher Lui Getano Lifu), along with Darnley (Erub) Island’s George Mye, are direct descendants of LMS Pacific Islander missionaries.
Consolidation and Development under Douglas – 1885 to 190495

Major changes began to occur following the appointment of former Queensland Premier and Acting Commissioner of British New Guinea (BNG), the Honourable John Douglas, as administrator on Thursday Island. A far more effective Queensland Colonial Government regime now began to assert itself across the Torres Strait and tighten its administrative grip on the Outer Islands. Douglas’s appointment in 1885 coincided with the establishment of local government administration on Thursday Island under the Divisional Board of Torres, later replaced by Torres Strait Shire Council in 1903. Under Douglas’s ‘benevolent administration’ development flourished at Thursday Island, which by now hosted a significant transient population and provided an administrative/commercial hub for the Strait’s extensive maritime industries, along with the gold mining industry on nearby Horn, Hammond and Possession Islands (Douglas 1900; Haddon 1935). As for the Outer Islands, Douglas strongly believed the LMS and its church courts were too powerful, and he sought to limit that power. First, secular government schools were established on several islands, with the Strait’s fourteen primary schools being run as a separate, yet parallel, component of the Queensland public education system. The schools provided compulsory schooling for children between six and twelve, were totally free of LMS control and employed Queensland government paid teachers, along with the state standard curriculum. In line with Douglas’s belief that Islander children demonstrated an eagerness to learn96, being ‘a very bright and orderly lot, quite equal in intelligence, according to my estimate, to the ordinary run of white children’97, Torres Strait primary students were to receive standards of education similar to those available in Brisbane. Second, in a move unprecedented in the South Western Pacific, Douglas set up a system of elected Island Councils to advise government teacher-supervisors98. The Islanders

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95 The Hon. John Douglas was Premier of Queensland 1877-79, Resident Magistrate of Thursday Island 1885-1904 and Special Commissioner for British New Guinea 1885-88.

96 Observation made by Douglas at Badu Island in 1889.

97 Observation made by Douglas at Murray Island in 1889.

98 Home Rule & Local Self-government: Despite Douglas’s (1900) dislike of the new Australian Constitution, he strongly supported Federation and ‘Home Rule’, which he likened to local self-government:

‘We give up some of our provincial autonomy in order to enter upon a higher form of government, which we hope will give more defined expression to our national development. We stand up as Australians. We do not by any means cease to be Queenslanders or even Thursday Islanders. Nay, more - the very intensity of your local predispositions will be the measure of your usefulness in the larger life which awaits you…. while you joyfully claim to call yourselves Australians, and while you may wish to identify yourselves with everything that is great and good in your inheritance, you are Home Rulers to the backbone. And what is Home Rule? It is not necessarily the amplification and reduplication of Parliamentary government. It is rather, according to my interpretation, the intelligent ordering of local self-government (Douglas 1900).
quickly embraced the system. While Council members generally continued to defer to the views of European island residents, their election did represent a substantial step forward in Islanders gaining a small measure of autonomy over the running of their own island affairs. Next, Douglas ensured Islanders were not made subject to the *Aboriginal Protection and Restriction on the Sale of Opium Act 1897* (Qld), which gave wide powers to Queensland government appointed ‘protectors’ to look after Aboriginal people. Douglas believed their exemption was appropriate as Islanders were ‘capable of exercising all the rights of British citizens, and ought to be regarded as such’ (Douglas 1885, 1900).

The LMS subsequently wound back its Torres Strait operations, relocating its headquarters to Sanguane on the Fly River. Clashes with Queensland government officials in 1904 and 1913 over education-related administrative matters finally precipitated the Mission requesting the Anglican Church (under the Anglican Diocese of Carpentaria) take over its facilities and local pastoral responsibilities in 191599. Seeking a continuity of the LMS’s Christian work rather than radical regime change, Torres Strait Anglicanism would prove to be far more receptive and accommodating of local traditional Torres Strait Islander customs. While still playing an important role in island life, the Christian church now ceased to either circumscribe the original inhabitant’s lifestyles or govern their daily behaviour (Beckett 1987: 45; Mullins 1995:44-5; Wetherell 2001). The death of Douglas in 1904 also marked the end of one era and the beginning of another, a time of oppressive protectionism and segregation100, the forerunner of which was the previously mentioned *Aboriginal Protection and Restriction of the Sale of Opium Act, 1897* (Qld). All major decisions concerning the Islanders’ fate were now taken in the state capital, Brisbane. And by 1910, both the Torres Strait region and its indigenous population were being officially portrayed as an economic and social burden to the newly formed State of Queensland101 (Chief Protector 1910: 961).

99 Anglican Church and Government Residents: A close relationship existed between the Anglican Church and the first three Queensland Government Residents (Police Magistrates) at Thursday Island. For example, John Douglas, Hugh Milman and Lee Bryce all actively attended the church. J.W. Bleakley, Queensland Protector of Aborigines (1913-42) also served as churchwarden at Thursday Island’s Anglican Cathedral Church. By contrast, later Protectors O’Leary and Killoran (1942-85) were both Roman Catholic and although sympathetic, were not as close to the local Anglican Church. The Church of England’s hegemony in the region was ultimately broken with the arrival of more fundamental charismatic Pentecostalist religious cults, which provided a ‘religion of political dissent’ during the 1970s (Wetherell 2001).

100 Friday Island & Leprosy: Segregation based on racial origin also occurred under Douglas’s administration. For example, on 27 October 1892, under the *Leprosy Act of 1892*, Friday (Gealug) Island was declared a lazaret for the reception and medical treatment of non-European lepers. By contrast, Stradbroke Island Lazaret, proclaimed in the same year, provided treatment for Europeans. In 1907, both centres were closed and both ‘whites’ and ‘coloured’ patients were subsequently transferred to Peel Island, Moreton Bay (QA3734).

101 Queensland’s Economic and Social Burden: On envisaging a copra industry as the Strait’s economic saviour, the Chief Protector stated in 1910: ‘The islands of the Torres Strait are at present a continual source of expense to the Government and an increasing one; whereas had coconuts alone been systematically planted some years since
Under earlier conditions of indirect supervision via the Island Councils system (1885-1904), Islanders had already begun to develop the determination, confidence and knowledge required to interact with the imposed Queensland administration on their own terms. Therefore, when post-federation Queensland governments at first moved to regulate and enforce stricter codes, in order to reshape Islander society and induce conformity, rather than engaging in conflict, Islanders initially began to develop their own *modus vivendi* within this new system. They desired knowledge and reputedly took a keen interest in rules relating to how they were governed (Bryce (Local Protector) 1912). They also continued along a process of exploiting the maritime industry, Christianity and the state government’s supervisory framework to extend and transform their own inter-island networks (Sharp 1982). Nevertheless, the Queensland government’s ultimate refusal to allow for the different set of circumstance presenting in the Torres Strait region would lead directly to traditional Torres Strait Islanders being subjected to the same controls as mainland Aborigines under the restrictive provisions of the various Aboriginals Protection Acts (Chief Protector 1910).

In 1912, the Shire of Torres was abolished and the town of Thursday Island created. That same year, many Torres Strait islands became ‘protected’ as Aboriginal reserves. Restrictions were placed on Islanders’ freedom of movement and the management of boats and island affairs. As wards of the state, Islanders were protectively segregated in several ways. First, they were restricted in their ability to interact with the broader multi-national community, to which they were perceived as vulnerable. Second, marriage between Europeans and Islanders required the Chief Protector’s consent. Third, sexual relations between races outside marriage were a criminal offence. Fourth, Islanders were forbidden to drink alcohol. Fifth, Islanders were not permitted residence at Thursday Island. Sixth, Islanders were encouraged to work on luggers, yet failed to receive earned wages directly. To teach them thrift and prevent extravagant gift giving, especially donations to the Church, wages were paid directly to Queensland government on their behalf, with Islanders receiving credit in government

*these islands would now be quite independent of outside assistance either from the government or others, and would be in a position to support four fold their present population* (Chief Protector 1910: 961).

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102 Ganter (1991) proposes governmental regulation of ethnic groupings within the industry was carried out according to a structural ranking or ‘hierarchy of races’, based on the race theory of the day, under which workers at the bottom most levels, namely Aborigines and Islanders, were subject to closer government supervision and received the greatest levels of ‘protection’ under the various Aboriginal Protection Acts. Ganter (1991) also argues that the Protector’s tight control over these workers’ ability to choose how they spent and invested their earnings, not only robbed them of any incentive or possible opportunities to plan and work towards their own personal advancement, but also later resulted in racist assumptions about Islanders’ personal attributes and behaviour. According to Ganter: ‘Because of these differing sets of protective and restrictive legislation, work ethic and suitability for employment presented themselves as attributes classifiable according to race, and came to be understood as an innate dispositions’ (Ganter 1991).
passbooks. These could be presented at any island store to purchase goods from the limited and austere range available. Purchases of items not available in the stores remained at the Chief Protector’s discretion (Beckett 1987: 44-53, 59).

However, three ethnic communities, all matrilineal descendents of the original Torres Strait Islanders and who, until very recently, chose to maintain non-Islander (and non-European) ethnic identities, would be excluded from this oppressive regime. The first were the Pacific Islander communities that elected to join their compatriots at St Paul’s Anglican Mission for Pacific Islanders on Moa (Banks) Island. The second were the inhabitants of Hammond (Keriri) Island Catholic Mission, all families of Catholic Filipinos and Rotumans. The third were the so-called ‘Thursday Islanders’, all descendents of Indonesian, Japanese and Chinese seamen and storekeepers who settled on Thursday Island. For many decades, these three communities would be excluded from protectionism under a form of administrative bias based upon ethnic origin that allowed them to avoid the more salient aspects of government control, such as the pass-system of travel and alcohol prohibition. This policy of selected exclusion, under which people of mixed ancestry who chose to remain on the reserve islands with their traditional inhabitant families would be officially declared as ‘Islanders’ and subjected to the same treatment as indigenous Islanders and Aborigines under the terms of the Act, would later engender a great deal of resentment in the region (Chief Protector 1910; Beckett 1987:59).

Perhaps the most tragic experience of the colonial and early protectionist eras was that of the traditional Kaurareg peoples, who were first forcibly removed from the region’s largest island of Muralag (Prince of Wales) to Keriri (Kiriri, Hammond) in 1871 by Somerset-based Police Magistrate Frank Jardine, using mainland Aboriginal police troops and Pacific Islander boat crews, to only once again be forcibly removed from their traditional lands in 1921 and 1922 by the state government, this time to Poid Village, Moa Island (Bosun 2005).

Over time, the influences of Christian teaching, Ailan Kastom and, in particular the relatively recent exponential increase in material benefits available to persons self-identifying as ‘Torres Strait Islanders’ would blur the once-dominant identity divisions between earlier generations.

103 St. Paul’s - Moa Island: Rather than accept repatriation to the Solomon Islands and New Caledonia, some Queensland Kanaka labourers migrated to Thursday Island and subsequently went to St. Paul’s, Moa Island. The mission on Moa was managed under joint custodianship by the Queensland Resident and the Bishop of the Church of England, the latter being trustee for Queensland Melanesians (Wetherell 2001).

104 Determination of Native Title in Torres Strait: The Australian Federal Court finally recognised Kaurareg native title rights on 23 May 2001. Other native title determination in Torres Strait are as follows: Meriam 1992 (Murray); Saibai 1999; Maulgal People 1999; Dauan Island 2000; Dalrymple and Masig 2000; Mabuiag Islanders 2000; Poruma 2000; Warraber 2000; Waier and Dauar Islands 2001 (Murray); Muralag 1 (Prince of Wales) 2001 (Kaurareg); Muralag 2 (Prince of Wales) 2001 (Kaurareg); Ngarupai People (Horn Island) 2001 (Kaurareg); Zuna (Entrance Island) 2001 (Kaurareg); and Dumalarlag and other islands 2001 (Kaurareg) (Yeta, Mipa Tarilag).
Today, Torres Strait Islander identity may outwardly appear unproblematic to many outsiders. While some Islanders remain unaware of their hybrid origins, as with many other Australian citizens, they readily use a multiplicity of identities: national, state, regional, local, religious, and cultural. However, closer observation reveals contested identities still torment the Torres Strait’s political and social life. Much resentment born of earlier Queensland governments’ official long-term policies of segregation based upon ethnicity still remains. When required, this latent undercurrent of emotion may also be readily exploited to gain political leverage and further individual political agendas within the region (Mullins 1995; Inter.12, June 2004).

World War 1, Papuan Industries, Aboriginal Industries and the ‘Company boats’
The First World War did not impact greatly on the region. As a vital communication point on an important international sea route, Thursday Island was already relatively well defended. In 1914, HMAS *Australia*’s presence deterred the German squadron and throughout the war HMAS *Sleuth* and *Mourilayan* patrolled the Strait. When many Europeans departed for overseas war service, thus precipitating a local labour shortage, this opportunity was used to obtain higher wages for indigenous workers, all of who were ineligible for military service.

However, any benefits gained, such as wages rises, were largely overridden by the restrictions placed on Islanders by Queensland’s Department of Native Affairs, once again ostensibly for their ‘protection’ (Beckett 1966). After decades of colonisation, Islanders were now heavily reliant on the cash economy and imported foodstuffs and goods, yet had little capacity to earn money, apart from working the pearling industry. Former LMS Reverend Walker determined the most productive way to help Islanders achieve a measure of financial independence was to establish Papuan Industries at Badu Island. The company intended purchasing Islanders’ catches in payment for fishing boats and purchases of stores goods, with the company’s income being supplemented from copra and rubber plantations on New Guinea’s mainland. A fleet of community-owned cutters and luggers, the so-called ‘Company boats’, was the final result. The venture was a mixed success. Most Islanders worked well, paid off their boats, and brought substantial amounts of money into their communities. Once debt-free, however, few were inclined to trepang or pearl shell, unless necessity dictated. Debts on some boats and equipment accumulated. The condition of others deteriorated. Nevertheless, the Queensland government was sufficiently impressed with Papuan Industries to establish its own company on those islands Walker’s scheme had not reached. Papuan Industries was subsequently sold to the Queensland Government in 1930-31. Once the company’s Papuan assets were disposed

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105 Between wars Kiwai Papuans and Australian Aborigines were also employed in the marine industry, but Torres Strait Islanders commanded the greatest rates of pay (Beckett 1966).
of, both companies merged to become Aboriginal Industries (Chief Protector 1910; Austin 1972; Sharpe 1982).

The Maritime Strike of 1936
Despite fluctuations, the pearling industry enjoyed relative prosperity post WW1, largely due to increased post-war demand for shell and the surplus of boats released from war service. Record catches were recorded in 1929, with total Australian production supplying over half the world’s pearl shell. That year also witnessed the exploitation of new pearl beds near Prince of Wales Island. Unfortunately, these events coincided with the onset of the Great Depression, which impacted dramatically on the world clothing trade. Demand for buttons, including pearl shell, was greatly reduced. Nor could Islanders’ incomes be supplemented as in past years by trepanging. That market had collapsed with the onset of the Sino-Japanese War in 1931. As a result, wages and incomes began to fall, both on ‘Master’ pearlers’ private vessels and the government-owned fleet operated by the State Aboriginal Industries Board. Few Islanders working in the remote Torres Strait had knowledge of the vagaries or volatility of a distant international pearl shell market that was subject to substantial price variations. Not fully comprehending the global economic logic driving sudden drops in wages, and accustomed to working for a static annual income known in advance, many self-employed Islanders in the government fleet began to resent unexpected or unexplained losses in their incomes. Some believed their earnings had been misappropriated. By 1936, all the above factors and tensions would combine with a general Islander’ resentment against their ‘protectors’, Queensland Government overrule, and the state’s ongoing failure to recognise their basic right to equality, autonomy, and control over their wages and own affairs. The situation reached such a crisis point that inter-island action directly involving seventy percent of the Islander workforce was initiated (Beckett 1987:51-4; Sharpe 1982).

The Maritime Strike of 1936 is interpreted as a defining moment in Islander affairs. For the first time, the majority of maritime workers across the islands acted in concert to collectively assert themselves and reject Queensland Government oppression. The strike also provided a foundation for a number of subsequent events that would cumulatively reinforce a developing notion of a regional Torres Strait Islander identity. Grievances included government control over ‘Company’ boats and Commonwealth Savings Bank Pass Books, along with Islanders’ right to spend their earnings and exchange goods as free persons. General dissatisfaction with poor working and living conditions in the maritime industry provided another yet stressor (Sharp 1982). The strike ran for four months and the industry gradually recovered thereafter.

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106 Later Island Industries Board (IIB).
only to reach pre-Depression levels by the outbreak of World War II. By late 1936, Chief Protector O’Leary was already transferring many of the government teacher-superintendents’ powers across to the Island (‘native’) Councils. An inaugural all-island Councilors’ Conference was held at Yorke Island in August 1937. In 1939, Islanders were also given greater responsibility for, and authority over, their domestic island affairs following the establishment of a system of elected local government for island reserves. This initiative provided Islanders with a greater role in the day-to-day management of their communities, albeit under tight Queensland Government control. The return to a system of indirect rule was formalized in Queensland laws (the ‘New Law’), with the passing of a separate Act for Islanders, the Torres Strait Island Act of 1939 (Qld). For the first time, Island Councils were constituted by an Act of Parliament (Section 3). While not being treated as equals with non-indigenous Australians, Islanders were at least finally being treated as ‘one separate people’ under Section 18 of the Act: Along with the jointly administered Aboriginals Preservation and Protection Act of 1939 (Qld), the Act also heralded a change in government policy away from the protection and segregation of indigenous people, to the protection and preservation of indigenes through assimilation into the broader white community (TSI Act 1939; APP Act 1939; Beckett 1987:55; ).

World War II
World War II brought significant change to Torres Strait. Local government was suspended between 25 April 1942 to 6 March 1949, with control of Thursday Island handed over to the Commonwealth Government (QA10416). All non-service personnel, excluding Islanders, were evacuated to mainland Australia. Japanese pearlers were removed to Hay (NSW) and Tatura (VIC) internment camps under General MacArthur’s orders (Ganter 1991). Thursday Island provided a forward staging post for American and Australian forces, with numerous allied troops passing through on their northward passage to New Guinea. Japanese forces also launched several raids on the area. Horn Island’s airfield was bombed on several occasions, however the combination of a radar unit on Badu (1942) and greater fighter presence on Horn greatly reduced the effectiveness of Japanese attacks. Nevertheless, many lives were lost due

107 Post World War II, the headquarters of the Director of Native Affairs and Protector of Islanders at Thursday Island, Cornelius O’Leary, were permanently based on Thursday Island from 1 July 1948 to 1 January 1957. After this, headquarters were transferred back to Brisbane, with P.J. Killoran taking over the most senior position (QA01642).

108 ‘The Island Council shall have delegated to it the functions of local government of the reserve, and shall be charged with the good rule and government of the reserve in accordance with island customs and practices (S.18).’

109 Following forty-nine years of subsequent State Government administration, Torres Shire Council was restored to elected Council status in March 1991 and subsequently administered as a mainstream local council authority (QA10416).
to the region’s remoteness and pilot inexperience. Indigenes were permitted to volunteer after 1941. Around 700 Torres Strait Islanders originally volunteered, joining the newly created Torres Strait Light Infantry (TSLI - A, B, C & D Companies). By war’s end, a sizable proportion of the region’s adult male Islander population had served in the unit, which was primarily engaged in guard duty and working parties, although D company saw special overseas duty in 1945 guarding Merauke airstrip in nearby Dutch New Guinea (West Papua). By mid-1943 Japanese forces were no longer a threat and the region’s strategic and military significance began to decline. However, the TSLI’s formation, and more significantly the opportunity to interact and garner knowledge and experience of the outside world through contact with large numbers of non-indigenous service personnel who treated them as equals, did much to alter Islanders’ expectations, both during and after the War. They quickly learned their wages and living conditions were far below those available on mainland Australia. In 1943, Companies A, B and C staged a sit down strike for pay equal to Australian service personnel. The Australian Army’s official response was relatively mild, with several Non-Commissioner Officers demoted and the trouble blamed on trade unionists among the white soldiers. Islanders got a pay rise, but only one equivalent to two thirds that of other Australian soldiers stationed at Thursday Island. After the war, former TSLI members had different expectations about how their and their families’ lives should be lived. They wanted to be part of the prosperity being promised to all Australians who had served their nation (Arthur 1998).

From 1948 to late 1967

From the late 1940s to late 1960s, the region was in a state of decline and neglect. Decades of paternalism and government control of the local economy had left many Islanders in a state of ‘arrested development’ (Beckett 1966). The virtual collapse of the beche-de-mer, trochus and pearl shell fisheries, along with the introduction of durable plastic buttons, had translated into greatly reduced local employment opportunities and rising unemployment levels (Beckett 1966; JCFADSC 1976; Ganter 1991; Arthur 1998). Thursday Island, the once-booming centre of Northern Australia’s maritime industry was now ‘the end of the line’, a stagnant forgotten outpost connected to Cairns (500 miles south) by a weekly plane and the occasional small boat. The Outer Island native reserves were closed to all but a handful of authorized strangers and could only be reached by lugger or government cargo boat. Constant radio link was maintained between the islands and the Deputy Director at Thursday Island, whose officers visited frequently by trawlers. No wider regular regional communications occurred, either

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110 The Outer Islands were declared reserves under The Aboriginal and Torres Strait Islander Affairs Act of 1965. Under the Act, no person/s may visit or hold land on a Reserve without the authority of a manager (Deputy Protector of Islands [nd], cited in BN649PD).
with the Australian administration in Port Moresby (300 miles east) or the small Fly River Station at Daru in the Trans-Fly, which remained one of the least developed and most sparsely populated areas in the Australian Territory of Papua New Guinea (Beckett 1966). According to Director Killoran, until their relatively recent ‘Australisation’, PNG’s mainland had always provided Islander men on the northern Torres Strait islands with a chief source of wives. Hence during the 1950s, Commonwealth Widow Pensions were also being paid to women domiciled in their original Papuan villages (Killoran 1969). Torres Strait Islanders were now permitted to live on Thursday Island, with most being housed in the newly created Tamwoy Aboriginal Reserve. Reserves were also established at Bamaga and Siesia communities on the tip of Cape York. The state government administration still maintained a tight reign on emigration. However, with the relaxation of restrictions on movement after 1948, many Islanders dissatisfied with the situation in Torres Strait joined the diaspora south, mostly to North Queensland. Their general lack of education and skills had equipped them only for labouring jobs, such as railway fettling and cane cutting, but at least their wages were equal to those of white workers and far above anything they could earn back home (Beckett 1966; Arthur 1998). Many also went labouring at Weipa, Gove and Hammersley. According to Director Killoran, the more ambitious preferred New South Wales (Killoran 1969).

During the 1960s, Queensland Government began to improve levels of services and increase public authority expenditure in the region. It also expanded its bureaucracy. Many remaining Islanders found employment in state government departments responsible for Islander affairs in the area, such as health, education and administration of the Outer Islands (Beckett 1966, 1987:70-1; JCFADSC 1976). The Islanders’ salaries were below Europeans, but significantly higher than wages in neighbouring PNG where no similar developments had occurred, despite decades of Australian administration (JCFADSC 1976:33; Arthur 1998). On Thursday Island an official government elite had replaced the old ‘Master’ pearlers. Thursday Island Town lost its council and was run from Brisbane. The community was dominated by the Department of Native Affairs (DNA), the Anglican and Presbyterian missions, and large hospitals such as the Star of the Sea, which caters mainly for indigenous populations on the Outer Islands and

111 Some Saibai Islanders reside at Seisia and Bamaga on traditional Aboriginal land yet are administratively regarded as part of the Torres Strait region. In the 1940s Saibai Island suffered severe tidal inundation and a substantial number of Islanders, led by Chief Bamaga Ginau, relocated to the tip of Cape York (Muttee Head), then to Bamaga settlement, which was subsequently established by the Department of Native Affairs. Bamaga provides the administrative centre for the Northern Peninsular Area (NPA), which consists of three Aboriginal communities, Injinoo, Umagico and New Mapoon, plus the Islander communities of Seisia and Bamaga (Solicitor-General (Qld) 1972). In 1965, the Northern Peninsular Reserves/settlements (‘Cape York Government Settlement’) of Bamaga, Cowal Creek, Red Island Point, New Mapoon (Aborigines from Mapoon Mission) and Umagico (Aborigines transferred from Lockhart River Mission) all came under the direct supervision of the Director of Native Affairs, Thursday Island (QA10515).

112 Over two thirds of Australia’s Torres Strait Island population currently reside on mainland Australia. Largest communities are in Cairns, Townsville and Darwin. Other communities are located at Bamaga and Seisia.
Cape York. Either directly or indirectly, most of Thursday Island’s 1,500 residents were economically dependent on government funding. The local community now reflected a mix of equal parts Europeans, Asians, part-Asians and Torres Strait Islanders. Meanwhile, on the Outer Islands the total population of around 800 was now entirely composed of Torres Strait Islanders (Beckett 1966).

The 1967 Referendum granted the Commonwealth Government responsibility for indigenous affairs nationally. By now, Torres Strait Islanders were officially recognised as full citizens of Australia, resident in the State of Queensland. While most had received welfare payments, for example child endowment, since the early 1940s, by the early 1970s the entire Torres Strait region was receiving the full range of Commonwealth welfare entitlements\textsuperscript{113}. Most Islanders were still heavily reliant on government transfers, and to a lesser extent on remittances sent by relatives on the mainland for cash incomes (JCFADSC 1976). A century of living under the all-pervading influences of colonization, protectionism, assimilation and government agencies, such as the Departments of Social Security (DSS), Native Affairs (DNA), and Aboriginal and Islanders Advancement (DAIA), had taken their toll on Islander society\textsuperscript{114} (Singe 1979:13). By the mid 1970s, only Papuans from PNG, which has no universal welfare system, could be found working in what little remained of the pearl shell industry, primarily because industry wages were much lower than the amounts Islanders received through unemployment benefits (Fisk 1974; Beckett 1987; Arthur 1998: 27). For example, until 1979, pearling luggers owned by Badu Island’s Nona family continued to recruit divers and deckhands from nearby coastal PNG villages (TSS-CC [n.d.], cited in Baume 1982).

According to Director Killoran, the Eastern, Central and Western reserve islands were run as ‘temporal states’, subject to DAIA oversight. Most government dealings were conducted directly via the Department’s Director (Brisbane) and Deputy Director (Thursday Island). DAIA also acted as agent for all Commonwealth departments\textsuperscript{115}. Under the terms of the

\textsuperscript{113} It is important to note that in the 1970s island populations were constituted primarily of children, old people and mothers, all of who were eligible for social service payments, no matter where they lived in Australia. Over half of the men aged between 20-29 worked on mainland Australia and remitted a high level of their incomes back to their families. They also paid taxes and contributed to the public revenue used to fund social service payments on the islands (JCFADSC 1976).

\textsuperscript{114} Singe (1979:131) would observe: ‘The Islander is sedate, confident, perhaps possessed of a quiet dignity, yet somehow he seems to lack the humble diligence of the Papuan and the individual initiative and energy that Papuans may display in pursuit of opportunity’.

\textsuperscript{115} DAIA offered Islanders around six to twenty-eight regular position on each island, as Island Councillors and Representatives, Island Clerks, police, teachers, school janitors, nurses, carpenters, radio assistants, and water supply and sanitation workers. The Department also established special works programs offering casual employment, for example building sea walls and airstrips. The Anglican Church also offered clerical positions on the islands (JCFADSC 1976).
Torres Strait Islanders’ Act 1971 (Qld), each island contained a ‘Village’ (Island) Council with Chair, who was nominal executive head of one or two each low level teachers, auxiliary policemen, and nursing aides. The latter maintained constant contact with Thursday Island Hospital. No permanent European staff worked on the Outer Islands. All court hearings or activities of significance occurred at Thursday Island. Of equal significance on individual islands was the Anglican mission and its Islander priests, normally the best educated residents. Each island also reportedly had a heavily-subsidised, well-stocked general store run by Island Industries Board (IIB). IIB controlled all economic activity in the region, which was negligible. Outside a few government departments, few employment opportunities existed. Post-primary Islander students were required to attend Anglican or Catholic schools at Thursday Island. Islanders were now drawn wholly into the Australian cash economy. In essence, the Torres Strait region functioned as a government-subsidised ‘Welfare State’ to which Commonwealth unemployment and Social Security benefits were given. According to Director Killoran, the region also received considerable state government assistance in kind, for example cinemas, water reticulation, schools, aid posts, housing material and supplementary food (Killoran 1969).

In 1973, the Commonwealth established the National Aboriginal Consultative Committee (NACC) and Department of Aboriginal Affairs (DAA) offices at Thursday Island, the latter being intended to encourage Islander economic development within the maritime industry and also inject funds into housing and other services. Rather than working through Queensland, the Commonwealth was now by-passing the state and dealing directly with local traditional inhabitants. Both governments would subsequently share administrative responsibility for the

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116 Primary education was available on the islands. In principle, Islander teachers received a maximum of two years (usually for one year or not at all) specialists training in Brisbane to supplement their primary, occasionally secondary, school education. Education standards in Torres Strait were significantly below mainland standards, due mostly to the lack of trained staff and poor facilities. Secondary education was provided at the boarding high school at Bamaga. Others students were sent to schools at Herberton, Charters Towers, Townsville, Rockhampton and Brisbane under the Commonwealth Government Secondary Grant Scheme. As a result of leaving their home islands, many of the younger generation of Islanders (under-40s) lost any intimate knowledge of their traditional language and island customs, such as gardening and fishing practices (JCFADSC 1976).

117 During a visit to the region, the Sub-Committee on Territorial Boundaries (1976) found Islanders were generally healthy and not subject to common disease found in tropical areas, for example worm infestation, dysentery, yaws and malaria. Venereal disease was considered a serious medical problem and difficult to control due to frequent contact with the source of infection. All inhabited islands had a Medical Aid Post (MAP) staffed by a government nurse and two to four assistants. On islands with a seconded Queensland Education Department head teacher, the teacher’s wife was appointed government nurse after a fortnight’s training at Thursday Island. Seriously ill patients were evacuated to Thursday Island, depending on weather conditions and available transport. The Thursday Island Hospital matron also made occasion trips to the islands for general check-ups (JCFADSC 1976).


119 NACC was disbanded in 1977.
Islanders under an unusual arrangement Beckett (1987) entitles an ‘uneasy condominium’. By the early 1980s, Islander concerns over the slow pace of improvements to basic infrastructure in local island communities were manifesting in increasing public demands for greater levels of local autonomy, even secession from Australia. And by the mid-1980s and early 1990s, Islanders were beginning to gain greater levels of control over their lives and island affairs. In response to their demands, an overarching statutory governance body, the Island Coordinating Council (ICC), was established under the *Queensland Community Services Act 1984* (Qld). The Council assumes responsibility for the Outer Islands and administers regional affairs, concentrating primarily on areas such as fishing rights, police and justice matters, economic development, health and welfare, and cultural and natural resources. The ICC also represents the interests of and works closely with individual elected Island Councils. In 1994, the Torres Strait Regional Authority (TSRA) was also established as an independent Commonwealth statutory authority under the *Aboriginal and Torres Strait Islander Commissioner (ATSIC) Act 1989* (Cth). TSRA provides local traditional inhabitant communities with a ‘voice’ at the national level (Inter. 6, May 2004). Nevertheless, local authorities are still reportedly playing developmental ‘catch up’ with mainland Australia, although policies of indigenous self-management and the localisation of government administration to Island Councils, along with the establishment of ICC and TSRA, have assisted in devolving greater levels of autonomy to the region (Inter. 6, May 2004).

Finally, despite the more negative aspects associated with decades of continuous isolation from mainstream Australian society under a parade of differing administrative regimes, Islanders did obtain some unexpected benefits from these historic processes. Their continuous occupation and exploitation of their customary territories, according to their own evolving interpretations of traditional laws and customs, when combined with their general isolation and a chronic lack of government and church resources, was to inadvertently provide these remote communities with increasing levels of political influence over the local-level decision-making processes immediately impacting upon their lives. It also facilitated experimentation

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120 Islanders had closely monitored wider unfolding regional decolonisation processes, such as the granting of independence to other Melanesian and Polynesian peoples, for example in Western Samoa (Independence from New Zealand 1962), Cook Island (Free Association with New Zealand 1965), Nauru (Independence from Australia 1968), Fiji (Independence from Britain 1970), Tonga (Britain (Protecting Power) 1970), Niue (Free Association with New Zealand 1974) and PNG (Independence from Australia 1975). Hence, many expressed their desire for greater levels of local autonomy using the language of decolonisation. In 1987, the pro-independence Townsville-based Torres United Party (TUP) and original TUP leaders Jim Akee and Calemo Wacando (Ugar (Stephens) Island) also resurfaced in the Strait to gain the support of Island Coordinating Council Chair, George Mye.

121 Elected Chairpersons on the ICC automatically become councillors on TSRA. Apart from Outer Island representatives, TSRA members also include representatives from TRAWQ (suburbs of Tamwoy, Rosehill, Aplin, Waiben and Quarantine on Thursday Island), the North Peninsular Area (NPA) communities of Bamaga and Seisia, one from Thursday Island township (Port Kennedy), and another representing Nurapai (Horn) and Muralag (Prince of Wales).
with, and selection of, the best and more utilitarian aspects of their religious and secular pasts. This, in turn, would enable the progressive establishment of a body of practice on which the local traditional inhabitants could begin to further build upon their own unique island customs and way of living (Beckett 1987: 56).

Conclusions
This chapter reveals the immense diversity, sensitivity and complexity of the geographically diverse Torres Strait region’s multi-cultural and multi-ethnic people and history. In particular, it highlights how under processes of religious and commercial acculturation, the original traditional Torres Strait Islander communities experienced a distinctive form of Polynesian authoritarianism and cultural influence, the inheritance of which remains clearly evident in Islander’ society today. It is within this intricate web of stories and complex personal relationships that the region’s future rests. It was also shown how the island way of doing things is reflective of the Islanders’ strong and dynamic traditions. As history attests, this extremely fluid culture is motivated by a combination of the language of family, kin-ship, self-interest, home islands, spirituality and religion. It has also proved itself readily accepting of change, opportunistically subsuming the more positive aspects of whatever sets of circumstances fate sails its way, while matter-of-factly rejecting the unwanted rest. It was also argued that in past times individual Torres Strait Islander communities never envisaged of themselves as a cohesive group or united nation. Nevertheless, when it comes to their dealings and interactions with perceived outsiders, since the time of first recorded contact Torres Strait Islander communities have always collectively identified themselves as a distinct and separate cultural and ethnic group, in particular during comparisons with their neighbouring coastal Papuan and mainland Aboriginal communities.

Torres Strait Islanders have also always taken an extremely keen, if at times well-concealed interest, in the behaviour and activities of outsiders in their customary land and sea territories. Despite the numerous negativities associated with colonisation, paternalism, and assimilation, growing levels of political consciousness about their traditional and non-traditional rights and abilities were being progressively raised over the decades by a number of catalysts, beginning with the collective action demonstrated during the Maritime Strike of 1936. Other events, for example the Inaugural Island Councillors meeting in 1937 and introduction of elected local government councils in 1939, along with the revision of the Aboriginal Protection Act of 1939 (Qld), would help to facilitate an unusual form of authoritarian state government control that paradoxically involved considerable degrees of local autonomy for Islanders, in particular when compared with Queensland Government’s harsh treatment of its Aboriginal population.
Islanders’ participation and experiences in World War 11 further heightened their political awareness about their rights and obligations as Torres Strait Islanders, Queeslanders and Australians citizens. The opening of mainland labour markets and subsequent large-scale migration of Islanders southward in search of better economic opportunities would also open new doors, as did the 1967 Referendum’s outcomes. Heightened levels of political activism were also evident in the frustration Islanders expressed over the slow pace of infrastructure development in the region and in local entreaties for greater levels of regional autonomy, even succession, during the 1980s. *Mabo v. Queensland [N0.2] (1992)* would also later provide yet another pivotal turning point in Islanders’ assertiveness and gaining of political wisdom. Nevertheless, for what still essentially remains a deeply-fractious nation, perhaps the greatest precipitator for heightening Islanders’ political consciousness and helping them to reinforce the notion of a collective Torres Strait Islander identity, both to outsiders and themselves, was the so-called Torres Strait ‘border dispute’ of the late 1960s and 1970s. It is to the complex issue of regional border delimitation that we now turn in the following chapter.

122 *Eddie Mabo and Others v. The State of Queensland; Mabo v. Queensland [N0.2] (1992) 175 CLR1.*
Chapter Four

Queensland Border Delimitation
& the Torres Strait ‘Border Dispute’

The world does not in fact break easily along neatly perforated lines...boundaries determined for one purpose are not necessarily appropriate for other purposes, and the most carefully chosen dividing lines have a perverse way of changing or coming to require change, and of overlapping.

Innes. L. Claude. JR

As the previously described events unfurled, a series of concurrent political, administrative and legal developments associated with a number of Letters Patent and statutory enactments were assisting with these processes and incrementally laying the foundations for an implied demarcation of Queensland’s northern colonial boundary. Post-Federation, this delineation would define Australia’s northernmost limits and also later prescribe an important section of Papua New Guinea’s international border. This chapter prepares the ground for a transition to the contemporary political analysis conducted over the following chapters by examining the history of real and proposed border readjustments in the Torres Strait area. In particular, it seeks to determine how the region’s past history on boundary arrangements has helped to shape its present border delimitation arrangements. It also revisits events surrounding the Torres Strait ‘border dispute’. The chapter adopts the following form. First, the motivations behind the Colony of Queensland’s pre-Federation attempts to extend its boundary northward to within close proximity of New Guinea’s southern coastline will be established. Three subsequent proposals to readjust the boundary south are then considered. Next, the issue of unofficial and official border discussions, consultations and negotiations between Australia, PNG and Queensland in the years prior to the Torres Strait Treaty’s signing are addressed. Differing perspectives held by the major actors engaged in the border conflict, namely the Commonwealth, Queensland and PNG governments and Torres Strait Islanders, will also be highlighted.

The chapter’s basis proposition is that ever since the Colony of Queensland first attempted to trace an arbitrary colonial boundary across the Torres Strait’s waters, tensions have existed over perceived inequalities and inequities in boundary arrangements within the region. It will be shown how a complex set of motives originally impelled Queensland to extend its northern
boundary line to ‘within a bowshot’ of New Guinea’s coastline. Three subsequent proposals would then attempt to move the boundary south, but without success, due primarily to the Australian Federation’s establishment and an accompanying underlying set of specific constitutional circumstances. Despite remaining dormant for many decades, tensions would once again resurface during the late 1960s during the lead up to tripartite negotiations over the delimitation of an international border between Australia and PNG. The conflicts emergent in this early phase of unofficial discussions would ultimately manifest in a border dispute. They would also lay foundations for much discord and political posturing that remained evident throughout the border demarcation dialogue. While official preliminary border delimitation negotiations were conducted with the Whitlam Labor government during PNG’s period of self-government between 1973-1975, achieving any form of negotiated agreement prior to PNG gaining its Independence would prove impossible, due to the great complexity of issues involved. More substantive discussions were to take place under the more co-operative Commonwealth-state relations evident between Queensland and Fraser federal governments during 1976 and 1978. However, due to heightened tensions, a period of suspension in talks occurred in 1977. The majority of conflicting viewpoints presenting throughout the border conflict would ultimately be reconciled, to a major extent, in the Torres Strait Treaty. The document’s signing also represented the culmination of many years of extensive behind-the-scenes negotiations between Commonwealth, Queensland and PNG government officials and representatives.

Establishing Queensland’s Northern Boundary, 1859-1901

When the Colony of Queensland was created out of the Colony of New South Wales, the Letters Patent of 6 June 1859 defined Queensland’s land boundaries, leaving its maritime boundaries imprecise. The new colony acquired ‘all and every the adjacent Islands, their members and appurtenances in the Pacific Ocean’. However, all islands outside a three nautical mile limit, including those within the Torres Strait and Great Barrier Reef regions remained New South Wales’ territory. In 1865, the Queensland government’s acquisition of a lease on Raine Island, a guano-covered coral islet located around sixty miles off Queensland’s coast, would set an important precedent. Under Letter Patent of 30 May 1872, the British Imperial Government consequently acceded to Queensland’s requests to annex all islands within sixty miles of its coastline. Within three months, Queensland Legislature had passed the necessary resolutions and annexation of all relevant Queensland islands, including those north of Cape York up to ten degrees South latitude had taken place, with transference by deed poll occurring on 22 August 1871. Under Premier John Douglas’s leadership, a Queensland

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123 Validated by the *Australian Colonies Act of 1861*. 

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government reserve was subsequently proclaimed on Thursday Island in December 1876 (van der Veur 1964; Holder 1974; White 1981; Kaye 2001). Queensland’s first official colonial presence in Torres Strait occurred in 1876, after its regional administrative base, then under the oversight of Government Resident, Police Magistrate and Sub-Collector of Customs, Lieutenant Henry Majoribanks Chester, was transferred from Sommerset, Cape York, to the safer anchorage of Port Kennedy at Thursday (Waiben) Island, in order to better administer the Strait (Fitzroy [1848], cited in Carroll 1969:37; Haddon 1935:13; Gordon 1968: 82-83; Carroll 1969: 36; Moore 1984).

Yet, despite Queensland’s enhanced control over southern Torres Strait, a complex mix of motives still existed for extending Queensland’s border northward to New Guinea’s coastline. First, the colonial government desired to protect Queensland fishing enterprises in northern Torres Strait. The need for government monitoring of working conditions in the beche-de-mer and pearl shelling industries provided an additional incentive. Second, the Queensland government recognised it had a moral responsibility to regulate interactions between traditional Torres Strait Islander inhabitants and outsiders, in particular South Western Pacific Islander maritime workers, hostile New Guinea Kiwai tribes, and fierce head-hunting Papuan Manrind-amin (Tugeri, Kaya-Kaya) raiding parties from Dutch New Guinea. Third, given the Colony’s heavy reliance on its northern sea route, critical importance was attached to securing the major shipping channel through the Strait. This was viewed as essential to Queensland’s future economic development and also that of other mainland colonies along Australia’s eastern seaboard. Fourth, with more non-British people migrating into the South Western Pacific region, in particular to islands immediately adjacent to Australia, great concern existed over the security of Australia’s trade and the vulnerability of its vast coastline. The Dutch presence in West New Guinea, along with the recent intrusion of French power into the region following France’s annexation of New Caledonia (1853) during the Second Empire, only served to confirm and deepen Queensland’s concerns that the Strait’s northern regions were vulnerable to foreign incursion. With a foreign power immediately on the doorstep of the Colony’s capital of Brisbane, and with little chance Britain would attempt to remove France from the Western Pacific, due to the Britain-France alliance against Russia in the Crimean War, Australia’s sense of security was shaken. Hence, the need existed to establish an outpost among the Strait’s northernmost islands at Tauan (Teiuan, Taun, Dauan) 124, in order to allow

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124 Evans (1875) observed: ‘Tauan (Mt. Cornwallis) [i.e. Dauan], is a small but lofty island (800 feet high), and appears suited for an outpost; a vessel of moderately heavy draft can anchor close to it. The occupation of this island would practically give possession of the mainland of New Guinea immediately opposite to Cape York, and at the narrowest part of Torres Strait’. The establishment of a British settlement at Port Moresby would later negate this requirement.
Queensland’s domination of the nearby Papuan coast. Fifth, with the struggle against Great Britain to end penal transportation just won, the possibility of another British convict settlement being established on nearby New Guinea was highly offensive to Australian public opinion. Sixth, the lack of any established administrative presence in New Guinea would allow Queensland to unilaterally trace its northern boundary close along New Guinea’s southern coastline, to thereby incorporate the Strait’s most northern islands within the Colony. Such an outcome would be achievable without need for due consideration of international convention or Treaty agreement (Evans 1875; Heath 1877; Douglas 1877a, 1877b; Haddon 1935; Joyce 1953; van der Veer 1964, 1966; Gordon 1968: 82-3, 110; McInnes 1979; White 1981; Mullins 1995; Schug 1996). Premier Griffith observed of Queensland’s expansionist ambitions: ‘With regard to the boundary … it was not unreasonable for Queensland to require to get all she could. She could not get New Guinea, but managed to get as near as possible. We followed around as close as we could get between the islands, and the coast of New Guinea, taking in practically everything…’125 (Griffith [1893], c.f. van der Veer 1966).

After pressurizing the British government, annexation of virtually all Torres Strait islands was achieved with the northward extension of Queensland’s boundary and Letters Patent of 10 October 1878126. A colonial maritime boundary, supported by Premier Douglas and confirmed by Premier MacIllraith, was passed by the Colony’s Legislature, then fixed under the Act of 24 June 1879 (Queensland Coast Island Act)127, and later proclaimed by the Governor of Queensland on 21 July 1879128. Concerns over the validity of this complex legal mechanism were subsequently addressed in the Colonial Boundaries Act 1895 (Imp) and later again by the High Court in Wacando v Commonwealth (1981)129, the latter of which

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125 Griffith continued…’at that time those parts were equally unknown and unsettled; but later when New Guinea had what was after all a civilised Government… it became extremely absurd that some of the islands should be governed by Queensland (Griffith [n.d.] c.f. JCFADSC 1976).

126 Commander G.P. Heath, Portmaster of Brisbane, and Captain Frederick J. Evans, Admiralty Hydrographer, were responsible for the actual drawing of the 1878 boundary line (Heath [1877] & Evans [1878], cited in JCFADSC 1976).

127 Effective from 1 August 1879, the Queensland Coast Island Act 1879 annexed: ‘Certain Islands in Torres Straits and lying between the Continent of Australia and Island of New Guinea, that is to say all the islands included within a line drawn from Sandy Cape northward to the south-eastern limit of the Great Barrier Reefs; thence following the line of the Great Barrier Reefs to their north-eastern extremity near the latitude of nine and a half degrees south; thence in a north-westerly direction embracing East Anchor and Bramble Cays; thence from Bramble Cays in a line west by south (south seventy-nine degrees west) true; embracing Warrior Reef, Saibai, and Tuan Islands, thence diverging in a north-westerly direction so as to embrace the group known as the Talbot Islands; thence to and embracing Deliverance Island and onwards in a west by south direction (true) to the meridian of one hundred and thirty-eight degrees of east longitude’ (Schedule to the Act 1879 c.f. van der Veer 1966).

128 Lord Normandy Proclamation of 21 July 1879.

confirmed the validity of incorporating all Torres Strait islands under Queensland sovereignty\textsuperscript{130}. However, despite annexation, customary patterns of Islander landownership, inheritance, use and enjoyment of land on the Outer Islands would continue substantially as before (van der Veur 1964; Beckett 1966; Sharpe 1982; Moore 1984; Kaye 1997, 2001). It need further be noted neither of the above-mentioned legal mechanisms specifically address matters relating to Queensland’s exclusive control over Torres Strait waters, sea-lanes, seabed exploitation, or fishing rights, although the documents do imply sovereignty over these issues is vested in the State of Queensland (Fisk 1975).

By late 1884, Anglo-German imperialist rivalry would turn the status quo even further in Queensland’s favour. As mentioned, to the Strait’s northwest the Netherlands had proclaimed title to New Guinea’s western half from 141 degrees East longitude\textsuperscript{131}. Then on 3 November 1884, Germany raised its flag to annex the non-Dutch portion of north-east New Guinea (Kaiser Wilhelm’s Land)\textsuperscript{132}. Despite repudiating successive Queensland-based claims to establish legal-political possession of the eastern half of New Guinea on behalf of the British Crown\textsuperscript{133}, and despite Queensland’s international notoriety for its callous treatment of its Aboriginal population and labour trade to Melanesia, the British Imperial government finally acceded to the Colony’s requests to annex the south-east quarter of New Guinea as a British Protectorate\textsuperscript{134}. Three days later in Port Moresby, the Union Jack flew over British New Guinea (BNG). The Strait was now politically secure. A commercial trade in marketable commodities between New Guinea’s natives and merchants and storekeepers in Townsville, Cooktown and Thursday Island was now also a possibility. By 1887, the Colonial Conference had provided for Queensland’s oversight of BNG’s administration, with both mainlands coming under the Governor of Queensland’s immediate responsibility\textsuperscript{135}. The Protectorate

\textsuperscript{130} Holden (1974) would later claim the 1879 boundary, which roughly corresponded with traditional boundaries between Saibai, Dauan and Boigu and the nearby Papuan coast, was not a legally recognised border but rather ‘a line of convenience’ encompassing several islands that were legally recognised as Queensland territory. In PNG’s House of Assembly on 26 August 1969, Ebia Olewale would challenge the existence of this traditional boundary. The veracity of Olewale’s argument was however questioned as northern Torres Strait Islanders speak yagar-yagar, a language not understood by the Bine speaking villages of Kunini and Tureture (JCFADSC 1976).

\textsuperscript{131} The Van Delden Proclamation of 1884.

\textsuperscript{132} The Schutzbrief of 1885.

\textsuperscript{133} Claimants to possession of New Guinea’s eastern half on behalf of the British Crown were made by Charles Yule in 1845, Captain John Moresby in 1873, and Henry Chester (on orders from Queensland Premier Thomas McIlwraith) in 1883.

\textsuperscript{134} The Erskine Proclamation of 1884.

\textsuperscript{135} Formal responsibility for governing British New Guinea (BNG) was shared by Britain and its colonies of Queensland, New South Wales and Victoria. BNG was later placed under the control of the Commonwealth of Australia (Queensland, New South Wales & Victoria) and renamed the Territory of Papua in 1906 (Papua Act). Papua was mandated to Australia by the League of Nations in 1920.
was subsequently declared a Crown Colony by Royal Letters Patent of 8 June 1888. However, due to the Port Moresby-based administration’s limited resources, BNG’s western portions were initially administered from Thursday Island. Queensland quickly lobbied other colonies to ensure its new settlement and preferred sea-lane through the Strait were effectively protected136 (Douglas 1885; Beckett 1966; Overlack 1978; Singe 1979; Moore 1984: 41; Kaye 1997).

Challenging Queensland’s Colonial Boundary
Between 1879 and 1903, three alternative boundary positions, known as the red, green and blue lines, were advanced during attempts to readjust Queensland’s boundary further south. A later lapsed Order in Council, issued May 1898, also proposed including a major part of the resource-rich Warrior Reefs within British New Guinea (Map 3).

Douglas’s Red Line (1 July 1885)
The first to express concern over Queensland’s northern border was former Queensland Premier, the Honourable John Douglas. Douglas’s dual appointment as Government Resident of Thursday Island and Acting Special Commissioner for the Protectorate of British New Guinea (BNG) offered him a more balanced outlook on boundary arrangements. It also highlighted its more inequitable aspects, especially when viewed from a Papuan perspective. Although chiefly responsible for shifting the boundary northward six years earlier, Douglas’s new solution to the ‘border problem’ was a proposed rectification south137 (Douglas 1885). Douglas insisted inhabitants on the northwestern islands were largely Melanesian villagers, akin to nearby horticulturalists Papuans and quite unlike the nomadic Aboriginal hunters on mainland Australia (Douglas 1885). He was also becoming increasingly frustrated with trying to implement ‘clumsy and irrelevant’ Queensland legislation, originally framed for mainland Aborigines, to the inhabited islands of Saibai (Sibia), Dauan and Boigu (5-10 km offshore) where a strong Papuan influence prevailed. For example, Douglas contended Saibai Island ‘belongs naturally to New Guinea and now that the Protectorate has been proclaimed it ought to be handed over…’ (Douglas 1885).

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136 Construction of defence fortifications at Thursday Island began in 1892. The garrison was manned by Queensland’s Defence Force Battery, supplemented by a complementary signal station on Goode Island. This mix of strategic defence assets facilitated control of Port Kennedy's maritime approaches and the strategic Prince of Wales Channel. All mainland colonies contributed to associated costs.

137 Douglas observed at the time, ‘the territorial definitions of the present are not binding on futurity, if more convenient arrangements for the purposes of government can be made. The union of the different States of Australia, which will be gradually accomplished, points to territorial re-adjustments in the interests of the people themselves’ (Douglas 1885).
MAP 3: Red, Blue, Green and Order in Council Lines

Extracted from Fisk et al., 1974.
Strong foundations existed for Douglas’s argument. Unlike the long-established communities on other Outer Islands, until very recently the Strait’s north Western Islands remained mostly uninhabited, with much larger coastal populations residing in the area between the Bensbach and Mai Kussa Rivers. Dauan, for example, was only permanently inhabited around a century ago, after repeated Tugeri raids forced small numbers of Papuan survivors offshore to seek refuge on the island. Here, they eventually fell under significant Polynesian and Melanesian influence. On the Papuan mainland, only Mabadian village was able to maintain sufficient internal community cohesion and strength to resist the onslaught from Merauke. At the time of Douglas’s proposal, a considerable two-way cross-border movement of people and goods also existed between the Papuan mainland and north Western Torres Strait islands. Primary linkages were occurring between Saibai and Sigabiduru/Upper Pamoturi/Mabadian; Dauan and Mabadian; and Boigu and Mari/Tais/Buji/Ber (Solicitor General (Qld) 1972). Douglas (1885) believed effective administration of these islands, which represented a source of future expenditure rather than revenue for Queensland, could never be achieved unless Queensland Parliament ceded them across to BNG. The actual process only required a minor readjustment in administrative responsibility. Under Douglas’s proposal, the resource-rich Darnley Deeps, and Warrior and Orman Reefs would remain Queensland territory. This would guarantee Queensland exclusive control of the main navigable channels in Western Torres Strait, although at one juncture Douglas did recommend all islands, including the Prince of Wales Group, be transferred across to BNG. However, nationalist sentiment in Queensland would render Douglas’s suggestions hypothetical. Queensland’s colonial government also had no intention of relinquishing its important administrative and commercial base at Thursday Island (Douglas [1885], cited in van der Veer 1964; Singe 1979; White 1981).

Douglas eventually advocated re-positioning the boundary along ten degrees South latitude, based on each administration possessing equal shares of the Strait and its resources. The northern Western, northern Central, and Eastern Islands, where Douglas was experiencing the greatest difficulty in applying Queensland laws, would come under BNG’s administration. Culturally, this arrangement appeared acceptable to both administrations. Apart from arbitrarily separating the closely-related inhabitants on Mabuig and Badu Islands, its implementation would be achievable with minimum disruption to local Islander populations. Douglas’s proposal was not accepted for three reasons: First, there was a general lack of interest on the issue. Second, re-adjustment of the Queensland border required the consent of Her Majesty’s Britannic Government and an Act of the Queensland Parliament. Third, and most importantly, many of the Strait’s best trochus, beche-de-mer and pearl shelling grounds
were located in the Darnley Deeps, Warrior and Orman Reefs, all of which lay north of the tenth parallel (Douglas [1885], cited in van der Veur 1964; Singe 1979).

**Griffith’s Blue Line (17 January 1893)**

The second readjustment line, proposed by then Queensland Premier, Sir Samuel Griffith\(^{138}\), following a tour of the islands with T. J. Bryce, sought to correct the most obvious anomaly in existing boundary arrangements by advocating the boundary be moved south of Saibai, Dauan and the Talbot Islands (including Boigu). The arrangement would unite the inhabitants on the northern islands, which ‘belong ethnologically and geographically to New Guinea’, with Papuans under British administration (Griffith 1893). Griffith (1893) agreed with Douglas, noting Queensland laws were ‘framed for the government of civilized and not of primitive people, such as those on Saibai who differ in few if any respects from their neighbours on the mainland of New Guinea’. Griffith (1893) believed that unlike Queensland laws, the system of government in BNG was ‘admirably adapted for dealing with the Papuan race’ as it had already enacted special provisions for protecting local tribal customs and land tenure systems. However, while Griffith’s proposal corrected the most noticeable shortcoming of the 1879 Act, by incorporating Saibai, Boigu and Dauan under BNG, it failed to include Warrior Reefs and the uninhabited islands of Turnagain and Deliverance Islands, thus once again denying a more equitable distribution of the Torres Strait region’s sedentary resources between the two administrations. As with Douglas’s earlier proposal, if accepted, Griffith’s solution would have caused minimum disturbance at the time\(^{139}\), apart from disrupting contact between Saibai, Dauan and Mabuiag (Jervis) Islands. It would also have helped reduce many tensions associated with the later border dispute. Conversely, under existing Ordinances of the Possession, it would also have prevented Boigu and Saibai Islander maritime workers from working in the Thursday Island headquartered Queensland Pearl Shell Fishery (Native Labour Ordinances of 1892, Sec: 23, in Griffith 1893; Griffith [1893], cited in van der Veur 1964.

**Macgregor’s Green Line (23 March 1893)**

The next proposal put up by BNG’s first Lieutenant Governor, Sir William Macgregor, approved of Griffith’s plan but criticised its failure to restore BNG with its just entitlement of

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\(^{138}\) Sir Samuel Griffith was Premier of Queensland between November 1883-June 1888 and August 1890-March 1893, and later first Chief Justice of the High Court of Australia.

\(^{139}\) At the time, Saibai Island supported several hundred people. The permanent inhabitants of Dauan were believed to consist of six families. Boigu, the only inhabited island of the Talbot Group, had seventeen families who periodically took refuge on Dauan to avoid Tugeri raids. All other islands in the Talbot Group were only inhabited for part of the year. Many men on these islands were also long-term employees in the Queensland Pearl Shell Fishery (Griffith 1893).
fishery resources. A frequent visitor to the northern Torres Strait islands, Macgregor was concerned the existing division of jurisdictions was ‘anomalous and unfair’ to the Possession. As Queensland’s encroachment came to ‘within one or two hundred yards’ of mainland New Guinea at the Talbot Islands, which by Macgregor’s calculations would include the offshore mangrove flats of Kawa, Mata-Kawa and Kussa Islands (300-400 m offshore), it was virtually impossible to travel from BNG’s Government Station for the Western Division at Mabadaun to Thompson Bay without crossing Queensland jurisdiction. Moreover, while the original extension of Queensland’s boundary to ‘within a bowshot’ of New Guinea’s mainland was once necessary to regulate the fishing industry, this was no longer the case. Nevertheless, Queensland continued to control all the Strait’s valuable fishing grounds while BNG suffered financially due to the loss of revenue from these marine resources, which MacGregor strongly believed the Protectorate was morally entitled to (MacGregor [1893, 1895, 1896], cited in van der Veur 1966).

Macgregor argued the existing inequitable nature of boundary arrangements inflicted ‘a great and unbearable injustice on several of our coastal tribes… these tribes cannot without injustice or oppression be cut off from these fishing grounds any more than they can be deprived of their hereditary garden lands. The reefs yield them crops that never fail’ (MacGregor [1893], c.f. van der Veur 1966: 37). For example, the Parama and Giavi (Gasiri) tribes’ fishing operations extended across the reefs of Kimusi, Wappa, Mataromai, Ibu, Uru and Parakiuru, and up to Tudu (Warrior, Tudo) Island. The Daru tribe traditionally fished on Mataromai, Ibu, Ura, Parakiuru and the east side of Warrior Reefs. The Mawatta and Turituri tribes, on the other hand, regularly fished Watawari, Kimusi, Wappa and their local reefs. However, under the existing arrangements, the only way these coastal Papuan fishers could legally work their hereditary tribal fishing grounds was in Queensland boats under Queensland laws (MacGregor [1893], cited in van der Veur 1966). MacGregor also insisted his modification of Griffith’s proposal include the prolific fishing areas of the crucial Warrior Reefs north of Warrior (Tuti) Island, Gabba and Deliverance Islands, along with a couple of additional uninhabited cays and islets. If accepted, Griffith’s proposal would have also assisted BNG administrators in controlling much of the illegal cross-border activity being committed by Saibai Island natives at that time, such as the carrying of firearms, theft and the intimidation of coastal Papuans. It would have also helped ameliorate many later conflicts

140 According to Macgregor (1893), ‘Sir Samuel Griffith’s proposal would not restore to the Possession anything like what would be a fair share of the Strait fishery. It would give them a mere fringe of what it would have received had the two colonies been simultaneously created and a fair division of the Straits been made between them’ (MacGregor [1893], c.f. van der Veur 1966).
associated with the border dispute (MacGregor [1893, 1895, 1896], Jiear [1903], Robinson [1903], all cited in van der Veur 1966; Fisk & Tait 1974).

On 31 August 1894, Queensland Premier Hugh Nelson recommended a boundary rectification based on Griffith’s proposal, and a subsequent British Imperial Government Order in Council, dated 29 June 1896, was made under the Colonial Boundaries Act 1895. It recommended a southward border adjustment to include Saibai, Boigu and Dauan in BNG, but was rejected as it failed to amount to any redistribution of resources in the Protectorate’s favour. In addition, under the Act, the alteration of the border required the consent of a self-governing Colony (Peel 1896). This would not be forthcoming. Following a conference between Douglas, Griffith and Nelson, another more conciliatory agreement in the form of a British Imperial Government Order in Council was issued 19 May 1898. It directed Saibai, Boigu, Dauan, Buru, Gebar, Bramble Cay and northern Warrior Reefs be included within BNG, with the Queensland Parliament’s concurrence (Nelson [1898], cited in van der Veur 1966). However, no bill was ever brought forward. In 1901, Federation intervened and Queensland became a State of the Commonwealth of Australia. Under the entrenched states’ rights contained within Section 123 of the Australian Constitution141, any alteration to a state’s border requires the approval of the Commonwealth and the relevant state parliament, along with a referendum in which the majority of that state’s electors approve of the change. This prerequisite effectively curtailed any hope of adjustments to Queensland’s northern border occurring in the first half of the twentieth century (S.123; Robinson 1903; Solicitor General (Qld) 1972).

With the Territory of Papua’s establishment (Papua Act 1906), the Commonwealth Attorney-General Isaac Isaacs gave an opinion to Prime Minister Alfred Deacon (28 June 1906), stating the Imperial Government could revoke the Order in Council, replacing it anew with one altering the boundary. Alternatively, Queensland’s Parliament could surrender territory north of the proposed boundary line to the Commonwealth under Section 111 of the Australian Constitution143. The Commonwealth could then, in turn, cede it to Papua under the Colonial Boundaries Act 1895 (Deakin [1906], cited in van der Veur 1966). Once again, no action was

141 S.123: ‘The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, otherwise alter the limits of the State, upon such terms and conditions as may be agreed upon, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected’ (Section 123).

142 Clause 9, Commonwealth of Australia Constitution Act (the Constitution).

143 S.111: ‘The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth’ (Section 111).
taken. The Queensland Government nevertheless moved to consolidate its boundary position with a compilation of all relevant Letters Patent annexing Queensland territory. Subsequent recommendations for incorporating the northern islands into the Territory of Papua, on the premise they could be more effectively administered from Daru, would also be lodged by Hugh Nelson in 1898, A.H. Jiear (Resident Magistrates Office, Daru) in 1903, C.S. Robinson (Acting Administrator) in 1903, and A.P. Lyons (Resident Magistrates Office, Daru) in 1919. Over following decades, many criticisms were levelled at an alleged ‘cartographic absurdity’ that legally prohibited many coastal Papuans communities from exploiting their traditional fishing grounds, and more importantly from a national point of view, increasingly affronted Papuans while simultaneously denying them a share of possible discoveries of oil, gas or minerals located beneath the Strait’s seabed (Olewale 1969; Whitlam 1971; Hastings 1973).

**Laying Foundations for a Border Dispute.**

While the Australian Territory of Papua and United Nations Trust Territory of New Guinea remained under Australian administration, little urgency existed for international maritime delimitation. However, tensions over Queensland’s northern boundary resurfaced once again during the move towards PNG’s period of self-government, attained 1 December 1973. The question of a new boundary and proposed resumption of allegedly Papuan offshore islands and sea territory was first raised by Dr. John Guise in PNG’s Legislative Council in 1963. Then in the late 1960s - early 1970s, a nationalistic minority of newly educated Papuan elites dominated areas of administration and politics in PNG. Most were deeply committed to a southward readjustment of the Queensland-Papua boundary. Much resentment was directed towards the close proximity of an allegedly obsolete Queensland colonial border that continued to deny Papuans access to their perceived rightful share of the Strait’s economic resources. Mr. Ebia Olewale (Olewali), a Kiwai of Tureture (Kunini village), Daru resident, and Member of the PNG House of Assembly for South Fly Electorate, was perhaps the most vocal. Olewale first raised the border issue in 1969 during the June session of the Territory’s House, laying claim to a large tract of Torres Strait’ fishing grounds on behalf of Mawatta and Tureture villagers within his electorate (ANNEX C). Olewale placed on notice a resolution, based upon the Royal Order in Council of 19 May 1898, which he intended moving at the forthcoming August meeting. In effect, if executed it would have excised several Torres Strait islands, including the inhabited islands of Saibai, Boigu and Dauan, from

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145 Later Sir John Guise and Governor General of PNG.

146 A full copy of Olewale’s statement is provided in ANNEX C.
Queensland’s sovereign jurisdiction. Olewale’s later negated motion also included the following reefs: Kimusi, Weappa, Mataromai, Ibumuba, Ura, Parakiwuro, Watawari, Arawgoro, Kopopi, Tepere and Todiwo, and all reefs southward to Tudu (Warrior, Tudo) Island\(^{147}\) (Olewale 1969; Griffin et al. 1979; JCFADSC 1976:70). In late 1968, Queensland waters claimed by Olewale also provided a site for offshore drilling operations\(^{148}\) (BN649PD).

Following referral of the matter by Australia’s Department of External Territories, the Prime Minister’s Department approached the Premier’s Department on 31 July 1969, regarding the possibility of both parties conducting low key informal discussions, at an officer level, on the question of the Queensland-Papua boundary (Curtis 1969a). Commonwealth officials argued this course of action would allow for further political developments in the Territory Chamber and also help indicate the type of Australian action possibly desirable at some future stage\(^{149}\) (AUS 1969). Shortly thereafter, during a debate on the second reading of the Coral Seas Islands Bill 1969, then federal Labor Opposition Leader Gough Whitlam began promoting border rectification in the House of Representatives\(^{150}\). The matter of speculation on Queensland’s northern frontier boundary and its northern islands was subsequently raised in Queensland’s Legislative Assembly on 21 August 1969. In an official position constantly reaffirmed across the coming years, Queensland’s Minister in Charge of Aboriginal and Island Affairs announced Queensland was unwilling to entertain any changes in its existing

\(^{147}\) On Mr. Olewale’s statement, state government records (BN649PD) note: ‘Implications here are quite meaningless to the mass of Islanders or nearby Papuans, but certainly not to MR. OLEWALI, M.H.A. and sophisticates… The Member realises that if he raises constitutional concepts over the heads of Highland colleagues he would get little interest or support. Consequently he must represent the issue in ‘bread and butter’ terms – i.e. ‘Queensland is stealing our heritage, etc.’ Raising the issue is also his sole means of widening his meagre political base amongst the coastal KIWAI. He realises that in pure economic terms, oil discoveries alone excepted, the issue does not make sense. Nonetheless MR. OLEWALI is essentially sincere, reasonable and clear thinking on the issue. He seeks to establish his own reputation as a forward, non-parochial thinker. Certainly he has no wish to create current bitterness’.

\(^{148}\) Coombs (1976) would later argue much of the agenda during the border dispute was being driven by tensions between Queensland and PNG for control over possible oil deposits in the sedimentary basins west of Warrior Reefs, stretching down to the Gulf of Carpentaria and Cape York. Coombs would state candidly: ‘The central issues in the so-called border question is control over the seabed resources of the Torres Strait. The Government of Queensland wishes to retain effective control over these and the Government of Papua New Guinea wishes to obtain a substantial share of them’ (Coombs [1976], c.f. JCFADSC 1976: 75).

\(^{149}\) P.M’s. Department was represented by Mr. Jack Taylor.

\(^{150}\) Whitlam (13 August, 1969) stated, inter alia: ‘In both area and population Australia now rules the largest empire in the world. It is true that the empire is declining and will decline further. Last year the Trust Territory of Nauru was granted independence. In a very few years the colony of Papua and the Trust Territory of New Guinea similarly will gain independence. I would hope that without any further delay we would make the process easier and more harmonious by speeding the consultations with Queensland to rectify the boundary which was set in 1878 between Queensland and Papua and which runs for some 60 miles within 3 miles of the coast of Papua… ’

Senator Lawrie (Queensland) would later correct Whitlam’s incorrect figures (Extract from Information Paper No.12, 29 August 1969, ‘ Territory of Papua and New Guinea’, in This Week in the House of Assembly 1969).
boundary arrangements. The Minister also confirmed the state government’s strong support for the Islanders’ ‘border no change’ position (Wharton [1969], c.f. Bjelke-Petersen 1969).151

Throughout unofficial intergovernmental consultations in Canberra in September 1969, major differences between Commonwealth and Queensland perspectives, agendas and assumptions became clearly evident. Queensland’s representative, Under Secretary Colin Curtis (Premier’s Department), remained adamant the boundary would not change. Assistant Secretary Ballard (Government and Social Affairs Division, Department of External Territories) expressed his personal opinion both governments shared a common view on the matter. Nevertheless, state officials believed the Commonwealth’s position might change, if it were subject to increased pressure from the Territory of Papua or United Nations. Further Commonwealth interest was expressed as to whether or not Queensland had undertaken a public opinion poll to ascertain a consensus of opinion amongst Islanders about a possible relinquishment of their Australian citizenship (Curtis 1969a). The Commonwealth’s mistaken belief it was official Queensland Government policy to compulsorily resettle Islanders on mainland Australia, and hence the need no longer existed to retain certain islands within Australia’s boundaries, was also quickly rectified by Curtis. Islanders electing to remain on home islands could. None were being encouraged to leave (Curtis 1969a). Nevertheless, given the high costs involved in ongoing state government subsidy of the islands, Queensland officials were quietly hopeful that increasing education levels among Islanders would precipitate voluntary migrations to mainland Australia (BN649PD). The Commonwealth’s representative also proposed federal authorities might better control the boundary region and prevent possible ‘infiltration’ from

151 In Queensland Legislative Assembly on 21 August 1969, Queensland’s Minister in Charge of Aboriginal and Island Affairs stated:

“The Government considers that, as these islands are within the boundaries of the state of Queensland, they are part of Queensland and the inhabitants are Queenslanders. I am aware that some such apprehensions are felt by the residents and during a recent visit to the Torres Strait I generally enquired, and in particular of the democratically elected Councilors, their views on their future and whether they regarded themselves as Queenslanders or would wish to be embraced by the Papua New Guinean administration. Unanimously it was quite firmly indicated that they believed themselves to be Queenslanders and would strenuously oppose any suggestion that they be transferred to any other administration. The Government considers that the approximately 900 hundred people inhabiting these islands are linked to Queensland by economic forces, religion, social welfare and politics, rather than to the neighboring Papuan shore. Indeed, with almost half the original Saibai Island population now resident on Cape York peninsula and many others from the three islands living on the mainland of Australia for education, work opportunity, etc., the whole of their outlook is oriented towards Queensland and to Australia and therefore, the Government can, with confidence assure the inhabitants that it will support their opposition to any change in status (Qld. Minister, c.f. Bjelke-Petersen 1969).

152 The Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) (1973) would later allege the following. First, certain Islander representatives on the Torres Strait Island Advisory Council were Queensland government appointees put there to espouse the state’s viewpoint. Second, in the early 1970s, the Queensland government was still keeping a tight control on Islanders’ movements within the region. It was also making it extremely difficult for outsiders to travel to the region (Horner (FCAATSI) [1973], cited in Webster 1973). Conversely, the Sub-Committee on Territorial Boundaries (1976) found that the migration of family groups and individuals from the Torres Strait had been an established pattern for over twenty-five years. Of approximately 10,000 Torres Strait Islanders in 1976, over sixty percent now lived permanently on the mainland.
PNG to mainland Australia if the Queensland-Papua boundary could be readjusted south. Specific enquiries were also made about general people movements in the region. By now, uncertain as to exactly where Commonwealth sympathies might lie, the increasingly cautious state government officials felt it unwise to advance the matter of a recent Papuan migratory trend occurring between 1963-1967, under which Pauans had taken up unlawful residence on Torres Strait islands in order to successfully lodge entitlements to Australian social service benefits, including child endowment and pensions. State officials also noted the agenda for border change appeared to be increasingly Canberra, rather than Papua, driven.

Following a visit to the region by Queensland’s Director of Aboriginal and Island Affairs, P.J. Killoran, and subsequent discussions with Islander representatives in May 1970, Curtis again advised Ballard that there should be absolutely no doubt on two points. First, residents on Saibai, Dauan and Boigu strongly resist border change and want to remain under Australian jurisdiction. Second, Queensland strongly opposed any proposed changes to the Islanders’ status or Queensland’s territorial boundary. That same month, thirty-nine democratically-elected Councillors from across wider Torres Strait attended a conference at Thursday Island to consider the three disputed islands’ future. A motion, moved by Wagea Waia (Chair of Saibai) and seconded by Charlie Gibuma (Chair of Boigu), was carried that the conference pledge its support for the wish of people on Saibai, Boigu and Dauan that their islands remain under Queensland sovereignty, within the State of Queensland. The Conference was to convey this viewpoint to Canberra. These sentiments were also later publicly reiterated by Bjelke-Petersen in a press statement dated July 1970.

Australia’s Department of Foreign Affairs initially adopted an ambiguous border stance and was subject to much criticism. Prior to granting PNG its Independence, Australia continued to retain foreign policy responsibility for that country. Hence, Foreign Affairs was also initially obliged to promote PNG’s interests abroad. In its later Submission to the Sub-Committee on Territorial Boundaries of the Joint Parliamentary Committee on Foreign Affairs and Defence, the Queensland Government would accuse Foreign Affairs of engaging in diplomatic appeasement while expressing its negative opinion on the Department’s tactics and strategies.

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153 With the signing of the Treaty, an Australian Department of Immigration and Ethnic Affairs Task Force visited the Torres Strait in late 1978-1979. It subsequently assessed 182 PNG residents as illegal immigrants. The majority left Australia voluntarily. Five were deported (Lyon & Smith 1981).

154 The Department of External Affairs became the Department of Foreign Affairs in 1970.
throughout border negotiations. It also highlighted possible strategic defence implications for the region’s future. Griffin (1977) and Griffin et al. (1979) also later argued that rather than focus attention on the influence factors such as human rights, political realities, natural justice, equity, defence strategy, potential political mobilization, and diplomatic influence might have swayed on the eventual outcome of border discussions, Foreign Affairs’ attitude throughout the entire border conflict was to generally ignore the region while treating its traditional inhabitants as the most marginalized second-class minority group within Australia. Boyce (1981) also proposes Foreign Affairs has much to be held accountable in that it failed to properly communicate its progress, to thereby keep the involved parties and wider general public better informed on the border issue. He suggests it could have, at a minimum, released a green or white paper on the matter. In reality however, the Department of Foreign Affairs appeared uncomfortable and was highly inexperienced in its dealings with a ‘recalcitrant State government and a minority problem’. Correctly, Boyce (1976) observed: ‘It has never had to fight on three fronts, it has not ever had to run a public education programme, it has never had to negotiate with a State government on a sensitive international issue. This is a real first time up and so far it has performed rather poorly…’

155 In its submission to the Joint Parliamentary Committee on Foreign Affairs and Defence’s Sub-Committee on Territorial Boundaries (1976), Queensland Government expressed its viewpoint on the Department of Foreign Affairs’ behaviour throughout the border negotiations:

‘International diplomacy is essential to Australia’s relations with other countries, but not at the expense of Australian territory, rights or citizens… The moves for change are primarily elements of an Australian foreign affairs strategy based on diplomatic appeasement in the face of pressure by Papua New Guinea for a solution to ‘protect PNG’s best national interests’. Their national interests are not defined and they themselves are uncertain what the terms means in relation to the Torres Strait. The PNG coastal villages do not want change. An unnecessary exercise in international diplomacy is aiming at an arrangement which creates rather than solves a problem that has never historically existed. It is not unrealistic to look back with regret at previous arrangements of diplomatic appeasement, e.g. March 1938. The area of defence cannot be overlooked and the North East Channel must be protected. We have seen an attempted Communist take over in East Timor in which Australian nationals have been killed. Soviet naval power and global military capability continues to expand. Former colonial territories in Africa which are independent sovereign states are now bases for Soviet naval and military units. It is not just the current PNG government with which we are dealing. An agreement would be for all time. Australia should not have to look back at its decision with regret and ruefully see that which was given in goodwill used in hostility by PNG or by any other foreign power harbouring in or freely using PNG territorial waters agreed to by the present Commonwealth government’ (Queensland Government Submission [n.d.] to JCFADSC 1976).

156 Conversely, in its Submission to the JCFAD Sub-Committee (1976), the Department of Defence (DoD) highlighted its defence concerns within the region. One was safeguarding unimpeded navigation in the Torres Strait. Another was protecting the region’s role as a sea route, although this was not viewed as crucial because the Adolphus Channel was under complete Australian control and would not be affected by any proposed border change. The third concern was the Torres Strait islands being used as a possible entry point for hostile elements in the archipelago to the north. However, Defence’s overriding concern was to prevent any unresolved boundary dispute causing bilateral tensions between Australia and PNG (DoD [n.d.], cited in JCFADSC 1976). In 1966, later Governor General John Kerr (1966) also highlighted the Department of Defence’s priority in the area was facilitating Australian disengagement from PNG without causing any escalating tensions or precipitating any trouble.
A Papua New Guinea Perspective

Within PNG, during the early days the border agenda continued to be driven primarily by Ebia Olewale (South Fly Open) and Naipuri Maina (Western Regional), both of the affected South Fly electorate. However, the self-governing Territory of Papua New Guinea was not yet a sovereign state, nor did it enjoy diplomatic recognition. Approaches by Papuan politicians to Australian Prime Ministers John Gorton and William McMahon met the standard official response, namely border negotiations are an internal state matter for consideration between the Commonwealth and Queensland governments. Bjelke-Petersen also heartily endorsed Gorton’s sentiments that Queensland’s offshore waters were the state’s responsibility. McMahon also rejected threats, such as those of PNG’s Deputy Chief Minister John Guise, suggesting Queensland’s off-shore islands should be subject to legal action in the International Court of Justice. Guise accused Bjelke-Petersen of wanting to maintain ‘a colonial inspired border which eats into the national homeland of the Papuan people’ 157. He was also highly critical of Queensland’s treatment of its indigenous people (Guise [1972], cited in *Courier Mail*, 14 Dec. 1972). Throughout 1972, Olewale continued his attack on the Queensland Government’s border stance. Supported by then Minister for Lands, Albert Maori Kiki, Olewale now urged for a revision of the border south to the tenth parallel. He claimed Torres Strait Islanders were traditionally Papuans who had been enticed by welfare payments to remain in Australia, and thus were unprepared to voluntarily reunite with their ‘brothers’ in PNG. Olewale also alleged Queensland would be less tolerant if the situation were reversed. According to Olewale’s calculations, the proposed changes would only impact on a limited number of Islanders (approx. 500) 158. Moreover, both Commonwealth and state governments were more than adequately equipped to compensate for their ongoing requirements. On Independence Day (16 September 1975), Olewale was still echoing Griffith’s (1893) original moral argument, asserting the Torres Strait ‘was both historically and ethnically part of New Guinea’ (Griffith 1893; Fisk & Tait 1974; Holder 1974; Singe 1979; Griffin et al. 1979).

A Commonwealth Perspective under E.G. Whitlam and the Whitlam Labor Government

The Whitlam years were ones of strained federal-state relations built on an immediate history of mounting tensions and political posturing that set the tone for a subsequent border dispute

157 While no existing Papuan claims on Saibai or Boigu Islands are mentioned, Queensland government records show the Umameri Clan of Madaduan village made strong claims to the whole of Dauan as their customary land. Several Western Kiwai groups also laid strong claims to customary ownership of reefs and fishing grounds near these three islands and more generally within Queensland territorial waters. By contrast, Papuan coastal villages further west were traditionally hunters and gatherers and did not push sea claims. Beyond seasonal barramundi, many immediate offshore reefs have no significant commercial value due to the outflow of rivers along PNG’s southern coastline, including the Fly River’s mouth area (BN649PD).

158 Total Islander and Papuan populations in Torres Strait as at February 1968 are provided in ANNEX D.
and also left many Islanders extremely cautious in their dealings with Canberra. During his years as federal Labor Opposition Leader, Whitlam made several announcements about the region’s future without first consulting with its traditional inhabitants. These were interpreted locally as a ‘sell-out’ of Islander interests and generated a great deal of widespread resentment and hostility. This subsequently led to the formation of the ‘Border No Change’ movement and Torres Strait Border Action Committee (TSBAC). The latter was chaired by George Mye and strongly committed to preserving existing Islander rights. Within Torres Strait, tensions were further exacerbated by unfavourable comparisons between Whitlam and Queensland Premier, Johannes (Joh) Bjelke-Petersen, who claimed to represent Islander interests and undertook extensive consultations with local island communities. Bjelke-Petersen’s behaviour stood in direct contrast to Whitlam’s ongoing failure to accept repeated state government and Islander invitations to personally tour the region before making crucial decisions on its future. Despite displaying sympathy for the Islanders’ predicament, then Commonwealth Aboriginal Affairs Minister Bryant did not help strained Commonwealth-Islander relations with his public belittlement of prominent island leader Tanu Nona OBE during a visit to the Strait (Bjelke-Petersen 1972; Bryant 1972a; Brown 1973a; Wharton 1976; Griffin et al. 1979; Singe 1979; White 1981).

During the late 1960s-early 1970s, Whitlam was also openly calling for PNG’s Independence and causing great agitation between all parties involved. He urged early border discussions to stave off a possible border dispute. Whitlam also publicly alleged the incumbent federal government knew about the inequitable state of boundary affairs, yet was choosing to do nothing (Whitlam 1971). In an argument later espoused by Olewale, Maori Kiki and Somare, during a visit to Daru Island in December 1969 Whitlam publicly recommended Queensland’s border be readjusted south to a median line between the two countries. He also advocated similar measures in September 1972 when assisting his party’s electoral campaign in the federal seat of Herbert (Wharton 1976). On 8 January 1971, Whitlam also attempted his own

159 Bryant was also a senior (fourteen year) member of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI).

160 According to Professor D.P. O’Connell (1971) (Legal Adviser to the Queensland Government, Chair of International Law at Oxford, Professor of Public International Law and Chair of the Adelaide Law School, University of Adelaide), during the Australia-Indonesia border negotiations in 1971, the Professor of International Law at Bandung University (also chair of the Indonesian Continental Shelf Boundary Commission and Legal Adviser to the Indonesian delegation negotiating the continental shelf boundary with Australia), informed him Indonesia was using the argument of estoppel in its border negotiations with Australia. The effect was to argue for a median line through the Arafura Sea and Torres Strait areas, thus ignoring the Timor Trough. At the time, the Indonesian government expected the Commonwealth would agree to a median line. Indonesia was also contemplating raising the question of the Queensland-Papua New Guinea boundary in the United Nations, with a view to getting the median line principle established in that area (O’Connell 1971).

Estoppel: a rule of evidence whereby a person is precluded from denying the truth of a statement of facts that person has previously asserted.
neo-colonial redraw of existing colonial boundaries in the region by announcing to students in Madang that PNG and the British Solomon Islands should unite as one country. Whitlam’s ongoing failure to acknowledge that significant alterations in existing Australia-PNG border arrangements also involved substantial changes in Queensland’s boundary, and thus would necessitate extensive consultations with Queensland, would result in a strong reaction from Bjelke-Petersen. From Dalby, Bjelke-Petersen responded the state government would ‘fight to the last ditch’ any attempt to give away Queensland islands in its far north. Apart from Queensland’s support for the Islanders’ position, Bjelke-Petersen strongly opposed Whitlam’s demands on national security grounds. At the time, immigration and quarantine regulations in Torres Strait were being poorly administered and Papuans working the Torres Strait fisheries could easily access mainland Australia (Bjelke-Petersen 1971; Griffin et al 1979: 261).

By 2 December 1972, now Prime Minister Whitlam’s primary concerns were for international opinion, Australia’s potential role as a middle power on the world stage, and the judgements of organisations such as the United Nations Trusteeship Council. On taking office, Whitlam immediately gave notice of Australia’s intention to accelerate political development in PNG to ensure its full independence within three years. He was already engaged in detailed border discussions with senior Foreign Affairs officials, including Permanent Head, Sir Keith Waller. Whitlam claimed he was not hostile to Queensland’s border position, but nevertheless argued Queensland’s northern boundary would need to be made more acceptable in contemporary and regional terms. Despite claiming to desire harmonious inter-state negotiations and an amicable tripartite settlement, Whitlam quickly clarified his government’s position on the border and northern islands: ‘Our policy is clear. We believe that the islands are part of New Guinea… We believe the present situation is anomalous, when one of the islands is only fifty yards off the New Guinea shore, yet is part of Australia’. According to Whitlam, the existing Queensland-Papua boundary was nothing but ‘a relic of a ninety-three year old decision’. Moreover, far more was at stake than the mere status of Torres Strait islands. There was the question of oil and mineral resources (Trundle 1972; Whitlam [1972], cited in Courier Mail 30 Dec. 1972).

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161 Whitlam (1972) argued: ‘It is going to receive increasing international attention. The boundary which has been fixed by agreement between Australia and Indonesia obviously forms a precedent to a boundary between Australia and Papua New Guinea. Queensland is part of Australia. Australia alone has international standing’.

162 Whitlam (1972) argued: ‘There is the vital international question of a country shortly to achieve independence and the oil and mineral wealth which may be found in this area to which Papua New Guinea would undoubtedly have legal rights’.
On 17 January 1973, during a joint statement issued with Chief Minister Somare\textsuperscript{163}, Whitlam announced existing border arrangements were also unacceptable to PNG. The Commonwealth was now willing, in principle, to negotiate a reallocation of Queensland’s border south. While noting the importance of certain constitutional considerations (S.111; S.123), both leaders now claimed to have developed a greater awareness of the need to protect existing Islander rights. Hence, both were increasingly reluctant to agree to any settlement not generally acceptable to all affected parties. While Somare believed certain Torres Strait Islanders were ethnically linked to people in Western Province district, he had no desire to get involved in an inter-state fight between Commonwealth and Queensland governments. Instead, he formally reiterated PNG wanted the boundary moved south to the tenth parallel. The proposed border would run just north of Mulgrave Island through central Torres Strait and involved transference of the three disputed islands and several smaller islands, including Turnagain (Buru), Gabba, Belle Vue, and Dungeness (Jeaka). Neither leader commented on the future of Stephens, Darnley, Yorke, Mabuiag or the Murray Islands, all of which lay above the tenth parallel. Whitlam’s spokesperson did however give an assurance Islanders affected by a boundary shift, believed to count around 500\textsuperscript{164} across three islands, would not suffer any loss of social security benefits. Neither would ‘narrow consideration’ be allowed to obstruct a border settlement as Whitlam had a ‘Queensland Act in mind’, intended to provide the simplest solution to the border problem. Commonwealth officials also threatened if settlement could not be reached on the border problem as a direct result of Queensland’s failure to agree to constitutional consideration actioned by Queensland Legislature, then the matter would go before the International Court of Justice where the Commonwealth would adopt a low key approach of no opposition to PNG’s claims. Somare also clarified that for remaining border negotiations, PNG intended dealing directly with the Commonwealth Government, not the State of Queensland (Brown 1973a; \textit{Courier Mail}, 17 Jan. 1973). A subsequent urgency motion was carried in the Australian Senate (28 Feb. 1973) that no Torres Strait islands be transferred from Australia without a prior referendum of all Islanders (Wharton 1976).

However, behind closed doors within Australia other mostly unspoken yet common concerns were also influencing Australian decision-makers, at both levels of government and across all political persuasions. The final days of Australia’s mandate in PNG were conducted against an often violent background of succession movements around the world, all of which posed serious threats to the territorial integrity of affected newly-independent states. Katanga and

\textsuperscript{163} Issued at Parliament House, Canberra.

\textsuperscript{164} Actual Torres Strait Islander population numbers in Torres Strait as enumerated in the 1971 Census are illustrated in ANNEX E.
the Congo, the declaration of the Republic of Biafra by Ibo-speaking peoples of south eastern Nigeria and the subsequent five year civil war, along with nearby Bouganvillean attempts to attain a separate independence, all provide examples. During the early 1970s, the prospect of approximately three million potential Melanesian ‘Australian citizens’ living in a politically unstable ‘Seventh State’\textsuperscript{165} directly to Australia’s north, all with the right to free movement within the Commonwealth of Australia, was inconceivable both to Australian and Queensland governments and the wider general public. Denoon (1999) argues that with Federation, the creation of an independent, territorially-sovereign and predominately white nation-state called Australia, along with the nation building processes entailed in sustaining that common vision, strongly impacted in particular in and around Torres Strait and the wider Coral Seas area. He interprets Australia’s granting of Independence to PNG as the final stage in an ongoing Commonwealth process of ‘ethnic tidying’ in the region. It began with the Commonwealth assuming administrative control over BNG as the Territory of Papua and continued with its granting Torres Strait Islanders a legal status superior to Aborigines yet inferior to other Australians, its repatriation of a majority of indentured Pacific Islander labourers from Torres Strait, and its general banning of further Japanese and Chinese migration under the White Australian Policy (Denoon 1999). Delimiting a precise, defensible maritime border between Australia and a newly Independent State of Papua New Guinea was a key strategic element within that final Commonwealth ‘ethnic tidying’ process.

\textbf{A State of Queensland Perspective}

Queensland Premier, Joh Bjelke-Petersen, was a renowned advocate of states’ rights. As the boundary dispute rapidly escalated, he became increasingly unwilling to compromise on any variation to the existing border (Bjelke-Petersen 1972). Bjelke-Petersen would sustain much criticism for his alleged paternalism and out-of-date native policies (FCAATSI [1973], cited in Webster 1973; Griffin et al. 1979). He would also come under direct bipartisan fire from Commonwealth politicians, for example the Australian Liberal Party’s Killen and Gorton and Labor Opposition’s Cross and Whellan, for his defence of Queensland’s northern frontier and ongoing failure to surrender Queensland territory to the Commonwealth. Against allegations he was exploiting sentimental rhetoric and the Islanders’ plight as a political lever in his fight against the Australian Labor Party (ALP), Bjelke-Petersen would draw great comfort from his firm conviction that only his political opposition had saved Islanders from being ‘sold up the Fly River’ by Bryant and Whitlam. Against a background of highly-speculative media reports about potential losses to PNG from one of Australia’s allegedly richest gas and oil fields, he would continue to deny any actual or possible personal interest in potential oil, gas or mineral

\textsuperscript{165} The so-called ‘seventh state’ policy (Kerr 1966).
discoveries in the region (Trundle 1972; Bjelke-Petersen 1972). Bjelke-Petersen also claimed to have no personal quarrel with PNG’s leaders. Nor was he opposed to bi-lateral border negotiations. Indeed, he believed that should the United Nations be drawn into the border dispute, it would side with Islanders against the Commonwealth. On the Australian and PNG governments’ positions, Bjelke-Petersen observed: ‘It is not I they have to convince but the Torres Strait Islanders. The right of the islanders to be consulted remains the central issue in moves to alter Queensland’s boundary with Papua New Guinea. The United Nations charter lays down the right of all people to decide their own future – and not to have that future decided by others for political reasons. I’m sure that the Papua New Guinea Deputy Chief Minister (Dr. John Guise) fully agrees with this principle’ (Courier Mail, 30 Dec. 1972).

Queensland’s Premier was proud to call Torres Strait Islanders his fellow Queenslanders. Bjelke-Petersen believed the Islanders had earned the right to be treated fairly and honestly as Australian citizens. He did not believe their fundamental rights and future as Australian citizens should be decided a thousand miles away by people such as Whitlam and Somare.

He would express amazement at a Labor Prime Minister’s failure to defend the rights of his fellow citizens and his willingness to cede Australian territory to another country, as was being implied in Whitlam’s statement of non-opposition to any claim by an independent PNG in the World Court. Bjelke-Petersen also claimed to have great difficulty in comprehending the logic behind the Australian Labor Party’s motives and Whitlam’s position, the end result of which would be the handing over of Australian citizens who enjoyed far higher standards of living than their Papuan neighbours to the control of a foreign power. For example, Queensland residents on the disputed islands risked loosing the full range of Australian social security benefits, including unemployment benefits, child endowment and old-age, widow and repatriation pensions, along with $500 annual school grants for secondary children. There was also the possible risk of irreparable damage to island culture. Bjelke-Petersen further accused Whitlam of double standards during his dealing with Australia’s indigenous people, by promising to establish land rights for Aborigines while simultaneously trying to deprive Torres Strait Islanders of their ancestral lands. Moreover, as Queensland officials had predicted, PNG’s initial demands had proved to be conservative in comparison with what was to follow. PNG now wanted the border relocated to the tenth parallel. Its

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166 United Nations International Covenant on Civil and Political Rights, Part 1 Article1(1): ‘All people have the right of self-determination. By that right they freely determine their political status and freely pursue their economic, social and cultural development’.

167 On the border dispute, Bjelke-Petersen (1972): ‘This is a matter Mr Whitlam initiated and it is up to him to find the solution. I don’t think it can be settled other than by Mr. Whitlam going to Thursday Island and seeing the demands he is making on the lives of the people. It is a clear cut issue with the effect on the lives of the people being the deciding factors’.
original claims had escalated from three to seventeen islands, including Yam, Yorke, Stephens, Darnely, Mabuiag and the Murray Islands. The numbers of affected Islanders potentially involved in a Commonwealth transfer to Papua New Guinea, along with an associated psychological, social and economic alienation from their kin on Thursday Island and mainland Australia, now numbered ‘in the thousands’, or around two thirds of the Torres Strait region’s total resident population (Courier Mail, 15 Dec. 1972; Bjelke-Petersen 1972; Webster 1973; Bjelke-Petersen [1973], cited in Webster 1973); Brown 1973a; Fisk & Tait 1974; Lunn 1978; Townsend 1983).

From a legal perspective, Queensland acknowledged the Commonwealth enjoyed superior constitutional authority in the field. Nevertheless, the state did have a strong supporting legal, historical and moral case for maintaining the existing boundary, and conflicting legal opinions abounded. In Queensland’s Legislative Assembly, it was argued Section 123 of the Australian Constitution prevented any Commonwealth ‘sell out’ of Australian citizens on the islands (Bjelke-Petersen 1972). Citing the Australia-Indonesia sea-bed boundary, Commonwealth legal experts countered S.123 applied exclusively to internal state boundaries, not the external Australian boundary. That matter was recently settled in border negotiation with Indonesia without recourse to referendum in Western Australia. In 1972, Queensland’s Solicitor General provided Spann with a number of possible legal formulae available at the time for transferring the islands under the Federal Constitution. The first was voluntary transfer under S.111 and S.123. For example, under S.111 South Australia had voluntarily surrendered the Northern Territory to the Commonwealth in 1910 without need for referendum168. The second aspect of transfer was alteration of a boundary pursuant to the Colonial Boundaries Act of 1895. However, uncertainty existed over whether or not the Commonwealth had the power to act without reference to a ‘State’ under the Act. Compliance with S.123’s more onerous requirements also once again presented problems. The third legal aspect related to the largely undefined External Affairs Power (S. 51 (xxix)) of the Australian Constitution. In this case, Queensland’s Solicitor General proposed the Commonwealth government could not ratify any international convention altering the boundaries of a state without once again complying with S.123. The Solicitor-General also noted that on any of the above formulae, Queensland’s and Papua’s claims would overlap to a considerable degree. He also noted the 1958 Convention sets down that, if agreement between two countries cannot be reached, the boundary line is to be a median line, unless another line is justified by special circumstances169 (Solicitor General (Qld) 1972; Convention on the Continental Shelf 1985, Article 6 (2)).

168 Northern Territory Surrender Act 1907; Northern Territory Acceptance Act 1910.
169 Convention on the Continental Shelf, 1985, Article 6 (2);
A Traditional Inhabitant Perspective

Both Commonwealth and PNG viewpoints were not shared by the local traditional inhabitants or small handful of fellow Australian citizens familiar with the region and strongly supportive of the Islanders’ position (Fisk et al. 1974). Despite their long-standing links with Papua, the vast majority of Islanders strongly objected to partitioning of the Strait and their incorporation into a PNG political unit. Rather than be handed a fait accompli, they would unite behind the ‘Border Not Change’ political movement to strongly oppose any attempts at border alteration. In line with the state government’s argument, they were concerned such a move would in all likelihood result in declining living standards, a loss of Australian citizenship and Queensland residency, and indefinite separation from their kin, many of who were firmly established on mainland Australia. Despite often close pre-contact era relationships, Islanders now perceived of themselves not as Papuans, but as proud saltwater Islander people with their own unique identities, cultures and languages, and most importantly a century-long ancestry primarily infused of East Melanesian, Polynesian and Asian bloodlines. They not only generally bore distinct ethnic and cultural differences to Papuans living in the immediate adjacent coastal areas but also strongly self-identified as Queenslanders and Australians. Papuan villagers enjoying traditional and continuing contact with nearby Torres Strait Islander communities also generally approved of existing border arrangements that allowed them to access island services and facilities, all of which were not available in Western Province, despite decades of Australian administration (Lawrie 1969; Hasting 1973; Bjelke-Petersen 1974; Fisk [1973], cited in Qld Submission 1976; Fisk & Tait 1974; Qld. Sub. [1976], cited in JCFADSC 1976; Singe 1979; Burmester 1982; Lui 1994).

Torres Strait Islanders also had no issues with local Papuans fishing in their customary waters under principles involving a reciprocal use of marine territories, conditional on laws covering the area being respected on both sides of border (Moseby 1972). Indeed, throughout the entire border conflict, relations between coastal Papuans and Islanders remained cordial (BN649PD; Singe 1976). Many Kiwai Councillors also reportedly had no strong feelings about the border controversy (Smales 1972). Four years later in State Cabinet on 2 July 1976, Queensland’s Minister for Aboriginal and Islanders Advancement and Fisheries, Claude Wharton, would also argue that while early pre-federation proposals for border change had merit, there was now a long history of generations of Torres Strait Islanders who had developed socially and

‘When the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breath of the territorial sea is measured’.
economically under state and Commonwealth sponsorship. Wharton (1976) also took the opportunity to place responsibility for the border dispute firmly at Whitlam’s feet.  

During the inaugural Aboriginal and Islander Advisory Council conference (Canberra 1972), Island Industries Board (IIB) executive and Torres Strait Border Action Committee (TSBAC) Chair, George Mye, argued on behalf of Islanders: ‘We are Australians, we will never be Papuans… We have not even been approached by the Federal Government, and yet they are giving us away… They forget we, too, fought during World War II for Australia and for what it stands’. Mye was highly critical of the proposed merger of Torres Strait islands with PNG. He argued that despite Torres Strait Islanders earning millions of dollars in export income for Australia through pearling and fishing for over sixty years, the Federal government rarely showed any consideration for Islanders as fellow Australians: ‘Now, thanks to the oil spill from Oceanic Grandeur, the pearling industry is almost finished. It appears we are no further use and are to be discarded’ (Mye [1972], c.f. Courier Mail 14 Dec. 1972). The highly dissatisfied Islanders remained extremely suspicious of the Commonwealth government’s motives. Uncertain about their collective future, they repeatedly sought clarification and early assurance on their status. For example, TSBAC sent Opposition Leader Whitlam a telegram immediately before the federal election (2 December 1972) requesting he outline his Torres Strait Island policy, but received no reply. Now Prime Minister Whitlam was making announcement on the region’s future without first consulting those directly involved (Mye [1972] & Moseby [1972], both cited in Courier Mail 15 Dec. 1972; Lui 1976: 35). In contrast, many Islander leaders continued to display strong support for the Queensland Government’s stance, publicly defending Bjelke-Petersen’s actions and later comparing them to other

170 Wharton (1976) argued: ‘The Islanders are a unified industrious and intelligent people. Their standards of living and social levels today have little in common with the inhabitants of southern PNG… They have contributed significantly as Australians to Australia’s industrial growth and defence. The marine produce harvested by Torres Strait Island divers often with loss of life, has assisted Australia’s overseas earnings and balance of payments position. Their men have fought with honour and often high distinction in World War II, Korea and Vietnam. The Border Dispute of recent time can be traced to a notice of motion given in the Papua New Guinea House of Assembly by Mr. Olewali, in June 1969. The House decided against taking any action, and having achieved political notoriety, Mr. Olewali’s moves would have probably faded had not Mr. Whitlam taken up the torch in August that year….’.

171 In 1972, George Mye argued: ‘If blood flows on the Torres Strait islands it will not be on the conscious of my people. I am a Murray Islander, a Queenslander and an Australian. I am confident that every one of the 10,000 to 12,000 islanders who could be subject to this switch want to remain Queenslanders and Australians. Mr Whitlam obviously does not know the feelings of the people he proposes to deal with. He would be welcome to visit the area and, after talking to my fellow islanders, he would be able to see the situation better. The Islanders would never submit to rule from Papua New Guinea. If the worst happened we would secede and form our own nation rather than cease to be Australians.’

172 In 1972, TSBAC Secretary, Donald Moseby argued: ‘The island people will not be convinced that the Federal government merely wants to stop at giving Boigu, Dauan and Saibai to Papua New Guinea. New Guinea politicians have been urging for a year that all islands north of the 10th parallel, which are the homelands for two-thirds of the 10,000 islanders, should go to the Territory’. 
national political leaders besides Whitlam\textsuperscript{173} (TSBAC 1972). Nevertheless, there were individual politicians, such as Bill Wood and Wallace Cook (Labor Members for Cook), Fulton (ALP-MHR for Leichhardt)\textsuperscript{174}, and Senator Condon Byrne (DLP), who held personal opinions at variance with those of Whitlam and publicly supported the Islanders’ position on retaining the existing line (\textit{Courier Mail} 30 Dec. 1972, 17 Jan. 1973).

In their ongoing complaints against Canberra, Islanders were fully supported by the Anglican Church, which believed its decades of work to preserve the unity and identity of Torres Strait Islanders as ‘a separate race’ would be destroyed in a border alteration. Dean of Rockhampton and official historian of the Diocese of Carpentaria, the Very Reverend John Bayton, strongly opposed the indiscriminate division of the islands. He was also against the deliverance of an entire separate ‘race of people’, who had been historically, culturally, and religiously closely attached to mainland Australia since 1871, to the oversight of a newly-established developing nation-state with which they lacked any real affinity: ‘they are in fact Australians, not a separate race of coloured people’ (Bayton 1972). In a letter to the Prime Minister, Anglican Bishop of Carpentaria, Bishop Eric Hawkey, argued the ‘ceding of territory to Papua New Guinea in this regard Mr Prime Minister would, I believe, be a flagrant breach of trust of your people whom you have no right to treat as so many exchangeable chattels’ (Hawkey [1972] c.f. Bayton 1972). Hawkey further asserted: ‘They cannot just be treated like animals. They have a right to their home islands, to their own territory. And I am 100 percent behind them….’ (Hawkey c.f. \textit{Courier Mail}, 28 Dec. 1972). Hawkey would receive strong support from the Anglican Archbishop of Brisbane, Archbishop Arnott, who argued the dispute was not just a matter between Australia and PNG as it also involved Islanders’ interests (Arnott 1972). Support also came from Melbourne-based Anglican Primate of Australia, Archbishop Woods and fellow Anglican leaders. This included the later Bishop of Carpentaria, the Rt. Revd. H.T. Jamesion (1976), whose primary concerns centred upon Islanders being treated as full and complete Australian citizens under a just border settlement that was neither open to misinterpretation nor suspicion\textsuperscript{175}. Due to its strong stance, the Anglican Church, and by

\begin{itemize}
\item \textsuperscript{173} In 1972, TSBAC members argued: ‘We have seen our Premier criticised for supporting us. He is Premier of Queensland and we are Queenslanders. We do not expect him to stand up for Papua New Guinea against us; yet our Australian Prime Minister is standing up for Papua New Guinea against us. We have asked Mr. Fraser and Mr. Peacock and Mr. Somare to come to see us and to talk to us and hear our wishes, yet only our Premier has come’ (TSBAC, 19 Dec. 1972).
\item \textsuperscript{174} For example, Fulton argued ‘The people should have been consulted before he [Whitlam] made any statement concerning their nationhood or their arbitrary handing over to another nation. I have always though that it was Labor Party policy that people should determine their own destiny’ (Fulton, c.f. \textit{Courier Mail}, 15 December 1972).
\item \textsuperscript{175} Bishop Jamieson (1976) argued several points for a just settlement for Islanders. The first related to the ‘dignity of the human being’; Torres Strait Islanders and Aborigines in the Torres Strait and on Cape York do not like being pushed around and manipulated by a minority of Europeans on their traditional territories in which they represent the numerically dominant force. The second point was ‘ethnic solidarity’. Although relationships may be
extension the symbolic Quetta Memorial Church at Thursday Island 176, which according to journalist Webster (1973) provides ‘a symbol of unity, stronger than government or tradition’, were consequently subjected to media accusations of holding a ‘monopoly on souls’ and encouraging an obstructionist conservatism amongst Islander leaders. These forces, in turn, were allegedly thwarting federal government plans for the region (Webster 1973).

The Queensland Coast and Torres Strait Pilot Service first highlighted the absence of media references or border discussions on the matter of the Great North East Channel (GNEC). The Channel provides the only northern passage linking Indian and Pacific Oceans navigable to ocean going vessels, a growing percentage of which at the time carried Australian mineral exports177. The waterway’s entire length, which the pilots viewed as essential to Australia’s commercial and regional strategic interests, came under Australian control. Readjusting the border to ten degrees South Latitude would excise around seventy miles of the GNEC, from Dove Inlet to Bramble Cay, from Australian jurisdiction. The pilots cautioned it would be ‘a grave error of judgement’ to allow the GNEC to fall under the control of a newly-developing country experiencing a lack of resources and uncertain future. Such actions would result in an inevitable neglect and deterioration of the existing excellent standards of navigational aids, lighthouse facilities and survey work, as experienced mariners were now discovering in nearby shipping channels maintained by the newly-independent nation-states of Indonesia and the Philippines (Smith 1973; Carn 1973; JCFADSC 1976).

Official Australia – Papua New Guinea Bi-lateral Border Negotiations

Official bi-lateral border negotiations commenced in 1973. Initially, little progress was made. The legal challenges involved were extremely complex: inhabited versus uninhabited islands; cays; reefs; territorial seas; right of transit; contiguous zones; swimming versus sedentary

friendly relations between Islanders and coastal Papuans, Islanders represent a distinct ethic group, separate from both Papuans and Aborigines. Hence, a seabed boundary was viewed as an appeasement to the PNG government and a prelude to the eventual handing-over of Saibai, Dauan and Boigu to PNG. The third point was ‘sociological implications’. Historically, Torres Strait Islanders have been dominated by European government, administration and technology (and Japanese technology). For a traditional fishing people, the concept of a sea-bed boundary now implied a further giving away of their identity, this time through giving away their customary sea space. The fourth point was ‘political repercussions’. While the Islanders were small in political numbers and might, as evidenced in the years of government neglect of the region, history demonstrates the carving up of ethnically-related people due to political expediency often results in a general resentment against Europeans (Jamieson 1976).

176 All Souls’ & Saint Bartholomews’ Quetta Memorial Church, Thursday Island, was named after the British India Royal Mail Steamer, RMS Quetta, which hit an outcrop and sank near Adolphus Island (Albany Pass) on the night of 28 February 1890. The Anglican Cathedral Church was erected as a memorial to the souls that perished in the tragedy.

177 For example, in the year ended June 1974, 1168 vessels were piloted through the Torres Strait. Trade through the Great North East Channel consisted of about seventy percent tanker traffic carrying fuel from the Persian Gulf, Singapore and Borneo to Port Moresby, Noumea, Fiji, Samoa, Suva and other Pacific ports. Manganese ore from Groote Eylandt along with bauxite from Weipa was also shipped to the United States via the main channel (Wharton 1976).
fisheries; seabed; mining and fishing rights; continental shelf issues; exclusive economic zones; and environmental issues, to name but a few. Nor were there specific international precedents that could be applied to the unique challenges raised by the border dispute, such as the firmly entrenched presence of Australian citizens on the northern Torres Strait islands (Whitlam 1973; Griffin et al. 1979; Singe 1979). On 15 December 1972, Whitlam wrote to the Queensland Premier proposing tripartite discussions between Commonwealth, PNG and Queensland officials. On 11 January 1973, Bjelke-Petersen replied he saw no good purpose in such talks (Whitlam 1973, 1975). Shortly thereafter, Whitlam invited individual Torres Strait Island Council representatives and TSBAC members to Canberra for Commonwealth funded discussions on 13 June 1973. He argued the opportunity would allow Islanders to personally express their opinions, both to Coombs and his colleagues on the Council for Aboriginal Affairs. Whitlam also invited Queensland’s Director of Aboriginal Affairs, P. J. Killoran, who declined to attend (Whitlam 1975; Killoran 1975).

Yam Island Conference   (19-20 September 1973)

Productive cross-border discussions were conducted between traditional Islanders and coastal Papuans at the Commonwealth-organised Yam Island Conference178. Both groups reiterated their strong opposition to ‘border change’. Papuan concerns centred upon protecting access rights to traditional Papuan fishing grounds. Islanders expressed a willingness to reciprocally share resources with their traditional neighbours. Both parties also articulated concerns over possible damage to the Strait’s fishing grounds and islands from oil drilling and mining, requesting protection against such events be provided179. Islander representatives also noted Queensland’s Premier had supported and respected their wishes from the outset. He had also agreed to put a Resolution through Queensland Parliament stating no alteration would occur within existing border arrangements. Under the Queensland Government’s plan, the Torres Strait region would be declared a ‘Marine National Park’. Coastal Papuans and Islanders would jointly share the waterway between Torres Strait and the Papuan coast, which would be reserved exclusively for their usage. Further drilling for oil and fishing by outside interests in

178 Yam Island Conference (19-20 September 1973): Islanders were represented by a Torres Strait Island Advisory Council and several Island Chairpersons. The seventeen strong Papuan delegation included John Natara and Anthony Seaguru, both representing the PNG administration, and Tatic Olewale, brother of the member for Fly (Ebia Olewale), along with the Minister of Commerce in PNG’s House of Assembly. Queensland’s DAIA Director Killoran, his senior regional departmental officer Mr. Yarrow, and Dr. H.C. Coombs, representing state and federal governments respectively, attended as observers (BN649PD).

179 Islanders wanted a complete embargo on mining and oil drilling or exploration for ten years. When, or if, the embargo ended, royalties for any approved mining or oil drilling project were to be dealt with as for mining on Aboriginal Reserves in the Northern Territory: i.e. (1) Royalties were to be double the standard rate; (2) Royalties were to be paid to Trustees, appointed by the local community most affected, and by representatives of the Torres Strait Islanders and coastal residents of PNG. All royalties were to be used for the benefit of the people (BN649 PD).
these designated traditional waters would be totally banned (Bjelke-Petersen 1974). And, in accordance with the traditional inhabitants’ specific requests, a Resolution was proposed in Queensland’s Legislative Assembly on 2 April 1974 that all inhabited Torres Strait islands remain within Queensland territory and their inhabitants remain Australian citizens (ANNEX F). The Resolution of 3 April 1974, adopted by Queensland Parliament, reaffirmed historic fishing privileges and natural resource interests held by the region’s traditional inhabitants. It further included a clause recommending Torres Strait be designated an International Marine Park (Bjelke-Petersen 1974). No activities would be permitted on the seabed. A permanent ban would be placed on all oil exploration within the area. The Resolution was not however granted official recognition, either by the Commonwealth of Australia or the Administration of Papua New Guinea (JCFADSC 1976).

During the previous year, Australian and PNG ministers and officials conducted discussions at a bilateral level. Queensland did not participate. State officials were however kept informed of proceedings (BN649PD). On the morning prior to moving the International Marine Park motion in Queensland’s Legislative Assembly, the State of Queensland gave Chief Minister Somare notice of its intention, which was subsequently reported in PNG’s press as an ‘olive branch, with a few strands missing’ (Post Courier, 4 April 1974, cited in BN649PD). Somare requested and received a copy of the report of proceedings. He welcomed Queensland’s new willingness to negotiate but noted the issue of border delimitation was an international, rather than inter-state, problem. Nor, Somare argued, was the boundary matter as uncomplicated as Queensland implied. It also involved mineral deposits, yet no provisions had been made for the region’s traditional inhabitants to share in any possible mineral riches beneath the seabed.

Whitlam’s response to Queensland’s initiative was to publicly warn the state government not to attempt to enter into bilateral negotiations with Government of Papua New Guinea (Whitlam 1974). Nevertheless, despite the history of bitter exchange between Brisbane and Canberra, Whitlam subsequently announced in light of Queensland’s changed attitude on the border issue, the Commonwealth was now once again inviting Queensland to take part in official tripartite discussions involving Australia and PNG, with the aim of attaining an agreed settlement prior to PNG’s forthcoming Independence celebrations (BN649PD).

Thursday Island Meeting (20-21 May 1974)
Following a request by Torres Strait Islander Chairpersons, the Commonwealth arranged another traditional inhabitants’ meeting to be held at Daru Island in May 1974 (Moy [n.d.], 180 A copy of the Resolution in provided in ANNEX F.

181 George Mye, Getano Lui and Tanu Nona.
In line with Whitlam’s wish that Islanders be informed on the current state of official bi-lateral discussions prior to the Daru gathering, and in particular on the proposed ‘Protected Zone’ concept, Advisory Council Chair Tanu Nona agreed to meet with Coombs for preliminary discussions at Thursday Island. Nona specifically requested talks be conducted exclusively within the framework provided by the Resolution carried unanimously in Queensland Parliament. In order for Islanders to gain a full understanding of their current situation, Nona also requested full disclosure of all previous border discussions conducted without Islander representatives in attendance. Furthermore, their delegation was unwilling to attend the Daru conference unless assurance could be given that no politicians would attend. In particular, they did not want PNG politicians and bureaucrats present. The gathering was to essentially be a continuance of productive discussions between local traditional inhabitants held a year earlier at Yam. Outsiders would participate as observers only. Coombs confirmed these wishes by telegram dated 7 May 1974, notifying George Mye, Tanu Nona and Getano Lui that Chief Minister Somare had agreed to their requests. No PNG Ministers would attend at Daru. However, two PNG officials would be sent as observers, one from Foreign Relations, the other from Fisheries. Australian observers would be provided by Coombs, Killoran and the relevant Foreign Affairs officer responsible for border negotiations. The meeting would be closed to the press (Nona 1974; Coombs 1974).

On arriving at Thursday Island for preliminary discussions on 21 May, rather than addressing the Resolution’s framework, Coombs notified Islander representatives the Queensland-Papua border was being changed from its present location (BN649PD). All inhabited islands would remain Australian territory. Conversely, all uninhabited islands and waterways would be ceded to PNG. The general area would then be declared a ‘Protected Zone’ providing for free movement over the proposed borderline on an inter-island basis. This arrangement would be temporary in nature. Islander representatives told Coombs they did not differentiate between inhabited and uninhabited islands, or the waterways from which they gathered their food and seafood. Moreover, the Commonwealth’s proposal was generally unacceptable. Conversely, Queensland’s Resolution of 3 April provided a realistic alternative. Anticipating PNG would not accept their ‘border no change’ demands, George Mye (a fellow National Aboriginal Council member) proposed there might nevertheless be a measure of room for negotiation on the Islanders’ firm border stance (Nona & Coombs 1974, cited in BN649PD).

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182 To be funded by the Commonwealth Department of Aboriginal Affairs (DAA).

183 According to Coombs, the border was to be moved to ‘a line drawn from Bramble Cay in a south westerly direction along the northern side of the Great North East Channel and to East of Warrior Reef in a south westerly direction to the passage south of the main Warrior Reef (Basilisk Pass) thence in a westerly direction to Deliverance Island’ (Coombs 1974, cited in BN649PD).
Daru Island Meeting (29-30 May 1974)

On 28 May 1974, shortly after the Islander contingent arrived at Daru, informal afternoon discussions were conducted among local traditional inhabitant councillors and representatives. All participants generally agreed on ‘no border change’. Next morning, the Commonwealth-PNG delegations arrived with the official meeting proceeding at 1.00 pm. From the outset, Co-Chairman and main spokesperson, Sam Kolonie of Daru, adopted an entirely different approach to that taken during informal talks earlier that morning and on the previous day. Kolonie immediately announced discussions would not proceed until agreement was first reached that the border be moved to the tenth parallel. This attitude prevailed throughout the afternoon. That evening, informal talks involving fifteen to twenty delegates were conducted at a ‘grass roots’ level. Both sides agreed there was no necessity for boundary alteration. Queensland’s proposed solution to the border problem was reasonable. However, once formal discussion reconvened on Thursday 30 May, Kolonie again adopted a hardline stance. When challenged, Kolonie remained adamant on the tenth parallel. For Islander representatives the situation was untenable. They declared their strong opposition and the meeting concluded in stalemate. Once it became clear PNG proposed extending its sovereignty to encompassed Darnley, Stephen and the Murray Islands (Mye’s home territory), Mye’s conciliatory gesture towards PNG was also quickly retracted. Throughout the meeting, Queensland officials noted two Port Moresby-based legal representatives observed proceedings, yet voiced no comment. Subsequent personal enquires would reveal that on arrival, one ‘observer’ had instructed Kolonie and other senior Daru Councillors to convey a line being directed down from Port Moresby, and not depart from it.\(^{184}\) (Killoran 1975).

Commonwealth – Queensland Inter-state Negotiations

On 26 June 1974, Whitlam again wrote to Bjelke-Petersen noting much common ground now appeared to exist between Commonwealth and Queensland perspectives (Whitlam & Bunting [1974] cited in BN649PD; Whitlam 1975). Both were interested in protecting Islanders’ rights and the local environment. Both agreed all inhabited islands would remain Australian territory and Islanders would retain their Australian citizenship. Both recognised the need to devise a special management regime for the Torres Strait region. Whitlam further noted that while a matter for negotiations between nation-states, both also now envisaged a treaty document for governing Australia-PNG border relations. Whitlam had authorized Australian officials to enter into bi-lateral discussions on the matter, without commitment, and was now anxious Commonwealth officers engage in talks with Queensland officials. Discussions would include

\(^{184}\) During an unofficial visit to the Torres Strait islands around ten months later, Kalonie confirmed he was acting on advices given him at Daru (presumably from Port Moresby), but had since changed his position and now believed there should be no border change (Killoran 1975).
consideration of developing a possible outline and management arrangements for a ‘Marine Park’-‘Protected Area’. Bjelke-Petersen duly agreed to formal discussions, formally requesting the Secretary, PM&C, contact Under Secretary Spann about arrangements. Queensland officials expected discussions would commence shortly after the Premier’s and state government’s special legal consultant, Dr. Daniel O’Connell, arrived in Australia\(^\text{185}\). On hearing the news, O’Connell telexed Spann, stating \textit{inter alia}: ‘Re Torres Strait matter I must say eureka, once the agreement is tied up, you should be prepared to make great political capital out of the victory’ (O’Connell, 28 June 1974, c.f. BN649PD).

Preliminary Commonwealth-Queensland border discussions commenced in Canberra on 13 November 1974\(^\text{186}\). In the Commonwealth’s official opening remarks, Sir John Bunting C.B.E (Secretary PM & C) noted the meeting’s objectives were to explore common grounds between Commonwealth and state proposals and identify and, where possible, reconcile any points of difference between the parties. The Commonwealth also wished to identify matters that might lead towards formal steps on negotiating a proposed treaty document, which was to embrace four sets of interests. In essence, Canberra wanted an arrangement that fitted within the Australian Constitution’s framework and was acceptable to Islanders, and also supported by Queensland Government. Equally, such a solution should not generate problems with an independent PNG within the framework of international law. Furthermore, future discussion and talks conducted at a political level should take cognisance of such special interests. The Commonwealth further proposed establishing two Working Groups, each with overlapping membership. One would focus on developing a ‘Marine Park’-‘Environmental Zone’ concept, the other on various emergent legal issues associated with that process. This collaborate effort would produce a series of reports as it progressed (BN649PD).

For their part, Queensland officials noted discussions within Queensland had culminated in a Resolution in Parliament that represented a sincere attempt to find a solution for resolving the potentially ‘unmanageable’ situation presenting in Torres Strait. Queensland officials believed the International Marine Park concept provided the basis upon which inter-state negotiations

\(^{185}\)At the time Dr. D.E. O’Connell was Chichele Professor of International Law at Oxford. Dr. O’Connell was recommended to Spann by Queensland’s Solicitor-General. Spann required an acknowledged expert in the field and O’Connell had a good working knowledge on the general question of the Territorial Sea. O’Connell had also privately discussed the problems presenting in Torres Strait with Queensland’s Solicitor–General on several occasions (Solicitor General (Qld) 1972).

\(^{186}\) Attending Australian Government officials were Sir John Bunting C.B.E. (Secretary, P.M. & C.), Dr. H.C. Coombs (Consultant to the Prime Minister), and Mr A. T. Griffith (First Assistant Secretary, External Relations and Defence Division, PM & C). Queensland Government officials were provided by Mr. Keith Spann (Under Secretary Premier’s Department), Mr. Leo. J. Murray (Parliamentary Counsel), and Mr J. Griffin (First Assistant Under Secretary, Premier’s Department). Procedural arrangements entailed all exploratory discussions being held on a mutually agreed no-commitment confidential basis (BN649PD).
should begin. Spann (Premier’s Dept.) outlined Queensland’s main concerns. First, while the Commonwealth now agreed the status of inhabited islands and Islanders’ citizenship was not negotiable, Canberra was yet to establish a distinction between the status of inhabited and uninhabited islands. Coombs (Consultant to Prime Minister) expressed his viewpoint that unpopulated island differed in status to populated ones. While noting the Commonwealth had to account for ‘wider considerations’, Spann stressed the importance of both parties finding a solution to the border problem that would not ‘leave a running sore’ between both countries following PNG’s Independence. Leo J. Murray (Parliamentary Counsel for Queensland) also inquired if Commonwealth officials had any knowledge of a desire on PNG’s part to acquire Queensland territory. Coombs responded some PNG officials believed a change in boundary status was necessary. Participants were then reminded while PNG’s original position had been to assert an international median line concept based roughly on the tenth parallel, that country now acknowledged Islanders’ wishes should be accounted for (BN649PD). Spann further mentioned two petroleum exploration permits (Q/10P & Q/11P) were linked to the area designated under Queensland Parliament’s Resolution (Figure 2). He also expressed concern over the Great North East and inner Barrier Reef channels, proposing that should these be classified as international waterways, it might create problems in managing pollution.

**FIGURE 2:** Offshore Petroleum Exploration Permits in the Papuan Basin (North & East of Cape York) December 1969.

<table>
<thead>
<tr>
<th>Permit No.</th>
<th>Actual Permit Holder</th>
<th>No. of Blocks</th>
<th>Ownership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q/1P</td>
<td>Tenneco Aust. Inc. and Singal (Aust) Pet. Co.</td>
<td>115</td>
<td>Foreign</td>
</tr>
<tr>
<td>Q/2P</td>
<td>Tenneco Aust. Inc. and Singal (Aust) Pet. Co.</td>
<td>186</td>
<td>Foreign</td>
</tr>
<tr>
<td>Q/3P</td>
<td>Tenneco Aust. Inc. and Singal (Aust) Pet. Co.</td>
<td>97</td>
<td>Foreign</td>
</tr>
<tr>
<td>Q/10P</td>
<td>California Asiatic Oil Co. and Texaco Overseas Pet. Co.</td>
<td>278</td>
<td>Foreign</td>
</tr>
<tr>
<td>Q/11P</td>
<td>Gulf Interstate Overseas Ltd.</td>
<td>126</td>
<td>Foreign</td>
</tr>
</tbody>
</table>

Source: JFADSC 1976; BN649PD.

Q/10P and Q/11P were issued in 1968 under the Commonwealth and Queensland Petroleum (Submerged Lands) Acts and provided for an initial six years and a renewal period of five years. The Royal Commission into Exploratory and Production Drilling for Petroleum in the Area of the Great Barrier Reef Province, (established May 1970) found of seven sedimentary basins in the Great Barrier Reef Province, six were officially classified as having ‘fair’ to ‘poor’ petroleum potential, the exception being the Papuan Basin (North and East of Cape York), which was classified as ‘good’. Although Bjelke-Petersen believed major reserves of similar potential to the Bass Strait and Gippsland Basins were located in the Torres Strait area, the Sub-Committee on Territorial Boundaries later found no significant commercially exploitable hydrocarbon deposits had been discovered. Moreover, despite a lack of confirmatory evidence, future prospects were not considered favourable (JFADSC 1976: 75, 88).
While interested in an ‘International Marine Park’ concept, Coombs noted Commonwealth officials held concerns about possible United Nations’ interpretations of the term which, they argued, was very restricted and not necessarily compatible with local traditional inhabitants engaging in activities that involved earning a livelihood, for example commercial fishing. Commonwealth officials preferred the more appropriate nomenclature, ‘Protected Zone’. This would prevent serious limitations being placed upon the traditional inhabitants’ capacity to conduct normal activities, in accordance with local traditions. Both parties agreed to discuss the matter at the next meeting, scheduled to be held following upcoming state government elections on 16 September 1974. Both groups of officials also agreed to issue a low-key press statement to prevent unwarranted press speculation. Commonwealth officials would inform PNG on the meeting’s general terms, but not enter into specific details. Queensland officials subsequently postponed the next meeting, reportedly due to formation of the new Queensland government, which was not expected to be completed until 23 December 1974 (Spann 1974).

Renewed informal federal-state negotiations commenced at an officer level in Brisbane on 20-21 February 1975188. This gathering focused primarily on the concept of a ‘Marine Park’-‘Protected Zone’ (McElligot 1975). Two Working Groups were established. Working Group A concentrated on environmental protection and social issues within the Torres Strait region, whereas Working Group B concentrated more on matters associated with various legal and political viewpoints. Throughout discussions, Commonwealth officials were being guided by attitudes expressed by Whitlam, whereas Queensland officials followed guidelines set out by the Parliamentary Resolution of 3 April, although the terms of reference were not inflexible (BN649PD). Commonwealth officials outlined a new plan that, according to Whitlam (1975), was ‘surprisingly similar’ to the one presented by Bjelke-Petersen in April 1974. All inhabited islands and their residents would remain Australian. The entire Torres Strait region would be declared a Protected Zone within which only environmentally-friendly new commercial activities would be permitted. Mining and drilling of the seabed would be prohibited for an initial period, then permitted only after agreement by all parties. The proposed treaty’s main provisions would (1) establish a Torres Strait Protected Zone (TSPZ); (2) relate to issues concerning navigation, law and order; and (3) provide a mechanism for settlement of disputes. Some form of management authority vested with powers to ensure the operation of regulations for environmental protection would also be necessary. Coombs further noted this management authority was to be a ‘conservation body’, rather than ‘mini-state’. It was to be advised by regular meetings of Islanders and coastal Papuans. Any earlier anxieties expressed

188 The Commonwealth team, led by Dr. Coombs, consisted of officials from the Departments of Aboriginal Affairs, Agriculture, Attorney-General’s, Environment and Conservation, Foreign Affairs, Minerals and Energy, and Prime Minister and Cabinet. Messrs Murphy and Riordan attended in place of Queensland’s Director of Aboriginal and Islander Affairs, P.J. Killoran (Killoran 1975).
by Queensland Government officials concerning shipping channels were shared by Australian military authorities and were already accommodated for (Coombs [1975], cited in BN649PD). Gelchrist (Foreign Affairs) further added the Department of Foreign Affairs did not want the border issue interfering with good PNG-Australia diplomatic relations. Hence, any Treaty document must be (1) enduring; (2) ‘embrace elements of political realism’; (3) ‘not attract unwarranted criticism’; (4) ‘meet the needs of local people’; and (5) ‘reduce the possibility of disputes’. He further cautioned in future PNG may not be as concerned with environmental protection as at present as evidence in other newly developing countries suggested people tended to become more interested in exploration, rather than conservation measures, overtime (Gelchrist [1975], in BN649PD).

On the Protected Zone’s extent, Queensland officials argued Australian interests demanded it be kept well clear of any ‘gateway’ to Australia to enable quarantine controls to be exercised (Spann [1975], cited in BN649PD). Spann further raised the issue of sovereignty over the territorial sea and seabed. On Queensland’s behalf, he also expressed the viewpoint that no valid distinction could be drawn between inhabited and uninhabited islands. Coombs deferred the matter, stating the seabed boundary line and issue of inhabited islands versus uninhabited would be left to Working Group B (Coombs [1975], cited in BN649PD). Coombs further expressed his opinion it ‘would be unimportant to Islanders where the actual boundary line occurred because as far as they were concerned the boundary line had no significance to their way of life, activities, nationality or rights as citizens of Queensland’ (Coombs [1975], c.f. BN649PD). Commonwealth officials further noted PNG officials had made representations to Australia’s Foreign Minister for a continuance on the petroleum moratorium. Meanwhile, no further oil exploration would occur in the region until discussions on the area’s future had been considered. Spann then indicated the necessity to refer the matter of Exploration Permits (Q/10P & Q/11P), both of which fell within the subject area, to the Queensland Government. It was further agreed Commonwealth officers would arrange for a Draft Treaty, which would

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189 Petroleum Moratorium: In September 1971, conditions of Queensland Permits for off-shore exploration activity were suspended pending findings of the Royal Commission Into Exploration and Production Drilling for Petroleum in the Area of the Great Barrier Reef (BN649PD).

According to Geological Survey (1975), offshore exploration was virtually in abeyance in the area adjacent to Queensland from 1970-1974. Of permits in force in the Torres Strait area, renewals were only sought for two, Q/10P and Q/11P. Offshore petroleum exploration in the contiguous area adjacent to PNG had been carried out under PNG/1P and PNG/3P. These areas were partly within the boundaries of the International Marine Park proposed by Queensland. In the western part of the Torres Strait, the Commonwealth had also called for applications in Area 2, but in 1969 deferred issues of a title pending the outcome of the Great Barrier Reef Royal Commissions. The area would impinge slightly on the northwest corner of the Queensland proposal. An important gas discovery was made at Pasca A-1 well, drilled in Exploration Permit PNG/3P at latitude 8° 36’ south, longitude 144° 54’ east in 1968. This area is about 40 km north of the northern boundary of Q1PA. Only half of PNG/3P had been renewed so there was now a buffer between PNG/3P and the northern boundary of the area adjacent to Queensland.
also include conditions applicable to a Protected Zone. And on 17 April 1975, Griffith (First Assistant Under Secretary, External Relations and Defence Division, PM & C) forwarded a copy of the mock-up agreement to Spann for consideration (Griffith 1975). Unlike the final document, the Draft Treaty described the Torres Strait’s ‘local inhabitants’ as including the following parties: (1) permanent Torres Strait Islander inhabitants; (2) permanent coastal village Papuans; (3) Bamaga residents; and (4) permanent Aboriginal residents on Cape York Peninsular. But still no specific reference was being made to delineating a seabed boundary line or any cession of Queensland territory (BN649PD).

In reviewing the meeting, Queensland officials agreed the Resolution of 3 April continued to admirably reflect the Islanders’ views. Whilst sympathetic with the goal of protecting PNG’s interests post Independence, Queensland’s prior responsibility was to its Torres Strait Islander residents. Nevertheless, state officials also felt their ultimate goal was to establish a Zone within which administrative arrangements could provide a basis of operations for the common good of both Islanders and coastal Papuans. State officials further noted that Commonwealth officials appeared to indicate the absence of populations on certain islands left their status open for discussion. Yet, such a concept imposed restrictions that totally ignored Islander’ traditions. From Queensland’s perspective, no valid distinction could be drawn between inhabited and uninhabited islands, nor could divisions be made on the quality of sovereignty exercised. Uninhabited Torres Strait islands provided Islanders with necessary adjuncts to their principal inhabited islands for cultural heritage, fishing, gardening and recreational purposes, and in earlier times, ceremonial sites. In particular, the waterways were of great significance as they provided Islanders with a meaningful subsistence and their inter-island ‘roads and highways’. On this understanding, Queensland officials argued, there could be no separation of islands on the basis of visible and identifiable habitation (BN649PD). State officials were also concerned that should uninhabited islands be ceded to PNG, that country might classify them as part of an archipelago190. Such a policy was already being promoted at Caracas Law of the Sea Conference on PNG’s behalf. It implications, in effect, would be that waters of the Great North East Channel would become PNG’s internal waters. Hence, it was in both Australia’s and Queensland’s interest that the Channel be regarded as an international strait, or alternatively PNG grant other nations completely unimpeded passage through its waters (BN649PD). On a more positive note, on the matter of inhabited islands, Killoran had recently acquired copies of two volumes which he believed clearly show certain ethnological and anthropological investigation would indicate that no meaningful intercommunication

190 Archipelago Concept-Principle: Mid-ocean countries, such as Indonesia, are entitled to draw lines linking the out-most points of their constituent islands, thereby transforming the waters inside into internal waters.
historically exists between Kiwais and Torres Strait Islanders. According to Landtman (1927), in 1910-1912 the Torres Strait region was regarded locally by Kiwais as a separate country\(^{191}\). Therefore, according to Killoran (1975), arguments Papuans could claim Torres Strait islands by right of discovery and for traditional usage were unfounded (BN649PD).

In May 1975, O’Connell advised Spann that Foreign Affairs was now under great pressure from Canberra to settle the border prior to PNG’s Independence. Hence, Queensland would need to focus more on political tactics. Officials from Queensland’s Department of Aboriginal and Island Advancement declined a Commonwealth invitation\(^{192}\), issued ten days beforehand, to attend a meeting between senior Commonwealth councillors and Island leaders in Sydney on 30 June 1975, during which Whitlam highlighted potential consequences associated with failure to reach an agreement\(^{193}\) (Griffin 1975; Whitlam 1975). The Islanders’ representatives continued to argue for a retention of the status quo and protection for their traditional way of life, but nevertheless did indicate a willingness to make some sacrifices, but only after prior consultations with their communities (Whitlam 1975; Anderson 1975; JCFADSC 1976:51).

The third session of Commonwealth-state discussions was held in Brisbane on 3-4 July 1975. Commonwealth officials noted a wide gap still remained between Queensland and PNG perspectives, both of which the federal government was obliged to consider. PNG wanted a single median line, but was now prepared to consider a treaty for protecting the Torres Strait environment. Queensland officials advised they were conscious of the need to avoid delay and

\(^{191}\) The two volumes Killoran (1975) refers to are: ‘The Kiwai Papuans of British New Guinea’, by Gunnar Landtman. PhD. Published by MacMillan and Co. Limited, London 1927. From April 1910 to April 1912, Dr Landtman lived among the Kiwai Papuans in the Western Divisions studying their anthropology and sociology (Killoran 1975).


\(^{192}\) At the time, Queensland Minister for Aboriginal Affairs and Island Advancement, Claude Wharton, was at sea aboard the government boat ‘Melbider’ during a ‘meet the people’ all party Queensland parliamentary tour of the Torres Strait. Meetings were held at Daru, Saibai and Yam Islands (councillors and residents from three other centrally located islands attended the Yam Island meeting). A meeting was also held on Thursday Island with Boigu Islanders. All traditional inhabitants indicated they were happy with present border arrangements but strongly opposed border change (Message from ‘Melbider’, 23 June 1975, BN649PD).

\(^{193}\) In the House of Representatives, 9 October 1975, Prime Minister Whitlam summarised of his discussions with Islanders at the Sydney meeting:

‘I took the opportunity to emphasise to the Islanders the importance of reaching an agreed solution if the independence of Papua New Guinea was to be achieved amicably. I pointed out that, once Papua New Guinea became fully independent, the power to resolve the issue would no longer lie solely in Australian hands. I reminded the Islanders that, if we were unable to reach an agreement, it would, after independence, be open to the Papua New Guinea Government to take the matter to the International Court of Justice for resolution and that the Australian government was committed to accept the decision of that court. I reminded the Islanders that, while the judgement of the International Court on such matters could not be confidently predicted, there were international precedents for such border issues between countries separated by areas of sea being settled by fixing the border approximately on the median line between the mainlands of the countries concerned…’ (Whitlam 1975).
were also prepared to make certain concessions, for example on the Protected Zone concept. It was further noted as federal and state officials appeared, at times, not to be talking about the same thing, it was helpful to have legal officers present who could discuss these matters and carefully explain all the legal factors involved to those giving instruction at a political level. Bourchoir (Foreign Affairs) further observed the post-Independence situation in PNG was ‘unpredictable’. Hence, the goal was now for a ‘peaceful northern area’ and for Australia and Queensland to give away as little of their interests as possible. Whitlam would later note a significant change appeared to have also occurred in the state government’s attitude during the third meeting. Indeed, Queensland’s position had moved considerably from that first adopted in the Resolution of 3 April 1974. It was now willing to proceed with the Marine Park (Protected Zone) concept, but this only applied to surface and sea waters and the seabed, not the islands nor resources underneath the seabed. Queensland also announced it wished to reserve for itself any decisions affecting applications to explore or drill for minerals on the islands and in the seabed. In response, Commonwealth officials proposed such terms would hardly satisfied the Islanders’ terms in relation to the effective protection of the environment. The Commonwealth further clarified it now wished to reserve the above-mentioned rights for itself (BN649PD; JCFADSC 1975:52).

On 11 July 1975, a Department of Foreign Affairs paper on a PNG report to the International Court claimed that country could now mount a strong argument Australia was not entitled to maintain a claim to all sea and seabed resources within the 1879 line. Foreign Affairs further proposed it was far better for Australia to negotiate a division of jurisdiction and allocation of seabed resources with PNG, rather than face the uncertainties of international adjudication in The Hague. On 18 July, O’Connell assessed the paper as ‘amateurish’, alleging Foreign Affairs was trying to call Queensland’s bluff. O’Connell further advised in relation to PNG’s threat to go to the World Court, Queensland had time on it side. PNG would first need to formulate a policy on its proposed court action. Even if its officials started work immediately after PNG’s Independence, its preparation would still take a great deal of time. O’Connell advised Spann: ‘if the objective is to avoid the threat without yielding, then procrastination would seem to be the order’. O’Connell further argued that even if the Commonwealth had plenary powers over the sea and could set up arrangements for the Torres Strait region, thus ignoring Queensland’s wishes, Canberra would still be heavily reliant on Queensland government agencies to deal with Islanders during the implementation stages of any policies or programs194. Serious difficulties might also arise out of possible local hostility over direct

194 During discussions with the Attorney’s General Department in Canberra on 27 August 1975, Commonwealth officers conceded to Leo Murray (Parliamentary Counsel Qld.) that while a High Court finding in favour of the Commonwealth in the Seas and Submerged Lands Case might assist Commonwealth officers administratively, it
Commonwealth involvement in the region. On a more negative note, O'Connell noted legal experts were predicting a disastrous decision for Australian states in the Seas and Submerged Lands Case. Should the Commonwealth win the case, nothing was preventing Australian officials from making a treaty with an independent PNG nation-state using a median line that ignores all Queensland islands up to their low tide mark. O'Connell further advised the Commonwealth was clearly waiting for a decision on the case before going ahead and carving up the sea bed with PNG. He suggested Spann might need to devise a strategy to ‘trade-off’ something. In the meantime, all Queensland officials could do was procrastinate, at least until the next federal election (O'Connell [1975], cited in BN649PD).

On 8 September 1975, Sir Albert Maori Kiki (PNG’s Minister for Defence, Foreign Relations and Trade) wrote to Australia’s Foreign Minister urging prompt action to avoid any possible difficulties over PNG’s territorial sovereignty following Independence. Whitlam sent Bjelke-Petersen a copy on 13 September, shortly before departing for Independence Day celebrations in Port Moresby (16 September 1975). By October, Whitlam still hadn’t heard back (Whitlam 1975). In correspondence, Maori Kiki complained to Whitlam about the lengthy hiatus in substantive bi-lateral negotiations, reiterating PNG wanted a definite single demarcation for all purposes, including seabed exploration and exploitation, fisheries, navigation and the exercise of sovereignty generally. From PNG’s perspective, the principle of equidistance would not help politically. It was considered desirable by all involved that the Commonwealth should have a prior agreement with the Government of Queensland. The Commonwealth could then put this proposal to PNG, presenting it as Australia’s stance on the Strait question (Murray 1975).

In 1975, in New South Wales v Commonwealth (‘Seas and Submerged Lands Case’), the High Court of Australia held that all legislative power and title to the sea and seabed was vested in the Commonwealth, and the States’ jurisdiction effectively ended at the low-water mark. With the exception of all internal waters, such as bays and river estuaries, all the seas and seabeds were under the Commonwealth’s control. In a strong reaction against centralism, the Fraser government sought a more cooperative arrangement with the States. Negotiations concluded in 1979 in the Offshore Constitutional Settlement, which was enacted through a series of statutes passed by the Commonwealth and the States. The two principal acts of legislation were the Coastal Waters (State Powers) Act 1980 (Cth), which gave States legislative power (and title to seabed minerals) on territorial waters within 3 miles of its coast, and the Coastal Waters (State Title) Act 1980 (Cth), which gave States title to the same area of sea, subject to certain limits (s4), namely the preservation of Commonwealth rights in respects of navigation, defence, petroleum pipelines, and of the pre-existing rights of individuals. This meant that, in reality, the Commonwealth had essentially granted its legislative power and title to the offshore areas, without vesting these areas to the States.

Then in 1983, the Governor General proclaimed territorial baselines around the Australian continent. The baselines closed the mouths of various bays, and enclosed various reefs and islands in order to mark the point from which the territorial sea was to be measured. In the Torres Strait, the baselines extended north from Cape York Peninsular to enclose all the southern groups of islands, thus making a portion of the waters of the south central Strait into internal waters of Queensland. Outside of the Protected Zone, all waters within 3 nm of the proclaimed baseline are under Queensland’s jurisdiction. Waters between 3-12 nm are part of the Commonwealth territorial sea. From 12-24 nm is the Commonwealth’s contiguous zone, proclaimed in 1994, in which international law permits a State to apply fiscal, immigration, sanitation, and customs regulations upon vessels. The problem with Torres Strait is that the area covered by the contiguous zone is tiny, due to the number of islands which militates against areas of sea being more than 12 nm from islands. Refer to (Holder) 1974 for more detailed information on legal situation at that time.
between the two mainlands overrode all other considerations, including the existence of small Australian islands (Maori Kiki 1975). While in agreement with the concept of a Protected Zone for safeguarding the local inhabitants’ traditional rights and protecting the environment, Maori Kiki argued it must be superimposed over an agreed boundary and not be used as an alternative to a relocated boundary. Moreover, the management regime for the Protected Zone should be based upon a bilateral agreement between two national governments, without involvement from provincial or state levels. PNG also envisaged of provisions for traditional movement, control over any new commercial ventures, environmental protection and border activities, along with a body representing local traditional inhabitants (Maori Kiki 1975).

Maori Kiki further highlighted the lack of early agreement on its maritime frontier also raised several practical questions for PNG. First, Australia was proposing an appropriate division of jurisdiction and equitable allocation of resources should be embodied in a Treaty between the two governments, yet Australia was still to define what it meant by ‘equitable’. Second, PNG believed the line asserted under Australian legislation for the purposes of petroleum exploration and exploitation as demarcing the limit of Queensland and PNG jurisdictions (i.e. the 1879 line) was the result of a unilateral Australian Act. Hence, it had no inherent validity. It was also ‘patently unfair’. Third, the same considerations also applied to living seabed resources. Fourth, in the absence of any agreement on a Territorial Sea Boundary, PNG faced the prospect of overlapping and conflicting jurisdictions within its territorial sea. This created difficulties for PNG, given that it was yet to determine its attitude to continued participation in the 1958 Geneva Conventions on the Law of the Sea, or the extent of its territorial sea. Fifth, fisheries legislation within PNG and Australia provided for a twelve-mile jurisdictional limit, yet neither country’s law provided for delimitation of a fisheries zone between opposite coasts. Without an agreement fixing national fishing boundaries, overlapping and conflicting fisheries jurisdictions would exist immediately after PNG’s independence. Sixth, the further extension in coastal States maritime jurisdictions likely under the third United Nations Convention on the Law of the Sea (UNCLOS) would also complicate maritime delimitation between the two countries. Without a border agreement, PNG might be forced to argue its case in the forum provided under UNCLOS. On a more positive note, Maori Kiki also noted Australia and PNG shared many viewpoints in common. He urged the Australian Prime Minister to consider promoting action on three points. The first was a resumption of bi-lateral negotiations adjourned from July 1974. The second was Australia making a general statement as to the principle on which ‘an appropriate division of jurisdiction and equitable allocation of resources might be made’. The third was, pending agreement, taking action to suspend all
activities in disputed area that might make any agreement more difficult or create practical problems in view of conflicting jurisdictions (Maori Kiki 1975).

Until now, Queensland officials felt the Commonwealth had not laid all its cards on the table. Commonwealth officials were responsible for conduct of Australian Foreign Affairs policy, yet throughout the negotiations had never given Queensland any indication of the possible border stance PNG might take. Now, Maori Kiki’s letter was finally laying it out on the line. Spann thought Maori Kiki’s pre-independence gesture might be either an ‘end of the line stance’ or an indication of a possible intransient nation emerging to Queensland’s immediate north (Spann [1975], cited in BN649PD). Spann also noted that given the tenor of Whitlam’s brief accompanying letter, talks might shortly be raised from an official to political level. Hence, he would need to be correctly positioned in order to give a clear and firm indication on the state government’s position. Again, he sought legal advice from O’Connell (BN649PD).

Then on 20 September 1975, the Commonwealth Department of Aboriginal Affairs (DAA) arranged a meeting at its Thursday Island offices to discuss budgetary allocations for the forthcoming year. Commonwealth officials decided the gathering would also provide an appropriate forum for updating Torres Strait Council Chairpersons on recent developments in border negotiations. Dr. Coombs attended, however Queensland officials were not invited. Their deliberate exclusion would result in Bjelke-Petersen publicly accusing Whitlam of duplicity and double-dealing (Whitlam 1975). Then, on 11 November 1975, Whitlam was gone. A statement signed by the Councils of Darnley, Murray and Stephens Islands (dated 18 December 1975) subsequently announced the Island Councils were appalled at the ongoing political confrontation between the Queensland Premier and then Federal Labor Minister for Aboriginal Affairs. They further challenged the accuracy of several of Bjelke-Petersen’s allegations regarding the alleged bungling of federal government projects within the region (JCFADSC 1976).

The Fraser Federal Government Years

No State Authority in Australia is vested with constitutional power to make treaties. This does not, however, mean that a state cannot enter into an intergovernmental agreement with a foreign power. From the beginning, Queensland wanted to be an active party to a treaty under

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196 Dismissal of the Whitlam Labor Government.

197 The Hon. Leslie Johnson (6 June -11 November 1975).

198 One ill-fated Commonwealth project was the turtle farming program which required large number of sardines. Over harvesting of sardines, a staple food of Islanders, resulted in an unprecedented collapse in fish stocks around Mer and Erub Islands. Islanders finally lost their patience with the project after it was proposed meat from giant clams be substituted for sardines as turtle food.
some form of tripartite agreement. However, the Commonwealth rejected this notion. From Queensland’s perspective, Commonwealth demands made in close consultation with PNG were unacceptable. The state was only being offered a minor role in the Torres Strait region’s future management. There was also no guaranteed sovereignty for Queensland over all Torres Strait islands. Conversely, state negotiators were also fully aware that no basis existed, either in the Commonwealth Constitution or in reliance of principles of international law, under which the federal government could alter the existing Queensland land border without the Queensland Legislature’s assent (Bennett199 [1973], cited in Knox 1976; Wharton 1976). The often-cited close proximity of Saibai, Dauan and Boigu to PNG did not present a legal challenge for Queensland either. Parallel situations existed elsewhere that were acceptable and endorsed under international law. The Greek island of Samos and Turkish mainland provided one example, as did nearby Bougainville and the Shortland Isles (BN649PD; Wharton 1976). Now all Queensland officials had to do was sit back and wait for political developments to further unfold at an international level (O’Connell 1975; Murray 1975).

The year 1976 witnessed a further hardening in all parties’ negotiating positions. Both PNG and Australian officials recognised the importance of settling the border dispute as quickly as possible. In March, Prime Ministers Somare and Fraser met to discuss border negotiations. Both agreed on the need to reach an equitable and permanent settlement. A joint communiqué was issued on 4 March. Both parties agreed the main objects of negotiations were to firstly draw a seabed line between the two countries and to secondly, establish a Protected Zone in order to preserve the environment and the traditional way of life of the region’s traditional inhabitants. Then, in late April, the PNG Government allegedly put forward a proposal that involved shifting the existing border approximately 110 kilometres south to within sixteen kilometres of Cape York. Fraser denied its existence during Parliamentary Question Time on 6 May (JCFADSC 1976). The first round of cordial bi-lateral talks between Prime Minister Somare, PNG Foreign Affairs Minister Maori Kiki, and Australian Foreign Minister Peacock was conducted on 18, 19, 28 and 29 May 1976. The previous year, Australia’s High Court had established the Commonwealth’s right over Australia’s territorial seas and submerged lands200, and by 5 June 1976, Peacock and Maori Kiki were able to reach an in-principle preliminary agreement. A continuous seabed boundary, the so-called Ellicott Line201, would be delimited south of the northern-most inhabited islands of Boigu, Dauan and Saibai.


200 Refer footnote 195.

201 Named after the Australian Attorney-General, the Hon. R. J. Ellicott, Q.C.
Australia would retain possession of the three disputed islands and their fisheries. A Protected Zone would also be established to protect the traditional way of life of the region’s traditional Islander and Papuan inhabitants. Once again, no references were made to the uninhabited islands north of the seabed line, nor were any assurances given against seabed mining. On 6 June in PNG’s National Parliament, Opposition Leader Tei Abal also announced if his party won the next election any bi-lateral agreement signed by Somare would have to be reviewed (JCFADSC 1976). Then, unexpectedly at a National Press Club luncheon on 6 July, Maori Kiki, aided by Australian legal advisers resident in PNG, virtually revoked the agreement by declaring his opposition to, and Melanesian rejection of, the concept of plural boundaries. Maori Kiki now favoured a full territorial border. He argued the seabed boundary line rose in a straight line up to the water’s surface, then up to the sky, until God himself pushed it back down again. Moreover, Islanders were not morally Australians and PNG was prepared to risk damaging the Australian-PNG bi-lateral relationship by taking unilateral action and appealing to the International Court of Justice (of which it was not then a member) unless certain PNG demands were met, such as the transfer of certain uninhabited Australian islands across to PNG sovereignty. On 8 July, the Australian Government announced it would not surrender to the interests of the Independent State of Papua New Guinea. Maori Kiki responded on 15 July 1976 in PNG’s National Parliament, demanding the existing seabed boundary be redrawn and converted into a full territorial border. However by 23 July, a more conciliatory Maori Kiki was emphasising the boundary now being negotiated between the two countries was to be an ‘all purpose’ international boundary in which each nation had ‘full sovereignty’ (BN649PD; Griffin et al., 1979; JCFADSC 1976; Singe 1979; White 1981).

During 1976, protest was also voiced in Torres Strait, but was mostly token in nature, aimed more at creating potential international embarrassment for the Australian Government. For example, Torres Strait Island Advisory Council Chair, Getano Lui, sent a telegram to Fraser on 18 April stating if Australia did not support the Islanders, they would take their case to the International Court and United Nations. Then in May, Tamwoy Reserve Council Chair, K. Abednego also announced that if Islanders failed to receive Commonwealth then support they would turn to the Indonesian government for assistance (JCFADSC1976). Fraser provided assurances on the Islanders’ position in the House of Representatives on 6 May, arguing the Commonwealth’s objective was to protect the land, culture and traditional way of life of all Australians (Fraser [1976], cited in JCFADSC 1976: 37). On 19 May, the National President of the Returned Services League, Sir William Hall, also encouraged the federal government to resist PNG’s requests to transfer Torres Strait islands across to its jurisdiction. Tensions were also evident within the wider Islander community. For example, in a letter to the Minister for
Aboriginal Affairs, Mr. Viner, dated 23 July, Naseli Nona (Chair Mabuiag Island Council) accused Getano Lui of double talk and making unilateral statements on behalf of the Torres Strait Island Advisory Council. Nona (1976) further alleged Lui spoke more on behalf of the Queensland Government than Torres Strait Islanders (BN649PD).

Apart from opposing the proposed seabed boundary, both state government and Islanders also opposed the concept of island enclaves. Bjelke-Petersen, in particular, reacted strongly to this proposal. On 7 June 1976, he accused the Commonwealth of betraying Islanders and giving away Australian territory to a foreign country. Bjelke-Petersen also claimed Papuans had no legitimate moral claims to Torres Strait but were instead motivated by possible discoveries of oil deposits. By 9 June, Olewale had responded in kind (Bjelke-Petersen [1976] & Olewale [1976], cited in JCFADSC 1976). State Minister for Aboriginal and Islander Advancement and Fisheries, Claude Wharton (1976), further argued that tensions between the Islanders’ holistic concept of habitat versus European concepts of a boundary line would raise potential problems for the Commonwealth’s latest proposal to create a seabed delineation leaving the Australian territory of Saibai, Boigu and Dauan enclaved north of a seabed line. In June 1976, O’Connell also advised Spann the Queensland Government should focus exclusively on land issues and Islanders’ rights, dropping all references to the 1879 boundary line. State officials should also avoid any litigation involving the 1967 Offshore Petroleum Agreement. Instead, they needed to ‘shift the argument to an altogether different plane so that it can support a political exercise’ (O’Connell 1976). O’Connell argued the 1879 line was not the Queensland border. On 25 March 1875, Law Officers had advised Queensland’s Colonial Government it had no legislative authority over seas beyond a distance of three nautical miles, either from Queensland’s mainland or its offshore islands. Again, before the International Court in the Anglo-Norwegian Fisheries Case (1951), Norway tried to argue the 1879 line was the Queensland border. The British government, with Australia’s approval, denied this stating the line merely ‘netted’ the islands that fell under the Act of 1879. It did not establish a boundary in the sea. Queensland’s border only acquired its character as a border by operation of the 1967 Offshore Petroleum legislation, which applied Queensland law for the purpose of

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202 The line was to extend from Bramble Cay to Moon Passage to a point twelve miles south of Saibai.

203 Wharton (1976) argued: ‘Islanders’ concept of habitat is not only the area of land on which is located his home or his gardens but his way of life merges with the land surface of the island he occupies, the waters surrounding it, adjacent islands used for gardening (not necessarily inhabited), the air, the winds and the currents. In effect, his life merges into a total of the environment of the area and cannot be identified to the European concept of an allotment of land or similar. To disrupt or deny any one factor within the total environment is to deny a total way of life. The concept of a line of delineation currently being advocated by Canberra would involve conceding the fact that over a period of time less than a single generation, the mental concept of local indigenous inhabitants would create mentally a ‘border’ line and thus, within a very short span of time, a new border would be created with further claims on the areas north of the original delineation which must then include the total environment’. 
exploration and exploitation of petroleum up to that limit. The Commonwealth could retract the limit by amendment to the schedule to that Act at any time. Moreover, corresponding state legislation would be overridden by a Commonwealth Act as the High Court held that the Continental Shelf is subject to the Sovereign Rights of the Commonwealth. It might also be held that state legislation is nullified by the Seas and Submerged Lands Case (O’Connell 1976).

O’Connell further advised Spann that Queensland had three primary objectives, all of which could be exploited to create political capital. Since the Seas and Submerged Lands Case, the Commonwealth had the power to draw boundary lines anywhere beyond the state’s low water mark. Queensland was legally powerless to prevent the drawing of a new seabed boundary line. However, the problem could be addressed in another way, by focusing on three primary goals. The first was retention of all inhabited and uninhabited islands initially covered by the 1879 Act. The second was to ensure Torres Strait Islanders were not deprived of their access to the living seabed resources they fished for sedentary purposes. The third objective was to ensure PNG could not grant exploration licences that might effect the ecology of subsistence areas exploited by Islanders. O’Connell argued that by ‘playing several cards adroitly’, the state would be able to ‘make virtue and policy happily coincide’. It would also be able to take all the political credit while turning public opinion against Canberra. On the matter of the uninhabited islands, O’Connell advised the following. Under the Act of 1879, all permanently dry features within Torres Strait are part of Queensland. Under the Australian Constitution, no constitutional distinction exists between inhabited and uninhabited permanently dry islands. Under International Law, all permanently dry islands are subject to sovereignty. In addition, under Article 1 of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958, all Torres Strait islands are entitled to a three-mile (or twelve-mile\(^{204}\)) territorial sea of Australian sovereignty. Hence, the only way the Commonwealth could cede the uninhabited islands across to PNG was for Queensland to surrender them under Sections 123 and 128 (Mode of altering the Constitution) of the Australian Constitution. Meanwhile, all Queensland officials could do was continue to procrastinate (O’Connell 1976).

Commonwealth bi-partisan agreement to discourage public debate on the issue in Australia did not prevent some discussion. During 2-8 August 1976, an Australian Parliamentary Sub-

\(^{204}\) According to O’Connell, following the break-down of the Geneva Conference in 1958/60, the question of territorial limits became fluid. Most States consolidated the limit at twelve miles, a view upheld by the International Court of Justice in the Iceland Fisheries Case in July 1974. In effect, placing a twelve-mile limit on all permanently dry features in the Torres Strait would ensure coverage of almost all its waters (O’Connell 1975).
Committee on Territorial Boundaries visited the Torres Strait area to hold public hearings\textsuperscript{205} (JCFADSC-TS 1976). In December 1976, an Australian Parliamentary Backbenchers’ Joint Committee’s Sub-Committee on Territorial Boundaries, which recommended against border change, also convened in Townsville. Some PNG politicians, for example Sir Tei Abal\textsuperscript{206}, Josephine Abaijah\textsuperscript{207}, Oala-Oala Rarua\textsuperscript{208} and Mopio also opposed boundary realignment, in the short term. A few commentators also specifically noted the Commonwealth’s ‘conspiracy of silence’ throughout this unique exercise in three-party diplomacy (Webb 1976:77). For example, Prescott (1976) argues the abysmal level of public debate on the issue resulted from four major factors. First, a bipartisan approach to managing the issue was adopted in Federal Parliament. Second, the Australian press and media generally felt PNG was an impoverished country and Australia was big enough to spare it a few islands. Third, an extremely negative bias against the Islanders’ main advocate, Bjelke-Petersen, characterised media reporting in southern states. Hence, it failed to take his statements seriously. For example, in 1973 The Australian’s Webster (1973) argued should the ‘irritating dispute’ and Queensland Premier’s ‘obstinacy’ over the ‘world’s silliest border’ be allowed to continue, it would in all likelihood result in Australia incurring much international ridicule (Webster 1973). Prescott (1976) also argues Australia found itself caught up in the final stages of the post-World War II global decolonisation processes. Hence, political concessions were being made in private, due to Commonwealth insecurities that a newly independent PNG might portray Australia in international forums as a nation of ‘racial oppressors’ (Prescott 1976). The general lack of knowledge about the Torres Strait region and its traditional inhabitants, both within Australia and PNG, also allowed many with a vested interest in border negotiations to capitalise upon this knowledge void, to thereby further their own political agendas (Fisk & Tait 1974).

Under pressure from the Department of Aboriginal Affairs (DAA), Fraser visited Torres Strait between 22-24 November 1976. Despite frank discussions with sixty Island Councillors, he failed to gain the Islanders’ support. Further bi-lateral discussions were conducted between Peacock and Maori Kiki in Port Moresby in late November 1976 (JCFADSC 1976). By 1977, an impasse was reached in bi-lateral negotiations. On 1 February 1977, Maori Kiki announced

\textsuperscript{205} The Joint Parliamentary Committee on Foreign Affairs and Defence tabled its report on the Torres Strait Boundary on 9 December 1976.

\textsuperscript{206} Leader of the Opposition.

\textsuperscript{207} Papua Besen Leader.

\textsuperscript{208} Oala Oala-Rarua was Lord Mayor of Port Moresby and later first High Commissioner to Australia.
in PNG’s National Parliament\textsuperscript{209} that border talks with Australia were now deadlocked. On 8 February, as Fraser visited Port Moresby amid concerns worsening border tensions might damage treaty proceedings, PNG’s Parliament symbolically passed an Act (National Seas Legislation) theoretically enabling PNG to make a unilateral declaration on its boundary, should the border conflict not be promptly resolved. The legislation extended PNG’s territorial seas to twelve miles and permitted the declaration of a two hundred mile Exclusive Economic Zone (EEC). With PNG preparing for its May general election, and with elections scheduled for Australian and Queensland Parliaments in the later half of 1977, Somare and Fraser issued a joint statement suspending further talks until the situation settled. With the border dispute now a full-blown ‘cause celebre’, Premier Bjelke-Petersen continued accusing the Commonwealth of seeking to deny Torres Strait Islanders their rights as Australian citizens. Meanwhile on visit to Brisbane, PNG High Commissioner Oala-Oala Rarua rebuffed Bjelke-Petersen by announcing PNG’s national government was only willing to negotiate with an equal level of government, not the State of Queensland. By the time PNG’s parliamentary elections returned a moderate Somare government to power, the newly-appointed PNG Foreign Minister, Ebia Olewale, (having succeeded Maori Kiki to the portfolio) now had relatives living on Yorke Island and was rumoured to regret his earlier border stance (Griffin et al. 1979; Singe 1979; BN649PD).

A meeting between Foreign Ministers Peacock and Olewale on 4 February 1978 heralded the resumption of official bi-lateral negotiations. Talks centred primarily around discussions on a establishing a fishing zone. On 31 March 1978, PNG subsequently declared a two hundred mile resource zone that also encompassed Torres Strait. A critical round of bi-lateral meetings in Sydney was held on 26-29 April. Under greatly improved Commonwealth-state relations, Peacock visited the Torres Strait region accompanied by a more conciliatory Bjelke-Petersen, who now recommended the Islanders agree to the proposed settlement. Although Peacock’s proposal differed little to Fraser’s proposal two years earlier, in that it involved establishing the northern islands as Australian enclaves with a separate border for fisheries and seabed resources, under the more co-operative inter-state relations Islander leaders followed Bjelke-Petersen’s lead, accepting the proposed agreement\textsuperscript{210} (Singe 1979; Griffin et al. 1979). Both

\textsuperscript{209} National Parliament: PNG has a Westminster type of government based upon a written Constitution and a single legislative house known as the National Parliament made up of 109 members.

\textsuperscript{210} Many conspiracy theories were put forward about the reasons behind Bjelke-Petersen’s change of stance. One argued he traded off his concerns for Islanders against possible Federal government intervention into the Queensland Government’s treatment of Aboriginals on Cape York Peninsular and its seizure of Aurukun and Mornington Island missions from the Uniting Church (Griffin et al. 1979). Two other coincidences around the time of the signing of the Torres Strait Treaty were noted by Singe (1979). First, the PNG government had contracted a north Queensland company to expand fish processing and storage facilities on Daru. Under the Treaty, Papuan fishers would gain access to considerable new fishing grounds in northern Torres Strait. Second, within a week of
Australian and PNG governments subsequently announced a new bi-lateral agreement had been reached. Shortly after Peacock’s visit, what Griffin et al. (1979) later described as a ‘blatantly bogus’ piece of Foreign Affairs’ research announced the uninhabited Talbot Islands (mangrove mud flats) of Kawa, Mata-Kawa and Kussa being ceded to PNG under the treaty agreement were not, and apparently never had been, part of Queensland territory. As early as 1975, Queensland Parliamentary Counsel, Leo Murray, was advising Queensland’s Premier’s Department that he also held a similar view to Foreign Affairs on this matter211.

On 25 May 1978, Peacock made a full statement in the House of Representatives regarding the provisions of the proposed Torres Strait Treaty (Peacock 1978). A new seabed resources line south of the Ellicott Line but well north of the tenth parallel would be delimited. Unlike the fisheries line, it tracked well south of Boigu, Dauan and Saibai, but at least appeared to follow traditional boundaries. All inhabited and uninhabited islands south of the original 1879 borderline would be conceded to Australia. A Protected Zone would be established to enable traditional indigenous inhabitants on both sides of the border to continue with their traditional activities and move freely. A ten-year embargo would be declared on mining and oil drilling within the zone. Further provisions were made for joint conservation and catch sharing arrangements for commercial fisheries in the designated area. The Draft Treaty also contained provisions covering freedom of navigation, passage and overflight. Most importantly, signing the Treaty, the Queensland Minister for Mines announced drilling for oil on the Great Barrier Reef was again under consideration.

211 In 1975, in a Memorandum to Under Secretary Spann (Premier’s Department), Leo Murray, Parliamentary Counsel, Queensland, stated on the provenance of Torres Strait boundary charts used:

‘Mr Brassell of the Commonwealth Attorney-General’s office has been engaged both here and in London in tracking down relevant charts that throw light on the exact location of the alleged boundary thrown around the Torres Strait Islands by the Letters Patent of 16 October 1878. Mr Brassell has photostats and reproductions of two significant Admiralty Charts – they are
Admiralty Code No. 2759, a being of Australia and adjacent islands and seas between its northern coast and the Equator;
No. A3819 being of a survey made by Lieutenant Connor RN of New Guinea – Orman Reef to Katow Reef.

‘Both have said the charts have been supplied from England. Connor’s survey was available to the Admiralty when chart 2759 was prepared. Indeed it is quite likely that the reduction was made to be annexed to the Imperial circular of 16 October 1878 and sent to the colony. The reduction was found in Sydney by the Crown Solicitor’s Office there and from it a photostat was made and exhibited in the High Court in the Seas and Submerged Lands Case. As yet I have been unable to obtain the exhibit (or a copy) from our Crown Law authorities. It appears reasonably clear to me from a study of these charts that the “boundary line” is not close to the coast of P.N.G. as some would claim. Although it clearly takes in Boigu and its proximate outlying islands it does not take in Kussa, Kawa or Mata Kawa. Mr. Brassell proposes to supply us with photocopies of their charts and such information as he has been able to gather as to their compilation’.

By contrast, NATMAP (NMM 76/062), produced by National Mapping Canberra A.C.T. 1976, and annexed to ‘The Torres Strait Boundary’, Report by the Sub Committee on Territorial Boundaries of the Joint Committee on Foreign Affairs and Defence (1976) clearly shows the three islands as being within the 1897 line and therefore part of Queensland.
Australia would retain strategic control over the entire length of the Great North East Channel (Griffin et al. 1979). However, problems remained between the Queensland Government and the not-so-compliant Islanders who refused to accept the border changes. Confident the High Court would require a referendum of the people of Queensland, Bjelke-Petersen told Islanders he had studied the Treaty’s details and would take the issue to the High Court, if necessary. But this was only rhetoric. Apart from three small islands (Kawa, Mata Kawa and Kussa Islands) immediately adjacent to PNG’s coastline, all inhabited and uninhabited islands would remain Australian sovereign territory. Any possible constitutional difficulties the Federal government might have faced over involuntary cessation of Queensland territory had been successfully avoided, as there had reportedly been no legal alteration to Queensland’s land border. The Commonwealth had also simultaneously managed to assert its authority over its territorial sea and resources while offsetting PNG’s objections to Australia’s sovereignty of all Torres Strait islands by separating the seabed and fisheries jurisdiction (water column jurisdiction) boundary lines (Singe 1979; Griffin et al. 1979:255-61). Peacock later observed of proceedings: ‘we have been able, through direct negotiation, to devise a peaceful, amicable and equitable solution between us’ (Peacock [1978], c.f. Lyon & Smith 1981).

Boyce (1981) proposes four notable features characterised treaty negotiations. First, during inter-state negotiations with Queensland, the Commonwealth confronted great difficulty in getting Queensland’s state-centric Premier Bjelke-Petersen to agree to any concessions to PNG. Senior Queensland Ministers also waged a campaign of highly political and parochial rhetoric between 1972-78. Second, throughout the public border dispute, a small group of professional advisers were patiently conducting extensive and detailed negotiations behind the scenes. In Canberra, specialist advisers, such as those in Foreign Affairs’ South East Asia and South Pacific Division and Legal and Treaties Division, facilitated agreement between Queensland and federal cabinets and also between Australia and PNG cabinets. Boyce (1981) specifically mentions Malcolm Lyon (South East Asia and South Pacific Division), who headed the regional division for the full period of negotiations from 1976 onwards and was also responsible for principal carriage of negotiations, and also M.G.M. Bourchier (Legal and Treaties 1976-77) and Richard J. Smith, from late 1977. Boyce (1981) also identifies special adviser to the Prime Minister, Alan Griffith, who acted as First Assistant Secretary, PM & C and head of its international relations division. In PNG, Boyce (1981) singles out Tony Siaguru, Secretary of PNG’s Department of Foreign Affairs and Trade and leader of Port Moresby’s official delegation, along with Australian expatriate Geoffrey Dabb from PNG’s Department of Foreign Affairs and Trade, who acted as legal adviser to Somare’s government and adopted a tough bargaining position throughout the entire negotiations.
In Brisbane, Boyce (1981) identifies senior civil servant negotiators Under Secretary Keith Spann and the Director of Aboriginal and Islanders Affairs, P. J. Killoran, along with several middle-rank officers from Queensland’s Premier’s and Justice Departments. At a ministerial level, Queensland’s chief negotiators were Premier Bjelke-Petersen and the Ministers for Aboriginal and Islander Affairs, Claude Wharton (until late 1976) and Charles Porter (1977-78). As noted, Dr. Daniel O’Connell, specialist legal consultant to Queensland Government and the State Premier also played a major role in proceedings. The third notable feature of negotiations was the Commonwealth government’s reluctance to publicly discuss the possible content of any treaty, either with the Australian Parliament, media or general public. While such an approach may have been appropriate in terms of classical international diplomacy, it was scarcely conducive to harmonious federal-state intergovernmental relations. Fourth, the Commonwealth maintained a bipartisan approach to the negotiations. Major disagreements within Australia were between federal and state political leaders, rather than national political parties. In Canberra, the National Country Party and its leader J. D. Anthony fully supported the border negotiations, as did the federal parliamentary Labor Party, although state ALP members for Cook were often highly critical of certain aspects of negotiations (Boyce 1981).

On 18 December 1978, Fraser, Somare, Peacock, Olewale and Bjelke-Petersen met at PNG House Sydney for the official tripartite signing of the Torres Strait Treaty. As Bjelke-Petersen arrived, Carl Wacando, a mainland resident, native of Erub (Darnley) and leader of the Torres United Party (TUP), presented Bjelke-Petersen with a High Court writ challenging the Treaty’s validity on a legal technicality, namely the illegal annexation of Darnley Island prior to federation. Meanwhile on Thursday Island, Erub (Darnley) Island’s Eti Pau sought to rally opposition against the Treaty among Torres Strait Light Infantry (TSLI) ex-servicemen. Some local Islander residents also threatened to request the World Court recognize a new nation in Torres Strait, which as custodian of alleged extensive oil reserves intended initially subsisting on income derived from fishing, tourism and postage stamps (Singe 1979; Griffin et al. 1979). Bjelke-Petersen would censured the pro-independence activists, cautioning PNG would be quick to take advantage of any newly-independent nation-state in Torres Strait. Understandably, Olewale took exception to Bjelke-Petersen’s assertions (Boyce 1981).

Finally, throughout the border dispute, Islanders collective voices were once again raised in opposition to outside government overrule. Many would later interpret the Treaty’s signing and demise of the ‘Border Not Change’ movement as yet another demonstration of the

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212 TUP-formed in November 1978.

213 Wacando’s application for a High Court declaration that Darney Island was not part of Queensland was subsequently dismissed due to his lack of locus standi.
Queensland Government’s continuing influence over their lives. Most Islanders recognised the delimitation of an Australian-PNG maritime border was an inevitable outcome of PNG gaining its Independence. Throughout negotiations they had attached great, even overriding, importance to protecting their total environment and the loss of waters and resources they had come to regard as their own over centuries of occupation was difficult to accept. An even greater blow would come with the realization they did not hold legal title to their ancestral lands or surrounding customary waters. Under Letters Patent of 30 May 1872, 10 October 1878, and the *Queensland Coast Island Act 1879* (Qld)\(^{214}\), they had unknowingly joined the Colony of Queensland. All their island homes were now converted into Queensland as Crown Land.

Nor was it just Torres Strait Islanders objecting to the Treaty’s provisions. On 30 December 1978, *The Australian*’s Port Moresby correspondent would observe: ‘The Torres Strait border agreement with Australia, presented as the year’s crowning triumph of government diplomacy, seems to most people in Port Moresby a ludicrous ‘cop out’ leaving black ‘Australian’ citizens on ‘Australian’ islands within a few miles of the PNG coast, just as they were before’ (*The Australian*, 30 Dec. 1979, cited in Singe 1979:135). Singe (1979:135) also later observed: ‘It would be unreasonable to expect that nationalist politicians in PNG, after their success this time, will not seek to renegotiate the border terms on a future occasion - whether it be in ten years or fifty’. Griffin et al. (1979: 261) would also note: ‘the present settlement will probably be satisfactory only so long as nothing happens in the Strait’. As for the Queensland Government, its preferred boundary solution was an internationally protected marine park. It never envisaged inhabited Queensland territory enclaved by PNG’s sea-bed or uninhabited Queensland islands and cays caught inside PNG’s sovereign border, surrounded by a foreign power’s territorial waters and seabed. Citing the volatile Samos-Turkey situation, Queensland Government officials observed and predicted the following:

> The creation of an Australian enclave is not an acceptable solution. This will only endure until sensitivities are offended and the question asked, why and when the water and seabed are ours is not the land also? History has proven such arrangements to be endowed with suspicion, hostility and dispute.


**Conclusions**

The point emphasised throughout this chapter is that perceived inequalities and inequities in Torres Strait border arrangements have always provided a potential source of underlying

\(^{214}\) *Act of 24 June 1879 (Queensland Coast Island Act)* (Qld).
tension and political conflict in the region. What began as a failed motion in PNG’s House of Assembly in 1969 would ultimately lead to a full-blown border dispute that threatened to destroy Australia-PNG bi-lateral relations. It also contributed to an intensely hostile period of inter-state relations within Australia. Due to the vast complexity of issues involved, much time would pass between Olewale first laying claim to a large tract of Torres Strait and the Torres Strait Treaty’s final ratification and entry into force some sixteen years later. This chronology of events has only briefly touched on that period.

From the outset, Whitlam showed scant regard for the region’s traditional inhabitants. When it came to his dealings with the Torres Strait region, his eye was always on the international stage. He repeatedly failed to recognise that the border issue was an internal matter that first needed to be settled within Australia. He also repeatedly ignored the wishes of the people most directly affected. More substantive negotiations would occur under the Fraser federal government, in no small measure due to greatly improved inter-state relations and the Seas and Submerged Lands Case’s outcome. From the outset, PNG believed a median line based upon the principle of equidistance overrode any consideration of Australian islands within the region. PNG wanted a single demarcation line, for all purposes and all time. That country had to be acknowledged as enjoying certain fishing, oil and mineral rights over parts of the wider Torres Strait region. Australia and Queensland had no moral right to withhold these. But neither could the Commonwealth or PNG Governments turn the hands of time back a century.

The traditional inhabitants living on the northern Torres Strait islands were now Australian citizens, resident in the State of Queensland. As such, they had certain inalienable rights. Backed by Section 123 of the Australian Constitution and expert legal advice, the Queensland Government and its states’ right Premier Bjelke-Petersen would refuse to voluntarily cede Queensland territory to the Commonwealth. Nor would the state agree to any proposal that involved the handing over of Australian citizens to a foreign power. The state government had gained a first hand knowledge of the wishes of the people directly involved. For many years, it would be the only official party to give full cognisance to their clearly expressed wishes. For the newly-emergent Torres Strait Islander nation, its members had less than a century earlier involuntarily found themselves caught up inside in a colonial borderland in which the forces of colonisation were arbitrarily drawing their disparate, sovereign socio-political units together as one under a series of imposed outside governance regimes. Now global processes of decolonisation and international border delimitation threatened to tear their small fledgling nation apart. The prospect of indigenous Australian citizens and their customary lands and waters being partitioned off to a newly-independent developing nation-state with an highly
uncertain future was deemed both highly unacceptable and unfair by a vast majority of Torres Strait Islanders.

This chapter also showed how this diverse spectrum of viewpoints would be ultimately reconciled, more or less, with the signing of the Torres Strait Treaty in 1978. Due to the extreme complexity of issues involved, another seven years would pass before the Treaty was finally ratified and entered into force in 1985. Almost a decade after he first raised the border matter in the Territory’s House, PNG Foreign Minister Olewale drew on Aristotle [384-322BC]1943) in summarising of proceedings:

Politics, it has been said, is the art of the possible. Boundary negotiation, also, is the art of the possible, as all who have taken part in it are acutely aware. Having said that, I say that we have done our best. I hope that we have built a framework that will serve the needs of our children. We have come a long way since I had reason to complain about the Torres Strait situation in our Parliament in 1968 [1969]. Although this is the end of the road – the road to signing the agreement – we now stand at the beginning of another road: the task of making it work. If we face that task in the same constructive way that we faced the first, it should not be too difficult (Olewale 1978 c.f. Lyon & Smith 1981: 36-7).

The analysis conducted over the next five chapters seeks to determine just how effectively Australia and PNG now jointly manage that task.
Chapter Five

The Torres Strait Treaty

There is now no simple answer to the question:

where is the border between Australia and Papua New Guinea?


The preceding chapter’s account of border negotiations highlighted essential features of the Torres Strait Treaty. This chapter elaborates upon the sui generis border agreement in greater detail. It questions the Treaty’s effectiveness. It considers the role played by the Department of Foreign Affairs and Trade (DFAT) within the region. It also examines the nature of the interactive relationships occurring across and between the multiple levels of governance contained within the individual institutions constituting the Treaty’s consultative structure. It will be shown that the majority of linkage structures found within the normative frameworks facilitated under the Treaty Cycle are typically characterised by cooperative and consultative modes of interaction. The following propositions are also asserted. First, DFAT is continuing in its failure to effectively promote the Treaty document in the region. Second, DFAT is also failing to seriously engage with the local traditional inhabitant communities in a genuine and meaningful dialogue on both the formulation and administration of government policies and programs that specifically relate to Treaty-associated border management issues in the region.

To justify this argument, a suite of Treaty-related challenges entailing four main dynamics are identified. The first is DFAT’s failure to effectively ‘sell’ the Treaty to a vast majority of the region’s traditional inhabitants. The second relates directly to the first and concerns the many differing interpretations and understandings of the Treaty’s purported aims, spirit and intent that present in the region. The third centres around two factors, namely the Treaty’s relevance to contemporary Torres Strait Islander society and both Treaty Parties’ failure to hold joint periodic, or regular, reviews of the document. The fourth arises with the Commonwealth’s failure to encourage greater and more positive levels of traditional inhabitant representation, influence and meaningful involvement within the individual bodies constituting the Treaty’s Cycle, to thereby fully capitalise upon the true potential held within these institutions.

215 A new replacement DFAT generalist officer arrived at Thursday Island to take up the position of Treaty Liaison Officer (TLO) shortly before the author’s visit in early May 2004. The majority of opinions expressed in this chapter relate to the period up to and including May 2004.
The Torres Strait Treaty

The Torres Strait Treaty was ratified and entered into force on 15 February 1985. It prescribes ‘one of the world’s most complex maritime boundary arrangements’ (Kaye 2001). The novel document was initially heralded as a milestone in the history of Australia-Papua New Guinea bilateral relations. Burmester (1982) held of its innovative approach to border delimitation: ‘the solution negotiated in the Torres Strait Treaty points to the fact that ocean issues will be settled in the most satisfactory manner once jurisdictional and conceptual approaches are abandoned and functional solutions sought’\(^{216}\). As highlighted, the bi-lateral agreement sought to clarify issues of sovereignty and jurisdiction between Australia and the newly-formed PNG nation-state (Articles 2-9; Higgins 1984). It delimits the Australia-PNG border (Articles 2, 3 & 4). It explicitly acknowledges the importance of protecting the traditional way of life and livelihood of the region’s traditional inhabitants (Article 10 (3)). As noted, it also helped to diffuse domestic political unrest arising out of objections to proposed alterations in existing border arrangements. This conciliatory outcome was achieved by designating a limited Torres Strait Protected Zone (TSPZ) that encompasses a majority of the region’s inhabited and uninhabited islands (Map 4). Within this Zone, lawful traditional activities and the free traditional cross-border movement (i.e. without a passport or visa)\(^{217}\) of named traditional Papuans and Torres Strait Islanders are explicitly recognised and protected (Articles 10, 11 & 12). In addition, the Treaty provides for the protection and preservation of the local maritime environment and indigenous flora and fauna (Articles 13 & 14). It further commits both Parties to cooperation in the conservation, management and sharing of fisheries resources, and also in the regulation of exploration and exploitation of seabed mineral resources (Articles 15, 20-2). The highly complex regime of lines tracing across the Torres Strait’s waters and seabed also attempts to accommodate, or at least not further prejudice, unresolved Islander rights and claims to the sea and its resources. It does this while simultaneously trying to satisfying a wide range of competing interests, from traditional, commercial and recreational fishing, to international shipping movements (Article 7, 23-8). The bi-lateral Treaty further anticipates and provides for potential conflicts, with the settlement of disputes through cooperation or negotiation (Article 29). The Treaty’s administrative arrangements also provide a basis of operations for serving the common good of both Torres Strait Islander and nearby coastal Papuan communities (TST 1985).

\(^{216}\) H. Burmester was formerly an officer in the Australian Attorney-General’s Department and a member of the negotiating team for the Torres Strait Treaty.

\(^{217}\) Movement of people; Although not covered by the Treaty, the two countries have developed a cooperative approach to illegal immigration by third country nationals under the *MOU on the Illegal Movement of Third Country Nations in the Torres Strait*. 


MAP 4: Australia-PNG Maritime Border within the Torres Strait region, including the Torres Strait Protected Zone (TSPZ).

Adapted from Joint Committee on Foreign Affairs and Defence, The Torres Strait Treaty: Report and Appendices, Canberra: A.G.P.S. 1979.

In the Strait’s eastern and western maritime approaches and Coral Seas Islands Territory, the Australia-PNG boundary is not exceptional. In these areas, the Fisheries Jurisdiction Line (FJL) runs parallel with the Seabed Jurisdiction Line (SJL). The latter marks the boundary between the two countries with respects to sovereignty and is roughly based on the principle of equidistance, as embodied in the median-line concept. Apart from accommodating a few islands in the Coral Sea, Louisiade Archipelago and Pocklington Reef, the single boundary line appears little different to the vast majority of bi-lateral maritime border arrangements found elsewhere around the world (MAP 1) (UNCLOS 1982; TST 1985). By contrast, in the central Torres Strait region the Treaty establishes a far complex border regime (MAP 4). Just west of 142°00 East, rather than remaining level with the SJL, the FJL turns sharply, tracking due north away from the SJL to encompass a unique so-called ‘top hat’ area. This leaves the inhabited northern Queensland islands of Boigu, Saibai and Dauan, their territorial seas, and a few uninhabited cays enclaved by PNG’s seabed. The fisheries beyond their respective
territorial seas come under Australian jurisdiction. In this region, both states have agreed to limit their territorial sea to three nautical miles (nautical leagues) from the low water mark, unless otherwise specified by the Treaty. PNG also recognises Australia’s sovereignty over a number of uninhabited Queensland islands and cays, including Aubusi, Deliverance, Kaumag, Moimi and Turnagain Islands, Kerr Islet, Black Rocks, and Turu, Pearce, East, Anchor and Bramble Cays, all of which are located inside PNG’s side of the international border (Article 2 (1a,b)). The Treaty further provides that sovereignty over these areas includes sovereignty over their territorial seas and rights to their airspace, seabeds and subsoils, thus leaving small pockets of Australian jurisdiction surrounded by PNG’s Exclusive Economic Zone (Article 2 (4)). Australia, in turn, recognises PNG sovereignty over Kawa, Mata Kawa and Kussa Islands (Article 2 (3a); TST 1985).

The Treaty also attempts to surmount several complex legal and jurisdictional issues. Despite International Court of Justice’ recognition as a legitimate maritime boundary delimitation mechanism, multiple maritime boundaries are rare. (Kaye 1995:95; Kaye [1997], cited in JSCT 1997:19). Separating sea-bed and water column jurisdictions and the resultant outcome, under which one State’s waters overlay over another State’s seabed, presents a number of challenges for the United Nations Convention on the Law of the Sea (UNCLOS 1982) with respects to accommodating individual State’s right to access their respective continental shelf and Exclusive Economic Zone (EEZ) resources. Problems presenting in establishing areas of overlapping jurisdiction can only be overcome with the proclamation of a fishing zone and introduction of management and regulatory arrangements for activities within that particular area. (Kaye 1995: 95). It is often suggested the separation of seabed and fisheries jurisdictions in Torres Strait was designed to accommodate PNG’s desire for a more equitable share of the region’s exploitable resources, while simultaneously preserving Torres Strait Islanders’ rights to enjoy fisheries surrounding their respective home islands. However, Kaye (1995) argues the FJL’s failure to enclose many of the small uninhabited islands and sand cays located at the Strait’s eastern and western ends, although the Treaty confirms these as falling under Australian jurisdiction, indicates that Islanders’ fishing rights were not of great importance in the FJL’s demarcation. As no Islander’ interests were perceived by the Commonwealth as

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218 Excluding sedentary species.

219 Territorial Waters Jurisdiction Act (United Kingdom 1878).

220 Gulf of Maine Case.

221 Another example highlighting Australia’s innovative use of multiple boundary delimitation processes is the Treaty between the Government of Australia and the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, commonly known as the Australian-Indonesia Maritime Delimitation Treaty.
being directly involved, these fisheries were allocated to PNG, thereby meeting that country’s objective of securing as many rights as far south as possible, without damaging perceived Australian national interests.²²² (Kaye 1995).

Administration of the Treaty
The Australian Government views the Treaty as a prescriptive document. It provides its administrators with an overarching, guiding administrative framework that attempts to ensure the relatively effective management of what would otherwise be a potentially ‘unmanageable’ situation. It also allows for the cooperative joint management of the entire common maritime boundary, including the area known as the Torres Strait. The Joint Declaration of Principles, signed by Prime Ministers Hawke and Wingti in 1987 and since reaffirmed by both Treaty Parties, also specifically refers to both Parties’ joint commitment to close cooperation in the shared Treaty area. Administration of the Treaty revolves around a continuous cycle of consultative Treaty meetings (Treaty Cycle) and comprises seven major elements. In addition to annual Papua New Guinea-Australia Ministerial Forums (Ministerial Councils), five major consultative mechanisms are in place to progress the Treaty’s implementation: Treaty Liaison Officers (TLOs)²²³, Torres Strait Joint Advisory Council (TSJAC); Treaty Liaison Meetings (TLMs); Traditional Inhabitants Meetings (TIMs); and the Environmental Management Committee (EMC). The latter constitutes a JAC sub-committee. A Torres Strait Protected Zone Joint Authority (PZJA), with its own independent advisory, facilitative and consultative structure, also manages all fisheries within Australia’s portion of the Protected Zone.²²⁴

DFAT maintains overall policy responsibility for the Torres Strait Treaty. By contrast, at an operational level, practical implementation of the Treaty’s terms and provisions remains the responsibility of the appropriate government line agencies. A DFAT Treaty Liaison Officer, supported by one Torres Strait Islander staff member, is permanently stationed at the Treaty

²²² Kaye suggests separating jurisdictions facilitates mutually acceptable outcomes while allowing negotiating parties to retain certain aspects of their original negotiating position (Kaye [1997], cited in JSCT 1997:19). Conversely, using the instance of overlapping jurisdictions and water columns in the Australia-Indonesia Maritime Delimitation Treaty, Herriman & Tsamenyi [1997] c.f. JSCT 1997:22) note the following: ‘the treaty establishes a regime under which Indonesia enjoys unfettered sovereign rights to explore, exploit, conserve and manage the marine living resources in the water column, while Australia cannot exercise its right to explore and exploit the seabed without giving rise to the possibility that Indonesia’s interests are harmed by such activity. For example, there is the possibility that Australian trawl fishers may not be able to take sedentary species from the seabed without removing at least some free-swimming resources from the water column as by-catch, resulting in possible Indonesian measures to either prevent certain activities or to demand financial compensation’. Under the Torres Strait Treaty, Article 23 (catch sharing of PZ commercial fisheries) and Article 15 (prohibition of mining and drilling of the seabed) currently assist in avoiding such scenarios (TST 1985).

²²³ PNG’s equivalent officer is the Border Liaison Officer (BLO).

²²⁴ The PZJA is addressed in detail in Chapter Eight.
Liaison Office at Thursday Island to assist in facilitating the document’s implementation at a local level. This includes working to uphold the Treaty’s integrity; ensuring its continuing effectiveness; promoting harmonious relations within the region; coordinating local bilateral relations with PNG; and assisting in progressing that country’s participation at various bilateral Treaty meetings. Achieving these outcomes, while attempting to pursue a coherent approach to common border management that is both consistent with the Treaty’s terms and provisions and with Australia’s wider national and foreign policy interests, requires effective coordination, cooperation and consultation with the wide variety of Commonwealth and state agencies tasked with the Treaty’s administration at an operational level. It also necessitates close liaison between Australian, Queensland, PNG and Western Province governments, PNG wards (collection of villages) and local indigenous representative organisations, for example the Island Coordinating Council (ICC), Torres Strait Regional Authority (TSRA) and various individual Island Councils. Indeed, continuous processes of consultation with local traditional inhabitant communities are regarded as an essential element in the document’s effective implementation (Article 18 TST 1985; Hallett 1998; DFAT 2004).

DFAT argues the Treaty represents ‘an unusual beast’ as it requires the agency reconciling several competing, often conflicting, objectives (Hallett 1998). The first, and typically DFAT objective, is advancing Australia’s broader national and foreign policy interests in the region. DFAT’s second objective continues to be pursued despite the progressive post-Independence weakening of the once-strong formal and informal relationships between the two countries, which results primarily from ongoing processes of intergenerational change. It revolves around preserving and nurturing an often bedevilled, yet close working, Australia-PNG bilateral relationship by acting as good neighbour in a spirit of cooperation, friendship and goodwill, as requisite under the Treaty (TST 1985; Hallett 1998; DFAT 2004). DFAT’s third, and unusually domestically-oriented objective, is maintaining a close working relationship with the State of Queensland. DFAT’s fourth major objective remains a constant challenge. It is driven by more altruistic impulses and born of the Parties’ geographic proximity, common humanity, shared news media and collective history, including shared memories of World War II and Australia’s colonial legacy in PNG. It involves ongoing processes of consultation with coastal Papuan and Islander communities in the immediate Torres Strait area and centres around attempts to ensure that the needs and aspirations of the local traditional inhabitants, including their rights to enjoyment of their traditional lifestyles, economic interests and total environment are being observed, as required by the Treaty (TST 1985; Hallett 1998; DFAT 2004).
Official Australian Government sources argue that along with cooperation, coordination and consultation, a chief feature of contemporary governance within the Torres Strait region is the Commonwealth government’s continuing commitment to the Treaty’s terms and provisions (Hallett 1998; Ruddock 2003; DFAT 2004). In early May 2004, at commencement of the interviewing process, this same official position was being promoted by DFAT and certain participants. The Torres Strait Treaty was reportedly working relatively well at an official level and also providing guidance for its administrators, in conjunction with the Attorney-General’s Department (DFAT 2004; Inter.1 & 6, May 2004). However, within the passage of weeks, it was being openly suggested that both the Treaty and its consultative structure were, in reality, little more than a ‘farce’. Meanwhile, the ineffectual Environmental Management Committee (EMC) had been relegated to the status of a ‘joke’. Indeed, apart from instances where the Treaty’s terms and provisions have been formalised in enabling Commonwealth legislation^{225}, or where necessity dictates, in practice only token official support appears to exist for adhering to the original spirit, and from many traditional inhabitants’ perspective, the original intent inherent within the Treaty’s wording. Contrary to official DFAT statements, in practice the document is not working well at all. Moreover, any incentives it may have once offered local traditional inhabitant communities have now been reportedly lost forever (TST (Miscellaneous Amendments) Act 1984; Inter.1, 4, 6, 7 & 8, May 2004). This is despite the possibility of such an occurrence being cautioned against three decades earlier, when the Sub-Committee on Territorial Boundaries’ report^{226} (1976) held that the Commonwealth should also, when implementing the Torres Strait Treaty, make a concerted effort to guarantee a concomitant observation of the document’s inherent spirit and intent at an operational level (JCFADSC 1976; Shipton 1984). That DFAT provides no replacement officer when the TLO is absent on annual leave is perhaps indicative of the low priority the Australian Government currently accord to the bi-lateral agreement in practice.

DFAT argues the successful ‘selling’ of the Treaty to the majority of the region’s traditional inhabitants continues to present the agency with its greatest challenge in the region. Yet, in an ongoing failure noted both inside and outside the agency, twenty years after the Treaty’s entry

^{225} The Torres Strait Treaty (Miscellaneous Amendments) Act 1984 enabled amendments to the following legislation:

- Wildlife Protection (Regulation of Exports and Imports) Act 1982;
- Historic Shipwrecks Act 1976;
- Migration Act 1958;
- Quarantine Act 1908;
- Quarantine Amendment Act 1999;
- Customs Tariff Act 1982; and the
- Fisheries Act 1952.

^{226} Tabled in Parliament on 9 November 1976.
into force DFAT is still not managing to effectively promote the document at a local level (Hallett 1998; DFAT 2002; Inter. 1, 6 & 7, May 2004). One participant observed that ‘waving a piece of paper’ around the Torres Strait region will not illicit cooperation from the local traditional inhabitants (Inter. 6, May 2004). Indeed, many Islanders reportedly believe that the Treaty’s terms and provisions are not only encroaching upon their traditional lifestyles but also constraining their ability to assume greater levels of control over their own affairs. Yet another participant proposes if local communities are to be convinced of the Treaty’s potential to make a positive contribution to effective border management within the region, and this includes accommodating and protecting the traditional activities and economic interests of the region’s traditional inhabitants, then Foreign Affairs will be required to properly explain the document’s terms, provisions and history to the wider general public. This includes better informing current generations of younger Islanders born in the years following the Treaty’s introduction. Only in this manner will it be possible for the unique story behind the Treaty to be subsumed into local folklore and handed down across the generations (Inter. 6 & 7, May 2004; Mye 2005).

By 2004, a succession of DFAT Treaty Liaison Officers had conducted day trips, or Treaty Awareness Visits, to promote the document to the region’s traditional inhabitants, but only to coastal areas along southern Western Province. In 2004-2005, DFAT had identified outreach to the Protected Zone as a top priority issue and plans were afoot to achieve this outcome. However, in May 2004 no official DFAT program designed to specifically promote the Treaty or get DFAT’s ‘message’ out into the wider Strait’s community was operating in the Outer Islands where there is reportedly limited intimate knowledge of many Treaty-related issues, including the numerous challenges facing its administrators. Nor were there any future plans to initiate Awareness Visits to the Inner Islands or Northern Peninsular Area (NPA), although residents in both areas also continue to live under the Treaty’s shadow. On Thursday Island, its neighbouring islands and the tip of Cape York, traditional indigenous communities reportedly have a general awareness of the Treaty’s free movement provisions. But yet again, outside official circles there is reportedly little detailed knowledge of the document or its associated challenges and problems. This is despite the Treaty’s terms and provisions continuing to impact, either directly or indirectly, on virtually every aspect of their daily lives, for example in areas related to various border-related health, quarantine and customs issues, fisheries management, or the promotion of regional economic prosperity and developing local business opportunities (Inter.1, 6 & 7, May 2004).

227 During talks with Island Council leaders in 1976 when the Sub-Committee on Territorial Boundaries visited Torres Strait, Sub-Committee members first noted this general lack of local knowledge about the Treaty and its terms and provisions (JCFADSC 1976).
Due to the Treaty’s unique terms and provisions, the document is positively interpreted as a vital, enabling document that actively promotes and protects the rights of local traditional inhabitants, including their basic human rights and freedoms (Kris 2004). No other Treaty or legal document in Australia affords similar rights and protections to Australia’s remaining population, including Aboriginal and Torres Strait Islander residents on mainland Australia. Nevertheless, many traditional inhabitants continue to express an ongoing sense of frustration and dissatisfaction with the document. This arises from several sources. The first is differing interpretations of the Treaty’s purported aims, spirit and intent. While acknowledging the document is primarily a border delimitation agreement, many Islanders believe the original spirit and intent inherent in the Treaty’s wording is to give overriding priority to the ongoing protection of the constantly evolving social, cultural and economic interests and rights of the region’s traditional inhabitants, the vast majority of whom are Torres Strait Islanders. Many Islanders therefore subsequently argue the document fails to provide direction on many areas the Australian Government classifies as domestic social policy issues, but which the region’s traditional indigenous inhabitants view as being inexplicitly intertwined with the Treaty’s terms and provisions. The aforementioned economic prosperity and business opportunities for traditional inhabitants provide examples, as does their right of access to appropriate universal health delivery services, basic infrastructure and social security, all of which are benefits and entitlements all other Australian citizens are entitled to enjoy, regardless of their territorial location within Australia. However, from many Islanders’ perspectives, the Treaty’s terms and provisions are primarily being employed to promote everybody else’s perceived rights in the area, from coastal Papuans, to commercial non-indigenous fishing fleets, to international vessels transiting the Strait’s navigational regime under the principle of transit passage228, at their expense (UNCLOS 1982, Article 37; Inter.6 & 7, May 2004).

A second source of discontent arises with the Treaty’s ongoing failure to mirror rapid changes occurring in the traditional inhabitants’ way of life and manner in which they earn their living. The document allegedly fails to account for the introduction of a cash economy and new technology, including changes in modes of transport and communications currently employed by local traditional inhabitants. Throughout the interviewing process, general agreement did appear to exist on the need to up-date the Treaty’s wording. In particular, it is suggested the term ‘traditional activities’ needs to be broadened to better reflect the more contemporary

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228 Principle of Transit Passage (and overflight): For the purposes of the 1982 United Nations Convention of the Law of the Sea (UNCLOS 1982), Torres Strait is classified as an essential international shipping channel. The main shipping channel is also subject native title sea claims. However, in respects of the sea, UNCLOS only recognises the rights of States, not indigenous rights. The granting of exclusive native title access rights in the main shipping channel and a concomitant denial of foreign vessels’ rights to innocent passage would cause Australia to breach its obligations under UNCLOS 1982.
lifestyles evident within the region today. For example, traditional inhabitants no longer row wooden canoes between islands but rather use aluminium dinghies (aka ‘tinnies’ or ‘Torres Strait utes’) equipped with outboard motors, or light aircraft and helicopters, to cater for inter-island movement in the pursuit of traditional cultural and social activities, for example while visiting kin or attending wedding ceremonies or tombstone openings. In the Treaty’s defence, the document does make provision and provide a mechanism for accommodating such evolutionary processes during the practical implementation of its terms and provisions. The Treaty clearly states any application of the term ‘traditional’ should be ‘interpreted liberally and in light of the prevailing custom’. However, such interpretations and applications were never intended to include activities of a commercial nature, for example business dealings and employment for cash money, and by extension thereby formally knowledge the introduction of a cash economy into the area, even though this first occurred over a century earlier (Article 1; DFAT 2005). Similarly, the allegedly ‘out-of-date’ Treaty also fails to reflect changes occurring in wider contemporary Australian society. For example, Article 18 continues to make reference to male liaison officers, when in practice two females officers have been appointed TLO’s (Article 18; TST 1985; Inter. 7, May 2004).

By contrast, disagreement does exist over the need to revisit the Treaty’s provisions. One participant strongly argued against any revision of the Treaty, firmly believing that Torres Strait Islanders, in particular those living immediately adjacent to PNG’s coastline, would lose their existing benefits. It was proposed a better way to implement change is gradually, over a period of time, through convention and practice (Inter. 6, May 2004). Conversely, in an argument premised on a belief both Treaty Parties would obtain gains through a review, while Islanders would not lose any pre-benefits obtained under the ‘original deal’ as a result of the Torres Strait border dispute, another participant noted that virtually every other border delimitation agreement in the world was periodically reviewed. The ‘old-fashioned’ Torres Strait vicinity is provided by PNG’s 1979 Border Agreement with Indonesia, as defined by an Australia-Indonesian border agreement, signed in 1973. Yet another by-product of the many arbitrary border delimitation decisions made by past colonial regimes in the region, this settlement attempts to provide for orderly border administration along the poorly-demarcated, mostly unmanned 750 kilometre (approx.) PNG-West Papua land frontier. Despite the heightened political sensitivities and potential volatility of the area, this bi-lateral agreement has been revised several times (1979, 1984) and was subject to a ten-year extension in 1990. It defines the PNG-Indonesia border, establishes a joint border committee

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Tombstone Openings: These ceremonies are secondary mortuary rites that take place at least one year following primary rites. They involve public unveilings of engraved tombstones blessed by a priest. Unveilings are followed with feasting and traditional dancing and singing. These occasions further heralds that the spirit of deceased has now joined other ancestors in a final resting place. They also signal the end of period of mourning, the fulfillment of obligations, and provide a strong reinforcement of Island Kastom, via the reunion of kin.

Refer Chapter Three.

One example of a revised bi-lateral border agreement in the immediate Torres Strait vicinity is provided by PNG’s 1979 Border Agreement with Indonesia, as defined by an Australia-Indonesian border agreement, signed in 1973. Yet another by-product of the many arbitrary border delimitation decisions made by past colonial regimes in the region, this settlement attempts to provide for orderly border administration along the poorly-demarcated, mostly unmanned 750 kilometre (approx.) PNG-West Papua land frontier. Despite the heightened political sensitivities and potential volatility of the area, this bi-lateral agreement has been revised several times (1979, 1984) and was subject to a ten-year extension in 1990. It defines the PNG-Indonesia border, establishes a joint border committee
Strait Treaty should not be an exception (Inter. 7, May 2004). The region’s peak indigenous representative body, the Torres Strait Regional Authority, has also previously recommended regular Treaty review (TSRA [2002], cited in SFADTRCI 2003232).

The third source of frustration arises with the Treaty’s consultative framework, as evidenced in the dissatisfaction many traditional inhabitants representatives reportedly express over their perceived lack of meaningful involvement within the Treaty Cycle. Traditional inhabitants fully understand that, at a formalised level, the Treaty is a bi-lateral agreement between two Parties, both of which are independent sovereign nation-states. Yet, in practice many view themselves as an unofficial ‘third Party’ to this arrangement, for the following reasons (Inter. 7, May 2004). The Torres Strait region forms a natural ‘buffer zone’ between the Australian and PNG mainlands for a wide range of national economic, social and strategic security purposes, including defence, customs, quarantine and immigration. To a lesser extent, it also provides a physical barrier between mainland Queensland and Indonesian territorial waters, which are situated around seventy-five kilometres due west of the Torres Strait, across the so-called ‘dog-leg’ of PNG territorial waters. For Australian, PNG, Queensland and Western Province governments, the harsh reality in the Torres Strait region is that without the ongoing support and cooperation provided by the Treaty’s unofficial ‘third Party’, that is the region’s traditional inhabitants, current international border arrangements in the area would not work. After decades of state and federal government neglect and trying to play ‘catch up’ with the rest of Australia, elected Islander representatives have since learnt to exploit this knowledge. When combined with frequent ministerial visits to the region and first hand ministerial

and provides for consultation and liaison arrangements for border crossings, both for traditional and customary purposes and for non-traditional inhabitants. It also attempts to protect the rights of groups of traditional Papuan shifting cultivators and hunter-gatherers living in and around the immediate border region, while simultaneously facilitating practical cooperation between the two Parties on several matters. These include the movement of traditional people when exercising their traditional rights to visit to tribal lands and gardens straddling the common border area, in addition to border security, quarantine and navigation, environmental protection, compensation for damages and the exchange of information on major construction and natural resource developments within the area. The agreement also provides for practical cooperation on the essentially one-way, cross-border incursions by genuine West Papuan refugees and an assortment of other border-crossers, including unauthorised Third Country Nationals and Organisasi Papua Merdeka (OPM, Free Papua Movement) separatists.

The agreement does not make provision for hot pursuit, although Indonesian military-security forces (Tentara National Indonesian Anga Katan Darat (TNI-AD), TNI Anga Katan Udara (TNI-AU), Kompassus) have reputedly ignored past PNG’ diplomatic protests to repeatedly cross the border and violate PNG’s territorial integrity and airspace in hot pursuit of OPM operatives. Such behaviour is impelled by TNI beliefs that the numerous scattered shantytowns and informal West Papuan refugee camps immediately inside PNG’s side of the frontier provide established bases and support networks OPM subversives engaging in cross-border acts of insurgency against Indonesian authorities. Until recently, PNG’s national government has continued to repeatedly resist Indonesian proposals for joint military patrols along the border to monitor incursions by Papuan separatists, ostensibly due to a lack of resources. PNG’s official government position is the matter remains an internal Indonesian security matter (Australia-Indonesia Border Agreement 1973; PNG-Indonesia Border Agreement 1979; Renton 1995; Pacific Magazine 2000; Boyd 2003; Irian News, 9 Jan. 2003; ASICJ PNG 2003).

232 TSRA Submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into Australia’s Relationship with Papua New Guinea and other Pacific Island Countries.
experiences of the ‘island way’, it is now employed to reinforce the Torres Strait region’s need to be treated differently and to also highlight the importance of continued government support for its local traditional inhabitants (Waia (2003), cited in DIMIA IPS 047/2003; Inter. 6 & 7, May 2004).

Traditional inhabitants, via their elected representatives, do actively participate at lower levels within the Treaty’s consultative arrangements. Many associated with this cycle of meetings believe the day-and-a-half long Traditional Inhabitants Meetings (TIMs) provide the only regular forum in which traditional inhabitants on both sides of the border have a ‘voice’ to discuss important regional issues and express their opinions on the way in which the border region is being administered under the Torres Strait Treaty, for example in relation to cross-border movements and fisheries management, including dugong and turtle harvesting. Traditional inhabitant representatives reportedly attend meetings, are highly vocal, and are not afraid to say what they think. None are hesitant about coming forward on important regional issues they strongly believe are directly linked to the Treaty’s spirit and original intent and stating: ‘these are the problems we’re having’, or ‘here’s another problem that needs fixing’. For example, aid money is not flowing through to ‘grass roots’ in Western Province or certain infrastructure, such as medical facilities, is required on identified Outer Islands. Where their frustration with the Treaty Cycle arises is in their genuine belief that their ‘message’, much of which the Commonwealth appears to classify as domestic policy issues, is continuously being filtered out according to the Commonwealth’s, in particular DFAT’s, wider regional agenda. Consequently, there is reportedly a common belief held locally that only information relating directly to either the preservation and maintenance of the Australia-PNG bi-lateral relationship or Australia’s current border protection agenda is being fed up through the consultative structure to Treaty Liaison Meetings (TLMs), then onwards to the Joint Advisory Committee, and finally to the Ministerial Forum (Foreign Ministers) (Inter. 7, May 2004). On a more positive note, Arthur (2000) attempts to draw similarities between informal Islander-Papuan interactions at TIMs and more the formal international relations established amongst independent Pacific Island nation-states, suggesting TIMs provide the border-dwelling Islanders with an ‘international profile’ that may be of importance to their aspirations for indigenous autonomy (Arthur 2000:12). Conversely, Sanders (2000: 12) argues a direct correlation appears to exist between Torres Strait Islanders’ support for governance institutions and the respective levels of cultural appropriateness and legitimacy those same institutions hold in the eyes of the region’s traditional inhabitants.

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233 PNG Grassroots; Ordinary village people, as opposed to the educated, pre-dominantly Port Moresby based ‘elites’ who control the distribution of power and influence within PNG society.
Hallett (1998) suggests such misconceptions over DFAT’s local role are understandable, yet unfair given the agency’s mission and Australia’s obligations under the Treaty to afford equal priority to the rights of both Australian and Papuan traditional inhabitants. Here, once again, confusion arises over a lack of understanding of the Treaty’s wording, and in this instance, the role played by Australia’s ‘frontline’ Treaty Liaison Officers which, as highlighted, entails officers engaging in processes of information exchange, consultation, facilitation, review and making recommendations to their respective governments (Article 18). By way of illustration, in facilitating practical operation of the Treaty’s provisions at a local level, TLOs are required to attend JAC meetings in an advisory capacity to the Australian delegation. TLOs must also organise, attend and report on other Treaty consultative meetings, for example TLMs and TIMs. Maintaining close liaison with Commonwealth, Queensland and local Torres Strait authorities on all matters falling immediately within their area of responsibility is another requirement as is the obligation to maintain close consultative relations with traditional Torres Strait Islander representatives (Article 18: 3(b); Article 18: 3(a)). TLOs must also convey the traditional inhabitants’ viewpoints to the Australian Government (Article 3(a)). However, in performing these tasks designated DFAT representatives are required to notify their superiors and make recommendations only on those matters impacting upon, or arising directly out of, the implementation of the Treaty’s terms and provisions, such as those relating directly to the exercise of free movement, traditional activities and customary rights, as is defined in the Treaty’s wording (Article 18; TST 1985).

DFAT is reportedly trying to supplement the Torres Strait Treaty’s consultative process by encouraging cross-border discussions between traditional inhabitant leaders outside the TIM structure (Inter.1, May 2004). One participant diplomatically suggested that over a period of two decades the Treaty’s consultative structure was ‘slowly evolving’ (Inter. 6, May 2004). Of two things, we may be certain. First, given the great diversity of perspectives and agendas found in the Torres Strait region, there will always be misunderstandings and misconceptions regarding the true nature of Treaty’s original spirit and intent (Inter.1, 6, 7 & 8, May 2004). Second, while the TSRA indicates a small increase in its recent levels of involvement within the Treaty Cycle of Meetings, neither the Commonwealth’s nor DFAT’s practices within the region currently live up to the Treaty’s original spirit, and from many Torres Strait Islanders’ perspectives, its true intent with regards to the levels of involvement of the Treaty’s unofficial ‘third Party’ (Inter. 1, 6 & 7, May 2004). Indeed, one participant suggests both the presence of traditional inhabitants at TIMs and their general level of involvement within the overall Treaty Cycle are nothing more than that of ‘token blackfellas’ (Inter. 7, May 2004).
FIGURE 3: Torres Strait Treaty’s Consultative Structure, or the ‘Treaty Cycle’.

- **Ministerial Forum**  
  (Ministerial Council)  
  \textit{Level of governance:} Supranational.

- **Torres Strait Joint Advisory Council (TSJAC)**  
  (Supported by an IDC)  
  \textit{Levels of governance:}  
  Supranational (Bi-lateral agreement)  
  National (Australia/PNG National Government);  
  State/Provincial (Queensland/Western Province);  
  Traditional Inhabitant Representatives.  
  (Local, State/Provincial, National)

- **Environmental Management Committee (EMC)**  
  (JAC Sub-Committee)  
  (Supported by an IDC)  
  \textit{Levels of governance:}  
  Supranational (Bi-lateral agreement)  
  National (C’wealth/PNG Nat. Govt);  
  State/Provincial (Qld./W.P);  
  Trad. Inhabitant Reps.

- **Treaty Liaison Meetings (TLMs)**  
  \textit{Levels of governance:}  
  Supranational (Bi-lateral agreement)  
  National (Australia/PNG), State/Provincial, Local,  
  Traditional Inhabitants Representatives.  
  (Local, State/Provincial, National)

- **Traditional Inhabitants Meeting (TIMs)**  
  \textit{Levels of governance:}  
  Supranational (Bi-lateral agreement)  
  National (TLO & BLO),  
  Traditional Inhabitants Representatives.  
  (Local, State/Provincial, National)

- **Treaty Liaison Officers**  
  \textit{Level of governance:} National

Note: The above mechanism is supplemented by the Protected Zone Joint Authority (PZJA) Consultative Structure, examined in detail in Chapter Nine.
Torres Strait Treaty’s Consultative Structure (the Treaty Cycle)
The Treaty Cycle is designed to advance the Treaty’s effective implementation. It is intended to facilitate a continuous process of consultation using a series of meetings that begins with convening a Traditional Inhabitants Meeting. This is followed by a Treaty Liaison Meeting which feeds into a subsequent Joint Advisory Council meeting. This annual Treaty Cycle culminates in the presentation of JAC reports and recommendations to both Parties’ Foreign Ministers at annual Australia-PNG Ministerial Forums (Ministerial Council) (Figure 3).

Papua New Guinea –Australia Ministerial Forums
All decisions and recommendations taken on matters relating to the PNG-Australia bilateral relationship at annual PNG-Australia Ministerial Forums, including those relating directly to the Torres Strait region must be jointly agreed upon by both countries. But these meetings would not classify as Joint Decision Systems (JDSs). Membership within the normative networks provided by Ministerial Forums is voluntary, as is continued participation by both Parties. The primary role these problem-solving structures play is in assisting in building bi-lateral trust and facilitating information sharing at the highest levels of diplomatic contact. Such positive outcomes are achieved by providing supranational-level discussion forums for the airing of issues of concern and the reaffirmation of bi-lateral relations. Unilateral action and exit out of the relationship by either Party are both feasible options. However, the cost of such actions would be high due to the possible resultant loss of trust and damage inflicted on the bi-lateral relationship. Any risk of opportunism by either Party within this forum is also being tempered by the ‘longer shadow of the future’, as both Parties’ expectations for their individual and collective futures in the South West Pacific region continue to be shaped by commonalities, for example their shared geography, history and news media outlets. Nor are Ministerial Forums typically characterised by asymmetric power relationships in which one Treaty Party dominates. Rather, the facilitative mechanisms provided by Ministerial Forums create highly discriminatory opportunity (power) structures that exhibit high problem solving capacities and in which it is possible for both Parties to exercise the ‘power of joint action’ via an aggregate pooling of the individual options held by either country. The highly cooperative modes of interactions being facilitated between the actors involved also allow both Parties to develop higher levels of trust and vulnerability during their dealings with each other. Such constructive linkages, in turn, further assist in building greater levels of social capital by improving levels of communication between senior officials from both countries,

234 Refer Chapter Two.
across a variety of issues\textsuperscript{235}. For example, discussion topics can range from policing, law and justice issues, to economic management, environment, health and public sector reform in PNG. As the Treaty is not generally regarded as a major concern in the bi-lateral relationship, matters specifically relating to Torres Strait are generally discussed towards the end of each gathering, with participants typically noting outcomes of previous JAC meetings (Scharpf 1997; DFAT 2004; DFAT-PNG Joint Statement 2003).

**Papua New Guinea – Australia Joint Advisory Council (JAC)**

Joint Advisory Councils are hosted by PNG and Australia’s Departments of Foreign Affairs and report directly to Ministerial Forums (Ministerial Council – Ministers of Foreign Affairs). Chairs of meetings alternating between Australia and PNG (Article 19 (6)). JACs’ primary purpose is to advise the respective governments on matters subject to the Torres Strait Treaty (Article 19). In exercising its functions, JAC is required to further ensure local traditional inhabitants are consulted and given full and timely opportunity to comment on matters of concern to their communities. Local traditional inhabitants’ viewpoints must also be conveyed within all JAC reports and recommendations. These, in turn, must be transmitted to Australian and PNG Foreign Ministers (Article 19 (4), (5)). While membership tends to vary, the Treaty specifies JACs shall comprise eighteen members, nine from each Party, and must include at least two national representatives, two officials representing Queensland and Western Province (Fly River Provincial) respectively, along with at least three members representing local traditional inhabitants (TST 1985). For example, Queensland representation has been provided by the Departments of Premier and Cabinet (Director, Policy Systems) and Aboriginal and Torres Strait Islander Affairs (DATSIP, Regional Manager TS). Conversely, at a Commonwealth level the Torres Strait Regional Authority represents local Torres Strait Islander inhabitants. Due to the diversity of topics addressed by JACs, an Interdepartmental Committee (IDC) consisting of Commonwealth and state officials from various line agencies, is convened by DFAT to support the JAC (Finger 1991; DP&C 2006). An Environmental Management Committee (EMC) also convenes the day prior to JAC\textsuperscript{236}.

While the Joint Advisory Council’s structure and functions are prescribed under the Treaty (Article 19), unlike the Protected Zone Joint Authority’s (PZJA) role and authority (power),

\textsuperscript{235} For example, in addition to Australia’s Foreign Minister and Attorney-General, attending Australian Ministers at the fifteenth Australia-PNG Ministerial Forum included Australia’s Ministers for Foreign Affairs and Trade, Defence, Customs and Justice, and Immigration and Multicultural and Indigenous Affairs. PNG’s delegation was represented by that country’s Prime Minister and Ministers for Foreign Affairs and Immigration, Petroleum and Energy, Finance and Treasury, Internal Security, Inter Government Relations, Defence, National Planning and Monitoring, Public Service and Justice respectively (DFAT-PNG Joint Statement 2003).

\textsuperscript{236} The Environmental Committee (EMC) is addressed in Chapter Nine.
which is legalised under the *Torres Strait Fisheries Act 1984*\(^{(237)}\) (Cth), JACs could never be categorised as formalised (legalised) institutions, as their behaviour is not being regulated by an enabling document with legal status (Article 19: (3); *TSFA 1984* (Cth)). JACs do however provide a mechanism for formal interactions between senior officials from both countries. For example, senior Northern Australian Quarantine Strategy (NAQS) and their PNG National Agricultural Quarantine and Inspection Authority (NAQIA) counterparts liaise on a formal basis via JACs. Conversely, at a ground level liaison between Torres Strait NAQS Operations Officers and Western Province-based PNG Quarantine Officers is conducted via the forum provided by Treaty Liaison Meetings (DAFF 2000). JACs also could not be classified as Joint Decision Systems (JDSs), as they provide a purely advisory and consultative mechanism (Scharpf 1997; Article 19: (3)). JACs do not have, nor can assume, responsibilities for management or administration of the Torres Strait region as these responsibilities, within the respective jurisdiction of each Party, rest with the relevant national, state, provincial and local authorities (Article 19: (3)). JACs do however provide a facilitating mechanism for reviewing the Treaty’s implementation and seeking positive outcomes to the many challenges that arise at an operational level and are unable to be resolved by the Treaty (Border) Liaison Officers. JACs also provide a basic skeletal network structure with the potential to assist in building greater levels of social capital and information sharing within the region. JACs also provide opportunity structures for problem solving, both for administrators and the local traditional inhabitants. The TSRA also notes the JAC’s potential as a forum for developing ideas relating to the Treaty’s management, suggesting the Advisory Council should meet more frequently (TSRA 2002-03). JAC meetings are held alternatively in PNG and Australia, but historically this occurs only when necessary, and at the request of either Party (Article 19 (7); TST 1985).

**Treaty Liaison Meetings (TLMs)**

Treaty Liaison Meetings (TLMs) are chaired by the Australian Treaty Liaison Officer (TLO) and PNG Border Liaison Officer (BLO) and attended by Commonwealth, state and local government agencies directly involved in the Treaty’s implementation, together with a PNG delegation. For example, at the TLM held at Thursday Island in 2000 PNG was represented by fifteen officials from Daru and Port Moresby, with Australian officials attending on behalf of counter government agencies based at Thursday Island, Cairns and Port Moresby. As with JACs, TLMs are intended to be held alternatively in Australia and PNG. TLMs’ main purpose is to attend to matters raised at Traditional Inhabitants Meetings (TIMs), along with other Treaty-related matters. Both country’s officials typically employ this mechanism to reaffirm their commitment to strengthening bi-lateral cooperation in managing the border region, for

\(^{(237)}\) Refer Chapter Eight.
example in areas relating to cross border crime, fisheries management, improving quarantine surveillance and administering the free movement of traditional inhabitants under Article 11. As with Ministerial Forums and JACs, the forums provided under TLMs would also clearly qualify as normative negotiation networks, as they assist in both building social capital and providing opportunity structures for problem solving by bringing together all those locally-based officials tasked with the cooperative and coordinated management of the wider Torres Strait region (Scharpf 1997; TST 1985; DFAT 2004).

**Traditional Inhabitants Meetings (TIMs)**

TIM’s were formed as part of the Treaty’s liaison arrangements to promote cross-border communication and cooperation between the region’s traditional inhabitants. TIMs are also intended to ensure the Treaty’s consultative requirements relating to traditional inhabitants are satisfied (Article 18:2(a), 3(a)+(b)). TIMs are held annually. Delegates typically including five each Torres Strait Island and PNG Treaty Village Chairs. Officially viewed as being integral to the Treaty’s administration, TIMs were created to provide a forum within which traditional inhabitants from both countries could discuss issues and activities occurring within the region and also report their concerns to government, via their respective Treaty or Border Liaison Officers. However, while TIMs may offer a great opportunity for fostering the growth of local networks and building social capital, historically the promise held within this institution, as with the remainder of the consultative structure, has not been utilised to its full extent. Indeed, neither the norms, values and traditions that promote cooperation and are inherent within all the Treaty’s consultative mechanisms, nor the networks, relationships and institutions that the same overall consultative structure potentially provides for bringing together all the various actors involved to jointly solve their common problems, are being properly capitalised upon.

**Conclusions**

The Torres Strait Treaty was initially proclaimed as an original solution to a complex border delimitation problem. Nevertheless, despite its admirable sentiments and novel approach to border demarcation, some twenty years after its introduction, a great deal of the document’s true potential is yet to be fully realised upon. Despite daily living under the Treaty’s shadow, the vast majority of local traditional inhabitants have an extremely limited knowledge and understanding of the document’s history, purposes and principles. Ongoing confusion and misunderstandings over the document’s true meaning, spirit and intent appear to abound. An absence of review also translates into the document’s ongoing failure to keep pace with contemporary Torres Strait Islanders’ lifestyles. As the institution tasked with overall policy
responsibility for the Treaty’s administration such outcomes are, in large part, the cumulative result of DFAT’s ongoing failure to effectively promote the document within the wider Torres Strait region.

The Treaty Cycle of Meetings does however provide a mechanism for facilitating positive modes of interactions across and between the four levels of governance evident within its framework. It also holds great potential for building increased levels of social capital within the region. And there is strong evidence to suggest that the nature of the interactive facilitative and advisory processes and linkage structures presenting within the Cycle are primarily characterised by relationships based on ongoing processes of cooperation and consultation. This is particularly evident between all the governmental actors involved. However, when it comes to facilitating greater levels of genuine involvement by the region’s traditional inhabitants in the individual institutions constituting the Treaty Cycle, contemporary practices within the Torres Strait region generally fail to reflect the spirit and intent contained in the Treaty’s wording. The Treaty’s consultative mechanisms are not being properly exploited, nor are the local traditional inhabitants and their chosen representative fully participating within the consultative structure in a constructive or meaningful way. Moreover, the general lack of opportunities within that advisory framework for any form of constructive local traditional inhabitant’ participation and contribution to the formulation of government policies pertaining to the border’s oversight further highlights a need for real, as opposed to token, indigenous involvement within the Cycle. One participant proposes greater levels of traditional inhabitant involvement across all levels of governance contained within the structure might enable governments and the local traditional inhabitant communities to better collectively regulate and manage activities covered under the Treaty. A need also reportedly exists for DFAT to better proactively promote the document in order to facilitate greater levels of understanding about its purposes and principles, for the benefit of all those government administrators, elected representatives, local traditional and non-traditional inhabitants, and members of the various sectoral interests, who must daily live and work under the shadow of the Torres Strait Treaty. The nature of the interactive processes and linkage structures occurring across and between the multiple levels of governance presenting within the individual institutions constituting the Treaty Cycle is illustrated in Figure 4, on the following page.
**FIGURE 4:** Interactive processes occurring within the Treaty’s Consultative Structure.

<table>
<thead>
<tr>
<th>Institutions</th>
<th>Levels of Governance</th>
<th>Actors</th>
<th>JDSs - Networks</th>
<th>Linkage Structures</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ministerial Forum (Council)</strong></td>
<td>Supranational</td>
<td>Aus. &amp; PNG Foreign Ministers</td>
<td>Normative Negotiation Network</td>
<td>Cooperative Consultative Facilitative</td>
</tr>
<tr>
<td><strong>T.S. Joint Advisory Council (TSJAC)</strong></td>
<td>Supranational (Treaty) National State/Provincial</td>
<td>Aus. (9) &amp; PNG (9) members Traditional Inhabitants Representatives</td>
<td>Normative Negotiation Network</td>
<td>Cooperative Consultative Advisory Facilitative</td>
</tr>
<tr>
<td><strong>Environmental Management Committee (EMC)</strong></td>
<td>Supranational (Treaty) National State/Provincial</td>
<td>Members drawn from JAC</td>
<td>Normative Negotiation Network</td>
<td>Cooperative Consultative Advisory Facilitative</td>
</tr>
<tr>
<td><strong>Treaty Liaison/Border Control Officers</strong></td>
<td>Supranational (Treaty) National</td>
<td>Aus. Treaty Liaison Officer PNG Border Control Officer</td>
<td>Normative Negotiation Network</td>
<td>Cooperative Consultative Advisory Facilitative</td>
</tr>
<tr>
<td><strong>Treaty Liaison Meeting (TLM)</strong></td>
<td>Supranational (Treaty) National State/Provincial Local</td>
<td>TLO &amp; BLO Aus. Govt. &amp; PNG delegations Traditional Inhabitants Reps.</td>
<td>Normative Negotiation Network</td>
<td>Cooperative Consultative Advisory Facilitative</td>
</tr>
<tr>
<td><strong>Traditional Inhabitants Meeting (TIM)</strong></td>
<td>Supranational (Treaty) National (TLO/BLO) Local</td>
<td>TLO &amp; BLO Traditional Inhabitants Reps. (Delegates inc. 5 T.S. Island Chairs &amp; 5 Papuan Treaty Village Chairs).</td>
<td>Normative Negotiation Network</td>
<td>Cooperative Consultative Advisory Facilitative</td>
</tr>
</tbody>
</table>
Chapter Six

On ‘Community’

*To cope with the outside world without destroying the understandings their common life requires – this is the underlying dilemma facing the community of political-administrators.*


The Torres Strait Treaty obliges both Parties to adopt a cooperative approach in managing the Australia-Papua New Guinea border. When combined with other influencing factors, such as the region’s uniqueness and remoteness and the Commonwealth’s whole-of-government approach to border management, it has the positive effect of drawing all the actors involved in the daily administration and implementation of its terms and provisions together in a spirit of mutual cooperation and support. The effect, in turn, is to create a distinctive ‘community’ of locally-based Australian frontier-governance political-administrators. Heclo and Wildavsky (1981:lxv) describe community as a set of informal interactions occurring within a defined parameter: ‘Community refers to the personal relationships between major political and administrative actors - sometimes in conflict, often in agreement, but always in touch and operating within a shared framework’. A similar observation may be applied to the diverse sets of dynamics occurring within the overarching governance framework found in the Torres Strait region. Although somewhat peripheral to its internal dynamics, due to a number of Commonwealth-state partnership arrangements several state government agencies, such as Queensland Police Service (QPS) and Queensland’s Department of Primary Industries and Fisheries (DPI&F), may also be included as associate members of this quintessentially Commonwealth community of professional middle-level managers and their agency staff. This distinctive administrative complex, in turn, constitutes an integral part of a much broader regional Torres Strait community network within which it is situated and highly reliant upon. This chapter seeks to establish what, if anything, is unusual about this remote gathering of political-administrators and their wider regional and cross-border community networks.

Within Torres Strait, the Commonwealth system is cooperative. It adopts a cohesive whole-of-government approach to border management. This approach attempts to facilitate effective coordination and implementation of various government policy decisions using processes of
consultation and partnership development\textsuperscript{238}. These procedures, in turn, link the relevant Commonwealth and state government agencies involved across organisational boundaries. They also link these institutions into a much wider networked system of cooperative and integrated cross-jurisdictional interactions and partnership arrangements that are spread across multi-levels of governance, thus minimising the risk of emphasising independently operating silos (RPMCTF 1999; Inter. 2 May 2004; APSC 2004).

By way of illustration, under the formal powers and authority granted under section 51 (ix) of the Australian Constitution, in addition to the \textit{Quarantine Act 1980} (Cth), Quarantine Regulations 2000, and associated legislation, Australian Quarantine Inspection Service’s (AQIS’s) overriding obligation is to protect and preserve Australia’s natural environment, agriculture, and plant, animal and human health, against incursion by exotic diseases and pests. In executing its tasks, AQIS achieves benefits in efficiency by proactively engaging in cooperative and coordinated multi-level governance (MLG) interactions with various local, state, national and supranational institutions operating within the wider regional area. For example, AQIS engages in high levels of inter-agency cooperation and enjoys a good working relationship with all Commonwealth government agencies within its immediate government circle, in particular its most dependable allies, Australian Customs Service (ACS) and the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA). During fiscal year 2002-03, AQIS also utilised ACS Coastwatch helicopters for 300 hours of monitoring activities. A Memorandum of Understanding (MOU) between AQIS and DIMIA further sets out a cooperative reciprocal working arrangement between the two Commonwealth agencies under which DIMIA’ Movement Monitoring Officers (MMOs) and authorised Quarantine officers cover for each other during periods of leave, training or other absences. AQIS’s wider regional networks also link the agency into other levels of governance within the area, via consultative arrangements such as the Torres Strait Treaty consultative meetings and the Northern Australia Quarantine Strategy (NAQS) Stakeholder Consultative Committee. At state and local levels, AQIS consults and works closely with the Island Coordinating Council (ICC) and individual Island Councils. Ongoing quarantine surveillance and inspection is also facilitated through the partnership approach established between AQIS Torres Strait, local indigenous plant Bio-security officers, Queensland Department of Primary Industries’ plant and animal Bio-security officers, and the various local Islander communities engaged in the

\textsuperscript{238} \textit{Whole-of-government}: ‘Whole-of-government denoted public servant agencies working across portfolio boundaries to achieve a shared goal and integrated government response to particular issues. Approaches can be formal and informal. They can focus on policy development, program management and service delivery’. Other names for this approach are joined-up government, connected government, policy coherence, networked government and horizontal management (APSC 2006).
Northwatch program\textsuperscript{239}. Meanwhile, at a supranational level, continuing cooperative joint activities between AQIS and the PNG National Agriculture and Quarantine Inspection Authority (NAQIA), for example the joint surveys and animal health sentinel herd program conducted in PNG, also assist in risk-minimisation of major quarantine concerns in the Torres Strait and nearby coastal PNG areas \textsuperscript{240}. Australia, Indonesia and PNG are also members of a Tripartite Committee on Agricultural Health and Quarantine (TCHAQ)\textsuperscript{241} (Waia 2002a; ATH 2002; ACS 2003, 2004; Inter. 8, May 2004; Palaszczuk 2005).

Within any given policy area, the nature of interactions across and between all four levels of governance in Torres Strait is generally very good (Inter. 8, May 2004). Due to the presence of multiple jurisdictions and accompanying overlap of legislative and administrative regimes, individual enforcement officers from the various agencies could probably lay as many pieces of legislation on one individual(s) or vessel(s) as they wished, depending on how heavy they chose to go. They could also potentially tie up a lot of scare resources. Consequently, both the enforcement of Commonwealth and state legislation and effective implementation of official government policies at a ground level within the region rely, in a large part, on the common sense and well-formed professional judgements of the individual officials involved\textsuperscript{242}. This is exercised on an individual case-by-case basis (ANAO 2000; Inter. 2, May 2004). A great deal of it also work on the basis of the close personal working relationships and extended network linkage structures established amongst government officials working within particular policy arenas (ANAO 2000; Inter.1, 2, 3 & 8, May 2005).

When most incoming Commonwealth administrators first transfer onto Thursday Island, it is normally with little background information on the numerous jurisdictional, economic, social, cultural, political and strategic defence issues associated with the region. Such factors may include a working knowledge of any, or all, of the following: current border arrangements;

\textsuperscript{239} Northwatch: This Queensland Government bio-security initiative was established in 1998 to enhance Queensland’s preparedness to respond to emergent exotic pests and disease threats in its north. Northwatch conducts early warning surveys and inspections throughout Torres Strait and the Northern Peninsular Area and is based on four pillars: preparedness; surveillance; response; and community awareness (Palaszczuk 2005).

\textsuperscript{240} Australia and PNG have signed a joint Memorandum of Understanding on Collaborative Animal and Plant Health and Quarantine Activities.

\textsuperscript{241} Tripartite Committee on Agricultural Health and Quarantine (TCHAQ) is constituted of Australia, Indonesia and PNG membership. TCHAQ’s objectives are to notify member countries of exotic pest/disease outbreaks, provide assistance with training of quarantine personnel, and provide technical assistance in the event of a pest outbreak. Testing for an agreed target list of bio-security hazards present in Indonesia are also conducted in Australian laboratories or by NAQS scientists (AFFA Submission n.d.).

\textsuperscript{242} For example, masters on foreign fishing vessels arrested by Customs may have committed numerous breaches against various Australian laws, yet only one lot of charges is normally laid, typically for illegal fishing within Australian waters (Inter. 2 & 4, May 2004).
traditional inhabitants’ mores; native title determinations and regional autonomy issues; the fluid, often volatile, nature of local politics; or the current situation in neighbouring PNG and West Papua. As generalists, these newly-arriving middle-level managers are expected to hit the ground running and immediately function in a challenging governance environment that all levels of government have, for many years, openly acknowledged is incredibly complex and extremely politically sensitive. If an administrator transferred into the region and did not immediately adapt to the system and fit into this remote community of frontier-governance administrators, then they would not be able to operate within the overall administrative unit. And there have been instances where people have come and not fitted in. Moreover, the resulting damage inflicted upon an individual agency’s standing and trustworthiness within the Commonwealth and wider Torres Strait community networks can often take subsequent replacement officers years to repair (Inter. 1, 2 & 3, May 2004). On newly arriving bureaucrats, it is observed: ‘We mould them and shape them. If they don’t fit in, they don’t last long’ (Inter. 2, May 2004).

Such pragmatism may outwardly appear harsh, but is essential to the efficient functioning of the overall administrative unit and its general internal working relationships, both of which are based on a spirit of mutual cooperation and support between the individual agencies and officers involved. Both are also based on a shared organisational culture that, rather than ‘turf protection’, supports a whole-of-government approach in which good communication and relationship building practices are viewed as prerequisite. What limited contracting-out of government services occurs within the region is extremely expensive. Hence, all community members are heavily reliant on each other. They all help each other. They often have to use each others’ resources. At times, they have to cooperatively pool resources. They also need to know that at all times, whatever the set of circumstances, they can rely on each other for firm professional and personal support in executing their professional duties. Without this level of backing and cooperation, the whole system simply would not work. Mutual trust and respect, both for members of their own immediate governmental community and their much wider overarching regional Torres Strait community networks, is this community’s guiding maxim. And it is prerequisite for being accepted into the predominately Commonwealth community of political-administrators gathered together on the foreshore at remote Thursday Island (Inter. 1, 2, 3 & 8, May 2004).

While individual Commonwealth line agencies take formal instruction directly from Canberra and feed a continuous stream of information and intelligence back to their head offices in return, a generally good informal atmosphere is also created at Thursday Island to facilitate a
cross-agency exchange of information and intelligence. Peters and Pierre (2004: 89) similarly argue most governmental relations are characterised by ‘two concurrent types of exchange; a formal, constitutionally defined exchange and an informal, contextually defined exchange’. Both are required for governmental relations to operate efficiently. Informal exchanges, for example, help facilitate explanations of formal departmental communications and assist lower level institutions, such as regional offices, to implement ‘top down’ decisions made by institutions higher up within their hierarchy, for example Canberra-based central agencies. Similarly, in order to guide future policies, higher level institutions remain reliant on feedback about how effectively their policies are working at an implementation level. Hence, in addition to hierarchical formal exchanges, the mutual need also exists for some form of cooperative informal MLG exchange between actors and institutions at an operational level. Should the need arise for individual Commonwealth and state agencies to protect their own interest positions, each institution always has the option of immediately retreating from multi-level governance interactions back into a federal system and the constitutional definition of their own institutional capacity. As Peters and Pierre argue (2004:89): ‘What makes informal exchanges efficient is that they are embedded in regulatory frameworks’.

When carrying out daily operations, individual Commonwealth agencies generally look first for support from individuals and agencies within their immediate Commonwealth community. Whether down the road, across the street, or in an adjacent office in the same building, these frontier-governance administrators are talking all the time. Issues are being discussed as they unfold. Generally, there is no major issue going on with one agency that the others are not informed about. All agencies also reportedly enjoy a good understanding of each other’s objectives. Hence, each agency is able to typically anticipate the other agencies’ reactions to issues or events as they unfold, and can therefore automatically adapt their own agency’s behaviour to fit in with the other agencies’ organisational goals. Nor are they afraid to ask for help if required. Each recognises the incredible importance of good liaison between individual community members. All are beneficiaries of its outcomes. Each also recognises that to perform at their individual best, they must develop and maintain a successful cohesive working relationship with the rest of their community. On summarising the nature of working and personal relationships operating within this predominately Commonwealth community, one participant observed: ‘The support base here is fantastic’ (Inter. 1, 3 & 8, May 2004).

Nevertheless, levels of inter-agency cooperation may also vary at times, depending on the specifics. The way in which the various agencies, organizations and sectoral interests involved work well, or not so well together also depends upon how well individual actor’s broader interests and the many differing agendas within their small community converge.
Much inter-agency interaction is also personality dependent. One participant suggests one area reportedly offering much room for improvement in inter-agency relations is the requirement to provide longer tenure periods for Commonwealth middle-managers. Such an initiative, it is argued, will allow for greater levels of consistency in inter-agency cooperation and coordination. It would also help build greater levels of social capital and trustworthiness of Commonwealth and state government agencies within the broader Torres Strait community (Inter. 4 & 8, May 2004). In the same vein, with Australia’s current national security focus now requiring a forging of closer links between federal agencies and across all levels of governance, it is also doubtful that individual Commonwealth agencies operating within the Torres Strait region could be fully effective without the ongoing support and cooperation being provided by other Commonwealth and state government agencies and their much wider regional and cross-border community networks, particularly in areas relating to intelligence gathering (DoD 2003).

A major challenge for agency administrators arises in attempting to strike an accommodation between government policy and meeting the needs and demands of their own immediate real-world community. Heclo and Wildavsky (1981:lxv) highlight this fundamental predicament facing political-administrators everywhere:

Community is the cohesive and orienting bond underlying any particular issue. Policy is governmental action directed toward and affecting some end outside itself. There is no escaping the tension between policy and community, between adapting actions and maintaining relationships, between decision and cohesion, between governing now and preserving the possibility of governing later. To cope with the world outside without destroying the understandings their common life requires – this is the underlying dilemma facing the community of political administrators (Heclo & Wildavsky 1981:lxv).

Overcoming tensions between effectively implementing official government policy, versus maintaining cohesion and support within their own immediate and wider Torres Strait community and cross-border networks, means that individual government agencies must be informative and employ effective consultation processes. Most importantly, they must always be aware of and follow wider Torres Strait community etiquette. A good communications strategy and strong focus on effective public relations is also prerequisite in attempting to successfully translate their individual agency’s or organisation’s message out into the wider community (Inter. 8, May 2004). Within Torres Strait, governmental actors employ a variety of strategies to achieve their individual and organisational objectives. When managing the demands and political imperatives of the ‘outside world’, without damaging those implicit
and explicit understandings and special relationships that have been built up over the years by the various agencies and organisations involved and are essential to the smooth management of everyday political-administrative life in the region, agency staff have learned to adapt and use discretion. General strategies and the manner in which individual actors deal with other agencies and organisations fluctuate and depend on several influencing factors, in particular the personalities, status and agendas of the players (stakeholders) involved. Many differing agendas operate in wider Torres Strait and the behaviour of individual actors may at any time be co-operative, coercive, aggressive, submissive or in some mix of these qualities, depending on individual sets of circumstances and motivating factors. It is a highly interactive process.

For middle-level managers, constantly turning to their own department for assistance with minor problems and developing a reputation for bothering higher authorities with disputes that could have been settled below is also most unhelpful for individual bureaucratic careers. Fortunately, for most Commonwealth managers working in the Torres Strait region, the levels of senior management they report directly to are reportedly generally very supportive and understanding. Most are also accustomed to the Torres Strait region’s uniqueness, and its need to be treated differently (Inter. 3 & 8, May 2004).

When attempting to promote broad new initiatives, these middle-level managers employ a number of stratagems. Garnering the support of one’s own agency staff is best achieved by demonstrating the task involved is their agency’s responsibility and authority. Managers need also demonstrate to staff that their agency either has, or can acquire, the necessary resources to successfully implement any initiative. Following the proper channels of command coming from higher up within your Department, while simultaneously letting your agency staff help plan the details of any initiative is also of great assistance. Obtaining support from community leaders and other influential players and institutions within the wider Torres Strait community is best achieved by relating your own initiatives to their own individual agendas. This is best accomplished by showing them how doing whatever you want done will also help them to accomplish other things they want to do. Getting people within their own ranks and individual agencies and organisations to present initiatives up to them is also helpful, as is agreeing to allow them to be involved in the development of specifics, at some future stage. Indeed, it is impossible to overstate the importance of agency managers ensuring that all indigenous representative organisations presenting at local, state and national levels of governance243 within the region are always involved in any broad new initiatives that Commonwealth or state government agencies might wish to promote. Without their advice and assistance, little will be successfully accomplished (Inter. 1, 6 & 8, May 2004).

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243 Island Councils (local level); Island Coordinating Council (ICC) (state level); Torres Strait Regional Authority (national level).
Among these Commonwealth frontier governance officers, general agreement appears to exist on a several matters. First, the two most rewarding and enjoyable elements of their working lives in Torres Strait are the major contribution they make to maintaining Australia’s border integrity in the area and the close working relationships they enjoy with other government agencies and the region’s traditional inhabitants. All take great professional pride in the first. All receive large amounts of personal satisfaction from the latter. Many believe themselves fortunate to be provided with the opportunity to develop close working relationships with members of the local indigenous communities. In particular, all senior Commonwealth staff demonstrate high levels of respect and admiration for their Torres Strait Islander staff and their professional capabilities. Second, most officers reportedly experience generally good relations with their Canberra-based head offices. In particular, Commonwealth law enforcement and military agencies reportedly receive excellent support and backing from their Ministers. Nevertheless, Australian law enforcement agencies operating in Torres Strait also reportedly face the major problem encountered by law enforcement agencies everywhere, namely the more work they do, the more work they have to do. Third, no requirement appears to exist within the area for the introduction of a single autonomous agency responsible for civil coastal surveillance, as espoused by Hudson in 1998. It was generally felt Coastwatch already serves this function well. Nevertheless, it was suggested that a paramilitary or constabulary unit might help eliminate much duplication and overlap of legislation and further assist with administrating legislation within the area (Inter. 2, May 2005). Fourth, most agencies are reportedly rarely availed of the opportunity to step back and take a comprehensive overview of their own agency’s management arrangements and performance. Management, staff and resources are reportedly constantly being caught up in a never-ending exhaustive cycle of attempting to provide basic border management and monitoring services, attending series of consultative meetings, identifying emerging risks, and gathering information and intelligence, while simultaneously attempting to keep the wider Torres Strait community informed of their individual agency’s activities. Fifth, most agencies generally found it difficult to find time to visit the Outer Island communities as often as they would like. Sixth, most agencies suffer from an evident lack of resources. ACS and Customs Coastwatch appear to be the exceptions. Nevertheless, Customs Torres Strait reportedly suffers a shortage of funding for staff training (JCPAA 2001; McIntyre 2003; Inter.1, 2, 3, 4 & 8, May 2004).

On a more negative note, several participants reported the Torres Strait Treaty is not working effectively. Nor have there been any major or noticeable reforms in the overarching Torres Strait governance structure in recent years. Despite Indonesia’s close proximity, professional
working relationships and intelligence exchange between Australian and PNG authorities and their Indonesian counterparts along West Papua’s south-western coastline (Merauke Regency) are virtually nonexistent. Moreover, while informational sessions on the roles and functions of Commonwealth agencies and organisations, such as DFAT, ACS, DIMIA and the AFP, are conducted in northern Torres Strait island communities with traditional Papuan visitors in attendance, most administrators believe many people in the wider community still lack a good understanding of the true nature and significance of the border protection roles they perform on behalf of all Australians, including local Torres Strait Islander communities (Inter. 1, 2, 4, 8 & 10, May 2004).

The Torres Strait region is also as a highly politicised environment with distinctive cultural and political sensitivities. It is difficult to find any area untouched by local politics, including religion. Nor can one separate politics from administration. The vast majority of government staff employed in the thirty-five (approx.) public service agencies operating in Torres Strait, including those involved in border management and Treaty implementation, are traditional Torres Strait Islanders. However, rather than the politically-neutral Weberian concept of bureaucracy posited under Weber’s (1964) rational-administrative model, Torres Strait Islander public servants generally adopt a more holistic approach to public sector management. It is observed of Torres Strait Islander Commonwealth government employees in particular: ‘The Strait is their life. It’s not just something they come in and administer. It’s something they live everyday of the week. It’s their life. It’s who they are…. the sea, the land, kastom’ (Inter. 2, May 2004). Indeed, Commonwealth government agencies rely heavily on the local traditional knowledge held by their Islander staff and their extended Islander communities. For example, in addition to its central Thursday Island office, AQIS maintains a presence on most inhabited islands through its network of twenty-four (approx.) Islander Quarantine officers permanently stationed at seventeen office locations throughout the Strait244. As with their Customs and Immigration counterparts, AQIS-TS operational staff are long standing members of their local communities and enjoy close working relationships with their respective Island Councils. Individual Commonwealth officers are uniquely positioned on their home island in terms of their response capabilities. Each also plays an intelligence monitoring role, acting as conduits for channelling a flow of quarantine, customs, or immigration related information in and out of their local communities. These officers also often provide Australia’s first line of defence against the introduction of unwanted pests, diseases, goods, cargo and human traffic (AQIS 2003b, 2004; Inter. 3 & 8 May 2004).

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244 Locations include Badu, Boigu, Dauan, Erub (Darnley), Mabuiag, Masig (Yorke), Mer (Murray), Moa, Poruma (Coconut), Saibai, Ugar (Stephen), Warraber (Sue), Iama (Yam).
As noted, a variety of forums and governance committees are established within Torres Strait to collectively regulate and manage cross-border activities under the Torres Strait Treaty, for example in areas relating to quarantine, customs, health care service provision, fisheries and policing. The actual processes by which decisions are made at a ground level generally result from the cumulative input of a majority of stakeholders involved. Key actors consistently playing major roles within decision-making processes are federal and state government agencies, and to a lesser extent indigenous representative agencies, such as TSRA, ICC, and the Island Councils. Processes of consultation and negotiation between representatives from these institutions are typically conducted within formal structures or informally at ad hoc meetings (Inter. 8, May 2004). When serious tension does arise within the wider Torres Strait community, it generally emerges out of an ongoing underlying latent discontent that is driven by factors such as native title issues, jealousy, personality clashes, or a lack of consultation with the local indigenous communities on important issues, or perhaps an absence of respect and understanding for the local traditional inhabitants’ culture and way of life, including the concept of *Ailan Kastom* (Inter. 8, May 2004). Tensions also arise over issues of transparency, regulation and enforcement. For example, the region’s traditional inhabitants generally view Commonwealth and state law enforcement agencies as being authoritative in nature. By contrast, regulatory agencies typically focus more on cooperation and attempt to take into account local cultural perspectives when designing policies pertaining to border-related issues. Their decision-making processes are normally highly transparent to the public and other agencies and organisations. Indigenous representative organisations, such as TSRA and ICC, are similarly seen by many locals as being particularly effective, due to their high levels of consultation, democratic practices, personalities, general attitudes, personal values and respect, along with their cultural awareness and general understanding of Torres Strait Islander society. These organisations are also reportedly generally viewed by the public as being cooperative, accountable, highly transparent and non-authoritative. Rather than focus on protecting Australian territorial sovereignty and the national interest, these institutions give overriding primacy to important regional issues, such as autonomy and local economic and infrastructure development. While these may not be high priority issues for Canberra-based decision-makers, these Islander goals are generally shared by others members of the wider Torres Strait community, including a majority of locally-based senior staff in Commonwealth government agencies (Inter.1, 2, 3, 4 & 8 May, 2004).

A perceived ‘overload of governance’ and Commonwealth and state government employment practices also exacerbate wider community tensions. While few rural communities in regional Australia might complain about excess public services, ongoing protest can be heard about the numbers of government agencies represented in Torres Shire (Inter. 7 & 8, May 2004). As the
region’s major employer group, government agencies provide the Torres Shire’s economic lifeblood. Any reduction in numbers of government institutions at Thursday Island would translate into even local higher unemployment levels and possible economic hardship for all the parties concerned. Nevertheless, in an often heated debate centred upon administration by bureaucracy versus building local capacity, much criticism is directed at the alleged weight of governance and the way in which government organisations are being administered within the region. While most government staff are traditional Islanders, the bulk of senior management positions in government agencies are held by ‘outsiders’. For example, six of the seven most senior positions within Commonwealth government agencies permanently based at Thursday Island in 2004 were held by non-Islanders. From one perspective, it is argued bureaucrats tasked with managing this sensitive border region frequently encounter highly complex and complicated challenges. Successful administration of government agencies therefore requires people both highly qualified and widely experienced within their chosen fields. It is not in Australia’s national interests to have unqualified or inexperienced people holding these key positions. Moreover, given the Strait’s relatively small population, only a limited number of persons may hold the prerequisite qualifications and necessary levels of experience required to hold down such middle-level management positions. The reticence of suitably qualified Islanders to take demotions and leave well-paid positions on mainland Australia and return permanently to Torres Strait provides another factor restricting the employment of traditional inhabitants within senior positions. In addition, the majority of these positions are restricted tenure, mostly for two years with an additional one to two year option. This helps prevent ‘empire building’. Such conditions may however prove unattractive to suitably qualified and experienced local traditional inhabitants wishing to remain permanently in Torres Strait (Inter. 3, 6 & 8, May 2004).

Some actors attempt to exploit this emotive issue for political gain. The former Australian Democrats Candidate for Leichhardt, for example, alleged the Commonwealth’s regular practice of transferring personnel into the region to ‘take up scarce local jobs’ and monitor a border on which they initially have little, if any, knowledge is ‘bad financial management’, given the existing pool of local skills (Reid 2004). Others argue it may well not be in the self-interests of either indigenous or non-indigenous public servants who transfer in, or already hold these positions, to ‘help people up’ within their organisations at a local level. Still others argue that while a small private sector exists locally, it’s in the Commonwealth and state government’s wider regional interests to keep the region’s inhabitants dependent on welfare and government handouts, rather than actively encourage private industry and economic development within this sensitive border environment, for example in the fisheries (Inter.7,
May 2004). It is also argued that with most islands experiencing severe housing shortages, there is little point in government agencies employing outsiders, whether Islander or non-Islander, unless they enjoy strong local family connections that are willing to assist in both providing accommodation and promoting community support for their work (Inter. 6, May 2004). To avoid further tension, one participant recommends more transparent, accountable merit selection processes be used when employing and promoting government employees from within individual government agencies. It is further proposed that government policies and programs need to better take into account redistributive questions, such as promoting the economic and social welfare of the local traditional inhabitants. AQIS-TS operational staff, for example, reflect AQIS’s affirmative policy of hiring locally born and raised indigenous staff who bring to their organisation a good understanding of and high levels of familiarity with the local culture, environment, protocols and traditional inhabitant communities. In May 2004, AQIS was the only permanently-based Australian Government agency employing a local traditional inhabitant in its most senior position (Inter. 7 & 8, May 2004).

The general lack of awareness by outsiders regarding the local traditional inhabitants’ lifestyle priorities and the overriding importance Islander society places on family and community obligations and responsibilities also creates tension within the wider Torres Strait community. Tensions also arise over the lack of cross-cultural contact between Islanders and many non-indigenous government employees outside normal working hours. This author, for example, had not expected to find a permanently revolving ‘expatriate’ community of transient remote location workers and their extended families based at Thursday Island. One participant suggests that on arrival in the region, many workers are not making enough effort to integrate into the local community. Most immediately bond instead into the temporary security of their own transient mainlander community. As short term guests in the Torres Strait region, many appear to be generally unaware there is a local expectation, both inside and outside working hours, that they will demonstrate a sensitivity towards appropriate local protocols and initiate any first effort at cross-cultural contact between themselves and local traditional inhabitants (Inter. 1 & 3, May 2004).

Within the realm of Torres Strait politics, the local press monopoly further provides another contributing stressor. In 2003-04, reporting by Torres News was causing heightened tension in the wider community (Inter. 3, 6 & 13, May 2004; Entsch 2004). As a major local political institution, this regional newspaper is a credible mover of information and public opinion. De

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245 Much local criticism of government agencies applies to Queensland Government departments. It is directed, in particular, at the large amounts of duplication and overlap occurring at a state level in organisations such as Q-Build and the Department of Main Roads, for example in areas related to infrastructure development and service delivery (Inter. 7, May 2004).
Tocequeville [1805-1859] (1990) notes the press’s influence in informing and shaping public opinion: ‘a newspaper can drop the same thought in a thousand minds at the same moment’. Within Torres Strait, most local people reportedly ‘take as gospel’ many articles published in the only regional newspaper (Inter. 3, May 2004). At a local level, it was suggested that while the term Fourth Estate may imply the role of an autonomous press is to inform and enlighten public opinion, there also needs to be an accompanying concomitant desire to represent the interests of a majority of society, not just those of one dominant or elite group (Inter. 3, 6 & 13, May 2004). Sensational or highly inflammatory reporting on local events may temporarily push sales up, but does little to contribute harmony to what remains under its relatively calm surface, a deeply-fractious society (Inter. 3, 6 & 15, May 2004). Similarly, while defending the editor’s right to free speech, Federal Member for Leichhardt, Warren Entsch (2003), has also alleged political bias by the local press monopoly. Finally, another major local irritant is Telstra’s substandard telecommunications service. According to Entsch (2003), after decades of neglect this is still ‘a work in progress’. Commonwealth government regulatory and law enforcement agencies may enjoy a secure telecommunications network, but are still nevertheless reliant on free call information services to gather information and intelligence from informants moving about at sea or on the remote islands. Government agencies also need a mechanism for getting their ‘message’ out into the remote Outer Island communities. Unfortunately, current telecommunications services within the Torres Strait area are generally not of a standard required in a strategic international border region.

Conclusions
The high levels of inter-agency cooperation currently being demonstrated within the highly interdependent frontier-governance community based out of Thursday Island would indicate the following. The overarching governance structure found within the Torres Strait region is not constituted of a collection of independently operating silos operating at a horizontal model of governance at the Commonwealth institutional level. The effective, efficient management of the Australia-PNG boundary area is indeed highly reliant on the ongoing cooperation and support being provided within the Commonwealth frontier-governance community and by its much wider regional community networks and partnership arrangements. Clearly, both formal and informal cooperative multi-level governance processes are now unfolding. Furthermore, it is becoming increasingly apparent that these complex network relationships now embrace a host of highly diverse, yet highly interdependent, individual and aggregate actors. Moreover, all these actors are being interconnected via a complex web of linkage structures that not only encompass a wide range of differing policy arenas, but also engages multiple levels of governance. Such conditions would further indicate that over the past two decades a
peculiarly dynamic set of overarching MLG frontier-governance structures has been gradually evolving within the Torres Strait region under the influence of the Torres Strait Treaty’s terms and provisions. Furthermore, this distinctive construct has since metamorphosed into a complex set of political, administrative, legislative and institutional arrangements that has increasingly taken on a life of its own. As such, it should now be studied as a political-administrative system within its own right.

In light of these findings, over the next three chapters the dissertation’s analytical framework will be used to conduct diagnostic and prescriptive enquiry of the empirical data gathered. As noted in Chapter One, the dispersal of authority will be employed as the dependent variable to determine the extent to which authority is being dispersed across the four basic level of governance found within three broad subunits of analysis, identified as the border protection, fisheries and environmental management regimes. The analysis will also attempt to establish whether or not the interactive processes occurring across and between the multiple levels of governance now presenting are taking place along cooperative, coordinated, competitive or hierarchical lines, or in some combination of these linkage structures. The various levels of governance, along with the individual or aggregate actors involved within each particular regime, will also be identified. Any network structures or joint decision systems (JDSs) will also be highlighted, as will the numerous challenges presenting within each management regime. The information gathered will be utilised throughout the chapters to build a wider picture of the Torres Strait region’s contemporary management. It will also help to determine whether or not a new form of cooperative MLG is emerging within the Torres Strait region.

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246 Research Project’s Analytical Framework. Refer Chapter One, pp. 4 –5.
Chapter Seven

Torres Strait Border Protection Management Regime

Covenants, without the Sword, are but Words, and of no strength to secure a man [or woman] at all.

Thomas Hobbes [1651], Leviathan, Ch.17.

As with any international maritime boundary, control of the sea and cross-border movements depend on the practical ability to enforce jurisdiction. Within the Torres Strait region, protecting the Australian nation’s interests requires a broad-subset of actors, including the Australian Departments of Foreign Affairs, Immigration, Quarantine, Fisheries, Defence, Customs and other associated law enforcement and regulatory agencies, providing a whole-of-government service\(^{247}\).

Under the Torres Strait Treaty’s formalised cooperative arrangements and free movement provisions, the successful management of people, cargo and traffic within the region also requires considerable amounts of ongoing cooperation, coordination and consultation, both between Commonwealth agencies maintaining a permanent presence in the region, and among Australian, Papua New Guinea and Queensland Governments, local Torres Strait authorities, and the region’s traditional inhabitants. According to Attorney-General Phillip Ruddock (DIMIA IPS 047/2003):

What happens in that part of Australia is a model of coexistence, because it demonstrates how a variety of people and government agencies can work cooperatively to maintain a way of life that preserves traditional values.

Maintaining border integrity in the Torres Strait region also presents Australian border control authorities and security agencies with a somewhat different set of circumstances and challenges to those found elsewhere around Australia’s international borders. In particular, in administrating traditional cross-border movement and the performance of lawful traditional activities within and near the vicinity of the Torres Strait Protected Zone (TSPZ), border management authorities are to have regard to Article 16 of the Torres Strait Treaty, which provides administrative guidance regarding the implementation of several important immigration, customs, quarantine and health procedures and specifically states the following:

\(^{247}\) As recommended under The Report of the Prime Minister’s Coastal Surveillance Task Force (1999).
Article 16

Immigration, customs, quarantine and health.

1. Except as otherwise provided in this Treaty, each Party shall apply immigration, customs, quarantine and health procedures in such a way as not to prevent or hinder free movement or the performance of traditional activities in and in the vicinity of the Protected Zone by the traditional inhabitants of the other Party.

2. Each Party, in administering its laws and policies relating to the entry and departure of persons and the importation and exportation of goods into and from areas under its jurisdiction in and in the vicinity of the Protected Zone, shall act in a spirit of mutual friendship and good neighbourliness, bearing in mind relevant principles of international law and established international practices and the importance of discouraging the occurrence, under the guise of free movement or performance of traditional activities, of illegal entry, evasion of justice and practices prejudicial to effective immigration, customs, health and quarantine protection and control.

3. Notwithstanding the provisions of paragraph 1 of this Article-
   (a) traditional inhabitants of one Party who wish to enter the other country, except for temporary stay for the performance of traditional activities, shall be subject to the same immigration, customs, health and quarantine requirements and procedures as a citizen of that Party who are not traditional inhabitants;
   (b) each Party reserves its right to limit free movement to the extent necessary to control abuses involving illegal entry or evasion of justice; and
   (c) each Party reserves its right to apply such immigration, customs, health and quarantine measures, temporary or otherwise, as it considers necessary to meet problems which may arise.

In particular each Party may apply measures to limit or prevent free movement, or the carriage of goods, plants or animals in the course thereof, in the case of an outbreak or spread of an epidemic, epizootic or epiphytotic in or in the vicinity of the Protected Zone.
This chapter provides an account of the border protection management regime that covers the common border region geographically separating the Independent State of Papua New Guinea from mainland Australian territory. The principal claim the analysis seeks to sustain is that while the modes of interaction unfolding across and between the multiple levels governance within this regime initially appear to reflect the logic of federalism, on closer examination it soon becomes apparent that the predominately cooperative, consultative and coordinated multi-level linkage structures now being exhibited within this broad policy arena rest beyond the normal tenets of federalism. As noted in the previous chapters, the types of regional and cross-border relationships and structures being facilitated under the Treaty have led to the development of a highly complex political-administrative system within the region. Due to its ability to address complex governance demands, the management arrangement facilitated by a normative MLG framework now provides a system-wide mechanism, or organising concept, for managing and steering such complexity. In addition, when exploited as analytical concept, the notion of MLG allows for identification, interpretation and understanding of the numerous complexities, tensions and interconnected relationships that now typify these multi-level interactions. Nevertheless, despite its superior ability for capturing the complexities inherent in factual, or real-world, multi-level governance situations at an implementation level, MLG still remains a highly contested concept. As a stand-alone analytical device, it cannot fully accommodate for a complete examination of the numerous complexities and tensions that now characterise and shape daily political-administrative life within the Torres Strait region. By contrast, the integrated analytical framework provided under an actor-centred institutional MLG approach does hold sufficient capacity for explaining and understanding the complex sets of dynamics now characterising the diverse linkage structures and policy networks found within the overarching Torres Strait governance structure. Indeed, it is only when systematic empirical investigation of such complex governance arrangements and interactions is conducted at an operational level that the true utility and practical application of an actor-centered institutional MLG analytical approach becomes apparent.

This chapter is divided into two sections. The first seeks to determine what causal factors make border management practices in the Torres Strait region so very different to those found elsewhere at Australia’s international borders. It also attempts to highlight why the need exists for MLG in the region by investigating how authorities now cooperatively exploit the concept to organize and manage this vast geographic area, while simultaneously attempting to deal with the many challenges and emergent problems that continue to present within the region. The chapter’s second section offers a broad overview of the area’s operational management. It investigates how the administrative framework being facilitated by the Customs Coastwatch
model helps to coordinate operational oversight of the region and order competing priorities as the various governmental actors involved go about their daily business of cooperatively managing the Australia-PNG border, while displaying concurrent regard for the interests of the region’s traditional inhabitants. This section also illustrates how Australian and PNG authorities now exploit the notion of MLG as a prime system-wide mechanism for steering the inherent tensions and complexities that now typify real-world border management practices within the region into more constructive directions and positive outcomes.

Throughout the chapter, two key sets of problematic issues will be identified, both of which can only be effectively managed through adopting a cooperative, coordinated MLG approach. The first arise as unintended consequences of the Treaty. Some involve perceived abuses of the Treaty’s free movement provisions. Others originate in traditional cultural pursuits and may pose future dilemmas for border management authorities in the region. The second relate directly to the Strait’s geographic, geo-political and geo-strategic location.

**Major Treaty-related problems and challenges:**
- Increasingly unidirectional flow of Papuan visitors under Article 11;
- Exponential increase in commercial transactions occurring under Article 11;
- Unregistered cross-border adoptions;
- Third party marriages;
- Cross-border exploitation of cheap Papuan labour;
- Inadequacies in the existing ‘pass’ system; and
- PNG nationals accessing Queensland Health facilities and services.

**Geo-political and geo-strategic problems and challenges:**
- High levels of local shipping traffic;
- Illegal foreign fishing vessels (FFVs);
- Drugs and weapons smuggling;
- Unauthorised Third Country Nationals;
- Unwanted pests, diseases and weeds; and the
- Torres Strait islands close proximity to each other, the Australian mainland, nearby Papua New Guinea and Indonesia’s troubled twenty-sixth West Papua province.

A game theoretic representation of the interaction-oriented policy research conducted within this chapter is provided in Figure 6.
FIGURE 6: Game theoretic conceptualisation of the interaction-oriented policy research being applied during analysis conducted on the Torres Strait Border Protection Management Regime.

Institutional Setting

Torres Strait Treaty
Australian Customs Coastwatch Administrative Framework
Individual Australian, Queensland & PNG Agencies’ Respective Legislative Acts & Regulations

Examples: Customs Act 1901 (Cth) & Customs Tariff Act 1995 (Cth);
Defence Act 1903; Quarantine Act 1908 (Cth) & Quarantine Regulations 2000;
Migration Act 1958 (Cth); Australian Federal Police Act 1979 (Cth);
Fisheries Administration Act 1991 (Cth).

Major Australian and Queensland departmental actors involved the Treaty’s implementation are identified as:

- Foreign Affairs and Trade (DFAT);
- Australian Customs Service (ACS, Customs), including Coastwatch and the National Marine Unit (NMU);
- Australian Federal Police (AFP);
- Immigration, Multicultural and Indigenous Affairs (DIMIA);
- Australian Defence Force (Defence, DoD);
- Agriculture, Fisheries and Forestry (DAFF), including the Australian Fisheries Management Authority (AFMA);
- Australian Quarantine Inspection Service (AQIS);
- Queensland Police Service (QPS);
- Queensland’s Department of Primary Industries and Fisheries (QDPI&F), including Queensland Fisheries and Boating Patrol (QFBP).
- Queensland Health (QH) and Queensland Ambulance Services (QAS);
- Environment and Heritage (DEH), including the National Oceans Office (NOO).

Most institutions maintain permanent bases at Thursday Island. Major indigenous representative organisations are identified as:

- Island Councils (IC); Island Coordinating Council (ICC); Torres Strait Regional Authority (TSRA).

Torres Strait Border Protection Management Regime: Problems and Challenges at an Operational (Implementation) Level

Article 11 (TST) Free Movement Provisions

Australia’s risk managed border protection system currently employs elaborate, sophisticated and effective arrangements for monitoring people movements in and out of Australian jurisdiction. Its alert-systems offer Australian border security authorities the advanced opportunity of identifying potential risks to the country through detailed pre-departure examination of all potential visitors, for example using Advanced Passenger Processing, Australia’s universal visa system and the Movement Alert List (MAL)248. All around the country, at international airports and shipping terminals, every day large volumes of closely-

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248 Movement Alert List (MAL): The DIMIA administered computer database stores information on persons and travel documents of immigration concern to Australian authorities. It provides a key mechanism for applying legislation governing the entry into and presence in Australia of non-citizens who are persons of concern and whose presence may constitute a risk to the Australian public, including people with adverse immigration records which the Immigration Act 1958 (Cth) prevents from entering Australia for various reasons, including health concerns, debts owed to the Commonwealth, and serious criminal records (DIMIA 2004).
monitored, increasingly streamlined passengers are being carefully funnelled by Australian authorities through combined customs, immigration, quarantine and security choke points prior to stepping out into Australian society at large. New container examination facilities and faster more efficient cargo examination using container and pallet x-ray machines, along with increased waterfront patrols and the boarding of arriving vessels, also assist in maintaining Australia’s border security and contribute to Australia’s counter terrorism and transnational crime capabilities (Ruddock 2004; ACS 2004b; DIMIA 2004; Inter. 3, May 2004).

By contrast, despite its reputation as Australia’s most intensely patrolled maritime zone, due to the relatively unrestricted free movement of people, cargo and traffic under the Treaty’s free movement provisions, the Torres Strait region now constitutes Australia’s most difficult and challenging maritime border management environment. With the Torres Strait Treaty’s introduction, the Torres Strait Protected Zone (TSPZ) (Article 10) created one huge open importation zone on Australia’s international border. This unique zone is a constantly active sector, day and night. It is also one over which Australian border control authorities have little, if any, real control. While most importations are legitimate, a strong trade in unlawful goods exists in the region and people are reportedly getting away with illegal activities (Inter. 3 & 6, May 2004). Due to the increasingly one-way nature of the growing levels of human traffic and cargo movement occurring between PNG’s southern coastline and the northern Torres Strait islands in recent years, this situation now presents a major challenge for border control authorities. For example, the vast majority of the 45,000 (approx.) officially recorded traditional visits occurring under the Treaty’s free movement provisions during 2003 were initiated by Papuans (Figure 7) (DFAT 2002; JCPAA 2001; Ruddock 2003; TST 1985).

**FIGURE 7:** Officially Reported Traditional Visitor Movements.

<table>
<thead>
<tr>
<th>Year</th>
<th>Reported Traditional Visitor Movements</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>21,000</td>
</tr>
<tr>
<td>1996/1997</td>
<td>23,710</td>
</tr>
<tr>
<td>1998/1999</td>
<td>36,694</td>
</tr>
<tr>
<td>1999/2000</td>
<td>45,320</td>
</tr>
<tr>
<td>2003</td>
<td>45,000</td>
</tr>
</tbody>
</table>


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249 Historical Migration Trends: Papuan migration was strong during the free-pearling era earlier this century, and later during the state-organised pearling era. Movement was again strong during 1963-66, when Papuans attempted to access Queensland state primary school education. Conversely, Islander migration from Australia to PNG occurred with the establishment of Mabadauan Station in the 1890s, and again during the phase of oil exploration conducted during the 1940s (BN649PD).
The growing porosity of Australia’s northern border and greatly increased trans-border flows now seriously impact on DIMIA’s ability to manage migratory movements within the region. Apart from providing a full range of normal Immigration services and reporting on general people movements, DIMIA Torres Strait is also tasked with managing cross-border migration under Article 11. Consequently, a close working, cooperative MLG arrangement involving local Commonwealth Immigration officials, DFAT’s Treaty Liaison Officer, PNG’s Border Liaison Officer, local Torres Strait Island Councils, PNG Village Chairs, and indigenous representative organisations, such as TSRA and ICC, is required to effectively manage people traffic within the region and to further prevent the unauthorised entry of foreign nationals into Australian sovereign territory under the guise of Article 11 (TST 1985; Migration Act 1958 (Cth); Ruddock 2004; Inter. 2, 3 & 6, May 2004; Kris 2004).

Currently, Australian border protection and security authorities have no method for tracking the movements of traditional Papuan visitors once they depart PNG. Nor is there any system in place for ongoing monitoring of their activities once they enter into Australian jurisdiction. Under the current permit, or pass system, the only formalities required of traditional Papuans holding free movement entitlements is, in the first instant, to request a pass from their Village Chair to travel to places within and near the Protected Zone’s vicinity. On arrival in Australia, the pass is presented to the Island Chair of the relevant Torres Strait island community visited, who then gives agreement to the visit, or otherwise. Unlike elsewhere within Australia, the authority allowing these identified foreign nationals entry into Australian jurisdiction is not being provided by DIMIA, nor by any other Australian Government regulatory or law enforcement authority, but rather by another of the region’s traditional indigenous inhabitants, albeit one with Australian citizenship. Under current management arrangements, Australian authorities have no immediate way of knowing that chain of activities has occurred. What local officials do request of traditional coastal Papuan visitors is that they go to certain designated inhabited islands inside the Torres Strait Protected Zone (TSPZ), where around twenty-seven DIMIA Movement Monitoring Officers (MMOs) and their Quarantine and Customs counterparts meet all dinghy traffic and count and check all incoming and outgoing persons and goods (Section 16 Migration Act 1958 (Cth); McFarlane 1998; Inter. 2 & 3, May 2004).

250 Consent is required from traditional inhabitants on both sides of the border. For example, due to inter-clan cross-border tensions, one group of Papuans caught in an ongoing family dispute has been subject to Section 16 (removal of immigration rights of inhabitants of a protected zone) of the Migration Act 1958 (Cth.) for several years, and are reportedly thereby being denied their right to free movement privileges under Article 11 (TST) by their Australian relatives (Section 16 Migration Act 1958; Inter.2, May 2004).
In 2000, Australia and PNG exchanged formal notes acknowledging a list of twenty-seven communities enjoying tradition cross-border ties within the region. Under the Torres Strait Treaty, fourteen Torres Strait islands and thirteen Western Province village communities may move freely (without a passport or visa) in areas in and near the Protected Zone in performing lawful traditional activities (Map 5). Identified Torres Strait Islanders are allowed to travel north into PNG jurisdiction up to nine degrees South latitude, just north of Daru. Visits to Parama Island and Sui and Sewerimabu villages are also permitted. Coastal Papuans from PNG Treaty Villages may also move south into Australian jurisdiction as far as ten degrees South latitude, near Number One Reef. However, identification of these villages was never intended to exclude the application of free movement provisions to traditional inhabitants in additional PNG villages, if at some future time their inclusion is jointly deemed appropriate by traditional inhabitants in both countries. PNG villages identified by local traditional inhabitants in 2000 as enjoying traditional connections with Torres Strait island communities within the Torres Strait Protected Zone are Sui, Parama, Katatai, Kadawa, Tureture, Old

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251 Formal Notes: A formal note from Australia was exchanged with PNG on 28 June 2000. PNG exchanged its note with Australia on 25 July 2000 (Hallett 1998; DFAT 2000).
Mawatta, Mabadauan, Sigabaduru, Buzi/Ber, Tias, Mari, Jarai and Bula (Hallett 1998; DFAT 2000). At the time, Kiwai villagers inhabiting the Fly-Bamu delta, southern coast areas and islands and Oriomo Plateau exerted a strong influence over the choice of Treaty Villages originally proposed up by PNG. More recently, there has been growing official recognition that these named PNG villages are not necessarily reflective of the full extent of traditional ties in the region, which Australian authorities now acknowledge may go much further inland. Consequently, more PNG villages may be included on the Treaty list (Hallett 1998 & DFAT 2000; Inter. 1 & 2, May 2004).

Under the Treaty, traditional activities include land activities (gardening and food collection); hunting; water activities (fishing for food); ceremonies and social gatherings; and traditional trade (Article 1: 1(k) (i,ii,iii,iv)). Business dealings and employment for money are not recognised as traditional activities (Article1: 1(k) (iv), JCPAA 2001: 99). For example, Buji villagers live a traditional lifestyle on coastal Western Province. Given the vast distances, time and expensive fuel costs involved, transporting goods by dinghy to Daru’s markets is not an economically viable option. Instead, villagers subsist on home gardens, fishing and earn a livelihood trading and selling bags, mats, mudcrabs and artifacts to residents on nearby Boigu Island, a ninety-minute voyage away. In a centuries-old trade, Buji villagers daily journey the six kilometers to Boigu to meet with the locally-based Torres Strait Islander Immigration and Quarantine officers tasked with government monitoring of cross-border people and cargo movements in the immediate vicinity. The vast majority of impoverished Papuans traveling across from Treaty Villages enter Australian territory to ‘get food for our kids’ and ‘look for money to feed our families’. Under Article 11, these foreign nationals are allowed to walk around island communities trading their goods for clothes and food. This food for craft trade and relatively good Islander-Papuan relationships help to keep the local culture alive and are of great social and economic importance to local traditional inhabitants. For the far more affluent Islanders who enjoy the benefits Australian citizenship brings, the cross-border trade also provides an opportunity to ‘bring kindness in’ to their relationships with these ‘very quiet nice people’ by assisting Treaty villagers with basic resources their own government

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252 | Kiwai is the language of spoken by one third of people in Western Province, including those living along the Fly-Bamu delta, the coast and islands, and Oriomo Plateau. Kiwai people also possess a distinctive group dance routine style, introduced by South Pacific missionaries. Hiri Motu is the main second language of the lowlands. Tok Pisin is spoken in the high mountains. Bahasa Indonesia is spoken along the West Papua border region. Over 50 local languages are also used within Western Province (OkTedi 2004).

253 | Dauan Islanders (approx. pop. 160), for example, strongly protect their cultural heritage. They still speak their traditional language (Dauan Au Eagau Ya) and cross-border family ties remain strong.

254 | Arthur (1998) highlights the great disparity in local incomes. In 1998, estimated annual per capita Western Province incomes were around AUSS860. At the same time, Torres Strait Islanders were in receipt of an average annual income from the Australian welfare system of AUSS13,000 (approx.).
cannot supply (TST 1985; Buji villagers, Humpries & MMO, all cited on *ABC Radio*, 3 Sep. 2003; Inter. 9, May 2004; DFAT 2004). Other members of the wider Torres Strait regional community, including Commonwealth and state government agencies and non-government (NGOs) and private sector organisations, for example Customs, Queensland Police, Thursday Island Rotary, Christian Missions, Seaswift and the Bloomfield River Community, also exploit these opportunities to help meet shortages in Treaty Villages by donating clothing, medical supplies and transport (TST 1985; *Torres News* 12-18 Dec. 2003; 23-29 June 2004).

Nevertheless, despite the humanitarian issues involved, many Torres Strait Islanders continue to express discontent with Article 11, for a number of reasons. First, when issuing border movement passes PNG Village Chairs reportedly fail to account for the adverse impacts that a combination of large numbers of traditional Papuan visitors, a lack of prior notice about the numbers coming, and the sudden influx of too many traditional visitors at one time is having on the general infrastructure, resources and resident communities on many Torres Strait islands (Inter. 6, 10, 11 & 12, May 2004). Article 11, for example, allegedly precipitates sudden, unexpected food and goods shortages in island stores. It further places increased pressure on local medical services and allegedly contributes to increased social problems and quarantine and health risks, such as drug-resistant cerebral malaria, tuberculosis and Hansens disease (leprosy). Local concerns over the ongoing negative impacts of the Treaty’s free movement provisions are well-founded. Low-lying Saibai Island (pop. 379 approx.) is located around four kilometres off PNG’s mainland. Its permanent residents endure severe periodic water restrictions and no suitable organised accommodation is available for Papuan visitors. Island leaders attempt to avoid the numerous environmental health risks associated with a limited potable water supply and overcrowding in existing housing by only permitting Papuan day visitors access from Monday to Friday. Boigu Island (pop. 340 approx.) maintains a similar policy (Inter. 6 & 9, May 2004). Some participants recommend that if these problems are to be overcome in the longer term, then greater levels of cross-border exchange between Wards (collection of villages) and Torres Strait island leaders on the issue of traditional visits will be required (Kris 2004; Inter. 1 & 6, May 2004).

Ongoing concerns are expressed over possible inadvertent introductions of unwanted medical conditions, for example multi-resistant strains of dengue-fever and malaria (Kris 2004). For example, in 2004, a representative from Queensland Health’s Cairns-based Tropical Public Health Unit claimed the four malaria cases Torres Strait Islander women presented with at Dauan and Saibai Islands in all likelihood originated with malaria transported across by traditional Papuan visitors. While cases of PNG-acquired malaria are frequently reported in island health clinics, outbreaks in the Torres Strait are rare because Australian vector control officers, in conjunction with Island Councils, employ fogging and residual insect spray to control malaria mosquitoes inhabiting the high-risk northern Torres Strait islands (Hanna 2004).
Second, a requirement also exists for a more up-to-date, improved processing system for monitoring traditional cross-border movement. This includes a more sophisticated mechanism that the current card-pass system. Several participants strongly argue the existing system is not working. It is also generally agreed that times have changed, technologies advanced, and the system should be replaced, or at least substantially upgraded (Inter. 2, 3, 6, 7 & 12, May 2004). Third, increasing numbers of commercial transactions involving the payment of fee, rather than the mandatory ‘barter’ required by the Treaty, are also occurring. While traditional cross-border exchanges of goods typically involve a southward trade of Papuan crafts in exchange for a northward trade in fuel, flour and food, certain Papuans have developed the practice of on-selling artefacts and locally caught crabs and fish in exchange for Australian currency, which is then used to purchase modern goods in island stores, often for resale back home (TST 1985; AQIS 2004; Inter. 1, May 2004). Many Papuans have also reportedly come over to work Australian fisheries and earn Australian dollars (Arthur 1998). A fourth problem arises with the cross-border exploitation of cheap Papuan labour. On some northern Torres Strait islands, Papuan labour and talent is being exploited without workers realising any profit on their long hours of hard labour-intensive work. Illegal cross-border workers are reportedly to be found under or behind houses on the northern Torres Strait islands working in small-industry cottage-craft workshops on hand-carved wooden artefacts destined for export and sale in lucrative southern markets in Australian capital cities (Inter. 1, May 2004).

A fifth set of challenges originates with traditional cultural practices, as demonstrated with unregistered cross-border adoptions and third party marriages. While generally harmonious relations exist between coastal Papuans and Islanders, division arise within these communities over perceived abuses of traditional adoptions, with certain parties exploiting their adoption status for other purposes, such as drug trafficking (Inter. 6, May 2004). Many adults engaging in traditional cross-border adoptions of children between peoples of the same ‘line’ (blood relatives) are also failing to register these adoptions at the Australian High Commission, Port Moresby (Inter. 2 & 6, May 2004). These children are essentially being raised as Australian citizens and are accustomed to the higher living standards found on the islands and mainland.

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Traditional Border-Crosser Card (TBC): A similar monitoring system exists along the more populated northern areas of the West Papua-PNG border where tribal border-crossers, such as those from Wutung, West Sepik, make day visits to their traditional food gardens inside Indonesia-controlled West Papua. On entry and exit, villagers give their names to and are counted by Indonesian military authorities. Wutung Villages avoid temporary closures of the common land border, as occurred in 2000 after OPM rebels killed five Javanesse loggers employed by Wutung villagers to log forests inside the Indonesian border, by crossing the international border by boat. On arrival, villagers purchase local and imported Vietnamese, Thai and Malaysian rice, sugar and oil in Jayapura’s (formerly Hollandia) stores where goods are available at far cheaper prices than those in remote PNG trade stores. No requirement exists by either government for passports or visas. Nor are villagers required to obtain permission to enter Indonesia from traditional West Papuan inhabitants. On land arrival in either country, Wutung villagers are only required to present their Traditional Border-Crosser Card (TBC) to the relevant immigration officials (Post Courier, 29 Dec. 2000).
Australia. Commonwealth authorities predict problems will present once these children reach adulthood (seventeen years of age) and must be returned to Western Province, where they may experience difficulties coping with the less affluent lifestyle after years of relatively free access to amenities available in Australia, such as health care, education, communications, and the wide variety of goods in IBIS supermarkets (Inter. 2, May 2004). Conversely, it is also predicted government authorities will experience great difficulty in attempting to implement any such repatriation policy as these adopted children have since bonded with their adopted parents and formed strong family ties, and child and parent must never be separated (Inter. 6, May 2004). Third party traditional marriages are also a cultural activity occurring mostly between coastal Papuan men with free movement entitlements and female PNG nationals residing further inland. However without Treaty entitlements, these female Papuan spouses cannot officially enter Australian jurisdiction without passports and the necessary visas. Australian citizens living on northern Torres Strait islands must also travel over to PNG’s mainland to visit their Papuan spouses. Given the common practice of polygamy within the wider region, this complex issue holds the potential to further complicate matters for Australian border authorities257 (Moiya 2005; Inter. 1 & 6, May 2004).

Another unintended consequence, unforeseen by the Treaty’s original drafters, centres around the sensitive issue of Papuans from Treaty Villages entering into Australian jurisdiction to access medical services delivered by Queensland Government, the provision of which rests outside its legislative mandate (Inter. 1, 6, 7 & 13, May 2004). In highlighting significant public health issues now confronting Torres Strait communities and Australian Government authorities, TSRA Chair Toshi Kris258 (2004) properly calls for humanitarian intervention in

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257 Polygamy: While the traditional practice of polygamy in PNG occurs primarily at the village level, it is now frequently used throughout the country as an excuse by affluent and/or promiscuous men, both Highlander and non-Highlander, for keeping more than one woman at a time. Polygamy is now also generally accepted in PNG as a high risk practice that contributes to the spread of HIV/AIDS and high levels of domestic violence against women (Moiya 2005). Also refer Footnote 65, p. 49 for traditional Torres Strait Islander polygamy practices.

258 TSRA Chair Toshi Kris (2004) argues: ‘The relatively unrestricted movement within the Treaty zone of PNG inhabitants into the Torres Strait islands now poses significant public health concerns. Vector-borne diseases and those transmitted through human contact are spreading, aided by extreme environmental conditions. Prevention and treatment are difficult if not impossible at times, as is any follow up or after-care, due to the lack of basic health and communication infrastructure on the PNG side of the border. Our health care facilities available in our communities within close proximity to the Western Province villages are stressed to the limit. Because of the deteriorating situation in PNG, the people of Torres Strait now have to deal with, and may well suffer a range of, communicable diseases. A number of public health risks exist including sexually transmitted infections, HIV, tuberculosis, dengue, malaria and typhoid. It is clear that the PNG and Australian aid agencies such as AusAID are finding it increasingly difficult to meet the growing needs of the people of Western Province. Greater effort and involvement of other organisations such as the World Health Organisation and various non-government organisations is urgently required. There is a need to build significant capacity within the Western Province to enable the people to better manage their own affairs and to bring these problems under control. There is an urgent need to: Provide better facilities and service to enable treatment of diseases; Build better infrastructure; - water, sanitation, housing, and communications, to try to prevent public health risks; Provide preventative health programs; and Ensure medicine reach aid posts. The list represents, however, only a small sample of what is required’ (Kris 2004).
Western Province at the international level. Today, the Torres Strait and Northern Peninsular Area Health Service District continues to provide ongoing primary medical assistance to PNG nationals presenting at health centres on Boigu, Saibai, Dauan, Yam, Mabuiag and Badu Islands. Through the Australian Health Care Agreement, the Australian Government also contributes additional funds and assistance towards offsetting additional costs incurred by Queensland Government for treating PNG nationals seeking medical assistance in the Strait. But it is reportedly nowhere near enough to meet the shortfalls currently being experienced by Queensland Health or local Torres Strait health authorities (Nuttall 2004; Inter. 7, May 2004; Inter. 13, June 2004). Medicare is available on Torres Strait islands, but only for Australian citizens. Neither Medicare nor any private health care benefits schemes are currently available to PNG citizens under the Treaty (Inter. 1 & 2, May 2004). The cost of subsidising treatment for PNG nationals inside Australian territory is reportedly largely being borne by Queensland Health, which continues to steadfastly stand by its commitment to a long-standing department policy of never turning away any person, whether Australian citizen or foreign national, who presents at a Queensland Health facility seeking medical attention (Qld. Health 2004; Inter. 13, June 2004).

By contrast, local Torres Strait health officials argue that while Commonwealth monies for additional costs may be going into Brisbane, they are not flowing through to Thursday Island. Consequently, any additional expenses incurred in the ongoing subsidisation of treatment for visiting Papuans severely impact on the district health budget (Inter.7, May 2004). When managing their budget, local health authorities not only encounter normal problems associated with remote locations, such as isolation and high freight costs, but also the numerous health problems characterising many other isolated indigenous communities, for example diabetes (Leonard et al. 2002; Inter.7, May 2004). Additional costs are further incurred in providing health care for visiting traditional Papuan inhabitants, for example at island health centres and in paying for medivacs. As Thursday Island Hospital is located outside the Protected Zone, additional immigration, customs and quarantine related expenses are also associated with restricting Papuan visitors to the hospital’s grounds, for example PNG Treaty Village women delivering babies259. However, these extra expenses are reportedly not being reimbursed from Brisbane. Repeated attempts by Torres Strait health authorities to raise this matter with both

259 A specifically quarantined area is established within the Thursday Island Hospital grounds for visiting PNG patients. Many Papuan women, for example, enter into Queensland jurisdiction under the Treaty’s free movement provisions from coastal Papuan villages, such as Dimiri, Sigabadura, Kulalai, and Old Mawatta, to deliver their babies at Thursday Island Hospital. Their only other choice is to attempt to access the poorly-resourced provincial hospital at Daru which, despite recent public service reforms and retrenchments and a lack of funding and transport, still managed in 2004 to maintain a doctor and provide limited training and back-up radio contact for the South Fly’s rural Wipim and Mabaduwan Heath Centres and Tapil, Sasiami, Kunini and Morehead Health Subcentres (Torres News 5-11 March, 2-8 June, 2004; Ok Tedi 2004).
the Australian and Queensland Governments are reportedly little more than a ‘voice in the wilderness’, as all attempts to discuss the issue with either party always come back to the bilateral relationship, intergovernmental ‘buck-passing’, and arguments over whether or not the provision of medical services for Papuans is a foreign aid problem or a Queensland Health responsibility (Inter. 7, May 2004). In a position rejected outright by both Queensland Health and the Queensland Government, one participant proposes the problem could be overcome if Queensland officials firmly turned away all Papuan patients presenting at local health centres, on the basis the provision of humanitarian aid for visiting foreign nationals is not the state’s responsibility (Inter. 2, May 2004; Inter. 13, June 2004; Qld. Health 2004). It was further proposed local Torres Strait health authorities could learn to better manage their annual budget and resources (Inter. 2, May 2004). Conversely, local health authorities argue that funds should flow directly from Canberra into Thursday Island and by-pass Brisbane. Local health officials also dismiss federal and state concerns over issues of accountability and transparency at a local level: ‘Nobody’s going to put it [health funds] into their back-pocket. It will all get used up in funding chopper flights’ (Inter. 7, May 2004).

During Question Time in Queensland Parliament on 12 May 2004, State Member for Cook, Jason O’Brien asked then Queensland Minister for Health, Gordon Nuttall, about the numbers of PNG Nationals accessing Queensland Health clinics in Torres Strait during 2003. He also enquired about numbers of Papuans medivaced south for treatment in mainland Queensland hospitals and sought clarification on what financial impact the servicing PNG nationals was having on Queensland Health in the year 2002-2003. The Minister responded:

From January to December 2003 a total of 1,534 Papua New Guinean people presented at Primary Health Care Centres in the Torres Strait.

During the 2002-03 financial year there were a total of 21 transfers from Thursday Island Hospital to Cairns, Townsville and Brisbane involving PNG Nationals.

In addition, during the same period, a total of 21 PNG Nationals were medivaced from outer island medical centres to the Thursday Island hospital. These included instances where transport was arranged through Queensland Ambulance Services, helicopter charter, fixed wing aircraft, fixed wing regular flights and use of scheduled air clinics.

In January 2003, Queensland Health conducted a comprehensive analysis of the financial impact of PNG Nationals accessing Queensland Health services. It showed that, based on available information, around $4.9 million is spent each year treating

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As the cost of provision of Queensland Health services for Papuan nationals is an extremely politically sensitive issue in the Torres Strait area, a full unedited transcript of the Minister’s statement in Queensland Parliament on 12 May 2004 is included in the main text.
PNG Nationals that access hospitals, clinics, transport services, pathology and various other public health programs.

Despite the Commonwealth government providing around $2.817 million in 2003-04 through the Australian Health Care Agreement in respect of the cost of providing services to PNG Nationals, the Queensland Government is still heavily subsidising what is essential a Commonwealth responsibility. Queensland will continue to negotiate with the Commonwealth Government to seek full compensation.

It should also be noted that, due to issues of geographical proximity and the free movement of Australian and PNG nationals permissible under the Torres Strait Treaty, it is important that appropriate treatment be available for PNG nationals given the severity and nature of cases treated, including multi-drug resistant strains of Tuberculosis and HIV. These conditions are communicable and would have catastrophic implications for Queensland’s Torres Strait population, and subsequently the health system, if they were to be transmitted.

Meanwhile, DFAT continues to retain its ongoing strong focus on humanitarian issues in the region. Little doubt exists amongst Australian authorities that a genuine humanitarian crisis is now unfolding along Australia’s international border. General agreement now also appears to exist on the urgent requirement to provide medical assistance to Australia’s less fortunate immediate northern neighbours and to prevent the spread of endemic transmittable diseases from PNG down into the Torres Strait. There is also now wide spread recognition that neither PNG nor the Australian Agency for International Development (AusAID) are capable of managing the current situation on their own (Waia 2002; DFAT 2004: Inter.1 & 6, May 2004; Kris 2004). Repeated, often ethnocentric propositions suggesting AusAID could assist by better targeting its funding, for example a sizable portion of its total aid budget to PNG of $435.6 million for 2004-2005, to direct a greater share of AusAID resources towards ‘grass roots’ along southern Western Province coastal are based, in large part, on the premise that provision of infrastructure and services within that area will help deter traditional Papuan inhabitants from accessing Australian medical facilities (Inter. 7, May 2004). This argument fails however to adequately account for the numerous challenges, priorities and inherent systemic problems that AusAID now encounters throughout PNG, along with the many hardships currently being experienced at a ‘grass roots’ level in other often far poorer PNG provinces.

Similarly, neo-colonial aspirations to Australian suzerainty over coastal Western

\[261\] For example, in 2000 AusAID (2000:18) classified Western Province as: ‘relatively wealthy compared to other provinces. But two dominant features of the provincial economy are marked by dualism and poor financial resource utilisation. The majority of the population is not significantly involved in the cash economy, receives few benefits from the province’s income, and gets minimal service from government. These shortcomings are
Province, which advocate Australia should unilaterally act to employ its wealth and regional influence to bring about rapid development in the area, also run contrary to widely-accepted principles of international law, namely the principles of national sovereignty, non-interference and non-intervention in other State’s internal affairs and domestic jurisdiction (Treaty of Westphalia 1648\textsuperscript{262}, UN Declaration 1960)\textsuperscript{263}.

The high risk of ongoing foreign aid dependency and potential for under-resourced PNG border control agencies and local Papuan communities developing a long-term reliance on the various forms of local assistance already provided by Australian agencies also raises the issue of moral hazard\textsuperscript{264}. PNG’s primary regional focus is the PNG-West Papua border and its potential for serious conflict. Rather than investing resources along coastal Western Province, successive PNG governments may instead elect not to accept long-term responsibility for major problems presenting in the area, confident in the knowledge Australian authorities will always offer to look after the immediate Torres Strait region (Inter. 7, May 2004; AusAID 2005). An earlier TSRA proposal to extend the Major Infrastructure Program (MIP) into adjacent Western Province coastal areas to help address key environmental health issues provides an example (TSRA Senate. Sub. 2001). One participant further cautions federal and state governments against inadvertently creating a humanitarian ‘honey pot’ immediately inside Australia’s side of the border. It is argued building additional medical infrastructure and facilities on the northern islands specifically for providing health services for Papuans entitled to unimpeded cross-border movement privileges will only result in increasing levels of human traffic and place additional demands on the already-stressed Torres Strait islands and their resident communities. It is also predicted it will bring accompanying increased levels in crime, prostitution and unwanted transmittable diseases down into a common border already classified by Australian authorities as extremely sensitive (Inter. 2, May 2004).

\textsuperscript{262} Treaty of Westphalia 1648 (system of modern states) (Peace of Westphalia, a.k.a Treaties of Munster and Osnabruck): The Treaty incorporates four basic principles:
\begin{itemize}
\item The principle of sovereignty of nation-states and concomitant fundamental right of political self-determination;
\item The principle of (legal) equality between nation-states;
\item The principle of international binding treaties between states; and
\item The principle of non-intervention in the internal affairs of other states.
\end{itemize}

\textsuperscript{263} Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. 1960.

\textsuperscript{264} Moral Hazard: A disposition on behalf of government to engage in riskier behaviour than otherwise normal due to a tacit assumption that someone else will bear a part or all of the costs and consequences if the incurred risk turns out badly.
On a more positive note, at the fifteenth Ministerial Forum PNG did give an undertaking to closely examine health strategies in Western Province. It also welcomed Australian assistance in the region, where appropriate (DFAT-PNG Joint Statement 2003). One proposed strategy put forward by one participant is for the District Health Council to work in partnership with government agencies, such as DFAT, DIMIA and Queensland Health, to lobby Canberra for adequate resources via the Health Partnership Agreement265 (Inter.1, May 2004). Meanwhile, the ‘touchy’ issue of health service delivery for foreign nationals continues to be employed as a ‘political football’, as all actors involved continue to exploit the presence of multi-level governance to shift responsibility for this issue from one level of governance, or jurisdiction, to another. While health care provision for visiting PNG nationals is not provided for under the Treaty, only a cooperative, coordinated MLG approach to addressing this problem, similar to that obliged under the Treaty, will enable local, state, national and international authorities to better collectively overcome and manage the highly unsatisfactory levels of interactions currently being experienced (TSRA 2004; Inter. 1 May, 2004).

Geographic, Geo-strategic and Geo-political Problems and Challenges

When historically compared to the heavier volumes of illicit activities detected in other Australian maritime approaches, cross-border movements within the Torres Strait region are not of major concern to Australian authorities. Detected levels and apprehension rates for illicit cross-border activities, such as drugs, weapons and people smuggling, are reportedly low. For example, unauthorised arrivals of third country nationals constitute but a small portion of the 13,593 ‘boat people’ arrivals in Australian territorial waters between 1989-2001 (ANNEX G). Nevertheless, latent threats remain and the potential for increased levels in illegal cross-border activity is significant, due to several high-risk factors that relate directly to the Strait’s geographic, geo-political and geo-strategic location.

Several issues of concern having potential to raise serious immigration, customs, quarantine, environmental and health challenges relate directly to the high levels of general shipping operating within and across the region. This includes the approximately 5,000 international shipping movements, such as merchant vessels, passing annually through this international strait under their right to innocent passage. Light aircraft, international yachts, and a sizable fleet of over a thousand local and East Coast commercial fishing vessels, along with a large

265 Torres Strait Health Partnership Forum (Health Partnership) facilitates interaction between the Commonwealth Department of Health and Ageing, Queensland Health, the Torres Strait and Northern Peninsular Area District Health Council and indigenous representative organisations, such as TSRA and the ICC, on local health issues.
number of small, difficult to detect high-speed craft, such as the fibreglass (banana) boats and aluminium dinghies that move regularly between the two countries under Article 11 (TST), also present complications. The threat of drugs, weapons and other illicit goods trafficking on these vessels is genuine, as is the potential for people smuggling and inadvertent breaches of Australia’s strict quarantine regulations (ACS 2004; Entsch 2004). Regular, highly-organised seasonal incursions by unflagged Foreign Fishing Vessels (FFVs) from Indonesia’s nearby maritime reaches into PNG’s ‘dog-leg’ area and nearby Australian territorial waters to unlawfully exploit both State’s fisheries resources also present serious problems, in particular for severely under-resourced PNG authorities operating in the area. Nevertheless, the situation is not as dire as elsewhere in PNG. According to PNG’s National Fisheries Authority (NFA), along New Guinea’s northern coastline near the Indonesia border, PNG lacks the capacity to apprehend or deter illegal foreign fishing operators currently plundering sashimi-grade tuna from the Bismarck Sea, to thereby prevent the annual loss of millions of kina in economic revenue. PNG’s low levels of on-water surveillance in its northern waters provide a stark comparison to the far greater levels of surveillance conducted along coastal Western Province and in the ‘dog-leg’ area, where Australian authorities provides back-up surveillance under the cooperative MLG management approach facilitated under the Treaty (NFA [2005], cited in Korimbao 2005; Korimbao 2005).

Australian Quarantine Inspection Service (AQIS) and Quarantine Management
Australia’s relative geographical isolation provides a level of protection from many pest and disease risks endemic in its northern neighbours. By contrast, within Torres Strait a number of significant offshore and onshore quarantine risks continue to pose threats to the protection and preservation of Australia’s public health, native flora and fauna, tourism, and horticulture and agricultural industries. Australian Quarantine Inspection Service confronts these challenges by proactively adopting a comprehensive, cooperative MLG approach to managing quarantine risk. Across Northern Australia, from Cairns to Broome, the Northern Australia Quarantine Strategy (NAQS) employs special measures to risk manage quarantine. Within Queensland’s Far North Region, AQIS operations encompass a highly decentralised remote area, stretching from Ogmore (north of Townsville) to the PNG border. As a key component of AQIS’s wider network of operational and scientific staff tasked with delivering NAQS, AQIS-TS’s primary responsibility is improving the integrity of Australia’s quarantine borders through the early detection and identification of quarantine risks and incursions within Torres Strait and the Northern Peninsular Area (NPA) (AQIS 2002-03; 2004; Inter.8, May 2004).

266 PNG’s ‘dog-leg’ area is illustrated on page 201.
Quarantine Risk Factors

The Torres Strait provides both a bridge and barrier to mainland Australia. Major quarantine risks arise with the chain of island stepping-stones physically linking the PNG landmass to mainland Australia. Paradoxically, the Strait’s physical characteristics also allow it to act as a natural containment zone for managing quarantine risks to Australia. The first risk comes with the Strait’s large volume of general shipping traffic. Constant threats are posed by transit shipping, international yachting and illegal fishers, via the dumping of disease-carrying food waste and rubbish (AQIS 2004). Unwanted pests, including sick animals, can also enter on foreign vessels. For example, the Taiwanese fishing vessel M.V. *Hasuda 1226*, apprehended by PNG’s Defence Force for illegally fishing in the ‘dog-leg’, was carrying two monkeys and several birds (26 Jan. 2004, *Post Courier*). Another risk is the region’s geographic proximity to countries with differing pest and disease status. The continuous eastward transmigration of people, animals and goods across the Indonesian archipelago, from densely-populated islands such as Java to West Papua Province also presents risks, as does the constant threat of exotic pests and diseases endemic in PNG and neighbouring countries moving down into the Torres Strait in food and food scraps, on animals or people, or in traded goods and soil under the Treaty’s free movement provisions (AQIS 2004; TST 1985). Firmly established herds of Rusa deer in Western Province also pose additional quarantine risks to Australian livestock (IUCN 1991). Migrating birds and mosquitoes can also transport viruses, such as Japanese Encephalitis and malaria, from nearby countries. Seasonal incursions by pests such as exotic and papaya fruit flies, both blown from PNG and neighbouring countries on known pathways like the monsoonal winds each wet season, may also occur. To reduce the impact of such invasions, annual campaigns to eradicate exotic pests from northern Torres Strait islands, such as Saibai, Dauan, Boigu and Erub, are conducted by Queensland’s Department of Primary Industries, in conjunction with AQIS and local Torres Strait Islander Quarantine officers (QDPI 2004; AQIS 2002-03; 2004: *Torres News* 2-8 Jan. 2004). Further challenges arise with domestic factors, such as local tourism and the area’s remoteness, difficult terrain, low-density population, and its high feral and domestic pig populations, both of which provide important hosts for the vector-borne infectious Japanese Encephalitis virus (Inter. 8, May 2004; Levi 2003). A high risk also exists that soil, plant and animal residue, and water reservoirs containing exotic mosquito breeding sites may be transported from outlying islands onto mainland Australia on vehicles, machinery or in cargo. Consequently, AQIS maintains

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267 In a scenario replicated throughout West Papua, the rapid demographic changes originating under Suharto’s ‘*transmigrasi*’ (transmigration) policies have now left the local indigenous Melanesians in nearby Merauke Regency a minority on their traditional land. Papuans now only constitute thirty percent of the Regency’s population. Javanese account for forty percent, Makassarese for twenty, and Manadonese, Maduranese, Acehnese and Chinese provide the remainder (TWPR 2005).
strict local quarantine measures to assist with the containment and minimisation of quarantine risks within the region (Map 6) (Quarantine Act 1908; AFFA 2003b).

Map 6: Torres Strait Quarantine Zones
To achieve its objectives, NAQS uses a proactive three-point stratagem that combines border control, scientific research and public awareness. NAQS’s first line of attack is border control. Unlike AQIS operational staff elsewhere, Torres Strait Quarantine officers engage in three major areas of work: international, response and domestic. The first, and typically AQIS task, involves clearing international passengers, aircraft, shipping vessels, plants, goods and cargo. The second task is quarantine responses to unauthorised Foreign Fishing Vessels and third party national arrivals within Australian jurisdiction. The third, and peculiarly Torres Strait requirement, is to monitor and conduct quarantine inspections of all goods, vessels (including dinghy traffic) and light aircraft movements occurring between the designated quarantine zones as part of the traditional trading activities permitted under the Treaty. In addition, AQIS-TS officers are also tasked with conducting routine inspections of vehicles, machinery and of goods on aircraft travelling south from the Torres Strait quarantine zone to Thursday Island and the Australian mainland (Map 6) (AQIS 2002-03; 2004).

NAQS’s second aspect is scientific. As part of its early warning program, NAQS employs a strategy of constantly monitoring islands using measures such as sentinel animals, a network of insect traps, and regular scientific surveys of the region’s flora and fauna. Under special Memorandums of Understanding, scientific personnel also conduct risk analysis in the wider region employing NAQS surveys in neighbouring countries, such as PNG and East Timor, to establish pest movement and distribution patterns and identify real or possible risks of incursions (AQIS 2002-03; 2004). NAQS’s third aspect is public awareness. Despite AQIS-Torres Strait’s small budget and need for ungraded information technology infrastructure, local Quarantine staff adopt a proactive approach in attempting to get their agency’s message out into the wider Torres Strait community. Informational presentations (awareness talks) are conducted with local communities, schools and other government agencies. School programs, local media, sponsorship, pamphlets, calendars, fact sheets, and brochures are also employed. NAQS’s public awareness program, the Top Watch Program, also maintains a strong focus on

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268 Quarantine Zones: A series of designated quarantine buffer zones established within and south of the Torres Strait govern movement of all goods and cargo and prohibit movement of certain items from the Outer Islands to the Thursday Island Group, and from these zones southwards to mainland Australian. Universally applied quarantine rules apply. These must be observed by traditional and non-traditional residents and visitors alike. This includes a ban on the movement of plants and animals between quarantine zones. Heavy fines apply for offenders. To safeguard against wind-blown spread of black sigatoka, Queensland’s Department of Primary Industries, aided by industry funding and Banana Industry Protection Board (BIPB) support, has also established a banana plant free buffer zone separating Cape York Peninsular and the Torres Strait islands from mainland production areas south of Cairns, although sparsely populated bananas plants are grown at many home sites within the zone. A livestock buffer zone is also established across the tip of Cape York to prevent against the southward movement of exotic animals (Map 6) (AQIS 2004).
developing a joint approach to quarantine risk management with local traditional inhabitants. All program products are developed in close consultation with local indigenous communities and representative organisations (ATH 2002). Nevertheless, local misconceptions still remain over AQIS-TS’s role in the region. Contrary to some locally-held beliefs, AQIS-TS is neither a domestic pest manager, dog-catcher, veterinary service, nor regulator of FFVs. Reported confusion also exists within the wider community over the agency’s role in relation to Japanese Encephalitis and dengue fever related health issues (ACS 2002-03; 2004).

Immigration and Unauthorised People Movements, including Third Country Nationals.

In 2001, the Department of Immigration and Multicultural Affairs officially identified people smuggling as a major challenge in the region (DIMIA [2001], cited in JCPAA 2001). The Joint Committee of Public Accounts and Audit (2001) suggests that while the movement of third country nationals is not covered under the Treaty, the apprehension of unauthorised Asian, Middle Eastern, Eastern European and African nationals in the region is both indicative of the area’s remoteness and the successful outcomes of the cooperative joint approach to illegal immigration and border protection management adopted under the bi-lateral Memorandum of Understanding on Illegal People Movements (MOU) in the Torres Strait 269. It is also the positive outcome of authorities adopting a MLG approach to trans-frontier cooperation across this shared international maritime border region. The bilateral MOU commits its signatories to careful screening of third country national visa applications and the reacceptance of unauthorised foreign nationals apprehended while attempting to exit or enter either country without meeting the appropriate government requirements. The Committee (2001) suggests the MOU exemplifies the spirit of cooperative border management embodied in the Treaty and has proved effective in assisting with the detection of people smuggling activities and unauthorised entries of third country nationals into Australia via Daru Island and West Papua.

A reportedly good working relationship has also developed between local DIMA officers and PNG’s Daru-based Border Liaison Officer (Hallett 1998; McFarlane 1998; JCPAA 2001; DIMA 2001; Inter. 2, May 2004). Additional problems also now present with Papuans and Highlanders travelling down from PNG’s Highlands and Port Moresby carrying false PNG passports270. Fortunately for both Australian and PNG border management authorities, local traditional Torres Strait Islander and Papuan communities are reportedly very territorial and extremely protective of their immediate area. These communities are also highly responsible and work cooperatively with border management authorities to provide intelligence on

269 Signed February 1994.

270 PNG does not have a secure passport processing system. Pieces of machinery used for processing passports have reportedly gone missing on occasions (Inter. 2, May 2004).
unauthorised entries and other illicit border-related activities (Inter. 1, 2 & 3, May 2004; *Torres News*, 20-26 April 2005). Strong local community support also exists for the Howard government’s decision to extend the definition of excised offshore places under the *Migration Act 1958* (Cth) to include all Torres Strait islands (Waia 2002a; Entsch 2004; Migration Amendments Regulations 2005).

**Illicit Importations**

One of the biggest changes law enforcement authorities have witnessed in the region over the past decade is the movement of illicit drugs within and across Torres Strait. It now provides a major focus for authorities. Despite investing considerable National Illicit Drugs Strategy (NIDS)\(^{271}\) resources to clean up the problem at a local level, the drug trade is allegedly almost part of the local culture now. While not a sizable market within island communities, drugs have increasingly become part of the Treaty’s barter-trade and are now a relatively common commodity on most islands, with high levels of personal usage in the eighteen to twenty-five years age range. Most illicit drugs moving down from PNG into Torres Strait reportedly stay there. Unlike structured drug importation in major urban centres such as Sydney, quantities of narcotics are sent down from PNG on a non-commercial, opportunistic and ad hoc basis, mainly for use at local sporting functions. Drugs have reportedly been exchanged for goods, often stolen in Cairns, such as outboard motors, boats, fuel and occasional firearms (JCPAA 2001; Inter. 3, May 2004).

The negative effects of both drug and alcohol usage impact on the fabric of Islander society and culture and frequently manifest in a lack of respect for traditional Elders. However, unlike illicit drugs, Australian law enforcement authorities view alcohol abuse as a local issue, a matter for individual Island Councils to work out. Some Councils attempt to address the issue by designating their islands dry. Given the hierarchical nature of Islander society, the problem is particularly difficult for some Elders to come to terms with. On one hand, Elders are trying

\(^{271}\) *National Illicit Drugs Strategy (NIDS)*: During a visit to the region in July 1997, Prime Minister John Howard noted its vulnerability to border incursions. A subsequent review of existing Commonwealth surveillance arrangements, carried out by Prime Minister and Cabinet (PM&C), Customs, Coastwatch, ADF, AFMA, AFP, DFAT, Finance, DOTARS, AQIS, and DIMA, recommended measures to improve surveillance and law enforcement capacity in the area. The measures were adopted as part of the National Illicit Drugs Strategy (NIDS), announced 2 November 1997. They included the establishment of a permanent Australian Federal Presence (AFP) on Thursday Island and a fully-operational secure law enforcement communications network in the region; the purchase of five new ready-response Customs vessels for Customs, one to be based at Thursday Island with the others strategically placed at various strategic locations throughout the Strait; increased night-time marine and helicopter and fixed wing operations to improve coastal surveillance; strategic positioning of lit helicopter landing facilities on some islands; the upgrading of the surveillance and response capabilities of Customs and other Federal Authorities; and instituting joint border patrols with PNG Customs to target cross border criminal activity (NIDS 1997; Hallett 1998 ).
to successfully run and manage their communities. On the other, they are forced to deal with a ground swell of young people coming from below saying it is not that they don’t respect their Elders, because they do. But when under the influence of drugs and alcohol, most are unaware of irresponsible and harmful aspects of their altered behaviour, for example vandalising where they live. Many wake up the morning after an incident with no recollection of the previous night’s events, or the harm caused. Only remorse and shame for the damage inflicted upon their individual communities remains. One participant, conscious of the urgent need for increased levels of intergovernmental cooperation between federal and state governments on this matter, proposes the development of a much stronger constructive working relationship between local traditional inhabitants, Queensland Health, the Department of Education and Commonwealth law enforcement agencies, such as Customs, might help to eliminate many drug-related problems currently being experienced within Torres Strait island communities. It would also help to reduce the workloads of several Commonwealth and state law enforcement agencies, thereby allowing scarce resources and funding to be redirected elsewhere. The same participant suggests such outcomes could be achieved largely by introducing a regional drugs prevention program in local schools to help raise local youths’ awareness of the negative impacts of drug and alcohol usage. By contrast, substance abuse is reportedly not a major problem within PNG Treaty Villages. What little money Papuan villagers manage to obtain is deemed better spent on basic essentials, such as food, clothes and fuel (Inter. 3, May 2004).

The transportation of illicit goods across the Torres Strait presents an entirely different set of challenges. Most ‘New Guinea Gold’ marijuana grown in the PNG Highlands and PNG-West Papua border vicinity is for domestic consumption. Nevertheless, by 2001 sufficient quantities were being trafficked southwards across the Torres Strait in an organised ‘guns for drugs trade’ to allow Australian Customs Service and the Australian Federal Police (AFP) to identify the ongoing structured small-scale importation of cannabis from PNG into mainland Northern Australia as the region’s major law enforcement challenge (Tierney 1999; Jones 2000; AFP [2001], cited in JCPAA 2001). Methods of in-country transportation from PNG cultivation points to coastal Western Province locations included regional airlines, coastal shipping, dinghy and foot, with Daru Island providing the major transhipment point for the bulk of cannabis importation into mainland Australia. Most illicit drugs are transported in fibreglass boats and aluminium dinghies to Torres Strait islands and Cape York Peninsular. Regional and charter airlines, commercial coastal shipping, inter-island barges, and Australian registered trawlers are also employed in organised drug trafficking. By way of illustration, in

272 New Guinea Gold contains a high tetrahydrocannabinol (THC) level of forty-two percent. THC is the active ingredient in marijuana.
2000 drugs were reportedly being transported from Daru and stockpiled at coastal Treaty Villages, such as Old Mawatta, Mabaduan and Sigabaduru, prior to exportation to Australia. Cannabis was also transported from Buji and Sigabaduru villages to Boigu and Saibai Islands. Importations also moved from Boigu to Murray Island. ACS identified the four distribution hubs for drugs as Saibai, Yam, Badu and Thursday Islands, with Saibai and Yam providing the main gateway into the Strait. On land arrival at mainland Australia, cannabis was typically transported to southern markets from points such as Seisia, using aircraft and four wheel drive vehicles. Importation was funded by goods leaving Australia, including weapons destined for raskol (criminal) gangs in PNG’s Highlands and separatists’ movements operating in West Papua (Jones 2000; AFP [n.d.], cited in JCPAA 2001:99).

Today, Torres Strait is cited as a known trafficking route and corridor for weapons and drugs running between Australia and PNG. Strategically-positioned Daru Island has a reputation for frontier-town lawlessness and is notorious as a regional hub for organised trafficking of illegal drugs and high-powered guns (Marru 2005). Despite their reportedly good reputation with Australian authorities for clamping down on illegal activities in the area, once again PNG border control authorities lack sufficient staff and resources to overcome the situation (Inter. 1, 2 & 6, May 2004; Marru 2004). In 2004, Daru was also reportedly being starved out of funds by Western Province’s provincial Governor in his attempt to relocate the seat of provincial government from Daru to his hometown, situated further north in the province (Inter. 1, May 2004). Tensions between Daru locals and the Royal PNG Constabulary were also evident, with complaints lodged about police behaviour, in particular that of visiting Port Moresby-based riot squads (Faik 2002; Andrews [2002], cited in Faik 2002; Marru [2004], cited in Forbes 2004). Controversy also erupted over PNG’s ‘Operation Whitewash’ report (Forbes 2004). Acting Assistant Commissioner and Southern Division Police Commander,
John Marru (2005), also linked the arrests of an Australian national and PNG Government doctor to an organised criminal gang operating within the region\textsuperscript{275}.

When attempting to manage these challenges, Australian and PNG law enforcement agencies typically adopt a cooperative multi-jurisdictional MLG approach to regional law enforcement. By way of illustration, the Australian Federal Police (AFP) is tasked with the enforcement of Commonwealth criminal law and protects Commonwealth national interests from criminal activity, both in Australia and overseas\textsuperscript{276}. At the local level, AFP employs an established network of Registering Police Informants to assist its Resident Agent in gathering tactical and strategic intelligence relevant to breaches of Commonwealth law, for example in relation to regional cross-border trafficking of narcotics, people, weapons and ammunition. At national and state levels, the establishment of a permanent Resident Agent’s position under the Tough on Drugs Strategy (1998) has also facilitated the development of close working relationships between the AFP and other Commonwealth and state law enforcement agencies permanently based in the area, in particular Australian Customs and Queensland Police Service (QPS). AFP also utilises Coastwatch helicopters and Royal Australian Navy (RAN)\textsuperscript{277} assets to assist with intelligence gathering and conducting investigations on the remote Torres Strait islands.

AFP Torres Strait further links into a much wider complementary overseas network of AFP liaison officers and enjoys a particularly close working relationship with its counterpart AFP Liaison Officer at the Australian High Commission, Port Moresby (AFP 2001; Moore 2003).

At a supranational level, Australian law enforcement agencies operating within Torres Strait also link into a cooperative regional cross-border law enforcement network under various bilateral border management arrangements with PNG, as demonstrated in joint Australia-PNG border patrols involving Australian Customs, Australian Federal Police, Queensland Police Service, PNG’s Internal Revenue Commission, and the Royal PNG Constabulary (Waia 2002; TST 1985). By way of illustration, normal international travel in the Torres Strait region occurs via the official ports of entry and exit at Horn and Daru Islands. Hence, when ACS officials need to travel directly into coastal Western Province, they must first obtain prior permission from PNG Customs. This does not present major problems. At an international level, ACS officers maintain constant contact and enjoy an extremely close working

\textsuperscript{275} The gang’s Australian arm allegedly used the code name ‘Titanic’. The PNG side were known as the ‘Aliens’ (Marru 2005).

\textsuperscript{276} Australian Federal Police Act 1979 (Cth).

\textsuperscript{277} The Royal Australian Navy (RAN) provides a response platform for law enforcement agencies operating within the region. It also undertakes search and rescue activities.
relationship with their counterparts at PNG’s Internal Revenue Commission. At an operational level, under the cooperative working arrangements formalised under the Treaty, Torres Strait based Customs officers also enjoy a close primary working relationship with their Daru-based counterparts. Every three months, Customs-TS reportedly conducts cross-border patrols in a Customs Bay Class Vessel\textsuperscript{278}. Along the way, Australian law enforcement officers call at Daru Island to collect their fellow PNG law enforcement officers, who carry warrants to conduct searches in PNG Treaty Villages. At a humanitarian level, visits by Australian law enforcement agencies also provide Australian authorities with further opportunities to donate much needed fuel, paper, photocopies, office equipment, old uniforms and t-shirts to their fellow PNG officers, many of whom are not paid regular wages by their national government (Inter. 3, May 2004).

Defence
From a defence perspective, the relative strategic defence advantage afforded by Australia’s geographic isolation is also weakened in the Torres Strait region, due to the close proximity of PNG and Indonesia. Geography dictates that countries located immediately within Australia’s northern approaches will always remain of enduring strategic and security significance to this country. Maintaining the territorial integrity of PNG and the nearby archipelagic Republic of Indonesian is crucial, both to Australia’s national interests and the wider region’s future stability. It is also inextricably linked to the strategic defence of Australia. Consequently, the Australian Government places a high priority on progressing regional cooperation in areas such as maritime surveillance, law enforcement, and intelligence exchange on regional border protection related matters (DoD 2003; Hill 2003). Australia’s strategic regional environment has greatly altered since the World Trade Centre terrorist attack on 11 September 2001 (Hill 2003). The foiled plan to attack Australia’s diplomatic mission in Singapore and the ‘Bali Bombing’ terrorist attack in October 2002 both confirm suspected links between Al-Qaida’s well-established global Islamists’ terrorism and various Middle Eastern radical Islamist organisations, and the terrorist actions of entrenched militant regional extremist groups operating in South East Asia, for example the Moro Islamic Liberation Front (MILF), Abu Sayyaf Group (ASG) and Jemaah Islamiyah (JI), with its stated goal of creating an Islamic state encompassing Indonesia, Malaysia, Singapore and the southern Philippines (CoA 2003). The relatively recent arrival in West Papua Province of Islamic militant group, Laksar Jihad, also contributes to changing regional dynamics. Backed by the Indonesian military’s political and financial strength, Laksar Jihad has reportedly been active along the PNG-West Papua

\textsuperscript{278} According to Marru (2005), PNG authorities only conducted two joint patrols with the AFP in 2004.
While no major regional disputes, evidence of aggressive development of military capability, or threats of direct military attack against Australia currently exist in the immediate region, Australia is situated within a relatively unstable and generally ‘troubled’ region (Hill 2003). Many of its closest neighbours are characterised by weak political leadership, slow growth rates, declining governance standards, lack of employment opportunities, serious economic hardship, corruption and popular dissatisfaction with their respective individual governments. As noted, terrorism and religious, ethnic and separatist challenges also pose serious threats to social cohesion and internal political stability within many of these countries. Population, environmental and internal security pressures only further exacerbate these problems (Hill 2003; DoD 2003). By way of illustration, despite reportedly constructive Indonesia-PNG bilateral relations, both Australian and PNG intelligence and military strategists view pre-existing and emergent tensions along the PNG-West Papua border region with deep concern. Australian strategic analysts, in particular, reportedly hold concerns that Canberra might be drawn into possible widening conflict in the region, should its former administrative territory ever formally request Australian military assistance to close down its porous western border (Daley 2000). Another major concern is that PNG authorities remain ill-equipped to manage a repeat mass exodus of potential refugees from the disputed West Papua province should there ever be another spill-over of the Free Papua (Papua Merdeka) campaign for independence, as occurred in 1984-86 when 10,000 to 12,000 West Papuan civilians fled into PNG (Daley 2000; Glazebrook 2001). Similar concerns are held that PNG’s deteriorating internal security situation might force a mass exodus of refugees down into the Torres Strait region, at some future stage (Boyd 2003; Windybank & Manning 2003; Barter 2004).

Within the immediate Torres Strait region, the Department of Defence (Charlie Company 51 FNQR C Coy) specifically provides assistance and logical support by acting as a response platform for civil law enforcement agencies, for example in assisting civil powers with

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279 Recent human rights violations include the killings of independence leader Theys Eluay in 2002 and Willem Onde in September 2001 (TAPOL 2004).

280 Defence operates out of Thursday Island barracks and maintains a regional military presence (Regional Force Surveillance Unit - RFSU) through the personnel of 51st Battalion – Far North Queensland Regiment (Charlie Company 51FNQR, C Coy). The Battalion’s Area of Responsibility (AR) covers over 640,000 square kilometres, from Cardwell to Torres Strait, including Cape York and the Gulf Country. Sarpeye C Coy reservists also continue in the spirit of the Torres Strait Light Infantry and have a good knowledge of their local land and maritime environs and the ability to live in the field for extended periods of time.

281 Platform: Mobile asset able to carry one or more sensors.
interdictions involving the illegal entry of third country nationals, drugs, weapons and FFVs. Sarpeye C Coy’s part-time reservist indigenous personnel also provide a civilian reporting network, being actively recruited from local traditional inhabitant communities to practice and conduct surveillance and operations training in defence of the immediate region. In this, they are strongly backed by their local communities. Defence personnel also support the Northern Australia Quarantine Strategy by providing logistical support and reporting on identified quarantine threats during normal surveillance activities. Defence further maintains a full time resident Royal Australian Navy Officer and support staff at its Thursday Island base in support of RAN regional activities, including patrol boat surveillance, mine warfare, logistics support and hydrographic surveys conducted by LADS\textsuperscript{282}. A twenty metre RAN Patrol Boat, \textit{Malu Baizam}, is based out of Thursday Island to assist in these tasks. RAN also works closely with Coastwatch in carrying out surveillance and enforcement duties in support of fisheries legislation relating to the Protected Zone Joint Authority (JPCPW 1997; JCPAA 2001:xxiv; Ellison 2004; ACS 2004; Inter. 3, May 2004).

Papua New Guinea

Papua New Guinea’s close proximity is of particular concern to Australian authorities. PNG is a country rich in natural and human resources. Typically, changes of government are regular, reasonably peaceful, and constitutional. Despite numerous predictions of imminent collapse, the State always managed to somehow remain intact, aided largely by a backup safety net of subsistence farming and local economies. Theoretically, PNG also remains a relatively intact democracy, as evidenced in its free press, independent judiciary and constitution which unlike Australia’s, guarantees its citizens their basic civil and political liberties. As the largest regional Pacific Island country, with a rapidly growing population around a quarter the size of Australia’s and predicted to double by 2025, PNG also provides Australian investments and exports with a current and potentially expanding billion dollar export market. Nevertheless, Australian officials continue to express ongoing concerns over the country’s future, including the possibility of a failed or failing state emerging to the Torres Strait’s north. Serious doubts are also expressed over PNG’s ability to withstand further periods of severe crisis and turmoil and avoid a descent into chaos. Other pre-existing tensions, such as those between PNG’s civilian government and its ill-disciplined Defence Force (PNGDF), and between PNGDF and the Royal PNG Constabulary, in addition to the ongoing costs to the nation resulting from the war in Bouganville and loss of Panguna mine’s sizable revenue, along with ongoing troubles

\textsuperscript{282} RAN Hydrographic Service & LADS: The Cairns-based Laser Airborne Depth Sounder (LADS) Unit comprises a mixture of navy and contract personnel who employ an airborne scanning laser mounted in a civil Fokker F27-500 ‘Friendship’ aircraft to conduct hydrographic surveying in the Torres Strait, Great Barrier Reef and Coral Sea areas (RAN 2000).
and lawlessness in the Southern Highlands, also continue to help exacerbate current difficulties. Numerous long-term negative trends are also evident, ranging from failing service delivery and public policy instability, to inadequate budget appropriations and consistently poor economic performance. The country continues to suffer with poor infrastructure, rising utility costs, poor health indicators, high illiteracy rates, and serious law and order problems. When combined with PNG’s inability to effectively monitor its land and sea borders, all these factors now increasingly expose the State to serious transnational threats, including potential exploitation by undesirable criminal actors, for example terrorists and people, drug and arms smugglers, all of who could exploit a weak PNG State as an operational base and point of unauthorised entry into Australian (PNG Constitution; DoD 2002; 2003; Windybank & Manning 2003; AusAID 2004; ASPI 2004).

Western Province

Another emergent risk factor in the immediate Torres Strait vicinity is social unrest in coastal Western Province, as evidenced in the four day localised closure of the Australia-PNG border in August 2004. During an outbreak of inter-tribal violence and destruction between Papuan Treaty Villages between 21-26 August 2004, Masingara village tribesmen burnt Old Mawatta village to the ground. According to Gamo Gagoro, member of the newly-established Mawatta Restoration Committee, in the process Masingara tribesmen incinerated an elderly disabled blind man alive, destroyed food gardens, killed animals and stole food. As a direct result of the incident, DFAT’s Treaty Liaison Officer authorised a total closure of the immediate Australia-PNG border area. Due to hardships inflicted on several coastal Papuan communities not involved in the violence, after a four-day closure the border was reopened, for essential travel only. Throughout the disturbance, Australia’s broader national security interests were given overriding priority over the Treaty’s free movement provisions as a concentration of Immigration, Quarantine, Queensland Police and Australian Customs officials, backed by the full support of the PNG Government, Torres Strait Island Councils, Council Chairs, and the various Protected Zone communities caught up in the restrictions, constantly monitored the situation in the immediate border area to prevent any possible opportunistic or illegal cross-border activities. Queensland Police and Australian Customs also maintained a vessel in the area. Clashes between the two Treaty Villages are believed to have arisen out of a number of long-standing cultural and ethnic tensions. The destruction of Old Mawatta, renowned as the site where the London Missionary Society’s Reverend Samuel McFarlane first landed in PNG in July 1871, left fifty-five families homeless. The unplanned displacement and subsequent relocation of around 250 Mawatta refugees to a neighbouring Treaty Village, Tureture, also left that village’s population of around 400 and its resources severely overburdened, thus
creating a temporary humanitarian crisis during which increased health problems and severe food and potable water shortages were experienced. Fighting between Masingara and Old Mawatta villagers reportedly began after a Masingara canoe allegedly sustained damage from a falling coconut (Torres News, 1-7 Sep. 2004; Torres News, 1-7 Sept.; 6-12 Oct. 2004).

Operational Oversight of the Australia-PNG Border Region

As highlighted, effective management and implementation of the Torres Strait Treaty’s terms and provisions relies heavily on the dynamics of MLG and also considerable and continuing cooperation between all parties involved. However, in a direct reflection of Australia’s history of federalism, the Treaty’s practical implementation at an operational level remains the responsibility of the appropriate line agencies. When implementing the Treaty’s terms and provisions and wider government policy within Australian jurisdiction in the area, Australian Government agencies typically operate in Australia’s national interests, acting in accordance with their respective administrative Acts, or in high priority situations under direct orders from Canberra. No single agency has been given the core role, and therefore legislative authority, for commanding responsibility for the Torres Strait region’s oversight. Nor is there any single overriding jurisdiction covering the overall enforcement of law within the region. Along Australia’s, and Queensland’s, most northern ‘frontline’, it is the Australian Customs Coastwatch model that provides the administrative framework for operational oversight of the Torres Strait region and the ordering of competing priorities as the various actors involved set about their respective tasks of cooperatively managing the Australia-PNG border region.

Australian Civil Coastal Surveillance System

Australian Civil Coastal Surveillance System encompasses the entire complex of government agencies with authority to enforce legislation in Australian maritime zones (Figure 8). As an important component, Australian Customs Coastwatch coordinates this system, which is based upon notions of shared responsibility. For example, Woolner (2000-01) notes: ‘The surveillance system can best be described as one of ‘distributed responsibility’, that is, an arrangement where many bodies have responsibility for distinct components but no one body has the power to implement requirements for the development, and manage the performance, of the whole system’. The inherent structural weakness of this system is any fragmentation amongst participating agencies places the entire system at risk of failure. Within the Torres Strait region, this risk is overcome to a great extent because individual Customs Coastwatch officers are able to talk directly with their local Clients to gather information and transfer
intelligence. Indeed, it is argued that the large amounts of cooperative and coordinated inter-agency liaison being conducted at a personal, one-on-one, face-to-face, ground level within the predominately Commonwealth frontier governance ‘community’ at Thursday Island is a major reason why the Australian Customs Coastwatch model works so effectively within the Torres Strait region (Inter. 3, May 2005).

As in other Australian maritime zones, the coastal surveillance system in Torres Strait draws together four main components: Stakeholders, Clients, Coastwatch, and Service Providers. While not directly engaged in civil maritime surveillance, Stakeholders, such as Prime Minister and Cabinet (PM&C), have a strong vested interest in the system’s outcomes, for example in relation to national policy direction. Clients, on the other hand, consist mostly of those Commonwealth government agencies tasked with law enforcement and administrative responsibility for the Torres Strait region. Each agency provides Coastwatch with tasking requests and related intelligence, and in return receives relevant surveillance reports and response coordination services. The Coastwatch component also provides the command, control and operational management functions of the civil maritime surveillance structure, under which contracted rotary wing aircraft are assigned to the Torres Strait region. These assets are reinforced by visual observing aircraft from Cairns and Darwin, which allow for night-time aerial surveillance (ACS 2004; DIMIA 2004; ACS-COCD 2004; Ellison 2005c). While Coastwatch uses civil contractors, it nevertheless maintains control over all operational planning and flight briefings for contract aircraft taskings (processes). Similarly, Coastwatch maintains a comprehensive performance measurement regime, including involvement in training and aircrew programs (Earley 2004; Marshall 2004). Specialist Providers also support the civil maritime surveillance effort by supplying Coastwatch with occasional specialists information. For example, Coastwatch receives information on vessels via the Australian Ship Reporting System (AUSREP) and Reef Reporting System (REEFREP), supplied by the Australian Maritime Safety Authority (ASMA) and Queensland Government respectively. Custom’s National Marine Unit (NMU) also provides on-sea assets for the response function (ACS 2004).

The history of Australian civil maritime surveillance is one of crisis driven incrementalism in which successive federal governments priorities have progressed from monitoring Australia’s fisheries zones to a much stronger focus on border protection and national security issues. Coastwatch now enjoys a particularly close working relationship with the Australian Defence Force (ADF), primarily due to areas of shared interest between Australia’s civil and military coastal and offshore surveillance programs. Benefits Coastwatch reportedly obtains through
its close connections with Defence and the military surveillance program include access to a variety of assets, including relevant information technology suites and intelligence sources for assisting in detecting and identifying vessels, for example signal traffic related to maritime surveillance. Other advantages include the leveraging-off of relevant Defence developments in fields such as communications and command and control structures. A minor client but strategic partner, Defence supports Coastwatch in the delivery of additional surveillance and response services to clients on Coastwatch’s behalf, for example via intelligence sharing, surveillance and response assets, such as RAN Patrol Boats. While Coastwatch will retain sufficient independent operational capability to cover core client business requirements, the relationship between Defence and Coastwatch moved even closer in 2005 when the agency became a key element of the jointly ACS-DoD staffed Australian Joint Offshore Protection Command.

Australian Customs Service

While Coastwatch is a highly-specialised division of Customs, Customs is also a Coastwatch client. Established in its current form by subsection 4 (1) of the Customs Administration Act 1985 (Cth), Australian Customs Service (ACS, Customs) is the prime agency responsible for Australia’s civil border protection. This regulatory and law enforcement agency derives its authority and power primarily from the Australian Constitution (Section 90), which vests the Commonwealth with exclusive powers to levy customs duties and is given legislative effect through the Customs Act 1901 (Cth), Customs Tariff Act 1995 (Cth) and related legislation. As a service-oriented organisation, ACS delivers legislation on behalf of several agencies, in accordance with the respective legislation administered by those agencies in areas relating to the cross-border movements of people, goods and cargo. This includes customs, fisheries, quarantine, immigration, environment, police and maritime security laws. Since October 1998, ACS has been responsible to the Minister for Justice and Customs as an

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283 Command and Control: ‘An integrated system of doctrine, procedures, organisational structure, personnel, equipment, facilities, communications, etc, that provide authorities at all levels with timely and adequate data to plan, coordinate and control their activities (ADF 1994 – abridged, ACS-COCD 2004).

284 Joint Offshore Protection Command (JOPC): JOPC builds on existing Coastwatch functions, supported by the ADF, to assume direct responsibility for counter terrorism prevention and interdiction and response. The initiative also now provides an overarching military command and control structure in all Australian offshore areas.

285 For example, the Department of Transport and Regional Services’ (DoTaRS), as the lead agency and driver for maritime security, is charged with responsibility for the prime carriage of implementation of the new International Marine Organisation (IMO) requirements for vessels and ports under Chapter XI-2 of the IMO’s International Convention for the Safety of Life at Sea (SOLAS) 1974, and the International Ship and Port Facility Security Code (ISPC Code). Under Australia’s treaty obligations, DoTaRS’s Maritime Security Regulation Branch implements these special measures through the Maritime Transport Security Act 2003 (Cth). However, as Customs maintains a strong physical at many Australian ports, it is also identified as a law enforcement agency for the purposes of this particular legislation and is therefore heavily involved in its enforcement (Woodward 2004).
agency under the Commonwealth Attorney-General’s portfolio, which the Attorney-General in turn maintains overall policy responsibility for, subject to Chief Executive Officer (CEO) statutory powers (ACS 2004). ACS’s long-standing, close, cooperative working relationships and partnership arrangements with other domestic and international law enforcement and security agencies also help to facilitate joint operational activity and information exchange and assist in identifying and intercepting illicit cross-border activity. In particular, Customs places a particularly heavy reliance on Australian Federal Police (AFP) intelligence networks, with information received from such sources being conducted into tactical drivers for operational activity (Collins 2001; Burns 2003; Woodward 2003).

Within the immediate Torres Strait area, ACS maintains a strong regional presence. Customs House at Thursday Island supports a significant contingent of permanently-based fulltime officers. All remain response-ready, with the capacity for rapid deployment to outer islands in Customs Coastwatch helicopters. ACS’s regional capabilities and organisational strength rest primarily in the ability of its well-resourced and highly experienced staff to ‘get the job done’. All are reportedly highly proficient at receiving instructions and carrying them out to a conclusion. During the normal course of duties, local Customs officers proactively engage in information gathering and targeting through intelligence received. Customs House (TI) also acts as a feeder office, working closely with Customs Cairns, the heart of regional Queensland intelligence gathering. Custom-TS’s greatest regional challenge falls under the enforcement side of operations, namely responses to interdictions at the Australian-PNG border. Customs House (TI) also provides the planning-liaison centre for Coastwatch surveillance flights and a communications centre for patrols conducted by Customs National Marine Unit (NMU) Bay Class Vessels, which also maintain a strategic local presence (Marshall 2004; Inter. 3, May 2004; Torres News, 26 Dec. – 1 Jan 2004).

Coastwatch Tasking Area 1

As highlighted, ACS is tasked with providing effective civil aerial maritime surveillance and response services to a wide range of Australian Government agencies. Its aerial surveillance arm, Coastwatch, provides these services on its behalf (Bonser 2002; ACS 2004). Coastwatch enjoys no separate legislation or formal (written) charter defining its role or powers. As with ACS, Coastwatch delivers and coordinates services on behalf of a number of other agencies.

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286 Coastwatch Tasking Area 1: This term is being replaced with the expression ‘Torres Strait Surveillance Situation’. Surveillance areas will comprises two distinct zones. Inshore Surveillance Environment Zone (SEZ) are positioned within 50 nm of the coastline. Offshore SEZs represent surveillance areas positioned greater than 50 nm from the coast. A 30 nm overlap will exist between the SEZ boundaries. The Torres Strait is classified as an inshore SEZ (ACS-CODC 2004).
Coastwatch attempts to maintain fairly comprehensive aerial coverage of the Torres Strait and adjacent areas. Coastwatch Tasking Area 1 applies to Torres Strait, the Torres Strait Protected Zone (TSPZ), and northern Cape York Peninsular and adjacent areas. It represents the only surveillance area in Australia in which clients require a regular contracted aerial response and logistical support capability. Principal surveillance and response platforms include contracted civil aircraft provided by Surveillance Australia and Australia Helicopters Pty. Ltd. (AHPL), Australian Defence Forces (ADF) resources, ACS National Marine Unit’s sea going (Bay Class) vessels, and the small Rapid Response Vessels (RRVs) that form part of the National Illicit Drugs Strategy (NIDS) (JCPAA 2001; Inter. 3, May 2004). Under the joint cooperative MLG approach to border management obliged under the Torres Strait Treaty, Coastwatch provides civil maritime surveillance coverage between 9° and 11° degrees South, and 141° and 145° East, and also extends to adjacent PNG coastal areas and overland into Cape York Peninsular to 15° degrees South (Cape Flattery)287 (Map 7) (ACS-COCD 2004).

Map 7: Coastwatch Tasking Area 1

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287 Coastwatch response capability is also required up to at least eighty nautical miles seaward from the coast of Cape York Peninsular, extending around 120 nautical mile radius from Horn Island, Lockhart River and Weipa (ACS-COCD 2004).
Coastwatch maintains around fifteen to eighteen flight routes within the surveillance area. Everyday contracted Coastwatch surveillance aircraft fly randomly across the 35,000 km² region, reporting on anything unusual or suspicious, or assessed as being of possible interest to Australian border control and security agencies. Few know in advance where Australian authorities will be on any given day, thus bringing an element of surprise and unpredictability. Coastwatch is essentially looking for early warning devices on activities of interest emerging in and around the general Torres Strait region. Information on observed targets is then immediately relayed back to the National Surveillance Centre (NSC) for identification and analysis. The vast area monitored, when combined with the impracticability of trying to provide continuous surveillance and response services within the demanding Torres Strait environment, necessitates high levels of coordination between Coastwatch and its key client agencies, for example DIMIA, Customs, AFP, AQIS and DFAT. It also requires sound intelligence and risk management procedures for tasking Coastwatch assets, along with clear lines of reporting and effective support systems for providing greater effectiveness in operations management. To support such requirements, Coastwatch maintains Service Level Agreements (SLA/MOUs) with its key clients. These clearly outline the individual parties’ roles and responsibilities, including performance and associated accountability criteria. Coastwatch’s extensive operational area also dictates surveillance efforts should preferably be concentrated in the right place, at the right time. This requirement is overcome to a certain extent by exploiting the aircraft’s flexibility. Within the Torres Strait region, Clients more often than not share a common task. All agencies also generally want access to the same information. The multi-tasking of contracted aircraft, including aircraft undertaking tactical operations, allows authorities to achieve optimal economy of effort, with each sortie being planned to deliver the maximum possible benefit for costs incurred. Nevertheless, there will always be gaps given the vastness of the coverage area and finite resources available. Hence, border authorities have to proactively risk-manage the area. First, they must identify where the biggest risk of illegal activities is, at any given moment, and that is where they will then concentrate their resources. At a ground level, the regional coastal surveillance program is also being reinforced by informal sources, such as free public telephone contact numbers and information provided by private and commercial shipping vessels (ANAO 2000; ACS 2001-04, 2003; ACS-COCD 2004: Inter. 3, May 2004).

Activities of Interests are targets or events that require consideration by Coastwatch clients. These are assigned a lower priority than Activities of Concern (ACS-COCD 2004).
Coastwatch ‘Concept of Operations’ (CONOPS)

Coastwatch is both a receiver and disseminator of information and intelligence (Inter. 16, July 2005). Its operations are client-driven, threat-based and risk-assessed (ACS 2004). Under CONOPS, the organisation’s overriding objective is achieving an operational solution that is responsive to its Clients’ needs, concomitant with an ability to provide its Client base with quality timely intelligence and related intelligence assessments. Individual government agencies constituting Coastwatch’s diverse Client base are responsible for determining their respective threat areas, developing threat assessments, and assessing their individual agency’s surveillance requirements. Using Common Risk Assessment Methodology (CRAM), Coastwatch translates these individually identified needs into timely surveillance outcomes, each with the highest probability of achieving a positive operational result. CRAM also provides the basis for ranking or ordering these competing interests. For example, Clients taskings within Australia’s maritime zones are notionally segmented into discrete geographic areas in which Clients identify threats relevant to their individual interests and allocate a numerical risk ranking. Once Client agencies rank (risk assess) each strategic and tactical tasking, ‘scores’ are then allocated to individual Clients. These inform surveillance planners and underpin all fight programming. Areas of possible threat are also continually reassessed by Coastwatch operational planners, in consultation with Client agencies, so any emerging threats may also be adequately addressed. Coastwatch also coordinates sightings, requests and on-the-water enforcement capabilities. Meanwhile, the National Surveillance Centre (NCS) determines the overall direction and focus for surveillance activities, in accordance with the priorities and response requirements identified by individual Client agencies, which may

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289 Coastwatch’s generic ‘Concept of Operations’ is currently underpinned by several key operating principles and parameters, identified as: (1) service provider to clients; (2) national perspective; (3) concentration of resources; (4) economy of effort; (5) common risk assessment methodology (CRAM); and (6) international cooperation. Beyond the term of current commercial surveillance contracts, which expire from 2004 to July 2007, under Coastwatch’s new generic ‘Concept of Operations’ (CONOPS) the organisation’s capability will be developed within a policy framework centred on five key pillars. The first (1) is its mission: ‘to safeguard the National interests through the delivery of an effective civil maritime surveillance and response service’. The second (2) is ensuring the effective delivery of Australia civil maritime surveillance program, including the development and maintenance of Maritime Zone Awareness (MZA), defined as ‘the knowledge of activities in maritime zones relevant to Australia’s national interest’ (ACS 2004). The third (3) is focusing on Australia’s northern approaches as the organisation’s primary short–term priority. The fourth (4) pillar is Coastwatch’s ongoing partnership arrangement with external contractors and other government agencies for the provision of those surveillance and response services that form the basis of Coastwatch’s capability. The fifth (5) is the deployment of Defence assets, where possible, to enhance MZA and improve the civil maritime surveillance effort. Coastwatch’s operational methodology is also undergoing change. Its civil surveillance program will consist of two forms, or ‘modes’: Wide Area Surveillance and Targeted Surveillance. Programmed missions conducted under the Wide Area Surveillance mode are designed to develop MZA, fulfil client surveillance requirements, and provide a deterrent effect. The service is complemented by Targeted Surveillance which is conducted to detect, identify, track and coordinate responses to specified targets within identified operational ‘situations’, such as Torres Strait Operations, using a combination of Coastwatch, Defence and other assets, including external providers. Targeted Surveillance typically has priority Wide Area Surveillance (ACS- COCD, 2004; Inter. 14, July 2005).

290 CRAM: The expression Common Risk Assessment Methodology is being replaced with the term ‘Risk Management’ (ACS- COCD 2004; ACS 2005).
differ depending on their respective interests. Regional Coastwatch offices, such as Thursday Island, are responsible for executing surveillance plans, including specific tasking details like aerial departure times, flight routes, and other individual flight parameters. Regional offices are also responsible for local liaison with Clients to ensure individual agency requirements are fully satisfied. As previously highlighted, the overall system’s effectiveness within the Torres Strait region is largely contributable to the highly cooperative and highly integrated working relationships established within the Commonwealth ‘community’ at Thursday Island (ANAO 2000; ACS 2004; Inter. 3, May 2004).

Coastwatch taskings (processes) fall into two main categories. Strategic taskings, for example normal fisheries patrols, are planned, general in nature and based on generic general intelligence. Typically, they involve pre-determined flight patterns and sailing routes. They form the basis of Customs Coastwatch’s long-term flying and sailing programs, allowing for the tasking of resources in the medium to long term. Regional government Clients, such as those at Thursday Island, can also generate strategic tasking requests through Coastwatch’s regional bases. For example, all Client taskings for the Torres Strait region go first to the Coastwatch desk, Customs House (TI). Individual taskings are then combined with Customs’ own strategic tasking requests and ‘pushed down’ to Canberra for validation, prioritisation, and integration into the existing operational program. Once a request is deemed to fit within the required parameters, it is forwarded to either Coastwatch or Customs’ sea-going unit, the National Marine Unit, for appropriate action (ANAO 2000; Inter. 3, May 2004).

Conversely, Coastwatch and National Marine Unit coordinated tactical taskings constitute a smaller percentage of total taskings and generally have a specific goal or objective (Figure 9). They typically involve breaches, or alleged breaches, of Australia’s border and are based on specific intelligence provided by Client agencies and/or are flown in response to emerging incidents or events requiring an immediate Customs or client agency response (ANAO 2000, 2003-04). For example, when Coastwatch aircraft sight a vessel or something suspicious, they report directly to Coastwatch, rather than the relevant line agency involved. Coastwatch National Surveillance Centre (NSC) then passes the information onto the relevant government agency, which then makes a decision on action to be undertaken. In a majority of cases, response actions to surveillance sighting are requested. Coastwatch then coordinates this response via the NMU or Royal Australian Navy (RAN), either of which sends a patrol boat out to investigate. Where appropriate, NMU responses are requested in preference to Defence assets. However, while Customs officers are permitted to carry side arms and employ a rifle and shotgun for personal defence during boarding operations, NMU is not a paramilitary unit
Hence, on occasion a military presence may also be required, for example for shooting warning shots across the bows of Suspected Illegal Entry Vessels (SIEVs) (*Defence Act 1903*, SECT 51T(1); Ellison 2005). Client agencies, for example DIMIA and AFMA, also deploy officers empowered under legislation to conduct boardings and apprehensions. Once a Customs patrol boat intercepts and conduct a boarding of a suspect vessel, an information report is channelled back through the Coastwatch communications network via the NMU, which then passes the information to the relevant agency. Conversely, if the apprehending vessel is a RAN patrol boat, that information would be channelled via Headquarters Northern Command²⁹² (HQNORCOM), Darwin. Information reports on incidents normally include a recommendation from either the relevant Fisheries or Immigration officer aboard, or if not available, the patrol boat commander (Venslovas [2004], cited in RRATLC).

FIGURE 9: Coastwatch Coordinated Tactical Tasking Process

²⁹¹ Customs patrol vessels *ACV Corio Bay* and the 104 metre Southern Ocean Patrol vessel *Oceanic Viking* already carry deck-mounted weapons systems. In July 2005, the Minister for Justice and Customs announced all 38 metre Customs Bay-Class will be fitted with 7.62mm General Purpose Machine Guns over the next few years (ACS 2005).

²⁹² Headquarters Northern Command (HQNORCOM): Situated at Larrakeyah Barracks, Darwin, HQNORCOM was established in 1988 as an operational level joint ADF Headquarters. The Commander NORCOM reports directly to Commander Australian Theatre (COMAST) and is responsible for the planning and conduct of surveillance, reconnaissance, protection and civil support operations within the Command’s Area of Operations (AO), which covers Queensland, the Northern Territory above nineteen degrees south, and the Kimberley and Pilbara Districts of Western Australia.
The following incident illustrates how a Coastwatch coordinated tactical response and the cooperative bi-lateral working relationships being facilitated under the Torres Strait Treaty combine with the Torres Strait region’s remoteness and uniqueness to exploit a cooperative and coordinated multi-level governance (MLG) approach in managing the multi-jurisdictional Torres Strait border region. In April 2005, a local traditional inhabitant living on the northern Queensland island of Boigu provided Australian Customs Service with information on the presence of a nearby foreign fishing vessel (FFV) operating inside the Torres Strait Protected Zone ‘Top Hat’ area. An Australian Customs Coastwatch aircraft already conducting local aerial surveillance in the area began monitoring the unauthorised Indonesian-flagged fishing boat. Following consultation with the Australian Fisheries Management Authority (AFMA), Australian Customs patrol boat *Hervey Bay* then responded and an Australian Fisheries Officer aboard the Australian Customs Vessel (ACV), acting under Papua New Guinea’s legislative authority and accompanied by Australian Customs officers, boarded the FFV, which was confirmed to be located inside PNG’s sovereign territorial waters. Under the cooperative bilateral MLG approach to regional border management being obliged under the Torres Strait Treaty, ACV *Hervey Bay* then escorted the illegal Indonesian vessel (FFV) out of the Torres Strait Protected Zone (TSPZ) over to Daru, Western Province, for subsequent investigation by national PNG Fisheries officers *(Torres News, 20-26 April 2005)*.

As evidenced above, tactical taskings always take precedence over strategic taskings. Major problems can however arise at an operational level when this occurs. For example, the emergence of a high risk threat would result in a concurrent high intensity concentration of resources in one area and temporary back-off in the strategic flying program in another, thus leaving holes, or gaps, in surveillance coverage and a resultant diminution of the strategic surveillance program within the Torres Strait region. Short periods of high intensity activity in one location would also allow for opportunistic activity in others. Authorities in Torres Strait may be well aware of potential breaches of Australian or PNG law occurring in nearby areas, yet not have the capacity to respond due to a lack of short term resources (JCPAA 2001; Inter. 3, May 2004). Recent military operations, for example *Operation Blackrock* and *Exercise Northern Exile*, have also highlighted serious concerns about the capacity of ACVs *(ANAO NMU Audit Report No. 37, 2003-2004)*. Similarly, due to extensive reef formations in

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293 Other instances of the numerous examples of coordinated MLG and close cross-border cooperation occurring during the successful apprehension of Indonesian FFVs are those involving joint responses by the Maritime Wing of the PNG Defence Force, PNG National Fisheries Authority, Australian Fisheries Management Authority, the Royal Australian Navy and Australian Customs Service, for example the forfeiture of *Mutiara Jaya #17* and *Mutiara Jaya #18* in 2001 (MCS 2001).

294 *Operation Blackrock* demonstrated the ACV’s pursuit tenders’ lack of suitability for deploying officers to board vessels at sea, due to their failure to provide a stable platform for boarding parties. *Exercise Northern Exile* also highlighted ACVs inability to undertake covert surveillance *(ANAO N, Audit Report No. 37, 2003-2004)*.
southern Torres Strait and heavy mud sedimentation in the Strait’s north, ACVs and RAN Patrol Boats are generally overly large for Torres Strait operations. Both types of vessels are essentially limited to an east-west passage through officially chartered waters, unlike the large amounts of sea traffic that moves in a north-south direction and requires close monitoring. Monitoring problems also arise with government surveillance of the numerous commercial fishing vessels working Torres Strait. Many carry detailed charts based on extensive personal surveys conducted by individual fishers over many years and have the capacity to readily move in and out of those officially unchartered waters and reefs still presenting in the Torres Strait area. At a ground level, such conditions leave local Australian and PNG border protection authorities highly reliant upon processes of proactive intelligence gathering, in addition to the response capabilities provided by small boats and helicopters (Woolner 2000-01; Inter. 4, May 2004).

Hence, to enhance remote area surveillance and increase Defence and Coastwatch’s capacity to deter and intercept illegal incursions of the border, the existing combination of fixed-wing aircraft, helicopters and satellites in the Torres Strait area is being augmented with the trailing of next generation long-range wide-area High Frequency Surface Wave Radar (HFSWR) technology. The nineteen million dollar initiative, jointly funded by Customs (twelve million) and Defence (seven million), again highlights the close working relationship between the agencies. The installation of strategically-placed HFSWR surveillance facilities on Dauan Island (440 metre-long receiver array) and uninhabited Koey Ngurtai (Pumpkin) Island (transmitter) supplements existing Defence radar coverage and enables improved twenty-four hour wide-area coastal monitoring of aircraft, ships and boats within the region. It also has the potential to complement the JORN sky wave system and provide an early warning storm device, and also assist in local search and rescue efforts. The facilities are further intended to help provide valuable intelligence for Coastwatch-coordinated operations and data gathering of probable air, or surface, contacts encountered during possible future military operations to defend Australian territory within the immediate region (Attorney-General 2004). The federal government’s joint signing of voluntary Indigenous Land Use Agreements (ILUAs) with the relevant Torres Strait Islander communities under the Native Title Act 1998 (Cth) has allowed construction of these facilities (Ellison 2004; Hill & Ellison 2004; Attorney-General 2004).

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295 Known by contractor Daramount as ‘SECAR Surface Water Extended Coastal Area Radar’.

296 Koey Ngurtai (Pumpkin) Island is administered by nearby Badu Island.

297 Jindalee Operational Radar Network (JORN): Jindalee over-the-horizon radar at Longreach, Alice Springs and Laverton (Western Australia) enables Australian Government monitoring of all air and sea activities to a distance of 3,000 km, including Java, East Timor, West Papua, Papua New Guinea, the Solomon Islands, and out across the Indian Ocean (DSD 2000).
ACS is also working closely with Defence and separately on the initial stages of trailing unmanned aerial vehicles (UVAs) to monitor illegal activities unfolding in the area\(^{298}\). Once fully operational, this ‘mix of solutions’ is intended to reduce actual aircraft flying hours while at the same time increase air surveillance coverage of the area (JCPAA [2001], citing Customs, Submission No. 56, Volume 4, p. S663; Burns 2003; Woodward 2004; Crane 2005; Hill & Ellison 2004; Marshall 2004, 2005, Torres News, 30 March - 6 April 2005).

Conclusions
The Australia-Papua New Guinea border region is jointly and cooperatively managed by both Treaty Parties. For much of its length it remains relatively unproblematic. By contrast, due to the Torres Strait Treaty’s terms and provisions and the complex jurisdicational and operational issues involved, effective implementation of government policies in the Torres Strait region is impossible without the ongoing cooperation and support of all parties involved. Nevertheless, the Commonwealth has not relinquished any noticeable measure of authority to other levels of governance. It still retains its firmly entrenched formal constitutional powers. Conversely, growing levels of interconnectedness and complexity also now require federal administrators and the relevant state actors involved to constantly seek out each other and other members of their wider integrated Torres Strait community as continuing resources. At a supranational level, effective border management also requires ongoing cooperative cross-border working relationships between the Australian and PNG government agencies tasked with operational oversight of the immediate Torres Strait area. Meanwhile at a local level, positive outcomes remain highly reliant on the ongoing cooperation and support provided by local traditional Papuan and Torres Strait Islander communities. At an implementation level, it is the presence of these wider integrated community networks and accompanying processes of cooperative MLG that allows government to work within the Torres Strait region. It was also noted that MLG processes, structures and outcomes tend to vary across individual policy arenas. AQIS proactively embraces the dynamics of cooperative, consultative MLG when attempting to achieve its wider regional goals. By contrast, ACS, DIMIA and the AFP’s exploitation of MLG tends to be more task specific, as demonstrated in tactical taskings and joint border patrols. Conversely, health care provision for entitled visiting PNG nationals is not included under the Treaty’s formalised cooperative arrangements. Subsequently, non-cooperative interactions and the presence of multi-level governance continue to be exploited by all the governmental actors involved in their ongoing attempts to shift responsibility for this unintended, unwelcome Treaty’ consequence from one jurisdictional level to another.

\(^{298}\) Department of Defence Unmanned Aerial Vehicles (UVAs): Operational UVAs can remain airborne for longer periods of time than conventional aircraft (up to twelve hours versus six). Defence’s UVAs, which can remain airborne for periods up to 36 hours, are not being trailed in the Torres Strait region (Marshall 2005).
When all these dynamics are combined with the formalised and non-formalised relationships and structures identified over the previous two chapters, it may now also be argued that a new form of cooperative MLG is identified within the Torres Strait border protection management regime. It can be found wherever the highly constructive, cooperative working arrangements facilitated under the Torres Strait Treaty are being observed. The Australian Government’s whole-of-government partnership approach to border management, in addition to the ordering framework provided under the Customs Coastwatch model also further assist in facilitating a cohesive and coordinated MLG approach during operational oversight of this remote northern boundary region. Within this regime, most linkage structures exhibit cooperative, coordinated, consultative, and at times hierarchical characteristics. Owing to a specific set of underlying constitutional circumstances, the majority of interactions occurring within this broad policy arena generally relate to one level of governance, the national. Little competition is evident, primarily for two reasons. First, the main actors within this regime are constituted of Commonwealth military, law enforcement and diplomatic agencies, all of which are tasked with providing a cooperative, coordinated and cohesive whole-of-government service within a unique frontier-governance environment in which most risks to Australian interests would be coming from exogenous sources. Second, both the Australian and PNG Government’s ability to effectively jointly manage the common border region at an operational level remains highly reliant upon ongoing processes of cooperative engagement with all the other actors involved. Two major factors contribute to the weakness of MLG within this regime. First, Australia’s strategic and national priorities always receive primacy over all other pre-existing or emergent factors within the region, including Australia’s formal Treaty obligations. Second, while the Torres Strait Treaty facilitates highly cooperation interactions at a supranational level, due to their chronic lack of resources, PNG authorities continue to lack sufficient capacity to make a major contribution to the emergence of this new form of cooperative MLG in the region.

Finally, MLG governance practices within Australian jurisdiction in the Torres Strait region pragmatically incorporate the logic of federalism. They are also subject to the dictates of state-led government, in particular during crisis situations. Indeed, it is only when such traditional forms of government are combined with the dynamics of MLG that a system-wide mechanism with sufficient leverage becomes available for providing satisfactory explanations and organizing the high levels of complexity and interconnectedness that now characterise the contemporary MLG processes, structures and outcomes presenting in the Torres Strait region. The main characteristics of the highly cooperative MLG linkage structures and relationships unfolding within the Torres Strait border protection management regime are illustrated in Figure 10, on the following page.
FIGURE 10: Nature of Linkage Structure occurring at an operational level within the Torres Strait Border Protection Management Regime.

<table>
<thead>
<tr>
<th>Actors/Institutions</th>
<th>Level of Governance</th>
<th>Actors Roles</th>
<th>JDS-Networks</th>
<th>Linkage structures</th>
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<tr>
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<td>Surveillance &amp; Response</td>
<td>Commonwealth Community &amp; TS Community Networks</td>
<td>Cooperative Coordinated Command &amp; Control</td>
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<td>Bi-lateral Treaty</td>
<td>Bi-lateral Relationship</td>
<td>Cooperative Consultative Facilitative</td>
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<td>Law Enforcement Agency</td>
<td>Commonwealth Community &amp; TS Community Networks</td>
<td>Cooperative Coordinated Authoritative Command &amp; Control</td>
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<td>Regulatory Agency</td>
<td>Commonwealth Community &amp; TS Community Networks</td>
<td>Cooperative Coordinated</td>
</tr>
<tr>
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<td>Diplomatic Agency</td>
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<td>Cooperative Consultative Facilitative Advisory</td>
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<td>Authoritative</td>
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<td>Cooperative Coordinated Consultative (DPI&amp;F) Authoritative (Qld. Police &amp; QFBP)</td>
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<tr>
<td>QFBP</td>
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<td>National</td>
<td>Central Government</td>
<td>N/A Non-Treaty</td>
<td>Cooperative Authoritative Hierarchical Command &amp; Control</td>
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<td>National State Local</td>
<td>Health Provision</td>
<td>N/A Non-Treaty</td>
<td>Highly Competitive</td>
</tr>
</tbody>
</table>
Chapter Eight

The Torres Strait Fisheries Management Regime

The sea is a thing so common to all,
that it cannot be the property of anyone save God alone.
Placentinus, cited in Grotius [1604-5], Mare Liberum - The Freedom of the Seas.

Due to a number of highly-contentious and unresolved issues, the Torres Strait Fishery historically lacks sufficient maturity for the introduction of statutory management plans, including the issuing of statutory fishing rights. Differing legal and governance issues also present as all other Commonwealth fisheries are managed under the Fisheries Management Act 1991 (Cth), whereas Torres Strait fisheries are managed under the Torres Strait Fisheries Act 1984 (Cth) (the Act), which implements certain Torres Strait Treaty provisions in law\(^{299}\).

Section 8 of the Act specifically states the objectives to be pursued:

In the administration of this Act, regard shall be had to the rights and obligations conferred on Australian by the Torres Strait Treaty and in particular to the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing\(^{300}\).

Section 30 of the Act also establishes a management authority, the Torres Strait Protected Zone Joint Authority (PZJA), to administer the Act. Conversely, regulation of Protected Zone fisheries falling under Papua New Guinea’s jurisdiction is achieved through the Fisheries (TSPZ) Act 1984 (PNG), which gives effect to the Torres Strait Treaty’s fisheries-related provisions. Consequently, governance structures in the Torres Strait Fishery are quite unlike those found elsewhere within Australia’s maritime zones.

\(^{299}\) Relevant Torres Strait Treaty provisions (Part 5 – Protected Zone Commercial Fisheries) are:

- Article 20 - Priority of traditional fishing and application of measures to traditional fishing;
- Article 21 - Conservation, management and optimum utilisation;
- Article 22 - Conservation and management of individual fisheries;
- Article 23 - Sharing of the catch of the Protected Zone commercial fisheries;
- Article 24 - Transitional entitlement;
- Article 25 - Preferential entitlement;
- Article 26 - Licensing arrangements;
- Article 27 - Third State fishing in Protected Zone commercial fisheries;
- Article 28 - Inspection and enforcement.

\(^{300}\) Both documents recognise the importance of protecting the traditional way of life and livelihood of Australian citizens who are Torres Strait Islanders and of PNG citizens who live in the coastal area in and adjacent to the Torres Strait. Neither document confers any obligations on Australia or PNG to have regard to the traditional way of life or livelihood of the region’s traditional Aboriginal inhabitants (TSFA 1984 (Cth); TST 1985).
This chapter focuses primarily on the nature of management arrangements in the Torres Strait Fishery in the period 2004-05. It will be argued that management of the multi-species Fishery is burdened by inherent systemic problems. Despite over two decades of PZJA oversight, the fisheries stock is not generally in good condition. In essence, formulation and implementation of fisheries policy during 2004-2005 was being conducted in an ad hoc incremental manner that lacked any long-term strategic vision, either for the future of the individual subset fisheries units constituting the Fishery or for upcoming generations of Islanders. While the fisheries are not ‘at risk of imminent collapse’, it is essential all stakeholders recognise these challenges will need to be first addressed before the Torres Strait can have a properly managed fishery. This will require management and other stakeholders to take some firm, if unpopular, decisions. Without such initiatives, the Torres Strait Fishery will continue to lack the capacity for achieving management’s goal of ensuring ecologically sustainable and economically efficient fisheries management, while having regard for the traditional way of life and long-term economic sustainability of the region’s traditional inhabitants, as is required under the Treaty. On a more positive note, resource allocation and management arrangements in the Torres Strait Fishery appear to be entering a period of transition. In late 2005, the PZJA announced a suite of reforms that seek to resolve many long-standing conflicts in the individual fisheries and hence represent a major step in the right direction. The PZJA now proposes developing and implementing statutory management plans for the Tropical Rock Lobster, Prawn and Finfish fisheries. These measures are intended to bring greater certainty of access to industry, while facilitating a more equitable distribution of resources between traditional and non-traditional inhabitant commercial fishing sectors. It is anticipated the new management arrangements will be progressed by the four PZJA Agencies (DAFF, AFMA, QDPI&F, TSRA) throughout 2006, to provide for subsequent PZJA consideration and a concurrent implementation for the 2007 fishing season (ANNEX H). Meanwhile, interim management arrangements are being introduced. It is impossible to predict the success, or failure, of the proposed reforms.

Such qualifications withstanding, the principal claim the analysis conducted in this chapter seeks to sustain is that as all the numerous tensions, frustrations and difficulties currently encountered within the Torres Strait Fishery are being worked out, a new form of cooperative multi-level governance is also slowly emerging. What sets this particular type of MLG apart from European models of MLG, and indeed models of federalism found within other

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Management: The term ‘management’ generally refers to the Torres Strait Fishery’s management and primary decision-making body, the Protected Zone Joint Authority (PZJA), and to a lesser extent the four PZJA Agencies (Dept. of Agriculture, Fisheries and Forestry (DAFF); Australian Fisheries Management Authority (AFMA); Torres Strait Regional Authority (TSRA); Queensland Dept. of Primary Industries and Fisheries (QDPI&F).
Commonwealth fisheries, are the following factors. First, it is the product of considerable and continuing efforts to build on, and attempt to improve upon, the ongoing interactive processes of consultation, cooperation and negotiation that are now occurring across and between all four levels of governance evident in the Torres Strait Fishery. Second, it is in part the result of a closer alignment between the Commonwealth model of fisheries’ partnership approach and the Torres Strait Treaty’s fisheries-related provisions, and is therefore more in keeping with the document’s original spirit and intent than were previous management approaches. Third, it involves all fisheries stakeholders, across all levels of governance. Fourth, it gives greater recognition in practice to Australia’s obligation under the Treaty to consult with the region’s traditional inhabitants. Fifth, it gives greater acknowledgement at an official level of the important role local traditional inhabitants have to play in making a major contribution to decision-making processes within the Fishery. Sixth, this new form of cooperative MLG is being guided by the overarching administrative framework provided under the Torres Strait Treaty’s terms and provisions, which are given legislative effect by the *Torres Strait Fisheries Act 1984* (Cth) and have enabled all these above mentioned processes in the first place.

The chapter takes the following form. The first section highlights a number of generic issues facing Commonwealth fisheries resource managers. The Commonwealth model of fisheries and Australian Fisheries Management Authority’s (AFMA) recent history are next addressed. The Torres Strait Fishery’s management regime, including the Protected Zone Joint Authority (PZJA) and its consultative structure are also examined. The second section examines major challenges and problems burdening fisheries management at an operational level, including:

- Conflicting perspectives on property rights over sea territory and fish stocks;
- Ongoing misunderstandings over the Treaty’s terms and provisions;
- Highly politicised nature of the Torres Strait Fishery;
- Current absence of any formal (statutory) management plans in the fisheries;
- Lack of proper management arrangements for certain sectors within the fisheries;
- Issue of sustainability;
- Tensions over sharing the costs of consultation;
- Systemic flaws in the bi-lateral catch-sharing arrangement; and
- Chronic lack of enforcement compliance within the Fishery;

Several of the PZJA’s recently announced major reforms and proposed statutory management plans will also be introduced throughout the chapter. Various linkage structures found within the fisheries will then be aggregated to demonstrate how a new form of cooperative, and increasingly consultative, MLG is slowly emerging within the Torres Strait Fishery. Finally, resource management within the Fishery is an extremely complex matter, characterised by a
number of highly emotive issues. This chapter’s purpose is not to advocate for any particular position. Rather, it attempts to present a balanced report on differing perspectives presenting in this policy arena. As noted, interaction-oriented policy research is being used to conduct a critical analysis within the framework of actor-centred institutionalism using multiple levels of governance. The dispersal of authority will provide the basic dependent variable. A game theoretic representation is illustrated below. In this instance, the Torres Strait Fishery provides the embedded sub-unit case study.

**FIGURE 11:** Game theoretic conceptualisation being applied to analysis conducted within the Torres Strait Fisheries Management Regime.
Commonwealth Fisheries Resource Management

Fisheries management is an extremely challenging resource management task. It involves multiple stakeholders and necessitates the discharging of legislative responsibilities within a highly complex jurisdictional, commercial and recreational marine environment. The highly-uncertain and difficult nature of the marine environment, along with the imprecise nature of knowledge on fish stocks and habitat also mean that decision-making and achieving stated objectives will always be problematic for fisheries managers. In *Managing Commonwealth Fisheries: The Last Frontier*, the Joint Standing Committee on Primary Industries and Regional Services (1997:5) identifies two key contributors to the inherent complexity of fisheries management. The first is the dynamic nature of the fish habitat and environment. The second is the difficulty of indeterminate property rights over fish stock (ANNEX I).

Commonwealth Model of Fisheries

Of the numerous government and parliamentary reviews of Commonwealth fisheries and their management, perhaps the most notable is the 1989 Commonwealth Government’s policy statement on fisheries: *New Directions for Commonwealth Fisheries in the 1990s* (NDCF 1989). The report’s major outcome, which precipitated a fundamental change in the way Commonwealth fisheries are managed, was the enactment of a suite of enabling fisheries management legislation 302. Principal amongst these are the *Fisheries Administration Act 1991* (Cth) which established Australian Fisheries Management Authority as the Commonwealth statutory authority empowered for day-to-day management of Australian fisheries (S.5), and the *Fisheries Management Act 1991* (Cth), which contains AFMA’s management authority and details the provisions of AFMA’s accountability process. AFMA’s statutory objectives, all of which are subject to a number of differing interpretations, ranging from AFMA Board’s relatively narrow versions, to middle management’s more wider accounts, to the Management Advisory Committee members’ reported general lack of understanding of AFMA’s legislative goals (ACIL 2001: 28-9), are prescribed in Sections 3 and 6 of the Acts respectively and include:

- implementing efficient and cost-effective fisheries management on behalf of the Commonwealth;
- ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically

302 Also included in the suite of new fisheries legislation replacing the *Fisheries Act 1952* (Cth) were:

- *Fisheries Legislation (consequential Provisions) Act 1991* (Cth);
- *Fishing Levy Act 1991* (Cth);
- *Foreign Fishing Licences Levy Act 1991* (Cth);
- *Statutory Fishing Rights Charge Act 1991* (Cth);
sustainable development and the exercise of the precautionary principle, in particular
the need to have regard to the impact of fishing activities on non-target species and
the long term sustainability of the marine environment;

- maximising economic efficiency in the exploitation of fisheries resources;
- ensuring accountability to the fishing industry and to the Australian community in the
  Authority’s management of fisheries resources; and
- achieving government targets in relation to the recovery of the costs of the Authority.

Similarly, AFMA’s management functions vary from formulating and implementing fisheries
management regimes and adjustment and restructuring programs, to initiating processes of
consultation and cooperation with the fishing industry and general public regarding AFMA
activities, to identifying research priorities in fisheries and establishing and allocating fishing
rights (FAA 1991– s.7 (Cth)). In order to monitor compliance and management strategies and
minimise cross sectoral impacts on fish stocks, AFMA has also developed a close cooperative
working relationship with a number of other Commonwealth agencies, including AFFA,
DEH, BRS, CSIRO, ABARE, AFP, Coastwatch, RAN, RAAF\textsuperscript{303}, and also state and territory
governments.

With most Australian fisheries now classified as over-fished\textsuperscript{304}, fully-fished\textsuperscript{305}, or of uncertain
status\textsuperscript{306}, AFMA pursues its mission of developing ecologically sustainable and economically
efficient fisheries by adopting a cooperative and consultative management approach that
emphasises partnership with key industry, community and government stakeholders, along with
relevant members of the scientific community with a particular interest in fisheries. However,
decision-making power remains vested in AFMA’s independent governing Board. The Board,
in turn, is directly accountable to the Commonwealth Minister responsible for fisheries via
AFMA’s Annual Report, Annual Operational and Corporate Plans, all of which require

\textsuperscript{303} Department of Agriculture, Fisheries and Forestry (AFFA); Department of Environment and Heritage (DEH);
Bureau of Rural Science (BRS); Commonwealth Scientific and Industrial Research Organisation (CSIRO);
Australian Bureau of Agriculture and Resource Economics (ABARE); Australian Federal Police (AFP); Customs
Coastwatch; Royal Australian Navy (RAN); and Royal Australian Air Force (RAAF).

\textsuperscript{304} Fully-fished: a fish stock for which current catches and fishing pressure are close to optimum. A fully-fished
categorisation implies that increasing fishing pressure or catches above target-reference levels (allowing for annual
variability) may lead to over-fishing (BRS FSR 2002-03).

\textsuperscript{305} Over-fished: a fish stock for which the amount of fishing is excessive, or from which the catch depletes the
biomass, or a stock that reflects the effects of previous excessive fishing. Growth over-fishing occurs when too
many small fish are taken. Recruitment over-fishing occurs when the fishing pressure is too heavy to allow the
population to replace itself (BRS FSR 2002-03).

\textsuperscript{306} Uncertain: inadequate information exists for a reliable assessment of a fisheries status. The fish stock may be
under-fished, fully-fished or over-fished. The extent of uncertainty regarding the status of Australian fisheries
indicates a need for a precautionary approach to fisheries management (BRS FSR 2002-03).
ministerial approval and allow ministerial monitoring of AFMA’s administration, operations and performance against its legislative objectives. Conversely, the Minister has oversight of AFMA’s activities but is only empowered to give the Authority directions on the performance of its functions and exercise of its powers in exceptional circumstances. AFMA is also accountable to the public, including industry and other fisheries stakeholders via its Annual Report, Annual Operational and Corporate Plans and fishery management plans, all of which are public documents and provide a transparent method for assessing AFMA’s performance against its legislative objectives (NDCF 1989; FAA 1991 (Cth), s. 6 & 9, 72-80 & 88; ANAO 1995-96; SCPIRRRA 1997; AFFA 2003).

Several features distinguish the Commonwealth model of fisheries from overseas models. The first and most important is the above noted partnership approach which gives recognition to the crucial role industry involvement plays in successful fisheries management. Industry advice and input into consideration of fisheries management issues costs relatively little and allows management to draw on the relevant expertise of industry, both in management and research. Industry contribution is viewed as essential to the development and implementation of practical, efficient and cost effective administration of fisheries and fisheries management outcomes. The approach further provides an educational element, with industry and other stakeholders now generally better informed about decision-making processes and important issues emerging within individual Commonwealth fisheries. Improved levels of consultation between management and other stakeholders have also been ensured, while greater industry acceptance of resource management decisions is being facilitated by giving stakeholders an increased sense of involvement in, and ownership of, management decisions and decision-making processes, along with greater responsibility for the well-being of individual fisheries (SCPIRRRA 1997; ACIL 2001: iv). Under this more inclusive partnership approach to fisheries management, greater levels of trust and confidence have also generally developed between industry and management, thus assisting in alleviating earlier industry mistrust of previous fisheries management, originally caused by the Australian Fisheries Service’s (AFS) ‘bureaucratic heavy-handedness’. AFS’s focus on the biological protection of fish stocks in Australian fisheries, all of which were formerly operated in an open-access unregulated manner that typically led to structural problems, including over capitalisation, excess capacity and subsequent economic inefficiency and overfishing, has also been broadened to include economic efficiency in the sustainable harvest of fisheries resources as a principal objective (Bailey 1997; SCPIRRRA 1997; ACIL 2001: iv).

307 AFS was located within the Department of Primary Industry and Energy (DPIE).
One of the model’s most notable features is its Management Advisory Committees (MACs) (FAA 1991 s.56 (Cth)). MACs play a key advisory and communications role and are considered central to modern Australian fisheries management. Unfortunately, the time-consuming nature of the consultative processes inherent in AFMA’s partnership approach also contributes to delays in decision-making, which when combined with AFMA/AFMA Board’s frequent failure to adequately explain the reasoning behind many of the organisation’s decisions, often results in perceptions AFMA is attempting to abrogate its decision-making responsibility. The Commonwealth’s original goal of using an independent authority model to distance fisheries resource management from daily political pressures, with professional fisheries managers making management decisions based purely on scientific and economic analysis, has also not proved very successful, as evidenced within the Torres Strait Fishery (SCPIRRRA 1997; ANAO 2001; ACIL 2001: iv, v; AFFA 2003: 2).

Nor has AFMA’s performance been without criticism. In 1996, the Australian National Audit Office (ANAO) concluded capacity existed to enhance AFMA’s efficiency and administrative effectiveness across a range of areas. ANAO (1996) also questioned the adequacy of AFMA’s performance as the principal agency responsible for managing Commonwealth fisheries, in terms of the organisation’s ability to satisfactorily meet its legislative objectives. In Managing Commonwealth Fisheries: the Last Frontier (1997), the House of Representatives Standing Committee on Primary Industries, Resources and Rural and Regional Affairs (SCPIRRRA) also criticised AFMA’s slow response to reviews. The Committee found many of the thirty-nine recommendations provided in ANAO’s 1996 report were not acted upon, although a follow-up audit for June 2000-July 2001 does acknowledges AFMA efforts since 1996. It also notes further areas for improvement (ANNEX J) (ANAO 1996; AFMA Annual Report 2000-01:23). AFFA’s (2003) latest review of Commonwealth fisheries policy, entitled Looking to the Future, highlights AFMA’s recent reorientation from species-based decision-making to an ecosystem-based fisheries management approach. This new driver in fisheries policy gives recognition to new developments and paradigms occurring in broader Australian Government policies. Implementation of Australia’s Oceans Policy and Regional Marine Plans (RMPs) provide examples, as does the growing impact on fisheries management of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and the extension of schedule 4 of the Wildlife Protection (Regulations of Exports and Imports) Act 1982 (Cth) to all fisheries, as illustrated in the Torres Strait Prawn Fishery’s Bycatch Action Plan (BAP) (Haward et al. 2001; AFFA 2003; TSPFBAP 2003). The review also reinforces the Commonwealth’s ongoing commitment to adopting a consultative cooperative approach in fisheries resource management (AFFA 2003).
The Torres Strait Fisheries Management Regime

The Torres Strait Fishery

When the Offshore Constitutional Settlement (OCS) (1979) facilitated the development of single jurisdictional fisheries within Australian waters, its agreed arrangements provided a framework for intergovernmental cooperation over the management of particular Australian fisheries under a single law. It also established a mechanism for the Commonwealth assuming responsibility for Australia’s major fisheries, with the Commonwealth’s power being drawn primarily from section 51 of the Australian Constitution. One management option under the OCS provided for the establishment of a joint authority of relevant Commonwealth and state ministers to manage fisheries crossing jurisdictional boundaries. Following the introduction of a single fisheries jurisdiction within the Torres Strait Protected Zone on 1 April 1999, all traditional and commercial fishing in Australia’s portion of the TSPZ was subsequently assigned to the Protected Zone Joint Authority’s (PZJA) management. Under a federal arrangement, the PZJA now has responsibility for monitoring conditions in, and formulating policies and plans for, management of a number of designated Australian TSPZ fisheries.

Under a cooperative cross-border multi-level governance management arrangement, the PZJA is also tasked with negotiating and maintaining healthy cooperative bi-lateral arrangements with PNG on matters relating to the conservation and management of Article 22 fisheries. This includes negotiating bilateral catch-sharing arrangements with PNG according to formulae set out under Article 23 (TST 1985; OSC 1979; Haward et al. 2001; BRS 2002-03; PZJA 2005). Conversely, all PNG fisheries in and near the TSPZ falling under the jurisdiction of the State of Papua New Guinea, Western Province and Gulf of Papua, are managed at a national level by the National Fisheries Authority (NFA), in accordance with the Fisheries Management Act 1988 (PNG), Fisheries Management Regulations 2000 (PNG), the Fisheries (Torres Strait Protected Zone) Act 1984 (PNG), and Articles 22 and 23 of the Torres Strait Treaty (TST 1985). Approval of commercial TSPZ fishing licences in PNG is also conducted at a national ministerial, rather than provincial government level (Ganafaro, 2002, cited in NFA 2002).

308 Part V - Powers of Parliament s. 51 (x) (‘Fisheries in Australian waters beyond territorial limits’).

309 Prior to 1 April 1999, the fishery was managed under Queensland legislation (Queensland Fisheries Act 1994 & Queensland Fisheries Regulation 1995) by Queensland Fisheries Management Authority (QFMA).

310 Outside the Protected Zone (PZ), under the Offshore Constitutional Settlement (1989) the Commonwealth has fisheries jurisdiction for waters beyond three nautical miles. Queensland has responsibility for waters within three nautical miles from its territorial sea baseline and for internal waters (Coastal Waters (State Powers) Act 1980 (Cth); Coastal Waters (State Title) Act 1980 (Qld)).

311 Neither Party is permitted to licence third country vessels to fish inside the Protected Zone without the consent of the other Party (TST 1985).
When the Australian Fisheries Management Authority (AFMA) adopted the role of principal agency responsible for day-to-day administration of the *Torres Strait Fisheries Act 1984* (Cth) on behalf of the PZJA in 1994, the agency also entered into a joint Commonwealth-state cost sharing management arrangement with Queensland’s Department of Primary Industries and Fisheries (QDPI&F), under which Queensland Fisheries Service 313(QFS) helps administer management and licensing tasks within Australia’s section of the TSPZ. Queensland Boating and Fisheries Patrol (QF&BP) conducts all surveillance/compliance programs. QFS (QF&BP) also maintains responsibility for recreational fishing314, including charter fishing and licensing (TSFA 1984 (Qld)). Commercial licensing arrangements include the Torres Strait Master Fisherman’s Licence, Torres Strait Fishing/Processor/Carrier Boat Licence, and Torres Strait Traditional Inhabitant Fishing Boat Licence (TIB)315. Queensland Government also retains responsibility for aquaculture and fisheries marketing (QDPI&F 2003).

All fisheries resources within the Protected Zone are managed in accordance with the Torres Strait Treaty, which requires both countries to cooperate in the conservation, management and optimum utilisation of the region’s natural resources, primarily for the benefit of traditional Torres Strait Islander and Papuan inhabitants living in the region (Articles 20-28). The Torres Strait Fishery is constituted of several smaller designated fisheries. Article 22 (TST) fisheries within Australia’s section of the TSPZ currently subject to PZJA management under the *Torres Strait Fisheries Act 1984* (Cth) are prawn, tropical rock lobster, pearl shell, Spanish mackerel and traditional, including dugong and turtle. The PZJA is also responsible for managing the sea cucumber, trochus, finfish (excluding mackerel) and crab fisheries, along with the barramundi fishery located in Australian territorial waters around Queensland’s northernmost islands of Saibai, Boigu, Moimi, Kaumag, Aubusi and Dauan (ANNEX K). Principal management tools include a suite of input and output controls to control over-fishing316. Torres Strait fishers are generally classified into three sectors: traditional inhabitant

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312 Mr. Ron Ganafaro, Minister for Fisheries & National Fisheries Board (NFB) Chair, Papua New Guinea, 2002.

313 Queensland Fisheries Service is a business group within QDPI&F.

314 Recreational Fishing: Non-traditional private fishing from an Australian boat.

315 Since the introduction of a single fisheries jurisdiction (1999), commercial Torres Strait Islander fishers may apply for TIB (Traditional Inhabitant Boat) licences, which permit indigenous fishers to operate in the beche-de-mer, crab, tropical rock lobster, reef line, Spanish mackerel, net, pearl shell and trochus fisheries.

316 Input and Output Controls: Examples are seasonal and permanent closures; gear and vessel restrictions; limited entry; levy payments; compulsory logbook reporting; total allowable catches (TACs); by-catch limits (catch of non-target species) and reduction devices (BRDs), such as Turtle Exclusion Devices (TEDs); legal minimum and maximum size limits; limits on the issue of new licences; and effort controls, for example latent effort removal.
(subsistence) \(^{317}\); traditional inhabitant commercial (community or Islander); and commercial (non-traditional inhabitant or non-Islander). All future expansion in fishing effort is reserved for local traditional inhabitants (TST 1985; D’Silva 2003; TSPZJA 2005).

**The Protected Zone Joint Authority & PZJA Consultative Structure**

The Torres Strait Fishery management regime provides a multi-level governance arrangement that both explicitly and implicitly acknowledges the overriding importance of protecting the traditional way of life and livelihood of the local traditional inhabitants, consistent with the rights and obligations conferred upon Australia and PNG under the Torres Strait Treaty. The keystone of the regime, the PZJA consultative structure, is constructed around an evolving, relatively sophisticated framework of management structures and accompanying participatory mechanisms. All these institutions engage stakeholders across multiple levels of governance and are designed to assist local and regional natural resource management (NRM). This cycle of consultative meetings, in which Working Group meetings are followed by Torres Strait Fisheries Management Advisory Committee (TSFMAC, MAC) meetings, timed to feed into TSPZJA meetings, is further supplemented with the following mechanisms: bi-lateral Treaty-related meetings; local meetings between Australian fisheries officers and Islander fishers within communities across wider Torres Strait; fisheries programs broadcast on Radio Torres Strait; and articles, notices and advertisements in the local newspaper. The latter mechanisms help to ameliorate many of the difficulties associated with consultation and communication in remote locations such as Torres Strait, such as time delays and high travel and communication costs. Annual bi-lateral fisheries meetings between Australian, Queensland and Papua New Guinean governments also provide important forums for enabling discussions and debates on matters relating to fisheries management in and near the Torres Strait Protected Zone\(^{318}\). These are attended by senior fisheries officials, fishing industry representatives, foreign affairs officials, and officials from other relevant government agencies (Dews [1997]; cited in SCPIRRRA 1997; TSPZJA Annual Report 2001-02; AFMA 2003; TSFMAC 2003a-g; PZJA 2005). As illustration of the PZJA’s consultative structure is provided in Figure 12, on the following page.

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\(^{317}\) Traditional fishing has the same meaning as in the Torres Strait Treaty under the Act, but does not include fishing method, or with the use of equipment or a boat, of a kind specified in a notice in force under subsection (2).

\(^{318}\) For example, significant outcomes of the Australia-PNG fisheries meeting held July 2001 were: (1) bi-lateral agreement on catch-sharing arrangements for tropical rock lobster, prawn and Spanish mackerel; (2) the possibility of extending the aerial survey for dugong into PNG waters; and (3) possible access for PNG boats to anchor at Bramble Cay and Deliverance Island (AFMA Annual Report 2000-01).
FIGURE 12: The Protected Zone Joint Authority’s (PZJA) Fisheries Consultative Structure (Cycle of Meetings), including relevant Advisory Bodies, Working Groups & supplementary processes.

Under the *Torres Strait Fisheries Act 1984* (Cth), Ministers are also required, where appropriate, to seek the views of the JAC (Article 19) when considering matters affecting the interests of traditional inhabitants.
In 2001, AFMA noted the need to improve consultative processes between stakeholders after local community concern highlighted existing representative structures were failing to provide PZJA members with sufficient advice (AFMA Annual Report 2000-01:25; Yorkson 2003). Subsequent major reforms in the PZJA’s consultative structure, announced at the 14th PZJA Meeting (PZJA14 2002), are the direct outcome of an emerging cooperative working relationship between industry, Islander and government representatives in which all actors, across all levels of governance, are proactively attempting to preserve and protect traditional fishing rights while sustaining the local commercial fishing industry. This new and more streamlined structure of advisory bodies continues to build on this spirit of cooperation by encouraging all stakeholders to proactively participate in the development of management arrangements. It is also designed to facilitate direct involvement by local traditional inhabitant fishers in all management and decision-making processes impacting on Torres Strait fisheries (Waia [2002] & Nakata [2002], cited in TSRA 2002c; TSPH 2004:9; TSRA Annual Report 2002-03; PZJA 2005a,b).

Executive Manager, Fisheries and Forest Industries, Daryl Quinlivan (2004) and former TSRA Chair, Terry Waia, (2003) both concur arrangements for the Torres Strait Fishery have undergone significant change as a result of the recent ‘rapid evolution’ in the administration and management of Torres Strait fisheries-related discussions and decision-making processes. For example, the TSRA Chair’s inclusion as a formal PZJA member in 2002 now allows for an officially recognised indigenous input into the management of traditional and commercial fishing. It also provides the TSRA Chair with an opportunity to share in decision-making responsibilities with the Commonwealth and state ministers responsible for fisheries. The appointment further helps address Islander dissatisfaction over their previous purely advisory role in fisheries management and is viewed as a significant forward step in processes of self-determination and economic development for the local traditional inhabitants. The inclusion of one elected indigenous fisher from each Torres Strait community at the Torres Strait Fisheries Management Advisory Committee (TSFMAC) meetings also further allows for direct traditional inhabitant involvement in discussions providing advice to the PZJA (TSFAA 2002 Cth; TSRA 2002c; Macdonald 2002; Waia [2002], cited in TSRA Annual Report 2002-03; Nakata 2002; Waia 2003; Quinlivan 2004; TSPZJA 2005a).

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319 Torres Strait Cultural Summit: In March 2001, a two day summit of 250 indigenous leaders gave the non-indigenous commercial fishing fleet seven (7) days to get out of the Torres Strait region. Fishing operations were to cease by 26 March 2001 until such times as the Commonwealth and Queensland Governments satisfactorily resolved the matter of traditional ownership of the Torres Strait region. The summit also called for a halt to the proposed Chevron Gas pipeline from PNG.
While still a long way from their ultimate goal of controlling fisheries management, for many of the traditional inhabitant representatives concerned, this more inclusive cooperative MLG approach to fisheries management is emerging as a normatively superior mode of allocating authority within the Torres Strait Fishery. Quinlivan (2004) suggests local indigenous fishers now also enjoy weight and equal representation with non-indigenous fishers. Indigenous representatives and spokespersons agree the new consultative structure helps address local traditional inhabitants’ concerns over their previous lack of fair representation and input into the decision-making process. It also better aligns with their long-term aspirations of managing and owning all Torres Strait fisheries, to thereby develop an economic base from which to gain a measure of independence from their current reliance on government subsidies and the Australian welfare system (Mau 2003; TSRA Annual Report 2002-03; PZJA 2005a). Mau (2003), for example, proposes with Islander fishers now represented at all levels within the PZJA management structure, traditional inhabitants are now better positioned to positively contribute to and impact upon the PZJA decision-making processes, with active indigenous involvement going from seven community fisher representatives in 2002 to twenty-four in 2003, including the Northern Peninsular Area (NPA) communities (Mau 2003). It is further suggested greater levels of indigenous involvement will also assist in building capacity by improving the skills and knowledge base of local community fishers involved in fisheries management, thereby providing a foundation for developing greater levels of indigenous involvement in managing the fisheries into the future (Mau 2003; PZJA 2005). While PNG has not historically participated in the PZJA cycle of meetings, Australia officially notified PNG officials at the 2003 Bilateral Fisheries Meeting of the PZJA’s decision to offer that country permanent observer status at the Tropical Rock Lobster (TRL) and Prawn Working Groups (PWG), and also at TSFMAC and PZJA meetings (TSFMAC 2003).

Nevertheless, the inclusion of greater numbers of traditional inhabitant representatives within the PZJA’s decision-making process, whether at a local, state, national or supranational level of involvement, is not necessarily indicative of greater conditions of equality, participation or representation between the participants involved within the PZJA structure. As a democratic process, MLG processes and structures draw on both informal and inclusive notions of decision-making. But as Peters and Pierre (2004) note, it is formal institutions, rather than just processes, that provide the vehicle for democratic and accountable government. Both authors also question whether or not the increased problem solving capacity and positive outcomes being facilitated under the self-adjusting dynamics of MLG should be allowed to take precedence over important issues such as democratic input and accountability. For example, with greater numbers of participants now contributing to the PZJA consultative and decision-
making process, who exactly now controls the agenda and makes final decisions on fisheries management related issues? Who is to ultimately be held accountable for poor decisions and the unintended, often unwelcome, policy outcomes that arise out of these cooperative MLG interactions? Is consensus-making being used to mask a ‘democratic deficit’ within the Torres Strait Fishery? Is government simply finding new ways to govern within the region?

The Protected Zone Joint Authority (PZJA)
The PZJA would qualify as a joint decision system (JDS). Within this formalised compulsory negotiation system (CNS), collective decision-making generally operates under unanimity or consensus rules (*Torres Strait Fisheries Act 1984* (Cth); Scharpf 1997). Unlike voluntary negotiation systems, none of the three actors involved, or their appointed deputies, have the option of formally exiting this legalised arrangement. Each participant has little choice but to deal and cooperate with the others. Hence, each may only withdraw from negotiations by switching to uncooperative methods of behaviour. As with other small JDSs, transaction costs are being reduced via consensus, the institutionalising of the agenda setting function, and in this particular instance by numerically limiting the actors to three. The PZJA’s low number conditions would also indicate that the unanimity rule has less likelihood of converting into an ‘joint decision trap’ under which any proposed attempt at institutional reform could be easily obstructed. Conversely, such institutional arrangements also carry an inherent tendency to reproduce, rather than change, outcomes on the basis of the existing distribution of authority, or power, within that same structure (Scharpf 1997). Scharpf (1997:117) also lends a further caution to formal arrangements such as the PZJA: ‘The size of actor-sets within which negotiated settlements can be reached is limited and quite likely to be small. In practice, it will often be much smaller than the population affected by a policy problem. When this is the case negotiators may well maximise their own welfare at the expense of the larger population and of overall welfare’.

The Commonwealth Minister for Fisheries, for example, has suggested: ‘The PZJA is a joint authority; Queensland and TSRA have equal say’ (Macdonald 2004). But in practice, it is questionable whether or not they have equal say with the third PZJA member when section 40 (4) of the *Torres Strait Fisheries Act 1984* (Cth) clearly gives overriding priority in the decision-making process to the Commonwealth Minister:

If, at a meeting of the Protected Zone Joint Authority, the members are not agreed as to the decisions to be made on the matter, the Commonwealth Minister may, subject

to subsection (5), decide that matter and his or her decision shall have effect as the
decision of the Protected Zone Joint Authority.

One participant argues the Commonwealth Minister can make as many unilateral decisions as
he likes, but he cannot act on his own. The Commonwealth may have the power to have the
final say on decisions, but such a course of action would be futile without the cooperation of
the remaining PZJA members (Inter. 6, May 2004). Without doubt, the Commonwealth PZJA
member\(^{321}\) has invested substantial personal effort in attempting to achieve sustainability of
the fisheries and long-term economic sustainability for local traditional inhabitants (Quinlivan
2004). But there is no point in making decisions no one will follow (Inter. 6, May 2004). In
Torres Strait, the successful implementation of any decisions made by the Commonwealth
Minister is highly dependent on wider Torres Strait community support. This would not be
forthcoming without proper processes of consultation and negotiation. It would simply result
in non-cooperative, even hostile, games being played during the implementation stages of any
unwanted government policies or programs (Inter. 6, May 2004). Consequently, if the
Commonwealth Minister and other PZJA members are to protect their own interest positions,
while avoiding negative coordination and the ‘problem of faithful implementation’ and
welfare losses, then all modes of unilateral action should be avoided by using cooperative
games, that is ‘under institutional conditions that not only provide legal or procedural
protection for property rights and others interests positions but also assure the binding force of
negotiated agreements’ (Scharpf 1997:116-7). Fortunately, the cooperative and consultative
multi-level governance approach to managing the Torres Strait Fishery that is now being
facilitated by a combination of the Torres Strait Treaty, *Torres Strait Fisheries 1984* (Cth)
and Commonwealth model of fisheries’ partnership approach, gives leverage to such modes
of interactions, thereby potentially providing individual and aggregate stakeholders with such
protections and conditions (TSFA 1984; TST 1985).

**Protected Zone Joint Authority (PZJA) Meetings**

However, not everyone is as optimistic when assessing PZJA meetings, although these have
operated as open forums since 2001, with interested stakeholder attending as observers and
providing input into matters under consideration. One participant had no doubt serving TSRA
Chairs take PZJA meetings very seriously, but observed of the behaviour of Commonwealth
and Queensland Ministers over time: ‘I don’t think they take it seriously… I think it’s another
meeting for them, and they get their advice before they get here, and they make all the
decisions before they get here… they’re not here to listen’ (Inter. 4, May 2004). Yet another
participant suggested a similar situation exists throughout the entire PZJA structure, with the

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\(^{321}\) Senator Ian Macdonald has since relinquished this portfolio. Senator Eric Abetz is the current serving
Commonwealth Minister for Fisheries, Forestry and Conservation.

Other participants would also cite instances where both Ministers outwardly appeared to not take PZJA meeting processes seriously, for example meetings starting late or finishing early, or Ministers rushing out of meetings to attend photo opportunities with apprehended foreign fishing vessels. In 2004, comments were also directed at the reported lack of good inter-state relations between Commonwealth and state fisheries ministers, with participants noting both preferred to stay in different accommodation at opposite ends of Thursday Island’s small commercial district. Consequently, little opportunity was available for Commonwealth-state fisheries discussions at a personal ministerial level prior to PZJA meetings (Inter. 4, 5 & 10, May 2004). Postponements of PZJA meeting times, for example due to Queensland Government and TSRA elections in 2004, were also interpreted locally as being indicative of the lack of priority given to PZJA meetings and processes of timely decision-making within the Torres Strait Fishery (Inter.1, 4 & 10, May 2004).

Torres Strait Management Advisory Committee (TSFMAC)
While assistance on fisheries management matters may occasionally be sought from suitably qualified outside entities, the PZJA draws primarily on the expertise and advice provided by the Torres Strait Fishery Management Advisory Committee (TSFMAC). As with the PZJA, MAC membership and duties are formalised in legislation. However, while these voluntary negotiation systems contribute to overall decision-making processes within Commonwealth fisheries, they would not qualify as joint decision systems (JDS). These institutions play a purely advisory role and enjoy no formalised, or legalised, decision-making powers (Scharpf 1997; s. 56 FAA 1991 (Cth); PZJA 2005a). As the centrepiece of AFMA’s partnership approach and principal method of consultation with fisheries stakeholders, expertise-based MACs play an important role in helping to improve the effectiveness of Australian fisheries management arrangements. The MAC mechanism is designed to facilitate a two-way flow of

322 Queensland Fisheries Minister Henry Palaszczuk was replaced by former Health Minister Gordon Nuttall. Since Mr. Nuttall’s retirement from politics, the position has been held by the Honourable Tim Mulherin.
information between AFMA/AFMA’s Board, Industry and the wider community. It also provides an important forum for discussing fisheries-related issues. For example, information fed up through TSFMAC from Working Groups assists both the PZJA and AFMA in making informed decisions as management attempts to find a balance between competing interests within the Torres Strait fisheries (ACIL 2001; AFMA 2003a,b; PZJA 2005a).

The MAC industry consultation model of fisheries management incorporates stakeholder input into fisheries management issues by empowering stakeholder involvement within often lengthy MAC consultation processes (ACIL 2001; AFMA 2003a). MACs’ functions, as determined under the Fisheries Management Act 1991 (Cth), are to provide fisheries management with advice and recommendations on management and operational issues, such as development plans and surveillance-compliance budgets, along with scientific, economic and other data pertinent to individual fisheries (FMA 1991 (Cth); Productivity Commission 1999; ACIL 2001). MACs also identify and make recommendations on research priorities within individual fisheries. For example, TSFMAC reports on issues as diverse as compliance, budgets, research, research priorities, AFMA cost recovery activities, and the status of Strategic Assessment Reports (SARS). A major difference within the Torres Strait Fishery is that unlike other MACs, TSFMAC reports to the PZJA, rather than just to AFMA’s Board (FMA 1991 – s. 57; JSCPIRS 1997; TSFMAC 2003; EPBC Act 1999). MACs may also establish sub-committees to examine certain issues (FMA 1991 – s. 58). In 2003, for example, TSFMAC’s Latent Effort Subcommittee highlighted the issue of ‘priority of access’ and reported on projected costs, possession limits, licence tenure, and the legal status of investment warnings (TSFMAC 2003). TSFMAC also reports on the outcomes of bi-lateral fisheries meeting with PNG and also on community-based management of turtle and dugong stocks, along with recommendations put up to the TSFMAC by the Finfish Fishery, Tropical Rock Lobster and Prawn Working Groups (TSFMAC 2003a-g).

While MACs may act on behalf of AFMA in performing their functions and exercising their powers, they must nevertheless at all times act in accordance with the policies determined by, and any directions given by AFMA/AFMA Board (FAA 1991 – s. 56 & 59 (Cth)). Within the Torres Strait, the PZJA provides such guidance (TSFA 1984 (Cth)). MACs must also regularly report to their constituents on their activities and developments and factors affecting their respective fisheries management regimes. Stakeholders and other interested parties also have an opportunity to question MAC Chairs at annual public meetings (ACIL 2001: 38).

323 Under the Environment Protection and Biodiversity Conservation Act 1999 (entered into effect 16 July 2000), AFMA is required to demonstrate through preparedness of Strategic Assessment Reports (SARs) that all Commonwealth fisheries are managed on a sustainable basis (EPBC Act 1999).
Nevertheless, despite AFMA’s heavy reliance on MAC recommendations, neither AFMA nor the Commonwealth Minister responsible for fisheries are under any obligation to listen to the advice provided by MACs (SCISTTCI 1993; JSCPIRS 1997). Indeed, in 1993 the Report of the Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure’s (SCISTTCI 1993) key recommendation that MACs become Management Committees and assume the full function of a fishery manager was rejected by the Commonwealth in March 1995, amid concerns such a policy would result in a series of bodies responsible for individual fisheries management, but with no responsibility to the Commonwealth Minister nor any accountability for its decisions. Such an outcome would also severely limit AFMA’s decision-making powers and constrain the AFMA Board’s capacity to realise its statutory obligations. ACIL Consulting (2001:iv) also determined no support existed within individual Commonwealth fisheries for converting MACs into management committees.

MAC-related issue of concern raised during AFFA’s (2003a) review of its consultative arrangements, many of which were highlighted earlier by ACIL Consulting (2001), include:

- Inadequate reporting against AFMA’s statutory objectives;
- The requirement for greater transparency in decision-making and communication between the AFMA Board and MACs, and also between MACs and the AFMA Board on one hand, and fishers and other stakeholders on the other;
- The requirement for better understanding by MAC members of their responsibilities and roles, and also for support for MAC members in carrying out their functions;
- The requirement for improved processes to adequately manage ‘conflicts of interest’,\(^\text{324}\)
- The requirement for AFMA officers or managers to engage directly with fishers and their representatives; and
- An undue focus by AFMA and MACs on commercial fishers’ interests.

It is also proposed in MACs with a majority of members from industry there is a risk of bias towards industry at other community sectors’ expense (AFFA 2003:20). Within a multi-species fishery there is also the risk that some fisheries will also take priority over others. For example, it is argued TSFMAC’s lack of capacity to progress matters relating to smaller, less valuable, traditional Torres Strait fisheries is perhaps attributable to the tendency for higher

\(^{324}\) ACIL suggests due to pejorative connotations associated with the word ‘conflict’, the term should be replaced with ‘declaration of interests’ (ACIL 2001: 32).
profile and more lucrative fisheries, such as the Prawn Fishery, to dominate TSFMAC discussions (PZJA 2005a).

ACIL (2001:40) further highlights an ‘incompatibility between confidentiality restrictions and communication requirements’, with MAC members, whether from industry, management, scientific, or environmental backgrounds, often not providing adequate feedback to their own organisations, due to confidentiality classifications on MAC papers and agenda items. Poor MAC-AFMA relationships are also noted, stemming largely from fishers’ frustration with AFMA Board’s perceived indecision in the face of clear MAC recommendations which many members believe are either not being properly noted or clearly communicated, or are being ‘subverted by other parties’, such as AFMA management or scientists. High turnover rates in AFMA managers and the attendant loss of corporate memory also negatively impact on MACs’ operational capacity (ACIL 2001: 26-8). ACIL (2001) further stresses a crucial need for MAC Chairpersons to competently chairing meetings, resolve members views into agreed recommendations, and to ensure documents are made available to members in a timely manner (ACIL 2001:v). For example, in 2005 after Industry representatives expressed regret at not being included in a specialist group (AFMA, TSRA, QDPI&F & DAFF) working on a consultation report on resource allocation within the Torres Strait Fishery, both traditional inhabitant and industry representatives suggested management’s proposal to hold a TSFMAC meeting the day prior to PZJA18, on the basis of cost effectiveness, failed to provide adequate timing for reasonable stakeholder consideration of any possible outcomes. Short periods of consultation would also fail to allow for full consultation of all stakeholders, in particular active fishers. To prevent the PZJA consultative cycle being ‘short-circuited’, both sectors argued the paper should first go to the Working Groups, then onto TSFMAC, before being put up to the PZJA for consideration. Fishing representatives also suggested consultation papers should be provided to all stakeholders as early as possible. By contrast, management argued it was being restricted by tight budgets, time constraints, and the PZJA Chair indicating a timely decision was required on the matter at the upcoming PZJA18 (TSFMAC No.5, Agenda Item. 2, 24-25 May 2005).

Typically, AFMA’s Board has final responsibility for determining MAC’s membership, based on the particular requirements of individual Commonwealth fisheries. MAC membership is detailed in Commonwealth legislation and consists of an independent Chair, the AFMA officer responsible for the respective fishery, and other industry and scientific members, not exceeding seven (FMA 1991 (Cth) s. 60 & 63). By contrast, within the Torres Strait Fishery AFMA may administer the overall appointment process but it is the PZJA that makes all TSFMAC and Working Group appointments, generally for three-year terms to ensure
continuity. Under the PZJA’s new consultative structure, TSFMAC membership typically consists of traditional inhabitant, commercial fisher and scientific representatives, fisheries managers from the four PZJA Agencies, and the Torres Strait Fisheries Scientific Advisory Committee’s (TSFSAC) Chair\(^{325}\) (PZJA 2005a). In a direct reflection of the agglutinant nature of power within Torres Strait, many TSFMAC members also enjoy concurrent membership on the other major committees within the fisheries consultative structure. Individual TSFMAC member’s roles and responsibilities, which similarly apply to the Prawn, Finfish and Tropical Rock Lobster Working Groups, are provided in ANNEX L (PZJA 2005a).

In undertaking their functions, TSFMAC Members must adopt a cooperative approach, acting in good faith in serving the PZJA’s best interests. Members must avoid personal agendas. Nor can they broadcast private comments in public forums that might be misconstrued as official TSFMAC or Working Group statements. Previous unauthorised comments to media sources on individual fisheries within this politically sensitive policy arena have given rise to resultant local community resistance to cooperation with fisheries management (TSFMAC 2005c). TSFMAC members must also clearly and concisely express their viewpoints and be willing to participate in fisheries discussions in an objective, diligent, impartial, civil, courteous and non-discriminatory manner. TSFMAC members must also be willing to negotiate to achieve acceptable compromises through consensus if necessary, whilst always acting in the best interests of the entire Fishery, rather than those of a particular organisation or vested interest group. Any possible direct or indirect financial or economic conflicts of interest arising should be immediately disclosed to other Members. Voting is not an acceptable mechanism for achieving outcomes. When consensus cannot be attained, all member viewpoints and general discussion must be well documented in Minutes of Meetings and highlighted in recommendations put before the PZJA (PZJA 2005a). A similar set of values and operational methodology applies to Working Group (WG) members and meetings (PZJA 2005a). Within the Torres Strait Fishery, compliance with these requirements may present difficulties for representatives of specific interest groups who are essentially performing a representational task that is somewhat incompatible with the expertise-based concept of MACs. Similarly,

\(^{325}\) TSFMAC Meeting held 24-25 May 2005 at Thursday Island: Attendance included the TSFMAC Chair, two AFMA representatives, two QDPI&F representatives, one each Torres Strait Prawn Entitlement Holder’s Association (TSPEHA) and Queensland Seafood Industry Association (QSIA) representative, one each Tropical Rock Lobster (TRL), Finfish and Spanish mackerel industry representative, one TRSA Fisheries Coordinator-Supporting, one TSRA Fisheries Committee representative, and one each Community Fisher representative for each of the following communities: Darnley, TRAWQ (Tamwoy, Rosehill, Apin, Waiben & Quarantine), Sibai, Boigu, Dauan, Kubin, Mabuiag, Murray, Yam, TSRA-Kaurareg, Yorke, Warraber, Coconut, Muralag WMN, Port Kennedy, Hammond, Seisia and Injinoo. Four AFMA observers and one DAFF observer also attended. The TSPEHA and St.Paul’s Community Fisher representatives sent their apologies (TSFMAC 2005c).
consensus implies bargaining is a process involving non-conflicting and accommodative decision-making. But when divergent interests are present, the bargaining process may well hide ‘a good deal of power’, for example the power to set the agenda, which in the Torres Strait reportedly still remains largely in the hands of the PZJA Committee and management. Conversely, the advantage of formal and legal mechanisms, such as the Torres Strait Treaty and the *Torres Strait Fisheries Act 1984* (Cth), is that they clearly define the nature of power relationships. Hence, such mechanisms can often provide less powerful actors with a formal means of competing against more powerful actors within the decision-making process. The Treaty-related provisions contained in section 8 of the *Torres Strait Fisheries Act 1984* (Cth) provide an example (TSFA 1984 (Cth); Peters & Pierre 2004).

**Torres Strait Scientific Advisory Committee (TSSAC) & Working Groups (WG)**

TSFMAC is advised by the Torres Strait Scientific Advisory Committee on scientific and research matters. TSSAC also coordinates all marine research within the Protected Zone. The Committee’s membership typically comprises Commonwealth and state fisheries managers, along with representatives from industry, the TSRA, various research organisations, and state and federal government agencies. In 2003, TSFMAC (2003b) suggested the need exists for a possible re-evaluation of the way TSSAC interacts with TSFMAC and the PZJA cycle of meetings, given TSSAC’s growing involvement with CRC Reef (TSFMAC 2003c). Working Groups, on the other hand, were established to provide recommendations on specific fisheries management and licensing issues. Working Group recommendations go directly to TSFMAC, then to the PZJA for final approval (PZJA 2005a).

Scharpf (1997) argues the ability of semi-permanent collective negotiation ‘associations’ or institutions, such as the Working Groups and TSSAC, to make a contribution to the problem-solving capacity of the overall consultative structure is mainly because they perform their policy making functions ‘in the shadow of the state’, or ‘in the shadow of a governmental hierarchy’ (Scharpf 1997: 2004; Jessop 2004). In this particular case, these tasks are also

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326 For example, the Bureau of Rural Sciences, Commonwealth Scientific and Industrial Research Organisation (CSIRO), National Oceans Office (NOO), Queensland’s Department of Primary Industries and Fisheries, James Cook University (JCU), Australian National University (ANU), Queensland Seafood Industry Association (QSIA), Cooperative Research Centre (CRC), and CRC-Torres Strait.

327 CRC Reef Research: The Cooperative Research Centre for the Great Barrier Reef World Heritage Area (incorporated as CRC Reef Research Centre Ltd). At completion of 2005, CRC was to be replaced with a DEH body (Narracott & Edwards 2005:15).

328 While the Working Group and its sub-Committee units, and indeed TSFMAC, constitute hybrid political institutions, in that they bring together self-organising civil society associations, such as Queensland Seafood Industry Association (QSIA), with the policy making system of the state, and hence cannot be called associations, the same dynamics would also apply.

being acted out ‘in the shadow’ of the Torres Strait Treaty. For example, while ultimate decision-making may rest with the PZJA members, within the advisory mechanisms provided under the Working Groups and TSSAC, policy choices are constantly being shaped and formed through the negotiated compromises of the preferences and perceptions of the actor constellations (groups of stakeholders) involved. Such processes are nevertheless structurally embedded within a hierarchical authority structure that, in turn, exercises a powerful influence over the direction of all interactions within that structure and also over their probable outcomes (Scharpf 1997: 205; Inter. 1, May 2004). For example, the PZJA consultative structure operates under the directive capacity of the state, as illustrated in the Commonwealth Minister’s ability to direct the TSFMAC, TSSAC and individual Working Groups to provide policy advice on specific fisheries-related matters. However, interactions occurring within the PZJA consultative structure’s individual institutions are more than just variants of hierarchical coordination as the welfare-theoretic advantage of the negotiated agreements, or discussions, being conducted between actors involved is also being employed to serve public purposes. Meanwhile, ‘artificial’ bargaining power is also being exploited to correct the limits of the negotiating systems, both within the Working Groups and TSSAC networks. Although its membership is formalised in legislation, this same argument would also apply to the modes of interaction occurring within TSFMAC (FAA 1991 & TSFA 1984 (Cth); Scharpf 1997: 205; Dews [1997], cited in SCIRRA 1997:125).

As with TSFMAC, the informal and semipermanent structures provided by Working Groups and TSSAC may be classified as voluntary negotiation networks. Working Groups typically comprise the TSSAC Chair, six traditional inhabitant fishing representatives, three industry representatives, and one each AFMA and QDPI&F staff member. The Working Groups’ restricted membership provides an appropriate, manageable and relatively cost effective mix of experience, knowledge and expertise that voluntarily comes together to discuss, negotiate, and debate issues relevant to the management of individual Torres Strait fisheries. Normative network relationships, such as those provided by the Working Groups and TSSAC, develop and are maintained because of the potential benefits they provide to members (Scharpf 1997). Unlike the more formal PZJA and TSFMAC structures, continuation of the semi-permanent network relationships being facilitated by the Working Groups and TSSAC is voluntary. Exit is costly, but is nevertheless a feasible option. Individual stakeholders’ actions are embedded within these voluntary arrangements, with each player having a ‘memory of past encounters’ and an ‘expectation of future dealings with each other’. These concepts, in turn, continue to shape and steer individual interactions occurring within these networks (Scharpf 1997). As Scharpf (1997: 137) notes: ‘networks relationships reduce the risk of opportunism by two
mechanisms: the longer shadow of the future and the higher visibility of transactions costs relevant to others’. Within such relationships, individual fisheries stakeholders may start out as ‘strangers’, and initially productive and mutually profitable interactions may be restricted due to individual actors’ lack of knowledge of the other actors’ real intentions, along with the need to adopt a cautionary approach. However, once players are able to trust one another over time, they are also able to accept higher degrees of vulnerability in their dealing with each other. In turn, the development of these mutual trust relationships allows greater levels of social capital to develop. As noted, Scharpf (1994, 1997: 137) proposes trust operates at two levels: ‘weakly at the level of communication and strongly at the level of strategy choices’. ‘Weak trust’ is enough to make cooperation unproblematic. Individual stakeholders are open and honest about their options and preferences and do not deliberately mislead other stakeholders. Unless original circumstances change significantly, each actor is willing to honour any commitments entered into. By contrast, more demanding ‘strong trust’ implies a measure of solidaristic interaction: ‘alter will avoid strategy options attractive to itself that would seriously hurt ego’s interests’. In this instance, there is an expectation that exploitative strategies will not be employed and assistance, if required, will be given, even if this action causes considerable costs to the provider (Scharpf 1997:137). Developing ‘strong trust’ also requires small number conditions. Scharpf (1997:138) also cautions on the benefits and fragility of relationships based upon trustworthiness, which can be easily destroyed.\footnote{Scharpf (1997: 138) cautions that ‘while being able to trust is advantageous, the investment required to achieve trustworthiness is costly in the sense that some potential advantages in individual interactions must be foregone. Since trust tends to be ‘studied’ rather than ‘unconditional’ (Sabel 1992; 1993), it is difficult to build up and is easily destroyed when disappointed. Hence, it may be necessary for the trustee to avoid even the appearance of being untrustworthy in situations that are non-transparent to others. Thus among self-interested actors the stability of trustful relations depends largely on the anticipation of costly investments necessary to rebuild them if they were to be destroyed. Moreover, the existence of a larger network of connected actors adds greatly to the incentives for maintaining trustworthiness. On one hand, membership in a network allows access to a larger number of trustworthy interactions and thus increases the value of social capital. On the other hand, close relationships among network members create conditions under which reliable information about the performance of other members will spread throughout the network (Milgrom/ Northz/Weingast 1990). This increases not only the visibility of potential violations of trust but also the severity of sanctions, since self-interested actors are unlikely to trust partners that are known to have been untrustworthy in other circumstances’.}

Scharpf (1997) further argues a greater likelihood exists of cooperative interactions occurring within normative networks, such as the Working Groups and TSSAC, due to the semi-permanent nature of these relationships and the possibility of low-cost exit. By contrast, in more formal or permanent relationships, such as the PZJA and TSFMAC, players cannot easily exit the arrangement, therefore a greater chance exists of opposing coalition formation occurring among the actors involved (Scharpf 1997:137; Knoke et al [1996], cited in Scharpf 1997:137). However, in contrast to Scharpf’s hypothesis, within the Torres Strait Fishery cooperative modes of interaction are just as likely to occur within formalised institutions such
as the PZJA and TSFMAC as they are within the voluntary relationships being provided by
the TSSAC and Working Groups and their sub-committees, due to the Commonwealth model
of fisheries’ cooperative partnership approach, and most importantly, because of the rights
and obligations conferred on Australian Government authorities by the Torres Strait Treaty at
a supranational level of governance, as is expressed domestically at a national level under the
Torres Strait Fisheries Act 1984 (Cth) (s. 8). Similarly, the probability of coalition formation
within the PZJA and TSFMAC is low because of low PZJA numbers and the terms of the
 Fisheries Management Act 1991 (Cth), which governs the conduct of MAC members. Indeed,
coalition formation is more likely to occur within the traditional inhabitant (community)
sector, or conversely within the non-traditional inhabitant commercial fishing sectors, both
within the individual fisheries’ normative networks (Working Groups) and across the entire
PZJA consultative structure, due primarily to the Torres Strait Fishery’s highly-politis ed
nature and the common belief systems found with the respective fishing sectors. This is best
illustrated by the local traditional inhabitants’ collective stance on property rights over sea
territory and fish stocks, and by non-indigenous fishers’ common belief in their inalienable
rights to work the waters of a Commonwealth fishery.

In the same vein, while the PZJA, TSFMAC and TSSAC now tend to be based more around
attempting to build high levels of trust and social capital within the fisheries, the focus of the
Tropical Rock Lobster (TRL) and Finfish Working Groups at times appears to be less about
building local or regional social capital and more about exploiting these normative networks
as opportunity, or power, structures. While generally adopting a cooperative approach to
fisheries management, within these voluntary institutions both traditional and non-traditional
inhabitant commercial fishing representatives often attempt to break or subvert negotiations to
obtain the best pay-off for their own sectoral interests, rather working in the interests of the
overall well-being and sustainability of the Torres Strait Fishery and its natural resources. By
contrast, when exchange between the two sectors does occur under conditions of cooperation
and mutual dependence, individual players may still have differing preferences for outcomes,
but at least they can obtain a ‘second best payoff’ by using a ‘soft’ bargaining strategy, rather
than have Working Group meetings end in non-agreement and tension, which can leave all
parties with a worst case result. Moreover, under such conditions, management is also able to
capture all the potential gains that flow from cooperation, both through AFMA’s direct
interactions with the individual sectoral groups and from cooperative interactions between
traditional inhabitant and non-traditional inhabitant commercial fishing interests (Scharpf
1997: 143-4). By way of illustration, in light of ongoing contention between hookah and free
divers, as evidenced near Warraber Island, the PZJA directed the Tropical Rock Lobster
Working Group (TRLWG) to consider establishing a register of hookahs\textsuperscript{331}. However, both Islander and non-Islander TRLWG members were in agreement that no benefits could be generated by introducing such a policy, which would only create more bureaucracy. Hence, management was able to build on inter-sectoral cooperation and instead agreed to settle with logbook and docket book systems (PZJA 2005a).

Finally, Scharpf (1997) argues negotiations across and between multiple levels of governance, as found within the PZJA’s consultative structure, are not dissimilar to those operating within bureaucratic hierarchies. Within the overall structure, individual participating bodies, or units, are involved in processes of horizontal self-coordination within and across their own specialty areas. At the same time, they are engaged in a ‘vertical dialogue’ in which both the Australian Government and Commonwealth Fisheries Minister’s collective political concerns are being ‘communicated downwards’, while fisheries-related issues and stakeholders’ concerns are being ‘communicated upwards’. As a rule, lower level units, such as the TSFMAC, Working Groups and TSSAC, are aware of the positions that will be adopted by the overall structure’s political leadership should their lower level negotiations fail. They would also be cognisant that only a limited number of issues can be appealed to a higher authority, such as the Commonwealth Minister (and other two PZJA members), at any one time due to the risk of overloading the centre and producing arbitrary outcomes. As a consequence, horizontal coordination within advisory mechanisms such as TSFMAC, Working Groups and TSSAC, must proceed under conditions in which the pressure to reach agreement is strong, but in which each side has the option of appealing to a higher authority should individual (or aggregate) players be pushed too far or confronted with unfair bargaining strategies. In this instant, that authority may be provided by individual line agencies’ senior management, peak industry bodies, the TSRA or PZJA, the region’s local, state or federal elected representatives, or ultimately a common superior, such as Prime Minister and Cabinet. By way of illustration, the commercial industry’s peak state representative body, Queensland Seafood Industry Association (QSIA), has little in the way of financial backing. It nevertheless enjoys strong political influence via its direct connections to the highest levels of Australian Government. Its representatives are not afraid to by-pass either AFMA or the PZJA’s consultative structure to take issues directly to Canberra, should the need arise. On the ground, the organization’s operational strength lies in its highly-committed, often unpaid representatives, all of who strongly believe in their members’ inalienable right to earn a livelihood within Queensland’s designated fisheries (Scharpf 1997:198; Inter. 4, May 2004).

\textsuperscript{331} Surface air supplied.
Torres Strait Fisheries Management Regime: Problems and Challenges at an Operational Level.

While consultative processes within the Torres Strait Fishery may be improving for the better, formal management plans, including statutory fishing rights (SFRs), are yet to be introduced (Quinlivan 2004; PZJA 2005c). Despite more than two decades of PZJA oversight and a suite of recently proposed milestone reforms, management of the Torres Strait Fishery continues to be underpinned by a series of short and long-term makeshift management arrangements that are, in turn, gradually being implemented in an incremental fashion somewhat akin to Lindblom’s (1959, 1979) concept of ‘muddling through’. Executive Director, Fisheries and Forest Industries, Daryl Quinlivan (2004) concurs:

There are no formal management plans in the Torres Strait. There is a collection of decisions made by the Protected Zone Joint Authority over time, which collectively has developed a management regime for the Torres Strait fisheries’.

Quinlivan (2004) also acknowledges that despite considerable efforts, management continues to experience great difficulty, both in terms of achieving its goals and in finding ways to overcome the inherent systemic problems burdening the fisheries:

Despite much effort invested in attempting to resolve contentious issues within the various individual fisheries, the objectives of achieving sustainability of the Torres Strait fisheries and providing for the long term economic development and traditional way of life of the region’s traditional inhabitants as required under the Torres Strait Treaty’s provisions, has proved difficult to achieve.

Property Rights over Sea Territory and Fish Stocks

Of the many challenges presenting in the Torres Strait Fishery, perhaps the most controversial arise with differing perspectives on property rights over sea territory and fish stocks. These can be traced back to three broad viewpoints.

Principle of Customary Marine Tenure (CMT)

The first set of ideas is local and remains constant across the centuries. It is a belief based on custom, defined in this instant as the regularly observed, constant and repeated practices of local traditional inhabitants over a lengthy period of time. This belief is characterised by a universally upheld and observed carer, or stewardship, ethic that is central to indigenous

332 Under the theory of administrative incrementalism proposed by political scientist, Charles Lindblom (1959) in The Science of Muddling Through, administrative decisions only occur in small increments. Under ‘successive limited comparisons’, changes in public policy occur slowly as a result of minor adjustments (or ‘tinkering’) over time. Incrementalism represents the most common approach to administrative decision-making. It is inherently conservative and dominates when the search for alternatives methods of decision-making is costly. Also refer Still Muddling, Not Yet Through’ (Lindblom 1979)
maritime culture worldwide and has been handed down from ancestor to ancestor since time immemorial. It is also based on notions of customary marine tenure (CMT) within defined inherited customary marine estates, all traditionally owned and managed by indigenous saltwater peoples. This ownership of sea territories involves a continuing complex of cultural traditions and exclusive management rights and responsibilities. Smyth (2003) identifies a conservative system of indigenous marine exploitation that pre-dates European colonisation and employs a mix of strategies and cultural practices to prevent the over-exploitation of finite local resources (Figure 13).


<table>
<thead>
<tr>
<th>Strategies &amp; Cultural Practices</th>
<th>Purpose or Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conduct of Ceremonies</strong></td>
<td>Songs, dances, story telling and other rituals conducted for purpose of nurturing the well-being of particular places, species and habitats.</td>
</tr>
<tr>
<td><strong>Control of Entry</strong></td>
<td>Controlled entry by outsiders into marine clan estates. Resource use restricted to clan members and others by agreement.</td>
</tr>
<tr>
<td><strong>Seasonal Exploitation</strong></td>
<td>Seasonal exploitation of particular marine resources. Opening &amp; closure of seasons marked by ecological events, e.g. flowering of particular plants, arrival of a migratory bird, etc.</td>
</tr>
<tr>
<td><strong>Restrictions on Harvesting</strong></td>
<td>Harvesting of particular species was based on age, gender, reproductive conditions, health, fat content, etc. of individual animals.</td>
</tr>
<tr>
<td><strong>Restrictions on Resource Use and Distribution</strong></td>
<td>Resource use and distribution by clan members and others restricted on the basis of age, gender, initiation status, marital status and other factors.</td>
</tr>
<tr>
<td><strong>Restrictions on Particular Animals and Plants of Totemic Significance to Individual Clans</strong></td>
<td>Each clan usually identified closely with at least one natural element (usually animal or plant), the use of which was often highly restricted or prohibited.</td>
</tr>
<tr>
<td><strong>Prohibited Entry to Certain Areas</strong></td>
<td>Prohibition of entry to certain areas on land and sea, often associated with storms or other sources of danger. Entry and/or hunting and fishing in these areas was believed to cause severe storms or other forms of danger to both intruders and other people in region.</td>
</tr>
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Pre-colonisation Torres Strait waters constituted a widespread collection of maritime estates, each owned by individual island groups. Customary owners enjoyed exclusive rights to large areas of sea territories that extended outwards from individual islands to embrace home reefs, beaches, waters, passages, foreshores, and in some instances, distant fishing grounds. For example, the Miriam people of Mer claim customary sea territories extending as far south as Raine Island. Double outrigger canoes, propelled by prevailing seasonal winds, provided transport, while fibre nets, fish traps, spears and harpoons were employed to harvest natural resources abounding in these fertile sea territories. Today, the technologies may have evolved, but the purposes and principles behind these traditional practices remain, as does the Islanders heavy reliance on their local subsistence marine resources. These strong sea customs and traditions, still evident throughout Queensland’s most northern islands, are built upon an unshakable belief that the local traditional inhabitants hold a primary and exclusive right, above all others, to access, exploit, distribute and manage their own sea territories and the resources found therein. It is an eternal belief in the traditional owners’ right to not only assume primary responsibility for their marine territories, but to also have the final and decisive word on who enters their waters, for whatever purpose. It is an ongoing belief in their absolute right to determine their whole future and establish economic independence from the Australian welfare system for themselves. It is an unwavering belief, as expressed at Yam Island Conference (1973) when traditional Islander and coastal Papuan inhabitants resolved that all fishing by outside interests within the immediate Torres Strait area should be banned (JCFADSC 1976). It is a constantly challenged belief that first found expression, frustration, and then failure in Mabo v. the State of Queensland after its sea claim was removed, and later in Yarmirr v. Northern Territory (2001) (the Crocker Islands Sea Case 1988), in which Justice Olney adopted the well-established position that public rights take precedence over any other rights and determined that native title sea rights are both non-exclusive and non-commercial (ATSISJC 2000). It is a collectively shared belief that has been reflected in Torres Strait Islanders’ frustration at not obtaining any direct, or little indirect, economic return from the region’s multi-million dollar commercial prawn fishing industry. It is an honest belief that manifested at its most radical form after two traditional inhabitants boarded a non-Islander commercial fishing vessel on Dugong Reef, some thirty kilometres from Mer (Murray) Island, to remove its coral trout catch and on-sell it to the Murray Island Council freezer (The Queen v. Benjamin Ali Nona and George Agnew [sic] Gesa).

Both men were charged under the Criminal Code Act 1889 (Qld) with armed robbery and dishonestly attaining property. At a committal hearing at Cairns District Court on 12 April 1999, Justice Healy found Nona’s and Gesa’s behaviour was justified under the common law defence of ‘honest right of claim’. It was argued those rights were traditional fishing rights (including for commercial fishing purposes) protected under the Torres Strait Treaty, the Torres Strait Fisheries Act 1984 (Qld) and the Queensland Fisheries Act 1994 (Qld). In the Cairns District Court on 16 August 1999, Justice White upheld Justice Healy’s directions, placing a stay on proceedings pending application to the Court of Appeal. The Crown’s application to the Court of Appeal was accepted and heard in the
Despite subsequent TSRA protests and denials of violence in the Eastern Torres Strait Reef Line Fishery, the problem still persists today (SMH 2002; Waia 2002; Inter. 4 & 5, May 2004). In 2003, Mapstone et al. (2003) reviewed the fishery after Islanders expressed their concerns over possible overexploitation of demersal Finfish Fishery resources by non-Islander commercial fishers within traditional hunting and fishing areas around the populated islands of Murray (Mer), Darnley (Erub), Stephens (Ugar), and Yorke (Masig & Kodall). In their assessment, Mapstone et al. (2003) highlighted the urgent need to resolve allocation issues and hostilities within the Fishery, citing increasing Islander resentment over the harvesting of resources within their maritime territories by non-Islanders as the primary source of tension. In 2004, serious conflict still existed between the two sectors, with reports of non-Islander commercial vessels constantly being ‘hassled’ at sea. For example, in May 2004 one non-Islander fishing vessel was allegedly approached at night twenty-three miles off Mer Island and instructed to get out of Meriam waters. The chronic lack of on-water law enforcement within the Eastern Torres Strait Fishery, when combined with fears of further unauthorised Islander boarding parties, is now reflected in the weapons carried aboard by non-Islander commercial fishers, all of who strongly believe in their right to defend their lives at sea. One participant further predicts should law enforcement authorities continue to fail to take reports of conflict in the Reef Line Fishery seriously, then tensions on the unpoliced Eastern Torres Strait waters will only abate after a decision on property rights is handed down in court, or somebody is accidentally wounded or killed (Inter. 4 & 5, May 2004).

Torres Strait-licensed, non-traditional inhabitant commercial fishers argue that they are not committing any offence and have, as the Commonwealth Minister agrees, an undeniable legal right to fish the waters of this Commonwealth fishery. As yet, there are no formal exclusion zones and non-Islander fishers could work much closer into the islands, but elect not to under the ‘gentlemen’s agreement’ established in conjunction with the Queensland Commercial Fishermens’ Organisation (QCFO) that restricts all commercial fishers to a ten nautical mile limit 334 (Bishop [1998], cited in FAIRA 1998; Inter. 4 & 5, May 2004; Macdonald 2004). The introduction of a single fisheries jurisdiction in 1999 was also intended to reduce the

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334 A ‘gentlemen’s agreement’ has also existed for a number of years in the Bramble Cay Spanish Mackerel Fishery, where fishers work in the early morning and late afternoon, resting the fishery during the day.

Queensland Supreme Court on 22 February 2000 by Justices Davies, Thomas and Wilson. They found Justice Healy had merely ruled the Crown could not satisfy a jury beyond reasonable doubt and that the two accused were not acting under an honest claim of right. It was not the case, as Justice White had assumed, that there was no case to answer (Haigh 2000). On February 2001, a jury at Cairns District Court subsequently found Gesa and Nona not guilty of armed robbery charges.
number of mainland commercial fishing boats operating in the area\textsuperscript{335} (Bishop [1998], cited in FAIRA 1998). Nevertheless, Murray Islanders and certain non-Islander commercial fishers question the effectiveness of this arrangement, due to its voluntary nature and the potential for ambiguity in its interpretation. In 2003, confusion also appeared to exist over the agreed specified distance of the exclusion zone (5nm, 7nm or 10 nm) (Mapstone et al. 2003). Ongoing tensions over access rights also continued to be noted at an official departmental level in Canberra during 2004: ‘There are some contentious issues about where people fish and whether it is appropriate for non-indigenous commercial fishers to fish near the islands. The local people feel it is not appropriate. But they [non-indigenous fishers] do have rights to fish there and at present we do not have a clear way of resolving that’ \textsuperscript{336}(Quinlivan 2004).

Principles of Customary International Law: Doctrine of \textit{Mare Liberum}, or Freedom of the Seas\textsuperscript{337}, Freedom of Navigation, Freedom to Fish, and Right of Public Access to Foreshores. This second set of ideas, commonly upheld by non-Islander commercial fishers, is antithetical to Islanders’ notions of privately-owned sea territories. It is based on Western concepts of freedom and is embedded in contemporary Anglo-Australian law. According to Seneca, once the entire human race enjoyed a type of universal unlimited sovereignty, quite unlike our contemporary concept of state territorial sovereignty: ‘Every path was free, All things were used in common’ (Seneca, cited in Octavia 413-414, [trans. Harris (Act 11, Scene 1)]. However, by the time of the Peace of Westphalia and the establishment of an international system of states, things had increasingly become either ‘public’ (\textit{res publicia}), that is the property of people, or a whole nation, and were common to all under Natural Law, or were private property and the property of individuals, the latter predominately through occupation and possession. But the sea, the open sea, remained \textit{res nullius}, the property of no one. It was a common possession (\textit{res communis}) and the same primitive right of nations concerning fishing and navigation that existed in earlier times remained undiminished as that right has never been separated from the community right of all humankind to be attached to, and trade

\textsuperscript{335} Prior to the introduction of a single fisheries jurisdiction in April 1999, over 1,700 commercial (non-Islander) boats had entitlements to line-fish anywhere in Queensland waters, including the Torres Strait. Over 1,000 were entitled to net fish in the region. Over 1,000 also had the right to crab fishing (Bishop [1998], cited in FAIRA 1998).

\textsuperscript{336} Proposed Reforms: As part of its proposed solution to the problem, the PZJA has now agreed to discussions being conducted during 2006 regarding the possible formal implementation of a ten nautical mile radius exclusion zone in 2007 for all non-traditional inhabitants fishers operating within the Finfish Fishery in waters surrounding Murray (Mer), Darnley (Erub), Yorke (Masig) and Stephens (Ugar) Islands (PZJA18, Item 3, 2005a).

\textsuperscript{337} Codified in \textit{The Geneva Convention on the High Seas} 1958, Article 2 (58 HSC) and the \textit{United Nations Convention on the Law of the Sea} 1982, Article 87 (82 CLOS). (Also includes the freedom to lay submarine cables and pipelines, freedom to conduct research, and freedom to fly over the high seas).
with, any persons or groups of persons, no matter how remote their location (Grotius [trans. Magoffin, 1916: 57]; Donellus IV, 2, 9, in Grotius [trans. Magoffin, 1916, 30].

During the seventeenth century, in *Mare liberum, or Freedom of the Seas*, Grotius (Hugo de Groot [1609] also argued the open sea could not be appropriated by anyone. Placentinus concurred: ‘The sea is a thing so clearly common to all, that it cannot be the property of anyone save God alone’ (Placentinus, cited in Grotius [trans. Magoffin, 1916:34]. Grotius did however exclude all internal waters, expanses of sea visible from the shore, and narrow bodies of external waters, for example gulfs and straits, such as Torres Strait, from his definition of the ‘open seas’ [338]. This equal right of all nations to the freedom of the seas, including the right of navigation, the freedom to trade, and peoples’ right of access to other peoples, is based on laws derived from Nature, or Natural Law. God, through the voice of Nature, united the earth’s widely scattered peoples using ‘occasional winds’ and ‘oceans navigable in every direction’ to distribute Nature’s products through commercial intercourse (Grotius [trans. Magoffin, 1916, 5,7,8]. This same principle applied to the freedom to fish. Cicero (23-23), for example, argued Nature knows no sovereigns, therefore nothing is by nature private property. Seizure and possession of objects not for ‘common’ use, such as wild animals, fish and birds, did however denote private ownership. Fish, for example, were the private property of those who caught them (Athenaeus, cited in Grotius [trans. Magoffin, 1916: 29]. Similarly, while the Crown (or Commonwealth) may have ownership of revenues levied on maritime fisheries, this income does not bind the open seas nor its fisheries to the Crown, only the persons engaged in fishing. Today, a coastal state’s sovereignty over its maritime belt includes an exclusive right to fish its territorial sea. Article 56(1)(a) of the 1982 Convention (UNCLOS) also gives coastal states sovereign rights over all economic resources of the sea, seabed and subsoil within its Exclusive Economic Zone (EEZ, 200nm). This not only includes fish but also minerals beneath the sea-bed. The introduction of Individual Transferable Quotas (ITQs) also provides a form of individual property rights within managed fisheries. But the open seas, the high seas, still remain open to all [339](Haward et al., 2001; FMA 1991(Cth); UNCLOS 1982).

338 Grotius argued: ‘the question at issue is the OUTER SEA, the OCEAN, that expanse of water which antiquity describes as the immense, the infinite, bounded only by the heavens, parent of all things: the ocean which the ancients believed was perpetually supplied with water not only by fountains, rivers and seas, but by the clouds, and by the very stars of heaven themselves; the ocean which, although surrounding this earth, the home of the human race, with the ebb and flow of its tides, can be neither seized nor enclosed; nay, which rather possesses the earth than is by it possessed. Further, the question at issue does not concern a gulf or a strait in this ocean, nor even all the expanse of sea which is visible from the shore (Grotius [nd] trans. Magoffin 1916:37).

339 A similar right of public access to foreshores applied. Vergil argued under the Law of Hospitality, the right of public occupation or access of foreshores, subject to it not infringing on international rights, was open to all (Vergil [n.d.], cited in Grotius [trans. Magoffin, 1916: 8]:

What men, what monsters, what inhuman race,
Principles of Ecologically Sustainable Development (ESD), Inter-generational and Intra-generational Equity and the Precautionary Principle

The third set of ideas is promoted primarily by the Commonwealth. It is based on the concept of ecologically sustainable development (ESD) and is driven, in part, by the Commonwealth’s desire to avoid a ‘tragedy of the commons’ within the Torres Strait Fishery. According to the Commonwealth Minister for Fisheries, such a scenario can be avoided via the clear and fair regulation of Commonwealth fisheries, in accordance with ESD principles (Macdonald 2004). ESD’s origins in Australia trace back to Our Common Future, the 1987 report of the World Commission on Environment and Development (Brundtland Report) and the highly-contested concept of sustainable development, that is ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs…’ (WCED1987). The Hawke government’s 1989 policy response to the report, entitled Ecologically Sustainable Development: A Commonwealth Discussion Paper, reflected Australia’s then-influential environment movement’s insistence on a differentiation between types of development. Subsequent Australian governments have adopted the term ESD, while the National Strategy for Ecologically Sustainable Development (NSESd), endorsed by all Australian governments in 1992, provides the major relevant policy initiative. ESD relates not only to environmental issues, but covers an extremely broad policy agenda which brings together quantitative and qualitative aspects of development. This is achieved by providing a policy framework for addressing short and long-term economic, social and environmental cost

What laws, what barbarous customs of the place,
Shut up a desert shore to drowning men,
And drive us to the cruel seas again.

Hardin (1968) argued that unless the ‘commons’ (oceans, fish stock, rivers, marine and national parks, etc.) were classified as private property, to which rights to entry and use could be allocated, the result would be ‘a tragedy of the commons’: ‘Freedom of a commons brings ruin to all’. Hence, government was to control use of rights, for example access to fishing rights within Commonwealth fisheries.

National Strategy for Ecologically Sustainable Development (NSESd): The Strategy states that ecologically sustainable development: …aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations (CoA 1992.6).

Three core objectives are articulated in NSESd:

- enhance individual and community wellbeing and welfare by following a path of economic development that safe guards the welfare of future generations; and
- provides for equity within, and between, generations; and
- protects biological diversity and maintain essential processes and life support systems.

NSESd outlines a number of guiding principles. Important among them are:

- the need for decision-making processes to effectively integrate long term and short term economic, environmental and social considerations; and
- that a lack of full scientific certainty should not be used as a reason for postponing action – known as the precautionary principle.

NSESd also sets out the broad strategic policy framework under which government should pursue ESD. It acknowledges that governments need to change their institutional arrangements to ensure that ESD principles and objectives are taken into account in relevant policy making processes.
and benefits, along with the precautionary principle and moral principles of intra-generational and inter-generational equity. For example, the Fisheries Management Act 1991 (s. 3) (Cth) explicitly incorporates principles of ESD that necessitate a ‘whole of ecosystem’ perspective as a management requirement for all Commonwealth fisheries (FMA 1991(Cth)).

Conversely, the Precautionary Principle was incorporated into the 1992 Rio Declaration on Environmental Development. The principle requires an anticipatory approach to prevent harm to the environment. It urges action be taken in advance of scientific proof of evidence of the need for the proposed action on the grounds that further delay could ultimately prove costly to society and nature, and in the longer term, selfish and unfair to future generations. Central to the application of the Precautionary Principle is the concept of proportionality, or cost effectiveness. Will the environmental benefits of precautionary action outweigh associated economic and societal costs? For example, at the TFSMAC Meeting in May 2005, industry representatives argued the Hump Headed Maori wrasse is a commercially important ‘take’ species. The traditional inhabitant sector supported a ‘no take’ policy. Their position was reinforced by the Queensland Government, which views Maori wrasse as iconic to the Great Barrier Reef. Hence, its classification as a ‘no take’ species within all Queensland fisheries. Conversely, the PZJA previously supported a ‘take’ policy at PZJA17, unaware of the Maori wrasse’s recent citing as a CITES species. However, as a result of access to new data on Maori wrasse’s slow growth rate, longevity, rarity, large size at maturity, along with national concern over its CITES listing and wider public perceptions of the species’ management in the Torres Strait region, TSFMAC recommended the PZJA should reassess its earlier decision to classify Maori wrasse as a ‘take’ species. The Department of Environment and Heritage (DEH) further advised Maori wrasse was being considered for listing under the Environment Protection and Biodiversity Conservation Act 1999 (Cth). This would prevent export and severely limit any form of domestic trading. TSFMAC’s Chair also highlighted the species is under pressure globally, while traditional inhabitants representatives noted the species

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342 An explanation of inter-generational equity is provided by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). In 1997, UNESCO passed the following:

Declarations on the Responsibilities of the Present Generations Towards Future Generations:
the present generation have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded. Every effort should be made to ensure, with due regard to human rights and fundamental freedoms, that the future as well as the present generations enjoy full freedom of choice as to their political, economic and social systems and are to preserve their cultural and religious diversity. present generations have the responsibility to bequeath to the future generations an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care of its natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth (UNESCO 1997).

potential for ecotourism. Management subsequently changed its position to support Maori wrasse as a ‘no take’ species. In this instant, contrary to official government policy, the PZJA initially failed to adopt an anticipatory approach when faced with a lack of scientific advice. It was only after considerable amounts of negotiation involving multiple levels of governance and consideration of various political, scientific and other economic factors, such as the Maori wrasse’s potential as an ecotourism attraction, came into play that management finally decided to take precautionary action (FMA 1991S.3 (Cth); UNESCO 1997; TSFMAC 2005c).

The Issue of Sustainability
Ensuring the Torres Strait Fishery is managed in a sustainable manner, as is required under the EPBC Act, presents fisheries managers with an enormous challenge. Apart from the non-Islander prawn fishery, during 2004-05 management was only seriously addressing the issue of sustainability in one sector, the non-Islander sector. Across all fisheries, the traditional inhabitant sector was not being properly monitored. Conversely, management of the non-indigenous sector was being underpinned by a string of short term ad-hoc decisions and temporary measures, or band-aid solutions, that were being implemented incrementally to fill in gaps in existing management arrangements until longer term statutory management plans were developed. Formal management plans were however never completed or implemented due to the numerous social, economic, cultural and operational obstacles that were constantly being put forward, or recycled, to justify the PZJA’s ongoing failure to implement formal management plans. These ranged from a lack of AFMA staff resources, to the PZJA’s failure to clarify the issue of preferential access, to management’s failure to properly consult with stakeholders (TSFMAC 2003a-g; Quinlivan 2004). For example, despite its estimated value of $30-$35 million and status as the most important commercial fishery for local traditional inhabitants, within the Tropical Rock Lobster Fishery there was no control on catch and nor any control on effort. A wide disparity existed between total potential and optimal level of effort. Moreover, not only was there no limit on numbers of Traditional Inhabitant Boat (TIB) licenses, but existing TIB licenses were not being properly monitored. Consequently, existing management tools, such as licenses, could not be used to control effort in the indigenous sector of the TRL Fishery as the exact number of licenses was unknown. Despite TSFMAC’s high priority ranking (April 2003), no formal, or statutory, management plans had ever been completed (TSFMAC 2003a; Quinlivan 2004). Nor, in 2004, was it predicted this was likely to happen in the foreseeable future. AFMA argued this was primarily due to a lack of staff resources at its Thursday Island operation. Until such time as formal management plans could be introduced, a number of short-term strategies were to be developed and implemented.
Despite the PZJA’s recent announcement of proposed reforms for the 2007 season, a similar management approach was still being applied throughout 2006 (PZJA 2005c).

The Torres Strait Fishery does have what Executive Director Quinlivan (2004) terms ‘lower case ‘m’ management’. However, what management arrangements exist are generally based on incomplete, often incorrect information. In late 2003, for example, the PZJA made a decision to cap Traditional Inhabitant Boating (TIB) licences with *kiar* (cray) endorsement (CR) for 12 months. Yet nobody in the PZJA or its cycle of meetings noticed, or mentioned, that a significant number of community *kiar* fishers held expired TIB licences, even though these licenses were originally issued by management. Consequently, the one year ceiling on the number of TIB licences with CR (cray) endorsements set by management was not only possibly too low, it also failed to accurately reflect true numbers of fishers operating within the Tropical Rock Lobster Fishery at the time (Bedford 2004). One participant suggests that removing the non-indigenous sector from the TRL Fishery will not remove the issue of sustainability344. Similarly, it is further cautioned if a large traditional inhabitant commercial fishing fleet is to grow, then strategies will need to be implemented now to ensure the future sustainability of the Torres Strait Fishery’s resources for future Islander generations. It is also suggested there is little purpose in investing time, money or labor in developing a commercial traditional inhabitant lobster fishery to service lucrative international and domestic markets if that same fishery suffers from a limited stock (Inter. 4, May 2004). The same participant notes, ‘If the fishery is to be there in a hundred years time, it will require a lot more vision and foresight than is being shown at present by the current generations of Islanders’ (Inter. 4, May 2004).

Non-indigenous fishers argue they have no problem with the issue of sustainability. Fisheries management has been implementing sustainability initiatives in the non-Islander trawleries (prawn fisheries) for years345. Torres Strait prawn stocks are now considered fully-fished, not

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344 One participant argued: ‘They [Islanders] will not do something that’s going to penalise themselves – they will never do it – they’ll say get rid of everybody else then we’ll talk about resource management. If you got rid of all the gear. If you’re just going to let Islanders keep getting more licences, and more and more licences, to go and catch crayfish, then somewhere down the track it’s going to become unsustainable. So you’ve got to address it now. That’s where the problem lies’ (Inter. 4, May, 2004).

345 Resource Sustainability Strategies in Prawn Fishery
- West of Warrior Reef closure 1981;
- 3 month seasonal closure 1985;
- East of Warrior Reef closure (8 month) 1987;
- Darnley Island closure 1990;
- Net reduction size of 10% 2001 (from 88 to 80ft);
- Turtle Exclusion Devices (TEDs) introduced in 2002;
- BYRD’s (by-catch reduction devices) introduced in 2003;
- 10mm ground chain introduced in 2003;
- 20% reduction penalty on trades to offset effort creep in upgrades;
over-fished. Fish stocks have not collapsed, nor are they in serious decline (PZJA 2003; Inter. 4, May 2004). By contrast, within the line fishery (finfish), and all other fisheries, similar management initiatives have not as yet been introduced. The Beche-de-mer (sea-cucumber) Fishery, which non-indigenous commercial fishers are not involved in, was severely depleted in recent years due to an absence of resource management on Warrior Reef. Previously, that fishery had functioned as a renewable resource. Targeted species were always plentiful and easily managed. However, recent over-exploitation of this fishery, which potentially provides local traditional inhabitants with substantial employment and income, led to fishery closures and a supplementary recommendation for catch restrictions346 (Inter. 4, May 2004; TSPH 2004:20-2; Skewes 2005). Conversely during 1998, on the issues of sustainability, fisheries resource management and the local Islanders’ customary stewardship role, Murray Island Chair, Ron Day, argued Mer Island’s traditional inhabitants historically enjoyed total control over management of their customary sea territories. Fishing within the Eastern Torres Strait Fishery has operated as a sustainable industry for centuries, until outsiders arrived to over harvest the region’s natural resources (Day [1998], cited in Faira 1998). Day [1998] also questions the capacity of scientific research to confirm or disconfirm events that he witnessed in everyday island life:

People say to us that the lives of the turtles are being threatened and the population of turtles are dying out but where I come from, the turtles are pests… We recognise that there is such a thing as science that is doing its job, but we are living in our area know what we are doing and our areas should be left alone for us and us only.

Finally, a poorly managed fishery is just as vulnerable to overexploitation as is an unmanaged fishery that lacks any checks or controls over fishing activities (JSCPIRS 1997: 9). Within the Torres Strait Fishery, in 2004 priority was not being given to the region’s natural resources, but rather to competing priority interests. For management and other stakeholders to avoid many of the serious problems that may arise out of a failure to positively engage in processes of ecologically sustainable development, both sectors of the Torres Strait Fishery need to be properly and firmly managed now. Management also needs to acknowledge the futility of attempting to introduce purely scientific management measures based on often incomplete and highly inaccurate information into a highly politicised fishery, in which one sector is not being properly managed. Similarly, if both traditional and non-traditional commercial fishers continue to work in their own short-term self interest, rather than the wider interests of all the region’s traditional inhabitants and its fragile eco-system, as is obliged under the Torres Strait

346 Some traditional fishers now feel beche-de-mer stocks are abundant and want the fishery reopened.
Treaty, then there is a high risk little of the region’s natural resources will left for future
generations of traditional inhabitants to manage and exploit. Hence, an urgent requirement
now exists for all stakeholders to collectively address the issue of sustainability in the Torres
Strait Fishery (TSFMAC 2003a; Mapstone et al. 2003; Inter. 4, May, 2004; AFMA 2004).

As noted in ANNEX H, the PZJA has resolved to develop statutory management plans for the
Tropical Rock Lobster and Finfish fisheries in 2006, for implementation in the 2007 season.
Within the TRL Fishery, after accounting for PNG’s entitlements, the PZJA now proposes
initially moving to a 50:50 share of the Australian commercial fishing concession between
traditional and non-traditional inhabitant commercial fishing sectors. The existing catch ratio
between the two sectors, once determined, will provide a starting point for implementing
resource allocation decisions. Under the new Quota Management System (QMS), the non-
Islander (TVH)\(^3\) sector will be required to operate under an Individual Transferable Quota
(ITQ) system. In early 2006 however, TSRA and the Torres Strait Community Fisher Group
(CFG) were still to advise on a preferred mechanism for distributing allocated community
fishing concessions within the traditional inhabitant sector. Given the complexity and political
sensitivity of the issues involved, along with the extensive consultations processes required, in
addition to the potential for conflicts of interest and the need to maintain the integrity of the
decision-making and allocation process, management predicts it may be some time before a
decision is reached on this matter (PZJA 2005c).

Misinterpretations of the Torres Strait Treaty

‘It’s just a misunderstanding of what’s in the Treaty’.


Preferential or Priority Access Rights.

There are many differing interpretations of the Torres Strait Treaty within the Torres Strait
Fishery (McLucas 2004). As one participant notes: ‘There’s the Treaty, and the interpretation
of the Treaty is who wants to chuck it up and which ball do we catch tomorrow’ (Inter. 4,
May 2004). One common misunderstanding that contributes significantly to the highly
politicised nature of the Torres Strait Fishery arises over the issue of giving preferential
access rights to traditional inhabitant fishers over those certain inalienable legal rights held by
licensed non-Islander commercial fishers to exploit the Torres Strait’s waters (PZJA Annual
fishing is clearly given priority over all commercial fishing activity under the Torres Strait

\(^3\)TVH: Torres Strait Fishing Boat Licence.
Treaty (TST 1985), historical confusion within the region over the issue of preferential, or priority, access for community fishers is understandable, especially in light of the conflicting viewpoints historically promoted by the Protected Zone Joint Authority (PZJA). Since its inception, the PZJA sought to promote and maximise opportunities for Islander participation within all sections of the commercial fisheries. Until 1992, the PZJA had a clear and publicly-stated policy of preferential access for all community fishers contained within its Annual Reports: ‘Torres Strait Islanders undertaking community fishing – a special category of commercial fishing established to facilitate islander involvement in the fishing industry in the region – have preferential access to all these fisheries in the Torres Strait’ (Item 11, Management Arrangements, TSPZJA Annual Reports 1988, 1989, 1990, 1990-91). While the policy was no longer being openly promoted by the PZJA at an official level by the time AFMA and QFS entered into their joint-management arrangement in 1994, confusion over the issue has remained within the wider Torres Strait fishing community (TSPZJA Annual Report 1994; McLucas 2004). The issue of preferential access, since retitled ‘priority access’, came to prominence once again with the release of Menham, Skehill and Young’s (2002) report, entitled *A fair share of the catch* (2002). In 2003, TSRA’s Chairperson echoed the report’s findings: ‘The Torres Strait Fisheries Act identifies the second priority [after traditional] as community fishing and the third and lowest priority as commercial fishing that is not community fishing – placing indigenous fishers of the Torres Strait in an elevated position’ (Waia 2003). TSRA’s Fisheries Officer also concurs: ‘There is a prima facie order of priority for the management of Torres Strait Fisheries under which traditional fishing has primacy followed by commercial fishing by traditional inhabitants and lastly commercial fishing by non-traditional inhabitants’ (Yorkson 2003).

Non-indigenous commercial fishers currently working Torres Strait reportedly have no issue with the granting of preferential access rights for traditional inhabitant fishers under the Torres Strait Treaty (TSFMAC 2003e). Relations between traditional inhabitant (subsistence) fishers and the non-Islander commercial fishing sector reportedly remain ‘harmonious’ (ANAO 1996; Inter. 4, May 2004). Conversely, Islander interests operating in the commercial sector believe the current system is ‘unfair’ and in 2004 called for a ‘level playing field’ in the Torres Strait Fishery. Islander fishers argue the Treaty’s terms and provisions not only protect their rights as traditional inhabitants, but also economically restrict their rights as traditional inhabitant commercial fishers (TIBs) are being ‘boxed in’ into the Protected Zone and during poor or bad seasons cannot go outside the area to work other Australian fisheries. By contrast, outsiders, or non-Islander commercial fishers with Torres Strait licences, are free to enter the

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348 Menham, G., Skehill, S., & Young, P., (2002), *A fair share of the catch*, an unpublished report to the Protected Zone Joint Authority by the Torres Strait Fisheries Independent Advisory Panel, Canberra.
TSPZ to work individual Torres Strait fisheries (Inter. 6, May 2004). Following unexpected increases in crayfish volumes within the Torres Strait TRL Fishery, the influx of non-Islander commercial boats from the East Coast Fishery in 2004 only further contributed to the inter-sectoral tension, as evidenced in the following statement, which was displayed by community kiar fishers at Port Kennedy Hall and reported in the regional newspaper (Bousen 2005):

> You’ve plundered the East Coast till there was none,
> Our people have seen what you have done.
> You bring your boats into our forefathers’ waters,
> and take from the mouths of our sons and daughters.

Conversely, both management and industry representatives argue if the Torres Strait Fishery is to ever introduce formal management plans, including statutory fishing rights, then all commercial fishers, whether Islander or not, should be subject equally to the same regulations and management arrangements: ‘If you’re commercial, you’re commercial’ (TSFMAC 2003a; Inter. 4, May 2004). It was also highlighted that in the past Islander fishers did own licences to go down and fish the East Coast, and all bar one sold them off for a profit to take up free Traditional Inhabitant Boast (TIB) licences. It is also suggested that as with other commercial Australian fishers, no regulations prevent Torres Strait community fishers from purchasing additional licences and working the East Coast, or indeed any other Commonwealth managed fishery (Inter. 4 May 2004). Such arguments fail however to acknowledge major impediments working against the successful establishment, development and expansion of indigenous businesses in and from remote Australian locations like Torres Strait. These may range from shortages of personal savings to a lack of access to credit or absence of credit histories, to the limitations placed by Commonwealth and state legislation on the use of inalienable indigenous land as personal collateral, as demonstrated in the inability to take out a personal mortgage. Other obstacles may arise with a general lack of regional employment, which in turn severely hinders opportunities for equity accumulation. Another impediment arises with the confines placed on the amounts of money local Councils may borrow. For example, the absence of traditional inhabitants in Torres Strait prawn trawling operations results primarily from the high capital costs associated with entering the Prawn Fishery, and to a lesser degree difficult employment conditions within the industry. By contrast, higher traditional inhabitant participation rates in the Tropical Rock Lobster Fishery are largely attributable to its higher profit margins and low set-up costs. The only major capital investments required are an aluminium dinghy, outboard motor, and spear or snare (ATSIC 1998:22-3; Arthur 1999:9-10).

Nor is the argument reportedly about ‘whitefella’ versus ‘blackfella’ issues. If indigenous fishers from other regions brought out existing Torres Strait licences and began working the
Strait’s fisheries they would also encounter similar local resistance. The core argument here is about the local traditional inhabitants’ exclusive right to fish their own customary waters, and it remains an extremely valid argument given that commercial fishing currently provides the region’s major source of future potential economic income. Put simply, community fishers want outsiders holding commercial Torres Strait licences gone from the Torres Strait region. And in 2004, many non-indigenous commercial fishers were reportedly willing to leave, conditional on the Australian Government agreeing to pay compensation for the Torres Strait component of their licences. Nor are non-Islander fishers generally in disagreement with the traditional inhabitants’ long-term aspirations of owning and managing the Torres Strait fisheries for their own benefit. But they view management practices, under which they believe they are currently being ‘squeezed out’ of the Torres Strait Fishery through an incremental ‘smuggling in’ of important policy changes at an operational level, without any form of structural adjustment assistance or compensation for their substantial financial investments from the Australian Government, as a ‘transfer of wealth by other means’. These fishers also argue that management’s practice of making decisions based on incomplete and invalidated data without first assessing their social or economic impact, as illustrated in the loss of business capacity, licensing cuts and effort reductions already sustained, is both unfair and inequitable (TSMAC 2003c; AFMA/QFS 2003; TSPZJA Disc. Paper 2003; Inter. 4, May 2004). Removing all non-indigenous fishers from the Torres Strait Fishery would also leave non-Islander fishers in partnership with local indigenous fishers by marriage in a somewhat difficult position. Both sectors agree that it is the Commonwealth, and not the TSRA, that should pay compensation to non-Islander fishers as the Commonwealth originally issued those licences industry purchased. Finally, the ongoing lack of direction and guidance coming from the PZJA on the issue of preferential, or priority, access only continues to contribute to ongoing confusion and tension over this highly emotive issue. Most stakeholders reportedly agree the Australian Government and PZJA need to officially clarify a jointly agreed position on this matter (TSMAC, Report-Latent Effort Subcommittee, Agenda No.3, 2003a: 5, 8; 2003c; Inter. 4, May 2004).

Another common misunderstanding of the Treaty centres around the genuine belief that the allocation of commercial licences under the Treaty applies to both Australian and Papua New Guinean traditional inhabitants (McLucas 2004; Quinlivan 2004). One example of a partial misinterpretation of the Treaty’s wording is provided by the TSRA, when it notes as one of its key fisheries related achievements during 2004: ‘acknowledgement by AFMA and QFS that the Torres Strait Treaty establishes the rights of traditional fishers and commercial Indigenous fishers before those of non-indigenous commercial fishermen’ (TSRA Press Release 2004(a);
TSRA Annual Report 2002-03:68; TST). This is not entirely the case. Under the Torres Strait Treaty, traditional fishers have priority access. But priority access to commercial fisheries in and near the Protected Zone is only provided for commercial PNG fishers. The specific rights traditional Torres Strait Islanders enjoy under the Treaty relate directly to the preservation of traditional access and the obligation on the PZJA in decision-making to show consideration for the economic advancement and traditional way of life of the local traditional inhabitants. The document does not confer any commercial licences, or licensing rights for commercial licences, on traditional Islander commercial fishers (Quinlivan 2004:64).

Misunderstandings over allocation of licences under the Torres Strait Treaty are repeatedly raised at PZJA meetings and many differing viewpoints exist on this matter (Macdonald 2004). Nevertheless, the official Australian Government viewpoint is as follows:

There is no explicit right under the Treaty for Torres Strait Islanders to take up licences… We do have licensing arrangements which are available to Torres Strait Islanders. They are called Torres Strait Islander boat licences and they are used in a fairly unrestricted fashion for lobster and finfish fishing. But there are no specific licences or licence rights provided by the treaty… The access to licences and access rights certainly exists for PNG fishers, but the treaty and act confer no specific rights on the Torres Strait Islanders. The Protected Zone Joint Authority, in making management decisions for Torres Strait fisheries, must have regard to the traditional way of life and the economic development of the Torres Strait Islanders. The Protected Zone Joint Authority has over time interpreted that to mean that Islanders have access to these unrestricted boat licences for lobster and finfish fishing, but that is because of a decision made by the PZJA, not because of specific rights in the treaty or the act (Quinlivan 2004:64)\(^\text{349}\).

It is fact that from the very beginning, the PZJA intended that any further expansion of the well-established non-Islander participation in the Protected Zone fisheries should be frozen. Whatever scope existed for additional growth was to be reserved exclusively for Islanders. It was with this intent in 1990 the PZJA announced in order to promote Islander involvement in the Prawn Fishery, one non-transferable commercial prawn-trawler licence and two non-transferable non-dedicated commercial catching boat licences would be granted, conditional on the respective vessels being operated and manned solely by traditional inhabitants\(^\text{350}\).

\(^{349}\) Due to ongoing confusion over this sensitive issue, a full text of Executive Director Quinlivan’s statement is included in the main text.

\(^{350}\) Except for approved training exercises.
(PZJA Annual Report 1990:6). The licences, which always remained the PZJA’s property, were subsequently allocated to TSRA to use as it wished\textsuperscript{351}. By 2004, TSRA had still not taken up those licences, nor had it been able to organise a traditional inhabitant prawning operation\textsuperscript{352} (Quinlivan 2004). To update, under recently announced reforms, an agreement for the permanent surrender of Torres Strait Islander prawn access rights (with appropriate compensation) has now been concluded between TSRA and the Island Coordinating Council and Commonwealth Department of Agriculture, Fisheries and Forestry (PZJA 2005c).

**Catch Sharing Arrangement**

The Torres Strait Treaty requires Australia and PNG to ‘co-operate in the conservation, management, and optimum utilisation of the Torres Strait Protected Zone (TSPZ) commercial fisheries’ (TST 1985). After accounting for traditional fishing and excluding the commercial barramundi fishery anomaly, a complex catch sharing arrangement is outlined based on statistical considerations of the TSPZ fisheries. Using a cooperative MLG management approach, both Parties jointly establish an overall quota for TSPZ stocks. The Treaty provides the Total Allowable Catch (TAC) is to be the optimum sustainable yield. If appropriate, subsidiary catch arrangements are then negotiated for individual fisheries (Article 23). Where the Parties have not entered into subsidiary arrangements, such as in the Torres Strait Reef Line Fishery, the Treaty’s catch sharing arrangements remain in principle but not in practice (Mapstone et al. 2003). Technically, division of the TAC between the Parties depends upon which TSPZ area fish are caught in. South of the Fisheries Jurisdiction Line (FJL), the split is Australia seventy-five percent and PNG twenty-five. In Australian territorial seas around the small Queensland islands and cays enclaved within PNG’s jurisdiction north of the FJL, catch entitlement is divided fifty-fifty. Conversely, in waters subject to PNG jurisdiction, situated north of the FJL, PNG receives seventy-five percent and Australia twenty-five. A degree of flexibility is built into the system under Article 23 (7), which allows both Parties to vary apportionment of catches between them, subject to ratios for the entire fishing effort remaining in the same proportions described above. Individual agreements may also be reached on individual stocks, in particular when a stock becomes more important for nationals of a particular country (TST 1985). For example, under depressed market conditions, PNG’s lower labour costs would permit a more economically viable Papuan harvest of pearl shell.

\textsuperscript{351} One licence was taken up in the 1980s but the venture proved unsuccessful (Dews [1997], cited in SCPIRRRA 1997:125)

\textsuperscript{352} Proposed Reforms: In line with scientific advice, the PZJA has recently decided to implement effort reduction within the Prawn Fishery (PZJA 2005c).
A major flaw in the bi-lateral catch sharing arrangement is that calculations used to determine the number of PNG boats entitled to access the Australian fishery are based on the Total Allowable Catch (TAC) calculated for the entire fishery, yet no restrictions are placed on where PNG fishers may take their share of the catch inside the Protected Zone. Under current arrangements, it is possible that within individual Australian fisheries, rather than spreading PNG effort across a fishery, the entire PNG effort could concentrate exclusively on the intensive exploitation of one small but highly productive area of a fishery, to the detriment of that overall fishery and its ecology. PNG effort in the Mackerel Fishery at Bramble Cay provides an example (TSFMAC 2003). Similarly, nothing prevents the entire Torres Strait-licenced PNG prawn fleet from entering into the Australian portion of the Protected Zone to take their whole catch entitlement in the first weeks of the season \(^{353}\) (PFWG BAP 2003). Fortunately, across the entire Torres Strait Fishery, PNG still has not taken up the full extent of its Treaty entitlements (Macdonald 2004). For example, due to bi-lateral negotiations on the catch sharing formula, of the total fishing effort cap for the Australian Torres Strait Prawn Fishery of 13,486 Allocated Fishing Days (AFDs) in 2004, PNG licences were allocated 2,200 AFDs, or sixteen percent, rather than the twenty-five percent originally negotiated under the Treaty (Figure 15) (TSPZJA Discussion Paper 2003). At the Bilateral Meeting held in April 2003, the PNG government did give in principle agreement to developing a long-term alternative to the process currently used to calculate catch sharing entitlements. It is proposed the new arrangements be based on science-based management practices and development of a scientifically-based risk assessment model (TSFMAC, FWG, Agenda Item No.1 8-10 April 2003).

**Figure 14**: Industry breakdown of total fishery effort cap for the commercial Prawn Fishery for 2004 licensing year.

<table>
<thead>
<tr>
<th>‘Australian’ Licensees</th>
<th>TS Licensees</th>
<th>PNG Licensees</th>
</tr>
</thead>
<tbody>
<tr>
<td>10,461 AFDs</td>
<td>825 AFDs</td>
<td>2,200 AFDs (16%)</td>
</tr>
</tbody>
</table>


Finally, the Torres Strait Prawn Fishery (TSPF) concentrates primarily in waters between Warrior Reef complex and Yorke (Masig) Island. It is fished mainly by Cairns-based boats. In order to ensure its long-term sustainability, in August 2004 the Commonwealth Minister for Fisheries announced the Australian Government was exploring the possibility of renegotiating

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\(^{353}\) Given the migratory patterns of certain Torres Strait fish stock, local concerns are also expressed over the possibility of PNG fishers harvesting common stock after it migrates across into PNG territorial waters, for example PNG boats trawling crayfish in the Gulf of Papua prawn fishery (TSFMMAC 7-9 July 2004).
the Torres Strait Treaty with a view to securing PNG’s agreement to remove their effort from the Fishery (Macdonald 2004). Bi-lateral fisheries negotiations between PNG and Australia’s Minister for Foreign Affairs, the Hon. Alexander Downer and officers from Australia’s Department of Foreign Affairs subsequently commenced in late 2004. However, PNG proved unwilling to relinquish its existing prawn access entitlements to the Australian Government in exchange for appropriate compensation. Hence, the Australian Government is now seeking access right from Australian commercial fishers (PZJA 2005c; TSFMAC 2005).

Costs of Consultation

Yet another source of tension arises with costs associated with funding consultative processes. The Commonwealth recognises TSRA’s reluctance to make decisions on behalf of traditional inhabitants without prior and full consultation. It also notes that the region’s remoteness and physical characteristics make these processes extremely time consuming and very expensive (Macdonald 2004). Under recent co-operative arrangements, the TSRA and Commonwealth and state governments have all made significant financial contributions towards improving such processes. For example, AFMA and QFS have jointly contributed $90,000 per annum towards supporting an Islander Fisheries Coordinator position within TSRA to help facilitate indigenous stakeholder involvement within the PZJA consultative structure, via formation of Islander community fisheries associations and a regional Islander fisheries council. TSRA has also outlaid substantial monies on developing its capacity to participate effectively within the new consultative structure. For example, it invested $100,000 for indigenous fishers’ travel expenses and another $50,000 on training community fishers to participate effectively in the new consultative structure (TSRA 2004; Quinlivan 2004).

However, Commonwealth fisheries are managed on a full cost recovery basis. Appropriate management costs are recoverable on the beneficiary pays principle. AFMA’s funding comes from two main sources. The first is management levies charged against the commercial fishing industry for costs directly attributable to fishing activity. The second is annual federal government appropriations, under which the Commonwealth government funds the public good elements of management arrangements and costs of government programs. For example, total revenue applicable to the Australian Fisheries Management Authority (AFMA) for 2004-
2005 was divided between the Commonwealth ($16,079 million) and monies levied from industry ($12,739 million) (AFFA 2003a; Portfolio Budget Statement, AFMA 2004-05). With the Torres Strait Fishery currently accounting for around twenty-five percent of AFMA’s total annual budget for all the Commonwealth fisheries (approx. $29 million), in addition to the significant drain the Torres Strait Fishery places on departmental resources in Canberra, Queensland, and the Torres Strait, Executive Director Quinlivan (2004) notes that TSRA’s annual budget (approx. $51 million in 2004) is, in comparison, ‘a vastly larger budget that the relevant parts of the department and AFMA’ (Portfolio Budget Statement, AFMA 2004-05; Quinlivan 2004). Quinlivan (2004) also argues AFMA is carrying the burden of the costs of consultation: ‘I realise they [TSRA] have a lot of other responsibilities as well, and I am not disparaging them in any way, but at present we are the ones who are principally making the financial contribution towards making these processes work’.

Compliance
The lack of domestic compliance in Torres Strait fisheries is a serious concern. Stakeholders constantly reiterate their concerns over the chronic lack of resources for compliance and the inadequacy of Queensland Fishing and Boating Patrol’s (QFBP) at-sea enforcement capabilities (PZJA Annual Report 2001-02; TSFMAC Meeting No 5, 2005). For example, the TRL Working Group has noted the difficulty of attempting to apply a scientific model of fisheries management when authorities have no capacity to enforce it (TRLWG Agenda Item No.6 (7)). Moreover, as legislation applying to the Torres Strait Fishery increasingly becomes more complex, the introduction of new legislation, as is proposed under the new reforms, will only serve to compound, perhaps ever worsen, the current unsatisfactory situation under which existing compliance resources are already stretched to the limit (TSFMAC 2003). Unlike other Queensland fisheries, for example the state-managed East Coast Trawl Fishery, the Torres Strait is a joint Commonwealth-state managed fishery. Within this arrangement, a chronically under-resourced, poorly-staffed Queensland Boating and Fishing Patrol (QBFP) plays an interdiction role and is tasked with enforcing the Torres Strait Fisheries Act 1984.

355 Proposed Reforms: As part of its proposed reforms (PZJA18), the PZJA has now agreed to implement cost recovery based on principles in the current AFMA Cost Recovery Impact Statement (CRIS) as it applies to other Commonwealth fisheries, but notes it may also elect to depart from percentages used in the CRIS. The PZJA plans to release a draft policy on the application of cost recovery to different license types for consultation within its consultative structure. It will also develop a discussion paper for consultation that details options and mechanisms for implementing cost recovery within the Torres Strait Tropical Rock Lobster, Finfish (reef line and Spanish mackerel) and Pearl Shell fisheries. The document will include phased in cost recovery over a period of three years at forty percent, seventy percent and one hundred percent respectively. It will also address consideration of options for allocating the cost per license (PZJA 2005c).

356 QBFP is located within the fisheries resources protection business unit within Queensland Fisheries Service, established in 2000 following the amalgamation of the former DPI Fisheries Group and the Queensland Fisheries Management Authority.
(Cth) in areas within and adjacent to the Protected Zone (TSFMAC 2003). QBFP’s official responsibilities include:

- Surveillance and enforcement to support PZJA policies and legislation;
- Providing education and extension services for traditional and commercial fisher persons to enhance the development and management of PZ fisheries;
- Undertaking such duties as required by the PZJA to protect TSPZ resources; and
- Promoting their exploitation by persons permitted to utilise these resources in keeping with the spirit of the Torres Strait Treaty.

In 2004, the Torres Strait Compliance Program was operating out of QBFP’s Thursday Island office, supported by one District Officer and a limited number of staff, along with back up support from Brisbane, Cairns and Townsville. It consisted of a sea surveillance program of around ninety days using a mix of platforms, such as private charter vessels, joint operations with Queensland Police aboard Police Vessel Conroy, and accompanying Australian Customs Vessels (ACVs) under charter. Successful enforcement outcomes could be achieved with the support of Coastwatch aerial surveillance using Coastwatch helicopters, particularly at night, together with fixed wing aircraft. Unfortunately, QBFP’s chronic lack of resources means that the burden of fisheries enforcement frequently falls to the other state law enforcement agency operating within the area, namely Queensland Police Service (QPS) 357(Inter. 10, May 2004; Inter.11, June 2004).

While the Commonwealth was reimbursing QFBP for any costs associated with apprehending foreign fishing vessels (FFVs) detected in Australian waters, these duties are not part of the PZJA’s Torres Strait Compliance Program and were adversely impacting on QFBS’s ability to fulfil its required surveillance and enforcement programs outcomes, including its policing and liaison activities. Doubts were also expressed about the long-term effectiveness of initiatives such as ‘administrative seizures’ 358 of FFVs given that QBFP had absolutely no capacity to identify repeat offenders, apart from personal recognition by the officers involved (Inter. 10, May 2004). QBFP also reportedly has no relations with its Indonesian counterparts.

357 QPS’s main commitments in the area relate to substance abuse, domestic violence and search and rescue.

358 On 25 March 2004, the Superintendent, Customs National Marine Unit, sent the following email to Australian Fisheries Management Authority (AFMA) officials. The directive contained a formal instruction, to take effect immediately (Johnson 2004).

ACV operations in support of AFMA.

‘Due to ever increasing operational demands being placed on Australian Customs Vessels, particularly those vessels operating in northern waters, Customs has reviewed the current level of support we can reasonably provide to the Australian Fisheries Management Authority. As a result, (with the exception of the forthcoming Operation SHARKFIN), effectively immediately, all Aces involved in the interception and boarding of FFVs 358 will, under normal circumstances and when appropriate, conduct only ‘Administrative Seizures’. Escort/towing to harbour of FFVs can now be considered to be the exception rather than the rule’ (Johnson 2004).
that might facilitate some measure of cross-border cooperation, for example an exchange of intelligence on fisheries-related matters. In terms of Australia’s Treaty obligations, QBFP also enjoys only a token relationship with its counterpart organisation at Daru Island (Inter. 10, May 2004). Indeed, it is only in very recent times that both Parties have begun to comply with the Torres Strait Treaty’s first article of law enforcement: ‘The Parties shall cooperate, including the exchange of personnel, in inspection and enforcement to prevent violations of Torres Strait Protected Zone commercial fisheries arrangements and in taking appropriate enforcement measures in the event of such violations’ (Article 28 (1)). Nor was there any funding for licensing or Marine Safety Programs within the region. Indeed, in 2004 there was a general feeling amongst operational staff in Torres Strait that those positioned at higher levels within Australia and Queensland Governments simply did not want to know about the general lack of compliance resources within the Torres Strait fisheries. Consequently, those at an operational level ‘just don’t push it anymore’. There was also general agreement, at least at a state government level, that compliance might be better handled by much better resourced Commonwealth law enforcement agencies, possibly with Queensland staff seconded to the Commonwealth under the joint management arrangement (Inter. 10, May 2004; Inter. 11, June 2004). Nevertheless, several participants went to great lengths to explain that the PZJA is a jointly-managed (50-50) Commonwealth-state fishery (Inter.1, 8 & 10, May 2004). In practice however, Queensland does not enjoy a position of authority and the Commonwealth government clearly dominates all aspects of practical day-to-day management of the fisheries.

To update, under recently introduced reforms the Foreign Fishing Vessel (FFV) and Domestic Compliance Programs have now been separated (PZJA 2005a,c). Although the system is yet to be severely tested, this initiative should help minimise the impact of FFVs on the PZJA Compliance Program and also prevent further diversions of PZJA compliance resources. Additional funding will also allow QBFP to retain two additional staff on Thursday Island to deliver FFV compliance services, within the short term. Within the long term, the Australian Government proposes delivering FFV compliance services by directly employing its own officers, rather than funding state staff. Additional proposed options for enhancing the existing Domestic Compliance Program within the Torres Strait Fishery include the trialling a private charter vessel for one hundred days per annum for fisheries compliance purposes. This will require extra funding of $210,000 (approx.) annually. As part of a broader review of the *Torres Strait Fisheries Act* 1984 (Cth), legislative provisions currently hindering compliance efforts within the Fishery will also be reviewed, including the possibility of introducing penalty infringements. The viability of introducing a customised registration sticker system for easy identification of TIB vessels is also being examined. The Department of Agriculture, Fisheries and Forestry (DAFF) has also requested the Royal Australian Navy urgently chart
certain, as yet unchartered, Torres Strait waters as part of its ‘Hyrdoscheme’ programme (PZJA18 2005c).

Conclusions

Within the Torres Strait Fishery, voices are raised in anger, opinions are vented, and harsh words may often be said. But more often than not, amongst the competition moderate voices may be heard as the various stakeholders engaged within the advisory bodies being facilitated by the PZJA’s consultative structure continue to work through an ongoing cycle of meetings. This cyclical process involves continuous processes of consultation, cooperation, bargaining, negotiation, mediation, consensus making and competition. It also engages multiple levels of governance and numerous differing perspectives and interest positions. At times, all the actors involved may appear to be moving in never ending circles, and the same old issues may be being raised time and time again. But all stakeholders are communicating. All also constitute integral elements of a much larger cumulative contribution to the decision-making process, no matter how big or small, or democratic, their input.

As all the many inherent systemic problems and tensions are being gradually worked out, a new form of cooperative, and increasingly consultative, multi-level governance is also slowly emerging from within the Torres Strait Fishery. It is primarily being enabled by the guiding administrative framework provided by the Torres Strait Treaty, as implemented domestically via the Torres Strait Fisheries Act 1984 (Cth). It is also the product of a closer alignment between the Treaty’s original spirit and intent and the Commonwealth model of fisheries. It is also, in large part, the outcome of ongoing efforts to improve upon pre-existing processes of consultation, as evidenced with the new PZJA consultative structure and its supplementary processes, which now involve a wide variety of stakeholders cooperatively engaging within and exploiting the dynamics of MLG processes and structures. Within this new form of MLG, most interactions occurring across and between the four levels of governance present are co-operative, but are also becoming increasingly consultative in nature. However, despite AFMA promoting a partnership approach to fisheries management, competition is evident between traditional and non-traditional inhabitant commercial fishing sectors, in particular within the Tropical Rock Lobster and Finfish fisheries. This is primarily due to each sector’s differing perspectives on property rights and ongoing confusion over the issue of preferential, or priority, access. Within the logic of federalism, the Commonwealth Minister continues to dominate the PZJA structure while AFMA dominates the practical day-today management of the overall Fishery, thus introducing a hierarchical element into the equation. However, while
increasing levels of cooperation and consultation are being witnessed within the Fishery’s consultative and decision-making processes, despite the proposed reforms, at an operational level there are still no formal or statutory management plans in place within the Torres Strait fisheries, and many serious problems remain unresolved. As Mapstone et al. argued in 2003, such inherent systemic problems should not be used to justify ongoing inaction on the part of management. On a more positive note, over the past four years the PZJA’s consultative structure has improved dramatically in terms of increased stakeholder participation, in particular in relation to increased levels of traditional inhabitant involvement. The proposed management reforms, if effectively implemented, should assist in building upon these recent developments.

Finally, as evidenced through this chapter, the notion of MLG now provides a system wide management arrangement for dealing with the inherent complexity, structural tensions and interconnected relationships that now increasingly characterise governance structures within the Torres Strait fisheries management regime. As various problems within the individual fisheries are constantly being identified, thrown up, then managed, or not, in turn more policy challenges arise to take their place, and so the policy cycle continues. Management of the Torres Strait Fishery may best be described as an evolutionary system-wide MLG process that is characterised by much ad hoc decision-making and a great deal of conservative incremental tinkering around the edges. Despite the recently announced proposed initiatives and reforms, including management’s proposals to introduce formal management plans into the fisheries, due to its numerous inherent systemic problems, it may well be that the Torres Strait Fishery will only ever have, at best, a constantly evolving informal management regime. A summary of the players, institutions and MLG relationships and linkages structures now presenting within the PZJA’s consultative structure is provided in Figure 15.
FIGURE 15: Nature of the players, institutions, MLG relationships and linkages structures occurring within the PZJA Consultative Structure.

<table>
<thead>
<tr>
<th>Institution</th>
<th>Levels of Governance</th>
<th>Actors</th>
<th>JDSs/Networks</th>
<th>Nature of Linkages</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bilateral Fisheries Meeting</strong></td>
<td>Supranational (Treaty) National State/Provincial Local</td>
<td><strong>AUS:</strong> AFFA, AFMA, DFAT, CSIRO, QFS, TSRA, NOO &amp; Industry Reps. <strong>PNG:</strong> National Fishing Authority, Dept. Environ. &amp; Cons., Dept. of Foreign Affairs &amp; Industry Reps.</td>
<td>Normative Negotiation Network</td>
<td>Cooperative Consultative</td>
</tr>
<tr>
<td>(Non-formalised Institution)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>PZJA (Formalised Institution)</strong></td>
<td>National State</td>
<td>Commonwealth Minister (Chair) State Minister TSRA Chair</td>
<td>Joint Decision System (JDS)</td>
<td>Cooperative Consultative Hierarchical</td>
</tr>
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<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td><strong>PZJA Meetings</strong></td>
<td>Supranational (Treaty) National State Local</td>
<td>Open Forum PZJA members; Commonwealth &amp; state agencies; Traditional Inhabitant &amp; Industry Reps; PNG (Observer Status)</td>
<td>Normative Negotiation Network</td>
<td>Cooperative Consultative Advisory</td>
</tr>
<tr>
<td>(Non-formalised Institution)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Hybrid Institution: voluntary participation but with formalised membership &amp; behaviour patterns)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Prawn, Tropical Rock Lobster, Finfish (inc. mackerel). (Non-formalised Institution)</td>
<td></td>
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</tbody>
</table>
Chapter Nine
Torres Strait Environmental Management Regime

One cannot separate land and sea.

Chris Roberts & Richard Aken,
‘Sea Country: Maritime Estates, traditional priorities for traditional country’,
Presentation to the Maritime Summit, March 2001.

The expanse of saltwater and dispersed archipelagic formation linking mainland Australia to littoral Western Province is a highly productive environment of great natural beauty. As yet, it remains relatively unchanged by its growing population and increasingly rapid infrastructure development. The region’s surface area comprises some 35,000 km² of scarce land base (2.6%), tidally inundated reef flats (6.2%) and mostly shallow open seas (91.2%). Extensive coral formations, localised mangrove wetlands, and 13,425 km² of seagrass meadows are also of significant note. Regularly cited as one of the world’s most extensive and ecologically complex continental shelves, this shared boundary area also plays host to a high proportion of endangered, threatened and near-threatened endemic species. Yet, this system of maritime and land estates also forms an integral part of a much wider ecosystem encompassing the northern most extremities of Queensland’s Great Barrier Reef and Cape York Peninsular areas, along with the thirty-five kilometer wide Fly River Delta and coastal Western Province region, including the Ramsar-listed Tonda Wildlife Management Area and Bensbach River localities.

360 Endangered species of cultural significance (both spiritually and as sustenance): Dugong (Dugong dugong); green sea turtles (Chelonia mydas). Other endangered species: pink snake (Cryptophis incredibilis) (Muralag Island); Bramble Cay melomys (Melomys rubicola) and Torresian tubenosed bat (Nyctimene cephalotes) (LSNRMS-TS 2005).

361 Tonda Wildlife Management Area (Ramsar Site no. 591). The 590,000 hectare Shorebird Network Site bordering Indonesia is closely linked to nearby Wasur National Park, West Papua. It includes tidal river reaches, mangrove areas, grasslands and savannah woodlands and provides an important wetland for over 250 species of resident and migratory birds. It also acts as a refuge in times of drought. Tourist activities at Tonda and on the Bensbach River (Bensbach Lodge) include fishing, bird-watching and deer (Lates calcarifer) hunting. Tonda is closely linked to Wasur National Park, West Papua.

Ramsar List of Wetlands of International Importance: The Ramsar Convention on Wetlands, signed in Ramsar Iran in 1971, is an intergovernmental treaty that provides the framework for national action and international cooperation and wise use of wetlands and their resources.
The Torres Strait Treaty was the first legal instrument to give specific legislative recognition to the need to preserve and protect this unique tropical environment. Collectively, Articles 13, 14 and 15 provide for the protection and preservation of the region’s marine environment and indigenous flora and fauna and seabed resources, while simultaneously allowing for freedom of navigation and overflight (Article 7). Article 15’s ten year prohibition on mining and drilling has since been subject to three extensions until 2008, with a moratorium in perpetuity almost recently being achieved. Both Treaty Parties are further obliged to exchange information and engage in consultative processes on the harmonisation of policies relating to Treaty-identified environmental measures and to also ensure their effective and coordinated implementation. In achieving these outcomes, both Parties must also minimise any possible negative impacts on the local traditional inhabitants’ customary activities (DFAT 2004; TST 1985).

Undoubtedly, increased state and federal government involvement in environmental matters has occurred within the region in the decades since the Treaty’s introduction. However, unlike conditions prevailing within the Torres Strait Fishery, no specific overarching legislation or comprehensive environmental management regime has been created to guide stewardship of the total regional environment and its natural and cultural resources. Nor have the Treaty Parties managed to exploit the unique protection and conservation provisions afforded by the Treaty to develop a clear, cohesive, and coordinated bioregional management strategy for applying across the wider Torres Strait and coastal Western Province regions. At a domestic level, Australian and Queensland Governments are also yet to jointly develop a specific overarching environmental policy or accredited Natural Resource Management (NRM) Plan based on community planning for steering activities within Australian jurisdiction in the area. As occurs elsewhere in Australia, environmental policy continues to be implemented by the relevant individual state and federal government agencies involved, in accordance with their individual legislative and regulatory requirements, albeit in close co-operation with local traditional inhabitant communities and the region’s peak indigenous representative bodies. Similarly, despite the existence of a bi-lateral Environmental Management Committee mechanism, the potential for any noteworthy levels of coordinated and cooperative cross-border MLG initiatives on environmental or NRM matters also appears to remain relatively untapped. What major initiatives occur within the immediate Torres Strait vicinity tend to be ‘bottom-up’ and driven by local indigenous representative organizations, backed with support from local Torres Strait island communities. The Marine Strategy for Torres Strait’s holistic regional vision for land and sea management provides one example. A Land and Sea Natural Resource Management Strategy (LSNRMS-TS) is being introduced which attempts to build on and harmonise with these processes. Nevertheless, it may still be argued an ongoing policy
and planning vacuum continues within the area of environmental policy and NRM in the wider Torres Strait area. This chapter seeks to develop a better understanding of the reasons behind this vacuum.

A plethora of environmental and natural resource management (NRM) challenges impact and influence upon the wider Torres Strait region, making it increasingly difficult to manage the total environment to a standard that facilitates and continues to improve upon a sustainable quality of life for local traditional inhabitants (ANNEX M). That no exclusive environmental policy or accredited Natural Resource Management Plan is in place within the Torres Strait region is a cumulative effect of the following factors:

- An ineffectual Environmental Committee Meeting (EMC) mechanism (1988);
- Environmental protections already afforded by the Torres Strait Treaty, and ongoing government failure to capitalise upon these provisions;
- Remoteness, ongoing government neglect, and a general lack of political will;
- UNCLOS 1982 and Australia’s declaration of an Exclusive Economic Zone (EEZ) (1994);
- Establishment of Australia’s National Oceans Policy (1998) and National Oceans Office (1999);
- Implementation of the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act 1999 (Cth));
- Decision to separate Torres Strait marine planning processes from Northern Australia Regional Marine Plan (2000-01);
- Late delivery of the National Heritage Trust Extension (the Trust) in Torres Strait;
- Lack of agreement on a common strategy;
- Stalled draft Natural Resource Management Plan for Torres Strait (2004);

Environmental Management Committee (EMC)

Traditional Torres Strait Islanders and coastal Papuans have always attached great, perhaps even overriding importance to protecting their region’s total environment (Whitlam 1975; Coombs 1976; BN649PD). As noted earlier, Commonwealth officials originally envisaged of a Torres Strait environmental management authority with powers to ensure the operation of environmental protection regulations in the Protected Zone area. This entity, or ‘conservation body’, was to be advised by regular meetings of Islanders and coastal Papuans (BN649PD). This germ of an idea would eventually evolve into the Torres Strait Joint Advisory Council (JAC). Nevertheless, although one major shortcoming of the Treaty is its failure to explicitly
address land issues, except as a source of pollutants, the document does oblige both Parties to protect the region’s unique marine environment and flora and fauna (Article 13 & 14). Subsequently, an Environmental Management Committee (EMC) mechanism was established as a sub-Committee under the auspices of JAC at its second meeting in 1988. However, as noted, unlike the Torres Strait Protected Zone Joint Authority which is formally established as a management authority under the *Torres Strait Fisheries Act 1984* (Cth) (S.30), neither the JAC nor EMC enjoy any formal decision-making powers. Hence overtime, rather than pursue the holistic approach consistently advocated by local traditional inhabitants, the Australian Government’s environmental management priorities and practices in the Torres Strait area have, as highlighted in the previous chapter, tended to focus on the sustainable development and management of local marine resources in support of the region’s commercial fishing industry and subsistence fishing practices.

As a JAC sub-committee, the EMC contributes to the Treaty’s consultative cycle of meetings. Its original purpose was to act as the principal advisory mechanism to JAC on strategies associated with implementing the Treaty’s environmental requirements. The EMC began its institutional life with a clear direction and specific organisational goals. At its inception, a main priority was collecting and collating baseline data from across the wider Torres Strait region. For example, the EMC monitored for any possible negative effects on Torres Strait’s marine environment caused by pollution from gold mining projects at Ok Tedi and Porgera (PNG), and also the defunct mine at Horn Island. The EMC also monitored environmental protection planning for operations of the proposed Kikori oil loading facility in the Gulf of Papua, a key component of development conducted by American firm Chevron as part of the Kutubu oil field project. At the time, PNG was seeking to make it conditional upon Chevron that all tankers using Kikori terminal carry a pilot aboard while undertaking transit passage through Torres Strait (BN649PD; Finger 1991).

The EMC mechanism was also intended to provide an annual bi-lateral advisory, consultative, and facilitative institution for building social capital and bringing together all those Australian (Commonwealth, Queensland, ICC and TSRA) and PNG Government officials with a direct interest in environmental management activities in the region. EMC membership is open to all parties represented on JAC. Delegates reportedly meet with the intention of exchanging ideas and information for utilising during the management and exploitation of natural resources. Representatives include officials from local indigenous, transport and maritime, fisheries, conservation, environment, health, scientific, quarantine, foreign affairs and aid authorities. The Australian Department of Environment and Heritage (DEH) and PNG’s Department of Environment and Conservation (PNG DEC) provide the lead agencies. Meetings are currently
co-chaired by the Assistant Secretary, National Oceans Office (NOO). The sub-Committee is further supported by a DEH convened Interdepartmental Committee (IDC). Matters under discussion cover a diverse range of topics, ranging from co-operative cross-border dugong and turtle management strategies, to fisheries activities and the moratorium on mineral exploration and mining, to the management of the Great North East Channel shipping lanes\(^{362}\) and the Oil Spill Contingency Plan\(^{363}\). As noted, the EMC reports to the JAC which, in turn, reports directly to the Ministerial Forum (Ministerial Council – Australian & PNG Foreign Ministers). Due to their lack of resources, PNG officials once again remain extremely limited in their capacity to interact with Australian officials. Owing to high levels of systemic official corruption permeating many areas related to environmental policy within PNG, DEH also reportedly experiences great difficulty in achieving many of its wider regional environmental goals, for example capacity building within its counter PNG agency (Hyman [2002], cited in SFADTRC 2002).

At a ground level, the EMC is not viewed as a particularly productive or effective forum. Indeed, these days it is difficult to establish the organisation’s real goals, or direction (Inter. 1, May 2004). In 2002, the lead Australian Government agency involved also appeared to know little about the sub-Committee’s long-term mission or its internal workings. During a Senate Foreign Affairs, Defence and Trade References Committee hearing in 2002, Senator Hogg (2002) enquired who sets the EMC’s agenda. Was it mutually agreed upon, or dominated by Australia’s agenda? He also queried how the effectiveness of the sub-Committee’s structure and arrangement should be measured (Hogg [2002], cited in SFADTRC 2002). In evidence, the Assistant Secretary, International and Intergovernmental Branch, Environment Australia, DEH, responded that to the best of his knowledge, the EMC was an annual bilateral ‘participatory advisory committee for managing marine resources in Torres Strait’, at which

\(^{362}\) Following years of inter-state tensions over shipping incidents, such as the Aegean Falcon in 2002, the matter of compulsory pilotage in the international waters of the Strait’s shipping lanes was finally put to rest with the International Maritime Organisation’s (IMO) declaration of the Torres Strait as a ‘Particularly Sensitive Sea Area’, which now allows for compulsory pilotage for all commercial vessels transiting Torres Strait (Anderson 2002; Bredhauser 2002; Torres News 1-7 September 2004). A new ocean going tug is also to be permanently located in the Great Barrier Reef and Torres Strait area to provide for emergency towage of ships and a platform for the maintenance of the national network of marine aids to navigation for commercial shipping, including lighthouses, lights, beacons, radar and tide gauges. The vessel will provide additional environmental protection and greatly reduce the risk of pollution from shipping accidents (Truss 2006).

\(^{363}\) Navigation through the main Torres Strait shipping channel is hazardous with strong tidal currents and a five-metre tidal range on its eastern side. Threats of a potential environmental damage through mismanagement and the dispersion of pollutants arise every time larger tankers traverse the Strait’s shipping channels. For example, while the oil spill from Oceanic Grandeur\(^{363}\) in 1970 was no more than a few tons, detergent used to disperse pollutant reportedly killed large areas of pearl shell in Torres Strait. The Australian Maritime Safety Authority (ASMA) and Queensland Transport have now established a Torres Strait Contingency Plan (TORRESPLAN) for response to oil spillages within the Torres Strait region.
officials address a range of ‘nitty-gritty’ issues relating to management problems arising within the Protected Zone. Hosting alternates, and ‘the host is in charge of organising the agenda, but it is a mutual process in which draft agendas are exchanged, comments are given and proposals are made to add and delete’ (Hyman [2002], cited in SFADTRC 2003). Rather than mislead the Committee, the Assistant Secretary then took the matter on notice. He also made an important observation on the effectiveness of participatory mechanisms, such as the Environmental Management Committee: ‘effectiveness is not determined by the forum but by its participants. How effective it is is determined by the energies and information, if you like, that participants bring to the meeting and by their willingness to engage and their capacity to be constructive in all those kind of things’ (Hyman [2002], cited in SFADTRC 2003).

The historic absence of a stand-alone official environmental policy and accredited NRM Plan in the wider Strait’s region is also the outcome of the following factors. First, since its entry into force, the Torres Strait Treaty has managed to provide a measure of environmental protection for the area, as demonstrated with the ongoing moratorium on mining and seabed drilling. Second, while at a supranational level the Treaty provides its three signatories with a unique framework for collectively and cooperatively developing a coherent and coordinated bi-lateral environmental policy and NRM Plan for application across the entire common boundary region, that opportunity has never been capitalised upon. Third, the absence of any readily-identifiable or specific Torres Strait environmental policy or accredited NRM Plan at both national and state government levels is also attributable to a combination of the region’s remoteness, ongoing government neglect, and a general lack of political will and concern by outside interests. On a more positive note, as with the earlier flourishing of Island Kastom, ongoing governmental neglect has also inadvertently helped to protect and preserve the region’s relatively pristine terrestrial and maritime environment. In recent years, however, Australian and Queensland Governments have begun to pay greater attention and invest more resources into the region, as evidenced in the accelerated pace of development occurring under the Major Infrastructure Programme (MIP)\(^{364}\). Given the Strait’s limited resource base, growing population numbers and increasing infrastructure development, the major challenge for natural resource managers and other stakeholders in the region today is trying to establish a correct balance between managing sustainable economic development in the best interests of current and future generations and protecting the local environment for future generations.

\(^{364}\) Major Infrastructure Programme (MIP): This Australian and Queensland Government joint venture initiative is cooperatively managed by TSRA and delivered $60 million worth of environmental health infrastructure to seventeen Torres Strait communities between 1998-2004. Stage Three (2004-2007) is now providing essential services, such as sewerage reticulation and improved water quality and quantity, in the outer islands communities.
Fourth, the Torres Strait region is further subject to general factors affecting other peripheral Australian maritime environments. While Australia declared its 200 nautical mile Australian Fishing Zone (AFZ) in November 1979, it was not until the United Nations Convention of the Sea (UNCLOS) 1982 came into effect fifteen years later (1 August 1994) that Australia’s declared a 200 nm Exclusive Economic Zone (EEZ). At that time, Australia also entered into a concurrent obligation, under international law, to protect and preserve all those maritime environments falling within its maritime jurisdictions (UNCLOS 1982 Article 192). However, another four years would pass before the official launching Australia’s Oceans Policy in 1998. By 2001, the National Oceans Ministerial Board had approved the development of a Regional Marine Plan (RMP) for northern Australia, including the Arafura Sea, Gulf of Carpentaria and Torres Strait regions. However, it was subsequently decided that a separate marine planning was required in Torres Strait (NOO Annual Report 2000-01) As part of this process, the recently established National Oceans Office, as lead Commonwealth agency responsible for implementing Australia’s Ocean Policy, began developing a close working relationship with the Torres Strait Regional Authority and other government agencies in supporting the marine component of NRM within the Torres Strait area (NOO Corporate Plan 2001-02; LSNRMS- TS 2005). However, problems arise within Torres Strait as Australia’s Ocean Policy addresses marine, not land management issues. Under Commonwealth legislation, the latter requires an accredited NRM Plan. To date, delivery of the Natural Heritage Trust Extension (the Trust) in the Torres Strait region still remains in its infancy and lags behind Trust initiatives elsewhere. Fully-accredited NRM Plans are already in place in fifteen Queensland regions, but not in Torres Strait. After initial scoping work on developing a draft integrated NRM Plan stalled in 2004, both Australian and Queensland Government Ministers responsible chose to postpone development of a fully-accredited NRM Plan for the Torres Strait region, as is required under the Natural Heritage Trust Agreement between the Australian and Queensland Governments. Instead, the Torres Strait Natural Resource Management (NRM) Reference

365 Natural Heritage Trust Agreement between the Australian and Queensland Governments: The Bilateral Agreement between Australia and Queensland Government for delivery of Trust and other Commonwealth and state natural resource management programs provides the framework for delivery of funding for NRM and planning in accredited regional NRM plans and investment strategies. Funds are primarily delivered through investments at a regional level in accordance with accredited NRM plans and investment strategies. The Bilateral Agreement is being implemented under the National Heritage Trust of Australia Act 1997 (Cth) and the Natural Resources Management (Financial Assistance) Act 1992 (Cth). The Joint Queensland-Australia NRM Steering Committee (JSC) is responsible for overseeing the management of the State’s and Commonwealth’s interests in the implementation of the Bilateral Agreement. The JSC advises the Ministerial Board and State Ministers regarding the delivery of the Trust in Queensland. The Bilateral Agreement specifically makes note of Australia’s obligations under the Torres Strait Treaty.

Clause 72: The Parties agree to:
(a) acknowledge the particular circumstances pertaining to the Torres Strait as recognised in the Torres Strait Treaty, especially the unique marine assets of the region, and the social, cultural, environmental and economic importance of these assets, and that international cooperation is necessary for the effective management of natural resources in the region;
Group’s attention has concentrated on setting strategic directions to meet NRM objectives by identifying and developing an overarching framework for a Land and Sea Natural Resource Management Strategy (LSNRMS-TS 2005). This attempt at revitalising the stalled planning process does not attempt to separate land and water. Rather, it echoes the holistic approach to environmental management the region’s traditional inhabitants originally voiced during the Torres Strait border dispute and which is contained within the ICC’s Marine Strategy for Torres Environment Resources Strategy (MaSTERS) and TSRA/ICC Marine Strategy for Torres Strait frameworks.

The LSNRMS-TS’s primary goal is facilitating regional delivery of the National Heritage Trust’s three overarching objectives: biodiversity conservation; sustainable use of natural resources; and community capacity building and institutional change. While the Strategy addresses a host of issues already covered by various other Commonwealth, state and local government agencies, it expressly seeks to avoid duplicating effort with other programs and management regimes in the immediate area. It is to be implemented through the TSRA, on the Joint Queensland-Australia NRM Steering Committee’s (JSC) behalf. The Strategy attempts to accord with Australia’s broader environmental and NRM obligations, programmes and initiatives in the wider region, for example the various Treaty governance arrangements,

- avoid duplication and integrate the institutional arrangements for the Trust with those existing in the region, especially the Torres Strait Regional Authority, Island Coordinating Council, the Protected Zone Joint Authority and the Torres Strait Environmental Management Committee; and
- recognise that through existing structures, cooperation already exists between the community and governments to plan and manage for natural resource management outcomes.

(b) Torres Strait NRM Reference Group is constituted of former Board members of Torres Strait Natural Resource Management Ltd (TSNRM Ltd), including representatives from key Commonwealth and state agencies and the scientific community, including officers from the Department of Environment and Heritage (DEH, including the National Ocean’s Office (NOO)), Australian Fisheries Management Authority (AFMA), Australian Quarantine Inspection Service (AQIS), Department of Foreign Affairs and Trade (DFAT), Torres Strait Regional Authority (TSRA), Queensland Department of Natural Resources and Mines (DNR&M), Queensland Department of Primary Industry and Fisheries (QDPI&F), Queensland Environmental Protection Agency (EPA), Queensland Parks and Wildlife Service (QPWS), the Cooperative Research Centre for Torres Strait (CRCTS), and James Cook University (JCU).

367 In 1991 the Torres Strait Island Coordinating Council (ICC) established a program known as Marine Strategy for Torres Environment Resources Strategy (MaSTERS). The aim of this ICC initiative was to exploit processes of community consultation and research to establish a comprehensive regional marine strategy, or framework, for managing regional marine resources. MaSTERS subsequently led to the publication of the Marine Strategy for Torres Strait.

368 Other broad environmental mechanisms applying to the Torres Strait region are: (1) The Convention on the Conservation of Nature in the South Pacific (‘the Apia Convention’) (March 1990); and The Convention for the Protection of Natural Resources and Environment of the Southwest Pacific Region (SPREP Convention) and associated protocols (1986).

369 The Strategy is a cumulative effort of extensive processes of consultation, research and decision-making on issues affecting land and sea management in the region. It is intended to provide a ‘guiding framework for gathering information (via reference material); developing and assessing projects for funding via the Trust; identifying local and regional priority issues; and directing government and research activities in the region’ (LSNRMS 2005:5).
the Northern Regional Marine Plan, and NAILSMA-coordinated Dugong and Marine Turtle Management Project, along with the community-based cross-regional Carpentaria Ghosts Nets Project. It also supports the local traditional inhabitants’ aspirations by facilitating integrated community-based approaches to environmental management and conservation. An associated PNG Engagement Project (to be managed by DEH’s International Unit and the Joint NRM Team) is further proposed to facilitate cross-border coordination with PNG’s Department of Environment and Conservation and the Western Provincial Government (LSNRMS -TS 2005). Unlike the Torres Strait Treaty, the Strategy specifically includes local traditional Aboriginal inhabitants living in the Kaurareg homelands. Under the Strategy, the Torres Strait NRM regional boundary includes all areas falling under TSRA’s administrative purview inside the Torres Strait Protected Zone, in addition to the Muralag Archipelago (Inner Islands) and areas south of the PZJA to the Great Barrier Reef Marine Park (GBRMP) boundary and tip of Cape York. However, west of the Northern Peninsular Area (NPA), the NRM boundary line stops short of the Australian mainland to exclude Seisia, Bamaga and the nearby Aboriginal communities of Umagico, Injinoo and New Mapoon.

Roberts and Aken (2001) argue rather than policy or conceptual frameworks centered around western concepts of bioregions and biodiversity principles, good outcomes are best produced by exploiting environmental protection based on protected area selection and management practices organised around clan (maritime and land) estates. Under this method, individual traditional inhabitant communities manage their own country, in conjunction with contemporary management practices. Such an approach gives recognition to indigenous inhabitants’ belief in their legitimate roles and rights in relation to the management of their long recognised and established land and sea countries. Moreover, problems can arise when authorities define land and sea management boundaries that hold no meaning for local traditional inhabitants, or for straddling fish stocks, or the wind, or air, or currents, tides and wildlife, all of which know no sovereign boundaries. As Roberts and Aken (2001) note: ‘It is

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370 NAILSMA: North Australian Indigenous Land and Sea Management Alliance.

371 The $2 million project to address the issue of ghost nets and marine debris is being coordinated by the northern Gulf Resources Management Group.

372 Roberts & Aken (2001) (Balkanu & Cape York Land Council) recommend agency planners recognise four basic principles during the land and sea management planning process:

- Bottom up is the way to go. Establish aspirations. Do not presume that traditional owners want certain outcomes and that all have the same aspirations;
- Recognise the clan estate;
- Recognise that management boundaries are not estate boundaries and are merely a concept of management;
- Economic choices and resource allocation must be the decision of traditional owners to a much greater degree than is currently the case.
conceded that management agencies have problems determining what is inside and outside an area if it does not have straight lines but these should not be mistaken for anything other than management boundaries’. Boundaries define management areas, not ownership. Hence, boundary lines need to conform closely with traditional territories if traditional inhabitants are to take responsibility for management of their own customary territories (Roberts & Aken 2001).

Legislative considerations provide the fifth contributor to the ongoing environmental policy and NRM planning vacuum within the Torres Strait area. While local, state and national level indigenous representative organisations, such as the Island Councils, ICC and TSRA, play a leading role in developing frameworks for managing environmental protection and planning at a local and regional level, it is at best only an advisory role. At national and state levels of governance, under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act 1999) and Queensland Environmental Protection Act 1994 (Qld), individual Commonwealth and state government agencies are respectively tasked with primary responsibility for implementing domestic environmental policy within Commonwealth and state jurisdictions in the region. Unlike the Treaty’s fisheries-related provisions which, as noted, are given legislative effect via the Torres Strait Fisheries Act 1984 (Cth), the Treaty’s environmental provisions are not formalised in enabling domestic legislation. With no stand-alone environmental legislative framework in place within the Torres Strait region, individual federal and state government agencies continue to be guided by their own specific legislative and administrative requirements. Hence, environmental policy continues to be implemented across a complex web of cross-jurisdictional arrangements by the individual Commonwealth and state line agencies involved as part of their wider policies, strategies and programs in the region. As highlighted, the Australian Fisheries Management Authority addresses the broader environmental impacts of fishing operations consistent with requirements of the EPBC Act 1999. Under the Act, AFMA must demonstrate Commonwealth fisheries are being managed on an ecologically sustainable basis. This is achieved by preparing Strategic Assessment Reports for submission to the Minister for Environment and Heritage. However, AFMA’s core business is managing Commonwealth fisheries. AFMA’s adoption and implementation of precautionary and ecosystem-based approaches in managing Australia’s fish stock within the Torres Strait region, in order to guarantee a sustainable marine environment and fisheries resource into the future, is inextricably linked to both the Australian Government’s and commercial fishing industry’s economic requirements for sustaining a long-term marine harvest within the area (AFMA 2004). Similarly, at both state and national levels, under the Offshore Constitutional Settlement’s additional influence, the Commonwealth Department of
Environment and Heritage and Queensland Government are required to share legislative and administrative responsibility for an abundance of marine and terrestrial related environmental protection and conservation measures. Likewise, under the influence of the Torres Strait Treaty’s terms and provisions, implementation of environmental initiatives at a supranational level, for example on issues such as straddling fish stocks and trans-boundary pollution, requires diplomatic interaction at a more formal international level. Hence, best outcomes and genuine progress in areas associated with environmental policy and NRM planning across the broader Torres Strait region can only be achieved by using an integrated MLG approach that centers upon the Treaty’s terms and provisions to facilitate ongoing processes of cooperation, coordination, consultation and negotiation between all the governmental and sectoral interests involved.

At a ground level, a coordinated regional approach to land and sea management also requires close, cooperative relationships and good levels of communication between the individual traditional inhabitant communities involved, and between these groups and NRM authorities. While traditional Torres Strait Islander communities may present a collective identity to the outside world, each community has also effectively managed its own natural resources since time immemorial. Understandably, these communities now wish to retain a considerable degree of autonomy over their individual island’s affairs and the continued management of their own individual customary land and sea territories. Conflict or disagreement between individual traditional owner groups over issues of land and seas ownership, in addition to any proposed one-size-fits-all generic management strategies for application across wider the Torres Strait region may also present further challenges for NRM authorities. Tensions may also arise out of differences between local traditional inhabitants’ cultural ideas, values and concepts of clan management, versus Western management philosophies and conservation priorities (Roberts & Aken 2001). For example, the United Nations suggests that before any proposal to implement broad NRM strategies is entertained, individual traditional inhabitant communities need to first independently and collectively arrive at a point where they believe natural resource planning is a real priority issue for their country. Any proposed management or planning strategies would also need to have sufficient flexibility to cope with indigenous

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373 Seebohm & Morvell (1998) touched on this problem in 1998, noting the need for an integrated and sustainable approach to NRM and environment management within the wider Torres Strait region. They argued the following:

‘The development of an environmental multiple-use strategic planning approach for Torres Strait requires coordination and integration across and between various sectors (for example, fisheries, shipping, conservation, mining, tourism and cultural heritage) and the management organisations responsible for these sectoral interests. Duplication of environmental management responsibilities should be avoided by ensuring complementary management approaches, the integration of legal and administrative regimes, the provision of clear lines of responsibility, and balance between development and environmental protection in a framework of ecologically-sustainable development and multiple use. The provisions of the Torres Strait Treaty should play a central role in any planning regime developed for the Strait.’
diversity within any planned NRM area. It would also need to provide for capacity building within the affected local communities (UNEP RRC AP 2002).

Conversely, owing to the many unintended environmental consequences of socio-economic development, for example environmental degradation, a concomitant requirement also exists for government agencies and local communities to collectively regulate any unsustainable exploitation of the region’s natural and cultural resources, in order to ensure the sustainability of development and serve the well-being of local indigenous communities into the future. By way of illustration, as accelerated infrastructure development and reliable potable water supplies facilitate growing population pressures and individual Torres Strait islands reach their optimal carrying capacity, concomitant problems relating to infrastructure design, construction and maintenance will also arise. Similarly, ensuring the continuation of adequate potable waters supplies, sanitation and safe, environmentally sound management of sewage and waste disposal, will necessitate more than the formulation of a regional waste management plan. It will also require the legislative ability to enforce it. Such conditions will also call for substantially more than a locally-coordinated land and sea NRM strategy. The formulation and implementation of an effective, integrated environmental policy that adopts a holistic approach to land and sea management in the wider Torres Strait region will also increasingly necessitate the harmonisation of policies and strategies between a large number of government agencies, local island councils and various other stakeholders across multiple levels of governance. Effective environmental regulation and enforcement across the scattered remote Torres Strait islands and vast areas of sea may however prove a challenge for locally-based regulatory authorities, especially considering the compliance difficulties already being experienced in other more high profile policy arenas, such as the fisheries. Given its larger population and highly developed tourism industry, the Maldives Group of Islands provide a glimpse into many potential problems and challenges that traditional Torres Strait Islander and adjacent Papuan Treaty Village communities may collectively find themselves confronting into the future (UNEP RRC AR 2002:60).

Finally, strong connections exist between saltwater people and sea country. Homelands and home waters are also intrinsically linked to sea. The strong well-established links between the economic, social and cultural well-being of remote indigenous communities and the health and productivity of their customary land and sea environment are now well documented. For local traditional inhabitants, the possible loss of fundamental ancestral indigenous land and sea management rights passed down by inheritance and custom is a source of great concern, as is their desire to manage and protect their local land and sea resources against outsiders, while simultaneously negotiating mutually acceptable terms for outsider users within their
customary terrestrial and marine environments. Sinha (2002) argues that such inherent rights and the importance of acknowledging traditional and local ecological knowledge need to be recognised in legal, policy and institutional arrangements, in particular through incorporating small groups with inherent rights into local political-administrative structures. Responsibility for decision-making and implementing decisions made within these structures also needs to be balanced amongst all the interests involved through partnership building (Sinha [2002], cited in UNEP RRC AR 2002). As Roberts and Aken (2001) caution, failure to recognise existing traditional marine and land ownership arrangements and the existence of Native Title of land and sea territories, whether it is formally acknowledged or not, can have far reaching unintended and unwelcome consequences for processes of implementation and compliance: ‘if Indigenous people help make the law we can expect the law to work better’.

Conclusions

The Torres Strait region is more than a handful of small islands in an isolated international Strait. It constitutes an integral part of a far wider, relatively pristine environment that does not begin and end at a designated Torres Strait Natural Resource Management boundary. The region’s two major potential sources of economic income, fisheries and eco-tourism, are both highly vulnerable to environmental impacts. Similarly, despite the Torres Strait’s potential as a launching platform for eco-tourist development in a relatively untouched coastal Western Province area, apart from the Treaty’s environmental protections and conservation measures, no specific overarching environmental policy or widespread cross-border approach to regional natural resource management has ever been introduced for stewarding the wider Torres Strait region. Hence, despite the introduction of domestic initiatives, such as the EPBC Act 1999 (Cth) and locally-based initiatives such as MaSTERS, the Marine Strategy for Torres Strait, and the Land and Sea Natural Resource Management Strategy, it may still be argued that an environmental policy and NRM planning vacuum continues in the wider Torres Strait region.
Chapter Ten
Conclusions and Implications

It is impossible in one brief ‘snapshot’ to capture the complex reality of governance practices within the Torres Strait region in their entirety. This project began with a central proposition, namely the nature of governance in the Torres Strait region has undergone major change since the introduction of the Torres Strait Treaty. As a result, the region now exhibits a peculiarly dynamic set of governance structures requiring MLG of a form not yet identified elsewhere in Australia. In order to sustain this argument and bring about understanding and a comparative element, the project historically traced the development of earlier governance arrangements within the region in the decades prior to the Treaty’s introduction. It was found the original pre-colonial self-governing indigenous political-social units in the Torres Strait region were geographically divided into two separate, yet parallel, systems of governance. This dual colonial administrative arrangement was subsequently overlaid with a highly-restrictive state government administrative regime. By the time Commonwealth government agencies arrived during the early 1970s to make their presence felt, the building of foundations for a new form of cooperative MLG were already well under way. Under the Treaty’s guiding administrative framework, a highly cooperative and workable transfrontier management arrangement has now been developed for overseeing what essentially still remains an ‘unmanageable’ common international maritime border region. As noted, the dynamic form of political, jurisdictional, administrative and institutional organization now being demonstrated within the Torres Strait region is, in large part, a direct outcome of earlier protracted Torres Strait border delimitation negotiations.

In addition to theoretical and historical enquiry, interaction-oriented policy research was also conducted within an actor-centered institutional multi-level governance framework to perform a critical analysis of contemporary management of the common Australia-PNG border area. In particular, the project sought to determine what form governance structures in the region have metamorphosed into under the Treaty’s guiding influence. It also attempted to assess how the notion of MLG is being exploited as a management device for steering complexity and capturing the fluid dynamics of factual decision-making and implementation processes in the Torres Strait region. In achieving its outcomes, the project investigated the distribution of
authority within three sub-units, or sub-sets, of multi-level interactions, one of which would prove to contain little more that a policy and planning vacuum.

**Border Protection Management Regime**

As highlighted in Chapter Two, amongst MLG theorists there is a general expectation MLG interactions would not be high within policy spheres functioning under centralized authority within hierarchical command and control environments that involve issues of ‘high politics’, such as those affecting high priority national interest or state security matters. In these areas, central governments remain the key actors and strong national governments determined to retain control over policy throughout the entire policy cycle enjoy considerable powers to do so. And in line with this argument, the Australian Government still remains an important shaper of post-decisional politics in the Torres Strait region. The State also acts as a powerful gatekeeper for protecting Australian interests in the area. It could also therefore be expected that the Torres Strait border protection management regime would also represent a hard case in terms of its likely response to emergent MLG pressures. And clearly, the Commonwealth’s influence dominates both at a decision-making level and during the policy implementation phase within this management regime, in particular during emergency or crisis situations. The formal layering of constitutional authority and lack of evidence of non-state and multi-level interactions at a decisional-level would further support this argument. Similarly, the modes of interactions occurring at an operational level within this regime would also initially appeared to reflect the logic of state-led government operating within a federated political system.

However, unlike governance arrangements within other Australian maritime areas, due to the effective formalization and promotion of cooperative and consultative MLG interactions via the Treaty’s governance arrangements and associated enabling national legislation, what initially appears to be a highly coordinated bifurcated system in which Canberra’s interests dominate is, in reality, a highly intricate system of multi-level and multi-jurisdictional policy networks in which governmental actors remain highly reliant upon the continued cooperation and support being provided by their wider Torres Strait community networks. Moreover, as growing levels of complexity and interconnectedness within this sensitive border region increasingly require governmental actors to constantly seek out each other and other members of their wider integrated community as continuing resources, effective implementation of government policies and programs in the region will become increasingly difficult without the ongoing cooperation and support of all the affected parties involved. This includes the local traditional inhabitant communities on both sides of the Australia-PNG border. Paradoxically however, rather than detracting from the role of a powerful Australian state and its
institutional actors, the presence of these highly-interactive and interconnected MLG linkage structures now serve to enhance the Commonwealth’s role within the region. Hence, while Torres Strait border governance practices may still be subject to the dictates of state-led government and initially reflect the logic of federalism, a new model of cooperative MLG may now also be identified within the Torres Strait border protection management regime.

**Fisheries and Environmental Management Regimes**

By contrast, within the fisheries management regime, cooperative MLG processes, structures and outcomes continue to emerge at both decisional and implementation levels. This policy arena is characterised by high levels of non-governmental participation and increasingly dispersed decision-making competences. Cooperative and consultative modes of interactions generally tend to be less formalised, but are nonetheless highly evident. Indeed, the cycle of policy development and local-level implementation within the Torres Strait Fishery confirms MLG theorists argument that the dynamics of MLG tend to be most visible in areas of ‘low politics’ where more open and unruly patterns of interactions are typically evident. Here, a combination of the Torres Strait Treaty’s governance arrangements, enabling Commonwealth legislation and the Commonwealth model of fisheries’ partnership principle, along with a host of national, sub-national, regional and local actors come together within a variety of formal and informal relationship structures, all of which play an important steering role in providing direction for fisheries management. Within this regime, a new form of cooperative, and increasingly consultative, MLG continues to emerge under the Treaty’s guiding influence as the numerous tensions and inherent systemic problems encountered within the fisheries are being incrementally worked out. Nevertheless, high levels of inter-sectoral competition and an abundance of competing policy objectives have led to a host of unintended and unwelcome consequences within the Torres Strait Fishery. Such outcomes, in turn, have historically contributed to management’s ongoing failure to successfully introduce statutory management plans. Similarly, owing to the trans-national characteristics of many environmental issues, for example pollution and quarantine risk, the environmental protection management regime is another policy sector in which cooperative transfrontier MLG interactions would expect to be prominent. Yet, despite the ongoing moratorium on drilling and sea-bed mining and unique environmental conservation measures and protections afforded by the Treaty, the potential for any significant form of cooperative, consultative or coordinated regional exploitation of the MLG concept remains untapped. Indeed, both Treaty Parties’ ongoing failure to capitalise on the unique environmental and NRM opportunities offered by the Treaty have resulted in an absence of MLG and a virtual policy and planning vacuum within this policy arena.
While it would be inappropriate to draw too many conclusions from the sub-unit studies about why and how MLG structures, processes, and outcomes tend to vary across different policy arenas, when collectively combined the study’s findings do provide a persuasive case for arguing a new form of cooperative MLG has now emerged within the Torres Strait region. This overarching cooperative MLG arrangement also tends to exhibit relatively high levels of consultation and coordination. It was also found that by introducing an additional supranational level of governance into pre-existing federal arrangements within the Torres Strait region, the Torres Strait Treaty has contributed to the development of an unusual form of political, institutional, administrative and jurisdictional organization that has since metamorphosed into a much more complex political system. It has also increasingly taken on a life of its own. Within this system-wide MLG management arrangement, authority is being dispersed across several multi-task territorial jurisdictions using both formalised and non-formalised MLG processes and structures. Nevertheless, this new model of cooperative multi-level governance does not represent a qualitatively new phenomenon in governance. Its roots are in federalism and it pragmatically incorporates elements of MLG and federal logic. It also continues to promote the notion of state-led government and role of Westphalian states as primary instruments in organizing domestic and international forms of governance.

It was also found that the set of structures contained within this overarching Torres Strait frontier-governance architecture does not function as a collection of independently operating silos. Rather than reflect a strictly hierarchical ordering of state-led institutions, all the major governmental actors engaged in real-world decision-making and implementation processes within the Torres Strait region are, in reality, highly dependent upon the ongoing cooperation and support being provided both by their immediate bureaucratic community and their wider regional networks. Moreover, when this complex system’s component elements are drawn together, all these highly interdependent and interconnected relationships now play a critical role in enhancing the entire system’s overall efficiency and coordination.

As noted, while PNG remained under Australian administration, little requirement existed for introducing sophisticated border management measures into the region. However, the ever-growing porosity of Australia’s northern domestic-foreign frontier now increasingly renders managing territoriality in the Torres Strait region more complex. Other drivers, for example emerging strategic defence and national security considerations, along with the introduction and amendments of legislation, in addition to accelerating infrastructure development and growing population pressures, will only in future translate into even greater levels of tensions and complexity in the Torres Strait region. On its own, at an operational level, federalism no
longer gives sufficient leverage for organising such complexity or managing the numerous tensions that continue to emerge from within this overarching frontier-governance structure. Put simply, in the Torres Strait region only a cooperative MLG approach allows government to work. Hence, governance arrangements within the Torres Strait region are now best studied as a multi-level political system within their own right, rather than as just another set of intergovernmental partnership arrangements between federal and state governments. It need also be noted that the increasing devolution of non-formalised authority to regionally-based peak indigenous representative organizations, such as TSRA and ICC, also holds potential to further complicate governance matters in the region by introducing a possible fifth layer of regional governance into the pre-existing multi-level equation, at some future stage.

The project’s second central proposition argued it is only when a legally-binding document is examined in factual, or real-world, practices that we may come to know its true strengths and weaknesses. At its inception, the Treaty was heralded as an innovative document, an original solution to a complex border delimitation challenge. In essence, this bi-lateral agreement provided a pragmatic solution that allows the Australian and PNG governments to jointly and cooperatively manage what still remains a potentially ‘unmanageable’, shared boundary region. Overtime, the Treaty’s terms and provisions have, in practice, progressively translated into an extremely complex set of legislative, regulatory and administrative arrangements. Ongoing abuses of the bi-lateral agreement’s free movement provisions, along with the many unintended consequences arising out of establishing a permanently open importation zone on Australia’s international border have only further contributed to this complexity. Despite the Treaty’s highly commendable intentions and the unique rights it affords local traditional inhabitant communities, it reportedly continues to fail to live up to their original expectations. There appears to be limited local knowledge or understanding of the document’s true content, history, meaning, spirit or original intent. There is a general disenchantment with the Treaty, which it is argued, also fails to provide either guidance or direction. An absence of review further translates into the Treaty’s ongoing failure to keep pace with contemporary local lifestyles. On a more positive note, the Treaty Cycle does offer a potential mechanism for facilitating cooperative and consultative modes of interactions and building increasing levels of social capital within the region. And there is strong evidence to suggest the interactive processes now occurring within this institution are based primarily on cooperation and consultation. Such linkage structures are particularly evident between all governmental actors involved. However, when it comes to facilitating constructive and meaningful traditional inhabitant involvement within the Cycle, from many local perspectives current practices in the Torres Strait region generally fail to reflect the true spirit and intent they believe is
inherent in the Treaty’s wording. Consequently, much traditional inhabitant’ participation and involvement in the formulation of government policies and programs pertaining to the border region’s oversight reportedly tends to be token, rather than real.

The project’s third central proposition proposed the analysis of governance structures in the Torres Strait region rests beyond the normal tenets of federalism. It argued current theories of inter-state relations employed in Australia now prove inadequate for examining the complexities inherent in contemporary Torres Strait political-administrative structures and relationships. Hence, an actor-centered institutional MLG theoretical framework is now required. And in line with this argument, a major outcome of this case study has been to highlight how federal theory now fails to provide adequate leverage for enabling satisfactory explanations and providing detailed insights into the numerous tensions and conflicts that continue to emerge from within Australia’s federal system. Another major outcome has been to highlight the crucial need for political analysts to distinguish between two distinctive processes. The first centres upon utilising MLG as an integral part of a much richer overarching theoretical framework designed specifically for analysing complex governance issues. The second is exploiting the notion of MLG as a practical management arrangement, or organizing device, for explaining various forms of political organization and types of political systems.

As noted, the concept of MLG has its strengths and weaknesses. As a system-wide ordering mechanism, its advantages lie in its high problem solving capacity and its ability to generate efficient outcomes and manage complexity, while simultaneously capturing both orderly and dis-orderly formalised and non-formalised multi-level processes. While not yet a fully fledged theory, as an analytical device its strength rests in its capacity to organize complex diagnostic enquiry and provide compelling descriptions of what actually happens to decisions taken at an implementation level, once they move outside of intergovernmental bargaining processes and central government policy control and enter into real-world situations. Similarly, as informal (non-formalised, non-legalised) processes of multi-level bargaining and consensus making at an operational level increasingly become as important as the formal (formalized, legalised) allocation of power across multiple levels of governance, and as informal political processes rather than purely laws and formal institutional structures increasingly become important determinants in successful policy and program outcomes in the face of growing complexity in contemporary Australian society, so will the requirement for MLG processes, structures and outcomes expand.
However, a major problem presenting with informality is its tendency to equate with an absence of structural constraints. Yet, the very efficiency of informal exchanges relies on such interactions being embedded within regulatory frameworks. A further problem with relying exclusively on a MLG model is its tendency to focus more on processes and outcomes, at the expense of institutional structures. Rather than defining governing as a uniform pattern across policy sectors, MLG defines governing in terms of the policy problems and policy sectors involved. MLG also focuses on the institutional location of key actors within those multi-level policy arenas, rather than on their position within formal institutional structures. Hence, there is a risk MLG may be conceived of purely as a political game.

On its own, MLG is also incapable of providing clear predictions or explanations of governance processes, as outcomes of MLG processes are bargained or negotiated for rather than imposed by central government. Another problem with multi-level bargaining and consensus-making is that it can be exploited by agenda controlling forces as a method for avoiding both democratic participation and accountability in decision-making processes. On a more positive note, MLG structures and processes could also be viewed as methods for removing decision-making responsibility away from traditional bases of political authority by capitalizing on processes of devolution and regionalisation, along with the growing professionalism of regional and local authorities. Conversely, the presence of MLG could also be interpreted as a pre-existing political process, or system, demonstrating its flexibility in adapting to changing requirements. In other words, MLG may just represent yet another example of central governments finding new ways of governing.

For all these above reasons, when used as a system-wide organizing mechanism, MLG is best used in conjunction with an established theoretical category, such as federalism. Similarly, when used as an analytical device, the concept of MLG needs to be incorporated into a theoretically-richer integrated analytical framework that holds sufficient capacity to facilitate consideration of both state-centered and multi-level institutions. The adaptation of Scharpf’s (1997) actor-centered institutional MLG approach that has been developed for application in this research project facilitates such an approach. It further allows for comparison of the research project’s assumptions, hypotheses and findings across a variety of other complex cases. The conceptual framework being facilitated under an actor-centered institutional MLG approach also holds the capacity to bridge federalism’s long-existing divide between national and international aspects of political science. Thus, it is argued that this concept now merits serious theoretical attention within this country. As previously noted, the author’s inability to locate any serious attempts at applying an actor-centered institutional MLG conceptual
framework, or indeed any other similar MLG interpretation, to local empirical conditions would also indicate that a serious gap now exists within the political science literature on inter-state relations within Australia.
APPENDIX A: Scharpf’s Classification of Institutions.

<table>
<thead>
<tr>
<th>Networks</th>
<th>Regimes</th>
<th>Joint-Decision Systems</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary negotiation systems. (Exit is costly, but nevertheless remains a feasible option, therefore continued participation is viewed as being voluntary in nature).</td>
<td>Ongoing rule structures (imposed from above or mutually agreed upon). Impose obligations. Do not typically eliminate capacity for unilateral action. Increase costs of certain types of damaging unilateral action. Effective outcomes determined by: (1) the regime itself, and (2) the subsequent interactions of parties committed to observing regime rules. Continued adherence to the regime depends on: (1) the self-interest of parties involved, and (2) the willingness of other parties to sanction breaches of regime obligations.</td>
<td>‘Actor Constellations’. Parties physically/legally unable to reach their purposes through unilateral action. Joint action depends on (nearly) unanimous agreement of all parties involved. JDSs conceptualise situations where sovereign state(s) is ‘brought back in’ and asserts itself to determine multi-level negotiations and outcomes. JDSs are ‘compulsory negotiation systems’ (CNSs). Collective decisions are binding, and only changed by the agreement of all. Can be cumbersome and difficult to manage. In negotiations involving high transaction costs, the unanimity rule can turn into a ‘joint-decision trap’ (Scharpf 1988). Low capacity for institutional reforms when high-conflict constellations must be resolved through compulsory negotiations. CNSs systems are prone to deadlock due to the power of hold out. CNSs require paying particular attention to the institutional arrangements and protocols for information exchange and negotiations in order to facilitate agreement, particularly if ‘problem solving’ styles are to supplant ‘negative coordination’.</td>
</tr>
<tr>
<td>Parties may choose between negotiations and unilateral action. Informal/self-organising semi-permanent structures. Evolve from the frequency of voluntary dyadic interactions. Facilitate trust and information sharing. Create opportunity structures for problem solving. Reduce the transaction costs of negotiated agreements. Reduce the risk of opportunism by: (1) the longer ‘shadow of the future’ and (2) the higher visibility of transactions relevant to others.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Two Types of Networks: (1) Networks as social capital. Operating at two levels: weak trust and strong trust. (2) Networks as opportunity and power structures.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### APPENDIX B: Modes of Interaction- Linkage Structures

<table>
<thead>
<tr>
<th>Structural Conditions</th>
<th>Unilateral Action</th>
<th>Negotiated Agreement</th>
<th>Hierarchical Direction</th>
<th>Majority Voting</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Networks.</td>
<td>State.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Regimes.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Joint Decision Systems.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Procedural Dimension</th>
<th>Unilateral Action</th>
<th>Negotiated Agreement</th>
<th>Hierarchical Direction</th>
<th>Majority Voting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mutual Adjustment.</td>
<td>Distributive Bargaining.</td>
<td>Collectively binding decisions can be imposed over the objections of a dissenting minority.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Negative Coordination.</td>
<td>Problem Solving.</td>
<td>Positive Coordination.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Positive Coordination.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Implications for welfare production</th>
<th>Unilateral Action</th>
<th>Negotiated Agreement</th>
<th>Hierarchical Direction</th>
<th>Majority Voting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highly problematic.</td>
<td>Generally positive.</td>
<td>Assured if holders of asymmetrical power can be assumed to have complete information and are motivated by public interest.</td>
<td>No positive welfare consequences.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Implications for distributive justice</th>
<th>Unilateral Action</th>
<th>Negotiated Agreement</th>
<th>Hierarchical Direction</th>
<th>Majority Voting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highly problematic</td>
<td>Realised only in the restricted sense of equity which tends to reproduce the initial distribution of bargaining power.</td>
<td>Assured if holders of asymmetrical power can be assumed to have complete information and are motivated by public interest.</td>
<td>Cannot assume approximate distributive justice of self-interested voters.</td>
<td></td>
</tr>
</tbody>
</table>

APPENDIX C:

Olewale’s (1969) statement reads:

1. That this House considers that the present state of the boundary between Papua and New Guinea and the State of Queensland, which in part runs within 1½ miles of the coast of the Western District and includes a number of islands (e.g. Saibai, Dauan, Boigu, Warrior Island, etc) and reefs within a few miles of that coast and separated from Queensland proper by the whole width of Torres Strait, is in all respects most unsatisfactory and will become more unsatisfactory as time goes by, both because of the facts (which have been recognised since at least 1885) that the customary fishing grounds and reefs of many Papuans, as well as other natural resources that ought to belong to Papua and New Guinea, are now situated in Queensland waters, and also for other reasons.

2. That this House believes that the boundary should be moved generally south at least to the line described in the Royal Order in Council issued by Her Majesty Queen Victoria on 19th May, 1898, but never implemented – apparently because of the federation of the Australian States in 1901.

3. That this house therefore requests the Administration to take whatever steps may be practicable to have the boundary adjusted to a reasonable and equitable line having regard to the proper needs and aspirations of Papua and New Guinea both now and in the future, and advise it of the position as soon as practicable, and for that purpose draws the attention of the Administration to the various documents in this matter compiled by Mr. Paul W. van der Veur in his volume Documents and Correspondence on New Guinea’s Boundaries (A.N.U. Press, 1966, pp.21 – 53) and in particular to the specific proposals in this regard by the Honourable John Douglas, Resident Magistrate, Thursday Island in 1885; Sir Samuel Griffith, then Premier of Queensland, in 1893; Sir William MacGregor in 1893, 1895 and 1896; the acceptance of Sir William MacGregor’s last proposal by the Queensland Government in 1898 and its proposed implementation by the Royal Order in Council of 19th May of that year; and the various correspondence following the thwarting of that proposal by temporary difficulties created by the federation of the Australian states.

Olewale, E., Member for South Fly, House of Assembly, Papua New Guinea, June 1969.

<table>
<thead>
<tr>
<th>Islands</th>
<th>Estimated Total Resident Population (a)</th>
<th>Papuan Component (c) Resident 3 yrs (d)</th>
<th>Papuan Component (c) Resident Less 3 yrs (e)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Western Group</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Saibai</td>
<td>238 (b)</td>
<td>14</td>
<td>31</td>
</tr>
<tr>
<td>Dauan (Cornwallis)</td>
<td>120(b)</td>
<td>-</td>
<td>11</td>
</tr>
<tr>
<td>Boigu (Talbot)</td>
<td>249(b)</td>
<td>14</td>
<td>15</td>
</tr>
<tr>
<td>Badu (Mulgrave)</td>
<td>100</td>
<td>-</td>
<td>12</td>
</tr>
<tr>
<td>Moa (Banks)</td>
<td>600</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Central Group</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yorke (Massig)</td>
<td>100</td>
<td>24</td>
<td>12</td>
</tr>
<tr>
<td>Yam (Turtleback)</td>
<td>200</td>
<td>60</td>
<td>33</td>
</tr>
<tr>
<td>Coconut (Parremer)</td>
<td>50</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td><strong>Eastern Group</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murray (Mer, Dauar, Waier)</td>
<td>150</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Darnley (Erbu)</td>
<td>400</td>
<td>7</td>
<td>-</td>
</tr>
<tr>
<td>Stephen (Ugar)</td>
<td>40</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Thursday Island</strong> (f)</td>
<td>3000</td>
<td>22</td>
<td>20</td>
</tr>
<tr>
<td><strong>Total Population</strong></td>
<td></td>
<td>143</td>
<td>134</td>
</tr>
</tbody>
</table>

Extracted from Batch No. 649, Premier’s Department, Queensland.

- Tentative Daru estimates.
- Advised by Queensland Department of Aboriginal and Island Affairs
- Permanent Australian residence to be considered (not effected due to Immigration Department’s insistence that it is its sole prerogative).
- To be returned to T.P.N.G. (not effected owing to lack of State legal machinery).
- All figures are very tentative estimates as Thursday Island was an ‘open town’ not subject to DAIA control.

374 ‘De-facto Queenslanders’: Papuan resident over three (3) years.

While the ‘island-hopping’ gate was closed with the support of Island Councils and the Anglican Mission, both of which actively persuaded unauthorised visitors from staying on Torres Strait islands, DAIA notes that once unauthorised Papuans got outside its jurisdiction, little could be done about the matter of returns. For example, Queensland records show that of the 134 PNG nationals marked ‘to be returned’, the majority of able-bodied males had since moved on with their Islander colleagues to ‘greener pastures’ at Weipa, Karumba, Gove, Mt. Tom Price and Mt. Newman. Individual unauthorised Papuan nationals were also recorded at Thursday Island, Cairns, Mt. Isa and Hammersley. For example, according to Queensland Government records, the allegedly ‘Islander’ fettling gangs at Hammersley also included several PNG nationals amongst their members (BN649PD).
APPENDIX E: Distribution of Torres Strait Islanders at Census 30 June, 1971.

<table>
<thead>
<tr>
<th>State</th>
<th>Region</th>
<th>Section</th>
<th>Males</th>
<th>Females</th>
<th>Persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Queensland</td>
<td>Torres Strait</td>
<td>Reserve Islands North of 10°S</td>
<td>673</td>
<td>935</td>
<td>1,608</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Reserve Islands South of 10°S</td>
<td>384</td>
<td>356</td>
<td>740</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Reserve Island Total</td>
<td>1,057</td>
<td>1,291</td>
<td>2,348</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Thursday Island and Adjacent</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unreserved Islands</td>
<td>674</td>
<td>904</td>
<td>1,578</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Bamaga Reserve (Cape York)</td>
<td>289</td>
<td>295</td>
<td>584</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Torres Strait Total</td>
<td>2,020</td>
<td>2,490</td>
<td>4,510</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cairns Statistical Division</td>
<td>490</td>
<td>521</td>
<td>1,011</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Townsville Statistical Division</td>
<td>422</td>
<td>350</td>
<td>772</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Mackay Statistical Division</td>
<td>203</td>
<td>155</td>
<td>358</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Brisbane Statistical Division</td>
<td>153</td>
<td>155</td>
<td>308</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Other Queensland</td>
<td>319</td>
<td>230</td>
<td>549</td>
</tr>
<tr>
<td>Queensland</td>
<td></td>
<td>Total</td>
<td>3,607</td>
<td>3,901</td>
<td>7,508</td>
</tr>
<tr>
<td>N.S.W Total</td>
<td></td>
<td></td>
<td>409</td>
<td>364</td>
<td>773</td>
</tr>
<tr>
<td>Victoria Total</td>
<td></td>
<td></td>
<td>355</td>
<td>360</td>
<td>715</td>
</tr>
<tr>
<td>W.A. Total</td>
<td></td>
<td></td>
<td>210</td>
<td>68</td>
<td>278</td>
</tr>
<tr>
<td>S.A Total</td>
<td></td>
<td></td>
<td>87</td>
<td>72</td>
<td>159</td>
</tr>
<tr>
<td>Tasmanian Total</td>
<td></td>
<td></td>
<td>58</td>
<td>38</td>
<td>96</td>
</tr>
<tr>
<td>Northern Territory Total</td>
<td></td>
<td></td>
<td>88</td>
<td>40</td>
<td>128</td>
</tr>
<tr>
<td>A.C.T. Total</td>
<td></td>
<td></td>
<td>1</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td><strong>All States – Total</strong></td>
<td></td>
<td></td>
<td><strong>4,815</strong></td>
<td><strong>4,849</strong></td>
<td><strong>9,664</strong></td>
</tr>
</tbody>
</table>

APPENDIX F: Resolution of 3 April 1974:

That, considering that one of the stated purposes of the United Nations is ‘to develop friendly relations among nations based on respect for the principle of equal rights and self-determination principles’, and considering that the people of the Torres Strait have asked the Government of Queensland to reaffirm their rights to their islands, their ancestral home for generations before the discovery of Australia, and to reiterate their wish to remain Queenslanders and Australians, and considering the interests of the people of Papua New Guinea in maintenance of their historic fishing privilege after they attain their independence and other interests in the matter of natural resources, this Parliament resolves to approve that negotiations be initiated with the Government of Papua New Guinea based upon the following general principles:

That the inhabited islands presently within Queensland remain therein so that the clearly expressed wishes of their inhabitants to remain Queenslanders and Australian citizens can be fulfilled.

That an area of sea between Cape York and Papua, whose size and co-ordinates are to be agreed upon, but within the area bounded by the coast of Papua in the north to the parallel of 9 degrees south latitude and to the south by the parallel of latitude 10 degrees 30 south and the parallels of longitude 141 degrees 50 east and 145 degrees east, be designated an international marine park. Within this area fishing is to be reserved to Torres Strait Islanders and the people of Papua who shall have their respective shores, such fishing to be subsistence and minor commercial fishing only and all other exploration of the natural resources of the sea and seabed shall be prohibited. Special arrangements shall, however be reached for pearling and trochees fishing together with commercial operations already established in that area. In addition, provision shall be made for the Marine Parks Board to authorize, in special circumstances, the establishment of any industry by local indigenous people where the resources involved are within the area of the international marine park. A Marine Parks Board shall be set up to administer the park and promote conservation measures with respects to its natural riches.

That outside the area of the international marine park and the islands themselves the continental shelf boundary beyond the limit of three miles from the low water mark of each island shall be determined according to the principles in the Geneva Convention of 1958, and calls upon the Prime Minister of the Commonwealth of Australia to approve the initiation of
such negotiations in discussions between the Governments of Queensland and Papua New Guinea with a view to the implementation of an agreed text in the form of a treaty to become effective as from the date of independence of Papua New Guinea, and requests the Speaker of this House to transmit copies of this resolution to the Prime Minister of the Commonwealth of Australia and the Chief Minister of Papua New Guinea.

Honourable J. Bjelke-Petersen (Barambah – Premier),
Legislative Assembly of Queensland, 2 April 1974.

<table>
<thead>
<tr>
<th>Date</th>
<th>Place of Arrival</th>
<th>Vessel</th>
<th>Arrivals/Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Nov. 1992</td>
<td>Saibai/TS</td>
<td>Otter</td>
<td>2 adults (1 Somali, 1 Nigerian) 2 departs.</td>
</tr>
<tr>
<td>13 June 1997</td>
<td>TS</td>
<td>Telopea</td>
<td>139 - 134 adults, 5 children (Chinese). 139 departs.</td>
</tr>
<tr>
<td>9 Sept. 1999</td>
<td>Saibai Island/TS</td>
<td>Lachlan</td>
<td>4 adults (1 Bangladeshi, 3 Indians). 2 det. 1 ref. 1 depart.</td>
</tr>
<tr>
<td>22 June 1999</td>
<td>Saibai Island/TS</td>
<td>Vigors</td>
<td>2 adults (Sri Lankan). 1 depart. 5 refs.</td>
</tr>
<tr>
<td>21 Dec. 1999</td>
<td>Powerful Island/TS</td>
<td>Xmas</td>
<td>4 adults (Iraqi). 2 det. 2 TPV.</td>
</tr>
<tr>
<td>4 May 2001</td>
<td>Saibai Island/TS</td>
<td>Patchewolloc</td>
<td>2 adults. 1 depart-1 escape.</td>
</tr>
<tr>
<td>27 Mar. 2001</td>
<td>Kerr Island/TS</td>
<td>Hesket</td>
<td>14 (4 adults, 10 children) TPV.</td>
</tr>
</tbody>
</table>

Source: Extracted from DIMIA, Fact Sheet 74a, Boat Arrival Details, 2004.
**APPENDIX H:** Proposed Management Arrangements to be developed in 2006 for implementation in the 2007 fishing season.

<table>
<thead>
<tr>
<th><strong>Torres Strait Fishery</strong></th>
<th><strong>Tropical Rock Lobster (TRL)</strong></th>
<th><strong>Finfish (reef line &amp; Spanish mackerel)</strong></th>
<th><strong>Prawn (TSPF)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Proposed Management Arrangements</strong></td>
<td>Quota Management System (QMS)</td>
<td>Catch Quota or Effort TAC or TAE (Still Undecided)</td>
<td>Reduce effort in fishery in line with scientific (DEH) advice.</td>
</tr>
<tr>
<td></td>
<td>PZJA Agencies will develop QMS in consultation with stakeholders in 2006 for implementation in 2007.</td>
<td></td>
<td>Licences will be granted for 2006 with pro-rata reduction to overall cap of 9179 days.</td>
</tr>
<tr>
<td></td>
<td>PNG’s fishing rights will be taken into consideration in developing QMS.</td>
<td></td>
<td>Move to a unitised system where fishing access is a proportion of the sustainable available resource, i.e. from fishing nights to a system involving units and access as a proportion of total pool of available fishing nights. New management arrangements to be developed over course of 2006 for implementation in 2007.</td>
</tr>
<tr>
<td><strong>Application</strong></td>
<td>All non-indigenous &amp; indigenous commercial TRL fishing within Australian portion of TSPZ. QMS does not apply to traditional (Non-commercial) fishing for TRL.</td>
<td>Applies to all non-indigenous and indigenous commercial Finfish fishing in the Australian area of the TSPZ. TAC or TAE will not apply to traditional (non-commercial) fishing.</td>
<td>Applies to all commercial prawn fishing in the Australian section of the TSPZ.</td>
</tr>
<tr>
<td><strong>Allocation of Shares (2006)</strong></td>
<td><strong>50:50</strong></td>
<td><strong>50:50</strong></td>
<td>DAFF has concluded an agreement for the permanent surrender of Torres Strait Islander prawn access rights.</td>
</tr>
<tr>
<td><strong>Initial (short-term) adjustment</strong></td>
<td>TAC will be allocated 50:50 between traditional inhabitant and non-traditional inhabitant commercial fishers to be achieved via a voluntary open tender process prior to commencement of the QMS. An Independent Allocation Advisory Panel (AAP) (formed 2006) will report to PZJA by mid August 2006 on how quota should be allocated to commercial fishers (individuals or licences)</td>
<td>TAC or TAE will be allocated 50:50 between traditional inhabitant and non-traditional inhabitant commercial fishers to be achieved via a voluntary open tender process. An Independent Allocation Advisory Panel (AAP) (formed 2006) will report to PZJA on how quota or effort units should be allocated to commercial fishers (individuals or licences)</td>
<td>The PNG government has advised its is unwilling to sell its existing prawn access rights back to Australia. The Australian government has agreed to purchase fishing entitlements from Australian commercial fishers equivalent to PNG’s share of the prawn fishery. (Payments are to be funded through an open tender process to ensure Australia is able to fully meet its obligations to PNG under the Torres Strait Treaty without making further calls on fishing rights allocated to domestic operators (as announced 27 July 2005).</td>
</tr>
<tr>
<td><strong>Allocation of shares (2007)</strong> (To be implemented following commencement of management arrangements in 2007).</td>
<td><strong>70:30</strong></td>
<td><strong>70:30</strong></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>In 2007, management proposes moving towards greater traditional inhabitant share of the fishery. To be achieved via open-market and shareholder self-funded processes.</td>
<td>In the longer term, management proposes moving towards greater traditional inhabitant share of the fishery. To be achieved via open-market and shareholder self-funded processes following commencement of longer term management arrangements in 2007.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Interim Management Arrangements for 2006</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Insufficient time for consultations post PZJA18 decisions. Possible trailing of interim arrangements e.g. catch reporting documentation and monitoring requirements.</td>
<td>During 2006 further discussions to be conducted on the implementation in 2007 of a 10 nm exclusion zone (agreed PZJA18) for non-traditional inhabitant commercial fishers in eastern Torres Strait around Murray (Mer), Darnely (Erub), Yorke (Masig) and Stephen (Ugar) Islands.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Fully-costed package forwarded to PZJA as drafting instructions for a formal (statutory) management plan under the Torres Strait Fisheries Act 1984 will include:</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Principles and process for setting the TAC. An allocation process for traditional and non-traditional inhabitant sectors. Quota management arrangements. Trading rules to facilitate the transfer of access from non-traditional inhabitants to traditional inhabitants.</td>
<td>Principles and process for setting the TAC or TAE. An allocation process for traditional and non-traditional inhabitant sectors. Quota management arrangements. Trading rules to facilitate the transfer of access from non-traditional inhabitants to traditional inhabitants.</td>
</tr>
</tbody>
</table>
A PZJA cross-agency team (Management Arrangements Team 2007) is to coordinate the development of new management arrangements, including consultations with the TSFMAC and Working Groups and preparation of draft documents for the PZJA Standing Committee and ultimately the PZJA. The PZJA Standing Committee consists of a Senior Executive Officer from the four PZJA agencies (TRSA, DAFF, AFMA, QDPI&F). It was established in early 2005 to assist in coordinating papers and recommendations for the PZJA. The Committee will provide the main avenue for supporting the PZJA delivery of the project. The agencies have agreed to act as project coordinate in assisting the PZJA with implementing the above aspects of the PZJA Project Plan (PZJA 2005c).
APPENDIX I: Major challenges facing Commonwealth fisheries managers.

<table>
<thead>
<tr>
<th>DYNAMIC NATURE OF FISH HABITAT AND ENVIRONMENT</th>
<th>INDETERMINATE PROPERTY RIGHTS OVER FISH STOCK</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Factors influencing the Availability of Fish Stocks</strong></td>
<td><strong>Issues of Concern Arising from an Absence of Property Rights</strong></td>
</tr>
<tr>
<td>Environmental Influences</td>
<td></td>
</tr>
<tr>
<td>Changes in water temperature;</td>
<td>Fish stocks are generally viewed as a public resource owned by the entire community;</td>
</tr>
<tr>
<td>Ocean circulation;</td>
<td>Reality: only fishers have the capability to turn the resource into an economic return.</td>
</tr>
<tr>
<td>Weather conditions generally.</td>
<td></td>
</tr>
<tr>
<td>Biological Characteristics of Fish Stock</td>
<td>Due to the absence of property rights over fish stocks, fisheries resources are liable to over exploitation by the commercial sector.</td>
</tr>
<tr>
<td>Movement and migration patterns;</td>
<td></td>
</tr>
<tr>
<td>Other behavioural characteristic;</td>
<td>Managers need to find a balance between the interests of the commercial sector and those of the community.</td>
</tr>
<tr>
<td>Breeding cycles;</td>
<td></td>
</tr>
<tr>
<td>Reproductive capacity;</td>
<td>Industry requires some degree of certainty of access to the resources to provide continuity of long-term activity and act as an incentive to invest in the industry.</td>
</tr>
<tr>
<td>Survival of young juvenile fish.</td>
<td></td>
</tr>
<tr>
<td>Predator-prey Relationships</td>
<td>Managers need to always remember fisheries are generally considered a public resource. The broader community has every right to expect Government and fisheries managers to make decisions to ensure the long-term sustainability of the resource.</td>
</tr>
<tr>
<td>Natural Mortality</td>
<td></td>
</tr>
<tr>
<td>Effects of Fishing Itself on Fish Behaviour</td>
<td>Managers need to account for possible public expectations that fisheries will be managed in a way that provides a return, or rent, to the community for allowing commercial fishers to realise an economic return from their resources.</td>
</tr>
<tr>
<td>Fish may become accustomed to presence of certain gear, for example nets, and avoid being caught.</td>
<td></td>
</tr>
<tr>
<td>Impacts of Man-made Events</td>
<td></td>
</tr>
<tr>
<td>Stormwater discharges into the ocean;</td>
<td></td>
</tr>
<tr>
<td>Agricultural run off;</td>
<td></td>
</tr>
<tr>
<td>Offshore sewerage outfalls;</td>
<td></td>
</tr>
<tr>
<td>Ballast water discharges;</td>
<td></td>
</tr>
<tr>
<td>Introduced marine organisms and pollution generally.</td>
<td></td>
</tr>
</tbody>
</table>

**APPENDIX J:** Key areas noted for improvement in AFMA’s performance in *Managing Commonwealth Fisheries: the Last Frontier, 1997.*

| Developing better advisory & communications arrangement with MACS & FAGS; |
| Improving levels of communication with key clients; |
| Amending fisheries legislation so AFMA’s statutory objectives better express the ecologically sustainable development (ESD) concept; |
| Increasing compliance levels by maximising voluntary compliance via education & greater awareness; |
| Completing formal management plans to provide secure access for fishers; |
| Reviewing current fisheries research & development (R&D) to assist in more effective management & to develop an eco-system based approach to management; |
| Reviewing existing cost recovery processes; |
| Addressing the absence of an agreed framework for resource sharing between charter, aquaculture, commercial & recreational sectors; |
| Ensuring the long term sustainability of traditional indigenous & commercial indigenous fishing; |
| Establishing a regime for State and Northern Territory management of recreational fishing (including charter fishing), with the Commonwealth taking an overall stewardship role; |
| Ensuring commercial indigenous fishing & aquaculture operate under the same rules as other participants in same sector; |
| Guaranteeing that in the granting of security of access rights the Commonwealth will not allocate rights that in any way limit its ability to manage the resource in accordance with government policy & priorities; |
| Reviewing access rights & penalty; |
| Preference to output controls in the form of individual transferable quotas (ITQ); |
| Adopting a whole-of-government approach to better coordinate engagement in regional & international fisheries forums; |
| Better addressing illegal, unreported & unregulated (IUU) fishing; |
| Building human capital in the fishing industry; |
| Working with industry to identify market access & trade barriers under the World Trade Organisation (WTO) framework; |
| Supporting the development of an Australian Seafood Standard; |
| Promoting bio-security, pest management, animal health & food safety for the seafood industry. |

### APPENDIX K: Australian Participation in Managed Torres Strait Fisheries

<table>
<thead>
<tr>
<th>Managed Torres Strait Fisheries</th>
<th>Target Species Scientific Name</th>
<th>Target Species Common Name</th>
<th>Indigenous/Non-indigenous Fishers</th>
</tr>
</thead>
<tbody>
<tr>
<td>TS Beche-de-mer</td>
<td><em>Holothuria fuscogilva</em>, <em>H. nobilis</em>, <em>Actinopyga mauritiana</em></td>
<td>White Teatfish, Black Teatfish, Surf Redfish</td>
<td>Traditional Inhabitant (One long-term non-Islander operates a restricted licence)</td>
</tr>
</tbody>
</table>
| TS Finfish (incorp. Spanish mackerel and reef-line fisheries) | **Mackerel**  
* Scomberomorus commerson  
* S. queenslandicus  
* S. semifasciatus  
* S. muaroii  
* Grammatorcynus bicornatus  
**Reef-line**  
* Plectropomus spp.  
* Lutjanus spp.  
* Lethrinus spp.  
* Epinephelus spp. | Narrow barred Spanish mackerel, School mackerel, Grey mackerel, Spotted mackerel, Shark or double-lined mackerel  
Coral Trout, Mixed reef fish, Mixed rock cods | Traditional Inhabitant & Non-Traditional Inhabitant |
| TS Pearl Fishery               | *Pinctada maxima* | Pearl Oyster (Gold lip) | Traditional Inhabitant |
| TS Prawn Fishery               | *Metapenaeus endeavouri*, *Penaeus esculentus*, *Melicertus longistylus* | Blue Endeavour Prawn, Brown Tiger Prawn, Red-spot King Prawn | Non-Traditional Inhabitant |
| TS Tropical Rock Lobster (TRL) | *Panulirus ornatus* | Tropical (Ornate) Rock Lobster | Traditional Inhabitant & Non-Traditional Inhabitant |
| TS Trochus Fishery             | *Trochus niloticus* | Trochus | Traditional Inhabitant |
| TS Crab Fishery                | *Scylla spp.*, *Portunus pelagicus* | Mud Crab, Blue Swimmer Crab | Traditional Inhabitant |
| Dugong & Turtle                | *Dugong dugong* | Dugong (Sea Cow) & Marine Turtle, Torres Strait-green, hawksbill, loggerhead, flatback, olive ridley & leather back (rare) (All CITES listed) | Traditional Inhabitant |

### APPENDIX L: Individual TSFMAC member numbers, roles & responsibilities.

<table>
<thead>
<tr>
<th>Actor</th>
<th>No</th>
<th>Roles &amp; Responsibilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>TSFMAC Chair</td>
<td>1</td>
<td>Chair meeting; Provide primary linkage between Working Groups, TSFMAC &amp; PZJA.</td>
</tr>
<tr>
<td>AFMA Officers &amp; QDPI&amp;F Officers</td>
<td>2</td>
<td>Participate in discussions; Contribute fisheries expertise; Ensure TSFMACs fully understand PZJA policy &amp; obligations under its governing legislation; Provide information on government policy.</td>
</tr>
<tr>
<td>Industry Members &amp; Representatives</td>
<td>5*</td>
<td>Contribute knowledge &amp; experience relevant to TS fisheries &amp; fishing industry generally; Contribute fisheries expertise to achieve best management of the fishery; Regularly report to &amp; liaise with other operators within the fishery on MAC related &amp; others fisheries matters.</td>
</tr>
<tr>
<td>Traditional Inhabitants &amp; TSRA Support member</td>
<td>5*</td>
<td>Rotate during meeting out of a total of 22 members representing each of the traditional inhabitant communities; Contribute knowledge of fisheries &amp; communities to MAC; Contribute fishing expertise.</td>
</tr>
<tr>
<td>Independent Research Member (Also Chair TSSAC)</td>
<td>1</td>
<td>Contribute scientific &amp; /or economic advice to MAC discussions; Provide advice on latest scientific/economic developments relevant to fishery; Coordinate development of five year strategic plan for fishery; Prioritise research projects for fishery for consideration of the PZJA; Chair the TSSAC.</td>
</tr>
<tr>
<td>Executive Officer (PZJA appointed)</td>
<td>1</td>
<td>Provide secretarial support services.</td>
</tr>
<tr>
<td>Permanent Observers</td>
<td>NA</td>
<td>Granted observer status for a period of three years. For example, the PZJA granted DEH permanent observer status on TSFMAC for 3 years while SARs are completed under the EPBC Act 1999.</td>
</tr>
<tr>
<td>Causal Observers</td>
<td>NA</td>
<td>Granted casual observer status.</td>
</tr>
</tbody>
</table>

Source: PZJA 2005.

* Numbers of traditional inhabitant and industry representatives may vary.
### Appendix M: Existing and Potential Environmental and Natural Resource Management Problems and Challenges.

#### Coast & Landscapes
- Coastal erosion;
- Strong tidal currents;
- Wind generated sea surges;
- South-easterly trade winds (dry-season, May to December); weaker winds from north west (January – April, including the wet season);
- Onshore & along shore sediment movement;
- Stormy & high wave occurrences;
- Loss of mangroves;
- Coral bleaching;
- Destruction of rich coral reef ecosystem;
- Increased frequency and intensity of stormy weather;
- Climate Change (global warming);
- Saltwater intrusion;
- Sewerage contamination;
- Water table elevation;
- Land erosion & degradation of the terrestrial environment;
- Loss of areas & features of economic significance & concern to many Torres Strait Islanders, e.g. tombstones, vegetation & landscape features, due to coastal erosion or flooding;
- Habitant loss;
- Conservation of endangered species, in particular dieback of seagrass beds & its impact of the size and distribution of dugong & turtle populations;
- Lack of scientific information on environmental issues, in particular land environments.

#### Access
- Native Title (*Native Title Act 1993*);
- Indigenous Land Use Agreement (ILUA);
- Prescribed Body Corporates (PBCs);
- Environment & cultural heritage approvals;
- Regional Sea Claim.

#### General Shipping
- Oil pollution & dispersion of pollutants;
- Navigation;
- Compulsory Pilotage;
- International Shipping Lane (ISL) & increased risk of shipping accidents, oil spills & resultant changes to habitat & species composition, e.g. *Oceanic Grandeur*.

#### Human Settlements
- Populous islands;
- Growing population;
- Significant government investment in community infrastructure;
- Increasing pressure for greater levels of infrastructure;
- Insufficient physical infrastructure in some areas;
- Inappropriate works;
- Lack of management skill at a community level;
- Community education & capacity building;
- Lack of fresh water;
- Optimising rainwater collection;
- Contamination of ground water by sewerage, chemicals and pathogens;
- Reducing sustainable yield of existing ground water aquifers;
- Need for desalination;
- Need for acceptable potable quality water;
- Waste & pollutants as by-products of domestic and commercial activities;
- Management of solid waste disposal;
- Inappropriate disposal of waste;
- Regional waste management;
- Improper sewerage disposal facilities;
- Fire burning regimes;
- Impact of government works, e.g. Defence Facilities & shipping infrastructure;
- Exotic weeds;
- Feral animals.

#### Fisheries
- Traditional, recreational and commercial fisheries;
- Commercial pressure for exploitation of natural resources;
- Over-exploitation of certain fisheries;
- Discard of bycatch;
- Effects of trawling on sea bed communities;
- Mortality of turtles & dugong caught in trawlnets;
- PNG catch sharing arrangement.

#### Mining
- On going uncertainty over the extension of the moratorium prohibiting mining exploration & exploitation of the sea bed in the TSPZ.
### Exogenous Factors

- Porous international border;
- Treaty’s free movement provisions;
- Quarantine risks;
- Presence & disposal of Foreign Fishing Vessels;
- Negative repercussions/impact of fisheries & tourism (region’s main economic mainstays);
- Trans-national nature of pollution;
- Proposed Chevron Gas Pipeline;
- Potential impacts on TS of mineral resource exploitation in Papua New Guinea;
- Land management practices in PNG, e.g. deforestation, logging & cash cropping resulting in possible sediment mobilisation & consequent impact on the coastal & marine environment;
- The lack of political will & political climate in PNG;
- Free Rider problem;
- Moral Hazard;
- Transboundary air pollution, e.g. haze from large forest fires in West Papua or Papua;
- The lack of financial resources for environmental management in PNG.

### Domestic Political Factors

- Cultural heritage;
- Culture, lifestyle & livelihood of traditional inhabitants;
- The remoteness of the TS; out of sight - out of mind;
- The unwillingness of government agencies to provide information, or cooperate with one another;
- Lack of inter-agency knowledge sharing;
- Politisation of environmental & natural resource management issues;
- Lack of effective environmental protection at the local level;
- The lack of political will at all levels of government to support the development of an appropriate Natural Resource Management Plan & a specific overarching environmental policy for application within the region.
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