



CHAPTER 6

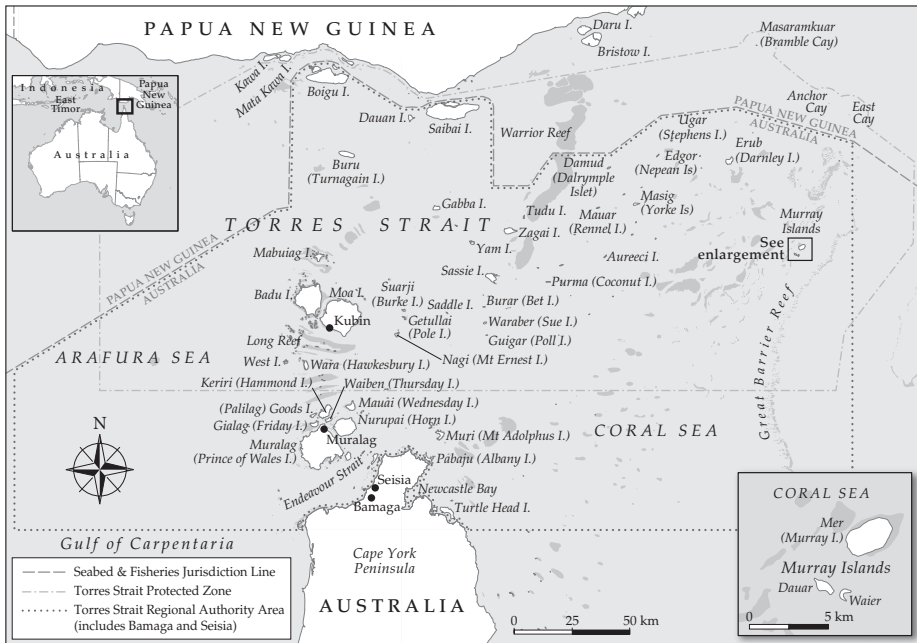
Traditional ownership of the sea's resources

The development and lodgement of land claims consumed a great deal of political and intellectual energy during the 1990s, but the parallel issue of the sea and its bounty was debated and fought over with equal intensity. Though perhaps less glamorous than the headline-grabbing issues of land and sea claims, the rights of the Torres Strait fishermen to their traditional resources needs to be understood as an important and unifying strand that brings land and sea claims together.

This particular phase in the Strait's political history has its roots in New Guinea achieving independence in 1975. In 1978, Australia and the new Papua New Guinea (PNG) signed the Torres Strait Treaty, though the treaty did not come into operation until it was ratified in 1985. Its principal purpose was 'to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fish and traditional movement' (Article 10.3 cited in AAP 2006a, p. 6). When the Commonwealth Government enacted the *Torres Strait Fisheries Act 1984* it became the law for fisheries in Torres Strait, although the treaty is 'basic to the legislative process' (Altman et al. 1994, p. 6). Prior to the Act both Torres Strait Islander and non-Islander fishers held Queensland Transferable Vessel Holder (TVH) fishing licences, which allowed them to work the east coast of Australia and the Torres Strait. Then, under the Act, the following commercial fishing licences came into use:

- *Traditional Inhabitant Boat (TIB) licences, also known as 'community licences', were open to Torres Strait Islanders only; there was no limit on the issue of TIB licences.*

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Torres Strait Region showing the Torres Strait Protected Zone, Fisheries Jurisdiction Lines and Torres Strait Regional Authority Area. Map by Damien Demaj, demap. Map based on JC Altman, WS Arthur & HG Bek, 1994, Indigenous Participation in Commercial Fisheries in Torres Strait: A preliminary discussion, CAEPR, the Australian National University, Canberra.

- *The TVH licences were now open only to non-traditional fishers who could demonstrate a history of operating in the fisheries. No new licences were granted after 1988, and non-traditional fishers wishing to fish in Torres Strait had to purchase a TVH licence from an existing operator.*

Islander fishers could retain their old TVH licences, allowing them to fish the east coast as well as Torres Strait, or they could sell those licences and take up a Torres Strait-only TIB licence. All but two fishermen sold their original TVH licences to non-Islander fishers (*TN* 1–7 February 2002, p. 4). Thus, almost all traditional fishers operated under the new TIB community licences.

Under the treaty a Torres Strait Protected Zone (‘the Zone’) was established and the two nations agreed on the extent of fishing effort (in respect to vessels and fishing technology) allowed in their respective areas of the zone. However, Torres Strait Islander lawyer Heron Loban argues that ‘Torres Strait Islanders [were] not a party to this treaty, and protecting and preserving Torres Strait culture [was] not a primary concern’ for its designers (Loban 2002, p. 1).

An obligation of the Australia–PNG treaty was to monitor ‘the impact of commercial fisheries on the marine environment and species traditionally utilised [by] customary fishers’ (Altman et al. 1994, p. 1). It, and associated legislation, established a ‘regulatory regime’ on the basis of ‘commercial catch-sharing between Australia and PNG’, and this regime included the setting up of the Torres Strait Protected Zone Joint Authority (the ‘Joint Authority’) in 1988 — a Commonwealth–state body ‘responsible for monitoring ... the jointly managed fisheries and ... formulation of policies and plans for their management’ (p. 3). The sole members of the Joint Authority, and so responsible for the Zone’s management, were the Commonwealth and Queensland ministers for fisheries. Adding to the layers of complexity, both Commonwealth and state governments had their own statutory bodies: the Commonwealth, its Australian Fish Management Authority (AFMA) and Queensland, the Queensland Fish Management Authority (QFMA). Queensland enacted its own *Torres Strait Fisheries Act* in 1984, though it could not contravene the Commonwealth provisions.

The Joint Authority managed the prawn, tropical rock lobster, Spanish mackerel, pearl shell, dugong, turtle and barramundi fisheries. Prior to 1999, when a single jurisdiction was put in place, the QFMA managed trochus, mud crab, bêche-de-mer, shark and line fishing (except Spanish mackerel). The Joint Authority had a structure of consultative and advisory bodies with non-voting Torres Strait Islander representation nominated by the ICC but, while they were set up as advisory and consultative bodies, there was concern over whether the island fishers’ recommendations would ever be implemented.

For a decade, island fishers had struggled to have their decision-making inputs into fisheries management strengthened. Simultaneously, island leaders were calling for recognition of their property rights in their seas. Mer chairperson Ron Day vehemently claimed:

Our traditional law says that our boundary runs from the top of the hill under the sea where the bed of the resources are. The water can be common ground but not the bed and the resources — that’s what we claim ... Our area should be left alone for us. (TN 18–25 June 1998, p. 5)

Single jurisdiction management

Clearly this situation was ineffective, and in 1996 the Joint Authority asked Indigenous and non-Indigenous fishers in Torres Strait to give their

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views on a proposal to establish a ‘single jurisdiction management system’ for the Zone, with Commonwealth law having sole jurisdiction. The new single jurisdiction would also incorporate a ‘streamlined fisheries licensing system’ (TN 17–23 July 1998, p. 9) which it was anticipated would reduce the number of licences held by non-Islander commercial fishers and ‘75 Islander fishermen’ would benefit from the reduction (TN 18–25 June 1998, p. 5). A target date of July 1998 was announced for its commencement. With the one Commonwealth body managing all fisheries, the Joint Authority claimed, it would be ‘simpler, clearer and fairer for fishermen [and] help safeguard the future of the Torres Strait fishers’; moreover, it would ‘ensure expansion of the fishing fleet as a reserve of the traditional inhabitants’ (TN 15–21 May 1998, p. 1).

But some leaders were sceptical. They doubted that system would ensure any more local input and control or address Torres Strait fishers’ concerns about overfishing. Their immediate concerns were about fish stocks and they wanted, as a priority, the authorities to check on current fishing practices. It was suggested that the Joint Authority did not even know how many unlicensed line fishers were operating in Torres Strait and what the effect was on marine resources (TN 27 March–2 April 1998, p. 3). In his Boyer Lecture in 1993, Getano Lui Jnr spoke about the effects of the management of the fisheries: ‘[We have] high unemployment, but very little control over our fisheries which have sustained our people throughout our history. We ... face governments and fishermen outside our region who deny our rights and who claim that our resources are for them to control’ (1994a, p. 63). And, in line with his thinking on Torres Strait Islander control of this region, Lui said, ‘It is totally out of our hands and we want a say in who gets the licences. What is self-government and self-management if we cannot have the controls?’ (TN 27 March–2 April 1998, p. 3).

Two Islander fishers concerned about non-Islander encroachment and overfishing in traditional areas were Ben Ali Nona (son of the politically active Ben Nona) from Badu, and George Gesa, from Mer. They took matters into their own hands and, in June 1998, they were charged with armed robbery and dishonestly obtaining property when they intercepted a commercial non-Islander fisher and confiscated the catch of trout caught in what they asserted was their sea area. A jury acquitted them after a three-day trial when it was ruled that they had ‘an honest claim’ to the trout (*Australian Magazine* 26–27 May 2001, p. 30). Following this victory, Ben Ali Nona — who was deeply influenced by Eddie Mabo — changed his name to Maluwap, ‘ocean fish’ (*Weekend Australian* 2–3 March 2002, p. 25). Nona explained his and Gesa’s use of such a strong measure thus (p. 30):

To stand against the might of government in this country and the might of the commercial fishing, you are fighting a losing battle. But my ancestors are with me to do something about what has happened over the past 100 years. Our things, our rightful things have been taken away, which is why I had to take this stand.

Ron Day, Meriam Council chair, pointed out that they were defending their traditional rights to resources that had:

ensured their survival through centuries ... The government must recognise that we are prior occupiers of areas not only for the land but the sea also. It is time we had control and management ... so that fishing can be a sustainable industry. People are coming in and wrecking the area and if the resources are over-harvested they will pack up and leave us with nothing. (TN 18–25 June 1998, p. 3)

He went on to explain what the sea and its resources meant for his people (p. 3):

From our culture we deal with the land and the sea; we touch the sea and then leave for replenishment; we go to the land and its our tribal estate ... the sea contributes, supports the land. If we didn't have it [the sea] the land would suffer ... The white fishermen they only look at the dollars.

For its part, the Commonwealth AFMA persisted in its claim that the single jurisdiction would result in a 'reduction in [non-Islander] commercial fishing boats ... and prove a great benefit to Torres Strait Island fishermen' (p. 5).

Islander fishers had a long-held view that the non-Islander fishers were given more consideration than Islander fishers received from government. A young Erub fisher (2006) pointed out that with their freezer boats and seven or eight dinghies the non-Islander fishers 'take all the produce from the reef and stock it in their freezers and take it to the mother ship'. He said they came to the 'local boundary and fish on the neap tide in our area'. These boundaries were fixed, he said, but the government favours these commercial fishers because of their boat capacity (TN 3–9 July 1998, p. 6).

A group of non-Islander mackerel fishers, acknowledging the prospect of Torres Strait Islanders gaining recognition of their sea rights, proposed a voluntary government-compensated selling back of their licences to island communities. They reasoned that 'even the mildest form of sea rights would affect them [by] reducing their area by half ... making their fishing uneconomical' (p. 6). These fishers proposed that a scheme be