occurrence in the Park; and occurs in numbers significantly below the natural capacity for that species (34.2.4);

* No further hunting permitted unless for authorised scientific purposes or for park management (34.2.4);

* Traditional fishing permitted subject to restrictions made only after consultation with a representative on the Northern Land Council (35.5.2);

* A recreational fishing permit may be granted provided the taking does not interfere with the management of wildlife (34.2.4);

* Commercial fishing is not permitted except with the consent of the Director and subject to permit (34.2.5).

Despite these provisions, whether effective control lies in Aboriginal hands, indeed whether there is any degree of formal power sharing, has been questioned. [723] However these criticisms pre-date the 1985 amendments to the *National Parks and Wildlife*  *<<" SRC="/images/contextup.gif">**Conservation** Act 1975* (Cth). [724]

912. Uluru National Park.

The existing plan of management for Uluru National Park was approved in 1983. [725] The plan was to have ceased to have effect on 30 June 1987. However, the grant of Uluru National Park to the traditional owners by the Commonwealth Government, and the subsequent lease of the Park back to the Commonwealth, has led to renegotiation of the management arrangements for the area. The Pitjantjatjara Council and Central Land Council have been involved in negotiations with the Commonwealth and Northern Territory Governments over questions of effective Aboriginal control and management of the Park. Agreement has been reached on the composition of the Board, [726] what comprises six representatives of the traditional owners, one representative each of the Australian National Parks and Wildlife Service, and of the Federal Departments of Sport, Recreation and Tourism and of Arts Heritage and Environment, and two members of the Legislative Assembly of the Northern Territory. The Board when constituted will continue to operate under the existing plan of management. These currently provide for the survey and classification of vegetation in the park incorporating Aboriginal knowledge, together with research on fire management, relying on Aboriginal knowledge of traditional fire regimes (37.2.3-37.2.5).

Pending the outcome of research harvesting by Aboriginals of plants or parts of plants for food, fuel or as primary material for the production of artefacts or for other purposes is to be regulated (37.2.12).

Similar provisions are contained in relation to the hunting of native fauna and food gathering by Aborigines. [727] The Plan of Management further provides for research to examine questions of sustained yield and maintenance of the park ecosystems, in order to determine the feasibility of Aboriginal resource harvesting (44.5.1). Limited harvesting programs which meet approved  <<" SRC="/images/contextup.gif">**conservation criteria agreed upon by the Director of National Parks and Wildlife and by the Uluru Aboriginal Advisory Committee, the Conservation** Commission of the Northern Territory and, as necessary, a representative of the Central Land Council are to be permitted (44.5.2).

913. Future Directions: Jawoyn Land Claim.

The question of effective Aboriginal control of the Board of Management of a National Park on Aboriginal land has arisen in the context of the Jawoyn Land Claim (near Katherine), currently before the Aboriginal Land Commissioner. On the assumption that the claim will succeed, a draft Jawoyn National Park Act has been prepared on behalf of the claimants, after extensive consultation with them and with others experienced in the management of Cobourg and Kakadu. A 12 man Board of Management is proposed, six members of which shall be traditional owners appointed on the nomination of the Land Council (cl 10(1)). As at Cobourg the Chairman would be appointed from among these six members and would have a casting vote (cl 13). The Board would be required to appoint a Planning Committee whose task is to prepare the management plans. [728] It is envisaged that the Planning Committee itself will prepare the plans, thus allowing for Aboriginal input and placing emphasis on Aboriginal values and priorities in the preparation of management plans. One of the

issue arising on Aboriginal land. Thus the Commonwealth shall not acquire land for a park or reserve designated under State law, as having special significance in relation to Aborigines, without the consent of the State (s6(2)). In addition, section 6(3) provides that:

Land in the Northern Territory, other than land in the Uluru (Ayers Rock-Mt Olga) National Park or in the Alligator Rivers Region as defined by the *Environment Protection (Alligator Rivers Region) Act 1978*, shall not, without the consent of the Territory, be acquired by the Commonwealth for the purposes of this Part if it is land that is dedicated or reserved under a law of the Territory for purposes related to 
<<" SRC="/images/contextup.gif">nature conservation or the protection of areas of historical, archaeological or geological importance or of areas having special significance in relation to Aboriginals. [715]

Section 18(1) provides that the Director of National Parks and Wildlife 'may assist and cooperate with Aborigines in managing land not being a park, reserve or 
<<" SRC="/images/contextup.gif">conservation
zone held on trust for, vested in Aboriginal people or occupied by them'. However he may do so only after consultation with any Aborigines who have traditional rights in relation to the land, and only in accordance with an agreement between the Director and the federal Minister for Aboriginal Affairs, relevant State Minister or administrative authority, or any other person or body owning the land, as the case may be (s18(2)). [716] In 1984 the Australian National Parks and Wildlife Service appointed an officer to initiate an Aboriginal Assistance Program to more fully implement s 18. Where Aboriginal land is held under lease by the Director of National Parks and Wildlife, it may be declared by the Governor General to be a park or reserve and administered under the terms of the relevant plan of management. [717] In 1985, the Act was amended to clarify the relationship between the Director of National Parks and Wildlife and the Land Councils in relation to the management of Aboriginal land situated wholly or partly within a Park or reserve. The new provision provides that where the Minister and the relevant Land Council agree to establish a Board of Management and, where the park consists wholly of Aboriginal Land, the majority of members shall be Aboriginal and nominated by the traditional owners (s14C(5)). [718] The Board's function is, in conjunction with the Director, to prepare plans of management, to advise the Minister in relation to the future development of the Park and to maintain the management of the Park. In the event of disagreement between the Director and Board, they shall each advise the Minister accordingly, who if unable to resolve the disagreement, shall appoint an arbitrator (sll(11A) – (lIF)).[719] The Plans of Management for Kakadu and the appointment of the Board of Management at Uluru demonstrate the ways in which the National Parks and Wildlife Service has sought to accommodate Aboriginal interests, as well as the interests of conservation and tourism. If Aboriginal land held under lease by the Commonwealth is declared a park or reserve, then certain activities (mining, the felling of trees, excavations etc.) are prohibited, notwithstanding any Commonwealth, State or Territory law, except in accordance with the plan of management (s 10).

911. Kakadu National Park.

Following 15 years of public interest, and after numerous Government studies and reports, [720] the Kakadu National Park was proclaimed in 1979. The creation of the National Park, on what was Aboriginal land, required amendment to the *National Parks and Wildlife* 
<<" SRC="/images/contextup.gif">***Conservation** Act 1975* (Cth) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The plan of management [721] contains detailed provisions for the involvement of Aboriginal people in the Park's management, [722] including the following:

* Resource harvesting program which meet 
<<" SRC="/images/contextup.gif">conservation
criteria as agreed between the Director and a representative of the Northern Land Council to be permitted (29.5.2);

* Aborigines, not being traditional owners, but entitled by tradition to use the land may so enter and use the land (29.5.6);

* Traditional hunting and foraging to be permitted subject to limitations on the hunting of certain species where the species is officially designated as endangered, nationally rare, threatened or locally of rare or of unusual

very often being reduced considerably (if not abrogated altogether) in the process.

908. Three Main Areas of Concern.

As the following discussion will indicate, Federal, State and Territory legislation and regulations vary considerably. The legislation is by no means consistent or complete, and in many cases difficulties can arise from divergences between legislation and administrative policy. For convenience it is proposed to distinguish between three main areas:

* hunting and gathering rights;

* rights to fish;

* rights of access to land.

In each case it is proposed to deal first with any relevant Commonwealth legislation, then with the States and the Northern Territory. In view of the large and complicated body of legislation and administrative practice, this account is substantially descriptive. The questions of principle will be returned to in Chapter 35, against the background of the present law and practice. [712]

Legislation on Hunting and Gathering Rights

The Commonwealth

909. Wildlife  <<" SRC="/images/contextup.gif">Conservation.

The *National Parks and Wildlife*  <<" *SRC="/images/contextup.gif">Conservation Act 1975* **(Cth) makes provision for the establishment and management of parks and reserves in the Territories and elsewhere in Australia, for purposes such as tourism or the carrying out of Australia's rights and obligations in relation to the continental shelf or in relation to agreements between Australia and other countries (s6 (1)). In general terms the Act provides that land owned and leased by the Commonwealth may be declared a Park or Reserve or designated a wilderness zone and administered by the Director in accordance with the plans of management relating to that Park or Reserve (s7, 11-14). Under s 71(I) the Governor-General has wide powers to make regulations providing for the protection and conservation** of wildlife, and for the preservation of parks and reserves. However such regulations are not to be interpreted as affecting the traditional use of land by Aboriginal people [713] unless expressly stated to do so. Section 70 provides that:

(I) Subject to subsection (2) and to the operation of this Act in relation to parks and reserves and  <<" SRC="/images/contextup.gif">**conservation** zones, nothing in this Act prevents Aborigines from continuing in accordance with law, the traditional use of any area of land or water for hunting for food-gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes.

(2) The operation of sub-section (1) is subject to regulations made for the purpose of conserving wildlife in any area and expressly affecting the traditional use of the area by Aborigines.

There are as yet no such regulations expressly affecting the traditional use of any area of land by Aborigines. [714]

910. Aboriginal Land.

The *National Parks and Wildlife*  <<" *SRC="/images/contextup.gif">Conservation Act 1975* **(Cth) establishes certain basic principles in relation to the Commonwealth's involvement in conservation**

take water cannot be a *profit a prendre* because water cannot be owned, and is not part of the soil. Despite these difficulties, it has been argued that the *profit a prendre* is useful both:

as a tool for analyzing the aboriginal rights [and] as a technique for protecting them. I agree that there are certain common law problems to any such categorization but they are not insuperable on either theoretical or practical grounds. The profit has always been a technique used by the common law to deal with resource harvesting rights held in gross whether this be hunting, gathering or oil and gas rights. Traditionally a profit could not be vested in a fluctuating body because this would tend to the destruction of the resource. But is this a valid concern with aboriginal harvesting, if we can establish a traditional capacity to self regulate the harvest within the limits of sustainable yields? In any event, it would seem that a simple statutory declaration could surmount any technical difficulties posed by the common law. Finally, a profit classification may be of some merit insofar as it may give aboriginal people access to traditional common law remedies such as trespass and nuisance.

Alternative classifications (such as licences) are far more problematic. [706]

The common law rules relating to profits a prendre may be useful in their limited circumstances, but as a vehicle for recognition of traditional hunting and fishing its use is limited. A particular problem is their vulnerability to extinction by subsequent dealings in land.

Conclusion

905. Common Law or Legislation ?

In the absence of any authoritative decision on the point by an Australian appeal court, it is far from clear whether or what customary or Aboriginal hunting and fishing fights would be recognized at common law. Even if the Australian courts do adopt the approach, which at least some Canadian courts have adopted, of recognizing an original customary title or usufructuary right, it is likely in the overwhelming majority of cases that this will have been cancelled or overridden by State, Territory or Commonwealth law or administrative action, [707] or that no one will now be able to demonstrate historical continuity with the original beneficiaries of such rights, so as to be able to rely on them. In the great majority of cases therefore (if not all cases) it will be necessary to rely instead on Australian land-use, <<" SRC="/images/contextup.gif">**conservation** or fisheries legislation to extend protection to Aboriginal traditional hunting and fishing practices.

35. Aboriginal Hunting, Fishing and Gathering Rights Current Australian Legislation

906. Legislative and Administrative Overview.

This Chapter examines Australian legislation as it affects 'traditional' hunting, fishing and gathering activities of Aborigines. It is based on an examination of relevant State, Territory and Commonwealth Acts and regulations, and on discussions with Aboriginal organisations and State and Commonwealth authorities such as Land Departments, Parks and Wildlife Authorities and Fisheries Departments. [708]

907. Historical Background.

As early as 1848, the question had been raised of 'such free access to land, trees and water as will enable [the Aborigines] to procure the animals, birds and fish, etc., on which they subsist', and of the possibility of securing such access by inserting conditions in Crown leases. [709] Between 1867 and 1900, legislation recognising Aboriginal rights to forage was enacted in Western Australia, Queensland, Victoria and South Australia. [710] One example, the Fisheries Act Amendment Act 1893 (SA) s 8, enabled the Governor to declare the whole or any part of any river, lagoon, estuary of the sea, a reserve within which only Aboriginal natives of South Australia would be allowed to fish. [711] This was the first legislative recognition of a fishing right as an independent right, that is, one not couched merely in terms of exemption from prosecution. The intervening years have seen many amendments to the early legislation, with the rights of Aboriginal people to gather food

the sea is the basis of the plaintiffs' statement of claim in Mabo v Queensland and the Commonwealth, pending before the High Court. [694] The action arises from the Queensland Government's intention to grant land currently held as Aboriginal reserves to Aboriginal Councils by way of a grant of a deed in  <<" SRC="/images/contextup.gif">**trust**. This would arguably result in the plaintiffs, traditional descendants of the owners of Mer (Murray Islands) and a member of the Island Council, being prevented from residing on Mer for more than one month without the permission of the Minister of Lands. [695] The plaintiffs argue that since time immemorial and since settlement they have continuously occupied, used and enjoyed the land, and have had exclusive rights to hunt, fish and forage. [696] These rights, they claim, were recognised on the acquisition of sovereignty by Great Britain in 1879, and continue to exist until lawfully impaired. They seek a declaration that they are the owners by custom, the holders of traditional native title, or the holders of a usufructuary right, that these rights are not impaired, or alternatively that the defendants are not entitled to impair such rights without paying compensation. [697]

902. Implications of Common Law Claims in Australia.

In practice common law claims (such as that in Mabo's case) are likely to do little to satisfy the aspirations of most Aboriginal people for land rights. Should such common law claims be accepted by the High Court, Aboriginal claimants must first establish the existence of the right at settlement and their direct descent from those entitled to such rights at settlement. The Murray Islanders are exceptional, having well-identified interests in specific areas of land. As a semi-hunting, semi-agrarian community, they have avoided many of the devastating consequences of widespread displacement and resettlement. But even if it were held that the principle of native title exists in Australia, this would not have helped the plaintiffs in Milirrpum, who were unable to prove direct descent from holders of the land in question at settlement. In other words they were unable to prove 'on the balance of probabilities that [their] predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim'. [698] Secondly, Aboriginal claimants must establish that the right has not been abrogated. In Calder's case in Canada, the majority held that an intention by the Crown (evidenced by Proclamation and Ordinance) to exercise absolute sovereignty on British Columbia was sufficient to extinguish native title, the exercise of sovereignty being inconsistent with 'Aboriginal title'. [699] On the other hand, United States' decisions require a clear and specific indication of intent by Congress to extinguish Indian title; dealings with property that are merely inconsistent with Indian title are insufficient. [700] Justice Blackburn, in the one Australian decision on the point, supported the view taken by the three majority judges in *Calder's* case. [701] The High Court has not yet considered the question. However, it appears that the continued existence of common law rights will be difficult to establish given the extensive statutory basis for land settlement and for the administration of Aboriginal reserves. [702]

903. Customary Rights.

An alternative possibility would be reliance upon hunting or fishing rights as independent proprietary interests of a customary kind recognised at common law. The common law does contain some scope for the recognition of customary rights in some circumstances. The rights relied on must have existed without interruption since 'time immemorial'. The custom asserted must be 'reasonable'. Though its manner of exercise may vary, the right must be 'certain', and in particular the asserted beneficiaries and the locality of the right must be certain. [703] The requirement that there must be proof of a long and uninterrupted use of the right by the inhabitants, and the fact that the custom is unlikely to be considered 'reasonable' where there are others exercising inconsistent rights and asserting control over the subject land, make it difficult to envisage situations where any customary rights could have survived dealings with land in mainland Australia by the Commonwealth and the States. [704]

904. Profits a Prendre.

A distinction is generally made between the right to use land, which comes within the concept of a usufructuary or customary right, and the right to reap the profits from land (e.g. the right to hunt and fish), which cannot be so described because the exercise of such a right could exhaust the subject matter. As such the right to hunt and fish falls more properly into the category of a *profit a prendre*. [705] However a *profit* represents an artificial and unduly restrictive way of describing the right of Aboriginal people to forage. For example, the right to fish or take game may be described as a *profit* for the fish or game once killed can be owned. However the right to

But hunting and fishing rights continue as a prominent aspect of 'customary law' claims in Canada, to which a great deal of attention continues to be paid. [680] Moreover, the mere existence of common law rights, whatever their scope, has been an important factor in the bargaining position of the Indian and Inuit peoples.

898. The New Zealand Position.

The question whether the doctrine of aboriginal title applies in New Zealand was the subject of considerable controversy earlier this century. [681] The principle was first recognised by the New Zealand Supreme Court in 1847 in R v Symonds. [682] But a subsequent decision by Pendergast J suggested that in the case of 'primitive barbarians' as opposed to civilised nations the issue of a Crown grant extinguished whatever native proprietary rights might exist. [683] The possibility of the continued existence of aboriginal title in New Zealand was reopened by the Privy Council in Wallis v Solicitor-General for New Zealand in 1903. [684] Unease at this decision led to the passing of the *Native Land Act 1909*, s 84 of which provided that:

Save so far as otherwise expressly provided in any other Act the native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in another manner. [685]

The combined effect of this legislation and of orders of the Maori Land Court in relation to customary land was to extinguish the possibility of native title to a major part, if not all, land in New Zealand. [686]

Australian Law

899. Absence of Treaties or Special Laws.

It will be clear from the description of Australian legislation in the next Chapter that many of the arguments on which Canadian Indians and Inuit have relied to preserve their hunting and fishing rights are not available in Australia. There is no general federal legislation comparable to the *Indian Act 1951* (Can) s 88. No treaties or agreements, ancient or modern, were concluded by or on behalf of the Crown with Aboriginal or Islander people. [687] There is no conferral of exclusive federal legislative power over Aborigines and Aboriginal land, comparable to that in s 91(24) of the Constitution Act 1867 (Can). There has been nothing comparable to the debates about Indian rights leading to, and following from, the 1982 Constitution.

900. Common Law Protection?

There remains at least the possibility that the common law may be held to protect Aboriginal hunting and fishing rights to some extent. Recent Canadian cases [688] and a series of American and Privy Council decisions [689] establish that when sovereignty over a country is acquired a radical or paramount title to that country vests in the Crown, but that the Crown's title may be burdened by pre-existing proprietary rights. Pre-existing native title has been described as arising from:

the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible to any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested. [690]

The only Australian decision, *Milirrpum v Nabalco Pty Ltd* , [691] denied the existence of a doctrine of Aboriginal title in Australia. Justice Blackburn doubted that the principle could apply to a settled, as opposed to a conquered, colony. Nor was he able to find that the doctrine was part of the English common law at the date of settlement of Australia. It would follow that rights to hunt and fish as an incident of such title would also be excluded. [692] The issue has not yet been considered by the High Court, and was acknowledged by at least some members of the Court to be an arguable one in *Coe v Commonwealth* . [693]

901. Mabo's Case.

A common law right to own, occupy, use and enjoy (and thus to hunt and fish upon) certain islands and areas of

1970 s.14 and the *Yukon Act 1970* s 17(3). [667] There is no equivalent obligation with respect to British Columbia, though attempts have been made to argue that Article 13 of the Terms of Union under which the province entered the Union may render invalid fisheries legislation which adopted a policy less liberal than that pursued by the British Government prior to union. [668]

* The James Bay and Northern Quebec Agreement signed in 1975 provides for priority to be given to Indian hunting, fishing and trapping rights, subject to <<" SRC="/images/contextup.gif">**conservation principles. [669] Paragraph 24.3.3 provides that 'the Native people shall enjoy the sole and exclusive exercise of the right to harvest in accordance with the provisions of this Section.' This right is subject to Federal and Provincial Wildlife regimes and certain other express provisions apart from the interests of conservation**. For example, para 24.3.7 provides:

a) The right to harvest shall not be exercised in lands situated within existing or future non-Native settlements within the Territory.

b) The annexation of land by a municipality or any other public body shall not in itself exclude such areas from the harvesting rights of Native people as long as such lands remain vacant.

Certain species of mammals, fish and birds are reserved for the exclusive use of Native people (para 24.7.1; cf schedule 2). This exclusive use includes the right to conduct commercial fisheries in relation to the species of fish so reserved. Non native have the right to hunt and fish in certain areas (para 24.6, 24.8). The management of hunting, fishing and trapping is controlled by the Hunting, Fishing and Trapping Coordinating Committee on which the Cree Native Party, the Inuit Native Party, Quebec and Canada each have three members. [670] The conclusion of the Northeastern Quebec Agreement has lead to the appointment of two representatives of the Naskapi Native Party and to an increase in Quebec's and Canada's representation to four. [671] The Co-ordinating Committee has been operating since 1975. [672] At the request of the Crees, the Quebec Government is currently undertaking a review of the implementation of the whole Agreement including Section 24. [673] The Quebec Government has concluded a further agreement with the Inuvialuit, [674] and is preparing negotiations with other Indian Nations which are expected to:

come up with completely different solutions in order to prevent as much as possible, conflicts with the white people (private landowners, forest concessions, sport fishing and hunting, etc.). [675]

* There is also a limited and variable degree of protection of Indian hunting and fishing rights under provincial legislation. [676]

In addition to long-established laws and treaties in Canada, there has been much recent negotiation by Indian and Inuit groups to establish the rights they assert on a sounder basis, to resolve land and related claims through comprehensive claims settlement agreements, and to create secure form of self government. In particular s35 of the *Constitution Act 1982* recognizes and affirms 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada'. Section 37 requires a continuing series of meetings between leaders of Indian and Inuit organisations and the First Ministers of Canada and the Provinces in an attempt to define and elaborate upon the constitutional provisions affecting native people. [677] The precise effect of s 35 in reinforcing aboriginal and treaty rights to hunt and fish remains unclear, [678] and for the time being the question is caught up with wider issues of self government and claims settlement.

897. Summary of the Canadian Position.

There is no doubt the range of protections outlined in para 896 is of more significance in Canada than such common law rights as exist. The recognition, particularly at common law. of aboriginal hunting and fishing rights in Canada has in fact 'been quite limited':

even a very general Federal enactment such as the Migratory Birds Convention Act has been held to supersede aboriginal rights and a great variety of overlapping wildlife laws makes the assertion of an aboriginal claim nearly futile. [679]

examination of, or recommendations for resolving, such claims. But, as the review of Australian legislation in Chapter 35 will show, important aspects of the topic are not, and cannot be, resolved through land rights legislation, particularly for those Aborigines who can no longer demonstrate traditional attachment to a particular area of land. The relations between land rights and hunting, fishing and gathering rights may well influence the form the Commission's recommendations can take, but they do not prevent consideration of the questions in the context of the present Reference.

34. Hunting, Fishing and Gathering Rights: Legislation or Common Law?

894. The Relevance of Common Law Arguments.

It has sometimes been argued that Aboriginal hunting and fishing rights exist at common law -- that is, independently of any legislative or executive action. If so, it would follow that such rights continue to exist until abrogated by legislation (either expressly or by necessary implication). In certain cases therefore common law rights to hunt and fish may not be affected by laws of general application. This could arguably happen in two distinct ways, either through the recognition of hunting and fishing rights as incidents to customary or native title, or through their recognition as independent customary rights of a usufructuary kind. [652]

The Position in Canada and New Zealand

895. Two Canadian Cases.

Two Canadian cases in particular show how such arguments may be relevant. In *R v White and Bob*, [653] the defendants were charged with hunting deer during the off season under a British Columbian Game Act. Justice Norris, one of the majority, held that aboriginal hunting and fishing rights had existed in favour of the Indians from time immemorial. These rights continued to exist as 'personal and usufructuary rights' under the British Crown when it acquired sovereignty over Vancouver Island. Since their rights had never been extinguished, provisions of the Game Act affecting the right to hunt and fish did not apply to the defendants. In *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*, [654] the plaintiffs sought a declaration that the lands comprising the Baker Lake area of the Northwest Territories were 'subject to the aboriginal right and title of the Inuit residing in or near that area to hunt and fish thereon'. Justice Mahoney, relying on the Supreme Court's apparent agreement, in *Calder v Attorney-General for British Columbia*, [655] on the existence of native title in the absence of lawful termination or exclusion, granted the declaration. [656]

896. Other Canadian Developments.

However, Canadian Indian and Inuit hunting and fishing rights are recognised in a variety of ways apart from at common law. [657] These include:

* Band council by-laws operating within a reserve pursuant to the *Indian Act 1951* s 88; such by-laws exclude provincial' legislation, though the position with federal legislation is unclear. [658]

* The provisions of Indian treaties, which prevail over provincial law [659] but not over subsequent clearly applicable federal legislation. [660] Treaty hunting and fishing rights are limited to unoccupied land, [661] and the courts have sometimes been strict in requiring proof of continuance of the treaty and of the descent of claimants from the original treaty Indian group. [662]

* Protection is also afforded by the Royal Proclamation of 1763 to those Nations and tribes of Indians who lived under British Protection. [663]

* Certain provisions of the Natural Resources Agreements 1930, subject to which Crown land was transferred to Alberta, Saskatchewan and Manitoba, protect the Indians' 'right ... of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right to access'. [664] Inconsistent provincial legislation is accordingly excluded [665] but not inconsistent federal legislation. [666] Similar provisions are contained in the *Northwest Territories Act*

fishermen taking dugong in their nets, while non-reserve Aborigines were not able to take dugong [638] and it was argued that hunting and fishing rights are indigenous rights. [639] The question of dugong hunting was also raised at Rockhampton. [640] On the North Coast of NSW the Commission was told that two men had been charged with killing wallabies for food and that 95% of Aboriginal people on the north coast are unemployed, resulting in heavy reliance on bush tucker for food. [641] At Aurukun there were allegations that commercial fishermen had placed nets over the mouths of the rivers, fished up the rivers and interfered with sacred sites. [642] At Doomadgee there were concerns about restrictions on the hunting of goanna. [643] Further requests for recognition and protection of hunting and fishing rights were raised in Kowanyama, Edward River, Weipa, Aurukun, Lockhart River, and Mornington Island. [644] The Tasmanian Legal Service pointed out that mutton bird hunters were in breach of the law if they did not obtain a licence, that even where the licence was obtained bag numbers were unrealistic, and that trespass laws conflicted with customary laws. [645] Requests for recognition have also been made in other forums. The Makarrata demands put forward by the National Aboriginal Conference claimed among other things:

7. The rights to hunting, fishing and gathering on all lands and waterways under the jurisdiction of the Commonwealth of Australia.

22. Timber rights to all forests and timbered areas within Aboriginal territories, including all waterways. [646]

Increased involvement for Torres Strait Islanders in matters affecting fishing in the Torres Strait has been sought by the Queensland branch of the National Aboriginal Conference. [647] A State Land Rights Meeting held in Sydney in September 1983 called for New South Wales fisheries and  <<" SRC="/images/contextup.gif">**conservation** legislation to be amended to accord with traditional hunting and fishing interests. [648] Sea closure applications and submissions to the Western Australian Aboriginal Land Inquiry also raised the question of Aboriginal hunting and fishing rights:

Claims to hunt and fish were made by Aboriginal groups living in the agricultural areas of the South West of the State. Some South West Aboriginal people claim the right to have access to farmland for kangaroo hunting and to pick wildflowers. They want access for the same purposes to fauna reserves and national parks. In the Geraldton area they wish to have access to local stations to do such things as shooting wild goats. In some areas there is complaint that there are farmers who will not give Aborigines permission to shoot kangaroos for food on farms when the same farmers will give permission to professional kangaroo shooters for profit. One South West Aboriginal described how only forty years ago his father supported the family by hunting and fishing in the Brookton area. The expansion of the farmed areas of the South West has ended those possibilities. [649]

892. The Significance of these Issues.

The significance of bush and sea food to many Aboriginal communities both in terms of diet, lifestyle and customary laws and practices, which is clear from the material cited in this Chapter, is strong support for the appropriate recognition of hunting, fishing and gathering rights. Much of the material cited is based on observations and reports of experience in the more remote communities and there are dangers of generalisation. This point was emphasised by the National Farmers Federation. [650] It is true that for other Aborigines, hunting and gathering may not take on such significance, either in terms of diet or of maintaining traditional ways of life. Hunting or fishing may be, for some, a recreational activity and a chance to enjoy particular foods. Further attention will be given to. the diversity of Aboriginal lifestyles and the relative importance of traditional hunting and fishing activities in Chapter 36.

893. Relationship with Land Rights.

As pointed out in Chapter 11, [651] issues of the grant of land rights (and seabed rights) have been treated as outside the scope of this report. The Commission does not seek to duplicate work being done by other Commonwealth or State bodies or commissions of inquiry. Given the extent of this activity, issues of land rights, including customary law rights to land and the seabed, have not been directly dealt with in this Report. The question is what implications this has for the treatment of traditional hunting, fishing and gathering rights. It is possible that the grant of !and or sea-bed by the Commonwealth and/or State Parliaments will resolve some of the significant claims to those rights. Certainly, it is not possible to ignore land rights legislation in any

before the people of one estate may enter on to the land of another:

they must first know the songs and then must have seen the sites or been shown the location of the sites in that estate. [627]

Entitlement to forage is the right to hunt and gather food. However, where a grant of land is made under the Act, the grant of land is for the benefit of Aborigines entitled by Aboriginal tradition to the use or occupation of that area of land, 'whether or not the traditional entitlement is qualified as to place time, circumstance, purpose or permission'. [628]The two requirements serve different purposes:

an entitlement to forage goes to a finding of traditional ownership. A right to the use or occupation of land other than that of the local descent group is relevant to the form of any recommendation made. [629]

The Northern Territory land claim experience thus provides judicial recognition of the nexus between land use and claims to 'own' land. But it has also established that the entitlement to forage usually, if not invariably, extends beyond land claimed by one descent group into land of others. The Land Commission's hearings have acted as a catalyst for research into these questions. However they have been limited to those traditional Aborigines who are in a position to claim entitlement to land in the first place. The power to bring a land claim does not assist those Aborigines who have been dispersed and resettled, for whom proof of traditional attachment to their particular land may be no longer possible. Nor does it assist those whose land is no longer 'unalienated Crown land' claimable under the Act. But these people may also, and legitimately, wish to supplement their diet by hunting and gathering on land. Clearly the needs of each group may have to be met in differing ways.

890. Sea Use and Ownership of the Seabed.

In 1908, Wilkin stated'

As foreshore rights of landed property extend not only over the adjacent reef, but to the water over it - as in the case of fish caught in the area - so the inhabitants of certain areas appear to have a pre-emptial right to certain distant fishing stations which lie off their part of the coast. [630]

Commissioner Woodward considered that Aborigines generally regarded the estuarine, bays and waters immediately adjacent to shoreline as being part of their land. [631] Little is known about traditional sea rights or fishing practices some distance from land, most research being conducted into estuarine and in-shore fishing practices. Recent anthropological research into traditional territory fights to the seabed has yet to reach the detail and comprehensiveness of that completed on territorial rights to land. However studies in North East Arnhem Land [632] and the Torres Strait [633] indicate that clear territorial sea-bed boundaries can be established, at least in some cases. [634] These have been made the basis for applications for closure of the seas under the *Aboriginal Land Act 1978* (NT). Section 12 requires the Aboriginal Land Commissioner to consider sea closure applications referred to him by the Administrator. Matters to be considered by the Commissioner include whether Aboriginal tradition restricts entry by strangers into the particular seas, and whether use of the seas by strangers would interfere with Aboriginal traditional use of the seas by those Aborigines who were traditionally entitled to use the seas (s12(3)(a), 12(3)(b)). On the other hand the Aboriginal Land Inquiry in Western Australia preferred not to recommend a system of sea closures which could create 'more exclusivity than is necessary to protect traditional interests'. [635] The Commissioner rejected the vesting of the sea bed in Aboriginal claimaints and sought other methods of protecting Aboriginal traditional fishing interests. [636]

The Commission's Approach to Recognition

891. Claims for Recognition of Hunting, Fishing and Gathering Rights.

Although, questions of hunting, foraging and fishing rights remain of considerable importance in some areas, the Commission has had only a limited number of verbal or written comments or submissions on these questions. During the public hearing at Port Augusta there were complaints that pastoralists were trying to keep Aboriginal people off their land contrary to the reservations in their pastoral leases, though it was stated that no charges had been laid under wildlife provisions. [637] In Cairns complaints were made about commercial

assumed that it exceeds 80 percent, and in places well over 90 per cent. [618]

Another way of assessing the significance of bush food is to quantify its value in monetary terms. After valuing the subsistence food production at Momega Outstation at market replacement value, Altman concluded that:

Quantifying production for use in this way gives a more accurate representation of the Momega outstation economy, for about 64 percent of total cash and imputed income came from subsistence production. In other words quantification of hunting, fishing and gathering activities indicated that subsistence production was the mainstay of the economy. Only 26 percent of total income (but 72 percent of cash income) came from social security payments; and 10 percent of total income (and 28 percent of cash income) came from production of artefacts for market exchange. [619]

Relationship to Land and Seabed Rights

888. Land Use and Ownership of Land.

Discussion of hunting and gathering in terms of sustenance or of tradition does not mean that these questions can be divorced from the question of land. For Aboriginal people the two are inseparable:

The shift from a hunter-gatherer mode of subsistence to a sedentary lifestyle on government settlements, cattle stations, missions and towns has meant more than the loss of land for Aboriginal men and women. Today they no longer control the resource from which both physical and spiritual sustenance may be drawn. The use one makes of the land and the spiritual maintenance of that land in ritual are intertwined and underwritten by the law. [620]

The relationship between rights to hunt and gather and 'ownership' of or 'title' to land is however highly complex, and has been the subject of much anthropological debate. [621] The terms 'estate' and 'range' have been used to distinguish ownership or custodianship of land from land use, and 'clans' and 'bands' to distinguish land-owning from land-using groups. [622] There is a danger that whatever terms are used may conceal the flexibility and diversity found in Aboriginal societies. [623] Dr Hiatt's study of the Gidjingali illustrates the way in which land using groups may forage over land owned by others. He commented in their case:

If every land-owning unit had had to depend solely upon the resources of its own estate, some would certainly have perished. (During the major tidal inundations salt water alone was available on the estate of one unit and on that of another there was no fresh water at any time). The diets of many others would have been monotonous and, at times, meagre. But the inhabitants did not suffer such hardships because they took open access to food and water for granted. People maintained a roughly uniform standard of living by moving over one another's estates and freely exploiting the resources. The region was rich in natural products. When a community exhausted the food supply in one place, it moved to another. On occasions the members visited neighbouring communities, and at other times acted as their hosts. Sharing deprived no one of basic requirements, and land owners from time to time had the satisfaction of fulfilling expectations of generosity. [624]

889. Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

The definition of 'traditional Aboriginal owners' in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) talks not only in terms of the 'local descent group with common spiritual affiliations to a site and primary spiritual responsibilities for that site and for the land', but also requires an entitlement by Aboriginal tradition 'to forage as of right over that land' (s3(1)). The Land Commissioner has taken the view that the requirement of an 'entitlement to forage as of right' must spring from Aboriginal tradition, [625] and that it must involve a right to forage over the land of the descent group. [626] As Justice Toohey pointed out in the *Uluru* Report:

That may not be the same as the land claimed: in most cases it will not be because the claim area will involve several local descent groups. I do not think it is necessary, in order to find traditional ownership, that each local descent group has a right to forage over an area wider than that for which the group has primary spiritual responsibility... It is beyond question that the members of each estate are entitled to forage as of right over that land. Evidence of this emerged at every turn ... A more difficult question is whether the evidence demonstrated a right in the members of one estate to forage over the land of another. Dr Layton expressed the view that

been possible because, rather than just responding to changed circumstances, Gunwinggu have created their own economic and social environment, within the structural limitations placed on their lifestyle. [607]

Not all remote communities have been able to demonstrate the resilience of the Gunwinggu, and the experience has varied enormously. Empirical studies demonstrate this divergence, but also show how traditional hunting and fishing remain important to many Aboriginal groups. [608] Further studies have documented the nutritional composition of Aboriginal bush foods and have demonstrated that traditional Aborigines continue to use an extraordinarily wide range of plants and fish for different purposes. [609] In doing so they indicate a considerable depth of knowledge of natural resources. [610]

886. The Evidence of Land Claims Hearings.

Evidence of Aboriginal reliance on bush food is important in land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). A key feature of the definition of 'traditional Aboriginal owners' in s3(1) of that Act, and one that must be established before the Commissioner can recommend a grant of land under the Act, is the requirement that the 'local descent group' must be 'entitled by Aboriginal tradition to forage as of right over that land'. Referring to this aspect of the definition, the then Aboriginal Land Commissioner (Justice Toohey) found that at Roper Bar:

There was certainly evidence of a wide range of activities falling within such a broad definition. As well as the hunting of kangaroo, bush turkey, goanna, porcupine and the gathering of sugarbag, yams, berries and various fruits, and fishing in the Roper River, there is regular activity on the claim area to seek out materials for artifacts. Coolamons, didgeridoos, boomerangs, woomeras, spears, pipes and stone knives are made by the claimants. Some are decorated and sold through Mimi Aboriginal Arts and Crafts Pty Ltd in Katherine. Others are used in the daily and ritual life of the claimants. One of the places visited in the course of site inspections, Burunngu, was pointed out as a particularly good source of a certain type of pandanus leaf, suitable for making baskets ... In the end it is unnecessary for me to decide whether the word 'forage' can be given so broad a meaning as to include all these activities. The Act is concerned with entitlement to forage rather than with foraging itself, though the latter may well be the best evidence of the former. There was evidence from witnesses for both estates that people other than the traditional owners of the land may and do come onto that land to fish and search for food. [611]

Evidence of the importance of traditional fishing has also been brought in applications for sea closures in the Northern Territory. [612] During the course of the Western Australian Aboriginal Land Inquiry, the Commissioner, P Seaman QC was presented with evidence of the importance of Aboriginal hunting and fishing in Western Australia. He concluded:

It is clear from the hearings that kangaroo hunting is an important part of South West Aboriginal life. I accept that it is more than a recreation, being a significant source of meat for many Aboriginal families, and a significant expression of their feeling for land and culture which they have lost. They might find it much more difficult to establish traditional hunting and fishing rights than Aboriginal people in more remote areas. [613]

887. Some Quantitative Data.

There is little quantitative data that reliably demonstrates the significance of bush foods today. It has been said that the 'true extent of use/or nonuse of bush foods is unknown'. [614] However three recent detailed studies quantitatively measure the modern significance of bush food. [615] Altman's study at Momega Outstation found that bush foods constituted 81% of the protein, and 46% of the kilo calories consumed. In all some 90 faunal species and 80 plant species were taken for food. [616] Meehan's detailed study, concentrating primarily on the role of shellfish in the diet of the Anbarra taken over an entire year, produced similar results. [617] Speaking of these studies Young has stated that:

the only communities which would show similarly low levels of dependence on purchased foods would be the outstations associated with Yirrkala, Galiwin'ku and Aurukun, and in all cases these contain well under half the total Aboriginal population. In all the other case-study communities - in the Kimberleys, the central desert and the centralised communities of northern regions - store food accounts for most of people's nutritional intake. While there are no detailed analyses of the exact contributions of purchased foods in such places, it can be

[598] A person's age, status and sex had a bearing on his right to take certain species. At Mornington Island, the Commission was told that the community wished to continue to punish people for breaches of the following laws relating to food taboos:

* a person cannot eat an animal, fruit or vegetable if it is their own totem;

* pregnant women and young women must eat the right food as directed by the elders. [599]

Athol Chase provides the following example:

[I]n parts of Cape York dugongs could be approached, killed and eaten only by older initiated men. For women, youths and children even to be in contact with water which had dugong grease floating on it meant that they would become very ill. People. in these categories could not even touch equipment to be used in hunting dugongs for fear that illness and misfortune would result. [600]

Defined rules for the distribution of food were important for the building of reciprocal obligations. RM Berndt comments that:

The field of economics... is not concerned only with obtaining food. It must be seen in reference to a network of obligations, of reciprocal relations, either indirect or direct, and involving intangible as well as tangible commodities, services as well as goods. It must be seen, too, in terms of persons of both sexes doing things for others according to the 'rules', and for social as well as personal reasons, with expectations of some kind of a return always in mind. Even within the immediate sphere of food collection, it was never simply that women obtained one kind of thing, men another; even if it were so, religious elements must also be taken into account... In one way or another, it was men and women in co-operation who formed the basis of traditional economic systems. [601]

885. Continued Importance of Traditional Hunting, Gathering and Fishing Rights.

Aborigines have had to adapt to change and outside influence, including the payment of welfare benefits in cash and the introduction of rations and store-bought food. Nonetheless, especially in more remote areas, hunting, foraging and fishing continue to be of economic and ritual importance, despite the impact of commercial interests. [602] In many cases hunting and fishing practices have incorporated new materials. Nylon fishing nets may have replaced those made of bush fibre, fencing wire may be converted into hooks for fishing spears, guns may very often replace spears, aluminium dinghies are used instead of dugouts, crowbars as digging sticks and car springs as adzes. Yet wooden digging sticks, traditional fishnets and traps, spears, harpoons and natural products such as bloodwood leaves for poisoning fish are still used. [603] Aborigines have become accustomed to newly introduced species in their diet. [604] More fundamentally, material aspirations and internal conflicts (e.g. between young and old) have placed pressures on traditional values such as sharing. Changes to the traditional economy, for example the introduction of shop bought foods, have resulted in fundamental shifts in the economic and social roles of men and women. [605]

In Aboriginal Australia before white settlement, women worked constantly and that contribution made them indispensable to their men folk. Rations relieved women of the burden of food - getting but made them primarily someone's wife and mother. Today women have no security as independent producers but are dependent on social security payments which entail relationships over which they have no control. [606]

Despite all these changes, it is clear that hunting, gathering and fishing are of continuing importance in the lives of many Aborigines. Airman concludes his analysis of the impact of outside influence on the Gunwinggu of North Australia in the following words:

The hunter-gatherer economy is resilient ... but its Achilles' heel is its vulnerability to the presence of large population concentrations. The eastern Gunwinggu economic system has shown remarkable resilience in adapting to changed circumstances following European colonisation. In previous countless millennia, Gunwinggu had extremely limited external contacts. But in the past twenty to thirty years, they have created an economic system, that incorporates important elements of the traditional cultural and economic systems, yet is enmeshed with a complex set of relations with the alien market economy and welfare State. This situation has

882. Traditional Hunting and the Law.

Traditional Aborigines have been regarded as the sole surviving representatives of hunters and gatherers in Oceania. [586] Bush food continues to form part of the diet of many Aboriginal people outside urban areas. But traditional hunting and fishing activities are not concerned only with subsistence. The close relationship between economic activities and the law has often been described. Sackett suggests that for Aboriginal people at Wiluna:

Hunting ties the past to the present, but is not simply a survival of some prior subsistence gambit... Most importantly it is an aspect of the law. As such it offers a venue through which certain men can and do display concern for the belief system ... Just like ritual, hunting affords men the opportunity of making claims regarding their position and right to authority in the group ... To hunt, then, is, as with ritual participation, to follow the Law, demonstrate its great potency, and guarantee its continuance. [587]

It was the law, in the full customary sense, that linked the use of land and sea with the spiritual maintenance of that land and sea through ritual. [588] Rituals to maintain the land and replenish the food supply were thus an important part of traditional life. [589] Altman says of the Gunwinggu:

Many of the rites performed at rituals, particularly at the currently prevalent Gunabibi ritual cult, involve the enactment of totemic dances that are explicitly linked to a concern with the reproduction of certain animal species... At ceremonies men share esoteric knowledge about animals' secret names, subsection terms and kinship categories. This male ritual concern has a secular corollary in the maintenance of the men's hunting economy: for it seems reasonable to argue that were links not conceptualised between the increase elements of ceremonies and the exploitation of game, then ceremonial focuses would have altered. When game is fat, healthy and abundant, men often state explicitly that this was proof of powerful bisnis (ceremony). [590]

883. Management of Natural Resources.

As an aspect of this care and responsibility for land Aborigines were careful to regulate the use of its natural resources. For example, according to TGH Strehlow the important ceremonial places of the Aranda had:

a sacred cave or tree storehouse for the local sacred objects and consequently its immediate

environs constituted a prohibited area, whose edge was generally about a mile (or even more) from the sacred cave. Within these sacred precincts all hunting and food gathering was forbidden. Even wounded animals could not be pursued into this forbidden zone which would be entered only for ceremonial purposes. [591]

As Maddock points out, these rules forbidding hunting near ceremonial sites in effect created game sanctuaries, and it was not only barren land and waters that were regulated in this manner:

The main waterhole of Japalpa remained a game reserve for fish, ducks, and all kinds of water birds, and so did the banks of the Finke along the first two miles of ponds at Irbmangkara. Again many of the finest waterholes in the Macdonnell Ranges provided inviolable sanctuaries for kangaroos, emus, and native animals of every kind. [592]

Anthropologists cite examples of traditional  <<" SRC="/images/contextup.gif">**conservation practices, including trees germinated in coastal regions being transplanted close to inland camp sites, [593] of yams being replanted, [594] the rotation of fishing areas [595] and the controlled use of fire. [596] Evidence given during the Jawoyn Land Claim indicated that the return of Aboriginal people to their land had enabled conservation** practices to be resumed. [597]

884. Customary Rules and Prescriptions.

Strict rules governed not only the taking of certain species but also the consumption and distribution of food.

PART VII - THE RECOGNITION OF TRADITIONAL HUNTING, FISHING AND GATHERING RIGHTS

33. Traditional Hunting, Fishing and Gathering Practices

Access to the country of one's forebears provided substance for the Dreamtime experience and an identity based on the continuity of life and values which were constantly reaffirmed in ritual and in use of the land. Economic exploitation of the land to support material needs, and its spiritual maintenance were not separate aspects of people's relations to country, but rather each validated and underwrote the other. The land was a living resource from which people drew sustenance - both physical and spiritual. The nexus between the two was shattered with the alienation of land by mining and pastoralists' interests. [581]

Relevance of these Issues

881. The Aim of this Part.

In this passage Dr Bell describes Aboriginal experiences in Central Australia. These experiences are shared by other hunter-gatherer societies that have had to make, or endure, the transition to farming, mining or other commercial land uses. The shift away from a hunter-gatherer economy, and the subsequent destruction of hunting and fishing grounds to make way for towns and industrial development, have been accompanied by legal restrictions on the right of people to hunt and forage for subsistence purposes. [582] Restrictions on foraging on land belonging to another are now usual. There has also been a realisation that steps must be taken to preserve endangered species. Rights to hunt and fish have been restricted further by governments in many countries in an attempt to regulate the commercial exploitation of the world's natural resources. In the past 200 years Aboriginal people have seen their economic interests similarly affected. In many cases their land was taken away, or its productivity drastically affected by pastoral and mining activities. [583] In more recent times Aboriginal hunting and fishing rights have been further whittled away by legislation. [584] A balance should be struck between acknowledging the rights and interests of Aboriginal people, and other interests, including 

and the management of natural resources. To some extent this is happening already. On the one hand, the right to pursue a traditional lifestyle, a right recognised by the Commission's Terms of Reference, implies a right to use the land to forage and gather food for consumption. On the other hand, other factors, including the impact of new hunting techniques, and the need to regulate commercial exploitation of species, mean that no simple solution to the question of recognising traditional hunting and gathering rights is possible. It is important to determine whether a more equitable accommodation of interests than currently exists can be devised. Any such accommodation should take account of Aboriginal traditions and practices, the special relationship of Aboriginal people to the land, the fact that Aboriginal traditions may be changing, and the role of hunting and gathering in the economies of many Aboriginal communities. The role of governments vis-a-vis Aboriginal groups, who are seeking control over decisions that affect their lives, should also be reassessed. [585] This part of the Report describes briefly Aboriginal hunting and fishing practices in Australia (Chapter 33), and whether they have a degree of recognition at common law (Chapter 34). The extent to which federal and state legislation supports or detracts from these interests is examined in Chapter 35. Finally, Chapter 36 considers the principles which should guide reforms aimed at recognising Aboriginal hunting, fishing and gathering practices.