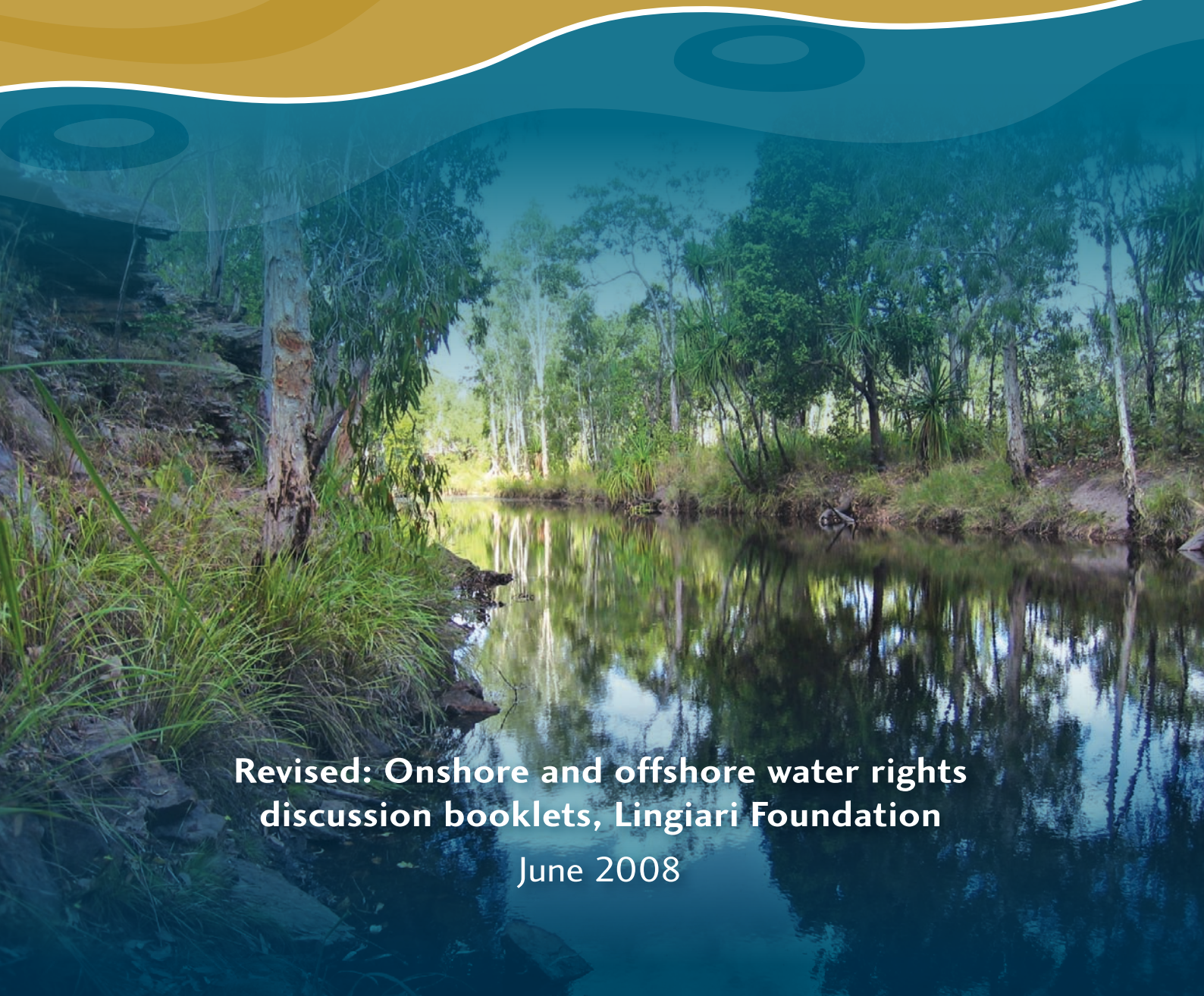
Lingiari Foundation (Inc.)

NAILSMA

North Australian Indigenous Land & Sea Management Alliance

An overview of Indigenous Rights in Water Resource Management



Revised: Onshore and offshore water rights discussion booklets, Lingiari Foundation

June 2008

North Australian Indigenous Land & Sea Management Alliance

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Introduction

Indigenous organisations and land owners are being asked more and more by non-Indigenous groups and other government and non-government stakeholders to say what Indigenous rights, responsibilities and interests in water are. Important changes are happening in the way that water is managed, governed and commercialized. Importantly, Indigenous people need to have a say in how this will happen. The discussions presented in this booklet have been written to help Aboriginal and Torres Strait Islander peoples to think about and discuss their rights, responsibilities and interests in onshore and offshore waters.

The booklet is broken into three sections:

1) A general overview of information important for understanding Indigenous rights and interests in water.
2) Onshore waters – water on and under the land.
3) Offshore waters – saltwater and the inter-tidal and coastal zones.

We know that for many Aboriginal and Torres Strait Islander peoples this is an artificial distinction and there is no separation between land, rivers and sea.

The rights, interests, practices and uses that Indigenous peoples say they have in water need to be talked about and understood in a meaningful way. This is vitally important so that the best ways to advocate, recognise, and protect these rights and interests can also be understood.

We acknowledge the work already conducted by the Lingiari Foundation (Inc.), in partnership with the former Aboriginal and Torres Strait Islander Commission (ATSIC), on the 2002 Onshore and Offshore water rights discussion booklets. The discussions presented here summarise those booklets, and also update that work and renew the debate on water reform and how this translates into Indigenous rights and interests.

We look forward to hearing from you about your ideas on standards, principles, protocols and pathways forward so that your rights in waters might be better recognised.

You can provide your input by going to the North Australian Indigenous Land and Sea Management Alliance (NAILSMA) website (**http://www.nailsma.org.au**) and visiting the Indigenous Water Resource Management web pages. Contacts of the people working on water can be found on this site. Or, go to the Lingiari Foundation home page (**http://www.lingiari.org**).

Overview of Indigenous Rights and Interests

Indigenous Water Rights

Water is central to Indigenous culture, society and livelihoods. Traditional use of lands has always included the use and management of fresh and salt waters. Aboriginal peoples have respected, looked after and celebrated their lands and waters for thousands of years. The coming of the Europeans to Australia has brought many changes to Indigenous rights over land and water and has led to many negative impacts on those resources, like:

- pollution from many different sources;
- too many fish being taken;
- dams changing the way that water flows;
- mining damaging the sea bed;
- too much water being taken for use and not enough left for the environment; and
- displacement and removal of Indigenous custodians from their traditional estates.

The future well being of all Australians is tied to our ability to respect and maintain water resources. This is an economic and social imperative. Equally important for Indigenous people is the capacity to both preserve and enjoy these resources and to practice and sustain the cultural obligations that are linked to the spirit of the country.

Indigenous Rights and Decision Making

Fulfilling responsibilities in Aboriginal law, and enjoying the use and benefit of country, is a fundamental right for Indigenous peoples. This is recognised in International law and recently acknowledged through the Australian Government's recent support for the United Nations Declaration on the Rights of Indigenous Peoples[1].

> ***Indigenous people's rights to be free to practice and enjoy their own culture are recognised under the International Convention on Civil and Political Rights.***[2]

The International Convention on Biological Diversity also requires governments to protect and encourage the customary use of biological resources. However, the practical influence of international law depends on how it is enacted in Australian legislation, and the emphasis is currently weak.

Indigenous rights to water are recognised through statutory land rights regimes[3] Native Title based

1 UN Declaration September 2007 **http://iwgia.synkron.com/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-13ResolutiontextDeclaration.pdf**

2 Lingiari Foundation 2002 *Offshore water rights discussion booklet*, Lingiari Foundation and ATSIC, Broome

3 Such as the Commonwealth Aboriginal Land Rights Act (Northern Territory) 1976

on the Mabo case and the Commonwealth Native Title Act, as well as other statutory protections and rights[4]. However, it is not always clear what legal rights Indigenous communities have to protect their own access to water, and to manage the actions and access of others. Governments have a lot of power and their decisions about rules and regulations often determine how water is managed and used, which impacts on the rights of Indigenous peoples. Although opportunities are sometimes provided for an Indigenous viewpoint to be put forward, structures and processes for this don't always work. Indigenous voices are often not heard at the most important levels of decision-making.

Importantly, Indigenous people have struggled to be part of the COAG (Council of Australian Governments) discussion in the past, which has contributed to the lack of understanding and engagement in the water reform agenda.

The Indigenous Water Policy Group (IWPG)[5] was initiated by NAILMSA in 2006 to address Indigenous rights responsibilities and interests in water, and to develop institutional arrangements for Indigenous participation in the National Water Initiative. The IWPG has highlighted that Indigenous rights and interests span social, cultural, environmental and economic interests.

Indigenous rights to water include commercial and customary rights. Too often, Indigenous rights are perceived narrowly, as rights to subsistence only.

Native Title

Native title claimants and holders throughout Australia have been working to assert their rights to access and use water resources. Often, competing commercial and political interests line up against the cultural and other responsibilities of Indigenous people.

Native title rights and interests exist in freshwater and onshore waters, but whether they amount to ownership or only a right to use waters is not yet sorted out [6]

Some judges have said that the *Native Title Act* does not provide an enforceable right for native title holders to be consulted by the government about water. But, Native Title holders may be able to find ways to challenge these procedures. Section 24HA of the Native Title Act states that native title claimants and holders have a right to comment on new water licenses before they are granted and a right to compensation for the effect upon any native title that may exist.

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4 For example the Northern Territory Fisheries Act, (Section 53) states:

(1) Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner.

5 Visit the NAILSMA website (**http://www.nailsma.org.au**) for more information about the IWPG and to download fact sheets

6 Lingiari Foundation 2002 Indigenous water rights a synopsis for discussion Lingiari Foundation and ATSIC, Broome Such as the Commonwealth Aboriginal Land Rights Act (Northern Territory) 1976

The box below includes three examples of how rights to water have been included in Native Title decisions. For each, Native Title does not include commercial rights.

Examples of water rights included in Three Native Title Decisions

Griffiths NT 2007

The right to have access to and use the natural water of the determination area; to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and

h) the right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purposes).

Wik 2004 (QLD)

The nature and extent of the native title rights and interests in relation to the flowing, tidal and underground waters of the Determination Area are, as stated in paragraphs 5 and 6, that Native Title Holders have non-exclusive rights to:

a) hunt, gather and fish on, in and from the flowing, tidal and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

b) take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

These rights are for non-commercial purposes only.

Ngalpil WA 2001

c) the right to hunt and gather, and to take water and other traditionally accessed resources (including ochre) for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual and communal needs.

There are also Native Title rights and interests over the sea. This was first recognised in the *Croker Island Seas Claim* (2001). The claimants argued for exclusive rights. Whilst the High court recognised native title, public rights to navigate and fish in those waters were also recognised. Many questions, like access to important offshore sites and to resources of the sea and sea bed remain unresolved. So far, very few native title claims have been made over water further than three nautical miles from the coast.

Indigenous Rights and Conservation Interests

Conservation groups are increasingly interested in land and waters that Indigenous people own or have an interest in. They have also sought advice from, and formed partnerships with Indigenous organisations to advance conservation goals. There is potential for conflicting agendas, but also potential for strategic and positive collaboration.

Wild Rivers Legislation, Queensland

The Wild Rivers legislation aims provide a mechanism to declare certain river systems in Queensland as wild rivers. Once declared, processes and assessments have been set up to ensure their management and development conforms to certain conservation goals aimed at protecting the natural values of wild rivers.[7]

The legislation itself includes safeguards for existing development, but stringent assessment for new development.

Issues that have emerged around the *Wild Rivers Act (QLD)* demonstrate the potential for conflict between Indigenous and conservation agendas. The Cape York Land Council has argued that Traditional Owner's rights to manage and develop land and waters will be diminished by this legislation. For example, development of outstation and homelands settlements, and new aquaculture, agriculture and animal husbandry enterprise may be prevented in areas affected by this legislation[8].

Asserting Indigenous interests clearly to define the terms of conservation on Indigenous land and waters is important to maximise positive collaboration and avoid conservation interests overriding Indigenous Interests. This could include highlighting the central role of Indigenous management for conservation, but also aspirations and rights to development and to resolve any tension in a way that benefits Indigenous people.

7 Declarations currently include the Settlement Wild River Declaration, Gregory Wild River Declaration, Morning Inlet Wild River Declaration, Staaten Wild River Declaration, Fraser Wild River Declaration, Hinchinbrook Wild River Declaration

8 Under this act, there are restrictions on what can occur for 1km either side of any designated 'Wild River' and its related tributaries, floodplain or wetlands.

Onshore Water Rights

Onshore waters include water that sits on and under the land. We know that this is an artificial distinction, because Indigenous peoples have never drawn a distinction between the land and the waters that flow over, rest upon or flow beneath it. They are equal components of 'country', that require care and nurturing, and for which there are ongoing responsibilities.[9]

Access and control of waters has been at the centre of many disputes between Aboriginal peoples and early colonizers. The Crown in Australia has always asserted that it has the right to control and manage water on and under the land. There are native title rights and interests in onshore waters. But it is not clear whether this amounts to ownership of waters, or only a right to use them.

As waterholes and rivers have been damaged and over-used, governments have changed their approach to management. Water markets, where water allocations can be traded, were developed under the COAG water reform agenda (1994). This reform impacts on Indigenous rights to water.

Aboriginal peoples and Torres Strait Islanders have detailed knowledge about land and onshore water management. International recognition for the importance of preserving, protecting and promoting this knowledge is increasing. There may also be commercial uses and this knowledge needs to be protected to ensure that Indigenous peoples benefit from any commercial application of their knowledge.

The COAG Water Reform and the National Water Initiative

The Council of Australian Governments water reform agenda, and the development of a National Water Initiative (2004)[10], is changing the way that waters are managed.

In urban areas, authorities are likely to charge more for water supply. Outside urban areas, the right to use water is being separated from land ownership.[11]

Water management plans are being developed at a catchment level, and land owners will no longer have free use of the water on their land.

Water management plans will determine:

a) the amount of water required to sustain the health of a particular catchment or river system;

b) the 'quota' or total amount of water that can be allocated for use from a particular catchment or water basin each year;

9 Lingiari Foundation 2002 *Onshore water rights discussion booklet* Lingiari Foundation and ATSIC, Broome

10 For information on the National Water Initiative visit the website: **http://nwc.gov.au/nwi/index.cfm**

11 Lingiari Foundation 2002 *Onshore water rights discussion booklet* Lingiari Foundation and ATSIC, Broome

c) who receives water allocations from the quota; and,

d) how much water each user can take.

Existing water users, such as landowners engaged in commercial agriculture and water corporations who supply water, are likely to be given first priority in water allocations. The intention is that owners who can't profit from the use of their water will sell their water quotas to other owners who can. People with water allocations are likely to profit as water becomes more precious and the tradable value of their quota increases.

If Indigenous peoples lose out in the water allocation process, they may have to pay for water delivered to their communities and purchase water quotas to irrigate their lands in the future.[12]

However, there may be opportunities in the new water laws to advance Indigenous interests including:

- recognition of Indigenous interests in water management plans, including, a right to be allocated water for commercial purposes and to decide and set what is sustainable water harvesting;
- a claim for water allocations to be made for the social and economic advancement of Indigenous communities; and,
- through native title claims.

Although Indigenous people did not participate in the negotiation of the National Water Initiative, the special nature of Indigenous interests in water have been acknowledged to a limited degree and informed participation of Indigenous people in the implementation of the National Water Initiative will be required.[13] Jackson and Morrison (2007)[14] have identified four challenges for the National Water initiative as:

- to incorporate Indigenous social, spiritual and customary objectives in water planning;
- to take account of the possible existence of native title rights to water;
- to account for any water allocated to native title holders;
- to include Indigenous representation in water planning.

12 Lingiari Foundation 2002 *Onshore water rights discussion booklet* Lingiari Foundation and ATSIC, Broome

13 Jackson, S (2007) *Indigenous interests and the national water initiative (NWI): Water management, reform and implementation.* Background paper and literature review. Darwin, NAILSMA, CSIRO. Available at: **http://www.nailsma.org.au/publications/indigenous_interests_nwi.html**

14 Jackson, S and Morrison, J (2007) *Indigenous perspectives in water management, reforms and implementation.* In K. Hussey and S. Dovers, Managing water for Australia: The social and institutional challenges. Melbourne, CSIRO.

The water reform agenda impacts on all surface waters (permanent and flowing) and all underground waters. It has committed States and Territories to develop management plans for groundwater and surface water allocation. Committees are being set up to co-ordinate management where states share the same source, such as for the Great Artesian Basin. Under NSW state legislation to enact the National Water Initiative, water allocations to Indigenous interests are recognised.

In the context of growing water scarcity in the south, and increasing concern about the implications of climate change, there is renewed interest and urgency in delivering the governments June 2004 National Water Initiative. In 2007, the government proposed a *Northern Australia Land and Water Taskforce* that seeks to examine the potential for further land and water development in Northern Australia that focuses heavily on agricultural development[15]. This Taskforce is informed by the *Northern Australia Land and Water Futures Assessment*[16]. Indigenous representatives from major regions in northern Australia are engaged on the Taskforce.

Indigenous people have extensive knowledge and significant cultural, social, environmental and social interests in water.

It is important that Indigenous people have a say in these new developments about the management of water. The Indigenous Water Policy Group hopes to better facilitate genuine engagement of Indigenous people in this national water reform agenda, as well as, ensure that polices are informed of Indigenous aspirations and any benefits that may flow from development of water resources share equitably with Indigenous people. To support the direction of the Indigenous Water Policy Group, NAILSMA has also established an *Indigenous Community Water Facilitator Network*[17]. The Community Water Facilitators Network provides for six regional Indigenous community water facilitators and a whole of the north coordinator to support engagement in water planning and research. The aim is for a strategic approach to Indigenous engagement in research on water resource management that is environmentally, culturally, socially and economically sustainable in the national interest and to act as a catalyst to ensure that Indigenous interests are articulated, encouraged and incorporated into water policy. As it has been highlighted by the Indigenous Water Policy Group,

It is no longer appropriate for Indigenous rights to be considered as only about protecting customary values, or native title. Commercial rights require recognition.

15 For more information see: **http://www.environment.gov.au/water/action/development/nalwt-tor.html**

16 For more information on the Futures Assessment see: **http://www.environment.gov.au/water/action/development/index.html**

17 **http://www.nailsma.org.au/projects/indigenous_engagement_in_water_resource_management.html**

The box below includes a case study in Indigenous engagement in catchment planning in the Daly River region.

Daly River Catchment Planning

The Daly River Region in the Northern Territory has been identified as one of the last 'un developed' regions with potential to support irrigated agriculture. There are a number of competing values and uses for this region – ecological, economic (pastoralism, agriculture and tourism), recreational (fishing), customary and cultural.

A catchment planning process including stakeholder engagement was held in 2004. Inadequate Indigenous representation and short time frames led traditional owners to initially withdraw their representative from the stakeholder forum. Since that time, the NT Government and Northern Land Council have supported the formation of an Aboriginal Reference Group representing the language groups of the catchment to provide input to land and water planning. Originally, Indigenous interests were narrowly defined as 'cultural values'. This resulted in the exclusion of Indigenous people from environmental research, regional economic development plans and debates about the commercial use of water. More recently, there has been greater attention given to the full suite of Indigenous interests in land and water, and in the ongoing management of water resources. With the likely development of a water trading scheme for the Daly River, in line with the National Water Initiative, it is imperative that Indigenous groups familiarize themselves with water policy, consider the implications for their estates and communities, and involve themselves in water planning processes[18].

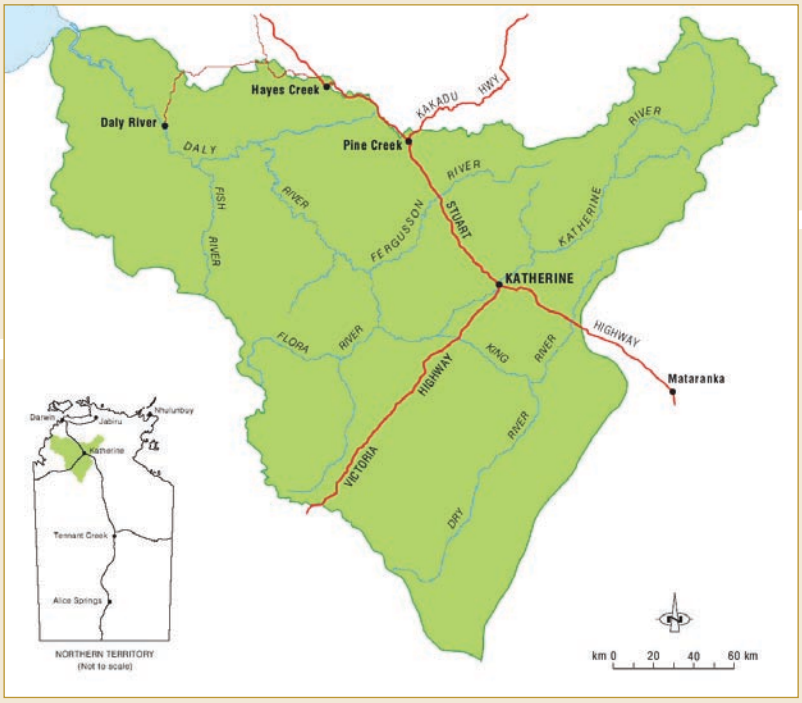

Figure 1 *Daly River Region, Northern Territory*[19]

18 For more information see: Jackson, S (2006) Compartmentalising culture: The articulation and consideration of Indigenous values in water resource management. Australian Geographer 37(1): 19-31; Jackson, S and O'Leary, P 2006. Indigenous interests in tropical rivers: Research and management issues – a scoping study for land and water Australia's tropical rivers program prepared for the North Australia land and sea management Alliance, CSIRO Sustainable Ecosystems, available at **http://www.nailsma.org.au**; and

Jackson, S 2006. Compartmentalising culture: The articulation and consideration of Indigenous values in water resource management Australian Geographer 37(1): 19-31.

19 Source **http://www.nt.gov.au/nreta/water/drmac/images/DalyRiverCatchmentMap.jpg**

Catching and Extracting Water – dams, bores, flooded country and other structures.

The building of manmade structures to capture and take water has been a major part of economic development and expansion in Australia since colonisation. Until now, the social, cultural and environmental issues associated with this have been largely ignored. Large-scale dam construction, in particular, has had a significant impact on not only the environment and its natural living systems, but also on Indigenous culture, heritage and knowledge systems. People's country and sites have been severely affected by some dams.

Man-made structures impact on the health of waterways, starving rivers of water and altering water flows and resources provided by rivers. Many Indigenous people use dams as a source of water from which to take traditional foods, such as fresh water crayfish. Indigenous communities also rely on bores, dams and rainwater collection to supply communities. A lot of money is spent on this infrastructure, and private companies are paid to provide these services to Indigenous communities.

> ***In spite of this, both the quality and quantity of water supplied to many communities remains inadequate and below international health standards. This contributes to the poor health and living standards of many communities and cost to the government.***[20]

Land Management and Water Quality

Land-based activities have affected the quality of surface and underground waters. These impacts can come from things like:

- primary production such as, land clearing that leads to salinity, pollution runoff from chemical and fertilizer use, and, the impact of stock on waterways;
- mining and industry processing;
- waste disposal such as, sewage, rubbish and toxic waste.

There are difficulties in reaching a common understanding of what is necessary to sustain a healthy water system. Although there is a general feeling that polluters should stop, they are often able to resist being made to stop, or to pay.

20 Lingiari Foundation 2002 *Onshore water rights discussion booklet* Lingiari Foundation and ATSIC, Broome

Two suggestions that have been made include:

- The introduction of taxes and tradable quotas, with quotas-to-pollute allocated in the same way as fisheries or water quotas;
- Pollution charges could be imposed to keep pollution loads within the set limit – for example, a 'resources rent', where people are charged to pollute including by Indigenous communities affected by the pollution.

Australian Governments have developed national guidelines for water quality standards.

At present, there is little opportunity for Indigenous participation in deciding these standards.

Concerns have been raised by Indigenous peoples about heavy metal contaminants arising from mining or other industrial activities. This highlights the need for Indigenous peoples' views to be part of the standard-setting process.

Rivers and wetlands are of fundamental importance to many Indigenous people and many Indigenous people across the north are actively engaged in their management. However, resources to support Indigenous managers are often limited. The Federal Government has allocated billions of dollars to land and environmental management programs through the Natural Heritage Trust (NHT) and the National Action Plan for Salinity. Although Indigenous people have had some access to these funds, for example through the Indigenous Protected Areas program, most funds are given out at a general community level. Additionally, the newly announced Caring for Our Country Program, which replaces the NHT, may continue to marginalize Indigenous people if adequate consideration is not afforded to Indigenous people.

Recreation and Enterprise

> ***Indigenous peoples have always blended the benefit and enjoyment from their access to waters, with their sustenance needs and cultural responsibilities related to those waters, leading to a sustainable balance.***[21]

Since colonization commenced, the competing interests of miners, pastoralists, tourism, and other types of development, have broken down that traditional balance. However, the need to fulfill cultural responsibilities and enjoy recreational benefits still remains.

Indigenous peoples are also endeavoring to regain a role in the management and development of water resources – particularly those that are used for tourism, aquaculture and recreation and many have already developed a place for themselves in these areas.

21 Lingiari Foundation 2002 *Onshore water rights discussion booklet* Lingiari Foundation and ATSIC, Broome

There are a range of issues that have been noted by Aboriginal people, including:

- conflicting requirements between mainstream regulations, planning, and management requirements according to traditional responsibilities;
- competing interests, for example, non-Aboriginal tourism and recreation in areas of cultural significance;
- where access to traditional sources of recreation and food is limited, this has an impact on nutrition and the education of children in their traditional responsibilities.

Indigenous communities have, in many cases, shown an enthusiasm for the commercial development of fisheries, which needs to be supported. Indigenous people need to be in a position where their rights in these areas can be recognized and resourced adequately.

It is vital that Indigenous people have a meaningful role in the management of recreational resources so that their cultural and community responsibilities can be fulfilled.

Offshore Water Rights

Offshore waters include all the different kinds of saltwater, and the inter-tidal zone. This is an artificial separation because we know that for many Indigenous peoples, there is no separation between land, rivers and sea.[22]

Offshore waters are valued highly by Australian governments and are governed under a number of different arrangements. In general;

- the States and the Northern Territory manage waters from the coastline up to three nautical miles offshore.
- waters beyond three nautical miles and up to around 200 nautical miles offshore are managed by the Australian Government and are known as Commonwealth waters.

Together the waters managed by the States, Northern Territory and the Australian Government are called the Exclusive Economic Zone. Waters outside of the Exclusive Economic Zone of each country are called the High Seas and are managed under international arrangements.

Different ways of thinking about offshore waters have different implications for the management of offshore waters. The approach that the government is taking is to divide the sea and ocean around the coastline of Australia into zones, or areas, for different uses, such as

- recreation;
- conservation; or
- commercial fishing.

A lack of understanding of Indigenous concepts of ownership and connection with land and seas has caused poor decisions in the past, and knowledge and acceptance of Indigenous views is central to informed decision making in the future.

22 Lingiari Foundation 2002 *Offshore water rights discussion booklet* Lingiari Foundation and ATSIC, Broome

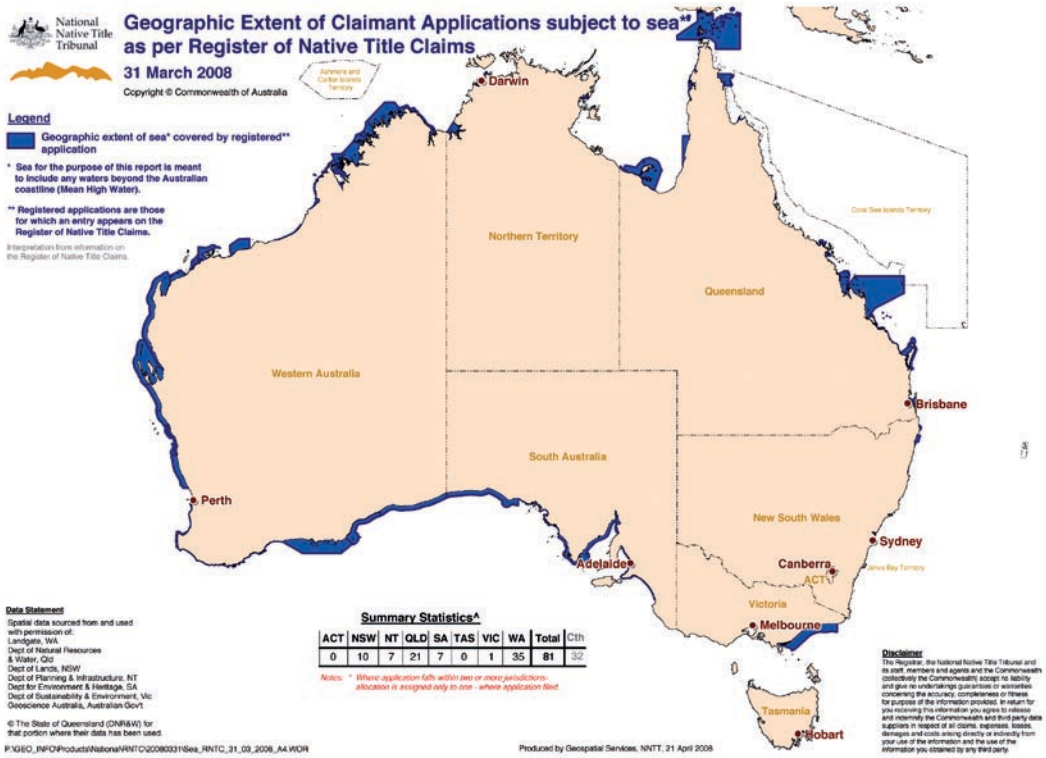

Figure 2 *Areas covered by Sea Claims*[23]

Since colonisation, Indigenous peoples have been concerned to protect their rights to the sea. The European idea that the sea can't be owned by anyone is different to Indigenous concepts of sea ownership, which include the right to exclude others. For thousands of years clans have always requested permission to enter seas belonging to other clans. This practice is still adhered to in many parts of Australia. In October 2001, the High Court decision in the Croker Seas native title test case recognized existence of native title over sea country.

23 Source: **http://www.nntt.gov.au/publications/data/files/Sea_RNTC_A4.pdf**

Fishing Zones and Fishing Rights

Customary fishing

Acknowledgement of customary fishing rights in different State laws across Australia is limited, even though they should be protected under international law. If Indigenous peoples can establish that they hold native title to the sea, their right to fish will be protected by the *Native Title Act 1993*.

Native title rights presently include only non-commercial uses.

Managing fisheries

It's no news for many Indigenous people that if you over-exploit a resource you're heading for trouble. Settler Australia is learning this slowly. The idea of *sustainable yield* – the number of fish that can be taken without causing a fishery to decline – is now being used to help manage fisheries sustainably. Determining sustainable yield is an uncertain process. The capacity of fishers to damage the environment, through overfishing, damage to other species as by-catch and the dumping of fishing gear and other rubbish at sea is undoubted. Governments have made laws to regulate particular types of fishing, or fishing in particular places. This can impact on the rights of Indigenous peoples to continue customary fishing practices.

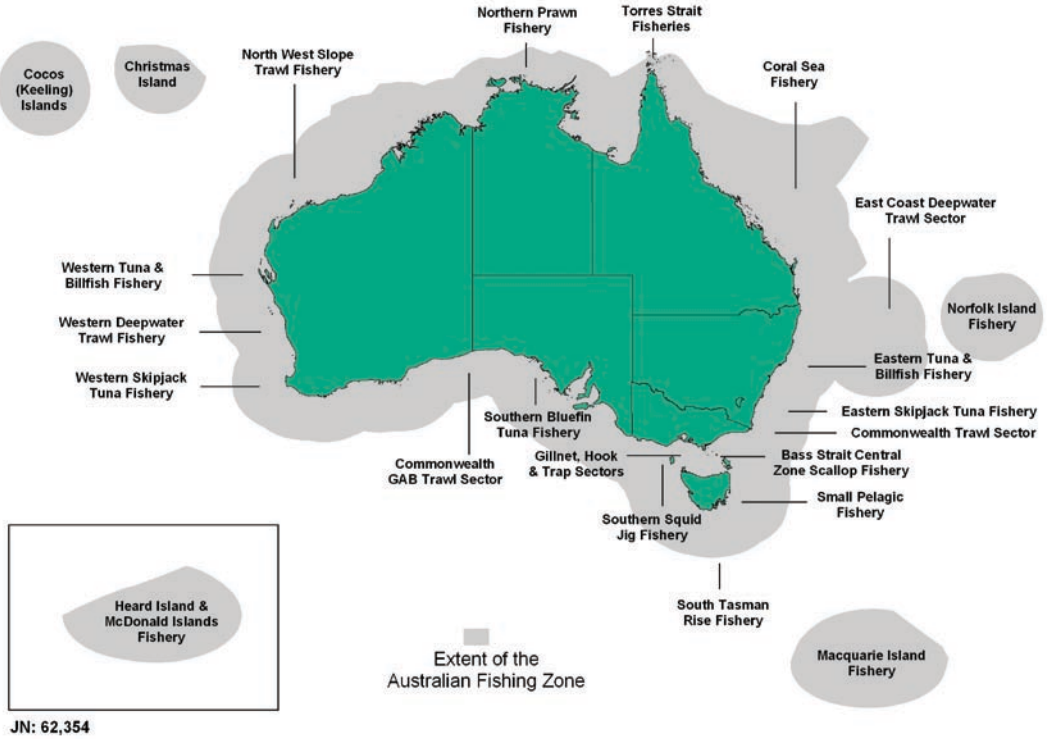

Figure 3 *Fisheries in the Australian Fishing Zone*[24]

24 Source: **http://www.afma.gov.au/information/maps/afz.htm**

Aboriginal and Torres Strait Islander peoples have an important role to play in fisheries management. There is international recognition that proper management of biodiversity depends on Indigenous communities. The maintenance of cultural practices, such as fishing, is also very much dependent on healthy biodiversity. However Aboriginal and Torres Strait Islander peoples currently have very little direct say in fisheries management.

Commercial fishing

Government policy for regulating commercial fishing is moving from a system of licenses and restrictions on the number of fishing boats towards the imposition of fisheries quotas. This is aimed at making sure the amount of fish taken by commercial fishers is in line with the best estimate of sustainable yield. Quotas are worked out by deciding how much of a particular fish can be taken from a particular place over a year, and dividing this total allowable catch between users.

Quota allocation is controlled by the Federal Government. Operations bringing in the largest catch at the time the quota is imposed are likely to receive the largest quota allocation. Once quotas are allocated, they can be bought and sold. A quota system will limit the total amount of fish caught. This means that:

- there should be more fish in the oceans as fisheries recover;
- the catch per fishing-hour will rise, making the cost of fishing less; and
- the price of fish may rise as there are less fish available to buy.

As this occurs, the value of quota will rise. People who are allocated quota in the beginning will profit, and fisheries quotas will cost more to buy. Large operators are more likely to benefit as it could be difficult for smaller operators, including Indigenous operators to stay in or enter the fishing industry. There is no specific allocation or quota for Indigenous people.

There are two national strategies that acknowledge Indigenous commercial rights:

- The National Aboriginal and Torres Strait Islander Fishing Industry Strategy[25] supports the buy-back of fishing licenses to allocate to Indigenous fishing interests;
- The National Indigenous Aquaculture Strategy[26] identifies an opportunity for Aboriginal peoples and Torres Strait Islanders to enter the aquaculture industry early in its development as key stakeholders.

So far there has been no real financial and policy commitment from governments to implement these strategies. Negotiation of agreements with private enterprise, such as through applying the concept of Indigenous Land Use Agreements to the marine environment is another avenue that Indigenous people could use to pursue commercial fishing or aquaculture enterprise (see figure 2).

25 For more information see: **http://www.fish.wa.gov.au/docs/pub/AbFishStrategy/index.php?0007**

26 For more information see: **http://www.daff.gov.au/fisheries/aquaculture/projects**

The Inter-tidal Zone

The inter-tidal zone is the land and waters between the high and low water marks, including estuaries and tidal creeks. It is an area of immense cultural, economic and social importance to coastal Indigenous people. For example:

- as a breeding area for many marine resources;
- for harvest of traditional foods; and
- in ceremonial and spiritual life and as a location for many culturally important sites.

Responsibility for protection of the inter-tidal zone has high priority under Aboriginal and Torres Strait Islander law and custom. This area also has major commercial significance for fisheries, both commercial and recreational.[27]

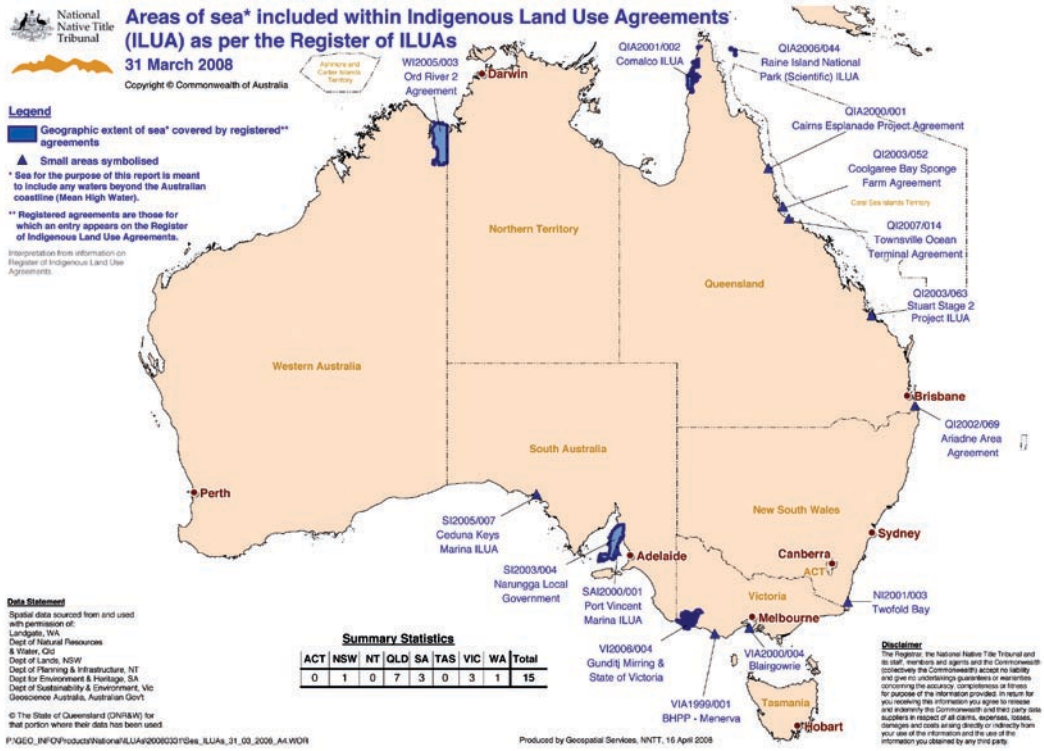

Figure 4 *Areas of sea covered by Indigenous Land Use agreements*[28]

27 Lingiari Foundation 2002 *Offshore water rights discussion booklet* Lingiari Foundation and ATSIC, Broome

28 Source: **http://www.nntt.gov.au/Publications-And-Research/Maps-and-Spatial-Reports/Documents/Quarterly%20Maps/Sea_ILUA_A4.pdf**

Despite the importance of the inter-tidal zone to Aboriginal and Torres Strait Islander peoples, native title to the inter-tidal zone has been limited by the *Native Title Act*. Indigenous Native Title holders have equivalent procedural rights to non-Indigenous title-holders in the inter-tidal zone. However, the Native Title Amendment Act (1998) removed any native title based right to negotiate over developments in the inter-tidal zone. The Blue Mud Bay Decision (2007) has the potential to significantly change the way land rights[29] are recognised in the inter-tidal zone in the Northern Territory.

The Blue Mud Bay Decision

The *Blue Mud Bay* decision (31 July 2008) holds that the simple/freehold title granted to Traditional owners under the Aboriginal Land Rights Act (ALRA) implies ownership of the seabed and the waters in the inter-tidal zone.

In this case, Native Title and ALRA (NT) claims were heard together.

Native Title, amounting to exclusive possession of the waters above the seabed to the low tide mark, was recognised. At the same time, the Yolgnu, who already hold land rights successfully argued that as land rights over the sea bed to the low tide mark already exist, ownership rights are therefore implied over any waters above this area.

This means that permission from traditional owners is now required to enter these areas. As Northern Territory legislation cannot override the Commonwealth land rights legislation, Northern Territory Fishing licenses no longer apply. This decision is also relevant to the Inter-tidal zone adjacent to all land held under the Land Rights Act. This includes in excess of 80% of the coast in the Northern Territory.

The Northern Land Council has highlighted the opportunity that this presents to negotiate a comprehensive settlement over commercial fishing in the inter-tidal zone.[30]

Coastal Waters and Coastal Management

Continual colonization has had a major impact on the coastal environment. Expanding coastal populations, towns and cities has resulted in damage to the coastal environment. A 1993 Commonwealth Inquiry into the Coastal Zone found that the collective benefits from the coastal zone to all Australians will no longer exist unless coastal management changes.

This Inquiry recognized the important role Indigenous communities have to play in all aspects of coastal zone management.

29 Held under the Commonwealth Aboriginal Land Rights Act (Northern Territory) 1976

30 Northern Land Council (2007) Blue mud bay case a win for traditional owners, 2 march 2007 Online resource: **http://www.nlc.org.au/html/files/07_03_02_TO's%20win%20Blue%20Mud%20Bay%20Appeal.pdf** Retrieved 16/6/07

Despite increasing threats to coastal environments, coastal zone management largely remains a state responsibility and is dealt with by complex overlapping laws. Indigenous communities like Kowanyama Community Council on Cape York and the Dhimurru Land Management Corporation in Arnhem Land, who have developed plans for the management of sea country, have been strongly endorsed. As with the inter-tidal zone, the Federal Government has used the *Native Title Act 1993* to limit the rights native title holders may have to negotiate over waters.

Complex cultural, spiritual, ceremonial, territorial, economic connections between Indigenous people and the sea exist regardless of the legal status of claims to sea country[31]. In addition to ongoing claims for legal recognition of rights, the re-establishment/continuance of Indigenous management of marine and coastal resources is leading to strong arguments for increased support for Indigenous sea country management and developing momentum towards a north Australian Indigenous sea ranger's network. Indigenous people are the majority of the public across the north coast of Australia, and are already performing important management work that requires greater recognition and subsequent resourcing by the Australian Government to ensure appropriate management of important coastal ecosystems remain in-tact.

Indigenous managers of sea country, particularly through sea rangers programs are already providing a wide range of services that are of benefit to their sea country and the nation as a whole.

Indigenous Sea Rangers

Indigenous sea ranger programs have developed a high level of skill and organizational capacity among rangers, who perform a wide range of roles. These include:

- Biosecurity surveillance and monitoring for illegal fishing;
- Environmental service provision and cultural management; and
- Sustainable harvesting of marine resources.
- There is momentum building towards the development of a Northern sea rangers network.[32]

31 See National Native Title Tribunal 2007, *Appeal in Blue Mud Bay Case (Gumana) – Full Court* Native Title Hot Spots, Available at: http://www.nntt.gov.au/newsletter/hotspots/1179197243_7564.html; Smyth, D (2004) *Living on saltwater country*. Review of literature about Aboriginal rights, use, management and interests in northern Australian marine environments.

32 Morrison, J and Josif, P (2007) *The future of Indigenous sea country management in the Northern Territory.* In M. K. Luckert, B. Campbell and J. T. Gorman, The case for investing in Indigenous natural resources management: promises and problems in the wet dry tropics of the Northern Territory. Darwin, Charles Darwin University.

Oceans

Since 2004, government planning for oceans has been managed under federal environment law through the Environmental Protection and Biodiversity Conservation Act (1999). In 2005 an initiative known as *Marine Bioregional Planning* was established under the Environmental Protection and Biodiversity Conservation Act. Marine bioregional plans will be developed for Commonwealth waters (waters beyond 3 nautical miles from the coast) for different regions around Australia (see figure 5). First, social, economic and scientific information for each bioregion will be brought together. This information will describe:

- natural processes;
- human uses and benefits; and
- threats to long term ecological sustainability; and
- existing conservation measures.

Much of this work is already underway. Information from consultations with Indigenous people on Saltwater Country is part of this process[33]. Collaboration with stakeholders, including Indigenous people, commercial and recreational fishers and others will be an important part of the development of marine bioregional plans. The plans will be completed around 2010.

Through this process, new measures for conservation, including declaration of additional marine protected areas, will be established. The Government policy on marine protected areas is that they must be "multiple-use", which means that a range of activities may continue to occur in them, as long as they are viewed as consistent with biodiversity conservation. No matter what management arrangements are established for marine protected areas and marine biodiversity conservation, Native title rights, must be respected[34].

33 See Smyth, D (2004) Living on saltwater country. Review of literature about Aboriginal rights, use, management and interests in northern Australian marine environments.

34 This is because the Native Title Act takes precedence over the Environmental Conservation and Protection of Biodiversity Act.

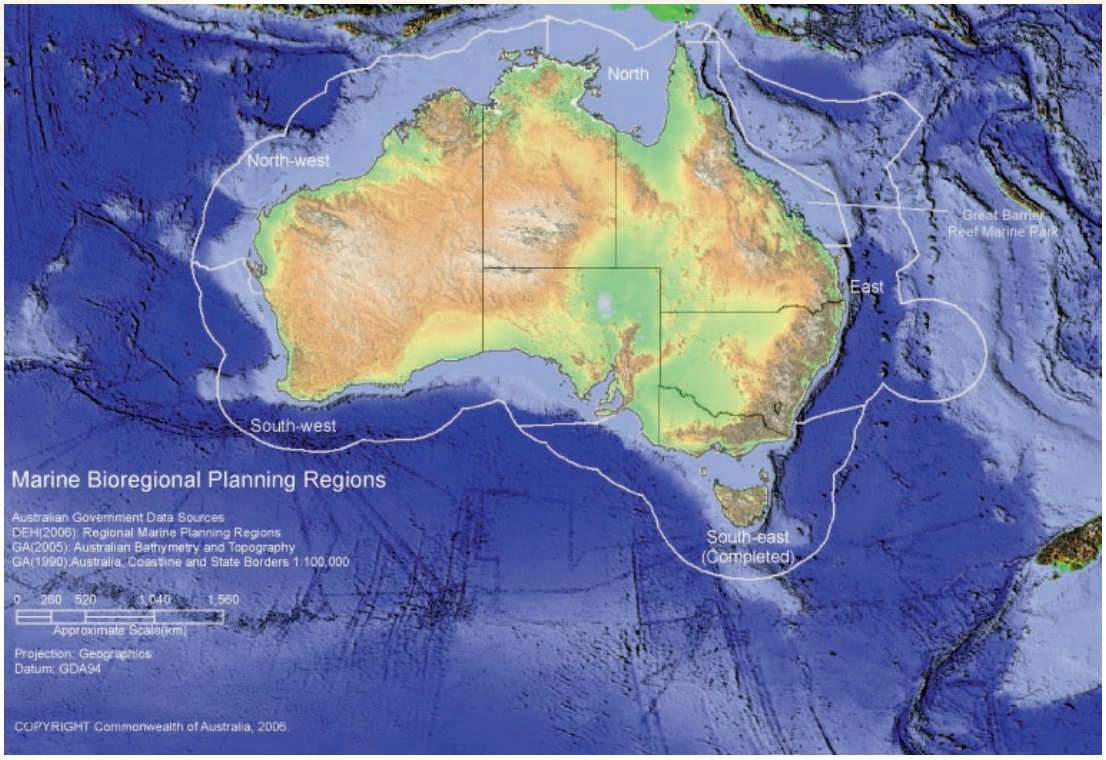

Figure 5 *Marine Bioregional Planning regions*[35]

***Rights and interests that Indigenous people have beyond native title, such as in the development of enterprise in aquaculture or tourism also need to be acknowledged. In the future, management plans for these protected areas will be developed. It is important that Indigenous people define the role that they would like to have in managing marine protected areas*[36].**

35 Source: **http://www.environment.gov.au/coasts/mbp/index.html**

36 For more information see: **http://www.environment.gov.au/about/publications/index.html#marine**

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