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**Towards a comprehensive
regional agreement: Torres
Strait**

W.S. Arthur

No. 147/1997



DISCUSSION PAPER

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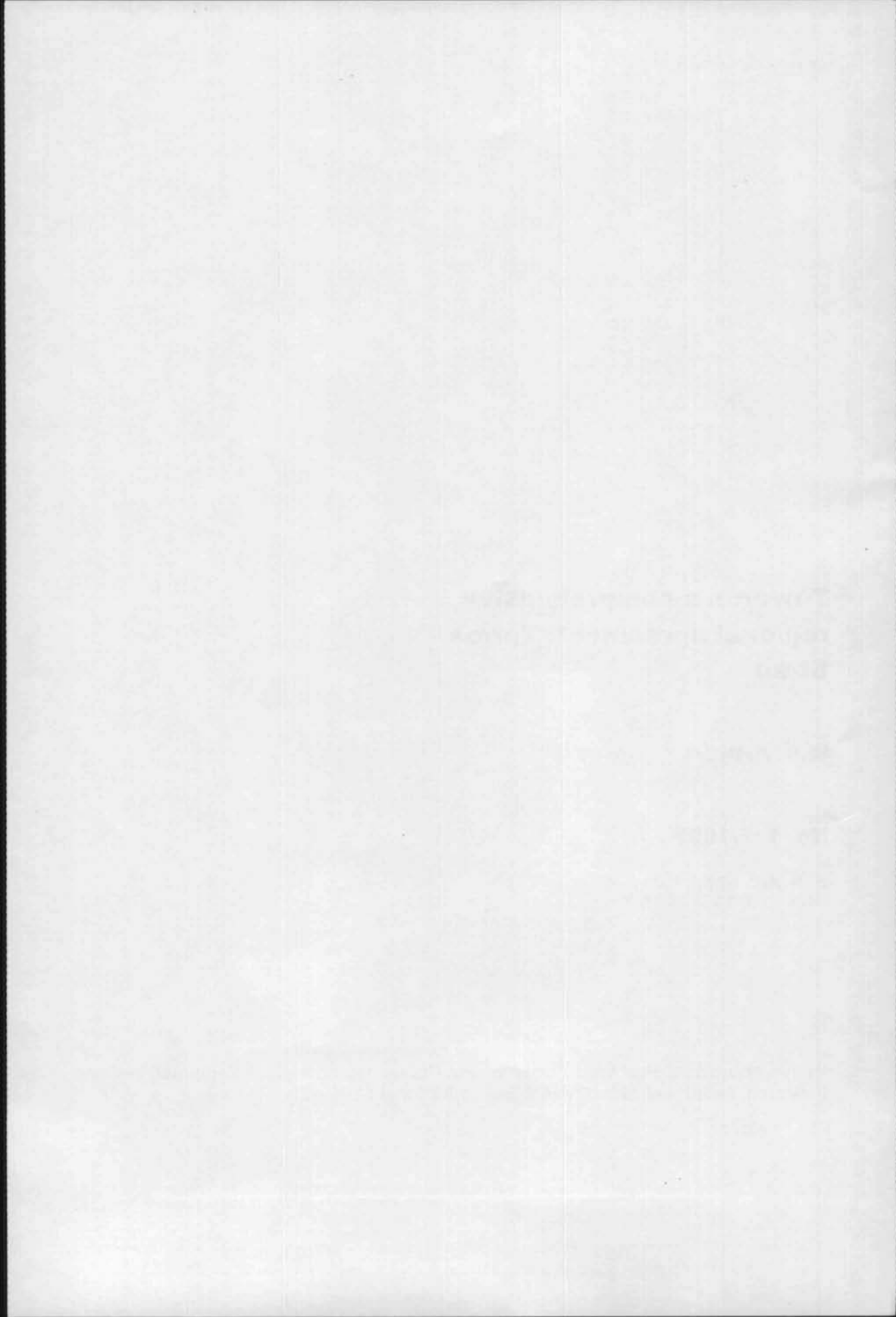
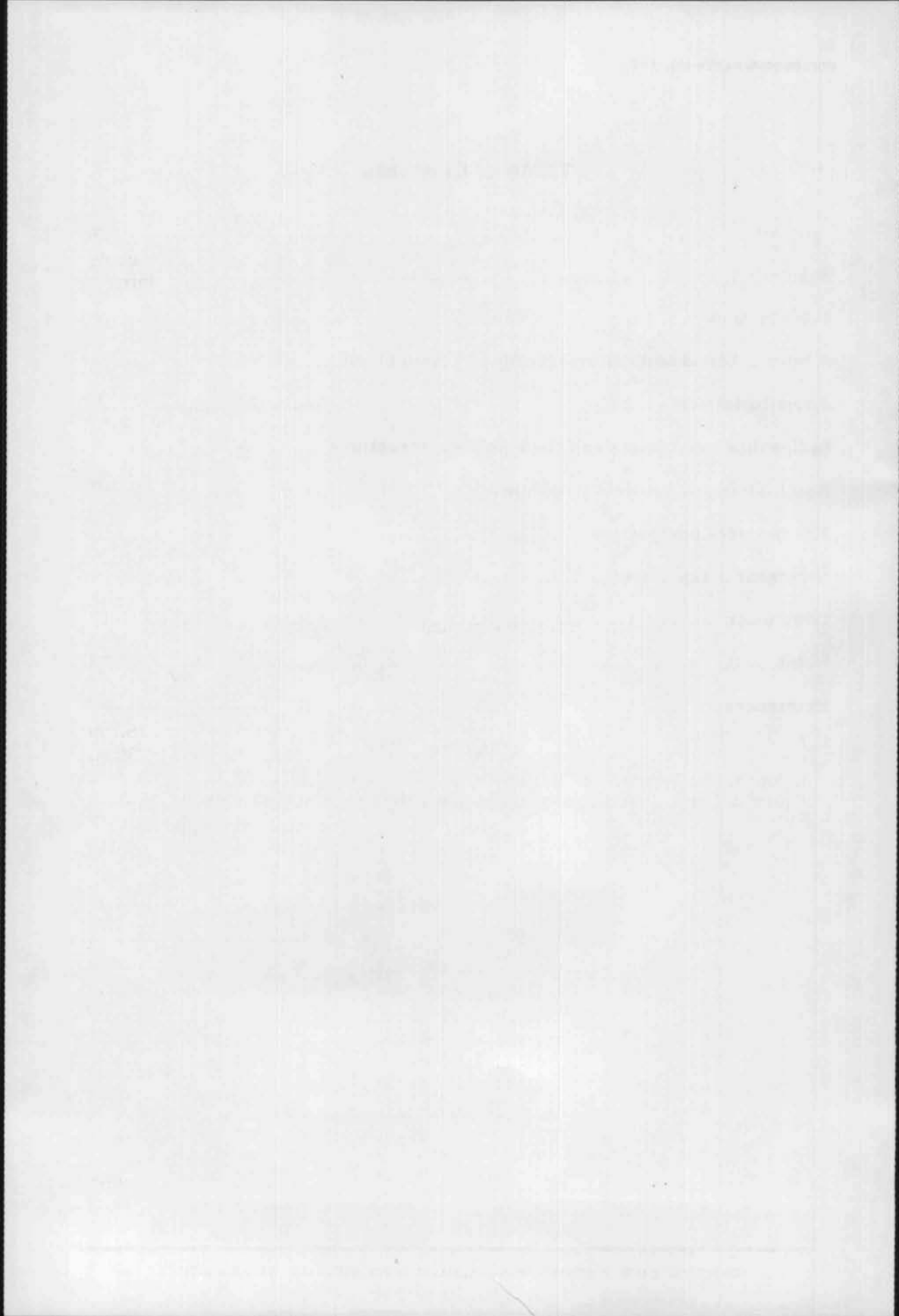


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Summary

Under native title in Australia, indigenous groups may form regional agreements with governments, industry and other parties. There is no clear statement about the scope of such agreements but the suggestion is that in some cases they could be comprehensive, resulting in arrangements which would resemble a form of regional government.

It is argued here that to achieve such an outcome would require the major parties involved to embrace notions of regionalism and agreement-making. This paper investigates the likelihood of a comprehensive regional agreement in Torres Strait by exploring the extent to which these two notions prevail. The investigation is informed by calls from Torres Strait Islander leaders for a form of self-government; the current status of native title in Torres Strait; Commonwealth initiatives to increase self-governance and autonomy for Torres Strait Islanders; and the arrangements for managing the international Treaty between Australia and Papua New Guinea.

The form of increased self-governance envisaged by Torres Strait Islander leaders is one in which they would have a greater say in policy-making with respect to State and Commonwealth inputs to Torres Strait, and some greater control over natural resources and development.

The Queensland Government has taken a regional approach to Torres Strait for some time and established the Island Coordinating Council so that Islander leaders could provide it with policy advice for the region.

The Commonwealth has taken several initiatives to increase Torres Strait Islander self-governance. These have included establishing the Torres Strait Regional Authority (TSRA) in 1994 and giving it the powers of a Commission; separating the TSRA's budget from the Aboriginal and Torres Strait Islander Commission; guaranteeing a greater degree of autonomy for Torres Strait Islanders by the year 2000; and mounting a parliamentary inquiry into the possibility of greater autonomy.

Although the TSRA is the Native Title Representative Body for the region, it does not presently handle the majority of the native title applications in Torres Strait. Furthermore, neither it nor any other body can claim to provide regional representation for all residents. The parliamentary inquiry into autonomy has recommended that the Island Coordinating Council, the TSRA and the Torres Shire be collapsed into a new Regional Assembly which would be elected by all Torres Strait residents and this proposal and the general issue of regional representation is the subject of ongoing consultation.

The paper concludes that despite some divergent views about the form and content of regional representation, there is evidence that the preconditions for a comprehensive regional agreement, or a form of self-governance, exist in Torres Strait. From a broad perspective, Torres Strait is an archipelago and its indigenous people, who are the majority of the population, have their own unique

culture and history. These factors encourage consideration of the Strait as a discrete Torres Strait Islander region.

However, the argument here is that it is the political geography of Torres Strait which has influenced the relationship between government and indigenous people in the region. Torres Strait sits on the international border between Australia and Papua New Guinea and the arrangements for managing the border and the associated Torres Strait Treaty have brought indigenous people, the Queensland Government, the Commonwealth Government, and the commercial fishing industry into a unique regional partnership. This relationship has, in part, provided the pre-conditions for a comprehensive regional agreement and/or increased self-governance in Torres Strait.

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Introduction

There have been calls by some Torres Strait Islander leaders for increased regional independence in the Torres Strait since the 1970s (Mullins nd). Some of the advocates of independence have demanded full sovereignty while the majority have suggested that independence might be limited to a form of Territorial status similar to that in Australia's Cocos-Keeling and Christmas Islands (Altman, Arthur and Sanders 1996). In 1996, the Torres Strait Regional Authority (TSRA) stated its intentions to strive for:

... a form of regional self-government for the Torres Strait based on the existing system of local government...without a form of regional self-government, a settlement of our aspirations will not be conclusive... The TSRA will continue to examine models for a form of self-government in the Torres Strait that would be culturally appropriate to the region and formally recognise the rights and practices of Ailan Custom (Island Custom) (TSRA 1996: 2).

In 1994, regional self-governance was advanced when the Aboriginal and Torres Strait Islander Commission (ATSIC) regional council for the Strait was upgraded to become the TSRA (Sanders 1994). In 1996, the Prime Minister committed his government to giving greater autonomy to the region by the year 2000 and the Minister for Aboriginal and Torres Strait Islander Affairs directed the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA) to inquire into the question of greater autonomy for Torres Strait Islanders.

In August 1997 the HRSCATSIA (hereafter referred to as the Inquiry) released its report entitled *Torres Strait Islanders: A New Deal* which suggests what form autonomy for the region might take, the benefits that could accrue from greater autonomy and the moves considered necessary to achieve this autonomy. The report recommends that the existing indigenous and non-indigenous regional bodies in Torres Strait be replaced by an elected Torres Strait Regional Assembly which would have the power to formulate policies for all of the residents of the region. In effect, the report proposes a form of regional government for the Strait and, while stopping short of suggesting Territorial status, it does not rule this out for the future (Commonwealth of Australia 1997).

Therefore, it can be argued that there has been some progress towards establishing a form of self-government in the Strait. Self-government meanwhile appears to be similar to what has been termed a comprehensive regional agreement under native title (Craig and Jull 1995; Sullivan 1997). By extension, we can suggest that a comprehensive regional agreement may be possible in the Strait.

It is contended here that to achieve a comprehensive regional agreement the major parties involved in a region need to embrace notions of agreement-making and regionalism. This paper attempts to show that this is the situation in the Strait and to trace its evolution.

Not all of the parties mentioned above are in total accord about regional issues. And most recently, while the work of the Inquiry into autonomy and the operations of native title have in some respects reinforced notions of agreement-making and regionalism in the Strait, they have also illuminated divergent perspectives. These divergent perspectives are discussed in the paper. The general conclusion is that the commitment to regionalism in the Torres Strait is significant and would appear to provide the base on which a comprehensive regional agreement, or a form of self-government, could be built.

The current social and political environment in the Strait is the result of a number of factors. The region is a fairly discreet archipelago; indigenous people make up 78 per cent of the local population;¹ the Queensland Government has historically treated the Strait as a fairly separate and special region; Torres Strait has long been recognised as a unique cultural area (Melanesian as distinct from Aboriginal); and it has a special geo-political status because of its location on Australia's only international border and its participation in the Torres Strait Treaty between Australia and Papua New Guinea (Babbage 1990: 292).

Although all of the above factors have been important in the formation of the present social and political environment in the Strait, it is argued that the last of these, the Treaty between Papua New Guinea and Australia, is pertinent to present deliberations about regional agreements because it has influenced regionalism and agreement-making in the Strait. Any treaty represents an agreement but the Treaty with Papua New Guinea is one made over a specific region: Torres Strait. The Treaty was the subject of comprehensive preparatory research, and of complex, extended and sometimes volatile negotiations involving all levels of government and the indigenous inhabitants of the region (Fisk et al. 1974; Babbage 1990: 293).² The eventual outcome, the Torres Strait Treaty, is a regional agreement *par excellence* which includes all of the stakeholders and in which notions of regionalism, and regional cooperation and consultation are paramount. The characteristics of the Treaty are highlighted in the following note by the Commonwealth Department of Foreign Affairs and Trade (quoted in Babbage 1990: 293-295).

While it is basically a border delimitation agreement, the Torres Strait Treaty fulfils a number of other complex requirements. The Treaty explicitly acknowledges and preserves the traditional way of life and livelihood of traditional inhabitants of the region and establishes for this purpose an area known as the Protected Zone. In particular, the Treaty recognises the traditional relationships of the region's inhabitants and movement patterns which have persisted for hundreds of years between what are now two independent countries.

The Treaty calls for the protection and preservation of the environment... and measures to prevent and control pollution... The Treaty contains detailed and complex provisions relating to commercial fisheries in the Protected Zone. The Treaty emphasises consultation at all levels—an extension of the approach taken during negotiation.

Furthermore, being an agreement about an international border region, the Treaty demands the interest and ongoing involvement of the Commonwealth

Government and several of its instrumentalities to an extent not found in other parts of the country. This has not however, excluded the State Government from the region but has instead drawn the State and the Commonwealth together in a form of joint regional administration (Babbage 1990). Also, to meet its concerns about the livelihood and rights of the traditional inhabitants of the region, the Treaty arrangements have included Torres Strait Islanders in this joint regional administration. Therefore, the Treaty has had the result of consolidating the notion of the Strait as a region, and of bringing together the major stakeholders into a regional forum for consultation and cooperation. I would argue therefore, that the border between Papua New Guinea and Australia gives Torres Strait Islanders a locational advantage with respect to negotiations with the State and Commonwealth Governments. However, it is not an advantage that is easily transferred to other parts of the country. The locational advantage created by the border is independent of native title and indeed, the apparent gains in regional autonomy have largely been made in the 15 years preceding native title.

Although the Treaty can be viewed positively by Torres Strait Islanders, it also imposes some limitations. The Treaty represents a prior agreement with Papua New Guinea, and the Commonwealth Government is strongly opposed to any moves that might lead to these conditions being renegotiated. Therefore the conditions of the Treaty, especially with respect to rights over waters and the seabed, may place an additional set of constraints on what Torres Strait Islanders are able to negotiate within a regional agreement. The majority of the Strait's natural wealth comes from its sea and reefs but it remains uncertain what rights native title might give over these.

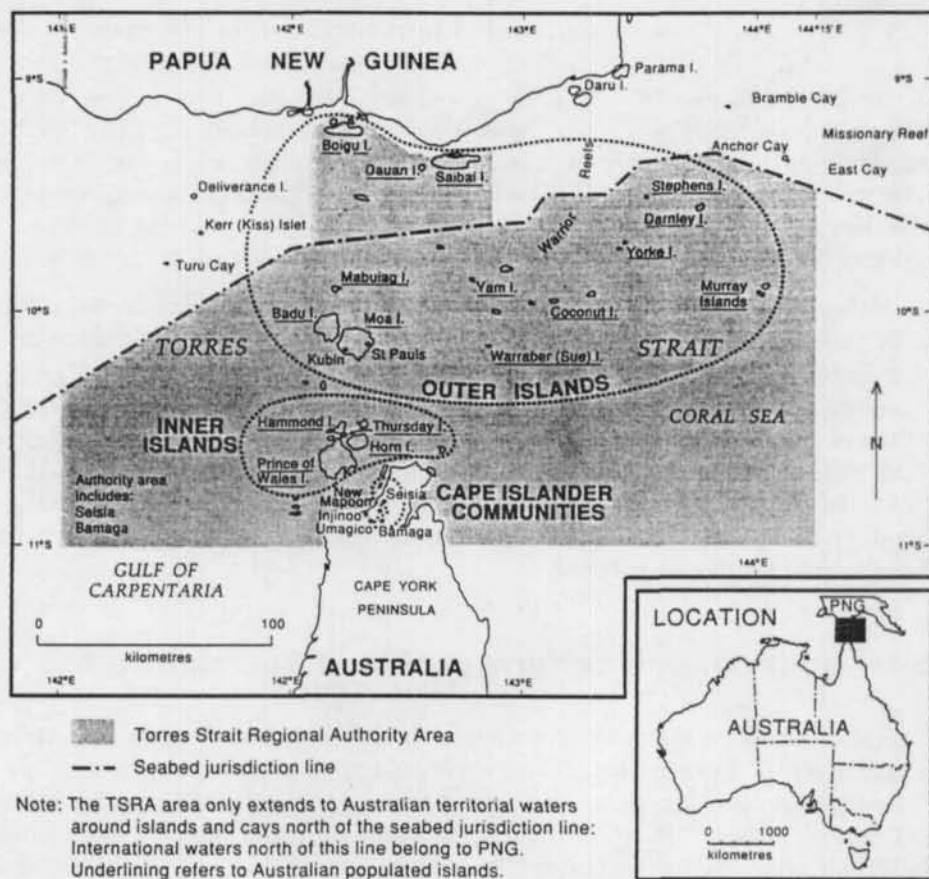
A brief political and cultural profile of Torres Strait

The region considered here is not precisely defined, but it is similar to the TSRA region (Figure 1). Torres Strait is an archipelago measuring approximately 100 km north-south by 260 km east-west, lying between the tip of Cape York and Papua New Guinea. It is made up of a large number of small islands and innumerable reefs which, along with the waters, hold the region's natural wealth (Arthur 1990: 6). The total value of the region's fisheries is estimated to be between \$26 million and \$30 million. However, \$20 million of this is from prawning which is carried out by fishers from the mainland and consequently produces no income for the region. It is estimated that in total the three levels of government spend between \$73 and \$80 million annually on the region (Altman, Arthur and Bek 1994: 9).

The regional population is an estimated 7,361, of which 5,396 identify as Torres Strait Islanders, 304 as Aborigines and 364 as both Torres Strait Islanders and as Aborigines; that is, 82 per cent of the population is indigenous. Torres Strait Islanders in the Strait represent only 20 per cent of the national Torres Strait Islander population, the remaining 80 per cent live on the Australian mainland (Arthur and Taylor 1994).

It is useful to consider the Strait as composed of three social and political sub-regions: the Outer Islands, the Inner Islands and the Cape Communities (Figure 1)³ (Arthur 1990).

Figure 1. The Torres Strait Region



The Outer Islands

There are 13 inhabited Outer Islands on which indigenous people (2,852) make up 94 per cent of the total population (Sanders 1994: 6). People reside in communities over which Island Community Councils have local government status under the *Queensland Community Services (Torres Strait) Act 1984*. These inhabited islands are held in Deed of Grant In Trust (DOGIT) from the Queensland Government. Generally speaking, the remaining uninhabited islands are vacant crown land. Native title has been applied for over the inhabited islands, some of the seas, reefs and the uninhabited islands. The Island Councils are part of the TSRA (which is also the Native Title Representative Body) and the

Island Coordinating Council (ICC). Residents of the Outer Islands do not vote in Torres Shire elections (see below).

The Inner Islands

The Inner Islands lie just north of Cape York and include the major urban centre of Thursday Island. Indigenous people (2,124) make up 62 per cent of the total population of the Inner Islands (Sanders 1994). The land tenure of the Inner Islands is mixed but does not include any DOGIT lands. The Inner Islands are serviced by the Torres Shire Council which is a local government council incorporated under the *Queensland Local Government Act 1993*. Indigenous people on the Inner Islands are represented on the TSRA and may also vote in the Shire elections. The Inner Islands are considerably more multi-racial than either the Outer Islands or the Cape Communities.

The Inner Islands (with the exception of Thursday Island) are claimed under native title by the Kaurareg people who identify as Aborigines not as Torres Strait Islanders. The Kaurareg are an estimated 4 per cent of the population of the Inner Islands (Sanders 1994).⁴ As well as being represented on the TSRA, the Kaurareg are affiliates of the Aboriginal Coordinating Council, a statutory body under Queensland legislation which operates principally for the Aboriginal communities on the mainland of Queensland. The Kaurareg's native title claims are presently handled by the Cape York Land Council, a Native Title Representative Body located in Cairns.

The Cape communities

Following resettlement from some of the northern Outer Islands around the time of the Second World War, two Islander communities (Bamaga and Seisia) were established on the tip of Cape York. Indigenous people (638) are 82 per cent of the population of the two communities. As in the Outer Islands, the community land is DOGIT, the community councils have local government status and are members of the ICC and the TSRA. Bamaga and Seisia are regarded as being part of Torres Strait and are in the domain of the TSRA and the ICC.

There are also three Aboriginal communities in the same region of the Cape. Indigenous people (723) are 74 per cent of the population of these communities which are also on DOGIT land. Unlike the two neighbouring Islander communities, the Aboriginal communities have local government status under the *Queensland Community Services (Aborigines) Act 1984* and are part of the Cooktown ATSIC region. Also they, like the Kaurareg of the Inner Islands, are members of the Aboriginal Coordinating Council and are represented for native title claims by the Cape York Land Council in Cairns. These Aboriginal communities are not part of what is regarded as the Strait and are outside the ambit of the TSRA and the ICC.

Therefore, there is some degree of overlap between what we can think of as the Torres Strait Islander and Aboriginal domains. On the one hand, the Kaurareg

who identify as Aboriginal, claim the Inner Islands as their traditional lands. On the other hand, two communities, which identify as Islander, are located on Cape York which is traditionally the Aboriginal domain.

The above describes the contemporary political sub-divisions of Torres Strait. However, other types of regional sub-divisions are also being articulated with respect to both native title and regional autonomy. In particular, it has been suggested that, for the purposes of regional considerations, indigenous representation should be drawn from what are considered to be the five 'traditional' sub-divisions of the Strait.⁵ It is being suggested that representatives for these sub-divisions be included in a Native Title Committee (see below).

A territorial note

About half of the area of Torres Strait (that part above 10 degrees) was excluded from the colony of Queensland when this was created in 1859 (Burmester 1990: 302). In 1872, Queensland annexed all islands within 60 miles off the coast, and in 1879 it obtained the remaining islands up to the Papua New Guinea coast under the *Queensland Coast Islands Act 1879* (Burmester 1990).

The Treaty between Australia and Papua New Guinea, an international agreement signed in 1978, established seabed and fisheries jurisdiction lines and confirmed which country has sovereignty over certain islands (Figure 2). The Treaty also established the Torres Strait Protected Zone. A feature of the Zone is an area called the Top Hat (see Figure 2) within which Papua New Guinea has seabed jurisdiction and Australia has fisheries jurisdiction. There are a number of Australian inhabited islands in the Top Hat, each with a 3 nautical miles (nm) territorial sea.

South of the seabed jurisdiction line

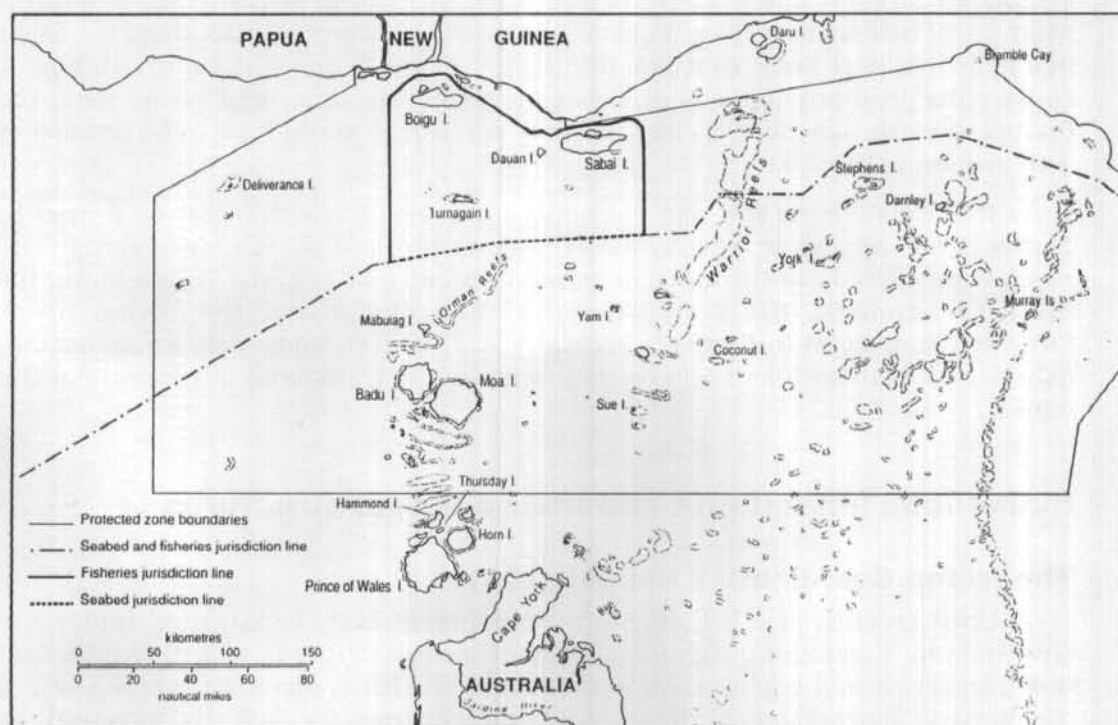
The seabed jurisdiction line represents the limit of Australia's continental shelf. South of this line State and Commonwealth legislation, to the extent that it applies offshore, pertains.

Regarding coastal waters south of the line, the State's jurisdiction extends to 3 nm beyond low water mark, and the Commonwealth's legislation extends to 12 nm beyond low water mark. Thus, both the State and Commonwealth Governments have jurisdiction over the waters 3 nm beyond low water mark. Generally State legislation would apply here, but this can be overridden by Commonwealth legislation if the two are inconsistent.

Regarding the seabed south of the line, the State has jurisdiction to 3 nm beyond low water mark, and there is joint Commonwealth-State management under Commonwealth legislation beyond that point. Therefore, south of the seabed jurisdiction line, both State and Commonwealth legislation could apply to

any native title considerations for the seabed and the seas. The same can be said about the land.

Figure 2. Lines of jurisdiction agreed under the Torres Strait Treaty



North of the seabed jurisdiction line

North of the seabed jurisdiction line, the situation is slightly different. Here, Australia has sovereignty over several islands and State and Commonwealth legislation could be relevant to native title negotiations over these islands.

Around the islands (and leaving aside the Top Hat) Australia has a 3 nm territorial sea, and State and Commonwealth legislation would apply here to the water and the seabed. The waters and seabed beyond the 3 nm are covered by Papua New Guinea law and could not be the subject of native title negotiations.

Inside the Top Hat, Papua New Guinea has jurisdiction over the seabed beyond Australia's 3 nm territorial waters and so, as with the Papua New Guinea waters and seabed outside the Top Hat, this could probably not be the subject of

native title. Also, inside the Top Hat Australia has rights over the waters regarding the fish, but how native title would be affected by this is not clear.

The Commonwealth and the State are awaiting the outcome of the Croker Island case⁶ in the hope that this will clarify native title with respect to offshore waters, the seabed and fishing rights. Given the uncertainty about what native title might mean with respect to these areas, and the somewhat complex conditions applying to the waters of the Strait, no attempt is made here to suggest what might be contained in a regional agreement. However, at this stage the State has indicated that because it has title rights only to 3 nm, it is uncertain how it could enter into any agreement that extends beyond this, and on its part, the Commonwealth has made it clear that any agreement would have to be consistent with articles of the Treaty.

The remainder of this paper describes the perspective that various parties in Torres Strait appear to have towards regionalism and agreement-making. The parties considered are the indigenous representative bodies, the Torres Shire, the State Government, the Commonwealth Government and the Torres Strait Protected Zone Joint Authority (a statutory body with responsibility for managing, fisheries, the environment and certain rights of the traditional inhabitants of the region).

Indigenous inhabitants and their political structures

The Island Coordinating Council (ICC)

Until recently the ICC, a State Government body constituted under the *Queensland Community Services (Torres Strait) Act 1984*, was the principal indigenous regional organisation in the Strait. The ICC's executive is composed of the elected Chairpersons of the Islander councils from the Outer Islands and the Cape, plus one representative from a former State reserve for Islanders on Thursday Island (Sanders 1994). The ICC was established to provide policy advice to the Queensland Government but it also deals with joint State/Commonwealth projects and can receive grants from both State and Commonwealth Governments (ICC 1996: 7).

The ICC has been described as a pan-Torres Strait body and during the late 1980s it was the organisation through which the Commonwealth and State Governments channelled and coordinated funding for major indigenous community infrastructure (Babbage 1990: 313). However, the ICC's legitimacy to be a fully regional body is restricted. Its legislation does not provide for any representation from the Kaurareg who are the native title applicants for the Inner Islands, nor from the region's 1,638 non-Islander residents (Sanders 1994: 6). Also, the ICC's activities have been limited to the Outer Islands and the Islander communities on the Cape, it has no mandate on the Inner Islands, which are the responsibility of Torres Shire (Arthur 1990).

The ICC's influence has been diluted by the creation of ATSIC in 1989 and by the formation of the TSRA in 1994. It was decided that the TSRA would include all the members of the ICC executive and, because the Chairs of both organisations have been the same, they have operated virtually as one. Indeed, the TSRA's submission to the Inquiry suggests that consideration should be given to formally merging the ICC and the TSRA (HRSCATSIA 1996a: 158).⁷ Also, although the TSRA is the official Native Title Representative Body, the Native Title Unit is in fact physically located within the offices of the ICC—possibly an attempt to link the two bodies for native title issues.

The ICC's legitimacy to make a comprehensive regional agreement would probably be limited by its restricted regional representation. However, the ICC does have a history of political action and liaison with government. Also, it remains the principal indigenous organisation represented on the region's key body responsible for the management of fisheries and the environment (the Torres Strait Protected Zone Joint Authority (TSPZJA), see below). Therefore, as a separate entity, the ICC could be an active participant in any discussions over regional agreements.

The Torres Strait Regional Authority (TSRA)

The TSRA is a Commonwealth indigenous body constituted under the *Aboriginal and Torres Strait Islander Commission Amendment Act 1993*. The TSRA came into being in 1994 replacing the ATSIC Torres Strait Regional Council. The TSRA is made up of the ICC executive plus two additional members from the Inner Islands.

Although a part of ATSIC, the Authority was created to increase regional autonomy and its enabling legislation gives it similar powers to those of the Commission itself (Sanders 1994). Until 1997, the Authority prepared its own budget estimate and negotiated this directly with the Chair of ATSIC and the Minister for Aboriginal and Torres Strait Islander Affairs (Menham 1995: 153). As a further step towards increasing this autonomy, the Commonwealth has separated the TSRA's budget from the ATSIC process, funding the TSRA directly from the Department of Finance (HRSCATSIA 1996a: 149).

The TSRA is also the Native Title Representative Body for the region. However, in a strategy to develop a model for procedures across the region, it has funded only one application and another 63 native title claimants have lodged their applications outside the TSRA. In what could be described either as a sign of local frustration with, or a misunderstanding of, the TSRA's strategy, there have been suggestions that another Native Title Representative Body be formed for handling these applications. As well as this, the Kaurareg have made their native title applications for the Inner Islands through the Cape York Land Council in Cairns.

In an apparent response to these developments, and to retain some regional cohesion, the Authority has initiated negotiations with the relevant indigenous

parties to establish a Native Title Committee which would have the role of coordinating all native title issues. This Committee would have representation from the five traditional sub-regions noted above and would include the Kaurareg and representation from Torres Strait Islanders on the mainland.

The TSRA was unwilling in early 1997 to state what form a regional agreement might take. However, it has previously indicated that, like the ICC and the Torres Strait Regional Council before it, the Authority aspires to a form of self-government, possibly similar to that which exists in Australia's external territories (Sanders 1994: 1). In this arrangement, the regional self-government would be elected by all of the residents of the Strait. The form of self-government or autonomy envisaged by the TSRA is one where it would be responsible for making policies on the development and management of resources such as fisheries and on the provision of services, but in which the delivery of these services would remain the responsibility of the Commonwealth and State Governments (HRSCATSIA 1996a: 153-6). As will be seen below, there is some similarity between this interpretation of self-government and the notion of autonomy as suggested by the Inquiry's report (see Commonwealth of Australia 1997).

At the time of writing, preliminary planning and community consultations were under way regarding the proposed construction of a natural gas pipeline from Papua New Guinea to Gladstone on the mainland of Queensland. The pipeline would pass through Torres Strait. Although it is possible that Islanders may wish to include the pipeline in an agreement, because of the uncertainty over rights to the waters and reefs, the details of what this might entail are not included here. Similarly, mineral rights to the seabed are not investigated.⁸

Considering the Canadian experience, it is likely that significant human resources would be required to conclude a comprehensive regional agreement in the Strait. At the moment the TSRA's Native Title Unit is made up of only one Native Title Executive Officer and does not have a resident lawyer or anthropologist. This is far below the human resources recommended for a Representative Body in a review of the Native Title Representatives Bodies carried out by ATSIC in 1995 (ATSIC 1995: 67) and is insufficient for the task of agreement-making.⁹ Consideration could be given to allocating a designated position which would explore in detail the pros and cons of forming a comprehensive agreement and the necessary strategies.

The Authority has indicated that it sees a move to self-government occurring in stages and it has recommended that a Task Force, composed of members of the Authority, the Commonwealth and the State Governments, be established to monitor this process (TSRA 1995: 22). In a similar vein, the Inquiry's report recommends that a working party, composed of representatives from all levels of government, all residents of Torres Strait and from the Islander community on the mainland, be formed to expedite a process of consultation on the issue of greater autonomy (Commonwealth of Australia 1997: 115). This, or a similar working party, could be given the task of overseeing the regional agreement process.

Like the ICC, the TSRA cannot claim to be a fully regional body. To date, it has not been seen to adequately represent all of the indigenous people of the region nor any of the non-indigenous people. However, recent and current moves are addressing these matters. As already noted, with the aim of increasing regional autonomy, the TSRA replaced ATSIC's Torres Strait Regional Council in 1994. The original Torres Strait Regional Council members were the ICC's executive, and, to make it more regionally representative, two additional members from the Inner Islands. Since March 1997, one of these additional members has been, coincidentally, the Chair of the Kaurareg Association, and so the Kaurareg are now represented in the TSRA, although it must be remembered that this has happened largely by chance rather than by designation. The Authority has also proposed that the Shire be formally represented in its membership (HRSCATSIA 1996a: 159) and if this were to occur it would have the effect of developing further the notion of a regional body. These moves, and others described above, suggest that the Authority is attempting to become a more fully regional body and in this regard it appears to have the backing of the present Minister for Aboriginal and Torres Strait Islander Affairs (Office of Minister for Aboriginal and Torres Strait Islander Affairs pers. comm.).¹⁰

Torres Strait Islanders residing on the Australian mainland

Islanders residing on the mainland wish to have some continuing involvement in the issues in Torres Strait. They have made at least two native title applications to the National Native Title Tribunal and they prepared substantial submissions to the Inquiry on autonomy for Torres Strait Islanders. The Inquiry's report recommended that mainlanders should have observer status on any future regional government. However at a National Torres Strait Islander Workshop in late 1997, representatives from the mainland rejected this view stating that, if a regional government was established, they should receive full voting rights. The precise part that mainlanders might play in formulating any regional agreement is unclear. However, as noted above, it is intended that mainlanders are represented on the proposed Native Title Committee.

The Kaurareg

The Kaurareg are the other indigenous group in the Torres Strait. They identify as Aborigines, or more precisely, as Kaurareg and, as noted above, they are applying for native title over the Inner Islands (excluding Thursday Island). The Kaurareg reside mostly in the Inner Islands, in Ngurapai Community on Horn Island.

Ngurapai Community is not on DOGIT land nor does it have local government status under the *Community Services (Torres Strait) Act 1984* as do the Outer Island Councils and, therefore, it is not eligible to be a member of the ICC/TSRA. The result of this is that the Kaurareg have been excluded from the regional consultation and coordination that has taken place between the ICC/TSRA, the State and the Commonwealth Governments, and from

participation on the TSPZJA—the regional fishing industry body (see below).¹¹ In fact, the Kaurareg have tended to look outside the region for assistance. They are affiliates of the Aboriginal Coordinating Council (the mainland equivalent of the ICC) and have their native title applications handled by the Cape York Land Council in Cairns.

However, Kaurareg representation in the region has recently increased: they are, as noted, represented on the TSRA, the TSRA have invited them to be part of the proposed regional Native Title Committee and the Kaurareg were also involved in the recent Inquiry. Therefore, there are suggestions that the Kaurareg are being more fully incorporated into regional structures and affairs.

Papua New Guineans

People of Papua New Guinea descent reside on several of the islands of Torres Strait and some have intermarried with Torres Strait Islanders. Under the conditions of the Treaty between Papua New Guinea and Australia (see below), these people and Torres Strait Islanders can move freely between the Strait and Papua New Guinea. Many of these Papua New Guinea residents are Australian citizens, but under definitions of 'indigenous' in Australia, it is unclear which of them can or do identify as Torres Strait Islander. It is also unclear at this stage, what role such residents might play in the formation of a regional agreement. However, we could assume that in the event that a regional government was established (see Commonwealth of Australia 1997) these residents would have the same voting rights as others.

Non-indigenous political structures

The Torres Shire Council

Until 1991, the Shire was under the control of a non-indigenous administrator located in Cairns and was responsible for the provision of local government services to the Inner Islands.¹² The Inner Islands are the administrative centre of Torres Strait and, during the Strait's early history, were largely a non-indigenous domain. Therefore the Shire's ability to provide broad representation was limited. Shire elections were introduced in 1991 and since 1994 the Mayor has been an Islander—indigenous people presently form the majority on the Council. It can therefore be suggested that the Shire now represents both indigenous and non-indigenous concerns, at least in the Inner Islands. Also, whereas previously the Shire paid little attention to the position of the Kaurareg, the native title applicants for the Inner Islands, the current Mayor has initiated discussions with the Kaurareg holding up the possibility of making an 'unique agreement' regarding their native title aspirations (Shire Mayor pers. comm.).

Historically the Shire has had little formal involvement with the ICC/TSRA, the two bodies with representation in the Outer Islands. The Shire has recently

proposed that the Mayor, or some other Shire representative, be included on the TSRA (HRSCATSIA 1997b: 331). This would greatly increase the Shire's regional presence.

It would seem therefore that for a number of reasons, not least of which may be that Islanders form the majority of the Council and that there are native title claims over the Shire's domain, the Shire is keen to broaden its base. It appears keen to be involved in issues affecting all of the residents—indigenous as well as non-indigenous—and to be included in a forum which would allow it to take part in regional decision-making rather than be limited to concerns on the Inner Islands.

The Queensland Government

The Queensland Government has a history of consultation with Islanders in the Strait.¹³ In the 1970s, the State established the Islander Advisory Council made up of Islander leaders for the specific purpose of advising the Government on regional Islander issues (Arthur 1992: 20). This trend continued in 1984, when the Council was replaced by the ICC, composed of the elected chairs of the Island Councils (Beckett 1987: 195). Although the ICC's role became somewhat diluted with the formation of the TSRA in the 1990s, the State continues to liaise with both organisations to a significant extent (HRSCATSIA 1997c: 357; Queensland Office of Intergovernmental Relations pers. comm.). (In some respects the two Islander organisations (ICC/TSRA) perform similar functions in tandem. The Inquiry's report on autonomy has characterised this relationship as a duplication of roles.

Because of the international border with Papua New Guinea, the Commonwealth Government has a greater and significantly different presence in the Strait than in other parts of Australia.¹⁴ This has created a special set of relationships between the State, the Commonwealth and indigenous people. The Commonwealth presence has led to cooperation with the State in areas such as fisheries and quarantine, and in joint funding of large infrastructure projects in Island communities (Babbage 1990: 47). These projects are negotiated and planned in consultation with the ICC/TSRA.

The Queensland Government claims to view regional agreements, and any increase in Islander autonomy, positively (HRSCATSIA 1997a: 158; HRSCATSIA 1997b). It acknowledges that there could be moves to greater autonomy and self-government with respect to duties and responsibilities but that this should be progressive and must include significant and ongoing consultations between Torres Strait Islanders, local, State and Commonwealth Governments (HRSCATSIA 1997b). The State also considers it unlikely that Torres Strait could be a viable territory, at least in terms of providing its own services, and that services should continue to be provided by the Queensland Government, as at present (HRSCATSIA 1997a: 159).

The Commonwealth Government

Commonwealth involvement in the Strait increased dramatically in the early 1970s during negotiations with Papua New Guinea about the location of the border with Australia and when an office of the Department of Aboriginal Affairs was opened on Thursday Island. The Commonwealth's involvement was not initially viewed positively by either the State Government or Islanders as it had suggested that the border might be moved to the south which would have transferred some islands, reefs and waters to Papua New Guinea (Fisk et al. 1974: 2). Queensland was against any change to its sovereignty over the islands and most Islanders wanted to remain Queenslanders and Australians (Fisk et al. 1974: 17).¹⁵ The location of the border was resolved (to the satisfaction of the Islanders) after extensive consultations and intensive lobbying by Islander leaders (Beckett 1987). The outcome was the Torres Strait Treaty signed in 1978 and ratified in 1985.

The Commonwealth is more involved in the Strait than it might be in other regions of the country, due in large part to the fact that it has responsibility for managing the border region and the associated Treaty (Beckett 1987: 171; Babbage 1990: 293). The Treaty acknowledges the rights of the traditional inhabitants and they are included in its implementation (Babbage 1990). To fulfil their Treaty obligations, the Commonwealth Government has had to consult extensively with the State Government and indigenous people. In these ways, the Treaty has brought together the Commonwealth and State Governments and the Torres Strait Islanders into a regional relationship.

In 1995, the then Labor Government Prime Minister, visited Torres Strait and proposed a regional agreement for the Strait based on native title over vacant crown land but not over the sea (Department of Prime Minister and Cabinet pers. comm.). This proposal was rejected by the TSRA. The Commonwealth Government's present commitment to a regional agreement in the Strait is not clear but it is now funding the TSRA directly from the Department of Finance and appears supportive of devolving greater delegation of powers and functions to local authorities such as the TSRA (HRSCATSIA 1997b: 277). The report of the Inquiry into greater autonomy for Torres Strait Islanders makes several recommendations on this theme (see Commonwealth of Australia 1997).

Principally, the report proposes that the ICC, the TSRA and the Torres Shire all be collapsed into one democratically elected body which would be called the Torres Strait Regional Assembly. The elected representatives would be drawn from the indigenous and non-indigenous residents of the whole. The Assembly would carry out the combined functions of the ICC, TSRA and the Shire and formulate policies for the region. The Inquiry also suggests that, as a move to devolve maximum authority to the Assembly to determine the priorities for the allocations of funds, the Commonwealth and State Governments could provide it with block grant funding (Commonwealth of Australia 1997: 63). However, the report states that the Commonwealth and State Governments would have a 'continuing responsibility for a range of functions in the region, even as self government

within the region consolidates' (Commonwealth of Australia 1997: 59). In considering the issue of greater economic autonomy, the report relies heavily on the ability of Islanders to increase their involvement in local industry—particularly the commercial fisheries—and in the Islanderisation of the public service (Commonwealth of Australia 1997: 72, 81). These recommendations appear to represent several of the features which one might expect to see in a comprehensive regional agreement.

The Commonwealth would not favour any agreement that was inconsistent with the Articles of the Treaty. Though not a law as such, the Treaty is a powerful form of international agreement, the obligations of which must be upheld and this could impose limits on the content of any regional agreement. In addition, there is a strong sense that the Papuans of neighbouring Western Province believe that Australia got the better deal when the Treaty was agreed to, especially with regard to access to reefs for commercial fishing (Fisk et al. 1974).¹⁶ These Papuans would welcome the opportunity to re-negotiate the Articles of the Treaty including the possible redistribution of fishing rights between the two countries. Therefore, the Commonwealth feels it would be unwise to consider any form of regional agreement that might make it necessary to renegotiate the conditions of the Treaty.

The industry perspective

Torres Strait's only primary industry is commercial fishing, valued at between \$24 and \$30 million annually. The Strait's fisheries are unique in Australia being subject to the requirements of the Treaty which is concerned with the issues of sovereignty, the maritime boundaries, the protection of the way of life and livelihood of the traditional inhabitants, and the marine environment. To fulfil the obligations of the Treaty the Commonwealth established the Torres Strait Protected Zone and the TSPZJA. To this end, the TSPZJA is structured to ensure that the industry and the environment are jointly managed by the State and Commonwealth Governments; the indigenous fishers and community representatives; and the non-indigenous fishers.¹⁷ The TSPZJA is headed by the Commonwealth and State Ministers responsible for fisheries and so all recommendations, including those from indigenous concerns are addressed directly to these Ministers.¹⁸ However, the TSPZJA does not include representation from the Kaurareg. This may be because the TSPZJA has viewed the ICC as the body from which indigenous representatives should be drawn and the Kaurareg are not members of the ICC, or it may be because the core area of the Torres Strait Protected Zone does not include the Kaurareg homelands—the Inner Islands. However, the TSPZJA actually has responsibility for the Zone area plus the contiguous waters—what are referred to as the 'outside but near areas' (TSPZJA 1995: 11) and these extend down to Cape York. Therefore, Kaurareg representation on the TSPZJA would seem appropriate.

Increasing indigenous participation in the industry is also one of the TSPZJA's policies. Licensing regulations have been relaxed for Islanders, growth in certain fisheries is reserved for Islanders and the non-Islander involvement in some fisheries is being gradually phased-out in favour of Islanders (HRSCATSIA 1997b: 232). Islanders now form a significant and important part of the industry.¹⁹

The Queensland Commercial Fisherman's Organisation which is also involved in the TSPZJA, is committed to the TSPZJA approach and supports the development of regional agreements between the commercial seafood industry and indigenous peak representative bodies (HRSCATSIA 1996b: 60). Some informal 'gentlemen's agreements' have been developed between individual Island Councils and non-Islander commercial fishers (Australian Fish Management Authority, Thursday Island pers. comm.). Additionally, the TSPZJA seems to have had a measure of success in establishing formal joint management procedures involving the Islander and non-Islander stakeholders. Therefore, in some respects, the TSPZJA already embodies the structural elements of a regional agreement, at least at an industry level and could be viewed as a framework upon which an industry agreement could be built.

Divergent perspectives

Although the foregoing suggest that there is a significant commitment to the notion of agreement-making and to regionalism in the Strait, there are also divergent views. As noted earlier, the Kaurareg have been excluded from the regional decision-making forums to date. However, the Kaurareg have been invited by the TSRA to be part of the proposed regional Native Title Committee, and they also contributed to the Inquiry into autonomy for Torres Strait Islanders. Therefore, there is evidence that the Kaurareg are now being incorporated into the regional decision-making.

At another level, not all Islanders are totally satisfied with the present system of regional representation. For example, despite the formation of the ICC in the 1980s as a regional body, each island claimed the right to make its own decisions on certain matters (Arthur 1990) and this was reiterated in submissions to the Inquiry (HRSCATSIA 1997b: 244). Also, Islander submissions to the Inquiry propose that the present system of representation—in which the ICC/TSRA are composed principally of the elected Island Council chairmen—should be replaced with one in which representatives are drawn from the five traditional island groupings noted earlier (HRSCATSIA 1996b: 55). These views open up the possibility of agreements structured on an island by island basis, or on the basis of groups of islands and are the subject of current discussion in the region.

More than 60 native title applications have been made outside the TSRA. This has resulted in a patchwork of applications and does not suggest a cohesive and regional approach to native title issues. This situation may be the unintended consequence of the TSRA's strategy of focusing all of its efforts on one claim with

the aim of constructing a regionally appropriate model for processing native title applications. The proposed Native Title Committee, which will have representation from across the region, as well as from Islanders residing on the mainland aims to unify the current separate approaches to native title.

Conclusion

At the time of researching this project (early 1997) people in Torres Strait had as their priorities issues associated with the native title applications process and the Inquiry into autonomy. Also, recent elections had for first time resulted in different Chairs for the ICC and the TSRA, causing some political complications. Furthermore, the matter of what rights over reefs and waters might accrue from native title were unknown. For these reasons it was not an ideal time to be carrying out research into the concept of regional agreements in Torres Strait.

However, for some time Islanders have been lobbying, if not always consistently, for some form of independence, self-government or territory status and there is evidence of them achieving some success in this aim: in 1994 the ATSIC Torres Strait Regional Council was upgraded to the status of a Regional Authority; in 1996 the Commonwealth agreed to fund this Authority directly from the Department of Finance; in 1997 the Commonwealth promised some greater autonomy for Islanders by the year 2000 and the recommendations of a Parliamentary Inquiry made a form of regional autonomy a real possibility (see Commonwealth of Australia 1997).

It has been suggested that Islanders have achieved their present political position by playing off the State and the Commonwealth Governments within the arena of welfare politics (Beckett 1987). Their cultural uniqueness, and the nature of the archipelago has also made it easier for them to argue their specialness and to delineate Torres Strait as region. However, I have argued in this paper that the international border and the subsequent Treaty with Papua New Guinea have also been determining factors in developing the notion of regionalism in the Strait.

It is uncertain what the prerequisites for a comprehensive agreement are (see Sullivan 1997), but it seems that at the very least there must be some commitment to making agreements and to regionalism. The conclusion of this paper is that such a commitment exists in the Strait. Islanders, the State and the Commonwealth Governments all liaise and cooperate quite fully. There is a regional industry body, the TSPZJA, which involves Islanders, non-Islanders and government in joint-management of the primary resource in the region. Although the approach to native title applications has not been cohesive, this may not necessarily reflect long-term divisions within the region and the proposed Native Title Committee may further a more unified approach. Also, although there is no fully regional body or fully representative regional forum, bodies such as the TSRA, the Kaurareg and the Shire are starting to come together to a degree and the Inquiry's report recommends that these bodies be amalgamated into one Regional Assembly (Commonwealth of Australia 1997). This suggests that of all

the 'regions' of Australia, the Torres Strait is the one where a comprehensive agreement—one which most nearly equates to self-government—is most likely to occur. Exactly what the content of such an agreement might be and what tangible benefits might flow to Torres Strait Islanders, is presently unclear.

Notes

1. In 1991, Torres Strait was the ATSIC region with the highest proportion of indigenous people in its population, by a significant margin: the next highest was Jabuluka in the Northern Territory where the indigenous population was 60 per cent of the population.
2. The Treaty negotiations extended over six years (Babbage 1990: 293).
3. It can be argued that an additional sub-region of the Strait is made up of the villages on the coast of Papua New Guinea's Western Province (see Arthur 1992). The provisions of the Treaty with Papua New Guinea allow traditional inhabitants of the region to visit each other without the formality of immigration procedures. It is estimated that 4,500 such visits are made from Papua New Guinea annually (Arthur 1990: 18; Davis 1994).
4. Thursday Island was, traditionally, also within the Kaurareg territory (see Sharp 1992; Southon 1995).
5. Several of the Torres Strait Islander submissions to the HRSCATSIA Inquiry made reference to these sub-divisions. They are, Maïem: Western Islands; Kulkalag: Central Islands; Kaurareg: Inner Islands; Maluilgal: Badu, Moa and Mabuïag Islands; Gudhamaluilgal: Northern Islands.
6. *Mary Yarmirr and others vs Northern Territory and others*, Federal Court of Australia, NT District, No. DG 6001, 1996.
7. In 1997 different people were elected to the Chair of the TSRA and the Chair of the ICC. It is not clear at this stage what this will mean for the regional role of the two organisations.
8. Under the Treaty, there is presently a moratorium over seabed exploration in the Strait.
9. At the time of writing, the TSRA was making plans to increase the staff of the Native Title Unit.
10. At the same time, other opportunities to increase regional representation have not been taken up. In 1993, the Minister for Aboriginal and Torres Strait Islander Affairs commissioned a review of the Torres Strait Regional Council representative structure. The review suggested that membership be increased from 20 to 23. Although this recommendation was endorsed by the Minister, the TSRA has not utilised it to increase its membership.
11. It has generally been assumed that indigenous representation on the TSPZJA should come through membership of the ICC (see TSPZJA 1995: 46-47).

12. In theory, the Shire has responsibility for the region from 11 degrees south to the Papua New Guinea border, but in practice it does not service the Outer Islands whose local government functions are performed by the Island Councils. The Shire operates on the Inner Islands and on a portion of Cape York.
13. Until just after the Second World War the Strait was under the control of a resident administrator of the Queensland Government (Beckett 1987: 45, 75)
14. The greater Commonwealth presence is noticeable in the areas of defence, customs, quarantine, immigration and fisheries.
15. Prime Minister Whitlam intervened directly in this matter, and Prime Ministerial interest and intervention in the region has continued. Since the 1970s, Prime Ministers Fraser, Keating and Howard have all visited the Torres Strait.
16. The border bisects the lobster-rich Warrior Reef.
17. The TSPZJA has several advisory groups which include State and Commonwealth Government agencies, and Islander and non-Islander commercial fishing representatives. The peak advisory group in the TSPZJA is the Torres Strait Fish Management Committee which is chaired by a representative of the Commonwealth Government and the Deputy Chair is a Torres Strait Islander (TSPZJA 1995: 2).
18. The Australian Fish Management Authority advise that recommendations made to the Ministers are normally approved.
19. The Australian Fish Management Authority estimated that Islanders now make up between 70 to 90 per cent of the lobster fishery (The Australian Fish Management Authority pers. comm.; Altman, Arthur and Bek 1994).

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