Chapter 2

Torres Strait and the Treaty

2.1   The Torres Strait Treaty (the Treaty) was signed in 1978 and came into effect in 1985. This agreement between Australia and Papua New Guinea (PNG) does far more than establish borders. It has multiple objectives and is concerned with protecting the traditional way of life of local inhabitants, conserving the environment and promoting sustainable development in the region.

2.2   In this chapter, the committee starts its consideration of the Torres Strait by providing a brief description of the region and its people—their history, customs and way of life. This account provides some understanding of the major factors that gave final shape to the Treaty. The committee then examines:

- the main features of the Treaty;
- the challenges implementing the Treaty
  - the complexity of the Treaty and the mechanisms for coordinating the work of the various levels of government involved in the Torres Strait; and
 - general views on the operation of the Treaty.

Torres Strait and its people

2.3   The Torres Strait is a body of water in the far north of Australia that stretches approximately 278 kilometres from the tip of Cape York Peninsula to the southern border of PNG. It is over 160 kilometres long connecting the Arafura Sea on the west to the Coral Sea on the east.[1] Hundreds of islands and reefs dot this area which is rich in geographical, ecological and cultural diversity. They range from low-lying islands formed from alluvial deposits and fringed with mangroves to granite islands with mounds of basaltic rock. There are high volcanic islands with rich brownish soils that stand in contrast to flat and poorly-watered sandy coral cays with scrubby vegetation.[2] On the very sandy islands, gardening is not productive, whereas cultivation takes place on those with fertile soils.

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1   Exact measurements differ but the figures given here are based on those in Document submitted by Australia and Papua New Guinea to the International Maritime Organization, Marine Environment Protection Committee, 49th session, Agenda item 8, MEPC 49/8, 10 April 2003, p. 2. It stated that the Torres Strait is about 150 nautical miles long and 90 nautical miles wide. See also the *Reef Guide, A Shipmaster's handbook to the Torres Strait and the Great Barrier Reef,* Maritime Safety Queensland and Australian Maritime Safety Authority, fifth edition, 2003. It stated that the Torres Strait is about 140 nautical miles long and 80 nautical miles wide, p. 6.

2   See for example, David Lawrence and Helen Reeves Lawrence, *Torres Strait: the region and its people,* Aboriginal Studies Press, www.aiatsis.gov.au/aboriginal_studies_press/order (accessed 19 February 2010).

Figure 2.1: Map of the Torres Strait
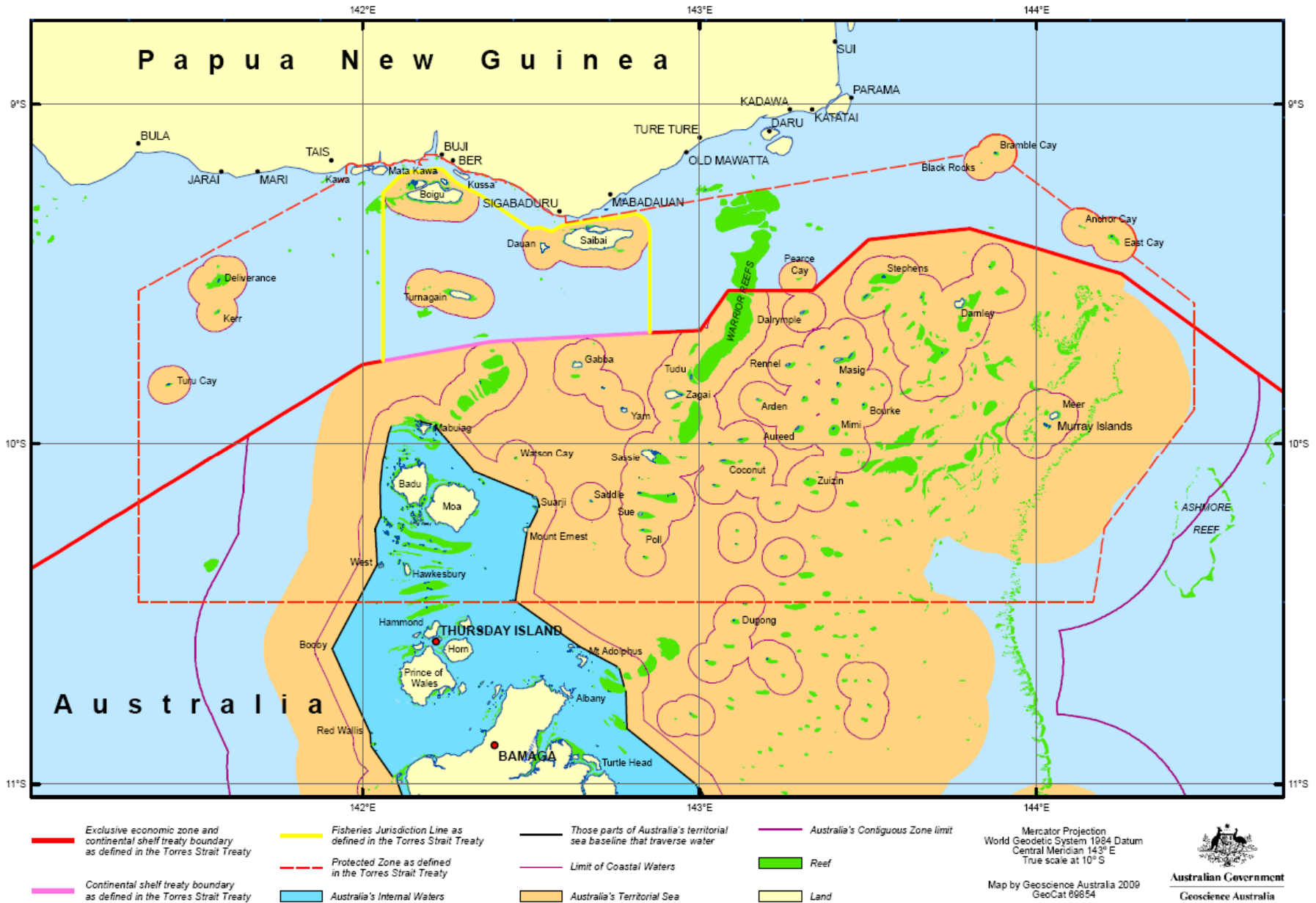
2.4   These environmentally diverse islands provide a unique home for indigenous flora, fauna and marine life. Eighteen island communities with populations ranging in size from less than one hundred to over two thousand are located in the strait.[3]

2.5   The islands in the Torres Strait form five distinct clusters. According to the Torres Strait Regional Authority (TSRA), they are:

Top Western Islands

- Boigu Island—a low lying island formed from alluvial mud deposited on decayed coral platforms, population 283;

- Dauan Island—a small granite island, population 153;

- Saibai Island—formed from alluvial sediment, is approximately 20 km long and 6 km wide, and separated from PNG by only 5 kilometres, population 337.

Western Islands

- Badu Island—one of the larger islands, partly covered with mounds of basaltic rocks with lightly vegetated open areas and fringed by extensive mangrove swamps, population 818;

- Mabuaig Island—partly covered with mounds of basaltic rocks, lightly vegetated and mostly well watered, population 251;

- Moa Island—the second largest island in the Torres Strait, is lightly vegetated and well watered and has two communities;

    - Kubin Community on the south side of the island, population 201; and

    - St Paul's Community on the northern side of the island, population 238.

Central Islands

- Iama (Yam) Island—a vegetated granite island with steep hills, population 311;

- Masig (Yorke) Island—a coral cay, approximately 2.7 kilometres long with a maximum width of 800 metres, population 300;

- Poruma (Coconut) Island—a coral cay, approximately 1.4 kilometres long and 400 metres wide, population 166; and

- Warraber (Sue) Island—a small low lying coral island of 93 acres surrounded by extensive reefs that support an abundant marine life, population 247.

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3   TSRA, website, http://www.tsra.gov.au/the-torres-strait/community-profiles.aspx (accessed 14 January 2010).

Eastern Islands

- Mer (Murray) Island—comprises three high level volcanic islands with red fertile soil and dense vegetation, population 485;

- Ugar (Stephen) Island—of volcanic origin with rich fertile soil, home to the region's smallest community, population 76;

- Erub (Darnley) Island—of volcanic origin with rich soil, the largest of the Eastern islands, population 320.

Inner Islands

- Hammond Island—hilly island with mounds of basaltic rocks, population 212;

- Muralug (Prince of Wales) Island—203 square kilometres, the largest of the Torres Strait Islands, population n/a;

- Ngurupai (Horn Island)—a flat island of approximately 53 square kilometres houses the region's primary airport, population 586;

- Thursday Island—the administrative centre for the Torres Strait Islands, population 2,547.

2.6   Of the 8,576 people residing in the Torres Strait at the time of the 2006 census, 81 per cent were Torres Strait Islanders, 1.7 per cent Aboriginal and 14.5 per cent non-Indigenous.[4]

2.7   There are three main administrative bodies in the Torres Strait that have responsibility for representing the interests of residents in the region. They are the Torres Shire Council (TSC), the Torres Strait Island Regional Council (TSIRC) and the Torres Strait Regional Authority (TSRA). The TSC is the local government authority that administers the inner islands of the Torres Strait; the TSIRC administers the 15 outer islands whose councils amalgamated in March 2008 to form the TSIRC.[5] The TSRA is an Australian Government statutory authority funded by the Australian Government and responsible for programs for Torres Strait Islander and Aboriginal people living in the region. Its primary objective is to achieve a better quality of life and develop an economic base for Torres Strait Islanders and Aboriginal persons in the Torres Strait.

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4   Queensland Government, Office of Economic and Statistical Research, Indigenous Regional Profile (Census 2006), Torres Strait Indigenous Region; see also Australian Bureau of Statistics, *Population distribution, Aboriginal and Torres Strait Islander Australians*, 4705.0, 2006, p. 40.

5   In the Torres Strait, the Torres Shire Council administers Thursday Island, Horn Island, Friday Island, Prince of Wales Island and Goods Island. For Information on the Torres Shire Council see http://www.torres.qld.gov.au/

Torres Strait Islanders—way of life

2.8   The people of the Torres Strait are seafaring people, who have a deep attachment to their lands and surrounding sea.[6] For example, researchers Colin Scott and Monica Mullrennan observed that at Erub:

> Ownership and control of reef and deeper water resources are as fundamental to culture and identity as ownership and control of dry land, and certainly more important to the future development prospects of people in the Strait. As a senior man of the Peidu clan declared 'Our feet are on the land, but our hands are in the sea'.[7]

2.9   Although communities in the Torres Strait share a geographical area and an established and enduring connection to the sea, they have over many generations evolved their own identity, culture and traditions.[8] Each has developed a 'sense of being distinctive to a stable, long established, closely knit and self-conscious society' and has stories that explain its spiritual and cultural heritage.[9] Ms Anna Shnukal noted the close bond between a community and its location. In the Central Islands:

> …almost every vertical projection—whether island, cay, atoll, reef, rock or sandbank—is named, owned and serves some material or symbolic purpose. Ownership resides with specific Islander communities, even down to the level of clans, families or individuals.[10]

2.10   The culture of the Torres Strait people is much more than rituals or ceremonies: it is also about the nature of community life, social expectations, the duties and obligations of members of the community and the moral values and beliefs underpinning them.[11] It establishes relationships with, and responsibilities to, the sea,

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6   See for example, David Lawrence and Helen Reeves Lawrence, *Torres Strait: the region and its people,* Aboriginal Studies Press, www.aiatsis.gov.au/aboriginal_studies_press/order and Nonie Sharp, Transcript, ABC Radio National, 'Spirit of Things', Seadreaming', 15 December 2002.

7   Colin Scott and Monica Mullrennan, 'Land and sea tenure at Erub, Torres Strait: Property, sovereignty and the adjudication of cultural continuity', *Oceania*, vol. 70, issue 2, Sydney, December 1999.

8   See for example, Case Study 1, 'Climate change and the human rights of Torres Strait Islanders', in Australian Human Rights Commission, *Native Title Report 2008,* p. 229, http://www.hreoc.gov.au/social_justice/nt_report/ntreport08/casestudy1.html (accessed 4 January 2010).

9   Jeremy Beckett, *Torres Strait Islanders: Custom and Colonialism,* Cambridge University Press, Cambridge, 1987, p. 4.

10   Anna Shnukal, 'The Post-contact created environment in the Torres Strait Central Islands', *Memoirs of the Queensland Museum Cultural Heritage Series*, vol. 3, part 1, Queensland Museum, Brisbane, June 2004, p. 319.

11   See for example, Julie Lahn, 'Past Visions, Present Lives: sociality and locality in a Torres Strait community', Thesis for the degree of Doctor of Philosophy submitted James Cook University, November 2003, p. 19.

its surrounds and resources. Antropologist Nonie Sharp wrote of the Meriam people of the Murray Island Group:

> The right to a locale or clan territory includes foreshore, reef, seabed, waters, fish. As with land it has *going with it* identifiable responsibilities…these responsibilities are given to the head of the patriline or nameholder of jointly-owned marine space to share it and its produce with designated kin, to look after it, to fish and 'farm' it, to exclude others from it (according to the 'keep off' rules of the Meriam god, Malo).[12]

2.11   Over the centuries, communities in the Torres Strait have built a complex social network. The bonds between some are strong and based on long standing cultural and social exchanges. For example, one researcher noted how communities form close relationships:

> A trip to Poruma [from Warraber] takes around two hours by dinghy…much less when the sea is calm. Here proximity and consanguinity fold into each other. Decades of intermarriage between these islands have resulted in a web of familial interconnection.[13]

2.12   Shaped by its history and own unique land and seascape, Island life in the Torres Strait draws on centuries of tradition as well as more recent Melanesian, Aboriginal, Polynesian and European influences. In this regard, the body of customs, traditions, beliefs and practices of Torres Strait Islanders is both diverse and dynamic. Anna Shnukal noted:

> Recent colonial history has left its mark. For example, the people of the Central Islands responded to the demands of the new economic and cultural order by altering many aspects of their traditional lifeways, but only by degrees and within traditional constraints.[14]

2.13   According to Jeremy Becket, Island custom is a lived and living creature, 'capable of taking on new meanings and functions'.[15] He wrote:

> According to the old myths, their ancestors subjected the fetishes brought in from other places to a process of 'domestication', integrating them into the local structures without denying their exotic origins. In the same way, latter day Islanders domesticated not only the songs and dances they adopted

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12   Nonie Sharp, 'Reimaging Northern Seascapes in Australia: Open Access, Common Property and the Return of Responsibility?', Paper prepared for the Seventh International Conference for the Study of Common Property, 'Crossing Boundaries', Vancouver, 10–14 June 1998.

13   Julie Lahn, 'Past Visions, Present Lives: sociality and locality in a Torres Strait community', Thesis submitted for the degree of Doctor of Philosophy, James Cook University, November 2003, p. 14.

14   Anna Shnukal, 'The Post-contact created Environment in the Torres Strait Central Islands', *Memoirs of the Queensland Museum Cultural Heritage Series*, vol. 3, part 1, Queensland Museum, Brisbane, June 2004, p. 336.

15   Jeremy Beckett, *Torres Strait Islanders: Custom and Colonialism,* Cambridge University Press, Cambridge, 1987, p. 4.

from the South Sea people, but also the diving boats, the church and government, weaving them about with customary practices and organizing them along customary lines.[16]

2.14   Some communities along the southern border of PNG also have a long and established affinity with the Torres Strait. For centuries, they have sailed, hunted, fished, traded produce and goods, formed strong family connections, and attended ceremonies and traditional tribal gatherings in the Torres Strait. This network of social bonds and trade routes between communities on the islands and the coast of PNG developed into a region-wide identity.[17]

2.15   When the time came to negotiate an international border, both Australia and PNG recognised the need to respect the age-old traditions, family links, customs, and practices of the local inhabitants. The following section considers the Treaty that was agreed to and the special provisions that recognise and accommodate the uniqueness of the region and its history.

Torres Strait Treaty

2.16   The Treaty took six years to negotiate, was signed by Australia and Papua New Guinea on 18 December 1978 and entered into force in February 1985.[18] It contains 32 Articles and, as noted earlier, is much more than 'a simple border delimitation agreement'.

Territorial boundaries

2.17   When negotiating the Treaty, Australia and PNG's first task was to recognise sovereignty over the many islands in the strait and to establish the territorial boundaries between them. History and tradition had a significant influence over the process.

History and sovereignty

2.18   By proclamation in 1879, the Colony of Queensland annexed a number of islands in the far north of the Torres Strait lying close to the coast of New Guinea, including Saibai, Dauan and Talbot (Boigu) Islands. The line on the map created by this historical act extended Australia's sovereignty to within five kilometres of the PNG coast. Thus, at the time of negotiating the Treaty, these islands had effectively been part of Queensland and subject to its laws for almost one hundred years.[19] At

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16   Jeremy Beckett, *Torres Strait Islanders: Custom and Colonialism,* Cambridge University Press, Cambridge, 1987, pp.6–7.

17   See for example, Torres Strait Natural Resource Management Reference Group, *Land & Sea Management Strategy for Torres Strait*, Natural Heritage Trust, November 2005, p. 45.

18   *Submission 23*, p. [1].

19   Queensland Government, *Queensland Coast Islands Proclamation dated 18 July 1879,* reprint No. 1.

various times since 1879, proposals had been made to move the border further south but to no effect. During the drafting of the Treaty, Torres Strait Islanders resisted strongly any suggestion for redrawing the line. According to Professor Donald Denoon:

> *Border No Change* signs were mounted across the archipelago, and Island Council chairmen asserted their collective solidarity with Saibai, Dauan and Boigu, under threat as the northern-most Islanders. The crisis crystallised the Islanders' sense of common identity and yearning for autonomy, and once it was stirred, their anxiety was impossible to allay.[20]

2.19   History and the wishes of the local inhabitants in the Torres Strait prevailed. With the exception of three small islands immediately adjacent to the PNG coast—Kawa, Mata Kawa and Kussa—the other islands in the Strait, including Sabai, Dauan and Boigu, were designated Australian Territory.

Territorial sea and fishing boundaries

2.20   Concerns about Australia's sovereignty extending so close to PNG's borders were settled by the agreement to separate the seabed boundary line and the fisheries jurisdiction boundary line.[21] The establishment of a different boundary for water column and for seabed set a clear precedent.[22] According to Mr Dean Bialek, a lecturer in law, University of Melbourne, this 'very rare' arrangement appears to have been done 'only twice', both times involving Australia—in the Torres Strait Treaty and again in the Timor Sea and the Arafura Sea negotiations.[23]

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20   Emeritus Professor Donald Denoon, ANU, 'The Hundred Fathers of the Torres Strait Treaty', 4th Annual R.G. Neale Lecture 2009, Department of Foreign Affairs and Trade, 5 November 2009, p. 3.

21   See Articles 3 and 4.

22   H. Burmester, 'The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement', *The American Journal of International Law*, vol. 76, 1982, p. 333.

23   Joint Standing Committee on Treaties, Timor Sea treaties, *Committee Hansard*, Friday, 4 October 2002, Melbourne, p. 135.

The PNG coast from Saibai's shoreline

Seabed boundary

2.21   The seabed jurisdiction line established by the Treaty runs through the centre of the Torres Strait well south of the Australian islands of Saibai, Dauan and Boigu. This line delineates who has control over the seabed. Most of the Australian islands below that line are surrounded by a 12-nautical mile territorial sea. The proximity to PNG of islands above that line required a different approach. Mr Henry Burmester, a member of the Australian negotiating team for the Treaty, noted that 'if every island were given a 12-mile territorial sea, the Strait would be transformed into an area of Australian sovereignty'.[24] Thus, islands above the seabed line form Australian enclaves with a territorial sea of only three nautical miles. In this regard, Mr William Campbell, Attorney-General's Department, explained further:

> Once you get closer to the coast of the Papua New Guinea mainland the treaty, rather than saying just three nautical miles from the coastline, actually plots the line in some cases, because it is between the Papua New Guinean coast and Australia. The territorial sea we have there is, I think,

24   H. Burmester, 'The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement', *The American Journal of International Law*, vol. 76, 1982, p. 336.

largely based on equidistance between the mainland, other PNG islands and our islands and is less than three nautical miles.[25]

Fisheries boundary

2.22   The fisheries jurisdiction line follows the seabed for much of its course but then turns sharply northward to form a 'top hat' that encloses the three northern Australian islands. South of this line, Australia controls the fisheries and on the other side, PNG controls fisheries.[26]

Protecting the traditional way of life

2.23   As noted earlier, long before any consideration was given to defining national borders between Australia and PNG, communities in the Torres Strait, including some of the villages along the southern coast of PNG, had lived their lives and sustained themselves according to long established traditions. This way of life involved freedom of movement between the islands and the PNG coast. When the time came to negotiate borders, both Australia and PNG took account of the local inhabitants and their traditional way of life. According to Mr Burmester:

> During the negotiations, the islanders made very clear to the Australian Government their concern that traditional practices and freedom of movement be allowed to continue…At the time of the negotiations, it was apparent that the use of the Strait by islanders and coastal Papuans involved considerable movement of both groups through the area.[27]

2.24   In the preamble to the Treaty, Australia and PNG recognise '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 the Torres Strait'.[28]

Torres Strait Protected Zone (TSPZ)

2.25   In order to uphold the traditional way of life, the Treaty established a Protected Zone (Article 10). This large zone includes all Australian islands north of the seabed boundary and most in the central part of the strait. The southern islands

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25   Mr William Campbell, *Committee Hansard*, 17 December 2009, pp. 7–8.

26   See for example, Professor Stuart Kaye, 'Torres Strait Native Title Sea Claim: Legal Issues Paper', *National Native Title Tribunal Occasional Papers Series*, No. 2/2004, 18 October 2002 (updated September 2004), p. 10.

27   H. Burmester, 'The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement', *The American Journal of International Law*, vol. 76, 1982, p. 330.

28   Preamble to Treaty, 'Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters', Australian Treaty Series, No. 4, Department of Foreign Affairs, Canberra, http://www.austlii.edu.au/au/other/dfat/treaties/1985/4.html (accessed 23 November 2009).

adjacent to Cape York Peninsula, including Hammond, Prince of Wales, Horn and Thursday Islands, are not within the zone. The principal purpose for establishing the Protected Zone was to:

- acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants, including their traditional fishing and free movement; and

- protect and preserve the marine environment and indigenous fauna and flora in and in the vicinity of the Protected Zone.

2.26   Although freedom of movement between the countries for traditional activities is allowed, the area is not a customs-free zone. Immigration requirements apply to all non-traditional activities but should not inconvenience those engaged in traditional business. The Protected Zone Joint Authority (PZJA) is the central decision-making and policy-setting body for managing commercial and traditional fisheries in the Australian portions of the TSPZ. [29]

Traditional inhabitants and traditional activities

2.27   The Treaty defines 'traditional inhabitants'. In relation to PNG, it means persons who live in the Protected Zone or the adjacent coastal area of PNG; are citizens of PNG; and maintain traditional customary associations with the area or in the vicinity of the Protected Zone. In 2000, Australia and PNG exchanged third person notes which identified the PNG villages deemed to be Treaty villages. Thus, PNG inhabitants from the 13 Treaty villages—Bula, Mari, Jarai, Tais, Buji/Ber, Sigabadaru, Mabadauan, Old Mawatta, Ture Ture, Kadawa, Katatai, Parama and Sui—can, without passports, visit the Protected Zone to carry out traditional activities. Torres Strait Islanders living in the Protected Zone have reciprocal rights to visit the Treaty villages to also carry out traditional activities. [30]

2.28   Furthermore, the Treaty defines traditional activities which include activities performed by the traditional inhabitants in accordance with local tradition. They cover:

- activities on land, including gardening, collection of food and hunting;

- activities on water, including traditional fishing;

- religious and secular ceremonies or gatherings for social purposes, for example, marriage celebrations and settlement of disputes; and

- barter and market trade. [31]

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29   Torres Strait Protected Zone Joint Authority, http://www.pzja.gov.au/about_us/default.htm (accessed 2 July 2010).

30   See for example, Department of Foreign Affairs and Trade, 'Torres Strait Treaty and You', http://www.dfat.gov.au/geo/torres_strait/brief.html (accessed 30 November 2009) and Mr William Campbell, *Committee Hansard*, 17 December 2009, p. 5.

31   Article 1, Definitions.

2.29   At this stage, the committee notes that some villages on the PNG side of the border that are not designated as Treaty villages question the current arrangements. They believe that the Treaty ignores their standing as traditional inhabitants and has removed their right to exercise their customary rights in Torres Strait. Some go further and deny the legitimacy of the Treaty and the borders it created.[32] The committee considers this matter in chapter 18 on the extent of Commonwealth responsibility.

Protecting the environment

2.30   The Treaty also has a considerable environmental protection component. The Torres Strait region supports a number of critical fisheries habitats and ecosystem resources. In recognition of the environmental sensitivity of the region, the Treaty states clearly that one of its objectives is to protect and preserve the marine environment and indigenous fauna and flora in, and in the vicinity of, the Protected Zone.[33] It includes provisions for the protection of indigenous flora, fauna and traditional fisheries, for sustainable management of commercial fisheries, prevention of pollution and environmental damage from all sources.[34] But even when it comes to conservation and biosecurity measures that may impose restrictions on traditional activity, the Treaty recognises the importance of allowing the free movement of traditional inhabitants in pursuit of the performance of lawful traditional activities. Thus, both countries are to use their 'best endeavours to minimise any restrictive effects on the traditional activities of the traditional inhabitants'.[35]

Promoting economic development

2.31   The economic development of the region is another of the Treaty's objectives. It requires both countries to work together in the conservation, management and optimum use of the Protected Zone's commercial fisheries. The Treaty provides for the sharing of commercial fishing resources between PNG and Australia, the licensing arrangements for this activity and for inspection and enforcement of such arrangements. Sustainable development and commercial enterprise matters will be discussed in detail in chapter 15.

Complexity of the Treaty

2.32   The separate seabed and fisheries jurisdictional lines, the specially created Protected Zone and the role of safeguarding the traditional way of life and protecting the environment make the Treaty one of the most complicated maritime boundary

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32   See *Submissions 4, 8* and *31*.

33   Article 10(4) and Articles 13, 14 and 15.

34   Articles 7, 10, 13, 14, 19 and 21–28.

35   Article 14(4).

delimitations.[36] It creates complex jurisdictional regimes across a range of activities which calls for effective coordination and cooperation in the exercise of jurisdictional responsibility by Australia and PNG and state and provincial or local governments. According to Mr Burmester:

> Although the special status and rights in the zone are directly created by the Treaty, it is left to each Government to ensure that they are given effect. To this extent, the jurisdictional division of the area remains significant.[37]

2.33   Aware of the importance of acting collaboratively in order to achieve the objectives of the Treaty, both countries entered into the agreement as 'good neighbours and in a spirit of cooperation, friendship and goodwill'. The preamble records their desire to cooperate with one another 'in the conservation, management and sharing of fisheries resources and in regulating the exploration and exploitation of seabed mineral resources'. The Treaty requires both countries to consult with each other in order to harmonise their policies and to coordinate their efforts when taking measures to protect and preserve the marine environment and to identify and protect vulnerable species of indigenous fauna and flora.[38] It also provides for matters such as resolving problems dealing with the administration of immigration, quarantine, health and customs matters.[39] Indeed, the Treaty stipulates that:

> 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…[40]

2.34   Similar importance is given to information sharing, consultation, negotiation, and joint decision making on a range of other measures—determining the share of the fish catch in the Protected Zone (Article 23); issuing commercial fishing licences in the Protected Zone (Article 26); and inspection and enforcement to prevent violations of the Protected Zone commercial fisheries arrangements. This consultative approach also extends generally to resolving any disputes between the parties arising out of the interpretation or implementation of the Treaty (Article 29).

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36   Professor Stuart Kaye, 'Torres Strait Native Title Sea Claim: Legal Issues Paper', *National Native Title Tribunal Occasional Papers Series*, No. 2/2004, 18 October 2002 (updated September 2004), and Stuart B Kaye, 'Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait', *Melbourne Journal of International Law,* vol. 2, 2001.

37   H Burmester, 'The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement', *The American Journal of International Law*, vol. 76, 1982, p. 332.

38   Article 13(4) and Article 14(3).

39   Article 17.

40   Article 16(2).

Treaty Liaison Officers

2.35   The Treaty sets up mechanisms to provide for a high level of consultation and cooperation between the two countries. Article 18 establishes Treaty Liaison Officers, one from Australia, based at Thursday Island, and one from PNG, based at Daru, who are required to facilitate the implementation of the provisions of the Treaty at the local level. They are required to exchange information on relevant developments, consult with each other on the practical operation of the provisions of the Treaty at the local level and resolve related problems. The Treaty stipulates that the liaison officers are to 'consult closely with representatives of the traditional inhabitants and maintain close liaison with national, State and Provincial authorities'.[41]

2.36   These officers chair the Treaty Liaison Meetings which are also attended by other Australian and PNG agencies represented in the region and involved in implementing arrangements under the Treaty. These meetings are held alternately in Australia and PNG and their main purpose is to address issues raised at the Traditional Inhabitants Meeting and to seek to solve locally identified problems at an administrative level.[42]

Cycle of treaty meetings

2.37   Government officials and representatives of traditional inhabitants attend a cycle of Treaty meetings to promote close consultation and to keep each other informed about their views and matters of concern. The committee covers these meetings in greater detail where relevant in the main body of the report but, for the moment, provides a brief description:

- *The Joint Advisory Council* (JAC) is the peak governance body established under Article 19 of the Treaty. It is an advisory and consultative body, co-chaired by senior officials from the PNG and Australian departments of foreign affairs and trade. JAC is made up of Australian and PNG officials and representatives of traditional inhabitants and meets annually to review the implementation of the Treaty. The JAC reports to the foreign ministers of Australia and PNG who consider its reports and recommendations.

- Three sub committees—

  - *Traditional Inhabitants Meeting* (TIM), co-chaired by traditional leaders from PNG and Australia, are held once a year alternatively in PNG and Australia generally prior to meetings of the JAC in order to identify main issues for its consideration. It is a consultative mechanism run by DFAT and attended by the Customs and Border Protection Service. Through these meetings, TSRA communicates with PNG on matters within the Protected Zone.

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41   Article 18(3).

42   http://www.dfat.gov.au/geo/torres_strait/brief.html and *Land & Sea Management Strategy for Torres Strait, 2005,* p. 46.

- *Health Issues Committee* (HIC), chaired by Australia's Department of Health and Ageing (DoHA), meets biannually in Australia. It was established in 2003 to examine health issues associated with the free movement of PNG nationals and Torres Strait Islanders.

- *Environmental Management Committee* (EMC), co-chaired by PNG and Australian national departments of environment, meets annually before the JAC meeting and reports directly to the JAC.[43] It provides a forum for Australian and PNG officials to share information and collaborate on issues affecting the environment within the Torres Strait Treaty Zone and surrounding region.[44] According to DEWHA, the EMC oversees and reports on a range of issues relating to environmental aspects of the Treaty, including the sustainable management of sea turtle and dugong resources, drift-nets and other fisheries-related matters arising from the parallel Australia and PNG fisheries bilateral meetings. It also considers management plans for the protection and sustainable use of resources; coastal management issues; and Torres Strait research.[45]

2.38   At a recent TIM meeting, traditional inhabitants decided that guidelines were needed as a means to make everyone in the Treaty area aware of the obligations and rules applying to visitors crossing the border. As a consequence, the *Guidelines for Traditional Visitors* was produced.[46] This document incorporates the protocols and accepted practices, previously conveyed in oral form, into a single written document. Importantly, the guidelines were created by and for the traditional inhabitants and subsequently endorsed by the JAC.[47] The committee refers to this document on numerous occasions throughout this report, but it is especially relevant to the committee's consideration of law and order issues in the Torres Strait.

International sea route

2.39   Running through the Torres Strait is a major international sea route which places particular obligations on Australia. According to international law, the Treaty is subservient to these obligations.

Views on the Treaty

2.40   Although the Treaty is one of the most complicated maritime boundary delimitations, both the Attorney-General's Department and Department of Foreign

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43   *Submission 24,* p. [3].

44   *Submission 24*, p. [3].

45   *Submission 24*, p. [3].

46   The text of the document belongs to the Traditional Inhabitants as defined in the Treaty. Additional Information provided to the committee, 22 June 2010.

47   Mr Brett Young, *Committee Hansard*, 18 December 2009, p. 7.

Affairs and Trade (DFAT) regard it as a success. Mr Campbell, Attorney-General's, explained:

> The treaty was intended to be a practical and fair solution to Australia and Papua New Guinea and, importantly, to the traditional inhabitants of both countries. And despite the difficulties that have arisen in the administration of the treaty, in our view it has stood the test of time.[48]

2.41   DFAT concurred with this assessment. In its view, the Treaty is very flexible, resilient and adaptable and has 'operated pretty well over time'.[49] The department also informed the committee that 'the Australian and PNG governments work hard and have a shared commitment to the proper and sensitive management of the region through the Torres Strait treaty'.[50]

2.42   A number of witnesses challenged these views. They raised concerns about aspects of the Treaty, or its implementation, including inadequate or ineffective consultation with local inhabitants, problems with interpretations, non-compliance with treaty provisions and enforcement, a lack of capacity on the PNG side to fulfil its obligations under the Treaty and the status afforded to some communities in PNG. A few local leaders suggested the need for a full review of the Treaty.[51]

2.43   In the following chapters, the committee examines in detail the issues that have given rise to concerns about the Treaty and its implementation. To start, the committee considers matters dealing with the free movement of traditional inhabitants: the health and welfare of local communities and the demands placed on them and more broadly on Australian resources by the visits of PNG nationals to the region.

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48   Mr William Campbell, *Committee Hansard*, 17 December 2009, p. 3.

49   Mr Jeremy Bruer, *Committee Hansard*, 18 December 2009, pp. 2–3 and *Submission 23,* [5].

50   *Committee Hansard*, 18 December 2009, p. 2.

51   Information obtained during the committee's visit to the Torres Strait and evidence taken on Thursday Island, *Committee Hansard*, 24 March 2010. See also Torres Strait Island Regional Council, *Submission 9.*

Part I

Health and law and order

The free movement provisions of the Treaty allow traditional inhabitants from PNG to cross the border to carry out traditional activities such as food gathering, fishing and hunting, and attending social gatherings and ceremonies. Although the Treaty defines traditional activities, some PNG nationals from the Treaty villages along the PNG south coast travel across the border for a range of reasons not covered by the Treaty. Some overstay their visits and behave contrary to the norms and customs of the Torres Strait Island communities. The lack of identification documents poses issues in the law enforcement and border protection context.

In this part of the report, the committee examines the tensions created by these breaches in the free movement provisions and the inappropriate or unacceptable conduct of some visitors. It then looks at the ways local communities and government agencies manage these tensions.