

Tradition and Legislation: Analysis of Torres Strait Treaty and Fisheries Act Terms

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Summary

Though in common use, terms such as ‘tradition’ ‘traditional’ and ‘custom’ can in fact be quite hard to operationalise. This is because they are subjective, ambiguous and dynamic. The Torres Strait Treaty and the associated Fisheries Act use terms of this nature. This paper focuses on the word ‘tradition’ and discusses the two generally accepted views of this, namely a common-sense view of it as a relatively fixed entity, and a more academic view of it as something that may change with circumstances. Neither view of the term allows it to be easily utilised. The paper points out that the language of treaties can also be ambiguous and open to reinterpretation as circumstances change. Accepting this analysis, it is proposed that a way of bringing some precision to such terms is through negotiation between the various parties. Though the paper focuses on the term ‘tradition’, the findings apply equally to a number of other terms in the Treaty and the Act and these are identified.

Introduction

At different times, evolutionary and functionalist anthropologists, as well as those of a political economy tendency, have represented ‘primitive culture’ as irreparably transformed by contact with ‘civilisation’. According to another view such cultures survive against all odds, encompassing alien influences, yet somehow remaining essentially themselves. But if the first view underestimates the resilience of cultural reproduction, the second tends to a romantic essentialism which short circuits the understanding of cultural dynamics. This kind of essentialism conceals processes such as cultural revival and the invention of tradition ... (Beckett 1994: 22).

Traditional customary rights are problematic as we do not know what they might be (Anderson 1981: 67).

Together the Torres Strait Treaty ratified in 1985 (hereafter the Treaty) and the *Torres Strait Fisheries Act 1984* (hereafter the Act) direct many matters associated with fisheries, the environment, the rights of traditional inhabitants and relationships with Papua New Guinea (PNG). The Treaty and the Act use several terms and phrases that are open to interpretation. These are shown in Table 1 and are detailed in Appendix A. This paper focuses on an explanation of the accepted understandings of the term ‘tradition’ and the implications of these for the administration of the Treaty.

Table 1. Terms and phrases used.

TERMS AND PHRASES	USED IN THE TREATY	USED IN THE ACT
Traditional way of life and livelihood	Preamble, A10(3), A19(2b)	S8
Traditional inhabitant(s)	A1(d), A1(k), A1(l), A1(m), A10(3), A11(1), A11(2), A12, A14(4), A16(1), A16(3,a), A18(2c), A18(3a), A19(2b), A19(4), A19(6c), A26(3), A26(4)	S3(s1), S3(s2), S3(s3), S8, S13, S14(s3), S14(s4), S15(2), S39, S45(s1), S56(s1)
Traditional activities	A1(d), A1(k), A1(l), A11(1), A14(4), A16(1), A16(2), A16(3a), A18(3a), A19(2b)	S50(s1)
Traditional fishing	A1(k), A1(l), A10(3), A11(2), A210(1), A20(2), A28(8)	S3(s1), S3(s2), S3(s5), S5(s4), S16(s1), S49(s1), S50(s1), S51(s5), S52(s2), S56(s1), S57(s1)
Traditional customary associations {Aust and PNG}	A1(m)	
Local tradition	A1(k), A12	
'traditional'	A1(k)	
Prevailing custom	A1(k)	
Barter	A1(k)	
Market trade	A1(k)	
Traditionally fished	A11(2)	
Traditional customary rights of access	A12	
Traditional customary rights	A12, A18(3a), A19(2b)	
Rights in relation to traditional fishing		S8
Customarily engaged in traditional fishing		S15(s2)

Methodology

The paper is the result of a desk-top exercise. The Treaty and the Act were reviewed and the potentially contentious terms and phrases identified. An anthropological literature dealing with the concept of tradition and with some relevant practices in Torres Strait was consulted, as was a legal literature dealing with the language of treaties. Some applications of the term tradition to legislation outside Torres Strait were reviewed.

Views of tradition

There are at least two alternative views of the notion of tradition. One is of something that is relative fixed and located at a particular point in the past; the other of something that is relatively dynamic and related to contemporary circumstances.

Relatively fixed, clear and definable

Tradition: the handing down of statements, beliefs, legends, customs etc., from generation to generation, especially by word of mouth or by practice... (The Macquarie Dictionary, Revised Third Edition, 2003).

The commonsense or everyday concept of tradition carries with it the notion of something unchanging with the implication of continuity with the past (Hobsbawm & Ranger 1992 :1). This view has been described as a core of quite fixed units handed down from one generation to the next (Ritchie 1999: 270-271, Linnekin 1992: 251). It is the positivistic (and common-sense) view of tradition and conforms to the general dictionary definitions.

The difficulty with this view is that it suggests that 'tradition' as such, or the 'core of fixed units' somehow became fixed at a particular point in time. This is rather hard to accept as life is, and has always been, constantly changing. In any event, in this positivist view, to identify what tradition was or is specifically, would require one to identify a particular time in history to which the tradition referred.

In some cases an attempt has been made to define the sense of tradition with respect to the past, albeit sometimes obliquely. The memorandum of understanding for the management plan of the Ashmore Reef Nature Reserve stipulated that access for Indonesian traditional fishermen would be limited to those using traditional methods and traditional vessels consistent with the tradition over decades of time, but excluding fishing methods or vessels that utilised motors or engines (Appendix 2, Annex II, 1974). Similarly, and in reaction to the *Aboriginal Land Rights Act 1976*, Section 122 of the Northern Territory's Territory Parks and Wildlife Conservation Ordinance, 1976 proposed that Aborigines who utilised firearms or motor vehicles would not be using land traditionally, and so would be liable to prosecution. (This aspect of the legislation was not passed.) With respect to Torres Strait, notices to the Act imposed technical conditions on some aspects of 'traditional fishing' (see Table 1 and Appendix A). For instance, dugong can only be taken with a spear (Notice 41 of 1995, Notices 65 and 66 of 2003).¹ Further, the 2003 notices to the Act stipulate that

¹ In Torres Strait, this is a particular form of spear called a 'wap'.

boats with Traditional Inhabitant Boating (TIB) licenses, from which people are hunting for dugong and turtle, must be no more than 6 meters long. In these cases tradition has been defined in part with respect to a level of technology, which by inference connects it to a particular period. This approach freezes the notion of tradition at a point in time.

The *Native Title Act 1992* also tends to sheet the notion of tradition back to some particular point in time, in this case, annexation. Traditional Owners are not rigidly defined in the Act but the term has been taken (in common law) to refer to people who can trace their descent back to an ancestor alive at the time of annexation by the relevant colonial power, and indeed this is the general approach adopted by the Native Title Unit in the Island Coordinating Council and the Torres Strait Regional Authority. Section 251B of the *Native Title Act* indicates that the group making the application should hold a process of decision-making under their traditional laws and customs. The traditional laws and customs as such are not defined, but the High Court in the Yorta Yorta decision saw these as having their origins in the normative set of rules of the Indigenous society pre-sovereignty, and as having a continuous existence and vitality since annexation. Although it was also noted that demonstrating some change to or adaptation of traditional law and customs would not necessarily negate a native title claim, there still appeared to be the need for these laws to be described as traditional laws and customs.

Despite the apparent concession to change in this last statement, in general these approaches to the term tradition attempt to locate and fix it at a particular point in the past. However, as Ritchie notes, there is a problem in anchoring to a particular event or point of time something that is in fact dynamic (Ritchie 1999: 259).

Relatively uncertain, dynamic and undefinable

Traditions provide societies with a body of daily behaviour...and can be reworked to justify new situations...a tradition need not be completely logical, consistent or even based on true information (Hunter & Whitten 1976: 391).

For oral (or not written) societies, we gain knowledge of tradition by asking the people about their past or by noting what others have asked their predecessors about their past. That is to say, we rely on what people tell us. Though the *Aboriginal Land Rights Act 1976* defines tradition, the details of this must in the final analysis be teased out in dialogue with the relevant Aboriginal people (Ritchie 1999: 258). However, the oral record does not necessarily extend a long time into the past. A group which had assumed ownership of land on the mainland in 1900, might by 1976 indicate that they had been there 'since the beginning of the world' an event that in fact might not be far beyond the recollection of the oldest living member (Ritchie 1999: 263). In addition to this, people's view of their own tradition might be influenced by their experiences in the more recent past such as through contact with researchers and their writings (Beckett 1994: 22). Indeed, the actual definition of tradition can become a political act or one that serves to define cultural identity, and to this end people may be quite selective about the elements that they wish to retrieve from the past to constitute their tradition (Linnekin 1990, Beckett 1994: 22).

This provides an alternative view of tradition which is that it is less an assemblage of features that are passively received than a contemporary and ongoing interpretation of the past (Handler and Linnekin 1984: 274, Linnekin 1990). This might include a selective representation of the past that is fashioned in the present as a response to

contemporary priorities (Linnekin 1990, 1992: 251). It can include changes introduced to bring contemporary practices in line with what is believed to be an authentic tradition (Linnekin 1990). Sutton characterises this as the ‘continuous art of making the past consistent with an idealised present’ (Ritchie 1999: 263/4). In this way, tradition can be seen as more of a model of former lifeways than as an unreflected and inherited legacy (Linnekin 1992: 251).

However, it should be noted that this more dynamic view of tradition applies equally to literate societies and has given rise to the notion that tradition is ‘invented’ (Hobsbawm 1992: 1, Linnekin 1990). While not denying this process, others feel that it is more appropriate to think of this as constructing tradition, rather than inventing it (Jolly and Thomas 1992). Nonetheless, the point is that although there is often an attempt to establish some continuity with a suitable point in history, traditions are constantly being created and this creation can be relatively recent (Hobsbawm 1992: 1). And so, even in western societies this may represent an attempt to present parts of a constantly changing world as unchanging, possibly with a political aim (Hobsbawm 1992: 2). For example, a village’s claim to some common land or right ‘since time immemorial’ often expresses not a historical fact, but the struggle for land between villages (Hobsbawm 1992: 2). Nonetheless, although it may be true to say that there is now tacit agreement that it is legitimate to consider tradition as dynamic, recent and ambiguous, many still feel that for it to be authentic, it should be shown to be ancient and immutable (Ritchie 1999: 272).

The implications of dynamism

If tradition can change then it becomes a problematic tool around which to build forms of management; as it represents something of a moving target. The factors that result in a change in tradition, as described above, can obviously result from a mix of the political, social and the technical. Technical changes are quite easy to identify and even to control. Political and social factors are rather more elusive, identifying them is quite hard and once identified they may not be easy to manage.

A few words about the use of the notion of tradition in the Treaty and Act and about Torres Strait society may help to illustrate the above. First, in the Treaty and Act, the category of fishing called traditional fishing includes all of the marine species that people may eat. However, in Torres Strait some species have different ‘values’ in a cultural sense and so may not be amenable to the same forms of management. Turtle and dugong are both foods used for feasts. Feasts may occur at special events such as funerals, birthdays, tombstone openings, baptisms, weddings, dinghy blessings, and possibly other important social events that I do not know about. A feast is not a ‘real feast’ unless it includes turtle and/or dugong; we could say therefore that these are ‘ceremonial foods’ and so have a special social value (Nietschmann & Nietschmann 1981: 62). (This specialness may be recognised in part by the notices to the Act mentioned above, that restrict the technology used for taking dugong and turtle.)

It is hard to say why these foods might have this special value.² However, we do have some pointers. They are hunted rather than fished and, as in many societies, hunting is a male prerogative and so gives males status and prestige. Indeed, along with oratory, song-writing, and dance choreography, skilled dugong and turtle hunting are qualities

² Some may speculate on why historical traditions came into being (see Hobsbawm & Ranger 1992), the rationale for traditions that are pre-historic is harder to determine.

that accord status to Torres Strait men. This is hardly surprising, as the hunt includes some danger and strength (not to mention excitement) and it requires knowledge of the beasts and the environment (Nietschmann & Nietschmann 1981). Also these foods have a large body mass and so represent a fairly significant chunk of protein, and they taste quite nice. Again, because they are large they can easily be cut up and shared and this probably gives them some special value as the distribution of food maintains social links, which is socially valued, and which generates a form of social capital. The two species can be said to be special because they are part of several of the creation myths of Torres Strait. However, it would be wrong to say that this is why they are important, for it is likely that people incorporate such resources into their myths; that is to say, they are incorporated into myths because of their more worldly qualities. Finally, one should note that although turtle and dugong are both special foods within the Treaty's category of 'traditional fishing', they each have their own value: dugong is more valued than turtle. Possibly this has to do with dugong's better taste, and because dugong are more difficult to hunt than are turtle.

Does a dynamic (changing) notion of tradition have implications for the value of these special foods? I will expand the discussion a little here as a change in tradition might, as I have tried to explain, depend on several factors and their interactions. First, populations change (usually upwards) and of course people's approach to food, traditional or not, is affected by the (additional) pressure put on it by a changing population. In Torres Strait the population hovers around 6000³, but of course there are many more Islanders on the mainland and the 'population of demand' for turtle and dugong may well include these mainlanders. In addition, and in part because of this population, no doubt feasts are larger than in the past. As well as this, people are more affluent than in even the 1980s and so they probably have more and larger feasts than in the past. Connected to affluence is the affordability of more, better and larger dinghies and motors; all increasing access to traditional fishing.

I have noted that hunting brings prestige. It has been suggested to me by some Torres Strait Islanders that there may be fewer avenues for gaining prestige in modern society, and that more males are hunting as a form of prestige replacement. It has also been suggested to me that social controls over the young are decreasing and as a result they over-hunt some species. However, this cannot be said with any certainty and these are complex issues that require investigation and verification. However, it is probably true that more people of all ages have access to the technology of the hunt than in the past. For instance, it is probably true that many more people have access to the water via dinghies than when access was through outriggers. Many of the above factors may also have combined to alter the value of the species. A conversation with an Islander recently indicated that in the past turtle might have been viewed both as a table food and a feast food, while dugong was mostly a feast food. Indications are that both may now be both table and feast foods. Again, such changes require confirmation by more detailed research.

Of course 'traditions' other than Torres Strait Islander impact on the species included in 'traditional fishing' and if we accept my arguments about traditions changing, then these other impacts are also changing. For instance, Torres Strait is not a closed system and is subject to technologies other than those used just by islanders. These 'outside' technologies are also bound up with their own political and social

³ This figure should be read with caution as the Torres Strait population dynamic is not clearly understood.

determinants. Included here would be other non-resident commercial fishers, illegal fishers say from Indonesia, and also PNG fishers. Any of these may be experiencing changing social, economic, political and technological circumstances that may impact adversely on 'traditional fishing' as defined in the Treaty and Act. For example, it would appear that illegal foreign fishers, driven no doubt into Torres Strait by their own economic circumstances, leave or discard large amounts of net in the Strait's waters. Presumably, this impacts on 'traditional fishing'. In this way, managing 'tradition' within Torres Strait and the Treaty is a multifaceted task.

Treaties and Acts

Treaties and acts, like the terms discussed above, are not necessarily the fixed entities they may at first appear to be, but are also subject to reinterpretation and change. The language of treaties can assume whatever shade of meaning the original negotiators saw fit and indeed some of the words used are intentionally ambiguous (Yu 1927: 43, 49, 52). In this case, a literal or plain interpretation of the words is not possible and they must be interpreted with reference to the original context and with intent of the treaty makers (Tammelo 1967: 12, 13, Yu: 44, 58). However, as with the notion of 'tradition' noted above, circumstances change over time and so, as the language of treaties is imperfect, there is a need and argument for constant reinterpretation (Yu 1927: 50, 76). These features were noted in some of the earliest analyses of the Treaty which indicated that in general it was variable in its intent and more specifically, that Articles 10 to 16 (several of which use the word tradition) would require flexible administration (Anderson 1981: 66, Harry 1981: 141).

Acts also change as circumstances change, hence their 'amendments' and 'notices'. These amendments may also be the subject of negotiation between affected parties. However, while a treaty is an agreement negotiated between sovereign (or relatively equal) bodies, legislation and legislative changes involve discussion between unequal parties and so they are quite different things that usually have a different intent and 'spirit'.

An additional difference between the Treaty and the Act in Torres Strait is that the former applies to the citizens of Australia and Papua New Guinea, while the latter does not. Though, in some parts of the Treaty it is unclear whether the provisions apply to all traditional inhabitants or to just those who are Australian citizens, and this makes Australia's responsibilities towards Papua New Guinea's traditional inhabitants a little hazy.

Conclusions

There seem to be two broad views of tradition, one that suggests it is a body of 'stuff' passed down through generations relatively unchanged. The other view is that it is a body of 'stuff' under constant change through circumstances; a dynamic rather than a static entity.

Plainly the first is a nonsense, if it were not then we would be able to observe a people living a 'traditional way of life', ie a way of life fixed in time, and clearly we cannot. In Torres Strait, we would see them hunting dugong from platforms and we would not

see them creating new dances. The second view also poses difficulties as, if tradition is a dynamic entity, then we can never fix exactly what it is, as this would mean stopping the clock in some way.

Even if one adopted a static view of tradition, then its ultimate definition would require reference to some particular point in time, when would this time be? In relation to the application of the *Aboriginal Land Rights Act (Northern Territory) 1976*, Ritchie says that notwithstanding the ideology of immutability, attempts to anchor a dynamic tradition to a particular event or point in the claims process has proved very problematic (Ritchie 1999: 259). Also, once a time is selected, how would one gather together the elements of the tradition? Adopting the more dynamic view is also problematic as it suggests tradition is a construct and the issue then becomes whose construction to accept as valid as the approach tends to indicate that everyone's view of tradition is equally true.

The Treaty and the Act embrace several parties. These include Torres Strait Islanders, people from PNG, other commercial fishers and illegal fishers. Though the Treaty and Act suggest that many of the terms (in Table 1) apply to Islanders and PNG people, in fact the activities embraced by the terms (such as traditional fishing) are impacted upon by anyone accessing the Strait, legally or otherwise. Therefore, management regimes directed at the terms in Table 1 would have to take all of the impacts into account.

In any event, what the foregoing suggests is that the word tradition and similar words and phrases used in the Treaty and the Act, are in and of themselves, not very precise and so not very useful, at least from a management point of view. (Although I have focussed here on the concept of tradition, most of the other words and phrases in Table 1 are equally ambiguous and carry the same caveats.) They are imprecise and they are contestable. On the other hand, the fact that they are used in a Treaty leaves the door open for negotiation. Treaties, as I have noted, are almost as ambiguous as the term tradition and, like the dynamic version of tradition, treaties are subject to reinterpretation as conditions change. It would seem then that if more precise meanings are required for the terms then these could, within the ethos and spirit of treaties, be negotiated between the parties affected. Of course, this would still require the parties to agree on the point, or points, in time to which the negotiation applied, as conditions will change again, with the events of today forming tomorrow's tradition(s).

This paper is no more than a note on the definitions and issues associated with the Treaty and Act. Therefore, in the best 'tradition' of research (longstanding *and* immutable), more work is required.

Appendix A: The terms and phrases⁴

The Treaty

Preamble

RECOGNISING the importance of protecting the traditional way of life and livelihood of Australians who are Torres Strait Islanders and of Papua New Guineans who live in the coastal area of Papua New Guinea in and adjacent to Torres Strait;

Article 1 (Definitions)

1.(d) ‘free movement’ means movement by the traditional inhabitants for or in the course of traditional activities;

1.(k) ‘traditional activities’ means activities performed by the traditional inhabitants in accordance with local tradition, and includes, when so performed—

- i. activities on land, including gardening, collection of food and hunting;
- ii. activities on water, including traditional fishing;
- iii. religious and secular ceremonies or gatherings for social purposes, for example, marriage celebrations, and settlement of disputes; and
- iv. barter and market trade.

In the application of this definition, except in relation to activities of a commercial nature ‘traditional’ shall be interpreted liberally and in the light of prevailing custom;

1.(l) traditional fishing means the taking by traditional inhabitants for their own or dependants’ consumption or for use in the course of other traditional activities, of the living resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle;

1.(m) traditional inhabitants means, in relation to Australia, persons who—

- i. are Torres Strait Islanders who live in the Protected Zone or the adjacent coastal area of Australia,
- ii. are citizens of Australia, and
- iii. maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural, religious activities, and

⁴ The specific terms and phrases discussed in this report are underlined.

in relation to Papua New Guinea, person who—

- i. live in the Protected Zone or the adjacent coastal areas of Papua New Guinea,
- ii. are citizens of Papua New Guinea, and
- iii. maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities.

Article 10, Establishment and Purposes of the Protected Zone

3. The principal purpose of the Parties in establishing the Protected Zone, and in determining its northern, southern, eastern and western boundaries, is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.

Article 11, Free Movement and Traditional Activities Including Traditional Fishing

1. Subject to the other provisions of this Treaty, each Party shall continue to permit free movement and the performance of lawful traditional activities in and in the vicinity of the Protected Zone by the traditional inhabitants of the other Party.

2. Paragraph 1 of this Article shall not be interpreted as sanctioning the expansion of traditional fishing by the traditional inhabitants of one Party into areas outside the Protected Zone under the jurisdiction of the other Party not traditionally fished by them prior to the date of entry into force of this Treaty.

Article 12, Traditional Customary Rights

Where the traditional inhabitants of one Party enjoy traditional customary rights of access to and usage of areas of land, seabed seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the other Party, and those rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continues exercise of these rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.

Article 14, Protection of Fauna and Flora

4. In giving effect to the provisions of this Article, each Party shall use its best endeavours to minimise any restrictive effects on the traditional activities of the traditional inhabitants.

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... the Protected Zone, shall act in a spirit of friendship and good neighbourliness, ... bearing in mind relevant principles of international law ... 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.(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 citizens of that Party who are not traditional inhabitants;

Article 18, Liaison Arrangements

2.(c) ... keep under review free movement by the traditional inhabitants of one Party into areas under the jurisdiction of the other Party and the local arrangements applying in respect of such free movement; and ...

3.(a) ... consult closely with representatives of the traditional inhabitants of his country, particularly in relation to any problems which may arise in respect of free movement, traditional activities and the exercise of traditional customary rights as provided for in this Treaty, and convey their views to his Government; ...

Article 19, Torres Strait Joint Advisory Council

2.(b) ... to consider and to make recommendations to the Parties on any developments or proposals which might affect the protection of the traditional way of life and livelihood of the traditional inhabitants, their free movement, performance of traditional activities and exercise of traditional customary rights as provided for by this Treaty; and ...

4. In the exercise of its functions, the Advisory Council shall ensure that the traditional inhabitants are consulted, that they are given full and timely opportunity to comment on matters of concern to them and that their views are conveyed to the Parties in any reports and recommendations made by the Advisory Council to the Parties.

6.(c) ... at least three members representing the traditional inhabitants, ...

Article 20, Priority of Traditional Fishing and Application of Measures to Traditional Fishing

1. The provisions of this Part shall be administered so as not to prejudice the achievement of the purposes of Part 4 of this Treaty in regard to traditional fishing.
2. A Party may adopt a conservation measure consistent with the provision of this Part which, if necessary for the conservation of a species, may be applied to traditional fishing, provided that that Party shall use its best endeavours to minimise any restrictive effects of that measure on traditional fishing.

Article 26, Licensing Arrangements

3. In issuing licences in accordance with paragraph 1 of this Article, the responsible authorities of both Parties shall have regard to the desirability of promoting economic development in the Torres Strait area and employment opportunities for the traditional inhabitants.
4. The responsible authorities of both parties shall ensure that the traditional inhabitants are consulted from time to time on the licensing arrangements in respect of Protected Zone commercial fisheries.

Article 28, Inspection and Enforcement

8. Where in the case of a suspected offence ... in the course of traditional fishing ... corrective action or other measures shall be taken ...

Torres Strait Fisheries Act 1984

Section 3, Interpretation

(Subsection 1)

Commercial Fishing means fishing for commercial purposes, but does not include traditional fishing.

Community fishing means commercial fishing carried on by:

- a) a person who is, or 2 or more persons each of whom is, both a traditional inhabitant and an Australian citizen (not being a person who is, in the course of that fishing, under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of another person who is not both an Australian citizen and a traditional inhabitant); ...

Papua New Guinea boat means: ...

- b) a boat that is being used by a traditional inhabitant who is a citizen of Papua New Guinea in the course of traditional fishing.
-

Protected Zone means...

- b) in relation to any act or thing done for the purposes of traditional fishing—any area adjacent to the first-mentioned area to the north of the line ... for the purposes of traditional fishing.

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

Traditional inhabitants has, subject to subsection (3), the same meaning as in the Torres Strait Treaty.

(Subsection 2)

The Minister may, by notice published in the *Gazette*, declare that the taking by traditional inhabitants of fish by a method, or with the use of equipment or a boat, of a kind specified in the notice is not traditional fishing.

(Subsection 3)

For the purposes of this Act:

- a) the reference in the definition of traditional inhabitants in Article 1 of the Torres Strait Treaty to the adjacent coastal area of Australia shall be read ...

(Subsection 5)

References in this Act to activities carried on for private purposes or to fishing for private purposes shall be read as not including references to activities carried on in the course of traditional fishing.

Section 5, Application of Act in certain waters

(Subsection 4)

- a) activities by way of traditional fishing; or ...

Section 8, Objectives to be pursued

In the administration of this Act, regard shall be had to the rights and obligations conferred on Australia 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.

Section 13, Minister to seek views of traditional inhabitants

The Minister shall, when he or she considers it appropriate to do so, seek the views of the members of the Joint Advisory Council established under Article 19 of the Torres Strait Treaty who are traditional inhabitants and Australian citizens on any matter relating to the administration of this Act that may affect the interests of traditional inhabitants who are Australian citizens.

Section 14, Minister may require information to be furnished

(Subsection 3)

(b) knows or has reasonable grounds to believe, that the other person is both a traditional inhabitant and an Australian citizen; ...

(Subsection 4)

In subsection (3): ...

Relevant person means a person:

- a) who is not both a traditional inhabitant and an Australian citizen; ...

Section 15, Proclamations in relation to fishing

(Subsection 2)

The Governor-General may, if he or she is satisfied that traditional inhabitants who are citizens of Papua New Guinea had, before the entry into force of the Torres Strait Treaty, customarily engaged in traditional fishing in an area of waters adjacent to the Protected Zone to the south of the line ... declare that area to be in the vicinity of the Protected Zone for the purposes of this Act.

Section 16, Regulation of fishing

(Subsection 1)

- m) prohibit the taking of fish, or fish included in a class of fish specified in the notice, otherwise than in the course of community fishing or traditional fishing;
 - n) where there is a notice ... otherwise than in the course of community fishing or traditional fishing;
-

Section 39, Protected Zone Joint Authority to seek views of traditional inhabitants

The Protected Zone Joint Authority shall, when it considers it appropriate to do so, seek the views of members of the Joint Advisory Council established under Article 19 of the Torres Strait Treaty who are traditional inhabitants and Australian citizens on any matter relating to a Protected Zone Joint Authority fishery where that matter may affect the interests of the traditional inhabitants who are Australian citizens.

Section 45, Offences relating to commercial fishing

(Subsection 1)

- b) being a traditional inhabitant, engage in activities by way of community fishing on a boat ... under subsection 19(2);

Section 49, Certain boats not to be brought to certain places

(Subsection 1)

The master of a foreign boat, not being a boat that is being used in the course of traditional fishing, ... not exceeding \$50,000.

Section 50, Certain boats not to land fish at certain places

(Subsection 1)

The master of a foreign boat who ... causes to be landed at a place in Australia any fish, not being fish that were taken in the course of traditional fishing and landed at that place for the purpose of the performance of traditional activities, that were brought to the place ... is guilty of an offence ...

Section 51, Having a boat equipped with nets etc.

(Subsection 5)

In this section, *unlicensed boat* means a boat

- (a) that is being used otherwise than in the course of traditional fishing or community fishing; ...

Section 52, Forfeiture

(Subsection 2)

- (b) a boat that was, at the time of the commission of the offence, being used in the course of traditional fishing or community fishing.
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Section 56, Certain prosecutions to require consent of Minister

(Subsection 1)

(c) that is alleged to have been committed by a person who is a traditional inhabitant and a citizen of Papua New Guinea and that, in the opinion of the Minister, was committed in the course of traditional fishing.

Section 57, Evidence

(Subsection 1)

- a) (iii) fish to which the charge relates were taken in the course of traditional fishing, community fishing or commercial fishing (other than community fishing);
 - b) the court considers that ... for those purposes or in the course of traditional fishing, community fishing or commercial fishing (other than community fishing), as the case may be.
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